

A STUDY OF THE ANTITRUST LAWS

HEARINGS BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE EIGHTY-FOURTH CONGRESS FIRST SESSION

TO STUDY THE ANTITRUST LAWS OF THE UNITED
STATES, AND THEIR ADMINISTRATION,
INTERPRETATION, AND
EFFECT
PURSUANT TO

S. Res. 61

PART 1 CORPORATE MERGERS

MAY 3, JUNE 1, 2, 3, 7, 8, 9, AND 10, 1955

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DIGEST OF TESTIMONY

TUESDAY, MAY 3, 1955

Introductory statement by Senator Kilgore

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- 1 Purpose of inquiry to conduct a full-scale investigation of entire anti-trust field, and if necessary to implement presently existing antitrust laws to provide enforcement tools to permit vigorous and effective enforcement.
- 2 Assistance of all persons who have made serious studies of antitrust problems will be solicited.
- 3 Statement of Stanley N. Barnes, Assistant Attorney General
- 4 Statement of qualifications.
- 5 Served as Cochairman of Attorney General's National Committee To Study the Antitrust Laws.
Report of committee does not necessarily represent administration policy. However, for most part, witnesses views coincide with majority positions taken in report. The Attorney General is giving careful consideration to the report.
- 6 Attorney General's recommendations will be announced from time to time, regarding the report.
- 7 Description of method used in preparing report and presenting conflicting views.
Every dissent noted by members of committee included in report, but not necessarily in the form and language desired by the dissenting member.
- 8 Dissents were not interpreted. "We stated exactly what their dissents were."
- 9 Rules for form and presentation of views of members of committee made by Cochairmen Judge Barnes and Professor Oppenheim.
- 10 Committee report built upon accumulated teachings of existing research. No new factual inquiries were made.
Almost all members of committee agreed that the economic consequences of legalized resale price maintenance constituted "an unwarranted compromise of the basic tenets of antitrust policy."
Committee left to Congress the task of determining the extent restraints exist insofar as organized labor concerned.
- 11 Necessity of new factual judgment concerning conference rate agreements under Shipping Act, shipping conference activities as related to national policy, and dual-rate systems.
- 12 Members of the committee appointed by Attorney General in August 1953, and selected as articulate spokesmen for major points of view on issues of antitrust policy. Sixty-one members appointed.
- 13 Committee divided into eight study groups and basic work of such groups submitted to all members of the committee for comment.
- 14 People outside of committee called upon to assist in specialized problems.
- 15 Views solicited and received from State, Commerce, Defense, Labor, and Foreign Operations Administration.
Tentative final draft circulated to committee. A number of changes incorporated, and this draft was printed.
- 16 Report advocates repeal of fair-trade laws. This viewpoint carried by almost a unanimous vote of approval by committee.
Throttling of price competition that attends fair-trade pricing a deplorable, yet inevitable concomitant of Federal exemptive laws.

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- 16 Statistics in support of statement that fair trade results in higher prices to consumer.
- 17 Recommendation in report for repeal of fair-trade laws not a Department of Justice recommendation. This matter presently being studied by Attorney General.
- 18 Fair-trade laws not the answer to competition from large discount houses or chainstores. Higher margin on fair-trade items makes possible even lower prices on competitive lines. Small retailer cannot compete.
- 18 Presently studying possibility of recommending to Congress some legislation concerning loss-leader sales and debasement of trade-name values.
- 19 Cannot overlook realities; when artificiality created by fair-trade laws is present, widespread violation of the laws always exist, i. e., identical products sold at fair-trade prices and at lower prices under different brand names.
- 19 The committee did not make a factual survey of the pricing situation relating to fair-trade and non-fair-trade areas but did reach a theoretical opinion concerning the problem as previously set forth.
- 20 The Department of Justice did make such a survey in 1954 and at the beginning of 1955. Statistical results set forth in each instance show that prices to the ultimate consumer were higher in fair-trade than in non-fair-trade areas.
- 20 Survey is admittedly not complete but it is accurate so far as it goes. The Department of Justice is still involved in an attempt to determine whether or not the ultimate consumer has to pay more or less in fair-trade areas.
- 21 Before a definite conclusion with respect to fair-trade practices can be reached it is necessary to reach some sort of conclusion with respect to administered prices carried on by large national corporations. Many so-called administered prices resulting from joint concert of action are, of course, violations of the antitrust laws.
- 21 The Department of Justice could file more antitrust suits if it had more money and more personnel.
- 21 Automobile manufacturers in a great many instances effectively fix the national price of automobiles. However, it is impossible to make a categorical statement concerning this as regards the entire industry.
- 21 There is competition in the automobile industry in just about everything except price.
- 21 The Department of Justice at present is following very closely a denial of franchise by automobile producers. Case involves purchase of cars from local dealers and resale of such cars at competitive market prices.
- 22 The Department of Justice refused to authorize General Motors to buy back cars from dealers in order to prohibit such dealers from selling surplus cars to other dealers who might go below the price the manufacturer wanted maintained.
- 22 Witness' position concerning automobile pricing is that individually automobile dealers should have the absolute right to sell at any price they desire.
- 22 In the witness' opinion it might very well be a violation of the anti-trust law for a manufacturer to compel a local dealer to sell at a fixed price and if the dealer refused, to buy back the cars.
- 22 The committee report recommends that the Department of Justice be given civil investigative power to force the production of relevant books and documents for use in civil cases. Such civil investigative powers would not take the place of the grand jury in investigating criminal charges.
- 22 The Department of Justice presently relies upon voluntary compliance by individuals upon FBI request. However, the FBI is on occasion prevented from obtaining the documents requested, thus making it necessary to form a grand jury and obtain the evidence to either indict or to file a civil suit.
- 23 It has been suggested that criminal process is inappropriate to obtain evidence for civil prosecution. It is for this reason that the civil investigative power is needed.
- 23 Such power would not require the production of oral testimony under oath but only the production of documents under proper supervision by the courts.

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- Federal Trade Commission presently has such power but as a practical matter it is inappropriate for the Department of Justice to use the FTC as an investigative agency.
- It is chiefly due to the lack of appropriations by FTC to accomplish such work for outside agencies.
- 24 Committee recommends that section 4 of the Clayton Act be amended to give the United States Government the right to sue for single damages stemming from antitrust violations. Such a bill has already passed the House of Representatives.
- The Sherman Act gives the United States the right to sue either civilly or criminally. New power desired would give the United States the right to sue as a private citizen for private recovery as distinguished from suing in a sovereign capacity to enforce the laws.
- 25 This bill would give the United States the right to sue under all antitrust laws as a private person for damages.
- Such a general bill would cover the field of negotiated contracts.
- 26 From a practical standpoint single damages would be preferable to treble damages because the purpose of the treble damage section of the law is to encourage private enforcement of the antitrust laws.
- The committee report contains a recommendation that the question of treble as against single damages be made discretionary with the court.
- Witness has not made up his own mind as to his recommendation concerning the amendment to the mandatory treble damage section of the act.
- 27 There are at times unwitting violators of the antitrust laws who should have the benefit of actual damages plus attorneys' fees plus costs.
- The conscious malfactors should not have the benefit of the actual damage amendment. The witness feels that mandatory treble damages are no longer necessary to encourage suits by private individuals to enforce the act. A development of both the procedural and substantive law, largely favorable to the plaintiff, plus the awarding of attorney's fees, offers sufficient incentive to private antitrust actions.
- The above question can be argued both ways and is very difficult. For example, a corporation losing a suit to the Government could be subjected to private treble damage suits with no leeway as to the amount of damages.
- 28 The House has passed a bill enlarging the amount of fine for violation of the Sherman antitrust law to \$50,000.
- States and municipalities can sue under the present law for more than single damages.
- 29 The witness is in favor of prefiling negotiations as recommended in the committee report. In approximately 75 percent of the cases handled in this manner by the Department, it has accomplished a great deal through the use of the prefiling procedure.
- This has resulted in the closing out of a limited number of cases with a saving to the taxpayer and the litigant.
- At this point the witness discussed the proposed antitrust suit against the American Association of Advertising Agencies and the public statements made by counsel for its organization.
- 30 Two classes of business were injured as a result of the American Association of Advertising Agency's activities—ad agencies desiring entry into the business were impeded, and advertisers were prevented from cutting sales costs by placing advertising directly with newspapers or magazines.
- Practices complained of by the Department of Justice have already been declared illegal per se by the courts. (Here the basis of the Department's action is set forth.)
- 31 By reason of the public announcement made by counsel for the American Association of Advertising Agencies the witness feels that prefiling procedure can no longer be followed in this particular case.
- 32 In the case of prefiling procedure generally the alleged violator does not have anything to do with the drafting of the form of the complaint. This complaint in each case is ultimately filed of record. All negotiations that result in settlements are made matters of record. It is the Department's policy not to negotiate in prefiling matters until the complaint is ready for filing with the specific charges capable of being disclosed.

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Statement of Milton Handler, professor, Columbia University Law School

- 33 Statement of qualifications.
Witness agreed to mail each member of the subcommittee a copy of his monograph on antitrust laws, written for the TNEC.
- 34 Witness commenced working on the monograph in the fall of 1937 and it was used by the then administration in connection with a study concerning possible revision of the antitrust laws.
There is a good deal of misinformation concerning the present extent of concentrated power in the United States. The trend toward concentrated power and bigness has, in the witness' opinion, been incorrectly reported.
Dr. Adelman, a member of the Attorney General's committee, is an authority on this phase of United States economy.
- 35 In the 1930's there was considerable doubt on the part of many students of economy as to whether the policies underlining antitrust laws were fundamentally sound.
Witness found numerous inadequacies in the antitrust laws insofar as enacted by Congress and as interpreted by the courts in curbing mergers and industrial concentrations. The intent and purpose of the law was good but the implementation was sometimes poor.
Witness called attention to certain Supreme Court decisions applying to various facets of the antitrust enforcement problem and pointed out the difficulties brought about by such rulings insofar as they applied to enforcement of the law.
- 36 The result of such interpretations, according to the witness was to make big cases bigger which situation does not facilitate enforcement. When the Government permits matters like territorial division, price fixing, and monopoly in certain fields, the economy is threatened.
The big difference between the United States and a number of foreign countries is that in the United States an effort has been made to keep industry competitive.
- 37 The witness reviewed statistics concerning cases filed in the antitrust field from 1890 to the present. Number greatly increased after 1940.
Intensified enforcement made possible by increased appropriations brought about revolutionary changes in concept of the antitrust laws after 1940.
The conclusions reached in the committee report should be considered in the light of 1955 enforcement and interpretation of the law.
- 38 Antitrust doctrine has been substantially transformed.
In 1942, in the rubber patents, it was necessary for the Antitrust Division to bring its problems to the Senate in order to obtain results. This was due to inadequacy of law.
Successful enforcement requires a concert of effort on the part of the legislative as well as the executive and judicial branch of the Government.
- 39 The deficiency of old section 7 of the Clayton Act, insofar as it relates to industrial combinations, has been corrected.
The area of the rule of reason has been narrowed.
The committee was unanimous in its endorsement of antitrust. None of the old depression day doubts concerning efficiency of antitrust laws were even articulated.
Antitrust can be enforced if there is the will to enforce it and the money is provided.
- 40 The committee rejected the criticism that there had been an undue expansion of the concept of per se illegality and did not urge any fundamental alteration in the concept of the rule of reason as currently administered by the courts.
Not every elimination of competition is unlawful. The test is whether the anticompetitive effects of the arrangement are such as to jeopardize or seriously impede continued competition in the market.
- 41 Antitrust laws are not too uncertain. Must choose between certainty or adaptability.
No amendment necessary in the fundamental structure of antitrust laws. All recommendations for change relate to less fundamental aspects of the laws.
Witness against doctrine requiring wholly owned subsidiaries to compete among themselves (discussed examples).

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- 42 Witness condemns doctrine of intracorporate conspiracy as unsound and unfair.
- 43 Doctrine of conscious parallelism, or uniform action, is not in and of itself a violation of the antitrust laws. Facts of each case should decide. These two doctrines may yet be corrected by judicial decision and legislation may not be necessary.
- 44 Courts have gone from one extreme to another in ruling on the percentage of control necessary to bring a merger within the purport of the antitrust laws (discussed examples).
- 45 Committee maintains that the test should be whether the merger so alters the structure of the industry as to impair the health and vigor of the remaining competition.
- Antitrust Subcommittee should clarify intent of section 7 insofar as mergers are concerned.
- 47 Recommends to subcommittee:
1. Committee's recommendations for legislative changes.
 2. Review each of the topics studied by the committee to determine soundness of conclusions.
 3. Review current administration and enforcement of antitrust laws, with emphasis on committee's recommendations for a civil investigative demand, for a change in mandatory treble damages, for adoption of a uniform statute of limitations.
 4. Merger problem.
 5. Problem of bigness and existing concentration of power.
 6. Review the various exemptions from antitrust laws as they now exist.
 7. Study restrictive practices abroad in which American business operates, with emphasis on possibility of treaty with foreign powers.
 8. Trade associations.
 9. Reevaluation of Robinson-Patman Act and its administration.
- 49 If properly construed no conflict exists between Robinson-Patman Act and Sherman Act.
- Statement of Eugene V. Rostow, professor of law, Yale University*
- Statement of qualifications.
- 50 Believes recommendations in committee report, insofar as related to the Sherman Act, strengthen antitrust laws. However, insofar as they relate to the Clayton Act, such recommendations may conceivably weaken antitrust enforcement. Concerning the Robinson-Patman Act, the recommendations of the report are debatable.
- Committee recommendations concerning treble damage may weaken effective policing of antitrust laws.
- Most good would probably result from report if used as a basis for further studies by congressional committees as a basis for legislative recommendations.
- 51 Report did not consider possibility of international treaty to help protect American economy against foreign cartels. Cartels should not be left free to fix prices and allocate markets. Present time most appropriate to move in this direction.
- Adequacy of enforcement of merger section, process of selecting cases, and adequacy of remedy problems, should be given further study by subcommittee. Some danger of ambiguity exists in committee's comments on divorcement and divestiture proceedings.
- Regulated industries not adequately covered in committee report. This question should be investigated further. Transportation and communication industries activities under regulatory statutes should be reconciled with antitrust philosophy.
- 52 Problem of extent to which competition in such industries should be made part of regulatory procedure warrants further study.
- Presence or absence of competition in a market is the basis of all anti-trust laws. Economists working on committee report in substantial agreement concerning definitions and criteria to be applied.
- Market must be defined in terms of the area where defendants function.
- 53 Existence of monopoly power, and not the manner of use, is the important point. "No trusts are good."
- 54 Should not attempt to decide when a monopoly is good and when bad.

- Protection of antitrust laws should be available to the smallest merchant in interstate commerce as well as the largest. Should deal with local situations as well as big ones.
- 55 Committee approves courts far-reaching and existing doctrine on definition of interstate commerce.
- Monopoly power is defined in report as power over price and power over entry of competitors and the possession by a single firm or a group acting in concert of a significant degree of the power to determine and fix price and policy.
- There is an absence of effective competition in auto industry if in fact it does not compete pricewise.
- 56 Presence of small number of sellers in any industry comprising considerable fraction of market always requires careful antitrust study. Likewise, opportunity for new entry, independence of rivals, predatory practices, and so on.
- This section of report helpful in presenting to courts relevant problems and issues in any given case.
- Prewar relations between oil industry and German chemical industry very dramatic illustration of how international private arrangements can restrict development of American technology.
- In Europe governments aided monopolies.
- 57 America can obtain relief against foreign monopolies only through international treaties.
- In the milk industry the pressure of interests has persuaded Government to fix prices and limit markets. Committee report does not treat this phase of problem.
- 58 Tariff barriers and tariff generally should be approached in light of antitrust aspects. A great many situations in domestic monopoly depend upon tariff protection.
- Department of Justice should be given right to be heard on tariff changes where antitrust issues could arise.
- Statement of Wendell Berge, attorney, Washington, D. C.*
- 60 Statement of qualifications.
- In general, committee report is an excellent report and should be of great help to bar, bench, and Department of Justice.
- 61 Practically every major antitrust problem is discussed in report. Provides excellent analysis.
- Minority views fairly stated.
- Basic antitrust acts do not need revision. Power broad enough to cover most of the important restraints of trade.
- Drastic overhauling would be more upsetting in its effect than it would be helpful. Agrees with Professor Handler on this point.
- Enforcement is real problem.
- Primary value of report is in its careful analysis of problems.
- 62 Committee was not set up as factfinding body. Its aim was to attempt to determine need, legislatively and policywise. This basic difference between Professor Schwartz and majority.
- Foreign trade was considered from point of view of whether international exigencies made amendment to antitrust laws necessary.
- Some members of committee urged that antitrust laws were an impediment to necessary foreign business arrangements and United States policy of promoting foreign investment. Some suggested that laws should be suspended or repealed as to foreign commerce.
- Witness feels that if humanly possible United States must avoid drastic amendment to soften application of antitrust laws to foreign commerce.
- No Government department or agency complained about application of antitrust to foreign commerce.
- 63 Committee arrived at conclusion that complaints against application of antitrust to foreign trade were groundless.
- Factual problems in foreign countries often different from those in domestic commerce. Except in per se violations the Attorney General has certain discretion in the institution of civil actions against situations involving foreign trade.

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- Some situations arise where Government requires cooperation between American companies operating abroad. This situation already covered by Defense Production Act.
- 64 Approximately 70 voluntary agreements relating to foreign programs have been approved under act.
- Committee recommends that Defense Production Act be extended past June 1955, and that in some instances antitrust immunity should be extended beyond the act's termination.
- Such immunity should be conditioned upon express findings that national defense requires the immunity.
- Attorney General, through consultation with defense agencies, can avoid collision between antitrust and defense policy. This course preferable to new law defining exemptions the need for which may later change.
- Antitrust laws must be strictly enforced in foreign commerce where enforcement does not constitute interference with defense policies.
- Witness endorses committee findings as set forth in report concerning: Extraterritorial jurisdiction; foreign subsidiaries; joint foreign activities.
- 65 International cartel problem is most important. Much study has been given in past to this problem.
- 66 Believes a real effort should be made among free nations of world to reach an international agreement defining and outlawing certain types of restrictive agreements.
- Enforcement should be left to each government according to its own system of law.
- Such agreement would require no changes in basic United States antitrust laws.
- Believes that general tenor of committee report strengthens rather than weakens antitrust law.
- Hopes that policy recommendations will be adopted by Attorney General.
- Legislative recommendations of report limited to specific problems which can only be solved by legislative action.
- Minimum amount of necessary legislative action requested.
- In the event policy recommendations are not adopted by enforcement agencies and courts, Congress should enact specific legislation.
- 67 Advocates repeal of Miller-Tydings and McGuire Acts.
- Nonsigner clause of McGuire Act unconscionable.
- Does not believe mail-order houses should be allowed to destroy local merchants.
- 68 One problem in re above is the basic dishonesty of manufacturers and distributors insofar as dual pricing is used for identical products sold under different brand names.
- Committee did not consider automobile pricing and discount system.
- 69 Does not agree that fair-trade laws necessary to prevent loss-leader sales.
- 70 United States should be permitted to sue for damages as a person under Sherman Act.
- Is against making amount of recoverable damages under Sherman Act discretionary with Court.
- 71 Does not believe the rule of intercorporate conspiracy, as applied by the courts, needs legislative correction.
- 80 Question of competitive bidding on Government contracts, as affected by Government specifications, has important bearing on overall monopoly problem.
- 81 Witness believes conflict exists between objectives of Sherman Act and Robinson-Patman Act. One encourages and the other discourages price competition.
- 82 Does not advocate repeal of Robinson-Patman Act. Problem is to reconcile one with the other. Problem only of conflict of applications.

WEDNESDAY, JUNE 1, 1955

83 *Introductory statement of Senator Kilgore*

The subcommittee is making a study and investigation of entire field of antitrust legislation to determine if revision and coordination is necessary.

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- Vagueness and ambiguities and various changes made in antitrust laws may have produced confusion and conflicting policies. There is also some question whether these laws have kept pace with technological changes.
- 84 The task of the subcommittee is attempting to coordinate various statutes and exemptions so as to achieve an effective and uniform Federal antitrust policy.
- These hearings have twofold purpose: (1) Have leading economists discuss nature of economic structure, kind of competition which exists, and effect of antitrust laws in aiding or retarding competition; and (2) to consider the important problem of mergers.
- Recently proposed mergers in automobiles and steel illustrate the problem of dealing with mergers.
- Statement of Edward F. Howrey, Chairman, Federal Trade Commission*
- 85 Stated his belief that current number of mergers and, perhaps, the economic importance of individual mergers were not as important as they were in previous merger waves. He did not suggest that the cumulative effect was not very disturbing.
- 86 Study conducted by FTC shows that merger activity has been stronger in some industries than in others. Significant increases showed up in baking, dairy (and other food products), textiles, nonelectrical machinery, automotive, and metals industries. Thus, it appeared screening procedures and other internal work methods of FTC should be reexamined.
- 87 Mr. Howrey said FTC report pointed out that mergers are 3 times the 1949 rate but well below the rate of late twenties. Attention of FTC is being focused on large number of cases having most economic impact.
- Mr. Howrey thinks report bears out the conclusion that incidence of mergers is greatest during periods of prosperity. He concurred in Senator Kilgore's suggestion that capital surpluses may make it possible.
- 88 Two-thirds of acquisitions were made by companies with assets of \$10 million or more; companies with assets of less than \$1 million accounted for less than 8 percent. Largest number of acquisitions during 1948-54 were in nonelectrical machinery industry with 249 mergers, and food products with 243.
- For clarification of terms, Mr. Howrey said "merger" usually means merging of companies of relative or same size; "consolidation" may mean a group of companies; "acquisition" has been used in the FTC report to cover all types.
- Usually the easiest way of acquiring another company is through exchange of stock, but there are many other ways of just buying the assets.
- 89 Mr. Howrey listed additional merger groupings and numbers in each. Size of acquiring companies during 1948-54 period and during 1940-47 period.
- Among acquisitions recorded by the staff, large companies revealed as having acquired more medium-size properties than were acquired by medium-size companies and more small properties than were acquired by small companies.
- The report then examined the "who-how-why" of current merger activity. The "who" is generally the acquiring company; "how" is described in the report as the plans most often used in important acquisitions; under the "why" of mergers, the report lists 5 reasons involving competitive factors. They are: (1) Additional capacity; (2) diversification of products; (3) backward vertical mergers looking toward sources of supply; (4) forward vertical mergers looking toward sale to consumers; and (5) additional capacity located in new markets.
- 90 Forces behind mergers other than competitive factors are: (1) Inability of smaller companies to command adequate financial resources; (2) surplus cash in hands of acquiring companies; (3) aging owners wanting to retire or adjust their estates; and (4) tax savings under provisions of the Internal Revenue Act.
- When manufacturer wants to expand his capacity he must decide whether to build, thus increasing capacity and competition, or to buy, thus increasing capacity and acquiring additional market. The report says that all things being equal, he usually buys.
- He then listed examples of acquisitions offering quick economies of scale, diversification, and stability in both production and distribution.

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- 91 Mr. Howrey agreed with Senator Kilgore that carryback, carryover features of tax act play a large part in acquisitions.
- He felt the Anti-Merger Act of 1950 was not intended to stop all mergers, but rather the enforcement agencies were to look at mergers and, "to speak loosely, permit the good ones to merge and to prevent the bad mergers."
- FTC report makes no recommendations for amendment of tax laws. Discussions with other Government agencies on the problem are in the works.
- 92 Disapproves of companies having advertised they would like to buy weak and insolvent companies.
- As Senator Kefauver sees it, a tax incentive merger results in the "Government's subsidizing and paying the cost of the merger." It might also give a strong company an incentive to push a smaller competitor "to the wall," buy him out and absorb his tax credit.
- 93 The tax provision is an important incentive to merge but not a major one, according to Mr. Howrey. Major competitive reason is desire for new capacity without new competition.
- 94 Reason for antitrust and monopoly legislation is to prevent dangerous lessening of competition.
- Mr. Howrey said FTC had not looked into the effect of mergers in food industry on continued high price of food (even though prices paid farmers have dropped).
- 95 FTC discontinued a "consumer dollar study" because of budgetary reasons.
- Large dairies buy up small producers and distributors, depress the price to the farmer but maintain, or even raise, price to consumer.
- 96 Some necessary facts to be considered in determining the probable consequences of acquisitions and mergers are: (1) The character of the acquiring and the acquired companies; (2) character of the markets affected; and (3) changes in the acquiring company and in the adjustment of other companies operating in these markets.
- "An acquisition which reduces the opportunity or incentive of sellers or buyers to enter new markets, to experiment with new channels of distribution, or to exercise choice among products and prices, may substantially lessen competition.
- "All of such facts cannot and need not be investigated in each case," the report observes. "Only those facts which are relevant in particular market contexts, can be obtained at reasonable cost, should become a part of the record * * *. While sufficient data to support a conclusion is required, sufficient data to provide certainty as to competitive consequences would nullify the words 'where the effect may be' in the Clayton Act and convert them into 'where the effect is.'"
- There are problems involved in the use of market information as legal evidence. However, the report says, "* * * refusal to use such information will not solve these problems. Conclusions concerning the competitive consequences of particular acquisitions cannot be reached on the basis of rule-of-thumb, they must be reached on the basis of the market facts relevant for an understanding of such consequences."
- 97 The report of the Attorney General's committee emphasized that the clear object of Congress in amending section 7 of the Clayton Act was to establish more effective rules against mergers and to strike down some mergers beyond the reach of the Sherman Act. Mr. Howrey felt the merger section of that report constituted an endorsement of FTC's handling of the Pillsbury case.
- The Attorney General's committee report suggested that the legality of a vertical acquisition may turn on whether the integration significantly restricts access to needed supplies or significantly limits the market for any product. The report states that in determining the legality of horizontal mergers, the dollar volume of the merged companies hardly bears on the question of whether the competition lost as result of merger may, in context of the market as a whole, constitute a substantial lessening of competition or tend toward monopoly.
- No one pattern of proof can meet the requirements of all cases.
- The FTC has issued 3 complaints under section 7 in 3 important industries—flour milling, paper, and scrap steel.

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- The merger problem has been taken out of routine channels; a task force has been set up to deal with it.
- 98 The FTC does not go into the courts but rather acts as an administrative court; the Antitrust Division of the Department of Justice operates through the courts.
- 99 After completion of study of facts contained in FTC report the FTC will consult with other interested agencies and decide "whether or to what extent legislative changes may be desirable."
- Statement of John W. Gwynne, member, Federal Trade Commission.*
- 100 One of the important amendments to the Clayton Act, adopted in 1950, was the inclusion of the acquisition of assets. Another was the omission of the test of lessening of competition between the acquiring and the acquired corporations. Elimination of this clause makes it clear that it applies to all types of mergers and acquisitions that have the effect of substantially lessening competition or tending to create a monopoly.
- 101 "The physical area in any particular case is not to be determined by geographical boundaries, but rather by the realities of competition." Congressional reports on the 1950 act make it clear that the amendments are not intended to duplicate the Sherman Act. The Senate report says, "The intention here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have obtained such effects as would justify a Sherman Act proceeding."
- 102 1950 amendments to section 7 accomplished 4 major things: (1) They broadened the law to include all means by which a merger may be accomplished; (2) they have taken out certain provisions that might make for unreasonable applications; (3) have included all types of mergers; and (4) they have stressed importance of attacking problem of monopoly in its incipiency.
- Scientific discoveries, technological advances, and greatly improved methods of production and distribution have all affected methods of competition. However, according to Mr. Gwynne, they do not take the place of competition but are largely the result of it.
- There are 3 phases to the problems of enforcement of antimerger statutes: (1) Discovering the fact of a merger; (2) determining whether there is reasonable ground to believe the law has been violated; (3) trying the case.
- There is no one place where complete information can be had about the facts of a particular proposed merger.
- 103 "It would not seem unreasonable," said Mr. Gwynne, "to require corporations planning a merger to keep the Government advised from the beginning of their efforts along this line." Because of the importance of an antimonopoly trial to the public as well as the parties affected, it is necessary to give careful consideration to the facts to be proved and the means by which these facts may be placed before the hearing examiner and the Commission.
- Although these cases are difficult, Mr. Gwynne feels trial techniques can be improved and proceedings expedited without impairment of due process.
- 113 In reply to question of the Chairman, Mr. Howrey said he felt the 1950 act was an improvement, even though it had not stopped the merger movement. It has not yet been tested in the courts. He could not prophesy what would have happened without the act.
- Mr. Howrey said there had been 22 instances since the 1950 act in which parties intending to acquire other companies had, prior to taking such action, asked advice of FTC. 11 were approved, 8 denied, one was withdrawn and 2 are pending. This was out of a total of about 1,700 mergers during this period.
- If all of the 1,700 had applied for clearance his staff would have been completely inadequate to handle it.
- 114 Thought this subcommittee might want to reexamine the provision of section 7 which made divestment the only remedy for restoration of competition.

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- 115 Mr. Howrey would want to examine some factors involved before he could answer yes or no to the question of the FTC having to pass upon the legality of proposed mergers in advance of consummation.
- 115 There were no recommendations in the FTC report on mergers, as there were areas that required further examination. They were the area of taxation, discussed previously; passing on mergers in advance; area of remedy; stock issues; and reporting in advance without provision for the Commission's passing on them in advance.
- The latter, Mr. Howrey opined, had merit, but also some dangers. If they did not "get to the merger within 90 days, or whatever period was suggested, it will be presumed by many people and maybe by some courts," that this implied approval, if they "did not disapprove or had some means of staying the merger."
- Perhaps only in case one of the merging companies had assets over a certain amount should there be a necessity for reporting in advance.
- Mr. Howrey repeated he had made no decision as to what amendments he would want to recommend.
- 117 Believes law should be amended to cover bank mergers.
- 118 Senator Kefauver suggested banks may have been omitted from the Antimerger Act because other agencies had control over them, such as in the issuance of charters.
- It was Mr. Howrey's understanding the Federal Reserve Board had wanted banks to be included.
- There seems to be no provision in the law to prohibit individual stockholders buying stock in another company, even though this action was tantamount to an acquisition.
- 120 Three cases have been filed and are being tried as a result of the amendment strengthening section 7 of the Clayton Act. The FTC had been anxious to get an amendment to section 7 because they felt the courts through various adjudicated cases had just about cut out any chance of getting effective relief through that section as it stood. Also, the 22 cases previously mentioned should be added to these 3.
- 121 Termination of cases now filed by the Commission and the Department of Justice should clarify the law and check rate of mergers.
- Mr. Gwynne felt the suggestion of establishment of a reporting system deserved great deal of consideration. He said:
- 122 "After all, here is a drastic law. Every person who contemplates merger should know that, and I think it would be in their interest to try to bring that to the public, to make contact with the proper Government officials at the earliest moment, and to have a little responsibility in furnishing the necessary information, and not leave it entirely up to the Federal Trade Commission to run it down. I think they would get better cooperation."
- 123 Senator Kilgore suggested that advance notice of proposed mergers would enable the public to express its opinion.
- There are other types of mergers that have an anticompetitive effect but are not reached under the present law. In addition to banks, studies should be made of each of the other categories of business now exempted from section 7—CAB, ICC, FCC, Maritime, and one or two others, Mr. Howrey believes.
- "The only other agency I know of that has ever brought a case under section 7 is the Federal Reserve Board."
- 124 Perhaps jurisdiction of other agencies should be expanded.
- In reply to a question by the chairman on use of standards by the FTC which reflected legislative intent, Mr. Howrey cited the Pillsbury case.
- 125 "Historical pattern of acquisition" is emphasized in importance.
- 127 If a producer acquires an important sales outlet it might have the same consequences to competitors of the producer as an exclusive contract, as the acquisition excludes competitors from access to a portion of the market. However, Mr. Howrey thinks "there is a difference between a vertical merger and an exclusive dealing contract."
- 129 Letter from M. S. Eccles, Chairman of the Board of Governors of the Federal Reserve System, dated March 21, 1945, pertaining to legislation under consideration at that time and bank mergers.

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- 132 Mr. Howrey requested that he be allowed to make clear that he was not making any recommendations for changes in the tax law at this time. His previous statement might have been misconstrued.
- 135 Senator Kefauver said, "Mr. Howrey, I can see a great many complications in trying to set a ceiling on mergers, a ceiling where mergers under that would be all right, and those above would be looked into but I do not see as many complications coming from Mr. Gwynne's suggestion of just prior notification for a certain length of time before the merger is consummated." Mr. Howrey agreed that notification might be helpful and "might have a psychological effect," even though it would not help the FTC make a decision.
- Information could not be given the Antitrust Subcommittee on the 22 applications that were submitted to FTC prior to merging without consulting the full Commission.
- 136 The Pillsbury case could be discussed, however, because it is public knowledge. "They sought approval in advance of the merger. We disapproved it. They went ahead and merged, and we brought suit, and that is a matter of public record." Case is still in courts.
- 137 In the Pillsbury case the companies have already merged and are doing business together so that even if FTC wins there will be great difficulty in unscrambling them. Also true in every merger case.
- 138 FTC did not ask Department of Justice to file preliminary injunction in this case so far as is known.
- Senator Kefauver, commenting on length of time involved in litigation, queried, "* * * is not this Pillsbury case a pretty good example of what your rule of reason is going to get you into?"
- Mr. Howrey replied, "Yes, I think it is a very good example of it, and, of course, I conclude differently from you. I think it proves 100 percent that you can apply the rule of reason approach and have a relatively small record and relatively quick trial * * *."
- 140 Senator Kefauver expressed the feeling that Congress expected that where there was manifestly a lessening of competition the amended Clayton Act should enable the prevention of such mergers. The FTC should not supplant the intent of Congress.
- 142 The tests used in the Pillsbury case were not those that would have been used under the Sherman Act but rather those used under section 7 of the Clayton Act.
- 143 Tests under the Sherman Act are similar to those of the Clayton Act because, Mr. Howrey said, "you are dealing with competition, you are dealing with market facts." However, less proof is needed "to make a section 7 case than it does a Sherman Act case."
- 144 It is Mr. Howrey's opinion that Congress gave the FTC the job of determining whether a merger is good or bad.
- Different rules are followed in procedure under section 7 and section 3. However, Senator Kefauver said the legislative intent was to apply "substantially the same procedures to section 7 that we have under section 3."
- 145 Although the House Judiciary report (1950), as read by Senator Kefauver, says tests of legality under section 7 "are intended to be similar to those which the courts have attempted to apply in interpreting other sections of the Clayton Act," Mr. Howrey felt there was other language in the report which made it necessary to consider the statute as a whole; that the legislative intent was contrary to the Senator's position.
- 160 Senator Kefauver disagreed with Howrey's contention that the Attorney General's committee represents a "good cross-section of legal and economic thinking."
- 161 Joining in the report of the Attorney General's committee might jeopardize the Commissioner's judicial position. He felt the questioning on the Pillsbury case a greater challenge to judicial processes because he is sitting as quasi-judicial officer in that case.
- Clarified his position with regard to the Attorney General's committee. Pointed out that he had not participated in its work too actively and signed the report with reservations.
- 162 Recently signed a letter as Chairman of the FTC, by direction of the full Commission, supporting an increase in criminal penalties of the Sherman Act to \$50,000.

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- 167 According to Mr. Howrey, there is great difference between rule of reason and rule of reason approach. The rule of reason is Sherman Act rule adopted by Supreme Court in 1911. Rule of reason approach means examination of competitive market facts.
- 168 FTC has not always adopted good faith defense when presented; in no case since Standard Oil has it been sustained. However, Mr. Howrey felt it is a fair statutory provision, and opposes changing the law.
- 169 Burden of proof of good faith rests not on the FTC but on the respondent, as in Standard Oil of Indiana case.
- Supreme Court held that if price were lowered to meet competitor's, that constituted "absolute defense."
- 170 Senator Kefauver feels Supreme Court decision misinterprets Congressional intent. It is Mr. Howrey's contention that he does not support the Court's decision because he signed the Attorney General's committee report.
- 172 Under Robinson-Patman Act, one cannot beat equally low price of a competitor but can only meet it.
- Most of the dissents to report of the Attorney General's committee's report did not contain name of individuals. Howrey's dissents were not specifically noted.
- 173 FTC and Department of Justice follow, generally, the same criteria in deciding whether proposal meets test of the law.
- Justice has listed some factors considered in merger cases; FTC has listed some in merger report.
- 174 Will submit to the subcommittee the amount of money requested for overall work of FTC, amount requested for enforcement of section 7, the amount appropriated, amount spent by FTC as a whole and section 7 in particular.
- 175 Although FTC could use more money, more antimonopoly complaints were issued in fiscal 1954 than in any period in previous 4 years.
- Mergers are now being taken up in nonroutine way. A special task force was set up to handle them midway in the merger study.
- There are many statutes to be administered other than the merger statute.
- 176 Robert M. Parrish, head of the new task force on mergers, presents his qualifications.
- 177 Task force will not take place of trial staff. Its job is to get cases investigated.
- Have been minor cuts in FTC budget requests.
- 178 Crown-Zellerbach did not apply for approval of merger, but did submit data when they found there was an investigation in the field. No injunction was requested.
- 179 Commission has no control over time allowed respondent to put in his case. Pillsbury has taken about 1 year.
- 180 Although the Luria case is not primarily a merger case, some of the mergers in it go back to the old statute before 1950. It is a case of restraining and restricting the channeling of scrap as it reaches the steel mills. One form of that restriction arose from the mergers that had occurred both prior to the enactment of the amendment and since, and they have been included in the complaint. But it is not primarily a merger case.
- 180 If participants ignore cease and desist order FTC can go to court and get contempt proceedings, but cannot issue them itself.
- The Commission has repeatedly asked Congress to amend the Clayton Act so that it would carry same civil penalties as Federal Trade Commission Act, without success.
- 181 Mr. Howrey raised the question of a court's having the power to enjoin a merger pending administrative hearings on the matter. (Does not know if Justice has invoked injunction provisions in any of its cases.) Might be done by Department of Justice obtaining jurisdiction in the case.
- FTC has authority to request injunctions only in cases involving false and misleading advertising dealing with medicines or drugs where it might be deleterious to health.
- 182 Senator Kefauver feels Howrey should make legislative recommendation to Congress that there be granted the right of stopping merger proceedings before they get under way.

THURSDAY, JUNE 2, 1955

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- Statement of Carl Kaysen, assistant professor of economics, Harvard University*
- 183 Statement of qualifications.
- 184 Wishes to comment on three topics discussed in the report of the Attorney General's National Committee To Study the Antitrust Laws: The concept of competition; problem of oligopoly markets, in which a small number of larger sellers provide all, or nearly all, the supply; and definition of the market in which a seller or group of sellers operate. Defines "oligopoly" as "a made-up word of several Greek words, and it means a few sellers, a market in which almost all the output is sold by 3, 4, or 5 people." It is a descriptive word, and does not mean an "oligopoly market" is good or bad necessarily. Endorsed the idea that "some concept of lack of market power, or limited market power appears as the central content of the kind of competition which the antitrust policy should and does strive to promote." Further, the report "rejects the notion that a benevolent or 'desirable' use of power is the same as not having power, and emphasizes the fact that a central virtue of competition, properly viewed, is that it compels proper behavior in the market, rather than making it a matter of management discretion."
- "* * * it is not the purpose of the antitrust law to mark out a standard of benevolent business conduct, but to enforce competition, so that benevolence is unnecessary."
- Competition also stimulates production of better articles.
- 186 Competition in reducing costs may, in some instances, be more important than competition in producing new products. There are two possible standards for determination of how much market power is all right and how much should not be tolerated. "The first, more stringent one, would say that any market power beyond that which is inevitable because of the size of firms necessary for efficient production is too much * * *. The second standard would look to balancing the extent of power, on the one hand, with the cost reducing it through interference by judicial and administrative action on the other. The more drastic measures for reducing market power would thus be used only where power is great."
- In regard to the second standard, there might be "an economist's rule of reason" which says, in effect, that where merged firms have increased their output, cut their prices, and improved the product, they should not be dissolved even though they had monopoly power.
- 187 The "hard core of the oligopoly problem," said Mr. Kaysen, "is inadequately treated in the report (of the Attorney General's committee.)" Although fewer sellers in a market the closer the scrutiny, "the fact that an oligopoly market may not be competitive even in the absence of anything which properly can be called collusion or conspiracy, and that this presents a problem of policy, is passed over."
- "The policy problem is important. Hard core oligopoly, without collusion, may well be present in such markets as primary aluminum, copper, sulfur, electrical machinery, cigarettes (still), and perhaps automobiles. At present, such markets do not lie within the reach of the law, fairly construed, as I see it."
- Excise tax is a major factor in cigarette pricing.
- 188 Although there are situations in which ability of oligopolists to act noncompetitively is facilitated by arrangements within reach of the law, a change in law is required to meet the hard core of oligopoly situations. Possibility of enlarging the reach of the law raises the question of whether the antitrust law is one which does and should control conduct only, or should go further and reach situations which are noncompetitive. "Any attempt to carry out the limitation-of-market-power standard, which the report appears to propose, would involve reaching out beyond conduct to define illegal, or undesirable situations."
- 189 Unsure of the wisdom of broadening the present law; it is a pretty tough problem. Would move the law into a "more regulatory phase," with the result that it could not be continued as criminal statute. "I do not think it is correct or right to make a firm criminally liable for conduct which is not viewed as bad conduct," said Mr. Kaysen.

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190

Government should not fix price, but might interfere when necessary to promote competition.

There is great difference of opinion on legality of pricing practices. Mr. Kaysen used the following example:

"Suppose this were a situation in which the cost of production was so much, output was about 65 percent of capacity, let us say, and the reasonable return was being secured not on 65 percent of capacity but on 100 percent of capacity, in other words, price would cover the full costs."

"If that went on for some period of time, I would say this represents the kind of problem I am talking about. My own judgment is that it does not violate the law as the law now stands. Equally or more learned and wiser men than I think that it does." But it is close to the edge of the law.

193

In areas where retail outlets are numerous it would be very difficult for a manufacturer to tie them up. In others, an exclusive dealing arrangement between manufacturer and dealer could tie up market.

194

Section 3 of Clayton Act is addressed to this problem.

196

When considering competition among substitutes, market cannot be defined intelligently without looking at price-cost margins, and cost of various substitutes as well as prices. "Only where two products are close substitutes at prices in the close neighborhood of their respective cost, can we include them in the same market."

199

Big business is not the same as monopoly. Some have monopoly power, others do not. Small businesses may have monopoly power, also.

"* * * there are many industries," said Mr. Kaysen, "in which the present degree of concentration under the present market structure suggests, points to, probably serious limitations on competition."

Present degree of business concentration is not dangerous to political freedom.

200

Steel industry should not be split up so as to have 150 producers.

201

There are different standards of competition envisioned by different statutes. Sherman Act emphasizes competition in the market place; many parts of the Clayton Act pertain to the same thing; Robinson-Patman is directed more toward protection of individual businessmen, enforcing equity, and fairness.

Statement of Prof. Louis B. Schwartz, University of Pennsylvania

202

Calls attention to the fact that he has made numerous recommendations in his attachment.

Advance notice of contemplated acquisitions should be given enforcement agencies of Government who would, in turn, make it public, but might deter some mergers to which there might be no objection from an antitrust standpoint.

203

Will discuss two issues out of the many contained in memorandum: Structure of the economies outside of the field of regulation—merger and monopoly; and the degree to which under laws enacted by Congress substantial areas of the economy have been withdrawn from competition.

"All true antitrusters are opposed to regulation, whether private regulation or public regulation unless there is indeed a public interest to be served * * *."

If there is real concern about competition there must be concern with limitations on it, whether by private action or mergers, buildup of super-concentrations, or by law, such as excessive limitations on new entries into a field.

Number of mergers is not as important as who is merging and who is achieving dominance in the field in that manner.

Professor Schwartz is especially concerned by any move which would tend to stop mergers but do nothing about those which have already achieved dominance.

205

Public Utility Holding Company Act of 1935 was thought to doom holding companies. Instead, they have reorganized and are doing well.

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| | Suggests this subcommittee develop tentative plans of reorganization for concerns the size of General Motors and United States Steel. |
| 206 | Large industries with diversified operations can lose money on one operation but make it up on others. |
| 207 | We are headed toward a pattern of having 2 or 3 dominant companies in every basic industry. An understanding is needed that all acquisitions by leading firms are bad, without inquiring into their economic effect. If they are to continue to expand they should contribute to the capital resources of the country rather than just buying out control of existing resources. |
| | There is no public interest in mergers as such of smaller units. |
| 208 | Should be flat prohibition of large mergers, noninterest in small ones, and on those in between should fall the burden of proof of showing that it is technologically justified and consistent with the public interest. |
| 209 | Watering down of the Clayton Act to make treble damages discretionary rather than mandatory should not be allowed, except that Government should be permitted only actual damage suffered. |
| | Small companies can be forced into bankruptcy because a big supplier, or suppliers, refuses to sell to them. In some instances, the big company then buys their facilities at liquidation prices. |
| 211 | Government settles most of its cases by consent decree. Violators like to sign consent decrees because under provisions of the Clayton Act such a decree signed by consent before testimony is taken does not set up a <i>prima facie</i> case of violation for the benefit of private victims, and they therefore save themselves from treble-damage actions. |
| | Mr. Schwartz, speaking as former Chief of Decree Section of Anti-trust Division, said they have not had a "notably successful enforcement program on decrees." |
| 212 | Subcommittee might try to determine how many times some of the dominant units of industry have been caught in activities such as price fixing and market division, and, thereby, which ones are confirmed or habitual violators. Questioned how many price agreements have been disposed of by cease-and-desist orders when they should have been disposed of by criminal penalties. |
| | Suggests study of patent pools, with, perhaps, drugs, petroleum refining, electronics as a starting point. |
| 213 | Expressed hope that if patent study were done, conclusion would be reached that restrictive licensing of patents—telling the licensee that he must sell at a certain price and only in a given territory—is unlawful, at least when done by dominant companies. |
| | Questions what percentage of the market constitutes a monopolistic position. Does not think one percentage would apply for all industry. |
| 215 | Concerning the proposed hearings on the automobile and steel industries, Professor Schwartz proposed "a pretty thoroughgoing internal investigation which would indicate the possible lines of cleavage in the very large organizations; the motives for bringing together what has been brought together, the extent to which outside sources have been used, and so forth—the relation with dealers." |
| | The chairman expressed the hope that the subcommittee would function after Congress recesses and be ready with some legislative suggestions to this Congress. |
| | When questioned on his statement that "leading firms should be subject to a flat prohibition against acquiring the capital assets or control of existing businesses," explained that these firms should not be prohibited from expanding; but if they wished to expand, it should be done by building new facilities and not by merger. |
| | <i>Statement of M. A. Adelman, associate professor of economics, Massachusetts Institute of Technology</i> |
| 220 | Statement of qualifications. |
| 221 | Will direct his remarks to two questions: "Mergers, as related to our policy on 'big business' in general," and "price discrimination, with particular reference to section 2 (b) of the Robinson-Patman Act, which permits prices to be lowered to meet the equally low price of a competitor." |

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In commenting on the report of the Attorney General's committee, he commented, "I see no inconsistency in opposing the attacks on size, and opposing divestiture in all but a few instances, yet approving a stringent prohibition on mergers. * * * I would personally go a little further, and express the hope that when the courts or the Federal Trade Commission are considering the legality of a merger, other things being equal, they make it somewhat tougher, the larger is the acquiring company."

Since the total number of business enterprises has grown so much, the relative importance of a given number of mergers is much less. Unless there are estimates of acquired and acquiring companies' assets there is no way of knowing whether mergers are tending to make any industries more or less concentrated. No way of knowing if effects of mergers have been reinforced or counteracted by other developments.

222 Expressed the hope that the Pillsbury case precedent—that there is no need for an exhaustive market study in order to reach a conclusion—will be followed in the future. Haste should not make for an inadequate economic analysis, but testimony of the interested parties could probably be shortened.

Price equality for all customers, when it costs more to serve some customers than others, means that there is more profit in serving some customers than others. Clearest example is the brokerage clause, section 2a. (c), of the Robinson-Patman Act.

223 Section 2 etc. (a) providing for "cost justification" is not very different from 2 (c).

Every seller knows that every other seller is in the same boat, and will find it difficult or impossible to justify a lower price, so there is little danger any seller will try to bid away this higher-margin business by the offer of a price cut. "The effect of everybody's knowing everybody else's intentions is precisely the same as if there were a collusive agreement not to cut the price."

Real importance of section 2 (b) is that it serves to remedy the defects of section 2 (a). Permits cost savings to be passed on, not directly, by being "justified" under 2 (a) but indirectly, through the need to meet the competition of the first ones to offer lower prices.

224 Recommends that section 2 (b) be continued as complete defense to any charge of price discrimination under Robinson-Patman Act. Dr. Adelman feels no new legislation is needed to accomplish this purpose.

225 In comparing Standard Oil of Indiana case and Muller case, Adelman said:

"* * * I am concerned only to draw the contrast between two fact situations: the Indiana case, where the seller was forced by the need to meet competition into cutting its prices so as to pass on cost savings to some of its customers; and the Muller case, where the seller unquestionably had great market power, beyond the reach of the Sherman Act, and used it to discriminate in price and hamper the growth of new competition. I hope the Robinson-Patman Act will, in the future, be applied to the latter type of situation, and not to the former."

General questioning of Professors Adelman, Schwartz, and Kaysen

Dr. Adelman favors Robinson-Patman Act as it now stands, without adoption of Capehart bill or S. 11.

To permit beating a competitor's price would probably nullify a great deal of Robinson-Patman.

227 Mr. Kaysen: "I think one possible line along which the statute might be revised is to recognize the difference between persistent discrimination and sporadic discrimination."

229 Mr. Schwartz: "I thought it was very significant that my friend, Professor Adelman, thinks that legislation is not necessary in respect to the Robinson-Patman Act, because it can be worked out administratively. That, to my mind, suggests that the law in fact can be changed in the direction that he favors by administration. That is a very serious danger, and while I am not in a position to answer your question about the work of the (Federal Trade) Commission as a whole * * * I am quite fearful that many things that have been established before are in process of being disestablished through administrative reinterpretation."

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- 232 In questioning on the possibility of monopoly or oligopoly in the aluminum industry Mr. Adelman suggested that removal of the tariff on imported aluminum would immediately provide another seller in the market.
- 232-241 Discussion of the report of the Attorney General's committee and Professor Schwartz' dissent thereto.

FRIDAY, JUNE 3, 1955

Statement of Donald F. Turner, assistant professor of law, Harvard Law School

- 243 Statement of qualifications.
Will discuss some of issues raised by Professors Adelman, Kaysen, and Schwartz, with special emphasis on problems of administration, enforcement, and compliance.
Report of the Attorney General's committee emphasizes the importance of market analysis to a sound judgment in antitrust cases, but this approach has potential difficulties. Per se rules of illegality can be readily enforced and understood, although there are weaknesses in them, too.
- 244 In light of "enforcement and compliance considerations, the per se approach—perhaps in modified form—might well be applicable to other kinds of conduct; and that this committee would find it fruitful to investigate the possibilities. I suggest, to cite an extremely important area, that careful economic studies might justify a more specific and more stringent statute against mergers than we now have."
- Mergers are one of the basic causes of monopoly.
When you merge you take a competitor out of the market and get a larger operation. Larger companies can acquire more smaller firms because of their better financial standing, and sometimes obtain these smaller companies at prices far in excess of actual value as independent concerns.
- 245 War-created need for expansion has often resulted in expansion of larger, rather than smaller companies through issuance of certificates of convenience and necessity. This also results in enlargement of target areas of possible bombing attacks instead of dispersal of industry.
- 246 A strong antimerger statute is important because it "can both maintain what competition you have in industries now, and it can also, it seems to me, over the course of time, simply by being there and preventing mergers considerably expand competition for this reason: That over the course of time you get the constant development of new products, new techniques of production and the growth of new companies, which will tend to erode the position of existing concentrations of power."
- 247 Government-buying practices can also contribute to the growth of monopoly, particularly in markets where Government is the biggest or one of the biggest buyers.
If Government adopts a policy of favoring small business, it should not be carried to the point where these small business rely on Government business for their survival. They should be encouraged to develop their resources and their efficiency to the point where they do not need any favoritism from the Government.
- 248 Government should make it possible for all companies to bid on an even basis. Mr. Turner said: "I think the Government might go further in some cases and consciously adopt a policy of attempting to get small companies in certain industries over the hump, so to speak, assisting them with purchase, maybe on a favored basis, as has been done for small business under the numerous statutes, in the hopes that they will thereby be able to develop themselves into independent competitive units."
- The FTC opinion in Pillsbury case and the report of the Attorney General's committee seem to contemplate a broader investigation, and a more inclusive protection, of mergers than may be necessary. It is quite possible that effective enforcement of our antimerger policy has been or will be seriously hindered by this.

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- 248 "If economic studies should show that mergers involving firms of greater than a certain relative size are likely to have adverse effects on competition in the vast majority of cases, we could then dispense with the requirement of showing the probability of harm in each particular case, even though a considerable number of innocuous mergers might thereby be prevented. Of course, a statute should not preclude significantly beneficial mergers, but this could be avoided by providing for affirmative justification along certain lines."
- 249 Existing patent protection may well be far greater than is necessary to promote the rate of technological progress and new development that we have had.
- 250 Much investigation, or a collection of past investigations, could be brought to bear on the standard of patentability. One can get patents from the Patent Office comparatively easily. In court, however, the higher you go the less chance there is of a patent being upheld.
- 251 Certain patent practices could be curbed without too much effect on growth and development. For example, "you could prohibit patentees from putting price-fixing clauses in their license agreements, from putting in grant-back clauses whereby the licensee agrees to give back to the patentee any improvement patents he acquires, clauses whereby the licensee agrees not to contest the validity of the patent and, perhaps, severe limitations on clauses that put territorial and use restrictions on the licensee."
- Once you get away from nonuse of the patent and to the point where the patentee is using the license himself or is licensing only one company, it is "very troublesome, really, to build up a rationale for compelling him to license to all comers." If that compulsion were put in, it might cut into the reward sufficiently to discourage it.
- 252 Compulsory licensing might be necessary in case of war.
- In cases where members of a patent pool are dominant in the industry, it might be necessary to compel them to let in all comers.
- 253 Another area in which the law might safely be made more specific is the kind of cooperative endeavor usually, though not always, carried on by trade associations. "These and other industry groups clearly perform many useful functions. They may gather and disseminate among members information that will improve the industry's competitive performance. But they may also collect and circulate information, or require certain behavior on the part of their members, which serves as a vehicle for price-fixing. * * *"
- "There seems to be no justification, for example, for agreements to abide by reported list prices, or for agreements to report all transactions and identify the buyer and seller in each. Indeed, decided cases may probably indicate that such practices are already illegal per se. I believe the list could be made longer," stated Professor Turner.
- There are many aspects of antitrust law which cannot be treated on a per se basis. It is doubtful that "market analysis can be avoided in any statute dealing with 'monopoly power' or oligopoly. Any attempt to be precise—no matter how detailed the effort is—is likely either to leave large loopholes or lead to irrational results."
- Endorses the action of the Attorney General's committee in seemingly rejecting a performance test for concentrated industries.
- More precise, accurate and comprehensible standards of market analysis should be developed.
- Divestiture may, in some instances, be the only way to restore competition in markets where one or more firms have a high degree of market power. "If courts are rightly reluctant to undertake the task of reorganizing a large firm or industry, the answer is not necessarily that reorganization should not take place, but rather that another body should be entrusted with the task."
- Reorganization contemplated by antitrust laws will probably be more difficult to accomplish than the reorganization of public utility holding companies under the act of 1935.
- On reorganization, Mr. Turner had this to say: "It may well be that the combination of an administrative body formulating a plan, with the courts subjecting the plan to limited review, is the best way to do this job."

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He rejected the idea of a flat excess-profits tax because it would not only interfere with monopoly profits but also profits in competitive industry, where they really perform a function of drawing in new resources. Profits are the lure for new investment.

Mr. Turner agreed with Senator Kilgore that too often laws are prepared to meet an existing situation and, as a consequence, do not provide adequate coverage for all contingencies. A really comprehensive law is needed. Sherman Act is broad general statute.

255

Seems that fair trade can be justified solely on the basis of noneconomic (social) considerations. These considerations, however, are important and should be taken into account.

"The effect of resale price maintenance is to prevent efficient distributors who can sell at a lower markup from doing so." It is his feeling that the consumer suffers and, furthermore, there is no "economic justification in the distribution field for having resale price maintenance."

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It is his feeling that "both fair trade and Robinson-Patman were passed primarily to protect small businesses for reasons not really economic." However, "* * * there is a real economic justification for an antidiscrimination statute in this sense: That it is unfair for a small business, a smaller distributor, to have to pay a higher price, which is totally unrelated to any cost differentials that the seller may incur."

Robinson-Patman can lead to discrimination against large buyers for which there is no justification, as he sees it.

257

In reply to a question from the chairman as to whether "dissolution, divesture, or divorcement is the only effective means of enforcement for oligopolistic industries." Mr. Turner said it depended on the definition.

In an "industry in which sellers are so few, the product so standardized that they do not price competitively, they take each other's actions into account and sort of behave together, then I would say that probably divestiture is the only effective remedy, if any."

258

If, however, it is an industry in which these firms are of the most efficient size, there is no effective antitrust remedy.

If "oligopolistic" is defined as an industry in which there are merely a few sellers, divestiture might not be necessary. "If the industry is one in which product differentiation is quite important, and there is a lot of room for product variation, and the noncompetition, if any, has been due to a formal agreement of one sort or another, (it) may well be that injunctive relief would be adequate."

Any merger that might reduce competition in any market could be regarded as harmful to the economy. He would not require proof that the immediate result of the merger is going to be the likelihood of price fixing, nor does he think the present statute does that.

259

It is very difficult for a newcomer to make a dent in the automobile industry because of the attachments that consumers have for existing brands and because of the lower resale value of his product.

"This is the tremendous advantage of the Big Three have of much higher trade-in value because of their existing position in the market."

260

Vertical integration makes entry difficult only where as a result of vertical integration some particular level is sewed up, so that if you go into the business you have to develop your own resources. Auto industry is an example. To the extent that there are no independent parts manufacturers, you just impose that much more of a burden on anybody trying to get in.

Ease of entry into an industry would tend to break down monopoly. However, there are many industries that are reasonably competitive, but entry involves such a heavy outlay of capital that it is difficult to achieve.

Because financing of large capital investments is so difficult to obtain from private banks, it might be necessary for the Government to supply the money and take the risks. Also, Mr. Turner said:

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"If the barrier is the large amount of capital required, I suppose to the extent that you broke down concentrations you would reduce the amount of money it took to get into the business, although this is not necessarily true. At least it makes the industry a somewhat more encouraging place to try your hand in."

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Automotive industry is a prime example.

Even though a company dominates a market because of internal growth, it is objectionable because domination of a market has, or is liable to have, bad effects, no matter how the company attained its position.

"The danger that you raise by having a law which gets undue market power regardless of the way it was acquired, is that you may discourage the very kind of behavior that the antitrust laws are supposedly designed to foster, namely that businessmen will go in and compete, try to improve their product, charge low prices, and do the best they can."

"If you have a law which says, in effect, 'if you succeed too well we are going to chop you up,' you are likely to discourage that kind of behavior.

"I think I would tend to say that the possibilities of a firm acquiring undue market power by what we might call normal competitive behavior are rather remote and, hence, you do not lose much by having a law that requires some demonstration that the power was acquired by other than competitive means. But I may be wrong on that."

262 Legislative history of section 7 of the Clayton Act shows that it should, and does, eliminate the rule of reason approach as applied in Sherman Act cases. It is questionable as to how far it goes toward a per se approach. One part of the report on the 1950 act showed the committee's approval of the Supreme Court's definition of phrase "may tend to substantially lessen competition" as requiring a showing of a reasonable probability of harm to competition."

263 Section 7 might be amended, without getting closer to a per se approach, along these lines: "that a merger shall be illegal wherever the acquiring firm has a substantial share of the market; in other words, where the putting of the two firms together is likely to increase market power."

Percentage-of-market approach is more meaningful than dollar-volume approach, but it is sometimes hard to apply because of the difficulty of defining the market and the situation.

264 American industry is frequently in competition with foreign business in the world markets, which is one reason for not putting absolute limit on size.

Statement of Myron W. Watkins, of Boni, Watkins, Mounteer & Co., New York City

Statement of qualifications.

265 Proceeding on the assumption that competition is good and should be fostered, the real question is: "How can competition be stimulated and safeguarded most effectively, so far as legislative measures can do it at all?"

Throwing new light on issues is one of the primary functions of congressional committee; settling a question is the job of Congress. This point is stressed because it is "so easy to fall into the rut of stale controversy and barren debate about what is being done in the premises that the creative task of discovering what might be done goes a-begging."

There are two parts of antitrust policy that need implementation and enforcement. "One deals with the structure of industry, the organization of industrial control. The other deals with the performance of industry, trade practices, business methods." Dr. Watkins believes the failure to recognize this distinction leads to much of the confusion that now exists.

He proposed that, "with respect to the powers and responsibilities of public enforcement agencies, as distinct from private litigation, Congress forthwith vest in the Department of Justice the exclusive authority to invoke the Clayton Act, sections 7 and 8 (if they are retained) and in the Federal Trade Commission exclusive authority to institute action under the Clayton Act, sections 2 and 3, and the Robinson-Patman Act, so far as its provisions are not embraced in the amendment to section 2 thereof.

266 "At the same time, Congress by redefining 'unfair methods of competition' should explicitly withdraw from the Federal Trade Commission the jurisdiction the Commission has assumed—with judicial approval—over conspiracies in restraint of trade."

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"* * * nothing essential would be lost and much might be gained by repeal of the four substantive antitrust sections of the Clayton Act."

Sometimes past practices bear on a current decision, even though those practices have been long discontinued. "It is hard for a corporation to live down its past."

267 It is suspected that the "substantive sections of the Clayton Act were enacted simply as an experiment in specification—an attempt to guide the courts in what was to be considered unreasonable under the recently (1911) adopted rule of reason—and the experiment has failed."

268 It is usually held that these measures, Clayton and Robinson-Patman Acts, are needed to prevent violations of the Sherman Act. However, "a restraint of trade need not be full blown to come within the proscription of section 1 of the Sherman Act. Nor does section 2 take effect only on monopolizing that has achieved its object; it condemns equally 'attempts to monopolize' however incipient they may be."

269 Congress can supplement antitrust policies. "* * * the subcommittee will find Federal incorporation of businesses engaged in interstate commerce and Federal licensing of trade associations whose operations touch interstate commerce promising and potent means of implementing the Sherman Act."

Lack of Federal standards and rules governing powers and procedures of businesses subject to antitrust regulation hampers enforcement of the act.

One way in which Federal incorporation could facilitate antitrust enforcement would be to define the powers and functions of corporate executives, committees, and boards so as to fix responsibility for antitrust violations on a personal basis.

There might be compulsory Federal incorporation of businesses above a certain minimum size engaged in interstate or foreign commerce. "Congress might prescribe uniform, strict rules with respect to such matters as (a) stockholder participation in voting powers; (b) qualifications, terms of office, compensation and methods of election of directors; (c) eligibility to solicit proxies and responsibility for expenses thus incurred * * *"

270 State incorporation laws are inadequate.

Federal licensing of trade associations would permit some activities "consonant with the maintenance of effective competition and, either by implication or expressly," prohibit others.

The foregoing measures "need involve no assumption by the Congress of: (a) powers beyond its constitutional grant * * * or (b) any share in managerial responsibility for the conduct of business operations."

Antitrust Subcommittee could open the eyes of the FTC and, perhaps, Congress to "the potential scope of the phrase 'unfair methods competition' in reference to exclusionary, as distinct from deceptive tactics * * * and the logical limitation of the scope of that phrase to the selling policies and practices of individual companies. Probably the latter point, as previously suggested, deserves and requires now—in view of judicial rulings—statutory affirmation.

"Beyond this * * * the subcommittee might well explore the advisability of congressional action to implement in other ways this arm of antitrust policy that has to do with a firm's competitive methods or business practices. To bring trademark law and patent law more nearly into harmony with antitrust law would be two promising ways of doing so * * *"

271 Reemphasized his opinion that antitrust laws and antitrust policies, with respect to mergers, are aimed not at a condition but at a course of conduct. The criterion "properly applicable to them is the intent with which an act is done."

The law condemns a course of conduct as a violation of the law, and when one says monopoly is bad, "then I say that it is monopolizing that is bad, it is a course of conduct and that means the intent."

272 The failure to distinguish between price difference and price discrimination is one of the worst features of recent adjudication.

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273

A company that is economically dangerous is one that seeks to create high unit profits by keeping production at a level lower than demand instead of relying on higher production at less cost per unit for annual profit. However, Mr. Watkins said, "the market is the best means, rather than administrative control, of insuring that their conduct will conform to that standard."

276

Criminal penalties and civil remedies should not be used to regulate competition. That should be left to administrative authorities.

TUESDAY, JUNE 7, 1955

Statement of Stanley N. Barnes, Assistant Attorney General in Charge of Antitrust Division, Department of Justice

281

Appeared to discuss "the relation of business size to the offense of monopolization under the Sherman Act, and second, more specifically, the activities of the Antitrust Division in the automotive field."

He agreed with late Chief Justice Hughes "that the Sherman Act, 'as a charter of freedom * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions * * *'. The restrictions the act imposes are not mechanical or artificial. Its general phrases interpreted to attain its fundamental objects set up the essential standards of reasonableness.'

282

"Applying these broad guides, the offense of monopolization consists of monopoly in the economic sense—that is the power to fix prices or exclude competition—plus a carefully defined but broad ingredient of purpose to use or preserve such power."

Monopoly is not determined by the size of the company, but bigger corporations probably have greater opportunities to monopolize than smaller ones.

Under section 2, monopolistic power may exist even though it has not been shown that prices have been raised or competition excluded; but the power to do so is there. Keeping prices low might have the effect of excluding competitors.

"This identification of monopoly with power rather than practice, Judge Learned Hand explains in the Alcoa decision. There he analogizes offenses prohibited by section 2 to those outlawed in section 1. All contracts fixing prices, he points out, are prohibited by Sherman Act, section 1. No real difference exists, he feels, between such contracts and monopoly. For monopoly necessarily involves an equal, or even larger power to fix prices."

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In attempting to determine if monopoly power exists one must first define the market. It is "normally identified both in terms of trade and products or services as well as the geographical area in which such trade may be limited."

Defining "market" may involve substitute products, for even where there is a complete monopoly a "single seller's power is generally limited by a customer's possible shift over time to substitute products." However, the Supreme Court held that "'a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small.'"

Once "market" has been defined it must be determined how much power within that market constitutes monopoly. Set percentage figures are not adequate yardstick.

284

Courts testing for monopoly power usually consider market structure and behavior bearing on control over price and competitive opportunity. "Regarding market structure, factors sometimes relevant include the relative size and strength of competitors, particularly whether defendant's market share has been increasing or decreasing over a period of a reasonable number of years.

"Also significant may be freedom of entry, including reference to such factors as capital requirements, locational advantages, and the importance of advertising. Appraising conduct affecting prices, courts may consider the course of prices, their flexibility and relation to price trends in other industries, price competition among firms, and the presence or absence of trade customs tending to reduce price competition.

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- 16 "Defining 'monopoly,' an issue is the presence of power to fix market price—not the reasonableness of prices actually charged. * * *"
- 17 Endorsed that part of the report of the Attorney General's Committee which states: "Measuring monopoly power depends upon a full evaluation of the market and its functioning, to determine whether on balance the defendants' power over the interrelated elements of supply, price, and entry are sufficiently great to be classed as monopoly power. * * *"
- 18 More than just monopoly power is needed to violate section 2 of the Sherman Act. Deliberateness, intent, are needed to make monopoly "monopolization." "Deliberateness is proved if monopoly has been achieved or protected by restraints of trade illegal under section 1." Also, "courts may infer a monopoly has been deliberately maintained from certain business practices themselves not violative of any antitrust law."
- 285 There was language in the Alcoa decision that led some to the belief that "section 2 might penalize aggressive business management."
- 286 Concurred in language of AGC report which concludes: "Such is not the teaching of Alcoa. Defendants' conduct was there held to constitute 'monopolization' not because Alcoa was progressive, but rather because it acted with calculation to head off every attempted entry in the field * * *."
- 286 There is a possibility that monopoly may be thrust upon the defendant. Using Shoe Machinery decision as an example, he quoted: "The defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profits maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law."
- 287 The pending Soap case may shed great deal of light on "the oligopoly position in a particular market area."
- 287 Senator Kilgore suggests that amount of money spent on advertising may be another usable yardstick.
- 288 In reply to the chairman's question on the adequacy of the present laws to deal with oligopolistic situations, Mr. Barnes said he felt there was no necessity for amending the Sherman Act at this time. Decisions on pending cases might change the picture.
- 288 "There have been no Supreme Court decisions that permit the conviction of any persons based upon conscious parallelism of action. That was specifically repudiated in the Times-Picayune case, and in earlier cases." However, if a pattern of behavior is followed over a period of time, this might "induce a reasonable trier of facts to come to a conclusion by inference that there must have been not price leadership but a desire and an attempt to fix prices * * *."
- 289 Would not advocate any law which attempted to define conscious parallelism as a crime or as a violation of the antitrust laws.
- 290 It is not necessary for Department of Justice to show the existence of predatory practices to seek and obtain divestiture. It can be decreed in cases where legal acts were used to obtain a monopoly position. Divestiture is hard to obtain, principally because of the many mechanical problems involved.
- 291 " * * * some really tremendous results have been achieved by that divestiture, and it is not a thing in the past * * *."
- 291 The chairman asked if having to purchase patents instead of being able to obtain license rights to them hinders divestiture. Mr. Barnes said that he would not recommend passage of a law which would prohibit an inventor from selling his patent.
- 292 It is difficult to police judgments once acquired. Mr. Barnes said he was "appalled" because "so little attention was paid to enforcement." That from 1890 through 1952 "there were 12 enforcement suits instituted. From 1953 to the present time, eight enforcement suits have been instituted * * *."
- 294 If he accepts the premise that there has been a breakdown of anti-trust enforcement because of inability to obtain it through courts, then additional legislation is needed. There was no consideration of this approach in AGC report.

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295

Price fixing is not much of a problem now because it is recognized as a per se violation. The real problem is in defining monopoly.

Activities of Antitrust Division in last 2 years "may be divided into 5 categories: First, the monopoly problem in the manufacture of automobiles; second, mergers among the smaller manufacturers; third, control over the distribution of parts and accessories by the major manufacturers, which might exclude independent producers; fourth, sales of new automobiles to consumers by others than authorized dealers (the so-called bootlegging problem); and fifth, price fixing and price packing by local dealer organizations."

296

The Big Three are doing all right, but the independents at the end of 1954 were making no substantial gain.

Under the interpretation of the Supreme Court in the American Tobacco case, General Motors might be in violation of the Sherman Act because it possibly could put other automotive producers out of business if it wanted to. Mr. Barnes raised the question as to whether, to violate section 2, General Motors would have to possess the power to "exclude all—or merely all but the major one—of its competitors."

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Congress is presented with the problem of doing something to make more effective the principle laid down by the American Tobacco case.

"Apart from the issue of power," said Judge Barnes, "required in addition, is the desire for its exercise. Here history may be relevant, to what extent has General Motors grown, not by internal expansion, but by besting and then buying out its competitors. One ultimate issue may become: to run afoul of the Sherman Act, how probable must General Motors' exercise of power to exclude be?"

298

Assured the committee that in his view "producer concentration lies at the heart of the antitrust problem in the automotive industry," and they are watching for an "indication of significant change in the competitive picture."

Antitrust Division has had under investigation for more than a year complaints that GM monopolizes manufacture and distribution of buses.

In 1949, major producers turned out more than 85 percent of new cars; by 1954 this percentage had jumped to 95%.

"Against this background, our feeling was the proposed mergers (Hudson-Nash, Packard-Studebaker) might revitalize these lagging smaller concerns. They would then have broader asset bases, might economize by eliminating duplicating facilities, secure better dealer representation and sell more complete lines of cars." They considered not only the merging companies' ability to compete with the giants, but with the remaining smaller companies as well.

299

Department of Justice reached the conclusion these mergers constituted no substantial lessening of competition nor tended toward monopoly. "A contrary conclusion we reached regarding the proposed Bethlehem-Youngstown merger."

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This case is different because Bethlehem is the second and Youngstown the sixth of the first 10 producers of steel. "Moreover, much of both Youngstown's and Bethlehem's capacity stems from past mergers and acquisitions."

"Unlike the auto mergers, however, there were, of course, many companies—integrated and nonintegrated—much smaller than Youngstown. Further, there was no need for Bethlehem and Youngstown to combine in order to compete with the 80 smaller steel companies most of which are not even integrated. Thus, not only would this proposed merger eliminate competition between Bethlehem and Youngstown—in itself I believe substantial enough to violate the law, and I refer here, of course, to section 7 of the Clayton Act—but equally important, it would increase concentration in the hands of two companies already industry leaders, and thus widen the competitive spread between the merged companies and their smaller rivals."

The two companies contended that by combining they could better compete with United States Steel, but this would move in the direction of a market controlled by a few large companies.

301

Thumbnail history of Bethlehem's acquisitions.

This history includes only expansion in basic steel industry, not in fabrication or other fields, such as shipyards.

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302

Have been investigating complaints that Ford Co. "required its dealers to handle exclusively, or at least to sell a specified quota of parts, accessories and tools made or approved by Ford." Exclusive dealing requirements were removed from Ford dealer contracts in 1949, but there are complaints that some form of pressure still exists. Since the start of the investigation procedure has been changed a little.

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The chairman pointed out that in some instances the same part may be used for differing makes of automobiles, but the price for this part will cost more if bought for a Cadillac than for a Chevrolet.

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The Antitrust Division intends "to be particularly alert to abuses in the manufacturer-dealer relationship throughout the industry."

305

It is his opinion that bootlegging of automobiles—that is sales by dealers of new automobiles to anyone besides other authorized dealers or the ultimate consumer—might hurt some dealers, but he could not see how it would harm the consumer. "In fact, there was some reason to believe that bootlegging represented a healthy form of price competition."

In one community, automobile dealers went to newspapers and other communication media "and told them that if they did not refuse advertising from 'bootleggers' they (the dealers) would cease to advertise in these media." However, these unauthorized boycotts did not work. "In some cases these boycotts have resulted in the filing of private treble damage actions by the 'bootleggers' against the parties involved in the boycott."

There are local associations of automobile dealers that may be conspiring "to fix or pack prices for new automobiles." He stressed the word "local" because of the lack of evidence that the National Automobile Dealers Association has participated in price-fixing schemes.

306

Mr. Barnes said: "I have been slow to act on these persistent complaints of price rigging by local dealers. I have already commented upon the disparity of economic power as between the manufacturer and the dealer in automobiles. This disparity makes me hesitate before attacking a combination of dealers in a single community for fixing the prices at which they will sell automobiles while the vastly more powerful manufacturer is free to set the price at which it will sell to all dealers throughout the country. Nevertheless, I wish to take this opportunity to issue a warning that if local associations of dealers continue to agree among themselves upon the price, or any element entering into the price of new automobiles, we shall prosecute. In line with established policy of this department, prosecutions of price-fixing schemes are on the criminal side."

307

Criminal action is not instituted unless there is a "hard core per se violation or some other reason," so that when criminal actions are filed they should be considered more carefully.

He also said there are areas "where we have great difficulty in convincing any Federal court that antitrust is something that they should give serious consideration to."

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Great delay in consideration of cases by the courts is also quite a handicap.

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Getting a decision from a court is sometimes most difficult. One case was tried in fall of 1953 and there is still no decision, even though the case "was a comparatively simple price-fixing case, taking 13 days to try."

313

Two areas covered by the "anti-merger amendment" need further study. "One is the peculiar distinction, when there is a transfer of stock, as to what corporations it is applied to, as compared to corporations to which the law is applicable when there is a transfer of assets."

Sees no reason for the distinction of 2 different groups of corporations, 1 group which is prohibited from transferring assets, the other stock. Should be uniformity. Is not sure if there should be exemption for banks.

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314

The second area that needs study is again one in which an attempt at uniformity should be made. "That is, that there should be some requirement, as long as section 7 is on our statute books relating to mergers, that any corporation that proposes to merge—and I think there should be some limitation as far as size is concerned, so that you get away from the de minimus transactions—that there should be some notification to the proper Government official, which I presume would be the Antitrust Division of the Department of Justice and the Federal Trade Commission, a sufficient number of days in advance of the proposed merger, so that examination of the factual situation could be had.

He would make this notification compulsory. It is more important to the Department of Justice than it is to the FTC, because Justice has the restraining power.

315 There should be some measuring stick for determining who must give prior notice of intent to merge. There is question as to whether it should be percentage of total production or dollar volume.

316 Department of Justice agrees to submit recommendations on the form of a law to require prior notification of intent to merge.

In drafting such a law there should be fixed standards, not just a "blank check to any commission or any department to decide."

317 The decision on asking for a restraining order or an injunction must be predicated on the situation existing in each case.

Because of its ability to obtain restraining orders, Justice "can act with more dispatch to prevent the ultimate necessity of unscrambling the omelet than can the Federal Trade Commission."

318 The chairman asked if "the concurrent jurisdiction of Federal Trade and the Antitrust Division is not unwise, and should not some thought be given to entrusting the agency best equipped to handle the problem with exclusive jurisdiction."

Judge Barnes pointed out, however, that so far the two agencies had not gotten in each other's way. Further, Judge Barnes said that "concurrent jurisdiction is a two-edged sword. It puts you on your toes."

319 For instance, if a merger is about to be consummated the Antitrust Division would handle the matter because of their ability to invoke the injunctive process. On the other hand, if there is an area that requires extensive investigation, the FTC could handle it better as it has investigative power the Department of Justice does not have unless it brings suit.

This system works because of an informal agreement between the heads of the two agencies involved. The chairman said he felt the "law must plainly say what it intends to say so there is no question of personal agreement involved."

Speaking on the question of "concurrent jurisdiction," Mr. Parnes pointed out that "the Supreme Court, in passing upon this question of concurrent jurisdiction has said that it is more than a concurrent jurisdiction; it is a cumulative jurisdiction, and that it is with a purpose 'to provide the Government * * * with cumulative remedies against activity detrimental to competition.'"

It is a matter of congressional policy as to whether there should be two responsibilities or one.

320 There are two tests in section 7 for determination of legality—does it substantially lessen competition or does it tend to create a monopoly.

As an example, in the Hilton Hotels, monopoly of hotel rooms has not been charged but monopoly of convention business. This merger also presents a test "of the question of a substantial lessening of competition within this line of commerce." So both problems are involved.

In the General Shoe Corp. case each acquisition was small but there were many of them. This "indicates a tendency to monopolize and particularly indicates a lessening of competition by reason of a plan or pattern of continued acquisition, each one of which to a limited degree does not tend to lessen competition."

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- 321 Ideal Cement Co. case was one wherein company sought approval of merger plan which was denied. This company has a history of considerable acquisition.
- 322 Ideal Cement, by this acquisition, would have moved into a position from 10 percent to about 35 percent of the relative market. Justice Department felt this was an acquisition which would eliminate competition, so refused approval.
- In the Hilton Hotel case it is charged this merger resulted in substantial lessening of competition in 4 cities and certain surrounding territory which has a relationship to the 4 cities. This points up the fact that the geographical area is considered in monopoly cases; that they are not necessarily national in scope.
- 323 The "area of effective competition" may be "geographical, it may be within a certain industry, it may be within a certain pattern of trade; it may be in a distributive pattern that makes it significant." The consideration of transportation and transportation rates is also very important.
- 324 Judge Barnes defined a conglomerate merger as "an incident where a corporation proposes to acquire an entirely different business." In a true conglomerate merger the question of loss of competition between the acquiring and acquired companies has been eliminated. There are, of course, other problems such as the question of "inherent powers that can be created by conglomerate merger," and the danger that the merger might wreck independent competitors in one field, making up their losses in another field.
- 325 "Then there is the question of how are you going to stop it. Will you take it by enforcement of your Robinson-Patman discriminatory pricing or are you going to go into it by your merger or by your monopoly laws?"
There are conglomerate mergers under study but none against which they intend to file suit at this time. They are harder to designate as violators of section 7 than vertical or horizontal mergers.
- 326 "Failing company defense" may be used if an acquired company was bankrupt or on the verge of bankruptcy and only the acquiring company was able to purchase it. There might be times when stockholders, for various reasons, would find it necessary to sell a going concern and the only purchaser would be a dominant company. This acquisition would substantially lessen competition in some markets, but it would not necessarily come under the provisions of section 7.
Mr. Barnes pointed out that the "failing corporation defense doctrine does not depend upon statutory language, but depends upon the interpretation of the Supreme Court in the International Shoe Case." An important part of this decision is a "statement in parentheses that such an acquisition is permissible 'there being no other buyer available.'" This means there must be some good faith effort to sell to a company other than the dominant company.
It was one of the purposes of the statute to eliminate the inquiry into what was in the minds of companies entering into the merger (such as tax savings), and to look only to competitive consequences.
- 327 In reply to a question from the chairman on the importance placed on the intention of the parties in considering the legality of mergers, Mr. Barnes said:
"The only exception that we can make under the adjudicated cases, other than specific exceptions in the statute, is this failing corporation theory."
The chairman commented on the suggestions in the FTC report of a "great variety of economic factors which should be considered in determining whether the prohibited effect upon a relevant market has been achieved by an acquisition." In reply, Judge Barnes went along with the comment in the AGC report on the subject. He said, "I am old fashioned enough to believe that the more facts I have on any particular problem, the better conclusion I can come to and when we have a merger it requires inquiry into a lot of facts." However, it is not always necessary to do an exhaustive study or to consider every possible market factor.

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329

Any situation in which increased business creates a market condition that results in rising prices to the consumer should be looked into. "After all," stated Mr. Barnes, "that is ultimately what we are supposed to be enforcing the law for—the benefit of the consumer."

Proposed merger of Bethlehem-Youngstown is good example of situation that has arisen since the Anti-Merger Act where percentage control or dollar volume of sales after acquisition would be practically sufficient in itself to bar the merger, without even considering other market data.

Set forth market factors considered in making the decision on B-Y and explained the "type of market data there are which might be relevant generally in mergers," but which were not considered significant in this case.

333 Mr. Barnes could not say at this time what action might be taken in the event Studebaker-Packard wanted to merge with American Motors. Would have to wait on the brief and showing of facts.

334 There is a difference in the corporate structure of GM and Ford.

Manufacturers of automobiles compete in almost everything but price. If price were emphasized more, it might result in reduction of prices.

335 Mergers help to eliminate competition; internal expansion creates it.

Tax writeoffs on certificates of necessity are awarded companies of varying sizes. However, larger corporations may be able to take advantage of the program more frequently because they are more likely to have the financial capital to go into the area than are smaller companies.

WEDNESDAY, JUNE 8, 1955

Statement of L. L. Colbert, president, Chrysler Corp., accompanied by George W. Troost, vice president

337 Introductory remarks.

338 Believes present period of automotive history is most competitive. There is increasing competition in "designing, producing, pricing, and selling of automobiles."

Chrysler Corp. was formed by acquisition of certain companies so there could be competition with other companies in various price brackets.

339 "There is no such thing as an entrenched and unassailable position in the automobile business." There is opportunity "in this industry for a company with a new product idea and a will to challenge and change existing shares of the market."

Brief history of the operation of Chrysler Corp.

340 Referred to the Dodge-Chrysler merger as illustrative of "the truth that a merger can be a positive and constructive support to the health of our competitive system by helping a company make a successful drive against bigger and more solidly based rivals."

342 It is his belief that the strong competitive spirit exhibited by Chrysler in its attempt to regain its share of the market has resulted in the "unusually large market for automobiles this year."

343 The main elements in their drive to regain their share of the market were: (1) Entirely new lines of cars; (2) increased effectiveness of their merchandising; and (3) strengthened advertising efforts.

In preparation for the future, Chrysler is in the process of expanding all of its facilities.

The automotive industry operates a patent exchange pool for all patents issued up to 1940. Any company can go in and get information on and license patents up to that time.

344 To build and equip modern factories geared to assembly-line production requires extensive capital outlays that place this industry automatically outside the category of small business. In addition to the money needed to build already designed automotive products, large additional funds are needed for engineering and testing of products for the years ahead.

Mass distribution, as well as mass production, have led to the great gains in making and using automobiles.

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- It is not true that automation precludes small manufacturers entering or staying in the automotive businesss. Many of their small suppliers use it.
- 345 Chrysler buys from about 8,000 independent suppliers. Most of these suppliers are awarded business on competitive bids.
- 346 "No development in the future is likely to change automobile making in America from an unusually large-scale enterprise, even for the so-called smaller companies. This is not to say, however, that the requirements of size form an insuperable obstacle to the entry of new companies into the industry. With a radical new concept of mechanical efficiency and convenience to the passengers, I believe that a capable newcomer could attract sufficient capital and dealers and could acquire the necessary production facilities to invade the industry successfully."
- They spend about 58 cents out of every sales dollar to buy materials, parts, and services from these independent suppliers in 42 States. They have approximately 10,000 dealers in the United States, who put up their own capital and operate as independent business enterprises. It is in the best interests of Chrysler and the dealers that the dealers run their businesses efficiently and sell the largest possible number of cars, so the company assists them in every way possible.
- 347 There are two kinds of dealers: Direct dealers who are distributors, and associate dealers.
- 349 Mr. Colbert feels there is, at this time, no concentration of production that is interfering with competition in the industry, even though Judge Barnes and Mr. Howrey were inclined to believe there is undesirable concentration of production in the automotive industry.
- Larger companies can convert to production of heavy goods necessary to a defense effort that smaller companies cannot produce; but the suppliers would still contribute the things they were able to produce.
- 350 Senator Kefauver questioned Mr. Colbert about the action taken by the Defense Department in awarding a contract for M-48 medium tanks to General Motors instead of to Chrysler, thus concentrating production. He said it had been brought out in hearings that the reason for GM's being able to submit a lower bid was their ability to procure supplies at a lower price than Chrysler, and questioned if this type of "consolidation of industries and supplies in the automobile industry" were not "reducing the chance of the other fellow to survive."
- 351 Mr. Colbert replied that Chrysler could have carried integration further if it had wished, but at the time Chrysler was set up they "leaned more toward engineering and research" than toward control of their own facilities.
- Senator Kefauver asked if this integration did not also affect, adversely, smaller automobile companies—is this a "healthy situation for the country." Mr. Colbert felt that question could not be answered categorically.
- 352 Chrysler lost the first tank contract but has recently obtained another.
- 353 Senator Kefauver pointed out that many of the parts that went into the M-48 were produced by GM or its subsidiaries and that the transmission was the big item; that in some instances specifications actually required GM products, so that "you practically had to buy from General Motors in order to make the M-48 tank."
- 354 It was further brought out that GM sold these supplies to itself at a lower price than to Chrysler; Chrylser tries to follow the policy of selling to others at the same price it sells to itself.
- 355 Senator Kefauver inquired if GM's preference to itself in pricing of supplies might be a violation of Robinson-Patman.
- 356 Mr. Colbert used the following incident as an example of how competition works when there is no defense angle involved:
- At one time Chrylser was GM's biggest customer for Delco products, but felt they were being overcharged. When they looked around, they found there was no other source available and one would have to be developed. They found a man who wanted to buy a company, build it up, go into competition with GM. That is how Autolite was born. Chrysler did not finance and has no stock in the company, but did assure them of enough business to enable them to operate profitably.
- 358 Chrysler has a separate department which concentrates on getting defense business for the company.

- Page*
- 359 The chairman said there had been complaints that Government specifications had been written so that only Chevrolets and Cadillacs could be procured.
- Mr. Troost said they had not protested the use of the GM transmission in the tanks "because no one else in the United States or anywhere else in the world, so far as we know, is tooled to make that transmission * * *."
- 362 Mr. Colbert does not think that increased concentration in the hands of the Big Three of the automobile industry will reduce the incentive to cut prices.
- He does not approve of consideration of legislation looking toward breaking up GM and Ford into smaller operating units. Had no answer to question of how much integration is beneficial. In the case of Chrysler, they look into every proposition of merger or acquisition and try to determine whether it would be advisable to integrate or expand their own facilities and produce the needed part.
- 363 Discussed mergers effected by Chrysler.
- 364 "Integration can be valuable at certain times and it can also be costly at certain other times." When business is good, highly integrated companies will probably do better, but if business falls off a less integrated company might be in a more favorable position.
- When a company is acquired it becomes a division of Chrysler Corp.—is not operated as a totally owned subsidiary. There was then some discussion on this operation.
- 365 Discussed sources of glass and tires.
- 366 There is no corporate connection between Goodyear Rubber and Chrysler; there is no agreement with glass companies that they will be exclusive furnishers.
- The chairman asked what effect "the arrangements between the Big Three with their glass suppliers have upon, first, the supply of glass available to independent car manufacturers and, second, entry into the market of new glass producers." Mr. Colbert knew of no reason why there should not be new glass producers; he said glass shortages had not affected the competitive position of "anyone in the industry, because when it is short for one, it is short for all."
- 368 GM exerts no market control over Chrysler because of its (GM) strong position in the parts and accessories field. The only things Chrysler buys from GM are on competitive bid.
- Higher integration in the automotive field does not foreclose the market for the independent parts suppliers—there are new ones entering the field all the time.
- 369 Imported cars pose no real competition to domestic manufacturers.
- There is strong competition for dealerships; a good dealer has no trouble in making financial arrangements.
- Chrysler permits its dealers to deal in cars or parts other than their own, but experience has shown a dealer usually does better if he sticks to one line. He may, however, stock more than one brand of that line.
- 370 They have a provision in their dealers' contracts that either side can cancel the contract on 90 day's notice, but in practice they usually work out a mutually satisfactory arrangement for termination.
- Chrysler has never built buses. They have built chassis but then sent them to someone else for mounting.
- 372 There is competition in pricing in the automobile industry, contrary to the remark made by Judge Barnes; trade-in value is not taken into consideration when setting the price on new cars.
- Mr. Colbert had no comment to make on the question of whether GM could reduce its prices but would not because of the danger of anti-trust action if its market share increased.

THURSDAY, JUNE 9, 1955

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- Statement of Clare E. Griffin, professor of business economics, University of Michigan*
- 375 Statement of qualifications.
- 376 He will deal with "some rather general concepts that the economists hold" and will comment on current problems, such as oligopoly, "and on the problem of price competition versus nonprice competition; mergers and bigness * * *."
- Economic freedom, as well as political freedom, is essential to Americans; "another requirement of a good society is that it shall be productive." High productivity is necessary to a free society, as exemplified by the fact that communism has made its greatest inroads in countries which are low on the economic scale.
- 377 " * * * in modern countries the relation between productivity and freedom poses a basic problem, for as we have advanced in production and we have become more interdependent, the economic welfare of everyone depends upon the actions of everyone else."
- He further asked, "how can the strict requirements of society placed upon all of us as producers be reconciled with our aspiration to do entirely as we please?"
- 378 People do not always like the pressures that competition places upon them, but this type of pressure is preferable to the heavy hand of authority.
- 379 Progress in a competitive society does not come easily or quickly. However, the time lag between the development of a new product, "of acquiring the know-how and of developing the market for a new brand and corresponding requirements in various other fields" is desirable, because it gives the leader some time to get out ahead. This gives him a larger reward and provides necessary incentive for development.
- "Any artificial barriers, such as agreements to divide markets, arrangements for tying up sources of supply or unreasonably tying up distribution outlets should, in principle, be discouraged; and in these areas the antitrust laws have a function to perform."
- 380 The ability to stifle new ideas and new ways of doing business is possessed by the majority in a democracy, and could be dangerous if left unchallenged. Antitrust laws should and, he believes, do "protect the necessary freedom of the innovators by preventing the established concerns from ganging up against the newcomer."
- "But there is also the possibility that the aim of preserving competition can be perverted by preserving particular competitors.
- I would respectfully urge that this distinction always be borne in mind and that, concerning any proposed legislation in this field, the question should always be asked, 'Is this proposal aimed at fostering competition in which every businessman must take his fair chances in the market, or is it designed to protect certain individuals or classes of businessmen from the unpleasant effects of fair competition?'"
- Professor Griffin believes the American businessman generally accepts the principle that competition is the regulator of our system, and that sets them apart from many of their foreign counterparts.
- 381 Although the British have not generally adopted our principle of competition, preferring to compete with other countries rather than with themselves, there is a growing awareness of the value of the free-enterprise system.
- 382 Senator Wiley commented that "when we are talking about free enterprise we have to look around the whole perimeter of the problem and realize that free enterprise as a philosophy is a wonderful thing, but when you come to a question between nations where you have all kinds of barriers and unfair dealings, and so forth, you had better look after your own affairs, too, so they do not take you for a ride."
- Even though some businessmen may complain about the antitrust laws, they do not want repeal of the Sherman Act. They accept the principle even though they may question a particular application.
- 383 Free competition is not synonymous with free cutthroat competition. Acceptance of the principle of competition does not mean there is no need for laws with teeth in them.

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Mr. Griffin drew the conclusion that "changes in the statutes or radical changes in the interpretation of them cannot successfully run very far ahead of the established mores, customs, and common opinion of the businessmen who are to be affected." Therefore, there should be no "legislative restriction upon the size of a company or the proportion of the market it will be permitted to serve * * * anyone should be allowed to grow without legal interference, as long as his methods are fair, and this growth represents only increased consumer acceptance of his products."

However, "Growth by merger or acquisition seems to me to be another matter, and appropriate regulation and limitations can properly be made by a government which has assumed responsibility for the preservation of the competitive system."

384 There are differing definitions of "competition." His concept "is that competition is rivalry between the members of one economic group to secure or retain the patronage of the members of another economic group."

Dealt with the American spirit of competitiveness at various levels.

385 This competitive attitude "cannot be created by government or by anyone else (but) it can be dampened and discouraged by governmental policies which would discourage the incentive to grow. Also, government can play a positive role by proscribing certain modes of growth which it is believed do not encourage competition and thus may help to channel the natural desire to grow into socially productive lines. In this latter remark," said Professor Griffin, "I have in mind a possible reasonable regulation of mergers, which, I think, is quite appropriate."

Some economists believe the larger the number of competitors the better, because there is less likelihood of agreements being made between them. Professor Griffin believes, however, that agreements "are as often made between the many small members of a trade through its trade association or by other means as are made in other industries in which the number of enterprises is relatively small." He also feels there are other factors involved that are more important than sheer numbers. They are: (1) Rate of technological change; (2) rapidity and pervasiveness of changes in consumer tastes; and (3) variety of products a manufacturer turns out.

386 Believes it is beneficial for companies to produce a variety of products.

387 "This question of competition among the few, to which economists give the name oligopoly, does not, therefore, seem to me to present the serious problem that some people see in it. The competition among the few may, indeed, present certain special aspects, but I believe there is no evidence that this competition will be less intense nor that it is less socially fruitful in terms of product improvement, cost reduction or other aspects of economic progress."

In an industry in which there are many small concerns, price may be kept "close to cost," yielding an immediate benefit to the consumer. However, in the long run it may be more desirable to improve the product.

There is no "essential difference between price competition and any other kind of competition."

388 Price is a ratio and can "be as effectively lowered by increasing the product side of the equation as by reducing the money side of the equation."

"I want to drive home my own view that there is no particular preference for the competition that takes the form of changes in the price as opposed to the competition that takes the form of improving the product; in fact, they come to pretty much the same thing."

389 Freedom of entry is a necessary element of competition, but it is obviously more difficult to establish a business in these days of mass production and distribution than it was when our industrial society was composed of many small factories and mills. These economic problems are unavoidable, unless we want to turn back the clock. However, these problems are aggravated by the concerted action of the "ins" trying to keep others out. He feels this practice is more seriously in restraint of trade than "restraints of competition between those who are already in."

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- Government should concern itself with the problems of small businesses but this should not be carried to the point of making it difficult for new businesses.
- 390 Surveys show that people think that big business, in general, is good for the country; but at the same time they are concerned about the economic power wielded by these giants.
- To those who contend that a legal limit should be placed on the size of a firm or its percentage of the market, Mr. Griffin replies that action to limit size will also limit growth.
- If a hard and fast limit is placed on size, "then any concern which would be affected by that limit will be strongly encouraged to adopt noncompetitive policies." Adoption of competitive policies that would lead to more sales would lead to increased size—this would lead to violation of the law.
- It is intent which makes a monopoly—not size.
- 391 One approach to the problem of monopoly is regulation of mergers, with a careful look being given each situation as it arises.
- "Another reasonable approach to the question of bigness is enforcement of the Sherman Act prohibitions against restraints of trade and deliberate efforts to monopolize. I believe that this general prohibition of monopolizing, enriched by the interpretation of the courts in particular cases, provides a much better governmental policy than would any statutory limits or attacks on bigness per se."
- The Sherman Act has been very successful; a good part of its success is in "the generality of its provisions" which can "be adapted by the courts to new conditions" when they arise.
- 392 There are usually more mergers during periods of great prosperity, and these periods frequently follow a war.
- There followed some discussion on the possibility that rashes of mergers and acquisitions had been partly responsible for the ensuing depressions.
- 393 Oligopoly is defined as "competition of the few." This might have the same effect as monopoly if wrongly used, but to reach this point would involve conspiracy which is prohibited by law.
- Mr. Griffin does not feel oligopoly markets are inherently incompatible with active competition.
- 395 Does not feel that American industry is too highly concentrated.
- 396 Concentration of industry is not only dangerous militarily, but also contributes to higher living costs in that area.
- 397 Definition of terms: An "economic group" means "sellers of a product in rivalry with one another"; a "bargaining relation is the relation between the seller and the buyer."
- Mr. Griffin said that anti-chain store legislation was an inroad on competition.
- 399 Does not approve issuance of certificates of convenience and necessity unless there is an absolute need for such action.
- Tendency toward regulation of an industry may have cumulative effect. For example, regulation of railroads may result in regulation of bus and trucking industries, thus removing industries that would normally have been competitive.
- 400 The chairman said certificates of necessity should be issued to plants for elimination of chemical stream pollution, and Mr. Griffin agreed.
- 401 Does not agree with the idea of reducing the size of organizations like General Motors and United States Steel.
- Discussion on aluminum and the Alcoa decision.
- 402 Has no objection to overlapping jurisdiction between FTC and Anti-trust Division of Justice.
- It is Mr. Griffin's opinion that there is fundamental difference in the philosophies of the Sherman and Robinson-Patman Acts.
- He believes the majority recommendations made in the AGC report would strengthen antitrust laws, although he might not have worded "all parts of the report exactly as it was written."
- Statement of Jesse W. Markham, associate professor of economics, Princeton University*
- 403 Statement of qualifications.
- 404 Inserted prepared statement, which he covered in oral testimony.

Page Statement of J. Fred Weston, associate professor of finance, University of California

406 Statement of qualifications.

Inserted prepared statement, which he covered in oral testimony.

410 In spite of the large number of mergers that have taken place in recent years, Professor Markham felt the Antimerger Act of 1950 had prevented the consummation of many more and had, therefore, been effective. He gave as an example the proposed Youngstown-Bethlehem merger.

417 The chairman wanted a clearer identification of the terms "merger" and "acquisition." "Merger" should mean consolidation by exchange of stock; "acquisition" would then be used when physical assets of one company are bought out by another.

418 Although the FTC report showed that a majority of acquisitions in the 1948-54 period were made by firms holding assets worth more than \$10 million, Professor Markham did not hold with the idea that this indicated growing concentration of power in the big corporations. It was his opinion that a look at the number of acquisitions made by firms with assets of more than \$1 billion would be more meaningful, as \$10 million firms are no longer considered big business; that people who fear this growing concentration of power have in mind organizations like United States Steel or duPont.

420 Mr. Markham was asked how the FTC obtained the facts on which it based the conclusions contained in the report on mergers. Mr. Markham said they had "steered pretty clear of the word 'motive.'" That they had tried "to infer from the type of acquisition what seemed to be the intent of the merger or acquisition" and this information had been broken down into categories; "acquiring capacity, say, in its same line, in the same market; acquiring capacity in the same line of product, but in a different geographical market; forward integration closer to the customer; backward integration closer to its source of supply; or whether the assets that were acquired seemed to be completely unrelated to the assets that the company previously held."

They did not rely on what the companies themselves said, but in the cases that were taken up in detail they had quoted what the company said at the time of the acquisition.

421 Mr. Burns asked if motive or reasons given had any "significance in determining the competitive consequences of the merger." Mr. Markham said it had had a great deal of meaning for those at the FTC who were doing the study, because they particularly wanted to identify horizontal mergers. "That while it is true that section 7 holds against conglomerate and vertical mergers, the most obvious cases of injury to competition, the tendency to injure competition, the tendency to create a monopoly, is still to be found, the most clear-cut cases are still to be found, in horizontal acquisitions."

They had not overlooked other types of mergers, but "it just adds up to common sense that when two producers producing the same commodity in the same market get together, that this is the most likely injury to competition."

Section 7 is adequate to prevent concentration of economic power. It is well worded, "it makes admissible tests that are not quite so strong as those under the Sherman Act test." It provides the opportunity "to catch the development of monopoly in its stage of incipiency."

"Had section 7 been on the books at that time, I am convinced after the third or fourth acquisition by United States Steel or, in fact, the mergers that preceded the formation of United States Steel, that those earlier acquisitions would probably have been caught under section 7."

He would be most interested in "the condition of entry at each successive stage" of a vertical integration. Could get "greatly alarmed about a vertical integration backward, an acquisition backward, where one firm acquired a substantial part of an indispensable resource that was greatly limited in quantity and, therefore, foreclosed other firms from entering at any successive stage of integration."

422 It is not necessary to make as detailed a study or as strong a case under section 7 as under the Sherman Act.

Page

In the Hamilton-Benrus decision the court relied almost entirely on the size of the two companies and amount of their business in relation to other companies; Pillsbury case differed in that the FTC took into consideration other economic factors. These two industries have entirely different structures.

423 In Professor Markham's opinion, Department of Justice may not examine all the types of evidence, in bringing Sherman Act cases, that FTC would examine in bringing section 7 cases. However, the two agencies would probably not use different criteria.

There are some conglomerate mergers under scrutiny.

426 Oligopoly, most of which is beyond the reach of the antitrust laws, is the problem of bigness. There are not too many monopolies "in the dictionary sense of the word, where you have a single firm controlling substantially all the output." There are many instances in American industry, however, where a few firms "control substantially all the output, and under certain conditions they are not likely to compete as vigorously with each other as they would if you had ten or twelve in those industries." Yet each of those firms would be behaving rationally and "you cannot, it seems to me, pass a law to force them to behave irrationally. This is what I deem to be the essence of the monopoly problem," said Mr. Markham.

427-430 General discussion on problems of oligopoly.

430 In questioning dealing with a book by Professor Weston, he explained the statement, "The policy actually adopted was to record all growth of a firm subsequent to a merger as internal growth," in this way:

"In my book I explained that I measured the direct effect of mergers on growth. I think there is danger of either understating or of stating the extent of internal growth. I think people generally get the impression that this overstates the extent of internal growth because they feel that automatically mergers are successful. But we have a large number of mergers that turn out to be failures."

431 There is no way of telling what might have happened in the expansion and growth of Bethlehem Steel, for instance, if there had been no acquisitions or mergers.

Mr. Weston felt there was no hard and fast answer to the question of whether dominance in a highly concentrated industry is more inimical to competition than dominance in an industry comprised of many small units, because many other factors would have to be taken into consideration.

432 Mr. Weston found "that mergers up to and around the turn of the century accounted for the high degree of concentration that existed at that point, but that mergers since approximately 1904 have had negligible effect on the degree of concentration." He used auto industry and United States Steel as examples.

433 Prevention of future mergers would not solve the problem of industrial concentration.

The problem of economic concentration is not serious enough to warrant divestiture proceedings.

There could not be developed "any absolute standards for absolute size of a firm, its relative size in terms of its percentage of the share of the market without running into grave difficulties." Professor Weston advocates reliance, as far as possible, "upon the operation of market forces on the one hand, and on the other, the kind of Government regulation you have had through the Federal Trade Commission and the Department of Justice."

434 Mr. Weston listed in his inserted prepared statement the factors he considered necessary in conducting a market analysis for the purpose of determining competitive relationships.

Monopoly as such is worse than oligopoly, but there are monopolies that can be prevented and can be acted against. "Whether oligopoly is more dangerous than monopoly depends upon the way the oligopolists behave." The danger in oligopolies lies in the fact that you cannot move against them as you can in monopolies.

Some oligopolies are beneficial.

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435

Ease of entry into an industry is "an important economic consideration." Mr. Weston said he was not aware of "factual evidence which would demonstrate one way or the other that ease of entry is a problem or is not a problem."

"There is a life cycle to individual industries. In the mature stage of the industry (such as auto) entry is likely to be difficult. The established firms have the know-how and ability and existing organizations are set. Whereas there is greater ease of entry in electronics or aircraft components."

436

The chairman said he opposed "making entry into a field too tough, because a fellow coming in there may have an idea that is very badly needed, even though it may be an old and well-established industry."

Mr. Weston replied that "because an individual cannot duplicate General Motors or United States Steel * * * is not sufficient evidence to establish that there is not still a tremendous scope for opportunity and individualism in the country." That "data from the Department of Commerce on the number of new firms established each year amply demonstrates" this point.

No law should be enacted to enable the breakup of companies such as General Motors and United States Steel. In fact, Mr. Weston cited two factors that probably justify firms of this size: (1) There are "certain kinds of research (that) can more effectively be carried on by large organizations;" and (2) "great executive ability can more effectively be utilized in a large operation than in a small operation."

437

There have been times when it was very difficult to get the large companies to concentrate on defense production because they were reluctant to give up profitable private production.

437

Discussion between Mr. Markham and the chairman on the necessity of increasing the budget for antitrust activities.

FRIDAY, JUNE 10, 1955

Statement of George Romney, president, American Motors Corp.

443

Statement of identification.

444

Merger history of Hudson and Nash-Kelvinator (American Motors).

446

The highly integrated Nash-Kelvinator Co., buys from about 5,000 vendors; it also sells to other motorcar companies.

"This slump in sales in the spring of 1953, which was felt particularly by the smaller companies, came simultaneously with the tightened credit policies of the Federal administration * * *." This resulted in tighter retail and wholesale credit.

Neither company had its own automobile financing company, although Nash-Kelvinator has one for appliances.

448

Major reason for merger of Hudson and Nash-Kelvinator was ability to use one basic body type instead of the four both companies had previously used.

449

Another reason for merger was increase in number of dealers handling their products. The dealer organizations of Hudson, Nash, and Kelvinator were kept intact.

American Motors' share of the market has gone up this year, as have dealers' profits, while production costs have gone down.

451

Cost of advertising and merchandising cars has gone up quite a bit, television being one of the biggest items, but the money American Motors expends reaps greater rewards than that spent by the individual companies.

Results of the merger were not all on the credit side. On the debit side, there was dislocation of workers, idling of facilities.

452

Efforts have been made to strengthen the financial position of the dealers as well as of the company.

454

Benefits of owning an American Motors car.

Auto industry is loaded with competition. The larger companies have, to an unparalleled extent, reached their present positions without adoption of "practices or policies that are, in and of themselves, subject to criticism of competitors or customers."

Page

455

"Nevertheless," Mr. Romney continued, "the present size of the largest companies, coupled with other recent developments, has created for them competitive advantages in areas which they now dominate.

"In an industry where style is a primary sales tool, public acceptance of a styling approach can be achieved by the sheer impact of product volume. Familiarity helps shape styling preferences."

He then drew the analogy that "automobiles and women's hats and sin have something in common."

"Styling or product innovations, undertaken by a company doing 50, 30 or 20 percent of the business, are more certain of public acceptance than equally good or better innovations by smaller firms." Because they are smaller, it is more difficult for American Motors to get public acceptance of its innovations.

"Furthermore, domination of television, radio, newspaper and magazine advertising, and even of news pages, contributes to this acceptance, even to the point where improvements of questionable consumer value can become a 'must' in the products of all other companies." He used as an example the continued emphasis on the desirability of "weight and bulk" in passenger cars.

456

"It is not impossible now for the bigger companies to duplicate a smaller company's product improvement and, through sheer volume, merchandise it as a big company innovation."

"On the other hand, the smaller company faces a tougher job of building customer familiarity with its product improvements because of its smaller relative volume and lesser advertising, sales and promotion expenditures.

457

"Another point at which sheer size is an important competitive factor is the area of labor contracts, and labor costs * * *."

Employment stability is not related to the size of the company, but rather to growth and stability of the market.

458

* * * The concentration of great economic power in large corporations which dominate a market and in a labor organization embracing in its membership substantially all employees in a given industry, places such corporations in a peculiarly favorable role in the marketplace.

"That role has been made even more favorable because of the union's past unwillingness to enter into agreements designed to deal with the particular economic factors affecting the smaller automobile manufacturers * * *."

459

Mr. Romney contended that "'pattern bargaining' has been an important factor in the recent trend toward mergers and liquidations of industrial enterprises. It is our intention," he continued, "to insist vigorously on collective bargaining this year that is based on the economic facts of American Motors and not of Ford or General Motors."

Pattern bargaining was not an element in their decision to merge, but is one of the problems of the automobile industry. However, it is not solely the fault of the union that smaller companies are paying high wage rates and in some instances higher fringe benefits than large companies.

He believes the "responsibility for this situation rests entirely outside of the Big Three."

460

Is opposed to industrywide bargaining because it would lead to greater concentration of economic power; also, "in industry bargaining you get away from the facts of an individual enterprise, and you get on to the basis of the facts of an industry or a few in the industry or some other basis of facts."

461

If union "will bargain on the facts, and not on the basis of sheer power, the results will eliminate the competitive advantage that has been enjoyed by General Motors and Ford in this area of cost."

American Motors is concentrating on building cars "that are distinctive and unique—cars that do not compete head on with automobiles of the Big Three."

The smaller companies have an advantage of being able to pioneer in new products because it is so much less costly for them than for the Big Three.

462

They have not yet had time to realize the full benefits of their merger; nor are they looking forward to a merger with any other company.

- Page*
- 463 "Unquestionably, American Motors is better able to cope with the highly competitive situation in the automobile industry than either Nash-Kelvinator or Hudson alone, and the creation of American Motors means more—not less—competition in the industry."
- In his judgment, they are "at a greater disadvantage as a result of misconceptions that have been built up around size" than by size itself. The six misconceptions he listed are:
- 464 "(1) That bigness means superior products and superior values; (2) that bigness means greater efficiency and greater progress; (3) that the resale value of small company cars is less than that of Big Three cars; (4) that the Big Three pay their workers more than the smaller companies and give them superior fringe benefits * * *.
- "No. 5 is that weight and bulk are necessary in cars to give them American standards of comfort, spaciousness and safety.
- "No. 6 is that automobile dinosaurs are superior to modern compact cars, built the way all other forms of modern transportation are built."
- Recent, premerger history that led to formation of American Motors.
- 465 Inability of small, single line firms to compete with the Big Three was one factor that made merger desirable.
- 468 In reply to a question on "bigness" in industry, Mr. Romney said "Certainly you can get too much concentration in an industry for the economic and social good of the country, and I think it is an important question of public policy as to what that point is." He feels that at this time the consumer is benefiting instead of suffering from competition in the auto industry. But, he continued:
- "I do think it is highly important to the future of the automobile industry that the smaller companies in this industry succeed in their efforts to continue as effective competitors for the three larger companies."
- 469 In discussion on the necessity for competition and competitors, Romney said, "individuals and organizations that are striving for success are more likely to come up with innovations than those who have fully met with success."
- Small suppliers of parts have played a major role in the evolution of the automobile industry because of their constant search for new and better products to sell to the automobile companies.
- 470 Cited some improvements developed by the independents that the Big Three either did not adopt or adopted slowly because their size made it so expensive.
- 471 Listed some examples where big companies had so shaped public acceptance of some features that smaller companies were forced to adopt changes that were of questionable consumer value.
- 473 Not only do they both buy from and sell to their competitors, but they find these transactions very helpful. He commented that their relationship with General Motors had been particularly rewarding.
- "Competition has been the prevailing practice in the automobile industry and," Mr. Romney continued, "I have no feeling that there is any intent on the part of any automobile company to monopolize the automobile industry."
- 474 It is frequently an advantage rather than a disadvantage to rely on a competitor for materials.
- There is an international trade factor involved in American Motors operations.
- 476 Although there has been some initial difficulty, they are now beginning to sell Ramblers to the Government, in limited quantities; they are now included in governmental specifications. These specifications had to be written to permit Government agencies to buy because it was a different size car.
- Their cars, other than the Rambler, meet Government specifications, and are being sold to the Government.
- They have, in the last 9 months, secured some development and experimental contracts from the Defense Department, where formerly they were primarily subcontractors.
- 477 Listed some of the types of prime contracts they are seeking, and getting.

A STUDY OF THE ANTITRUST LAWS

TUESDAY, MAY 3, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10:15 a. m., in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore (presiding), Kefauver, O'Mahoney, and Wiley.

Also present: Joseph W. Burns, chief counsel and staff director, and Gareth M. Neville, assistant counsel.

The CHAIRMAN. The meeting will come to order.

The Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary today commences public hearing into the issues and problems discussed in the report of the Attorney General's National Committee To Study the Antitrust Laws.

The hearing will develop testimony from members of the committee who participated in the recommendations contained in that report and an explanation as to how the recommendations were arrived at by the full membership of the Attorney General's committee.

I wish to state further that inasmuch as this is a report to the Attorney General, and not to the Congress, our subcommittee is anxious to have the views of the members of the committee, and particularly one of the cochairmen, in the event that the Attorney General, at a later date, is disposed to submit legislative recommendations to the Congress based upon this report.

At the outset, I wish to point out that this is only the first step in our full-scale investigation of the entire antitrust and monopoly field. The Subcommittee on Antitrust and Monopoly has a number of areas of investigation that it will undertake in the near future.

The subcommittee is aware that criticism has been raised in many quarters with respect to various antitrust problems. Among the problems which this subcommittee intends to study are: (1) The adequacy of the present laws in the face of the apparent growth and concentration of economic power in fewer corporations; (2) monopolies and oligopolies; (3) the adequacy of the present laws affecting mergers; (4) price discrimination, exclusive dealerships, and other distribution practices; (5) the effect of the Government's procurement policies on the small business of the country; (6) restrictive patent licenses; (7) the economic and social justification for continuing the exemptions afforded to certain industries, businesses, or pursuits, such as electric power, transportation, communications, etc.; (8) problems

affecting foreign trade; (9) alleged overlapping of jurisdiction of the Department of Justice and the Federal Trade Commission; and (10) administration and enforcement of existing laws.

The subcommittee is greatly concerned with the growing number of mergers that have occurred within recent years. The subcommittee will inquire into this merger movement in an effort to determine whether the present statutes are lacking in teeth to prevent mergers which unduly restrict competition, or, on the other hand, whether there is a lack of enforcement on the part of the responsible regulatory agencies of the Government.

It may well be that as a result of our investigation, legislation may be necessary to implement our presently existing antitrust laws in order to provide the enforcement tools so that our regulatory agencies may be fully armed to combat undesirable mergers and monopolies.

It is imperative that a thorough investigation be made of the entire antitrust field in order to achieve such realinement of the antitrust laws as will determine an effective Federal antitrust policy which can be enforced vigorously, effectively, and uniformly to achieve the desired goal of competition in a free economy.

While endeavoring to achieve this objective, recognition must be given to the complaint of businessmen and their advisers that the uncertainties of the present laws make it difficult to know what conduct and practices are prohibited.

It is the intention of this subcommittee to enlist the assistance of all persons who have made serious studies of these antitrust problems to cooperate with this subcommittee in attempting to solve them. We particularly request professors of law and economics who have specialized in the antitrust field to present to us the results of their studies and the evidence upon which their conclusions are based. We invite all other groups, organizations, or institutions which have studied these problems to make available to us in factual form suitable for presentation at hearings, any evidence supporting their points of view.

I may state for the record that the subcommittee is appreciative of the cooperation evidenced by the cochairman and the other members of the Attorney General's committee and their helpfulness in presenting their views on this highly complex and technical field of antitrust law. I am sure that the testimony which will be taken here today will be of value to the subcommittee in its efforts to determine the present adequacy of the antitrust laws.

Today we shall hear one of the cochairmen of the Attorney General's committee, Assistant Attorney General Stanley N. Barnes. Then we shall hear Prof. Milton Handler of the Columbia University Law School, Prof. Eugene Y. Rostow of the Yale University Law School, and Wendell Berge, former Assistant Attorney General in charge of the Antitrust Division.

Judge Barnes, we are glad to have you with us this morning and to have the benefit of your views on the general subject of the anti-trust laws, and also on the subject of this report of this committee, because it seems to me that since the report is not to this subcommittee, it can only come to this subcommittee through the report of the chairmen of that committee, together with the recommendations of its chairmen as to what they think should be done with reference to the report.

I want to introduce at this point for the benefit of the record the resolution directing the holding of the hearings, together with a copy of my letter to the chairman of the Rules Committee, which is included in the committee report reporting the resolution to the Rules Committee.

(The documents referred to are as follows:)

[S. Res. 61, 84th Cong., 1st sess.]

RESOLUTION

Resolved, That in holding hearings, reporting such hearings, and making investigations as authorized by section 134 of the Legislative Reorganization Act of 1946, and in accordance with its jurisdictions specified by rule XXV of the Standing Rules of the Senate insofar as they relate to the authority of the Committee on the Judiciary to make a complete and comprehensive study and investigation of the antitrust laws of the United States and their administration, interpretation, operation, enforcement, and effect, and to determine the nature and extent of any legislation which may be necessary or desirable to—

- (a) clarify existing statutory enactments, and eliminate any conflicts which may exist among the several statutes comprising such laws;
- (b) rectify any misapplications and misinterpretations of such laws which may have developed in the administration thereof;
- (c) supplement such statutes to provide any additional substantive, procedural or organizational legislation which may be needed for the attainment of the fundamental objects of such statutes; and
- (d) improve the administration and enforcement of such statutes, the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized from March 1, 1955, through January 31, 1956, (1) to make such expenditures as it deems advisable; (2) to employ on a temporary basis such technical, clerical, and other assistants and consultants as it deems advisable; and (3) with the consent of the heads of the department or agency concerned, to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

SEC. 2. The expenses of the committee under this resolution, which shall not exceed \$250,000, shall be paid from the contingent fund of the Senate by vouchers approved by the chairman of the committee.

SEC. 3. This resolution shall be effective as of March 1, 1955.

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
February 21, 1955.

Hon. THEODORE FRANCIS GREEN,
Chairman, Committee on Rules and Administration,
United States Senate, Washington, D. C.

DEAR SENATOR GREEN: The Senate Judiciary Committee has today favorably reported Senate Resolution 61, proposing a study and investigation of the administration and enforcement of the antitrust laws. The resolution proposes the sum of \$250,000 for the expense of this undertaking.

Attention is invited to the fact that the basic law, the Sherman Act, is now 65 years old, the Clayton Act is 41 years old, and the Robinson-Patman Act is 19 years old. During this 65-year period, no attempt has yet been made by the Congress to survey the entire field of antitrust laws with a view toward a comprehensive revision and coordination of these basic laws. Controversy has arisen as to whether these basic policies may have become outmoded. Because of the many differences of opinion about the objectives of these antitrust statutes, suggestions have been made by many sources that a complete study should be made of our present antitrust policy. Criticism has been raised regarding the procedures and remedies of the antitrust laws. The overlapping of jurisdiction of Federal antitrust agencies, highlighted especially by the overlap in jurisdiction of the Department of Justice and the Federal Trade Commission, has generated demands for congressional action to centralize antitrust administration and enforcement in one source of authority or at least to coordinate through a central agency the concurrent jurisdiction of the several Federal agencies.

Questions have been raised in many quarters as to the adequacy of the present-day antitrust laws in the face of the apparent growth and concentration of economic power in fewer corporations and the consequent effect on the consumer dollar as contrasted with the situation existing at the time of the enactment of the Sherman Act in 1890. In view of the fact that the United States Government is the largest single customer of business and industry, it has been suggested that a study be made of the adequacy of our antitrust structure with relationship to the Government's procurement program and its effect upon the small business of the country and as to whether such large procurements are contributing to the growth of monopoly control, and a weakening of our free competitive economy.

The many questions raised as to the adequacy and present effectiveness of the antitrust laws point up the necessity for a comprehensive study and investigation of the Federal antitrust laws. The committee realizes the enormity of the task and the necessity of providing a staff of technicians thoroughly skilled in the complex field of antitrust law.

Attorney General Brownell recognized the need for a study of the antitrust laws on June 26, 1953, in announcing the appointment of the Attorney General's National Committee To Study the Antitrust Laws. The Attorney General's committee is expected to report its recommendations for revision of the antitrust laws to the Congress some time next month. As the Committee on the Judiciary under the Legislative Reorganization Act, has jurisdiction over the subject matter of the "protection of trade and commerce against unlawful restraints and monopolies" those recommendations will be referred to the Committee on the Judiciary for consideration. The Committee on the Judiciary will immediately be faced with the task of evaluating and analyzing the recommendations which have occupied the attention of the Attorney General's 60-man committee for almost 2 years. Because of the necessity of reconciling conflicting points of view, extensive and lengthy hearings on these recommendations are contemplated.

In view of the tremendous technological progress of American industry since the enactment of the Sherman Act in 1890, it is imperative that a thorough review be made of the antitrust field in order to achieve such realinement of the antitrust laws as will determine an effective Federal antitrust policy which can be enforced vigorously, effectively, and uniformly to achieve the desired goal of competition in a free economy.

The Committee on the Judiciary respectfully requests that your committee approve the sum set out in Senate Resolution 61 for the expenses for such study and investigation.

Enclosed herewith for the information of your committee are copies of a proposed budget.

With kindest regards, I am
Most sincerely yours,

H. M. KILGORE, Chairman.

STATEMENT OF HON. STANLEY N. BARNES, ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, AND COCHAIRMAN OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, ACCOMPANIED BY ROBERT A. BICKS, EXECUTIVE SECRETARY OF THE ATTORNEY GENERAL'S COMMITTEE AND LEGAL ASSISTANT TO MR. BARNES

Mr. BURNS. Judge Barnes, will you state your professional background before becoming Assistant Attorney General in charge of the Antitrust Division?

Mr. BARNES. I was admitted to the practice of the law in California in 1925. I practiced law as a private practitioner largely in corporate finance, bond issues, with a large firm in San Francisco for 3 years. I then went to Los Angeles and began trial work. I was in trial practice with my own firm in Los Angeles for 18 years.

I was appointed to the superior court bench in Los Angeles County in 1946 by the then Governor and present Chief Justice of the United

States. I filled an unexpired term of the gentleman who is now the Governor of the State of California.

I was thereafter elected to that office for a term of 6 years, and later elected by the 62 judges on that court as presiding judge of the court for 1952 and 1953. That position I left to come here at the request of the Attorney General.

Mr. BURNS. When did you become head of the Antitrust Division?

Mr. BARNES. May 1, 1953.

Mr. BURNS. The subcommittee has before it a document entitled "Report of the Attorney General's National Committee To Study the Antitrust Laws." Will you tell us whether this report at the present time represents administration policy.

Mr. BARNES. Let me explain before discussing the Committee's work that for the past 20 months it has been my pleasant task to serve both as Assistant Attorney General and Cochairman of this Committee. As Cochairman, my task was to direct the gathering of diverse views of the members and the synthesis of those views in the report that is now before you.

As Assistant Attorney General, however, that report's recommendations, I must say, do not necessarily represent administration policy. The Attorney General presently is giving the same careful consideration to this report that the Committee members contributed to its formulation, and that the committees of Congress propose to give to it.

From time to time I expect that he, or I on his behalf, will announce which of these report recommendations we shall adopt as administrative policy.

I think that our views as to what the law is have been best expressed in the enforcement record of the Antitrust Division for the past 2 years. However, let me say frankly that for the most part my views do coincide with the majority positions taken in this report.

In several instances, however, they do not. For the most part these instances are reflected in dissents from the Committee recommendations.

Mr. BURNS. What authority does this report carry, either for the courts or for Congress?

Mr. BARNES. Well, the significance of the report is, I think, that for the first time since the enactment of the Sherman Act in 1890 there is gathered in one place a comprehensive analysis of all major decisions under the Sherman, Clayton, Robinson-Patman, and Federal Trade Commission Acts. I think it is important to know that this survey was made by a group representing all possible responsible viewpoints in antitrust policy. Thus the report is significant, not only for its scope, but also by virtue of the representative competence of the committee that formulated it.

The CHAIRMAN. Judge Barnes, a question at that point, going back to the preceding answer. I recently saw in the newspapers a statement to the effect that some dissents were not included in the report. Will you tell me whether or not all dissents filed by members of that committee were included in the present report.

Mr. BARNES. All dissents of members as they were proposed by the dissenting members were not in that form included in the report.

There is included in the report, however, every dissent noted by any individual, not exactly as they desired it incorporated in each event,

but accurately and fairly stated in the report. In other words, the Cochairmen felt it was essential that they have the right to delineate the order in which the various thoughts of individual members should appear.

The CHAIRMAN. Well, does it only go to the order in which they appear or were the dissenting opinions, using the court's phraseology, rewritten in any way that might, shall we say, color or change the content?

Mr. BARNES. The manner of arrangement of the dissents in no way colored the content. Of course, that is an arguable matter. It can be argued that a dissent is more forceful if it is all gathered together in one place than if it is distributed through the 393 pages of the document.

However, for a person interested in what is the authoritative law on the subject, it is extremely valuable for him to have the majority and minority opinions, dissents and assents at the particular point where he is considering any situation, any legal theory.

(Judge Barnes later requested that this additional statement be inserted in the record at this point:)

For maximum usefulness to enforcement agencies, the bench, and bar, we felt this should be the organization. Otherwise, we might have little more than 61 separate treatises, written by each of the members. This mechanical matter of organization—that is, whether dissenting views would be placed with that topic from which they differed, or grouped together at the end—we deemed within the Cochairmen's discretion. With that decision, incidentally, 59 of the Committee's 61 members agreed.

Mr. BARNES. I want to be perfectly frank about this. Professor Schwartz and Professor Rostow were two of the individuals who dissented. Professor Rostow's exact language, with one exception, was placed in the report, with no change in language whatsoever except in this one exception.

Mr. Schwartz' dissent was slightly different and longer. Nonetheless, we went to great pains to see that every one of Mr. Schwartz' views appeared in the final report. I personally went through Mr. Schwartz' dissent. I have here before me the copy of his dissent which I used. This shows exactly what language was placed in the report in its final form. It indicates further at what page that language in his dissent appears, and in any case, where his view does not appear in his language, it lists the page upon which it appears in the language of the Committee, which is substantially identical to his language.

I think I should at this time present to you the official position taken on March 22 and March 23, 1955, when I as Cochairman wrote to both Professor Rostow and Professor Schwartz relative to the placement of dissents within the report. I deliver to you, Mr. Chairman, copies of those two documents.

The CHAIRMAN. Let them be placed in the record at this point.

(The letter to Professor Rostow follows. The letter to Professor Schwartz appears on pp. 7-8.)

MARCH 23, 1955.

Prof. EUGENE V. ROSTOW,
Yale University Law School,
New Haven, Conn.

DEAR GENE: I have your wire asking that I confirm that your "various dissents and concurring statements will be printed in the report exactly as submitted." In reply, I write the substance of our telephone conversation of Monday evening.

At the outset, we agree that each member has the right to dissent, to identify himself by name as a dissenter, and to state his thoughts in the tenor he chooses. Consistent with these principles, at all times the chairmen have taken the position that while they cannot change the meaning of nor omit any position taken by a member, they do have the right to edit the report. Our differences stem from your apparent feeling that right to dissent involves also the unrestricted privilege of each member to dictate, regardless of the report's organization, where his dissent is to appear. In addition, you feel that each member has the right to refer specifically to the various intermediary drafts of sections of this report—referred to as work-group drafts.

The cochairmen's position, in contrast, is that theirs is the responsibility for report organization. Accordingly, they have printed each dissenting position with the report topic from which it differs. As you know, this way we have treated, with your concurrence, the bulk of your clarifying, concurring, and dissenting views. This we plan to do, in addition, with your mimeographed submission.

We propose to print as your separate overall comment the first four paragraphs of your mimeographed dissent. We feel the balance of your submission refers precisely, first, to the discussion of the ad hoc committee in the Foreign Commerce Section; and second, it treats generally problems dealt with in the administration and enforcement chapter. Accordingly, it will be separated and printed in each of those sections. Incidentally, this is the precise treatment accorded each other dissent by any other member.

The sole alteration that we propose to make is the deletion of any reference to work-group reports. Your exact language will be used without any reference to its source in work-group reports.

This deletion is required by our long-standing committee policy re the confidentiality of the work-group process. From the beginning, the cochairmen have consistently refused to make public the names of work-group members, the substance of work-group reports, as well as various alterations made in them by the full committee. Banking on this confidentiality, members participated in the work-group process. With varying degrees of agreement in the substance of the work-group drafts, they consented to pass those drafts on to the full committee. Thus, each member participating in the work-group process had the right to feel that his support will be attributed, directly or indirectly, only to those views in the final report from which he does not dissent. Thus, to adopt the position you urge would not only be unfair to all work-group participants, but would also compel our release for publication of all intermediate drafts and alterations leading to the final report. Neither result can we accept.

I hope you will understand the position of the cochairmen. We have given long and thoughtful consideration to the problems you raised. Our only desire is to be certain our decisions ensure fair and equitable treatment to all members.

Sincerely yours,

STANLEY N. BARNES, Cochairman.

Senator KEFAUVER. While we are on that subject, Mr. Chairman, I have Mr. Schwartz' dissent. He complains vigorously about the way his minority report was handled. He says that the dissenting opinion has been printed and released independently. I assume he had to pay for it; is that correct?

Mr. BARNES. I assume so.

Senator KEFAUVER. Because the cochairman of the committee refused to publish it as submitted. Did you refuse to publish it?

Mr. BARNES. I prefer to have my letter speak for itself. I would like to read you exactly what was written to Professor Schwartz. I think that best states it. This letter is dated March 22, a copy of which I supplied for the record. It is addressed to Prof. Louis B. Schwartz, University of Pennsylvania Law School, Philadelphia Pa., and it reads as follows:

DEAR LOUIS: This will confirm our last night's telephone conversation. At the outset, we agree that each member has the right to dissent, to identify his dissent, and to have his thoughts stated, at reasonable length, in the tenor he chooses. Differences stem from your apparent feeling that this right to dissent involves also the unrestricted privilege of each member to dictate, re-

gardless of the report's organization, where his dissent is to appear. In addition, you apparently feel each member has the right to repeat dissenting ideas—though the precise thought in almost the precise language has already been expressed by another member.

The cochairmen's position, in contrast, is that theirs is the responsibility for report organization. Accordingly, they have printed each dissenting position with the report topic from which it differs. In addition, where two dissenters have taken the same position and phrased their views in like tenor, the cochairmen have combined dissenters' thoughts and indicated those members dissenting. Finally, the cochairmen reserve the right to make sure that a representation, in contrast to characterization, of any majority view is accurate.

In your case, Louis, a 38-page dissent was received by the cochairmen the last day before the deadline for comments. This dissent, as you know, we reproduced and immediately circulated to the committee. In line with committee procedures we have just explained, we are now separating your various dissenting views and stating them, at reasonable length, throughout the report with the topics to which they refer. Thus each of your positions will be set forth where the majority treats the same topic.

This we have done with every dissent by every member. To make an exception in your case would be to violate established committee procedures and at the same time do violence both to the report's organization and to our obligations to all other members.

We do hope you understand our position.

I might point out that after Professor Schwartz' dissent was received—and I do not criticize him for delivering it the last hour that the dissent could be delivered—we thereupon received strong and vigorous dissents to the dissent from other gentlemen on the committee. These we did not print because they were dissents, not from the report, but from another dissent. We reached the conclusion that we would never be through with dissents to dissents to dissents.

Senator KEFAUVER. In other words, Judge Barnes, you took the liberty of editing and interpreting what Mr. Schwartz sent in?

Mr. BARNES. Not at all.

Senator KEFAUVER. That is just what you just said.

Mr. BARNES. I did not say that I interpreted it in any way.

Senator KEFAUVER. You say here:

In addition, where two dissenters have taken the same position and phrased their views in like tenor, the cochairmen have combined dissenters' thoughts and indicated those members dissenting.

Mr. BARNES. Exactly. At no time did we attempt to interpret. We stated exactly what their dissents were. I think it should be said here I do not think any dissenter will state there was any unfairness in presenting their dissenting views.

Senator KEFAUVER. Mr. Schwartz states that.

Mr. BARNES. He has stated the contrary to me.

Senator KEFAUVER. I was reading his statement here.

Instead the opinion has been dismembered, condensed, and distributed through 350 pages of the majority report. This frustrates the main purpose of the dissent which was to demonstrate that the net effect of most of the interpretations and changes recommended by the majority is to weaken rather than to strengthen the antitrust laws. The cochairmen justified this unauthorized mutilation of the dissent on the ground that other committee members were content to have their differences noted at particular points in the report. This handling of dissents to particular issues fairly records the position of those who are in the main satisfied with the report. It does not fairly present the views of those who differ with its basic philosophy.

Mr. BARNES. He has stated it does not fairly represent the views, not because there has been an interpretation or change, but because he maintains it was dismembered.

Senator KEFAUVER. He says it was mutilated.

Mr. BARNES. All right, mutilated or dismembered. I would not argue that.

Senator KEFAUVER. I don't understand, Judge Barnes, what is the purpose of having members who might have a different point of view, if you are not going to let them express their points of view.

Mr. BARNES. They have expressed it, Senator. They have expressed it in exactly the same words, with one exception, that they desired to express it in.

Senator KEFAUVER. But it appears to me, if a person has a dissent, he ought to have it printed.

Mr. BARNES. I told you the reasons that underlie the decisions of the chairmen of the committee. I think they are sound.

Senator KEFAUVER. Up here, when anybody has a dissent, his dissent is printed, and I think the Senate would feel that it was very unfair for the majority of the committee to take a person's dissent and disperse it through a whole document and condense it, edit it, or mutilate it, as Mr. Schwartz says here. It looks to me as though you have stymied and minimized the position of those who might dissent from the report.

Mr. BARNES. Professor Schwartz has stated to me that he felt that, while he didn't budge from his statement that it should not have been cut up, he felt that every idea he had was fairly stated in the report.

Senator KEFAUVER. That is not what he says here.

Mr. BARNES. I am sorry he is not here, Senator, as he was at the previous hearing at which he testified.

Senator KEFAUVER. He says further somewhere here:

I believe that all the majority members were treated a little differently. Their views were printed as they were presented.

Mr. BARNES. Recall, Senator, dissents to the dissents to the dissents were not printed at all. We had to come to an end to this business of having an interminable argument.

Senator KEFAUVER. Well, he filed it in the time prescribed, didn't he?

Mr. BARNES. He did.

Senator KEFAUVER. What was the purpose of having a rule to file a dissent if it was not to be printed?

Mr. BARNES. It was printed, sir.

Senator KEFAUVER. I have read the report, and it is awfully hard to make much coherence out of the way you handled the dissents in the report, Judge Barnes. It looks to me like you have stifled the dissent.

Mr. BARNES. I do not concede that any dissent has been stifled.

Senator KEFAUVER. I am just expressing my opinion about it. There are many others who believe it. It would have been much fairer, don't you think, to have printed a minority as well as the majority? You have 393 pages of majority. This 38 pages of dissenting opinion would not have taken more than about 20 pages of the final print.

Mr. BARNES. Would you have printed dissents to dissents?

Senator KEFAUVER. I certainly would. As long as anybody had a view to express, I would express it. You spent a lot of money trying to get this report out.

Mr. BARNES. It wouldn't be through now if we did that. There are violently differing opinions here.

Senator KEFAUVER. Up here in the Senate the majority states its views and the dissenting opinion is expressed. I have never heard of any legislative history where a chairman of a committee required a dissent to be broken down and reworded and placed in the various sections of the majority report.

Mr. BARNES. I think, Senator, that everybody has to establish its own rules and endeavor to do the best possible job. I point out to you that when you refer to the 393 pages, a great deal of that is dissent, a great many of those pages are dissent in certain instances. We spent more time on the dissent in some instances than we have on the majority statement in order that the public might get a fairly representative view.

Senator KEFAUVER. Well, my viewpoint is that this report is supposed to carry some weight and we have been looking forward to it now for some 2 years, and it is a considerable disappointment after all the time and money that has been spent, to come here and find that the chief dissenter feels that his dissent has not been properly dealt with, and that he himself had to pay, in spite of the hundreds of thousands of dollars that have been spent, that he himself has to pay for printing of his own dissent.

Mr. BARNES. Just a minute, Senator. I think you should know there are no hundreds of thousands of dollars involved. That was the appropriation for the Congress to investigate this committee. That was \$250,000. Our committee spent \$76,000.

The CHAIRMAN. May I correct you. It was \$200,000, not \$250,000.

Mr. BARNES. I am sorry.

Senator KEFAUVER. Your committee spent \$200,000?

Mr. BARNES. No, sir.

Senator KEFAUVER. How much has your committee spent?

Mr. BARNES. Not quite \$76,000.

Senator KEFAUVER. How have all these men been paid?

Mr. BARNES. They haven't been paid. They all volunteered their duties.

Senator KEFAUVER. Their expenses are here and allowances?

Mr. BARNES. That is correct. That is the cost of \$76,000.

Senator KEFAUVER. Do you have some staff?

Mr. BARNES. No, sir; only the executive secretary of the committee, who is sitting on my right.

Senator KEFAUVER. And you and other members of the Antitrust Division have given it some time?

Mr. BARNES. Yes. There are four Government men on the committee—the Secretary of Commerce, the Small Business Administrator, the Chairman of the Federal Trade Commission, and myself.

Senator KEFAUVER. It wouldn't have cost much money to have had this printed.

Mr. BARNES. No question about that. It wasn't a question of money involved. It was a question of the way we thought the committee should be organized and the rules that should be applied to all members indiscriminately.

Senator KEFAUVER. Do you have records of your committee hearings showing agreement that dissenting members would not be entitled to have their dissents printed all together?

Mr. BARNES. No, sir.

Senator KEFAUVER. Who cooked that up? Who decided on that?

Mr. BARNES. Well, the responsibility for any decisions lie with the cochairmen.

Senator KEFAUVER. And you and Professor Oppenheim were the cochairmen?

Mr. BARNES. Yes.

Senator KEFAUVER. I imagine some of these men would not have given all their time if they thought they could not get their views printed.

Mr. BARNES. I note that Professor Rostow is here. I am sure he will be glad to discuss the subject. He is not noted for backing down from any position he has taken. He will give you his views as to whether or not he was fairly treated. He will again point out to you that he would prefer to have his dissent in one piece. We put it in three pieces. I don't want to speak for him, but I do wish that Professor Schwartz could be called before your committee so he can express himself here.

The CHAIRMAN. I haven't had the privilege of being furnished with one of these copies of Professor Schwartz' dissent. I believe it was mailed to the subcommittee. One of his complaints is that the whole group of recommendations is bad. Is that it? That is the point I am trying to get at. The Senate has one type of procedure and other people have other types. I am just wondering whether that was a part of his dissent.

Senator KEFAUVER. He says here:

The central thread of the majority report unwinds from a core of belief that the competitive situation in the country is satisfactory and that the antitrust laws require modification sheerly to temper their rigor.

He thinks the antitrust laws are not sufficient, so it is a basic difference in philosophy.

Then the second thing is, as I get it from his introduction, that the majority report has been written in a vacuum. On page 2 he says:

To answer this question would have required a good hard look at the financial and industrial structure and practices in the United States in comparison with the goals envisioned by the antitrust laws. This was not done. Instead the report offers a survey of economic theory and a surprisingly detailed review of decisional law with special emphasis on recent cases.

In other words, the economic situation in the Nation was not considered by the committee.

The CHAIRMAN. I think I have the information now I wanted.

Mr. BARNES. May I state something with regard to the comment the Senator just made?

The CHAIRMAN. Yes.

Mr. BARNES. In the first place, there was that portion of Mr. Schwartz' dissent which could not be specifically allocated to a subject under discussion in the report, which was printed at pages 390, 391, and 392 of the report; that is his general dissent, where he points out that in his opinion the majority report would weaken the antitrust laws in a number of respects.

The CHAIRMAN. Am I to understand that you say that the last three pages of the printed report of the committee include the general dissent as to the theory which was followed?

Mr. BARNES. That is correct, sir.

The CHAIRMAN. I just wanted to get that clear for the record. That is all.

Mr. BARNES. That is on pages 390 to 393, Senator Kilgore.

In regard to the alleged vacuum in which this report was written, our report states at the outset that its aim was not to add to the storehouse of statistical data nor to survey the economic effects of the antitrust applications to specific industries. This means only that we had no new factual inquiries, for we had no subpoena power, no large research staff, and no provision for public hearing. It by no stretch means, however, that our report was made without regard for the facts of antitrust enforcement. The committee instead built upon the accumulated teachings of existing research. Where data already gathered overwhelmingly pointed to one conclusion, the committee made recommendations based on factual conclusions. However, where members split on the teaching of existing data, the committee suggested the need for further inquiry.

For example, compare the committee's recommendation on fair trade with those in the organized labor and regulated industries sections of the report. Treating fair trade, almost all members agreed that the economic consequences of legalized resale price maintenance constituted "an unwarranted compromise of the basic tenets of antitrust policy." Treating organized labor in contrast, apart from reported decisions, the committee could not generalize as to the extent commercial restraints existed not effectively curbed by antitrust law or the Labor-Management Relations Act. Accordingly, the committee left the Congress the task of determining the extent such commercial restraints exist unchecked.

Similarly, treating, for example, dual conference rate agreements under the shipping act, the committee notes the necessity for a new factual judgment concerning, first, the role of shipping conference activities in our national shipping policy, and, second, the necessity of dual rate systems on such conferences.

I do not, of course, suggest that this committee or any congressional body will take our committee's words for those areas where existing data clearly points to one conclusion. Nonetheless, our report may offer leads to those areas where further inquiry may be possible.

Mr. BURNS. Judge Barnes, will you state how the membership of this committee was selected?

Mr. BARNES. Yes, sir.

The committee was appointed by the Attorney General in August of 1953. It consisted of 61 members. These included practicing lawyers, law professors, and economists—gentlemen we thought were articulate spokesmen for major points of view on issues of antitrust policy.

On the one hand, members included men who had long served in the Antitrust Division and were in private practice—such men as Assistant Attorney General Wendell Berge, Kenneth Kimble, Stewart Kerr, Louis Schwartz, and Cyrus Anderson. On the other, included were men who counsel all types and sizes of business enterprises.

We sought the fairest possible representation for all responsible points of view.

Mr. BURNS. How did the committee go about making this study?

Mr. BARNES. After considerable thought and study, the fact that we had no appropriation and no staff, the cochairmen divided the

antitrust problems into eight major areas for study purposes. These eventually included sections 1 and 2 of the Sherman Act generally, foreign commerce, distribution, primarily Robinson-Patman, mergers, patents, exemptions from antitrust coverage, economic indicia of competition, and monopoly and antitrust administration and enforcement.

Then work groups roughly corresponding to these areas were organized and committee members assigned to each.

In this work-group process almost every committee member participated. For example, two who were originally named to the committee simply found they could not devote any time to it, and a notation is made to that effect in the report.

The cooperation, however, from almost every member of that committee, to my mind, was extraordinary, it being a voluntary action, labor without compensation.

Some conferees were chosen by the cochairman for their specific qualifications in a particular area.

The report, on page 7—that is, small roman vii at the beginning of the report—lists the some one dozen conferees who cooperated in this committee and brought their specialized knowledge on particular subjects to the thinking of the committee.

Finally, the Antitrust Division and the Federal Trade Commission's legal and economic staff members worked as liaison with relevant committee work groups. In such manner we sought to insure that practical problems of antitrust administration and enforcement were at all times before the committee.

I might explain that these work groups were that and nothing more. They were fluid; they changed from time to time to meet the problems that were before the committee; and we determined from the start, and so advised the committee, that the details of the work-group membership must remain confidential. We took the position, first, that these work groups were in no sense subcommittees but merely informal and fluid breakdowns of committee membership to assist in formulating tentative draft targets.

In addition, to identify work-group members, we felt, might, in turn, identify particular members with particular positions on issues the work groups considered. However, the ultimate decision, whether or not to identify a member's views in the final report, with one position or another, we have left up to each member. We felt this understanding would be abrogated were each work-group member identified.

Also confidential is the composition of work-group drafts. These targets reports, as I said, were tentative submissions for the entire committee's consideration. With varying degree of agreement in the substance of work-group drafts, work-group members consented to pass them on to the full committee. Each member participating in the work-group process thus was assured his support would be attributed directly or indirectly only to those views in the final report from which he did not dissent. To publish work-group drafts would do violence to that assurance by imputing to work-group members support of the drafts they agreed merely to pass on to the full committee for discussion and revisions.

The CHAIRMAN. Could you list for the record the number of work groups you had and the subject on which each group worked? I am

not asking for specific names, just the number of different groups assigned and the subjects on which each group worked.

Mr. BARNES. Roughly, Senator, they correspond to the eight chapters of the report. There were some work groups of different names that worked for a short period of time. Some were consolidated into a large work group. Some were divided up into smaller work groups. We will be glad to supply names of specific work groups, beyond the eight already mentioned.

The CHAIRMAN. I wish you would supply that for the record.

Mr. BURNS. Did the committee endeavor to obtain the assistance of the views of any other Government agencies than the Antitrust Division and the Federal Trade Commission?

Mr. BARNES. Yes, sir. We established liaison very early with various departments—the Departments of State, Commerce, Defense, Labor, and the Foreign Operations Administration.

Mr. BURNS. Did the committee solicit the views and assistance of any outside parties?

Mr. BARNES. The cochairs invited views from any and all outside parties who desired to submit them. Not only were public announcements to that effect made, but whenever inquiries would come in from any particular organization or group relative to the conduct of the committee, that is, to its deliberations and to its possible recommendations, we urge that such views be offered to the committee.

Certain interested private groups did submit material. In each instance where any such submission was made by any private group, these were circulated throughout the committee. In this way the committee had the benefit of ideas not only from within its own ranks, but also from a range of Government and private groups.

Mr. BURNS. To what extent did the full committee study or consider the results of these work groups?

Mr. BARNES. The work group reports were submitted to the cochairs. They were really by that time area reports. For we had organized work groups into the areas which appear in the chapters of the report. These were submitted to the cochairs and in July of 1954 were circulated to each member of the committee. Each member of the committee was urged to, and most of them did, make comments on the circulated drafts. The cochairs then formulated in the middle of 1954 the first draft of the overall committee report.

This overall draft was circulated to the full committee in August 1954, and late that month there was a 3-day meeting of the committee in Ann Arbor, Mich. At that meeting numerous committee decisions regarding additions and revisions were made. These changes were effectuated by the cochairs, and a revised overall draft was circulated to each member of the committee in December 1954. Thereupon, after consideration by each member, the full committee again met for a 4-day session here in Washington late in December 1954.

Again after discussion, changes were directed by the committee. There were made by the cochairs. A tentative final draft was circulated by the committee. That was the fourth full draft. Finally a number of changes again were incorporated. The draft was printed and transmitted to the Attorney General on March 31, 1955.

Mr. BURNS. I note in reading the report that some of the recommendations were made for the legislature, and others were made to enforcement agencies and the courts. I note there are 11 legislative

recommendations. Would you tell us what the recommendation was with respect to the so-called fair-trade laws?

Mr. BARNES. The easiest answer to that, sir, is repeal.

Mr. BURNS. Would you rare to comment any further on the reasons for the committee's recommendation and to what extent that represented a majority opinion or minority opinion?

Mr. BARNES. The recommendation that fair-trade laws be repealed was one of the matters which received not quite but almost a unanimous vote of approval by this committee. There were less than 5 of the 61 members who were in opposition to the recommendation for repeal.

In that connection, this report states—and I refer to page 154:

On balance, we regard the Federal statutory exemption of fair-trade pricing as an unwarranted compromise of the basic tenets of national antitrust policy. We recognize that the legislatures of 45 States have at some time accorded official sanction to fair-trade pricing; that the Congress twice deferred to State enactments by creating Federal fair-trade exemptions from antitrust prohibitions; and that without Federal immunization fair-trade pricing, as a practical matter, cannot survive.

Nevertheless, the throttling of price competition in the process of distribution that attends fair-trade pricing is, in our opinion, a deplorable yet inevitable concomitant of Federal exemptive laws. Moreover, whatever may be the underlying legislative intent, any operative fair-trade system facilitates horizontal price-fixing efforts on the manufacturing and each succeeding distributive level. And the prominent existence of a Federal price-fixing exemption not only symbolizes a radical departure from national antitrust policy without commensurate gains, but extends an invitation for further encroachment on the free market philosophy that the antitrust laws subserve.

We therefore recommend congressional repeal both of the Miller-Tydings amendment to the Sherman Act and the McGuire amendment to the Federal Trade Commission Act, thereby subjecting resale-price maintenance, as other price-fixing practices, to those Federal antitrust controls which safeguard the public by keeping the channels of distribution free.

I should note that there is a cautionary note which appears next in this report to this effect:

A few committee members feel that repeal, without more, overlooks serious business problems recognized by Congress and the State legislatures in adopting these statutes. Thus, in connection with repeal, they believe that Congress should consider means for treating problems like loss leader sales and debasement of widely advertised trademark and business goodwill. In addition, they fear that repeal of fair trade may prejudice existence of small retailing units which comprise an important part of the country's merchandising system.

Then it points out that a few members flatly oppose repeal. It points out President Truman's comment in signing the McGuire Act, and points out that a congressional committee report was issued after both Houses passed the McGuire amendment by an overwhelming majority, and quotes from that report.

Mr. BURNS. Did you have any further statement you wish to make at this time with regard to that recommendation?

Mr. BARNES. I might say this: It has been of great concern to me to read in certain data put out by certain groups that the fair-trade laws and the price-maintenance laws actually did the consumers a service by giving them an opportunity to purchase commodities at a cheaper rate, because very obviously the ultimate consumer is the person whose interest the Antitrust Division should be attempting to protect, and which we think we try to protect.

When a flat statement is made that prices are cheaper under fair trade laws and contrary statements are made by those who oppose

fair trade, I felt it was incumbent upon the Antitrust Division to make such a factual inquiry as it could. Before taking a position before the District Committee of the Senate last year, I had our economic section make an on-the-ground checkup of prices in the District of Columbia as opposed to sales where fair trade laws existed.

You might be interested in the conclusion that we came to. We don't think that is an exhaustive survey, but it was extremely significant that, applying the very practical test of going out and buying products here in the various stores, we made a comparison of prices of drug store items from April to June of 1954. We compiled a list of 736 items which the druggists in the District of Columbia told us were the standard items usually sold in the greatest quantity in drug stores. The fair trade price totaled \$2,241.10. The nonfair trade price totaled \$1,602.44. That was a saving of 28.4 percent.

In the appliance field a similar comparison of so-called fair trade prices and the prices of low-markup outlets in the District on 245 items showed a total of \$6,142.33 under fair trade, and \$4,442.69 for the same items, or a saving to consumers of 27.7 percent in nonfair trade areas.

We checked into some of the individual facts in these items to see whether the retailers were using these as loss leaders, because that is the argument so frequently used, that it isn't fair to compare the prices in nonfair trade areas because of the loss-leader use, but we found that even at the lower prices that they are charging they are still taking markups and making a profit. A certain mixer cost retailers \$29.70, and was fair traded at \$46.50, while nonfair trade retailers were selling it for \$34.79. I am not enough of a merchandiser to know whether it is a sufficient markup, but it is a markup. Under fair trade it sold for \$46.50.

Certain razor blades have a gross margin of 58 percent under fair trade as compared with the non-fair-trade margin of 2 percent. Vacuum cleaners showed a gross margin of 93.4 percent as compared with 29 percent.

Senator O'MAHONEY. Do you have the name of those razor blades?

Mr. BARNES. I won't try to attempt to give you the name of the razor blades, but I shall submit it to you.

The CHAIRMAN. All right.

Mr. BARNES. I might say that after making this survey we were convinced that we were doubtful that there were lower prices under fair trade, and I requested some of the individuals who are interested in fair trade to submit to me, if they desired to do so, the information upon which they based their statement, the so-called Nielsen survey, which is frequently heard in discussions of this kind, which covered a very limited number of articles, and which is weighted. I attempted to find out just exactly what was meant by "weighted." I think I know what was meant; that it is weighted to represent the number of times a sale was made rather than the individual price.

We found in the first place the so-called Nielsen survey was based upon a total of 24 items limited to laxatives, dentrifices, headache remedies, shampoos, and shaving creams. That raised the problem of what items one should take into consideration in making a survey of this kind.

Senator O'MAHONEY. Judge, may I ask you 1 or 2 questions about this matter?

Mr. BARNES. Certainly.

Senator O'MAHONEY. Do you personally give your approval to this particular recommendation?

Mr. BARNES. I do.

Senator O'MAHONEY. Can it then be said that it is the recommendation of the Department of Justice?

Mr. BARNES. It cannot, Senator. I stated before you came into the room that the recommendations of the committee were made to the Attorney General and that he is studying them now and that he expects to take a position on them, but to date he has not taken any position on fair trade.

Senator O'MAHONEY. The Attorney General then has not as yet made up his mind with respect to the matters recommended or disagreed on in this report?

Mr. BARNES. That is correct.

Senator O'MAHONEY. So your statement is a wholly personal statement?

Mr. BARNES. That is correct.

Senator O'MAHONEY. Have you personally gone into the problem of the large-scale national discount houses?

Mr. BARNES. I have given some attention and thought to it; yes, sir.

Senator O'MAHONEY. Let us take, for example, a discount house which has been very prominent in the papers recently by reason of the famous proxy fight of *Wolfson v. Avery*. Do you recognize that Montgomery Ward and Sears, Roebuck and such houses sell commodities at a much lower level than some small businesses do in the community served by both?

Mr. BARNES. I think that that is true in certain cases; yes, sir.

Senator O'MAHONEY. And have you given any consideration to the desirability or otherwise of Congress protecting the local merchants against the discount activities of the huge national corporations?

Mr. BARNES. That is a matter that we have given some thought to. We have not made any recommendations. May I say something there, Senator?

Senator O'Mahoney, I think one of the things you have to realize, and I think even the advocates of fair trade are beginning to realize it, is that they may have problems, to which fair trade is not the answer. You take a large store with terrific purchasing power. It goes into competition in a fair-trade area with the smaller dealer. By reason of its large purchasing power it can obtain its goods and can sell them at a fair-trade price with such a large markup over what competitive markups are, similar markups to the small dealer, that they can then cut their nonfair trade articles to such a low degree that they can run the small retailer out of business.

Senator O'MAHONEY. Then do you recommend any legislative program by which this condition which you have just described could be brought into control so as to protect the small, the local merchant against the national merchant?

Before you answer the question, I would like to point out that we all know, as you say, that the large national corporation by reason of its size can buy at a much lower level than the small local merchant, but at the same time, while the large national corporation can mark up and thereby get a very much higher percentage return, the large merchant can also mark down and put the little fellow out of business.

In addition to that, the small merchant operates under the eyes of the local public and sometimes under local laws, whereas the national corporation operates throughout the Nation without any regulation of any kind, save those which come through the Federal Trade Commission, Robinson-Patman Act, and others, which I sometimes think are inadequate to the job.

Mr. BARNES. I think it is only fair to state that the Attorney General has requested me to look into this minority recommendation of the committee relating to the possibility of recommending to Congress, along with repeal, if he should come to that conclusion, of the Fair Trade Act, some legislation protecting against loss-leader sales and the debasement of trade-name values.

Senator O'MAHONEY. You do recognize, do you not, that the economic picture of the large national corporation enables it to go either way toward low prices that will compete with the local merchant or toward high prices that will put the local merchant out of business?

Mr. BARNES. I think if it is fair traded—if it is in a fair-traded area, then he can go to the high prices. But if it is nonfair traded, I do not think he can get the business. That is what accounts for the success of the discount houses, because they only operate not on a nonfair—

Senator O'MAHONEY. What have you to say about the position of the manufacturer who is on a little broader scale than merely trading in the community, in the country or city, and who argues that if the fair-trade laws are repealed, such manufacturer can be driven out of business by the larger corporations?

Mr. BARNES. I have really tried to point out that fair trade may do the little merchant more harm than good.

Now, as far as the question you just raised, very obviously if your statement is correct that this manufacturer on a national basis, on a national distribution basis, is going to go out of business if he does not have the fair-trade laws, I cannot answer that.

I can point out to you, however, that some individuals whom I consider very smart in their merchandising, automobile manufacturers, for one thing, do not adopt fair-trade pricing.

Even those companies, I am sorry to say that—I do not know whether I am sorry to say it either—but certain companies that pay great lip service to fair-trade laws when they have a surplus on hand, they may go around and file a suit to enforce it one day, and the next day they go back and sell at a discount.

You cannot overlook the realities, the facts of life with regard to the distributive system in our country, and when you have this artificiality that is created by the fair-trade laws, you find widespread violation.

The CHAIRMAN. Have you gone into the question of the subterfuge of the manufacturer himself in which, for instance, a big chain distributing group will go to a tire manufacturer, for example, and while he puts a price label on the tires bearing his imprint, they will hand in the same specification and have another name like Atlas and All-State or something like that, but on identically the same tire; but he will sell it to them on a big discount below what he sells to the regular outlet on his own trademarked price?

Mr. BARNES. Yes, of course, we are familiar with that difficulty.

The CHAIRMAN. I wondered if you went into that and thought about it.

Mr. BARNES. Yes; that is treated in the Robinson-Patman Act discussion. There is a section there on quantity discount.

Senator O'MAHONEY. I was going to point out, Judge, that just a few days ago I had the opportunity of having lunch with a group of Members of Congress. This lunch was not organized for the purpose of discussing this problem of fair trade. But, curiously enough, the question arose.

I was seated between 2 gentlemen, 1 of whom represented the manufacturer's point of view, and who was not a member of the majority of the present Congress, and another gentleman who represented the point of view of the small druggist, and who was a member of the majority; while across the table there was another member of the minority, whose private interest was chiefly in banking.

The banker took the position that you did, but both of the other gentlemen took the position directly contrary to yours.

Mr. BARNES. I guess that is the only way I can be in that unanimous position with the bankers, which is to have them agree with me, because I am afraid I could not be considered in any other category with them.

Senator O'MAHONEY. In your testimony, as I came in, in response to a question asked by Mr. Burns, you spoke about the fair-trade laws not being in accordance with the philosophy of the antitrust law.

Mr. BARNES. That is correct.

Senator O'MAHONEY. Is your judgment then, upon this recommendation, based upon philosophy or is it based upon a factual examination of conditions throughout the country? The figures that you cited were gathered a year ago as a result of the survey in the District of Columbia. Has there been a survey made since that time?

Mr. BARNES. I will get into that right now if I may, Senator.

Senator O'MAHONEY. Well, let me ask also whether the Commission itself, if you know, made a survey, a factual survey.

Mr. BARNES. You mean the committee?

Senator O'MAHONEY. The committee.

Mr. BARNES. No. To my knowledge they did not make a factual survey, and I take it that as I was answering the chairman just a few minutes ago, that I pointed out what the theoretical opinion of this committee was, and then I attempted to explain some of my misgivings from a practical standpoint and why we have gone into this matter from a practical standpoint a year ago.

After we made that survey a year ago—and I testified before the District Committee of the Senate—I communicated with the individuals who made this Nielsen Drug Index survey. They very graciously came to my office, and we discussed the basis of their conclusions on the relatively very slightly cheaper prices under fair trade and thereafter discussed some of the factors that might influence the particular figures that I mentioned just a few minutes ago, the percentage figures.

In other words, is it fair to take advertised prices rather than the actual selling price? Should there be a weight for sales that take place? Should the sales on either side of the coin be considered?

We felt that the survey that we had made in 1954 was not complete, and at the end of last year and the start of this year I directed another

survey to be made, a little more exhaustive geographically, and covering 606 items usually sold in drugstores.

I am covering 46 categories rather than the smaller number that are contained in the Nielsen survey, but covering the usual patent medicine, toiletries, and other supplies usually sold through drugstores, as well as prescription items, small electrical appliances, watches, cigars, fountain pens, and so forth.

These fair-trade proponents vigorously argued with me and criticized the inclusions of items specially priced for limited periods, in which lists of items sold usually through retail outlets, and so I directed that this price comparison be made on two separate lists: One list covering items offered every day by the stores in comparison with fair-trade prices, and the other list containing items specially priced at any particular period.

Our latest conclusions are, and these are unweighted, based upon the number of sales, but otherwise taking into consideration this complaint made by the fair-trade proponents, the 606 items, the cost of them, amounted in fair-trade sales to \$2,699.15, and this was made this year, just within the last several months. These were offered in the District stores for \$2,213; that is a saving of 18 percent.

When we consider the special sales, the pricing on the special sales on this 606-item total, during the 4-month period preceding the week under survey when actual prices were taken; that is, getting the best sale prices, the fair-trade values of these items amounted to \$969.18: they were sale-priced at \$658.70, or an average unweighted saving of 32 percent in favor of the non-fair-trade area.

Now, that survey is not complete. I am not satisfied that it is entirely accurate in all respects. I want to know what the weights are that good merchandising surveys place in surveys of this kind, and I can assure you, Senator, I want to get to the facts and not come to any wrong conclusions as to whether or not the ultimate consumer has to pay more or less in fair trade.

Senator O'MAHONEY. I would expect that of you, Judge, as I know your previous history; and so my questions are merely directed toward developing as factual a basis as we can for reaching a sound judgment.

Mr. BARNES. I am sure of that, sir.

Senator O'MAHONEY. Now, in my mind, before you can reach a definite conclusion with respect to fair-trade practices as they affect drugstores, you have got to reach some sort of a conclusion with respect to administer prices carried on by some of the large national corporations.

Do you agree with that?

Mr. BARNES. Yes; that is exactly right.

Senator O'MAHONEY. Do you think that administered prices are now regulated in the public interest?

Mr. BARNES. I do not think I am qualified to answer that question, Senator. In the first place, I do not know exactly what you mean by "administered prices." You mean a recommended price?

Senator O'MAHONEY. I mean prices which are actually fixed by a group of dominant corporations in a particular trade.

Mr. BARNES. Well, if you are talking about joint concerts of action, you are describing to me a violation of the antitrust laws which I would be happy to prosecute.

Senator O'MAHONEY. Can you prosecute all of these violations? What do you do to try to prosecute them?

Mr. BARNES. Well, some people think I am filing too many suits, I think, Senator, from what I have heard in the last few days.

Senator O'MAHONEY. Now, let us say that you are filing a pretty good number. Are you filing enough from the complaints that come to you, in your own judgment?

Mr. BARNES. That is a very difficult question. Very obviously, if the Antitrust Division had more money than it has now we would have more men, we could do a bigger job; we could file more suits. That is a direct answer to your question.

Senator O'MAHONEY. I have often said, and I will ask you whether you agree with this, that the practical effectiveness of the antitrust laws depend upon the willingness of the Attorney General to ask for the appropriations necessary to carry on a full-fledged antitrust campaign, and upon the willingness of Congress to give the appropriations. It is not a program that can be carried out by the personal desire of the head of the Antitrust Division. I know that from observation over a great many years.

Now, with that preliminary, let us talk about automobile prices. Have you given any study to them?

Mr. BARNES. Yes, sir.

Senator O'MAHONEY. Are they administered?

Mr. BARNES. Well, again, I will have to ask you to tell me what you mean by "administered." I am not trying to evade your question.

Senator O'MAHONEY. Does the manufacturer effectively fix a national price for automobiles, nationally?

Mr. BARNES. I think that in a great many instances he does.

I point out, however, that you cannot make any categorical statement. For example, we are investigating certain matters now where dealers associations have taken it upon themselves to maintain a price because in their thinking there is no price maintained by the manufacturers, so I do not think you can give an overall broad answer.

However, I will say this, Senator, I do not want to evade any questions you ask—I will say this: that there is competition in the automobile industry in just about everything except price.

The CHAIRMAN. Particularly in speed and power.

Senator O'MAHONEY. My attention was called recently to a law case which was initiated, I think, in Hartford, Conn., by an automobile dealer or a person who wished to engage in the sale of automobiles and who, from the news story—I have not seen the filing, so that I do not know what the actual bill was, what the actual petition was—

Mr. BARNES. I think there was a denial of a franchise.

Senator O'MAHONEY. It was what?

Mr. BARNES. Denial of a franchise.

Senator O'MAHONEY. Yes. The plaintiff wanted to buy cars from local dealers and sell them at his own price, and he was required to buy them at the price that the manufacturer fixed for that local man, or that was his allegation.

Mr. BARNES. Yes; we are following that very closely.

I might say for the purpose of the record, and I can say this only because General Motors has already issued a statement on it, they requested us some time ago, under our release procedure, to authorize

them to buy back cars from dealers and to prohibit those dealers from selling them to some other dealers who might go below the price that the manufacturer wanted to maintain. That, of course, was refused.

Senator O'MAHONEY. Well, now, in supporting this recommendation of the committee for the repeal of the fair-trade laws, would you recommend any action which would permit local dealers in automobiles to sell at prices at the figure that they desired?

Mr. BARNES. Not in concert. Individually they have the absolute right to sell at any price they want.

Senator O'MAHONEY. All right.

If a dealer of General Motors in Hartford wants to sell at less than the manufacturer's price, has he the right to do so?

Mr. BARNES. As far as I am concerned. We are not involving any sale below costs, State statute, or anything of that kind.

Senator O'MAHONEY. Well, would it be a concert, a concerted action, against the antitrust laws, as they now exist, if an automobile manufacturer should compel a local dealer to sell at a fixed price, and if he did not sell, to buy back?

Mr. BARNES. Yes. I think that it might very well be a violation of the antitrust laws. It is a little hard to give an unequivocal answer to a supposition statement that may not contain all the facts.

Senator O'MAHONEY. Well, of course; but I hope the press table takes note of the answer of the Attorney General.

The CHAIRMAN. Anything further?

Senator O'MAHONEY. I will give you a chance now.

Mr. BURNS. Judge Barnes, the subcommittee intends to go into each of these legislative recommendations in detail. But there are a few more that we would like to have you describe briefly so that we can study them in the light of your explanation of them.

There is one recommendation that a new statute authorize the Attorney General to issue a civil-investigative demand compelling potential antitrust defendants in civil cases to produce relevant books and documents.

Will you tell the members of the subcommittee the purpose of that recommendation?

Mr. BARNES. Yes; that is on page 344.

As the Congress undoubtedly knows, the Department of Justice and, more particularly, the Antitrust Division, enforces a peculiar act in the Sherman Antitrust statute in that it is both criminal and civil.

It is a prosecuting agency; it has no investigative powers whatsoever, and unlike the Federal Trade Commission and a great many other agencies, the Department of Justice, unlike those agencies, cannot investigate except through the process of law, that is, by impaneling a grand jury and having the witnesses testify under oath or produce documents in response to subpoenas.

Now, I do not deprecate the great value of the grand jury. It has been invaluable in producing evidence of that kind.

I want it distinctly understood that this civil investigative demand is not to take the place of the grand jury in investigating criminal charges.

I point out, however, that the Department of Justice, because of this lack of investigatory demand must rely upon voluntary compliance by individuals when we send out the FBI.

Now, very frequently the FBI obtains the information that we desire. But, on the other hand, frequently, it does not. If defendants or others tell the FBI that they will not let them see their files, not deliver documents, not give them information, there is nothing the Department of Justice can do except call a grand jury.

It has been suggested that a criminal process such as a grand jury is inappropriate to obtain evidence for civil prosecution. There are various reasons involving fundamental rights.

It is for that reason that we have felt, and I do feel, that the Department, the Antitrust Division, needs additional weapons. We want a scalpel rather than a sledge hammer when we go after certain information. For example, we met with some very stiff opposition on a very simple question of who owned a Cadillac car in a certain part of the country. We had to go to the grand jury to get a subpoena issued by the judge to find out who owned that Cadillac car.

Now, a civil-investigative demand, while it cannot take the place of the grand jury, cannot require production of oral testimony under oath, which is frequently essential to any antitrust prosecution, it could require the production of documents under proper supervision by the courts if there is any dispute as to the scope of the inquiry and the documents demanded.

The CHAIRMAN. You made a differentiation there between the Federal Trade Commission and yourself, and your organization. Can they get this information without a suit?

Mr. BARNES. Yes; they can get it, and I want to be absolutely fair. They can get it, and we can ask them to get it. But the difficulty is, I am informed, that when the Department of Justice asks the Federal Trade Commission to do part of its investigation they say, "We have not enough money."

The CHAIRMAN. That is a very, very important point in these hearings. That is one of the things that needs straightening out.

Mr. BARNES. That is right; that is one of the very fine recommendations in this report. There are others.

The CHAIRMAN. For instance, in that you would have a parallel, if properly functioning, to the Internal Revenue method of handling income-tax evasion. It can tell its Investigative Section to make a demand, and if it does not get a reply then it makes an estimate and goes after them.

Then there is not that cooperation that is really necessary between the Federal Trade Commission and the Department of Justice.

Mr. BARNES. I do not want to say that, Senator, because the cooperation has existed.

The CHAIRMAN. I am not stating the reason for it; I am not talking about the lack of appropriation. I am talking about the fact that the law does not fix that necessary connecting link in there.

Mr. BARNES. There are defects in the procedure.

The CHAIRMAN. In other words, they ask you to do the legal job, but you are not in position to make them do the enforcing job, providing they claim, if they feel, they are short on appropriations.

Mr. BARNES. That is right.

The CHAIRMAN. I mean the investigative job.

Mr. BARNES. You understand the investigative jobs we have frequently take months to do, and sometimes one particular job, for

example, will require an FBI agent to spend 10 months on a particular investigation, or maybe a half dozen of them.

I have one in mind where there are 6 FBI agents working throughout a year on 1 investigation.

Now, you cannot go to another branch of the Government and say, "Outside of your budget, will you do a job like that for us?" At least, you cannot, with much success, and I have not had the effrontery to suggest it to Chairman Howrey.

I will say, very frankly, with the reputation it has, usually it gets the information to a surprising extent.

Mr. BURNS. Another recommendation which the committee makes is to amend section 4 of the Clayton Act to give the United States Government the right to sue for single damages stemming from antitrust violations. Will you tell us the reasons for that recommendation?

Mr. BARNES. Well, it is a historical reason based upon a Supreme Court ruling, as I understand it, that when the act uses the words "a person," who is entitled to sue, the Supreme Court has held that the United States was not a person within the meaning of that act, and hence the United States in its proprietary capacity, for example, when it uses the railroads to ship, when it buys goods, cannot get the advantage of the antitrust laws, because it does not have a right to sue. We think that is a thing that should be taken care of.

The CHAIRMAN. It is not a legal entity.

Mr. BARNES. It is not a person according to the Supreme Court.

Senator KEFAUVER. Judge Barnes, may I ask a question in that connection? Judge Barnes, the bill sponsored by Congressman Celler to remedy that, to give the United States the right to sue for damages, has passed the House of Representatives, has it not?

Mr. BARNES. I believe it has; yes, sir. That is on page 385.

Senator KEFAUVER. Was that bill recommended by the Department of Justice?

Mr. BARNES. The bill itself received our approval; yes. You are not talking about the committee, sir; you are asking me about the Department of Justice. The Department of Justice did approve it.

Senator KEFAUVER. I mean the Department of Justice recommended the Celler bill?

Mr. BARNES. That is correct; yes. You have got the unchecked draft, Senator, I am sorry to say. You have the unchecked draft which did not contain the dissents that later came in.

Senator KEFAUVER. I notice this one does not contain it.

Senator O'MAHONEY. What is the page?

Mr. BARNES. 385, Senator O'Mahoney.

Senator, here is an analysis that may help you some, a statement that I made before a different committee.

Senator KEFAUVER. This amends section 4 of the Clayton Act.

Mr. BARNES. Yes.

Senator KEFAUVER. Is the same difficulty present in the Sherman Act?

Mr. BARNES. Well, no. The Sherman Act, of course, gives the United States the right to sue either civilly or criminally. This is the United States suing in its private capacity as a businessman, that we are trying to give the right of action to it, not in its sovereign capacity as an enforcer of laws.

The CHAIRMAN. In other words, as a purchaser.

Mr. BARNES. Yes.

Senator KEFAUVER. Would there not be some possible suits under the Sherman Act where the United States would want to sue in its private capacity rather than as a Government for triple damages?

Mr. BARNES. I do not see how under the Sherman Act that it could.

Mr. BICKS. This would provide a right to sue under the Sherman Act or any antitrust laws.

Senator KEFAUVER. This says under the Clayton Act.

Mr. BICKS. It is an amendment to the act that would provide rights under all the antitrust laws as defined by the Clayton Act; that should be in the form of an amendment to the Clayton Act.

Senator KEFAUVER. Well, there are some places where the United States Government sells gasoline, sells supplies, sells many things. It occurred to me that under the Sherman Act there might be situations where the United States would want to sue for damages of a private nature, not just in a sovereign right.

Mr. BICKS. That is just what this would provide.

Senator KEFAUVER. Judge Barnes just said that it did not apply to the Sherman Act.

Mr. BURNS. Senator, I think this may explain it: The Sherman Act contains a provision for any person to sue for private damages. When Congress enacted the Clayton Act, it provided again that private parties could sue for damages for violation of the antitrust laws if they can show their damages and in effect superseded the Sherman section so that all of these acts, the Sherman Act, the Clayton Act, the Robinson-Patman Act, and many others constituting the antitrust laws and the right to sue for damages, happen to be contained in the Clayton Act.

Senator KEFAUVER. The Sherman Act provides for suits for triple damages.

Mr. BURNS. That is the Sherman Act.

Mr. BARNES. But the right is given in the Clayton Act, and that is why I did not get your connection.

Senator KEFAUVER. Does it give the Government the right to sue for triple damages?

Mr. BARNES. Single damages, unlike the ordinary litigant.

Senator O'MAHONEY. Do you not think it would be a pretty good protection to the Treasury of the United States if this amendment that you suggest here were specially directed with respect to the negotiated contracts which are made by the Department of Defense for the purchase of the materials that are used for defense?

Mr. BARNES. I would think that it would cover that, Senator, but I do not know whether it should be expressly directed. I prefer the general legislation myself.

Senator O'MAHONEY. Well, you will recall that when the country became involved in the Second World War and it became necessary to build implements of warfare that never before had been dreamed of, not only the atom bomb but many other things, negotiated contracts had to be made because the manufacturers themselves had no basis upon which to base a competitive price.

Mr. BARNES. Yes, sir.

Senator O'MAHONEY. Well, the result has been that we have drifted, to a large degree even, to negotiated contracts instead of competitive

contracts, and Congress is even now considering the reenactment of the Renegotiation Act.

It would be much more effective, would it not, in your opinion, if this recommendation of your committee were to be broadened so that it would clearly and specifically refer to such contracts?

Mr. BARNES. I think that the language is broad enough to cover it now.

Senator O'MAHONEY. Has the language been suggested?

Mr. BICKS. There is already a bill introduced.

Mr. BARNES. I believe there has been a bill introduced in Congress, and there is language suggested "any person who shall be injured in his business or property." The exact form of the bill has not been suggested.

Senator O'MAHONEY. Well, your desire is to have the person include the United States Government?

Mr. BARNES. That is right; but with a right for single damages rather than treble.

Senator O'MAHONEY. Why do you wish to eliminate treble damages?

Mr. BARNES. From a practical standpoint it would be extremely difficult to get; secondly, the purpose of your treble damage is to encourage your private enforcement of the antitrust laws. That is not necessary in this case because the Government theoretically enforces it anyway.

Senator O'MAHONEY. Well, there is a recommendation anyway in this document against treble damages, is there not?

Mr. BARNES. Against mandatory treble damages.

Senator O'MAHONEY. Yes.

Mr. BARNES. There is a recommendation that it be made discretionary.

Senator O'MAHONEY. Well, when you extend the discretion of that kind, it is almost an invitation to go to the minimum when one considers the great economic power of the corporations against which such cases are brought.

The small man, Judge—I think you will agree with this—the individual, the person, and the small corporation which is injured by a large corporation is at a great disadvantage in defending his rights in the courts because he is not financially capable of carrying the case to the Supreme Court of the United States. We constantly hear of individuals who say, "I cannot afford to follow it through the courts. I have got to throw up my hands."

Do you not think that the mandatory treble damages is likely to be much more effective as a deterrent than discretionary single damages?

Mr. BARNES. Are you asking for the committee's report or for my personal view?

Senator O'MAHONEY. Your personal view. We have got the committee's report before us, and we have been studying it. You are the head of the Antitrust Division.

Mr. BARNES. Yes, I will be very frank with you. I have not made up my mind as to what recommendation I will make to the Attorney General on that score. It is a very close question. There is a lot to be said on both sides.

Perhaps by reason of the fact that I was once a judge, I think that ordinarily in any criminal statute the remedy for proper enforce-

ment is to get the right kind of judges and not tie their hands by mandatory acts here and there.

You can sometimes destroy the very purpose that you are going after by taking discretion to meet the facts in the particular case away from the judge.

Now, may I point out—

Senator O'MAHONEY. Before you do that, may I just say this: That I recognize the desirability of erecting a safeguard against strike suits, against suits that are brought by lawyers whose only business is to give themselves a nuisance value.

Mr. BARNES. Yes.

Senator O'MAHONEY. But that is a very different matter.

Mr. BARNES. That is another problem in your viewpoint.

Senator O'MAHONEY. And I think that should not be cured—we should not knock out the only defense that the little fellow has.

Mr. BARNES. One of the principal arguments that is urged for some change in the treble-damage statute is that there have been "unwitting," I put this in quotes, too, "unwitting violators" who have been trapped by the antitrust laws. I am not expressing any personal opinion on that theory.

The position urged by the majority of the committee was, their position was, that the repeal of the triple recovery would not impair the deterring effect of private suits. They pointed out that the conscious malefactor, the one who does not unwittingly violate the antitrust laws, cannot expect the benefit of such discretion, if we have honest judges; and the unwitting violator seeking to conform to antitrust laws, but nevertheless caught in a violation, should nevertheless have the benefit of actual damages, plus attorney's fees, plus costs.

Senator O'MAHONEY. Do not point at me; I am not practicing any more. [Laughter.]

Mr. BARNES. Excuse me, Senator; I did not mean to become emphatic, but I want to emphasize the fact that attorney's fees were still allowed in that case which, contrary to English law, is rather unusual in this country.

Senator O'MAHONEY. That is right.

Mr. BARNES. Then they also point out that, in their opinion, the incentive to private suits will not be curtailed.

Now, that is the point that bothered me, frankly, because I wanted to go a little further into the effect on antitrust enforcement of removing the present mandatory treble-damage requirement.

The inducement of mandatory treble damages is no longer necessary to encourage suits by injured persons, says the committee in its report. The development of both the procedural and substantive law, largely favorable to the plaintiff, plus the award of attorney's fees, offers sufficient incentive to private antitrust actions.

Now, that is a question that can be argued both ways, and it is a very difficult question.

One corporation today is defending as a result of a successful Government prosecution, some \$400 million in private treble-damage suits. In their opinion, this is a perfect example of the strike suits that you had reference to. In fact, in that particular industry, one firm of attorneys, I am told, had mimeographed complaints and had merely inserted the amount, the names, and there was not very much leeway as to the amount of damages. They would sue for many millions.

Senator O'MAHONEY. When we come to that subject, the record here is that you have not yet made up your mind, as the committee did, with respect to this treble damage.

Mr. BARNES. That is exactly right, and I say that in all honesty. As a matter of fact, I had a discussion with the Attorney General on that very problem yesterday, expressing some of my doubts on the subject.

Senator O'MAHONEY. Thank you.

Senator KEFAUVER. Mr. Chairman, may I ask a question?

First, I would like to say that I agree fully with the sentiment expressed by Senator O'Mahoney, that treble damages should not be taken out of the law, for reasons that we can discuss later on, and I think it should be pointed out that in the opinion of the House of Representatives, at least, that treble damages, even that is not sufficient to deter violations, because the House has passed a bill enlarging the amount of fine or punishment for violation of the Sherman anti-trust law.

Mr. BARNES. That is correct.

Senator KEFAUVER. With a mandatory fine of—I have forgotten the amounts.

Mr. BARNES. It is discretionary; it is up to \$50,000.

Senator KEFAUVER. But, anyway, they raised it. It is up to \$50,000; so, in the opinion of the Judiciary Committee in the House, the trend should be the other way, to increase the punishment rather than to diminish it.

My question is, on page 385, it is stated that—

States and municipalities, etc., may maintain suits in their own right.

I take it they can maintain suits for treble damages, can they not?

Mr. BARNES. I do not know that, Senator, I am sorry to say.

Mr. BICKS. I think they can.

Senator KEFAUVER. I think they can; they are treated as a person.

Mr. BARNES. I think they can; that is right.

Senator KEFAUVER. If States and municipalities can sue for more than single damages, do you not think that that is a pretty sound argument for allowing the Federal Government also to collect more than actual damages?

Mr. BARNES. Well, I think it is a question as to what theory you want to advocate—whether the right of private treble-damage action will so aid in the enforcement that it needs not only the State and city's right but also the Federal Government's right; it is an arguable point.

Senator WILEY. Mr. Chairman, I am sorry that I could not be here throughout the entire session as I had to get to the White House at 8:30 this morning and then to Foreign Relations, but I shall read this record, I am sure, with profit and interest.

I have but one question that goes back to a previous matter that was discussed. In light, Judge Barnes, of the recent events involving the American Association of Advertising Agencies and American Newspaper Publishers Association, do you still approve of pre-filing negotiations recommended in the committee report?

Mr. BARNES. The answer is a somewhat disappointed "Yes." In other words, I do not think, because a procedure breaks down in one case—

Senator WILEY. You mean "disappointed" means a hesitating "Yes"?

Mr. BARNES. No. In this particular case I am disappointed that the prefiling negotiations did not accomplish something. I think that we can report that in about 75 percent of the cases—and, understand me, there are only certain cases that are susceptible to prefiling negotiations—that in about 75 percent of those cases where we have had that type of negotiation, I think we have accomplished a great deal.

We have been successful in about 75 percent, and I take it that if you can even close out a limited number of cases with a saving to the taxpayer, a saving to the litigant, and, at the same time, accomplish worthwhile results, that even if it were 10 percent it would be extremely worthwhile.

Senator O'MAHONEY. That raises a very important question. I am glad Senator Wiley asked it.

Mr. BARNES. Could I finish my statement?

Senator O'MAHONEY. Oh, I beg your pardon. Certainly.

Mr. BARNES. I think I should at this time make a statement with regard to that case by reason of the fact that it is brought up and there has been a good deal in the papers about it.

The CHAIRMAN. You want to include it in the record?

Mr. BARNES. I am going to read it.

Many of you perhaps have read in the recent press about the Government's proposed antitrust suit against the American Association of Advertising Agencies, known as the 4 A's, and various newspaper and magazine associations. Public statements by counsel for the 4 A's as well as the American Newspaper Publishers Association have challenged the Government's complaint, while admitting its principal allegations, and have urged their clients to shun consent settlements and proceed to trial.

As a law enforcement officer, I do not propose to try any cause, pending or proposed, in the public press. Our prized tradition of unbiased trial bars any prosecutor from unseemly comment on such proceedings. However, public responsibility here requires some explanation of those violations the Government charges, and those procedures chosen to strike down the actions alleged to be illegal.

The story begins with a letter to me or more accurately to the Attorney General, dated 10 days after I took office on May 1, 1953. This letter of complaint came from an advertising agent claiming he had been injured by acts of the proposed defendants. He charged that he had previously been given the runaround by the Department of Justice. My investigation first disclosed that a proposed grand jury investigation into this subject, recommended by a field office in 1951, had been denied by Washington.

After some 3 months of careful consideration, in September 1953, I ordered reopening of the preliminary investigation closed in 1951. As a first step, we searched the records of four associations of newspaper and magazine publishers, as well as the 4 A's. This survey soon revealed the existence, as our complaint in substance alleges, of a veritable private government known as "the recognition system." This system fixed conditions for newcomers' entry into the advertising agency business; fixed rates which those ad agencies already in business might charge; and a fixed sanctuary from competition for ad agencies by in effect barring advertisers from dealing directly with newspapers and magazines. As a result, the Government feels two

classes of businessmen were injured—ad agencies whose entry into the business was impeded and advertisers who were prevented from cutting sales costs, if they so desired, by placing advertising directly with newspapers or magazines. As a result, national advertisers were compelled to pay media the full ad rate, including payment for advertising agency services they did not want, and never received.

In 1930, the FTC dismissed a complaint involving many of the same issues. No opinion of any kind accompanied this dismissal. I am informed that the sole ground for this dismissal was the legal conclusion that there was want of interstate commerce.

That dismissal, some 25 years ago, however, was under the narrower interstate commerce definition embodied in the Federal Trade Commission Act, not the broader standards of the Sherman Act, under which we now proceed. Furthermore, subsequent to 1930, the Supreme Court has squarely held that, under the Sherman Act, local—distribution * * * of * * * advertisements transmitted * * * in interstate commerce * * * is an inseparable part of the flow of * * * interstate commerce (*Lorain Journal v. U. S.*, 342 U. S. 143, 1952).

Thus, defendants' "recognition" system, it seems clear, rests on the traditional hard core antitrust violations of price fixing of ad agencies' commissions and group boycott of nonrecognized agencies. These practices, the Supreme Court has repeatedly declared illegal *per se*. As the recent report of the Attorney General's National Committee To Study the Antitrust Laws put it—

Certain forms of conduct, such as agreements among competitors to fix market prices (or group boycotts) are "conclusively presumed to be illegal by reason of their nature or their necessary effect" so that they can quickly and positively be adjudged violations of the Sherman Act.

Faced with this situation, I ordered a complaint prepared. That complaint charges, first, that 4 A's and the five defendant media associations conspired with each other. Second, it charges a separate conspiracy between each association and its members.

At the heart of the offenses alleged is the "recognition system." Under this system, newspaper and magazine associations "recognize" those advertising agencies which are entitled to receive agency commissions and credit. Failure by an ad agency to secure recognition from any one of the defendant media associations constitutes a severe competitive handicap. First, a "nonrecognized" agency is denied advertising commissions and credit. Second, perhaps equally important, its "nonrecognized" status is proclaimed among national advertisers and media. This imputes to the "nonrecognized" agency an aura of financial instability and business incompetence.

"Standards" for agency recognition adopted by each of the defendant media associations, our complaint alleges, are practically identical. Briefly, these "standards" require that an ad agency seeking recognition must represent and assure in writing, among other things, that (a) it functions as an independent contractor, not a house agency controlled by or affiliated with an advertiser, or an owner of a printing or engraving establishment, and (b) that it retains all agency commissions and does not discount to its clients any part thereof.

Agency commissions, it should be said, are paid by media in the form of a discount allowed to ad agencies on gross rates. All defendant media associations, our complaint charges, have agreed to

standardize their 15 percent commission for advertising agents. The only way, therefore, that an advertising agency could cut rates to an advertiser is through a "rebate." Thus media associations' requirements barring rebates result in price fixing.

In addition, all defendant media associations, the Government charges, insisted that each "recognized" ad agency agrees to abide by the 4 A's "Standard Conditions Governing Advertising Contracts and Orders" and to use the 4 A's standard contract and order forms. The essentials of the media associations' standards for agency recognition were proposed by the 4 A's. Four A's aim, our complaint charges, was to free ad agencies as a class: first, from price competition among themselves and, second, from competition in advertising services from national advertisers who wished to deal directly with the media.

Further pursuing its plan, our complaint alleges, the 4 A's and its members agreed to retain their full commission and not rebate any part to advertisers. Beyond that, they agreed to fix and maintain agency commissions at 15 percent and to refrain from competing with each other for new business by submitting speculative material.

After the complaint was drafted and approved by the Attorney General, the Department notified the ANPA and the 4 A's that the Government contemplated suit against them and others. This was done in accordance with our usual procedures, after a specific request made by these two associations during the investigation that we do notify them of our intentions. In response, several officials of ANPA sought, and had, a meeting with us. Further, I explained that while settlement could be fairly negotiated, the ANPA, like any other potential defendant, must consent to have its settlement embodied in a consent order, a court decree.

For my belief is that all groups—no matter what their power—must be treated alike. The ANPA officials requested several days to consider the matter and advised us we would have their answer.

The next I heard from counsel for this proposed defendant was via the public press. There statements by counsel for ANPA as well as the 4 A's proclaimed each association was free from any taint of violation and attacked the Government's proposed complaint. In addition, counsel for ANPA sought to distort our efforts to curb the ANPA's stifling of competition as an effort to "control the operation of the press." Suffice it to say, in the language of the Supreme Court in the Associated Press case:

Surely a command that the Government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some * * *. Freedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests (326 U. S. 1, 20 (1944)).

These statements by counsel, it seems clear to me, make prefilng negotiation impossible, and I should add, perhaps I am going too strong there, perhaps not impossible, but almost so.

Soon after he took office, you may recall, the Attorney General announced the Antitrust Division would, in certain civil antitrust cases, offer businessmen a chance to negotiate a settlement before we file suit. Such prefilng procedures aimed to ease consent negotiation by enabling settlement before the position of either party had been frozen by public announcement. This aim, of course, counsels' public statements have defeated.

I might add there, Senator O'Mahoney, that as you know when I was on the bench, I used to use an instruction that I thought was extremely valuable with juries, and that was, just before they went out I would caution them that it was rarely productive of good for any one of their number to violently take a position as soon as they went into a courtroom before they had heard what the others had to say, and that interfered with the due process of law and prevented the possibility of coming to an agreement, because once having taken a position publicly, even though you are convinced it is wrong, it takes a brave man to retreat from it.

Senator WILEY. You think the Senator does that?

Mr. BARNES. No; I do not think he does that. I am sure he does not think I think so.

Senator WILEY. He addressed you, sir.

Senator O'MAHONEY. The judge addressed me, I think, because he knew that I approved that sort of instruction. I think it was one of the great credits in his experience and his career that made me highly satisfied when he was made the head of the Antitrust Division, and I want to add this, Judge Barnes, before you reciprocate, perhaps [laughter]—

Senator WILEY. That might be a good instruction to the Senators on the floor, too, don't you think so?

Mr. BARNES. I stand mute.

Senator O'MAHONEY. Judge, I was about to say this: You characterize this, if I remember correctly, as private government of interstate commerce, this alleged combination of advertising agencies.

That is our trouble today, as I see it. Today in the economic field, in the field of antitrust legislation, private hands have taken over and seek to maintain private economic government in the United States to the disadvantage of the States, to the disadvantage of local communities, to the disadvantage of competitive enterprise, and I feel that you should be complimented, highly complimented, for having refused to pursue any further negotiations with this group when they refuse to agree to a consent decree.

Of course, I have my doubts about consent decrees, because I think it is pretty difficult to know, to govern the nature of the conferences which take place before a complaint is written.

The great advantage of our judicial system and of the legislative system as we have known it in this country, is that both are supposed to be conducted in public. The courts are open for the public to see; the Congress is open for the public to see.

But we have gradually drifted into a system whereby rules and regulations which have the force and effect of law are being drawn in private where the public cannot know how its interests are being affected, and I have had the feeling, sir, that to establish—and you are not the author of the consent-decree system—but to establish a program by which alleged violators can sit down with the prosecuting officer and cooperate in the drafting of a complaint to which he is willing to sign a consent order is extremely doubtful in value.

Mr. BARNES. Well, I would be glad to go into that, Senator.

May I point this out, that the alleged violator does not have anything to do with drafting the form of the complaint which, in each case, is ultimately filed as a matter of record. There are no negotiations that result in any decrees that do not become matters of record.

I have adopted as a policy not to negotiate, even in prefiling negotiations on any case, unless I have a complaint ready for filing with the specific charges capable of being disclosed, although I may not disclose them at the time that the negotiations start; and I furthermore insist upon having the necessary approval of everyone in the Antitrust Division, so that if negotiations fail at any time, the suit, in a well-conceived, thought-out manner, can be filed immediately.

Senator O'MAHONEY. Your rule, if I understand you, is that before any prefiling negotiations are undertaken, a complaint has already been drawn.

Mr. BARNES. Exactly; and that has been the invariable rule since I have initiated these prefiling negotiations. Consequently, in going back to my statement, I expect to file the complaint that I mentioned in probably the United States Court for the Southern District of New York soon.

In the light of public statements by counsel for some of the defendants, I feel sure that the defendants will share my desire for a prompt decision of the issues soon to be at bar.

For this reason, I trust they will answer promptly and put the matter at issue. As soon as this has been done, I, of course, shall be glad to cooperate in any endeavor to speedily bring the matter to trial at the earliest possible moment.

The CHAIRMAN. Gentlemen, we will recess at this time until 2:30 in this room.

(Whereupon, at 12:20 p. m., the subcommittee recessed, to reconvene at 2:30 p. m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Mr. BURNS. Professor Handler, will you please state your professional background and experience in the antitrust field?

STATEMENT OF MILTON HANDLER, PROFESSOR, COLUMBIA UNIVERSITY LAW SCHOOL

Mr. HANDLER. I am a member of the New York bar, a professor of law at Columbia University and a senior member of the firm of Kaye, Scholer, Fierman & Hays. I have specialized in antitrust law for more than 28 years as a practitioner, teacher, writer, and lecturer.

My governmental career started in 1926 when I was clerk to Justice Stone. In 1933 I was General Counsel to the National Labor Board.

In 1937 I was appointed Special Assistant to the Attorney General to advise the Roosevelt administration on proposed revision of the antitrust laws.

Subsequently I wrote a monograph on the antitrust laws for the Temporary National Economic Committee.

Senator WILEY. Do you have that with you?

Mr. HANDLER. I have that with me.

Senator WILEY. Where is the copy of that manuscript?

Mr. HANDLER. I will be glad to supply the committee with copies.

Senator WILEY. Mail us each one.

Mr. HANDLER. I will be delighted to.

Senator WILEY. Let us look at it now.

Mr. HANDLER. Certainly you may look at it. That is the only copy I have. It is a marked copy.

Mr. BURNS. What year did you prepare this TNEC monograph?

Mr. HANDLER. I commenced working on this in the fall of 1937. The committee will recall that at that time President Roosevelt summoned a special session of the Congress to consider 4 items of legislation, 1 of which was revision of the antitrust laws and I was requested to advise the administration and the then Assistant Attorney General Jackson on the preparation of such a program. As a result of these studies which ran over a period of years, I prepared for the Treasury Department this monograph which was published as No. 38 of the TNEC monographs.

Senator WILEY. That was not one I got hold of. I would love to have it because I had a lot of monographs furnished by very distinguished lawyers that I use. A lot of them became best sellers. Some sold as high as 35,000 copies.

Mr. HANDLER. I thought, if the committee please, that it might be helpful in your evaluation of the report of the Attorney General's National Committee To Study the Antitrust Laws, if I were briefly to contrast the conditions which prevailed in the forties when I made this study and the conditions which confronted our committee here in the fifties. I think that contrast might aid you in appraising the significance of the suggestions, conclusions, and recommendations that the present committee has made to the Attorney General.

The CHAIRMAN. Isn't it a fact that during the thirties and forties tremendous reserves were built up by various groups which will, if not controlled, not only contribute to, but actually permit complete monopolization if we don't watch it.

Mr. HANDLER. I don't agree with that, with great deference, Mr. Senator.

The CHAIRMAN. I am thinking of all the tax-free plants that were built. I say tax-free because we gave them rapid amortization and other benefits. Isn't that a natural contributor to monopoly.

Mr. HANDLER. That is water over the dam.

The CHAIRMAN. I am not talking about water over the dam. I am asking you your opinion.

Mr. HANDLER. My opinion is based upon my reading. I have never made any independent factual investigation. But I believe the committee at some point will call upon Dr. Adelman, who was a member of our committee. He has studied all the data on the concentration of economic power in the United States, and I think you will find that he has a refreshing point of view on the subject and is very well informed. I believe that there is a good deal of misinformation concerning the present extent of concentrated power in the United States. That is not to deny that there is bigness, that there is a great deal of power, but the trend, I think, has been incorrectly reported.

I don't have those facts, and I prefer to testify about the things about which I know something.

Senator WILEY. Do you have Adelman on the list?

Mr. BURNS. In the future, yes.

Senator WILEY. O. K.

The CHAIRMAN. Mr. Burns has practically everybody on the list of witnesses with differing views on economic problems. He has interviewed a great number of them and has their views in writing.

Senator WILEY. The statement of the witness is really challenging and is one I think which calls for real concerted effort to get at the real facts because there is so much prejudice and loose talk on pretty nearly every subject. If you have someone who has the facts of life, that is what we want.

Mr. HANDLER. Precisely.

The CHAIRMAN. May I say this one point? Have you ever read Dr. Webb's book, United We Stand?

Mr. HANDLER. No; I have not.

The CHAIRMAN. Might I suggest that you read it?

Mr. HANDLER. I will be delighted to.

The CHAIRMAN. In that book he shows that 9 States derive their income largely from the rest of the 48 States. That thinking has stirred up a lot of opposition. If you happen to be 1 of the rest of the 48, might I say, Senator Wiley, there is a lot of opposition to this situation.

I would like to talk to you after you read the book. It was written by Dr. Webb, of the University of Texas. Get the last edition. It is about the fifth edition now. He brings it up to date about every 4 years.

Senator WILEY. I don't know anything about that book. But I know that some of the States that have produced and are producing great wealth make a great contribution to States that do not have the wealth. That is evident when you look at what we are figuring on appropriating in the western arid regions. Let's go ahead with the inquiry.

Mr. HANDLER. I was going to contrast the conditions confronting the country 15 years ago with those that confront us today.

At the time I made the investigation for the TNEC I found that there was considerable doubt during those depression years in the thirties on the part of many students of the economy as to whether the policies underlying the antitrust laws were fundamentally sound. There were those who questioned whether the antitrust laws were enforceable. There was a widespread belief that antitrust had significantly failed. I found numerous inadequacies in the antitrust laws. First and foremost, there were the inadequacies of the law as enacted by the Congress and as interpreted by the United States Supreme Court in curbing mergers and industrial concentrations.

The CHAIRMAN. Let me ask you one question at that point. Don't you think the intent and purpose back of it was good? The question is the implementation.

Mr. HANDLER. Precisely, and I would like to develop that.

The CHAIRMAN. That is the point. I think the purpose of those laws was excellent, but the implementation was sometimes poor.

Mr. HANDLER. I want to emphasize that thought and go into the central theme of my testimony. The United States Supreme Court in 1927 in the International Harvester case upheld as consonant with the requirement of the Sherman Antitrust Act a corporate combination controlling 64 percent of the production of agricultural implements.

The deficiencies of section 7 of the Clayton Act enacted by the Congress in 1914 are well known to this committee, which has held many hearings on the matter over the years and need not be repeated.

But those were inadequacies with respect to the processes of merger, the disheartening interpretation of the statute by the Supreme Court, the inadequacies of the supplementary legislation enacted by the Congress.

Then I found that there was a dangerous breadth to the rule of reason as developed by Chief Justice Hughes and Justice Brandeis which required a factual showing of illegality in every case and which had the tendency of making each case a law unto itself, vastly increasing the difficulties of enforcing the antitrust laws.

The CHAIRMAN. At this point, that in itself put a problem on the Antitrust Division of the Justice Department and the FTC of trying to outguess the courts; is that not right?

Mr. HANDLER. I don't think I would put it exactly that way, but the amplitude of the rule of reason required both the Government as part of the prosecution and the defendant in the course of its defense to go into the sort of evidence which Justice Brandeis outlined as being relevant in antitrust litigation in the well-known Chicago Board of Trade case, where he did say:

To determine that question—
meaning whether or not a contract or combination was in restraint of trade—

the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.

When you consider these as relevant facts—and I am not quarreling with this decision or the view of Justice Brandeis. I am here more as a historian at this point to review the history of antitrust enforcement in the past 65 years—when you have a doctrine that makes this kind of data relevant, you are going to have big cases, and cases are going to start off by being gargantuan. They then are going to become colossal and then they will become supercolossal and you will have cases such as the Investment Bankers case, which was in the courts in the active trial process for several years.

That does not facilitate enforcement.

I would like to proceed, if I may, and then tie all these loose ends together.

The CHAIRMAN. You will probably agree with me that when a government agrees to matters like territorial division, price fixing, and complete monopoly in certain fields, its economy is threatened.

Mr. HANDLER. Precisely.

The CHAIRMAN. The big difference between us and the countries that do that is the fact that we have endeavored to the best of our ability to keep up competitive industry; isn't that right?

Mr. HANDLER. Entirely right. And I have as part of my testimony a comment I want to make about the international aspects of restraints of trade, if I may.

The CHAIRMAN. I wanted to ask that question at this one point because I thought that it fitted.

Mr. HANDLER. It was also thought at that time that the doctrines of conspiracy as then applied in the antitrust field imposed an undue burden on the Government in proving a conspiracy, a conspiratorial agreement.

As the present report points out, during the Sherman Act's first 50 years, which brings you to the year 1940, private antitrust plaintiffs succeeded in only 13 out of 175 actions brought. It was believed then in the thirties and in the forties that there were serious procedural obstacles to the successful use of the treble-damage procedure.

Finally we found that the vigor and effectiveness of antitrust enforcement were impeded by meager appropriations and lack of enforcing manpower.

The statistics are illuminating. From 1890 to 1932, a period of 42 years, 385 antitrust proceedings had been instituted. By March 12, 1943, a period of approximately 10 years thereafter, another 385 cases were instituted. So that during that decade you had an average of close to 40 cases a year filed as contrasted with the average of 10 cases a year during the preceding 42 years.

By the end of 1948, a total of 970 cases had been commenced and as of the end of 1954, 1,212.

I have described these grim and dismal conditions as they presented themselves to the TNEC in 1940, conditions prevailing in the twenties and in the thirties.

A great transformation occurred after 1940. With intensified enforcement made possible by increased appropriations, revolutionary changes occurred both in the antitrust doctrines and in methods of enforcement.

During the forties, the pendulum began to swing in the other direction. And this is a fact that I want to underline because I think it is most important for this committee to comprehend the changes that have occurred in the past 15 years.

The CHAIRMAN. That was during the period in which adequate appropriations were given to the Antitrust Division?

Mr. HANDLER. That is exactly so.

The conclusions that are reached in the report of this committee should be appraised in the light of the conditions confronting this committee here and now in 1955 and not by the conditions which prevailed prior to 1940.

I can't emphasize that point too strongly.

Senator WILEY. That is the way we should appraise everything, isn't it?

Mr. HANDLER. Unfortunately, Mr. Senator, this report has not been appraised in terms of the conditions confronting this committee, but has been appraised by some people in terms of conditions that have long since been corrected.

There is a tendency among the American people—I trust you won't regard me as being patronizing—as slaying a dead horse and this committee need not waste its time on slaying a dead horse.

There are plenty of live horses for this committee to deal with. I would like in this testimony to indicate what are the live, pulsating, vital issues of the 1950's and not the antitrust issues of a dead and forgotten era.

During this period of intensified enforcement with numerous revolutionary and landmark decisions being handed down by the United

States Supreme Court—and it has been my pleasant duty for the past many years to present an annual review of these decisions before the Association of the Bar of the City of New York—antitrust doctrines have been substantially transformed and I would like now to review by way of contrast the conditions with which this committee appointed by the Attorney General had to deal.

The CHAIRMAN. Could I ask you a question at that point?

Isn't it a fact that in 1942, the antitrust division found itself in such a situation in rubber patents that it could not shake them loose and they had to go to a committee of the United States Senate to expose that situation because they had been hanging in the courts for about 4 years? They could not get action by the court. I don't know whether you remember that or not. Those were the famous Standard Oil cases.

Mr. HANDLER. I remember reading it in the newspaper. I am not familiar with the facts.

The CHAIRMAN. As a result of the hearings in the United States Senate, the necessary patents were released for licensing and things of that kind which ultimately developed into rubber patents and explosive patents? So it was not just a question of the Antitrust Division because the Antitrust Division brought its problem to the United States Senate at that time, because they could not get decisions out of the courts. The point I am getting at is that at that time the antitrust division could not get decisions out of the courts. Things were being delayed. They finally brought their problem to the United States Senate and after a public hearing up here with the newspapers present, the necessary licenses were issued and various other things were done that straightened out the war picture.

Do you realize that?

Mr. HANDLER. I certainly do.

The CHAIRMAN. If not, I will give you a copy of the hearing.

Mr. HANDLER. Can we make a trade? I will give my monograph to you in exchange for a record of the hearings.

The CHAIRMAN. I will loan it to you. I can't give it to you. I can't find a copy any place else. The point I am getting at is this: The question there raised was the fact of inadequacy of law. That only public opinion could heal. And a committee of the Senate crystallized public opinion to such an extent that without the decision of a court, the company involved proceeded to release the necessary licenses on their patents and various other things so we could go ahead.

I wondered what solution you had for that.

Mr. HANDLER. My feeling, which I earnestly hold, is that success in the administration and enforcement of the antitrust laws requires a concert of effort on the part of the legislative as well as the executive branch of the Government and, of course, the judiciary plays an instrumental role in construing the legislation enacted by Congress. If I may be permitted to, before I conclude my testimony, I would like to suggest certain things that I think this committee could usefully undertake in an effort to facilitate the successful administration of the antitrust laws.

Senator WILEY. Give us an exhibit, briefly, 1, 2, 3, of those acts that have gone out of existence, that are not material and the facts that have come into existence that are material. Then we have a bird's eye view of it.

MR. HANDLER. I would like to do that. I pointed out the inadequacy of the law concerning industrial mergers.

In 1940, Congress enacted an amendment to section 7 so that we have a new piece of legislation dealing with that subject. The deficiency of old section 7 has been corrected.

Secondly, although from the earliest days of judicial construction of the antitrust laws, there was in the law a concept of per se illegality, that doctrines crystallized during this period in a series of important decisions of the Supreme Court, and the area of the rule of reason has been narrowed.

While there has not been any repudiation on the part of the Court of the Hughes and Brandeis conception of a factual showing of illegality in each case, such a factual showing is not necessary where there is a restraint which unduly limits competitive opportunities and, therefore, is unreasonable as a matter of law.

As contrasted with the meager appropriations during the twenties and the thirties, there has been a vast increase of appropriations, a vast increase in the size of the Antitrust Division, and as I pointed out by the statistics, a large increase in the number of proceedings instituted.

This 61-man committee, representing a cross section of all shades of opinion on this subject, was unanimous in its endorsement of antitrust. None of the doubts which were ventilated in the thirties were even articulated in any of our meetings.

No one at any time ever suggested anything other than vigorous, fair, and effective enforcement of the antitrust laws.

I never heard one syllable from any member of this committee appointed by the Attorney General, despite the fact that we had all shades of opinion represented upon it, that did not sincerely and earnestly subscribe to the underlying philosophy of the antitrust laws.

THE CHAIRMAN. Isn't it a fact that no matter how good and effective a law is, unless the Congress gives them money to enforce it, it is ineffective?

MR. HANDLER. I would go further, Mr. Senator. If a law is ineffective in its draftsmanship and you give adequate appropriations and you have inspired leadership in the Antitrust Division as you now have, you will have effective enforcement.

Manpower is more important than laws.

THE CHAIRMAN. I know. But if they have no money to work with or inadequate money—

MR. HANDLER. They can't do a thing.

THE CHAIRMAN. So that you can nullify the best law in the world by inadequate appropriations.

MR. HANDLER. I conducted at Columbia University in 1932 the first symposium on the antitrust laws that had been held up to that time. Many people thought that the antitrust laws were like prohibition, the purposes might be salutary, the intentions of the framers might be beneficent, but the goals were unattainable. I don't believe that anyone, any serious student of antitrust, shares that opinion today, not after the enforcement efforts of Thurman Arnold, Wendell Berge, and their successors.

We know that antitrust can be enforced if there is the will to enforce it on the part of the executive branch of the Government and if money is provided to supply the sinews of enforcement.

The CHAIRMAN. The two must be present.

Mr. HANDLER. The two must be present in this.

In this TNEC-38, I took the position I indicated; the need for larger appropriations and larger staff. That is a fact that will always exist. We have a larger staff now and larger appropriations than during the thirties and forties.

I think Judge Barnes would like to have a larger staff and more money. I know he can do a good job with what he has. It is my belief he could do a better job if he had more money and a larger staff and I would support his request and the action of the Congress in giving him more money for the enforcement of antitrust.

The CHAIRMAN. However, you must realize his request for money must come through the Attorney General of the United States.

Mr. HANDLER. I understand that.

The CHAIRMAN. And then from him through the Budget Officer, so we are sort of hamstrung up here on recommendations.

I say that as a member of the Appropriations Committee, and knowing what we face.

Mr. HANDLER. With these changes which occurred in the past 15 years, the situation was quite different when we commenced our study some 20 months ago.

We considered various criticisms that were leveled against the antitrust laws, criticisms which were quite different than those I had to consider 15 years ago.

First, there was the criticism that there had been an undue expansion of the concept of per se illegality.

The committee rejects that criticism. It points out that in the very decision which originated the rule of reason under the Sherman Act, the court recognized that those arrangements which impose undue limitations upon competitive conditions were unreasonable as a matter of law.

The committee recommends no change in any of the per se rules with possibly one exception, and that has to do with the interpretation of section 3 of the Clayton Act, not the Sherman Act itself.

Nor does the committee urge any fundamental alteration in the rule of reason as currently administered by the courts.

The reasonableness of a restraint must be measured in terms of our fundamental antitrust objectives.

A restraint which is not consonant with the maintenance of effective competition in the markets because it alters the structure of an industry or unduly eliminates competition therefrom will not be upheld.

Arrangements which might be reasonable according to the subjective reactions of the judge or under some policy not founded upon free enterprise and free competition is nonetheless unreasonable under the antitrust laws.

Not every elimination of competition is unlawful. The test is whether the anticompetitive effects of the arrangement are such as to jeopardize or seriously impede continued competition in the market.

This was the view of the rule of reason advocated at the time of TNEC. It is the rule of reason now in effect under the latest decisions of the Supreme Court and it is the rule of reason which this committee upholds. There is thus no weakening of the antitrust laws in basic positions taken by the committee.

The committee rejects the view that in the guise of applying the rule of reason, enforcement officials or the courts may adopt economic policies at war with our antitrust goals.

The complaint has widely and repeatedly been made that the antitrust laws are too uncertain. The committee considered that criticism and its conclusion briefly is that in a field such as this, where you are regulating the sprawling untidy, unpredictable masses of factual arrangements which characterizes this dynamic economy which we have, you have to make up your mind whether you want certainty or whether you want adaptability. You can't have both.

The function of this committee was to bring as much enlightenment into this subject, having regard to the difficulty which the facts and the law inevitably present.

I think the claim of uncertainty has been somewhat exaggerated. There is uncertainty. There has been confusion. There has been oscillation in the views of the court.

That is all inevitable. But we prefer not to straitjacket the economy by rigid, inflexible rules which might be certain. We prefer to have inflexible rules and the price of inflexibility is some degree of uncertainty.

The CHAIRMAN. I know. Take the Sherman Act that was enacted how long ago, 60 years ago?

Mr. HANDLER. Yes.

The CHAIRMAN. There have arisen economic conditions which might need amendment to bring them up to the present time.

Mr. HANDLER. The committee considered this carefully and it does not believe that any amendment is necessary in the fundamental structure of the antitrust laws.

They provide adequate tools to do the job.

We do make recommendations for some legislative changes but they relate in the main to the less fundamental aspects of these laws.

Any charge that this committee countenances a weakening of the antitrust laws is utterly absurd, totally without foundation, and can only be made by those who are willing to volunteer criticisms without pausing to read to find out what the committee has done.

Senator WILEY (presiding). Carry on.

Mr. HANDLER. I mentioned before that during the forties the pendulum had begun to swing in the opposite direction.

During this period two doctrines developed which we believe are unfair to defendants. From a personal point of view, just as I vigorously urged in 1940 changes in the law to correct those features which were unfair to the prosecuting officials, so too in the deliberations of this committee I strongly urged the correction of doctrines which result in unfairness to the defendants. The two I want to mention very briefly are the doctrines of intracorporate conspiracy and conscious parallelism.

A weird doctrine has emerged from the cases requiring wholly owned subsidiaries to compete with one another or to compete with their parent, and treating price arrangements among the members of a corporate family, each constituent unit of which is wholly owned, as constituting a price-fixing violation under the antitrust laws.

I would like to tell the committee of a case that went up to the United States Supreme Court. Seagram has a group of Seagram companies, all wholly owned. There is a top company at the apex of

this corporate pyramid. There is a company which produces Seagram liquor. There is a company which sells Seagram liquor. Seagram also owns a group of companies which manufacture and sell Calvert liquor. After OPS expired, Seagram sought to control the price at which its wholesalers resold Seagram liquor, to control it in terms of requiring its wholesalers to maintain the prior selling price and not sell above the ceiling.

A wholesaler refused to observe this policy. He wanted to charge what the traffic would bear. Seagram refused to continue him as a wholesaler, a right which it had under settled antitrust doctrine.

Arrangements then were made by Calvert to sell to this wholesaler. Subsequently, Calvert reluctantly told the wholesaler that it had to follow Seagram's price policies and could not sell to him as long as he refused to maintain the ceiling price. Whereupon he brought suit for treble damages.

I regret some of the members of the committee who expressed some doubts about one of our recommendations having to do with the change in the law providing for mandatory treble damages are not here to consider the facts of the case of Kiefer-Stewart.

The wholesaler brought suit against the Seagram and Calvert group of companies, all, as I said, wholly owned.

There is no question that if this enterprise operated, as does General Motors, in divisions rather than subsidiaries, the action would have fallen insofar as it was based not on an illegal contract but based upon refusal to deal.

But because there were corporations, wholly owned subsidiaries, which provided a plurality of actors, the claim was made there was a conspiracy among these companies and the plaintiff recovered in this case close to a million dollars in damage, after trebling, plus attorney's fees.

I think I could safely say that most antitrust lawyers, if consulted, would have told Seagram, that while there might have been some doubt as to the validity of an agreement setting a maximum above which the wholesaler might not charge, there was no doubt, antitrust-wise, that Seagram could refuse to continue Kiefer-Stewart as a wholesaler and, having regard for the fact that Calvert was wholly owned, I think the advice would have been that Calvert, too, could have been instructed not to sell the wholesaler.

In this treble-damage action, new law was made.

For the first time it was held unlawful to enter into a contract to set maximum prices.

There had been a dictum to that effect in the Supreme Court's opinion in Socony Vacuum.

But this was the first holding by the United States Supreme Court that the concert between wholly owned subsidiaries would constitute a conspiracy.

I submit, as one who favors the recommended change in making treble damages discretionary, that this is the type of case where the discretion should be exercised in favor of the defendant, the law having been unclear prior to its announcement by the United States Supreme Court.

This committee rejects and condemns the doctrine of intracorporate conspiracy as an unsound and an unfair rule of law. We subscribe to the view that antitrust laws must not only permit a vigorous and

effective enforcement, they must also permit fair enforcement. Doctrines which are unfair will bring our whole antitrust program into disrepute.

I don't regard my advocacy of the elimination of this unsound doctrine of the law as in anywise shaking my sincere devotion to our antitrust principles.

Another doctrine where we seek change in the interest of making the law fair to defendants as well as to the plaintiffs and prosecuting officials is the doctrine of conscious parallelism.

There was a belief prior to a year and a half ago that uniform business behavior might be the substantive equivalent of the conspiracy which the antitrust laws condemn.

The United States Supreme Court held to the contrary in *Theater Enterprises*. It there held that conscious uniform action is not the substantive equivalent of conspiracy.

It is not a violation of the antitrust laws in and of itself.

It is relevant evidence which is admissible in proof of the agreement which every conspiracy presupposes. The court was not called upon and did not determine the probative force to be ascribed to that evidence.

It held that that evidence coupled with proof of a prior violation of the antitrust laws in the form of a decree did not warrant the direction of a verdict.

This committee likewise holds that uniform action is not in and of itself a violation of the antitrust laws, that it is relevant evidence and the value of the evidence, its probative force, is to be determined in light of all the facts and circumstances in each case.

Those are the two principal alterations of antitrust law urged in that part which has to do with section 1 of the Sherman Act.

The second is really no alteration because it has the complete support of the Supreme Court as to one phase of our recommendations and the implicit support of the Supreme Court decision in respect to the others.

Senator WILEY. Have you prepared the suggested change in the form of amendments?

Mr. HANDLER. No; the committee feels that amendment is unnecessary.

It feels in the case of conscious parallelism that the law is now developing in the direction which the committee deems sound and therefore no change is indicated. In regard to intracorporate conspiracy, it does not feel that the cases have clearly and unequivocably adopted this doctrine and it feels that the weight of our recommendations should be sufficient to persuade the courts not to adopt this policy.

In addition we have, we believe, the support of the Department of Justice and the Federal Trade Commission, which makes new legislation unnecessary, because to the best of my knowledge, while the head of the Commission and the head of the Antitrust Division are competent to speak for themselves and their votes are to be taken only as personal votes, I think it is noteworthy that they did not dissent from these recommendations.

I personally feel that if the doctrine of intracorporate conspiracy is adopted by the courts, legislative change will be necessary.

I think we can afford to wait to see what the courts do.

Senator WILEY. I thought you said the Supreme Court in the Seagram case had virtually decided that.

Mr. HANDLER. The case can be explained on other grounds and so can the Timken case, decided in the same term of the Court.

The matter was not fully argued and it is considered only briefly by the Court in about 1 or 2 sentences in the opinion and I believe when the matter is properly presented to the Court, the Court can see the dangers and the evils implicit in this doctrine, but should the Court adhere to its present view, it is my personal conviction that legislation would be called for.

Senator WILEY. Let us take that Seagram case for a minute from the statement of facts as you have given.

If at the time Seagram took over Calvert, they had issued stock, say, in Seagram Co., and the Calvert Co. had gone out of business, but the stock had become virtually a part of the parent organization instead of a separate organization, then that doctrine would not have come into play; is that right?

Senator WILEY. How long before was it that they took over the Calvert thing?

I am trying to get at the facts.

Mr. HANDLER. 1933.

Senator WILEY. When did this violation—

Mr. HANDLER. This litigation occurred in the late forties and early fifties.

Senator WILEY. Was there any question of some other illegal manipulation?

Mr. HANDLER. No. The case can be rested on the ground that the agreement between 1 seller and 1 buyer, controlling the buyer's maximum price, is in itself an illegal contract and restraint of trade, without getting into the question as to whether there was a conspiracy among the members of this corporate family.

Senator WILEY. Did the Seagram people own a controlling stock of the Calvert—

Mr. HANDLER. One hundred percent. The case does not deal with the legality of Seagram's acquisition of the Calvert stock.

Senator WILEY. I understand.

Mr. HANDLER. That was not an issue in the case, and if it was thought that ownership was unlawful, there is a remedy under the antitrust laws, separate and apart from the type of proceeding that was involved in the case.

Mr. BURNS. Will you continue, Professor Handler?

Mr. HANDLER. I wanted, if the committee please, to say a word about that part of the report which deals with the subject of mergers.

The only guide which Congress gave the courts under the Sherman Act in uprooting and curbing the concentration of economic power were the twin concepts of monopoly and restraint of trade.

It gave no indication of its own views as to the point at which the purchase of a competing company becomes an unreasonable restraint of trade or a monopolization or an attempt to monopolize.

It is, therefore, no wonder that the courts floundered, that there were wide fluctuations in the views of the judges, and that at one period the court had forbidden acquisitions resulting in control of 33½ percent

or less of an industry, while in others it has upheld mergers controlling as much as 64 percent of the field.

In amending section 7, the Congress adopted as the new yardstick by which mergers and consolidations are to be measured the test whether competition may be substantially lessened in any defined market.

At what point can it be said that a corporate fusion crosses the dividing line between those mergers which substantially lessen and those which do not substantially lessen competition?

The Congress was clear that it intended the new standard to be stricter than that under the Sherman Act, but how much stricter it did not reveal.

It made clear that it did not intend to forbid all purchases of competing businesses; manifestly, such a rigid rule would fall of its own weight.

Now, some members of our committee felt that in applying this new statutory standard, emphasis should be put on the quantity of competition which disappears from the market as the result of the merger.

They relied upon their reading of a decision of the Supreme Court in the Standard Oil of California case, having to do with the application of section 3 of the Clayton Act to exclusive dealing arrangements.

The Supreme Court in that case indicated that exclusive dealing arrangements covering outlets handling 2 percent of the batteries and tires sold in that market and 6 percent of the gasoline would involve a substantial foreclosure of competitors from the market.

If that doctrine were to be applied in the merger field, it would virtually preclude all mergers; at least, that was the view of another school of thought in the committee, and it represents my view.

The majority of our committee does not believe that it was the congressional intent to preclude all mergers or mergers involving so small a disappearance of competition.

It maintains that the test is not whether the industry remains competitive after the acquisition, which is the test under the Sherman Act, but whether the merger so alters the structure of the industry as to impair the health and vigor of the remaining competition.

It eschews any rigid per se rule of invalidity. It urges that a value judgment be made on the basis of all the facts.

It enumerates the various factors that may be taken into account, but rather amusingly qualifies its analysis by stating, and I quote from page 125:

We do not, of course, imply that all, several, or any one of these guides may be significant or even relevant in a given case.

At this stage of our knowledge we can deal only with metaphors. It is clear that Congress intended to interdict mergers falling short of monopoly power. It did not intend to prevent all mergers.

Our committee has striven, and perhaps unsuccessfully, to enlighten the administrative officials, the courts, the bar, and business generally as to what facts must be considered in determining whether or not a merger is permissible.

Perhaps this committee—and that would be one of my recommendations to it—can clarify what it intends section 7 to forbid.

All that we have been able to do has been to speculate as to what your intentions are and how far you want this statute to be applied.

I find, Mr. Senator, that my time is running short, and I know I have other witnesses following me, so with your permission, I will eliminate many points that I wanted to make in dealing with this report, and come to my recommendations as to what this committee may properly do in the conduct of its investigations, because I understand from your counsel that my advice was sought in that regard. It would be presumptuous for me to make any suggestions unless invited to present them to the committee. With your permission therefore, I shall cover those very briefly.

Senator Wiley. Let me ask, in that California case you talk about, 6 percent and 2 percent, yet they held that it violated the antitrust laws—

Mr. HANDLER. Section 3 of the Clayton Act.

Senator WILEY. What?

Mr. HANDLER. Section 3 of the Clayton Act.

Senator WILEY. Weren't there some other facts in the case that had a tremendous bearing?

Mr. HANDLER. I think that if you take all the facts in the record, you can understand the case and reduce the area of one's quarrel with the decision. If you take the opinion of Judge Yankewich in the trial court, and the opinion of the Supreme Court, there is a great deal to quarrel with.

Senator WILEY. That is a lawyer's right, I presume.

Mr. HANDLER. That is what we are paid for, Mr. Senator.

Senator WILEY. Yes.

Mr. HANDLER. Standard of California dealt only with the exclusive dealing arrangements made by one company. The fact is that many other companies in that market had like arrangements.

The result is that anyone entering this field found all outlets tied up, and the only way he could compete with the established companies would be to open up his own outlets, which would involve an investment which might preclude the rise of new competition.

If you consider those facts and the economic impact of the arrangements under scrutiny by the court, you can justify the result, but the rationale of the case is much broader. The trial court enunciated a doctrine of quantitative substantiality, that is, if the volume of business restricted is substantial, then section 3 of the Clayton Act is transgressed. The Supreme Court uses the metaphor of a substantial foreclosure of competitors from any given market. And the Court seemed to feel on the basis of the percentages I gave, without considering the other facts explicitly, that there was such a substantial foreclosure.

I do not object, and the committee did not object, to this theory of substantial foreclosure if it is read to mean a substantial denial of access to one's market as a result of these restrictive arrangements.

But we feel that if a large company in the appliance field, for example, appoints an exclusive wholesaler, and there are dozens and dozens of wholesalers in the field all available to competitors, there is no reason why that arrangement should be frowned upon, no matter how substantial the business going through this one outlet may be.

The test is whether competitors of the seller can obtain access to the market by utilizing unrestricted outlets.

Senator WILEY. All right. Carry on.

Mr. HANDLER. I would, with deference, suggest to the committee the following agenda:

First, I urge respectfully that you give earnest consideration to the committee's recommendations for legislative changes. I have not commented upon many of them. Judge Barnes has commented only upon several, and all of them, I am sure, this committee will consider carefully.

They are matters upon which reasonable men can and have differed. We have majority and minority views in respect of them, but no view of anyone in respect of these changes was suppressed in the slightest, and the views are all present in this report for the benefit of the committee.

Second, I believe this committee should review each of the topics which have been carefully studied by our committee to determine whether our conclusions are sound or unsound insofar as we do not recommend legislation.

You may feel that legislation is indicated in areas where we think that it is not. Here you will find an extraordinary unanimity on the part of the committee.

Dissents are always dramatic. Conflict and controversy are always dramatic, and interest in personalities tends to dim the accomplishments of a large and serious group of people who devoted a great deal of time to a careful study of these problems and who, surprisingly, achieved an enormous measure of unanimity.

However, we have no pride, and I speak for myself, but I think I can speak for the members of the committee—I do not believe any member of the committee has any pride of authorship, and if we have taken a position that is wrong, we want our positions to be reviewed by this committee and by the correlative committees of the House, and wherever we have made mistakes, we would be happy to see those mistakes rectified by this committee.

Senator WILEY. Have you seen copies of any suggested bills on the subject?

Mr. HANDLER. Well, there are bills that have been pending before the Congress in regard to all the legislative changes. Of course, there are no bills where no legislation is recommended; and I am sure that the members of our committee and the Department of Justice would be very happy to assist the committee in formulating legislation dealing with these specific recommendations.

Now, third, I think this committee should take a good look at current administration and enforcement of the antitrust laws, with emphasis on the committee's recommendations particularly for a civil investigative demand, for a change in mandatory treble damages to discretionary, for the adoption of a uniform statute of limitations applicable to civil antitrust actions (we have no statute of limitations today), and for the enlargement of the criminal penalty.

I would urge upon the committee, fourth, that it make a most detailed examination of the merger problem.

First, it ought to deal with the facts concerning the current concentration of economic power; second, it ought to look into the administration of section 7, as amended. This statute was enacted almost 5 years ago. The time has come for Congress to take a look

to see what is happening with the statute it put on the books at that time.

If there is any change of law indicated, any clarification necessary, any better indication of congressional purpose possible, any better formulation of the guideposts by which the executive branch of the Government is to be guided in its enforcement, and the courts in their interpretation of the statute, those are all things this committee should look into.

Fifth, I think the committee should look into the problem of bigness and existing concentration of power.

Our Attorney General's committee makes no recommendation for the alteration in the structure of American industry when it is not monopolistic. It made no study of the facts concerning bigness.

It made no economic investigation as to whether bigness is good or bad, whether it is consonant with the effective workings of a free competitive system, whether it jeopardizes small business, whether it is more or less efficient than small business, whether its treatment of labor and consumers is superior or worse than that of smaller units, whether bigness is necessary in the interests of defense, whether bigness is desirable or undesirable in the atomic age.

As to existing concentration of power, the antitrust laws only apply where there is restraint of trade or monopoly. Section 7, as amended, will hit new concentrations.

What the national policy should be in respect of bigness in view of the debate that has raged on this subject for many, many years is more appropriate for a legislative committee having fact-finding powers to consider than a committee set up in the executive branch of the Government with limited staff, limited funds, and no fact-finding power.

I think that judgments on the subject of bigness ought to be reserved until the facts are carefully assembled and analyzed.

I then urge upon the committee that it review the various exemptions from the antitrust laws which now exist as the result of congressional enactment, and I urge that the committee consider what were the conditions leading to such exemptions.

Do those conditions now obtain? What has been the experience when the exemption has served its purpose? Is the public interest adequately protected? Where a method of regulation has been adopted or where methods have been adopted in place of competition, has the system of regulation worked satisfactorily? Can any of these areas be safely returned to the free-enterprise system? Are there any other segments of the economy for which regulation should be substituted for competition?

This field bristles with perplexing inquiries and calls for a re-examination and reappraisal of our national policy, all of this necessarily dependent upon the facts.

A great contribution could be made if this committee would take a fresh look at our entire system of handling the regulated and exempt industries 1 by 1, in light of their special facts and needs.

I also urge upon the committee that it consider the problem of restrictive practices in other parts of the world in which American business operates.

Professor Rostow has a statement in our report at page 98 in which he criticizes our committee, and I share his criticism, for its failure

to strongly recommend the entry by this Nation into a treaty with foreign powers having to do with the elimination of restrictive practices in various parts of the world. I strongly endorse and am happy to associate myself with that view of Professor Rostow.

I also urge that this committee look into the facts and the law concerning trade associations, something that our committee was unable to do, so far as the facts were concerned, although we considered the law. I think this is a fertile field for constructive study.

Finally I urge upon the committee an educational study of the Robinson-Patman Act and its administration. The chapter in this report on the Robinson-Patman Act is difficult to read, it is very concise and compressed, and is, in my judgment, the best analysis that has been made of that difficult and thorny statute.

This committee can profitably spend a great deal of its time in reviewing the fundamental philosophy of that statute which has now been on the books for almost 20 years, the way in which it has been administered by the Federal Trade Commission, and the construction that it has received in the courts.

I regret that I have taken so much of the committee's time. There were many other matters that I would like to have discussed had there been more time. Thank you very much for your attention.

Mr. BURNS. I would just like to ask one question with respect to that last statement you made about the Robinson-Patman Act.

One of the questions which this subcommittee has been asked to consider is the contention of some people that there is a conflict between the objectives of the Sherman Act and the Robinson-Patman Act. Would you care to give us your opinion with respect to that contention?

Mr. HANDLER. I believe that there is only a possible conflict if the Robinson-Patman Act is misconstrued. I think that if properly construed, it can be rationalized with our prevailing antitrust philosophy.

The Supreme Court has indicated that the philosophy underlying the Sherman Act should be the controlling philosophy in this field. I believe that what the committee has done in this chapter puts the Robinson-Patman Act in its proper focus, and makes its philosophy entirely consistent with that of the Sherman Act.

Mr. BURNS. Thank you very much, Professor Handler.

Senator WILEY. Who is your next witness? Prof. Eugene Rostow? Have a chair, Professor. Give us your background, please.

STATEMENT OF EUGENE V. ROSTOW, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. Rostow. My name is Eugene V. Rostow. I am a professor of law and a member of the graduate faculty of economics at Yale University.

After graduating from law school, I practiced for a while in New York with the firm of Cravath, De Gersdorff, Swaine & Wood, and then I returned to the Yale Law School to teach, where I have been ever since, except for intervals of Government service.

Mr. BURNS. Will you state whether, in your opinion, the conclusions reached by the recommendations in this report strengthen or weaken the antitrust laws?

Mr. Rostow. I think it is a very good and very creditable report, and I think that the way to answer the question is to divide it up into topics.

I feel that the recommendations of the committee with regard to the Sherman Act certainly strengthen the antitrust law in the sense, as Professor Handler has said, that the committee recommends and supports the very important changes which the Congress and the courts have accomplished in the field of Sherman Act interpretation in the last 15 years.

So far as the Clayton Act is concerned, I think, in part, the report strengthens and, in part, may conceivably weaken the possibility of effective antitrust enforcement.

So far as the recommendations with regard to the Robinson-Patman Act are concerned, which is part of the Clayton Act, of course, I feel that the recommendations of the report are more debatable.

While I agree with Professor Handler that the analysis in the report is a very useful one and a very comprehensive one, and I certainly agree that the rule of construction recently announced by the Supreme Court, that all the antitrust laws are to be interpreted and construed in the light of the dominant policy of the Sherman Act, is a very sound one and one which may permit all apparent inconsistencies to be reconciled, in the end certain of the Robinson-Patman Act recommendations, I think may weaken the possibilities of effective enforcement.

So far as administration and enforcement are concerned, I think that some of the recommendations are very helpful, and others would probably weaken the treble damage action as a vehicle for effective policing of the antitrust laws.

I have noted my views as to the various items in detail as we go through, but I think, in general, that the report is a serious and commendable and useful document, and definitely a contribution to understanding and progress in this field.

Mr. BURNS. What weight do you feel the courts or Congress should give to the recommendations in this report?

Mr. ROSTOW. Well, I suppose the weight which they earn. I think the approach of this committee is a very helpful one. If we look back at reports of this kind by committees or commissions set up by the executive branch, those that have been most successful in accomplishing real changes in the law, like the report of the Attorney General's Committee on Administrative Procedure some 15 years ago, are those which have been followed by serious studies in congressional committees, sifting and weighing, revising and evaluating what has been done by the executive branch's committee, and followed up through that process of deliberation and review by legislative recommendations.

I should feel very happy if the fate of this report could in any way be compared 10 years from now to the fate of the Attorney General's Committee on Administrative Procedure, which helped to contribute to the development of the Administrative Procedure Act.

Mr. BURNS. Are there any areas of antitrust law which the report did not cover but which you believe that this subcommittee should cover?

Mr. ROSTOV. Yes; there were a few. To my way of thinking, the most important topic which we did not consider in the report is the

possibility of a treaty, an international treaty, which would help to protect the American economy against foreign cartels.

This issue was passed as outside the terms of reference of our committee. I did not agree with that decision. As you gathered, Professor Handler and others did not agree either.

We feel—I feel at any rate—it is useless to talk about liberalizing world trade and reducing tariff and other barriers to trade if cartels are to be left free to fix prices and allocate markets.

My colleague, Wendell Berge, will testify to greater length on this subject, but I just wanted to note now my feeling that this is an extremely important subject for the committee to take up, especially since the way in which the movement for a treaty against cartels has developed in the last 10 years or so, makes this year a crucial time for the American Government to determine its position on this matter.

There has been a very hopeful and promising development of foreign law on the subject of cartels and monopolies. Britain passed a statute in 1948; other countries have considered statutes, and I feel that that development would be arrested and reversed unless it is encouraged and fortified by international cooperation through treaty procedures against world cartels.

Secondly, our report consists, by and large, of an analysis and restatement of the law, the doctrines of the law, and we do not go at all into the question of the adequacy of enforcement procedures or the extent to which existing antitrust laws protect the American economy and protect the American people in assuring them an effectively competitive economy.

I felt that we should have gone somewhat further, especially in commenting on the adequacy of the enforcement of the merger statute, section 7, of the Clayton Act, and on the process of selecting cases, as well as our treatment of some of the remedy problems.

I made it clear in my dissenting statement that there was danger of ambiguity in our comments on divorcement and divestiture. I do not think there is anything peculiar or very ominous about busting trusts, and I think we are liable to be misconstrued in what we say there in emphasizing the gravity and seriousness of remedies which would change the structure of industries by forcing a change in ownership patterns.

I think that the cases which we approve, and the doctrines which we do approve in this report, provide an adequate basis for the Antitrust Division, and the courts, in dealing with industries where the real problem of monopoly or restraint of competition is inherent in industry structure, but there is some language, perhaps, in the chapter on administration and enforcement which is liable to be misinterpreted in this sense.

Finally, I agree with what Mr. Handler said a few moments ago on the subject of the regulated industries. We could not go very far into that question.

I think our chapter on the regulated industries raises a great many very important questions which should be faced and should be fought through; that is, the reconciliation of our antitrust philosophy with the way in which regulated industries are controlled, the transportation industries, the communications industries, and so on.

We should consider the extent to which considerations of competition can or should be made part of regulatory standards in those fields.

We raised those issues, and I think raised them very clearly, but clearly in terms of our own report, they are problems on which further work is required.

Mr. BURNS. The report has a chapter on economic indicia. Can you tell us what the relationship of that chapter is to the rest of the report?

Mr. ROSTOW. Well, this report is, in a curious way, the first attempt to synthesize all the antitrust laws, and consider them together. It is a fact that there is no really good book in this field, so that the report, by providing the opportunity to survey the whole field, permits us to view the relationship of the various antitrust statutes to each other.

Now, the analysis that we present in this report is that basically the antitrust laws, all of them, are concerned with prohibiting and preventing substantial restraints of competition in particular markets.

We are all agreed that the antitrust laws do not distinguish between good and bad trusts; that they do not permit the courts to consider whether a particular monopoly or a particular combination in restraint of trade has been well managed or badly managed, has a high-price policy or a low-price policy; that the criteria that have developed and that have been approved by the courts, as we put them together here, are concerned with the issue of competition or its absence, not with whether monopoly power has been well or badly used; so that we say that section 2 of the Sherman Act dealing with monopolization requires a very high degree of control over the market; that section 1 of the Sherman Act dealing with substantial restraints of trade, which may be less significant than complete monopolizations, are prohibited by that law; that the Clayton Act deals with restraints, trade practices, which may, or probably will, substantially lessen competition: all these statutory criteria are related back to an analysis of competition in a market.

Now, competition in a market, the presence or absence of competition in a market, is an economic question, and we thought we would present in this chapter an economic analysis of markets and of the various criteria for judging the presence or absence of competition in markets, so as to be able to compare legal and economic criteria for determining these antitrust questions, and for seeing what contribution economic analysis could make to the law in resolving these sometimes complicated and thorny issues.

Now, it was interesting to discover that it was quite possible for the economists in this group, who were as diverse in their views as the lawyers were, to agree substantially on the material which is presented in chapter 7 of the report.

The wife of one of the economists told me at the Ann Arbor meeting that she never expected to see her husband stand and publicly agree with another economist who was present. They spend most of their professional life among economists disagreeing; but when they were confronted by the lawyers, in their ignorance they found themselves shoulder to shoulder, and I think it was an interesting experience for a good many of the brethren to discover that they agreed a good deal more on fundamentals than they disagreed.

Senator WILEY. What did they agree on? Let us get it in a nutshell.

Mr. ROSTOW. They agreed, in the first place, on how to define markets. They agreed that the way the courts have built up the definition of the relevant market for antitrust purposes over the years is, by and large, a very sound one; that is, you will remember that—well, take an old case like the Indiana Farmer's Guide case where they were dealing with farm journals.

The defendant said, "We should consider the national market for farm journals."

The Supreme Court said, "Oh, no, we are going to consider only the restraints in the market where these defendants function, eight States in the Middle West," and the economists agreed that the criteria for defining the market, which is where all antitrust analysis starts, as those criteria have emerged in antitrust cases, is by and large a sound one; that is, that the market has to be defined fundamentally in terms of the markets where the defendants actually function.

Senator WILEY. In other words, they agreed with the Court?

Mr. ROSTOW. They agreed with the Court.

Senator WILEY. Is that unusual?

Mr. ROSTOW. Very.

Senator WILEY. Proceed.

Mr. ROSTOW. Secondly, the economists agreed from the economic point of view that the significant issue is the existence of monopoly power and not the way in which it has been used.

I regard one of the most important contributions of this whole report as the elimination of the argument that a good trust should be tolerated under the antitrust laws.

The economists agreed with the lawyers that the significant thing is the presence of monopoly power, effective monopoly power, and not the way in which it has been used or abused.

Senator WILEY. In other words, no trusts are good?

Mr. ROSTOW. That is right.

Senator WILEY. Good for the economic health of the country or political health?

Mr. ROSTOW. Exactly, both.

The CHAIRMAN. In other words, is that not what is causing trouble in the Orient right now?

Mr. ROSTOW. What is that?

The CHAIRMAN. Is that not what is causing most of our trouble in the Orient right now?

Mr. ROSTOW. In the Orient? I would not pretend to know that.

The CHAIRMAN. If we study the operation of the East India Co., the Dutch East India Co., the Portuguese East India Co. in the Orient. Have you ever studied that?

Mr. ROSTOW. I never have, sir.

The CHAIRMAN. Those are complete Government-sponsored monopolies.

Mr. ROSTOW. They certainly led to a lot of trouble.

The CHAIRMAN. I think if you study those operations, you will find that they are the cause of all the unrest in that area.

While a monopoly might be very well in Wisconsin on cheese and milk and dairy products, in Minnesota and other States, it might be

very disadvantageous to West Virginia, Virginia, Kentucky, and other places; is that not right? Is that not the final ultimate result?

Mr. ROSTOW. Absolutely; and I think that thought runs through this entire report, that either in legislation or in judicial opinions we cannot and should not attempt to decide when a monopoly is good and when it is not good.

The CHAIRMAN. Can you not agree on this one fact, that when a monopoly affects the whole economy, it is definitely bad?

Mr. ROSTOW. I certainly do, sir.

The CHAIRMAN. In other words, when it holds the company back or it prevents it from going forward too much, it is definitely bad!

Mr. ROSTOW. It is definitely bad.

The CHAIRMAN. Just the fact that a small section has a monopoly and the other sections do not object to a monopoly does not mean a monopoly is not bad.

Mr. ROSTOW. Well, it depends on how small the section is.

The CHAIRMAN. Let us look at the question of dairy products. Let us take a small middle western section. They build up there a monopoly on milk products, 3, 4, 5, 6 States.

Senator WILEY. You had better talk about barriers, not monopolies.

The CHAIRMAN. No; I am talking about the monopoly question on price fixing, things of that kind.

Am I to understand you to say that it is not a bad monopoly?

Mr. ROSTOW. No, sir. I would say that any monopoly arrangements affecting the economy of 5 or 6 States certainly affects interstate commerce and comes within the prohibition of the law, and should.

The CHAIRMAN. In other words, if the ultimate result is that it affects the whole economy, it is a bad monopoly.

Mr. ROSTOW. That is right.

The CHAIRMAN. On the other hand, if the ultimate result only affects part of the economy, it is not a bad monopoly. Is that right?

Mr. ROSTOW. Well, I will fall back on de minimis. If it is small enough so that it is not worth worrying about, I am agreed it should not be worried about. But I think if you have a universal law that has to apply throughout the area of interstate commerce, you cannot make exceptions of that kind.

The CHAIRMAN. The trouble is, we must realize that what looks like a local monopoly eventually develops into total monopoly from outside.

Mr. ROSTOW. Let me put it this way: that the protection of the antitrust laws should be available to the smallest merchant who wants to get into a trade so long as it affects interstate commerce, as well as to the big ones, and if you take cases like the Lorain Journal case that was decided a few years ago, where a newspaper fellow was trying to kill a radio station, that hurt the proprietor of the radio station just as badly as if we were dealing with a big national scandal, and I think the antitrust laws should deal with the local situations so long as they affect interstate commerce, as well as the big ones.

The CHAIRMAN. Suppose within a State a group of retailers get together and decide to put arbitrary markups in existence. What do you think about that?

Mr. ROSTOW. I think that is a violation of the antitrust laws so long as interstate commerce is affected.

The CHAIRMAN. That is the question; interstate commerce is not affected. Suppose it is not affected; it is purely within that State.

Mr. ROSTOW. Well, the court has gone pretty far in determining the scope of interstate commerce for the purposes of the antitrust laws; the flow doctrine extends all the way back to the sugar-beet growers in a few counties in California, and to the plasterers in Chicago, and this committee approves of that interpretation of the scope of the interstate commerce doctrine, and I do, too.

If you can find a local situation where interstate commerce is not involved within the reach of those cases, then you have to fall back on the common law, that of State statutes which exist everywhere, but are not very well enforced.

The CHAIRMAN. May I say this: In a number of States you will find associations, shall we say, of retail gasoline dealers, arbitrarily marking the prices up probably double the markup. That cannot be dealt with as long as it stays within the State.

Mr. ROSTOW. Oh, I think it could. One of our Federal judges in Connecticut slapped down such a group a couple of years ago. They came into court suing the Sun Co., I think it was, claiming that the Sun Co. was starting price wars and so on, and Judge Smith ruled that the plaintiffs were violating the antitrust laws.

The CHAIRMAN. But how could the Antitrust Division come into court themselves?

Mr. BARNES. If I may interrupt, Senator, because usually that gasoline comes from across the State line.

The CHAIRMAN. One of the States I happen to know produces about three times as much gasoline as is sold, but it is not sold within the State. That gasoline does come across State lines, yes. In the meantime, other gasoline is substituted for it and shipped elsewhere for modification purposes.

Mr. BARNES. Then both shipments would be within the realm of antitrust laws.

The CHAIRMAN. Fine; thank you.

Please go ahead.

Mr. ROSTOW. I have forgotten whether I was up to the third or fourth point, but it does not make very much difference.

Another issue in defining the economic approach to the problem of analyzing competition and monopoly within markets on which our committee and its economists were fully agreed is in defining what we mean by monopoly power.

Now, monopoly power here is defined very carefully as power over price and power over the entry of competitors, and the possession by a single firm or a group acting in concert of a significant degree of the power to determine and fix their own price, the power to fix a price policy or to restrain the entry of potential competitors.

So that if we refer back to Judge Barnes' testimony this morning when he said of a certain industry, and I have no opinion as to whether his comment is factually correct or not, when he said of that industry that they compete in every way except in price, then in terms of the analysis in this report, there is in that industry an absence of effective competition.

In attempting to be more particular about what circumstances give rise to the possession of effective power over price, the effective power

of a monopolist over price, the committee lists 10, I think it is 10, factual elements in a market situation which should be analyzed, of which the first three are treated as the most general, and the most universal, and the others are factors which should be considered where they arise.

The first of those factors is the number of effective competitive sellers, and this committee report in very careful and very carefully considered language highlights the importance for antitrust enforcement of the problem, which is general in our economy, of industries which are dominated by a few sellers, industries of the big few, and it points out that the presence of a small number of sellers in any industry comprising a very considerable fraction of the capacity of that industry is always a problem which requires careful antitrust study.

Now, then, we go on to list other factors which, in market situations, require consideration from this point of view, opportunity for entry, independence of rivals, predatory practices, and so on. But I think this analysis should contribute to the antitrust laws a way of analyzing market data, a way of organizing antitrust data, which should be very helpful in presenting to the courts the relevant issues, and eliminating the irrelevant issues.

I think that covers what I had to say about this.

The CHAIRMAN. Any questions?

Senator WILEY. He was talking about the fact of foreign cartels. I wanted on this subject for him to give us a brief factual statement as to just how that would affect this whole picture.

Mr. ROSTOW. Well, of course, it is a question that has been frequently studied by one of Senator Kilgore's committees in the past, among others, and we have had the experience with a great many commodities. Quinine is one; diamonds is another.

The CHAIRMAN. Electronics.

Mr. ROSTOW. Electronics. There are a good many industries.

The CHAIRMAN. Rubber, chemicals.

Mr. ROSTOW. Chemicals and, of course, the famous problem of the prewar relations between the oil industry and the German chemical industry. It gave a very dramatic illustration of how international private arrangements can even restrict the development of American technology or technology within the United States.

The CHAIRMAN. Well, the big point is that in Europe, the government aided the monopolies.

Mr. ROSTOW. That is true.

The CHAIRMAN. By treaty, because that is how it arises. The word "cartel" later meant an offering of peace. It was always international. But in Europe the Governments of England, Germany, France, Belgium, Holland, due to the Crown's interest and the trade, became a party to these international agreements. In the United States of America, they did not.

I do not know whether you know it or not, but in Luxembourg there is a record that they refuse to disclose now which shows the American steelmakers refusing to sign an agreement because of the Sherman Act, although the Germans, the English, the French, the Government of Luxembourg, and the Belgians signed an agreement to resume operations the same as prewar. This was in 1943. So the cartel is a monopoly with Government cooperation.

With us a monopoly is a monopoly. It is not a cartel, because the Government refuses to cooperate; is that not correct?

Mr. ROSTOW. That is right.

Of course, the word has been more generally used, and I suppose I was using it in a looser sense. There are all kinds of private restrictive arrangements, including those which have Government sanction or may even be compelled by Government decree.

But I think if we ever are going to get effective action in this field to protect the American economy against exploitation by international cartels, it will require international action to keep the development of foreign law going in the direction which has slowly been undertaken since the war.

Senator WILEY. You are talking now about treaties?

Mr. ROSTOW. Yes. It will take the backing of an international treaty to keep encouraging the development of foreign domestic law in a way which can ultimately protect us against this kind of thing.

The CHAIRMAN. Did you check the Rye Conference?

Mr. ROSTOW. The Rye Conference?

The CHAIRMAN. That was held in Rye, N. Y. Lord McGowan, of the Bureau of Chemicals, and others from England, representatives of American interests, were there. Didn't you check that? If you did not, why didn't you?

Mr. ROSTOW. I do not know about it. When did this take place?

The CHAIRMAN. It took place in 1945 late or 1946 early; but they are working in South America now.

Senator WILEY. What about when folks get the Government to place restrictive orders on shipments within our own country; are they subject to the antitrust laws?

Mr. ROSTOW. I suppose not, unless they can be—

Senator WILEY. Well, let us take your local community. I cannot even ship milk from Wisconsin down here because you have got some order here, and you have got other orders up in my State, a certain part of the milk cannot be shipped into Chicago. They have got a Chicago order. In other words, it is the pressure of interests to get the Government to create the order that fixes the price; do not forget that.

Mr. ROSTOW. Absolutely, sir.

Senator WILEY. All right.

Have you gone into that phase of it?

Mr. ROSTOW. Well, I do not think in this committee report we took up those local burdens on interstate commerce.

Of course, the Supreme Court has knocked out a good many of them, including, I think, some of the Chicago orders as burdens on interstate commerce.

I have always been sympathetic to the view that both the States and the municipal governments can violate the Sherman Act, but that has not had very much development in the courts.

Senator WILEY. I think it is very important right now, particularly because you have got a vast segment of our economy that is getting economically sick.

The CHAIRMAN. You think so? You had better come down to the coalfields to really see a sick industry.

Senator WILEY. I realize that. There is not so much here a question of Government orders, but I just wanted to get your reaction, because what is grist for one ought to be grist for the other.

Mr. Rostow. I agree with you.

Senator WILEY. It is a situation to which I have given considerable study. That is why I asked you about this cartel business because we all know that cartels are mostly the creature of governments; they have grown out of government sanctions, and the result has been that some folks have been preferred way above others, and they have by virtue of their ability, entered into unjust competition.

Mr. Rostow. We do in this report go into one phase of that problem, and that is the tariff question, and we do recommend that in connection with tariffs and changes in the tariffs, the antitrust aspects of tariff changes be considered because, after all, a great many situations in domestic monopoly depend upon tariff protection.

Senator WILEY. You are talking about the peril point now?

Mr. Rostow. Well, we did not mention those sacred words, no, sir. But we did recommend, as I recall it, that the Department of Justice be given a right to be heard on tariff changes where antitrust issues could arise, where the result of a tariff was to create protective local markets.

Senator WILEY. Well, the whole basis of the antitrust laws is based entirely upon equity.

Mr. Rostow. Yes.

Senator WILEY. And that there should be no preference as between citizens, and so forth; and if that is still the basis, all the legalistic terms to the contrary still cannot change the important facts that where there are instances of that which create injustice, the Government should have something to say about it.

Mr. Rostow. Yes, sir.

Senator WILEY. Whether it is done through legalistic methods or illegal methods, I do not care what, so long as the individual himself, or the groups damaged, that is where they are entitled to have the Government interfere for their protection. That is all, Mr. Chairman.

The CHAIRMAN. Anything further?

Mr. Rostow. No, sir.

The CHAIRMAN. That will be all. Thank you.

(The following material is placed into the record at Mr. Rostow's request:)

To : The members of the Attorney General's National Committee To Study the Antitrust Laws.

From : E. V. Rostow.

In order to complete the record with respect to the issue of what constitutes a dissent from our report, I am enclosing some material which supplements the letters recently circulated by the cochairman.

MARCH 25, 1955.

Judge STANLEY N. BARNES,
Prof. S. C. OPPENHEIM,

Cochairmen, Attorney General's National Committee To Study the Antitrust Laws, Department of Justice, Washington, D. C.

MY DEAR COCHAIRMEN : In response to Judge Barnes' letter to me of March 23, may I add to the telegram I sent the Attorney General the following observation:

(1) Your letter to me of December 30, 1953, contained the following paragraph, coming after a general exposition of your views on the desirability of anonymity in the report :

"However, we assure you that if a member, like yourself, feels that committee membership carries with it the right to identify his individual views by signing his name to a statement thereof, we do not ask you to waive such a right. We accordingly recognize that should you feel that principle and conscience require

you to identify your views, you have the right to do so, as would any other member of the committee who feels the same way."

(2) In the light of all the precedents I have ever known about the conduct and rules of procedure of public bodies of this type, I have always assumed that your letter of December 30, 1953, meant that members could dissent, if they wished, in their own names, and in statements for which they, and they alone, took full and final responsibility.

(3) To me, the right to dissent means the right to dissent—not with the permission of the majority, or in a mode and form prescribed by the majority, but an absolute right to state individual views in one's own language, whatever the consequences. I can never concede that anyone—and certainly not the very party with whom I am differing—has the power to determine the style, content, or form of my dissent. Your rule would give one lawyer the power to censor his opponent's brief. The right to dissent implies—indeed presumptively suggests—the right to be wrong. It clearly includes the constitutional and natural law right to make a damned fool of oneself. You may be altogether correct in suggesting that it would be more sensible to break up general dissents, and put them in various parts of the text. The point, and, so far as I am concerned, the only point at issue is that it is for the dissenter, not the cochairmen, to decide what goes into dissenting opinions, and where, and in what words.

I wrote a carefully limited concluding statement of partial dissent, seeking to point out that in two respects we had in my opinion failed to carry out the mandate given us by the President and the Attorney General. I thought, and think, that the right place for such a comment was at the end of the report, where the reader could judge the validity of my criticism of the scope of the report as a whole. One of my principal purposes in so organizing my concluding statement of partial dissent was to subordinate my more detailed criticisms of particular passages of the report, so as not to weaken the impact of the report itself.

In any event, right or wrong, I insist that only the dissenter can decide what to say in his own dissent. The procedure you have adopted, over my protest, and that of Professor Schwartz, seems to me arbitrary, and wrong in principle, and I repeat my protest.

(4) I also quoted several passages of the carefully considered report of the work group on legal and economic concepts. I understand that the reference to the source of these quotations has been deleted from the final report. Since the cochairman decided not to circulate my detailed comments on particular passages of the report, this step has the effect of making me seem the sole, and perhaps eccentric dissenter on certain points, rather than a representative of a substantial minority—or perhaps majority—view. I remain unpersuaded that the work group reports, as interim documents of the committee, can be considered in any sense as "secret" papers.

Since you have circulated your letter to me of March 23 to the committee I am following the same procedure, and enclosing also copies of my telegram of that date to the Attorney General, together with his reply of March 25.

With great regret that this issue has arisen to confuse our harmonious experience in a complicated exercise in cooperation, I remain.

Sincerely and cordially yours,

E. V. ROSTOW.

[Telegram]

Prof. EUGENE V. ROSTOW,
Yale University Law School, New Haven, Conn.:

MARCH 28, 1955.

Reurtel A. G.'s committee study of antitrust laws. Committee procedures are a matter for committee members and the cochairman. However, let me assure you that I have the fullest confidence that Judge Barnes and Professor Oppenheim have made all efforts to assure you full and fair chance for expression and dissent. This means in your own words and under your own name.

HERBERT BROWNELL, Jr.,
Attorney General, Washington, D. C.

[Telegram]

MARCH 23, 1955.

Hon. HERBERT BROWNEll,

*Attorney General of the United States,**Department of Justice, Washington, D. C.:*

I must vehemently protest recent attempts of Judge Barnes and Professor Oppenheim to interfere with the right of members of the Attorney General's Antitrust Committee to express dissent in their own language and form. I regard this policy as not only unprecedented in the procedure of public bodies, and unwise in itself, but a breach of faith so far as the committee is concerned. Much has been accomplished by the committee, both negatively and positively. That accomplishment will not be lost if criticisms of the report for failing to go farther are suppressed, weakened, diluted, or denied their full impact. On the contrary, such a policy risks the loss of what has been gained through petty and futile bickering.

EUGENE V. ROSTOW.

Mr. BURNS. Mr. Berge, will you give your background in the anti-trust field?

STATEMENT OF WENDELL BERGE, ATTORNEY, WASHINGTON, D. C.

Mr. BERGE. Mr. Chairman, I joined the Antitrust Division of the Department of Justice as a special assistant to the Attorney General in 1930.

For 10 years thereafter I remained on the staff, served in various capacities, at one time Chief of the Appellate Section, then Chief of the Trial Section. Assistant Attorney General Jackson appointed me to be his first assistant, and I stayed as first assistant to Thurman Arnold until December 1940, when I was appointed Assistant Attorney General to head the Criminal Division, and I transferred to that Division for 2½ years.

The CHAIRMAN. Wasn't that at the time when Arnold was Chief of the Antitrust Division?

Mr. BERGE. Yes.

The CHAIRMAN. And you were placed in the Criminal Division, so that the two of you cooperated; is that not right?

Mr. BERGE. That is right.

I was first assistant to Arnold from the time he came in March 1938, until December of 1940, when I was appointed to a position of the same rank, but to head the Criminal Division, and he and I did co-operate in the matter of war fraud prosecutions. He had the staff, but we were supposed to have the responsibility; but that is irrelevant to antitrust qualifications.

In August 1943, Attorney General Biddle put me in charge of the Antitrust Division. Assistant Attorney General Tom Clark, who had been appointed to succeed Arnold, and I exchanged posts, and I served as head of the Antitrust Division from August 1943 until May 1947, when I resigned and went into private practice here in Washington. I have been practicing here since.

Mr. BURNS. Were you a member of the Attorney General's National Committee To Study the Antitrust Laws?

Mr. BERGE. I was, sir; yes.

Mr. BURNS. What is your overall appraisal of the recommendations contained in that report?

Mr. BERGE. Why, in general, I feel that it is an excellent report and it should be of great help to Congress and to the bench and the bar and to the Department of Justice in its enforcing of the law.

Practically every major antitrust problem is discussed in the report, and I think it is the best analysis of antitrust which has ever been compiled.

It represents the composite opinion of 60 leading men in the field, men of experience in this field, drawn both from private practice and from the teaching profession.

True, there were differences of opinion which are noted in the report, and the minority views, I think, were always fairly stated.

But considering that the members of this committee were men of great independence of mind, independence of thought, I think there is on the whole a remarkable unanimity in the report, much more so than I anticipated when I first was appointed to the committee.

Mr. BURNS. What is your opinion as to the adequacy of the present antitrust laws to maintain competition?

Mr. BERGE. Well, I have never been one of those who thought that the basic acts, the Sherman Act and the Clayton Act, needed drastic revision. I shall later refer to some legislative changes which I think are needed. But basically I think that the Sherman and Clayton Acts are broad enough in their terms to cover most of the important restraints of trade and monopolistic activities, and they have been interpreted over the years by the courts in decisions which have now become firmly imbedded in our case law, and I would feel that any drastic overhauling to the extent of changing the fundamental structure of the acts would be more upsetting in its effects upon our antitrust jurisprudence than it would be helpful.

I think my views in this respect generally accord with those of Professor Handler, who has just testified.

I do not mean that I think the Sherman Act and the Clayton Act and the Federal Trade Commission Act have been overwhelmingly successful in accomplishing their purposes.

I think they have had wholesome effects on the American economy, and especially since 1938. Again, I agree with Professor Handler. I think that the matter of enforcement is the great problem, and I think that more enforcement is needed, more personnel, and this means more appropriations.

I think that the primary value of the report is that it presents a careful analysis of problems which have perplexed enforcement officials both in the Department of Justice and in the Federal Trade Commission, and also problems which have perplexed the private practitioners in advising their clients, and I hope that most of the major recommendations will be adopted and acted upon by the Department, and I think that the report has, as a whole, furnished and will furnish a very valuable guide to everyone concerned in the field.

The recommendations of 60 men, supposedly experts, should be of great help in guiding enforcement policy.

This thought comes to me: The question arose this morning, I think, in the discussion of Professor Schwartz' dissent regarding the fact that the committee had not made independent factual studies in the sense of holding hearings and delving into the present-day structure of industry and the percentages of control and the various things that were taken up, say, by the TNEC and the various Federal Trade Commission studies and those of other governmental groups and private groups, private foundations.

Now, to begin with, our charter of action, the authority that created the Commission, as stated by the Attorney General, specifically provided that we were not to be a factfinding group; and as I conceived my duty when I was appointed to the committee, it was this: That the Attorney General wanted the judgment of these men who were appointed to the committee based upon their experience as to what was needed legislatively and policywise to make the antitrust laws more effective.

What was there wrong in the laws; what was wrong in the enforcement policy, and what policies should be recommended and strengthened; and these men were not appointed to hold hearings, and they presumably were familiar with the factual materials that have been produced by such agencies as the Federal Trade Commission and the Small Business Administration, and the studies of private foundations and the hearings of the TNEC.

The Attorney General wanted our judgment. He did not want us to act as a body of inquiry, and that is the judgment that is embodied in this report; and that, I think, is the basic point of difference between Professor Schwartz and the majority.

Mr. BURNS. Did you actively work on the chapter with reference to foreign trade?

Mr. BERGE. I did, Mr. Burns. I guess it is appropriate now to mention that I did. At the time, the personnel were not generally announced for reasons stated by Judge Barnes this morning.

Mr. BURNS. Will you tell us what problems the committee considered in the area of foreign trade?

Mr. BERGE. One of the major problems which confronted the committee was whether international exigencies made necessary the amendment of the antitrust laws as they applied to foreign commerce or a different application of them. The involved world situation inevitably has tied up our foreign commerce activities with diplomatic and political relations and even with the cold war on communism. It was variously represented by sundry private interests that the antitrust laws were an impediment to necessary foreign-business arrangements and to our policy of promoting foreign investments.

There were even some extreme suggestions that in the present upset condition of the world, the antitrust laws should be suspended or repealed as to foreign commerce. It was said that our companies had to do business where competition was impractical or forbidden and also that the vast amount of investment required in some of our foreign operations made necessary the pooling of capital of competing American concerns, with resulting arrangements for division of activities that would violate the antitrust laws.

I approached the problem with a view that if humanly possible, we must avoid any drastic amendment that softened the application of the antitrust laws to foreign commerce. I had been head of the Antitrust Division during the war period when we were exposing and prosecuting international cartel activities, and I was fully cognizant of the damage that had been done to American business and to our potential for fighting an effective war by the restrictive agreements that had been entered into in the prewar period, and yet I recognized that in the present period there are overall international policies which must receive the cooperation of every department of Government, so that I think was the basic problem which we faced.

Mr. BURNS. To what extent did your committee consider the problems that other Government agencies had to cope with, and the desire or necessity for cooperating and considering these problems?

Mr. BERGE. Well, it seemed that one of our first problems was to determine from responsible Government agencies, Government departments, which were concerned with foreign affairs, whether in fact the antitrust laws were an impediment to any of our foreign operations. The committee's report at pages 92 to 97 shows the result of this canvass. We interviewed every department and agency concerned with foreign policy and foreign commerce. Not a one of them had any real complaint about the operation of the antitrust laws on our foreign commerce. Perhaps the most conservative statement was that of the Department of Defense which I shall quote:

We find in certain cases adherence to the principles contained in the antitrust laws has inconvenienced and perhaps, to some extent, delayed Defense Department procurement activities abroad, particularly in areas where cartel arrangements are the rule rather than the exception. However, it is believed that the long-term benefit to be derived from opposing combinations in restraint of trade, a policy now expressed in the Mutual Security Act, counterbalances any advantages which this Department might derive from a less stringent application of antitrust principles to our foreign procurement.

And in the pages that I cited, you will find quotations from the Department of State, the Department of Commerce, the Foreign Operations Administration and, I think, maybe 1 or 2 others. We have covered them all, and from our interviews with these Departments and agencies we were convinced that the complaints of companies engaged in foreign commerce that the antitrust laws were interfering with Government policies were groundless.

Mr. BURNS. Did the committee consider to what extent different factual situations exist in foreign countries that require a different treatment of the problem from domestic commerce?

Mr. BERGE. Yes. We had to recognize that the factual problems in foreign commerce were often different from those in domestic commerce. As one of the dissenting Justices in the Timken case put it:

The circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint. This suggests that there may be some factual considerations to be taken into account in applying the rule of reason in foreign commerce which would not be pertinent in domestic commerce. If a foreign government, for example, with whose companies we desire to trade, exacts certain conditions in order to do business there, American companies should not be prosecuted because they are complying with the laws of a foreign country.

The Attorney General in a sense applies the rule of reason in determining whether or not to institute antitrust actions except in cases where per se violations are involved. There he has no choice. Except for per se violations, the Attorney General has a certain discretion in the institution of civil actions. Where intricate matters of foreign commerce are concerned, the committee believes that the Attorney General should consult with the Departments of State and Defense as well as with the National Security Council before and after bringing a suit, but we understand that this is a procedure already being followed.

Some situations arise where a Government program requires definite cooperation between American companies operating abroad which might be questionable under the antitrust laws, but the Defense Pro-

duction Act already provides for this situation by authorizing the president to request members of an industry to enter into a voluntary agreement or program upon findings that it is vital to the national defense. In practice, the President has delegated his power to request voluntary agreements primarily to ODM. Under the act all requests for voluntary agreements are conditioned upon the approval of the Attorney General. The Attorney General considers such proposed agreements and, prior to approval, seeks to have the parties conform them to the antitrust laws, if there is any lack of conformity.

The Attorney General has recognized, of course, that some activities otherwise illegal, other than those involving cooperation between competitors in defense projects, have been necessary to accomplish the purposes of the act. The Department of Justice informed us that approximately 70 voluntary agreements or programs have been approved and in only 1 or 2 cases was approval withheld, and in those cases alternative plans were worked out which were consonant with the antitrust laws.

The Defense Production Act expires in June. The committee recommends that it be further extended and also that antitrust immunity should be in some instances extended beyond the act's termination.

However, such immunity should be conditioned upon express findings that the national defense requires its duration beyond the expiration of the Defense Production Act; and that before granting the immunity, consideration be given to the possibility of accomplishing the same defense objective by alternate methods involving less restraint on competition.

Thus we believe that all the necessary needs for cooperation among competitors can be accomplished without amendment of the antitrust laws. We also believe that the Attorney General by appropriate consultation with defense agencies, can avoid the creation of situations where there is a collision between antitrust policy and defense policy.

We think that this is much better than to undertake any amendment of the antitrust laws seeking to define exemptions which, if in the national interest today, might be definitely against it tomorrow, in this world of changing political and economic conditions.

It is essential that the antitrust laws be strictly enforced in foreign commerce situations where agreements have the effect of restraining American trade and commerce and where enforcement does not constitute any interference with defense policies or diplomatic and political relationships.

Mr. BURNS. Are there any other problems in this foreign trade area that you wish to comment on?

Mr. BERGE. Well, I wouldn't say there were problems. There are several subjects that are discussed in the foreign commerce chapter, which I think are quite important in that they analyze several delicate questions of law, disputed questions of law, some controversial cases like the Timken case, and give their interpretations, and some advice on policy guidance. I had several pages on it prepared, but when I thought it over, I don't think that I could do anything more than endorse what the committee has said. I might say that I am referring to the discussion of extraterritorial jurisdiction, foreign subsidiaries, and joint activities abroad.

Now those three headings, if the committee desires, I can discuss, but my discussion would amount to no more than a summary of what is in the report. The report does not recommend any congressional action on these questions or any change in legislative policy. It simply tries to make out of the various decisions, some of which seem to be slightly conflicting, what it believes the true law ought to be. So, if it is agreeable, I think in view of the lateness of the hour, it would be best to skip that particular discussion.

Mr. BURNS. Well, the report contains 11 legislative recommendations and approximately—

Mr. BERGE. Before we go into that, Mr. Burns, I did want to comment on Mr. Rostow's dissent related to the foreign commerce report. I agree with his dissent. It is contained in the report, 4 or 5 pages of it, page 98 and the pages that follow.

A majority of the committee held that considerations of international means for curbing undue restraints of trade and monopolistic practices lay beyond the scope of the report. They felt that the problem was primarily one of international relations rather than of national antitrust policy. They felt that the committee should not pass generally on the need for any international agreement in this area.

On this subject, I join with Professor Rostow's dissent. He took the position that the international cartel problem is a most important matter and that years of effort by committees, governments, foundations, and individual scholars have fully documented the significant role of cartels in our world economy.

Our Government has spent years of effort to curb cartels through unilateral action, but it has only been partially successful. During the years when I was head of the Antitrust Division, a number of such cases were instituted and tried and the Government usually won them, but it was difficult to obtain effective relief.

Now I also recall that during that period, 1943 through 1945, up until the end of the war, a great deal of time and money were spent by various committees here on the Hill, and particularly by the subcommittee of which Chairman Kilgore was the chairman, the subcommittee of the Military Affairs Committee, I believe, and I know I appeared before that committee 6 or 8 times, taking up the history of different cartels as they have been developed in antitrust cases. I should also mention there were interdepartmental committees, committees made up of representatives of State, Justice, and several others, that spent a great deal of time trying to forge a postwar cartel policy.

What was the purpose of it? We were not just telling stories for people to read. We were trying to alert the people to the dangers inherent in cartel activities and to try to work out some program for postwar action. Of course, there was a decartelization program in Germany and Japan, only partially successful, I suspect, but we have not given up completely the idea that there should be a real effort made to reach an international agreement among the Free World nations which defines and outlaws certain types of restrictive agreements. Professor Rostow dissents to the present program, and he says this is a crucial year and the firm support of this Government for an international program is necessary.

There is much public sentiment in many foreign countries today to alter their previous cartel policies. But in my opinion, it will take

the joint action of many countries to effectively eliminate cartel practices. Professor Rostow has summarized the present proposal very well: enforcement is left to each government according to its own system of law. Since the standard of the draft articles of this agreement is far less severe than the Sherman Act, representing an agreed compromise between American and European views on these matters, the draft articles should require no change in our law nor could they alter in any way the standard of our courts.

Mr. ROSTOW. Mr. Chairman, I would like to add my support to the report. Mr. Burns has asked me to say a few words about the report. Mr. Burns feels, and I agree with him, that our Government should give its full support to this United Nations action; as he says, a policy of inaction on the part of our Government will be in effect a policy of positive action in killing off much that has been slowly and laboriously gained in many years of effort.

Mr. BURNS. Now the report made both legislative recommendations and recommendations to enforcement agencies and the court. In your opinion, if those recommendations were adopted, will they weaken or strengthen antitrust enforcement?

Mr. BERGE. I do not agree with those critics who contend that the report weakens antitrust enforcement. Indeed, I think that the general tenor of the report will strengthen it.

The report vigorously reasserts faith in antitrust fundamentals. It tries to settle any doubts that might exist as to the basic soundness of the antitrust laws, and Professor Handler well brought that out; that there was no one on the committee whose basic approach was hostile to the antitrust laws. It was all favorable and any differences of opinion related to means and methods.

Mr. BURNS. The committee made only a few legislative recommendations, but many recommendations to the enforcement agencies and to the courts. How is it expected that these latter recommendations will be adopted?

Mr. BERGE. Well, of course, we hope that so far as the policy recommendations are concerned, their merit is such that the Attorney General will want to adopt them. But this committee started with the purpose of studying the many perplexing problems which had faced enforcement officials, lawyers who represented business, and the courts, to see to what extent these problems could be solved. The committee limited the actual legislative recommendations to specific problems which could not in its judgment be solved in any other way. In other words, we frankly sought to get by with a minimum of legislation because we realized that tinkering with the Sherman Act is fraught with dangers and we felt we should not recommend legislation unless we felt it was the only solution.

With respect to the policy recommendations, we hoped that the enforcement agencies and courts would accept our recommendations as coming from a group which represented a fair cross-section of the antitrust profession, and that specific legislation to carry out these recommendations would be unnecessary.

However, I personally consider that many of these recommendations are of such importance to the enforcement of the antitrust laws that if the enforcement agencies and courts do not adopt them, it might well be advisable for Congress to consider whether some of them should not be enacted into law even though the committee has not recommended it.

Mr. BURNS. Would you care to comment on some of the legislative recommendations which the committee did make?

Mr. BERGE. That, I think, would strengthen antitrust enforcement?

Mr. BURNS. Yes.

Mr. BERGE. Yes. I was going to discuss the Miller-Tydings Act, and the McGuire amendment to the Federal Trade Commission Act. I think the repeal of both of those acts will materially strengthen the enforcement of the antitrust laws. I think that a vertical price agreement, dictated by the manufacturer and applicable to all of the retailers in a State, accomplishes, economically, the same restraining effect as horizontal agreements which are forbidden under the Sherman Act. And I think the nonsigner clause of the McGuire Act is unconscionable.

That is the clause whereby a contract by a single manufacturer with a single retailer in the State automatically binds all of the retailers and they are subject to whatever penalties the State law imposes if they do not go along with the contract. It always went against my grain, and I thought there was a constitutional question involved. The Supreme Court didn't seem to think so and refused to review at least the case that was brought up to it. Maybe another one will get up sometime. I think approximately half a dozen State supreme courts within the last year or so have held their State fair trade laws unconstitutional under their State constitutions on account of this non-signer clause.

The CHAIRMAN. How about this argument? It was stated on the floor of the Senate by a man who had a lot of experience in the drug industry at the retail level. Say toothpaste was put at a price designed so that druggists could cut it, the amount of his profit depending upon the amount of the cut, so that he could compete. Then we ran into this other situation where Sears, Roebuck has their Allstate tires. They go to Firestone, Goodyear, Goodrich, and others and they have their name Allstate put on the identical tire, a Goodyear, Goodrich, Firestone, or what-have-you tire, tires with the same exact specifications, and they get a lower price, and they can undersell the men who are dealing in a special trade price.

Mr. BERGE. Yes.

The CHAIRMAN. You run into that situation. Then you run into a number of others of a similar character, all intended, shall we say, as backdoor entrances to getting around the question of fair pricing and all that sort of thing.

Mr. BERGE. It is a very complicated picture, I grant you.

The CHAIRMAN. It looks to me like we have got to have a law that will get back to the basic manufacturer and make him be honest for a change.

Mr. BERGE. Well, that may be. I am not prepared to oppose such a law.

The CHAIRMAN. I know the tire situation.

Mr. BERGE. When you come, Senator, to the situation you describe, of large discount houses, of course, according to one school of thought, if a certain method of distribution can get products out to the consumers so that it would be with less cost and less expense than another method, under a truly competitive system, the more efficient method should prevail, but I don't go along with an application that would allow mail-order houses to destroy local merchants, of course, and there is no doubt—

The CHAIRMAN. I remember very well back in my earlier days in the coal mines. The coal-company stores carried no men's clothing, except what you call made-to-measure suits. If a man wanted a suit of clothes, he went in and he was measured up. The store had three kinds of cards, a white one, a red one, and a green one. The white one was a hundred-percent markup to the company store, the green one was a 50-percent markup, and the red one was a $33\frac{1}{3}$ -percent markup.

Of course, the people who knew the store policy, the first thing they asked when they walked in, was, "What card do you use, the white, red, or green?" If they said a red card, they would order a suit of clothes. But what I am thinking of were the poor, ignorant devils, and they were about 25 to 1 compared to the others, who would go in without asking which color card was being used; and buy a suit of clothes. Somebody who was smart, and there were very few fellows who knew the racket, except the store manager, and some of his clerks, would get the same identical suit of clothes with a 33-percent markup that this poor laborer was paying a hundred percent markup on.

Now what I am getting at is we have got to get back at the manufacturers' surreptitious dealing, shall I say, in this whole antitrust picture, if we are going to deal on a fair-price basis. Don't you think that is one of the problems?

Mr. BERGE. I think it is. I think it is.

The CHAIRMAN. I think it is one of the major problems.

Mr. BERGE. I don't question that it is.

The CHAIRMAN. For instance, let's take the automobile man. I don't know whether you know it or not, but the dealer carries full financial responsibility in the automobile industry.

Mr. BERGE. Yes; I know it.

The CHAIRMAN. He guarantees the payments, the price of cars sold on the installment plan; if they don't pay, he has to take the car back and take the notes up. They worked out a new racket to hold the prices up. They divided the year up into quota periods of 3 months each and he has a certain number of cars to dispose of in the 3 months, and if he disposes of 1 less than that number, why, he has a certain discount, a certain commission. But if he happens to dispose of the full quota, he gets a rebate on all the cars sold during that period. So the last fellow who buys a car from him can really get a bargain because he is cut back on the other cars sold, and splits up that rebate. Have you heard about that?

Mr. BERGE. I know something of it, yes.

The CHAIRMAN. That is going on right now. That is why one dealer can offer you a much better price than another one.

Mr. BERGE. Those are all questions certainly appropriate for your committee to look into.

The CHAIRMAN. I just wondered if this committee of which you are a member looked into that sort of thing.

Mr. BERGE. We didn't look into the particular problems that you posed. I think in order to do that, sir, I think that is more the function of this committee because we were never equipped—

The CHAIRMAN. You mean the Senate committee?

Mr. BERGE. Yes; the Senate committee. Our committee was never equipped to make factual inquiries. We had no staff, we had no subpoena power, we had no permission from the Attorney General to

make factual inquiries to establish new facts as a basis for antitrust legislation. We were rather giving our judgments on the problems that were fairly crystallized, that had long bothered the profession and the bench and the bar.

Now, in any event, sir, I don't see how the repeal of the Miller-Tydings Act would bear on the problem that you have mentioned. I don't disagree with any of your suggestions, but I think that the peculiar problem of the Miller-Tydings Act is whether or not it does not cut a deep slice off of antitrust enforcement by authorizing resale price maintenance, and Judge Barnes discussed it so thoroughly this morning that I do not feel any need to go into it further.

The CHAIRMAN. Here is my thought. Here is XYZ Company that wants to take what you call loss-leader sales on a certain item. As you well recall, Peoples Drug here in the District had a loss-leader sales on cigarettes, when they were selling cigarettes during OPA days, up to 11 cents a pack. The OPA caught them napping and froze their price at 11 cents and they had to sell their cigarettes at 11 cents a pack.

Mr. BERGE. Which was at a loss.

The CHAIRMAN. Which was at a loss, but as long as the retailer wants to take that for the sake of publicity, for advertising to get business, I can see no particular harm in it. But when he does it in connivance with a wholesaler who then gives him that right which he denies to another retailer, I think then you are running into an anti-trust problem. What do you think?

Mr. BERGE. Well, I certainly would agree that where he does it in connivance with the wholesaler, it is a bad practice, and there are some people who think that any loss-leader sales ought to be prohibited. Now, I have not given any great thought to that, but I think that one of the great arguments that was made for fair trade legislation was that it was necessary to prevent loss-leader practices, and I have never been able to see that. I felt, and I still think, that if the State legislatures and Congress want to outlaw loss-leader sales, that that can be done without upsetting the whole retail-manufacturer relationship and giving them a blanket exemption from the antitrust laws.

Of course, I think that any legislation aimed at eliminating loss-leaders is going to involve a lot of accounting difficulties and cost allocation difficulties, and things of that kind. It might be impracticable of enforcement.

The CHAIRMAN. That is why I say as long as we control the basic end from which they get it, so this one company will not be preferred over another company, if they want to put a loss-leader on, it is not going to hurt anybody because they are putting that on and figuring on losing a certain amount of money in order to get a certain number of customers in their store. I don't think that upsets the situation. But when in doing that they go back and enter into an agreement with the producer to give them the benefit of a price so they can take a loss-leader—

Mr. BERGE. In other words, if they make an agreement with the manufacturer whereby they get a better price.

The CHAIRMAN. Yes.

Senator WILEY. Can I ask a question, Mr. Chairman?

The CHAIRMAN. Go ahead.

Senator WILEY. As I understand your position, Mr. Berge, it is substantially this: that in your opinion, there is no need for entering into any amendment of a substantive nature of the present antitrust laws; is that right?

Mr. BERGE. Well, I mean, Senator, such as rewriting the Sherman Act to specifically define offenses, or to change the basic nature of the penalties. Some people have urged the repeal of criminal penalties, or something like that. I don't think that sections 1 and 2 of the Sherman Act need any drastic revision, but the things I am going to discuss, and fair trade was one of them, are in a way subsidiary matters perhaps, but I think would give an important impetus to antitrust enforcement.

The question was whether I thought this report strengthened anti-trust enforcement and wherein it did and what legislative proposals were made that I thought were helpful, and the first one, I think, would be repeal of the Miller-Tydings Act.

Senator WILEY. Let me ask one other question. Have you any suggestions as to whether or not some of the court decisions should be mended by legislation?

Mr. BERGE. Yes. For example, the Supreme Court back in 1940 decided that the United States did not have a right to maintain a suit for damages on account of conspiracies of which it was the victim, that is, in its capacity, say, as a purchaser. I think that case involved collusive buying, which caused the Government a loss of a huge amount, I forget what it was, but since then, the law has been, on account of that Cooper decision, that the Government had no right to maintain a suit on its own behalf to recover damages. This report recommends that it be given such a right. That amounts to a legislative overruling of a court decision.

Senator WILEY. Any other?

Mr. BERGE. Well, that is the only one that I think of specifically at the moment. I think, for example, when Congress passed the Anti-Merger Act, it in effect overruled the Columbia Steel case; that was the Columbia Steel case where they permitted a subsidiary of United States Steel to buy one of the large independent fabricators out on the west coast, and the actual percentage of the addition of control was small, but under the new criteria set up by the Anti-Merger Act, the legislative history of which shows that the Clayton Act is intended to nip conspiracies and monopolies in their infancy rather than waiting, as you must under the Sherman Act, until there is a real attempt to monopolize or a real case of monopolization shown, that was a legislative overruling.

Senator WILEY. How about triple damages?

Mr. BERGE. Well, there are arguments both ways on that. You have heard it discussed today. My own feeling was that I was loath to go along with that recommendation, but I see the arguments in favor of discretionary damages, too. I think sometimes plaintiffs lose cases because the jury feels that mandatory treble damages are too much of a penalty on the defendants.

Senator WILEY. Did you hear the discussion today on the Schenley case?

Mr. BERGE. I guess it was the Seagram case; was it not?

Senator WILEY. Yes, the Seagram case.

Mr. BERGE. Yes, I heard that this afternoon.

Senator WILEY. Was there anything from that discussion that you think would require legislative correction?

Mr. BERGE. There is the matter, of course, of the intercorporate conspiracy.

Senator WILEY. That's right.

Mr. BERGE. We didn't make any recommendation for legislation on that, and I would have to say that without further thought, I don't believe it is a matter that requires legislative action.

Senator WILEY. Have you in your statement prepared a sheet, 1, 2, 3, 4, 5, indicating what should be done legislatively, and what you think should be done otherwise?

Mr. BERGE. Well, I discussed 3 or 4 recommendations here that I think should be favorably acted upon.

Now, there has been prepared, I believe, by the Department of Justice, a summary of the 11 legislative recommendations that the report makes. Is that right, Mr. Bicks?

Mr. BARNES. We have a summary here which lists actually 12 recommendations for legislative changes, if we assume that the recommendation relative to labor exemption be listed as a recommendation. In addition, we have a listing of the 73 administrative recommendations made by the committee report. I shall be glad to make this a portion of the record, if you desire.

Senator WILEY. I think that should go into the record at this point.

The CHAIRMAN. It should.

(The document referred to follows:)

**LEGISLATIVE RECOMMENDATIONS OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE
TO STUDY THE ANTITRUST LAWS—MARCH 31, 1955**

1. Sections 1 and 2 of the Sherman Act generally

No legislative change.

2. Trade or commerce with foreign nations

(1) Defense Production Act (50 U. S. C. App. sec. 2061 et seq., as amended June 30, 1953) should be extended. And a separate statute should provide antitrust immunity beyond the Defense Production Act's expiration for presidentially approved projects requiring large investment. (See report, pp. 108-109.)

3. Mergers

No legislative change.

4. Distribution

(1) The Miller-Tydings amendment to the Sherman Act (15 U. S. C. sec. 1) and the McGuire amendment to the Federal Trade Commission Act should be repealed. (See report, pp. 149-155.)

(2) Robinson-Patman section 2c (brokerage provision) (15 U. S. C. sec. 13 (c)) should be amended to revitalize except "for services rendered" clause. (See report, pp. 187-193.)

(3) Robinson-Patman section 3 (criminal penalty for discriminatory practices) (15 U. S. C. sec. 13 (a)) should be repealed. (See report, pp. 198-201.)

5. Patents

(1) Recommend that, in addition to repealing section 33 (b) (7) of the Trademark Act of 1946, the Congress enact the following amendment to section 46 (a) of that act:

The benefit of incontestability under section 15 of this act shall not be deemed to affect the jurisdiction of any Government agency to institute proceedings under the antitrust laws of the United States against the owner of such registered mark in any case in which the mark is alleged to have been used or is being used as an instrumentality of violation of the antitrust laws. (See report, p. 260.)

6. Exemptions

(1) Regulated industries: No legislative change.

(2) Organized labor: "To the extent that union restraints on commercial competition not effectively curbed by either antitrust or Labor-Management Relations Act exist, then * * * [the committee] recommends appropriate legislation to prohibit these union efforts at outright market control." (See report, pp. 303-305.)

(3) Agricultural cooperatives: No legislative change.

7. Economic indicia of competition and monopoly

No legislative change.

8. Antitrust administration and enforcement

(1) New statute authorizing the Attorney General to issue a civil investigative demand compelling potential antitrust defendants in civil cases to produce relevant books and documents. (See report, pp. 343-347.)

(2) Amendment of Sherman Act, section 1 (15 U. S. C. sec. 1) to increase maximum criminal penalties from \$5,000 to \$10,000 on each count. (See report, pp. 351-353.)

(3) Amendment of Federal Trade Commission Act, section 5 (15 U. S. C. sec. 45) repealing present \$5,000 per day ceiling on fines for violating orders, leaving instead a ceiling of \$5,000 per violation. (See report, pp. 372-374.)

(4) Amendment of Clayton Act, section 4 (15 U. S. C. sec. 15) to provide for discretionary treble damages in private antitrust suits. (See report, pp. 378-379.)

(5) Amendment of Clayton Act, section 4 (15 U. S. C. sec. 15) to provide a 4-year Federal statute of limitations, running from accrual of the cause of action, for private antitrust suits. (See report, pp. 380-384.)

(6) Amendment of Clayton Act, section 4 (15 U. S. C. sec. 15) to give the United States Government the right to sue for single damages stemming from antitrust violations. (See report, pp. 383-385.)

GENERAL GUIDES OR RECOMMENDATIONS TO ENFORCEMENT AGENCIES AND THE COURTS

I. SECTIONS I AND II OF THE SHERMAN ACT GENERALLY

A. Section 1 of the Sherman Act

1. Recommend to enforcement agencies continued vigorous enforcement: Thus the committee states: "The committee unanimously adheres to antitrust fundamentals with full vigor. Although many forces and other Government policies have materially promoted our creative American economy, we believe the anti-trust laws remain one of the most important" (report, p. 2).

"There have undoubtedly been fluctuations in the vitality and wisdom of antitrust administration and enforcement as well as occasional setbacks in Congress and in the courts. Nonetheless, a backward look across the 64 years since the Sherman Act reveals on the whole a healthy process of growth through which antitrust fundamentals have gained in strength and effectiveness" (report, p. 3).

2. Recommend to courts that certain conduct be deemed unreasonable "per se": "Certain forms of conduct, such as agreements among competitors to fix market price or control production, are 'conclusively presumed to be illegal, by reason of their nature or their necessary effect,' so that they can quickly and positively be adjudged violations of the Sherman Act. In such cases, inquiry under the rule of reason is over once it has been decided that the conspiracy or agreement under review in fact constitutes price rigging or production control. For further example, group boycotts are deemed unreasonable as clearly anticompetitive in character or effect" (report, p. 11).

3. Recommend to courts that market division among competitors be conclusively presumed illegal: "While in no Supreme Court case have the facts been limited exclusively to simple market division among competitors, there is little doubt, either as a matter of principle or of precedent, that agreements among competitors for market division should be and are treated like price-control arrangements" (report, p. 28).

4. Recommendation to courts and enforcement agencies re exclusive dealerships: "Where an exclusive dealership forms part of an attempt to monopolize prohibited by section 2, or the lesser degree of unreasonable restraint prohibited by section 1, it should be held a violation. On the other hand, where an exclu-

sive dealership is merely an ancillary restraint reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is not unreasonably to foreclose competition from the dealer's market" (report, p. 29).

5. Recommendation to courts and enforcement agencies re intraenterprise conspiracy: "Most members of the Committee disapprove any application of this doctrine to joint action between members of a corporate family not intended to or resulting in coercive undue restraint on their customers or competitors. However, they believe, for example, that when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor section 1 may be transgressed.

"Some members feel, in contrast, that in no instance can a parent and its subsidiary be held guilty of an offense that must be committed by more than one person. Since there would concededly be no liability under section 1, if a company does business through unincorporated branches, divisions, or departments, they believe it is wholly unreal to impose liability where it employs subsidiaries instead. To distinguish between these types of operations, they feel, is to sacrifice substance for mere form" (report, p. 35).

6. Recommendation to enforcement agencies and courts re "conscious parallelism": In the language of the Theatre Enterprises Supreme Court decision (*Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.*, 346 U. S. 537, 540-541 (1954)), the Committee concludes: "To be sure, business behavior is admissible circumstantial evidence from which the factfinder may infer agreement [citing cases]. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense" (report, p. 39).

7. Recommendation to courts and enforcement agencies re relevance of trade association membership to proof of antitrust conspiracy to "avoid blanket findings based on mere guilt by membership." The Committee recommends courts and agencies insist on proof of participation by particular members in conspiratorial action of other members (report, p. 42).

B. Section II of the Sherman Act

8. Recommendation to courts and enforcement agencies re inclusion of substitute products in market definition: Adopting the language of the Times-Picayune case (*Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 612 n. 31 (1953)), the Committee urges, "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small" (report, p. 47).

9. Recommendation to courts and enforcement agencies that searches for monopoly power start with the primary fact of relative size: Thus the report states: "All judicial searches for monopoly power start with the primary fact of relative size—the percentage of supply controlled. For 'size is of course an earmark of monopoly power.'" (*United States v. Griffith*, 334 U. S. 100, 107 n. 10 (1948)).

However, the report cautions, in the language of Columbia Steel (*United States v. Columbia Steel Co.*, 334 U. S. 495, 527-528 (1948)), "We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed" (report, p. 49).

10. Recommend to courts and enforcement agencies that for purposes of monopolization under section 2, "no showing of intent is required beyond 'the mere intent to do the act'" (*United States v. Aluminum Co. of America*, 148 F. 2d 416, 432 (2d Cir. 1945); report, p. 56).

11. Recommend to courts and enforcement agencies that antitrust not impair business efficiency: Thus, in the language of the recent United Shoe decision, the report urges: "[T]he defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly *solely* to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (including patents on one's own inventions, or franchises granted directly to the enterprise by a

public authority." [Emphasis supplied.] (*United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953), affirmed per curiam 347 U. S. 521 (1954); report, p. 57).

II. "TRADE OR COMMERCE * * * WITH FOREIGN NATIONS"

12. Recommendation to courts and enforcement agencies re Sherman Act's extraterritorial jurisdiction: (a) The committee feels "that the Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anticompetitive effects on this country's 'trade or commerce * * * with foreign nations' as to constitute unreasonable restraints" (report, p. 76).

(b) Further, the committee believes "that conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce. The 'international complications likely to rise' from any contrary view convince us, as they did the Court in *Alcoa* 'that Congress certainly did not intend to cover' such arrangements when they have no restrictive purpose and effect on our commerce." (*United States v. Aluminum Co. of America*, 148 F. 2d 416, 483 (2d Cir. 1945); report, p. 76.)

13. Recommendation to courts and enforcement agencies rescope of "trade or commerce * * * with foreign nations." The report urges, "that the words 'trade and commerce * * * with foreign nations' should be construed broadly to include not only the import and export flow of finished products, their component parts and adjunct services, but also, as in domestic commerce, capital investment, and financing" (report, pp. 79-80).

14. Recommendation to courts and enforcement agencies re inquiry relevant to determining damage to this country's foreign commerce: (a) The report approves "judicial recognition that, under the rule of reason, defendants may proffer evidence that their activities abroad constitute no undue restraint on our foreign commerce since, even absent the challenged conduct, trade, and investment in a particular foreign area would be virtually impossible. We believe that defendants should be allowed to show that, due to foreign economic or political barriers, their conduct at bar was prerequisite to trade or investment in a foreign country" (report, p. 83).

(b) But the report cautions, "under no circumstances, however, can impossibility of trade or investment in one country justify consequences illegal under the antitrust laws outside that country; nor can impossibility of export or import of goods justify what would in effect be an unreasonable restraint of American investment." And "we feel that the rule of reason cannot be used to justify concert of action among competitors by showing that, despite a primary purpose to fix market prices, control production, divide markets or allocate customers, foreign trade conditions made such restraints a more profitable way of doing business" (report, p. 83).

15. Recommend to enforcement agencies "advance discussion with affected agency concerning projected antitrust proceedings seriously involving any of the Government's foreign programs" (report, p. 97).

16. Most members recommend to Congress that Webb-Pomerene "may well be retained until facts are adduced to show some changes in the present pattern abroad of state-controlled buying agencies, state monopolies, and other combinations now part of the cartel policy prevalent in many parts of the world" (report, p. 114).

III. MERGERS

17. Recommend to courts and enforcement agencies that the "congressional objective of establishing more effective rules against mergers," provide "the main guide to the administrative and judicial construction" of section 7 (report, p. 117).

18. Recommend to courts and enforcement agencies that the legal test for vertical acquisitions under section 7 be whether there is a "reasonable probability that the merger will foreclose competition from a substantial share of the market" (report, p. 122).

19. Recommend to courts and enforcement agencies that the legal test for horizontal mergers under section 7 be "whether the competition lost as a result of the merger may, in the context of the market as a whole, constitute a substantial lessening of competition or tend toward monopoly (report, p. 123).

20. Recommend to courts and enforcement agencies that "no one pattern of proof can meet the requirements of all cases: * * * Thus, it will always be necessary to analyze the effect of the merger on relevant markets in sufficient detail, given the circumstances of each case, to permit a reasonable conclusion as to its probable economic effect" (report, p. 123).

21. Recommend to courts and enforcement agencies that section 7's "tendency to monopoly clause * * * should be construed to slow an appreciable growth toward monopoly by even relatively minor acquisitions" (report, p. 124).

IV. DISTRIBUTION

22. Recommend to courts and enforcement agencies that generally theirs is the "duty to reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress" (346 U. S. 61, 63, 73-74 (1953); report, p. 132).

23. Recommend to courts and agencies regarding individual refusals to deal "only thoroughgoing factual inquiry into the surrounding business circumstances can characterize a refusal to deal as part of a restrictive court of conduct incompatible with antitrust objectives.

"However, the committee subscribes to vigorous condemnation of concerted and conspiratorial refusals to deal" (report, p. 137).

24. Recommend to courts and enforcement agencies that "tying arrangements that involve the 'wielding of monopolistic leverage' generate the requisite probability of economic harm whenever the seller occupies a dominant market position for the 'tying' commodity or if his arrangements cover a substantial volume of trade in the 'tied' product" (report, p. 144).

25. Recommend to courts and enforcement agencies that, testing the legality under Clayton Act section 3 of exclusive dealerships, "the central inquiry * * * is whether a system of challenged exclusive arrangements in fact 'forecloses' competitors from a substantial market" (report, p. 148).

26. Recommend to courts and enforcement agencies that, regarding the "goods of like grade and quality" limitation in Robinson-Patman section 2 (a): "Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act" (report, p. 158).

27. Recommend to courts and enforcement agencies that "the 'prima facie' case mentioned in section 2 (b) hence refers not to any discrimination, but only to discriminations affirmatively prohibited when causing the adverse market effects described in 2 (a) and unlawful unless justified by the seller through one of the several defenses" (report, p. 163).

28. Recommendation to the Federal Trade Commission that it "devote serious effort to vindicating its expert administrative status through precision in the mandates its orders impose" (report, p. 169).

29. Recommend to courts and the Federal Trade Commission that construing the cost proviso of Robinson-Patman section 2 (a), "a reasonable approximation of production or distribution cost variances to price differentials—when demonstrated in good faith through any authoritative and sound accounting principles—suffice as a matter of law to meet the requirement for justification under the section 2 (a) cost provision. Applied in this way, the act should impede no price variation reasonably related to economies in any of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions" (report, p. 175).

30. Recommend to courts and the Federal Trade Commission that "an independent and significant meaning might be accorded to the statutory phrase 'changing conditions affecting the market' to which a competitor might respond by revising his price—wholly apart from the 'marketability of the goods concerned,' the second statutory factor which the enumerated examples in the proviso illustrate: In any event, we view the significant common denominator in these far-from-homogeneous examples not as a deterioration of the seller's goods or business position, but as a spontaneous shift in market conditions beyond the seller's control. The proviso should enable a seller to reflect such commercial adjustments in good faith by revised price quotations on short notice, though this may incidentally prejudice some customers who bought at less favorable prices in the immediate past. We equally recommend a realistic interpretation to protect a seller's flexibility in adapting his prices to perceptible market shifts, whether already underway or only impending" (report, p. 179).

31. Recommend to courts and the Federal Trade Commission that "Whatever the interpretation of the substantive price discrimination offense, we think that a seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any antiprice discrimination law" (report, p. 181).

32. Regarding Robinson-Patman section 2 (d) and (e), the report recommends to the Commission that the "proportionally equal" criteria be met if a seller offers "bona fide alternative means enabling all buyers to participate in some form" (report, p. 190).

33. Recommend to the courts and Federal Trade Commission that regarding functional discounts "suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics" (report, p. 208).

34. Recommend to the Federal Trade Commission that "a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it" (report, p. 208).

35. Regarding basing-point pricing, "the committee recommends that the law carefully differentiate competitive and collusive 'delivered' pricing. It is our view that overall antitrust policy is served when sellers are free to meet competition in distant markets by quoting 'delivered' prices to equalize the freight advantages of more favorably situated competitors. Conversely, however, basic antitrust considerations firmly dictate that 'delivered' pricing employed to effectuate price-fixing conspiracies be relentlessly pursued" (report, p. 219).

V. PATENT-ANTITRUST PROBLEMS

36. Recommend to courts that "violation of the Sherman Act should, as the cases suggest, require abuse of the patent grant or proof of intent to monopolize beyond the lawful patent grants" (report, p. 226).

37. Recommend to courts that the legality of grant backs should turn on: "(1) the licensor's position as to patents or the products they cover, and (2) each party's incentive to research" (report, p. 229).

38. Recommend to courts and enforcement agencies that "an improper purpose unduly to restrain trade, to monopolize or attempt to monopolize through individual nonuse should give rise to antitrust liability: On the other hand where there is no affirmative showing that the purpose or effect of nonuse is unreasonably to restrain trade, to monopolize or attempt to monopolize, the patentee's conduct does not transgress the antitrust laws. Clearly, however, contracts, combination or conspiracy among patentees to refrain from using or to refuse to license others to use patented inventions should be deemed unreasonable per se" (report, p. 231).

39. Most members recommend to courts that "absent any concert or arrangement aimed at or resulting in industrywide price fixing, * * * a patentee who is engaged in manufacturing and marketing the patented product may fix the prices at which his manufacturing licensee or licensees may sell" (report, p. 233).

40. Recommend to courts that "from an antitrust standpoint, a tying clause in a patent license is like a tying clause in any other contract" (report, p. 238).

"Accordingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting, including the scope of the patent in relation to other patented or unpatented products, the patent does not create the market power requisite to illegality of the tying clause" (report, p. 238).

41. Recommend to courts that, regarding patent pools, "in any given case, a determination of legality requires an examination of the purpose of the interchange, the power possessed by the interchange when formed, and its operating practices. Depending upon the situation, some of these factors, or even one of them, may be decisive. In other instances, all demand consideration" (report, pp. 246-247).

42. Regarding patent infringement suits, the committee recommends to courts "that antitrust violation should be considered a defense to a patent infringement action only when it is shown that the patent in suit is integral to the violation or that the grant of customary patent relief conflicts with antitrust goals. Further, in any patent infringement suit in which antitrust violation is the basis of defense, or counterclaims, the court, pursuant to rule 42 (b) of the Federal Rules of Civil Procedure, should order separate trials of the antitrust issues and the patent issues. Such separation may be essential not only 'in furtherance of convenience and to avoid prejudice,' but also 'to serve the ends of jus-

tice.' Trial of the infringement issue should precede trial of antitrust questions except where, in court discretion, a balancing of all factors favors prior trial of antitrust issues" (report, p. 249).

43. Regarding the scope of the patent misuse doctrine, recommend to courts that "the doctrine should extend only to those cases where a realistic analysis shows that the patent itself significantly contributes to the practice under attack" (report, p. 251).

44. Recommend to courts against "the view that any violation of patent law necessarily violates the antitrust laws: From some abuses of patent policy may flow consequences not drastic enough to meet antitrust prerequisites of effect on competition. In addition, many patent abuses are more effectively curbed by simply denying equitable relief as a matter of patent policy. Holding every patent law transgression to be at the same time an antitrust violation would, moreover, put the patent owner on a different footing than owners of other property subject to antitrust" (report, p. 254).

45. A majority recommends that courts "deem compulsory license free of royalties and dedication penal rather than remedial in character, and hence beyond the Sherman Act's authority to 'prevent and restrain' violations" (report, p. 256).

VI. EXEMPTIONS FROM ANTITRUST COVERAGE

A. Regulated industries

46. Recommend to courts that "even in the areas where Congress has adopted the policy that 'competition may [not] have full play,' (*Federal Communications Commission v. R. C. A. Communications, Inc.*, 346 U. S. 86, 92 [1953]) we feel that unless Congress has expressly provided to the contrary, the regulatory guide consistent with the 'public interest' as applied to mergers must 'include the principles of free enterprise which have long distinguished our economy,'" (*McLean Trucking Co. v. United States*, 321 U. S. 67, 94 [1944] [dissenting opinion]; report, p. 269.)

"In all instances, the courts, in reviewing agency discretion, should recognize that 'administrative authority to grant exemptions from the antitrust laws should be closely confined to those (instances) where the * * * (regulatory) need is clear.' " (*McLean Trucking Co. v. United States*, 321 U. S. 67, 93 [1944] [dissenting opinion]; report, p. 270.)

47. Recommend to courts that "if the essence of an antitrust action is an agreement already approved by agency action within the scope and policy of an enabling statute which provides for antitrust exemption, then the antitrust charge should be dismissed" (report, p. 282.)

48. Recommend to courts that "where no express statutory exemption is provided * * * [and] the agency has found that the challenged conduct is necessary to carry out duties imposed on the defendants by the regulatory statute * * * such conduct cannot form the sole basis for antitrust suit" (report, pp. 282-283).

49. Some members recommend to courts that "where there is no finding that the challenged conduct is required by regulatory goals but the agency has found the conduct not inconsistent with regulatory provisions * * *, even this agency approval, if in accord with regulatory guides, warrants dismissal of the antitrust complaint" (report, p. 283).

"Other committee members feel, however, that, through agency approval of disputed conduct should normally bar its antitrust litigation, that fact alone in all cases may not warrant denial of antitrust relief" (report, p. 283).

50. Recommend to Department of Justice "broader and more formalized liaison procedures" with regulatory agencies "regarding complaints involving matters subject to their regulation" (report, p. 286).

B. Agricultural Cooperatives

51. Recommend to courts regarding agricultural cooperatives' antitrust exemption that "where cooperatives attempt to or actually obtain monopoly power by means not sanctioned by section 1 of Capper-Volstead, the Sherman Act should apply even though the monopolized product's price is not unduly enhanced" (report, p. 311).

52. Recommend to the Department of Justice and the Secretary of Agriculture: "First, the formulation of administrative criteria, particularly for the guidance of smaller cooperatives, in determining whether or not particular conduct comes within the exemption; and second, a more formalized coordination between the Secretary and Government antitrust agencies for exchanging in-

formation involving complaints and investigations pertinent to agricultural co-operatives charged with antitrust violation. In this way, possible conflicts between these agencies can be avoided or minimized" (report, pp. 312-313).

VII. ECONOMIC INDICIA OF COMPETITION AND MONOPOLY

53. Recommends to courts and enforcement agencies that "‘workable’ or ‘effective’ competition supplies no formula which can substitute for judgment. It suggests leads to data of significance, and a means of organizing the data bearing on the question whether a given market of itself is sufficiently competitive in its structure and behavior to be classified as workably competitive. And it provides some bench-marks or criteria, representing somewhat different points of vantage, for the process of making that judgment" (report, p. 337).

54. Recommend "that the Department of Justice and the Federal Trade Commission, in carrying out their enforcement and investigatory responsibilities, systematically examine the domestic market effects of tariffs and appropriately transmit their findings to the President, Tariff Commission, or the Congress. We recommend also that tariff legislation expressly recognize the purposes of the antitrust laws as one of the justifications for and objectives of both unilateral and negotiated tariff reductions" (report, p. 342).

VIII. ANTITRUST ADMINISTRATION AND ENFORCEMENT

55. Recommend to the Division that, in demanding divestiture, it "bear in mind these guides: (1) It should not be decreed as a penalty; (2) It should not be invoked where less drastic remedies will accomplish the purpose of the litigation; (3) It is important to consider the effect of a possible resultant disruption upon the industry involved, its cognate markets, and the public needs in peace and war; (4) Though we recognize it is not feasible to prepare before trial a final plan for effectuating such relief, we feel that once divestiture has been ordered, the Division must take account, in submitting a plan to effectuate the order, of its effect on the public as well as on the defendant and persons interested in it, as investors, customers and employees. Such appraisal, we emphasize, seems a prime responsibility of any antitrust enforcement agency" (report, pp. 355-356).

56. Recommend that the Assistant Attorney General "designate ad hoc or continuing groups as the need and the problem at hand may suggest" to "review any matter submitted by the Assistant Attorney General on his own initiative or in response to the request of a potential or actual defendant." Most members recommend—

"(a) Where a substantial question of policy or a serious doubt exists as to whether any proceedings should be instituted and if so, whether such proceedings should be civil or criminal;

"(b) Where important issues arise involving the relief to be sought in civil proceedings—either in advance of a complaint or at the close of litigation;

"(c) Where deadlocks have arisen in the negotiation of consent judgments;

"(d) Where proposals have been made by parties under investigation for settlement by negotiation of a consent judgment prior to the filing of a complaint" (report, p. 359).

57. Recommend to the Antitrust Division "prefiling negotiation whenever the Division deems it feasible for efficient enforcement" (report, p. 360).

58. Recommend that the Department continue "to negotiate consent judgments with fewer than all defendants" (report, p. 360).

59. Recommend that "renewed and separate negotiation [of consent settlements] after agreement has once been reached, should be minimized" (report, p. 361).

60. Recommend that the Department should not require in all cases that defendants submit an "initial draft" of a possible consent judgment (report, p. 361).

61. Recommend that "in consent negotiation, the Department should not seek relief (1) deemed by the Supreme Court to transgress constitutional boundaries; or (2) which, in the particular case, could not reasonably be expected after litigation" (report, p. 361).

62. Recommend to courts that "each antitrust case, public and private, should be assigned, as a regular practice in all districts, promptly after the action has commenced to one judge for all purposes" (report, p. 362).

63. Recommend to courts "where pleadings do not present issues of fact or law with sufficient particularity for efficient trial preparation, the court and

counsel should promptly undertake to particularize the issues to be tried by some suitable procedure" (report, p. 363).

64. Recommend to courts that "if either party, in a private or Government case, anticipates the use of any discovery process, on an extensive or minor scale, with respect to some or all issues, the court, where feasible, should require a pre-trial statement stating to its satisfaction the issues as to which discovery is sought. When approved by the court after hearing, the pretrial statement, unless modified for a good cause, would constitute the plan for discovery and mark its permissible limits" (report, p. 363).

65. Recommend to courts "in all civil Government proceedings, private actions or Federal Trade Commission hearings, the Oregon State Medical Society opinion (*United States v. Oregon State Medical Society*, 343 U. S. 326 (1952)), should be the guide where the proof offered by either party reaches back more than a reasonable number of years" (report, p. 364).

However, "the plaintiff should never be prevented from offering direct evidence of the commencement of an alleged antitrust offense—whether under the Sherman, Clayton, or Federal Trade Commission Acts—no matter when it occurred" (report, p. 364).

66. Recommend to courts that "separate trials are desirable":

(a) In nonjury treble-damage cases, the issues of liability should be tried before the issue of damage. * * *

(b) Where the validity of patents is in issue, that issue should be segregated. * * *

(c) "Where the Government seeks dissolution, divestiture, or other complex relief posing knotty economic problems, hearings on relief should be conducted after trial on the merits" (report, p. 365).

67. Recommend to the Department that it "conduct regular studies to determine whether its judgments have been effective to restore competition" (report p. 366).

68. Recommend to the Department that it "consent to judgment modification where the defendant can show that a change in circumstances makes its continuation unchange incompatible with antitrust goals" (report, p. 366).

69. Recommend to the Department that where decree provisions "which, designed to dissipate the effects of past unlawful practices, ban conduct which would otherwise be lawful," the decree should include: "(1) A provision which expressly expires after a stated period, and (2) a provision under which defendants may after a stated period show that conditions have changed so that relief is no longer necessary" (report, p. 367).

70. Recommend to the Department "no change in the existing procedures of the Department of Justice for advance clearances and releases" but recognize "value of informal discussion of problems between counsel for the Department and for private parties" (report, p. 368).

71. Recommend the Commission continue its new orders governing consent settlement procedures which:

"1. Eliminates the previous requirement that consent settlements contain findings of fact or a statement of the alleged unlawful practices;

"2. Permits disposition of a case by consent at any stage of the proceeding;

"3. Allows settlement of a case as to some or all of the issues or respondents.

"4. Authorizes hearing examiners to accept or reject stipulations containing proposed consent orders, with acceptance subject to Commission review and with rejection subject to appeal to the Commission. However, such an appeal may be taken only if the trial staff joins with respondents in seeking review" (report, p. 371).

72. Recommend that the Commission continue its new judgment enforcement procedures involving:

"1. Closer coordination between the general investigation staff and those primarily responsible "for compliance with orders, stipulations, and trade-practice rules.

"2. More frequent use of procedures for requiring the filing of special followup reports showing the manner and form of compliance with cease-and-desist orders."

"3. A more informative letter of notification to (a) respondents under orders, and (b) parties to stipulations concerning the action taken in response to their reports of compliance.

"4. A more effective program for enlisting the cooperation of industry members to effect industrywide observance of trade-practice rules" (report, p. 374).

73. Recommend to Antitrust Division and Federal Trade Commission:
- "1. Extension of the present card-exchange procedure to all proceedings and ruling of both agencies. * * *
- "2. To avoid duplicating investigations, the investigative files should, to the extent permitted by existing law, be made fully available to the other.
- "3. Commission economists should regularly consult with their division counterparts. * * *
- "4. Antitrust investigators, now somewhat scattered through the Federal Bureau of Investigation, should be consolidated into a distinctive unit of the Bureau and made readily available to the Division and the Commission as well.
- "5. The two agency heads should regularly meet to review significant investigations contemplated or commenced, discuss what proceedings, if any, should be brought, and which agency is best equipped to handle them. * * *
- "6. Both [agencies] should never for any reason, including differences in views as to the law or the facts, proceed against the same parties for the same offense growing out of the same factual situation" (report, p. 377).

73. Caution courts against "unreliable estimates of damage, essentially based on speculation and guesswork contrary to the Bigelow requirement of a 'just and reasonable estimate of the damage based on relevant data'" (report, p. 380).

Senator WILEY. Thank you very much.

The CHAIRMAN. I am wondering if something should not be in there to prevent Government from contributing to monopoly. For instance, I had this situation arise in 1953. I got letters from two major automobile companies complaining that the specifications issued on passenger cars by the Defense Department were so worded that it could only be filled by General Motors. Therefore, all of the other motor-car companies were prohibited from bidding. Now, I am just wondering if there should not be something put up on the question of antitrust to prevent Government agencies from contributing to monopoly by so writing specifications that they could only be filled by one company.

Mr. BERGE. Well, we had a similar problem during the war-procurement period.

The CHAIRMAN. I know.

Mr. BERGE. At that time we had this Small Business Section in the Department of Justice and they used to get complaints where specifications were drawn that way and go over and try to work it out administratively with the other departments. I agree that is a major problem, and the drawing of specifications—

The CHAIRMAN. In other words, Government can contribute to monopoly if they don't watch out?

Mr. BERGE. But it would occur to me, just off-hand, that that is not a thing to handle through the amendment of the antitrust laws. It seems to me that is to be handled through a sterner requirement of the departments that draw the specifications.

The CHAIRMAN. Well, I am not talking about that.

Senator WILEY. You are talking about milk orders, aren't you?

The CHAIRMAN. I am not talking about milk orders. I am talking about this. I don't know whether you realize it or not, but if the entire United States fleet was stationed off an island and we had an Army fighting on that island and it ran out of ammunition, do you realize the only thing that would fit the guns of that Army would be the small arms ammunition? Why? Because the admirals and the generals put the specifications so that you could not exchange ammunition above 50 caliber. Now, the only reason you can exchange ammunition from 50 caliber down is the fact that the Congress has written certain laws that require standardization.

I just wonder if, in this monopoly picture, which occasions us a tremendous lot of expense in Government contracts, it would not be wise also to go into the question of Government requirements and Government specifications.

Mr. BERGE. I think it would be quite proper for your committee to go into that. That is, I don't take it that your committee's jurisdiction is necessarily limited on the Sherman and Clayton Acts. You are inquiring into the whole field of monopoly on the American scene.

The CHAIRMAN. But if any particular group in Government decided to favor one particular manufacturer. I think we should, by apt and proper legislation, require competitive bidding on the subject.

Mr. BERGE. Yes.

The CHAIRMAN. And specifications which would permit competitive bidding.

Mr. BERGE. Well, of course, there are plenty of other laws.

The CHAIRMAN. The specifications of which I complained used certain trademark names for parts. It did not use the words "or its equal or better," so it was impossible for anybody else to bid.

Mr. BERGE. Well, there are certainly many Government policies other than the Sherman Act, the Clayton Act and the Federal Trade Commission Act that bear on the question of monopoly.

The CHAIRMAN. Certainly.

Mr. BERGE. And certainly, your procurement policies and your letting of contracts and the activities of that nature—

The CHAIRMAN. Of Government agencies?

Mr. BERGE. Of Government agencies have a great bearing on the overall monopoly position of certain companies in this country. And I should certainly think those would be proper subjects of the inquiry of your committee. They were not proper subjects for the inquiry of this Attorney General's Committee.

The CHAIRMAN. However, in your report, you were just thinking of the effect upon the general public. When those things occur, they affect the general public in the way of taxation.

Mr. BERGE. No doubt.

The CHAIRMAN. And employment and other things.

Mr. BURNS. There was one further question: What is your opinion with respect to the contention of some people that there is a conflict between the objectives of the Sherman Act and the Robinson-Patman Act?

Mr. BERGE. Well, I will give my personal opinion on that. I am not expressing the committee's opinion on that. But I think that there is a conflict, and I don't know that I have the answer to it, but I am willing to pose the problem.

The Sherman Act tends to encourage price competition and flexible price structures. If a company can take business from a competitor by cutting prices, that is in line with the Sherman Act. The Robinson-Patman Act tends to stabilize price structures and eliminate price competition. My thought on that could not be better stated than it was by Dean Edward H. Levi of the Chicago Law School, speaking at the annual meeting of the antitrust law section of the American Bar Association in San Francisco in 1952, and I would like to quote a paragraph from Dean Levi's speech:

At one level the conflict between the Robinson-Patman Act and the Sherman Act is this: The Robinson-Patman Act promotes that uniformity of prices and

control over prices which the Sherman Act and also the Federal Trade Commission Act deem to be illegal. An agreement between competitive purchasers as to what they will pay a single seller is illegal under the antitrust laws. The same uniformity of price, however, may be required under the Robinson-Patman Act. Uniformity of prices, terms and conditions among sellers may be evidence of a price-fixing arrangement under the antitrust laws. Under the Robinson-Patman Act, however, not only is uniform treatment as among customers encouraged and the likelihood of price reductions to individual customers in response to market conditions thereby diminished, but in addition, where there is any definite deviation from uniformity, the act makes it important to have or to seek to have the most intimate knowledge of the terms offered by one's competitors. This promotes price rigidity and produces evidence of illegal concert of action.

Conversely, where trade association practices or industry customs may be suspected of having produced a collusive price pattern, definite deviations from the pattern which disprove the charge are likely to indicate violations of the Robinson-Patman Act.

Now I have run into that. I won't name the industry, but we had a company we were advising and who wanted advice as to whether their pricing practices were legal under the Sherman Act. They followed a uniform list price that was prevalent in the industry. It was not an agreement on prices, but it was an industry in which there were several hundred items and, in order to avoid chaos, there had to be some uniform classification in the various shapes and sizes of their products, and the practice in the industry was to quote discounts in these list prices.

Well, we looked at their actual sales, and there were so many different actual quoted prices, in fact, every transaction seemed to be an individual one. They quoted what was necessary to quote to get the customer.

That more or less convinced me there was no price conspiracy operative, but probably they were violating the Robinson-Patman Act, and I asked them which they would rather violate and they said they would rather take their chances on the Robinson-Patman Act because the penalty is less severe.

I don't undertake to solve that; I am not advocating repeal of the Robinson-Patman Act. Certainly this report is an effort to improve the Robinson-Patman Act. The chapter on distribution which covers the Robinson-Patman Act contains one of the most detailed analyses of any portion of the report. I am not competent to discuss it, and there are others, if you want to go into that phase of it, who are more competent than I. But one of the problems as I see it is to try to reconcile this basic conflict in philosophy between the two acts. It is a little more than philosophy. It is a conflict of application of anti-trust principles.

That is all.

The CHAIRMAN. Well, that will be all. We will recess to meet at the call of the chairman as soon as we have arranged for the next witnesses.

(Whereupon, at 5:15 p. m., the committee adjourned subject to the call of the Chair.)

A STUDY OF THE ANTITRUST LAWS

WEDNESDAY, JUNE 1, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10:10 a. m., in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore, Kefauver, and Wiley.

Also present: Joseph W. Burns, chief counsel; and Donald P. McHugh, assistant counsel.

THE CHAIRMAN. The committee will come to order.

The Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee is engaged in a comprehensive study and investigation of the entire field of antitrust laws with a view toward determining whether revision and coordination of these basic laws are necessary. We realize that we face an enormous task in attempting to solve any of the complex problems which have arisen. Many professors of law and economics who specialize in the antitrust field are actively assisting the subcommittee and its staff in attempting to solve these problems.

This study and investigation has been undertaken because there has been a growing public debate that the antitrust laws require reexamination and a fresh appraisal of their functioning in the American economy today. It should be noted that the antitrust laws do not consist of a single statute, but a series of statutes enacted at different times. They include the Sherman Act of 1890, the Clayton and Federal Trade Commission Acts of 1914, the Robinson-Patman Act of 1936, the Miller-Tydings Act of 1937, the Celler-Kefauver Antimerger Act of 1950, the McGuire Act of 1952, and others. From time to time Congress has exempted certain industries or trade areas from the rigors of the antitrust laws. Many people have expressed a belief that vagueness and ambiguities and the various changes made in the antitrust laws over this 65-year period have produced confusion and conflicting policies. One of our tasks is to determine whether there are any conflicts, either in the statutes themselves, or in their interpretation by the administrative agencies and courts. We must also consider whether the laws have kept pace with the tremendous technological changes that have occurred. For these reasons we believe that reexamination of the entire body of antitrust laws is in order.

The antitrust laws have been termed a charter of economic freedom. They declare that competition shall be the guiding rule of our economy.

They are applicable to all American business—big, medium-sized, or small. The difficult problem is to set standards or guides for determining the kind of competition we desire in a dynamic and expanding economy. We have the task of endeavoring to coordinate the various statutes and exemptions so as to achieve an effective and uniform Federal antitrust policy.

The hearings commencing today have a twofold purpose. One is to have some of the country's leading economists discuss the nature of our economic structure today, the kind of competition which exists, and the effect of our antitrust laws in aiding competition or retarding it. The other is to consider the important problem of mergers.

In the general economic discussion we want to learn to what extent there has been an increase in concentration of economic power, and how competition has been affected by those mergers. This economic information is necessary as a background against which the various antitrust problems must be considered.

We should endeavor to define and clarify those terms generally used in this field which have economic and legal significance. A useful study must begin with a mutual understanding of the words used. A common language and common ground is a first step in progress toward clarification.

One of the most important and difficult questions before the country today is what the national economic policy should be with respect to Big Business. A responsible body of opinion points to the very high standard of living which we now enjoy, and attributes it in large part to achievements of Big Business. These persons refer to the steady flow of new appliances and labor-saving home products, constantly improved automobiles, radios, and other products. A great deal of our technological progress is attributed to Big Business.

Conversely, another responsible body of opinion believes that the growth of Big Business threatens the economic foundation of a free society. These persons see a progressive concentration of economic power in the hands of fewer and fewer corporate giants, which they consider monopolistic and likely to exploit the public. They feel there has been a progressive decline in competition.

On the problem of mergers, Congress enacted the Celler-Kefauver Antimerger Act of 1950 primarily for the purpose of plugging a loophole in section 7 of the Clayton Act in order to slow down the merger movement and stop those which might substantially lessen competition. We wish to learn why mergers have continued at a great pace. Is it because section 7 is still not adequate to prohibit undesirable mergers? Is it because the law has not been vigorously enforced? Or can it be said that most of the mergers do not substantially lessen competition and should not be prohibited? This subcommittee hopes to throw light on this perplexing problem through testimony at these and succeeding days' hearings.

The mergers recently proposed in two great industries, automobiles and steel, illustrate the problem. The executive branch of the Government, charged with enforcing the Antimerger Act, approved the mergers in the automobile industry and disapproved a proposed merger in the steel industry. Since both of these industries have been described as dominated by a few companies, it should be very enlightening to the subcommittee to have representatives of the Government

and of the companies concerned, and outside economists, discuss the economic factors involved in the light of the Antimerger Act.

Starting out we are asking the Federal Trade Commission Chairman, Mr. Howrey, to appear, and subsequently we will ask others from the Federal Trade Commission who have made a survey of the field.

Once, of course, we complete the economic picture with outside economists, lawyers, we then expect to go into the legal picture.

The first witness will be Edward F. Howrey, Chairman of the Federal Trade Commission.

Now, Mr. Howrey, in your speech in January 1955, that you gave before the New York State Bar Association, you expressed the opinion that the post-Korean merger movement was not as significant as the previous merger waves in this country.

Do you believe that the Commission's study, which was recently published, bears out your opinion?

STATEMENT OF EDWARD F. HOWREY, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. HOWREY. Yes, I think it does, Senator.

If I may explain that a little, when I said that it was not as significant as the wave at the turn of the century and the other so-called wave in the twenties, I meant that the number of mergers and, perhaps, the economic importance of the individual mergers were not as important.

I did not mean to suggest that the cumulative effect was not very disturbing. I was merely comparing the individual movements, the one at the turn of the century, the one in the twenties, and the present movement. They, of course, all put together have a cumulative effect that we consider a very disturbing one.

I have a prepared statement which deals largely with our merger report that was sent to the Congress last May 20, and I will be glad to read it if you would like to have me do so.

The CHAIRMAN. All right. We would like for you to read it so that I can ask you some further questions on it.

Mr. HOWREY. Mr. Chairman and members of the committee, I greatly appreciate the opportunity to appear this morning in response to your invitation.

It has been suggested that I deal with the subject of mergers, particularly from the standpoint of the Federal Trade Commission's comprehensive economic report on mergers which was transmitted to the Congress on May 20 of this year.

This subject is indeed an important one. The high incidence of mergers is one of the disturbing facts of life in our economy today. Presented are questions which are perhaps more difficult and challenging than any other in the entire field of antitrust.

It was for this reason that the Federal Trade Commission, on October 26 of last year, directed its Bureau of Economics to conduct a speedy but thorough economic investigation—for the purpose of supplying the Commission, the Department of Justice, the Congress, and the public with documented facts on the dimensions and significance of the merger movement as a whole. It was generally conceded that

until such a study was made the competitive significance of the post-Korean merger pattern would remain largely speculative.

The study was completed after 4 months of intensive work by our top economists, lawyers, and statisticians. The report has more than measured up to our hopes. It is a careful, objective, and forthright analysis. It is, in my opinion, the best study of mergers ever made by the Federal Trade Commission or any other Government agency. The report turns a factual searchlight on an economic problem whose dimensions have been obscured by lack of current information.

During the course of the investigation, it was discovered that merger activity had been stronger in some industries than in others. Industries marked by significant increases in merger activity included, for instance, the baking, dairy (and other food products), textiles, nonelectrical machinery, automotive, and metals industries. In the light of this information, it appeared that our ordinary screening procedures and other internal work methods should be reexamined. Moving promptly, a task force of lawyers, accountants, economists, and statisticians was therefore appointed with authority to select and examine particular mergers having the greatest significance in the current merger movement and to speed their investigation by the use of methods designed to cut redtape.

Reorganization directive No. 13, issued on April 5, lists the detailed functions of this task force and the men and women serving on it.

It occurs to me, Mr. Chairman, that you might like to insert that in the record. I submit it for that purpose in case you desire to do so.

The CHAIRMAN. Let it go in the record at this point.

(The document referred to follows:)

Full text of the FTC reorganization directive No. 13 setting up the task force follows:

"By virtue of the authority vested in me as Chairman of the Federal Trade Commission of the Reorganization Plan No. 8 of 1950, and in order to facilitate the work of the Commission under section 7 of the Clayton Act, as amended, a special task force is hereby established.

"This task force will be headed by a chairman under the immediate supervision of the Executive Director, and responsibility for the performance of the functions of the Commission's staff enumerated below is hereby transferred to the task force:

"1. Identification and selection of industries in which the incidence of significant mergers or acquisitions is high, and the employment of procedures necessary to develop full information with respect to such mergers or acquisitions;

"2. Development of procedures for speedy initial screening of new mergers and acquisitions by trial lawyers, investigators, and economists, and development of such additional procedures as may be necessary to obtain supplemental information concerning such mergers and acquisitions;

"3. Consideration on a case-by-case basis of whether surveys, samples and tabulations are needed, and if so, the stage of the particular case at which they can best be developed in a form admissible as evidence;

"4. Survey of mergers or acquisitions presently under study in the informal stage for the purpose of determining those which should be expedited;

"5. Consideration of premerger applications; and

"6. Consideration of the possibility of greater use of compulsory processes, pretrial procedures, interrogatories, depositions, stipulations, and other like procedures which might speed the handling of section 7 cases, including the development of any appropriate amendments to the Commission's rules of practice which might assist in the achievement of this end.

"I am designating Robert M. Parrish as Chairman of the task force and the following persons on the staff to serve as members:

J. Wallace Adair
 Betty Bock
 L. E. Creel, Jr.
 F. P. Favarella
 Edward Fischer
 William R. Haley

John R. Heim
 John F. McCarty
 William S. Opdyke
 Lawrence Stratton
 Robert L. Wald
 Ames W. Williams

"The Executive Director is authorized to increase or decrease the personnel as exigencies of the situation may require and to furnish clerical and stenographic help as well as office space. Unless otherwise directed, the members of the task force will continue to perform their regular duties.

"(Signed) EDWARD F. HOWREY."

Mr. HOWREY. I cannot report today on the confidential aspects of the task force's work, although it is possible for me to say that a fairly large number of cases in the selected industry areas is receiving active scrutiny at the moment. Attention is being focused on cases having the greatest importance, the ones that count the most in terms of economic impact.

The merger report itself, as I said a moment ago, was issued on May 20, and was transmitted to the chairman of this committee and to the President of the Senate and the Speaker of the House.

Among other things, it points out that mergers have increased to three times the 1949 rate, are nearing the postwar peak rates of 1946-47, but are well below the predepression rate of the late twenties.

Two major statistical studies are contained in the report.

The CHAIRMAN. Do you attach any significance to the fact that the mergers occurring during the depression years, and those that followed, are a lower number than the ones now going on? With an expanding economy and the peak of business, apparently, we have this constantly expanding number of mergers.

Mr. HOWREY. I might say, first, that this study was prepared by our Bureau of Economics, and was prepared under the supervision of Dr. Jesse Markham, who is on his way here by air, and if he is not in the room soon, we hope he will be before I get through.

It was transmitted by the Bureau of Economics to the Commission, and we approved it and issued it.

The CHAIRMAN. I'm not talking about the report.

Mr. HOWREY. I was leading up to saying, that I think in this document there is the conclusion that the incident of mergers is the greatest during periods of prosperity rather than in periods of depressions.

I think in the late twenties there was an enormous growth in mergers. I do not believe that mergers are high in depression years, and I believe this report bears that out.

The CHAIRMAN. In other words, bankruptcies go higher in depression years than mergers do; is that not right?

Mr. HOWREY. That is correct.

The CHAIRMAN. Isn't it a fact that there are capital surpluses which make it possible to have this enormous growth of mergers?

Mr. HOWREY. That certainly is one of the reasons.

The CHAIRMAN. During prosperity?

Mr. HOWREY. Yes, sir.

The CHAIRMAN. That is the basic cause.

Mr. HOWREY. Well, we found in our study, that there were several basic causes and, I suppose, back of all those basic causes is the money to do it with or they could not do it, that is the point you are making.

The CHAIRMAN. Yes; go ahead, please.

Mr. HOWREY. The first of these analyzes 1,773 mergers and acquisitions during 1948 to 1954 in the manufacturing and mining fields.

Nearly two-thirds of these acquisitions, the report points out, were made by companies with assets of \$10 million or more. In contrast, companies with assets of less than \$1 million accounted for less than 8 percent.

The largest number of acquisitions during 1948-54 were in the non-electrical machinery industry with 249 mergers, and in the food products industry with 243.

The CHAIRMAN. Let us subdivide again merger by acquisition and merger by mutual agreement, in other words, where the stockholders of both companies participate in the merger and each gets an exchange of stock in the merged company. Don't you find that the mergers by acquisition exceed the mergers by mutual agreement?

Mr. HOWREY. I think not.

The CHAIRMAN. I think "merger by agreement" is rather a loose way of stating it.

Mr. HOWREY. I think most all of the mergers are by mutual agreement.

The CHAIRMAN. Yes.

Mr. HOWREY. I think it is important that we get the words straight. We have "merger" which usually means merging of companies of relative or the same size.

We have the term "consolidation" which may mean a group of companies, and then we have the term "acquisition" which we have used in our report to cover all types.

Now, I think generally the most important method used is the exchange of stock. Whether you call it by mutual agreement, purchase, or anything else, usually the easiest way to acquire another company is through the stock exchange. But there are many other ways of just buying the assets, and then the other corporation liquidates its corporate form.

We have a chapter in our report which deals with the methods used during this period in merging, taking each one up and discussing it.

The CHAIRMAN. We recently had a matter up in which one of these attempted acquisitions kind of blew up. This was a case in which even the corporate charter went on the auction block, and was about to be sold to a company which was not even interested in the business for which the charter was originally issued, but because that charter had a very high value on the stock exchange.

Mr. HOWREY. Yes; and I understand in the bank merger of New York, about which I know none of the details; I understand there that the small company technically bought out the big company, and they kept the charter of the small company.

The next 18 industry groups in number of mergers were: Chemicals, 168; fabricated metals, 161; transportation equipment, 125; textiles and apparel, 117; electrical machinery, 111; nonmanufacturing, 96; mining, 81; primary metals, 78; stone, clay, and glass, 70; paper and allied products, 60; professional and scientific instruments, 47; lumber and furniture, 40; petroleum and coal products, 35; printing and publishing, 24; rubber products, 23; leather products, 21; miscellaneous manufacturing, 20; and tobacco manufactures, 4.

The study also draws a comparison in the size of acquiring companies during the 1948-54 period with those acquiring properties during the earlier period 1940-47. During the earlier period, companies with assets exceeding \$10 million accounted for 57.9 percent of all acquisitions. During the later period, the percentage rose to 65.5 percent. Nearly all of the gain came from companies with assets ranging from \$10 to \$49 million, since the proportion for companies with assets above \$50 million was about the same for both periods.

The second statistical study covers some 2,100 mergers and acquisitions (including companies acquired only in part) in the manufacturing, mining, trade, and certain service industries. These took place during the 43 months following enactment of the Antimerger Act of 1950.

I am told Congressman Celler wants us to call it the Celler amendment rather than the Antimerger Act, and that Senator Kefauver sometimes calls it the Kefauver amendment, so I am calling it the Antimerger Act, so that I will not get into trouble.

Of these mergers, the report shows, one-third involved property valued at \$750,000 or more, with well over 100 cases in which the property acquired was worth at least \$10 million. Among the acquiring companies, one-fifth had assets of \$50 million or more, and about 1,000 had assets of at least \$10 million.

Among the acquisitions recorded by the staff of the Commission, large companies are revealed as having acquired more medium-size properties than were acquired by medium-size companies and more small properties than were acquired by small companies.

The report next examined the "who-how-why" of current merger activity.

The "who" is generally the acquiring company, and promotion of this type, the report says, is the most important. Mergers originating with the acquired company also are common, particularly where smaller companies wished to sell out to other companies. Promotion by a divesting company is frequent in cases where it seeks a buyer for part of its property or business. Still another important agent is the outside financial or other interest who finds it to his advantage—because of stock ownership, interest in products or services to be provided, or fees to be collected for promotional assistance—to see that the combinations or acquisitions are made. Of less frequency is the merger promoted by the joint efforts of both parties to it, that is, the acquiring and the acquired firms.

The report suggests—

that more and more firms representing outside interests are becoming engaged or involved in the business of promoting or playing some other vital role in merger formation.

Dealing with the "how" of mergers, the report describes as the plans most often used in important acquisitions the exchange of stocks between companies, and the purchase of stock of the acquired company from individuals and firms either privately or in the open market. The report also describes the several forms of organization used in both acquisitions and mergers.

Turning to the "why" of mergers, the report lists five reasons— Involving competitive factors—which seem to occur most frequently. These are: additional capacity, accounting for 2 out of 5 acquisitions;

diversification of products, accounting for 1 out of 4; backward vertical mergers looking toward sources of supply, 1 out of 8; forward vertical mergers looking toward ultimate sale to consumers, 1 out of 10; and additional capacity located in new markets, 1 out of 10.

Strictly competitive factors, however, are not the only forces underlying acquisitions. The report lists such other factors as: (1) Inability of smaller companies to command adequate financial resources for expansion and modernization; (2) surplus cash in the hands of acquiring companies; (3) aging owners wanting to retire or adjust their estates; (4) tax savings under provisions of the Internal Revenue Act granting more favorable rates on capital gains, tax-free exchanges of stock, and tax advantages from carrying forward past operating losses as credits against future earnings.

Case studies, the report reveals, indicate that when a manufacturer desires to expand his capacity his first decision must be whether to build or buy. If he builds he creates additional capacity and competition; if he buys he reaps not only the advantage of increasing his capacity but acquires the market previously served by a competitor.

If I may interpolate there, the report goes on to say, with other things being equal, the costs being relatively the same, why, the tendency is to buy rather than to build new capacity.

**The analysis—
the report says—**

of the economic forces discernible in acquisitions * * * indicates that where satisfactory existing facilities are available for purchase at a price even approximating their new construction cost, the balance is strongly weighed in favor of purchase.

Competitive considerations, the report continues, are especially important if a manufacturer is diversifying into new products, supplying new markets with existing products, or supplying existing markets where he sells at a freight rate handicap. They also apply if the proposed expansion is vertical in nature, such as increasing capacity to produce raw materials; supplying the manufacturer with component parts, or expanding his operations to produce and distribute end products.

Listed as examples of acquisitions offering quick economies of scale, diversification, and stability in both production and distribution without competitive struggle were the following:

Consolidated Foods' integration and diversification in the production and wholesale distribution of food products.

Avco Manufacturing Co.'s addition of a wide variety of household appliances and farm equipment to its previous lines.

Burlington Mills' expansion over the years from a company engaged exclusively in manufacturing rayon textiles to the manufacturing and marketing of yarns and fabrics made of synthetic fibers, cotton, wool, and mixtures of synthetic and natural fibers.

The report said that in discussions with the Commission's staff members, both acquiring and acquired companies have pointed out that tax savings are a frequent factor in acquisitions. The report then referred to the recent merger of Willys-Overland and Kaiser-Frazer in the automobile field. "Willys-Overland," the report noted, "in becoming the earning asset in the merger, obtained Kaiser-Frazer's past losses for tax credits against its future earnings."

This is not to imply, of course, that tax incentives have inspired the relatively large number of mergers in the automobile industry—
the report continued—

the Nash-Hudson, Kaiser-Willys, and Studebaker-Packard mergers have posed a dilemma for antitrust agencies; namely, is the public interest best served by permitting the independents to merge and thereby to strengthen their competitive positions, or by attempting to force them to continue to compete independently with the three dominant companies at the risk of possible eventual disappearance of at least some of them through total withdrawal or bankruptcy? This dilemma was in fact resolved in favor of permitting them to merge, thereby increasing the combined companies' ability to compete with the Big Three.

The CHAIRMAN. Getting back to what you discussed just a moment ago, this tax question, is it not a fact that the carryback, carryover features of the tax act are an enormous incentive for one company to acquire another one in order to get tax credits?

Mr. HOWREY. I am sure that is so. We do not think it is the most important one, but we think it is a very important one.

We think that it was present in the Kaiser-Willys merger, where Willys had been earning a net profit regularly, and Kaiser had been losing quite regularly. I think at one period, a year or two before the merger, they had a \$30 million loss, and my recollection is that in 1952 Willys had about a \$6 million profit.

Well, they merged, and they kept the Kaiser Corp., and they were able to write off, I am told—

The CHAIRMAN. On the other hand, you may find a big company that has subsidiaries with losses is interested in building up its tax credits and alleviate the losses by the subsidiaries.

Mr. HOWREY. I am not an expert in that field.

The CHAIRMAN. I ran into one case of this kind where they bought up a company and were going to completely obliterate the plant.

Mr. HOWREY. The difficulty that presents itself immediately, the 1950 act, as I read it, and I am sure as the authors intended it, and as the legislative history conclusively demonstrates, was not intended to stop all mergers. It was the enforcement agencies that were to look at the mergers and, to speak loosely, permit the good ones to merge and to prevent the bad mergers, and those which lessened competition were prohibited, those which might increase competition were to be permitted.

Now, I have been asked why we have not recommended amendments to the tax laws in this report. Well, the answer to that is that we are studying the problem.

It is not an easy problem, because once you pass an amendment to the tax law you cannot make that distinction between good and bad mergers. They have to all be treated alike.

So that would require, I should think, consultation with the Treasury Department and the tax experts, and with the committees of Congress to ascertain whether we want to keep the concept, which I think is desirable, of not stopping all mergers.

I think the Kaiser-Willys merger on balance was a good thing for our economy and not a bad thing.

Senator KEFAUVER. Mr. Chairman, may I ask Mr. Howrey, have you discussed with Mr. Humphrey or with the Treasury people the problem of this merger for tax purposes that we have just been discussing, whether some amendment of the tax law might be indicated?

Mr. HOWREY. We have not yet done so. We plan to do so. We have had discussions with other Government agencies, and we are sending them our report.

We have written the Commissioner of Internal Revenue, listing some of the mergers that we think were motivated primarily by tax incentives. We have even called attention in our report to instances where companies have even advertised that they would like to buy weak and insolvent companies.

Senator KEFAUVER. What is your personal opinion about that kind of practice?

Mr. HOWREY. I think this advertising is very bad, and I think it is a matter that needs very careful attention.

I do want to preserve, if I can, the concept of your original bill, which is that we should not outlaw all mergers as such.

I think some mergers are good, and they promote our competitive economy. Others are very bad, and I think we must preserve that theory in all of our antitrust laws which is to prohibit activities which lessen competition and restrain trade, and permit those which do not.

We, of course, set up this task force, for example, to speed the prosecution and examination of the bad ones, and we want to go after the bad ones. But I do think that the mergers like the automotive mergers of these very small companies, are beneficial rather than detrimental to our economy.

Senator KEFAUVER. Well, don't you think it is a rather unwholesome situation when a company has a bad year or two and instead of trying to work out its own problems and get back on the black side of the ledger, it tries to see where it can make a good deal at the expense of the Government, just by selling the idea of merging with someone who needs a tax situation?

Mr. HOWREY. I agree; yes, indeed.

Senator KEFAUVER. Don't you think that is something that the Federal Trade Commission ought to be making some recommendations about, if you think it is bad?

Mr. HOWREY. I think we should; yes.

However, I think we should do it in consultation with other agencies and departments, including the Tax Department, and including this committee and the other committees having jurisdiction.

We set the facts out in this report. From those facts I think all of us can take a look at the situation and recommend changes in our tax laws.

My only reservation at all is that we should try to keep in any amendments to our tax laws the concept that we have in the 1950 act.

Senator KEFAUVER. This tax incentive merger, as I see it, really results in the Government's subsidizing and paying the cost of the merger, does it not, Mr. Howrey?

Mr. HOWREY. It certainly helps. It certainly did in the Kaiser-Willys case. I do not think it nearly covered the full amount. I think \$60 million or \$70 million was involved in that purchase. But the tax incentive was important there and is, I think, much more important in other cases.

Senator KEFAUVER. It also gives a strong competitor an incentive to sort of push his smaller competitor to the wall, and then having

pushed him to the wall and made him operate at a loss, he is then in a position to offer a pretty good price to his smaller and distressed competitor. Thus he eliminates his competition, and a substantial part of the expense, which the Government would actually have to pay in the long run; is that not true?

In other words, suppose General Motors should be able to push Chrysler into the red through various kinds of unfair competition so that Chrysler would have some tax credit that might be available which General Motors could use to very great advantage and, by a merger, the Government would actually be paying part of the cost of the acquisition.

Mr. HOWREY. Yes; it might. I do not conceive of any possibility of any Government agencies permitting those two to merge. But outside of that, I think if you would use another example, I would agree.

Senator KEFAUVER. I do not mean to imply that Chrysler is going to get into that situation; but I am just using it as a hypothetical case.

But, frankly, if you would have looked at some current mergers 5 or 6 years ago, I would not conceive of some of these companies that had merged as being in a position where they were more or less forced to do so. So you cannot prophesy what is going to happen in the future.

Mr. HOWREY. I think you have to look at each case on a case-by-case basis.

I do not like to use names, but I think Kaiser-Willys is a merger of the type that, under all of the facts of the case, where there were only 3 big companies and 6 small companies, I think that even the combined Kaiser-Willys Co. in 1954 in the passenger-car field still had only about three-tenths of 1 percent of the volume in that field.

Now, we analyzed that merger, and we passed on that merger, and we approved it not because we wanted to see a company grow bigger, but we thought on balance, under all of the circumstances, that we should permit that merger because we thought it would permit the combined companies to furnish some competition to the Big Three that might not otherwise be there in the years to come. So I think you have to look at each case on a case-by-case basis.

I think that in that instance under all of the facts of that case, you yourself would have approved it 100 percent, because there was not much else that you could do.

Senator KEFAUVER. Do not accuse me—I doubt if I would have; I do not know enough about it. But I do say I think it showed the growth of a system under our tax laws to which some thought ought to have been given a long time ago.

I did not mean to interrupt you.

Mr. HOWREY. We exposed all those facts in this report, and I am sure that they will lead to some suggestions to solve the problem.

I do not want to leave a wrong impression, but we do not find that a major incentive to mergers is the tax incentive. It is one of the important ones, but we do not find it to be a major one.

Senator KEFAUVER. That is not exactly something that a company should be proud of. So don't you think it may be possible that while they may be giving other reasons as the primary reasons, the taking

advantage of the tax laws might be more of a reason than they are willing to admit?

Mr. HOWREY. Well, I think the major competitive reason is the desire for new capacity and the desire to get that new capacity without creating new competition. They can get the new capacity and remove a competitor, and that seems to be the major competitive factor of the noncompetitive factors which I have just listed, that of the tax incentive is very important in that field.

The CHAIRMAN. The purpose of antitrust and monopoly legislation is not to remove competition; is that not right?

Mr. HOWREY. That is right.

The CHAIRMAN. In other words, even though a tax incentive is present, that alone should not govern. But the question as to whether or not such a merger does reduce competition to a dangerous point, where the welfare of the public as a whole would be involved, is an important one.

Mr. HOWREY. That is the exact point I was trying to make.

The CHAIRMAN. Of course, I agree with Senator Kefauver that if a tax law is an added incentive, that also should be looked into.

Mr. HOWREY. The philosophy behind our antitrust laws is to prevent restraints of trade and mergers and various other practices where it may lessen competition or tend to monopoly, and the competitive consequence or competitive effect must be ascertained by looking at the market facts.

So I suggest that when you are looking at the tax statutes which do not apply in that way, they do not apply to that sort of concept, they apply across the board. Everybody is treated exactly the same, and we will probably want to bear in mind and keep in the merger field a concept of the good and the bad.

The CHAIRMAN. Of course, a tax law might make it possible to have more mergers; is that not right?

Mr. HOWREY. Yes.

The CHAIRMAN. In other words, making it easier to merge and thereby to get an elimination of competition mainly because such a law is available.

Mr. HOWREY. Or on the other hand, I suppose, and I say again, I am not a tax lawyer, but I suppose the tax laws could be written so that you could stop all mergers. It depends on whether you want to follow that rule or not.

The CHAIRMAN. Yes.

One interesting thing in your testimony so far that has struck me is your remark that the major group of mergers has been in the food, textile, and kindred fields, exclusive of the nonelectronic manufacturing field.

Could that in any way contribute to the present situation that although farm prices have dropped pretty heavily on the farmer, food prices have not dropped at all?

Those things seem to affect what I call the minimum living standard of the American people. Food and clothing are two essential musts in the American economy.

A merger of that kind might contribute to the maintenance of the high cost of the basic essentials of living. Do you find enough of that going on to have that effect?

Mr. HOWREY. Our report, I do not think, deals with that at all.

The CHAIRMAN. In other words, you have not made a study of that?

Mr. HOWREY. No, we have not. We started a consumer-dollar study which probably would not tie it into mergers, but we discontinued that for budgetary reasons.

The CHAIRMAN. I think that if there really should be mergers of that kind, they would be dangerous for the American people. I might mention I had a man just this morning in my office who told me that he lost \$6,000 on a recent cattle purchase by a drop in the cattle market. At the same time the price stayed the same to the farmer.

Mr. HOWREY. Of course, the food industry is one of the industries we have selected to look into because of the high incidence of mergers.

The CHAIRMAN. Incidentally, you must realize that the question of food and clothing and a few other items also contribute to some of these wage controversies going on right now.

Mr. HOWREY. They do, indeed.

To continue my prepared statement, the rest of the report analyzes the 1950 act, and explores the uses and limits of economic information in determining the probable competitive consequences of acquisitions and mergers.

Among the necessary facts to be considered in evaluating probable consequences are: (1) The character of the acquiring and the acquired companies.

The CHAIRMAN. Getting back to type of acquisition, the fact that Borden came into a dozen small towns and bought out individuals who were distributing milk in those towns, isn't that an acquisition rather than a merger of corporations? I am not just picking on the Borden Co., but using it as an example.

Mr. HOWREY. Borden made 17 separate acquisitions. Now, I cannot answer you as to whether those were all corporations or not.

Is there anyone in the room who can? We have some of our people here.

The CHAIRMAN. I would just say that that is an interesting point.

Mr. HOWREY. Mr. Blair might be able to answer your question.

Mr. BLAIR. I did not quite understand the question, Mr. Chairman.

The CHAIRMAN. The question is whether your study went into the acquisition of a bunch of little fellows in towns and cities. Do you remember, Mr. Blair, we discussed that when the Kefauver-Celler bill was up?

Mr. BLAIR. I do not recall the situation with respect to Borden.

The CHAIRMAN. I am not just picking that out. I just used Borden as a name that is well known.

Mr. BLAIR. Well, the company that has made more acquisitions than any other in the field of mining and dairying is Foremost Dairies, and some of the enterprises acquired by Foremost are of the nature you describe, that is, they are small, you might say, milk-distributing outfits or in some cases they are enterprises where the farmer himself picks up milk from other farmers, distributes it to—

The CHAIRMAN. That is the type of case I am getting to.

Mr. BLAIR. Yes, there are several of those.

The CHAIRMAN. I am just wondering if you had gotten into those, because I had a complaint some time ago in one section of Virginia, not West Virginia, but Virginia, where a number of individual farmers

had built up milk routes in smaller towns, and then they bought milk from other farmers, and added their own to it and distributed it. And those fellows had sold out, whereupon the acquiring company went in and dropped the price of milk by the pound, lowered that price to the farmer, at the same time not lowering the delivered price to the consumers; in fact, in some places, they raised it.

Mr. BLAIR. Well, to the extent that such acquisitions are reported in the financial manuals, we have picked them up and, as I said, in the case of Foremost, I know the figures that are contained in the report do reflect acquisitions of that type.

The CHAIRMAN. Thank you very much.

Mr. HOWREY. You may want to have in mind, and I am sure you do, that the act, the statute, applies to corporations.

The CHAIRMAN. I know. However, that is pointing to a possible weakness in the act.

Mr. HOWREY. Yes.

The CHAIRMAN. That is the reason I was bringing it out.

Mr. HOWREY. Yes.

Among the necessary facts to be considered in evaluating probable consequences are: (1) The character of the acquiring and the acquired companies; (2) the character of the markets affected; and (3) changes in the acquiring company and in the adjustment of other companies operating in these markets.

An acquisition which reduces the opportunity or incentive of sellers or buyers to enter new markets, to experiment with new channels of distribution, or to exercise choice among products and prices, may substantially lessen competition.

All of such facts cannot and need not be investigated in each case, the report observes.

Only those facts which are relevant in particular market contexts, can be obtained at reasonable cost, should become a part of the record. In certain cases the facts that can be obtained at reasonable cost may leave gaps in the information that would be helpful in reaching greater certainty as to the competitive consequences of an acquisition. While sufficient data to support a conclusion is required, sufficient data to provide certainty as to competitive consequences would nullify the words, "where the effect may be" in the Clayton Act and convert them into "where the effect is."

That is usually referred to as the Sherman Act.

After pointing out problems involved in the use of market information as legal evidence—including the need to protect third parties from disclosure of confidential information—the report says:

Although the use of market information in the administration of section 7 of the Clayton Act raises special problems, refusal to use such information will not solve these problems. Conclusions concerning the competitive consequences of particular acquisitions cannot be reached on the basis of rule-of-thumb, they must be reached on the basis of the market facts relevant for an understanding of such consequences.

Perhaps I should refer briefly at this point to the merger section of the report of the Attorney General's National Committee to Study the Antitrust Laws. That Committee stressed the fact that the clear object of Congress in amending section 7 of the Clayton Act was to establish more effective rules against mergers and to strike down some mergers beyond the reach of the Sherman Act.

The merger section of the report constitutes an endorsement by the Committee—that is the Attorney General's Committee—of the Federal Trade Commission's handling of the Pillsbury case, wherein the Commission delineated in broad terms its view of new section 7.

The complaint in that case charged Pillsbury with violation of section 7 by reason of its acquisitions of Ballard and Duff, two important manufacturers of flour-base mixes. The hearing examiner dismissed the complaint on the ground that the allegations were not supported by reliable evidence. The Commission reversed and emphasized the following factors: a pattern of acquisition in the industry and by Pillsbury particularly, a general increase in the major mills' percentage market share, a decline in the number of mills, a lack of new entries, and a movement in the direction of oligopoly in the urban markets. In its decision in Pillsbury the Commission rejected any automatic test of illegality, viewing its task under section 7 as requiring a case-by-case examination of relevant factors in order to ascertain the probable economic consequences of the merger. At the same time the Commission strongly rejected any suggestions that this examination called for the application of Sherman Act tests.

The committee's report suggested that the legality of a vertical acquisition—leaving the Pillsbury case and going back to the Attorney General's report—may turn on whether the integration significantly restricts access to needed supplies or significantly limits the market for any product. In short, is there a reasonable probability that the merger will foreclose competition from a substantial share of the market?

In no merger case—

Said the committee—

horizontal, vertical, or conglomerate—can a "quantitative substantiality" rule substitute for the market tests section 7 prescribes.

In determining the legality of horizontal mergers, said the Attorney General's report, the dollar volume of the merged companies hardly bears on the question of whether the competition lost as the result of the merger may, in the context of the market as a whole, constitute a substantial lessening of competition or tend toward monopoly. In some cases, the market share in which competition is eliminated, however, may be of prime importance. In others, different market factors may be equally important in measuring the effect on competition.

As the Pillsbury opinion suggests, no one pattern of proof can meet the requirements of all cases. It will always be necessary to analyze the effect of the mergers on relevant markets in sufficient detail to permit a conclusion as to its probable economic effect.

It may be relevant, said the Attorney General's committee, to study: (1) the character of the acquiring and the acquired companies, (2) the characteristics of the markets affected, (3) the immediate changes in the size and competitive position of the acquired company and the position of other companies in the same markets, and (4) the probable long-range competitive consequences.

The Commission so far has issued three complaints under section 7 in three important industries, flour milling, paper, and scrap steel.

If I may, Mr. Chairman, I would like to interpolate there and say since we set up our task force we have taken the merger problem

out of our routine channels. We have established a task force to deal with it.

On that task force are lawyers, economists, and accountants, all representing the various parts of our Commission, and they have the job of selecting, based on this report, the industries that need investigating, the cases that have the greatest impact on our economy, and we expect within the fairly near future to institute additional cases.

The problem there, of course, is one also of money and manpower. These three cases we have pending now are big cases. They take a great deal of time and numbers of economists and lawyers to try them.

We have, I think, 200 and some lawyers, and we have enormous jurisdiction. We have a jurisdiction which is probably greater than any other Government agency over our economy, so I do not know how many of these merger cases which, if they get into actual litigation, we could handle with our staff. But we contemplate bringing a number of additional cases, and we are certainly going to go after the cases where we think the impact on our economy is adverse.

The CHAIRMAN. The Federal Trade Commission can go into court and bring cases. You are limited to civil cases, are you not?

Mr. HOWREY. No; we do not go into court at all, except on the review of our orders.

The CHAIRMAN. In other words, you operate as an administrative court yourselves?

Mr. HOWREY. Yes, sir.

The CHAIRMAN. And then, on review, of course, your attorneys go into court representing—

Mr. HOWREY. We issue an administrative order, a cease and desist order.

The CHAIRMAN. On the other hand the procedure of the Antitrust Division of the Justice Department is through the courts?

Mr. HOWREY. That is correct. They are the traditional prosecutor. We are an administrative agency having no access to the courts except in certain types of cases under the Wheeler-Lee amendment, which do not include merger cases.

The CHAIRMAN. In other words, the operation is parallel, shall we say, to the operation of the Patent Appeals Court and of the United States district court, either one of which may act upon a patent dispute. However, the Patent Appeals Court is limited to a trial from the record subject to appeal, whereas the United States district court is a court where cases are brought *de novo*, and a trial is had in the district court.

Mr. HOWREY. Yes. I think that analogy applies to the Department of Justice and to Federal Trade. We both administer the same laws, that is, certain sections of the Clayton Act. But we till the same fields using, however, different tools.

The concept of the administrative agency was that we should deal with the problem as a preventive, not as a prosecuting agency.

We try to prevent these mergers or try to undo them by administrative hearings and administrative orders.

The CHAIRMAN. Your method gives you access to the records of the corporations involved without further court action?

Mr. HOWREY. Yes.

The CHAIRMAN. Whereas the Department of Justice has to bring a suit or institute a criminal action before they get access to the actual records?

Mr. HOWREY. Yes. That is, compulsory access; they frequently get access in a voluntary way.

One of the recommendations of the Attorney General's committee was to give the Department of Justice what is called a civil demand procedure, whereby they can in civil cases demand access to documents the same way in which we have access.

The CHAIRMAN. The reason I asked that question was to clarify that in your statement. There was a question raised about it in the Attorney General's report.

Mr. HOWREY. It might be interesting, if you will permit me, just to clarify a little bit what the concept of the administrative agency is.

You will recall that the ICC is the best example; that the courts, private litigation through the courts, used to be the only means of settling railroad disputes, fixing rates, and all those things.

Well, that broke down completely. The courts were not equipped to handle those technical matters, and they did not have the time and their dollars would not permit them to do that.

The CHAIRMAN. And the same applies to patent matters, too.

Mr. HOWREY. So they set up the ICC with their experts to try to handle that on an administrative basis.

Now, they set up the Federal Trade Commission, which is the second oldest administrative agency, with a little different concept. It was to cut across all industries. It was not to deal with, as the FCC or CAB or ICC, a particular segment of our economy; they were to cut across all industry. But we were to try to approach the problem in the same way, that is, as a body of experts.

We were given not only lawyers but we were given economists and statisticians, accountants; and in our false advertising field we have doctors and chemists on our staff.

We were to try, as a body of experts, to approach these trade regulation problems and to stop them before they got to the courts, because the courts were not equipped to handle them. They do not have economists and statisticians attached to the bench and, of course, the volume is so great with the growth of our economy that they cannot handle them.

In other words, put it this way: We supplement the work of the Department of Justice, the Antitrust Division.

The CHAIRMAN. All right, go ahead, please.

Mr. HOWREY. Well, I have finished my statement except as to the concluding paragraph, which I shall read. It is merely a conclusion.

It is our hope that you will find the Commission's merger report of interest and assistance in dealing with this important subject. We at the Commission are continuing to study the myriad of facts contained in the report. After we complete our own consideration of these facts, we shall consult with other interested agencies and then decide whether or to what extent legislative changes may be desirable.

The CHAIRMAN. All right.

I think in order to expedite matters and to get in as much as possible, I am going to ask Commissioner Gwynne to testify next, and then I think we will ask both of you questions indiscriminately, so if you will just stay here or step to one side until he finishes, and then we would like to get both of you back here to answer questions put by the committee.

This is Commissioner John W. Gwynne, a member of the Federal Trade Commission. You may go ahead and identify yourself and we will hear your testimony.

Senator Kefauver, will you take over for a few minutes?

STATEMENT OF JOHN W. GWYNNE, MEMBER, FEDERAL TRADE COMMISSION

Mr. GWYNNE. I have a very brief statement, Senator. Shall I read it?

Senator KEFAUVER. Commissioner Gwynne, the committee is glad to have you here.

The acting chairman recalls many years of service with the Commissioner Gwynne on the House Judiciary Committee back in the dark, dark past. Please read your statement.

Do you have copies of it for the committee?

Mr. GWYNNE. Yes. Copies were made available.

Senator KEFAUVER. I have one here.

Mr. GWYNNE. Before I begin, Senator, I wonder if I could say that I recall those years with a great deal of pleasure, and have always appreciated the splendid efforts you made, and I am glad that the amendment that you worked on so diligently has finally been adopted.

Senator KEFAUVER. I thank you.

Mr. GWYNNE. After I got out of Congress is when it happened, so I can claim no part of the credit.

Senator KEFAUVER. Commissioner Gwynne wrote the report in the 80th Congress on the bill that I filed in that Congress, on section 7.

When did you become a member of the Commission, Commissioner Gwynne?

Mr. GWYNNE. September 25, 1953.

Senator KEFAUVER. All right, sir.

Mr. GWYNNE. The amendments to the Clayton Act adopted December 29, 1950, marked an important step in the history of antimonopoly legislation.

One of the important amendments was the inclusion of the acquisition of assets within the scope of the statute. Prior to the adoption of the Clayton Act, mergers were usually accomplished by stock purchases. The development of holding companies and their control (often secret) of other corporations was the primary evil which held the attention of the Congress and the public. While a merger through purchase of assets is not usually as easy as through acquisition of stock, nevertheless, it was soon learned that it could be done. Thus, the effectiveness of the original section 7 was greatly limited.

Another important change was the omission of the test of lessening of competition between the acquiring and the acquired corporations. This part of the old law was apparently not construed literally; neither was it entirely ignored. The result was to introduce considerable confusion, which under the present law does not exist.

The elimination of this clause makes it clear that the prohibitions of the section were not limited to horizontal mergers. The House Judiciary Committee report, in commenting on this, points out that the law makes it clear that it applies to all types of mergers and acquisitions, vertical and conglomerate, as well as horizontal, which have

the specified effect of substantially lessening competition or tending to create a monopoly.

The original statute prohibited acquisitions where the effect may be (1) to restrain commerce in any section or community, or (2) to tend to create a monopoly of any line of commerce. The present law prohibits acquisitions whereby the effect may be (1) substantially to lessen competition in any line of commerce in any section of the country, or (2) to tend to create a monopoly in any line of commerce in any section of the country. Thus, the physical area in any particular case is not to be determined by geographical boundaries but rather by the realities of competition.

Both the Senate and House reports make it clear that the amendments are not intended as a mere duplication of the Sherman Act. The Senate report contains the following language:

The intention here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have obtained such effects as would justify a Sherman Act proceeding.

The CHAIRMAN. And looking to trade areas and not to any legislative boundary line; is that not right?

Mr. Gwynne. That is right.

The CHAIRMAN. In other words, the boundary line there is the trading area?

Mr. Gwynne. That is my understanding, Senator.

The CHAIRMAN. Yes. I just wanted to get that clear.

Mr. Gwynne. The words "may be" are contained in both the old and new versions of section 7. In the Senate report on the amendments, the intent of the law is explained in the following clear and forcible language:

The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act. * * * The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.

In other words, Congress has made it clear that we are not to wait until the horse is stolen. Diligent consideration must be given to locking the barn door at a time when such locking will do some good.

This prospective application of the law, this mandate to check a defined evil in its incipiency, presents a difficult problem of administration. The law does not prohibit all mergers. Nor does it exempt any, where there is a reasonably probability of the prescribed effect, to wit, the substantial lessening of competition or tendency to create a monopoly.

Senator KEFAUVER. Mr. Chairman, may I interrupt to say that I think the legislative intent as set forth by Commissioner Gwynne at the beginning of this statement down to the paragraph beginning with "This prospective application of the law," is especially clear.

Being one of the sponsors of the amendment to section 7 both in the House and in the Senate, I would say that I think he has stated very clearly just what the Judiciary Committees in the House and Senate had in mind in amending section 7 of the Clayton Act.

Mr. Gwynne. Thank you.

The CHAIRMAN. All right. Anything else?

Senator KEFAUVER. No, that is all.

The CHAIRMAN. Go ahead, please.

Mr. Gwynne. The application of the law in a concrete case will often pose a difficult problem and one in which there will often be a difference of opinion. Nevertheless, the courts and the administrative agencies are not complete strangers to this type of work. A judge is often called upon to issue an injunction where no injury exists, but where harm is threatened for the future. A jury under proper instructions from the court often assesses the amount of present damages to be awarded for injuries which may extend into the future. In these cases, the decision must not be based on speculation or conjecture but must be the result of the diligent study of proven facts against a background of human experience. Thus is the future forecast and reasonable provision made for it.

The 1950 amendments to section 7 have accomplished four major things:

(1) They have broadened the law to include all means by which a merger may be accomplished;

(2) They have taken out certain provisions which might make for unreasonable application. The elimination of the competitive test between the acquiring and the acquired corporations, and the elimination of the word "community" are examples.

(3) They have included all types of mergers, vertical, horizontal and conglomerate; and

(4) They have stressed the importance of attacking the problem of monopoly in its incipiency.

The amendments and the legislative history indicate that the Congress meant to deal with the problem effectively. The new section 7 appears to be a much more useful weapon than anything we have had heretofore.

Mr. Chairman, I had occasion on November 5, 1954, to discuss some legal phases of this amendment before the antitrust section of the Illinois Bar Association.

I would like to include that statement at the conclusion of my remarks.

The CHAIRMAN. All right; that will be included.

Mr. Gwynne. No study of the problems of mergers would be complete without consideration of many other factors of our present political, economic, and social life. Our times have been characterized by important scientific discoveries, technological advances, and greatly improved methods of production and distribution. All these have affected the methods of competition. Nevertheless, they do not take the place of it; in fact, they are largely the result of it.

Without discussing these broader features, I would like to mention some more commonplace matters covering the day-by-day enforcement of the antimerger statutes. These problems are in three phases: (1) Discovering the fact of a merger; (2) determining whether there is reasonable ground to believe the law has been violated; and (3) trying the case.

There is no one place where complete information can be had about the facts of a particular proposed merger. No notice of intention is required. Many of the initial steps are often taken before the public

or Government knows about it. After that, some investigation must be made to determine whether the merger violates the law. There are a certain number which have no competitive importance. Nevertheless, considerable time and effort must be spent in finding that out.

It would not seem unreasonable to require corporations planning a merger to keep the Government advised from the beginning of their efforts along this line. Prompt and effective cooperation would, in the long run, be much simpler than going through the unscrambling process if it should develop that the acquisition violated the law.

The trial of cases under section 7 is a long and tedious process. The final decision is a matter of great concern not only to the parties affected, but also the public. The question to be resolved is the probable effect on competition. An examination must be made of many factors, such as the size and competitive importance of the acquiring and acquired corporations, the situation of the market generally, other recent acquisitions by either corporation, and many others.

Before the trial begins, it is necessary to give careful consideration to (1) the facts necessary to be proved, and (2) the means by which these facts may be placed before the hearing examiner and the Commission.

This last is particularly important. The trial of any antimonopoly case is much different from the trial of a negligence case, for example. There, the evidence may usually be introduced by calling a relatively few witnesses familiar with the facts. The record is usually short and the legal questions already more or less settled by court decision. The inquiry in an antitrust case takes a wider range. Many economic facts are relevant. Great care must be taken to confine consideration to matters that are relevant and to get those facts into the record in a minimum number of words. Consideration must be given to the use of data already available from reliable sources, such as census reports and surveys. Commenting on this type of evidence, the court in *U. S. v. Minnesota Mining and Manufacturing Company* ((1950) 92 Fed. Supp. 947, at p. 948) had this to say :

Relevant political and economic facts can be presented to the court in an informal way. It is not necessary to comply with those minimal standards of evidentiary competence suitable for the proof of other types of facts, even in the comparatively loose procedure commonly followed in an antitrust case where the Government seeks an injunction (cf. *U. S. v. U. S. Machinery Corporation*, D. C. 89 Fed. Supp 349). It is sufficient that the economic and political facts come from published sources recognized as authoritative, persuasive, or reliable by the profession of economists and political scientists, and if the publications are presented at a time and in a manner which give the adverse party adequate opportunity to examine, to challenge, to rebut, and to argue upon them.

Those who have any responsibility in the trial of these cases must use diligence and imagination in improving trial techniques. These cases will always be difficult, but much can be done to expedite the proceedings and to shorten the record. In doing this, we must not forget the requirements of due process as laid down through the years in our great legal system.

Every respondent is entitled to a fair trial, to properly test his opponent's case, and to develop his own. But in doing this, he should cooperate so that the case may be tried as simply and as expeditiously as possible. In the long run, that should be as much in his interest as it is in the interest of the public.

Mr. Chairman, the Commission has recently issued an opinion considering, in an antimerger case, some of these evidentiary matters. If it is agreeable with you, I would like to make that part of the record.

The CHAIRMAN. All right. That will go in the record.

(The documents submitted by Mr. Gwynne are as follows:)

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

Commissioners: Edward F. Howrey, Chairman; Lowell B. Mason, James M. Mead, John W. Gwynne, Robert T. Secrest.

Docket No. 6180

In the matter of Crown-Zellerbach Corporation, a Corporation

OPINION OF THE COMMISSION

By GWINNE, Commissioner:

This is an interlocutory appeal by counsel supporting the complaint. The questions involved have to do with a tabulation identified as Commission's Exhibit 62.

The complaint charges respondent (which is engaged in the business of producing and selling pulp, paper, and paper products) with violation of Section 7 of the Clayton Act in connection with the acquisition of St. Helens Pulp & Paper Co. Subsequent to the issuance of the complaint, the Federal Trade Commission, by resolution, authorized the Bureau of Economics to collect data, ascertain market characteristics, and prepare statistical compilations for use in this proceeding.

At the hearing Dr. Irston R. Barnes, an economist of the Federal Trade Commission in charge of developing the economic work relating to Section 7 matters, testified that he had charge of the carrying out of the above resolution and he related in detail various steps taken under his supervision. He testified in substance that St. Helens had reported that 98 percent of its sales in the Western and Pacific States were to converters and jobbers. Questionnaires were prepared classifying the various papers formerly manufactured and sold by St. Helens into certain specified types. The questionnaires to converters classified the products into eight types of coarse paper; those to jobbers covered six types of coarse paper and three types of coarse paper products. Both jobbers and converters were instructed to show the dollar volume of such purchases from each named supplier of such products for specified periods of time, both before and after the acquisition. If the company's records did not supply prices on the product basis specified in the report, estimates based on company records were to be used. The list of jobbers and converters was made up from St. Helens' salesbook, from respondent's sales analysis, from Lockwood's Directory of the Paper & Allied Trades for 1953, and from other sources. Some wholesale grocers were also included. Answers to the questionnaires were required to be certified by an officer of the corporation. Reports received were tabulated both as to dollar volume and percentage of aggregate sales by each supplier shown in the reports.

At the conclusion of the direct testimony of Dr. Barnes, the tabulation (Commission's Exhibit 62) was offered in evidence. Respondent objected on the ground that the basic material on which the survey was based had not been made available for cross-examination. The Hearing Examiner ruled that unless the material were made available, it would be necessary to sustain the objection. At that point an adjournment was taken and counsel supporting the complaint took up with the Commission the matter of authorizing the respondent to make some examination of the reports.

On January 18, 1955, the Commission directed the Bureau of Economics to transmit the records to the Bureau of Litigation with authority to make the data available to counsel for respondent under the following conditions:

"(1) It shall be made available to such counsel in the Washington Office of the Commission solely for inspection and for use during the examination of the witness or witnesses who received and edited the replies and compiled the Survey. No information secured on FTC forms EE-1 or EE-2 that can be identified with reporting companies shall be admitted into the public record for any purpose.

"(2) The Survey documents shall not be removed from the Washington Office of the Commission. An employee of the Commission familiar with the records shall have custody of same at all times during the inspection or other use thereof. He shall have full responsibility for the preservation of such records and shall cooperate with and assist those using them."

Respondent insisted that the disclosure permitted under the Commission's order was inadequate, which view was sustained by the Hearing Examiner and he entered an order "that the objections of the respondent to Commission's Exhibit 62 for identification be sustained."

The questions involved are (1) Is the tabulation (Commission's Exhibit 62) admissible in evidence as an exception to the hearsay rule? (2) Are the limitations placed by the Commission on respondent's examination of the questionnaires such as to deny it a fair trial?

In the general discussion on hearsay in Wigmore on Evidence, 3rd edition, Volume V, Section 1420, and following, the distinguished author says: "The purpose and reason of the hearsay rule is the key to the exceptions to it." He points out that cross-examination "is, beyond any doubt, the greatest legal engine ever invented for the discovery of truth * * *. The theory of the rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare, untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test * * * may in a given case be superfluous; that is, not needed or impossible of employment. * * * If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary sense), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured."

Wigmore concludes that a consideration of two principles has been responsible for most of the hearsay exceptions. These principles are, first, the circumstantial probability of trustworthiness and, second, the necessity for the evidence.

These principles have been considered and applied in a great variety of cases, many of which are cited in the briefs. For example, tabulations or surveys made by a competent witness have been admitted in evidence where the tabulations were made from evidence already properly in the case (*U. S. v. Grayson*, 1948, 168 F. 2d, 863; *Harper v. U. S.*, 1944, 143 F. 2d, 795; *U. S. v. Feindberg*, 1944, 140 F. 2d, 592). In some cases tabulations or audits have been admitted, even though the records or data on which the exhibits were based were not formally in evidence but were available for examination (*Northern Pacific Railway Company v. Keyes*, 1898, 91 Fed. 47, and *Butler v. U. S.*, 1951, 53 F. 2d, 800).

Another type of case has to do with surveys based on consumer opinion. An example is *U. S. v. 88 Cases, More or Less, Containing Bireley's Orange Beverage* (1951, 187 F. 2d, 967), which was a libel proceeding under the Food, Drug, and Cosmetic Act. There, the court admitted surveys covering answers given by 3,539 individuals to questions prepared by the government. These questions concerned conclusions drawn by the individuals (based on certain advertising) as to the contents of the product in question. Other cases commenting on the admissibility and value of this type of evidence are *Bristol-Myers Company v. F. T. C.* (1950, 185 F. 2d, 58); *Gulf Oil Corporation v. F. T. C.* (1954, 150 F. 2d, 106); *Rhodes Pharmacal Company v. F. T. C.* (1953, 208 F. 2d 382). In the latter case the court said "Obviously, the value of a survey depends upon the manner in which it is conducted, whether the techniques used were slanted or fair." In none of the cases does it appear that the individuals whose opinions were collected were available for cross-examination.

Some of the language in *Elgin National Watch Company v. Elgin Clock Company* (1928, 26 F. 2d, 376), seems to indicate a view contrary to that expressed in the above cases. There, a petition was filed for an injunction restraining defendant from using "Elgin" in connection with its products. Plaintiff, relying on equity rule 48, asked permission to file an affidavit of Arthur Lynn, based on answers to questionnaires mailed to many retail jewelers. Questionnaires asked not only for the opinions of the individual jewelers as to the impressions made by the word "Elgin" but also asked what the opinions of the jewelers' customers were. The court's conclusion seems to have been based largely on its opinion of the purpose and meaning of equity rule 48.

In addition to the public opinion or consumer surveys, the courts have also admitted in evidence tabulations of factual data, which data was gathered by numerous persons not available for cross-examination. In *U. S. v. Aluminum Company of America* (1940, 85 F. Supp. 820), one of the issues concerned bauxite deposits in Arkansas. Exhibit 1684 was a tabulation made by a witness of

facts shown by the records of the drillings of 605 test holes. The court ruled against the government's claim that the individual and numerous drillers should be called to testify as to what each had learned in his separate drilling operations. The court overruled the objections that the offered exhibit was hearsay. The drillings had not been done for the purposes of the lawsuit. It also appeared that it had been the general custom to accept such test-hole reports as correct without calling the makers to verify them. *Powhatan Mining Company, et al. v. Ickes* (1941, 118 F. 2d, 105) involved an application to the Bituminous Coal Division of the Department of Interior for changes in minimum coal prices. The Director of the Division admitted in evidence 25 pages of tabulations based upon invoices filed with the Division under Section 4, II (a) of the Bituminous Coal Act, purporting to show the prices of coal of similar quality sold to one of the largest consumers in the district. Section 4, II (a) provided "All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it * * * copies of all invoices * * *. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information." The court held that the tabulations were admissible under the liberal rules applicable to administrative hearings and that the exhibit was not hearsay.

American Employers Insurance Company v. Roundup Coal Mining Company (1934, 73 F. 2d, 592) was an action to recover on a fidelity bond because of fraud and embezzlement of an employee, Bunker. One claim was that Bunker embezzled money received from the company's customers and failed to credit such payment on the books. Exhibit 65 was made up by an auditor from replies to letters to various customers, in which replies was set out what purported to be the true status of the individual accounts. The exhibit was held to be "not only hearsay, but also made up of a series of self-serving declarations." Thus, it appears that the showing of the circumstantial probability of trustworthiness was unsatisfactory nor was there adequate showing of the necessity for the evidence. In fact, it appears that the evidence, even if admitted, would have had no direct bearing on the real question at issue.

Concerning the second principle, that is, the necessity for the evidence, Wigmore points out that necessity, in one form or another, is found in all the hearsay exceptions (Wigmore on Evidence, Volume V, Section 1630). In applying this principle, Wigmore recommends a reasonable and practical approach as is shown by the following statement from *U. S. v. Aluminum Company of America* (35 Fed. Suppl. 820 at 823) :

"In effect, Wigmore says that, as the word 'necessity' is here used, it is not to be interpreted as uniformly demanding a showing of total inaccessibility of first-hand evidence as a condition precedent to the acceptance of a particular piece of hearsay, but that necessity exists where otherwise great practical inconvenience would be experienced in making the desired proof (Wigmore, 3rd Ed., Vol. V, sec. 1421; Vol. VI, sec. 1702). As will be seen by scrutinizing the cases cited above as being in accord with or supporting the Merriam case, it is inconceivable that what the courts whose decisions control in this court have said can properly be construed as requiring that physical inability be shown in order to establish the type of necessity which constitutes one of the conditions precedent for using hearsay. If it were otherwise, the result would be that the exception created to the hearsay rule would thereby be mostly, if not completely, destroyed."

This matter of necessity for the evidence has been emphasized particularly in antitrust cases, where the inquiry often takes a wide range. In commenting on this fact, the court in *U. S. v. Minnesota Mining and Manufacturing Company* (1950, 92 Fed. Suppl. 947), said at page 948:

"Relevant political and economic facts can be presented to the court in an informal way. It is not necessary to comply with those minimal standards of evidentiary competence suitable for the proof of other types of facts, even in the comparatively loose procedure commonly followed in an antitrust case where the government seeks an injunction (cf. *U. S. v. U. S. Machinery Corporation* (D. C. 89 Fed. Supp. 349)). It is sufficient that the economic and political facts come from published sources recognized as authoritative, persuasive, or reliable by the profession of economists and political scientists, and if the publications are presented at a time and in a manner which give the adverse party adequate opportunity to examine, to challenge, to rebut, and to argue upon them."

See also *Cub Fork Coal Company v. Glass Company* (1927, 19 F. 2d, 273).

In applying these two tests of admissibility in the instant case, consideration must be given to the statute under which the data was collected and tabulated. Section 6 of the Federal Trade Commission Act provides:

"That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

Section 10 of the Act provides:

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, * * * shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment."

As against the required trustworthiness and necessity, respondent urges, among other things: That the surveys were conducted by mail; that they were made after complaint was issued and for purposes of this litigation; that Dr. Barnes, while a trained economist, is not an expert in the paper business; that the classification of products was not correct; that the method of selecting customers (particularly those of respondent and St. Helens Pulp & Paper Co.) was unfair and would result in biased answers; that the persons supplying the evidence are not available for cross-examination.

These are all matters which may be inquired into and evaluated at the proper time. They have to do with the weight of the evidence rather than its admissibility. Dr. Barnes' testimony, already in the record, sets out the steps taken to insure the accuracy of the data sought under Section 6 of the Federal Trade Commission Act. One of the developments of our complex economic life is the increase in the use of information of this character, both by government and business. The personal property tax system of many states relies on data collected by officials and certified by the individual taxpayer to be correct. Tabulations of this data so collected are later used by boards in equalizing taxes between governmental subdivisions. The use of information collected by the Census Bureau is another example. Surveys made by independent organizations on a variety of subjects are used and relied upon in the field of business. Such a survey was considered admissible and as having probative value in the matter of Pillsbury Mills, Inc., Docket No. 6000.

It is our conclusion that Commission's Exhibit 62 is not subject to the objection that it is hearsay.

II

The second question (and the one immediately before us) has to do with the limitation placed by the Commission on the use of the data upon which Exhibit 62 was based.

Many of the cases already cited have also considered this question. In *Powhatan Mining Company et al. vs. Ickes*, the Director did not allow an inspection of the invoices on which the tabulations were based, because he considered them confidential. The court pointed out that the information secured under Section 4, II (a) was not confidential in this type of proceeding, and that the disclosure should have been made, in the interest of a fair hearing. *Northern Pacific Railway Company vs. Keys* (91 Fed. 47), was a suit involving the fixing of railway rates by a state board of railway commissioners. A large number of tables were

prepared in the accounting departments of several railroads affected showing the amount of business done for a certain period. The work was done by 40 or 50 clerks under the direction of the heads of the departments who were called as witnesses. The court held that it was not necessary to call the clerks to testify as to the correctness of the tables as each clerk made but a part of them, but it was sufficient if the records from which the computations were made were placed at the disposal of the opposing party for examination. *Augustine vs. Bowles* (1945, 149 F. 2d, 93), was an action by the Administrator of the OPA for treble damages for violation of the Emergency Price Control Act. Exhibit 11 was a compilation showing overcharges made by Augustine in the sale of meats to wholesale grocers. An OPA investigator, Ortlund, obtained the original invoices of sales from Augustine, had another investigator prepare the tabulation listing customers sales, prices, etc. Ortlund, alone, was called and testified he only "spot-checked" a certain number of invoices. All the invoices, however, were made available at the trial for examination by Augustine and the tabulation was held admissible.

The general purport of these decisions is that cross-examination is a valuable right and should not be restricted beyond the actual necessities of a particular case. We believe that the order of the Commission of January 18, 1955, was unnecessarily restrictive. It is ordered that the said order be withdrawn and the following is adopted in lieu thereof:

For the purposes of this litigation the basic information collected by the Bureau of Economics pursuant to Commission resolution of May 8, 1954, and the work papers used in compiling the Survey of Western Converters and Jobbers of Certain Coarse Paper and Paper Products shall be made available to respondent and its counsel, at such reasonable times and places as may be determined by the hearing examiner. No information secured on FTC forms EE-1 or EE-2 that can be identified with reporting companies shall be admitted into the public record for any purpose.

The case is remanded to the Hearing Examiner for further proceedings in accordance with this opinion.

**REMARKS BY COMMISSIONER GWINNE FOR PRESENTATION NOVEMBER 5, 1954, TO
ANTITRUST SECTION OF ILLINOIS BAR ASSOCIATION, CHICAGO, ILL.**

By act of December 29, 1950, Congress adopted new amendments to the Clayton Act. These amendments, together with the legislative history, suggest some interesting questions as to the interpretation of section 7 as amended.

The first paragraph of section 7 now reads:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of 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."¹

The important changes made in this paragraph are (1) the inclusion of the acquisition of assets within the scope of the statute, (2) the elimination of the competitive test between the acquiring and the acquired corporation, (3) the adoption of the words "in any line of commerce in any section of the country," and (4) a revision of the tests by which the illegality of a proposed merger is to be determined.

The original section 7 made no attempt to prohibit mergers by acquisition of assets. The mergers of that period were usually accomplished by stock purchases. The development of holding companies, and their control (often secret) of other corporations was the primary evil which held the attention of the Congress and the public.²

The interpretation of the section by the Supreme Court greatly limited its effectiveness³ and led to demands both in and out of Congress for modification of

¹ 64 Stat. 1125; 15 U. S. C., sec. 18.

² See report of Senate Debates, particularly statements of Senator Cummins, 51 Congressional Record, 14316; House of Representatives Rept. No. 1191, 81st Cong., 1st sess., p. 4.

³ *Thatcher Manufacturing Company v. FTC*, *FTC v. Western Meat Company, Swift and Company v. FTC*, all reported in 272 U. S. 554 (1926). *Arrow-Hart and Hegeman Electric Company v. FTC* ((1934) 291 U. S. 587).

the law. In fact "the plugging of the loopholes" caused by the failure to include assets and also by the court decisions as to stock purchases was generally given as one of the main objectives of the proposed legislation.⁴

Amended section 7 now brings acquisitions of assets within the prohibitions of the law by the following language:

"And no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of any other corporation," etc.

The word "assets" is not defined, although its meaning did receive some consideration in various stages of the efforts to amend the law.⁵

The original section 7 prohibited a stock acquisition, "Where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition." The amended law omits the quoted language. Both the House and Senate Judiciary Committee reports state that this omission made the law less restrictive.⁶ That would no doubt be true if the clause were to be given its literal meaning. The merger of two competing corporations would seem to eliminate whatever degree of competition had existed between them. There has, however, always been considerable difference of opinion as to the meaning of the clause and for practical purposes, it came to have a limited effect.⁷

In any event, the elimination of all reference to lessening of competition between the acquiring and the acquired corporation has an important bearing on the interpretation of the present law. For example, it makes it clear that the prohibitions of the section are not limited to horizontal mergers. On this subject, the House committee report says:

"But in the proposed bill, as has been pointed out above, the test of the effect on competition by the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. But there is a second, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate, as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly. If, for example, one or a number of raw-material producers purchases firms in a fabricating field (i. e., a "forward vertical" acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms. The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers."⁸

Another important change in the section was the adoption of the language "in any line of commerce in any section of the country."

The original law (omitting the competitive test between the acquiring and acquired corporations) prohibited stock acquisitions where the effect may be (1) to restrain commerce in any section or community, or (2) to tend to create a monopoly of any line of commerce. The present law prohibits acquisitions of either stock or assets whereby the effect may be (1) substantially to lessen competition in any line of commerce in any section of the country, or (2) to tend to create a monopoly in any line of commerce in any section of the country.

In regard to the words "section of the country," the Senate report points out that:

"Although it is, of course, impossible to define rigidly what constitutes a 'section of the country,' certain broad standards reflecting the general intent of Congress can be set forth to guide the Commission and the courts in their interpretation. What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless from an economic point of view to attempt to apply for

⁴ See S. Rept. No. 1775, 81st Cong., 2d sess., p. 2.

⁵ A statement of the National Canners Association suggested the following amendment: "The term 'assets' as used in this section * * * shall not include stock in trade, inventories, or other property held by a corporation primarily for sale to customers in the ordinary course of its trade or business." (Senate hearings on H. R. 2734, 81st Cong., 2d sess., p. 318.)

⁶ S. Rept. No. 1775, 81st Cong., 2d sess., p. 4; H. Rept. No. 1191, 81st Cong., 1st sess., p. 5.

⁷ See Henderson, *The Federal Trade Commission*, pp. 40-42; dissenting memorandum of Commissioner Van Fleet in *Fiske Rubber Company* (1926), 10 FTC 433.

⁸ House of Representatives Committee Rept. No. 1191, 81st Cong., 1st sess., p. 11.

all products a uniform definition of section, whether such a definition were based upon miles, population, income, or other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk."⁹

The limits of a section of the country in any particular case is not to be determined by geographical boundaries but rather by the realities of competition. Generally speaking, it is an area of effective competition—a trade area. In determining its extent, consideration should be given to many factors—the character of the product, its practical transportability, its perishability, relation to competitors outside the area, and many others.

The original law contained the words "in any section or community," as did also some of the prior bills introduced to amend section 7. In the final version, the phrase "or community" was omitted, for the purpose of making the law less restrictive—to prevent the test of competitive effect being applied to a governmentally or socially recognized area having no relation to the real area of effective competition.

The phrase now being considered does not appear in the Sherman Act. Nevertheless, the courts under that act have had occasion to consider the question of restraints which did not affect the entire United States.¹⁰ These decisions may be of some value in construing this particular phrase in the Clayton Act.

The original section 7 contained the words "or tend to create a monopoly of any line of commerce." In the present law, the language is "in any line of commerce," and the phrase is made applicable both to substantial lessening of competition and to tendency to create a monopoly.

In *Van Camp and Sons Company v. American Can Company*,¹¹ the court considered the phrase "in any line of commerce" as it appeared in section 2 of the Clayton Act, which section prohibited certain discriminations in price, the effect of which may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The court said:

"The phrase is comprehensive and means if the forbidden effect or tendency is produced in one out of all the various lines of commerce, the words 'in any line of commerce' literally are satisfied."

The court rejected the argument that the words must be confined to the particular line of commerce in which the seller (discriminator) is engaged and held that it applied also to the line of commerce in which the purchasers were engaged.

On that subject, the Senate Judiciary Committee report says:

"It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition."¹²

The following is from the House committee report:

"The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a nationwide or industrywide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country."¹³

Line of commerce is sometimes defined as the manufacture or distribution of a product distinct from all other products. The difficulty is, however, that many products may differ from other products and yet not be distinct so far as competitive effect is concerned. On the other hand, two products may fall in the same general category, yet may not fill the needs of the same class of buyers and therefore are not really competitive. For example, under the particular facts in *United States v. Columbia Steel Corporation*,¹⁴ seamless high-pressure steel pipe was regarded as not competing with welded low-pressure steel pipe. In *International Shoe Company v. F. T. C.*,¹⁵ it appeared that two types of shoes were primarily sold in different markets and to different classes of buyers with the result that in respect to 95 percent of the business, there was no real competition between the acquiring and the acquired corporations. Therefore, there was not substantial competition between the two companies.

⁹ S. Rept. 1775, 81st Cong., 2d sess., p. 5.

¹⁰ U. S. v. *Columbia Steel Company* ((1948) 834 U. S. 495); U. S. v. *Yellow Cab Company* (332 U. S. 218).

¹¹ 278 U. S. 245 (1929).

¹² S. Rept. 1775, 81st Cong., 2d sess., p. 5.

¹³ H. Rept. 1191, 81st Cong., 1st sess., p. 8.

¹⁴ See note 10.

¹⁵ 280 U. S. 291 (1930).

Another important question has to do with the test by which the illegality of the proposed acquisition is to be determined. In this matter, too, the committee reports suggest some general standards.

The House report points out that the amendment is not intended as a mere duplication of the Sherman Act. Speaking of the cumulative effect of acquisitions, the report says:

"The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair chance to compete."¹⁸

The Senate report contains the following language:

"The committee wishes to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have obtained such effects as would justify a Sherman Act proceeding."¹⁹

Speaking more specifically on the two tests of illegality provided in the act—that is, substantial lessening of competition or tendency to create a monopoly—the House committee said:

"These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act."

It should be noted that the tests are to be similar, not necessarily the same. I think it was intended that proper consideration be given to the difference in purpose and application of the several sections of the Clayton Act. Proof of the probability of substantially lessening competition or tendency to create a monopoly is required under section 2 (a) having to do with price discrimination. It is also required under section 3 having to do with exclusive dealing contracts. Yet there are important differences in the application of the law in section 2 (a) itself.²⁰ Similarly, there is a difference under section 3 between tying contracts and "requirements" contracts.²¹ In like manner, there is a difference between sections 2 (a), 3, and 7. Hasty generalizations should not be drawn that the manner of applying the tests under a particular set of facts under one section should automatically be adopted in cases under another section.

In the matter of *Pillsbury Mills, Inc.*, docket 6000, the Federal Trade Commission pointed out that the "substantiality doctrine" of the *Standard Oil Company of California v. U. S.* and of *International Salt Company v. U. S.*,²² as there applied in section 3 cases, was not in itself a reliable guide for the Commission in carrying out its long-range responsibility under section 7. The rule laid down in *Pillsbury Mills* was that the Commission would make a "case-by-case examination of all relevant factors in order to ascertain the probable economic consequences."

In amending section 7, Congress did not prohibit all mergers, nor did it single out any particular types. It directed that mergers should be prevented where the effect may be to substantially lessen competition or tend to create a monopoly. How better may the Federal Trade Commission obey this mandate than by examining all competent evidence which has a tendency to prove or disprove that the forbidden results are reasonably probable?

Both committee reports give some attention to the words "may be" found both in the old and new versions of section 7. The Senate report explained that:

"The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act. * * * The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of

¹⁸ See note 18.

¹⁹ S. Rept. 1775, 81st Cong., 2d sess., p. 4.

²⁰ See 1948 Policy Statement of the Federal Trade Commission.

²¹ See discussion of this subject in *International Salt Company v. U. S.* ((1947) 382 U. S. 392), and *Standard Oil Company of California v. U. S.* ((1949) 387 U. S. 293).

²² 387 U. S. 293 (1949) and 382 U. S. 392 (1947).

trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."²⁴

The attempt to reach evils reasonably probable in the future rather than those actually existing is one of the important differences between the Clayton and Sherman Acts. Its practical application in concrete cases often poses a difficult problem. A judge, considering the issuance of an injunction for threatened harm, or determining the amount of present damages to be awarded for injuries which may extend into the future, is confronted with a somewhat similar problem. In deciding this issue, Congress did not intend that the Commission should enter into the realm of speculation or conjecture. While future evils need only appear reasonably probable, nevertheless, in every case that reasonable probability must be proved.

In construing any statute, attention must be given not only to actual language but also to the overall purpose of the legislation—the evils sought to be remedied; the results desired to be secured. It is generally said that the adoption of section 7 in 1914 was to cure the evils of economic concentration and control growing out of the operation of holding companies. The intention in adopting the 1950 amendments was to prevent the substantial lessening of competition by the acquisition of either the stock or assets of a competing corporation. This is illustrated by the economic data considered by both the House and Senate committees, a summary of which is set out in each report.

It has often been pointed out that our various antimonopoly laws are vague and conflicting and, in fact, sometimes seem headed in different directions. Nevertheless, they all are the product of a common aspiration—the maintenance of the competitive system. Among all the nations, we have placed the greatest emphasis on competition. It is the cornerstone of our economic structure. This must be kept constantly in mind by all who have any responsibility in regard to section 7.

We must also keep in mind that the conditions under which the competitive battle is now waged differ from those existing in 1890 or in 1914. Scientific discoveries, technological advances, mass production and distribution, enactment of laws outside the antimonopoly field, a different standard of living, changed social concepts—all have their effect on the production and distribution which go to make up commerce. Competition is still essential but it is competition under different rules.

The conclusion of the Congress was that mergers, however brought about, which may substantially lessen competition, contained a threat to our economic system. The amendments adopted, together with the general legislative history, indicate that Congress meant to deal with this problem effectively. Attention was given to the inadequacies of the existing law and attempts were made to remove them. That the final result was a weapon more potent than anything theretofore designed seems obvious. The end result, whether good, bad, or insignificant, will depend largely upon the skill, the judgment, and the commonsense of the bar, the agencies, and the courts, whose duty it will be to wield this weapon in the public interest.

Mr. Gwynne. That concludes my statement.

The CHAIRMAN. Mr. Howrey, since the number of mergers in 1954 was three times that in 1949, or slightly less than the high of 1946-47, does it not appear that the antimerger amendment has not noticeably affected the merger movement?

Mr. HOWREY. Well, it is a very hard question to answer yes or no. We cannot prophesy what would have happened without the 1950 amendment.

The CHAIRMAN. Is the amendment strong enough and does it go far enough?

Mr. HOWREY. Well, it is a new law. The only adjudication under it really is the interlocutory opinion of the Commission in the Pillsbury case and a preliminary injunction in the Benrus case, so it has not been tested in the courts.

²⁴ S. Rept. 1775, 81st Cong., 2d sess., p. 6.

I agree with Judge Gwynne. I think it is a great improvement, but it has not stopped the merger movement, to answer your question. Whether the merger movement might have been much greater than it was, I do not know.

The CHAIRMAN. Now, in listing the number of mergers that has taken place, does that include not only the mergers consummated but the mergers attempted?

Mr. HOWREY. I think not, Mr. Chairman. I included only consummated mergers.

The CHAIRMAN. How many proposed mergers did the Commission turn down?

Mr. HOWREY. You refer there, Mr. Chairman, to our clearance procedure?

The CHAIRMAN. Yes.

Mr. HOWREY. We do have a procedure—and Justice has also—whereby a party planning to acquire another company or perhaps two companies can come in and give us all of their facts and we can tell them what we think about it.

Now, I have the figures on that. Those were cases where people ask us, where we do not go out and give clearances, where they come in and ask for a clearance.

“Clearance” is probably the wrong word, but where they come in and ask for our advice.

We have examined 22 since the new act was passed. We have approved 11 of the applicants and we have denied 8; and 1 was withdrawn and 2 are pending.

The CHAIRMAN. Now, of the ones listed as consummated, you had application for clearance from how many?

Mr. HOWREY. Eleven of them.

The CHAIRMAN. You only had application from 11 of them?

Mr. HOWREY. Well, we had applications on 22, but we approved 11.

The CHAIRMAN. You had 22 applications out of how many mergers that took place?

Mr. HOWREY. Well, we had probably 1,700 and some during this period.

The CHAIRMAN. After the merger was consummated, without reference to either you or the Antitrust Division, in how many of them have you been called upon to go into?

Mr. HOWREY. Well, I cannot answer that question precisely.

We have several hundred mergers in our files that we are examining now. They are in one stage or another of the examination.

The way we usually go about it, we try to make inspection, and if we find that particular merger is one that should be looked into, we ask for certain specified information, in great detail some of it, and they furnish that and they are examined. So, we have several hundred that were examined.

I do not know how many of those will develop into cases. Some of them will; probably most of them will not, into cases that we think we can make under the statute.

The CHAIRMAN. If all of the 1,700 had had to apply for a clearance some place, your staff would have been utterly inadequate to handle that, is that not right?

Mr. HOWREY. Yes; that is true.

The CHAIRMAN. You can only handle a small percentage, and if the merger has been consummated, it is a much tougher proposition than to go ahead.

Mr. HOWREY. Yes; and that is one thing I think this committee will want to reexamine, the remedy provided in section 7. The only remedy provided in the statute is divestment.

Now, the Commission probably, although it has not been decided, does not have the power of an equity court, so we probably could not create a remedy of our own which would restore competition in cases where divestiture is impossible, that is, where the eggs are scrambled, sometimes it is impossible to unscramble them, and an equity court has power to grant other forms of relief if necessary to restore competition.

Section 7 does not have that provision in it. It has only the remedy of divestiture.

The CHAIRMAN. Now, if sufficient funds were available, would you favor a law requiring the Federal Trade Commission to pass upon the legality of proposed acquisitions over a given size, in advance of consummation?

The TNEC made such a proposal in 1941, that would require a decision of the Commission before companies are permitted to act.

Mr. HOWREY. Yes; I remember.

The CHAIRMAN. That was a suggestion.

Mr. HOWREY. I remember that proposal and it was withdrawn and did not find its way into the law.

The Commission opposed that proposal at the time. What its position would be today, I do not know, because I cannot speak for them, but personally I think that I would want to examine some factors before I gave a "Yes" or "No" answer to your question.

If the law should set up a provision for declaratory orders and hold hearings and permit a trial, like you have in court on declaratory orders, it might be feasible, provided we had the funds and staff to do it.

I would not want the power in the Federal Trade Commission just to issue licenses, certificates of convenience and necessity, like you might have in a public utility; that would make all business a regulated public utility.

The CHAIRMAN. Of course, the only way would be or might be what is called trial commissions.

Mr. HOWREY. If we had to pass upon every merger in advance and approve it, we probably would have to build a building the size of the Pentagon to house the people to do it.

But there are philosophical concepts there, too. I think the declaratory type of order with hearings, with the parties having the opportunity to present their case, might be an appropriate way to do it, if it were feasible from a manpower standpoint and a money standpoint.

The CHAIRMAN. Now, since it is difficult and expensive to attack consummated acquisitions, wouldn't it tend to slow down the rate of mergers if corporations were required to report them to you or the Department of Justice a given number of days in advance of consummation?

Assistant Attorney General Barnes recently made such a proposal before the Senate Small Business Committee. The Commission did not make such a recommendation in its report on mergers. This pro-

posal merely requires the companies to report their plan so many days in advance of consummation.

What do you think of that?

Mr. HOWREY. Well, would you permit me to give a little background before I reach the answer as to why our report did not contain any recommendation, and then, if I may, I will direct my attention to your particular problem.

When we started out, we recognized that we had just gotten a new law.

The Commission tried, you know, for almost 28 or 25 years, to get the amendment which finally culminated in a new section 7. We advocated it for years and years and struggled to get it.

We realized there had been no adjudications under that new law, so when we started out with this factual study on mergers, we thought the proper thing to do was to get all the facts together, put them on the top of the table, expose them to the scrutiny of this committee and other congressional committees, and other people in the Government and then, after those facts had been analyzed, decide in consultation with everyone what recommendations should be made to amend what, as I say, is a brand-new law.

Now, that is why we did not have in our report any recommendations, because it was not our intention to have them, to begin with, and when we got all through we decided that while there were certainly many areas that should be examined with reference to recommendations we wanted to study before we made any.

Now, those areas—there was the tax area discussed this morning. Another area was whether there should be any thought of passing on mergers in advance. The third is the remedy, and the fourth is whether there should be some stay like there is in the SEC Act in reference to certain stock issues, and so forth.

And then, of course, there is the one that you just suggested or asked me about, namely, whether they should be required to report in advance, without there being any provision whether we shall pass on them in advance.

Now, I think that has some merit. I think that there are some dangers, in the sense that if you do not get to the merger within the 90 days, or whatever period is suggested, it will be presumed by many people and maybe by some courts that we had the opportunity and did not take it, and it was just too bad and that might imply approval, perhaps, if we did not disapprove or had some means of staying the merger.

So, I do not think that you could just limit the proposal to that. I think that you would have to provide some safety clauses in it.

I have not yet concluded whether I would recommend such a measure or not. If I would recommend it, I think there should be a floor.

Our report indicates, for example, that probably the major mergers are by companies having assets of \$10 million or more. Now, perhaps a bill requiring acquisitions, where one of the merging companies has assets of more than \$10 million—that they should be required to report in advance.

The CHAIRMAN. Well, that was the nature of my question.

Mr. HOWREY. But we have, frankly, Senator, or I have, at least, not decided just what amendments I would want to recommend. I would

want to do it in consultation with the other Government agencies who enforce section 7—the Department of Justice.

I think if possible we should be in agreement on recommendations of that type, and so while we are going to make them, I do not believe today I would want to say one way or the other on the proposal you have just outlined.

The CHAIRMAN. Let me give you an illustration. In this committee we long ago adopted a policy, when a nomination came up to us for a judge in the district court or a marshal or a case of that kind that came up for nomination before the committee, the committee served notice on the floor of the Senate and gave a number of days before the committee would consider that nomination, and then it went into the Congressional Record, and from the Congressional Record it got into the newspapers in the area involved. At that point public opinion enters and people that wanted to object had an opportunity to write letters or send in telegrams of objection and we found that that was very conducive to an orderly operation of the confirmation of these nominations.

Following that procedure, we did not later on, after the confirmation had gone through, have to face a lot of people coming in and saying, "This fellow is not fit for the job," and that sort of thing.

My own thought is that, in the final analysis, the monopoly laws are interested to protect people against really unfair trade practices. Isn't that a fact?

Mr. HOWREY. Absolutely.

The CHAIRMAN. And the mass of the people of the United States wanted to be protected against, say, the idea of price fixing and limited production and things of that kind.

Now, if such a report was made by the Commission and the Commission publicized that report, possibly getting it into the general press, then people would be advised, don't you think so?

Mr. HOWREY. Yes.

The CHAIRMAN. And then they can come in, if a certain company is going to buy out some plants in a certain community. You can do all that pretty much under cover. For example, there was one proposed merger that came to me when the thing was practically consummated—

Mr. HOWREY. I don't think that actually occurs. I think every major merger is dealt with in the business press long before it is consummated.

The CHAIRMAN. Well, this one did not come out until it was almost complete, until it was very late.

Mr. HOWREY. The smallest mergers would not, of course, but I think it would be very desirable for us to know these things in advance.

But, like every other law, you have to consider its administration, and it does not do us any good to know about the merger.

We have to know the facts involved. We have about 30 or 40 questions that we ask.

Now, if they furnish all those facts in advance and if we had a staff to examine them, so that we could reach some tentative, not final, position within the waiting period, then of course it might be feasible.

The CHAIRMAN. I think, however, many acquisitions would be favorably thought of; whereas in the case of those that would work

rather disastrous effects, you would get protests and plenty of them; and then, would not a public statement by the Commission, saying that delay in reaching a decision should not be an indication of approval, answer one of the criticisms to that proposal?

Mr. HOWREY. Yes. The only point I am making is that mere notification could be of little value to us.

The CHAIRMAN. Unless it was publicized.

Mr. HOWREY. Well, even if it was publicized, because we have to know what products are involved.

We have to know what markets are involved, and whether there are other competitors in the same market, whether there have been new entries into the business, or whether there is a declining number of mills, and all of those things.

We have to know those facts and unless they report those facts along with the fact that they are contemplating merger, we would have nothing to work with and we would have to go out in the field and try to get those facts.

The CHAIRMAN. But competitors would come in and complain, and if it was a bad merger, you would get notice.

Mr. HOWREY. We would get that.

The CHAIRMAN. And then possibly such a law would reinforce you if you decided to go into a full-scale investigation and hold it up until it was over.

Mr. HOWREY. We made a little tentative survey down at the Commission of the number of companies or number of acquisitions that occurred per year, based on the past 8, over \$10 million; that is, where one or the other of the companies involved had assets of over \$10 million.

I think tentatively we reached some figure in excess of 500.

Now, if you had a floor like that, that we would be required to examine if there were premerger applications and advance clearances, and that sort of thing, that would take still an enormous staff, as you suggest, to do even those 500.

The CHAIRMAN. Now, in view of the recent wave of merger acquisitions in the banking industry, do you believe that the law should be amended to cover banks?

Mr. HOWREY. Yes; I do. I do not know why they were excluded.

We developed in our report the fact that the Chairman of the Federal Reserve Bank wrote a letter to the committee considering the law and requested that banks be included in the amendment of section 7. I think he wrote the letter to the House committee.

There is no reason that I know of for excluding them. They are included in old section 7 and they are included in that portion of the present section 7 that prohibits stock acquisitions. They are merely excluded from the amendment which prohibits asset acquisition under certain circumstances.

The Federal Reserve Board wanted them included, but they were not, and I see no reason why.

Senator KEFAUVER. Mr. Howrey, I think there must be some mistake about that. As I remember, in the committee we had them included at one time, and very substantial influences came from either the Comptroller or somebody which threatened the passage of our bill until they were taken out.

Mr. HOWREY. Well, that may be. I did not mean to suggest that there were not good reasons for that. I did not know that.

But I do know that Mr. Eccles, Chairman of the Federal Reserve Board, recommended that they be included.

Senator KEFAUVER. Where is his letter, in the report?

Mr. HOWREY. Well, that just reached my hands when it reached yours, so I cannot give it to you there, but I think I can give it to you in our mimeographed copy.

I can tell you where it is. It is under chapter 6, and I believe under the kind of acquisition not covered, which is page 160 of my copy here.

Senator KEFAUVER. Of course, the idea was that the other agencies of government had control over them, over merger of banks or the issuance of charters. That was the theory that it was based upon, just as in the case of an airline merger, that came under the Civil Aeronautics Administration, which had control over airlines.

Mr. HOWREY. It may be. I think, as you suggest, the asset amendment did not include other regulated industries.

You will have to go back and look at section 11 of the Clayton Act which gives the ICC jurisdiction over common carriers, railroad common carriers; which gives CAB jurisdiction over air carriers, and which gives the FCC jurisdiction over the communications carriers insofar as section 7 of the Clayton Act is concerned, and in the asset acquisition amendment, they limited it—and then I should go on and say that section 7 says that all other industries come within the jurisdiction of the Federal Trade Commission and the asset acquisition in section 7 just limits it to those corporations coming within the jurisdiction of the Federal Trade Commission.

It still left the enforcement jurisdiction in the respective agencies I have named.

So that, in the asset acquisition amendment, there were excluded these banks—these various regulated industries, including banks and, as Senator Kefauver suggests, there may have been good and sufficient reasons for it.

But my understanding is that the Federal Reserve Board did desire banks to be included.

I discussed it with one of the lawyers for the Federal Reserve Board and he verified it.

The CHAIRMAN. Mr. Howrey, you mentioned in your statement the purchase of stock by stockholders.

In other words, the stockholders of ABC company would go in as individuals and buy the stock in XYZ company. However, that would be done by individual stockholders or individual officers and not by the corporation itself.

Now, that really amounts to an acquisition; but is there anything in the law to control such an acquisition?

Mr. HOWREY. Well, I think not, because the law seems to me to be limited to the merging of corporations and acquiring of stock and assets of other corporations.

The CHAIRMAN. I was recently informed in a complaint that was brought up about the Chase National Bank which, years ago, had a holding company which belonged to them. Among the assets was the American Express Co. The stockholders of Chase National Bank

simply bought in the stock of the various companies held, including the American Express, which has since become converted into a banking institution that carries on a worldwide business in the banking field.

It was a very interesting study and it came to me through some complaints from Army personnel, because they had a contract with the post-exchange system. The only banking facilities available to them abroad was the American Express Co., which is also Chase National Bank—in other words, they could not get checks cashed from the home bank, and had to go through that. That is an interesting illustration on the question of buying into the stock.

Mr. HOWREY. Yes.

(The American Express Co. submitted the following statement for insertion in the record:)

The American Express Co. has had called to its attention the testimony before the Subcommittee on Antitrust and Monopoly Legislation of the Senate Committee on the Judiciary on June 1, 2, and 24, 1955, during which the statement was made that the American Express Co. was at the present time a wholly owned subsidiary of Chase Manhattan Bank.

We wish to state for the record that American Express Co. has had no corporate connections whatever with the Chase Manhattan for over 20 years. The detailed facts are as follows:

On July 1, 1929, the Chase Securities Corp., at that time an affiliate of the Chase National Bank, acquired control of American Express Co.

On June 14, 1934, the affiliation of the Chase Securities Corp. (then known as Chase Corp.) with Chase National Bank was terminated in order to comply with the provisions of the Banking Act of 1933 which required all national banks to divest themselves of security affiliates on or before June 16, 1934.

Since June 14, 1934, Chase Manhattan Bank (formerly Chase National Bank) has not directly or indirectly owned or controlled American Express Co.

Reference was also made at these hearings to the banking facilities provided the military abroad by American Express. The following facts are submitted in this connection:

American Express Co. is not a banking institution and its operations are confined to the United States and Canada. It does have a wholly owned subsidiary, the American Express Co., Inc., which is a banking institution chartered by the State of Connecticut in 1919. Since its incorporation, the American Express Co., Inc., has been actively engaged in a general banking business overseas but with the exception of a New York agency, does not operate within the United States.

The American Express Co., Inc., is 1 of 4 United States banking institutions requested and/or authorized by the United States Treasury Department to operate banking facilities in accordance with the relative military regulations in Germany and other foreign countries. It is the policy of the Treasury to designate not more than one bank to operate the banking facility at a particular military installation.

Among other banking services provided the military at American Express banking facilities are the cashing and collection of stateside checks; the maintenance of checking and savings accounts; and the making of personal loans. United States Government checks are cashed without charge.

The CHAIRMAN. Now, in this report you go into the question of direct and indirect acquisition. The one I have just discussed is the indirect acquisition, and you say—

Mr. HOWREY. May I ask what page?

The CHAIRMAN. Page 150 of the report, section 3, at the bottom of the page, where you say that indirect as well as direct is covered. Acquisition by an individual, partnership or syndicate is covered if the acquisition is a direct acquisition for a corporation which is covered.

Mr. HOWREY. Well, I suppose that means that if it was just a subterfuge they could pierce through the veil, so to speak.

The CHAIRMAN. Yes.

I understand in the Chase National Bank instance, the stock was divided equitably among all of the stockholders. Each one got a proportionate number of shares and the shares were held in the bank.

Mr. HOWREY. May I go back a moment to this question of what types of industries are excluded from the asset amendment to section 7?

Now, in some cases the basic law—I think in the ICC and perhaps in the CAB—the basic law setting those agencies up required them to pass on certain mergers and things of that sort in some instances, the asset acquisition of 2 airlines or 2 railroads may be adequately covered in the general law dealing with those particular industries and the agencies regulating them, but I know of nothing in the banking laws that requires passage, or approval, rather, of any Government agency before an asset acquisition.

Senator KEFAUVER. However, they have to secure the approval of the Federal Deposit Insurance Corporation; do they not?

Mr. HOWREY. I don't know.

Senator KEFAUVER. I would certainly like to see the banks included under section 7 and section 11. I had always felt that they had the power in the Federal Reserve Board or the Federal Deposit Insurance Corporation to prevent these mergers if they were inclined to do so.

I think, Mr. Howrey, however, that you will find that though they were originally to be included under section 7, they were specifically asked not to be included. We are checking the particular testimony. I think there must be some error on page 153 of your report because it starts off by saying that on March 21, 1954, Mr. Eccles wrote to Chairman Hatton W. Sumners—

Mr. HOWREY. That is a typographical error.

Senator KEFAUVER. Yes; it must have been 1944, because he was not in Congress in 1954.

Mr. HOWREY. No; you are quite right. However, I have read the original of that document, and it did precede the passage of the 1950 act.

Senator KEFAUVER. I know that is a typographical error.

Mr. HOWREY. Yes.

Senator KEFAUVER. But I have a very distinct recollection of our efforts to try to include the banks and there were very strong forces either in the Congress or the Federal Reserve Board or in the Government that caused us to leave them out. But, we can establish that. If they want to come in, I think they ought to be entitled to.

Mr. HOWREY. I think they should, too.

Senator KEFAUVER. Because there have certainly been some very alarming mergers in the banking field.

The CHAIRMAN. Now, either one of you gentlemen:

How many cases have been filed by the Commission since the anti-merger amendment charging with violation of section 7 of the Clayton Act; do you know?

Mr. HOWREY. Three have actually been filed and are in the progress of being tried.

The CHAIRMAN. Now, how does this compare with the number of cases filed for a comparable period of time prior to that?

Mr. HOWREY. I cannot answer that, Senator. I know that one of the reasons that the Commission was so anxious to get an amendment to section 7 was that they felt that the courts through the various

adjudicated cases had just about cut out any chance of getting effective relief through section 7.

I remember one case, for example, and I think it was the Arrow-heart-Hageman case, where the court held that inasmuch as the corporation acquired had been dissolved and the assets had been distributed, that that took them out from under the act, although the original acquisition was the stock acquisition.

So, it made it very easy to evade the act, simply by acquiring the stock and then liquidating the acquired corporation and not disposing of the assets, but distributing them around.

So, I would guess, and I can get exact figures for you, that very few cases had been filed under section 7 in recent years.

The CHAIRMAN. I wonder if you would get those figures and put them in the record; not just any particular period, but a similar period of time.

Mr. HOWREY. I will try to get them.

The CHAIRMAN. Under the old statute, and under the new.

Mr. HOWREY. In addition, I think that you should really add to the cases started, these 22 cases where we passed on the factual situations informally and rejected 8 of them.

(The information referred to is contained in the following letter:)

AUGUST 19, 1955.

Hon. HARLEY M. KILGORE,
Chairman, Committee on the Judiciary,
United States Senate, 131 Indiana Avenue NW.,
Washington, D. C.

(Attention Mr. Joseph W. Burns, chief counsel.)

DEAR SENATOR KILGORE: Inasmuch as I have the responsibility of furnishing material requested by your committee, Chairman Howrey referred to me your letter of August 11 requesting additional information concerning matters which arose at your subcommittee hearing.

Our record indicates that 68 complaints were filed under section 7 of the Clayton Act by the Federal Trade Commission from 1918 until the amendment of the law in 1950. After the amendment and before the time of the hearing, 3 complaints were filed and 2 additional complaints were issued on June 30, 1955.

I have been informed that prior to amendment of section 7, there was no pre-merger clearance procedure. Subsequent to the amendment and before June 1, 1955, 22 applications for clearance were filed with the Commission.

Sincerely yours,

ROBERT T. SEOREST, Commissioner.

The CHAIRMAN. Well now, do you believe that the termination of cases now filed by the Commission and by the Department of Justice will clarify the law and appreciably check the rate of recent mergers?

Mr. HOWREY. I would think that the answer to that is "Yes."

I think that once we get an authoritative delineation of the new section 7 by the highest court, that lawyers and businessmen will follow that.

I believe there is a tendency, perhaps, not to follow what in their opinion is merely an interlocutory opinion written at the close of the Commission's case, but after final delineation by the courts of the new section 7.

I would think that it would have a very powerful effect upon deterring the merger trend.

We thought so when we made the recommendations that section 7 be amended, and I still think so.

Of course, under our system of jurisprudence, it takes years to try cases and get them finally decided, particularly big cases, so it will take some time to reach that goal, but when it is reached, I am sure it will have a very effective deterrent effect on mergers.

The CHAIRMAN. Now, do you feel, Mr. Gwynne, that the antimerger amendment is now adequate to prevent dangerous concentration of economic power?

Mr. GWYNNE. I think the present law is a good one, Senator, and I think it has teeth in it. I think the courts have said so, and looking over some of the past cases I have concluded that some mergers that were not struck down by the courts under the old law would be struck down under this law.

I suggested another thing that I think might well be explored, but I have no definite conclusions or anything like that—we had this matter in the House some years ago and we gave some consideration to this question of a clearance from the Federal Trade Commission. We did not give it too much consideration and it was not concluded in the bill as we finally reported it.

Senator KEFAUVER. Mr. Chairman, I think if I can refresh Commissioner Gwynne's recollection, once or twice we did have bills in our committee with some limit set, that any mergers over a certain amount required clearance with the Commission. I think we tried to use a figure of \$5 million at one time. The trouble was that \$5 million might be a very high figure in one line of industry, but in the steel industry or maybe the automobile industry, it would be too low. But we did have two bills with a money standard setup. As I recall, they were reported, or we had them in the committee.

Mr. GWYNNE. I recall that. I was referring to the bill before the 80th Congress. It was not in the bill.

I think, Senator, to get back to your question, I think that the law now is a pretty good law, but we need now to give consideration to the mechanics of its operation.

The suggestion you made a bit ago is one that is entitled to a great deal of consideration, in my opinion, and that is some sort of a reporting system.

After all, here is a drastic law. Every person who contemplates merger should know that, and I think it would be in their interest to try to bring that to the public, to make contact with the proper Government officials at the earliest moment, and to have a little responsibility in furnishing the necessary information, and not leave it entirely up to the Federal Trade Commission to run it down. I think it would get better cooperation.

Many of these mergers, of course, under that program or any program, would be cleared; I mean, would not be held to be violative of the law, would have no competitive significance, let us say, but it should sort of stop the rapidity with which these mergers, I think, are brought in.

The CHAIRMAN. Mr. Gwynne, my mind goes back to a case about public notice. You will remember, early in World War II, when we were trying to get a rubber program underway, the oil companies, because of certain agreements they had, had been refusing to license rubber factories. The Antitrust Division of the Department of Justice had spent 2 years, but was unable to get anything shaken loose

and the situation was getting desperate on rubber. There was a 1-day public hearing and it was brought before the American people and within 24 hours every one of those oil companies issued licenses to responsible producers of rubber.

It was not a question for the oil companies of limiting production. They had an agreement about licensing those plants which were jointly owned with an enemy company, and that gave them the excuse to do this and they would not go along. But once the public pressure was applied through the press and publicity, then there was rapid action. That happened a number of times during the war when things had to be brought before the public, and in each case we found that we got cooperation once it was brought to public attention.

That is the reason I made the suggestion of 90 days' notice, or something of that kind, notice that such a merger was in process of being consummated. Then you would get public reaction and they could protest or endorse it, and that would make mergers work for the general benefit of the public at large.

Now, Mr. Howrey, have your studies of the merger movement revealed any types of corporate acquisitions over which you have no jurisdiction, which might have serious anticompetitive effects and which the law does not now reach—in other words, the types of merger that are not now reached by law but which definitely have an anticompetitive effect?

MR. HOWREY. Well, yes. I think that banks, of course, are the outstanding example.

I think a study should be made of it, made of each of the other categories of business that are now exempted from section 7, namely, CAB, ICC, FCC, Maritime—I think there are 1 or 2 others, each of those should be examined to see whether the basic laws are adequate to deal with the merger problems.

The only other agency I know of that has ever brought a case under section 7 is the Federal Reserve Board.

They have all had this jurisdiction throughout the years, but I know of no agency—I am not saying that none has been brought, but none other than the case of the Federal Reserve Board brought against the Gianinni interests.

They brought an action under the old section 7 against the Bank of America, and they issued an order to cease and desist, and ordered divestiture, but the court reversed them upon the ground that there was no showing of monopoly in the particular market.

They held that banking was a local business, it had only a local market and the court held that the acquisition by the Bank of America did not restrict competition in the local markets.

Now, students of antitrust have criticized that case considerably, no so much the court's holding, but upon the factual finding that banking was strictly a local business.

There has been some criticism of that.

So I do think that any agency which has jurisdiction under section 7, with that lone exception, other than the Federal Trade Commission and the Department of Justice, has ever invoked it.

I think their jurisdictions should be expanded, perhaps, to include assets and then I think perhaps there should be some study made of whether or not the jurisdiction should be invoked.

THE CHAIRMAN. Have you ever thought of another factor?

For instance, I am informed that one company has practically every topflight television performer under contract, as agents, and they are invoking some pretty strenuous and arduous rules. Now, is that a monopoly the present act will cover?

Mr. HOWREY. Well, I am afraid I cannot answer that without a little more factual background.

I know if it were a section 7 action, it would be under the jurisdiction of the FCC and they could invoke section 7 if it is a so-called acquisition.

Now, if it is merely a restraint of trade by contract, why, I would think that possibly that deleterious effect would come under the Sherman Act or under section 5—

The CHAIRMAN. Well, do you think it would come under the Sherman Act?

Mr. HOWREY. Well, if it is a contract in restraint of trade and interstate commerce is involved, it comes under the Sherman Act; but whether the facts you have outlined would make a case, I don't know, because I do not know enough about it.

The CHAIRMAN. It very definitely does increase the cost of production which, in turn, is reflected back upon the consuming public, who have to pay additional for advertising, enough to take care of that extra cost.

Of course, then, we get into all sorts of fields when we get into that subject, but I am just wondering if there is such jurisdiction under the Sherman Act, in your opinion.

Mr. HOWREY. I would think it would come under either the Sherman Act or section 5 of the Federal Trade Commission Act rather than under the antimerger law.

The CHAIRMAN. Yes. Now, I have one more question.

Do you have any new standards for testing the legality of mergers which the Commission feels Congress intended in enacting the antimerger amendment?

Mr. HOWREY. I did not quite understand.

The CHAIRMAN. In other words, do you have any standards for testing legality of mergers which the Commission feels Congress intended or rather had legislative intent in enacting the antimerger amendment, that is, something not written specifically into it but which was based upon the report and testimony which show legislative intent?

Mr. HOWREY. Well, I don't know whether you would call them new standards or not.

We have held in our Pillsbury opinion, which shows our first delineation of the law, that the factors that were introduced for them make a *prima facie* case, and those factors were—well, under the findings we made that after the acquisition Pillsbury had about 45 percent of the flour-mix market in the Southeast.

In other words, we found that they had a substantial share of that particular market. We also found that there had been a declining number of mills in that area.

We also found that there had been very few new entries, new people going into the milling business in that area.

We also found that there had been a tendency toward oligopoly in the urban markets. That is, there was a tendency in the urban markets of the Southeast for the remaining competition to be in

the hands of a few big ones, like Pillsbury and like General Mills, companies of that type.

Now, as we read the legislative history of section 7, we think that is the type of case the law was meant to meet and that that was the type of factors that Congress meant for us to consider.

And while we admitted, in our opinion, that probably a Sherman Act violation was not made out because there was still very vigorous competition in these urban markets between the big companies, still we thought that if we were going to meet the situation in its incipiency, there was enough to make a *prima facie* violation.

And one other factor which we considered and which I am sure you meant for us to consider in the legislative history was that there had been in the milling industry for a long period of time a historical pattern of growth by acquisition, and respondent Pillsbury itself had had a history of acquisition.

And, putting those together, we said, "Those are the factors that should be considered. The hearing examiner made a mistake, he should have considered those and should not have dismissed the complaint."

The CHAIRMAN. In the legislative history of the act and in the Attorney General's Committee report, it is emphasized that the tendency to monopoly provision would reach even a relatively minor acquisition in the light of a historical pattern of acquisition. What has the Commission done to combat this type of acquisition since the enactment of the law?

Mr. HOWREY. Well, I think I agree with that wholeheartedly, that is, where there has been a pattern of minor acquisitions, and that is exactly what occurred in our Pillsbury case, where they had acquired a couple of small mills in Iowa and other mills in various parts of the country and there was a historical pattern of acquisitions of small companies.

And, so, we agree, we follow that policy and work on it in our examination.

The CHAIRMAN. In the recent Hamilton-Benrus case, didn't the court in its decision rely almost entirely upon the size of the two companies and the amount of their business in relation to other companies, without considering questions of prior acquisition, whether other companies were making acquisitions, and whether the number of manufacturers was decreasing, and whether there were any new entries in the business?

Mr. HOWREY. Yes. I think that that is correct.

I have never examined the full record in that case but I have read the opinion, and that came up on a request for a preliminary injunction.

The Hamilton people, I think it was, had bought a lot of Benrus stock and the Benrus people brought action for preliminary injunction to prevent the Hamilton people from voting their stock at directors' meetings and stockholders' meetings.

And in granting that injunction the court pointed out that Benrus and Hamilton were leaders in the industry and that together they had a substantial share of the market.

I think there were some other factors, but those were the principal ones as the basis for granting the preliminary injunction.

The CHAIRMAN. Well, then, how does this approach compare with the Commission's reasoning in the Pillsbury case?

Mr. HOWREY. I think it is the same.

The Attorney General's committee's report approved both, wholeheartedly.

And I think I should add, some more effects in the Pillsbury case—and we did hold in the Pillsbury case that the quantitative substantiality rule of the Standard Stations case, which they had used to measure competitive consequences in section 3 cases, did not apply to section 7, but we held in that case, for instance, that the share of the market was a very important item. The quantitative substantiality rule of the Standard Stations case has been variously described by various lawyers, including Mr. Justice Frankfurter, who wrote the original opinion and then commented on it in dissent in the Motion Picture Advertisers case, so many of us do not know just what Standard Stations held.

That is, if it held, just as International Salt did under section 3, that just dollar volume was enough why, clearly, we did not—we rejected that in Pillsbury.

Now, if that held that quantitative substantiality meant share of the market, why, we rejected that in the Pillsbury case, standing alone. I mean, we rejected that theory as being applicable to all cases.

Supposing it was only a 6-percent share as in the Standard Stations case—now, you would have to know what the percentage is, the percentage would mount, so by itself in some cases it might be more than enough to determine competitive consequences, but we think the legislative history of section 7 clearly establishes the proposition that you wanted us to determine the competitive consequences in the market.

And we held in Pillsbury we could only determine that by examining the relevant factors I have just outlined.

Now the reason, I think, that you asked us to do that, for instance, you did away with the sort of automatic rule that the mere destruction of competition between the acquiring and the acquired company was not enough, it took that out of the act and you asked us—you said through the legislative history that some mergers should be approved but others should not and in the Pillsbury case we said in effect that you could not just look at any one factor that would be conclusive in all cases.

Now, in some cases if the share of the market involved in the merger is 60 or 70 percent, why, certainly, that would be enough.

But, where it is not, then you would want to examine the other factors to determine whether competition was lessened and in doing that we followed the only court case extant, the court of appeals in the Bank of America case, where the Federal Reserve Board brought in old section 7 and that dealt with this precise question of whether a section 3 case would apply to a section 7 case and they rejected that and they rejected it as we rejected it in the Pillsbury case, upon the ground that section 3 is an entirely different statute.

Section 3 deals with exclusive dealings and tie-in contracts. It was designed to permit a seller to sell to whomsoever he pleases and was designed to permit a buyer to buy from whomsoever he pleases, that you could not tie those up with an exclusive deal contract.

Now, section 7, at least as to horizontal mergers, was clearly designed for a different purpose, to keep competition in the market place, and not designed for the protection of a particular seller or buyer, designed as a protection for the public generally and competition in the market place and we tried in the Pillsbury opinion to carry out the intent of the congressional committees as written in their legislative history.

The CHAIRMAN. Let us take the case of a vertical acquisition forward, where a producer acquires an important sales outlet. Does this not have the same consequences to competitors of the producer as an exclusive contract? Since the acquisition permanently excludes competitors from access to a portion of the market, couldn't such an acquisition in some cases be more detrimental to competition than an exclusive contract?

Mr. HOWREY. Yes. I think there is an analogy there.

The Pillsbury acquisition was a horizontal one. There was one mix company that acquired two other mix companies. It was a horizontal merger, where the merged companies were in competition with each other in the same Southeast area of the country.

Now, if you have a vertical merger where they are buying a source of supply or where they are buying a sales outlet, then the rule, I think, is different.

I think, as it is stated in the Attorney General's committee's report, where they said that the legality of a vertical acquisition may turn on whether the integration significantly restricts access to needed supplies or significantly limits the market for any product—in short, is there reasonable probability that the merger will foreclose competition in a substantial share of the market?

I think you can analyze that to a section 3 case much more easily than you can a horizontal merger, although still I think there is a difference between a vertical merger and an exclusive dealing contract.

Senator KEFAUVER. Mr. Chairman, off the record.

(Discussion off the record.)

The CHAIRMAN. Gentlemen, can you come back this afternoon and let Senator Kefauver ask you some questions?

Mr. HOWREY. We are at your disposal.

Senator KEFAUVER. Then, will you excuse me? I would like to stay, but the Governor of Tennessee and some others are waiting to see me.

The CHAIRMAN. Well now, I want to get off to another type of vertical acquisition, for instance, the acquiring of a base source which might exclude competitors from procuring necessary supplies.

Wouldn't that also be under it, or would you think so?

Mr. HOWREY. Yes; where a company acquires a source of supply and thereby perhaps prohibits other companies from access to that source of supply.

The CHAIRMAN. I mean companies that had been accustomed to using them.

Mr. HOWREY. And maybe not have any alternative sources to turn to, then I think that would be the type of competitive consequence—

The CHAIRMAN. For instance, take the airplane industry. They rely on what they call vendors for about 70 percent of their total construction to prefabricate parts. One of the big problems we ran into in the early stages of the war was that certain of them had gone out and contracted for the entire output of certain plants on which a

number of other airplane companies depended for their supply. It completely wrecked the industry for about 6 months—in fact, the Government had to intervene.

Now, under the Pillsbury case, I think you pointed out that this company by acquiring two competitors, the second largest miller in the country, increased its share of the mix market in the Southeast from approximately 20 to 23 percent to 45 percent, which also put it in first place nationally in the mix field, its share increasing from 16 percent to 23 percent.

Shouldn't those figures have been practically sufficient to determine the issue of substantial lessening of competition or tendency to monopoly in the Southeast markets?

Mr. HOWREY. That is something that is a hard question for me to answer. The other facts are in the record.

I think that the share of the market, where it is of sufficient size, may in many cases be enough, standing by itself.

On the other hand, I can think in some instances where the share of the market might be insufficient, where there is plenty of remaining competition, and where there may have been other reasons for the merger, such as bad financial condition or something, which might involve a substantial share but still might not affect competition.

I think the goal in each case to determine whether the competitive pattern in the market has been involved and the percentage share of the market may in some cases be enough to show that and in other cases may not.

I hate to fix on any one percentage, because Judge Hand did that in the ALCOA case and has never been able to live it down.

The CHAIRMAN. Yes.

Now, has the Commission found that the Department of Justice does not deem it necessary to consider all the factors relied upon by the Commission in its Pillsbury decision in deciding the legality of certain horizontal acquisitions.

Mr. HOWREY. I don't know, of course, what the Department of Justice thinks. I would guess, I don't know whether Judge Barnes has ever said so or not, but I would guess that perhaps—well, I better not guess.

Let me answer this way. He will have to speak for himself, but I support fully the position of the Attorney General's Committee on the merger report and what is necessary to provide a case. I support it fully and I have not heard whether Judge Barnes does or not. I would have guessed that he would, but I should not guess for him.

The CHAIRMAN. Is it your personal opinion or that of the full Commission in that respect?

Mr. HOWREY. Well, the Pillsbury opinion was the unanimous opinion, wasn't it—or did Senator Mead dissent?

Mr. BURNS. It was a concurring opinion.

The CHAIRMAN. Did the Department of Justice in the Youngstown-Bethlehem decision adopt a substantially different approach to the antimerger law from that taken by the Commission?

Mr. HOWREY. I do not know. The facts have never been fully developed to the public; we have no access to the Justice's files, but I would think—well, I was just going to say before Mr. Murchison reminded me, that the Attorney General made a speech in New York, I think before an economic group—I will be glad to put it in the rec-

ord—where he outlined the factors that the Department of Justice considers relevant in a merger case, and I would say that, based on that speech, our approach is identical to merger problems.

Now, I think that one of the staff members of the Antitrust Division made a speech in New York which might be interpreted, I don't know, to be different from the Attorney General's committee's report. I don't know, but I think it was his own individual expression—but I haven't any reason to believe that the thinking of Justice was any different from the thinking of the Federal Trade Commission or vice versa on merger cases.

I think that the best indication that I can give on that is that—I don't know what Judge Gwynne's views are, but at least I agree with the merger section of the Attorney General's committee's report.

The CHAIRMAN. Mr. Burns, do you have any questions?

Mr. BURNS. I understand they will be here this afternoon.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. We will recess until 2:30, and Senator Kefauver will be here.

(Thereupon, at 12:45 p. m., the committee recessed to reconvene at 2:30 p. m., of the same day.)

AFTERNOON SESSION

(Present: As heretofore set forth, with the following addition: Senator Dirksen.)

Senator KEFAUVER (presiding). Senator Kilgore has asked me to act as chairman during our resumed session this afternoon.

I think for the record, in view of the statement this morning with reference to the inclusion of Federal banks in section 7 of the Clayton Act, we have secured the hearings to which Mr. Howrey referred of May 23, 24, 25, and September 20, 1945, and at page 360 of the hearings is a long letter from Mr. Eccles, Chairman of the Board of Governors of the Federal Reserve System: and then, following that, is a suggested amendment to the bill which, at that time, was before the Judiciary Committee. I think that letter and the suggested amendment, even though it may be pertaining to another bill, would be helpful in this record when the committee comes to consider the suggestion that national banks should be included.

If there is no objection, I am going to order that the letter and also the suggested amendment be reprinted in the record taken from the hearings of the House Judiciary Committee of 1945.

(The documents referred to follow:)

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, March 21, 1945.

Hon. HATTON W. SUMNERS,

Chairman, Committee on the Judiciary,

House of Representatives, Washington, D. C.

DEAR MR. SUMNERS: This is in reply to your letter of March 7, 1945, in which you enclosed copies of a bill introduced by Congressman Kefauver, H. R. 2357, to amend an act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved March 15, 1914 (38 Stat. 730), and in which you request that your committee be furnished with comments concerning such proposed legislation.

The Board has considered Congressman Kefauver's bill with a great deal of interest. The two basic objectives which seem to be presented therein are (1)

To subject the acquisitions of assets of companies to the same restrictions as are now imposed by the Clayton Act up acquisitions of shares of such companies, and (2) to require, as to certain acquisitions by or on behalf of any corporation now subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of such act, a finding by that Commission that such acquisitions will be consistent with the public interest before they may be lawfully consummated.

The Board sees no objection to legislation which will effectively attain these objectives. As to the first, the Board feels that to include acquisitions of assets within the proscriptions of the Clayton Act will go far toward eliminating a very practical as well as difficult enforcement problem which seems to inhere in the present language of that act. Undoubtedly there have been many instances where the underlying aim of the Congress as expressed in this law has been circumvented in whole or in part through acquisitions of assets, instead of shares, of one corporation by another. The evils of substantially lessened competition, restraint of trade and commerce and monopoly have thus been perpetuated in the face of the statute, simply because the device for accomplishing these ends is not specifically outlawed. The Board feels that the language of H. R. 2357 is adequate to correct this situation.

The second basic objective of Congressman Kefauver's bill seems equally desirable. Perhaps its most salutary advantage lies in the fact that it attempts to prevent the harmful results of unprincipled business expansion in an appropriate field of regulation, rather than attempting to correct these evils after they have occurred. The Board has been of the opinion for some that the complexities of modern business render very difficult a satisfactory application of corrective sanctions. Too often this remedy may work such substantial injustices and be productive of such incidental injurious consequences that the direct application of such sanctions in given cases may work against rather than for the public interest. These observations would seem particularly appropriate of situations affecting banks. Under existing law, for all practical purposes it is not until after the stock of a given bank has been acquired that the acquiring person or company may be proceeded against under the Clayton Act. Assuming that the effect of such acquisition raises an enforcement question under that act, it at once becomes apparent that a public proceeding brought to test such question may have the very undesirable result of disturbing public confidence in the bank, the stock of which has been acquired, but which is not itself a party thereto. It is the existence of such imponderables as these which tend to demonstrate the inadequacy of corrective sanctions, generally.

In its annual report to Congress for the year 1943, the Board, in discussing the need for legislation respecting bank holding companies, had occasion to express similar views to those just given. For example, at page 35 of such report, the Board said:

"Finally, even if the holding company chooses to subject itself to regulation, the effectiveness of the Board's supervision is hindered rather than helped by the penalties provided by the statute. For violation of the statute or of its agreement with the Board, the holding company's voting permit may, after hearing, be revoked. The consequences flowing from such a revocation are that the member bank whose stock is controlled cannot receive the deposits of public moneys of the United States nor pay any further dividends to the holding company. Also, if the controlled bank is a national bank, its charter may be forfeited, and if it is a member State bank, its membership in the system may be terminated. The Board believes that means should be provided for reaching the holding company and its management directly rather than indirectly, as is now the case."

It is believed that much of the other comments that appeared in the Board's annual report for 1943 would be helpful to the committee in its present deliberations. There are enclosed herewith several copies of this report for the convenience of the members.

In the light of the above observations, the Board recommends that the second objective of H. R. 2357 be not limited to apply solely to those cases which fall within the jurisdiction of the Federal Trade Commission. As your committee is aware, other agencies, including this Board, are invested with similar jurisdiction to that of the Federal Trade Commission under the existing provisions of section 11 of the Clayton Act and the reasoning for the proposed change would seem to apply with equal force to acquisitions that are within the range of jurisdiction now conferred upon each of such other agencies, respectively.

Accordingly, the Board recommends that the language of Congressman Kefauver's bill be extended to cover all classes of acquisitions which are now

encompassed within the jurisdictional provisions of section 11, with power in each of the authorities therein enumerated to administer the proposed licensing features of the bill. To the end that our suggestions may be presented in a formal manner, we have prepared a draft containing our recommended changes, which are all included between line 11 on page 4 and line 23 on page 6 of the present bill, and enclose it herewith for the consideration of your committee.

One final and purely clerical correction: H. R. 2357 refers to this Board as the Federal Reserve Board. The correct title is Board of Governors of the Federal Reserve System.

Sincerely yours,

M. S. ECCLES, Chairman.

H. R. 2357 (79TH CONG.)

Comparative print showing suggested changes on pages 4, 5, and 6 (beginning with line 11 on p. 4 and ending with line 23 on p. 6; suggested amendments shown in black brackets and italic).

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Congress to the Civil Aeronautics Authority, Federal Communications Commission, Federal Power Commission, (Federal Reserve Board), Board of Governors of the Federal Reserve System, Interstate Commerce Commission, or the Securities and Exchange Commission.

Wherever the consummation of any plan, undertaking, or agreement by or on behalf of any corporation engaged in or affecting commerce or engaged in manufacturing or processing for distribution in commerce or by or on behalf of any of its subsidiaries so engaged, to acquire the whole or any part of the stock or other share capital or the whole or any part of the assets other than inventories of any other corporation likewise engaged would involve property to the value of more than \$—, no such plan, undertaking or agreement (by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of the Clayton Act, as amended) shall be consummated, effectuated, and completed except upon and after compliance with the following requirements:

(1) that the parties to such acquisition shall have discharged the burden of establishing before the Federal Trade Commission that the acquisition would be consistent with the public interest.)

(1) that the parties to such acquisition shall have discharged the burden of establishing that the acquisition would be consistent with the public interest before the Interstate Commerce Commission in the case of stock or assets of common stock or assets of common carriers subject to the Interstate Commerce Act, as amended; before the Federal Communications Commission in the case of stock or assets of common carriers engaged in wire or radio communication or radio transmission of energy; before the Civil Aeronautics Authority in the case of stock or assets of air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; before the Board of Governors of the Federal Reserve System in the case of stock or assets of banks, banking associations and trust companies; and before the Federal Trade Commission in the case of stock or assets of corporations engaged in all other character of commerce.

(2) that the parties to such acquisition shall have obtained the written and the publicly announced finding of the (Federal Trade Commission) appropriate commission, authority, or board that consummation of the acquisition would be consistent with the public interest. If upon the showing made by the parties to such acquisition (the Commission) such commission, authority, or board shall be of the opinion that it is not consistent with the public interest according to the standard hereinabove established, it shall make a finding to that effect and give the reasons therefor.

(3) that the (Federal Trade Commission) appropriate commission, authority, or board shall not find the proposed acquisition to be consistent with the public interest unless it also finds—

(a) that the acquisition will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in the trade, industry, or line of commerce in which such corporations are engaged;

(b) that the size of the acquiring corporation after the acquisition will be compatible with the existence and maintenance of effective competition in the trade, industry, or line of commerce in which it is engaged;

(c) that the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce affected as materially to lessen the effectiveness of competition therein;

(d) that the acquiring corporation has not, to induce the acquisition, indulged in any unlawful methods of competition, and has not otherwise violated the provisions of the Federal Trade Commission Act, as amended; any of the Acts of Congress now being administered by such commission, authority, or board;

(e) that the acquisition will not be incompatible with greater efficiency and economy of production, distribution, and management.

Upon consummation of any acquisition pursuant to the required finding of (the Federal Trade Commission) the appropriate commission, authority, or board, no proceedings shall thereafter be brought by the Government on the ground that such acquisition constitutes a violation of section 7 of the Clayton Act, as amended.

Senator KEFAUVER. Senator Dirksen, did you have some questions you wanted to put?

Senator DIRKSEN. Mr. Chairman, I am sorry I was not here this morning. I was tied up in an appropriation hearing. I think there are a few questions I would like to ask.

STATEMENT OF EDWARD F. HOWREY, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY JOHN W. GWYNNE AND ROBERT T. SECREST, MEMBERS, FEDERAL TRADE COMMISSION; ROBERT M. PARRISH, SECRETARY; ALEX AKERMAN, JR., EXECUTIVE DIRECTOR; EARL W. KINTNER, GENERAL COUNSEL; AND JOSEPH E. SHEEHY, DIRECTOR, BUREAU OF LITIGATION—Resumed

Mr. HOWREY. Do you suppose I could interrupt just long enough to direct your attention to the fact that Commissioner Secrest is here this afternoon? He was not here this morning. He is here, as well as Judge Gwynne.

Senator KEFAUVER. Why don't you come around here, Commissioner Secrest, and sit here, and let us look at you.

Mr. HOWREY. If I may, and I do not want to trespass on your time, but I would like to correct a statement I made this morning, if I may, or amplify it.

Apparently, in response to questions by Senator Kefauver, I either said or some construe my answers as being a recommendation or admission that the tax laws should be amended to stop the merger movement.

I had said earlier, and I want to restate it, that I am not making any recommendations of that kind at this time, and did not so intend to, Senator, when I answered your questions.

I merely said that that was a field which should be explored, inasmuch as the facts indicate that tax benefits have been an incentive to some mergers.

But before we make any recommendations of any kind, we want to examine all the facts and confer with other interested Government agencies.

I just wanted to clarify that in case I had not done so.

Senator KEFAUVER. I think you said, in answer to a question that I asked, that since these tax benefits were undoubtedly part of the reason for some of these mergers, you felt the time had come when there should be full and immediate consideration to possible amendments of the tax laws with that in mind.

Mr. HOWREY. I think the question should be explored. But I have not consulted the tax people of the Treasury Department, and I certainly am not making any such recommendation as of today.

Senator KEFAUVER. I just want to say on my own that this is a problem that has been with us here for some time. I hope that no time is lost in exploring the matter because the present state of the tax law is encouraging mergers, some of which are unjustified. I do not think the tax picture of particular corporations is irrelevant in considering what is good or bad insofar as competition is concerned.

Do you agree with that, Mr. Howrey?

Mr. HOWREY. Well, I think I have gotten into a little trouble this morning in agreeing or not with statements you made, and I do not believe I want to answer that, if you will permit me.

Senator KEFAUVER. In other words, under the Clayton Act and the antimonopoly laws what we are trying to protect is competition. Doing a tax favor to the people involved in a merger seems to me to be in conflict with that objective.

Mr. HOWREY. The point I tried to make this morning was that the basic philosophy of amended section 7 quite clearly, I think, was to distinguish between what I loosely called good or bad mergers.

Some mergers promote competition; others obviously suppress competition.

They must be examined on a case-by-case basis, and I pointed out that exploring tax angles, normally tax laws apply across the board, and they are not keyed to a competitive consequence or a competitive effect, and I, for one, would want to retain the basic philosophy of present section 7 because, as I indicated, we have approved some mergers because we thought they promoted competition.

On the other hand, we have disapproved some, and we are prosecuting others, and we will certainly continue to prosecute very vigorously those that we think suppress competition. I did not mean to interrupt you, but I wanted to correct it.

Senator DIRKSEN. That is perfectly all right. This tax matter you are talking about was the acquisition of a tax base by some company?

Mr. HOWREY. Yes.

I pointed out this morning that one of the reasons, or at least I think I could say one of the reasons, that motivated the Kaiser-Willys merger was that Kaiser had been losing money rapidly, Willys had been making money, and they kept the Kaiser corporate setup and were able to apply the losses against the gains of Willys, thus putting the company in a better position against the Big Three.

Senator DIRKSEN. Of course, you get situations where the conditions are not identical. Somebody in the textile industry goes about acquiring a hardware business; there has been a great deal of that. I do not know how much there has been, but I have not seen the figure, obviously.

Of course your statement, Mr. Howrey—I went over it a little bit—adds up to about this: That there seems to be an increasing number of mergers and, No. 2, they are in the higher dollar bracket; and, No. 3, there is doubtless or there has doubtless been some diminution of competition; and, No. 4, the question is what, if anything, does the Federal Government do about it?

Mr. HOWREY. Yes; I think that might be a good summary of our statement.

Senator DIRKSEN. The thing that has occurred to me is, of course, if mergers are subject to approval if they are over a given amount of money, we will say \$10 million or \$5 million, any amount that must have approval, I am wondering about the imposition of such a ceiling, because Government then virtually imposes a ceiling from which there might or might not be an appeal.

Mr. HOWREY. Well, that does present a problem.

Senator DIRKSEN. What would be the appellate procedure there?

Mr. HOWREY. Well, that was discussed this morning, not in connection with what mergers would be permitted and what would not, but with reference to whether they should be required to report in advance to the Government that they were contemplating a merger.

I made no recommendation. As I say again, we are not in position yet to make our recommendations.

We made this report so that we could examine the facts before we made any recommendations. But if it was contemplated to require corporations to notify the Government in advance, that probably some floor would have to be established as to, let us say, the acquirer or the acquiring company or both, because we would have to have a building the size of the Pentagon, perhaps, if we were to examine all mergers in advance; we can only examine them in a cursory way.

Then we brought out, I think someone did, Senator, that the floor of \$10 million or \$5 million might be all right in one industry but it might be very bad in another.

Some industries where the acquiring company is \$10 million or between \$5 million and \$10 million may be the dominant one in that industry, and in others, like the automobile industry, they might be of no size at all.

Senator DIRKSEN. If a modification of existing law conferred such authority upon the Federal Trade Commission, obviously you would have to write certain guidelines and certain standards into the law, otherwise there would be no appeal, would there, or there has to be some basis for an appeal?

Mr. HOWREY. Yes, you would have—

Senator DIRKSEN. Competition would be one of the guides; there might be other factors.

Mr. HOWREY. If we were given the power to approve or disapprove or if we were required to approve or disapprove, why then, I suppose you would certainly want some court review of our action. I have been exploring this morning, I had suggested, if we are going to have any advance approval in the event of the requirement of advance approval, I should think you would want to have something in the nature of a declaratory order such as you would have in the Federal district court so that hearings could be held and evidence introduced. Otherwise we would be exercising arbitrary power of a licensor in issuing certificates of convenience and necessity, as you would in a business vested with the public interest, a utility, or something like that; so it presents many problems.

Then the other one that was mentioned this morning was that the mere notification, while it might have some very beneficial effects as a matter of psychology, publicity, that it would not do the enforcement agency very much good unless the law required them to file certain facts along with the notice.

We would have to collect a great many facts as to the volume and the share of the market and the facts of the industry and the facts of the market, and all those things before we could reach any conclusions.

So I think the problem of prior notification or prior approval carries with it the same problems of administration that we have today, and that is ascertaining and passing upon the facts, the market facts.

Senator KEFAUVER. Mr. Howrey, I can see a great many complications in trying to set a ceiling on mergers, a ceiling where mergers under that would be all right, and those above would be looked into, but I do not see as many complications coming from Mr. Gwynne's suggestion of just prior notification for a certain length of time before the merger is consummated.

If you had such a rule or if the statute were amended so as to require, say, the notification of the Federal Trade Commission 1 month before a merger is consummated, or 2 months, where the value of the merged companies would be 1 or 2 or 3 million dollars, that would at least help you in your big problem of ferreting out these mergers, would it not?

Mr. HOWREY. I think the notification would be helpful, although as I said, all the big mergers we know about in advance through the financial journals, the business press, which seem also to have information on mergers, and then they have to be usually submitted to a vote of the stockholders and, as a matter of fact, all of the mergers that we deal with in here came to our attention through the business press, through the reports and various things that are available.

However, I am not discounting that a notice might be very helpful and might have a psychological effect.

Senator KEFAUVER. You think it might also put these companies on notice that the Federal Trade Commission is interested?

Mr. HOWREY. Yes, it might. But it would not help us to our decision that we have to make, because we have to have the facts, too.

Senator KEFAUVER. You have on page 5 of your statement that 43 months following the enactment of the act of 1950, 2,100 mergers and acquisitions in the manufacturing and mining trade and certain service industries took place.

How many of these did you say presented their cases, their plans, to you for consideration?

Mr. HOWREY. We have had 22.

Senator KEFAUVER. Is that over the same period?

Mr. HOWREY. Approximately so, I think. I think these figures apply since the new act went into effect.

We have had 22 applications for what we call premerger clearance. Now "clearance" is not the right word because we do not clear them. We ask them for all these facts, and they have to furnish a great deal of statistical information.

We look at it, and we say in some cases:

We think if you go ahead with the merger that it probably would violate the law and we will have to undertake a field investigation if you go ahead with it.

In other cases where we take a look at it, we say:

From what you have submitted, it looks all right, and we see no reason to conduct a full field investigation if you go ahead with it. We reserve the right, however, to take a second look at a later time.

That is what we call clearance. People who receive a letter sometimes think they constitute full clearance. Of course, they do not. But we have had 22 of those applications and, as I said this morning, we gave clearance, giving it the meaning I have just described, to 11; we denied it in 8; 1 was withdrawn; and 2 were pending further consideration.

Senator KEFAUVER. Two were what?

Mr. HOWREY. Pending further consideration.

Senator KEFAUVER. Is there information you could give this committee as to the 22 applications or plans that were submitted to the Commission?

Mr. HOWREY. Well, I suppose that raises the question of propriety and confidentiality. These figures are intimate figures of a business, and they are submitted to us in confidence.

We would have to, if you wanted those plans—why, I will have to take it up with the full Commission.

We have a statute, you know—we have two statutes—under which we operate: one, making it a misdemeanor to disclose information except by direction of the full Commission, and then we have another statute which forbids us to disclose trade secrets, and subject to those two statutory commands, why, I would be glad to take it up with the full Commission, if you feel that you would want it.

Senator KEFAUVER. Well, that particular question was not directed to the details of their financing or what was involved, but just the names of the companies that were given clearance, those that were denied, 1 that was withdrawn, and the 2 that are pending. I was not asking for the details of their financing or other matters.

Mr. HOWREY. We have got a quorum here. We have to do it by vote of the full Commission. But it is one thing that we would have to submit and get a Commission minute on it, but I am sure that we have cooperated and will continue to cooperate with every congressional committee insofar as the statute permits.

Senator KEFAUVER. If you would, I think it would be helpful to this committee.

Mr. HOWREY. I would be very glad to take it up.

Senator KEFAUVER. To see if you can submit the names to us.

Mr. HOWREY. I can say in one it is public knowledge. It is the Pillsbury case. They sought approval in advance of the merger. We disapproved it. They went ahead and merged, and we brought suit, and that is a matter of public record. That is one of them.

Senator DIRKSEN. Was that an injunctive procedure?

Mr. HOWREY. No. We filed under our procedures, formal procedure. We filed a complaint, like a complaint in court, equity court, a civil case.

They answered. We held hearings before a hearing examiner. In this case, at the end of the case in chief, the hearing examiner dismissed the complaint upon the ground that the evidence was not reliable and probative, and there had not been a *prima facie* case made.

That was appealed to the Commission, and the Commission reversed the hearing examiner, and we held that counsel in support of the complaint had made a *prima facie* case and, for the first time, delineated in an opinion how we construed the new law.

Senator KEFAUVER. Mr. Howrey, I have wondered under this decision in the Pillsbury case of the Commission which I have here—what was the date of this decision, Mr. Howrey?

Mr. HOWREY. That was, I think, in December of 1953. It is not on the face of the opinion, but I think it was in 1953. Yes, it is December 28, 1953.

Senator KEFAUVER. December 1953 was the date of your opinion; and this is the big case that you brought under section 7?

Mr. HOWREY. We brought one case against Crown Zellerbach, and one against Luria Bros., but this is the first one.

Senator KEFAUVER. Yes; this is the first one.

You have allowed a situation to take place here that looks to me as if it is going to be difficult to unscramble even if you win your case.

On page 2 of the opinion, it states that on June 12, 1951, respondent acquired all of the assets of Ballard for \$5 million plus: on March 7 it acquired Duff for about \$2,238,000.

So, since June 1951 and March 1952, these companies have become merged, consolidated and merged, doing business together, and the case is still in litigation, so that even if you win your case you are going to have a very difficult problem of unscrambling them, are you not?

Mr. HOWREY. I think is it true in this case and true in every merger case.

Senator KEFAUVER. Can we get the chronological order of just what happened in the Pillsbury case? When did they present their request for consent to you, to the Federal Trade Commission?

Mr. HOWREY. I do not have those dates with me. Mr. Sheehy might know those dates. Do you, Mr. Sheehy?

Mr. SHEEHY. I cannot give the date of the original conferences with Pillsbury, but the complaint in that case was issued in 1952.

Senator KEFAUVER. Anyway it was before any of the acquisitions took place that you did have your original conferences?

Mr. SHEEHY. That is correct, sir.

Senator KEFAUVER. And they asked permission to carry out these mergers?

Mr. SHEEHY. They sought our advice as to whether or not we would proceed if they went ahead with the merger.

Senator KEFAUVER. Then, Mr. Howrey, on the statement you made this morning, and as set forth in your opinion here, generally, insofar as dough mix or whatever it may be, in the southeastern part of the United States, Pillsbury had approximately 22 or 23 percent, and Duff and Ballard had 22 or 23 percent, and so somewhere they were winding up with between 45 and 48 percent of the dough-mix business in the southeastern part of the country. Those are rough figures, but that is substantially correct, is it not?

Mr. HOWREY. Yes, that is substantially correct.

I can give you the precise figures.

Senator KEFAUVER. Well, they are in your opinion here. But that would be quite an obvious lessening of competition, particularly in view of the fact that there have been so many acquisitions prior to that time in the flour business. Wouldn't you have thought so?

Mr. HOWREY. Yes, and I so said and so held.

Senator KEFAUVER. It would seem to me in a very obvious case of that sort that when they made application, and then you saw that they were unwilling to hold up until after the case would be determined, and incidentally, they were unwilling to desist until the matter could be consummated through litigation, were they not—

Mr. HOWREY. As I said, they came to us and asked for our approval. We denied it. They went ahead, and we sued.

Senator KEFAUVER. Well, they asked for your approval, and on June 12, 1951, they acquired Ballard, and on March 7, 1952, they acquired Duff.

Mr. HOWREY. We brought our suit—I have the date now—June 16, 1952.

Senator KEFAUVER. June 16, after the mergers had been consummated; but you had information before then that they were about to, and I wondered why you did not ask the Department of Justice for injunctive process? Why was that not done?

Mr. HOWREY. Well, I cannot answer that. It occurred about a year before I took office.

I do not believe any one of the three Commissioners were there.

Senator KEFAUVER. I am talking about why the Commission did not ask for injunctive process.

Mr. HOWREY. I do not know. I think they probably could have gone to the Department of Justice and asked the Department of Justice to file an injunction, a preliminary injunction.

Senator KEFAUVER. I wonder if any of your men here know the answer to the question?

Mr. HOWREY. Does any one know? Do you know the answer to that question?

Mr. SHEEHY. I do not. So far as I know, there was no effort made to secure an injunction or to have the Department seek an injunction.

Senator KEFAUVER. What is the name of the gentleman who just spoke?

Mr. HOWREY. He is Mr. Sheehy, Director of the Bureau of Litigation of the Federal Trade Commission.

Of course, one—I will withdraw that. I have not any idea, and I will not try to guess at it.

Senator KEFAUVER. Mr. Burns has just suggested that a good question might be, Is this not an instance where dual responsibility either does not work or has its shortcomings?

Mr. HOWREY. Well, that may occur. I think that the present head of the Antitrust Division and the members of the Commission work very closely together. I consult with Judge Barnes frequently, and I think our liaison is working now.

We, of course, have a job in every case where we ask them to file an injunction suit, of pressing enough facts for them to make a *prima facie* showing of violation.

Senator KEFAUVER. It would seem to me that in a case where it is quite obvious and plain that there is a lessening of competition and, therefore, a violation of section 7 of the law, that perhaps the companies themselves would be relieved of future headaches if, upon their refusal to hold off until after the litigation can be settled, the Department of Justice were asked to institute injunction proceedings.

Mr. HOWREY. I want to say, if I may, that the opinion we rendered was after the close of the Government's case, and we said in the

opinion, and I should say in my testimony, because I am a quasi-judicial officer, and if anybody reads it, they will see that I made up my mind, and will ask that I disqualify myself and, I think, rightly so—I should qualify what I said before, that we so held that the history of acquisitions and the relative share, and so forth, when I characterized that, I meant to characterize that solely what they made was what we think is a *prima facie* case and, of course, Pillsbury has an opportunity to come back and is putting in its case right now so that the case has not been decided, and I should not indicate that it has.

Senator KEFAUVER. Mr. Howrey, that is another thing that worries me about this decision. I do not see how you can hardly ever get to an end of litigation if the decision of the Federal Trade Commission is merely that of *prima facie* case violation has been found, and then it goes eventually to the courts, where there is still more argument.

Did not Pillsbury already submit information at the time this decision was rendered?

Mr. HOWREY. Yes; but under long established procedures and more particularly under the Administrative Procedure Act, every person, every corporation, has his right to his day in court, and we have to decide these things on sworn testimony made upon the public record and under the procedures established by Congress.

So whatever delay occurs in that respect, I think is due to the type of jurisprudence under which this country lives.

But I should, if I may, just add to that, the record in the Pillsbury case at the close of the Government's case was not a big record. It was 3,500 pages.

Now, in an antimonopoly or antitrust case, unfortunately or fortunately that is considered a small record.

Senator KEFAUVER. Well, I appreciate the fact that there must be some consideration given to size and the effect upon competition, and you must have some standards to go by. But is not this Pillsbury case a pretty good example of what your rule of reason is going to get you into?

Mr. HOWREY. Yes; I think it is a very good example of it, and, of course, I conclude differently from you. I think it proves 100 percent that you can apply the rule of reason approach and have a relatively small record and relatively quick trial because, as I say, the case in chief was put in in 3,500 pages.

Now, the old Cement case went to 30,000 pages.

Senator KEFAUVER. But, Mr. Howrey, it has just started. The thing has been going on ever since December 1953, and the hearing examiner is still hearing all this, that and the other, under your rule of reason. When does this terminate?

Mr. HOWREY. Well, Pillsbury is putting in its case now, and I do now know just when they will finish. But you cannot try merger cases like you can try a personal injury case or a contract case or a promissory-note case.

All of the restraint-of-trade cases that we have on our books are long cases. I would say that the Pillsbury record is shorter than almost any other.

Senator KEFAUVER. It is about 9,000 page now; is it not?

Mr. HOWREY. I do not know.

Senator KEFAUVER. You would not be surprised; would you?

Mr. HOWREY. No; I could not tell you exactly what it is. It is 5,191. Is that the total pages or is that the number of pages that the respondent—

Mr. Sheehy. It is the number of pages put in by the respondent on their defense, up to last week when the hearings opened in Minneapolis, and they are continuing on now.

Senator KEFAUVER. How many pages were put in by the Commission?

Mr. SHEEHY. Approximately 3,500.

Senator KEFAUVER. So then 9,000 is approximately right.

Mr. HOWREY. That would be about 8,600 pages.

Senator KEFAUVER. This illustrates what I have been talking about, Mr. Howrey. I think Congress expected that where there was manifestly a lessening of competition, under the amended Clayton Act a merger should not take place.

Now, here in the Southeast, a section of the country, there is a lessening of competition because one firm had 20 and something percent, and the other had 20 and something percent.

It would seem to me by applying the rule of reason and running the record up to 9,000 pages with more to come, and bringing in every possible economic factor, this, that, and the other, that the Federal Trade Commission is rather taking over the prerogative of congressional intent.

Mr. HOWREY. I would not think so, Senator. I think a careful study of the legislative history of amended section 7 requires the law-enforcement agency, and the quasi-judicial agency, to examine the market facts. I think the fact is that you did away with the test originally which was whether there was a lessening of competition between the acquiring and the acquired company. You did away with that test. We have to show that there is a lessening or maybe there is a probability of a lessening of competition in a segment of the market involved.

Now, the question is how are you going to show that. There is no one factor that I think conclusively demonstrates that. In one case you might have a very large share of the market involved and that might be enough.

In another case you might have a fairly substantial share of market involved, and that may not be enough.

There might be new entries into the business; there might be strengthening of competition.

If you are taking one factor—supposing you had taken the Kaiser-Willys, if I may—

Senator KEFAUVER. Let us stay with Pillsbury, Mr. Howrey.

It was not the intention of Congress where there is obviously a combination which lessens competition in an area to have the Federal Trade Commission supplant the intent of Congress and decide whether Congress really meant to apply the law to this case or Congress did not mean to apply it. And did not you, as a matter of fact, overrule your counsel and your staff in applying the rule of reason in the Pillsbury case?

Mr. HOWREY. Well, we frequently overrule our counsel and our staff, that is what we are for. We are a quasi-judicial agency. If we were going to agree with our staff on every issue why, we would not, we shouuld not, exist.

Senator KEFAUVER. I am not arguing about your right to overrule it, but I am just asking if you did overrule them.

Mr. HOWREY. Well, I can answer that more specifically. The brief of Counsel in support of the complaint took two positions: It took the position, first, that the Standard stations doctrine, which is sometimes called the quantitative substantiality doctrine—that means different things to different people; to some people it means the dollar volume involved, and to other people it means the share of the market involved—they said, citing the International Salt case, which was a section 3 case, it was the dollar volume; in Standard stations they said some people say it is the share of the market.

They said under those two cases "We feel we have made a *prima facie* case by showing those facts."

They said, "In addition we have shown all these other facts so that if that doctrine does not apply, we have shown that there are no new entries; that there is a pattern of acquisitions both by Pillsbury and by the industry as a whole; that there have been decreasing numbers of mills," and so forth. So they took both positions.

They took the alternative positions in their brief. We agreed with the latter provision. We did say that we did not think section 3—what the courts had said about section 3—applied in section 7 cases for the reason I set forth this morning, and that is that section 3 is a very different type of statute from section 7.

Senator KEFAUVER. You state in here, in your opinion, that you are not using section 3 rules in dealing with section 7 cases; but, Mr. Howrey, what I fear you are getting into is this: The Supreme Court in the Aluminum Company case, as you know, said—

Mr. HOWREY. In the what?

Senator KEFAUVER. In the Aluminum Company case—rather the Court decided it, the special court, the 33½ percent control of the market, standing by itself, represents no violation of the Sherman Act; 66 percent, maybe; 90 percent, surely. You are getting into a situation where you are applying the rule of reason, all of these Sherman Act tests, to section 7, which was never the intent of Congress. As you so well pointed out, and as Mr. Gwynne pointed out, the purpose of section 7 was to stop monopoly before it occurs.

You do differentiate between the Sherman test and section 7 in your opinion, but by getting into whether it is 40 or 48 percent, it seems to me that you are carrying section 7 right over to about the same standards and tests that are applied to the Sherman Act.

Mr. HOWREY. No.

The Alcoa case was dealing with section 2 of the Sherman Act, which was a monopoly question, and Judge Learned Hand, when using those figures which you cited, was referring to what constitutes a tendency to monopolize. But the percentage figures showing the share of the market, that was the test which the proponents—counsel in support of the complaint—were trying to get us to adopt, and which we rejected.

We did not reject the suggestion that the share of the market was a very important factor to be considered in all cases, but we did say that in merger cases where the test is whether there is competition in the market, that you could not just adopt some automatic test, one factor

was not enough, that you had to look at all the relevant facts to ascertain whether there was strong competition in the market.

It seems to me that the intent of Congress and the history of section 7 compels that conclusion.

Senator KEFAUVER. Well, whatever it is, you have had this case pending for a long time; in 20th century business, 3 years or more to get to a final decision means that it is going to be mighty hard to secure effective enforcement.

Mr. HOWREY. Yes. It is a problem in all antitrust cases. As I pointed out, the record of the case-in-chief in Pillsbury is, I think, comparatively a small record—everything in life is comparative, I suppose.

Senator KEFAUVER. How do you differentiate your proceedings now in the Pillsbury case under section 7 from what is done in a Sherman antitrust case?

Mr. HOWREY. I have got several pages on that in my opinion.

Senator KEFAUVER. I know.

Mr. HOWREY. I will be glad to read them.

Senator KEFAUVER. I have read your opinion. But you are going into the size, into the intent, who is in the market, how much money they control, how much of the business they are going to have, what effect they are going to have on other companies. Are not all those things standards that you are using, just exactly the standards that are used in Sherman cases?

Mr. HOWREY. Well, I do not for a minute concede that those standards were the ones we used. The standards which we used in the Pillsbury case I have mentioned before. They are the following factors: The pattern of acquisition in the industry and by Pillsbury, particularly; the general increase in the major mills' percentage of the market share; a decline in the number of mills, the lack of new entries, and the movement in the direction of oligopoly in the urban markets.

Those were the factors we considered. Based on those factors, we concluded that counsel in support of the complaint had made out a *prima facie* case.

Now, in the opinion there is a whole section distinguishing the Sherman act from section 7, and I think it speaks for itself.

Senator KEFAUVER. Well, you state in the opinion that section 7 is supposed to stop these things in their incipiency, and the Sherman Act comes along later and is supposed to be more severe and what not, but you have not stopped this one in its incipiency, and so far as I can see you are applying the same tests that are applied to a Sherman Act case.

Mr. HOWREY. I can only disagree, Senator, because I am quite sure if you will study this opinion and the record you will be compelled to conclude that under the Sherman Act tests we would have had no case at all against Pillsbury because there was strong competition in all the markets, and we reached the conclusion that notwithstanding that strong competition in the urban markets between the big companies—General Mills and the other big companies—that section 7 would meet that because one of the purposes of section 7 was to stop the cumulative effect of acquisitions, and to stop this trend toward oligopoly in urban markets.

I do not think that, under the Sherman Act, the Department of Justice could make a case in court, and we so say in our opinion.

Senator KEFAUVER. Mr. Howrey, you are talking about the tests you have applied to section 7. Did you agree with the Attorney General's committee on which you served—I have here page 125—I am not sure it is the same one you have, this is one that was given out to the press—where the Attorney General's committee laid down 41 tests and standards for deciding whether section 7 is violated or not.

Is that part of your work?

Mr. HOWREY. That is not part of my work. I do not agree with your characterization of it, but I do agree with what the report says; yes.

Senator KEFAUVER. Well, you agree that it has 41 standards?

Mr. HOWREY. Well, it has standards.

Senator KEFAUVER. If you will look at my copy, I have it numbered: 42 things to be considered.

Mr. HOWREY. Well, it does not suggest that each of those be examined in every case. They are things which may be relevant in one or another type of case.

Some of your 40, or whatever they are, are amplifications of one. They are divided into six paragraphs.

Senator KEFAUVER. Well, they carry over on the next page: immediate competitive situations.

Mr. HOWREY. Maybe we are looking at different ones.

Senator KEFAUVER. I have the copy that was released to the press, and I do not know whether you have a different one. I do not know which is which.

Mr. HOWREY. Yes; it is the same one.

No; it is not exactly the same, but I think, I am sure, the substance is the same. The paging is a little different.

Senator KEFAUVER. Did you dissent from those 42 standards?

Mr. HOWREY. No; I did not dissent from it at all; I agree with them.

Senator KEFAUVER. What is the difference between these standards and the Sherman Act standards?

Mr. HOWREY. Well, I think the main difference is that in—again I would like to read my opinion, if I may, because I dealt with that in the greatest detail.

Senator KEFAUVER. Just tell us about it, Mr. Howrey.

Mr. HOWREY. Well, the main thing that I think differs in the Sherman Act test from the Clayton Act test is that you deal with the same kind of facts; you have to, because you are dealing with competition, you are dealing with market facts, but it takes a much less quantity and quality of proof to make a section 7 case than it does a Sherman Act case, and, as I explained, I do not believe that you could make under the facts of the Pillsbury case a Sherman Act violation because there is strong competition in every market.

Senator KEFAUVER. You mean you have about the same standard but they just do not quite have to come up to as severe a test; is that it?

Mr. HOWREY. Well, you deal with the same type of facts, because you are dealing with the same market facts; but you do not have to have the same quantity or the same quality of proof.

Senator KEFAUVER. You do not apply all of this rule of reason to section 3 cases, do you?

Mr. HOWREY. Well, I do not like to disagree with you, but then I must say that the rule of reason to a lawyer is one thing; a rule of

reason approach which we recommend to section 7, which the Attorney General's committee recommends, is entirely different.

The rule of reason approach simply means, as we use the term, the examination and consideration of all the relevant market factors, and distinguishes the other approach from the presumptive approach where you conclusively presume certain consequences following.

Senator KEFAUVER. In other words, you decide whether it is good or bad based on what you think about it?

Mr. HOWREY. Yes; that is the job that Congress gave the Federal Trade Commission.

Senator KEFAUVER. Do you use the rule of reason approach in section 3 cases?

Mr. HOWREY. I use it—you use it—I think we have used it, in some of our section 3 cases.

It depends somewhat, I think, on whether it is a tie-in agreement or whether it is an exclusive dealing agreement.

I think under a tie-in agreement where you sell a machine and say you have got to take "our cards with it," where you tie some product to some other product, why then, I think that you can almost presume from a transaction like that that the purpose of the transaction is to lessen competition, to prevent someone else from selling them.

Now, exclusive dealing contracts, as the Supreme Court held in the Motion Picture Advertising case, were not unreasonable insofar as 1 year's duration is concerned, because of some of the particular facts in that industry then, they thought it was a reasonable restriction.

So I think in exclusive-dealing contracts you sometimes use the rule of reason approach.

In tie-in contracts, I think there the proof needs to be less, and you can almost presume there that the purpose of the tie-in contract was to—

Senator KEFAUVER. Well, you say in your opinion with respect to section 7 that you do not follow the same general procedure that you do under section 3 cases. You discuss the difference, substantially, that you do not apply the rule of reason or that at least not to the extent you do under section 7.

Mr. HOWREY. That is correct, I think.

Senator KEFAUVER. But now—

Mr. HOWREY. We distinguish section 7 from section 3, and apply a different rule.

Senator KEFAUVER. On page 6 here you talk about section 3, that it is rather mandatory where you find tie-in sales and whatnot: that it is unreasonable per se to foreclose competitors from any substantial market; that is true, is it not? That is, in your opinion.

But you are aware, Mr. Howrey, that the legislative intent was to apply the same procedures or substantially the same procedures to section 7 that we have under section 3?

Mr. HOWREY. Well, we hold just to the contrary. We held that was not the legislative intent.

Senator KEFAUVER. You are aware of the statement in the House Judiciary report, I think it was, was it not—the House Judiciary report which states that the two tests of legality under section 7—

are intended to be similar to those which the courts have attempted to apply in interpreting other sections of the Clayton Act.

The Supreme Court has given per se application or substantially per se application to section 3, and I guess also to section 5, of the Federal Trade Commission Act.

What do you say about this language of the House committee?

Mr. HOWREY. I would say that other language in the committee report compels the court or the quasi-judicial agency, whichever is studying it, to look at the statute as a whole, and from pages 172 through 179 of the mimeographed edition of our merger report, we discuss those questions and answer them.

What you have to do is you cannot just look at part of section 3. You have got to look at all of section 3, and section 3 prohibits exclusive dealing and tie-in contracts under certain circumstances, that is where they may be substantially to lessen competition or tend to create a monopoly.

Section 2 of the Clayton Act prohibits price discrimination, with certain qualifications and certain exceptions, where that may substantially lessen competition or tend to create a monopoly.

Section 7 prohibits the acquisition of stock or in some cases the acquisition of assets where it would substantially lessen competition.

Now, you have to look at the purpose of each statute. The purpose of section 3, as I said this morning, deals with the seller and the buyer.

The purpose of it was to permit a seller not to have his market foreclosed, and be able to go out and sell to anybody in the distribution end of his business.

If he were foreclosed by a tie-in contract or an exclusive dealing contract, why, he could not have access to that market. The same thing with the buyer.

So it is a very different purpose and a very different test, in my judgment. Men will differ on these things, but we reached the conclusion unanimously, I say, or at least four of us reached that conclusion, that the legislative intent was just contrary to what you suggest.

Senator KEFAUVER. Will you go through the reports and find out whether the legislative intent was contrary, and furnish the committee staff with a memorandum?

Mr. HOWREY. I will be very glad to do that. I think to put in the record the opinion in the Pillsbury case, put in the record pages 180 through 186 of the merger report, will furnish just what you have in mind.

(The opinion in the Pillsbury case follows:)

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

Commissioners: Edward F. Howrey, Chairman; Lowell B. Mason; James M. Mead; Albert A. Carretta; John W. Gwynne.

Docket No. 6000

In the Matter of Pillsbury Mills, Inc., a Corporation

OPINION OF THE COMMISSION

Chairman HOWREY delivered the Opinion of the Commission.

The complaint in this case charges that respondent Pillsbury Mills, Inc. has violated Section 7 of the Clayton Act, as amended, by acquiring the assets of two of its competitors, namely, Ballard and Ballard Company and Duff's Baking

Mix Division of American Home Products Corporation. It alleges that Pillsbury and Duff were, prior to the acquisitions, leaders throughout the United States (including the southeast) in the sale of flour-base mixes, and that Pillsbury and Ballard were leaders in the southeastern part of the United States in the sale of family flour, bakery flour, and mixes.

A considerable amount of testimony was taken by attorneys in support of the complaint in Minneapolis, Louisville, Cincinnati, New York City and in many cities throughout the southeastern states. Subpoenas duces tecum were served on respondent to produce production and sales figures for a period of time before and after the dates of acquisition, and to produce other data to show competitive market shares and universe figures prepared for respondent by the Market Research Corporation of America. Respondent refused to honor these subpoenas and refused to produce the data requested.

Instead of seeking enforcement of the subpoenas in court and instead of seeking to subpoena figures from respondent's competitors as suggested by the hearing examiner, counsel supporting the complaint relied on figures and estimates for the fiscal year 1949-1950 furnished by respondent during the course of the preliminary investigation. In an effort to corroborate these estimates, counsel introduced surveys of specific market areas made by newspapers and other independent agencies.

At the close of the case-in-chief of attorneys supporting the complaint, respondent moved to dismiss on the ground that a *prima facie* case had not been made.

Without expressing an opinion as to whether Section 7 had been violated, the hearing examiner granted the motion to dismiss on the ground that the "allegations of the complaint were not supported by reliable, probative, and substantial evidence in the record as required by the Administrative Procedure Act."

Section 7 of the Clayton Act, as amended December 29, 1950, which is now before us for construction for the first time, provides in relevant part:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of 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."¹

The salient facts as shown by the partial record now before us—respondent has not yet put in its case—are set forth below. We reserve until later the question as to reliability of the evidence.

Respondent Pillsbury is the second largest flour miller in the United States. Prior to the acquisition it was the 2nd largest seller of family flour, the 2nd largest seller of flour-base mixes, the 3rd largest seller of bakery flour, and among the 15 largest sellers of formula feed in the United States.

In the southeast, that is, the area east of the Mississippi River and south of the Ohio and Potomac Rivers, respondent was the 5th largest seller of family flour, the 3rd largest seller of bakery flour, and the largest seller of mixes.

On June 12, 1951, respondent acquired all the assets of Ballard for approximately \$5,172,000.² On March 7, 1952, it acquired Duff for about \$2,238,000.³

By these acquisitions respondent increased its capacity for milling flour approximately 6 percent, for manufacturing mixes about 40 percent,⁴ and for manufacturing commercial feed by almost 57 percent; its total sales of bakery flour increased 2.8 percent, family flour 23.8 percent, feeds 34.4 percent, and mixes 40.9 (32.8) percent;⁵ its feed position improved from "among the first fifteen" to tenth place.

¹ 64 Stat. 1125, 15 U. S. C., sec. 18.

² Purchase was accomplished by issuing 115,000 shares of respondent's stock and turning them over to Ballard in exchange for all its assets and liabilities. Ballard's net worth as stated in its balance sheet of May 31, 1951, was \$5,172,000.

³ This amount was set forth in a statement which respondent filed with Securities and Exchange Commission.

⁴ The attorneys supporting the complaint claim that the acquisitions increased respondent's mix capacity about 48 percent. We think this should be 40 rather than 48 percent. The latter figure seems to be based on the assumption that the capacity increased at Springfield, Illinois, resulted from the acquisition. Neither Duff nor Ballard had a plant at that location.

⁵ These percentage figures, except the 40.9 percent for mixes, were arrived at by dividing the Pillsbury net dollar sales for the fiscal year ending May 31, 1950, into the Ballard net dollar sales for a similar fiscal year. Comparable fiscal year figures for Duff were not available so 1949 calendar year net sales were used to arrive at the 40.9 percent figure for mixes; if 1950 calendar year net sales were used the figure would be 32.8 percent.

In the southeast respondent's sales of bakery flour increased 40 percent, mix sales increased 78 percent, and family flour sales increased 154 percent.* Respondent's feed sales in this market increased from 20,000 tons per year to 175,000 tons per year.

Attorneys supporting the complaint contend that the foregoing shows a "substantiality" of acquisitions sufficient to bring the mergers within the "substantiality doctrine" of the *Standard Stations* and *International Salt* cases.¹

The record, however, contains much more in the way of economic and business facts—facts about Pillsbury, Ballard, and Duff, about their respective shares of the market, and about the structure, behavior, and characteristics of the flour market in general.

During the 11-year period ending in 1951 Pillsbury's net sales grew from approximately \$47,000,000 to \$224,500,000; its total assets increased from \$30,000,000 to \$95,500,000; and its net worth grew from \$23,000,000 to \$42,000,000. Its history during this period was marked by a number of acquisitions. It acquired a California milling company, two Iowa companies, four grain elevators in different parts of the country, and two Canadian flour mills.

During the 10 year period from 1940 to 1950 Ballard's net sales grew from approximately \$8,000,000 to \$30,000,000 and its assets increased from \$2,600,000 to \$11,300,000. The market for all of Ballard's relevant products was within the southeastern region. In this area it was the 3rd largest seller of family flour, the 3rd largest seller of mixes, and the 9th largest seller of bakery flour.

Duff, in 1950, was the 5th largest seller of mixes in the United States and the 5th largest seller of mixes in the southeast. Its gross sales for the 11-month period ending November 30, 1951, were about \$6,500,000 and its gross profits were \$1,919,404. Duff's inventory and fixed assets as of November 30, 1951, were \$2,396,320.

By the acquisitions respondent was promoted in the southeastern area from 5th to 2nd place in family flour, from 3rd to 1st place in bakery flour, and increased its 1st place position in the mix market in the southeast from 22.7 percent to almost 45 percent.*

The wheat flour milling industry in the United States has decreased in size from a peak of 11,691 mills in 1909 to 1,799 mills in 1951. In 1945 there were 2,571 mills with a total capacity of 1,349,699 cwt. daily. By 1951 the country's 1,799 mills had an aggregate daily capacity of 1,282,796 cwt. with about 97 percent of all flour products being accounted for by the 355 largest mills.

In 1945 the ten largest firms in the United States, measured by milling capacity, controlled about 34 percent of the industry's capacity. In 1951 the ten largest companies—the same firms as in 1945—had 40 percent of the capacity. Between 1945 and 1951, while the industry was losing about 67,000 cwt. in daily capacity, the ten largest companies increased their daily capacity by 57,000 cwt. Of this total increase, over 39,000 cwt. or 68 percent resulted from acquisitions. If the acquisition of Ballard by Pillsbury is included, the daily capacity gain is 62,000 cwt. with acquisitions accounting for over 71 percent of the increase.

Although the southeast had 21 percent of the country's population (1950) and 34 percent of the number of mills (January 1951), it had only 11 percent of the nation's milling capacity. The number of mills in this area declined from 805 in 1945 to 660 in 1951; the total daily capacity declined from 154,073 cwt. to 142,907 cwt.* No new mills, of any size, have been established in the southeast in recent years.

* These percentage figures for the southeast were based on the 1949-1950 sales of respondent and the acquired companies and were arrived at by dividing the derived dollar sales figure for respondent into the actual dollar sales figures for Ballard and the derived sales figures for Duff.

The figures for the three companies were arrived at as follows: Ballard's actual dollar sales for each class of products for the fiscal year 1949-1950 are in the record. As it sold only in the southeast, these were its dollar figures in that area.

For respondent and Duff, the record contains total dollar sales, total unit sales by product, and unit sales for each class of product in the southeast. Dollar sales in the southeast were calculated from its dollar sales for the country on the assumption that the percentage of its total dollar sales in the southeast would be the same as the percentage of unit sales in that area.

¹ *Standard Oil Co. of California v. United States* (Standard Stations) (337 U. S. 208 (1949)); *International Salt Co. v. United States* (332 U. S. 392 (1947)).

* Market positions and percentage figures were arrived at by combining respondent's figures with those of the acquired companies for 1950 and using them as a basis for estimating sales position after the acquisitions.

* According to the trade publication, the Northwestern Miller, there were 805 mills in the southeast in 1945 of which capacity figures were given for only 757; namely, 154,073 cwt. Similarly, there were 660 mills in the southeast in 1951 of which capacity figures were given for only 615, namely, 142,907 cwt. It is assumed that the listed mills for which The Northwestern Miller could get no figures, were very small.

For many years Ballard had offered effective competition to Pillsbury in the southeast.¹⁰ In 1945 the Ballard flour mill had the largest capacity of any mill in this area. In 1951 it shared this distinction with the General Mills plant in Louisville. At the time it was acquired by Pillsbury it owned and operated one of the largest and most modern formula feed plants in the southeast. The Ballard brands of flour, formula feeds, and prepared mixes enjoyed widespread consumer acceptance. Ballard had shown a profit for many years prior to its acquisition. It had sizable net earnings for the eleven-month period just before its acquisition. It was an important factor in the competitive market.

Through its acquisition of Ballard respondent increased its share of the family flour market in the southeast from 3.66 percent to 8.31 percent; it increased its share of the bakery flour market from 4.93 percent to 8.55 percent.¹¹

While there were a large number of mills selling flour in the southeast, respondent's sales were more concentrated in urban areas and it competed with relatively few flour millers in each of said urban areas.¹²

Respondent's and Ballard's prices differed in different locations prior to the acquisition. Afterwards the prices of the two brands became identical.

In the mix market, prior to the acquisitions, respondent was the largest seller in the southeast (22.7%) and the second largest seller in the United States (16%). It was in competition with both Ballard and Duff in the southeast and with Duff on a national basis. As a result of the acquisitions respondent increased its share of the market in the southeast to 44.9 percent.¹³ In the national mix market, its position advanced from second to first place, or approximately 23 percent of the national market.¹⁴

Three questions are presented by brief and argument on appeal:

1. Do recent cases decided under Section 3 of the Clayton Act¹⁵ apply to Section 7 cases; that is, where "substantiality" of the acquisition has been established, is it necessary to examine economic consequences or determine the probable effects of the acquisition?

2. If Section 3 cases are not applicable, what tests do apply under Section 7; do Sherman Act tests apply or does Section 7 have tests of its own?

3. Does the record show *prima facie*, by reliable evidence, that the effect of the acquisitions may be substantially to lessen competition or tend to create a monopoly in certain market areas?

I

The attorneys supporting the complaint rely, in the first place, on the "substantiality" doctrine of *International Salt, Standard Stations*, and other Section 3 cases.¹⁶ To be on the safe side, however, they also introduced proof of market structure and characteristics which they claim are sufficient, even if the Commission rejects the substantiality theory, to show that respondent's acquisitions will substantially lessen competition.

Section 3 of the Clayton Act prohibits the use of tying and exclusive dealing contracts the effect of which "may be to substantially lessen competition or tend to create a monopoly."¹⁷ The *International Salt* case,¹⁸ brought under this section, involved a tying of the company's salt to the patented salt dispensing machine it leased to its customers. The tying device was struck down by the

¹⁰ Ballard's unit volume of sales of family flour and bakery flour combined in the southeast for the fiscal year 1949-1950 was slightly larger than respondent's and second only to General Mills.

¹¹ These figures were arrived at by combining Ballard's and respondent's percentage of the market during the 1949-1950 fiscal year.

¹² It is the policy of the chain stores to carry the leading national brands, the top one or two local brands, and one or two cheap priced brands or a total of five or six brands. Store movement records of certain chain stores, testimony of grocery wholesalers and testimony of certain of respondent's regional managers taken together show that respondent's sales of flour in urban areas in the southeast are a much greater percentage of the total sales in such markets than its percentage of the entire southeast flour market. They also show that only a few brands are sold in all areas. Many local brands are important only in their own areas.

¹³ This percentage figure was arrived at by combining respondent's, Ballard's, and Duff's percentages of the market during the fiscal year 1949-1950.

¹⁴ *Id.*
¹⁵ *Standard Oil Co. of California v. United States, supra*; *International Salt Co. v. United States, supra*; *United States v. Richfield Oil Corp.* (343 U. S. 922 (1952)); *Automatic Canteen Co. of America v. F. T. C.* (194 F. 2d 433 (C. A. 7, 1952)), reversed on grounds not presently pertinent (346 U. S. 61 (1953)).

¹⁶ *Id.*

¹⁷ 38 Stat. 731, 15 U. S. C., sec. 14.

¹⁸ 332 U. S. 392 (1947).

Supreme Court which held that the test of potential injury to competition was satisfied by proof that in one year the company had sold for use in its machines 119,000 tons of industrial salt valued at \$500,000. Such a market, the Court said, was not "insignificant or insubstantial" and it is "unreasonable, *per se*, to foreclose competitors from any substantial market."¹⁹

In the *Standard Stations* case,²⁰ also brought under Section 3, the Supreme Court applied a like doctrine to requirements contracts in the retailing of gasoline by a major company through independent stations. In its holding, the Court appeared to read out of the qualifying clause any real consideration of the effect upon competition and declared that the requirement was satisfied by proof that a substantial share of the market was affected by the practice. Under the exclusive supply contracts which Standard Oil had entered into with independent service stations in a 7 State market area, \$57,646,233 worth of gasoline, amounting to 6.7 percent of the total, was held to be a "substantial share."²¹

Although there is a considerable difference between the two cases,²² it may be assumed for present purposes that in each case the Court held that the "qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."²³

It does not follow, however, that because the qualifying clauses of Sections 3 and 7 are expressed in the same language they prescribe the same tests. "Familiar but loose language affords too ready a temptation for comprehensive but loose construction."²⁴

"It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance."²⁵ Accordingly, the respective tests prescribed by Sections 3 and 7 are to be determined in the light of the purpose of each section.

The primary purpose of Section 3 is the protection of buyers and sellers in the marketing process—to guarantee to buyers the right to handle any goods they see fit, and to sellers the opportunity to obtain the business of any buyer whose trade they wish to seek.²⁶

Section 7, on the other hand, is directed toward adverse changes in competitive patterns that may result from mergers. It is concerned with the effects of acquisitions on the character of competition, with the maintenance of competition in every market to the end that business rivalry may produce better products at lower costs.

While both sections are designed to protect the competitive process, they reach this goal by different routes—one by protecting the seller and buyer segment of our economy, the other by protecting competition on an overall basis.

The impact of a tying contract or a requirements contract is different from that of an acquisition. The force of the former falls principally upon buyers or upon competitors of the company which imposes the contract, the effect of such contracts is thus to cut off these competitors from what would otherwise be part of their natural market.²⁷ In contrast, an acquisition seldom has such an immediate impact upon competitors. The reason that acquisitions are, under certain circumstances, to be regarded as illegal is not because of their

¹⁹ Id. at 396.

²⁰ 337 U. S. 293 (1949).

²¹ Id. 295, 314 (1949).

²² In the *Standard Stations* case—unlike the *Salt* case—the Supreme Court spoke of the "share" of the market foreclosed; it also showed a full awareness of the important difference between tying contracts and requirement contracts.

²³ 337 U. S. 293, at 304, 314, and 332 U. S. at 394-397.

²⁴ *Automatic Canteen Co. of America v. F. T. C.*, 346 U. S. 61 at 65 (1953).

²⁵ *Atlantic Cleaners and Dyers v. United States* (286 U. S. 427, at 433 (1932)); see also *F. T. C. v. Morton Salt Co.* (334 U. S. 37, at 46, footnote 14).

²⁶ Cf. McAllister, "Where the effect may be to substantially lessen competition or tend to create a monopoly," *Proceedings of the American Bar Association, Section of Antitrust Law*, August 26-27, 1958, p. 131.

"Specifically, exclusive dealing and tying arrangements are forbidden when the restricted freedom of the buyer to purchase from competing suppliers injures his competitive position or that of the competing supplier."

²⁷ As the Commission said in the *Matter of Automatic Canteen Company of America* (46 F. T. C. 861, at 894 (1950)), "It is apparent that [respondent's exclusive dealing contracts] entirely foreclosed the sale and leasing of vending machines to respondent's distributors by anyone but respondent and that other sellers and suppliers of candy, gum, nuts, and other confectionery products have been completely and effectively foreclosed from selling these products to respondent's distributors." Affirmed 194 F. 2d 433 (C. A. 7, 1952), reversed on grounds not presently pertinent, 346 U. S. 61 (1953).

effect on buying and selling practices but because of their probable effect on competition.²⁰

Moreover, a further distinction can be drawn from the fact that tying and exclusive dealing contracts are frequently coercive, while acquisitions are usually voluntary in nature.

Competition cannot be directly measured; no single set of standards can be applied to the whole range of American industries. No single characteristic of an acquisition would of itself be sufficient to determine its effect on competition. For this reason it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected.²¹

Much as the simplified test laid down in *Standard Stations* and *International Salt* may aid in the presentation of proof in case under Section 3, it is not in itself a reliable guide for the Commission in carrying out its long-run responsibility to prevent reductions in competition through acquisitions of assets or stock.

Furthermore, neither case can be construed as depriving the Federal Trade Commission, as an administrative agency, of the right to examine relevant economic factors and competitive effects (even in Section 3 cases) in the event it desires to do so.²²

In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a "body of experts" competent to deal with complex competitive practices "by reason of information, experience and careful study of business and economic conditions";²³ and second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages.²⁴

The driving impulse in creating this, and other administrative agencies, was the need for specialization and expertise.²⁵ The complexities of modern American trade and industry had made it apparent that effective trade regulation could neither be accomplished by "self-executing legislation nor the judicial process." See *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. (134, 142, (1940)); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy* (50 Mich. L. Rev. 1139, 1221, n. 215 (1952)).

The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business."²⁶ It contemplated clarification and coropletion by the Federal Trade Commission. If the administrative tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines, the rationale for its creation disappears.²⁷ If a particular competitive act is automatically to be presumed unlawful, the administrative process of the Commission loses its purpose, and the justification for limiting the scope of judicial review and for exempting the Commission from executive control no longer remain. In such event the administrative agency may as well give way to the prosecutor.

As we understand it, the Federal Trade Commission has a greater task than this in administering the broad provisions of section 7 of the Clayton Act. There must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences.

The most recent decision interpreting section 7, prior to its amendment, is *Transamerica Corporation v. Board of Governors of the Federal Reserve System*

²⁰ In determining the effect on competition under section 7 the Commission is, of course, concerned with the relationships between an acquiring company and other parties, such as, competitors, suppliers, and outlets, insofar as such relationships may affect competition in a given market.

²¹ The attorneys supporting the complaint suggest the following test for Section 7 cases: "Where a leading factor in the relevant market having a substantial share of that market, acquires another factor in that market also having a substantial share of that market, the inference arises that competition may be substantially lessened in the lines of commerce involved."

²² *In the Matter of The Malco Company, Inc.*, decided by F. T. C. December 7, 1953.

²³ Sen. Rep. No. 597, 63d Cong., 2d Sess., pp. 9, 11 (1914); *F. T. C. v. The Cement Institute* (323 U. S. 683, 727 (1948)); *F. T. C. v. R. F. Keppel & Bros., Inc.* (291 U. S. 305, 314 (1934)).

²⁴ *Standard Fashion Co. v. Magrane-Houston Co.* (258 U. S. 348, 356 (1922)).

²⁵ The Commission was to be staffed with lawyers, economists, accountants, statisticians and other business experts. It was understood that this staff would become specialists in preventing improper business practices which interfered with the competitive process or were against the public interest. Cf. *United States v. Morton Salt Co.*, 338 U. S. 632, 640 (1940).

²⁶ *F. T. C. v. Motion Picture Advertising Service Co. Inc.*, 344 U. S. 392 (1952); *F. T. C. v. Keppel & Bro.*, *supra*, 310-312.

²⁷ See dissenting opinion of Mr. Justice Jackson in *The Rubberoid Co. v. F. T. C.*, 343 U. S. 470 (1952).

(206 F. 2d 163 (1953), cert. den. November 30, 1953). The Federal Reserve Board had ordered divestiture of stock in a number of banks comprising the so-called Giannini group in the West Coast and Rocky Mountain area. The Board pointed out that the Giannini banks did a large proportion of the banking business in five western states, invoked the *Standard Stations* case, and held that section 7 was violated. The Third Circuit reversed, saying:

"* * * such acquisition is a violation only if its effect may be in fact to substantially lessen competition between such corporations, to restrain commerce or to tend to create a monopoly. Otherwise the acquisition is entirely lawful, so far as section 7 is concerned. It necessarily follows that under section 7, contrary to the rule under section 3, the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statutes may be invoked. Evidence of mere size and participation in a substantial share of the line of business involved, the 'quantitative substantiality' theory relied on by the Board, is not enough."²⁸

The court was impressed by the "tremendous concentration of banking capital * * * in the hands of the Transamerica group," and thought that legislative or administrative action might well be desirable to decrease it.²⁹ But the Court held that no case had been made under section 7. Lessening of competition or tendency to monopoly were market phenomena, and could only refer to some particular market or set of markets. But the Board had not attempted to show any undesirable effect or dangerous probability in any given markets. The five state area was but an artificial segment of the United States, unrelated to any market activity. Hence, said the Court, the contention of the Reserve Board could not be sustained.³⁰

While the *Transamerica* case does not question *Standard Stations* so far as section 3 is concerned, it does seem to seal off section 7 from the *per se* rule of that case. The fact that the *Transamerica* case was decided under old section 7 does not in our opinion lessen its applicability in this respect. While the 1950 amendment modified section 7 in many ways it did not change the basic purpose to protect competition in a given market.

II

This does not mean that we are thrown back on Sherman Act tests. In fact, one of the purposes of amended section 7 was to reestablish the difference between Sherman Act and Clayton Act violations and to restate the legislative view, largely repudiated by the case law,³¹ that the tests of the Sherman Act have no proper place in the application of section 7.

"Monopoly and competition, as economic facts, are the same no matter what law is applied to them."³² Market control, restraint of trade, injury to competition, tendency toward monopoly are the subjects of both the Sherman and Clayton Acts. But the standard of illegality is different; otherwise Congress would have been wasting its time by enacting duplicating legislation. The difference is usually said to be that under section 7 the undesired condition may not yet be in existence; there is only a reasonable probability that it will come to pass if nothing is done to stop it. This, of course, was the underlying purpose of the original Clayton Act. It was designed to "supplement" the Sherman Act, to prohibit practices which singly and in themselves were not covered by that act, to arrest potential violations of the Sherman Act in their incipiency and before consummation.³³

The trouble is that this sort of language, lawyer's language some call it, is not very meaningful until applied to a particular set of facts—facts which suffice for the Clayton Act but do not constitute a showing of evidence sufficiently impressive under the Sherman Act. The courts and the Commission have fre-

²⁸ 209 F. 2d 163, at 170 (C. A. 8, 1953), cert. den. Nov. 30, 1953.

²⁹ *Id.* 169.

³⁰ *Id.*

³¹ *International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930); *F. Vivaudou v. F. T. C.*, 54 Fed. 2d 278 (C. A. 2, 1931); *Temple Anthracite Coal Co. v. F. T. C.*, 51 F. 2d 656 (C. A. 8, 1931); *United States v. Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio, 1935); see *Irvine, "The Uncertainties of Section 7 of the Clayton Act,"* 14 Cornell L. Q. 28, 40 (1928) for a review of the earlier cases.

³² See *Adelman, "Acquire the Whole or Any Part of the Stock of Assets of Another Corporation."* Proceedings of the American Bar Association, Section of Antitrust Law, Aug. 26-27, 1958, pp. 111, 117.

³³ *Sen. Rep. No. 698, 68rd Cong., 2d Sess.*, p. 1 (1924); *Standard Fashion Company v. Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

quently paid homage to the incipency doctrine and the difference between the Sherman and Clayton Act tests, but no clear standards have emerged.

Putting aside the broad concepts of competition and monopoly, the essential difference seems to be that the Clayton Act requires a lower standard of proof of the same kind of facts—"evidence which is quantitatively or qualitatively less impressive than where the Sherman Act is invoked."⁴² More specifically, the merger in *U. S. v. Columbia Steel Co.* (334 U. S. 495 (1948)), which was examined under the Sherman Act, would probably not have been approved had new section 7 been in existence and invoked against it.⁴³

Section 7, before it was amended, prohibited corporate acquisitions of stock which might have any one of the following effects: (1) substantial lessening of competition between the merging companies, (2) restraint of commerce in any section or community, or (3) tendency to create a monopoly. This language, if taken literally, would have precluded almost every merger where competition existed between the two merging companies. As we have indicated, the courts shied away from this drastic interpretation and invoked the rule of reason of the Sherman Act.⁴⁴

Section 7, as amended, prohibits the acquisition of assets as well as stock, thus closing the longstanding loophole on this point. The acquisition is prohibited "where in any line of 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."⁴⁵

The earlier test as to competition between the acquiring and acquired companies is eliminated and so is the earlier alternative test of "to restrain such commerce in any section or community." The elimination of the first test eliminates the possibility of a strict and literal interpretation which would strike down local and unimportant acquisitions; the elimination of the second test removes any likelihood that broad Sherman Act tests will again be applied. The legislative history is clear on this point.

The Senate committee said:

"The purpose of H. R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act * * *."

* * * * *

"The committee believe that the excessive sweep that has been given to section 7 of the present Clayton Act by these two features of that section has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding."⁴⁶

This is confirmed in the House report:

"Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.

"Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enter-

⁴² See Adelman, *supra*, 118.

⁴³ H. R. Rep. No. 1191, 81st Cong., 1st sess., pp. 10-11 (1949).

⁴⁴ See also McAllister, *supra*, 142-143.

⁴⁵ 64 Stat. 1125, 15 U. S. C., sec. 18.

⁴⁶ See McAllister, *supra*, 143.

⁴⁷ Sen. Rep. No. 1775, 81st Cong., 2d sess., pp. 4-5 (1950).

prise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete." "¹⁹

The House and Senate committees also took the occasion to make clear that "may be" means reasonable "probability," not "possibility." The Senate report said:

"The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable *probability* of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act."²⁰

Under amended section 7 "the Government must define and prove the relevant market and the relevant products involved in the acquisitions. The 'line of commerce' need not be industrywide; any part of the domestic commerce is included. 'In any section of the country' apparently is intended to cover any market area in the United States in which the acquiring or acquired corporation is doing business and to embrace potential as well as actual competition. * * * The Government, therefore, has a lesser burden of proof under section 7 than under the Sherman Act, which requires a proof of an unreasonable restraint of trade."²¹

As we see it, amended section 7 sought to reach the mergers embraced within its sphere in their incipiency, and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are section 7 prohibitions to be added to the list of *per se* violations. Somewhere in between is section 7, which prohibits acts that "may" happen in a particular market, that looks to "a reasonable probability," to "substantial" economic consequences, to acts that "tend" to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraints.²²

While these are far from specific standards—specificity would in any event be inconsistent with the "convenient vagueness" of antitrust prohibitions—they can, we believe, be applied on a case-by-case basis. We think the present case is the type Congress had in mind—one that presents a set of facts which would be insufficient under the Sherman Act but nonetheless establishes, *prima facie*, a violation of section 7 of the Clayton Act.

III

Commission action, under section 7 (c) of the Administrative Procedure Act, must be supported by "reliable, probative and substantial evidence."²³ It is said that "These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand."²⁴ This is in reality a restatement of the "substantial evidence rule."²⁵ Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National Labor Relations Board* (305 U. S. 197, 229 (1938)).

Under section 7 (c) it is clear that, as heretofore, the technical rules of evidence are not applicable to administrative hearings.²⁶ Thus it is stated that "the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence)."²⁷ "But this assurance of the desirable flexibility in administrative procedure does not go so far

¹⁹ H. R. Rep. No. 1191, 81st Cong., 1st sess., p. 8 (1949).

²⁰ Sen. Rep. No. 1775, 81st Cong., 2d sess., p. 6 (1950).

²¹ Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 Mich. L. Rev. 1197 (1952).

²² See McAllister, *supra*, 148.

²³ 60 Stat. 241, 5 U. S. C. Sec. 1006c.

²⁴ H. R. Rep. No. 1980, 79th Cong., 2d sess., p. 36 (1946); Sen. Rep. No. 752, 79th Cong., 1st sess., p. 22 (1945); (Sen. Doc. No. 248, 79th Cong., 2d sess., pp. 208, 270 (1946)).

²⁵ Attorney General's Manual on the Administrative Procedure Act, p. 76 (1947).

²⁶ Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. *Interstate Commerce Comm'n. v. Baird*, 194 U. S. 25, 44. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceeding like this, here the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." *F. T. C. v. The Cement Institute et al.*, *supra*, 705.

²⁷ *Id.*

²⁸ See footnote 53.

as to justify orders without a basis in evidence having rational probative force."⁶⁷

The principal evidence in this case which the hearing examiner refused to accept as reliable, consists of several letters addressed to the Commission, in which respondent set forth (1) its sales of the relevant products in the southeast and in the nation,⁶⁸ (2) the acquired companies' sales of the relevant products in the southeast, and in the nation,⁶⁹ and (3) respondent's best estimates of its major competitor's shares of the relevant markets. Respondent's counsel did not object to the introduction of these letters as not being competent evidence. In fact, respondent said at the time that here were no accurate, absolute figures available in the flour industry showing competitors' sales or total sales.

Whether or not respondent's estimates of competitors' shares of a particular market can be accepted as reliable depends upon the circumstances. According to the testimony of respondent's market analyst, the best data available showing the market position and trend of sales of respondent and certain of its competitors in the flour industry are surveys prepared by the Market Research Corporation of America. This organization makes a random sample audit of retail stores which the witness described as the only random sample available which he considered projectionable. Respondent must have considered this information reliable enough for its own purposes inasmuch as it paid about \$50,000 per year for same.⁷⁰

Respondent prepares periodic market analyses of flour and mix markets for its use in the regular course of business, in which it uses the information supplied by the Market Research Corporation. The market position information contained in these reports was used, together with respondent's own data, in the preparation of the estimates in question.

The reports containing the data supplied by the Market Research Corporation were subpoenaed by counsel supporting the complaint but respondent refused to comply on the ground that it was not at liberty to divulge such information.

The estimates were prepared by respondent and submitted to the Commission during the course of the preliminary investigation, and respondent asked the Commission to rely upon them in reviewing the case prior to the culmination of the acquisitions. Presumably respondent at that time, as an advocate, "put its best foot forward."

Under all the circumstances,⁷¹ it is believed that the "common sense" and "reasonable mind" tests have been met and the estimates are *prima facie* evidence of respondent's market position, the market position of the acquired companies and the market position of its major competitors. *Prima facie* evidence is the minimum quantity necessary to raise a presumption of fact or is sufficient, if not rebutted, to establish the fact. *Otis & Co. v. S. E. C.* (176 F. 2d 34 (C. A. D. C., 1949)). Respondent, when it puts in its case will have full opportunity to rebut, explain, or contradict. It is important to remember in this connection that the issue here does not go to the absolute sales of respondent, the acquired companies or its competitors, but to the question as to the effect which the mergers may have on competition.

A few words should be said about the problem of proof in antitrust cases. Competition is a complex and constantly changing phenomenon. It has never been sharply defined. Injury to competition, as distinguished from injury to a competitor, is seldom capable of proof by direct testimony and may therefore be inferred from all the surrounding circumstances. "An antitrust charge may * * * be proved by circumstantial evidence, and the circumstances may include actions affecting any of the broad issues of fact posed in the complaint."⁷²

Analysis of the competitive effects of an acquisition should begin, we believe, with the relevant facts concerning the competitive pattern of the industry as a

⁶⁷ *Consolidated Edison Co. v. National Labor Relations Board*, *supra*, p. 230 (1938).

⁶⁸ The letters contained actual figures for respondent for the fiscal year 1949-1950.

⁶⁹ The letters set forth actual sales for Ballard for the fiscal year 1949-1950 and respondent's best estimates for Duff for the same period.

⁷⁰ The admissibility of commercial reports is well recognized. As Wigmore points out, "The * * * [exception to the Hearsay rule] is capable of liberal expansion to include * * * commercial and industrial records, made by persons disinterested in the particular litigation, published or kept accessible to third persons, and customarily relied upon by them in the conduct of particular occupations." *6 Wigmore on Evidence*, sec. 1708 (3d ed. 1940), p. 38.

⁷¹ These circumstances include the fact that respondent refused to comply with Commission subpoenas seeking the basic data upon which the estimates were based.

⁷² See McAllister, "The Big Case: Procedural Problems in Antitrust Litigation," 64 Harvard L. R. 27 at 28.

whole and its markets, particularly in the period preceding the acquisition. From such facts, and from information about the specific merger, it should be possible to determine what changes the acquisition can be expected to make in the character of competition in the markets concerned.

Counsel supporting the complaint say they have made such an analysis; that the evidence was not limited to the application of Section 3 cases to Section 7, but included in addition "an extensive showing of the character of the markets and the market setting in which the acquisitions took place."

To summarize the evidence, respondent, whose rapid growth during the past few years has been due in part to acquisitions and mergers, has now acquired two more substantial competitors. By these acquisitions it has substantially increased its milling and production capacity and its market position. In one of the relevant products, namely, mixes, its position in the southeast increased to about 45 percent.

These acquisitions have taken place in an industry which has steadily declined in size and capacity, and in which the big companies have increased their percentage share. This increase has been largely due—71 percent of it—to mergers. In the southeast the number of mills has not only declined but there have been no new entries of any size into the industry. The number of competitors in the southeast, more particularly in the urban markets, has been materially reduced by the acquisitions; in the mix business, for example, Ballard, with 12 percent, and Duff, with 10.2 percent, of the market, have been eliminated.

This establishes, it seems to us, a *prima facie* case.²⁸ The pattern of competition in the southeast, particularly in the cities, has undergone a considerable change as a result of the mergers. Unless explained, contradicted or rebutted, and respondent will have every opportunity to do this when it puts in its case, it is a change which constitutes a move away from healthy competitive conditions.

There is nothing in the record to indicate that the mergers will at present convert the industry in the southeast from a competitive to a noncompetitive pattern. The inference, in fact, must be to the contrary inasmuch as large national distributors, such as General Mills and Quaker Oats, and large regional distributors remain to furnish effective competition to Pillsbury Mills. However, in the urban markets at least, the mergers lead in the direction of what is sometimes called oligopolistic or "monopolistic" competition, that is, to a situation where the remaining competition in the particular market is between big companies.

If, for example, respondent should continue to acquire competitors at the rate it has since 1940, and other large companies should do the same, the urban markets in the southeast may come to be dominated by a few large milling companies. This, of course, has been the trend in other industries. In some of them, under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the new Clayton Act antimerger provision.²⁹

This matter, therefore, should be remanded to the hearing examiner for further consideration in conformity with this opinion.

Mr. Mead, while concurring in the result, will file a separate concurring opinion.

(Pps. 180–186 of the Federal Trade Commission Report on Corporate Mergers and Acquisitions follow:)

H. THE MARKETS IN WHICH COMPETITIVE CONSEQUENCES ARE EXAMINED

The 1950 Act applies to acquisitions where, "in any line of commerce, in any section of the country," the prohibited consequences may occur. The Act, therefore, appears to apply wherever the prohibited consequences may be found. It is not limited to any specific set of product relations between the acquir-

²⁸ As stated in *In re Chicago Ry. Co.*, 175 F. 2d 282 (C. A. 7, 1949), cert. denied (*Illinois v. Sullivan*), 338 U. S. 850 (1949), a *prima facie* case is established by evidence adduced by the plaintiff in support of its case up to the time such evidence stands unexplained and uncontradicted.

²⁹ Sen. Rep. No. 1775, 81st Cong., 2d sess., p. 5 (1950); H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8 (1949).

ing and the acquired company, to particular sets of suppliers, competitors, or customers of either company, or to any particular geographic area in which they may trade. Nor is scrutiny of the competitive effects of an acquisition confined to product lines which constitute a major portion of the business of either the acquiring or the acquired company.

The markets in which the consequences of an acquisition are to be evaluated are the markets in which the acquiring and acquired companies operate and the markets affected by what happens in these markets. In economic terms, this appears to mean that market facts define the meaning of the relevant line of commerce and section of the country and that the actual and potential competitive consequences of an acquisition are to be tested (a) in any product line (line of commerce), (b) in any geographic area (section of the country), and (c) at whatever market levels (trade levels) they may occur. Each of these three major dimensions of a market may be briefly examined.

1. Line of commerce

The product line may be as broad or as narrow as the facts of competition require. Acquisitions which result, for example, in prohibited impairment of competition are unlawful—

" * * * whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition."¹

Furthermore, a line of commerce need not be so broad as an industry if the prohibited effects work themselves out in narrower markets.

"The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a nationwide or industrywide scale.

"The purpose of the bill is to protect competition in each line of commerce in each section of the country."²

2. Section of the country

The geographic area in which the effects of an acquisition are to be studied is as broad or as narrow as the facts of competition require. Where a product is sold nationally, the United States is the relevant market. Where, however, a product is sold in a limited geographic area, it is not necessary to consider effects of competition on sales in the United States as a whole.

The Senate Judiciary Committee has stated that a "section of the country" may be as broad or as narrow as the area in which competition is, in fact, affected.

"What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.

"As the Supreme Court stated in *Standard Oil v. U. S.* (337 U. S. 293), 'Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition.'

"In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.

"It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well."³

The House Committee on the Judiciary is equally explicit:

"The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a nationwide or industrywide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country."⁴

¹ S. Jud. Com. Rept. 1775, op. cit., p. 5.

² H. Jud. Com. Rept. 1191, op. cit., p. 8.

³ S. Jud. Com. Rept. 1775, op. cit., pp. 5-6.

⁴ H. Jud. Com. Rept. 1191, op. cit., p. 8.

The geographic area in which the effects of an acquisition are to be examined is, accordingly, determined not by arbitrary boundaries but by the realities of competition.

3. Market level

Under the 1914 Act, examination of competitive consequences was confined to competition between the acquiring and the acquired company; the 1950 Act applies at any market level at which competitive consequences may work themselves out.

Acquisitions have been classified as horizontal, vertical, and conglomerate. An acquisition is classified as horizontal where the firms involved are engaged in roughly similar lines of endeavor; an acquisition is classified as vertical where it represents a movement either backward from or forward toward the ultimate consumer; an acquisition is classified as conglomerate where there is no discernible relationship between the business of the acquiring and the acquired firms.⁵ While the 1914 Act applied solely to horizontal mergers, the 1950 Act applies not only to horizontal acquisitions but to vertical and conglomerate acquisitions which might substantially lessen competition or tend to create a monopoly.⁶

I. ACQUISITIONS WHICH WILL NOT HAVE SUBSTANTIAL COMPETITIVE CONSEQUENCES, NOT PROHIBITED

The Congressional committees sponsoring the bill which subsequently became the 1950 Act stated that certain types of acquisitions are not prohibited.

1. A corporation in failing or bankrupt condition is not prevented from selling its assets to a competitor

The House Judiciary Committee considered the question of whether the Act would prevent a corporation in failing or bankrupt condition from selling its assets to a competitor. The Committee answered in the negative as follows:

"The argument that a corporation in bankrupt or failing condition might not be allowed to sell to competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. In the case of *International Shoe Co. v. The Federal Trade Commission* (280 U. S. 291) the Supreme Court went much further, as it shown by the following excerpt from the decision:

"* * * a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially (303) lessen competition or restrain commerce within the intent of the Clayton Act."⁷

Similarly, the Senate Judiciary Committee has stated that the Act would not prevent a company in failing or bankrupt condition from selling out:

"The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

"The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue."⁸

2. Small companies are not prohibited from merging

The Act does not prohibit small companies from merging.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p. 6.

⁸ S. Jud. Com. Rept. 1775, op. cit., p. 7.

In commenting on this point, the House Committee on the Judiciary has stated: " * * * no case has been found where a small corporation had any difficulty or was criticized by the Federal Trade Commission for selling its business by selling its stock to another small corporation. The small corporations have not had to avoid the present language of section 7 by selling their assets in place of their stock, when they wanted to dispose of their business."¹¹

And again, the House Judiciary Committee has pointed out that:

"Furthermore, the Supreme Court and the Federal courts have not applied the present strict language of section 7, even in cases of stock acquisition, so as to prevent a small corporation from selling its business or of merging with another small business. The Supreme Court has only applied the present language of section 7, even in the case of stock acquisitions, to large transactions which would substantially lessen competition, or tend to create a monopoly."¹²

The House Judiciary Committee goes on to state that the test of a prohibited merger is the probability of a substantial lessening of competition and, therefore, concludes that:

" * * * Small companies which cannot produce the specified effect upon competition are not thereby forbidden to acquire either stock or assets."¹³

Finally, it may be noted that during Congressional debate on the bill which subsequently became the 1950 Act, question was raised as to whether the bill would prevent the growth of small firms that might compete more effectively with the giant corporation in their industries. The answer was in the negative: " * * * [the bill] will not have that effect * * *. Obviously, those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition, but rather, intensify it."¹⁴

J. SUMMARY: THE FOCUS OF SECTION 7, AS AMENDED, ON PROBABLE COMPETITIVE CONSEQUENCES

Section 7 of the Clayton Act, as amended in 1950, is addressed to the probable competitive consequences of an acquisition rather than to the character of the acquisition, as such. An acquisition is neither legal nor illegal in itself; it becomes so only after determination of the character and magnitude of its effects upon the competitive incentives and opportunities of other companies. This determination requires study of the companies involved, the markets affected, and the resulting difference in competitive incentive and opportunity.

Information concerning the character of an acquisition in terms of the size of the acquiring or the acquired company, the classification of the acquisition as horizontal, vertical, or conglomerate, or the percent of a specified product or geographical market accounted for by the output of the acquiring or the acquired company is relevant to an appraisal of violation of law only to the extent that it bears on a determination of whether the acquisition may result in a substantial lessening of competition or a tendency to monopoly. These facts, as well as others, must, however, be viewed in their market setting. Taken by themselves, they signify little as to whether a particular acquisition may result in a substantial lessening of competition or a tendency to monopoly.

This is so because competition is a complex and constantly changing phenomenon. The meaning and relative importance of competitive activities varies from industry to industry and from market to market. Since competition cannot be directly measured, no single standard is applicable to the whole range of American industries and markets. Conclusions as to the probable effects of an acquisition must, therefore, rise out of facts concerning the acquiring and the acquired companies and the competitive pattern of the markets which the acquisition will affect, particularly in the period preceding, and directly following, the acquisition.

By virtue of the incipency clause, the Act is focused on the long-range effects of acquisitions on the pattern of competition. It is not necessary for an enforcement agency to wait until a substantial lessening of competition or monopoly has, in fact, been accomplished; it may act, and indeed is required to act, where there is a factual showing that the direct consequences of an acquisition, working themselves out in the markets affected, may lead to long-range substantial deterioration in the competitive opportunity of other companies.

¹¹ H. Jud. Com. Rept. 1191, op. cit., p. 7.

¹² Ibid.

¹³ Ibid., p. 8.

¹⁴ 95 Cong. Rec. 11724 (Mr. Boggs).

Neither incentive nor opportunity can, however, be directly measured. They are greatest where a company is free to move into and out of a market as it sees fit, is free to shop the market for the supplies it may need, and to shift among materials and among suppliers as differences in costs and in potential selling prices suggest. They are also greatest where a company is free to manufacture or sell products of its own selection and to test buyer acceptance by varying the product to be sold, its quality, its price, and methods and channels of sale.

The range of choice open to an individual company in these respects is determined by the kind and number of sources and outlets, the range of purchasing and selling prices, the extent to which buyers or sellers are dependent on competitors for supplies or outlets, and the relative restrictiveness of long-term contractual arrangements tying suppliers and customers or groups of competitors to each other in more or less stable relationships which cannot be penetrated by other companies.

The kinds of information from which competitive consequences may be determined, and the major problems connected with the development and use of such information as evidence are explored in the next chapter.

Senator KEFAUVER. I think it is a very good study which has been made. I have not had a chance to read it all, but I think it is timely and useful. You did not think Pillsbury would be a Sherman Act violation, did I so understand you to say that?

Mr. HOWREY. I so said.

Senator KEFAUVER. What is your authority for that? There you have in one section of the country approximately 48 percent getting into the hands of 1 company, a merger bringing that about.

Mr. HOWREY. I think it is a little difficult to be characterizing one's own opinion.

I happened to have written the Pillsbury opinion, but the substance of it was that there was not only competition, but strong competition, in all markets. It was the same kind of competition in the markets that you will find in the automobile industry, strong competition between big companies. Of course, men's minds differ, but I think this opinion indicates that we have reached a violation of section 7, and would not have reached it under the Sherman Act.

Senator KEFAUVER. Well, you have 48 percent of a business in 1 section by virtue of the acquisition.

Mr. HOWREY. In the Southeastern United States. We did not say that about any one market.

Senator KEFAUVER. Well, anyway, that is the finding.

Mr. HOWREY. It was in, I think, an 11-State area, was it not?

Senator KEFAUVER. You say that would not violate the Sherman Act?

Mr. HOWREY. I did not say that. I said the facts presented in the record of Pillsbury, I do not think, would have constituted a violation of the Sherman Act.

Senator KEFAUVER. You are aware, are you not, Mr. Howrey, that in the Consolidated Steel case, as a result of mergers, Consolidated held about 28 percent of the business in 1 section of the country. The Supreme Court held that was not a violation of the Sherman Act, but by a 4-to-3 decision. So 28 percent was getting mighty close to the point of violating the Sherman Act, in the opinion of the Supreme Court.

Yet you think 48 percent apparently would not?

Mr. HOWREY. Senator, I must not answer your characterization because I did not say that at all. I say the Consolidated Steel case was a typical case where it was not a Sherman Act violation but it would

have been a section 7 violation and that, I think, is the situation in Pillsbury; that is the difference.

Senator KEFAUVER. I just want to say, as one who has been very much interested in this, Mr. Howrey—and we are just talking in the sense of being the best of friends here, because I think we all have, I hope we all have, the same interests—that I have been rather shocked and surprised with the turn that has been given to the amendment to the Clayton Act, having lived with it since the early 1940's.

I became interested in this amendment way back when Judge Davis was Chairman of the Federal Trade Commission and Congressman Gwynne was a member of the House Judiciary Committee. It was never the intention of the Judiciary Committee of the House—and I am certain that the same was true over here—that the new amendment to section 7 of the Clayton Act should be enforced, as you have enforced it, on the basis of Sherman Act tests. It was intended that it was to be enforced on the basis of what the Congress had said about section 3 and the other sections of the Clayton Act.

Here, I cannot be sure, but it seems that you are applying no different treatment to section 7 of the Clayton Act than has always been applied to Sherman Act cases. That was just not the intent of many of us who were interested in this legislation.

Mr. HOWREY. I probably cannot convince you, but I would like to respond to your last statement: First, I have just said that the Consolidated Steel case and Pillsbury case were two cases where the Sherman Act did not stop the mergers, but where section 7 will. Now, there is one difference.

Now then, I do not know whether I should speak for Judge Gwynne, but he was on the Judiciary Committee and he wrote the report in the 80th Congress on this section and he joined in the Pillsbury opinion.

Senator KEFAUVER. Maybe he made a mistake.

Mr. HOWREY. Well, maybe he did. I do not think he did. I think he is a very able lawyer.

Senator KEFAUVER. I agree with you he is an able lawyer, and I was surprised when I saw his approval of the Pillsbury case.

Mr. HOWREY. Secondly, the Attorney General's committee approved the Pillsbury approach, with very few dissents. There were just a handful of dissents, and the committee represented, I think, a good cross section of legal and economic thinking of the country.

Senator KEFAUVER. Well, Mr. Howrey, I disagree with you very strongly. I do not think the Attorney General's committee represented a cross section. Although it had some members who represent the public interest, I think it largely was loaded in favor of big business.

Mr. HOWREY. Well, I disagree with that one, Senator.

Senator KEFAUVER. I also think that you, as chairman of a quasi-judicial body, have done some damage to your judicial position in joining in a report so that everybody can see just exactly how you feel about matters not before your Commission.

Mr. HOWREY. I would like to answer that, if I may.

There is a note at page 5 of the report that while I participated in the proceedings, and, as a matter of fact, I have a little written statement on that I would like to insert in the record, if I may.

Senator KEFAUVER. Without objection it will be inserted.

(The statement referred to is quoted on p. 161.)

Senator KEFAUVER. What I am getting at is—

Mr. HOWREY. I know what you are getting at, and I have an answer to it.

Senator KEFAUVER. Any lawyer can take this report and know exactly how Mr. Howrey's thinking goes about any antitrust problem that is discussed in it, and they are all discussed.

Mr. HOWREY. Well, I think the question you are asking about the Pillsbury decision is a much greater challenge to judicial processes, because I am sitting as a quasi-judicial officer in that case. That is a much greater challenge to judicial processes than anything I did by participating in this committee of the Attorney General.

Senator KEFAUVER. Maybe you should not have answered my questions.

Mr. HOWREY. I think I will disqualify myself in the Pillsbury case for the rest of the case because of the inquiry which you have made about my mental processes in it.

But let me answer your other question, and I think I should because I do not think I can sit in a quasi-judicial capacity and—I think you have delved too deeply into the quasi-judicial mind in the Pillsbury matter.

But as a member of the Attorney General's committee, I attended its two general sessions. I was not a member of any task force or work group, and did not attend any session of any such group.

I did not vote on specific issues nor did I participate in the discussion of any matter in which I had an interest before becoming a member of the Federal Trade Commission such as, for example, the quantity limit proviso. In fact, I was not in the conference room when the quantity limit proviso was discussed.

In addition, I call your attention to the following statement set forth on page 5 of the report:

While the Chairman of the Federal Trade Commission participated in the proceedings of the committee and signed the report, this should not be construed as a prejudgment of issues which may come before the Commission in individual cases.

Now, that seems to me to be an answer to the criticism that I participated in it.

The administrative agency is, as you know, a conglomerate. We are administrators one day; we are quasi-judicial officers the next.

We decide what complaints should issue; we vote on that, and then we sit and hear the evidence; that is the administrative procedure, that is administrative law, and it has grown up and has become one of the great branches of our Government.

So I do not see how, as an administrator, I could do anything else but participate in a study of the very subject which I was administering.

When the Attorney General invited me to participate, I, of course, accepted.

Senator KEFAUVER. I see the statement on page 5. But the thing that bothers me, Mr. Howrey, is that you have discussed in this report situations that have not arisen but may arise, giving interpretations on a wide variety of matters, such as damages, how much the penalty ought to be, and so on, and you signed the report.

Mr. HOWREY. Yes, I admit that. I have answered letters from this committee asking numerous opinions on similar subjects. Just

recently I signed a letter supporting, as Chairman of the Commission, by direction of the full Commission, the increase in the criminal penalties of the Sherman Act to \$50,000. That is part of my job. You see, I am an administrator, too.

As Chairman, under the policies laid down by the full Commission, I supervise the staff, I appoint the staff, except those who are bureau directors. They are appointed by me and approved by the full Commission. So I have a dual role, and every officer and every administrative agency has that dual role. It is a part of the whole system of administrative law.

Whether it is desirable or not, I will not attempt to answer, but it has been established and has functioned in this country since 1890, I think, or whenever the ICC was first enacted.

Senator DIRKSEN. 1887.

Senator KEFAUVER. 1887.

Mr. Howrey, you have made some qualification about your participation in this report.

You made a speech in New York which I think ought to be made a part of this record. Would you qualify your attitude expressed in that speech by the same addendum here, that is, it is not supposed to be a pre-judgment of issues that come before the Commission?

Mr. HOWREY. I certainly would. I take my quasi-judicial duties very seriously. I look at the sworn testimony and the record, as we are required to do under the Administrative Procedure Act, and based upon that record render a decision. I think that is true of all our commissioners.

Senator KEFAUVER. Has this been made a part of the record, Mr. Burns, this speech?

Mr. BURNS. No, it has not.

Senator KEFAUVER. I was a little bit amazed to get the impression from your New York speech that—

Mr. HOWREY. May I ask which one it is, Senator?

I made several.

Senator KEFAUVER. This is January 26, 1955, before the section on antitrust law of the New York State Bar Association; that you were rather happy that you were in this rule-of-reason business, and you expressed the feeling that you were getting further along the road of the rule of reason.

Was that the impression you intended to give?

Mr. HOWREY. I will let the speech speak for itself, Senator, if I may.

Senator KEFAUVER. Very well; it does speak for itself.

Mr. HOWREY. I will be glad to have it put in the record.

Senator KEFAUVER. Yes, let us put that in the record.

(The document referred to follows:)

COALESCENCE OF LEGAL AND ECONOMIC CONCEPTS OF COMPETITION

Address by Hon. Edward F. Howrey, Chairman, Federal Trade Commission, prepared for delivery before the section on antitrust law of the New York State Bar Association, New York, N. Y., January 26, 1955

The Attorney General of the United States recently prophesied that this year promises to be one of special antitrust significance in the work of his Depart-

ment.¹ I venture to say that the same will be true at the Federal Trade Commission.

The Commission has already instituted various programs designed to give its statutes new vigor. The Antitrust Division has undertaken like measures, and, in addition, the Attorney General's National Committee To Study the Antitrust Laws has attracted national attention.

Certainly no one can deny that we are currently witnessing a reaffirmation by both agencies of the principle that a judicious national antitrust policy is an unexpended article of faith in our political and economic democracy. While there may be differences of opinion with respect to the implementation of this policy, there should be no doubt in anyone's mind that the public is obtaining a progressively greater return on its antitrust dollar.

Instead of listing our accomplishments during the past year, I should like to discuss, if I may, one of our most challenging and intriguing antitrust problems; namely the *per se* doctrine versus the rule of reason approach, and the dependency of the latter on a greater coalescence of legal and economic concepts of competition.

The *per se* violation doctrine means that certain practices are in and of themselves unlawful, that is, the conduct is considered unreasonable *per se*; the effects on competition are automatically and conclusively presumed and are not dependent upon examination of industry and market facts.²

Diametrically opposed is the so-called rule of reason approach. This approach draws the line between zones of legal and illegal conduct through a consideration of relevant economic factors; the market is analyzed to determine whether the restraint merely regulates competition or whether it is such as may suppress or even destroy competition.³

Stated another way, the question—in terms of FTC practice—is whether or not the Commission will sit as a tribunal of experts and conduct a factual inquiry into legal and economic issues.

In the past three decades the industry of this Nation has seen growth and change that are without parallel in history. New products, new markets, and vast new industries have come into being; we have seen two important periods when our economy was so predicated upon war or preparation for war that almost every business in America was affected.

It is not surprising therefore that those charged with law enforcement or adjudicative responsibilities found the dynamics of our industrial complex difficult of analysis. It was quite human, and no doubt appeared to them more efficient, to develop and apply self-operative, automatic rules of illegality and thus to avoid the heavy burden of proof.

However valid this initial motivation may have been, administrative agencies and the courts should now shoulder the responsibility inherent in examining relevant economic factors. The very complexity of the economy itself demands that antitrust decisions should not be made in a factual vacuum. Almost every antitrust case presents issues which are basically economic; we use our legal procedures merely to resolve them.

During the years that followed the Trenton Potteries and Socony Vacuum decisions, the Commission probably did its share in expanding the *per se* approach. This prompted me to observe in 1953, at Ann Arbor, that critics of the Commission had maintained that it was not the body of experts Congress intended; that it had become instead a prosecuting agency employing laborious procedures and rigid interpretations without regard to the relationship of law, business economics and public policy. I took the position then, and still do, that if this were true, that if an administrative tribunal does nothing but promulgate *per se* doctrines, then the rationale for its creation disappears. It may as well give way to the prosecutor.

¹ New York Times, October 1, 1954, p. 10.

² Agreements among competitors involving such practices as price fixing and boycotts are frequently cited by the courts as *per se* violations. And Congress, itself, has prohibited certain practices as such—for example, secs. 2 (d) and 2 (e) of the Robinson-Patman Act. This paper does not deal with these but rather with the growth and extension of the *per se* doctrine.

³ In the Chicago Board of Trade case, Mr. Justice Brandeis said:

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint as imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts" (246 U. S. 281, 238 (1918)).

THE ROLE OF THE ECONOMIST

This leads to a consideration of the role of economic data in administrative and judicial proceedings, particularly in ascertaining and adjudicating the ultimate question of injury to competition. Professor Oppenheim said in 1952, "Antitrust lawyers and antitrust economists face a joint task of overcoming existing barriers to greater coalescence of the judicial and the economic doctrines of antitrust. They are the ones who should provide the guides to clarification of * * * fundamental antitrust issues * * *."

This coalescence has not occurred nor has it progressed to a satisfactory degree. Lawyers and economists alike have the habit of emphasizing the differences between legal and economic concepts of competition, rather than recognizing that the antitrust laws are here to stay and require, or at least should require, the use of economic evidence in analyzing markets and in determining competitive effects.

When an economist speaks on the subject of competition, restraint of trade, or monopoly, he usually stresses the point that economic theories do not provide any legal standards nor formulate any tests or criteria of liability under antitrust laws. Many lawyers do likewise, declaring that the legal significance to be given a particular set of facts has no relationship whatsoever to their economic significance.

The economist says he is a social scientist interested only in human behavior and the fundamental relationships between men and business. The lawyer says, "That's all right for the professors, but I am concerned merely with formal statutory rules enforceable in the courts."

This may all be true under current economic and legal theories. But, if I may say so without offense, it is about time the lawyers and the economists recognize that large and important changes have taken place in our economy and prepare a new approach dealing with the problem of competition and monopoly in 1955 under present antitrust laws. Surely these laws were meant to deal with the subject that interests both the economists and the lawyer, namely, man and business.

If this is not done, and done fairly soon, I venture to prophesy that the forward march of the *per se* doctrine will continue and the rule-of-reason approach, for which we have been struggling at the Commission, will lose ground.

Lawyers frequently complain that they must exercise great care because the economist's use of a particular word may be misleading from a legal standpoint. Words like "monopoly," "competition," "discrimination," etc., are given a meaning in economics which may sometimes differ considerably from the meaning in law, and vice versa.

This confusion of terms has been an important barrier to the successful use of economic analysis in antitrust cases, and yet the solution seems fairly simple. The economists should be asked to furnish an analysis of relevant economic factors within the context of the statute itself.⁴ He should not be called upon to write a general treatise on competition or monopoly, nor should he be asked to interpret or define the statute, or to decide the boundaries or limitations of the law.

Economists generally agree, regardless of their school, that the competition which the antitrust laws seek to preserve cannot be defined in terms of absolute or perfect competition. Most economists regard "perfect competition" and "pure monopoly" only as theoretical extremes of possible market situations.⁵ They recognize that between these extremes there are such concepts as "imperfect competition," "workable" or "effective competition," "oligopoly," and "monopolistic competition."

Some economists belong to the behaviorist school while others belong to the structuralist school. The former focus attention upon the performance of the industry and the behavior of the firms in the industry as the key to the competitive situation. The latter group looks to the market structure; e. g., to the number of sellers or buyers present in the particular market. My own belief is that these are not mutually exclusive viewpoints. In most situations market

⁴ See especially *U. S. v. E. I. duPont de Nemours and Co.* (118 F. Supp. 41 (D. Del. 1953)).

⁵ See opinion of Judge Leahy in *U. S. v. E. I. duPont de Nemours and Co.*, *supra*. For an excellent discussion, see Brief for the United States on Liability, *U. S. v. United Shoe Machinery Corp.* (110 F. Supp. 295 (1953)); Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws, Economic Background* (19 Geo. Wash. Law Rev. 120-122 (1950)); Stocking and Watkins, *Monopoly and Free Enterprise*, Twentieth Century Fund, pp. 13, 49 (1951).

structure and behavior are inseparable and in many situations an examination of the relevant facts will involve both structural and behavior considerations.

In June of 1954 I gave a paper before the American Marketing Association in which I outlined 16 tests, standards, or criteria for determining competitive effects. These tests were not meant to be all-inclusive and would, of course, vary from case to case. The market, the industry, the statute, and the type of violation involved would form the frame of reference. But they are, I think, the type of criteria that lawyers and economists should be able to agree upon as guides or factors in determining competitive effects in a particular market.

I would like briefly to discuss some of these factors:

1. The number of comparable sellers in a market and their relative size.

An acceptably competitive condition requires a sufficient number of independent companies to assure that no one company will have monopoly power, that is, power over price or power to exclude competitors. Unless numbers are already large in a given market, a reduction of numbers may involve reduction of competition. Where it is alleged that genuine economies of scale, or other considerations (including the capacity to innovate), permit only a small number of sellers, close scrutiny must be given to the competitive situation.

In addition to numbers of sellers, their relative size is important. Relative size refers to market shares or market power. Absolute size, as measured by number of employees, dollar volume, or dollar value of assets, ordinarily has no particular significance in determining the presence or absence of effective competition. But the share of the market occupied by a particular firm is one of the important bits of evidence bearing on market power and competition.

2. Opportunities for entry into the market.

Freedom of opportunity for rivals to enter the market is a fundamental requisite of effective competition. This condition is necessary if there is to be, in the long run, a sufficient number of sellers to prevent markets from tending toward monopoly. The exclusion of new rivals is a major impairment of competition, and the power to exclude rivals is usually associated with the power to eliminate rivalry among those already in the industry.

When there is little or no new entry into a given field, alternative explanations must, of course, be considered. Perhaps, for example, there is no economic justification for new enterprise. In any event, the existence of barriers to entry is a matter of proof and should be shown. The facts should not be presumed.

3. Opportunity for survival.

Often competitive behavior can best be defined as a struggle for survival. Admitting that profit is the ultimate goal, a company must maintain its market position today in order to provide an acceptable balance sheet tomorrow. Thus withdrawals of firms from a market should be carefully analyzed. Facts of mortality and exit may be as important as those relating to entry.

4. Growth and profits.

It is quite obvious that growth and profits are linked together as objectives of a healthy and successful business enterprise. The principal road to increased profits is expansion. Opportunities for growth are therefore necessary for a competitively effective market.

In a rapidly expanding industry, it is generally more difficult for established firms to dominate the market. In a static industry, on the other hand, where certain firms have a tight hold and are not actively competitive, they may, by inaction, not only discourage the entry of rivals but also discourage new methods and techniques.

Other factors which may be relevant to an appraisal of the competitive characteristics of a market include (5) effective consumer choice of alternative goods and services, (6) balance of bargaining power between seller and buyer, (7) level of concentration, including the trend of mergers and acquisitions, (8) relationship between size and efficiency, (9) degree of price competition and competitive meeting of prices, (10) responsiveness of price to changes in costs, (11) degree of independence, (12) efficiency in production, (13) efficiency in distribution, (14) flexible adjustments to changing markets, (15) presence or absence of unfair methods of competition, and (16) national defense requirements.

These 16 tests represent criteria that have received considerable attention by economists and it is not unreasonable to conclude that by now they should be prepared to fit them into the framework of the antitrust laws.

It has been suggested that these factors cannot be administered successfully by the average district court; that to ask courts to go into matters of this kind might cause antitrust administration to become mired in a bottomless bog.

This may or may not be true of the courts—personally, I do not think it is—but the Federal Trade Commission was designed and set up for the specific purpose of dealing with complex problems of industries and markets. It was to be staffed with business specialists—lawyers, economists, marketing experts, accountants, and statisticians who could appraise economic data and market facts. It was given wide powers of inquiry and compulsory disclosure. It was, in short, created for the purpose of supplementing the work of the courts by furnishing expert guidance as to competitive effects.

The importance of factors of this kind should therefore be recognized by the Commission at all stages, that is, in the initiation of antitrust cases, in the development of a theory of the case, in planning and conducting the investigation, and in prescribing the remedy.

PROBLEMS OF EVIDENCE

The success or failure of a rule of reason approach may ultimately depend upon standards of admissibility for economic evidence. It is important to remember in this connection that the Commission is an administrative tribunal, not a court; that while Commission action must be supported by "reliable, probative, and substantial evidence,"⁶ technical rules of evidence are not applicable to administrative hearings.⁷ At the same time I believe that the courts, as well as the Commission, must recognize a degree of flexibility in their procedures sufficient to permit reception of evidence of competitive effects not based wholly on absolute facts such as precise sales, costs, or profits.⁸ Hearing officers and judges should permit industry and company history, industry and company statistics, pricing and trade practices, price levels and variations in price, and other business facts to be shown by methods usually employed by practical marketing men—methods "resting mainly on common sense," that is, upon "such * * * evidence as a reasonable mind might accept as adequate to support a conclusion."⁹

Perhaps a sharper distinction could be made between facts designed to show competitive consequences and facts that are necessary to show conspiracy or a per se violation. Once a set of facts is in the record, the weight to be ascribed to different facts can be determined; it need not and often cannot be determined in advance.

Market data should be considered admissible in the same proportion as the rule of reason approach is applied. This is essential because market information is never as precise or as subject to verification in cases where the rule of reason approach is taken as in those cases where one crucial fact or a few facts make the conduct unlawful per se.

Data concerning companies not party to a proceeding are frequently necessary and present special problems. Such data are often required to determine market shares or relative standings of particular companies, or opportunity for entry, rate of growth, relative prices, and other matters relevant to an appraisal of the practice under scrutiny. It is, of course, true that in such cases the need for concrete and verifiable information must be balanced against the rights of companies not parties of record to protect themselves from disclosure of confidential information and trade secrets.

Summaries, tabulations, charts, graphs, sampling and polls of opinion should be admitted into evidence if antitrust enforcement is to succeed as a practical matter. The lawyer, the Commission and the courts should make a sincere effort to eliminate the unfavorable stigma that has attached to these devices. To put it another way, the statistical literacy of lawyers and judges should be improved. As one economist recently said:

"In corporation management, when economic pressure compels the greatest efficiency compatible with prescribed reliability, this problem is solved by sampling. In judicial proceedings, however, the use of sampling is amazingly limited. One reason is that judges, having been lawyers themselves, are properly suspicious of the zeal of lawyers seeking to advance the cause of their clients. Judges feel inadequately protected when they are forced to rely upon samples

⁶ Sec. 7 (c) of the Administrative Procedure Act, 5 U. S. C. 1006c.

⁷ Attorney General's Manual on the Administrative Procedure Act, p. 76 (1947); *F. T. C. v. Cement Institute* (333 U. S. 683, 705 (1948)).

⁸ See 8 percent sample of shoe factories selected by Judge Wyanski in *U. S. v. United Shoe Machinery Corp.*, *supra*; see also projection of salesmen's reports to show substitute product competition in *U. S. v. E. I. duPont de Nemours and Co.*, *supra*.

⁹ See *In the Matter of Pillsbury Mills, Inc.*, Docket No. 8000, decided December 28, 1953; *Consolidated Edison Co. v. N. L. R. B.* (305 U. S. 197, 229 (1938)).

selected by adversaries. They are aware of the ease with which a sample can be rigged and the difficulty of detecting such bias. Because of this reluctance to rely on sampling, courts often do without relevant evidence or try to escape the peril of bias by rushing into the costly and time-killing citadel of the complete census. * * * Fortunately, there are sampling procedures which eliminate bias and which produce results of measurable accuracy."¹⁰

* * * * *

Administrative agencies and the courts are presently weighing the two antithetical approaches to enforcement I have mentioned. At the Federal Trade Commission, I am glad to say, we have moved in the direction of a rule of reason approach in our recent decisional work. If this trend is to continue there must be a greater coalescence of legal and economic concepts of competition.

Certainly the Congress intended that the Commission, as an expert body, enforce its laws not by applying a legalistic yardstick but by digging into the facts, analyzing them carefully, and issuing clear decisions.

Senator KEFAUVER. You have also applied the rule of reason pretty much to the good-faith provision, Mr. Howrey, have you not?

Mr. HOWREY. First, the rule of reason and a rule of reason approach are two very different things, if I may keep that distinction, because the rule of reason is the Sherman Act rule that was adopted by the Supreme Court in 1911. As far as I know, it is still the law.

I use a rule of reason approach to mean that we examine the competitive market facts, and that is the way I think the Attorney General's report uses it.

Senator KEFAUVER. You have even applied the rule of reason so far to the good-faith provision, that even though the price discrimination takes the form of undercutting for the purpose of trying to adversely affect a competitor, you still let them off if they do not actually put the competitor out of business. Is that not about the sum of your decision by the Commission in this Northwest Food case?

What was it, General Foods?

Mr. HOWREY. General Foods case.

First, I want to say that I do not agree with what you have just said.

Senator KEFAUVER. Well, they reduced their price; did they not?

Mr. HOWREY. Judge Gwynne wrote the opinion in that case and, if I may, I would like to turn any questions on that over to him, but I do not believe that involved the meeting of good-faith defense at all.

Mr. GWINNE. No.

Senator KEFAUVER. Well, I remember reading about the case, and I saw the decision at the time.

As I remember it, General Foods reduced its price in the Pacific Northwest to meet some of its competitors—

Mr. GWINNE. I would be glad to make a little explanation of it, Senator.

Senator KEFAUVER. Yes, all right.

Mr. GWINNE. That was a two-way case. General Foods put on what they referred to as a package deal. They made a certain deal in selling their product. Their principal competitor responded with a deal of his own.

It is very true they confined that particular deal, that particular offer, to that area. They did not give it in the eastern part of the United States.

Senator KEFAUVER. Didn't they do this, though—they were trying to get at this competitor in the Northwest?

Mr. Gwynne. There was no doubt they were trying to meet competition, and he was tough competition.

Senator KEFAUVER. They not only met his competition, but they cut under his competition.

Mr. Gwynne. It is hard to say whether they did or did not, because each one was competing in the same field, selling the same type of product, and each one was offering a different deal.

Now, the hearing examiner dismissed the case on the theory that there was no proof of injury.

I wrote the opinion and agreed with the hearing examiner on the facts.

Here was the situation, Senator: The only evidence of injury was, first, the statement of this competitor who had been injured. However, on cross-examination they went into the facts and figures as to injury, and it did not stand up.

Senator KEFAUVER. Well, in spite of the unfair competition, he was still a pretty good merchandiser and survived in business. But the point is that they not only reduced their prices to allegedly meet a competitor, which might be permissible under the Standard Oil of Indiana case, they went under the competitor. They did not give the same price to people in other sections of the United States.

Mr. Gwynne. That is correct.

Senator KEFAUVER. As a matter of fact, you have just quit doing business, then, in meeting competition cases, have you not?

I mean, you do not investigate them any more.

Mr. HOWREY. I do not know where you are getting your facts, Senator, but that certainly is wrong.

Senator KEFAUVER. Where somebody discriminates in prices allegedly to meet a competitor, do you investigate the case now?

Mr. HOWREY. Yes. In the first place, I would like to correct a statement, if I may, that has been made several times. I think it was contained in your New York speech. I would like to correct a statement to the effect that the good-faith meeting of competition—and these are not the words, but I think the implication was that since the Standard Oil of Indiana case, the Commission had always adopted the good-faith defense where it was presented.

Those are not the words, no, but I think if you will recall, that was the implication.

Senator KEFAUVER. Isn't that what was done in—

Mr. HOWREY. We made a check—no, it was not involved in General Foods. We made a check and we find it is just the contrary. The good-faith meeting of a competitor defense has been raised, I think it is, in nine cases, and each time has been rejected, and in no case before the Federal Trade Commission since the Standard Oil case has that defense been sustained.

The implication is just the contrary, it seems to me.

Senator KEFAUVER. Mr. Howrey, if you have rejected it in these cases, then you apparently think it is not a fair rule or procedure. Why don't you join in recommending the enactment of S. 11 to remedy the situation?

Mr. HOWREY. I did not mean to give that impression. I think it is a fair statutory provision.

Now, the reason we rejected it—for instance, we rejected it in a case just last week where they raised the defense in an automotive

parts case. We held there they were not meeting the equally low price of the competitor in good faith, but they were meeting a system, a price system that a competitor had; whereas the statute required it to meet an equally low price of a competitor; and Commissioner Secrest wrote the opinion in that case. He might be able to give you a better statement of it than I have.

Senator KEFAUVER. Mr. Howrey, in fairness to you, may I state that with respect to my question asking you whether you are still investigating the good faith meeting of competition—the meeting the price in good faith cases, arose because I had been advised that Mr. Simon testified before the House committee that those cases were no longer investigated by the Federal Trade Commission.

If I am wrong about it, I have given my source of information.

Mr. HOWREY. I am sure the fact is to the contrary. We investigate Robinson-Patman cases every day.

This good faith as a defense which a respondent raises, we do not raise it. We have to decide it when it is raised, and the only point I wanted to make was that every time that it has been raised, it has been rejected so far.

Senator KEFAUVER. But still you are unwilling to recommend that the law be changed in line with what you have rejected?

Mr. HOWREY. Yes. I am very strongly opposed to changing the law because I think our competitive system, if it is to exist, and continue, requires—put it this way: The law must permit a competitor to meet the equally low price of another competitor; that is what competition is, that is the essence of competition.

Senator KEFAUVER. This changes the burden of proof from the company of proving that he was meeting an equally low price, to the Federal Trade Commission to prove that he was not acting in good faith. That is, the burden now is on you to prove that he was not acting in good faith in reducing his price to meet a competitor's price.

How do you prove that a person was not acting in good faith?

Mr. HOWREY. No, Senator; I do not understand the law to be that. I understand that the good faith meeting of competition provides an affirmative defense which a respondent must raise and must carry the burden of proof, and I know of no decision, either in the Commission or the courts, to the contrary.

Senator KEFAUVER. Doesn't the Standard Oil decision say that, the good faith defense having been raised, then the burden is on the Government to prove that the seller did not meet the equally low price in good faith, that is, the Government must prove an absence of good faith if it is going to win its case?

Mr. HOWREY. No. Not as I read it. I think the issue in the Standard Oil of Indiana case was this: The respondent raised the defense and did apparently assume the burden, and successfully, of showing that he lowered his price to meet equally low prices of a competitor.

Now, the counsel for the Government contended that that was not enough, that they had to show that once that was shown, why then the Commission can go ahead and prove that there was injury to competition, and if they proved that, then the defense was of no avail and the defense fell even though they proved good faith and equally low prices. If the Government in its case in rebuttal could show there was injury, then the defense was no good. The Supreme Court held

"No," that it was an absolute defense, that if the lower price was made in good faith to meet an equally low price of a competitor, it was an absolute defense even though there may have been some injury.

They pointed out that in all competition there is injury; that whenever one seller gets the business, and another seller loses it, that that is always injury, but it is only the unfair type which is prohibited.

Senator KEFAUVER. I thought the burden of proof shifted and that now you had the burden of proof if they showed that they had met the price of a competitor—that you had to prove that it was not in good faith.

Mr. HOWREY. That was the contention of counsel for the Government, that if we showed in rebuttal that it was injurious, that the defense fell, but the Court rejected that viewpoint and said it was an absolute defense. Now, that is my understanding of the case.

Senator KEFAUVER. What worries me, Mr. Howrey, is that you put yourself on record, not only as being willing to go along with the Supreme Court decision, which, I think, misinterprets congressional intent, and which makes the case very difficult anyway, but in this report of the Attorney General's committee you advocate it being a defense not only to meet, but to undercut, the other fellow. In other words, you let Standard Oil not only reduce its price on some alleged meeting of good faith to some competition, but you, by signing this report, are advocating not only meeting, but undercutting.

Mr. HOWREY. No; again I must respectfully disagree with you. I don't think the report says that.

Senator KEFAUVER. I will show it to you.

Mr. HOWREY. And, furthermore, the portion you have referred to does not represent my view.

Senator KEFAUVER. Why didn't you dissent?

Mr. HOWREY. Well, I did dissent. I dissented in several places.

Senator KEFAUVER. I will find this, where the report says—

Mr. HOWREY. Not by name. No one dissented by name except 2 or 3 professors. I can tell you what it says, if you would like.

Senator KEFAUVER. This is not the copy I had marked, but I will find it here.

Mr. HOWREY. The price just—

Senator KEFAUVER. Since it is all right to reduce your prices to meet—we see no objection to meeting it under that.

Mr. HOWREY. It says just to the contrary. It says this—

Senator KEFAUVER. All right.

Mr. HOWREY. It is talking about branded goods and unbranded goods or highly advertised goods, presumably advertised goods against unadvertised goods, where they are of equal grade and quality, and it says where the premium goods, the highly advertised goods—we are assuming they are identical goods, equal grade and quality, physically identical, but one has a widely advertised brand and one does not, the price differential—where the advertised brand sells a little bit above the unadvertised brand. Now the report says it has not been good faith to have the highly advertised brand to come down and meet the equally low price of a competitor of the unadvertised brand when normally there is a differential between the two and it suggests it only be allowed to come down part way, that is, down to the normal differential.

It goes the other way on the unadvertised brand where there is a normal differential, it may go a little bit below the highly advertised brand. So I think the purpose of it is to reach an opposite result.

Senator KEFAUVER. Let's just read from page 132 of this document that you have signed, called the Attorney General's report.

Mr. HOWREY. The Attorney General's Committee's Report. He has not signed it yet.

Senator KEFAUVER. Do you see at subsection 3, "Although the meeting of competition—"

Mr. HOWREY. Could I find it, Senator?

Senator KEFAUVER. It is 132, if you have the same one I have. Have you got the place there?

Mr. HOWREY. I think I have; yes.

Senator KEFAUVER. "Although the meeting competition defense authorizes a seller only to meet, but not to better, competitors' prices, we recommend a reasonable adaptation of this limitation to the actualities of business." What does that mean?

Mr. HOWREY. Congressman Secrest says he would like to explain that, if you would like.

Senator KEFAUVER. Well, I was asking you, about that, Mr. Howrey.

Mr. HOWREY. All right.

Senator KEFAUVER. You signed the report here. Mr. Secrest did not sign it.

Consonant with the Supreme Court's formula in the Staley case, a seller should be held to show only the existence of facts which would lead a reasonable and prudent man to believe that the granting of a lower price would in fact meet the equally low price of a competition. An incidental undercutting of the price quoted by others when in the course of genuinely meeting one particular competitor's equally low competition price, hence, should not invalidate a seller's defense.

What are these reasonable adaptations and what is this undercutting of the prices?

Mr. HOWREY. That seems to be a quotation from the Staley case.

Senator KEFAUVER. No; it just refers to the Staley case.

Mr. HOWREY. And it quotes from it:

The existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would, in fact, meet equally low prices of a competitor.

That is apparently what the Supreme Court said in the Staley case.

Senator KEFAUVER. Yes; but then you go on to say an incidental undercutting of the prices quoted should not be bad. I don't know what you call "incidental"; I don't know how big it must be to be incidental.

Mr. HOWREY. I think if you were in good faith trying to meet an equally low price of a competitor, I suppose it means if you are off a cent or two, that should not destroy the good faith part of it. I suppose nothing in life can be absolutely certain.

Senator KEFAUVER. You don't agree to that, then?

Mr. HOWREY. Oh, I think I would agree with that language; yes.

Senator KEFAUVER. Well, you are not only reversing the Supreme Court, but you are going to make some "reasonable adaptations" and you are going to permit undercutting "incidentally."

Mr. HOWREY. No; apparently I am following the Supreme Court because the Supreme Court is quoted in the sentence you read.

Senator KEFAUVER. Well, the Court said you could meet; it didn't say you could undercut.

Mr. HOWREY. Well, I don't know; I would say that you cannot, under the Robinson-Patman Act, beat the equally low price of a competitor, you can only meet it, and if there is any meeting—

Senator KEFAUVER. That is what this says.

Mr. HOWREY. I think it does say—

Senator KEFAUVER. That is not what it says.

Mr. HOWREY. I think it does.

Senator KEFAUVER. The trouble is, Mr. Howrey, you think you are making only a little change in what the Supreme Court said by agreeing to the report, by agreeing to undercutting and a reasonable adaptation to the actualities of business. But I think by signing this report, you have opened up a door that may be very, very dangerous.

Mr. HOWREY. Well, I respectfully dissent. I think this is a fine report. I disagreed with a few parts of it.

Senator KEFAUVER. What parts did you disagree with? Do you have any dissents noted here?

Mr. HOWREY. Well, I did not—

Senator KEFAUVER. Did you note your dissents?

Mr. HOWREY. Not by name, no. Very few people did. It was agreed at the beginning, or it was sort of understood, because of the size of the committee, that dissents would not be noted by name.

Now there are certain ones, I think only very few, who wanted their names noted in dissent, but if you will read it throughout, you will see that only a few of the members thought that. There is one particular place where I belong to the few, and I—

Senator KEFAUVER. Don't you think, Mr. Howrey, since you are going to have cases coming before you involving untried issues, that it would have been well to have had specific notations of your dissents?

Mr. HOWREY. No, I think that would have made it worse. That would have identified me with a particular viewpoint, and it was supposed to be a committee work.

Now there are a few who felt strongly about it; Professor Schartz, Professor Rostow was another, who wanted their names attached to their dissents, but the vast majority of the dissents or disagreements, or comments, did not contain the name of the individual involved.

Now, furthermore, it was understood, and I think this is a reasonable approach to it, that in a document of this magnitude, that no one of the 60 or 70 members ever felt that every word in that document represented his viewpoint. It would be impossible to have that many lawyers and economists and college professors agree to that. But unless there was a matter of great substance that one or another felt strongly on, why he normally did not have a comment.

I think if you would have had dissents and comments individually, you would have had a book that high [indicating]. Here you have a composite view with some dissents indicated, but mostly the disagreement is where a few thought this, some thought that. It is not meant to decide issues. It is meant to be a commentary. Of course, I am speaking only as one member. I was not a member of any task force, nor was I a chairman.

Senator KEFAUVER. Mr. Howrey, I have been somewhat troubled by the problem of joint jurisdiction. These people who want to

merge have an option, if they want to submit it for consideration and advice, of coming to the Federal Trade Commission or to the Department of Justice. That is true, is it not?

Mr. HOWREY. Yes.

Senator KEFAUVER. Justice has an advisory organization, department, as to Clayton cases as well as Sherman cases?

Mr. HOWREY. I know they have have on Clayton cases. I don't know whether they have on Sherman cases.

Senator KEFAUVER. On deciding on whether a proposal might or might not meet the test of the law. Do you follow the same criteria, the same standards, as the Department of Justice?

Mr. HOWREY. I think we do. As I said this morning, the Attorney General in a speech to, I think, some economic society in New York, listed the factors, the criteria that Justice follows, and I think they agree pretty much with ours, yes.

Senator KEFAUVER. I wanted to ask a few questions about appropriations.

Mr. HOWREY. I could not speak for the Department of Justice. I do not mean to do that, but we try to follow the same factors.

Senator KEFAUVER. Do you think that any legislation to try to have the same standards followed in the consideration of merger cases by the Federal Trade Commission and the Department of Justice might be in order?

Mr. HOWREY. I think there should at the minimum be a very close liaison between the two agencies. As I say, Congress set up a dual jurisdiction. They had in mind the fact that we would till the same fields, using different tools, we using the administrative approach, and they using the prosecutors approach, and we do have a close liaison. At least we can say, I think, that we do not duplicate each other's efforts.

Senator KEFAUVER. I read somewhere that the Department of Justice has set up standards that they go by; written standards.

Mr. HOWREY. Well, they have not set up standards, I would not think.

Senator KEFAUVER. Don't they have a set of standards they put out to the public?

Mr. HOWREY. The Attorney General listed a number of factors which the Department considers in merger cases. I don't think it was suggested or meant to suggest that those would apply to every case. In some cases those factors might not even be in existence.

Senator KEFAUVER. Do you have written factors? Do you have the same published factors?

Mr. HOWREY. We have listed in the merger report in chapter, page—

Senator KEFAUVER. That is in this one here?

Mr. HOWREY. Yes. Again I am handicapped by not having a printed copy until a few hours ago. But I think if you will turn to page 180 of the printed copy, you will find a section entitled "Market Facts Relevant to an Appraisal of Competitive Conditions." And that whole section, 180 through 184, deals with that and it lists some of those. It has them on page 183.

Senator KEFAUVER. This, though, has been prepared by your staff. It has not been approved by the Commission.

Mr. HOWREY. Yes, it has been approved by the Commission and transmitted to Congress.

Senator KEFAUVER. Then these are standards to which you referred?

Mr. HOWREY. I think standards is probably the wrong phrase. We list those as factors which may be considered in one or another type of case. They cannot be considered in all cases, of course, because every case has a different set of facts, a different history. Some industries have a pattern of growth by building their own plants.

Senator KEFAUVER. The point I want to make is by not having the same standards, are you not rather inviting proposed consolidators to pick out which agency they feel gives them the best chance to get by?

Mr. HOWREY. Well, I would not think that exists. I don't think we do have different standards in the first place, and I think we are equally tough in the second place. I think, as a matter of fact, they have had more applications than we have had, or maybe about the same, applications for prior approval.

Senator KEFAUVER. What is the appropriation for enforcement last year for the Federal Trade Commission?

Mr. HOWREY. Our appropriation was \$4,200,000.

Senator KEFAUVER. Of this you spent about \$155,000 on section 7?

Mr. HOWREY. I don't believe I can answer that, Senator. I can get that information for you.

Senator KEFAUVER. Does one of your men here know?

Mr. HOWREY. Does anyone here know how much money we spent on enforcement of section 7? We have our budget figures broken down which we would be glad to submit.

Senator KEFAUVER. Would you submit the amount you spent? I had read somewhere that it was \$155,000.

You spent how much of that \$155,000, if that was the amount, on this study?

Mr. HOWREY. I am sure in the first place that that was not the amount. At least I don't believe it is. Secondly, I don't believe I can answer how much. Mr. Akerman, who is our Executive Director, could we give this committee the amount of money this study cost us?

Mr. AKERMAN. Yes, sir; we have it broken down up to the last month, but I don't have the figures with me. The amount that went into section 7, we have broken down for the last month, and it was submitted to one of the committees of the House; we will bring it up to date.

Senator KEFAUVER. Will you give the committee the amount you have requested, for the overall work of the Federal Trade Commission, the amount you have requested for section 7, the amount that was appropriated, the amount that was spent, the amount that was spent by the Federal Trade Commission as a whole, and in section 7 specifically.

Mr. HOWREY. We will be glad to bring it down.

Senator KEFAUVER. I remember back in 1952 I submitted an amendment to your appropriation bill and we got \$125,000 extra appropriated for the enforcement of section 7. My impression was that you turned it back.

Mr. HOWREY. I don't recall that we have ever turned any money back.

Senator KEFAUVER. Or that it was taken away from you by the administration. Do you remember what happened to that?

Mr. HOWREY. No; I have no recollection of it.

Senator KEFAUVER. In other words, that it was not used.

Mr. HOWREY. I have no recollection of it. Does anyone in the room have?

Senator KEFAUVER. They shake their heads. Do they know or do they not know?

Mr. HOWREY. I assume if they knew they would stand and speak.

We have always asked for more money than the budget gives us. At least, that has been true in my period of office.

Senator KEFAUVER. Mr. Howrey, you have an increasing merger load requiring increasing investigation activity to secure the facts on these mergers in order to see whether the law is being violated or not. I guess you have to have more staff, don't you?

Mr. HOWREY. Well, I think we are doing a pretty good job with the money we have. Of course, we could use more money, but I feel that we are doing a fine job. I think the statistics will show that we brought more—I want to be accurate about this—we brought more antimonopoly complaints in 1954 than in any period in the last 4 years. We have issued more antimonopoly orders in fiscal year 1954 than in any year in the past 4 years, and I think we are doing a splendid job.

I think we are making real progress. I am not saying that we could not use more money, and we did request more money than the Budget granted.

Senator KEFAUVER. Do you use lawyers or economists to investigate the facts of these proposed mergers?

Mr. HOWREY. Yes?

Senator KEFAUVER. Do you use economists along with the lawyers?

Mr. HOWREY. Yes. Now, presently, we are taking up mergers in a nonroutine way. We have established a special task force. We did it midway in this merger study. We found that with our routine procedures, we were getting bogged down. The routine was for the Bureau of Economics to study the market facts first and then transmit it to the lawyers, and then the lawyers would study it to see if under those facts they could make a case, whether to recommend a complaint, and the cases were shuttling back and forth between the lawyers and the economists. So we set up a special task force which includes lawyers, economists, statisticians, and accountants, and it is headed by one man, and we are taking mergers now out of the regular channels and treating them just like we treated coffee. We are having a task force handle it.

Senator KEFAUVER. Haven't you reduced the number of lawyers that you have studying these mergers?

Mr. HOWREY. No; I would not think so. I think we are probably increasing them. Of course, you must understand, I am sure you do, because you have followed our work, that we have many statutes to administer. We have not only the merger statute, but we have the Robinson-Patman Act, we have our basic section 5 statute, which creates the great volume of our work probably, and then we have all of the Clayton Act, and then we have these new acts which Congress has given us recently, without any additional money, the Flammable Fabric, Fur, and Wool Labeling Acts. Then we have the Webb-Pomerene Act and we have a great many acts to administer, and we are required under the budgetary system of government, and I sup-

pose under the mandates of Congress, to divide our money the best we can. When you enacted a new law like the Flammable Fabrics Act and the Fur Labeling Act, those were two recent examples, no appropriation was provided for the administration of those laws.

Senator KEFAUVER. Mr. Howrey, have you reduced the number of economists that you have?

Mr. HOWREY. I don't know what period you refer to. I don't know whether we have more or fewer economists than we did 2 years ago. It is very close to the same number. We had a reduction in force where about 30 or 40 people had to be let go, when our budget was cut. I don't know what the comparative number was, but any reduction was because of the budget.

Senator KEFAUVER. Didn't you carry your budget over from July 1 to October and November before you started using new money and increase your reduction in force for that reason?

Mr. HOWREY. I have no recollection of that; no.

Senator KEFAUVER. Who did you say the head of this task force was?

Mr. HOWREY. Robert M. Parrish, who is the Secretary of the Commission. He is head of the new task force.

Senator KEFAUVER. Robert Parrish; I heard you read the names of the men who were the heads of the task forces, then you have Mr. Akerman?

Mr. HOWREY. No; Mr. Akerman is the Executive Director of the Commission. He is not a member of the task forces except perhaps in his capacity as Executive Director. He is a member of everything around there, and he is the chief administrative officer, but he is not a member. The task force, I will be glad to name them if you would like.

Senator KEFAUVER. All right, sir.

Mr. HOWREY. Mr. Parrish is chairman, and the other members are not listed by seniority at all, but alphabetically; they are J. Wallace Adair, who is a lawyer; Betty Bock, who is an economist; L. E. Creel, Jr., who is a lawyer; F. P. Favarella, Edward Fischer, William R. Haley, John R. Heim, John F. McCarty, William S. Opdyke, Lawrence Stratton, Robert L. Wald, and Ames W. Williams.

Senator KEFAUVER. Mr. Parrish, he is the chairman of the task force?

Mr. HOWREY. He is the chairman.

Senator KEFAUVER. Has he had experience in investigating and trying antitrust cases?

Mr. HOWREY. Well, he is a career man, started out with the Federal Trade Commission and had a series of important jobs. May I ask him? He is here.

Senator KEFAUVER. Which one is Mr. Parrish?

Mr. PARRISH. I am, sir. Do you want a résumé of my background, Senator? Is that it?

Senator KEFAUVER. No; I was just asking how long you had been down there and what your qualifications are?

Mr. PARRISH. I originally was with the Federal Trade Commission in 1938 until 1942. Thereafter, I was with the Office of Price Administration, where I had charge of the enforcement of a number of price regulations. Since then, I have been with other agencies. Most re-

cently, before coming to the Federal Trade Commission in August of 1953, I was in the General Counsel's Office of the National Production Authority.

Senator KEFAUVER. Of the what?

Mr. PARRISH. Of the National Production Authority, NPA.

Mr. HOWREY. I consider him a highly qualified man.

Senator KEFAUVER. As head of the task force, is he the man who investigates the proposed mergers?

Mr. HOWREY. No; his chief job, Senator, is to be the needler; to get the cases investigated, to get them out. We felt that the task force was necessary—

Senator KEFAUVER. Have you tried antitrust cases?

Mr. PARRISH. No, sir; I have not tried antitrust cases, as such. I have investigated some.

Mr. HOWREY. He will not try these. The task force is not to take the place of our trial staff. It is to work up to the point of getting the complaint out. The trial work will be under Mr. Sheehy, the trial work, as usual.

Senator KEFAUVER. Who is the General Counsel of the Federal Trade Commission?

Mr. HOWREY. Earl Kintner is the General Counsel.

Senator KEFAUVER. Which is Mr. Kintner? You have had lots of experience in trying cases, have you not, Mr. Kintner?

Mr. KINTNER. I think I have, Senator. I started at the Commission in 1948 as a senior trial attorney.

Senator KEFAUVER. I have heard of the cases you have tried. I know something about you. How much have you asked for enforcement this year, Mr. Howrey?

Mr. HOWREY. You are asking our request to the Budget, or the request to the Congress?

Senator KEFAUVER. The request to the Budget, if you don't mind giving it.

Mr. HOWREY. I don't know. I guess I am authorized to give it; I don't know. We requested from the Congress, the Bureau of the Budget approved, \$4,300,000.

Mr. AKERMAN. A little over \$4 million. I think it was \$4,335,000. The House granted us \$4,200,000.

Senator KEFAUVER. That is substantially what was requested of the Budget, without asking for any round figures?

Mr. HOWREY. I think it was about a million dollars less.

Mr. AKERMAN. I think that is approximately right.

Senator KEFAUVER. I believe that is all I have to ask you.

Senator Dirksen, do you have any questions?

Senator DIRKSEN. I have a question or two to ask. Mr. Howrey, did the House cut you on your estimate this year?

Mr. HOWREY. The House cut us \$75,000 and that \$75,000 came entirely out of our financial reporting program. We have a program where we are sort of the handmaiden to the rest of the Government in obtaining statistics, which is a sort of combined financial report. We do it jointly with the SEC, but we do it for the whole Government. We asked for an increase in that appropriation and the House cut us \$75,000. That was the only cut.

Senator DIRKSEN. What was your cut last year? Do you recall it?

Mr. HOWREY. It was fairly minor. They have been giving us a little more money each year, but they have cut us from the Budget request. I can get that figure for you.

Senator KEFAUVER. Mr. Howrey, to complete the record, I would like to ask about the three cases you have pending now; you have told us about the Pillsbury case. Now, how about the Crown Zellerbach case, the paper case?

Mr. HOWREY. The Crown Zellerbach?

Senator KEFAUVER. Tell us the chronological history of that case. Did they come and ask for permission to merge?

Mr. HOWREY. No; they did not.

Senator KEFAUVER. When was the complaint filed?

Mr. HOWREY. The complaint was filed February 15, 1954.

Senator KEFAUVER. When were they merged?

Mr. HOWREY. If you give me a second, I believe I can answer that. I can't give you that, Senator.

Mr. SHEEHY. We do not have that date.

Senator KEFAUVER. About how long before the complaint was filed, or afterward?

Mr. SHEEHY. We were in the field making some investigations on that within a week after the merger was voted by the stockholders, and I can't say exactly how long after that it was before we got a complaint drafted for the Commission, but it went up very promptly.

Senator KEFAUVER. That is a pretty big merger, isn't it?

Mr. HOWREY. Well, that case is described on page 212 in my report.

Senator KEFAUVER. We don't have the same report that you have. Anyway, isn't that a case where, if they had come in and reported, you might have had facts to begin action before they actually merged?

Mr. HOWREY. Well, we had, I think. Are you free, Mr. Sheehy, to give the history of the negotiations that you had with Crown Zellerbach? They didn't apply for approval, but they did come in and submit facts when they heard we were investigating in the field.

Mr. SHEEHY. They did not seek clearance with us.

Senator KEFAUVER. You were out investigating and getting some of the facts and I assume you knew some of the facts. But when it became clear that they were going to go and merge anyway why didn't you ask the Department of Justice to get an injunction in this case?

Mr. SHEEHY. Senator, I cannot answer that other than the fact that we have not asked for injunctions in any of these cases from the Department of Justice.

Senator KEFAUVER. You let them merge and the thing goes on 5 or 6 years. I don't see how the suit is going to do much good because they have been getting all the benefit of the merger. There is a stifling of competition. Whatever the results of the merger may be, they will be getting all of the benefits while you are litigating it.

Mr. HOWREY. May I raise a question? I don't know whether this should—

Senator KEFAUVER. I would rather you didn't talk much about this case. I don't want to get you disqualified in it too.

Mr. HOWREY. I think that is true. I probably should not.

Senator KEFAUVER. I want you to still have something to do down there on some of these cases.

Mr. HOWREY. I never worked so hard in all my life, Senator, and I have worked all by life.

Senator KEFAUVER. I will ask the counsel what is the status of it now.

Mr. SHEEHY. On that case, we conducted a survey of purchasing practices of about 330 converters and purchasers who were obtaining their supplies from Crown, and the question has been up now as to the admissibility of that survey in the record, and recently, we have gotten a ruling from the Commission admitting that survey subject to certain cross examination of the data back of that survey. The hearings will open here next week, the 7th, I believe, at which time the people who prepared and submitted this survey—

Senator KEFAUVER. I don't want any details. Just when do you think you might get to a final Commission determination of it?

Mr. SHEEHY. After we get this survey in, we shall then seek—

Senator KEFAUVER. I mean in December or January?

Mr. SHEEHY. Senator, I cannot control what the respondent will do. I can merely tell you we will put our case in in a period of about 6 weeks after we got them into the field. We put our Pillsbury case in in a period of 4 months, and the respondent has now finished approximately 1 year putting its case in, and we cannot control that. We can merely attempt to meet it as it comes in.

Senator KEFAUVER. You mean the Commission has no control over how long a respondent has to put in his case?

Mr. SHEEHY. No, sir; the Bureau of Litigation has no control. I am speaking solely for it.

Senator KEFAUVER. Doesn't the Commission have some control over it?

Mr. HOWREY. The hearing examiner has complete charge of the case under the statute.

Senator KEFAUVER. You mean you have no right as a Commissioner to say speed up this case and give them 3 months to get it completed?

Mr. HOWREY. No; we have no such right. Under the Administrative Procedure Act, the hearing examiner, as I say, has charge of the case, and we can hear it on interlocutory appeals, and we have, of course—

Senator KEFAUVER. It certainly seems to me that if monopoly is a bad thing, there ought to be some way of speeding up consideration of these cases so that the public and competitors won't be imposed on all this length of time where, while they are taking all the time they want, and more, probably, getting their defenses in. Then, after the Commission decides, then they have recourse to the courts. In the meantime, they have been maybe enjoying all of the benefits of monopoly. Is that correct?

Mr. HOWREY. Well, you will have to speak for yourself, Senator.

Senator KEFAUVER. When did the Scrap Steel, the Luria case, get started?

Mr. HOWREY. I can give you the dates, and then I will have to turn you over to Mr. Sheehy. The complaint was filed January 19, 1954. There was an amended complaint, and that was filed July 13, 1954, and the first hearing started on January 12 of this year.

Senator KEFAUVER. Was that a case where they asked for permission to merge?

Mr. SHEEHY. No, sir; they did not.

Senator KEFAUVER. What was the situation when the merger took place? When did the merger take place?

Mr. SHEEHY. Again, the mergers in this case go back to the old statute, prior to 1950; some of the mergers. One comes after that. This case is not primarily a merger case. It is a case of restraining and restricting the channeling of scrap as it reaches the steel mills and one form of that restriction arose from the mergers that had occurred both prior to the enactment of the amendment and since the enactment of the amendment, and we have included those in this complaint, but it is not primarily a merger case.

Senator KEFAUVER. Then this is not primarily a section 7 case then.

Mr. SHEEHY. It has a section 7 charge in it, but it also has a section 5 Federal Trade Commission count covering other restrictive practices in the channelizing of scrap.

Senator KEFAUVER. Then the only two really section 7 cases are the Pillsbury and the Crown Zellerbach cases?

Mr. SHEEHY. Those are the only two cases that are exclusively section 7.

Mr. HOWREY. But not the only two that are real. Luria is a real case.

Senator KEFAUVER. I think some real thought ought to be given to the practice of prior notification and injunctive procedures through the Department of Justice when they are going to go ahead notwithstanding. Unless that is done, they will enjoy the benefits of monopoly, the public will be deprived of the protection of these laws, the competitors will be deprived, and furthermore, if, after 3 or 4 years the case is finally decided, a competitor may be out of business, and then you are faced with a very difficult untangling process using your order of divestiture, the only order you can issue in this type of case, isn't it?

Mr. HOWREY. Yes; we only have the power of our administrative order.

Senator KEFAUVER. You do not have the power to fine the participants, to assess a financial penalty against them, only the administrative order?

Mr. HOWREY. After the cease and desist order becomes final, either by court action, why, then, we have the contempt procedures of the courts that we can ask Justice to invoke.

Now going back to that injunction—

Senator KEFAUVER. Let's get that clear. If they fail to comply with your cease and desist orders, then you can go to a court and get contempt proceedings. You cannot issue them yourself. But you cannot place any monetary fine or obligation in order to punish these people for the damage they have done to competitors or to the people by virtue of monopolization?

Mr. HOWREY. Not in Clayton Act cases; no. Under section 5 of the Federal Trade Commission Act, after the order becomes final, either by a period of time or by a final adjudication of the courts, why, civil penalties do attach. The Commission has asked Congress regularly, I think, since 1938, probably, to amend the Clayton Act so that it would carry the same civil penalties as the Federal Trade Commission Act. But we have not been successful in getting that law amended.

I would just like, if I may, Senator, to raise this one inquiry: You asked several times why we have not gone to Justice to ask them to enjoin a merger before it takes place. We have all assumed that that could be done. I don't know whether it could or not. I am going to check very carefully, but I don't know whether a court would feel it had the power to enjoin a merger pending administrative hearing on the matter. Now, I don't know whether Justice has invoked the injunctive provisions in any of their cases, but as I sat here I wondered if it is not a real question whether a court has jurisdiction to enjoin a merger pending a Federal Trade Commission hearing on the case.

Senator KEFAUVER. I don't know either. I have always assumed that if something can be adjudicated, is illegal, there is generally jurisdiction, if not statutory, explicit jurisdiction to enjoin that which may later be declared illegal.

Mr. HOWREY. I would guess it probably would have to be done with Justice taking the case over rather than pending an administrative hearing.

Senator KEFAUVER. Under section 11, would you have a right, if Justice were willing, to relinquish jurisdiction to the Justice Department?

Mr. HOWREY. I didn't understand that.

Senator KEFAUVER. I say you could relinquish jurisdiction in those cases to the Justice Department.

Mr. HOWREY. Oh, yes; if Justice would take it over, we could do that.

Senator DIRKSEN. Mr. Howrey, precisely what authority would you have to request an injunction?

Mr. HOWREY. We have no authority in the section 7 cases. The only statutory authority we have to request injunctions in the courts is in false and misleading advertising cases dealing with medicines or drugs that may be deleterious to health. That is under the special Wheeler-Lee amendment. That is the only statutory authority we have to seek an injunction.

Senator DIRKSEN. That means you would have to go to the Department of Justice and persuade them that an injunction should be requested from a court?

Mr. HOWREY. That is correct.

Senator DIRKSEN. And to do that, of course, you would have to make your case to the Department of Justice first?

Mr. HOWREY. Yes; we would have to do that.

Senator DIRKSEN. Insofar as an injunction may be requested because of the alleged doing of an illegal act where health is actually in issue, and that is in issue as a matter of fact, you virtually would have to show irretrievable harm that could not be subsequently redressed in order to persuade Justice to get an injunction; wouldn't you?

Mr. HOWREY. Yes. You would have to make a showing in any injunction case that the threat of irreparable damage existed, and sometimes that is difficult, sometimes it is not. I don't know of any proceeding that has been filed this date under the old or new section 7 where an injunction has been requested.

Senator KEFAUVER. Well, section 11, Clayton Act, here, it is a long section—the second paragraph reads:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8, it shall issue and serve upon such person and the Attorney General a complaint stating its charge in that respect and containing a notice of hearing at a date and place at least 30 days afterward.

You know it says that the Attorney General shall have the right to intervene and appear in such proceedings? So I would think with this liaison, if there is an injunctive right, with this liaison you have with the Department of Justice, you could do something about it.

Mr. HOWREY. I would doubt, and this is a curbstone lawyer's opinion, that—if any other lawyers disagree with me, I hope they will speak up—but I would doubt that any court would enjoin a proposed merger pending an administrative determination by the Federal Trade Commission.

Senator KEFAUVER. Well, the district court of West Virginia enjoined the proposed merger Follansbee Steel with Republic Steel. Of course, an administrative proceeding was pending before the SEC. Would that not represent the same situation?

Mr. HOWREY. I don't know that case. I may be wrong. I am just expressing an opinion. It is certainly something we will look into, Senator.

Senator KEFAUVER. I think it is something you ought to look into. If you don't have the right, you ought to consider making a legislative recommendation to the Congress that somebody have the right to stop these mergers before they take place.

Mr. HOWREY. There is a provision, now that you mention it, under which the SEC—I can't give it accurately, I can't give it exactly, which Earl Kintner will describe—which permits the SEC to get a stay order for a certain period of time with reference to their orders on stock issues. I don't know the details of it, but it is statutory.

Senator KEFAUVER. I don't know the details of the proceedings in the Follansbee Steel case, but it is my impression that the complaint asking for an injunction was brought by a private individual or individuals, alleging violation of section 7 plus violation of certain provisions of the SEC rules, and the judge did issue an injunction. That, of course, is not a case that was taken to the higher courts.

Mr. HOWREY. Well, that happened in a section 7 case in the Benrus case, where they issued an injunction.

Senator KEFAUVER. All right, thank you very much.

The committee will adjourn until 10 o'clock tomorrow morning.

Senator DIRKSEN. Did you get your story told?

Mr. HOWREY. Well, I tried to.

(Whereupon, at 5 p. m., adjournment was taken until 10 a. m. the following day, Thursday, June 2, 1955.)

A STUDY OF THE ANTITRUST LAWS

THURSDAY, JUNE 2, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10:15 a. m. in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore, Kefauver, Wiley, and Dirksen.

Also present: Joseph W. Burns, chief counsel, and Donald P. McHugh, assistant counsel.

The CHAIRMAN. The committee will come to order.

We will proceed today with witnesses from the fields of both economics and law.

The first witness will be Prof. Carl Kaysen of Harvard University.

Mr. Kaysen, you have a prepared statement?

Mr. KAYSEN. I do, sir.

The CHAIRMAN. If you would care to read that, then we will ask you some questions.

Do you object to being interrupted as a point comes up about which one of us wants to ask a question?

Mr. KAYSEN. Not at all, sir; interrupt me at any time you please.

The CHAIRMAN. You may proceed.

STATEMENT OF CARL KAYSEN, ASSISTANT PROFESSOR OF ECONOMICS, HARVARD UNIVERSITY

Mr. KAYSEN. My name is Carl Kaysen; I am assistant professor of economics at Harvard University. My colleagues, Profs. Adelman and Turner, and myself are all members of a group in Cambridge which has been studying antitrust problems for some years now under a grant from the Merrill Foundation for the Advancement of Financial Knowledge.

Senator WILEY. Who is the other one?

Mr. KAYSEN. Adelman is the second one, and Turner is the third.

Senator WILEY. All right.

Mr. KAYSEN. This group includes men from the economics department, the Law School, and the Business School at Harvard, and the economics department at Massachusetts Institute of Technology.

The CHAIRMAN. Then your study has not been only an economic study?

Mr. KAYSEN. It has been a legal study and an administrative study.

The CHAIRMAN. An administrative study of the whole question?

Mr. KAYSEN. That is right.

While our testimony here reflects the benefit of the study and discussion of the group, we are each responsible for our own statements, which express our individual views.

I wish to comment on three topics discussed in the report of the Attorney General's National Committee To Study the Antitrust Laws; the concept of competition; the problem of oligopoly markets, in which a small number of large sellers provide all or nearly all the supply.

The CHAIRMAN. Could I ask a question at that point?

Mr. KAYSEN. Yes, sir.

The CHAIRMAN. I wish you would define "oligopoly."

Mr. KAYSEN. It is a made-up word of several Greek words, and it means a few sellers, a market in which almost all the output is sold by 3 or 4 or 5 people. Economists call that oligopoly. It is a short-hand descriptive word.

The CHAIRMAN. It is distinct, then, from where one seller would control the market? This is where a few sellers control the market as against open competition by a great number of sellers?

Mr. KAYSEN. Yes, sir.

I think it is fair to say, if I can depart here from the statement, that the word is a descriptive word.

The CHAIRMAN. I know it.

Mr. KAYSEN. It is not an evaluative word. If an economist, at least one who is tending to his business, says a market is an oligopoly market, he does not mean it is a good or it is bad necessarily; he is just using a descriptive way of referring to the fact that there are a few big sellers.

The CHAIRMAN. Yes. Thank you.

Mr. KAYSEN. Thank you, sir.

The third thing I want to comment on is the definition of the market in which a seller or a group of sellers operate.

"Competition" is defined in two places in the report, in chapter I, which sets out the general policy of the Sherman Act, and in chapter VII, entitled "Economic Indicia of Competition and Monopoly." In chapter VII the economic standard of antitrust policy is set forth as some notion of workable or effective competition. This is defined basically (p. 320)—let me say I am referring to the old or first edition of the report, and there has been a second edition Mr. Burns tells me, and the page number might be slightly different from that.

The CHAIRMAN. What page is that?

Mr. KAYSEN. This is 320 in the copy that I have.

This is defined basically as a situation in which "no one seller and no group of sellers acting in concert has the power to choose its level of profit by giving less and charging more." In chapter I, which is the legal chapter, the more legal chapter, the central goal of the policy is defined as the removal of "undue limitations on competition" (p. 8). This is elaborated in the later discussion of monopoly power to point to two "monopoly earmarks, the power to control market prices or exclude competition." In both discussions, the legal one and the economic one, then, some concept of lack of market power, or limited market power appears as the central content of the kind of competition which the antitrust policy should and does strive to promote.

This is as it should be, in my opinion. Specifically, let me call attention to the fact that the report explicitly rejects the performance test of what constitutes competition. That is, it rejects the notion that a benevolent or desirable use of power is the same as not having power, and emphasizes the fact that a central virtue of competition, properly viewed, is that it compels proper behavior in the market, rather than making it a matter of management discretion.

In the language of the report (p. 318) :

The existence of monopoly power, lodged in private hands which are free to pursue their own advantage, is generally condemned by economists, aside from the question of whether such power is used reasonably or progressively. It is an unsafe power to lodge in private hands, making the monopolist a judge in his own case.

This specific rejection is, in my opinion, correct, and eminently desirable; it is not the purpose of the antitrust law to mark out a standard of benevolent business conduct, but to enforce competition, so that benevolence is unnecessary.

The CHAIRMAN. In other words, we get back into the old Greek theory of government in which you had your benevolent tyrant. It was believed to be a good form of government because it was a one-man government, and it was good as long as he was benevolent; is that not right?

Mr. KAYSEN. Yes: that is right, sir.

Competition is good for two kinds of reasons: (1) We know it produces good results from experience, and (2) we know that these results are produced by pressure on the business firm, the pressure of competitors in the market. They do not depend on a business firm deciding, "Well, we will be good today and we will not be good tomorrow."

They have to be good, produce goods efficiently and cheaply in order to meet the test of the market.

The CHAIRMAN. But does it not also produce progressively better articles in order to meet the competition? In other words, each one is striving to produce a better article than the other one can.

Mr. KAYSEN. In an industry in which there is new technology, new ways of doing things, new products, competition tends to produce better articles.

One seller who produces new goods or a new gadget is going to stimulate another seller to outdo him if he can.

There are industries, of course, in which progress is slow. They may be no less competitive even though there are not a lot of new gadgets in them, and this depends, in part, on the nature of the industry and the kind of technology used.

The CHAIRMAN. I think that is best illustrated worldwide in the coal-mining industry, where due to the high competition in the United States of America, we outproduce foreign countries about 10 to 1 per man in tonnage.

That has been due to the competition between the operating companies, each one seeking new mining devices at all times to increase production; is that not right? It is not just gadgets, it is actually the getting of new materials.

Mr. KAYSEN. I think there are other examples of this sort. I, perhaps, should not use the word "gadgets"; competition in reducing

costs is as important as, maybe more important than, competition in producing new products.

You mentioned the coal industry. We can pick out, for example, the oil industry, in which the cost of turning out a gallon of gasoline from a gallon of crude has gone down a good deal over the years.

Shall I continue?

The CHAIRMAN. Yes; please go ahead.

Mr. KAYSEN. But, excellent as the definition of "competition" is in centering on the limitation of market power, it fails to meet squarely the question of how much. We need some standard of how much market power is too much; the report provides none. Thus (p. 54) we are told:

An illegal degree of power over price is a good deal more than the absence of a perfectly elastic demand curve, i. e., more than the availability of alternatives in pricing policy which many producers have to some degree.

But how much more constitutes monopoly power we are not told; the long discussion of chapter VII is no more enlightening on this issue.

Two possible standards could be used to fill the gap of how much market power is all right and how much should we not tolerate.

The first, more stringent one, would say that any market power beyond that which is inevitable because of the size of firms necessary for efficient production is too much, and antitrust policy should aim at reducing market power whenever it exceeds this limit. The second standard would look to balancing the extent of power, on the one hand, with the cost of reducing it through interference by judicial and administrative action on the other. The more drastic measures for reducing market power would thus be used only where power is great. This second standard would inevitably involve certain "performance" elements in its application, since the willingness of administrators and courts to impose far-reaching remedies in this area has not been unrelated to their appreciation of the reasonableness or unreasonableness of the behavior of the firms on which they are passing judgment. I refer here to the Supreme Court's comments on the Government's request, which the Court turned down, for a dissolution remedy in the National Lead case. The Antitrust Division asked that the Du Pont subsidiary and the National Lead division, which produced titanium oxide pigments, each be cut in two. The Court looked at the record of these firms and said, in effect:

They have increased their output, they have cut their prices, they have improved the product; we don't see any reason for doing anything so drastic even though the court below found, and we agree, that these firms had monopoly power.

Perhaps the comments of some committee members (p. 339) that workable competition is essentially a subjective judgment of whether or not an industry is performing reasonably well—a sort of economists's rule of reason—points in the same direction as this last comment.

The problem I raise here is particularly important in respect to the large-firm cases, the markets dominated by a single seller or a few large sellers.

That is all I want to say here in my statement about the problem of defining the standard of competition which the antitrust laws should enforce.

Now, on the next topic I want to say something about oligopoly. The economist defines an oligopoly market as one in which a small number of sellers furnish so large a proportion of the supply that each must be aware of the impact of his own decisions on those of his rivals. Some element of oligopoly, in this sense, is present in many industrial markets. In certain situations, where the number of oligopolistic rivals in a market is very small—4 or 5, or fewer, perhaps—and the situation of each in the market is very similar to the situation of every other, something like joint action may result even though each oligopolist pursues, independently, his own self-interest: competition becomes joint action. This problem, which might be called the hard core of the oligopoly problem, is inadequately treated in the report, in my opinion. For the most part, the discussion deals with the problem of oligopoly markets as if it involved nothing more than a question of proof; what is the evidence of "parallel action"; does it, in the circumstances warrant an inference of "collusion," or does it not?

This is discussed on pages 36 to 40 of the report.

Chapter VII notes that the fewer the sellers, the more closely must the market be scrutinized (p. 326), and warns cryptically that, and I am quoting from page 327, "fewness of sellers does not necessarily lead to mutual interdependence of policies, but it may do so." But the fact that an oligopoly market may not be competitive even in the absence of anything which properly can be called collusion or conspiracy, and that this presents a problem of policy, is passed over.

The policy problem is important. Hard-core oligopoly, without collusion, may well be present in such markets as primary aluminum, copper, sulfur, electrical machinery, cigarettes (still), and perhaps automobiles. At present, such markets do not lie within the reach of the law, fairly construed, as I see it.

I think tobacco, which has been interpreted to reach mutual interdependence as such, and make it illegal—and see Professor Rostow's comments on pages 40-42 of the report—does not really do so. My own view of that case is that it rests on an erroneous interpretation of the facts, the finding of a conspiracy, when in fact oligopolistic interdependence, everybody watching everybody else, was the principal explanation of the observed pricing behavior. I base this conclusion very heavily on two extremely good studies of this industry, one by Professor Nicholls, of Vanderbilt University, called Price Policies in the Cigarette Industry, and one by Professor Jackson, a new one, which has just come out, of the University of Florida, called the Pricing of Cigarette Tobaccos.

The CHAIRMAN. On the cigarette industry, specifically, is it not a heavy contributor to what might be called practical price-fixing, because of the fact that the major costs of cigarettes are in the excise tax?

Mr. KAYSEN. Yes, sir.

The CHAIRMAN. There is such a small amount of money invested in tobacco and paper compared to the excise tax.

Mr. KAYSEN. That is certainly an important point.

One of the ways it has been important in the past—I am not so sure it is as important now with the whole level of prices as high as it is—is that since the tax was a flat-rate tax, the margin that could be

maintained between cheaper and more expensive brands of cigarettes was limited, and the more the excise tax was raised, the less this margin could be.

Now, in the early thirties, when the major cigarette producers made what I am sure they later viewed as a mistake, and raised their prices substantially, you may remember that the cheaper 10-cent brands made a tremendous gain in the market. The reason they made a tremendous gain is there was a pretty big margin between the price of a pack of Camels or Luckies and types like that, and the price of a pack of Avalons or Wings or whatever.

Of course, in those days when you talk about 10 cents a pack it is pretty far in the past, but if we translate this into present situations, the excise tax is such a large part of the price that a man cannot really sell a cheap cigarette.

If the excise tax, for example, were based on the wholesale value of the cigarettes, instead of on the number of cigarettes in the pack, I think that would be helpful in that situation. But that, of course, I think is part of the story, sir, and not all of it.

The CHAIRMAN. I remember one time—and you may remember—during the price situation when one company started bringing out foot-long cigarettes in an endeavor to get around the excise tax by selling 20 cigarettes a foot long at practically the same price as 20 cigarettes of the normal size.

Of course, they shortly put a stop to that, however; but that was an endeavor to beat the tax.

Go ahead, please.

Mr. KAYSEN. In my view, either the policy should retreat to what I conceive the proper limits of the present law, in which case the hard core of oligopoly situations will remain outside the reach of antitrust, or some change in law is required which would reach such situations. Let me comment here, as an aside, that there are oligopoly situations in which the ability of the oligopolists to act noncompetitively is greatly facilitated by arrangements now within the reach of the law. Thus, in the can market, the shortening of the term of the requirements contracts and the sale by American and Continental Can Cos. of can-closing machinery formerly under lease, which resulted from the decree in the 1949 case against American Can, has already lessened the power of the two leaders significantly. Similarly, the striking down of a basing-point system may greatly increase competitive forces in a small-numbers market, when its previous existence has operated to facilitate price-leadership, and high margins. But there do remain situations to which these simpler remedies are not applicable—such as tobacco, in which conspiracy and collusion in any proper sense do not play an important role, and which, though not competitive, are outside the present reach of the law, in my opinion.

The possibility of enlarging the reach of the law raises a fundamental problem of antitrust policy, which is also relevant to my previous discussion of competition. This is the question of whether the antitrust law is one which does and should control conduct only, or one which should go further and reach situations which are noncompetitive, whether or not they can be attributed to anticompetitive conduct by particular firms. Any attempt to carry out the limitation-of-market-power standard, which the report appears to propose, would

involve reaching out beyond conduct to define illegal, or undesirable situations.

The report itself touches on this problem. It defines monopolization as market power plus something more. That something more is elusive, and difficult to pin down, but its essence is some element of culpable conduct on the part of an individual firm or group of firms. If each of a small group of rival sellers, acting independently in his own interest, severally and independently arrives at a pattern of non-competitive behavior, which results jointly in the possession of significant market power, is this illegal? Should it be? These are questions easier to ask than to answer, but it is important that they be asked.

Senator WILEY. What is your best illustration of that latter fact?

Mr. KAYSEN. I think the cigarette situation up to the time of the antitrust case, sir, would be a good illustration of that. I think the sulfur situation is a good illustration. We have essentially two producers of Frasch-process sulfur in Texas and Louisiana on the Gulf coast.

I do not see nor have I ever seen any evidence that shows these fellows get together and agree on what the price of sulfur is. I do not think it is necessary. I think that if 2 firms produce 90 percent of the supply, have the same technology of producing, and sell to the same customers, each of them just acting like good, sensible businessmen, doing what they ought to do, they are going to come out with about the same results.

Now, the question I am raising is: Do we say these fellows have not conspired and, therefore, they have done nothing illegal? That is one view, and that reaches conduct.

Or do we say here are two firms, it is inevitable that this result will occur. This result is not the result of any bad conduct, but we do not like the situation. Shall we change the situation?

That is a different approach.

Senator WILEY. How would you change it?

Mr. KAYSEN. Excuse me, have I made myself clear?

Senator WILEY. Yes. But how would you change it, then? Let us assume there is not any conspiracy between them, and they arrive at a given result, which is beneficial, say, to the consumer, the purchaser.

Mr. KAYSEN. Part of the question would be is the result beneficial. If the result is a high price and a high profit margin, maybe that is not a beneficial result.

Senator WILEY. No; I assumed from your statement of facts in the beginning that there was not any question of gouging.

Now, let us assume there is a question of gouging, what then?

Mr. KAYSEN. Well, let me say, sir, that I am not clear in my own mind that it is wise to move the law out past where it now reaches. I have thought about this, but I think it is a pretty difficult problem.

If I were going to do so, I should say that the law should specifically say that certain kinds of situations are to be proceeded against where they involve illegal conduct or where they do not.

In other words, this would move the law into a more regulatory phase, and one of the consequences of that, it seems to me—it is an

important problem—is that you could not possibly continue, in my judgment, this law as a criminal statute. I do not think it is correct or right to make a firm criminally liable for conduct which is not viewed as bad conduct.

Senator WILEY. Do you want the Government to fix the price? That is what I was getting at.

Mr. KAYSEN. No, sir; I do not think the Government should fix the price.

Senator WILEY. If you had two of them that had virtually a monopoly of a given commodity, and without any conspiracy between them, whether we were handling diamonds or handling foodstuffs or anything else, and you found there was not any agreement or any conspiracy, what are you going to say about them charging what price they see fit? Is there any public interest there that demands that the Government interfere?

Mr. KAYSEN. Well, I think that a policy of promoting competition might be construed to demand that the Government interfere.

Senator WILEY. In what way would they interfere?

Mr. KAYSEN. I think the only useful way to interfere would be to do something that would create more sellers, break up some of the existing firms, stimulate the entrance of the new producers.

As I have said, I think there are serious questions as to whether this is desirable or whether this is worth while, but I do not think that interference by way of price control, price fixing, direct price fixing, is at all desirable.

Senator WILEY. Would it depend largely on the commodity? Supposing the public had a vital interest in the commodity, and a given individual or two of them had a monopoly. Would the question be whether or not there was really a public interest in the matter or not? Suppose the commodity was not one that the public had any particular interest in.

Mr. KAYSEN. It is a little hard for me to be sure of what you mean. Senator, by a public interest.

May I try to take an example of that?

Senator WILEY. Yes; go ahead.

Mr. KAYSEN. Now, suppose this were a commodity which was being bought under the stockpiling program for the military stockpile.

Senator WILEY. Yes; that is a good one.

Mr. KAYSEN. Here there is a public interest, and there is an even narrower governmental interest in the sense that the taxpayers' money is being paid out for this stuff, and the question is, Have they been getting a ride on the taxpayers, in effect?

Senator WILEY. Suppose the Government got a very fine tax return from it.

Mr. KAYSEN. I think in that situation there may well be an argument for direct Government intervention. But in the sense that there is a very broad public interest in having competition, that the Sherman Act and other antitrust laws express, I think that kind of public interest is very broad and diffuse, and it is very hard to pin it down and say there is a greater public interest of this sort in commodity 1 than in commodity 2. Am I making myself clear, sir?

Senator WILEY. Yes; sure.

The CHAIRMAN. This situation that you define, taking sulfur, for example, or any other product, it usually arises when, shall we say, demand exceeds or, at least, equals production; is that not right?

Mr. KAYSEN. No, sir. I think one can find examples of situations in which it arises when demand is short of capacity. When demand exceeds production capacity the price is naturally going to be high, and I think this would be true whether this was a monopolistic or competitive industry; in fact, if you had a monopolist, you often find that the price does not rise as much in situations in which demand exceeds supply.

The CHAIRMAN. What I was thinking of was when there are 2 or 3 people, they may each within their own minds, without a conspiracy, reach a conclusion that "I will hold my production to a certain amount where I know demand will take all my production, and as long as I get my fair share, I am not going to disturb the price structure."

Mr. KAYSEN. Yes, sir.

The CHAIRMAN. That is the thinking of the oligopoly group.

Mr. KAYSEN. Right.

The CHAIRMAN. When they have a standard price practically among themselves without competition.

Mr. KAYSEN. Right.

The CHAIRMAN. In other words, it is much easier to run a business if you do not have to estimate your market than it is where you have to estimate and gamble on your market in your production figures; is that not right?

Mr. KAYSEN. Yes.

The CHAIRMAN. Is that not the basic cause of all this? I well remember in the coal industry back in the thirties, we passed the Stabilization Act which forbade anybody from selling at less than cost of production. That instantly stabilized the coal market.

It is true, it did not mean you got the same price from every operator, but he could not drop below his production costs. Before that, operators could always exceed the demand in production. Therefore, each was trying to maintain his level, to try to undercut, and the next thing you know, you had bankruptcy. Stabilization was beneficial to the industry, and it did not raise prices.

Mr. KAYSEN. But, of course, the coal industry is a situation in which you have a very large number of producers.

The CHAIRMAN. Oh, yes.

Mr. KAYSEN. Very many small producers. The kind of situation I had in mind is where you had a small number of producers.

The CHAIRMAN. I know.

In that case you do not need to worry about the question of price fixing or anything else. The demand is going to take care of that. But it is where you have a relatively small number of big producers where even without a conspiracy there is really a subconscious, shall we say, conspiracy to limit production.

Mr. KAYSEN. Sir, I think the word "conspiracy" is not appropriate even if you call it subconscious. As I see it, there is a situation in which reasonable businessmen, running their businesses in a reasonable way, are going to behave in a certain way and produce certain results.

The CHAIRMAN. I agree with you that subconscious conspiracy is the wrong phraseology, but minds running in a similar track are really doing so unconsciously.

Mr. KAYSEN. They are looking at the same situation, they are placed in the same situation, and come to the same conclusion.

The CHAIRMAN. All right. Pardon me.

Senator WILEY. Supposing in a given instance you have got, as he suggested there, that you even had a law in which you are prohibited from selling below the cost of production. Supposing in a given instance you had a commodity that was highly competitive, and they all actually, without conspiring, recognize that the cost of production is so much, and a reasonable return on top of that was so much, and that was what they sold it for. Would that violate the law?

Mr. KAYSEN. I think one would have to specify something more on the factual side, sir.

Suppose this were a situation in which the cost of production was so much, output was about 65 percent of capacity, let us say, and the reasonable return was being secured not on a 65 percent of capacity but on 100 percent of capacity; in other words, price would cover the full costs.

If that went on for some period of time, I would say this represents the kind of problem I am talking about. My own judgment is that it does not violate the law as the law now stands. Equally or more learned and wiser men than I think that it does.

You had Professor Rostow down here the other day. He thinks it does violate the law. I think it does not. I think in one way or another it is on the margin, it is close to the edge of the law, and the question we have been discussing for the last little while is the question of whether you want that situation to persist or not.

If you decide, as a matter of policy, that it is not a desirable situation, then my own judgment is that the law has to be extended in some way to deal with it because the present law really reaches certain kinds of conduct which are thought to be undesirable, predatory, aggressive, monopolizing, but it does not reach situations as such.

If I may take another example that may or may not help here: If we look back at the section of the Public Utility Holding Company Act which specified certain structures, holding company structures, which had to be reorganized, the act did not say if the structures were created as a result of false promotions or bond salesmanship, or this, that or the other. It simply said here is a certain situation. If this situation exists we have created an administrative agency with power to change the situation.

As I see the Sherman Act now, it is not a statute like the Public Utility Holding Company Act which says: "Here is a certain situation; whenever that situation exists we are going to act."

It is a statute which says, "Here are certain kinds of forbidden conduct. Whenever people engage in that conduct we are going to slap them down," and I think this conduct standard falls short of reaching all of the problems, as an economist see them. But I have not a really clear idea myself of all the problems involved in trying to make the law reach out to cover situations that an economist would say are less competitive than they might be.

Senator WILEY. I would like to ask in connection with this. Let us assume a hypothetical case: This country of ours is a Nation of small communities, villages, small cities in which there are, well, various independent producers, businessmen in certain lines.

Now, there are also growing up in the country overall organizations that are handling commodities in certain lines, and the result is that

they want to get into these small communities. Of course, the commodity they handle is very competitive with what some small producers in the community produce. But the commodity is also retailed through stores.

Now, these big producers go into given communities and go into these stores and say, "If you will handle our products, we will do so and so in relation to your fixtures, but you will have to give us a monopoly in your store, selling our product."

The result is that many of the so-called local manufacturers are being put out of business. The question is whether it is economically a healthy condition or not.

The next question is whether, in your judgment, the fact of giving a certain advantage to certain businesses, stores, and so forth, by giving them equipment and so forth, is an unfair trade practice, or whether it is in violation of the statute. But the result is that the overall concern is becoming the owner of virtually all those outlets by virtue of that kind of treatment.

I have been asked the question just recently on the subject. Now that I have someone who is ready to give free advice, I would like to see what you have got to say on the subject.

(Discussion off the record.)

Mr. KAYSEN. Well, sir, I am not sure I would give you any advice that you will find worth passing on.

Senator WILEY. But you see the picture; do you not?

Mr. KAYSEN. Yes, sir; and I think a lot of the question turns on what kind of trading establishments, what kind of retail distribution establishments are involved.

Let me take two extreme cases. Let us take one case like the grocery business in which any community, unless it is very, very small, has a large number of grocery stores.

It is fairly easy to get into this business. There are always quite a few fellows coming in; the turnover is high. In an industry with distribution characteristics like that, a man who tried to tie up retail outlets would essentially fail. He might try very hard, but he would not be able to succeed. He might get a quarter of the grocers to agree to distribute his brand of whatever, Fruities or Crispies or whatever, and no other brands. But there would always be fellows he could not get in.

So in a distribution trade in which the units are small, entry is easy, and the local market, unless it is a small village and, of course, with the automobile, the small local village markets are less important, supports a number of outlets, I think the problem is not serious.

Senator WILEY. I do not think you have got the picture.

Mr. KAYSEN. But, excuse me, sir, may I go on to the other thing which I think, perhaps, corresponds more nearly to your proposition?

Suppose you take a situation which is like the situation that has existed in the past, a long time ago, in the agricultural implements industry. Suppose you had the typical farm county which can support one good dealer and no more. Then the manufacturer, who has an exclusive dealing arrangement with that dealer, has really tied up that county, and another manufacturer may not be really able to get in.

Now, you are posing a situation in which a manufacturer offers an inducement by way of a free supply of fixtures or something like that.

But I think the line of my answer runs something like this: In a situation in which it is easy to get into business, there are a lot of competing fellows, turnover is high, the manufacturer will find that there is not much in offering this inducement. There will not be many people who will take it; they will not find much in it, and that an attempt really to corner the market by offering this inducement, corner the market for distribution services, will just be too expensive.

On the other hand, in a market like this other example that I mentioned, in which the typical local market area can only support one dealer, then cornering the dealer, getting an exclusive dealing arrangement is important, it is practical, and it can have very significant anti-competitive effects.

So that this is one of the problems, to which section 3 of the Clayton Act is now addressed; and I think that it is not possible to say flatly that an attempt to get an exclusive dealing arrangement is always bad in its effect, because I think many times it will fail of having any effect at all.

But I think there are practical situations in which it can succeed and in which it will have just the kind of effect that you mentioned, of excluding all but a few manufacturers from local markets.

The CHAIRMAN. Could I interrupt?

Senator WILEY. Yes.

The CHAIRMAN. There is also a practice which does not require a loss—in which the manufacturer, through his buying ability, was able to get at a low price, shall we say, refrigeration, and he, in turn, sells that to the merchant at what it costs him, in order to get an exclusive franchise. That is a practice that is going on now.

I am just using refrigeration as one example, but there are several. I know in the State of West Virginia, where I come from, we passed a law against a company or its distributors giving coolers to beer dealers. They are getting around that by selling them at vastly reduced prices, and the law is going to have to be changed. The law not only affected the beer companies, but it also affected the retail men dealing in refrigeration, because it has almost put them out of business.

Mr. KAYSEN. My judgment on that—and I want to emphasize that it is a judgment in which you are familiar with the factual situation and I am not—but from what you said, I would say this sounds to me like something which is now reachable under the Clayton Act, section 3 of the Clayton Act.

But, of course, to make a statement like that is always—it is impossible to make it firmly unless you really have looked into the facts of the situation and I, of course, do not know about the fact situation you mentioned.

Senator WILEY. Well, apparently, my statement of fact was not very clear from what you said.

I want to restate that in certain communities throughout the land there are small manufacturers that make certain commodities, and those commodities are retailed to the various stores.

Now, the larger concern from outside or from a big city comes in and says to the stores that handle the commodities of the smaller concern:

"We will give you certain fixtures—we won't say what they are, but they are very valuable—and they cost up to, some of them,

thousands of dollars, if you will give us the exclusive franchise of handling the product."

That product is a product that needs these fixtures. The result is that in various communities the small manufacturer, relatively small, has had to go out of business or has had to sell to the big chap, and all because it is just human that a storekeeper, a small storekeeper, cannot afford to have his store fixtures cost money. All at once he gets them, and he gets a first-class appearance, and the customers see these nice new wonderful fixtures like these new cars you have got along the streets, you know, and they fall for it.

The result is that the small manufacturer in the community that makes the product either "goes to the wall" or sells out at the other fellow's price.

I feel personally that economically it is always good for the small community to be as self-supporting as it can be in relation to, particularly, foodstuffs.

Now, that is the issue. That presents the statement of fact, and whether those practices are in the nature of unfair trade practices or whether they violate the Clayton Act or whether there is any remedy under the Federal statute is really my question.

Mr. KAYSEN. As you have described the situation, sir, again I give you my judgment, a layman's judgment, since I am not a lawyer, this violates section 3 of the Clayton Act in that the firm that is, let us say, a firm that is driven out of business by this, would have a private remedy, and the Federal Trade Commission or the Antitrust Division would have a ground for action.

Senator WILEY. All right, carry on. You have got point 3 coming up.

Mr. KAYSEN. Yes, sir.

My third and final point is narrower and more technical, but it is important. The report rightly lays stress on the central position that definition of the market occupies in cases under section 2 of the Sherman Act and section 7 of the Clayton Act. In several places it discusses the problems of defining the market, and the role of substitute products and competition from substitute products in market definition (pp. 44-48, 332).

On page 322, the report states:

"the market" should include all firms whose production has so immediate and substantial an effect on the prices and production of the firms in question that the action of the one group cannot be explained without direct and constant reference to the other. One should include in a market all firms whose products are in fact good and directly available substitutes for one another in sales to some significant group of buyers, and exclude all others. Where the products of different industries compete directly, as alternatives for the same use, the market for that class of products should include the rival goods supplied by different industries. One should combine into one market two or more products if an appreciable fall in the price of one product—will promptly lead to a relatively large diversion of purchasers from the other product.

That is the quotation from page 322 of the report.

This, and similar statements at the other places cited, fail to come to grips with an important aspect of the problem of market definition. The nature of the difficulty may best be brought out by an example.

In many localities, gas competes with fuel oil and with coal as a fuel for heating buildings and houses. Nonetheless, the local gas-distribution company is usually considered as a monopoly, and regu-

lated as such, with public control over its price policy. Is this erroneous, in view of the many rival sellers of fuel oil and coal, and the fact that consumers do switch when the relative prices change? To be sure, price change in recent years has tended to be in favor of gas, rather than against it.

The answer is: No, it is not an error; the utility commissions are correct. For, in the absence of regulation, the local monopolist of gas might raise his price considerably, losing a substantial share of his market to oil and coal, but still making higher total profits. Where we look at competition among substitutes, we cannot define the market intelligibly without looking at price-cost margins—

The CHAIRMAN. Particularly in industries like gas and electricity, where the municipality grants franchises, and that franchise creates a monopoly in that field.

Mr. KAYSEN. Yes.

The CHAIRMAN. And they do not grant franchises for oil or coal.

Mr. KAYSEN. That is right, Senator; and the question I am raising, addressing myself to, is can we say that a man who has a monopoly of gas based on a franchise has a monopoly of fuel? He has not a monopoly of fuel.

Can we say there is so much competition from other fuel that even though he has a monopoly from gas he should not be regulated? And the answer I am giving here is, "No," we should not say that; it would be a mistake. Shall I continue, please?

The CHAIRMAN. Yes.

Mr. KAYSEN. Let me repeat that last sentence.

Where we look at competition among substitutes, we cannot define the market intelligibly without looking at price-cost margins, and the costs of the various substitute products as well as their prices. Only where two products are close substitutes at prices in the close neighborhood of their respective cost, can we include them in the same market.

This is not a new idea, though it is often lost sight of. Let me repeat it in the language of Judge Learned Hand, in *United States v. Corn Products Refining Company* (1916, 234 Fed. at 975, 6), and this was a case that was decided in 1916:

This argument—

and I am quoting—

may best be met by an illustration for which I will take as one instance one much pressed by the defendants; i. e., that of the competition of the pearl starch, under the name "refined grits," with dry millers' similar article, "brewers' grits." What the brewers, the buyer, want is maltose, and he will buy it indifferently from the wet or dry miller, as he gets more maltose for his money. The production of maltose is, however, by a different process in the one case from the other, the proportion of maltose is as 90 to 73 in favor of "refined grits." So long as the cost of production per unit of maltose favors the "refined grits," a producer who controls its means of production has a monopoly limited only by the amount of the differential. It is quite true that, if for any reason the monopolist of the cheaper material raises the price to that of the dearer, he will at once meet with the competition of the sources of supply so thrown open by his advance. Thereafter he cannot be properly called a monopolist, unless the supply opened is so insubstantial as not to affect the market. In short, his monopoly, where the two commodities compared are indistinguishable in use is limited by the actual difference of the cost of production between them. Such a monopoly is, therefore, only a limited one, but within the limits it may be true one. * * * The relevance of all this is as follows: If the wet process is

cheaper than the dry, then, although a monopoly of the wet will be limited by the dry, it is improper to consider the production of the dry millers, when ascertaining the proportion of production controlled by a supposed monopolist of wet milling.

That is the end of my statement.

The CHAIRMAN. You know, what you just said about that fuel situation, I think, is well borne out by the fact that the coal people are now requesting the right to appear at Power Commission hearings involving gas to present their side, to see whether or not the correct charges are being made; showing that they recognize the right to go into that hearing because every fuel is involved and not just gas.

Are there any questions? Senator Kefauver?

Senator KEFAUVER. Mr. Chairman, I am sorry I did not get to hear all of Professor Kaysen's statement.

When did this group that you are with under the Merrill Foundation start its work?

Mr. KAYSEN. 1950.

Senator KEFAUVER. Have you issued reports from time to time?

Mr. KAYSEN. We have not issued reports. We sponsored the publication of some books.

Senator KEFAUVER. Publication of what?

Mr. KAYSEN. Some books, some studies. There is just one which has been published; that is the study of the rayon industry by Prof. Jesse Markham, now professor at Princeton.

We have three in the press now, and we have a couple of more in the fire getting done. Some of them were studies of different industries. Some of them are studies of problems like how hard or how easy is it to get into business, manufacturing business, of different sorts, the problem of entry into manufacturing.

Senator KEFAUVER. Has your group made an official report on your opinion of the Attorney General's committee's report?

Mr. KAYSEN. No, sir; I take it that this delegation, if I can give it so grand a name, of Professor Adelman who, I think, will testify next, and Professor Turner and myself, are here, in part, to represent our views.

The CHAIRMAN. May I say, Senator Kefauver, that we figured on letting Professor Adelman put in his statement next, and then the third witness, and then we can ask all three of them to sit down here and we will get a discussion going. I think that would be rather illuminating.

Mr. KAYSEN. Excuse me, sir; may I add a word to my answer to your last question?

Senator KEFAUVER. Yes.

Mr. KAYSEN. I want to emphasize that this is an academic group; that we do not have any group views; I mean each of us tries to get the benefit of the ideas of the other, but we end up with our own views, and we may disagree on some things and agree on others.

The work comes out in the form of books and articles signed by individual authors representing their own opinions rather than any official opinion of the group as such.

Senator KEFAUVER. Do you have a copy of your study of the rayon industry?

Mr. KAYSEN. The rayon industry?

Senator KEFAUVER. Yes.

Mr. KAYSEN. I did not bring one with me, sir.

Senator KEFAUVER. That is all, Mr. Chairman.

The CHAIRMAN. Any questions, Senator Wiley?

Senator KEFAUVER. Excuse me for just a second. May I ask, do you make any studies for or findings for any groups outside of the Merrill Foundation? In other words, are you retained or do you do any work for any industries?

Mr. KAYSEN. I have done some consulting work for industry in the past. I have worked for—done a certain amount of work for a firm of consulting economists called Joel Dean Associates. I am not now doing any such consulting work.

Senator KEFAUVER. What was that work in connection with?

Mr. KAYSEN. It was in connection with doing some work for the International Business Machines Corp.

Senator KEFAUVER. In the monopoly field?

Mr. KAYSEN. Yes, sir.

As you may know, a complaint had been filed against the International Business Machines Corp. by the Department of Justice under sections 1 and 2 of the Sherman Act. They retained the services of Mr. Dean and his firm to give them some advice about what kind of presentation they should make.

My work in connection with that was to offer my opinions about what the problems were like. How do you define the market for business machinery, for example, things of that sort.

Senator KEFAUVER. Was the work in preparation for the defense of their case?

Mr. KAYSEN. In a very broad sense, yes; not in a very narrow specific sense, because no trial date was set down.

Senator KEFAUVER. It was generally, though, working up the economic background for the defense of this case?

Mr. KAYSEN. That is right.

Senator KEFAUVER. Is that the only industry work for the defendant's side of industry that you have done?

Mr. KAYSEN. Yes, sir; it is.

Senator KEFAUVER. When was this?

Mr. KAYSEN. I am not perfectly certain, but I think the last work that I did in connection with this was along in the spring of last year; in other words, it was somewhat more than a year ago, and I think the total amount of work that I did on it was relatively little, perhaps 7 or 8 days over the course of a period of 4 months.

Senator KEFAUVER. You did not do any work for the Atlantic & Pacific Tea Co.?

Mr. KAYSEN. I never have.

Senator KEFAUVER. Mr. Adelman did, did he not?

Mr. KAYSEN. I cannot speak to that, sir.

Senator KEFAUVER. I mean, did you, as a group, do any work for them?

Mr. KAYSEN. Oh, no.

I, perhaps, have not made it clear that the group exists only for the purpose of discussion, of financing individual work, such things as surveys and trips for the getting of information, and so forth; that any individual work is the responsibility of the individual, and the group, as such, does not do any work for anyone.

Any work that I did for IBM in connection with Joel Dean was purely an individual matter, which I did on my own, not in connection with this group.

The group is a purely research enterprise, has no purpose of consulting, offering of advice to business or any such thing. It is entirely academic in its origins and aims.

Senator KEFAUVER. That is all, Mr. Chairman.

Senator WILEY. You have not any, what you might call, prejudices for or against business because it might be big business?

Mr. KAYSEN. No, sir; I do not.

Senator WILEY. In other words, big business is not the same as monopoly, is it?

Mr. KAYSEN. No. I think there is always a distinction between big business and monopolies. Some big businesses have monopoly power, some do not. Some small businesses have monopoly power, although, other things being equal, it is probably less likely that a small business will have a monopoly power than a big one.

Senator WILEY. Of course, in this day where America has grown up, anyone can see the significance of having what you call big business in operation—it is part of the economic lifeblood of America. I presume the whole question resolves itself down into whether business itself becomes autocratic in the sense that it damages the public interest.

Mr. KAYSEN. Well, I think that certainly is a fundamental part of the problem. But it does seem to me that we have a policy in favor of competition which, I think, is a very important policy, and I think one of the reasons for having that policy in favor of competition—

Senator WILEY. I recognize the validity of your statement.

Do you consider the present degree of concentration a possible danger to economic freedom?

Mr. KAYSEN. May I answer a slightly narrower question than that, sir, and say that I consider that there are many industries in which the present degree of concentration under the present market structure suggests, points to, probably serious limitations on competition.

Senator WILEY. Do you want to exemplify them?

Mr. KAYSEN. I think this is a risky proposition, sir. I think a statement about whether an industry is competitive should be made only after the industry has been examined in great detail with a lot of factual study.

I am not prepared really to say that this and that industry is or is not competitive, because to do so, to be responsible about it, I would want to have a great deal of factual preparation.

I did in my prepared statement suggest certain industries which, on the basis of a less than perfectly thorough study, appear to me to be less competitive than they might well be.

But, as I say, I think it is not necessarily useful for me to pick out a few industries unless I were prepared with a very thorough study, sir.

Senator WILEY. Do you consider the present degree of concentration as a danger to the political freedom of the country?

Mr. KAYSEN. No, sir; I do not.

Senator WILEY. Some do, you know. You do not?

Mr. KAYSEN. I do not.

Senator WILEY. Well, from your statement here this morning I presume that you have come to some conclusion as to what, if any, amendments should be made to the present statute or any corrective measures which should be taken. If you have them, would you give them to us?

Mr. KAYSEN. The main conclusion I have come to personally, and I emphasize this is my conclusion and other people with whom I have discussed this problem may disagree, is that it would be desirable to extend the scope of the antitrust statutes, so that they explicitly dealt with situations rather than merely with conduct.

Senator WILEY. What was that again?

Mr. KAYSEN. I say, the chief conclusion which I have come to in my own mind, and I emphasize it is a personal conclusion—not necessarily everybody in my group would agree with me on it, many of them do not—is that the present law should be changed, and I am not saying in what language, so that it explicitly reaches noncompetitive situations whether or not conduct which is illegal under the present law is involved.

Senator WILEY. I assume those noncompetitive situations to which you refer would have to be in some possible danger of, say, their economic freedom?

Mr. KAYSEN. My own view is that we do not have to look at any specific danger to economic freedom.

Let us take an industry which used to be a monopoly. It has now got three sellers. Let us take the aluminum industry. Until World War II there was only one producer of primary aluminum.

Now, I do not think, and I do not think you could substantiate the conclusion, that the fact there was a single producer of primary aluminum represented any great threat to economic freedom in a broad sense. There were individual businessmen, fabricating aluminum, who suffered from this situation from time to time.

But I do think that if we look back at that situation, it was one in which there was a good deal less competition than there could have been. There was more monopoly than was necessary; and my own view is not based on attempts to make rather global judgments about whether a particular situation is a threat to economic freedom. It is based on a belief that we should have as much competition as we can possibly have, as is consistent with efficiency.

It is not consistent with efficiency, for example, to try to have 150 steel producers in the United States. In order for a steel firm to be efficient it has to be pretty big, and even if we split up steel firms very radically, and I am not suggesting that we should at all, we could not get more than a relatively small number.

We have a dozen or 14 major ones now. We might, if we engage in a very drastic program, have 30 or 40.

Now, my own view about policy is that it should be based on the goal of having as much competition in the economy as possible.

Senator WILEY. I presume you would not think it necessary to reduce the size and power of General Motors or the United States Steel Corp.?

Mr. KAYSEN. If I may, sir, I would prefer not to give a specific answer because I am not factually prepared on either of those issues.

I think that both the power of General Motors and the power of United States Steel bears looking into.

Senator WILEY. Are there any companies which you think should be reduced in size that you have in mind?

Mr. KAYSEN. I do not want to be evasive, Senator, but again I think it is really not my appropriate task to make such statements about particular companies, because I think a statement about a particular company should be made only after very thorough study.

Senator WILEY. Well, I am glad to have that answer. I think you are right. I think there has been too much of what you might call curbstone judgments and advice on things like that, present company excepted, of course, of things that are very important to the life of this country; so we can do without them, without the curbstone advice.

As an economist, do you see different standards of competition contemplated by different laws? For example, under the Sherman and Clayton Acts and the Robinson-Patman Act, do you see different standards of competition?

Mr. KAYSEN. Yes, sir; I do. My own judgment is that the Sherman Act in its broad sense emphasizes competition as a process that goes on in the market.

The Clayton Act, in many of its sections, leaving aside what has become the Robinson-Patman Act, is addressed to the same thing.

The Robinson-Patman Act and, I may say, that Professor Adelman knows a lot more about this than I do, and he is going to speak to it, but still I will say that the Robinson-Patman Act is a statute which is directed much more to protecting individual businessmen and to enforcing equity and fairness.

Now, competition is not always fair in the sense that individual businessmen often suffer by competition. They go bankrupt. This is part of the competitive process.

I think there are many respects in which the Robinson-Patman Act is an attempt to soften the rigor of certain kinds of competition. There are many respects in which it reinforces the goal of the Sherman Act, but I think it is fair to say as an overall judgment that its spirit is different from the spirit of the Sherman Act.

The CHAIRMAN. I am sorry, but we will have to recess for a few minutes while we go over and vote.

(Short recess taken.)

Mr. BURNS. The chairman has requested me to state that the Senate is in session, and the committee will adjourn until 2 o'clock this afternoon.

(Whereupon, at 12 noon the committee recessed, to resume at 2 p. m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Our next witness is Prof Louis B. Schwartz, of the University of Pennsylvania.

Please go ahead with your prepared statement, if you have one.

May I say that some time later I would like to have a talk with you and possibly the committee would like to, on some of the things you raised.

Mr. SCHWARTZ. I will be at your service.

STATEMENT OF PROF. LOUIS B. SCHWARTZ, UNIVERSITY OF PENNSYLVANIA

Mr. SCHWARTZ. I have laid before the committee a summary statement which covers, especially the enclosures, the attachments, cover a series of proposals.

On the third page down you will see my half dozen proposals for investigation that I think this committee might conduct.

I have presented a program to the Celler committee and that is an attachment to my statement here. As I said, on the third page of the combined folder are my half dozen suggestions for investigation.

Beginning on the third and running over to the fourth page are a dozen suggestions with respect to legislation that might be desirable in order to restore a competitive economy.

The CHAIRMAN. Let me ask you a question before you go ahead.

Yesterday in discussing the matter with the Federal Trade Commission witnesses, I suggested that in the acquisition of any small competitors, notice should be published a reasonable amount of time in advance in order that the public might be aware of what was going to happen, and that would put them on notice when an investigation might be needed. What do you think of that idea?

Mr. SCHWARTZ. Senator, I am not sure whether you were suggesting notice to the enforcement agencies of the Government or a public notice.

The CHAIRMAN. I suggested notice to the enforcement agencies of the Government who would in turn make a public notice of it.

Mr. SCHWARTZ. I can see that that might be helpful. It does not go as far as I should like to see the Congress go in assuring a halt to the merger movement and reestablishment of the competitive structure.

The CHAIRMAN. I thought that that possibly might be a slight deterrent.

Mr. SCHWARTZ. Yes; I imagine that it would have that effect and it might have a destructive effect on some mergers to which we might not have an objection from an antitrust standpoint.

The CHAIRMAN. In other words, this arose when it was said that proposed mergers could not be investigated unless some enormous sums of money were appropriated. I thought that that might raise the question whether or not investigation might not be needed. That, however, was based on some conditions I had personally observed in which notice had been given in time.

Mr. SCHWARTZ. I heard Assistant General Barnes give a comparable proposal, limiting it to the Department of Justice and the Federal Trade Commission.

The CHAIRMAN. However, my suggestion was for notice to go to the Federal Trade Commission and the Department of Justice, and that they in turn publicize it.

Mr. SCHWARTZ. That might have a beneficial influence, but I regret to say I think something more will be required if we are to reach the ends that we have in mind.

The CHAIRMAN. All right. Go ahead.

Mr. SCHWARTZ. I referred to this somewhat elaborate program. That is on the bottom pages of my memorandum but I do not propose to discuss each one of those here, since we do not have the time for that,

and I think it will be enough to select two issues that I think are crucial and that will really test our determination to take the free-enterprise road.

Those two issues are, the structure of the economy outside of the field of regulation. I am talking about merger and monopoly. That is one of the issues.

The other is the degree to which, under laws enacted by Congress, we have withdrawn substantial areas of the economy from competition.

One example that I call attention to on page 1 of my memorandum is the Motor Carrier Act of 1935 in which the Congress inaugurated a scheme of limited competition in the motor-carrier industry. All true antitrusters are opposed to regulation, whether private regulation or public regulation, unless there is indeed a public interest to be served by regulation.

The CHAIRMAN. The 1935 act is the one with the grandfather clause?

Mr. SCHWARTZ. Yes.

The CHAIRMAN. And which has terribly upset the whole carrier business, when it comes to building up new lines.

Mr. SCHWARTZ. The Motor Carrier Act required a certificate of public convenience and necessity in order to engage in interstate motor transportation.

It did not require that, however, of organizations which were already in business or whose predecessors had been in business. That is the grandfather provision to which you refer.

The CHAIRMAN. Right.

Mr. SCHWARTZ. The point I am making is that if we are really concerned with competition, we must be concerned with limitations on it, whether by private action by mergers, or the building up of super-concentrations, such as General Motors or United States Steel, or by law, such as the limitation of competition placed by the Motor Carrier Act, the excessive limitation on new entries under the Civil Aeronautics Act and comparable regulation elsewhere.

Now those are the two branches of inquiry that I should like to emphasize in the limited time available today.

Taking up first the question of merger and size, I do not separate those problems in my mind. In fact, I think they are intimately associated.

To me it does not carry much weight that there have been fifty or a hundred or a thousand mergers lately. I think there is a warning signal posted by that. But the important thing is, who is merging and, especially, are the dominant companies extending their control by acquisition of the small units in the field and thus bringing about a dangerous reduction in the number of independent enterprises.

I am especially concerned by any move which says, "We are going to stop mergers but we are not going to do anything about those enterprises that have already achieved a dominant position in the field." In my memorandum before you, I refer to one bill which is pending now dealing with bank mergers.

The origin of this, of course, is the recent wave of mergers in the banking industry, and I suppose particularly the Trans-America case, which failed in the Third Circuit Court of the United States, several years ago.

In that case it was shown that Transamerica did approximately 50 percent of the banking business of the Far West. They had acquired

a very large number of banks over the years and the Third Circuit Court held that there had not been adequate findings by the Federal Reserve Board as to a market on the basis of which one could say that 50 percent of the commercial banking business was too much, a rather technical reversal.

One would have supposed that the Federal Reserve Board would then have gone ahead and made their own conclusions as to what the market was and once more called for the dissolution of the excessive concentration of banking power.

The CHAIRMAN. I am informed—I have not checked—that, as you know, the American Express ceased to be an express company and has become a bank. That is to say, I have been informed that it is completely owned by the stockholders of Chase National Bank and they had been ordered to dissolve the holding company by turning the stock over to their membership.

The complaint came to me through members of the armed services who suddenly discovered that they must deal with American Express. They could not send their paychecks otherwise, in order to get money abroad, thus giving to the American Express a complete monopoly on international banking business, as far as we are concerned in this country. Have you heard about that?

Mr. SCHWARTZ. No, I have not, Senator.

The CHAIRMAN. It is a very interesting picture. It came from a statement made to me.

(Explanatory statement by American Express Co. is on p. 119.)

Mr. SCHWARTZ. I am not informed about those facts.

To speak of the Chase, of course, it was recently involved in a merger with the Bank of Manhattan.

The CHAIRMAN. Yes, but they are the sole owners of American Express Co., I am informed.

Now, of course, you see, I am informed that they have an exclusive contract with the post exchanges and the ships stores abroad and the personnel abroad must deal with them in order to be able to safeguard their paychecks and also be able to draw checks, and that is a sizable quantity of business.

Mr. SCHWARTZ. I should think so.

Now, my thought is this: If we pass a bill at this point, say, in the banking field which says, "No more mergers," but we do not say, "Let us look into the existing situation in Transamerica or the Bank of Manhattan and Chase," then what you are really doing is underwriting the power of the top firms, because no one doubts that the extension of power on this level gives you an advantage over your smaller rivals, and some economists like Professor Galbraith of Harvard had talked about countervailing power as the only thing you can do to meet such a situation.

That is to say, if you have one dominant firm, the only thing you can do is build up another one and build up the size of its customers and build up the size of its labor organizations, so as to restore some sort of a balance.

I suggest the contrary course, that we create competition all along the line.

The CHAIRMAN. In other words, if we do as you fear we may do, we would simply protect the dominance of certain corporations?

Mr. SCHWARTZ. I am afraid that would be the result if you simply prohibit mergers prospectively, without touching the existing very large firms.

In that connection I have referred in my memorandum to the precedent of the Public Utility Holding Company Act of 1935. You will recall that Congress became concerned in the thirties about these excessively powerful holding-company operations—excessively powerful in an economic and in a political sense. They passed an act regulating the holding companies and requiring under section 11 that they be reorganized. They still operate, but limited to a single integrated system, and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operation.

That was attacked as a death sentence for the holding companies, but, on the contrary, what has worked out is that the utility business has enjoyed unparalleled prosperity at the operating level and those holding companies which are confined to a sensible integrated system have done very well, too.

My feeling is, therefore, that it would be quite practicable to take a close look at some of the very largest industrial concerns in the United States and to develop plans of reorganization for them. I cannot do that this afternoon and no one could without a very careful study of the facts.

One of the things I would like to see this committee do—and it is not anything we can do in public; it would have to be carefully prepared in private sessions, I think—is to develop tentative plans of reorganization for concerns of that size, just to see what might be done.

I don't know whether I should cite Chairman Howrey in support of a proposition like this, but he did say not many weeks ago that he would like to do something about General Motors and United States Steel. He thought something ought to be done about it, but he did not know of a law which would permit it.

I think, if this committee has any function, it is certainly that of addressing itself to that problem, whether a law could be enacted to reorganize, in a case of that sort, and what kind of reorganizations might result.

Senator KEFAUVER. Where did Chairman Howrey make this statement?

Mr. SCHWARTZ. Well, he was quoted in the Wall Street Journal some weeks back. I do not have the clippings. Perhaps some of the press people here can furnish the information. It was in an address before one of the professional organizations.

As I say, I would like to see tried a reorganization of some of these companies on rational lines. I am emboldened to do that because in private conversations with some fairly important industrial figures—and I prefer not to be interrogated about who they were—I have heard it said again and again, "We could get rid of one-half or three-quarters of our operation and make more money," or "There are excessive demands upon the managerial talent when you get an empire that extends across the world and into a dozen different industries."

I believe we have enough effective talent and brains in the United States so you could have independently operated enterprises—what

number, I am not now prepared to say—instead of one United States Steel Corp. or one General Motors.

The CHAIRMAN. You realize, do you not, that that type of building up enables or makes it very easy to squeeze out competition? As the old Italian said, "What you lose on the peanuts you make up on the bananas."

In other words, when you get spread out enough, you can lose money on one function and still make money on the overall picture: isn't that right?

Mr. SCHWARTZ. That is what I believe. I think you may hear to the contrary from some of our economists.

The CHAIRMAN. General Motors could lose money on Frigidaire and make it up on automobiles.

Mr. SCHWARTZ. That is certainly a possibility.

The CHAIRMAN. Now, I have had this complaint.

At the end of the war, and the early part immediately after the war, the United States Steel Corp., we found, was trying to hold the price line on steel. They could well do that and wreck their competitors because of their additional operations, from which other money was being made, such as fabrication, transportation, raw material production, and things of that kind, and so they could on the actual steel operations lose some money and still make it back on the other operations.

However, the other steel companies who had to buy their ore and pay transportation charges on it, simply could not meet that price. These people who, in turn, sold to fabricators, could not sell at the price ceiling invoked then by OPA and hope to break even—they were going to lose money.

That was the complaint made to me by a lot of independent steel producers.

Mr. SCHWARTZ. I have no doubt that a very large scale, horizontal operation, or a vertical integration, provides an opportunity for the absorption of losses at one point out of profits elsewhere.

I was going to say that the contrary contention that you will hear strongly urged is that if there were real competition at all levels, this could not be done because there would not be any excessive profit at any point.

But, that is a description of economics in another world. We live in a system of imperfect, not perfect, competition, and as long as that is true and people cannot go from one industry to another, it will unquestionably be possible for them to absorb losses.

The CHAIRMAN. For instance, in a highly competitive field, like coal production, a company could actually lose money on the coal and get it back on its stores, rentals, and various things, because those things were attached to the coal industry. Their profit would come from those sources and they could still underbid the other fellow on the actual production cost of coal.

Mr. SCHWARTZ. I think all practical observation points in that direction, Senator.

Now, I want to make one thing clear. What I have said is not by any means to be construed as an attack upon any bigness that is justified by economies of technology.

Everybody recognizes that you cannot have a small steel plant, but that does not lead, it seems to me, to the conclusion that you must have one company that controls a number of large steel plants.

The history of the United States Steel Corp. is a history of bringing together, in 1911 I think, about 9 fully integrated steel operations. In 1920, when the Supreme Court of the United States upheld that by 1 vote, they had 50 percent of the steel business of the United States. The situation has not been substantially changed legally since that time, I fear.

You had only a few years ago another example of a merger acquisition by United States Steel Corp., approved once more in the Supreme Court, when they acquired Consolidated Steel out in Los Angeles, and this was held to be legal because, after the acquisition, it was not clear that Bethlehem and Youngstown and Republic and Inland and the others had been shut out of a substantial market, the standard espoused in the Attorney General's report which, as you know, I dissented from.

So, I come back to my main point, which is, not only must we prevent mergers but we must do something about the existing super-concentrations.

The CHAIRMAN. You surely realize that the present argument put up by Bethlehem and Youngstown is that by merging they will form a competitor to United States Steel.

Mr. SCHWARTZ. I understand that very well. It is part of my reason for suggesting that we better do something about United States Steel, because of that argument is accepted we are headed toward, if we are not already at, a pattern of 2 or 3 dominant companies in every basic industry.

Now, maybe that is the public policy of the United States. I think any fair observer from Germany or Mars would have to say it was already the effective policy of the United States, to have 2, 3, 4, or 5 firms controlling the basic industries.

Thurman Arnold once said that the antitrust laws were an elaborate ritual in which we pretend we are against monopoly while, in fact, permitting it to continue and encouraging it.

I am not prepared to accept that cynical, or perhaps he would say realistic, view of it. I think that if you do not want that viewpoint to be an accurate description, you must do something about the oversize firms we have now.

Passing upon that other question, of what to do about mergers, I have already indicated, Mr. Chairman, that I do not think that a notice provision would solve the problem. I do not think that the present section 7 gives adequate legal means to stop the merger movement.

What I think you need is an understanding that all acquisitions by the leading firms are bad, without inquiring into their economic effect; that is, a flat prohibition, instead of an "iffy" prohibition that we now have in section 7 for the dominant companies.

My point is this: If they are to continue to expand, it is not too much to ask them to expand by contributing to the capital resources of the country rather than by simply buying out control of available resources.

The acquisition of Consolidated Steel Co. in California by United States Steel, that I referred to a few minutes ago, was regarded and

even characterized in the Supreme Court opinion as expansion to the West.

Well, it was no such thing. It was taking over control of some western resources. "Expansion into the West" would have meant building another plant, which is quite a different thing from taking over an existing outlet.

The CHAIRMAN. Well, didn't you have expansion into the West from the Salt Lake City plant?

Mr. SCHWARTZ. The Geneva Steel plant?

The CHAIRMAN. Yes.

Mr. SCHWARTZ. Yes.

But that expansion was done by the Government during the war, and then that plant was sold by the Surplus Property Administration to the United States Steel Corp. That acquisition was, in turn, part of the excuse given in tolerating the further expansion in the Consolidated merger.

So I say, with respect to the merger movement, what you need is a flat prohibition against acquisition of existing facilities by firms already dominant.

In the second place, I think it ought to be made clear there is no public interest in the merger, as such, of smaller units in the industry. I think you can foul up an administration and get a lot of waste energy if the Federal Trade Commission feels that all mergers are its fields, because many of them have no real significance at all.

So, at the top I would have a flat prohibition, and at the bottom I would say, "Forget about it," and in between I would adopt the proposal sponsored by the Temporary National Committee 15 years ago, and others more recently, that the burden of proof should be upon the merging companies to show that it is technologically justified and consistent with the public interest.

The CHAIRMAN. In other words, in most cases mergers might be justified. It is acquisition by big companies that brings trouble: isn't that right?

Mr. SCHWARTZ. That is where I start, by prohibiting that.

Now you will have, of course, the problem of definition of what are the dominant ones.

The CHAIRMAN. Yes.

Mr. SCHWARTZ. But I do not think that we ought ever to give up an effort because of the problem of definition. All that is required is an administrative agency to make the appropriate decision, just as the SEC does in the utility field, dealing with holding companies under section 11.

Now, Mr. Chairman, considering the fact that you expect to hear from others, and the fact that I understand there are to be questions. I will just run rapidly through my remaining points and then give way to Dr. Adelman.

I want to call attention to the list of specific proposals that appears, beginning at page 3 and running over to page 4. These are technical matters, you might say, that grew out of the Attorney General's report.

I have not made them the main subject of my remarks here because there is no time, but I do want to mention some of them to you.

In the first place, there has been a proposal that the treble damage provisions of the Clayton Act be watered down to make treble damages discretionary rather than mandatory.

I am sure you are familiar with the purpose of this proposal. At present, and indeed for more than 300 years, stemming back to the British Statute on Monopolies, a victim of a monopolistic scheme is entitled to recover not only the damages he suffered by treble damages.

This is put in there as an incentive to private enforcement of the antitrust laws, and I can see no reason for taking that incentive away at this time.

The CHAIRMAN. And also as a deterrent.

Mr. SCHWARTZ. Also as a deterrent; yes.

The CHAIRMAN. In other words, it is a fine.

Mr. SCHWARTZ. It operates as a sensible sort of fine for violations.

If all you are going to do is offer the victim, possibly after years of litigation, the actual damages that he can prove—a very difficult thing to prove, by the way—you are substantially undermining that aspect of the enforcement program.

The CHAIRMAN. Now, there is one point I am interested in.

Suppose the Government, as a contracting agency, suffers from such activity. Should it be given treble damages?

Mr. SCHWARTZ. No.

My proposal on that is to permit only actual damage suffered.

I do think that the pending legislation, to make the Government a proper party plaintiff so it can recover when mulcted by a monopolistic scheme, is proper, but I see no occasion for treble damages.

The CHAIRMAN. As occurred frequently during the war; is that not so?

Mr. SCHWARTZ. I am informed so.

So, I do not see occasion for making that a treble-damage action; but I see no occasion for taking treble damages away from a private plaintiff.

Very few private plaintiffs are in a position to conduct extensive investigations. It is a chancy proposition, and you have got to get a determined and skilled lawyer, and by hypothesis, if you are a victim, you are not a big fellow, so there is no justification for watering this down.

The CHAIRMAN. Let me ask you a question at that point.

Here is ABC Co. They have a steel-fabricating plant and they have been running for years.

All of a sudden, due to a plant expansion by the people from whom they had previously bought their raw products, those people decide to put them out of business, and they suddenly refuse to sell them anything. I have heard that happened a number of times.

Take the steel industry. I have often found that the son of one of the vice presidents or somebody else came in and bought the plant under the hammer for about 5 cents on the dollar. What do you think of that?

Mr. SCHWARTZ. Well, Senator—

The CHAIRMAN. You see, they could not come to another company and get the raw material. In one case I know of they had been buying for 30 years from one steel company, one of the big five, and all of a sudden they found themselves cut off, so they sold out for anything they could get.

Mr. SCHWARTZ. Well, Mr. Chairman, I think you put your finger on the difficulty when you say they could not get it anywhere else.

As long as you have an economy in which there are so few suppliers that a man really has no alternative source of raw material, you do not have a competitive economy, and that again is a reason for having the 35 or so steel plants that Professor Kaysen contemplated as a possibility this morning.

Now, it makes no sense to say that mere refusal is a privilege on the part of the private enterpriser, when there are 35 or 40 suppliers, it does not make any difference because there will be some other suppliers; but if the number of suppliers diminishes to 5, then there will be no alternative, and what we are finally driven to is to put these enterprises pretty much on a public-utility basis, so that they must serve all buyers on a nondiscriminatory basis.

The CHAIRMAN. I don't know whether you know the steel picture during the early part of World War II or not. At that time we had what we called Big Steel, Little Steel, and Independent Steel.

We had to expand steel. Certain Members of Congress, of whom I happened to be one, were in favor of putting in some independent blast furnaces, open hearths, at Government expense, hoping that eventually the little companies could take them over and operate them, thereby expanding what we called Little Steel, which consisted of about 6 or 7 companies.

Instead, we found ourselves suddenly faced by a self-appointed, self-annointed advisory committee of 5 executive vice presidents of 5 big steel companies, who tried to convince us that we must build up the five big companies. As a result we put up plants—the Salt Lake City plant was one, the plant at Ferris Point, a plant in Indiana, and plants in Pennsylvania, to further enlarge the big companies.

Why? Because this committee convinced the War Production Board that was the only way to expand. We had applications from any number of what we called Little Steel. They were afraid to buck Big Steel. We went to them and they wouldn't buck, and as a result they merged, and then Big Steel could say, "We have enough fabricating facilities to take all of our production, we cannot sell to Lukens or Austin"—hundreds of them—"we cannot sell you any billets or rods, you find those the best way you can."

And when the controls were taken off, of course, those little companies, a large number of them, sold out completely and were sold for the scrap value of the plant.

That was a mistake that was made in World War II.

Mr. SCHWARTZ. Well, it is a mistake that grows out of the general notion that bigness is indispensable.

The CHAIRMAN. Alcoa did the same thing.

Mr. SCHWARTZ. Exactly.

The CHAIRMAN. But, fortunately, in that field we got in some other companies, and we now have 3 instead of 1. My deep regret is that we don't have 7 or 8 or 9 of them.

Mr. SCHWARTZ. Well, it is significant to note why we don't have more.

You will recall that Alcoa was convicted of monopolizing the ingot market, and after the war the question arose whether that should be broken up. One of the reasons given in the Federal district court in

New York for not breaking them up was because you had such a big steel and such a big copper company. Judge Knox said: "You must have a big aluminum company to compete with those firms."

I am just wondering what situation that puts the smaller aluminum companies in. If they have to be as big as Alcoa to be in this business, then where do Kaiser and Reynolds come off?

The CHAIRMAN. This came up because a large number of Government-built plants were put up. The Government by its own activities let them come in.

Mr. SCHWARTZ. There were even suggestions in that opinion that the industry structure, being what it was, that Alcoa had to play the benevolent uncle to these firms and relieve them of an embarrassing inventory if things got bad. But, that is not competition. That is a sort of ameliorated monopoly.

The CHAIRMAN. Or rather, benevolent tyranny.

Mr. SCHWARTZ. Well, possibly.

I think this is the kind of question this committee will have to address itself to, and I hope they will do so by trying this thing I have suggested; namely, an inquiry into the possibility, the development tentatively, of a practicable plan of reorganization.

I suggested some other things for investigation. I am not sure you want me to go into those at this point.

The CHAIRMAN. Go right ahead.

Mr. SCHWARTZ. I might run through them, with the thought that one or the other might interest you.

On this damages point, the practical situation is this: Few private plaintiffs, as I say, have the funds or resources to establish a violation by the big elements. The Government does.

Now, the Government settles most of its cases by consent decree. The reason why violators are happy to sign consent decrees is that under the provisions of the Clayton Act such a decree signed by consent before testimony is taken does not set up a *prima facie* case of violation for the benefit of private victims, and, therefore, they save themselves the treble-damage actions by consenting to a decree.

The CHAIRMAN. Do you realize the Justice Department frequently asks for a safeguard against even that?

I well remember that when I first came to the Senate, I was asked to keep the movie-divorce bill and the block-booking bills alive, as a guaranty the consent decrees were lived up to.

Mr. SCHWARTZ. Well, we have not had a notably successful enforcement program on decrees, and I speak as a former Chief of the Decree Section of the Antitrust Division.

It is a very difficult thing to try to police the whole economy of the United States, and that is again no reason why we should make it self-policing by turning it over to competitive enterprise. The virtue of the competitive system is that it reduces the burden on Government. If motor carriers are taken out of regulation, the Interstate Commerce Commission could then address its limited energies to the important problems of regulation where there are some monopolies.

Getting back to the damage question, if we keep the consent-decree procedure, one of the things that ought to be given consideration is the establishment of a regular procedure for making whole any victims of violations covered by the decree. I don't see why the Govern-

ment should stop its case without an assurance that the private victims will be made whole.

In such a case I would not give treble damages. At the conclusion of the Government's case, any others can come in and say, "Here is how much I have been hurt," and that would not be trebled because the Government had the job of proving it; but everybody would have a chance to speak his piece on damages, and that would be the end. So much for damages.

I also suggest that it would be worthwhile for the committee to find out how many times some of the dominant units of industry have been caught in price fixing and market division and so on. It is my impression there has been a very substantial amount of it, and one would wonder why it should be necessary for the largest units, which claim to be the most efficient, to enter into price agreements or market divisions. They ought to be able to maintain their market on their better price. Yet we find these units and their subsidiaries again and again caught in this trade restraint. I would like to know which of them, therefore, are confirmed or habitual violators. Again, I would like to know how many price agreements have been disposed of by way of cease and desist orders, an administrative tap on the wrist, when it should be disposed of by criminal penalties.

The criminal law has been abused in many directions and I am not in favor of using it in this area to test new applications of the antitrust laws; but it seems to me the illegality, the criminality, of price fixing is not a new doctrine, and I always wonder when I read about a cease-and-desist order, or a consent decree against price fixing. We would need much less policing if people understood it was a crime to fix prices. So, if this committee should do a study of that kind, I think it would be valuable from the point of view of policy and certainly from the point of view of those of us engaged in the study of the law's effectiveness.

I have been much impressed, finally, with the prevalence of patent pools in a number of areas of the economy. I suggest a detailed study, using the committee's subpoena power, of the actual operation of patent pools in a number of selected fields. I think of drugs, of petroleum refining, of electronics as places where one might make a beginning. In that connection one of the conclusions you might come to is that patent pooling by dominant firms ought to be prohibited outright.

The CHAIRMAN. What do you think of patent pooling under the guise of foundations?

Mr. SCHWARTZ. Well, I am against it in any guise when it is industry dominating.

The CHAIRMAN. Have you run into that?

Mr. SCHWARTZ. Yes. The Wisconsin Research Alumni Foundation is one. They had it in vitamin D; did they not?

The CHAIRMAN. Then you have a chemical foundation in New York which controls many gasoline and oil patents. The authorities questioned their activities so strongly that they finally set up a foundation so they wouldn't be pushed any further.

Mr. SCHWARTZ. Well, a foundation is a nice way to disguise, or at least make palatable, a concentration of control.

The CHAIRMAN. Or rather to mislead the public on concentration.

Mr. SCHWARTZ. I would also hope that, if you went into the study of the exercise of economic control through patents, you would come to the conclusion, again endorsed by the Temporary National Economic Committee, that restrictive licensing of patents, that is telling the licensee that he must sell at a certain price and that he can sell only in a given territory, is unlawful, at least when done by dominant companies.

Now, that covers in a summary way the main points that I wanted to focus on at this time, Mr. Chairman, and I will be glad to help out in any additional way I can.

The CHAIRMAN. Any questions, Senator Dirksen?

Senator DIRKSEN. I am quite inclined to agree with your thesis, that if you leave the superconcentrations that now exist to continue, it would be like locking the door after the horse is stolen. But that develops this administrative problem, of what yardsticks to apply and what proceedings can you impose to indicate what constitutes superconcentration or domination or large area control. Just where would you draw the line? Or to put it another way, let us assume now that there was legislation that was valid, so to speak, to roll back some of these superconcentrations, how far would you roll them back?

Mr. SCHWARTZ. Senator, I am sure you would not blame me if I said I am not prepared to answer that question at this point. I would hope that the committee's studies would help us along that line.

However, there are some precedents that suggest the sort of test that might be evolved. We have in the antitrust field developed certain percentage tests that are still of significance in the law.

In the Alcoa case, Judge Hand said something about 35 percent control of a market was, at least under the precedents, inadequate; 66 percent was questionable, and he was sure that 90 percent was a monopoly and therefore he proposed to do some fancy calculating so that the aluminum company was shown to have 90 percent and therefore was judged a monopoly. That suggests a beginning.

With regard to the 35-percent rule, Senator, that needs some revision. It is one of the glaring defects in our antitrust laws at present, that it can be thought that United States Steel Co., with more than one-third of the total steel production of the country, is not in an excessive position there.

Senator DIRKSEN. Is not?

Mr. SCHWARTZ. I think it is a glaring defect in our law, when one company gets 35 percent of a basic resource.

The CHAIRMAN. Well, you can also add to that the vertical monopoly features, which include everything from the ore, the transportation, the fundamental basic steel and the fabrication—in other words, from the bowels of the earth to the bosom of the sea.

Mr. SCHWARTZ. It certainly is an additional resource, which magnifies the power of a company which has 35-percent horizontal.

Now, if I were to pick a figure out of the air, I would pick a *prima facie* figure. I would say that a company which has 20 percent of certain basic resources of the country would *prima facie* be above the limits of safety and therefore might reasonably have the attention of an appropriate agency corresponding to the SEC in the public utility field.

Another test that has been suggested has to do with the number of employees. For example, when we had a military occupation of Ger-

many and we were applying an antitrust law somewhat more stringent than at home, they went so far as to say that any firm with more than 10,000 employees was subject to examination, at least to determine whether it had excessive power.

Now, this is the kind of test one would have to evolve. I don't think one could ever take a percentage and say, "This is it," for all industry.

I think what you would end up with is kind of a *prima facie*—"We are going to look at you if you are above a certain figure," and if you make a beginning, you can go on refining your concepts with administration. You legislate once and for all. Experience will soon show what is needed.

Senator DIRKSEN. Taking an example, suppose you roll back, as far as the large automobile companies were concerned, and they could establish that by detaching the body-building part there and another foundry and a few other things, and cutting the production of cars by 25 percent, that actually it would probably add \$100 to the cost of the car; what would the public be likely to say about that?

Mr. SCHWARTZ. Well, if I thought there was any substantial probability of that, I would not be taking the position that I do take. On the contrary, I think that smaller units, medium-size units, units which have full integration in the sense that they do the whole of the operation, but which are, nevertheless, not aggregates of technologically integrated units, can in general do the job better.

That was the conclusion of the Federal Trade Commission study, although that study, of course, like any other, has been subject to very serious attack on statistical grounds; but no better study of it has been made that I am aware of, however.

I again refer to the fact that in industry itself there has been a growing concern about the management difficulties created by this effort to run a gigantic empire that has transportation facilities, raw materials, mines, assembly plants.

It does not seem to me that on the face of it we should expect a rise in the price of cars by restoring competition, but a fall in the price of cars. Surely, Chevrolets are produced in adequate numbers to receive all the benefits of scale without also producing Oldsmobiles and Buicks.

The CHAIRMAN. I don't know whether you know the history of the automotive industry or not.

The started out with a completely fabricated car at the factory, although they bought things like the hardware and the carburetor and the generator and the headlights. As a matter of fact, in the early days you bought your car and then bought the top and headlights, and your bumpers, and all that, extra.

Then, they suddenly discovered it was cheaper to build the car and buy those parts and put them on the cars, and it has only been since about 1940 that they have owned the parts manufacturers also. They went in the field and bought those. Did you know that fact?

Mr. SCHWARTZ. I knew of that development.

The CHAIRMAN. That was a definite trend.

Mr. SCHWARTZ. I wondered whether that development was not related in part to our arming for the war and the consciousness there was going to be a demand.

The CHAIRMAN. Oh, yes.

We had the same thing in the airplane industry. At the outbreak of the war 65 percent of the total cost of an automobile was purchased from what we call vendors, and the same was true in the airplane industry. It is still true in the airplane industry, but not in automobiles; 65 percent of the vehicle comes from smaller factories which are, however, owned in toto by the major industry.

It gives a wonderful opportunity for a profit markup. You take a profit on the parts and a profit on the car, and so on down the line.

Mr. SCHWARTZ. May I express one concern here, Mr. Chairman. I am looking at the program of your hearings, and I know that you are going to hear from the automobile industry and the steel industry.

I think you must be prepared for a very effective demonstration that things as they are, are the best that possibly could be, and it would be impossible for you to meet that unless you have the kind of inquiry which I suggest, namely, a pretty thoroughgoing internal investigation which would indicate the possible lines of cleavage in the very large organizations; the motives for bringing together what has been brought together, the extent to which outside sources have been used, and so forth—the relation with dealers.

The CHAIRMAN. It is my hope that the subcommittee will continue to function after the Congress recesses and be ready with some legislative suggestions. I think it would probably be too early to come out with many legislative suggestions in this Congress, because it deserves thorough study.

Senator DIRKSEN. Dr. Schwartz, I notice in your statement, on page 2, you say—

The CHAIRMAN. Will you take over, Senator Dirksen? I have to leave for a few minutes.

Senator DIRKSEN (presiding). On page 2 of your statement you say:

Leading firms should be subject to a flat prohibition against acquiring the capital assets or control of existing businesses.

Is this a suggestion that an absolute ceiling or an absolute limit be placed on the leading firms, that beyond that they could not go; is that the connotation of the word "flat"?

Mr. SCHWARTZ. Well, the connotation, Senator, of "flat prohibition" is in contrast with the kind of prohibition that we presently have in section 7, which is in terms of where the effect may be to substantially lessen competition or tend to create a monopoly, and so forth.

Now, that clause in section 7 opens up possibilities of argument, such as were fully exploited in the Columbia Steel case, about which I spoke previously.

It makes it possible for the United States Steel Corp., as in that case, to say: "Well, we are only taking 3 percent of the market here and that does not foreclose the other units in the field from successfully marketing their wares."

I say, for a company of that size, there ought not be an inquiry as to what the effects may be on competition; they ought merely to be told: "You do not expand by merger. If you wish to expand, then you go and build some more plants."

We do not say: "You cannot expand," but as far as merger is concerned, that is out, because of the desirability of maintaining some independent outlets; so in that sense, I am not talking about a ceiling on absolute size.

Senator DIRKSEN. Well, now, if we were to raise the competitive factor and place a limitation, what would you consider to be the leading firms?

Would that be denominated by invested capital, people employed—or what would be the yardstick?

It seems to me that the great problem we are dealing with is how to measure these things, what kind of guidelines or yardstick to use.

Mr. SCHWARTZ. That is the problem. You bring me back to it again.

I can only answer in the same way, Senator. That is, that I have some ideas as to the sort of yardstick we would use as *prima facie* tests—it seems to me this committee might explore the possibility of such a yardstick. I refuse to concede that the problem of definition is insuperable; not until someone tries it.

Senator DIRKSEN. I wondered whether the final implication was the development of an economy where you had single-plant operation, large or small, and no expansion beyond that, so that size would be measured only by technological efficiency.

Mr. SCHWARTZ. Well, I am not prepared to accept that as the goal, at least for the present. We have so much ground to cover before that issue presents itself that I would not want to adopt that goal at this point.

Senator DIRKSEN. Those bells mean a vote on the foreign-aid bill, and I am advised that we are going to have 3 or 4 votes in succession over there. I presume that Senator Kilgore will want to come back. We will have to go to the floor; we have just about time to get over there.

(Thereupon, a recess was taken.)

(The prepared statement submitted by Mr. Schwartz is as follows:)

**ANTITRUST AND MONOPOLY SUBCOMMITTEE,
COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE.**

SUMMARY STATEMENT OF PROF. LOUIS B. SCHWARTZ OF THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

The report of the Attorney General's National Committee To Study the Antitrust Laws poses for Congress and the country a number of specific issues of economic and legal policy. I have stated my views on many of these issues before the Celler committee, and a copy of that statement is attached hereto. It indicates how widely we have departed from the ideal of free competitive enterprise. It lists a half dozen topics worthy of investigation and a dozen legislative proposals. I am not so naive as to believe that this or the next Congress will adopt the whole of this program. My present purpose is to focus on several representative measures that seem to be most urgently required. In my opinion, they are the proposals to:

Prohibit dominant companies from expanding by merger, without advance approval based upon a showing of technological necessity.

Provide a means for breaking up existing superconcentrations, organizations like General Motors and United States Steel. If American Motors is large enough to survive, General Motors must be bigger than technological necessity requires. If Bethlehem and Youngstown are big enough, United States Steel must be too big.

Amend the Motor Carrier Act to eliminate control of entry and rates, as well as exemptions from the antitrust laws; direct the CAB to establish conditions which will make possible new entry into trunkline air transportation.

The central antitrust issue today is the problem of the structure of our economy. Is it our national policy to have each basic industry dominated by

a few firms, or are we ready not only to call a halt to further mergers but also to study existing superconcentrations and reorganize them into units justifiable on grounds of technological necessity?

REORGANIZATION OF OVERSIZE FIRMS

This is the basic problem. It will do little good to stop further mergers if the stupendous aggregations already in being are left undisturbed. That would be locking the barn door after the horse is stolen. It might even aggravate the competitive problem of the medium and small firms. Federal courts and the Department of Justice have already been influenced by this consideration. For example, one of the reasons given by a Federal district court for rejecting the Government's proposal to break up the Aluminum Company of America, after it had been held to be an unlawful monopoly, was that competing metals are being manufactured and sold "by concerns that, in size, are fully equal to Alcoa. * * * Rightly or wrongly, from an economic and social standpoint, big business in many industries is an actuality, and if such enterprises are to be subjected to effective competition, their trade rivals must be of somewhat comparable strength." Thus the existence of giant firms in steel and copper becomes an excuse for perpetuating giantism in aluminum and presumably other building materials. Similarly, the Department of Justice felt compelled to approve the merger of smaller automobile manufacturers in view of the overpowering size of the Big Three of the industry. The Department's opposition to the Bethlehem-Youngstown merger must be embarrassed by the fact that United States Steel would still be nearly twice as big as the proposed combination; but even here the Department is not challenging the prevailing pattern of industry domination by a few big firms. Bethlehem is, after all, the No. 2 firm in steel. Presumably lower ranking units may continue to amalgamate. (Cf. judicial approval of merger of the 3d and 12th ranking steel producers, *U. S. v. Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935); merger of Standard Oil of New York with Vacuum Oil Co., *U. S. v. Standard Oil Co.*, 47 F. 2d 288 (E. D. Mo. 1931).)

The pending bill to control bank mergers raises in acute form the question whether Congress is willing to touch existing superconcentrations. The background is the well-known wave of bank mergers including the combination of such colossi as the Bank of Manhattan and Chase National. A recent effort by the Federal Reserve Board to challenge the domination of the Transamerica Corp. in commercial banking in the far West came to grief in the United States Court of Appeals for the Third Circuit. To halt new mergers without touching Transamerica's present 50-percent control is practically to underwrite its present commanding position.

THE PRECEDENT OF SECTION 11 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

When Congress became concerned in the 1930's over the financial and political power of giant utility holding companies, it directed the Securities and Exchange Commission to "limit the operations of the holding-company system * * * to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary, or appropriate to the operations [unless combination of systems would effect "substantial economies" and would not] impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

This statute, far from being a death sentence, as its opponents described it, seems to have contributed to the remarkable degree of health and stability of operating utility companies and of the rationalized holding-company systems that have met the standards of the act.

No one supposes that provisions drafted for utility-holding companies can be carried over bodily to the nonutility field. But with this precedent it would seem worthwhile for this committee to study the feasibility of financial decentralization of some of our very largest industrial concerns.

CONTROL OF MERGERS

Assuming that effective action is taken against existing firms of excessive size, the question arises what sort of merger controls are needed. The minimum need is the proposal already stated to require advance approval for mergers

by dominant companies. This committee study, however, may lay the basis for a more refined and effective program based on the following principles:

(1) Leading firms should be subject to a flat prohibition against acquiring the capital assets or control of existing businesses. Thus they would have to build additional facilities when they wish to expand. This adds to the community's resources whereas a merger merely rearranges control of existing resources.

(2) Merger of small units need not be of concern to the Government even if the merging units have been in competition with each other.

(3) An intermediate group might be permitted to expand by merger subject to prior approval by an appropriate public body, such as the free enterprise commission suggested on page 3 of my statement to the Celler committee. The replacement of advance approval was endorsed by the Temporary National Economic Committee in 1940 and by the committee on cartels and monopoly of the Twentieth Century Fund in 1951.

Deregulation

The proposal to open interstate motor transportation to free enterprise is selected for emphasis here because Government economic regulation, in areas where there is no justification for controls of the public utility type, represents a serious inroad on the competitive system. A great mass of such regulation has grown up, imposing impossible governmental burdens on agencies like the Interstate Commerce Commission and high prices on the users of the service.

OUTLINE SUMMARY OF TESTIMONY OF PROF. LOUIS B. SCHWARTZ OF THE LAW SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA TO THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, MAY 12, 1955

I. ON THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS

A. General appraisal

Although it contains a few recommendations favorable to free and fair competition, the overwhelming majority of its proposals in the field of legislation, interpretation, and administration tend to weaken the antitrust laws. The committee failed to carry out its mission to strengthen the antitrust laws primarily because it decided to concentrate on legal analysis of existing statutes and decisions. Thus it managed to avoid facing major issues of policy such as whether a pattern of industry domination by 2 or 3 firms requires fundamental change in the statutory scheme that permits this condition to continue. Somewhat inconsistently, the committee did give effect to its notions of policy in making numerous proposals whose combined effect is to relax existing law and impede its enforcement.

B. Major deficiencies

Among the major errors and deficiencies of the report are the following:

1. It makes no effective proposals to prevent further expansion of dominant firms by merger.

2. It fails to provide for breaking up existing superconcentrations of control in fields like steel, aluminum, motorcars.

3. It disapproves breaking up monopolistic agglomerations, except as a last resort, even when they have been convicted of abusing their power.

4. It approves industry-dominating patent pools if they exercise their control reasonably.

5. It approves price fixing under patents and restrictive licensing without regard to whether the licensor is a dominant firm.

6. It would exclude compulsory royalty-free licensing as an available form of relief in patent-abuse cases.

7. It encourages exclusive dealing by making it necessary to show actual foreclosure from the market; a rule which, if appropriate in Sherman Act cases, is certainly inconsistent with the Clayton Act purpose to forbid restrictive practices that are potentially rather than actually impairing competition.

8. It undermines the Robinson-Patman Act's effort to prevent big sellers from discriminating unjustifiably among their customers, and to prevent big buyers from coercing price concessions not related to the lower cost of doing business with them.

9. It proposes to impair existing right of the antitrust victim to recover mandatory treble damages and to restrict the period for which damages may be recovered. It fails to deal affirmatively with the existing situation under which antitrust victims are in most cases practically unable to recover even compensatory damages because consent decrees under section 5 of the Clayton Act do not make a *prima facie* case of violation.

10. It fails, except in the one instance of fair trade, to do anything about the vast sectors of our economy that have been withdrawn from free competition, sometimes by legislative restriction on entry, as in motor and air transportation, sometimes by express exemption, e. g., for collective ratemaking by common carriers and casualty insurers, sometimes by judicial interpretations like the primary jurisdiction rule.

11. The report does not reflect any awareness that antitrust law has more than economic significance in American life. Many Americans believe that economic power must be kept reasonably dispersed in order to keep business from dominating Government itself. Others believe that a society of vigorously independent individuals can exist only where property ownership and entrepreneurial responsibility are widely distributed.

12. The report contains internal contradictions resulting from different authorship of various chapters and does not accurately present the variety of opinions among the committee members.

13. The report says nothing about adequate appropriations for effective antitrust enforcement.

C. *The opportunity presented by the report*

Although the Attorney General's committee misfired, the very fact that such a committee was convened and that it failed focuses on the need for positive measures in this area and gives the legislative branch of Government an opportunity to modernize and strengthen the antitrust laws.

II. A PROGRAM FOR LEGISLATIVE ACTION

A. *Investigation*

1. Further generalized investigation of antitrust problems would be of doubtful utility. More immediately useful would be a well-financed analysis-digest-index of the voluminous information accumulated in all the post-World War II congressional hearings. In addition the following specific topics might be fruitfully explored, not necessarily by public hearing.

2. A legislative committee might conduct pilot studies of a few of the very largest industrial giants with the specific objective of drawing up tentative reorganization plans that would limit these enterprises to reasonably related activities on a scale justified by technological requirements. On the basis of several such studies Congress would be better prepared to enact general legislation, patterned on section 11 of the Public Utility Holding Company Act of 1935.

3. A study might be made of the extent of uncompensated injury to competitors and the public in several of the more important antitrust cases of the recent past, especially where consent decrees have been entered.

4. There should be a study of the number of cases of price-fixing and other clear violations of the Sherman Act which have been disposed of by FTC cease and desist order or by consent decree, when criminal prosecution would have been appropriate under the announced policies of the Department of Justice.

5. There should be compiled a list of the restraint of trade cases brought against leading firms, to reveal which if any of them are habitual violators.

6. The actual operation of some leading patent pools might be closely examined.

B. *Legislation indicated as probably desirable*

1. Prohibit dominant companies from expanding by merger, without advance approval based upon a showing of technological necessity.

2. Provide a means for breaking up existing superconcentrations, organizations like General Motors and United States Steel. If American Motors is large enough to survive, General Motors must be bigger than technological necessity requires. If Bethlehem and Youngstown are big enough, United States Steel must be too big.

3. Enact a legislative declaration that competition (free enterprise, untrammeled business choice, etc.) is preferable to private (or public) regulation, except where Congress has clearly directed otherwise, and that agencies administering statutes which authorize dispensation from the rule of competition "in the public interest" or "to promote the national transportation policy" shall not grant such

dispensation unless available alternative methods of promoting the alleged public policy are shown to be less practicable. It should not be enough to show that a merger inconsistent with the antitrust laws is "consistent" with the public interest.

4. Declare legislatively that the restrictive practices specifically named in the Clayton Act are unlawful without inquiry as to their competitive effects in a particular situation, when engaged in by dominant firms.

5. Prohibit restrictive licensing of patents by dominant patentees and the combination of dominant companies in patent pools.

6. Amend section 5 of the Clayton Act to make it discretionary with the court whether a consent decree shall be available to help private plaintiffs make out a *prima facie* case; in the alternative, provide a procedure for compensating all antitrust victims upon the successful conclusion of any Government case.

7. Amend the Motor Carrier Act to eliminate control of entry and rates, as well as exemptions from the antitrust laws, direct the CAB to establish conditions which will make possible new entry into trunkline air transportation.

8. Repeal the Reed-Bullwinkle authorization of collective ratemaking by railroads, and the McCarran Act exempting certain insurance operations from the antitrust laws.

9. Repeal the McGuire Act authorizing resale price control in interstate commerce.

10. Raise the maximum fine for violations of the Sherman Act to at least \$50,000.

11. Permit the United States to recover as a party injured by antitrust violations.

12. Create a permanent Free Enterprise Commission to take over the anti-monopoly functions of the Federal Trade Commission and to make antitrust investigations, reporting to the Department of Justice, which would conduct litigation before the courts. Among the powers and responsibilities of the Free Enterprise Commission would be the following:

(a) Power by regulation to define and prohibit anticompetitive practices.

(b) Power by regulation or order to prevent integration not justified by production or distribution economies, and to require advance approval for certain classes of such transactions.

(c) Power to compel the reorganization of excessively large enterprises into units conforming with the standard of paragraph (b).

(d) Power to make exemptions under standards defined by statute.

(e) Authority to appear before any Government agency, including congressional committees, to present testimony or argument as to the implications for free enterprise of the matter before the agency.

(f) A duty to report annually on the state of free enterprise in the country and to propose legislation for the further protection of free enterprise.

Senator KEFAUVER (presiding). Our next witness is Dr. M. A. Adelman, associate professor of economics at Massachusetts Institute of Technology.

Mr. ADELMAN. Thank you.

Senator KEFAUVER. We appreciate your coming and giving us the benefit of your testimony and any further thoughts you have in connection with the matter we are investigating.

STATEMENT OF M. A. ADELMAN, ASSOCIATE PROFESSOR OF ECONOMICS, MASSACHUSETTS INSTITUTE OF TECHNOLOGY

Mr. ADELMAN. Thank you, Senator.

My name is M. A. Adelman, associate professor of economics at Massachusetts Institute of Technology. I was a member of the Attorney General's Committee, but my comments are in no way an authoritative explanation of the Committee's report. That document must speak for itself. I can, however, explain my own reasons, which are not necessarily those of any other member, for some of the recommendations made there.

The time of this committee is limited; my remarks will be brief, and directed to only two questions.

The first is that of mergers, as related to our policy on big business in general; the second is price discrimination, with particular reference to section 2 (b) of the Robinson-Patman Act, which permits prices to be lowered to meet the equally low price of a competitor.

As to mergers and bigness: The report is very unsympathetic to attacks on Big Business, and urges the utmost caution in divestiture or dissolution. Yet it also approves an extremely drastic law, section 7 of the Clayton Act, which forbids the acquisition of one company by another if there is even a reasonable probability that competition may be adversely affected. The Sherman Act is violated only by actual monopoly (or market control, as many economists prefer to call it), plus some other elements as well; the Clayton Act is violated by no more than the probability of substantially less competition.

Is it consistent to oppose divestiture in all but the most extreme cases, yet to support a special kind of preventive divestiture—prohibition of a merger—in much less serious instances? I believe that hostility to bigness must in practice become a serious deterrent to growth and to rivalry. If large firms must hesitate and look over their shoulders before taking any action, by way of price reduction or new products or new processes, that promise to give them an advantage over their competitors, then they will compete much less vigorously. And since every one of them knows that all the others are in the same boat, we end up with a live-and-let-live policy enforced by the Government, which is just the contrary of what we want.

Prohibition of mergers, however, involves no such danger. So long as companies are free to raise any funds they need through retained earnings or the capital market, and to spend the money for any expansion they desire, there is little to be lost by blocking the merger route.

For this reason I see no inconsistency in opposing the attacks on size, and opposing divestiture in all but a few instances, yet approving a stringent prohibition on mergers, as does the report of the Attorney General's committee. I would personally go a little further and express the hope that when the courts or the Federal Trade Commission are considering the legality of a merger, other things being equal, they make it somewhat tougher, the larger is the acquiring company. My reason is simple. In obtaining money for expansion, the larger firm usually finds it easier to obtain a given amount. I think public policy should try to redress the balance.

I have been asked to comment on the Federal Trade Commission report on mergers during the 1948-54. The report has been issued so recently that there has not been time for a careful reading, but it is clear that the number of mergers is still far below what it was in the 1920's, which was the last merger movement of any significance. It is even below the figure for 1944-47, when there was no merger movement outside the world of fiction. Since the total number of business enterprises is substantially larger today, the relative importance of a given number of mergers is much less. Unfortunately, there is almost nothing in the FTC report about the assets of the companies acquired, so that we learn almost nothing about any changes

in the structure of any industry. Unless we have estimates of the assets of acquired and acquiring companies, we have no way of knowing whether these mergers are tending to make any industries more or less concentrated. Nor do we know whether the effects of mergers have been reinforced, or counteracted, by other developments. This is not said in criticism of the authors of the Trade Commission report. They did the best they could in what time they had, but they had not enough time. I would suggest that the Commission immediately authorize a further study in which the assets involved, and the effects on concentration, be explored. This information is long overdue.

May I depart from the prepared text of my remarks to say this does not have any immediate or direct enforcement significance. So far as the Federal Trade Commission and the Department of Justice are concerned as conscientious law enforcement agencies, even one merger is too many if it threatens to have the forbidden effects.

This brings me to my final comment on mergers. The Attorney General's Committee report generally endorses the decision in Pillsbury Mills, where the Federal Trade Commission stated that no single test sufficed to tell when competition was diminished; that one needed to look at all relevant market factors. This aspect of the Pillsbury opinion has been widely discussed. Curiously enough, there has been almost nothing said about the actual decision in that case—that is, the actual controversy which the Commission had to and did settle. The hearing examiner had dismissed the complaint on the ground that the evidence of Pillsbury's market share before and after the merger was not the best evidence that could be obtained. The Commission reversed him on the ground that, while the evidence might not be the best possible evidence, it did suffice for the conclusion that, absent any rebutting evidence, competition was lessened. I do not wish to comment further, because it would take us too near the merits of a pending case. What is important is the Commission's principle that one does not necessarily need an exhaustive market study in order to reach a conclusion. All one needs is enough to say whether there is a reasonable probability of lessened competition.

I hope that the Pillsbury precedent will be followed in the future. If the enforcement agencies must chase up hill and down dale after every last shred of evidence, they will simply discredit any organized search after market facts, and will invite simple, drastic—and utterly unworkable—*per se* rules. Not that there is any excuse for sloppy or fallacious economic analysis in the name of haste. Organized study is not the big time consumer, anyway; most in need of a strict reducing diet is the testimony of interested parties—suppliers, customers, competitors—which exhausts time and patience and which generally produces more heat than light, long sessions, and little evidence.

Turning now to the second topic—meeting competition under section 2-b of the Robinson-Patman Act: This act, as all will agree, is a price equality act. But price equality for all customers, when it costs more to serve some customers than others, means that there is more profit in serving some customers than others.

The clearest cut example is of course the brokerage clause, section 2 (c). A seller who disposes of his goods through brokers and also through direct buyers is not allowed to recognize any cost savings on

selling to direct buyers. He may not accept the same net return from both parties. He must charge the direct buyer a phantom brokerage, and put the extra money into his pockets. It has been pointed out many times that this means a legal discrimination against direct buyers, including cooperative buying groups; and a legally privileged status for brokers. Moreover, an equivalent of the brokerage clause was part of the notorious Sugar Institute code which the courts struck down in the mid 1930's; another equivalent is contained in the agreements between advertising agencies and publishers, against which the Department of Justice has just filed suit.

However, at this point I am concerned only with the fact that the law makes sales to direct buyers much more profitable. Hence there is a constant incentive or temptation to bid for this extramargin business, by some kind of concession or an outright rebate on the price.

Few will try to defend section 2 (c) and I will not therefore waste this committee's time in discussing it. But what must be pointed out is that section 2 (a) providing for "cost justification," is not very different from 2 (c). I mentioned earlier that under 2 (c) no costs saved by dealing with the direct buyer will be recognized by the law to "justify" a price differential. But, as a practical matter, very few costs saved by dealing with any buyer will ever be recognized and allowed under the act, even under 2 (a). There are several reasons for this. The cost of assembling cost information is very heavy and often prohibitive. Secondly, there are many costs on which information cannot be had, particularly distribution costs, because there are so many common and joint elements that allocations must be made on the basis of judgment. Thirdly, the Federal Trade Commission has set standards impossible to meet, although matters may be changing in this respect.

But most important of all—every seller knows that every other seller is in the same boat, and will find it difficult or impossible to "justify" a lower price. Hence there is little danger that any other seller will try to bid away this higher margin business by the offer of a price cut. The effect of everybody's knowing everybody else's intentions is precisely the same as if there were a collusive agreement not to cut the price.

Given all these facts, the businessman who knows that he saves money by dealing with certain customers will try to get the extra profits from them if he can.

If he wants more of that business than he has, he will not waste his time and money trying to justify a lower price; he will simply try by legal or extralegal means to get it. For example, some sellers may decide that they are better off specializing and selling only to the more profitable types of buyers. In that case, they can sell at one price, stay within the law, and yet obtain the wider margin business.

For whatever the reason, if at least one or a few sellers are able to pass on the savings to their lower cost customers, and get business away from their rivals, it then becomes possible, under section 2 (b) of the Robinson-Patman Act, for all competing sellers to do so, since they are merely meeting the equally low price of a competitor.

Hence the real importance of section 2 (b) is this: It serves to remedy the defects of section 2 (a). It permits cost savings to be

passed on, not directly, by being "justified" under 2 (a), but indirectly, through the need to meet the competition of the first ones to offer the lower prices. And since as a practical matter cost "justification" under 2 (a) has in the past been impossible and will always be extremely difficult, we are faced with this choice: Either compel sellers constantly to make more money from some customers than from others, simply because the law forbids them to pass on cost savings to lower cost buyers, or permit competition to operate and the cost savings to be passed on to customers.

For these reasons, I agree with the majority of the Attorney General's Committee in recommending that the Supreme Court decision in the Standard Oil of Indiana case continue to be followed by the courts, and that section 2 (b) continue as a complete defense to any charge of price discrimination under the Robinson-Patman Act. I also agree with the majority of the Committee that no new legislation is required to accomplish this purpose, and therefore I hope the Capehart bill, S. 780, will not be passed—on the general principle that unnecessary laws tend to create unforeseen headaches.

There is no merit in overstating one's case. The Robinson-Patman Act, even with the Indiana doctrine, still leaves room for much controversy. The master question of fact in every case is: Do we have market control by a seller or buyer, and a probably anticompetitive result? Two instances must suffice by way of illustration: the Standard of Indiana litigation itself, to show one kind of possibility; and the Muller case, decided some years ago, to show another.

In the former case, Standard of Indiana, a big Midwest refiner, charged a lower price to some jobbers who took delivery in tank-car lots, stored the gasoline, and trucked it to service stations. They paid a price 1½ cents per gallon less than that paid by the retailer who took delivery in smaller amounts directly at his service station. Without question, Standard made definite cost savings by selling to these jobbers, and only by the lengthy and expensive miracle of "cost justification" procedure was the Federal Trade Commission able officially to disregard this elementary fact of life. But other refiners had cut the price to these jobbers to allow for the cost saving, and Indiana therefore followed suit, in order not to lose the business. Indirectly, therefore, they were able to pass on the cost savings—not because they were trying to be nice or to do good, but because competition forced them to do it. Simply as a matter of self-defense, Indiana fell into line with a trend to lower prices, stopped charging some customers for services that the customers themselves performed, and helped break up a retailers' conspiracy to keep prices high.

A contrasting situation was presented in the Muller case, where a seller with a very large market share (though quite small in absolute size) drastically cut the price in New Orleans only. Thereby it diverted some of the largest accounts of its only rival in New Orleans, injuring not only him but the public interest in maintaining competition, since even an equally or more efficient small competitor could not be really effective and independent, even though he might survive and earn profits.

Of course, decisions forbidding local price discrimination are always difficult because they may become a sort of local tariff protecting the local competitor. In fact, every decision in this area is pretty much a

law unto itself. So much depends on the particular facts that there is very little force of precedent. And reasonable men may well differ over any particular decision. I am concerned only to draw the contrast between two fact situations: the Indiana case, where the seller was forced by the need to meet competition into cutting its prices so as to pass on cost savings to some of its customers; and the Muller case, where the seller unquestionably had great market power, beyond the reach of the Sherman Act, and used it to discriminate in price and hamper the growth of new competition. I hope the Robinson-Patman Act will, in the future, be applied to the latter type of situation, and not to the former. That concludes my statement.

(Professor Adelman later requested that this additional statement be placed in the record at this point:)

At this point, may I refer to what Senator Kefauver said previously about my having been employed in some capacity or other by the Great Atlantic & Pacific Tea Co. Although it is not clear to me whether the Senator was asking a question or purporting to state a fact, I am sure that the last thing he intended was to give anyone an impression which was not in accordance with the facts. In order to have the matter perfectly clear, the record should contain my statement that I have at no time been employed by this company, directly or indirectly, in any manner whatsoever.

Senator KEFAUVER. Thank you, Dr. Adelman.

Mr. Burns, what is the procedure now?

Mr. BURNS. You may go ahead with questions of any of the 3 or you may direct the same question to all. Senator Kilgore had suggested that all three witnesses remain so that they could be questioned at the same time.

Senator KEFAUVER. I take it then, Dr. Adelman, that you think the Robinson-Patman Act, as it now stands, is all right. You are not in favor of either the Capehart bill or S. 11 which in one case would write the Standard Oil decision into law affirmatively, and the other case would take it back to what many of us thought it was before.

Mr. ADELMAN. I would be happier, Senator, if neither bill were passed.

Senator KEFAUVER. Do you go along with the suggestion in the Attorney General's report that it might not only be all right to meet a competitor's competition, but to incidentally beat or undercut it?

Mr. ADELMAN. Personally, I think a good deal might be said for a proposal of that kind, but having accepted the idea of having the Robinson-Patman Act at all, I agree with the report that to permit freely the beating of a price would probably nullify a good deal of the act.

Senator KEFAUVER. There would be an entering wedge that would be very hard to define or to delineate.

Mr. ADELMAN. It probably would, but it has this in common—

Senator KEFAUVER. Did you dissent from that part of the Attorney General's committee's report?

Mr. ADELMAN. Covering section 2 (b), Senator?

Senator KEFAUVER. Yes.

Mr. ADELMAN. No; I did not.

Senator KEFAUVER. Mr. Schwartz, what is your idea about the Robinson-Patman Act?

Mr. SCHWARTZ. Well, I recognize, Senator, that there is a theoretical conflict between an act which says you cannot discriminate in prices,

and an act which says you ought to be free to make any prices that competition dictates.

I say it is a theoretical conflict, because we do not in fact really have a competitive economy. That means that some sellers have it in their power to wreck competition at other levels of the distribution process, and that power must be restrained. I, therefore, dissented from the report's handling of the Robinson-Patman Act.

Senator KEFAUVER. Dr. Kaysen, you were not a member of the Commission?

Mr. KAYSEN. That's right. I was not.

Senator KEFAUVER. I take it you are a strong competition man; are you not?

Mr. KAYSEN. As I understand that phrase, I am.

Senator KEFAUVER. What is your opinion about it? Do you think—

Mr. SCHWARTZ. So am I, Senator.

Senator KEFAUVER. Yes; I know you are. I read your dissents.

Mr. SCHWARTZ. But some people think the Robinson-Patman Act is soft competition. I am a strong competition man and believe in both the Sherman Act and in the Robinson-Patman Act until the Sherman Act becomes fully effective.

Mr. KAYSEN. I think the Robinson-Patman Act has some practical as well as theoretical anticompetitive effects.

Senator KEFAUVER. You had better talk a little louder and plainer.

Mr. KAYSEN. Excuse me. I said I think that the Robinson-Patman Act has some practical as well as theoretical anticompetitive effects. I would not be for a bill to try to enact the Standard Oil of Indiana decision into law. I share Mr. Adelman's skepticism about the ability to do that kind of thing in a bill.

I may say that in a seminar at the Harvard Law School, where a group including a couple of law professors, some law students and some graduate students in economics spent a period of 6 months trying to fuss with the language of the Robinson-Patman Act, we decided it was extremely difficult, but did come up with some notions about the direction in which a price discrimination statute might move. I don't know whether you want me to say anything more about that.

The major point, it seems to me, is that price discrimination, which is sporadic, which goes on for a short period of time, which follows one price cut with another price cut, which tends to spread through the market, is procompetitive in its effect. I think the Robinson-Patman Act does now operate to restrict that kind of price competition in some situations.

Senator KEFAUVER. You mean in a situation like you had where the A. & P. followed certain practices back a few years ago?

Mr. KAYSEN. I am not sure what practices you are referring to, sir.

Senator KEFAUVER. Well, such as the practice of lowering prices for a time adverse to a competitor and then raising prices.

Mr. KAYSEN. No; I don't think that is the kind of situation I had in mind at all. I am thinking of the situation like the Standard Oil situation in which one seller cuts the price, another seller finds that in order to keep his business, he has got to cut the price. Perhaps the price cuts start with big customers, but they finally spread to the whole market.

I think the two evils that the Robinson-Patman Act should get at, and perhaps some better legislation, better drafted legislation might reach, are, one, price discrimination which is persistent, which goes on for a long time. Mr. Adelman's statement cited the Muller case. If we see a man cutting his prices, selling at a lower price in one region than in another region, and this price differential was going on for a year, 16 months, 2 years, then I think it is pretty clear this is not a question of price cuts spreading through the market. It is a question of a discriminatory price differential which probably has an anticompetitive effect.

I think one possible line along which the statute might be revised is to recognize the difference between persistent discrimination and sporadic discrimination.

Senator KEFAUVER. Has not the Federal Trade Commission pretty well ruled out doing that in the General Foods case?

Mr. KAYSEN. Ruled out doing that?

Senator KEFAUVER. That is, the Federal Trade Commission, where prices were cut in an area, apparently for some reason or another, but not in other sections of the country, gives its approval to that kind of procedure: did they not?

Mr. KAYSEN. In the General Foods case, they seemed to, from my knowledge of the facts in the General Foods case. I am not in sympathy with that decision.

Senator KEFAUVER. Are you in sympathy with it, Dr. Adelman?

Mr. ADELMAN. No; I think it involves a misinterpretation of the facts in the case.

Senator KEFAUVER. So you think it was a bad decision?

Mr. ADELMAN. I think toward the situation it was applied to, it was a bad decision. As I said here, I don't think—

Senator KEFAUVER. As I got the general tenor of this report, it rather approved of the General Foods case: did it not?

Mr. ADELMAN. It did, on the point that a difference in price does not of itself, without more, amount to competitive injury.

Senator KEFAUVER. Did you dissent to that?

Mr. ADELMAN. No; not for the purposes of that.

Senator KEFAUVER. Did you dissent in any of this, Dr. Adelman?

Mr. ADELMAN. Not by name.

Senator KEFAUVER. Did you dissent from this General Foods decision. Mr. Schwartz?

Mr. SCHWARTZ. I did not take specific issue with that. My general dissent, Senator, was a dissent from the whole point of view of the committee supported by enough illustrations of the anticompetitive inclinations of the majority, as I saw it, to make my point. I did not undertake to make a separate dissent on every item that I might have dissented on. I just said the committee as a whole took an anticompetitive position.

(Senator Kilgore, the chairman, now presiding.)

Senator KEFAUVER. Mr. Chairman, we had gone on with Dr. Adelman's statement.

The CHAIRMAN. I want to thank you for going ahead, because I was tied up on appropriations.

Senator KEFAUVER. I was just asking some questions on general statements. We started off with a discussion of the Robinson-Patman Act.

The CHAIRMAN. Please go ahead.

Senator KEFAUVER. Professor Adelman, I don't exactly understand what you mean by the Pillsbury case. You seem to approve of the way the Federal Trade Commission, on the evidence it had before it, handed down a decision of *prima facie* violation in the Pillsbury case. You stated on page 4 that you thought that was a good precedent and should be followed, and you seem to be against the idea that you had to go into all facets of evidence and chase up the hill and down the hill after the last vestige of evidence in order to decide a case of that sort.

Are you not overlooking the fact that the decision in the Pillsbury case is just an interlocutory decision inviting the presentation of all kinds of evidence?

Mr. ADELMAN. I think the respondent had the right to put in such rebutting evidence as he wished. I think, too, that the hearing examiner had a kind of direction from the Commission not to let in anything unless it was relevant, and a sort of general reminder on how to proceed, that you did not need to know all the facts in order adequately to make up your mind.

Senator KEFAUVER. But now they have been putting in evidence for 2 years, and we have no decision.

Mr. ADELMAN. I have not tried to follow the case, Senator.

Senator KEFAUVER. In other words, you think that section 7 is a rather mandatory statute which, when direct evidence shows that it is violated, that you should not have to get in all of the last little shred of evidence to reach a decision?

Mr. ADELMAN. That is correct, sir.

Senator KEFAUVER. You would apply a limited rule of reason then to section 7?

Mr. ADELMAN. Yes; I think the Clayton Act, in general, and section 7 in particular, has a different kind of a rule of reason, different from that of the Sherman Act. It is narrower.

Senator KEFAUVER. As a matter of fact, you would agree with former Justice Harlan's famous dissent that it was not up to the Court to say that this monopoly is good and this one is bad; if it is a monopoly, Congress meant to outlaw it, and it ought to be outlawed.

Mr. ADELMAN. Well, to those implications in the old Standard Oil decision that good trusts were to be allowed and bad ones not, I certainly would agree with the late Mr. Justice Harlan. I guess we have to distinguish now between the late Mr. Justice Harlan and the present Mr. Justice Harlan. I would not agree if what he meant was that we did not need some kind of organized procedure for finding out when a trust exists.

Senator KEFAUVER. Well, of course you have to have evidence.

Mr. ADELMAN. Yes, sir.

Senator KEFAUVER. But you would agree that it is not up to the Court to say "We think this is probably not a good one and this one was a bad one." If they meet the legal classification for being a trust or a monopoly, whether they litigated it or did not litigate it, it was a violation of the law.

Mr. ADELMAN. Yes, sir.

Senator KEFAUVER. That is not the way the Federal Trade Commission is going now, though, is it?

Mr. ADELMAN. I wouldn't try to characterize the work of the Federal Trade Commission unless I had carefully followed it out, and I have not.

Senator KEFAUVER. You followed it, Mr. Schwartz. What do you think of the way it is going?

Mr. SCHWARTZ. You do me too much credit, Mr. Senator. I cannot appraise all their work.

Senator KEFAUVER. Didn't you hear Mr. Howrey testify here yesterday that he thought—

The CHAIRMAN. Mr. Schwartz was not here yesterday.

Mr. SCHWARTZ. I was not here yesterday.

The CHAIRMAN. In fact, I had a tough time getting him here today.

Mr. SCHWARTZ. I am sorry that it seemed that way, Mr. Chairman.

The CHAIRMAN. I know. I apologize to you, because, frankly, I realize how overworked you are, and I am sorry we held you so late this afternoon. But it is only through your courtesy that you are here this afternoon.

Mr. SCHWARTZ. That is quite all right, sir.

The CHAIRMAN. May I say this to Senator Kefauver: I had promised Mr. Schwartz we would hear him before 1 o'clock and during the early morning session, but we were not able to. He finally agreed to stay over despite the fact it was interfering with his schedule. I wanted you to understand that, Senator.

Senator KEFAUVER. We all understand it. We know how busy he is.

Mr. SCHWARTZ. We all have demands on our time.

Senator KEFAUVER. You were going to tell us what you thought about the section.

Mr. SCHWARTZ. Well, I am not enthusiastic about the Pillsbury decision in its call for a full examination of the industrial situation, the justification for the merger, when you once see that the merger involves the creation of a 45-percent position in the relevant market.

To me there is a per se operation of section 7, and it is when, as I have indicated in my previous testimony, dominant companies seek to enlarge their control by the merger process. It thought it was very significant that my friend, Professor Adelman, thinks that legislation is not necessary in respect to the Robinson-Patman Act, because it can be worked out administratively. That, to my mind, suggests that the law in fact can be changed in the direction that he favors by administration. That is a very serious danger, and while I am not in a position to answer your question about the work of the Commission as a whole, Senator Kefauver, I am quite fearful that many things that have been established before are in process of being disestablished through administrative reinterpretation. One illustration is the General Foods decision that you are referring to. We are told that the burden of proof of injury to competition is not established successfully by a showing that people in a common market are getting different prices. I cannot believe that that is what was intended when the Robinson-Patman Act was passed.

We had earlier decisions by the respected second circuit that look the other way, and I am disturbed when such decisions are changed by administrative and almost imperceptible pressure.

Senator KEFAUVER. Do all of you gentlemen agree that what is said in the Pillsbury case, what the Federal Trade Commission is actually

doing, is substantially following Sherman Act tests and standards, rather than more mandatory procedure? I took it you agreed that that was the case.

Mr. SCHWARTZ. I am afraid that is what is happening.

Senator KEFAUVER. Do you think that is what is happening, Mr. Kaysen?

Mr. KAYSEN. Let me be sure, sir, that I understand your question: Whether the Commission is now following Sherman Act standards rather than a narrower standard in the enforcement of section 7; is that it?

Senator KEFAUVER. That is right.

Mr. KAYSEN. My first response to that is: The Commission has brought so few procedures under this act that it would be a little hard to tell what standards they are following.

I join some of the views of Mr. Schwartz in this respect, and I think the prime question to be established in any merger case is: Is there going to be the creation of market power; is there going to be an increase in the market power of the merging firm? If the answer to that question is "Yes," I would say I don't see that the justification of business necessity, business which is dominant and so on, comes into the matter at all.

The CHAIRMAN. Senator Kefauver, could I interject a question at this point? Here is a company, for instance, that has a predominant position in a certain field, in the production of, shall we say, the raw or semifinished material and it has a definite policy announced where although they may be in the fabricating business, they will furnish all people in that business who have been customers of theirs with a fair amount of raw material to work with.

Would you think that is a bad monopolistic situation?

Mr. KAYSEN. Sir, I think that in a situation in which a supplier has to announce to customers that he is—

The CHAIRMAN. In other words, may I say this?

Mr. KAYSEN. Excuse me, sir.

The CHAIRMAN. The raw material they furnish requires a tremendous capital investment, and only 2 or 3 companies can get it. But this company has an announced policy they will take care of all the fabricators that they have been dealing with, with a sufficient amount of raw material.

Mr. KAYSEN. My answer to you, sir, would be: Yes, that is a monopoly. It may be a good monopoly, but the very fact a firm is saying to its customers, "We are willing to supply you to meet your needs," indicates that it is a firm with considerable power in the market. If the market were more competitive, customers would not need these assurances and in general they would be able to buy at some going price.

The CHAIRMAN. The case I am talking about, I happen to know about. There are three furnishers of raw material that require capital investment. Two of those have announced they will furnish the fabricator all the material they can produce as long as they can produce it. The other firm is doing its own fabricating. Of course, it is a vertical monopoly. Now, what I am wondering is, does that come under the good-faith feature?

Mr. KAYSEN. To me, as you describe that situation, it presents a Sherman Act problem. Here are 3 firms that dominate a market, they

control all the supply, so that purchasers in this market are essentially dependent, as you put it, on the good will of 2 of these firms. I consider this to be a section 2, Sherman Act problem and I would ask the question: Is there any good reason why there should be only three firms?

The CHAIRMAN. Apparently, the only reason is that nobody else ever entered the field, because of the tremendous capital investment involved in producing the material.

Mr. KAYSEN. Then, it seems to me there might be more questions to ask. Is there anything more to the lack of entry than the capital investment?

The CHAIRMAN. May I get down to specific terms. It happens to be the aluminum industry. Certificates of necessity had been issued to two other firms. There are only three firms in the field now. Two others who have been given a certificate of necessity have failed to go ahead and develop. However, two of these companies in the field have openly announced that they are going to take care of all the fabricators regardless. I do not know how we could get another company in that field of production because that is largely dependent upon power and the basic raw material.

I am asking for information because I am rather worried about the situation myself.

Mr. KAYSEN. Well, one opportunity to get another company, or two companies, in the field was passed up when the district court in the southern district of New York decided that the Government had not made a case for divesting the aluminum company of some of its plants, of splitting is up that way.

The CHAIRMAN. In fact, I recently heard the president of one company urging people to go into fabrication. He said, "We would much rather stay out of it and let you folks do the fabrication. Let us do the reduction and the ingot production." I am wondering whether, if he should be helped along in this process, we would be contributing to a monopoly.

Mr. KAYSEN. If you are starting with a situation in which the monopoly power already exists, you may come to the conclusion that there is nothing feasible—

The CHAIRMAN. No, that is oligopoly, taking your own definition; there are three companies.

Mr. KAYSEN. Yes, sir; that is right, but you may come to the conclusion it is not feasible to do anything about it. Then, as you come to that conclusion, I think the Government or some organ of the Government has to be concerned with the fair use of this power. But the general aim of the procompetitive policy is not to have the power.

The CHAIRMAN. All right. Now you begin to understand the problem that this subcommittee faces; do you not? Isn't that right?

Mr. KAYSEN. I think you come back here to some of the suggestions that Mr. Schwartz made.

The CHAIRMAN. Isn't that right, Senator Kefauver? Isn't that the problem this subcommittee faces?

Senator KEFAUVER. That is the big problem.

The CHAIRMAN. As to what would be proper legislation; that is why we are asking people like you to come in here to give us your views and your best advice and studies for the general betterment of the United States of America.

Mr. ADELMAN. I have, Senator, if I may, one simple and practical suggestion, and that is to reduce or remove the tariff on imported aluminum, which would immediately give us another seller in the market.

The CHAIRMAN. All right; but you must realize that we built that aluminum plant at Government expense in competition with our own plants. I am now talking about Shipshaw, because I had very intimate dealings with that whole program myself.

Senator KEFAUVER. There is no aluminum imported except from Canada.

The CHAIRMAN. That is Shipshaw and incidentally, it is being helped very materially by the canalization of the St. Lawrence seaway as well as by the enormous power dams built up there at the expense of the United States Government.

It looks like we are caught on the horns of our own dilemma.

Senator KEFAUVER. I did not understand that Mr. Schwartz' statement had been made a part of the record. He did not read it.

Mr. BURNS. Most of it.

The CHAIRMAN. Do you object if we put it in the record?

Mr. SCHWARTZ. I would hope that you would, Mr. Chairman.

The CHAIRMAN. All right.

Senator KEFAUVER. I would say that all these statements are illuminating and interesting. I think Mr. Schwartz has set forth some very pertinent points of deficiency in the Attorney General's Committee's report, most of which I agree with fully. I think his suggested program for legislative action is well thought out. It has many excellent points. I am very much interested in the proposed section as to some of these corporations, that there should be some consideration given as to how you are going to get them to reduce in size.

I do not know whether it ever can be done, whether it is practical, but I think your suggestions here are worthy of great thought and consideration.

Mr. SCHWARTZ. I heard part of Mr. Barnes' testimony when he testified over here and then I was over in the House committee when he testified there. I did not get to hear your statement before the House Judiciary Committee. Some days ago, I sent over and got a transcript of it. I have read it, and I have been amazed by the strong points made in your dissent, which were omitted in the Attorney General's Committee's report, and I do not think that your dissent was treated fairly in the Attorney General's Committee's report.

Before the House committee, you bracketed the items that were included throughout the report, not in any one place, but which were included in one form or another, and the unbracketed criticisms of the report are quite important, don't you think?

Mr. SCHWARTZ. I certainly do. It was over my protest that my dissent was treated as it was.

Senator KEFAUVER. So I think that the report has been greatly weakened by the refusal of the cochairman to include some very strong criticism that you made.

For instance, you said here on page 7 of the report, in your dissent:

Antitrust measures are undermined and rendered almost absurd so long as a number of colossal enterprises remain apparently immune from the law, even though they are of greater size than their combining competitors.

Then you went on to give some specific examples. That, it seems to me, is an important matter for consideration, and yet the Attorney General's Committee's report would not include that in it.

I see here you said on page 14 of your dissent:

The chapter of the majority report dealing with administration and enforcement offers as clear a demonstration as any that the majority operates on the undeclared assumption that we have too much rather than too little antitrust enforcement.

That was your opinion, and that was not included in the committee's report : was it, Mr. Schwartz?

Mr. SCHWARTZ. I don't have the marked copy before me, Senator Kefauver, but as I recall, that was one of the portions omitted.

Senator KEFAUVER. Then you say here on page 15, speaking of the Attorney General's Committee's report :

But when they are all added together, the total effect of the recommendations is clear, to restrict the Antitrust Division's power of investigation, to curtail use of criminal prosecutions, to slow up the filing of complaints, to encumber the existence of prosecutors' discretion with novel and interminable administrative reviews on request of the defendant, to expand the use of the consent decree in a manner calculated to remove the last possibility of public scrutiny of this useful but dangerous practice, which, among other things, shields the defendants from damage suits by private parties, to water down the threat of triple-damage recovery.

That is a very pertinent criticism and about the same one I have been making about the Attorney General's Committee's report, but they would not include that; would they?

Mr. SCHWARTZ. They did not, because it summarizes and assembles my criticism. They preferred to distribute my criticisms at particular points through the body of the 390-page document.

Senator KEFAUVER. In other words, your criticism is that this is a report for the weakening and dismembering of the antitrust laws and for the support of the position of opposition to the antitrust laws, but they would not include your characterization of it in the Committee's report : is that not correct?

Mr. SCHWARTZ. Well, you have stated the criticism of the report rather more strongly than I have put it, Senator Kefauver.

Senator KEFAUVER. I don't see how it could be put any more strongly than you put it in here.

Mr. SCHWARTZ. Perhaps not. But what I am trying to say is this: I don't question the good faith of my colleagues on the Committee. I think they were satisfied with the way things were going for the most part and saw only a few complaints about what the antitrust division had been doing to them. Much stronger measures are called for and the Committee was not prepared to consider them.

The CHAIRMAN. Do you feel the Attorney General's report is a professionally competent analysis of existing laws and economics looking to the best interests of all the people of the United States of America?

Mr. SCHWARTZ. I had better answer that this way, Mr. Chairman: It is professionally competent. I don't think it is in the best interests of the people of the United States.

The CHAIRMAN. As a whole?

Mr. SCHWARTZ. As a whole.

The CHAIRMAN. Do you think it is in the best interests of the industry of the United States, taking into consideration the fact that

there are so many small industries that are so immensely valuable to our economy?

Mr. SCHWARTZ. I have a similar answer to that, Mr. Chairman. I think that what is good for the United States is good for industry.

The CHAIRMAN. I think that is very well put. I think it is the best description I have ever heard.

Senator KEFAUVER. Well, you think it is technically competent, considering the fact that of the 46 practicing lawyers who participated in it 24 of them, as of the time they were participating, were defending cases brought by either the Department of Justice or by the Federal Trade Commission; that is true, is it not?

Mr. SCHWARTZ. I have seen the Patman list, Senator Kefauver. I have no independent knowledge of those facts, but I have no doubt that these people knew what they were talking about from experience.

Senator KEFAUVER. Mr. Barnes agreed here that 22 were defending cases in the courts against the Department of Justice, and then it develops that two were defending cases brought by the Federal Trade Commission, so this gave them a wonderful opportunity to write a brief in the name of the Government, a brief for the defense of antitrust cases, in the name of the Attorney General's committee, did it not?

Mr. SCHWARTZ. It gave them an opportunity to, Senator Kefauver. But I repeat that I do not question the good faith of my colleagues on the committee. I think rather that their experience operated in this way. If you take men who have been defending large corporations, as many of these people had, and you ask them, "What is wrong with the antitrust laws, from your experience?"—because we were not conducting any independent investigation such as congressional committees do of the facts—just say, "In your experience, what is wrong with the antitrust laws?" well, their experience is that they got pushed around in court or that they lost this case or that in the Commission, or that they were required to produce that evidence in response to a grand jury subpoena. So their complaints tend to take that character, since that is what their experience constituted.

Senator KEFAUVER. I did not mean to impute a lack of integrity to any of these distinguished gentlemen, but just that their experience has always been against antitrust laws.

Mr. SCHWARTZ. Pinching them.

Senator KEFAUVER. Pinching them, and they want to get unpinched.

The CHAIRMAN. In other words, they had always been on the side of the defendant?

Mr. SCHWARTZ. No; I cannot say always, Mr. Chairman.

The CHAIRMAN. I mean the group that Senator Kefauver is talking about.

Mr. SCHWARTZ. I am sure some of those men had been in the Anti-trust Division before they were in private practice, at this time.

Senator KEFAUVER. There is a little group around here that is always trying to weaken antitrust laws whenever they have the opportunity to come up here and testify on a bill on the Hill. You see the same faces, the same group, and that whole group is right here on the Attorney General's Committee. You know that is the truth: do you not?

Mr. SCHWARTZ. I accept your word for it, Senator Kefauver. I have not attended many hearings. If you tell me that same group has been testifying, I am sure it would be correct.

The CHAIRMAN. You are not a habitue of Washington?

Mr. SCHWARTZ. No, Mr. Chairman, I come down very occasionally.

Senator KEFAUVER. Here on page 14 of your minority report:

The chapter of the majority report dealing with administration and enforcement offers a clear demonstration—

no, I have already read that. Here is another one over here, on page 18:

What are the objections to the grand jury subpoena? We are told that it debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.

That is a quotation from the report—

and criminal procedure should not be invoked where the Department of Justice has not initially contemplated indictment. This view entirely misapprehends the nature of Sherman Act violations—

and so forth.

They did not include that in this report?

Mr. SCHWARTZ. No, and Assistant Attorney General Barnes expressed regret over that one before the Celler committee, I believe.

Senator KEFAUVER. Then you come down here and you dissect in a fine way this recommendation on damages on page 20:

The majority makes a direct attack on damage suits proposing that the trebling of damages be made discretionary rather than mandatory. It is difficult to see what public exigencies led to this proposal. Certainly the Committee made no finding of any adverse effect of the mandatory treble-damage provision on the public interest.

You go on to point out that has been the law for 65 years, and so forth.

They did not print that part of your minority report in the Attorney General's Committee's report, did they?

Mr. SCHWARTZ. I believe that was omitted.

Senator KEFAUVER. Then you dissented from this undercutting thing on page 23, this beating competition and undercutting under the Robinson-Patman Act:

I dissent from the majority's proposal of the proposition of charging different prices to purchasers for the same product who compete in its resale, that it does not establish a prima facie violation of the Robinson-Patman Act—

and so forth.

That was not included; was it?

Mr. SCHWARTZ. I have no recollection of that.

Senator KEFAUVER. It is not in here.

Mr. SCHWARTZ. If it is indicated in the report you have.

Senator KEFAUVER. Finally, here is one thing they would not include that really shocks me. At page 29 you said:

Finally, it is worth noting two instances in which the majority report does recommend a change in existing law, in both cases to weaken it.

So, actually, there are two recommendations to change existing law, in both cases, rather than strengthen the law, they would weaken the law. And you made the statement that they would not include it in the report, would they?

Mr. SCHWARTZ. They exercised discretion as to what they thought was worth printing.

Senator KEFAUVER. Well, do you think that is an important statement to leave out?

Mr. SCHWARTZ. To tell you the truth, Senator, I think that if you are on a committee and you have a dissent, it ought to be printed whether it is important or unimportant. If I had known that my dissent would not be printed as I submitted it, I would not have accepted appointment to the committee.

Senator KEFAUVER. You spent a lot of time working and then could not get your ideas printed as you presented them, could you?

Mr. SCHWARTZ. That is correct.

Senator KEFAUVER. One other thing that came out, I want you to enlarge upon a little bit. Somewhere in your report you tell about the recommendation you had that truck carriers be taken out from the jurisdiction of the Interstate Commerce Commission on the theory that the little fellows with one or two trucks going into business, until they reach a large position where competition is very keen, should not have to be under the jurisdiction of the Interstate Commerce Commission; isn't that correct?

Mr. SCHWARTZ. That is my position, that there ought not to be a requirement, a legal requirement, of a certificate of public convenience and necessity to engage in a business like trucking.

Senator KEFAUVER. And that position was actually agreed to by a vote of the Attorney General's Committee; was it not?

Mr. SCHWARTZ. The reason I hesitate, Senator Kefauver, is that we are under some obligations, the exact scope of which I am uncertain of, not to disclose the internal operations of the committee. That matter was discussed.

Senator KEFAUVER. Your position was agreed to, and then Mr. Oppenheim got busy and—

Mr. SCHWARTZ. Well, I just had better say, "Yes"; that is the fact, and if you know it—not from me—I am not going to deny it. That is what happened.

Senator KEFAUVER. A vote was taken, your position was agreed to as to these small truckers and it did not please Mr. Oppenheim and one other man. They got busy and called around and then when they came to write the report, they did not say anything about the majority having agreed to your position. They just said some had a different opinion; isn't that right?

Mr. SCHWARTZ. Yes.

Senator KEFAUVER. What page is that on? I read it the other day.

Mr. SCHWARTZ. Well, my position is on page 31 of the dissent. Are you speaking of the report or the dissent?

Senator KEFAUVER. I am speaking of the report.

Mr. SCHWARTZ. Yes; it is in the chapter on exemptions—I will have it for you in a moment.

Senator KEFAUVER. I don't know whether your position is right or not, but it seems to me if the committee agreed to something, it should have been in the report as it was agreed upon. It certainly ill behoves the cochairmen to then try to get the members to change their position about it for some strange reason.

Mr. SCHWARTZ. Yes; it is on page 269, Senator Kefauver.

Senator KEFAUVER. 269?

Mr. SCHWARTZ. Yes; down at the—beginning with—

While the whole committee accepted these general principles, views differing in other respects—

and so on.

Senator KEFAUVER. Now the thing is that he says the whole committee agreed upon something that is the exact opposite of what the committee actually did agree upon; isn't that correct?

Mr. SCHWARTZ. It is hard for me to interpret that language. They say:

The whole committee accepted these general principles.

I may say that I never did.

We urge that moves toward regulations be taken only with full recognition of the effects of such exceptions to the policy favoring competition which, as a general rule, we endorse.

That was not a general principle that I espoused. It says—

Don't institute regulations for competition without realizing that you are affecting competition.

Well, of course, every such move is made with a full realization that it affects competition.

Senator KEFAUVER. Well, the important factor is, Mr. Schwartz, the committee by a vote voted to accept your position as to these small carriers, whether it is right or wrong. There was such competition that they be removed from the jurisdiction of the ICC. That was not included in the report, was it?

Mr. SCHWARTZ. The report does not reflect the vote that was taken in terms endorsing a reversal of the trend toward substitution of regulations in place of competition.

Maury, I have to ask you if that is not substantially your recollection?

Mr. ADELMAN. I think it was the sense of the committee approximately what is stated here, that on the whole we looked with disquiet on any trend to increasing regulation and to substitute the regulated for the competitive principle. I think I had better not comment on what particular vote was taken on any particular item.

Senator KEFAUVER. That is all, Mr. Chairman.

The CHAIRMAN. May I say it has been a pleasure to have you gentlemen here. I want to thank you, all of you, for coming down and helping us out, because it is our hope that as a result of these conferences, we can get some sensible laws that are workable under modern conditions of competition.

(Whereupon, at 5 p. m., adjournment was taken subject to the call of the Chair.)

(Attached is a list of replies by Prof. Morris Adelman to supplemental questions sent to him by the subcommittee.)

Will you please define the following in terms of their meaning, as used in your testimony before this subcommittee?

Question. Monopoly.

Answer. Monopoly, in the economic sense, means a degree of control over the supply of a commodity sufficient to have an effect upon price.

Question. Duopoly.

Answer. Duopoly means a market supplied by two sellers.

Question. Oligopoly.

Answer. Oligopoly strictly speaking means few sellers. It is generally though not always used to mean so few sellers of a relatively homogeneous commodity that each is aware of the reactions of all the others to any move affecting price.

Question. Is the term "oligopoly" useful from either an economic or antitrust standpoint?

Answer. I would personally prefer the term "few sellers" or "fewness," but some such term is needed.

Question. Are oligopoly markets inherently incompatible with active competition?

Answer. Oligopoly markets are not inherently incompatible with active competition.

Question. Competition and workable competition.

Answer. Competition in any market means enough individual rivalry to generate substantial downward pressure on the price of, and the profit derived from, any particular product or service. It therefore serves as an incentive to discover new methods or processes which have not been subjected to this erosion.

"Workable competition" is sometimes used in the foregoing broad sense, sometimes to mean sufficient competition to satisfy some legal or public policy standard. The synonym "effective competition" was used by Judge Knox in the second Alcoa decision (91 F. Supp. 333 (S. D. N. Y. 1950)), as indicating the general purpose of the Sherman Act.

Question. Do you advocate the adoption of the concept of effective or workable competition?

Answer. I think some such concept as workable or effective competition is necessary for any kind of antitrust enforcement.

Question. Market or market place.

Answer. The term "market" is a summary expression for all of the forces of demand and supply that determine the price and production of some product; stated differently, it comprises all buyers and sellers whose demand and supply, individually or together, have any effect on price.

Question. Economic concentration as related to competition and markets.

Answer. Economic concentration may refer to the percent of ownership of the assets of some section of the economy, or of employees, etc., by the largest companies. The section may be as broad as all gainfully employed persons, or as narrow as a single market, depending on the purpose of the inquiry. If concentration is measured in a single market, it is a measure of fewness, or oligopoly.

Question. Big business.

Answer. Big business may refer to absolute size, e. g., total assets, number of employees, valued-added, or (generally the poorest measure) sales. Or it may refer to concentration, already discussed.

Question. Is big business the same as monopoly?

Answer. Big business is not the same as monopoly. Absolute size is irrelevant to market control or market power. Relative size, i. e., concentration within a market, may have a good deal to do with monopoly, but there is no simple or general rule for it.

Question. Integration—vertical, horizontal, conglomerate.

Answer. Vertical integration refers to the combination, under common ownership, of successive stages in the productive process. Horizontal integration refers to the combination of related, i. e., part or fully competing products. Conglomerate integration refers to the combination of unrelated products.

Horizontal integration may confer monopoly power; it is a matter of degree, like share of a market. Vertical integration has no significance in itself, but may serve to spread control existing at one stage to another stage. Conglomerate integration has little if any significance for the degree of competition or monopoly.

Question. Do you think that American industry is unduly concentrated?

Answer. The question in its present form is not meaningful to me. In many industries concentration is greater than it need be to permit economies of scale.

Question. Do you consider the present degree of concentration as a possible danger to economic freedom and, as propounded by some schools of thought, the political freedom of the country?

Answer. Economic freedom means competition to some people, and to others it means freedom from the pressures and penalties of competition. In some industries, concentration may be so great as, in combination with other circumstances, to threaten or reduce competition. In others, economies of scale

may require concentration, and the removal of smaller and less efficient units, thus threatening their economic freedom.

Question. Would there be an increase in the number of rivals and hence the amount of rivalry if we did not have so much concentration of economic power in certain industries?

Answer. If "industries" in this context mean "markets," the answer is "Yes," provided there is no collusion among the smaller-scale enterprises, and no exclusive or governmental pressure against increase in size by the more efficient or as necessary for economies of scale.

Question. Do you believe that economic concentration must be stopped, and the trend reversed, as a safeguard against the possible necessity of Government regulations?

(a) If not, why not?

(b) How do you suggest that deconcentration be brought about?

Answer. If this question implies that concentration is increased, either for the economy as a whole, or for large segments, or in more industries than it is decreasing, then the implication is contrary to the facts, at least down to the early postwar. There are as yet no data for more recent years.

Question. Do you believe that in any American industries or markets competition is actually imperfect in various forms and degrees?

Answer. I believe that in all American industries and markets competition is actually imperfect in various forms and degrees, because of lack of complete knowledge, or complete mobility.

In the past it could be said that in many agricultural and nonagricultural raw products, competition was "pure" in the sense that no seller or buyer had any influence over the price. Because of Government programs that directly or indirectly control the supply and price of these commodities, they can no longer be considered as competitive; in fact, they are the most effectively monopolized.

Question. Considering the definition which you have already given for big business, do you believe that big business is compatible with a competitive system?

Answer. I believe that big business is compatible with a competitive system, and that any attempt to get rid of big business would mean not more but considerably less competition.

Question. From an economic point of view, what kinds and degrees of competition are contemplated by the antitrust laws?

Answer. Answered with question 9.

Question. As an economist, do you see different standards of competition contemplated by different laws—as for example, under the Sherman and Clayton Acts and the Robinson-Patman Act?

Answer. Questions 8 and 9 answered here. The antitrust laws appear to contemplate a condition of imperfect but active competition, corresponding roughly to "workable" or "effective" competition as defined earlier. The degree of competition varies considerably from time to time, and from case to case. Some parts of the antitrust laws are either difficult (but perhaps not impossible) to reconcile with this objective—the Robinson-Patman Act. Some parts are completely antagonistic, the laws legitimizing "fair trade."

Question. As an economist, would you say that dissolution, divestiture, or divorce is the only effective remedy for oligopolistic industries? If not, what would you suggest?

Answer. Where an oligopoly industry is not workably competitive, the remedy can usually be found in striking down some particular trade practices which were the vehicle for the understanding or agreement on production and prices. The Sherman Act, section 1, reaches them all; the Clayton Act reaches only some, but much more expeditiously. There remain a small number of instances where nothing short of divestiture will do.

Question. Do you believe that section 7 of the Clayton Act, as amended, is adequate to stem incipient monopoly and the substantial lessening of competition throughout the economy?

Answer. I believe that section 7, properly enforced, is sufficient to prevent any increase in the degree of monopoly through merger. It does not reach other methods of lessening competition.

Question. Would a more rigorous enforcement policy since 1950 have checked the tide of mergers which had developed throughout the economy?

Answer. I fail to understand what is meant by a "tide of mergers." There is no basis, so far, for the belief that the degree of monopoly has been significantly increased through mergers since 1950. It is conceivable and even plausible that

some of the mergers which have occurred since then have lessened competition in their respective markets, and should therefore not have been permitted. I am not satisfied that the enforcement agencies have kept themselves sufficiently and currently informed on merger activity and its industry-by-industry impact; I do not believe they have the machinery or manpower to do it. The blame, if such there be, should probably be divided between them and the Congress.

Question. Several times Congress has passed laws for the purpose of putting a brake on merger movements. Yet mergers have continued at a rapid pace. Why?

(a) Was it because the laws were not properly framed?

Answer. For the 1914-50 period; yes.

(b) Properly enforced?

Answer. For the period since 1950, see the previous question.

(c) Because the economic facts presented perplexing problems difficult to solve by legislation and court action?

Answer. The economic facts presented problems which were neither insuperable nor demanded inordinate manpower or money. But the necessary resources were not provided, nor are they, in my opinion, provided today. Partly, though not wholly, in consequence of this fact the economic staff work of the enforcement agencies is very weak.

Question. What type of mergers would you consider harmful to the economy from the standpoint of the national antitrust policy?

Answer. Any mergers which lessened competition.

Question. What economic facts, or situations, do you think should be of prime importance in determining whether a proposed merger would be harmful to the economy?

Answer. I am not able to answer this question briefly. Perhaps it is proper to refer to my statement in Current Business Studies No. 21, issued in December 1954, by the Society of Business Advisory Professions.

Question. Will you comment upon the three factors which the FTC says shall be considered in analyzing a merger?

(a) The character of the acquiring and acquired company and the transaction.

(b) The character of the markets affected.

(c) Immediate changes in the acquiring company and in the adjustments of other companies operating in these markets.

Answer. These factors seem too broad to be operational. Presumably the Federal Trade Commission used them as summary statements for a more precisely drawn list.

Question. Do you think greater emphasis should be given to other considerations?

Answer. The three factors mentioned appear to include all possible considerations.

Question. How do you view the tendency of big companies taking over their customers? For example, the steel companies taking over most of the steel-drum industry.

Answer. I have not been apprised of the existence of this tendency, and have no knowledge of the steel-drum industry.

Question. Has not the pattern of vertical integration, as exemplified by steel and later by automobiles, set the price of new entry into the fields at practically prohibitive levels?

Answer. Aside from high-capital requirements, there seems to be little similarity between barriers to entry in these two industries. My impression is that the chief barrier to entry into the automobile industry is the need of a distributor organization. This is only indirectly, if at all, a matter of vertical integration; it is essentially a problem of few distributors in their respective local markets.

Question. Do you believe that ease of entry into an industry is one of the large economic problems of today?

Answer. The degree of ease or difficulty of entry is one of the fundamental determinants of competition in any market, and is, therefore, an abiding problem of a competitive society.

Question. What recommendations would you have to reducing this barrier?

Answer. Aside from a constant vigilance to remove any barriers imposed by existing competitors, some attention ought to be given to the possibility of making organized research more accessible to small and new business concerns. I also believe that high rates of corporate and individual income taxation have the effect of discouraging entry and growth, and encouraging a lower dividend payout and a higher rate of reinvestment by existing concerns.

Question. Even though a company may dominate a market because of internal growth, would the fact that its domination alone gave it undue monopoly power be objectionable?

Answer. Monopoly power I would consider objectionable as such, however acquired; although some methods of acquisition may also be objectionable in themselves.

Question. Would you be opposed to dominance regardless of whether it was achieved by internal or external growth?

Answer. If "dominance" in this connection means possession of monopoly power, I would regard it as undesirable if achieved by internal growth and even more undesirable if achieved by merger. Furthermore, in trying to weigh the evidence of whether the power did in fact exist, growth by merger would count as evidence, admittedly not conclusive, of this power.

Question. Is the real evil of dominant companies their power to fix prices, control the market and dominate their field of endeavor?

Answer. Yes; except that I consider "dominate" as having no meaning except "to fix prices [and] control the market."

Question. Do you believe that so-called stabilization of an industry through economic concentration can ever be justified?

Answer. By "stabilization" I understand an arrangement, public or privately sponsored and enforced, to prevent the operation of competitive forces in order to stabilize higher prices or lower production, decree fair shares of output, etc. There are a very few instances where such arrangements can be justified for reasons of the national defense. Where this is the case, the exception should be made by the Congress, which should also set the standards for maximum prices and profits.

Aside from these instances, there seems no justification for permitting "stabilization" by private business. Matters are much worse where the law makes or permits an exemption from the competitive rules, delegating to private parties the legislative function and providing for no check on their actions but their own self-restraint.

Question. At what point in the development of an industry do you consider optimum size to be in the public good?

Answer. Optimum size may be optimum either for the economy or for the private interests of the company. Under the first meaning, if optimum size is so large as to make competition impossible—natural monopolies—then the government must supplement free enterprise with some form of regulation, its degree depending on the circumstances. In other words, I believe the competition or regulation dichotomy to be a false one.

Under the second meaning the bigger the better, up to the point of complete monopoly, unless the difficulties of coordination and management outweigh the gains from market control.

Question. What steps would you take to control optimum size?

Answer. Where optimum size was so large as to prevent competition, see previous question. Otherwise, no problem is presented except to maintain competition as the perpetual selective agent.

A STUDY OF THE ANTITRUST LAWS

FRIDAY, JUNE 3, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10:10 a. m., in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore, Kefauver, Wiley, and Dirksen.

Also present: Joseph W. Burns, chief counsel, and Joseph A. Seeley, assistant counsel.

The CHAIRMAN. The subcommittee will come to order.

The first witness today will be Prof. Donald F. Turner, of Harvard Law School.

STATEMENT OF DONALD F. TURNER, ASSISTANT PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. TURNER. Mr. Chairman, I will read my prepared statement. I would like to interpolate 2 or 3 things that I think were raised by the discussions yesterday.

The CHAIRMAN. Go right ahead.

Mr. TURNER. My name is Donald F. Turner, assistant professor of law at Harvard Law School. I would like to discuss further some of the issues raised yesterday by Professors Adelman and Kaysen and Schwartz, with particular emphasis on the problems of administration, enforcement, and compliance.

A principal feature of the Attorney General's committee report is its emphasis on the importance of market analysis to a sound judgment in antitrust cases. Few will disagree with this as a general proposition, and I most certainly do not. But there are obvious potential difficulties with this approach that ought to be minimized wherever possible. Case-by-case market analysis imposes a heavy burden on enforcement agencies, defendants, and the courts. Moreover, unless there is substantial agreement and understanding on the technique and standards of analysis, the law becomes vague and business firms have difficulty determining whether or not they are complying with it. The wider the room for dispute, the less likely it is that there will be serious efforts to comply.

The considerable virtue of per se rules of illegality, on the other hand, is that they can be readily enforced and readily understood and complied with by those who care to do so. The potential weak-

nesses of per se rules are, first, that they may rest on a bad generalization or an overgeneralization and thus catch the good with the bad; and, second, that they may not be general enough, so that other techniques of achieving bad results are allowed to slip by.

Fortunately, economic analysis and per se rules are not necessarily inconsistent with each other. Economic analysis may convincingly demonstrate that certain kinds of practices or conduct are almost invariably anticompetitive in nature or effect; or that they are usually anticompetitive, and that where they are not, they are neutral or produce a good which is far outweighed, generally speaking, by the bad. When this can be shown, case-by-case market analysis of actual or probable effects can be dispensed with—much is gained and little if anything lost by a rule that the particular conduct is illegal per se. Such has been the deserved fate, in my opinion—as antitrust law has developed—of price-fixing agreements, group boycotts, market-sharing agreements, and—for all practical purposes—tying clauses.

It seems to me that in the light of enforcement and compliance considerations, the per se approach—perhaps in modified form—might well be applicable to other kinds of conduct; and that this committee would find it fruitful to investigate the possibilities. I suggest, to cite an extremely important area, that careful economic studies might justify a more specific and more stringent statute against mergers than we now have.

The CHAIRMAN. In other words, is not the merger the basic or one of the basic causes of monopoly?

Mr. TURNER. That is right.

The CHAIRMAN. In other words, you do two things when you merge: You get a larger operation and you eliminate a competitor.

Mr. TURNER. That is right. You have taken a competitor out of the market: you have got one less person making a decision.

The CHAIRMAN. The fundamental cause of all that is, shall we say, concentrations of wealth to such an extent that they can finance such operations?

Mr. TURNER. Well, by and large, that is correct, Senator, that the companies which are likely to do most of the merging are the companies who can afford to do it, and the companies that can afford to pay the higher prices.

This means, I would just guess, I mean, without looking at the pattern or studying the pattern of mergers, that when any small company contemplates selling out whenever it is approached, the chances are that the larger companies are going to be able to make the best offer, and unless they are prevented from acquiring the firm they are likely to be the one to make the purchase.

The larger companies can make a better price offer because they have greater resources, because if there is really going to be an anticompetitive effect, it pays them to take the assets over for more than they might be worth as an independent concern.

Now, in the past, several of our most notable antitrust cases involving mergers showed a pattern just like this: The old American Tobacco case, the buildup of that great aggregation, was largely done by the acquisition of small companies at prices far in excess of the actual value as independent concerns; and what frequently happened in those days was that the assets were just completely dismantled. The purchase was made to take them off the market.

The CHAIRMAN. Let us get back to another basic cause. We have had to, shall we say, force-feed the introduction of expansion, occasioned in many fields; is that not correct?

Mr. TURNER. That is right.

The CHAIRMAN. And all too often the smaller companies did not get a commensurate buildup with their larger competitors. I am talking about the certificate of necessity, for instance. Most of the certificates of necessity in steel expansion went to the big companies because they had the capital to build the plant, and then with the writeoff of 20 percent a year on their taxes, the plants eventually really cost them nothing because it was taken out of their tax-free earnings; is that not right?

Mr. TURNER. Well, I do not think that is strictly correct, Senator.

I think the fast writeoff merely means that they have gotten their investment out quicker than they ordinarily would.

The CHAIRMAN. Here is what I am getting at. Here is a small steel plant, and here is one of its big competitors which gets in on the expansion program with a tax writeoff; if it wanted to expand, however, it has to do its expansion with funds saved after taxes.

Mr. TURNER. Unless they can get their certificate.

The CHAIRMAN. Unless they can get the certificate; and if they do not get the certificate, the Government has discriminated against them, unwittingly, it is true, in the interests of the national safety, but don't you think that has caused a certain amount of buildup that might be dangerous?

Mr. TURNER. Well, Senator, I am not enough familiar with the facts in the various industries as to who has and who has not gotten certificates to make my own judgment on that.

I would certainly agree with your suggestion that the pattern of issuance of Government certificates of convenience and necessity, particularly when you have expansion as big as you have done in steel and in aluminum and in other industries, will certainly have an important impact on the overall industry. What the Government does can either make the markets considerably more competitive, or considerably less competitive.

Now, as you, of course, know, other considerations come into the issuance of these certificates if you are in an awful hurry, and you have got to get the stuff done fast and, I would suppose, in a lot of cases you will find that the large companies can produce faster and quicker than the smaller companies, and if speed is important—

The CHAIRMAN. That is, they cannot only produce, but they can expand with proper supervision because of the number of employees who have the special skills necessary.

Mr. TURNER. They have the complete management, they have got more personnel, they can probably absorb any given expansion a lot more easily than a small company can.

The CHAIRMAN. I was very much worried about the steel expansion and certain other expansions because it tended to a concentration of industry in certain areas that made us highly vulnerable to bombing, from the defense viewpoint. We built more steel plants up in Pennsylvania, we built more in Indiana, and we enlarged the target area, instead of scattering it: whereas the smaller steel companies, which were more inland and went farther into the South, did not get that expansion.

Mr. TURNER. Yes.

The CHAIRMAN. The same applied in electronics and various other fields where they would build another big plant just beside one already in existence.

Mr. TURNER. Well, it is something which has always been somewhat of a mystery to me why particularly the Korean expansion did not take this consideration into account much more than was done, that is, the purely defense problem of getting our industrial potential scattered out.

Now, this does not necessarily imply that you do it by small companies; presumably you could take a big company and tell them that they could build a plant out in Missouri or Arkansas, but it is possible that you can have a situation of (1) promoting dispersion; and (2) building up some smaller companies as competitors.

The CHAIRMAN. I think of this in comparison with the British Board of Trade. I have always been opposed to the idea, but when it comes down, for instance, to scattering their industries around, the British Board of Trade does an admirable job on that. They keep everything decentralized, and when you build a plant, you have to accept the location that is approved by the Board of Trade. They look at the question of manpower, transportation, isolation, and everything else in locating that plant.

Mr. TURNER. Yes, and depressed areas they take into account also, as I recall.

The CHAIRMAN. Yes; that is what I said, they take manpower into account.

Mr. TURNER. Yes.

The CHAIRMAN. Transportation and isolation are taken into account.

Go ahead with your statement. I was going afield, but I do think the big thing we must look at in the whole question of monopoly is what are the basic causes of monopoly, what is the food on which it feeds, and once you get that, of course, it solves itself. We pass laws against murder, but there are still murders committed; and we pass them against the sale and use of narcotics, but they are still peddling narcotics.

Of course, laws do control to a great extent those situations.

Go ahead, please.

Mr. TURNER. What I wanted to put in at this point was just a brief discussion of the importance of a strong antimerger statute in this respect: An antimerger statute can both maintain what competition you have in industries now, and it can also, it seems to me, over the course of time, simply by being there and preventing mergers, considerably expand competition for this reason: That over the course of time you get the constant development of new products, new techniques of production, and the growth of new companies, which will tend to erode the position of existing concentration of power.

For example, it seems to me quite likely that if we had had a very strong antimerger statute, concurrently with the Sherman Act in 1890, that the existing pattern of industrial concentration would be considerably different from what it is now; and if such a statute were put into effect now, it seems to me that over the course of time a lot of existing concentrations might well be decreased just by the changes that come in.

The CHAIRMAN. Here is another question: Don't you think that the pattern of Government buying also can contribute toward the growth of monopoly?

Mr. TURNER. It certainly can, particularly in product markets where the Government is the biggest buyer or one of the biggest buyers.

The CHAIRMAN. The Government has since 1939 developed into the biggest buyer in the world, the United States Government has; is that not right?

Mr. TURNER. That is right.

The CHAIRMAN. For instance, I remember a very bitter letter I received from the president of Packard Motor Co. complaining about the specifications on passenger vehicles issued by the Defense Secretary in 1953. This was before the Packard merger. He said it just simply cut all the independents out of an opportunity to bid on passenger vehicles; that the only vehicles that would fit would be General Motors.

I had no answer because I remember that at the outbreak of World War II, it took us 2 years to get orders properly distributed in order to increase production to what it should be.

It was a whole lot easier for the Government agency to call up some big manufacturer and place an order than it was to shop around for bids by a number of smaller ones and that, in turn, contributed to monopolistic practices.

Mr. TURNER. It certainly does.

I think, however, of one thing you have to keep in mind, assuming that the Government adopts a policy of favoring small businesses. I think it would be unwise to carry it to the point where the Government is really propping up the smaller businesses so that they sort of get to the point where they rely on the Government business for their survival.

It seems to me important to create an atmosphere in which the smaller companies are encouraged to develop their resources and their efficiency to the point where they do not need any favoritism from Government.

The CHAIRMAN. I know. But leaving out the question of favoritism, is it not a fact that we have not followed the policy used by business itself in our buying?

Mr. TURNER. I just would not know.

The CHAIRMAN. A big corporation would have a purchasing department which would shop all over the market for what they wanted, and distribute their orders for and on the basis of 2 or 3 things: One, was building up good will; another one was where they could get the best product at the lowest price, even if they had to buy from 3 or 4 different companies. They would do that; whereas the Government does not, because we simply do not have any professional purchasing department which knows the business of procurement.

Mr. TURNER. This is something, Senator, I am not familiar with.

The CHAIRMAN. In other words, a man in procurement in any one of our agencies cannot afford to make a career out of it because the salary is low, and he is barred from going back into business again for 2 years, unless he happens to be an Army officer or a Navy officer, or an Air Force officer. Therefore, it is very hard to get career experts in purchasing.

Mr. TURNER. This is not a problem peculiar to purchasing experts, however.

The CHAIRMAN. Oh, no, it is not peculiar to this; it goes to everything.

Mr. TURNER. It runs through the whole civil service.

The CHAIRMAN. But a determined effort by the Government to see that everybody had a chance to bid, and everybody had an equal opportunity to come into the market, and not have the statement that has been so frequently made to me, "Well, I don't know those people, we have never bought from them before, we don't know whether their product is all right"—there should be a determined effort by the Government to see that everybody had a chance to bid.

Mr. TURNER. I do not think there can be any argument on that. The Government certainly ought to make it possible for people to bid on an even basis for their purchases.

I think the Government might go further in some cases and consciously adopt a policy of attempting to get small companies in certain industries over the hump, so to speak, assisting them with purchase, maybe on a favored basis, as has been done for small business under numerous statutes, in the hope that they will thereby be able to develop into independent competitive units.

The CHAIRMAN. Congress has sought to do that for some time, particularly to take care of the companies in depressed areas by giving even a slight price advantage, and it has not worked out.

Mr. TURNER. Yes, sir.

The CHAIRMAN. Go ahead, please.

Mr. TURNER. Well, the comments that I have on the possibilities for a more extensive merger statute are somewhat similar to those made by Professor Schwartz yesterday.

First, while section 7 of the Clayton Act, as amended, has not been definitely interpreted as yet, some portions of the Federal Trade Commission's opinion in the Pillsbury Mills case, and of the Attorney General's Committee's report, seem to contemplate a broader investigation, and a more inclusive protection, of mergers than may be necessary. I think it is quite possible that effective enforcement of our antimerger policy has been or will be seriously hindered by this.

If economic studies should show that mergers involving firms of greater than a certain relative size are likely to have adverse effects on competition in the vast majority of cases, we could then dispense with the requirement of showing the probability of harm in each particular case, even though a considerable number of innocuous mergers might thereby be prevented. Of course, a statute should not preclude significantly beneficial mergers, but this could be avoided by providing for affirmative justification along certain lines.

To be more specific, thorough study may show nothing seriously wrong or dangerous with a statute which made presumptively illegal any horizontal merger involving firms together selling more than, say, 15 percent of the goods in any market in which they compete, and any vertical merger which actually foreclosed competitors from a specified percentage of the consuming market or from access to a specified percentage of raw materials or supplies. Exceptions could be made where the acquired firm is insolvent or imminently so, or where the merger would produce clearly substantial operating econ-

omies; but the burden of proof would be on those supporting the merger.

The CHAIRMAN. Do you differentiate in your thinking between a merger and what we call captive corporations?

Mr. TURNER. No. I am referring to—

The CHAIRMAN. Or wholly owned affiliates?

Mr. TURNER. I am referring to acquisitions of other corporations, directly or indirectly, as the present statute does.

The CHAIRMAN. Yours would apply to both cases?

Mr. TURNER. That is right.

I am not talking, however, of the situation in which a corporation builds its own additional plants which it incorporates or does not incorporate; I am referring to acquisitions.

At this point I want to just briefly discuss another very important area for prospective effects, and that is the area of patents, and I will say at the outset I do not have much definitively to say about it; I merely have a very strong suspicion that existing patent protection may well be far greater than is necessary to promote the rate of technical progress and new development that we have had.

By and large, research these days is carried on not by the individual inventor in the attic, but by businesses on a fairly organized basis or in the laboratories of academic institutions.

Now, I just feel that an awful lot, if not close to all, of these kinds of developments would go on at much the same rate even though patent protection were substantially reduced, or the alternatives open to patent holders were substantially reduced.

The CHAIRMAN. However, have you not found that corporate research has been largely applied research, as distinguished from basic research which, in my definition, is discovery?

Penicillin was discovered long before applied research ever made it applicable, and most of our big companies are working on applied research.

The original discovery of the substance may have been made in a college laboratory or some other place, and usually and frequently is. But the commercial company put their technicians to work in working out a way of producing it.

Mr. TURNER. Yes, by and large, I think that distinction is correct. The industrial firms tend more and more to concentrate on what might be called either applied or directed research.

The CHAIRMAN. Yes.

Mr. TURNER. That is, they are interested primarily in certain kinds of things.

The CHAIRMAN. And prior to 1940, by 1939, we relied largely for basic discovery on European research; is that not right?

Mr. TURNER. Well, European or domestic academic research.

The CHAIRMAN. Yes.

Mr. TURNER. There are exceptions to this.

The names do not come to my mind immediately, but there have been some companies that have consciously set aside funds for sort of freewheeling research to see what they will come up with.

But in any event, I do not think any of these varieties in research, the academic or industrial, would be very much affected if certain things were done to the patent laws.

The CHAIRMAN. I do not know whether you know it, but the Patent Subcommittee of the Judiciary Committee of the Senate is starting a complete and thorough investigation of the patent laws.

Mr. TURNER. Yes. My recollection is that when the last revision of the patent code was passed, it was suggested in the committee reports that this was sort of a tentative revision of the statute, and they contemplated further work.

I think an awful lot of investigation or at least collection of past investigations could be brought to bear on the standard of patentability.

It is notorious that for the past 10 or 20 years you can get patents comparatively easily from the Patent Office, but once you go to court, the higher you go, the less chance there is of a patent being upheld.

In other words, the standards of patentability which have been espoused by the Supreme Court are clearly much tougher and much more stringent than those of the Patent Office. Very few patents that get to the Supreme Court survive, and yet this has not seemed to have any great impact on the Patent Office.

The second general area that bears a good deal of study is the restrictive provisions that patentees are allowed to include in licenses for manufacture and sale.

I would hazard a guess again, without having too much to go on, that you could prohibit patentees from putting price-fixing clauses in their license agreements, from putting in grant-back clauses whereby the licensee agrees to give back to the patentee any improvement patents he acquires, clauses whereby the licensee agrees not to contest the validity of the patent and, perhaps, severe limitations on clauses that put territorial and use restrictions on the licensee. I have a feeling that all of those could be substantially curbed without having any serious impact on growth and development.

The CHAIRMAN. What do you think of forbidding the exclusive licensing of patents?

Mr. TURNER. What do you mean by that, Senator?

The CHAIRMAN. Well, where they are only licensed to one manufacturer.

Mr. TURNER. This is a fairly complicated issue. The TNEC, as I recall, recommended compulsory licensing in situations of nonuse, that is, where the patentee is just sitting on his patent.

I believe that a couple of countries have tried that. I believe you have such a statute in Canada. There is no evident strong result from this, that is, there have been very few cases in Canada of people coming in and asking for a court to compel the patentee to issue a license.

Now, this does not necessarily prove that the law is not important. It may well be that because the law is there, very few patentees then refuse to license.

Once you get away from nonuse, that is, if you get to the point where the patentee is either using the license himself only, or is licensing only one company, it is very troublesome, really, to build up a rationale for compelling him to license to all comers.

It seems to me if you did put that compulsion in, you might well be cutting into the reward to a sufficient degree to discourage it.

The CHAIRMAN. I do not know whether you are aware of it or not, but the United States Government did have a great deal of trouble

with the question of patents in the early days of the last war, due to the fact that manufacturers, some patent owners, would not license to anybody.

For instance, in the Standard Oil cases—there was a case with respect to rubber. Then we had the screw case, in which a screw company refused to heed the demand for screws by airplane manufacturers. It slowed up the airplane program quite materially to start with. There were a number of similar cases where the patent holder was not in sympathy with the war, and he just threw all the obstacles he could into it to keep from getting into production.

Mr. TURNER. Yes.

Well, that would raise entirely independent and valid reasons for compelling licensing, certainly in a war situation and a defense situation.

The CHAIRMAN. And only the War Powers Act saved us from that. We could compel certain things. But I do agree with you that one of the great monopoly foundation stones is the patent system. How to be fair to the patent owner and to the public is a very difficult question to solve.

Mr. TURNER. It is a very hard one, and it is, I must say, very difficult.

The CHAIRMAN. For instance, the accumulation of patent pools in one case—I know a certain patent pool now is a foundation, trying thereby to avoid monopoly prosecution by listing itself a foundation.

Mr. TURNER. There are some suggestions in past cases that where you have a patent pool in which the members are dominant in the industry, that they might be compelled in that situation to let in all comers. I do not know whether this principle has been carried out in practice or not. It certainly might well be.

The CHAIRMAN. I remember when I had a lot of nasty names thrown at me for trying to invoke the statute and letting the United States Government patent the inventions of its research workers, and then have compulsory licensing of those patents, in fact, free licensing. They do have a policy now, as you know, where anything is developed of that kind, on what we call a research and development plan, the company that has developed it is allowed to patent it, but the Government gets a license free, and there is no license fee to the Government manufacturer. That is a development that has occurred since the early days of the war, and is very beneficial, I think. It is written into all of our contracts.

Mr. TURNER. One of the biggest difficulties really with patents is just the potentialities of harassment of people, small people, who cannot afford a lawsuit.

The CHAIRMAN. Small people with big lawsuits.

Mr. TURNER. That is right. They may well feel that the patents involved which they are infringing are not valid, and if they carried the fight through, they would win, but the costs would be too great.

The CHAIRMAN. Is it not a fact that you have a dual remedy? In other words, you can either go into the Court of Patent Appeals, or you can go directly *de novo* into the United States courts on patent cases. It is when they get into the United States courts that you have these enormous delays; whereas the Court of Patent Appeals can dispose of a case pretty rapidly, but if you are not satisfied with the decision of the Court of Patent Appeals you can go to the other

court, which is not set up to deal with patents, because they do not have the necessary scientific skills in their court staffs.

Mr. TURNER. And yet, judging from the results, I would think that it might always be argued that it is beneficial that the courts do not know too much about patents, because they are harder on patents than the Patent Office and the courts in the patent system.

The CHAIRMAN. That is right. All right, go ahead, please.

Mr. TURNER. Well, I just want to mention briefly one other area in which the law might be made more specific, and that is in the area of the kind of cooperative endeavor that is usually, although not always, carried on by trade associations. These and other industry groups clearly perform many useful functions. They may gather and disseminate among members information that will improve the industry's competitive performance. But they may also collect and circulate information, or require certain behavior on the part of their members, which serves as a vehicle for price-fixing. It should be possible and, I think, the courts have largely succeeded in doing this, to pick out some trade-association activities which serve no substantially useful function except to promote agreement on prices or price rigidity.

There seems to be no justification, for example, for agreements to abide by reported list prices, or for agreements to report all transactions and identify the buyer and seller in each. Indeed, decided cases may probably indicate that such practices are already illegal per se. I believe the list could be made longer.

The CHAIRMAN. I think, for instance, of the gasoline dealers associations in the various States which set a markup which amounts to price-fixing.

Mr. TURNER. That is right.

The CHAIRMAN. So that in some States you find a terrific markup in cost of gasoline far above what the taxes would justify, because of an arbitrary markup, possibly double what the normal markup would be.

Mr. TURNER. Yes: this is a form of price-fixing in another guise.

The CHAIRMAN. It is gradually creeping into the farm cooperatives.

Mr. TURNER. I am not familiar with that.

Now, despite certain areas in which you may be able to say that certain practices should be illegal per se, there are bound to remain, it seems to me, many aspects of antitrust law which cannot be reasonably treated on a per se basis. I seriously doubt that market analysis can be avoided in any statute dealing with monopoly power or oligopoly. Any attempt to be precise—no matter how detailed the effort is—is likely either to leave large loopholes or lead to irrational results.

In passing, I want to indicate my complete agreement with the Attorney General's Committee in rejecting—as I think the Committee does—a performance test for concentrated industries. There has developed in recent years considerable support for the idea, that antitrust law should not apply to firms or industries which have shown apparent progressiveness and have not abused their power.

As Mr. Kaysen pointed out yesterday, theirs should not be an uncontrolled decision; they should not be a judge in their own case.

Moreover, complex as market analysis might be in some cases, a performance test would be infinitely worse, since there is no rational

way of determining whether a particular industry—in its own context—has performed badly or well. It may have performed much better under competitive conditions.

While market analysis remains essential in this kind of antitrust case, there is still room for imparting more clarity by developing more precise, accurate, and comprehensible standards of market analysis. Mr. Kaysen yesterday offered several suggestions along this line, and I do not want to belabor the point much further.

I think that this is not a problem which can be easily dealt with by statute. Market analysis is necessarily quite complex. I think it is the kind of area in which you would run the risk, if you tried to lay down lines in a statute, of leaving too much out, or taking too much in.

It is the kind of problem in which most of the work must be done by the Antitrust Division and the Trade Commission in the formulation and presentation of cases.

Defendants and the courts may be able to overcome egregiously bad theories and analysis, but they cannot be expected to advance matters very far if the enforcement agencies—the initiators of cases and the drafters of complaints—have failed to take a sensible approach. I am not suggesting that the agencies should assume a greater burden of proof than the particular case warrants, but only that the issues be rationally formed and presented.

I do not feel prepared to discuss at this time the possibilities of revising the existing techniques of enforcing the antitrust laws. There is one aspect of the current situation, however, that seems to me to have considerable bearing on the adequacy of existing methods. I refer to the remedy of divestiture, which is applied where you have a large dominant firm or several large dominant firms in an industry.

One need not disagree with the Attorney General's Committee's report—in its conclusion that divestiture should not be employed where other measures will restore competition—to say that divestiture may be the only way to restore competition in markets where one or more firms have a high degree of market power.

If courts are rightly reluctant to undertake the task of reorganizing a large firm or industry, the answer is not necessarily that reorganization should not take place, but rather that another body should be entrusted with the task.

For a number of reasons, the reorganization contemplated by the antitrust laws is likely to be more difficult and present more problems than, say, the reorganization of public utility holding companies under the act of 1935.

What I have in mind there is this: That when you were reorganizing the public utility holding company setup, after reorganization you ended up with self-sustaining local or regional monopolies, going concerns, regulated rates, so that there was no problem of creating firms that would survive.

Now, when you set about to rip up an existing industrial firm, like a large steel company or a large automobile company or a large cement company, this is the problem that you have to deal with: Some of the plants or assets that they may have may be badly located or comparatively inefficient, so that if you just cut those loose they would die on the vine very quickly; that is, you have a quite difficult problem in reorganizing in an industrial area, creating a group of firms which

are going to be capable of competing fairly evenly, and this is a problem that you did not face in the reorganization of the utilities.

But these difficulties are not insuperable, and it may well be that the combination of an administrative body formulating a plan, with the courts subjecting the plan to limited review, is the best way to do this job.

The CHAIRMAN. What do you think of the idea of taxation as an approach to price fixing?

Mr. TURNER. What do you have in mind, Senator?

The CHAIRMAN. In other words, take something like the excess-profits tax, in which an excessive profit would be so heavily taxed that it would hardly be justifiable to run the price way up, because the prime reason for monopoly, of course—I mean, for getting a monopoly—is, of course, to make the biggest possible profit.

Mr. TURNER. Not necessarily so, Senator.

I think the danger is this: You would normally expect in competitive markets that from time to time profit rates would get very high. In fact, in a competitive system the profit rate is sort of a signal for new investment to come in.

This is the way a competitive economy governs its flow of resources. If you have an extremely profitable industry this will attract new investment, and this is what you should have, because what the high profits indicate are that there is not enough supply to meet the demand, and the profits go up, so people are encouraged to come in.

If you just had a statute, as a flat excess-profits tax, you would interfere not only with monopoly profits, but you would interfere with profits in a competitive industry, where they really perform a function of drawing in new resources. Do you see my point on this?

The CHAIRMAN. Yes.

Mr. TURNER. Profits may not represent monopoly power at all. They merely represent an industry which, at the time, does not have capacity adequate to meet the demand, and there would be no point in penalizing them for making those profits.

The CHAIRMAN. I want to get something into the record here.

Are you both an economist and a lawyer?

Mr. TURNER. Yes, sir: I am.

The CHAIRMAN. I was couching my questions based on that thought, that you were trained in both fields.

Mr. TURNER. That is right.

The CHAIRMAN. That is the reason why my questions got out of the legal field. As an economist, you see different standards of competition contemplated by different laws as, for example, under the Sherman and Clayton Acts and the Robinson-Patman Act?

Mr. TURNER. This is hard to answer in a few short words, so I will use more than a few words.

My feeling is that the Robinson-Patman Act is carrying out a policy which is both consistent in some respects with general antitrust policy, and inconsistent with others.

The CHAIRMAN. Right at that point I want to interject a question.

Mr. TURNER. Yes.

The CHAIRMAN. I have always had the feeling that too often laws are prepared to meet an existing situation, and as a mass of laws grows up in that line, they impinge, wrongly sometimes, upon one another or leave enormous loopholes.

Beginning back with the Sherman Act and coming up to the Clayton Act, and then the Robinson-Patman Act, each was designed to meet a certain condition or to cure what was considered to be one, and for that reason they do not fully meet the whole situation; is that right?

Mr. TURNER. Well, laws rarely do.

The CHAIRMAN. I know.

What really is needed is a comprehensive law; is that not right?

Mr. TURNER. Well, the Sherman Act is the comprehensive law.

The CHAIRMAN. I know it is the comprehensive basic law.

Mr. TURNER. Which, however, I think, as suggested by Mr. Kaysen yesterday, does not cover everything.

The CHAIRMAN. It really announces a policy generally.

Mr. TURNER. That is right.

I would agree with Mr. Kaysen's analysis that the Sherman Act, fairly interpreted, does not adequately deal with the oligopoly problem, but it is a broad general statute, and it is, apart from this, hard to conceive of one that could be broader. It is a broad statute in favor of competition.

Now, I think I could approach the Robinson-Patman Act best by talking first, briefly, about fair trade.

It seems to me that fair trade can be justified solely on the basis of noneconomic consideration. I am not saying that the noneconomic considerations are not pertinent or should not be taken into account. The noneconomic considerations, I think, are social ones; they are an expression of the belief that having small independently owned business units is a good thing for society, even though maintaining them may result in some economic loss.

I think as to the latter, that really no fair argument can be made. The effect of resale price maintenance is to prevent efficient distributors who can sell at a lower markup from doing so.

Almost inevitably the minimum prices set under resale price maintenance laws are going to be high enough so that the markup margin is adequate for the smallest and least efficient distributor.

I think the consumer suffers from this and, furthermore, I find no economic justification in the distribution field for having resale price maintenance for the reasons I have outlined.

The only argument, I think, that could be made is that there might be some possibility of large distributors driving out so many small distributors that you might get monopoly at the distribution level, at the retail level.

I think historical evidence, and any kind of analysis you might care to bring to bear, would show that this possibility is extraordinarily remote.

You do not have resale price maintenance in the grocery field. To be sure, the chains and the supermarkets have taken over a substantial share of the grocery business, and yet over the past 10, 15, years, I do not think the percentage has changed very much.

Small grocers still survive because they give certain things that the big stores do not give, and people are willing to pay for them.

They are willing to pay extra for credit, for delivery, and for personal service; and I think the same think would be true of the general distribution field.

I think if resale price maintenance were eliminated, certainly some drug stores would go out of business, and some would be less profitable, but I think, by and large, sufficient small drug stores would stay in business so that you would not have anything resembling monopoly at the retail level.

Now, I have approached my point circuitously. What I am getting at is this: That I think both fair trade and Robinson-Patman were passed primarily to protect small businesses for reasons not really economic.

The Robinson-Patman Act is not explicitly that kind of a statute as fair trade, I think, is.

Nevertheless, in its actual effect, and it is certainly clear in the brokerage clause, it does keep in business certain kinds of distributors who, if left to the usual play of competitive forces, would fade out of the picture or at least their role would be substantially reduced.

Now, I do think that there is a real economic justification for an antidiscrimination statute in this sense: That it is unfair for a small business, a smaller distributor, to have to pay a higher price, which is totally unrelated to any cost differentials that the seller may incur.

Where this does go on on a persistent basis, it means that the little fellow is being penalized not for inefficiency, but simply because of his size and, theoretically, at least, the statute says to a seller, "You can't sell at a different price, a higher price, to a small fellow than you do to a large fellow, unless you can show cost differences," and that does make sense.

The problems are practical ones.

Now, Mr. Adelman pointed out some of them in his testimony. The principal problem, it seems to me, is that the ordinary businessman, even though he knows that he is going to make some cost savings on a sale to a large buyer, cannot really determine without a fantastically large investigation and some arbitrary assumptions just what the cost savings are, and the tendency of any antiprice discrimination statute like the Robinson-Patman Act, therefore, is to cause sellers to sell at one price simply because they save themselves the trouble.

Now, to the extent they do this, you have a statute which is really discriminating against large buyers for which there is no justification. The difficulties, in other words, with the Robinson-Patman Act are not so much theoretical as practical.

The CHAIRMAN. For instance, one thing I have run into in the fruit business is that some of the big chains operate also as commission brokers in the purchase of fruit.

Mr. TURNER. Yes.

The CHAIRMAN. So that automatically the independent store owner who has to buy through his wholesaler has a brokerage fee in there. When you get into a question of price cutting, the big chains can cut the price that much at least below him and still make as big a profit as he does.

I have had fruit producers complain of that to me.

Mr. TURNER. Yes.

The CHAIRMAN. There is a funny thing about the producer in certain lines of fruit. He wants to hold the retail price as low as possible before he can make a profit, because it furnishes a bigger market for his output, and if the retail price gets unreasonably high there is a

lower demand for his product. They are slightly different therein from other fields because they are vitally interested in what the retail price is.

I know in my State of West Virginia, the apple growers are tremendously worried when the price of apples at the retail level get too high because it reduces the market for their crop.

Mr. TURNER. On the first point that you made, I think that has to be analyzed a little more closely.

As I understand it, you were suggesting that the large buyer, the large retailer, who also acts as a commission merchant, has an advantage.

The CHAIRMAN. He has his wholesale setup, of course.

Mr. TURNER. Yes.

The CHAIRMAN. He buys directly, but he buys through his own commission broker.

Mr. TURNER. Yes. But the point I want to make, Senator, on that is that this is not, I do not think, the advantage it may seem to be because they have made the investment.

The CHAIRMAN. Oh, yes.

Mr. TURNER. That is, the retail buyer who does not have a wholesaling organization has no investment in wholesaling, and obviously he should not get the same price that somebody gets who performs his own wholesaling function.

The CHAIRMAN. I think that activity is contrary to the Robinson-Patman Act. That is what it amounts to, on a brokerage fee.

Mr. TURNER. There is no question about it. The antibrokerage clause has been applied to say that this is just illegal. No buyer or no person acting as an agent for a buyer can get a brokerage commission, and it is in this sense, it seems to me, that is really a discriminatory statute against large buyers, for which I can see no justification.

The CHAIRMAN. That was brought out before this committee—Senator Kefauver well remembers—when the independent wholesalers were opposing that part of the Robinson-Patman Act, and wanted that repealed as it applied to them, but left in effect as to the big stores.

Mr. TURNER. Yes.

Paradoxically, the brokerage clause was adopted, I think, to get at organizations like the A and P and the other large chains, and yet the clause was definitely interpreted in cases involving not these big buyers, but cooperative buying organizations for little fellows who had formed a cooperative buying organization in order to compete effectively, and the brokerage clause got slapped at them. Of course, the others were hit, too.

The CHAIRMAN. As an economist, would you say dissolution, divestiture, or divorce is the only effective means of enforcement for oligopolistic industries? If not, what would be your suggestion?

Mr. TURNER. I could not make a general answer to that, Senator. I would have to look at the industry.

First, I suppose it depends on how you define an oligopoly industry.

If you define it fairly strictly as an industry in which you have very few sellers, a standardized product, clearly noncompetitive price behavior, in other words, an industry in which sellers are so few, the

product so standardized that they do not price competitively, they take each other's actions into account and sort of behave together, then I would say that probably divestiture is the only effective remedy, if any.

Now, I say, if any, because the industry may be one in which those few firms have the most efficient size. In other words, there may have been technological reasons why the firms are the size that they are. If such is the case, I would say that there is no effective antitrust remedy.

If you break them up, all you would be doing is setting up an unstable situation which, 10 years from now, would be back to where it was before.

If you define oligopolistic somewhat more broadly as referring to industries in which there are merely a few sellers, I would say that there are some situations where you would not need divestiture. If the industry is one in which product differentiation is quite important, and there is a lot of room for product variation, and the noncompetition, if any, has been due to a formal agreement of one sort or another, that may well be that injunctive relief would be adequate.

The CHAIRMAN. Well now, what type of mergers would you consider harmful to the economy from the standpoint of the national antitrust policy?

Mr. TURNER. Well, I can give a simple and probably meaningless answer to that. I would say any merger that is likely to reduce competition in any market.

The CHAIRMAN. And would tend toward price fixing?

Mr. TURNER. Well, yes; one that would tend to, although I would stop well short of that; I would not require proof that the immediate result of the merger is going to be the likelihood of price fixing, and I do not think the present statute does that.

The CHAIRMAN. Has not the pattern of vertical integration, as exemplified by steel and later by automobiles, set the price of new entry into a field at practically prohibitive levels?

Mr. TURNER. It has to the extent, Senator—

The CHAIRMAN. For instance—I will explain what I am driving at.

Mr. TURNER. Yes.

The CHAIRMAN. I remember as a very young man when there were independents moving into the automotive field right and left. There was every year a perfect rash of new cars coming on the market; and all of a sudden, things started centralizing.

Originally, the manufacturing companies now making up the General Motors group were all independents, and there were many, many more than now. But suddenly, there developed the General Motors and Chrysler pattern, and then Ford went into the high-priced field, and so we set this present pattern.

Mr. TURNER. Well, one difficulty with the automobile industry, it seems to me, is that not only do you have a fairly high investment requirement which, in itself, is not insuperable, but you also have a problem of extremely strong consumer preference which is going to take a long time to overcome.

Now, I will explain that a little more thoroughly.

The CHAIRMAN. Let me give you some factual background behind this other matter. During the time of which I speak you had 3 or 4 manufacturers, for instance, you had Delco and Remy and others,

all of them in the free market, selling to any manufacturer who wanted to buy, so that, as we said, most of the cars were assembled products, and the parts were bought in the open market.

For instance, one year one company would come out with a Delco lighting system, and the next year they would switch over to Remy or some other, and they bought their carburetors. In fact, most of them made their own engines and frames, that was about all they made. The parts field was sort of wide open for anybody to come in and buy what he wanted.

Then the pattern changed, and a new company now has a tremendous job buying parts. Either that, or they have to build up a gigantic parts organization of their own.

Mr. TURNER. Yes.

The CHAIRMAN. I think that is what caused the terrific capital investment in the automotive field. It is not just a question of the main plant putting the car together; you need all the necessary parts plants.

Mr. TURNER. Yes. You have got to build your own parts factories, so to speak.

The CHAIRMAN. Yes.

Mr. TURNER. As I recall, there was some reversal of that trend and, as I think possibly, although I am not sure of these facts, that in the last 15 or 20 years, if anything, the trend has been back the other way, of companies tending to subcontract more and more of their parts.

The CHAIRMAN. Oh, yes.

Mr. TURNER. That is, bumpers and headlights.

The CHAIRMAN. But they still have their own contractors. That started in the airplane industry during the war, and were successfully blocked by the Government. They started to make all their own parts, and we got that put out of business, and it has kept the airplane industry fairly free of that sort of thing.

Mr. TURNER. There is no doubt that the situation is quite difficult, from an investment standpoint, to get into the automobile industry.

As I was saying, though, I think, perhaps, the second and far more important area is that over the course of time you have built up strong consuming attachments to existing brands of automobiles, and it is terribly difficult for a newcomer to come in because what he faces in this situation: Even though he can succeed in selling a part of the market until over the course of years he builds up a fairly large market, the resale value of his car is going to be terribly low and, by and large, consumers just do not want to buy a car that is worth half the price the day after they buy it.

This is the tremendous advantage the Big Three have of much higher trade-in value because of their existing position in the market.

The CHAIRMAN. I suppose the tendency of the American citizen to finish paying his installments and then buy a new car, and the 18-month spread of those installments, just about almost limits his use of that car. Therefore, the used-car field—

Mr. TURNER. The resale value is terribly important to most car buyers.

The CHAIRMAN. Yes.

Mr. TURNER. Generally on vertical integration, if I may make just a couple of more comments, you get into problems. As vertical inte-

gration makes entry difficult only where as a result of vertical integration some particular level, say, a raw material or a primitive fabricated part is completely sewed up, which means if you go into the business, you have got to develop your own resources there. That creates a difficult problem.

Now, the automobile industry, as you suggested, is an illustration of that. As to the extent that there are no independent parts manufacturers, you just impose that much more of a burden on anybody trying to get in.

The CHAIRMAN. Even in that same field, in the first year of the war, a situation grew up in which we simply were not producing airframes in the airplane industry. The reason was that one company would go out and contract for the entire output of forgings from a forging plant, and another company would go out and contract for all the extrusions for an extrusion plant, but they were contracting for everything, and the Government had to step in finally and take over the entire forging, extrusion, and parts program, and it then became what we called—

Mr. TURNER. CMP.

The CHAIRMAN. No; GFP, Government furnishing parts, and that was the only way we stabilized that situation, and kept it from getting completely out of hand.

Do you believe that ease of entry into an industry is one of the large economic problems today—ease or, rather, lack of ease?

Mr. TURNER. It is fairly easy to answer that question; yes.

The CHAIRMAN. In other words, ease of entry would tend to break down monopoly, would it not?

Mr. TURNER. That is right; and an awful lot of industries today, even though they are themselves reasonably competitive, involve such a heavy capital investment that it is very hard to get in. It is hard to get financing on a large-scale basis and start up a completely new firm.

The CHAIRMAN. That was one reason why I strongly supported the Reconstruction Finance Corporation, particularly in its loans to smaller businesses, because in cities of 50 to 100 thousand, local banks simply could not finance these plants, and they had to go to some metropolis like New York or Chicago for financing.

Most of the new businesses could not do that and, therefore, it did deter industrial competition because of the loan limit of the local banks. Each one had a definite loan limit, and they could not exceed that, and most of the loans were in excess of that.

Mr. TURNER. And you have it on a larger scale also; that is, if anybody contemplates going into an industry that requires a tremendous capital investment, they are likely to find prospective lenders do not want to take that kind of a risk.

The CHAIRMAN. Now, what recommendations would you have to reduce this barrier?

Mr. TURNER. I have not given this matter too much thought, Senator. But one obvious answer is the one you have suggested, to the extent that the problem is one of inability to get funds because private lenders will not take the risks, the Government might do it, and take the risks.

The CHAIRMAN. But the Government has to pretty well safeguard itself, too, in those situations.

Mr. TURNER. If the barrier is the large amount of capital required, I suppose to the extent that you broke down concentrations you would reduce the amount of money it took to get into the business, although this is not necessarily true. At least it makes the industry a somewhat more encouraging place to try your hand in.

To cite a very quick example, I think almost anybody would be discouraged about the prospects of going into the automobile industry and struggling against the Big Three.

The CHAIRMAN. Even though a company may dominate a market because of internal growth, would the fact that its domination alone gave it undue monopoly power be objectionable?

Mr. TURNER. It is objectionable in the economic sense that domination of a market has or is likely to have bad effects, regardless of how the company got there.

I think an economist would say undue control over a market is bad, or potentially bad, and I do not care whether the company got there by merger or by internal growth. That is not quite enough, though, to say, for this reason: This really touches on the policy issue that Mr. Kaysen raised yesterday of whether you want to get undue market power, even though it was acquired by internal growth and purely competitive behavior.

I will not stop and define what I mean by that because it is a little hard.

The danger that you raise by having a law which gets undue market power regardless of the way it was acquired, is that you may discourage the very kind of behavior that the antitrust laws are supposedly designed to foster, namely that businessmen will go in and compete, try to improve their product, charge low prices, and do the best they can.

If you have a law which says, in effect, "if you succeed too well, we are going to chop you up," you are likely to discourage that kind of behavior.

Now this, it seems to me, is a really difficult policy problem. I think I would tend to say that the possibilities of a firm acquiring undue market power by what we might call normal competitive behavior are rather remote and, hence, you do not lose much by having a law that requires some demonstration that the power was acquired by other than competitive means. But I may be wrong on that.

Senator KEFAUVER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Will you take over for about 3 or 4 minutes? Go ahead.

Senator KEFAUVER. Mr. Turner, on page 2 of your statement—

Mr. TURNER. Yes, sir.

Senator KEFAUVER. You say it would be desirable to have more of a per se approach to monopoly conditions, so that you would not have to get into all of the details about what they were doing and what not; that is one of your chief recommendations.

Mr. TURNER. I say I think this is a real possibility in the area of mergers, Senator.

Senator KEFAUVER. Well, Mr. Turner, do you think we need any changes in the law to get back to more of a per se approach?

Is it not true that section 7, under its legislative history, is supposed to follow the general approach of other sections of the Clayton Act

which substantially eliminate the so-called rate rule of reason approach?

Mr. TURNER. Well, I agree, Senator, that it eliminates the rule of reason as it is applied in Sherman Act cases. As to just how far it goes toward a per se approach, I think there is fair room for argument.

Senator KEFAUVER. In other words, bringing in the Sherman approach, which is what the Federal Trade Commission has done in the Pillsbury case and in the Attorney General's Committee's report, is not justified by the legal history of section 7; is that correct?

Mr. TURNER. I would not make a flat statement to that effect, Senator, for this reason: I remember, in particular, one part of the committee's report on the amendment that was passed in 1950-51, where the committee approved the Supreme Court's definition of the phrase "may tend to substantially lessen competition" as requiring a showing of a reasonable probability of harm to competition.

Now, I think if that is the test, and the committee report indicated an acceptance of that, it is only reasonable for the Trade Commission to look into the market facts sufficiently in order to be able to form some sort of rational judgment.

I think the Commission might have indicated in their opinion a somewhat less extensive approach than they indicated they might take; that is, I think, for example, the Commission might say:

"Well, if one company is buying out a healthy competitor, we don't really have to look any further. We don't have to look at the whole market, what the rest of the structure of the market is, what it is likely to be like 10 years from now."

In other words, I think the Commission could interpret the law to require less of an investigation than they may have suggested in that opinion.

However, I do think that the law is not a per se law, and is not to be interpreted that way.

Senator KEFAUVER. Of course, some proof is required by the very words "may substantially lessen competition or tend to create a monopoly."

Mr. TURNER. That is right.

Senator KEFAUVER. But where the facts are plain, certainly it is not as necessary to go as far as they suggest going in the Pillsbury decision, or in the Attorney General's Committee's report.

Mr. TURNER. Yes. I think, as I said in my statement, that there are aspects of the Pillsbury opinion and of the Attorney General's Committee's report that seem to suggest a more extensive approach that I do not think are even necessary or warranted.

Senator KEFAUVER. So what you suggest could actually be accomplished by the procedure followed by the Federal Trade Commission or by the Department of Justice if they wanted to follow more of a per se procedure.

Mr. TURNER. Well, in view of the Standard Stations opinion interpreting section 3, I think that if the Commission adopted sort of a percentage test, that it would be upheld in the courts, yes. However, I do not think they are unreasonable.

Senator KEFAUVER. Do you have any specific suggestions for amendment to section 7 which would enable the Commission and the Department of Justice to more specifically follow your recommendations about getting closer back to a per se approach?

Mr. TURNER. Well, it might be amended somewhat along the lines I suggested or along these lines: that a merger shall be illegal wherever the acquiring firm has a substantial share of the market or wherever the acquired firm occupies a substantial share of the market; in other words, where the putting of the two firms together is likely to increase market power.

Senator KEFAUVER. You have got a 15-percent approach suggested here.

Mr. TURNER. Well, I just suggest that as a possibility. I find it a little difficult to think of the—

Senator KEFAUVER. Well, these percent or dollar approaches are rather difficult to apply.

Mr. TURNER. A percentage figure is more meaningful for this reason, Senator, that a company may have a large dollar volume of business and, nevertheless, be a minor fraction of the market. I think percentages of the market are more significant than dollar amounts.

Senator KEFAUVER. The percentages are sometimes difficult to apply, because you have to first—

Mr. TURNER. Define the market.

Senator KEFAUVER. Yes; define the market.

Mr. TURNER. And define the situation.

Senator KEFAUVER. I agree, and what I was sort of suggesting there was that it still leaves the problem of defining the market, which is not an easy problem.

Any questions, Senator Dirksen?

Senator DIRKSEN. Mr. Turner, you are a professor at Harvard?

Mr. TURNER. That is right.

Senator DIRKSEN. And do you teach?

Mr. TURNER. Yes; I teach law.

Senator DIRKSEN. What specific subject do you teach?

Mr. TURNER. I teach antitrust law and contracts.

Senator DIRKSEN. Have you had any identity with business of any kind prior to joining the Harvard faculty?

Mr. TURNER. No, sir. I was associated with a law firm in this city for 3 years.

Senator DIRKSEN. Here in Washington?

Mr. TURNER. In Washington; yes.

Senator KEFAUVER. What was the name of the firm?

Mr. TURNER. Cox, Langford, Stoddard & Cutler.

Senator DIRKSEN. And what was the nature of that past experience?

Mr. TURNER. It was just general practice.

Senator DIRKSEN. The only reason for the question is just to get kind of a little background, to find out whether the testimony in your statement was based upon identity with business.

Now, among the problems that engage our attention, here is one thing that has always intrigued me. Assuming that we do some time enact legislation to roll back big industry in the United States, then, with respect to mergers, perhaps even put the burden of proof upon the performers of the merger, that is, why it should be done, and so forth, assuming that in a certain line of endeavor you may have a building up of industry in another country and they moved into the whole world field, that is, the domestic field.

I am thinking, for instance, of the tremendous strides made by the German automobile industry. They are moving into the British mar-

ket; they are moving into the French market, and they are moving into the South American market.

Now, what offsetting factors must we take into account to make sure that we are not penalizing our large-scale operation in competition with those foreign companies?

Mr. TURNER. Well, Senator, I would not be in favor of a law which penalized, and would not be in favor of a law which put any sort of an absolute limit on size.

Senator DIRKSEN. You do not subscribe to the phrase that was current at one time, "Bigness is badness"?

Mr. TURNER. No; I do not, Senator. I think this phrase, however, was used by people for somewhat different reasons.

Senator KEFAUVER. Any other questions?

Senator DIRKSEN. No.

Senator KEFAUVER. Mr. Burns?

Mr. BURNS. No.

Senator KEFAUVER. Thank you very much, Professor Turner.

Dr. Watkins, will you come around?

STATEMENT OF MYRON W. WATKINS, BONI, WATKINS, MOUNTEER & CO., NEW YORK CITY

Senator KEFAUVER. Is Dr. Watkins going to read a statement?

Mr. BURNS. Yes.

Mr. WATKINS. Should I be sworn first?

Senator KEFAUVER. No.

Mr. WATKINS. Mr. Chairman, I suppose the first obligation of a witness is to identify himself.

Of the 37 years since I completed my academic training as an economist, the first 30 were spent as a member of university faculties and the last 7 as a member of the New York firm of Boni, Watkins, Mounteer & Co., business consultants and market analysts.

At various times during the period in which I held a university professorship, the following organizations commissioned me for economic research work: Brookings Institution, Twentieth Century Fund, Department of Justice, National Industrial Conference Board, National Bureau of Economic Research. For 40 years, the antitrust laws, on the one hand, and, on the other, the industrial structure and market practices they are designed to mold have been my primary preoccupation.

On the basis of this much identification, may I proceed? Or must I invoke the fifth amendment to escape further disclosure of my past? [Laughter.]

After reading your chairman's letter setting forth the objectives of this inquiry, I take it that the subcommittee is proceeding upon the assumption that competition is good and can be effectively fostered and maintained.

I heartily concur in that premise. Considering all that has gone before, looking back on 65 years of experience under the Sherman Act, it would be folly, or at any rate bootless, for this subcommittee to set out upon an exploration of the wider question of whether competition or some alternative scheme of regulation would provide a more sensible and salutary rule for the Government of general industry and trade.

We can leave that question to the professors, confident that even in their proverbial absentmindedness it will not be slighted.

The real question, the pressing practical question, before you, then, starting from the above assumption, is: "How can competition be stimulated and safeguarded most effectively, so far as legislative measures can do it at all?"

Approaching the inquiry from this standpoint will enable this subcommittee, I venture, to avoid the pitfalls and cul-de-sacs that have frustrated so many previous investigations in this field. They have generally, at least since President Wilson's first administration, either lost their way in a thicket of controversy over whether it is possible to maintain competition or sunk in a bog of speculation and debate concerning the meaning of antitrust law as currently interpreted, in all its various reaches.

But your subcommittee, by holding steadily to the course suggested, would open up questions that need to be discussed. It would explore issues on which the Congress and the public generally seek, indeed are impatient for, some new light. Unless I mistake, this uncovering, or opening up, aim is the primary and essential function of congressional committee hearings. To settle a question is the job of the Congress itself: is it not? Yet its committees often act as if they thought that was their responsibility.

I stress this point, because it seems to me peculiarly vital to a successful outcome of these hearings. It is so easy to fall into the rut of stale controversy and barren debate about what is being done in the premises that the creative task of discovering what might be done goes a-begging.

As the record of some quite recent probes in this very field discloses, trying to bake a loaf of wisdom, even out of grade 1 wheat of knowledge, but without the leavening agent of creative imagination can lead only to a sodden mass of dough. Probing, I submit, needs groping far more than it needs either sifting or mixing. We are reminded, alas all too frequently, of the paraphrase that "Where there is no vision, the legislators fumble, the people grumble, and progress stumbles."

To pursue your inquiry undeviatingly in the way here suggested will require a boldness bordering on audacity. It will require a firm grasp on fundamentals without loosening one's grip on practical expediency. To suggest what the former implies, I would invite consideration of the proposition that there are two fundamentally distinct arms of antitrust policy to be implemented and enforced.

One deals with the structure of industry, the organization of industrial control. The other deals with the performance of industry, trade practices, business methods. If there are any phases of antitrust policy that do not fall into one or the other of these categories, I do not know what they are. Yet the failure to recognize this distinction and act (including legislate) accordingly is the source, I believe, of much of the confusion, controversy, and inadequacy of trade regulation as now constituted and conducted.

To keep the two arms of antitrust policy separate but complementary, I would propose that, with respect to the powers and responsibilities of public enforcement agencies, as distinct from private litigation, Congress forthwith vest in the Department of Justice the exclusive authority to invoke the Clayton Act, sections 7 and 8 (if

they are retained; see below) and in the Federal Trade Commission exclusive authority to institute action under the Clayton Act, sections 2 and 3, and the Robinson-Patman Act, so far as its provisions are not embraced in the amendment to section 2 thereof.

At the same time, Congress by redefining "unfair methods of competition" should explicitly withdraw from the Federal Trade Commission the jurisdiction the Commission has assumed—with judicial approval—over conspiracies in restraint of trade. Congress, I am convinced, never contemplated that methods of competition could be interpreted to embrace methods of not competing—and if it did so, it was only an offshoot of muddled thinking. Overlapping jurisdiction can only lead to confusion and working to cross-purposes. Ideally, the two enforcement agencies should be branches of a single unit, of course, but here the demands of practical expediency probably override those of logic.

Incidentally, in this connection, I am personally persuaded that nothing essential would be lost and much might be gained by repeal of the four substantive antitrust sections of the Clayton Act. I know of not a single right decision in an action—public or private—under those sections that could not have been reached through a proceeding under either the Sherman Act, sections 1 or 2, or the Federal Trade Commission Act, section 5, properly construed and administered.

Consider, for example, the litigation concerning the United Shoe Machinery leasing system. The Government lost its original (1918) Sherman Act case, in which, *inter alia*, the exclusive dealing practice was challenged. Four years later, it prevailed when it attacked this practice as a violation of the Clayton Act, section 3. But would anyone contend that, if the 1918 complaint were to be filed today, presenting *de novo* the issue of the status of exclusive dealing under the Sherman Act, upon the basis of pre-1918 facts, an opposite decision would not be reached?

In the light of the 1953 ruling on the company's status under the Sherman Act after its leasing system had been purged of every formal, outward trace of exclusive dealing—and I emphasize "exclusive," I am not talking in weasel words, I am talking about it in the actual terms, "exclusive"—how could anyone doubt the outcome of a similar challenge on the pre-1918 facts?

Parenthetically, I might add, that I detect in Judge Wyzanski's 1953 opinion at least a trace of judicial disposition to correct old wrongs by introducing, if need be, new ones. Were not the glasses through which he was looking when he professed to find "exclusionary tactics" in certain quite ordinary—and so far as I can see, economically legitimate—features of the company's leasing system tinged with the color of past practices, long discontinued?

Perhaps, though, it would be asking too much of judges—even the most impartial, competent, and conscientious, among whom I would certainly include Judge Wyzanski—that they should appraise challenged contemporary conduct strictly on its own merits, and harken not at all to echoes from the dim and distant past. Certainly the distinguished jurist who presided over the Shoe Machinery trial is not alone in evincing some indications of remembrance of times past when dealing with current corporate practice. Specifically, I suspect that, upon close scrutiny, similar traces of a slight bias of this kind can be discerned in the American Tobacco, that is, the latest

American Tobacco case, and the Standard Oil (California) cases. It is hard for a corporation to live down its past.

In sum, the Shoe Machinery cases seem to me clearly to support the conclusion that, as of today, any business conduct that is properly subject to condemnation under the Clayton Act, section 3, can likewise be reached under the Sherman Act, section 2. Insofar as the Federal Trade Commission has succeeded—as in the hearing aid cases, thus far—in pushing the scope of the Clayton Act, section 3, prohibition beyond the limits of the Sherman Act's reach, I think that it has clearly exceeded congressional intent. I am even more positive that it has defied commonsense. So far as concerns the Clayton Act, section 2, prohibition, the same conclusion seems to me to follow from the rulings in the Staley, the Minneapolis-Honeywell, the Automatic Canteen, and the Standard Oil of Indiana cases, on the one hand, and from such decisions as those in the Morton Salt and the Moss cases, on the other.

These latter two, in my opinion, were very dubious decisions, the one eliminating the distinction between a price difference and price discrimination; and in the latter case, the Moss case, even such a distinguished jurist as Judge Hand forgetting, or at any rate disregarding, the salutary rule of the Shade Shop case that a purely private controversy of a strictly local compass is not a proper subject for composition or disposition by an administrative authority charged with responsibility for the regulation of business methods "in the public interest."

The fact is, and eventually, I dare say, we shall have to face it, these substantive sections of the Clayton Act were enacted simply as an experiment in "specification"—an attempt to guide the courts in what was to be considered unreasonable under the recently (1911) adopted "rule of reason"—and the experiment has failed.

It represented an attempt to "draw a line" legislatively where such line drawing is not only needless but ill advised. For in matters not *contra bonos mores*, the legitimacy of which depends entirely upon the surrounding circumstances, which disclose "intent"—in the proper, technical meaning of the term—the attempt to "draw a line" legislatively can lead only to one of two results.

Either a rigidity will be introduced, in the form of *per se* offenses, that thwarts justice in concrete application, or an off again, on again juggling with words will ensue, which means utter confusion and the degradation of the rule of law. That, at any rate, is my interpretation of what has actually transpired in the adjudication of those sections and especially of the further extension of futile efforts to be specific in the Robinson-Patman Act.

Line drawing in these matters of competitive behavior is preeminently a judicial function. For expedition and to avoid overloading the courts, administrative bodies in the exercise of delegated—and strictly defined—quasi-judicial powers may properly share in this function, subject always to ultimate review and determination by the courts. The reason that legislative specification in these matters is a mistake lies in the literally infinite variety of circumstances that determine the quality or significance of specific business acts. Their legitimacy depends, as stated, upon the surrounding circumstances which disclose intent.

Let me illustrate, using a familiar analogy, and this is not the first time this has been developed, one way or another.

At precisely 2:15 p. m., on a certain day armed robbers entered a bank on Main Street, herded the tellers, officers, and sole customer into the vaults and thereupon escaped with their loot. A patient in the offices of a dentist directly above the bank observed that at precisely 2:10 p. m. on that day the town's sole uniformed policeman met a friend of the dentist's patient on the sidewalk directly opposite the bank, shook hands with the man, turned and accompanied him half a block in the opposite direction to a corner, where they turned down a side street.

The dentist's patient thereupon, as he idly glanced back along the street, recognized a lady, well known to him, emerging from a store. As she did, a stranger doffed his hat to her. She evidently resented being thus accosted for she passed on with a stony stare and the man moved off in the opposite direction. It was later confirmed that this man was likewise a stranger to the lady.

He was subsequently apprehended and indicted as an accomplice in the bank holdup. Did the hat-doffing stem from the man's having mistaken the lady's identity? Or was it a prearranged signal to the armed robbers? The law declares it a felony to participate thus in a robbery. That, we submit, is a proper exercise of the legislative power. The determination of whether the stranger was guilty of the offense charged depends, clearly, upon "the surrounding circumstances which disclose intent": a distinctively judicial function.

Suppose the legislature, designing to make the law more specific, were to declare it a legal offense for a man to doff his hat to a lady within 500 feet of a bank during banking hours. Such legislative specification would plainly be absurd, and even if a proviso were added that, to constitute such an offense, the man must be a stranger to the lady and a second proviso to the effect that he must have intended thus to give a signal for armed robbery, it would still be unwise. Yet such is in all essentials, we submit, the gist of the congressional excursion in specification represented by the Clayton Act and, especially, the Robinson-Patman Act.

The usual defense of these measures is that they are designed to nip in the bud, or catch in their incipiency, violations of the Sherman Act. The defense will not stand critical analysis. Lacking time here thoroughly to expose its shortcomings, let me briefly make three points. First, a restraint of trade need not be full blown to come within the proscription of section 1 of the Sherman Act. Nor does section 2 take effect only on monopolizing that has achieved its object; it condemns equally attempts to monopolize however incipient they may be.

Secondly, where does incipiency leave off and restraining trade or monopolizing begin? My own view, recalling the incisive wisdom of Professor Gray's—I am not certain of that name. He was a Harvard University professor of law and maybe the preceding witness can tell you the exact name, but I believe it was Professor Gray.

My own view, recalling the incisive wisdom of Professor Gray's famous case of the combination of two New Jersey expressmen, is that in trying to push back the limits of trade restraint and monopolizing into the area of incipiency, Congress has come close, and the courts under the legislative mandate have come even closer, to pushing back the statutory prohibition into the area of nonsense.

Which brings me to the third point, that action under the Federal Trade Commission Act, section 5, can certainly reach any practice or conduct otherwise prohibited by the Clayton Act or the Robinson-Patman Act that might not be subject to condemnation under the Sherman Act. If it be said that the penalty for an infraction of the Federal Trade Commission Act, section 5, is less severe than the penalties provided by the Clayton Act and the Robinson-Patman Act, my answer is, "Right. And praise Congress from whom this blessing flows." This benediction springs from reflection on, inter alia, the ruling in the Motion Picture Advertising case.

To get back to the main question, once jurisdiction is properly divided up among enforcement agencies, how can antitrust policy be supplemented, by Congress, to make it more effective? On the structural side, I suggest that the subcommittee will find Federal incorporation of businesses engaged in interstate commerce and Federal licensing of trade associations whose operations touch interstate commerce a promising and potent means of implementing the Sherman Act.

The lack of Federal standards and rules governing the powers and procedures of the business units subject to antitrust regulation inevitably and seriously hampers enforcement of the act. Without attempting here to go into the matter in detail, I suggest you may find some suggestive ideas in chapter 13 of our study, Competition and Free Enterprise.

Just as one example of the ways in which Federal incorporation could facilitate antitrust enforcement, by defining the powers and functions of various corporate executives, committees, and boards, the way would be opened to fixing responsibility for antitrust violations on a personal basis. Unless I mistake, antitrust penalties assessed on corporations exert a comparatively slight deterrent influence on corporate conduct skirting the edges of the law. It might well prove a far more effective sanction for strict compliance to impose a penalty on the responsible corporate officials, for example, by depriving them of remunerative employment in—or contractual work for—any Federal corporation for a period, the limits of which would be prescribed by Congress, say from 1 to 10 years, but the exact length of which would be left to the discretion of the court in each specific case.

Let me offer one more illustration of how compulsory Federal incorporation of business units above a certain minimum size engaged in interstate or foreign commerce, say those with an annual gross income in excess of \$5 million, would effectively implement antitrust policy. Congress might prescribe uniform, strict rules with respect to such matters as (a) stockholder participation in voting powers; (b) qualifications, terms of office, compensation, and methods of election of directors; (c) eligibility to solicit proxies and responsibility for expenses thus incurred.

The diversity and laxity of State incorporation laws governing matters of this kind offer a positive premium to would-be empire builders.

We have in recent months seen plenty of instances of how these irresponsibly initiated proxy battles, conducted without a semblance of Marquis of Queensberry rules, can divert management from its

proper tasks and lead to ever-increasing integration of financial power and industrial control.

Similarly, Federal licensing of trade associations would permit explicit authorization of certain voluntary group activities consonant with the maintenance of effective competition and, either by implication or expressly, prohibition of others. With respect to statistical reporting, for example, the system or procedure to be followed could be made subject to advance administrative approval and its operation to continuous surveillance. The power to withhold or withdraw a license, pursuant to the enforcement of congressionally stipulated standards—of, e. g., admission to membership, periodic reports of operations, meetings, et cetera—should provide an effective sanction for compliance with the antitrust laws by these groups.

The foregoing measures, be it noted, need involve no assumption by the Congress of (a) powers beyond its constitutional grant—see, for a starter, my three articles on Federal Incorporation in the Michigan Law Review, 1918–19; or (b) any share in managerial responsibility for the conduct of business operations.

Parenthetically, those three articles that I refer to on Federal Incorporation were the first published product of my pen. I was just out of college when I wrote them. Nevertheless, they seemed to make quite an impression and on the basis of those articles no less an authority than Thomas Reed Powell recommended me for a professorship in constitutional law.

When I say that there need be involved no assumption by Congress of any share in managerial responsibility for the conduct of business operations, I emphasize that we are not suggesting that the Congress set up somebody to run a business, the business of any company, we are simply providing the rules of the game for them.

With respect to the operational arm of antitrust policy, or the regulation of commercial behavior, as already indicated, section 5 of the Federal Trade Commission Act provides, in my view, an adequate substantive rule. I suggest, however, that the subcommittee has a vital role to play in “opening the eyes” of the Commission—and perhaps Congress, too—to (a) the potential scope of the phrase “unfair methods of competition” in reference to exclusionary, as distinct from deceptive tactics—e. g., price discrimination, exclusive dealing, commercial “squeezing” of rivals by integrated companies, et cetera; and (b) the logical limitation of the scope of that phrase to the selling policies and practices of individual companies. Probably the latter point, as previously suggested, deserves and requires now—in view of judicial rulings—statutory affirmation.

Beyond this, it occurs to me that the subcommittee might well explore the advisability of congressional action to implement in other ways this arm of antitrust policy that has to do with a firm’s competitive methods or business practices. To bring trade-mark law and patent law more nearly into harmony with antitrust law would be two promising ways of doing so. But that is another story.

I believe I have now covered all the principal aspects of the inquiry on which the subcommittee is currently engaged. I want to thank you, first, for the invitation to testify and, secondly, for the attention accorded my remarks. I should like to take this occasion, finally, to express my profound appreciation for the courtesies your chief

counsel has so generously shown me in making arrangements for this appearance.

The CHAIRMAN. Dr. Watkins, in 1951, you, in collaboration with Dr. George W. Stocking wrote *Monopoly and Free Enterprise*. In that book, at page 81, it is stated :

Probably the most persistent and pervasive influence fostering growth in the size of business units has been the quest for power to control the market * * *. Though the architects who have been busily adding more floors and new wings to the big-business structure since World War II may speak in terms of "expansion" and "rounding out the picture," the primary objective of industrial consolidation remains the same. It is market power.

Is it still your belief that the primary objective of industrial consolidation in America today is the achievement of power to control the market?

Mr. WATKINS. I believe that statement is an excerpt from the context that grossly exaggerates what I, at least, had in mind in that connection.

If that were applied to every business unit that I know of on the basis of scale or size, it would be absurd.

I especially emphasize, as I did in the statement, that the antitrust policy and, I believe, the antitrust laws are with respect to industrial consolidation and mergers, aimed not at a condition but at a course of conduct and that the criterion that is properly applicable to them is the intent with which an act is done.

It is the same rule in the field of trade regulation, in my opinion, as in the field of torts. The quality of the act is determined by the intent with which it is performed and not otherwise, and I may say that has always been my view as to antitrust violation.

And I might say that I have adopted that view from intimate association with two men whom I regard among our greatest members of the bar. One was Secretary of Commerce in President Taft's administration, Charles F. Nagel, and the other one was Frederick P. Fish, and they were both members of my committee when I was making a series of studies for the National Industrial Conference Board.

They emphasized the fact that intent is the basic element in the offense.

And I may say, too, from intimate knowledge, that the former of those two men was a close friend of Chief Justice White and, through that friendship, shared in no small measure responsibility for the introduction of the rule of reason in the Sherman Act. Thereby the test of intent was brought into the interpretation and application of the law as a basic criterion.

Now, if I may stress something there, which I wish I could even more than I have so far, it seems to me especially unfortunate to try to specify a certain market share as the maximum which a single company can legitimately hold—for instance, 15 percent, as some witnesses have suggested—and to declare that it is obnoxious for a company to acquire a share of the market greater than that. Or the market share that is not "suspect," that does not put a company under a cloud, may, by some people, be put at anything less than 25 percent. Judge Hand suggested 35 percent, I believe, as a suitable figure for such a limit, while he would make it a *per se* violation of the law, in no circumstances to be excused or exempted, if you had over 90 percent of the business.

Now, having a certain share of a market, a certain percentage of total sales, is a condition. The antitrust law does not condemn a condition, a business position; it condemns a certain course of business conduct. The offense specified in the statute is not "monopoly," i. e., occupancy of the position of a single seller, or that of a seller supplying a very large part of a given market; it is "monopolizing," i. e., using business methods designed primarily to obstruct competitors rather than to advance one's own business, or to gouge customers rather than to expand sales. Clearly, whether a firm's behavior can justly be characterized as "monopolizing" or only as vigorous competition depends on the intent manifest in its activities. I would stress that "intent" is not, in law, a subjective criterion; it is fully as objective as the proposed criterion of "performance," or economic results.

Now, Henry Ford for 20 years was practically the only supplier of low-priced automobiles. Nobody would contend that Henry Ford was a monopolist, or monopolized. He was exhibiting the beneficence of free enterprise and vigorous competition.

I maintain that if the State were to lay down a rule that doing up to a certain percentage of the business in any line is all right but doing more than that is bad, under a cloud, it would be flying in the face of common sense.

Nobody contends, I repeat, that Henry Ford was monopolizing the automobile business when he was in that "condition," i. e., when he was selling 90 percent or more of the popular-priced cars being marketed. For what he was doing was reducing the price, increasing the output, and improving the quality of the product and bringing it within the reach of millions of people everywhere. That was competition, the best evidence of competition, and to make that an offense to put Ford under a cloud because he had more than 90 percent—as he did—would be absurd.

The CHAIRMAN. The theory is that it is the misuse of the control, that is the point at which we should strike; is that correct?

Mr. WATKINS. That is one way of putting it. Let me add that essentially the same thing applies in the sphere of trade-practice regulation. The failure to distinguish, for example, between a price difference and a price discrimination is one of the worst features of recent adjudication of cases arising under the Clayton Act, section 2. Yet in 1936, during the debate on the Robinson-Patman amendment, Congressman Utterback put his finger on that distinction. He pointed out that a price difference may be justified by any number of circumstances, whereas a price discrimination implies a grant by the seller, and receipt by one or more buyers, of some special preference for which no sound economic reason or ethical excuse can be found.

The CHAIRMAN. In that same book you said that the kernel of the strategic advantage coming from industrial consolidation was that the leading firms in an industry could count on likemindedness among organized trade groups to maintain noncompetitive prices in the market.

Is it still your view that such an advantage is the key stimulus to industrial mergers?

Mr. WATKINS. I do not recall the specific passage in which that statement is made. My suspicion, offhand, is that it referred to retail price maintenance, and that the phrase "organized trade groups"

meant organizations like the National Retail Druggists Association, which put over the Miller-Tydings Act and so on, and if that is what is meant, I agree.

The CHAIRMAN. In your 1951 book you expressed the view that:

To protect society's interest, at times competition must be ruinous in a very real sense in some industries and to some enterprises.

How would you reconcile that view with the purposes intended to be accomplished by the Robinson-Patman Act, the Miller-Tydings Act, or the McGuire Act?

Mr. WATKINS. I don't believe you can reconcile it.

The CHAIRMAN. In the same book, you said that the economic argument for reducing existing concentration and preventing further concentration was strong and you suggested that the Sherman Act might be amended to establish a rebuttable presumption that concentration exceeding a specified percentage of the market for any product or relating group of products was prejudicial to the public interest—that is on page 554. You commented that if corporations could show in antitrust proceedings that greater concentration was in the public interest, they might be permitted to retain or expand an area of control but otherwise existing combinations might be dissolved and the right to enter into future ones denied.

Is it still your view that this would be the best remedy for undue concentration of economic power?

Mr. WATKINS. Well, my previous remarks have indicated my answer to that, an emphatic "No."

My suspicion is that was the committee's recommendation, not ours. I don't believe that I ever allowed my name to go on a statement like that.

The CHAIRMAN. Now, Dr. George Stocking, in testifying before the Joint Committee on the Economic Report on February 1, 1955, said:

While we cannot safely generalize about the economic consequences of bigness, I believe that if we wish to preserve a free private-enterprise economy—and I think we can agree on the desirability of this objective—public policy should be directed toward insuring as many firms in an industry as is consistent with the economies of scale. Many firms I believe have exceeded this limit, and mergers have played an important role in their doing so.

You have been associated with Dr. Stocking in the writing on the subject of mergers and cartels. Can you tell us what is meant by the phrase "economies of scale"?

Mr. WATKINS. My belief is that this would cover it: that, up to a certain limit (differing from industry to industry, from firm to firm, and from time to time), the more you produce, the lower the unit costs, the larger the output, the lower the cost. At any rate, the phrase "economies of scale" signifies that to me, and I believe it did to Dr. Stocking.

The CHAIRMAN. In other words, a company that would operate on a theory of annual profit rather than high unit profit at the expense of price would be a desirable type of company, would it not, for our economy?

Mr. WATKINS. Yes; the desirable type—continuity, long-run stability, and long-run life, for that matter, but not on the basis of the rate of profit earnings alone. After all, Ford, while he was outdistancing all rivals in the popular-priced car field, was making, perhaps,

20 percent a year, maybe 50 percent a year; so a nonmonopolist may be earning a high profit just as well as a monopolist.

The CHAIRMAN. In other words, the dangerous type is the type that seeks to create high unit profits by keeping production at a much lower level than demand?

Mr. WATKINS. Yes; yes, that is true; I agree with that; but I should say that the market is the best means, rather than administrative control, of insuring that their conduct will conform to that standard.

In other words, I agree with Justice Oliver Wendell Holmes that, as he put it in one of his opinions, a free market is the best test of ideas, or words to that effect. Likewise, a free market provides the best test of what is a good product, fairly earned profits, and so on.

The CHAIRMAN. A monopoly that does what I describe is bad for the whole economy as well as for prices; isn't that right? We have an illustration of that in the cartel operations in Europe.

Mr. WATKINS. Well, unquestionably so.

The cartel operations, even under the ECSC, the European Coal & Steel Corp.—I noticed just last week that the price trend of the British steel industry, which still is not a member of the cartel, not a member of the community, its prices in the home market are about 20 to 25 percent less than those of the group on the Continent.

I would like to know much more about the background of the differential, whether it is due to high costs of extracting coal or bringing in iron ore or the processes of conversion of that iron into steel. I don't know what their difficulties are. I would like to know something about it, but perhaps that illustrates just the sort of case you have in mind.

The CHAIRMAN. Dr. Watkins, did you know that recently, just as some indication of what I am talking about, that recently an American company bid against a British coal company for a contract for coal delivered in Holland, and the American company, in spite of the long ocean haul and the rail haul, underbid the British company, due to low-cost production in this country?

Mr. WATKINS. I did not know that it went to Holland; but I know last year we were carrying coals to Newcastle. [Laughter.]

The CHAIRMAN. Do you agree that public policy should try to insure as many firms in an industry as is consistent with this concept? That is, the concept expressed in the previous question.

Mr. WATKINS. Most certainly. I should think that should be an aim of public policy.

The CHAIRMAN. What criteria would you recommend for determining the number of firms which it is desirable to have in a given industry?

Mr. WATKINS. Now, I don't know how one could recommend any specific number.

I tried to emphasize that in my statement—I don't know how you could ever set down any test of the proper number of firms. It is just the same as the test of the proper proportion of the market to be supplied by any one firm.

That is line drawing. I would like to insist, and I do insist, that, in my judgment, line drawing, beyond those fundamental principles that are now a part of the substantive law, is a mistake.

In other words, my suggestion, Senator Kilgore, is that what we need is not a new version of substantive law or additions to substantive

law in the field of industrial control and market practices, but what we need rather is to go back to the fundamentals, let them stand and implement and enforce those fundamentals.

The CHAIRMAN. From your study of the present situation in Europe, do you not think that the following out of the old cartel concept of limited production and antiquated methods has slowed down European recovery quite definitely and has made it necessary for us to give more aid to the community there?

Mr. WATKINS. Yes, I do; but, Senator Kilgore, the conditions, the economic conditions vary incontinently and the economic ways of doing things, above all, of another people are something beyond our province, I think. It is hard to reconcile the usages and habits of thoughts of nations with entirely different backgrounds. After all, the Spaniards went into South America, they went into Peru, and they tried to show those people there what they thought was the right way of doing things.

Now, I hesitate to endorse those contrasts and comparisons and implied denunciations or criticisms of other people. I believe it a little beyond our power, indeed, bordering on bigotry. Maybe I am wrong. Maybe we ought to, perhaps we should be more like the Conquistadores or, to go back even further, the Crusaders, but I think we better stay home if we want to start crusading.

The CHAIRMAN. I asked that question to bring out the fact that we had an illustration before us of what monopoly could do to a national economy, not with the idea of our attempting to reorganize the business systems abroad.

Mr. WATKINS. In Europe?

The CHAIRMAN. Yes.

Mr. WATKINS. Yes, but there is one thing I would implore you, Senator Kilgore. Let us drop "monopoly" and let us substitute "monopolizing."

A monopoly is a condition. I tried to emphasize that being the sole source of supply of something is not bad at all. It depends on intent. It is monopolizing that is bad.

Now, otherwise, I agree 100 percent. Yes, that is right.

The CHAIRMAN. In other words, they have existed so long under that system that they cannot get the system out of their mental makeup and we should avoid getting into a rut of that type?

Mr. WATKINS. That is right. They have been under that system for a long time and it is beyond our power. We have plenty to do at home.

The CHAIRMAN. In your 1951 book at page 254, you said that the function of a modern trade association is to exchange among a few rivals the intimate details of the operations and policies of the group and provide them with the information that a monopolist acquires by virtue of being the sole supplier. You said that the effect is to transform a relatively free although imperfectly competitive market into a more rigidly monopolistic market.

What remedy do you suggest in an industry where this has occurred?

Mr. WATKINS. I have already suggested the remedy, I think; the licensing of the trade associations.

But I would like to comment on that quotation from the book.

That is not my view at all, that the function of a modern trade association is to do those things. That is not the function of a modern

trade association. I think that is a condensation of a page which gives it a twist that I would not agree with—but the remedy is already suggested.

The CHAIRMAN. The committee on cartels and monopoly of the 20th Century Fund, in its report in 1951, found that there were two developments that threatened to weaken or destroy competition. First, the committee said, independent enterprises have agreed to control investment, output, prices, or terms of sale. Second, it said that individual enterprises by combinations or internal growth have gained monopolistic powers, putting them in a position to dominate the markets in which they buy and sell.

Do you think that these criticisms of trade associations and of individual companies are valid under today's conditions?

Mr. WATKINS. Of some but not all, by any means.

Getting back to the original proposition, I trust the courts. I believe the courts have the power, and when the matter is left to their discretion that in the long run they will exercise it properly and to the advantage of the country.

The CHAIRMAN. Now, my remaining questions are based upon your recent letter to our chief counsel, Mr. Burns.

What are your views as to the overlapping jurisdiction in the enforcement of antitrust statutes between the Department of Justice and the Federal Trade Commission?

Do you have any suggestions to make as to a realinement of authority?

Mr. WATKINS. Not specifically. Ever since 1940—well, 1929, when I wrote that book on competitive regulation, *The Public Regulation of Competitive Practices*, I pointed out the distinction between the regulation of industrial structure and the regulation of business practices, and urged that it should be made a basis for dividing jurisdiction between the Federal Trade Commission and the Department of Justice.

It seems to me that it could be readily accomplished in one respect by simply putting conspiracy cases outside of the province of the Federal Trade Commission.

The Federal Trade Commission is supposed to regulate business practices of particular companies. That is what a business practice is, a firm's method of competing. If it is not that, if it is a combination, if it is an agreement upon something, then it comes under the Sherman Act, and that is where it should be.

The CHAIRMAN. Now, do you believe Congress should give consideration to the question, To what extent criminal penalties as provided in the Sherman Act should be used to regulate competition and to what extent civil remedies should be used?

Mr. WATKINS. Well, the focal point of the question is, "to regulate competition." Now, to regulate competition signifies to me to regulate competitive practices and not to control the structure of industry.

The structure of industry is a matter for regulation under the Sherman Act. To regulate competitive practices is the Federal Trade Commission's job. In other words, when the Commission finds some firm using an unfair method of competition it is authorized, in fact directed, to issue an order to cease and desist. Should that not be made a criminal offense—should those infractions of the rule prohibiting unfair methods of competition be given the sanction of criminal

penalties? If that is the question, my answer is "No." I think it would be unwise either to give a treble-damage suit right of action or provide a criminal penalty for such misbehavior. The reason is that those matters generally lie close to the border of a code of business ethics and that whole field of law is still in a stage of experimental development. That is work we should leave to the administrative authorities, specifically to the Federal Trade Commission.

THE CHAIRMAN. Thank you.

We will adjourn this hearing until next Tuesday, June 7, at 10 o'clock in the morning.

(Whereupon, at 12:30 p. m., the subcommittee recessed to reconvene at 10 a. m., Tuesday, June 7, 1955.)

(Attached is a list of replies by Myron W. Watkins to supplemental questions sent to him by the subcommittee:)

Will you please define the following in terms of their meaning, as used in your testimony before this subcommittee:

Question. Monopoly.

Answer. Monopoly, in economics, signifies sufficient control of the supply in any market to prevent price from approaching the level of marginal cost, on the average, in a normal period, the length of which depends on the conditions that set the limits, varying among the several fields of production, to the interval required for adjustment of the rate of production to a change in demand.

I used the term in my testimony, so far as I recall, solely to counsel against its use as an element in any legal offense. As the subcommittee is aware, the word appears nowhere in the Sherman Act. The authors of that act were quite well aware that "monopoly" was no offense at common law, and as they were bent simply on bringing the common law into the Federal jurisdiction they wisely avoided use of the term. They condemned a course of conduct, a species of behavior. They deliberately declined to condemn a condition, the position in which a supplier might find himself in the market in which he sells, and which he might reach either by anticompetitive design or by forthright, diligent, and scrupulously fair competitive effort.

One ground for the recommendation in my oral testimony that the 4 substantive sections of the Clayton Act be repealed was that 3 of them departed from the sound tradition of the Sherman Act and did incorporate the term "monopoly." As used in those sections it is fully as misleading, confusing, and mischievous as it would have been in section 2 of the Sherman Act. For sheer efficiency and entirely legitimate, upright, and straightforward business tactics may "tend to create a monopoly" quite as well as artful devices of discrimination and deception of predatory designs.

Once more let me urge upon your subcommittee that the use of the term "monopoly" as an element in a legal offense is a snare and a delusion. In economic analysis, the term is both necessary and useful; in legal regulation, it has no proper place. In fact, it is self-defeating. For it makes vulnerable the conduct the antitrust law was designed to foster "in the same breath" that it condemns the conduct which is its real target. Legislators, unlike businessmen, should stick to monopolizing.

Question. Duopoly.

Answer. This term was not used in my testimony.

Question. Oligopoly.

Answer. Briefly, oligopoly refers to a market of few sellers and many buyers. In practice, as a rule, it is confined to industrial markets.

Question. Is the term "oligopoly" useful from either an economic or antitrust standpoint?

Answer. Yes, from the economic standpoint. If you mean by "antitrust standpoint" to inquire whether legislation specifically aimed at oligopolizing would be appropriate, the answer is: "No." As indicated in my oral testimony, I am firmly of the opinion that the substantive rules laid down in the Sherman Act are adequate for their fundamental purpose, given discriminative judicial application. What they require, above all, so far as legislation is concerned, is what might be termed "collateral implementation"—a phrase the meaning of which an examination of my testimony should make clear.

Question. Are oligopoly markets inherently incompatible with active competition?

Answer. No. In oligopoly markets prices are indeterminate. With respect to other features, or facets, of the competitive process, oligopoly tends, in practice, to accentuate competition.

Question. Competition and workable competition.

Answer. Competition, in the present context, is business rivalry for patronage. "Workable competition" may be defined as "less than pure, but still effective, competition." The "workable" adjective signifies that, despite some departure in the structure of the market from the conditions of pure competition, in operation it will tend to bring about an allocation of resources, a distribution of income shares, a progressive improvement of methods of production, and a quid pro quo for consumers approximating, on balance, the presumptive outcome in these respects of pure competition.

Question. Do you advocate the adoption of the concept of effective or workable competition?

Answer. The answer depends on the meaning of the key word, "adoption." If it is taken to mean enactment of legislation, no. If it is taken to mean use by the courts (and quasi-judicial administrative bodies) in interpreting and applying the antitrust laws, yes.

Question. Market or market place.

Answer. The forum (area; meeting place) of sellers and buyers of, or the process of adjustment between the forces determining the supply of, and demand for, goods or services.

Question. Economic concentration as related to competition and markets.

Answer. Properly understood, the phrase has reference to the foci of decision-making in economic affairs and implies a diminution of their number and a widening of the operative scope of the decisions made.

Question. Big business.

Answer. A popular term, not a term of art, the connotation of which varies inordinately from user to user and from context to context.

Question. Is big business the same as monopoly?

Answer. No.

Question. Integration—vertical, horizontal, conglomerate.

Answer. Vertical integration is the linking up under a single direction of successive stages in a productive process. Horizontal integration is the combination of business units engaged in substantially the same (or overlapping) phases of a productive process. Conglomerate (or circular) integration is the combination of business units operating in conventionally distinct spheres of industry or trade.

Question. Do you think that American industry is unduly concentrated?

Answer. In some fields, yes. In others, no.

Question. Do you consider the present degree of concentration as a possible danger to economic freedom and, as propounded by some schools of thought, the political freedom of the country?

Answer. So far as economic freedom is concerned, as the answer to question 2 indicates (the preceding question) an "omnibus" answer here seems to me out of place. It all depends on the specific circumstances in particular concrete situations. So far as political freedom is concerned, I have no misgivings regarding either the devotion of Americans to individual liberty or the viability of democratic institutions.

Question. Would there be an increase in the number of rivals and hence the amount of rivalry if we did not have so much concentration of economic power in certain industries?

Answer. The intensity of business rivalry does not vary directly with the number of rivals, nor does it seem to me to depend so much on the number of rivals as is implied. The inverse relationship of the number of rivals and the concentration of economic power is tautological.

Question. Do you believe that economic concentration must be stopped, and the trend reversed, as a safeguard against the possible necessity of Government regulations?

(a) If not, why not?

(b) How do you suggest that deconcentration be brought about?

Answer. As the foregoing answers have suggested, I do not believe broadside measures or an undiscriminating approach to these problems is appropriate. The case-by-case approach commends itself alike to commonsense and to reason.

Question. Do you believe that in many American industries or markets competition is actually imperfect in various forms and degrees?

Answer. Yes, but in the economists' lexicon imperfect competition does not necessarily mean ineffective competition.

Question. Considering the definition which you have already given for "big business," do you believe that "big business" is compatible with a competitive system?

Answer. Using the term in a literal sense, "big business" is not only compatible with a competitive system, it is, today, a sine qua non of its advancement.

Question. From an economic point of view, what kinds and degrees of competition are contemplated by the antitrust laws?

Answer. Fair, vigorous, forthright, and aboveboard competition.

Question. As an economist, do you see different standards of competition contemplated by different laws—as for example, under the Sherman and Clayton Acts and the Robinson-Patman Act?

Answer. Yes, as indicated in my oral testimony.

Question. As an economist, would you say that dissolution, divestiture, or divorcement is the only effective remedy for oligopolistic industries? If not, what would you suggest?

Answer. Not the only remedy; but on occasion it may be appropriate. I would look for an appreciable correction of an economically unwarranted pattern of oligopolistic industrial organization, where it exists, from a judiciously framed Federal incorporation law.

Question. Do you believe that section 7 of the Clayton Act, as amended, is adequate to stem incipient monopoly and the substantial lessening of competition throughout the economy?

Answer. More than adequate. I would repeal it, and rely on the Sherman Act, section 2, for the reasons set forth in my oral testimony.

Question. Would a more rigorous enforcement policy since 1950 have checked the tide of mergers which had developed throughout the economy?

Answer. It might have. Much would depend on the standards of adjudication.

Question. Several times Congress has passed laws for the purpose of putting a brake on merger movements. Yet, mergers have continued at a rapid pace. Why?

(a) Was it because the laws were not properly framed?

(b) Properly enforced?

(c) Because the economic facts presented perplexing problems, difficult to solve by legislation and court action?

Answer. Chiefly because of faulty, or deficient, implementation of the Sherman Act.

Question. What type of mergers would you consider harmful to the economy from the standpoint of the national antitrust policy?

Answer: Those effected with an intent to monopolize.

Question. What economic facts, or situations, do you think should be of prime importance in determining whether a proposed merger would be harmful to the economy?

Answer. Those disclosing the intent, or moving purpose, of the merger. The relevant economic facts are myriad and will always vary from case to case. They cannot (wisely) be blueprinted, or detailed, in advance; but the opinions of eminent jurists such as Holmes, Hand, Hughes, Brandeis, Cardozo, and White provide a pretty clear guide as to their general nature.

Question. Will you comment upon the three factors which the FTC says shall be considered in analyzing a merger?

(a) The character of the acquiring and acquired company and the transaction.

(b) The character of the markets affected.

(c) Immediate changes in the acquiring company and in the adjustments of other companies operating in these markets.

Answer. The three criteria named are good, as far as they go.

Question. Do you think greater emphasis should be given to other considerations?

Answer. Often. For the background is no less crucial, i. e., revealing of intent, than the foreground.

Question. How do you view the tendency of big companies taking over their customers? For example, the steel companies taking over most of the steel drum industry.

Answer. Vertical integration, either upstream or downstream, should certainly never be regarded as illegal per se. It should be judged on the basis of

the intent manifest in the surrounding circumstances. In general, the *prima facie* case for leaving vertical integration to the arbitrament of the market is strong.

Question. Has not the pattern of vertical integration, as exemplified by steel and later by automobiles, set the price of new entry into the fields at practically prohibitive levels?

Answer. I doubt it. Ford's experience in making steel, tires, and glass does not suggest to me the likelihood of undue constriction of opportunities for new enterprise in supplier industries.

Question. Do you believe that ease of entry into an industry is one of the large economic problems of today?

Answer. No. I do believe the maintenance of freedom of entry is one of the prime essentials of an effectively competitive economic system.

Question. What recommendations would you have to reducing this barrier?

Answer. Where uneconomic barriers to free entry exist, the Sherman Act provides, in my judgment, adequate means of lowering them.

Question. Even though a company may dominate a market because of internal growth, would the fact that its domination alone gave it undue monopoly power be objectionable?

Answer. The question is unintelligible to me (see the distinction developed above between "monopoly" and "monopolizing").

Question. Would you be opposed to dominance regardless of whether it was achieved by internal or external growth?

Answer. The key word here is "dominance." If taken to mean simply occupancy of a large share of a given market, the position would not be objectionable.

Question. Is the real evil of dominant companies their power to fix prices, control the market and dominate their field of endeavor?

Answer. No. (See above.)

Question. Do you believe that so-called stabilization of an industry through economic concentration can ever be justified?

Answer. It would require still more definitions to answer this question intelligently.

Question. At what point in the development of an industry do you consider optimum size to be in the public good?

Answer. Ditto.

Question. What steps would you take to control optimum size?

Answer. To me, the question as stated is meaningless.

A STUDY OF THE ANTITRUST LAWS

TUESDAY, JUNE 7, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10:05 a. m., in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore (chairman), O'Mahoney, and Wiley.

Also present: Joseph W. Burns, chief counsel; and Donald P. McHugh, assistant counsel.

The CHAIRMAN. The committee will come to order.

The witness today will be Judge Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division.

You have, I think, Judge, a prepared statement?

Mr. BARNES. I have one. If you desire me to give my testimony in that manner, Mr. Chairman, I think I would prefer to start that way anyway.

The CHAIRMAN. All right.

Mr. BARNES. If it is agreeable with you.

The CHAIRMAN. If you decide at any time that you want to just put the rest of it in the record and go ahead and comment, why, that is perfectly agreeable.

STATEMENT OF STANLEY N. BARNES, ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROBERT A. BICKS, LEGAL ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL AND EXECUTIVE SECRETARY OF ATTORNEY GENERAL'S COMMITTEE

Mr. BARNES. I have been asked to appear today to discuss with you, first, the relation of business size to the offense of monopolization under the Sherman Act, and second, more specifically, the activities of the Antitrust Division in the automotive field.

First, I sketch briefly the relation of business size to monopolization outlawed by Sherman Act, section 2. My beginning point, in the words of the late Chief Justice Hughes, is that the Sherman Act—

as a charter of freedom * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions * * *. The restrictions the act imposes are not mechanical or artificial. Its general phrases interpreted to attain its fundamental objects set up the essential standards of reasonableness.

Applying these broad guides, the offense of monopolization consists of monopoly in the economic sense—that is, the power to fix prices or exclude competition—plus a carefully defined but broad ingredient of purpose to use or preserve such power.

The CHAIRMAN. Judge, a previous witness said that monopolization consisted of the intent, not the size, of the company. Do you agree with that?

Mr. BARNES. Yes. I do not think that it is alone intent. There must be the power, plus the intent or a purpose to preserve that power; the size itself, I will come to that in a minute rather specifically, Senator; but I do not think the size in itself creates necessarily monopoly power, although it might have some tendency in that direction.

The CHAIRMAN. However, it may be the function for monopoly power if exercised with the wrong intent.

Mr. BARNES. It is one of the matters that would cause anyone interested in the problem to examine the situation very carefully because very obviously a bigger corporation would probably have greater opportunity to monopolize.

The CHAIRMAN. That is the point I am making.

Mr. BARNES. A bigger corporation would probably have greater opportunities to monopolize than a smaller corporation.

Of course, one cannot say that absolutely because the relative market position is the payoff.

The CHAIRMAN. Would you not also say that the Sherman Act really, in fact, amounts to and, I think, is well-defined here by Justice Hughes, when he said it operated as a constitutional or on a constitutional method? It sets down the policy of the United States Government at the time; is that not a fact?

Mr. BARNES. Yes; it is broad and general language not aimed at specific violations.

The CHAIRMAN. That is correct.

Mr. BARNES. That monopoly power required for a section 2 offense is what I want to consider next.

The first essential is the concept of monopoly required by section 2. This begins with the easy case, a single seller of a commodity or service for which no close substitutes exist. Beyond this basic notion, courts class, as monopolies under section 2, situations where a single seller, or a group of sellers acting in concert, control market price or possess power to exclude competition.

It must be kept always in mind that monopoly power may be found, even absent a showing that prices have in fact been raised or competitors actually excluded. As the Supreme Court put it in the American Tobacco case "the material consideration in determining whether a monopoly exists 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."

Leaving my prepared comments for a minute, I might point out that it might very well be that the company in a monopoly position might well keep its prices low rather than raise prices in order to have an effect of excluding competitors in the business.

This identification of monopoly with power rather than practice Judge Learned Hand explains in the Alcoa decision. There he analogizes offenses prohibited by section 2 to those outlawed in section 1.

All contracts fixing prices, he points out, are prohibited by Sherman Act, section 1. No real difference exists, he feels, between such contracts and monopoly. For monopoly necessarily involves an equal, or even larger, power to fix prices. Therefore, in his language—

it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for contracts are only steps toward that entire control that monopoly confers: they are really partial monopolies.

Then we come to the next important factor, which is the definition of the market.

Monopoly power cannot exist in a vacuum, nor in theory alone. Testing for monopoly power requires first delineating that market within which power must be gauged. The relevant market, in the words of Standard Stations, is the "area of effective competition" within which the defendant operates. And the "problem of defining a market," the recent United Shoe decision explains—that is, the United Shoe Machinery decision—"turns on discovering patterns of trade which are followed in practice."

"Market" is normally identified both in terms of trade and products or services as well as the geographical area in which such trade may be limited. For the Sherman Act, the Supreme Court has held, has both a geographical and distributive significance and it applies to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce.

Increasingly, in recent years, definition of "market" may, and perhaps soon must, involve consideration of substitute products. Even in rare situations of complete monopoly, the single seller's power is generally limited by a customer's possible shift over time to substitute products. In Times-Picayune, the Supreme Court cautions that "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small." That is from the Times-Picayune case.

Senator WILEY. Whoever created that phrase?

Mr. BARNES. I think it was not the lawyers; we cannot blame them. I think it was a phrase created by economists, and then adopted by Mr. Justice Clark in the decision, Tom Clark, in the Times-Picayune case. At least, he wrote that decision. Thus, the Court here refused to include newspaper, radio and television advertising in the same market for Sherman Act purposes, despite the fact that there obviously is some competition among them.

The next question is how much market power constitutes monopoly.

Once we have "market" defined, relevant next is the question of how much power within that market constitutes monopoly. "Monopoly power," one district court recently explained "can be distinguished from the normal freedom of business only in degree." The most direct evidence, of course, that defendants possess monopoly power over market price, or over competitors' entry, is its actual use.

Frequently however, evidence of the actual course of prices or the competitive opportunities of rivals is equivocal at best. So courts must rely on other tests for monopoly power, and measure its degree in other ways. All judicial searches for monopoly power start with

the primary fact of relative size—the percentage of supply controlled. For in the language of the Supreme Court, "size is, of course, an earmark of monopoly power." However, let me caution, as the Columbia Steel court put it, that it is impossible "to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed."

However, significant relevant size may be, absolute size is absolutely irrelevant under section 2 of the Sherman Act. Only relevant is relative size in the context of a particular market setting.

More generally, testing for monopoly power, courts scan market structure and behavior bearing on control over price and competitive opportunity. Regarding market structure, factors sometimes relevant include the relative size and strength of competitors, particularly whether defendant's market share has been increasing or decreasing over a period of a reasonable number of years.

Also significant may be freedom of entry including reference to such factors as capital requirements, locational advantages, and the importance of advertising. Appraising conduct affecting prices, courts may consider the course of prices, their flexibility and relation to price trends in other industries, price competition among firms and the presence or absence of trade customs tending to reduce price competition.

Defining monopoly, an issue is the presence of power to fix market price—not the reasonableness of prices actually charged. Therefore, whether profits or prices are high or low need not, strictly speaking, be relevant to the proof of the offense of monopolization, and I refer to the example that I quoted a few moments before.

Nonetheless, such evidence may sometimes throw light on other problems, like the possibility of entry, or indeed, the existence of monopoly power over price. In the American Tobacco case, for example, the fact that defendants raised prices in a price leadership pattern, during a depression period, and even managed to increase their profits, was held to evidence their monopoly power as well as barriers to entry of new competitors.

In sum, then, as the report of the Attorney General's Committee put it, and I endorse that statement fully:

Measuring monopoly power depends upon a full evaluation of the market and its functioning, to determine whether on balance the defendants' power over the interrelated elements of supply, price and entry are sufficiently great to be classed as monopoly power. While the decisions illuminate the economic theory of the courts in evaluating these facts, they provide no magic formula for simplifying the inquiry.

The next important factor is the additional element of "deliberateness" required to make monopoly "monopolization." That is because we must keep always in mind the distinction between monopoly and monopolization.

More than monopoly power, however, is needed to violate section 2. For evidence of monopoly power does not by itself prove the offense of monopolization. Needed also, in the language of the court in the Griffith case, is "the purpose or intent to exercise that power." Here, requisite intent is not a "specific" intent to monopolize, but rather a conclusion made by the court based on how monopoly power was

acquired, maintained or used. Clearly, "deliberateness" is proved if monopoly has been achieved or protected by restraints of trade illegal under section 1. In addition, courts may infer a monopoly has been "deliberately" maintained from certain business practices themselves not violative of any antitrust law. To hold otherwise under section 2, Judge Hand explained in Alcoa, would "make nonsense" of that provision; "for no monopolist monopolizes unconscious of what he is doing." In such cases, therefore, Alcoa suggests that no showing of intent is required beyond the "mere intent to do the act." That is the act which converts the monopoly to the monopolization.

Certain other language in Alcoa, however, inspired the fear that section 2 might penalize aggressive business management. Particularly, the Alcoa court observed:

* * * It was not inevitable that * * * (Alcoa) should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. * * * (Alcoa) insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case, says the court, we interpret "exclusion" as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the act, would permit just such consolidations as it was designed to prevent.

These statements, approved by the Supreme Court in the American Tobacco case, were misconstrued by some to suggest that monopoly might become monopolization merely by being active, enterprising and dynamic. From this construction, it would follow that the safest course for business leaders is passive stagnation with a gradual loss of market share—a business policy directly at war with antitrust claims.

With any such conclusion, the Attorney General's Committee report sharply differs. I might say I concur most strongly in this language of the Attorney General's report.

It concludes:

Such is not the teaching of Alcoa. Defendants' conduct was there held to constitute "monopolization" not because Alcoa was progressive, but rather because it acted, with calculation—

those are the important words, "with calculation"—

to head off every attempted entry in the field. That history of frustrating potential entrants and the vital fact that no company succeeded in breaking into a basic manufacturing industry, whose technology was widely known, over a period of more than 25 years, while Alcoa's output increased 800 percent, convinced the Court, as a practical matter, that Alcoa's monopoly position rested on a good deal more than its technical and business skill.

The Alcoa case is not to be interpreted as penalizing enterprise; instead it declares illegal monopoly maintained by policies intended to discourage, impede, or even prevent the rise of new competitors.

The CHAIRMAN. When was that decision rendered; do you know?

Mr. BARNES. 1946, I believe, Senator; before American Tobacco, and the Supreme Court affirmed it.

The CHAIRMAN. That is right.

Mr. BARNES. That brings us to the next important situation, the fact that we must recognize there is a defense that a corporation can prove

if it can possibly obtain the information, that is, it is possible that monopoly may be thrust upon the defendant, again in the language of the Alcoa case.

Supporting the committee's construction of Alcoa, is Judge Hand's language from Alcoa, quoted with approval by the Supreme Court in the Tobacco case (328 U. S. 781, 814 (1946)):

* * * It does not follow because "Alcoa" had such a monopoly, that it "monopolized" the ingot market; it may not have achieved monopoly; monopoly may have been thrust upon it.

Illustrating this principle, the court in the recent United Shoe Machinery case which, of course, was decided last year, Senator, said:

The defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and use within, the limits of law.

The CHAIRMAN. Has your economic staff made studies of the type of competition that exists in those industries dominated by so-called Big Two or Big Four?

Mr. BARNES. Yes, sir; in certain of those industries. For example, I think that I can point out to you that we have pending at the present time the so-called Soap case, where we have joined the large soap manufacturers on the question involving primarily whether their uniform prices changed day by day, week by week, month by month at almost the precise moment—I would say at the precise moment in probably 90 percent of the cases; whether that is price leadership as they maintain or whether it is an attempt to monopolize by more than one large corporation within an industry.

That very naturally, Senator, involves a great deal of preparation. We have a large staff at work on it. Unfortunately, we frequently are compelled to change counsel when the blandishments of private practice take away some of our best men. That happened in this particular case, but it is again staffed and they are working on it exceedingly hard.

I think that that may be considered as a case that may—and I am speaking only in possibilities—give us considerable enlightenment on that particular area of where you have what the economists like to call the oligopoly position in a particular market area.

The CHAIRMAN. Do you believe the type of competition existing in such industries is healthy to the economy?

Mr. BARNES. That is a problem that cannot be answered "Yes" or "No" without a detailed analysis, both from a business standpoint and from an economic standpoint.

I do not think you can give only general answers to such a question. I think it depends again upon history—upon many factors that have to be considered before you can come to an intelligent conclusion.

If the Government is right in this case, it is unhealthy in that particular industry that I mentioned. If the Government is wrong, then I presume we must accept it as a healthy situation, at least in the minds of the courts.

The CHAIRMAN. I think when you get into the soap question one yardstick that might be applied there is the terrific amount of tele-

vision advertising, particularly when you take into consideration its cost, because the cost of television advertising is terrific.

Mr. BARNES. I do not know whether you know it, Senator—

The CHAIRMAN. Here you find an ad running 5 or 6 times a day, advertising that 1 company is selling 4 cakes of soap for the same price of the other company's 3; in other words, they advertise they are cutting the price, but they are spending an enormous amount of money on a television show to do it.

Mr. BARNES. I presume you saw, Senator, that the 10 largest advertisers in the United States last year were the 3 automobile companies, the 3 soap companies, the 3 largest liquor companies, and General Mills; and I think that substantiates your position that they do spend a lot of money.

Of course, that is an industry philosophical question. We have had defendants tell us they have to keep the prices up, otherwise they would not be able to advertise as much, and there would be a lot of advertising people out of work if they were not able to sell at a tremendous markup.

For example, a perfume manufacturer told me that. He said:

We are helping the American economy by charging several hundred percent over the cost because all that money enables us to advertise extensively.

Of course, it also enabled him to make a good deal of money personally.

The CHAIRMAN. An interesting factor on that one point was that a group came before this committee about a year ago asking that the Robinson-Patman Act be amended to permit the charging of unearned brokerage fees by wholesalers in order to build up a fund with which to advertise against the chains; that if we gave them that and forbade the chains to charge unearned brokerage, we would be giving them a weapon with which they could fight the chainstores. That came from the independent wholesalers.

Now, don't you feel that in oligopolistic industries, the antitrust laws are now not adequate to enable the Department to seek relief?

Mr. BARNES. Senator, we can seek relief, and we are seeking it, in certain areas, such as the one I just mentioned, the soap industry.

Whether or not the laws are adequate, and the factual situation is such as to convince the courts that the oligopoly position constitutes the equivalent of a monopoly position, is something that, to my knowledge, the Supreme Court has thus far not passed upon.

The CHAIRMAN. But the question is, Do you think the statutes themselves give you adequate grounds to go into that field?

Mr. BARNES. I do not recommend, nor do I believe that it would be advisable to amend the Sherman Act, just as we were discussing a few moments ago. We are not talking about some of the other laws, but we are talking about the Sherman Act.

The CHAIRMAN. Judge, let me interrupt at that point. Under the interpretation, really, of the Sherman Act, it is a statement of policy, and is like a constitutional amendment. It must be implemented by special statutes on special subjects in conformity with the policy laid down.

Mr. BARNES. Well, I will not argue with you about your first statement because I agree with you that the Sherman Act paints with a broad brush the principles of antitrust, and that there are other statutes that attempt to meet specific areas and problems.

The advisability of that is something else again. I do not believe that there is any necessity at this time under the present state of the law for the amendment of the Sherman Act.

That conclusion, of course, is subject to some of these cases that we have filed, and if there is a final determination of this question of what is best for the country, the monopoly versus oligopoly situation, then we will have a problem.

Some people will think there should be amendment, perhaps, of the Sherman Act, or specific statutes to cover that situation if the courts rule that it is monopolies only, and not oligopolies, that the Sherman Act is presumed to prevent.

I might say that a little later in what I propose to say, we get into the automobile question, which is a pretty good question of several leaders in the industry, and that may give you some of my thinking on the subject, Senator.

The CHAIRMAN. In those industries where, because of price leadership, there is no real competition, but where there is not sufficient evidence to spell out a conspiracy, do you believe that there should be changes in the antitrust laws to cope with that situation?

In other words, what I am getting back at is this: Is the Sherman Act sufficiently broad to keep abreast of all the economic changes that have taken place in the past 65 years? If it is not then, of course, possibly amendment is needed to it.

But the point I was getting at before is that if it still is, there may be specific developments that should be taken care of by special statutes dealing only with that type of development, and carrying out the intent and purpose of the Sherman Act.

Mr. BARNES. Now, your question related to, or assumed, rather, that there were certain industries where there was a similarity of prices, but no proof of any concert of action among those who fixed the prices: am I correct?

The CHAIRMAN. That is correct.

Mr. BARNES. Under the law, I think, as it exists today—and we are on this subject that is very troublesome from a semantics standpoint because you get into conscious parallelism of action, which depends upon how you read it, whether it is a bad word or a good word—there have been no Supreme Court decisions that permit the conviction of any persons based upon conscious parallelism of action. That was specifically repudiated in the Times-Picayune case, and in earlier cases.

At the same time, if a course of conduct which a defendant alleges is the result of independent thought and determination occurs over a pattern of time, and is changed with sufficient regularity so as to induce a reasonable trier of facts to come to a conclusion by inference that there must have been not price leadership but a desire and an attempt to fix prices, then the courts will recognize such a conclusion by the trier of facts.

Now, you get into a very difficult subject, but not an impossible subject to enforce antitrust laws. It may not be the best way, but I would not want to say the door is closed.

The CHAIRMAN. That brings to my mind one particular matter. I know that your division has a lot of records on this because some of the information I got on it came from the records of the Antitrust

Division. That has to do with the paint prices in which two men who could not afford to go ahead and develop their product, discovered titanium oxide which they, in turn, sold to National Lead, National Lead at that time owning practically the entire white-lead production.

In the meantime, Du Pont was developing Lithopone, and by some strange coincidence the prices stabilized in this country in sort of an escalator fashion, Lithopone being at the bottom of the price pile, but being an inferior product; white lead next up in the scale, and then titanium oxide at the top of it, in which there is really no sound basis for the price, but that has been maintained still, and is still maintained.

Mr. BARNES. We are going to have an interesting problem—

The CHAIRMAN. There is competition, at least on the surface between Lithopone of Du Pont and titanium oxide of National Lead.

Mr. BARNES. We are going to have an interesting situation here, Senator, I think, in watching what happens to the Salk vaccine. Here we have six competitors and, perhaps another one may come in. For example we saw a newspaper story that the six manufacturers had agreed to raise their price from \$3.12 for a certain unit to \$6.

We checked into that and found out that that was not true.

We will watch with great interest to see what prices are put by these various laboratories. Of course, there must be a certain amount of standardization, but to have all of them down to the last penny would be a rather remarkable coincidence in this new process, with different facilities for manufacturing.

The CHAIRMAN. Do you feel that Congress should enact into law some kind of conscious parallelism doctrine as a basis for filing an antitrust suit, and that this would compel companies to adopt independent pricing practices which would insure competition?

Mr. BARNES. I do not think that is the way to reach it. I would not advocate any law which attempted to define conscious parallelism as a crime or as a violation of the antitrust laws.

The CHAIRMAN. That to me was why the titanium oxide incident was interesting. Du Pont, realizing that Lithopone was an inferior product, priced it as low as they could; the other company took advantage of that, and priced the other substances in higher brackets.

Mr. BARNES. I think that the ultimate answer there is what happens in the market place. The consumer wants the product that is less good at a cheaper price; he should be able to buy it. If he doesn't buy it, why, he will soon turn it down, and the manufacturer will go out of business.

They may be willing to pay for the better product and pay a higher price, and there is no reason why the higher price should not be paid, if there is value there.

The CHAIRMAN. In what particular industries have you found an absence of active competition because of price leadership?

Mr. BARNES. I do not think I can answer that, Senator. That presumes that there is an absence of competition because of price leadership. It would assume that, in the first place, one follows the other; it would assume that the similarity of prices was based upon price leadership, which is what we generally try to prove does not happen, and so I do not think I can with any advantage to you answer that question.

The CHAIRMAN. Is it necessary for the Department to establish the existence of predatory practices before it can seek and obtain divestiture?

Mr. BARNES. No, sir. Under the Fruits doctrine, divestiture can be decreed in the discretion of the court in those cases even where legal acts were used to obtain a monopoly position.

If the position and acquisition of assets and share of market was achieved by a monopoly position, plus this intent to monopolize, even by the use of legal acts, then there is no reason, within the discretion of the court, why divestiture should not be invoked in those cases where the court believes it should.

The CHAIRMAN. Do you believe, as a result of court decisions, such as the National Lead case, it is now impossible or extremely difficult to obtain divestiture or dissolution in industries where such relief is needed?

Mr. BARNES. I think that it is a difficult task. I think that the history of antitrust enforcement shows that the courts are not prone to order divestiture because there are always a hundred and one mechanical problems.

It is very seldom that a business organization is set up in precisely the way that lends itself to divestiture.

Probably if it were, it would not be a very efficient corporation, and for that reason we find a disposition on the part of the courts that we do.

I say this at this point, not in a critical manner in any way; I think it is a difficult problem. I think Judge Wyzanski pointed out, and the language was used in the Attorney General's report, as follows:

Judicial reluctance to grant drastic relief is firmly grounded in considerations of policy.

That is what the Attorney General's report said.

As Judge Wyzanski put it:

In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law.

That is this divestiture—

They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so frequently have altered from time to time the interpretation of its substantive provisions if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.

That is what one judge says with regard to divestiture. I think we have to recognize that the climate that exists in public thought, perhaps unconsciously, has an effect upon the action of judges, and I think that we will always find that judges who, I believe, as a rule are of conservative trend, take great care and give their due thought to what this one judge described as a surgical operation.

You can see it in the record of cases where divestiture has been granted. They are comparatively few.

On the other hand, some really tremendous results have been achieved by that divestiture, and it is not a thing in the past. It is something that continues, and our ICI case is a case where we are

still working on divestiture provisions, where Du Pont and the British Nylon Spinners were required to divest themselves of their interest in their Canadian plants, and now competition exists there as a result of that ICI case, with its resultant divestiture.

The CHAIRMAN. For instance, we get now into the patent field, the outright purchase of patents: that makes divestiture much more difficult, does it not?

Mr. BARNES. Yes.

The CHAIRMAN. In other words, if the patent owner could only grant licensing rights rather than actually outright sale of the patent, would that help the situation?

Mr. BARNES. I would—

The CHAIRMAN. For instance, I think of this—to get back again to the National Lead situation—in that National Lead purchased the patent on titanium oxide and owned it: whereas, had the owners of that patent licensed their patent to National Lead, it would have been much easier because National Lead not only got the patent, but they got that still more priceless thing, the know-how.

Mr. BARNES. You have got a terrific subject there, Senator.

The CHAIRMAN. And they got it exclusively.

Mr. BARNES. I would not go so far as to say that upon my limited knowledge a law should be passed which would prohibit an inventor from selling his patent.

Perhaps that procedure is the only way that he can achieve the benefits that are constitutionally guaranteed to him under our patent system, the product of his own inventive genius.

On the other hand, I point out to you that a great many inventions—I do not even want to attempt to say how many percentage-wise—but a great many inventions today are issued not to the inventor actually, but to the employer who accumulates the mental processes of these inventive geniuses, and that is a problem that we are going to have to meet sooner or later; not the monopoly power that is given to the inventor, but the monopoly power that may be created by the accumulation of a monopoly power.

The CHAIRMAN. A series.

Mr. BARNES. Yes, the accumulation: and that is exactly why—

The CHAIRMAN. For instance, I remember a bill was introduced in the Congress of the United States in 1941 giving the Government the power to seize, and the bill was worded this way, the patents of a corporation needed by it in the conduct of the war.

There was a terrific fight put up on that, by the big companies particularly, and they finally compromised by agreeing that the Government could commandeer licenses on patents but that the patent itself was an invaluable proposition.

Mr. BARNES. Yes.

The CHAIRMAN. That would have been divestiture of the patent right there.

Mr. BARNES. Yes. It is a tremendous question. I think that it is probably one of the most fruitful areas for study.

As you will recall, we have an extremely important patent suit pending against RCA on this very question of accumulation of patents and licensing in groups rather than singly, matters of that kind.

Senator O'MAHONEY. What is the title of that suit?

Mr. BARNES. *United States v. RCA.*

Senator O'MAHONEY. Where is it?

Mr. BARNES. The Southern District of New York.

I might say, Senator, that that is a suit that we feel is a significant suit because efforts have been made by the Department of Justice for a good many years to file a suit of this kind, and we feel that the fact that it has been filed and that it has withstood its preliminary attacks against it indicates that we, perhaps, have achieved a theory that will be extremely worth while in antitrust enforcement.

Senator O'MAHONEY. I am very much interested in that.

The CHAIRMAN. Now, what steps do you take to police your judgments once acquired and, particularly, on those cases where it was felt divestiture was needed and could not be obtained because of the attitude of the courts? How can you police those?

Mr. BARNES. Well, of course, that is again getting into a question of manpower. It is extremely difficult.

I think, Senator, as I have expressed before, one of the things that appalled me was that so little attention was paid to enforcement.

I can point out to you, and I think this answers your question in figures and facts better than any theory, that from 1890, I am informed, down to and including 1952 there were 12 enforcement suits instituted.

From 1953 to the present time, eight enforcement suits have been instituted, which indicates an awareness on our part that merely getting the judgment is not enough: you have got to follow it down.

However, I want to be honest with you. We have had two very unsatisfactory conclusions to that type of enforcement, one within the last week out in the Middle West, where we attempted to enforce contempt in the Milk Wagon Drivers case and, to my sorrow and dismay, it was decided against us just this last week.

Now we have the problem as to whether or not—as a matter of fact, it is a very strange thing. The court was trying a criminal case, and decided the criminal case against the Government, and said there was no use in the Government's proceeding with the civil attempt and, of course, we have no appeal from criminal matters, so if it is a disposition of it, it is a very nice way of preventing the Government from taking any other steps.

The CHAIRMAN. I know in one case—and that is the reason I asked the question—in 1941 I was requested by the antitrust division to reintroduce two bills—that was in movie divorce, agreeing to a consent decree, and also on the question of block booking; and I kept those bills in the committee in the Senate for some 6 years to assist them in policing the consent decree.

Mr. BARNES. That is one of our great problems. In fact, the policing of the decrees in the motion picture industry is one of our most difficult problems because of the great interest in it, the fact that it affects so many small-business men in the theatrical business, and I will very frankly say, the fact that some of the theater owners, the independents, have been in a comparatively advantageous position by reason of the decrees that were entered in the Paramount Pictures case, for example.

They have not had to face the competition of new entries by the big companies during the period that this decree prohibited entry, and

some of those provisions are expiring by their terms, and now the question comes as to whether or not some of the smaller theater owners are going to be satisfied with competition that looks as though it is developing on the part of some of those who have previously been convicted of violation of the antitrust laws, and now reaching the end of the term, so to speak.

Senator O'MAHONEY. Does that amount, Judge Barnes, to saying in this situation that the Department of Justice has obtained a certain degree of competition by judicial action which, in its own terms, is limited, and upon the expiration—limited in time—and upon the expiration of that time the conditions will be recreated by which the evil you sought to suppress through judicial action will arise again?

Mr. BARNES. No; I did not intend to infer that. I intended to state this: That as a part of this taking of the fruits of the conspiracy, and this punishment, there were certain defendants who were required to desist for a certain period of time from the acquisition of certain theaters.

Now, by the terms of the decree, that period is over. As to whether or not they will not only compete by the introduction of theaters legitimately, whether they would go beyond that, go back to their old habits that were the subject of litigation, of course, I cannot say.

Senator O'MAHONEY. I did not seek to imply that. I asked you if the conditions that were created—by the limitation of time during which the condition was sought to be prevented by judicial action—could arise again; in other words, that they could—

Mr. BARNES. The prohibition against purchasing of theaters, as I understand it, of certain defendants was to permit small theaters and small chains to attempt to recoup their position to a normal position by keeping out the big ones for a certain period of time.

Now, I am merely pointing out that that time is coming to an end.

Senator O'MAHONEY. Now that the period of time is coming to an end, do you think it would be worth considering establishing the prohibition which the Department of Justice sought by judicial action or action through the courts, by law?

Mr. BARNES. Yes; I get your point now, Senator. I am sorry if I misunderstood it. I do not believe the Department of Justice should take a position such as you intimate at this time under our present knowledge of affairs, because I believe that that would be saying, in effect, to the court, "You did not sentence the man for a long enough term and therefore we are going to modify that sentence."

I do not think the Department of Justice should do that on the facts, as we know them.

Senator O'MAHONEY. Well, the Department of Justice would not do what I am suggesting, but the Congress would.

Mr. BARNES. That is right; it would recommend to the Congress—

Senator O'MAHONEY. Do you think the Department of Justice should oppose such a thing, if it is a good thing to maintain competition, so that the little theaters should survive or could survive, and you succeeded in protecting them in their survival for a certain time? Why not give them the benefit of a law which will, without the limit of time, protect their right to compete?

Mr. BARNES. Because theoretically you are preventing a big corporation from competing with the little corporation.

Now, that was punishment because of what they had done. Whether or not you want to enact that into law, that is, to prevent the big corporation from competing with the little one, is a matter of policy that goes beyond—

Senator O'MAHONEY. Of course, it is a matter of policy. But when we undertake to deal with any of these monopoly problems we are dealing with matters of policy. A situation which the Department of Justice has confronted these many years, it seems to me, is that it is finding great difficulty to successfully prevent monopolistic growth through action in the courts.

When you go to the court you go in the opinion that there is a monopolistic condition which ought to be prevented, so that competition may survive.

My question, sir, is simply: Is not the real remedy to be found in action by Congress through law?

I do not want to commit you to anything at all with respect to specific action. But it seems to me that—

Mr. BARNES. I think, Senator, if I accept your premise—there has been a breakdown of antitrust enforcement by inability to obtain it through the courts—then I agree with you that the only remedy would be through additional legislation.

Senator O'MAHONEY. Now, there was no consideration of that approach that I recall in this report of the committee: was there?

Mr. BARNES. No; I do not believe that there was.

Senator O'MAHONEY. The Department of Justice, in administration after administration, without regard to political complexion, has been moved to go into court because of a condition which the Department felt was violative of the principle, at least, of the Sherman antitrust law.

Your efforts—and by this I mean the whole Department of Justice—have been repeatedly frustrated because the courts do not go along in their acting under the terms—the technical terms—of the Sherman Act and the other antitrust laws, and your defeat frequently arises from the fact that Congress has not sufficiently defined the issue.

Mr. BARNES. I think that is correct. I think the best example of that is what could be accomplished under one rule—under section 7 of the Clayton Act—that could never be accomplished under your Sherman Act.

Senator O'MAHONEY. Right.

If it is agreed that in this country we ought to prevent monopoly from arising by allowing conditions to exist which enable a small group or a single unit to obtain a monopolistic position to shut out competition, is not the remedy to be found actually not in new means of helping the Department to enforce a very difficult law but in the enactment of legislation?

Mr. BARNES. If you can agree upon the evil that you want to eliminate, if you can define it, if you can say that X is a monopoly—

Senator O'MAHONEY. Price fixing.

Mr. BARNES. Price fixing, no question about that.

Senator O'MAHONEY. And whether that price fixing is done by means of a written agreement or oral agreement or pattern, it is all monopolistic; is it not?

Mr. BARNES. Right.

Senator O'MAHONEY. Those patterns of price fixing, those patterns of dividing territories, those patterns of controlling production are all monopolistic patterns, which you would prevent if you could; would you not?

Mr. BARNES. I do not know what you mean by controlling production exactly, Senator. I do not want to be committed here to what I do not understand.

Senator O'MAHONEY. Well, what I mean by controlling production is by—

Mr. BARNES. Creating an artificial—

Senator O'MAHONEY. Holding down production to maintain price.

Mr. BARNES. Yes; that is right.

But, you see, I point out to you that we do not have much difficulty on price fixing now—that is, it is well recognized as a *per se* violation. That is not where our problem comes.

You start defining monopoly; when you get to monopoly, where is the dividing line? If you can define that by statute you would take an awful lot off us.

Senator O'MAHONEY. Well, would it not be a good thing to put our heads together to find a way to develop that?

Mr. BARNES. Yes; indeed, it would.

Senator O'MAHONEY. Well, I think that is one of the objectives of this committee.

The CHAIRMAN. That is the primary objective.

Mr. BARNES. As I pointed out here, in what I said.

Senator O'MAHONEY. Unfortunately, I was attending another committee meeting this morning, and could not get here at the beginning. I am sorry if I interrupted.

The CHAIRMAN. No; I was going to ask if you had some questions because I knew positively that you did.

Go right ahead with any more questions that you have.

Mr. BARNES. Senator, if I could, I would like to get back to some of the specific questions here because I think they will point up our monopoly problem.

I have gone down to page 10, Senator O'Mahoney.

The CHAIRMAN. I was just getting ready to ask you if Senator O'Mahoney was through, to go ahead with your statement.

Mr. BARNES. I will proceed then on page 10, the top of the page.

The general problem of size considered, as you requested, I turn more specifically to the activities of the Antitrust Division in the automotive field. During the past 2 years these may be divided into 5 categories: First, the monopoly problem in the manufacture of automobiles; second, mergers among the smaller manufacturers; third, control over the distribution of parts and accessories by the major manufacturers, which might exclude independent producers; fourth, sales of new automobiles to consumers by other than authorized dealers (the so-called bootlegging problem); and, fifth, price fixing and price packing by local dealer organizations.

I shall sketch each of these problems generally—from the vantage point of the antitrust prosecutor. Indeed, it is this vantage point that requires me perhaps to raise more questions than I can properly answer. My belief is that law-enforcement officials must shun comment on investigations that may prejudice either the considered judgment

of whether or not to proceed or, once complaint is filed, its unpressured disposition. Thus today I attempt, not so much to survey our own activities in the auto field, but rather to place before you some basic competitive problems that to my view plague autos.

The monopoly problem in the manufacture of automobiles: More than 1 year ago, Attorney General Brownell announced we sought "the explanation of the developing pattern of concentration in the automobile industry." Well, what is that pattern? In 1954 General Motors produced slightly more than one-half of all new automobiles sold in this country (52 percent); Ford produced about one-third (31 percent); Chrysler, around 13 percent, and the remaining 3 independents produced about 4 percent. Fords and Chevrolets—these two brands alone—accounted for approximately one-half of all new automobiles sold last year.

The 1955 figures are encouraging from the point of view of the Chrysler Corp. For they indicate that Chrysler may be once more taking sales away from Ford and General Motors. The first 4 months of this year Chrysler increased by 50 percent its own production and, as a result, upped its industry share some 6 percent—13 to 19 percent. Thus, the phrase "The Big Three," as applied to the auto industry, may again become more, rather than less, accurate. However, the independents at least to the end of 1954, did not seem to be making any substantial gain. Viewed from this aspect, the picture is indeed discouraging.

How does the Sherman Act apply to this situation? The Supreme Court has said that a person monopolizes within the meaning of the act whenever he possesses the power *** to exclude actual or potential competitors from the field *** when it is desired to do so." (*American Tobacco Co. v. United States*, 328 U. S. 781, 809, 811 (1946).) Note that essential to the offense of monopolization is not that the power to exclude be exercised but only that it be possessed along with an intent to use it when circumstances become appropriate.

It may be that General Motors could put all other automotive producers out of business—if it wanted. That is one way of saying General Motors ultimately has the power to exclude. Not to be ignored, on the other hand, is Ford's healthy comeback. That company, with its vast capital resources, last year sold almost one-third of American-made autos. So long as Ford maintains this present vigor, could General Motors, in fact, rout Ford from the competitive arena and thus render its domination complete? Even absent power to drive out Ford, however, does General Motors possess that market strength required to violate section 2 if it can drive out its competitor other than Ford? In short, to transgress section 2 must General Motors be able to exclude all—or merely all but the major one—of its competitors?

Senator O'MAHONEY. May I interrupt at that point?

Mr. BARNES. You may, sir.

Senator O'MAHONEY. You quote the decision of the Supreme Court in the American Tobacco case—a person monopolizes within the meaning of the act wherever he possesses the power "to exclude actual or potential competitors from the field when it is desired to do so."

Now, is that accepted as a correct statement of the law?

Mr. BARNES. Yes; that is a correct statement of the law. It is difficult to make a short statement, but I think it is a correct statement of the law.

Senator O'MAHONEY. It is a desirable condition?

Mr. BARNES. It is.

Senator O'MAHONEY. We should then, as a matter of policy, prevent any group or any unit from getting such strength in any area as to be able to exclude competitors.

Mr. BARNES. If that group is acting in concert, yes. But, you see, when you get a group you get something different from your single seller.

Senator O'MAHONEY. Well, I said group or unit.

Mr. BARNES. Well—

Senator O'MAHONEY. Of course, you are right.

Mr. BARNES (continuing). I will agree if you say a group acting in concert.

Senator O'MAHONEY. Or a unit.

So now you are presenting to us the problem of what Congress should do to make effective, more effective, than it is now, the principle laid down by the Supreme Court under the Sherman Act in the American Tobacco case.

Mr. BARNES. That is correct, sir.

Senator O'MAHONEY. Have you any suggestions?

Mr. BARNES. No, I do not know the answer.

Senator O'MAHONEY. But you have described a gap in making effectual the policy which you and I both agree is a good one, namely, to prevent any unit—I will take the group out now, because concert is clearly a violation—where any unit gets itself into power to prevent competition, if it desires to do so.

Mr. BARNES. If it desires to do so, and how can you prove that desire, that is what I discussed a little earlier, Senator. I discussed the fact that I cannot make that determination, and no court is going to take it merely because I charge it. We have to get into a question of fact.

Senator O'MAHONEY. Now that is where your judicial enforcement finds the going tough.

Mr. BARNES. Yes.

Senator O'MAHONEY. But if, as a matter of fact, size is so great that if you have a unit possessing the size can, if it should take the notion to do so, exclude competition—

Mr. BARNES. Or fix prices.

Senator O'MAHONEY (continuing). Or fix prices, do any of these things, then should not it be the policy of Congress by law to clarify that policy so as to make your success in the courts much more certain?

Mr. BARNES. Yes, if we approve that law then we should be thankful for any help Congress should give us or could give us.

Senator O'MAHONEY. Thank you, sir.

The CHAIRMAN. Senator O'Mahoney, I want to step out for 2 minutes. Go ahead.

Senator O'MAHONEY. The Judge wants to proceed with his presentation.

Mr. BARNES. Apart from the issue of power, required in addition, is the desire for its exercise. Here history may be relevant, to what

extent has General Motors grown, not by internal expansion, but by besting and then buying out its competitors. One ultimate issue may become: to run afoul of the Sherman Act, how probable must General Motors "exercise" of power to "exclude" be?

Answering these questions, we look, of course, to the Sherman Act's fundamental goal of maintaining "effective competition." Inquiry demands at the outset an investigation of such magnitude that, to press it with utmost dispatch, would demand a high portion of the Division's manpower over a long period of time. As a result, we must proceed, aware of the limitations of our resources. At this point, I can only assure the committee that, to my view, producer concentration lies at the heart of the antitrust problem in the automotive industry. We in the Antitrust Division are very much aware of this; and we are alert for indication of significant change in the competitive picture. I think that is a direct statement, Senator, that does not beat around the bush in any way.

Senator O'MAHONEY. No, I think it is a very direct statement, and no evasion of the issue.

Mr. BARNES. That is right.

Of immediate importance, the Antitrust Division has had under investigation for more than a year complaints that General Motors monopolizes the manufacture and distribution of motor buses. It is a fact that General Motors makes more than 70 percent of all buses produced in this country. It is also a fact that several other bus manufacturers have gone out of business in recent years. This investigation we now press with utmost vigor. We hope we will conclude it within the next several months. Against this background, I deem further comment unseemly and impossible.

Closely related to auto production concentration is the problem of recent mergers by small auto makers. Consider, if you will, the pattern of auto production in early 1954, the time the Division considered the proposed mergers of Hudson-Nash, Packard-Studebaker. There were then three major, and several smaller concerns. The majors in 1949 produced more than 85 percent of new cars—leaving the smaller firms with a meager 14½ percent market share. By the first 4 months of 1954, moreover, the majors had jumped to almost 95½ percent—while smaller producers' share had shrunk to a bit over 4 percent. In 1954 some of the smaller firms actually operated at a loss. The picture confronting us, then, revealed the smaller companies falling fast behind and the larger producers surging rapidly ahead.

Against this background, our feeling was the proposed mergers might revitalize these lagging smaller concerns. They would then have broader asset basis, might economize by eliminating duplicating facilities, secure better dealer representation and sell more complete lines of cars. It should be emphasized that these companies merging were the smallest in the business. Thus their consolidation spelled no competitive disadvantage over the other small concerns. Vital to our determination of legality was, I emphasize, this consideration as to the merger's probable effect, not only on the merging companies' ability to compete with their giant rivals, but also on any remaining smaller companies. In this case, not only were there no smaller concerns to be disadvantaged, but the merger, by increasing the smallest firms' strength, created far more competition than it eliminated.

The postmerger judgment of experts not connected with the Department corroborates this conclusion. I quote from the Investors Reader, published by Merrill Lynch, Pierce, Fenner & Bean, dated June 1, 1955.

American Motors—

these investment experts conclude—

has found substantial savings in the merger. Integration was completed in only 10 months. Hudson production was moved from Detroit to the Nash plants in Kenosha and Milwaukee. At Kenosha the Hudson Hornets and Wasps now move down the assembly line sandwiched between Nash Statesmen and Ambassadors and the Rambler. American uses a separate set of dies to make its small-sized Ramblers, but all its other makes employ the same basic body shell. This is the economy-producing system used by the big three for many of its cars. * * * For example, GM uses the same shell for Buick and Olds, Ford for Ford and Mercury, Chrysler for DeSoto and Chrysler.

Explains President Romney: Retooling for 1955 models cost us \$9,500,000; it would have cost \$25 million if Nash and Hudson had retooled separately. In addition, the merger meant production of 1 power-steering unit rather than 2, a single-style air-conditioning unit, and so forth. Also interchangeable are most of the forged parts, from connecting rods to universals.

Atop the big tooling economy, the company cut its parts warehouses from 34 to 18. This will save an additional \$2 million annually. And while Nash and Hudson dealers function separately and competitively as before, in most cases regional sales offices for the two organizations have been brought to the same location.

All this permits overhead to be spread over a big sales volume and results in lowered unit costs. One result happily reported by George Romney: "Separately we could not afford TV, but as American Motors we have picked off one of the hottest TV programs of the year—Disneyland." As a clincher, he adds: "One Nash dealer told me 3 out of 4 visitors to his showroom mentioned Disneyland."

In that connection, I might refer to a statement made by Mr. Kaiser shortly after the merger of Kaiser-Frazer and Willys, in which he pointed out that not only was the tax saving, which I think all will agree, a major impetus behind that particular merger, an important factor in the case, but in the first year of operation it was his estimate that they had effected economies of \$10 million in the production of their cars.

Absent competitive disadvantage to smaller rivals, Congress beyond doubt intended us to consider the merger's effect on small companies' ability to compete with dominant firms. Thus, the report of the House committee considering section 7, for example:

Would the bill prohibit small corporations from merging in order to afford greater competition to larger companies?

The report then refers to the "objection that the suggested amendment would prohibit small companies from merging." Rejecting this possibility, the report concludes "there is no real basis for this objection." Applying this legislative guide, I concluded the auto mergers submitted—and I refer now to Nash-Hudson and Studebaker-Packard, because the Department of Justice had nothing to do with the Kaiser-Willys merger—constituted no substantial lessening of competition nor tended toward monopoly.

A contrary conclusion we reached regarding the proposed Bethlehem-Youngstown merger. Since litigation may well be in the offing, my comments are perforce cursory. In steel, the 3 majors have 30 percent, 15 percent, and 8 percent of the basic capacity. Bethlehem, of course, is No. 2. The remaining 7 of the first 10 producers range from 5 percent to 1.7 percent of capacity. In addition to that, there

are some 23 fully integrated companies, and some 90 nonintegrated companies in the business, all of them with a smaller percentage than the 1.7, which is the percentage of total ingot production in the United States of the 10 largest steel producers.

Of the proposed merging companies, Bethlehem is the second of the big three and Youngstown the sixth of the first 10. Moreover, much of both Youngstown's and Bethlehem's capacity stems from past mergers and acquisitions.

Unlike the auto mergers, however, there were, of course, many companies—integrated and nonintegrated—much smaller than Youngstown. Further, there was no need for Bethlehem and Youngstown to combine in order to compete with the 80 smaller steel companies, most of which are not even integrated. Thus, not only would this proposed merger eliminate competition between Bethlehem and Youngstown—in itself I believe substantial enough to violate the law, and I refer here, of course, to section 7 of the Clayton Act—but equally important, it would increase concentration in the hands of two companies already industry leaders, and thus widen the competitive spread between the merged companies and their smaller rivals.

Arguing to the contrary, Bethlehem and Youngstown urge that by combining they may better compete with the largest steel giant—United States Steel. Suffice it to say, in the language of the Federal Trade Commission in the Pillsbury case the result of the proposed merger would be a market “dominated by a few large * * * companies * * *. ” This, of course, has been the trend in other industries. In some of them, under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the new Clayton Act antimerger provisions.

The facts of steel concentration underscore the necessity of applying that reasoning to halt the Youngstown-Bethlehem merger.

Were I not to take a position against the proposed Bethlehem-Youngstown merger, I pose the question, where would we stop mergers in the steel industry? If the Bethlehem-Youngstown merger was approved, could we fail to approve any other proposed merger that resulted in less than United States Steel's 34 percent? Could we permit Republic, National, and all 23 of the fully integrated companies smaller than the first 10 to unite? Or should we permit the smaller 23 to merge with Kaiser, Colorado Fuel & Iron, Interlake, Armo, Inland, and Jones & Laughlin? Neither of such mergers would create a company larger than United States Steel. Yet could such mergers conceivably be outside the congressional-intended ban? In short, stopping steel mergers now seems the only chance to avoid the troublesome problem—some years from now—that automobile concentration today poses.

Before quitting the proposed steel merger, I recall a recent statement made by my good friend Bruce Bromley, counsel for Bethlehem Steel Corp. Judge Bromley stated, and I quote:

* * * contrary to popular belief, the greatest part of the growth of these companies (the steel companies) has been by expansion of their own facilities rather than by merger. For example, in the case of Bethlehem, about two-thirds of its 1954 capacity is the result of expansion of its own facilities; about one-third is the result of acquired facilities. In the case of Youngstown, about three-

quarters represents expansion of its own facilities and about one-quarter acquired facilities.

That statement, I suggest, is significant more for what it ignores than for what it says. Now what are the facts submitted to us, I note, by the steel companies themselves? Bethlehem started off with a plant located at Bethlehem, Pa. Beginning in 1916 Bethlehem started buying up other steel companies. It bought out the Pennsylvania, and then the Maryland Steel Co. In 1922 it bought the Lackawanna Steel Co. A year later it purchased the Cambria, Midvale, and Ordnance companies. Finally, the year 1929 saw Bethlehem move to the west coast with its purchases of the Pacific coast and the southern California iron and steel companies. This is the company's record of expansion through merger only in the basic steel industry, and doesn't include its other acquisitions in fabrication or other fields.

The result is that, today, Bethlehem operates basic steel facilities not only at Bethlehem, Pa., its point of origin, but at Steelton and Johnstown, Pa.; at Sparrows Point, Md.; at Lackawanna, N. Y.; and at south San Francisco, Los Angeles, and Seattle on the coast. Every one of these stemmed from merger.

But let's get back to Mr. Bromley's statement that only one-third of its (Bethlehem's) 1954 capacity is the result of acquired facilities. This is accurate in terms of the original size of these 7 steel companies Bethlehem acquired. But the fact is that these 7 steel companies Bethlehem has acquired have more than doubled their capacities in the years since Bethlehem acquired them. So, we find that on top of the 36 percent of Bethlehem's present size due to the companies acquired, you need add another 46 percent which represents the amount that these acquired facilities have expanded. In short, only 17 to 18 percent of Bethlehem's present size is the result of the original Bethlehem, Pa., plant and its subsequent growth. The remaining more than 80 percent stems from growth by companies Bethlehem acquired, and acquired by merger plus the accretion.

This is a different picture than that Mr. Bromley reaches to portray. So much for steel mergers.

Senator O'MAHONEY. On page 18, judge, the last sentence in the paragraph beginning—

Mr. BARNES. Yes, sir.

Senator O'MAHONEY. The sentence reads:

This is the company's record of expansion through merger only in the basic steel industry and does not include its other expansions in fabrication or other fields.

What did you mean by "other fields?" In what other fields has Bethlehem—

Mr. BARNES. I did not mean any other fields other than steel, but I meant there are other certain specialized methods; well, what I had in mind there was building bridges and things of that kind, the use of steel products, certain fabricating—

Senator O'MAHONEY. You mentioned fabricating, and then you said "other fields," so I wondered what that was.

The CHAIRMAN. Shipyards.

Mr. BARNES. What was that?

The CHAIRMAN. They have shipyards.

Mr. BARNES. Yes; they have shipyards.

The CHAIRMAN. A number of them.

Mr. BARNES. What I was trying to point out there was that we were trying to make a fair comparison because it is based only on the basic steel ingot capacity.

Back to page 20—Control over the distribution of parts and accessories by the major manufacturers. Shortly after I took office in May of 1953 I was asked to approve a grand-jury investigation of charges that Ford Motor Co. required its dealers to handle exclusively, or at least to sell a specified quota of, parts, accessories, and tools made or approved by Ford. Instead of authorizing the grand jury, the Attorney General and I determined to communicate with the Ford Co. and endeavor to obtain voluntary access to its files. The company, after considering our request, granted access, and representatives of the Department of Justice have examined the files relating to many, many Ford dealers. The examination has been conducted not only in Detroit but in various of Ford's offices scattered throughout the country. I am informed that over 10,000 Ford documents have been copied by our investigators; perhaps I should say copies or photostats.

This survey sprang from persistent complaints not only from Ford dealers but also from independent manufacturers and jobbers of parts and accessories that Ford was requiring its dealers to do business only with the Ford Co. According to the complainants, independent manufacturers and jobbers of parts and accessories were thus excluded from access to the thousands of retail outlets represented by Ford dealers.

Ford Motor Co. has flatly denied the accusation. It could not deny, of course, that prior to 1949 it required its dealers by contract to handle exclusively Ford parts and accessories. However, in 1949 Ford changed its dealer contracts by removing the express exclusive dealing requirement. Perhaps this was done in deference to the decision of the Supreme Court in the *Standard Stations* case (337 U. S. 293). Ford insists that it has a right to take all reasonable steps to see to it that its dealers do not palm off as genuine Ford parts items that are in fact not made or approved by Ford. Ford also insists that it has a right to insist that its dealers adequately represent it as merchandisers of its parts and accessories. Ford maintain that it has done no more than this; and I might say that I would not disagree with either of those contentions if that was the factual result that our investigation might disclose.

Senator O'MAHONEY. The former activity was done by contract, that has been abandoned?

Mr. BARNES. That is exactly why we stepped into it.

Senator O'MAHONEY. And now Ford insists upon these policies which you list in that paragraph—how does Ford make them effective, if not by a written contract, with its local representatives?

Mr. BARNES. That is exactly why we have got the 10,000 documents, to try to show the pressures which may or may not exist, but it is the conclusion—

Senator O'MAHONEY. The record shows that pressures were made?

Mr. BARNES. Complaint has been made that pressure exists.

The CHAIRMAN. Judge, in this particular field in order to get a franchise, and I am talking about not only Ford but all dealers, you first have to buy a big stock of parts; did you know that?

Mr. BARNES. Yes, sir.

The CHAIRMAN. Of course, at that time they enter into an agreement that if they revoke your franchise they will take the parts back.

Mr. BARNES. Well, I think you should know that since our investigation started that procedure has been changed a little bit. The dealer gets a better deal, he gets more money for his parts, and he doesn't have to quit so quickly.

Several things have changed, whether there is a relationship with the investigation or not, I could not say, but I am merely reporting it chronologically.

The CHAIRMAN. I will ask you another thing, if you are aware that on the parts that they buy from other producers, shall we say, roller bearings and ball bearings, that those manufacturers have to put a code number for Ford or Buck or Oldsmobile and they have various different prices on these items, although in many cases they are identical?

For example, you can buy a front-wheel bearing for a Chevrolet at one price and the identical same bearing that goes into a Buick you buy at a higher price because it has the code number for the Buick parts list, and then it goes on up to the Cadillac, and you pay a still higher price if you put it in a Cadillac. Did you know that?

Mr. BARNES. I did not know that specific fact; no.

The CHAIRMAN. Well, there was a very extensive hearing held by the National Defense Investigating Committee on that subject. It brought that out and discovered that in bearings alone in Army warehouses we were required to have considerably more than 16,000 bins because of those numbers, because the manuals gave them by number, whereas actually we needed only 8,000 if we bought them direct from Timken and had known the sizes.

And the Army is still trying to work out, and the Navy too and the Air Force, a cross index on these various parts that are the same.

And in Italy at one time General Clark destroyed 3,000 trucks because he did not have bearings for them, although he had plenty of bearings there, but they had the wrong bearing number.

Mr. BARNES. I recall once coming back from Mexico that I broke an axle on a LaSalle—that shows you how long ago it was—and I could not get one for a LaSalle but I got a cheaper one for International truck that fitted perfectly.

Senator O'MAHONEY. That leads me to this sentence which you have written as the result of the investigation of Ford:

Ford also insists that it has a right to insist that its dealers adequately represent it as merchandisers of its parts and accessories.

Now, does "adequately" in the case of the Ford management mean "exclusively"?

Mr. BARNES. They say it does not. That is what we are trying to find out—whether what they say is what the fact is.

Senator O'MAHONEY. How would you measure "adequately"? That is a concept of management and the Department of Justice—

Mr. BARNES. It is very difficult.

Senator O'MAHONEY. And it is not fixed by law.

Mr. BARNES. That is right.

Senator O'MAHONEY. Of course, it is quite possible that some Ford dealers might try to palm off parts which are inferior.

Mr. BARNES. There has to be some protection for the manufacturer, no question about that. It is a difficult question just how far they can go.

You will find interestingly enough and naturally enough that the difficulty arises not with the good products of the manufacturer, which the dealers are always anxious to push because they are good, but some of the products that are not as good as some independent manufacturer puts out, and then they want to push the independent product, and sometimes they get into difficulty—not referring to Ford, now, just referring generally.

The CHAIRMAN. In other words, where it affected the car industry.

Mr. BARNES. Yes.

The CHAIRMAN. And incidentally, the same bearings were used in other makes of cars by other companies like Ford, Chrysler, Packard.

Mr. BARNES. That is very interesting, when you get into the question of what stock an independent manufacturer particularly must buy from a larger manufacturer.

We are now busy evaluating the mass of material our investigators have collected. We may have to conduct even more investigations in this area. In any event, I am happy to report that recently the Ford Motor Co. revised its contracts with its dealers and in certain respects has made the provisions of its standard contract more favorable to the dealer generally. I point out, however, that the vast disproportion in size between any auto manufacturer and any single dealer offers manufacturers the opportunity for abuse. And I say that without regard to any particular company.

Consequently, the Antitrust Division proposes to be particularly alert to abuses in the manufacturer-dealer relationship throughout the industry. The law is clear that automobile manufacturers do not have a license to channel distribution of parts and accessories by use of contracts or a course of dealing resulting in reasonable restraint of trade.

Senator O'MAHONEY. Have you heard of any charges from any of these dealers, not referring to any particular company, that they had been forced by word of mouth from regional representatives to purchase parts and accessories for which they really did not have a market and which they did not need?

Mr. BARNES. Yes. We have considerable evidence of that kind. But let me point out to you one of our difficulties. We do not get evidence like that until the dealership is terminated, as a rule, until then they are not going around making the complaints.

And then we have always the hassle if the witness takes the stand, "Didn't you lose the dealership; aren't you angry toward the company because you lost your dealership?"

And then the question is, "How good is that testimony; how much weight can you attach to it?" It is just an unfortunate situation and we have that problem, which we have in any lawsuit, of course, but it is particularly apt in this type of business. The dealers will go a long way to protect and retain their dealerships because obviously most of them have made an awful lot of money.

"Bootlegging" new automobiles: "Bootlegging" is the term applied by the industry to sales of new automobiles to consumers by persons other than dealers authorized by the manufacturer. Early last year the Antitrust Division was flooded with complaints involving "bootlegging." At the same time, General Motors Corp., applying under our so-called "railroad release" program, asked for clearance to insert in its contracts with its dealers a clause the effect of which would have been to outlaw sales by dealers of new automobiles to anyone besides other authorized dealers or the ultimate consumer. We declined to grant the clearance because we thought it would constitute an unreasonable restraint upon the dealer's privilege to sell automobiles that he owned to whomever he pleased.

The National Automobile Dealers Association urged us to reconsider. Its officers believed that bootlegging was a serious competitive evil. I agree that bootlegging might be harmful to some authorized dealers; I could not see how it could harm the consumer. In fact, there was some reason to believe that bootlegging represented a healthy form of price competition. In any event, I saw no reason to approve joint action by private citizens against "bootlegging."

Senator O'MAHONEY. I think it might be well to take note there that "bootlegging" is an altogether inappropriate term.

Mr. BARNES. It is, exactly.

Senator O'MAHONEY. Because it is quite impossible to put an automobile in your boot. [Laughter.]

Mr. BARNES. That is very true. Of course, we have lots of problems like that, Senator, fair trade, things of that kind.

In this connection it is interesting to note that some local associations of automobile dealers engaged in group action to combat "bootlegging" with results that may have boomeranged. Thus, we received and investigated complaints that the automobile dealers in one community ganged up on "bootleggers" by inducing a boycott. These dealers went to newspapers and other media of communication in their area and told them that if they did not refuse advertising from "bootleggers" they (the dealers) would cease to advertise in these media. I am happy to report that this entirely unauthorized boycott has apparently not succeeded. In some cases these boycotts have resulted in the filing of private treble damage actions by the "bootleggers" against the parties involved in the boycott. There is no rule in this country, as I see it, permitting businessmen to take the law into their own hands and organize a boycott through concert of action against unpopular competitors.

Price fixing and price packing by local dealer organizations: I regret to inform the committee that local associations of automobile dealers may be engaged—and this applies to more than one community—in conspiracies to fix or pack prices for new automobiles. I stress the word "local" because there is no evidence that the National Automobile Dealers Association has had any part in these price-fixing schemes. Members of these local associations agree upon uniform additional or extra charges involved in the purchase of a new automobile. This practice is commonly referred to as "price packing." The retail prices of automobiles are not controlled by the manufacturer under our fair-trade laws. Thus each dealer has the right to

determine for himself the prices at which he will sell the automobile. The dealer also may, if he chooses, "pack the price" by making additional charges; at least imposition of such additional charges by individual dealer's independent action does not violate the Sherman Act. The dealers do not, however, have the right to agree among themselves upon the prices that they will charge for automobiles.

I have been slow to act on these persistent complaints of price rigging by local dealers. I have already commented upon the disparity of economic power as between the manufacturer and the dealer in automobiles. This disparity makes me hesitate before attacking a combination of dealers in a single community for fixing the prices at which they will sell automobiles while the vastly more powerful manufacturer is free to set the price at which it will sell to all dealers throughout the country. Nevertheless, I wish to take this opportunity to issue a warning that if local associations of dealers continue to agree among themselves upon the price, or any element entering into the price of new automobiles, we shall prosecute. In line with established policy of this department, prosecutions of price-fixing schemes are on the criminal side.

I have surveyed for you activities in the automotive field in the Antitrust Division during the past 2 years. I hope I have pointed to the major competitive problems which that industry presents. I trust that my survey may have suggested areas in which this committee may wish to devote further study.

Senator O'MAHONEY. Judge, as I listen to your paper and your extemporaneous remarks, I am bound to say that I found throughout many quotable sentences and many clear statements of what I believe to be sound principles, and the one causing me to make this comment is on page 23, the last sentence of the top paragraph:

There is no law in this country, as I see it, permitting businessmen to take the law into their own hands and organize a boycott through concert of action against unpopular competitors.

I assume that you would also agree that if the sentence were to be cut in two and you were to say, "There is no rule in this country, as I see it, permitting businessmen to take the law into their own hands" period.

Mr. BARNES. I concur 100 percent.

Senator O'MAHONEY. And our problem is to make clear the law, so that it would be understood by everybody; that is the trouble, that is the whole basis of your antimonopoly trouble; isn't it?

Mr. BARNES. I don't know whether it is the whole trouble or just part of it.

Senator O'MAHONEY. Well, it is the basic trouble.

Mr. BARNES. Yes. I can talk at some length on that, but I don't know whether this is the time for it.

We do not like to try cases and then—where, for example, there is a pure price fix—and then have the judge say that he does not think anybody ought to plead guilty to a price fix in an antitrust case, that there ought to be a nolo plea, and if there is, why, he has the discretion to determine that. We do not. We can only make our recommendations and, as a certain judge did in 1 case, he then fines, as the result of a price fix, he fines some defendants \$50 and in 1 case \$25—

in fact, 1 antitrust case some years ago, not while I was in office, there was, as I understand, a fine of \$1.

Now, we do not institute criminal action unless there is a hard core per se violation or some other reason, I cannot point exactly to that, but unless there is a good clean-cut violation, well recognized by the courts and we think that when criminal actions are filed, that they ought to be considered a little more carefully rather than results of that kind.

Now, that is symptomatic of an attitude that very obviously I cannot agree with because my job is on the other side and my convictions are on the other side. I think that a judgment like that is extremely bad for law enforcement, not only in the antitrust area, but anywhere in the law-enforcement area. However, there is that attitude on the part of certain judges

We have areas where we have great difficulty in convincing any Federal court that antitrust is something that they should give serious consideration to—

Senator O'MAHONEY. And that suggests a question which came to my mind, when you expressed a great deal of distress over the failure of one of the courts into which a case had gone to adopt your point of view, on one of these antitrust cases which you brought.

Would it be possible for you to make a list for the committee of all the cases which, and I hope there are not too many, of the cases which have been brought since you have been in office in which the courts did not share your point of view, so that we might have an analysis of the reasons why the judges did not share your point of view?

Mr. BARNES. Well, Senator, I will give you anything that I have. It is a matter of public record, very obviously.

May I suggest this: I have been asked to appear before some judicial conferences, and what we are just now talking about is going to be the substance of some of the things I am going to discuss. Now, to answer your suggestion specifically, it would require me to pass judgment on a very complicated matter—

Senator O'MAHONEY. Oh, no; I was not intending that you pass any judgment, just that you give us the facts.

Mr. BARNES. I could get up a list of—I would not even say "inadequate awards," I would say very low judgments in criminal matters from which you or anyone else could draw your own conclusions.

Senator O'MAHONEY. Well, cases in which you feel there was a monopoly violation in which you brought the suit and in which the court rules against you, and by comparing the charge which you made with the decision made by the court, I think this committee would be very much illuminated.

Mr. BARNES. Well, I will be glad to furnish that.

Senator O'MAHONEY. Without calling on you for any judgments.

Mr. BARNES. I could point out that that probably would be a list of cases that we had lost.

Senator O'MAHONEY. Yes. I did not want to use that word, I left it up to you. [Laughter.]

Mr. BARNES. Yes. Unfortunately, we still face that word—and I think I should also say that it would not be a very long list.

Senator O'MAHONEY. Well, I did not expect that it would be.

Mr. BARNES. And we could give the committee those that we cannot bring to trial—and that, of course, is another of our problems. We file a case in New York, where most of them would have to be filed, and immediately we have 2 years' delay before the case can be brought to trial.

Senator O'MAHONEY. Why do most of them have to be filed in New York?

Mr. BARNES. Because that is where the business is and where the contract took place and where the corporations have their being.

Senator O'MAHONEY. Of course, I knew all that, I knew what your answer was going to be, but I just wanted it made a part of the record here.

Mr. BARNES. The national corporations—

Senator O'MAHONEY. And the trade of the whole United States, of the 48 States and of local communities and counties is governed from New York because we permit the national corporations which carry on this business to obtain their charters from States authorities who have no jurisdiction over that in those States—

Mr. BARNES. I think it should be said, to cover the subject fairly, however, that there is a greater awareness of the antitrust law and a greater number of cases filed in other sections of the country other than New York and Chicago, and frankly we favor it where we can, because of this delay problem.

I have particular reference to New York. When we can, we avoid filing in the southern district court simply to avoid delay. We have a case now that we are trying to work out an adjustment, and I am satisfied that we can never work out an adjustment for at least 2 years, and at that time they will come and start talking to us but not until that time, they will obtain all the benefits of continuing their activities.

The CHAIRMAN. Any further questions?

Senator O'MAHONEY. Well, I did not want to take up the whole time.

The CHAIRMAN. Well, go ahead. I have got many questions I want to ask him when you are through.

Senator O'MAHONEY. Well, let me defer to the chairman.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. I was going to ask you this: Don't you think it would be advisable also to get a list of the cases that have been won by the Department of Justice?

Mr. BARNES. I would be very glad, much happier to furnish that list.

The CHAIRMAN. With the penalty assessed in each case.

Mr. BARNES. Yes.

The CHAIRMAN. That does not leave any discretion with you and you cannot be blamed for anything; and let the committee draw its own conclusions. It is simply that if the Department could furnish that I think it would help us rather materially.

Mr. BARNES. I would be very happy to furnish that.

The CHAIRMAN. Both civil and criminal.

(The list provided by Mr. Barnes is as follows:)

Antitrust cases filed May 1, 1953-June 15, 1955

Civil.....		44
Criminal.....		32

Of the 76 antitrust cases filed by Judge Barnes (May 1, 1953-June 15, 1955), the present status is as follows:

Civil:		Criminal:	
Consents.....	12	Nolo contendere.....	5
Dismissed.....	0	Dismissed (by court).....	1
Litigated.....	0	Litigated:	
		Won	1
Pending.....	32	Lost	1
		Guilty plea.....	3
		Pending	21

Total pending antitrust cases: Civil, 78; criminal, 30.

Criminal cases terminated May 1, 1953, through June 15, 1955

Blue Book No.	Case	Date filed, district and case number	Fines recommended by division	Fines imposed by court and date	How terminated
894	Wallace & Tiernan Co.....	May 1, 1947, district of Rhode Island, 6070.	\$63,000.....	\$63,000, July 26, 1954 and Nov. 17, 1954.....	Nolo contendere.
1012	Association of American Battery Manufacturers, et al.	Feb. 6, 1950, western district of Missouri, 17662.	None ¹	\$10,251, Dec. 17, 1953, \$500, May 12, 1954; \$750, Mar. 7, 1955.	Do.
1059	Thomas P. Henry Co.....	July 5, 1950, eastern district of Michigan, 31763.	\$18,000.....	\$18,000, Apr. 16, 1954.....	Do.
1066	Pittsburgh Crushed Steel Co.....	Jan. 30, 1951, northern district of Ohio, 20231.	\$52,000.....	\$50,500, Nov. 29, 1954.....	Do.
1068	Minneapolis Electrical Contractors Association.	Mar. 8, 1951, district of Minnesota, 8161.....	None ¹	\$42,500, Apr. 3, 1953; reduced by court to \$24,500 on Nov. 7, 1953.	Litigated; won.
1070	Las Vegas Merchant Plumbers Association.	Mar. 27, 1951, district of Nevada, 12173.....do ¹	\$35,000, Nov. 8, 1951 (Supreme Court denied rehearing Jan. 3, 1955.) \$15,500, June 2, 1953.....	Do.
1086	National Association of Printers' Rollers Manufacturers.	May 24, 1951, southern district of New York, 135-270.	\$17,600.....	Do.	
1095	Tobacco & Candy Jobbers Association.	June 20, 1951, northern district of Ohio, 20338.	\$49,500.....	\$16,250, Dec. 23, 1953.....	Do.
1111	Allegheny County Retail Druggists Association.	Oct. 22, 1951, western district of Pennsylvania, 13470.	\$5,000.....	\$500, Oct. 8, 1953.....	Do.
1112	William D. Eldridge.....	Oct. 26, 1951, district of Massachusetts, 51-345.	\$7,250.....	\$7,250, Jan. 18, 1955.....	Do.
1113	Atlantic Fishermen's Union.....	Nov. 19, 1951, district of Massachusetts, 51-380.	\$20,000 for 2 associations, no specific recommendation for individual defendants.	\$12,000, Jan. 26, 1955, \$300, May 9, 1955.....	Do. ²
1116	Northland Milk & Ice Cream Co.....	Jan. 23, 1952, district of Minnesota, 8222.....	\$45,000.....	\$34,500, Mar. 2, 1953.....	Do.
1126	Great Western Food Distributors.....	Apr. 22, 1952, southern district of New York, transferred to northern district of Illinois, eastern division, May 27, 1952, 52C R315.	\$3,700.....	\$3,700, May 21, 1954.....	Do.
1127	do.....	Apr. 25, 1952, northern district of Illinois, eastern division, 52C R239.	\$12,500.....	\$12,500, May 21, 1954.....	Do.
1131	Diamond Dealers Club.....	June 9, 1952, southern district of New York, 138-285.	\$1,000, \$1,500.....	\$250, Aug. 26, 1953, \$250, Oct. 13, 1953.....	Do.
1132	Union Ice Co.....	June 4, 1952, southern district of California, 22360.	\$41,000.....	\$16,806, Jan. 14, 1954.....	Do.
1145	Baugh & Sons Co.....	Sept. 17, 1952, eastern district of Pennsylvania, 16891.	\$100,500 with 34 to be suspended, or \$50,250.	\$85,850, Dec. 18, 1953, of which \$42,950 suspended, or \$42,900.	Do.
1146	H. Perilstein.....	Oct. 16, 1952, eastern district of Pennsylvania, 16935.	\$30,000.....	\$30,000, Sept. 29, 1953.....	Do.
1149	Detroit Sheet Metal & Roofing Contractors Association.	Dec. 9, 1952, eastern district of Michigan, 33452.	No formal recommendation made.	\$47,750, Mar. 7, 1955.....	Do.
1161	Western Pennsylvania Sand & Gravel Association.	Apr. 20, 1953, western district of Pennsylvania, 13854.	Recommended nominal fines.	\$1,000, Nov. 10, 1953; \$100, Mar. 11, 1954; \$500, Mar. 30, 1954; \$100, May 19, 1954	Do.

1162-A	do.....	Apr. 20, 1953, western district of Pennsylvania, 12855.	Same as imposed by court.	\$10,000, Nov. 10, 1953; \$20,000, Mar. 11, 1954; \$67,500, Mar. 8, 1954, \$6,000, May 19, 1954	Do.
1170	Walton Hauling.....	June 23, 1953, southern district of New York, 141-349.	\$10,000.....	\$10,000, Apr. 27, 1955.....	Do. ²
1171	Chattanooga chapter, National Electrical Contractors Association.	July 1, 1953, eastern district of Tennessee, 10-208.	None ¹	\$5,000, Feb. 10, 1954.....	Litigated; won.
1173	Louisiana Fruit and Vegetable Producers Union, Local 312.	July 29, 1953, eastern district of Louisiana, 24906.	\$8,400.....	\$9,000, Apr. 28, 1954.....	Guilty pleas.
1178	Norfolk Southern Ry. Co.....	Nov. 5, 1953, eastern district of Virginia, 10-708.	\$5,000 for railroad; dismissal of individual defendants.	\$5,000, Nov. 12, 1953.....	Nolo contendere.
1179	Toledo Milk Distributors' Association.	Dec. 21, 1953, northern district of Ohio, 10076.	No recommendation requested.	\$12,750, May 19, 1955.....	Do.
1182	American Lead Pencil Co.....	Jan. 26, 1954, district of New Jersey, 23-54.	Maximum as imposed.....	\$20,000, Feb. 5, 1954.....	Do.
1188	Owyhee Bottled Gas Service.....	Mar. 15, 1954, district of Idaho, 3434.....	\$7,500.....	\$1,400, Aug. 27, 1954.....	Do.
1191	Charles A. Krause Milling Co.....	Apr. 20, 1954, eastern district of Illinois, 18134.	\$40,000.....	\$40,000, Sept. 24, 1954.....	Guilty pleas.
1202	Embroidery Cutters Association.....	June 30, 1954, southern district of New York, C-114-295.	\$5,000.....	\$3,500, June 30, 1954.....	Do.
1206	Inland Coca-Cola Bottling Co.....	Aug. 25, 1954, district of Idaho, 3450.....	\$11,500.....	\$1,780, Sept. 16, 1954.....	Nolo contendere

¹ No recommendations.² Appeal taken from sentence requiring defendant McHugh not to engage in union activity for a 2-year period.³ Case pending as to union and its secretary.

Cases filed by Barnes and terminated by consent decrees

Blue Book No.	Case	Date filed, district and number	How terminated
1180	R. L. Polk & Co. et al.....	Jan. 8, 1954, eastern district of Michigan, civil 13135.	Consent Mar. 16, 1954.
1184	American Lead Pencil Co. et al.....	Jan. 26, 1954, district of New Jersey, civil 73-54.	Consent Feb. 5, 1954.
1190	Cincinnati Milling Machine Co. et al.....	Apr. 19, 1954, eastern district of Michigan, civil 13401.	Consent Apr. 19, 1954.
1198	Empro Corp.....	May 28, 1954, southern district of New York, civil 93-270.	Consent May 28, 1954.
1200	Liberty National Life Insurance Co. et al....	June 29, 1954, northern district of Alabama, civil 7719-S.	Consent June 29, 1954.
1201	Standard Ultramarine & Color Co. et al....	June 29, 1954, southern district of West Virginia, civil 730.	Consent Oct. 28, 1954.
1208	Embroidery Cutters Association et al.....	Nov. 12, 1954, district of New Jersey, civil 889-54.	Consent Nov. 12, 1954.
1209	Pleaters, Stitchers & Embroiders Association, Inc.	Nov. 12, 1954, southern district of New York, civil 90-390.	Do.
1213	Eastman Kodak Co.....	Dec. 21, 1954, western district of New York, civil 6450.	Consent Dec. 21, 1954.
1216	Kosher Butchers' Association of Los Angeles.	Mar. 1, 1955, southern district of California, civil 17914-Y.	Consent Mar. 1, 1955.
1219	Machine Chain Manufacturers' Association et al.	Mar. 18, 1955, district of Rhode Island, civil 1816.	Consent Mar. 18, 1955.
1231	American Monorail Co.....	May 5, 1955, eastern district of Ohio, civil 31799.	Consent May 5, 1955.
1172	Walton Hauling & Warehouse Corp., et al.	July 15, 1955, southern district of New York, civil 86-286.	Apr. 27, 1955, consent decree as to all defendants except union and 1 individual.
1194	American Can Co.....	May 21, 1954, northern district of California, southern division 34080.	Dismissed by court Dec. 8, 1954.
1204-A	Milk Wagon Drivers' Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America.	July 30, 1954, northern district of Illinois, eastern division, supplement to civil 2088.	Dismissed by court, June 3, 1955 (dismissed).

Mr. BARNES. We not only have the problem, of course, of delays in getting the cases to trial, but occasionally we have the problem of getting a decision. We have one case that was tried in the fall of 1953 and we are still without a decision and that case was a comparatively simple price-fixing case, taking 13 days to try.

The CHAIRMAN. Doesn't that lead to this conclusion: That is some of these cases the judges get sympathetic with the defendants because the defendants put up the plea, "Well, we did not understand the law this way," and perhaps should not some more specific law or clarification of the law be called for?

Mr. BARNES. Well, I do not doubt that that plea would be made by any conscientious lawyer, and I would not blame him if he did make it. I do not know how much worth it has as far as the courts are concerned. It is pretty hard to say as to that defense how it would be applicable to a price-fixing case, for example, for certainly you cannot blame the judges for listening. That is their duty and you cannot blame the attorneys for urging it because that is their duty.

The CHAIRMAN. You know, Judge, from experience probably, that

most of the big law firms have at least one member in there who is there for mitigation or reduction of fines. I well remember a judge in the district court in my State one time saying, "Can't you cry a little on my shoulder?" during the trial of a case.

Mr. BARNES. Well, human nature being what it is, I don't think we can do too much to reform that situation.

The CHAIRMAN. Oh, I know it, but I say that does come into it to a great extent now. Judge, do you feel that the antimerger amendment is now adequate to prevent the danger of concentrations of economic power as it is on the books?

Mr. BARNES. I have heretofore suggested that a study might be made of two things to correct areas that I think might well be subject to further study. One is the peculiar distinction, when there is a transfer of stock, as to what corporations it is applied to, as compared to corporations to which the law is applicable when there is a transfer of assets.

Now, the statute, as you will recall, section 7, reads something like this—

that no corporation shall acquire the stock and no corporation subject to the Federal Trade Commission shall acquire the assets—

and so on.

Now, that creates two classes of corporations and very obviously certain public utilities and banks are excluded from the second category, so that permits banks to effect a merger that an ordinary corporation could not accomplish.

Now, personally, I do not see why there should be this distinction, with two different groups of corporations—one which, if they are in it, they are prohibited from transferring assets and the other from transferring stock. I think there should be a uniformity there.

Now, perhaps I do not know enough about banking and they can convince me why it should be that way, but I have not yet heard it, and the congressional history of the amendment, section 7, throws no light on the purpose of creating these two different categories.

I think that should be studied. Now, perhaps there should be some exemption for banks. I would like to hear the argument.

Senator O'MAHONEY. Well, I remember the development of that amendment, and I would say to you that no thought was given at any time to any action toward a distinction between the banks and—

Mr. BARNES. Other organizations.

Senator O'MAHONEY. Other corporations. I guess it was realized that the banks obviously were not covered because the original act did not cover it. And I think it was obvious that when the act was originally written Congress was thinking of mergers in terms of acquisition of stock and it was some time after that Congress discovered that they can make mergers without buying the stock, and it was then that we brought about the amendment—but they were dealing in that particular category.

Mr. BARNES. I am not sure, but it appears that it was merely an oversight at the time of the amendment of the law, because there is an absolute lack, so far as my staff can find, of any reference in the congressional history.

Senator O'MAHONEY. Well, I do not think it was so much of an oversight as it was a desire to get one job done. You can complicate legislation by taking in too much.

Mr. BARNES. Yes; I have no doubt—anyway, I will pass that.

I merely suggested that this would be a subject for study. I do not claim to be a banker nor to have enough knowledge on the subject, to know that banks per se should be subject to the same rules as other corporations.

The CHAIRMAN. Have you found, Judge, that life insurance companies participate just about the same as the banks do in these matters?

Mr. BARNES. In mergers? No, sir.

The CHAIRMAN. By furnishing capital for mergers, shall we say?

Mr. BARNES. Well, that is a different question. They certainly furnish the capital for a great many of these mergers; yes.

The CHAIRMAN. Well, have you found that they buy stock in corporations, too?

Mr. BARNES. Why, certainly we find that and fire insurance companies, in fact, are nothing but investment trusts plus a few policies.

The CHAIRMAN. I think, and I have always felt, that that feature in the Clayton Act was brought about by the fact that at the time the act was written, it was thought that banks and insurance companies were handling other people's money and that they could not go into the risk capital field. Don't you think that was just about the same thing?

Mr. BARNES. I hesitate to say what the reason was, there.

Now, the second thing, if I may proceed, that I have suggested is this, and again it is an attempt to achieve uniformity as much as possible and make the same ground rules applicable to anyone that is concerned in the matter: That is, that there should be some requirement, as long as section 7 is on our statute books relating to mergers, that any corporation that proposes to merge—and I think there should be some limitation as far as size is concerned, so that you get away from the de minimus transactions—that there should be some notification to the proper Government official, which I presume would be the Anti-trust Division of the Department of Justice and the Federal Trade Commission, a sufficient number of days in advance of the proposed merger, so that examination of the factual situation could be had.

I would make the notification compulsory, not consent compulsory, because very obviously any business should have the right to go to court if they disagreed with the rulings of either the Federal Trade Commission or the Department of Justice, or be brought to court, and they may go ahead with the merger on their own volition if they want to take the consequences of an attempt subsequently to unscramble the omelet.

That is particularly important as far as the Department of Justice is concerned, but not as important as the Federal Trade Commission is concerned, because the Federal Trade Commission does not have the restraining power that we have.

It is important to us so we can be ready to take action prior to the time that the merger has become an accomplished fact, if such action should be taken.

The CHAIRMAN. Well, now, Judge, since the number of mergers in 1954 was three times that of 1949 and only slightly less than the high for 1946-47, does it not appear that the antimerger amendment has had little effect upon the merger movement; I mean the antimerger amendment as it now stands?

Mr. BARNES. Very little effect—I think you cannot say it has had a large effect.

We find, of course, that you had this great number of mergers in 1949, before section 7 in 1950, so that it is a little difficult to compare the period of time prior to the 1950 amendment and subsequent thereto.

Now, it is also true that outside of the private litigation instituted by Benrus and the 3 cases that the Federal Trade Commission has instituted in the last year and the 3 cases that the Department of Justice has instituted in the last year, there has been no attempt to enforce section 7, as amended, and very obviously, when I say there has been no attempt to enforce it, I mean by litigation. During that time there have been quite a few mergers that have been stopped by companies who could not obtain the Department of Justice approval or where the Department of Justice or the Federal Trade Commission had refused approval, and there has been as a consequence a stopping of the mergers.

For example, this year in addition to the mergers that we pick up by an examination of financial papers and business periodicals, in this year there were three mergers presented to the Department of Justice. No; there were 11 mergers presented to the Department of Justice, of which 3 were cleared; 3 were abandoned after we indicated that it did not look as though we could give our approval; 4 were specifically denied; and 1 is pending.

These denials, of course, relate not to this year but previous years, and relate to the Bethlehem-Youngstown denial.

Senator O'MAHONEY. Your source of information apparently has been through the business press.

Mr. BARNES. That is where. Now, for example, Senator, in the last 2 years we have had less than 30 mergers suggested to the Department, where they requested our advice and during that same period of time we have gone into 1,600 mergers.

Senator O'MAHONEY. What would you think of a law that would require merging companies which handled over X percent of the product in any given line to give notice to the Department of Justice or to the Federal Trade Commission?

Mr. BARNES. You mean X percent of the total production?

Senator O'MAHONEY. Yes.

Mr. BARNES. I have never considered that as one of the measuring sticks. I think there should be some notice—whether that should be the measuring stick or mere dollar volume is open to debate.

Senator O'MAHONEY. Well, some measuring stick.

Mr. BARNES. Some measuring stick, yes; I am for that.

I think that most obviously—well, in the first place, the Government has a tough psychological hurdle to overcome if there is a merger that is accomplished with an amalgamation of all of the resources and the operation, and then the Government goes in and says, "We want to unscramble this." There is just a natural reluctance on the part of the courts to order that unless they are awfully convinced—

Senator O'MAHONEY. Because it was permitted. Well, here is an open forum, Judge, you have an opportunity to make a suggestion to this committee, the form of a law which will require notice of

intent to merge to be filed with the Department of Justice, and you draft your measuring stick.

Mr. BARNES. If you request us to do so, why, we will, the Department of Justice will, I am sure, be pleased to make suggestions.

Senator O'MAHONEY. Mr. Chairman, I suggest that we make that as a formal request.

The CHAIRMAN. I heartily concur in that. Don't you think that would be helpful to you?

Mr. BARNES. Personally, I think it would be good.

The CHAIRMAN. Instead of unscrambling something, get it straightened out before the eggs are broken.

Mr. BARNES. I personally believe, as I said, as long as Congress in its wisdom has enunciated the requirements of section 7 to meet these things in their incipiency, it is foolish not to give to the enforcement agency the mechanism to meet incipiency, rather than to wait—

The CHAIRMAN. Well, don't you think such a bill should require you also to pass on that and render an opinion?

Mr. BARNES. You mean pass yes or no as to whether it is lawful or—

The CHAIRMAN. Give an opinion.

Senator O'MAHONEY. I believe, Mr. Chairman, that in drafting such a law we should fix the standards and not give just a blank check to any commission or any department to decide.

The CHAIRMAN. Yes; I agree with you. The law should include the standards.

Senator O'MAHONEY. But two very valuable suggestions have been made by Judge Barnes this morning: One, the broadening of section 7 so it may go into other fields of business and commercial activities than what is now covered; and, secondly, the point we are now discussing.

Mr. BARNES. Notification.

The CHAIRMAN. If you will recall, Senator O'Mahoney, in the TNEC report—

Senator O'MAHONEY. I remember.

The CHAIRMAN. Such a recommendation was made.

Senator O'MAHONEY. I remember.

Mr. BARNES. May I say just this, Senator: I don't want to be misunderstood. I don't know exactly what you mean by "broadening" the act.

Senator O'MAHONEY. Well, you suggested banks ought to be included.

Mr. BARNES. Yes. I say that a bank should not be permitted to achieve by transfer of assets what it is prohibited by transfer of stock, if it is the only corporation that is so treated, and there should be no special rules that I can see why that should result.

Senator O'MAHONEY. Well, it would require study, as you indicated.

The CHAIRMAN. We will recess until 2 o'clock, if you can come back at that time, Senator O'Mahoney, and the reason is I do not have permission to hold over in the afternoon, and I want to go to the floor now to get that. Is that satisfactory to you, Judge?

Mr. BARNES. I can be here.

The CHAIRMAN. I do have quite a few questions I would like to ask and I am sure Senator O'Mahoney has.

All right, we will recess until 2 o'clock.

(Whereupon, at 12:10 the subcommittee recessed, to resume at 2 p. m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

I want to apologize, but I have been trying to get permission of the Senate to go ahead, and I have just gotten it.

In what circumstances, Judge, do you seek a temporary injunction when you file suit based upon a merger?

STATEMENT OF STANLEY N. BARNES, ACCCOMPANIED BY ROBERT A. BICKS—Resumed

Mr. Barnes. There are two problems there. We file suits in merger cases under two circumstances: where the merger has already been consummated and where it is about to be consummated.

We can only speak from experience, and the three cases in which we have filed action, that is, the General Shoe, the Hilton Hotel, and the Schenley Industries.

In each of those cases the merger had actually been consummated without approval and without notice to the Department of Justice.

Therefore, in those cases we had to survey the situation to see if there were any interests that would require us to ask for restraining orders or injunctions. The injunctions were obviously not necessary in those three cases.

As to restraining orders, we did ask for it in one case, Schenley, and that matter is at the present time still a matter of negotiation as between counsel for the Department of Justice and Schenley to determine whether or not we can agree upon the nature and extent of the restraining order that should go into effect.

Now, in the type of case such as Bethlehem-Youngstown, we have announced publicly that if they propose to go ahead with it, and if, as and when they execute a contract, then we propose to seek an injunction to prevent their doing it.

The CHAIRMAN. Since the Clayton Act is designed to stifle the tendency to monopoly and lessening of competition in their incipiency, is it not especially vital that the enforcement agency be able to act as expeditiously as possible in merger cases?

Mr. Barnes. Exactly; as I attempted to express this morning, it is a reason why I think it is only commonsense if you expect an agency to reach a situation in its incipiency, you should enable it to act as soon as possible, and give it the information in time so that it can act, and that is the primary reason why I believe it is essential that there be some uniform requirement as to notice if we are going to enforce section 7 relative to mergers.

The CHAIRMAN. Do you think the processes of the Federal Trade Commission are suited to merger cases where the passage of time greatly complicates your opportunity to unscramble a consummated merger?

Mr. Barnes. No; I think that it is a matter of degree. I think that the Department of Justice, with its ability to obtain restraining orders,

can act with more dispatch to prevent the ultimate necessity of unscrambling the omelet than can the Federal Trade Commission.

I point out, however, that the Federal Trade Commission has the right to request the Department of Justice to take such action on its behalf, if it desires to do so, which, to my knowledge, it has not yet sought to obtain; and likewise I point out that it might very well be needed by the Federal Trade Commission, the need to have some power to stay proceedings if it does not approve the merger. That is a matter of policy as to whether both agencies should have that right or not. We have it; the Federal Trade Commission does not.

We would be glad to take the initiative for them if they request us to, but thus far they have not.

The CHAIRMAN. Judge—and this is getting into an area that I am very much interested in—is not this an area, this one, where the concurrent jurisdiction of Federal Trade and the Antitrust Division is unwise, and should not some thought be given to entrusting the agency best equipped to handle the problem with exclusive jurisdiction?

What I mean by that is: I have found that when you get two agencies or three with concurrent jurisdiction on a subject, you normally run into a situation where sometimes neither act, and sometimes both act, and get in each other's way; is that not a fact?

Mr. BARNES. If you are talking about what ordinarily happens, I think we have to recognize that as just human nature. If you have a responsibility, and it is everybody's responsibility, then it is nobody's responsibility.

The CHAIRMAN. Yes.

Mr. BARNES. But I point out to you that I have repeatedly made the statement, and thus far have not been challenged, that at no time since January 20, 1953, to my knowledge, has the Federal Trade Commission and the Antitrust Division of the Department of Justice been in any one corporation's books on the same matter at the same time, and we have tried very strenuously to avoid that.

We have done that by operation of a comparatively simple and uncomplicated system of liaison and conference, both on an operative level and at a high level, by a system of priorities that undoubtedly is not the most efficient system that could be devised, but nevertheless works out surprisingly well in practice, in my opinion.

The CHAIRMAN. Do you not think it would be better if we spelled out the jurisdiction and the responsibility and authority so that each realized what his exclusive responsibility was and what his exclusive authority was?

Mr. BARNES. Well, I do not think I am qualified to answer that question.

I have only seen it in operation where both have exclusive jurisdiction along certain lines. I think it has worked out quite well. It is always possible to overlook some field where action should be taken. But I also point out to you that when there is concurrent jurisdiction that is a two-edged sword. It puts you on your toes.

There is quite a little rivalry in certain areas between the Federal Trade Commission and the Antitrust Division to show that they are on the ball and watching developments, and under this system that we

have, why, the first one that takes the bit in his teeth is the one that has the priority, unless there is some reason to change that general rule because of the peculiar facts in the case.

For example, just as you pointed out a few minutes ago, if it is a merger that, on its face, raises grave questions, that is about to be consummated within a very short period of time, I think that both Chairman Howrey and I would agree that the Antitrust Division should take charge of that particular matter because of our ability to invoke the injunctive process and his inability to do so.

On the other hand, vice versa, if there is some area that requires an extensive investigation, and we know through past experience or through statements of the leaders within the particular business organization, that they are not going to voluntarily cooperate in any effort by the Government to investigate the facts, then I again say there will probably be agreement between Mr. Howrey and myself whereby the Federal Trade Commission with its investigative power, which the Department of Justice does not have, unless it brings suit, will proceed.

The CHAIRMAN. Your system, then, depends upon personalities.

Mr. BARNES. That is right.

The CHAIRMAN. I think a law should not depend upon or be dependent upon personalities. I think a law must plainly say what it intends to say so that there is no question of personal agreement involved.

Mr. BARNES. What you say is that there should never be concurrent jurisdiction.

The CHAIRMAN. I do not know, but we might get into a situation like we found up here on Capitol Hill at times when two committees having the same jurisdiction would hide out witnesses at one time from the other and, of course, would only make a partial showing.

Mr. BARNES. Of course, I do not know what congressional committees will do, Senator. I am speaking about the Department of Justice.

The CHAIRMAN. I know. I am speaking about the human element and, incidentally, I think there is that element in the Department of Justice.

Mr. BARNES. Yes, sir; I think you are right.

Of course, you go back to the fundamental question. I point out that the Supreme Court, in passing upon this question of concurrent jurisdiction has said that it is more than a concurrent jurisdiction; it is a cumulative jurisdiction, and that it is with a purpose "to provide the Government," and I am quoting, "to provide the Government with cumulative remedies against activity detrimental to competition." That is the language that was used by the Supreme Court in *Federal Trade Commission v. Cement Institute*, also *United States v. Great Atlantic and Pacific*.

So you get into a question of philosophy as to how you want the administration of the law to be done. It could be argued on both sides.

There is a great deal to what you say and, as I have just stated, if you have got too many cooks you are liable to spoil the broth. But in responsibility it should be direct as to whether there should be two responsibilities rather than one, and that is a matter of congressional policy.

The CHAIRMAN. That is right.

Then why did not the Department of Justice seek a restraining order in the Pillsbury case? Did the Federal Trade Commission advise the Department of Justice that it refused clearance?

Mr. BARNES. I believe, Senator, that I cannot answer that question because it is my recollection that the Pillsbury case had its inception prior to the time that I took office, and I believe it was prior to the time that Chairman Howrey took office.

But, be that as it may, to my knowledge no request was made by the Federal Trade Commission to the Department of Justice for any aid in establishing injunctive relief.

The CHAIRMAN. Now, the Clayton Act speaks of two tests for determining the legality of an acquisition. One, does it substantially lessen competition or, two, does it tend to create a monopoly?

Can you give us a specific example of situations where these two different tests apply in either cases you have filed or mergers you have studied since the changes in the law?

Mr. BARNES. Yes, sir.

In the Hilton Hotel case you had some very interesting problems.

You have there, first, to define your line of commerce. You will recall that the statute refers to "in any line of commerce in any part of the country" or vice versa in sequence.

Now, we have not charged there that the Hilton Hotels have a monopoly in hotel rooms. Very obviously that would be a rather foolish charge because, I believe, that there are some 29,000 hotel rooms controlled by the merged companies out of some several million in the United States, a very small percentage.

Then, in attempts to define what is the relevant market, what is the relevant line of commerce, if we cannot use hotel rooms, then what is the next thing?

Are we talking about hotel rooms in the first-class hotels or are we talking about or can we define what you mean by a first-class hotel?

If I may be facetious for a moment, one of my assistants told me that would be very easy. A first-class hotel would be one in which a Department of Justice employee could not afford to stay.

However, you can recognize the fact that we do have a problem there in attempting to define the market.

We attempted to solve that problem in this case by restricting the allegations of monopoly to the convention business, the use of hotels in convention business in the United States, with particular reference to the four principal cities of the United States, where so much of the convention business takes place, namely, New York, Washington, St. Louis, and Los Angeles. We would have included Chicago, but the factual situation did not fit Chicago.

I do not want to say that that is the only issue in the case, but that is an issue in the case, because Hilton Hotels can control and do control, by their merger in excess of 50 percent of the convention business in the United States.

Now, in addition to the monopoly question, that case also presents a test of the question of a substantial lessening of the competition within this line of commerce by the merger of the two; so we have both problems in that Hilton case.

Now, I refer you to the General Shoe Corp. case, where the acquisition which we attacked is percentagewise very small, but is the 18th of a series of acquisitions, each in themselves small and each in them-

selves in their total not creating a monopoly position, because the total percentage is so small; but which indicates a tendency to monopolize and particularly indicates a lessening of competition by reason of a plan or pattern of continued acquisition, each one of which to a limited degree does tend to lessen competition.

I think those are the best examples that I can give you. Of course, the number of cases filed is very few, so we are limited to what have been filed, with 1 or 2 exceptions.

I could go into another case that is extremely interesting; I have spoken about it before, and I think I can again, because of the fact that the companies involved published the fact that they had sought permission from us, that is, they sought approval from us of their plan to merge, and we had declined that approval. That was the proposed acquisition of Ideal Cement—I mean by Ideal Cement of the Superior Cement Co. out in the State of Washington.

Now, Ideal Cement is not the largest cement company in the United States by any manner of means, but it is one of the large companies. It has practically no plants east of the Mississippi, but has a number of plant west of the Mississippi.

It has a history of considerable acquisition of local plants.

Now there, of course, again emphasizing about what I was speaking this morning, you have to consider the peculiarities and the problems of this particular industry. In cement you have a situation entirely different from automobiles or steel. You have an area which is roughly estimated as around 200 miles around the plant beyond which the product of that plant cannot be economically transported so that you can compete with someone else.

Now, there are exceptions to that, of course, because if you are on water you have a different problem in point of mileage.

What Ideal came to us some time ago and requested permission to acquire was a plant in eastern Washington. They were not in that area. The introduction of Ideal's plant into western Washington, the western Washington area, located at Spokane, would bring a new competitor into the area of some 200 miles around Spokane. For that reason we gave them permission.

They again came to us some time later and asked for our approval of the acquisition of the Superior plant which is located in western Washington. They pointed out to us that being in western Washington, some 250, 300 miles away, that in between the location of their Spokane plant and their proposed acquisition to the Seattle plant, there were these Cascade Mountains, and that it was impossible to bring cement from Seattle over the Cascades into the Spokane area or vice versa and, therefore, there could be no competition between their 2 plants and, therefore, no eliminating of competition by a merger of the 2 plants.

We investigated the matter. We found out that what they proposed to do was not to use the transportation of trucks, as it was being done by the present owners of Superior, but they had already made arrangements to acquire a certain island in the straits there off Seattle, whereby they could bring their cement, their raw product, in by barge, and would then use water transportation out around the straits, through the straits, down the coast of Washington and Oregon—of Washington, rather, and up the Columbia River, and

could lay down their cement in eastern Washington so as to compete with the company they already owned. There was thus this lessening of competition if that went through.

We also found, for example, that Kaiser, down in California, although not specifically on the water, in their plant at Stockton, their Permanente plant, could transport by water out through the Golden Gate up California, up Oregon, up the Columbia River, and lay down their cement in eastern Washington at a lower cost than ground transportation.

We concluded that the picture there was that the relevant market area was not eastern Washington, not eastern Washington and western Idaho, nor even the State of Washington as a whole, but Washington, certain northern parts of Oregon that were on the Columbia River, and even that portion of cement that was coming up from the Kaiser interests in California.

By this proposed acquisition they would move into a position from 10 to some 35 percent of the relevant market, and hence we felt that that was an acquisition which would eliminate competition presently existing between their formerly acquired plant, their proposed newly acquired plant, and would raise their position in the market from some 10 to 35 percent, and we, therefore, refused approval.

Now, that gives you an example of some of the problems we have in trying to determine what may look like a very simple acquisition.

The CHAIRMAN. Now, in the General Shoe case, the complaint alleges that the 250 retail outlets acquired by General Shoe had total sales of \$34 million based on the annual sales of each for the year preceding the acquisition. Would the foreclosure of General Shoe's competitors from a market this size be sufficient in itself to violate the new law?

Mr. BARNES. Well, to answer your question directly, no, we do not look upon mere dollars and cents or quantitative amounts as the answer to the question.

It is our belief that you must consider the relative position. If that much of an acquisition is compared to another company 10 times that much, it does not amount to so much; in other words, it is always relative.

It is the same question as your monopoly position. It must be relative to the other factors in the industry.

The CHAIRMAN. Now, getting back to the Hilton question, the Hilton Hotels, does Hilton's acquisition or expansion in foreign countries have any bearing on your suit?

Mr. BARNES. Not on the suit.

The CHAIRMAN. Could there be a substantial lessening of competition in any one city as a result of this merger that would be sufficient to make this merger illegal?

Mr. BARNES. Yes; that is the charge as far as the 4 specific cities and certain surrounding territory, which has a relationship to the 4 cities.

The CHAIRMAN. In other words, your policy on measuring the question of monopoly is not necessarily national in scope, but has to do with the area served; is that not right?

Mr. BARNES. That is one of the factors, the geographical area.

The CHAIRMAN. In other words, the area served, where it can be best served or has to be served by local service. You might have a

monopoly in hotels, for instance, in Philadelphia, and not have a monopoly in hotels in the State of Pennsylvania, for instance?

Mr. BARNES. That is exactly right.

As I pointed out this morning, Senator, in any definition of a market, the geographical definition is a very important one, and it is frequently the first one that comes to mind, but it is not necessarily the only definition, because of the language of section 7.

I pointed out that it is in our mind the "area of effective competition." That may be geographical, it may be within a certain industry, it may be within a certain pattern of trade; it may be in a distributive pattern that makes it significant.

The CHAIRMAN. It could also be governed by transportation.

Mr. BARNES. Transportation.

The CHAIRMAN. And transportation rates.

Mr. BARNES. Transportation has a very important effect, of course. As soon as you have the geography you have to get into transportation.

You have, for example, in your steel merger the argument that is used, by Bethlehem and Youngstown, which is that Youngstown's plants are all in Ohio, and that Bethlehem's plants in the East are all in Pennsylvania, Maryland, New York, and those are two different geographical areas.

What they do not point out is that the Bethlehem plant, Lackawanna, sells more at a further point beyond Ohio than the Youngstown, Ohio, plants do, that is, at Detroit.

Lackawanna is on the water, and the Youngstown plants are, I believe, some distance from the water, so your transportation can be extremely important. You have got to get into the distributive pattern there again to see why and where your product goes.

The CHAIRMAN. Does the basing point plan have any bearing on that?

Mr. BARNES. Not on that; no, sir.

The CHAIRMAN. Now, could there be a substantial lessening of competition, getting back to hotels, in soliciting convention business in a single city as a result of this merger which would be sufficient to violate the law?

Mr. BARNES. Yes; that is the position we take, that it does not make any difference whether it is 1 city or 4—we happened to choose 4, 4 plus.

Of course, we assume always, Senator, that you do not include within your question the very troublesome problem of interstate commerce. We assume that has been decided in favor of the Government before we reach your question.

The CHAIRMAN. The Federal Trade Commission report on mergers showed a very large number of acquisitions in the food and kindred products industry. In the retail food, baking, and dairy fields, have there not been many cases in recent years of horizontal acquisitions? Under what circumstances would the act reach such acquisitions if the companies operate in different geographical markets and areas?

Mr. BARNES. Well, are you talking about section 7, are you, and not about the Sherman Act?

The CHAIRMAN. No; section 7.

Mr. BARNES. Unless you could interpret the acquisition by one company of a company in an entirely different section of the country as a tendency to monopolize the entire United States market or some large

market, larger market, than the geographical areas in which they separately are operating, then I should say that there would be no immediate section 7 merger problem.

The CHAIRMAN. Would you apply the new act to prohibit mergers of retail food chains covering different geographical areas but where the two chains did compete to some extent in areas that overlapped?

Mr. BARNES. Well, I do not want to get into opinions based upon incomplete facts, and I think that I would have to decline to express an opinion on that, Senator, because it would depend upon a great many things.

I think I have already answered to indicate that if, for example, the Great Atlantic & Pacific wanted to merge with Safeway we would have a nice section 7 problem.

The CHAIRMAN. That is just the point I am trying to make in that question.

Mr. BARNES. Yes, sir.

The CHAIRMAN. You would there have a section 7 problem unquestionably?

Mr. BARNES. I would think so.

The CHAIRMAN. And that would be particularly where it merged in a competing area in which they were serving for instance, shall we say, in the District of Columbia and surrounding territory?

Mr. BARNES. As you well know, Senator, the original section 7 referred to the elimination of competition between the acquired and the acquiring corporation. That requirement has been eliminated, but it does not eliminate competition that may be eliminated by such a merger.

The CHAIRMAN. I want to get into this conglomerate merger situation.

The House and Senate reports on the Antimerger Act emphasize that vertical and conglomerate mergers can be barred as well as horizontal mergers. Will you explain what a conglomerate merger is, and tell us what has been done to stop such mergers, and if any cases have come to your attention.

Mr. BARNES. Of course, we are speaking about words of art, and everyone is entitled to interpret them a little differently, I take it; at least, economists disagree, but there is not much disagreement between your horizontal, vertical, and conglomerate mergers.

Your conglomerate merger is usually defined as an incident where a corporation proposes to acquire an entirely different business.

For example, as I have used before, where the Pullman Corp., at least, after its divorce, that is, the manufacturer of pullman cars, after its divorce from the service end of Pullman, acquired the M. W. Kellogg Co., which was an organization which, as I understand it, has for its primary purpose the building of gasoline plants in different parts of the country.

Now, for a pullman-car manufacturer to acquire such a type of business would be a conglomerate merger because theoretically the business of building pullman cars would not in any way offer competition to the building of gasoline refraction plants.

You have eliminated the question in a true conglomerate merger of the loss of competition between the acquiring and the acquired corporation, but you have not eliminated certain other questions, and that is, for example, suppose Du Pont would want to acquire General

Motors, assuming that there is no such acquisition at the present time.

Would you say that there could be no objection to such a merger because it was conglomerate? Of course, that is an extreme example, but you get into a question of inherent powers that can be created by conglomerate merger that would be, I would say, not without some concern to any person attempting to administer the antitrust laws.

The CHAIRMAN. Well, is there not this danger also, that by conglomerate mergers a strategically powerful merger of such kind might wreck independent competitors in one field, making up their losses in another field?

Mr. BARNES. Exactly right; that presents a possibility.

The CHAIRMAN. Is that not one of the grave dangers?

Mr. BARNES. Then there is the question of how are you going to stop it. Will you take it by enforcement of your Robinson-Patman discriminatory pricing or are you going to go into it by your merger or by your monopoly laws? You have got separate tools here to meet theoretically separate problems.

The CHAIRMAN. Have your studies revealed any dangerous tendencies as a result of such mergers in any particular industry or by any particular companies?

Mr. BARNES. I would say that there are some conglomerate mergers that are under study by us. I will say that conglomerate mergers are more difficult to designate as possible violations of section 7 of the Clayton Act than a vertical and most certainly a horizontal merger. The horizontal merger is your easiest to detect, your elimination of competition; your vertical slightly less so, and your conglomerate even more so, so far as difficulty is concerned. We have no conglomerate merger at this time that we propose to file suit against. We have and are considering watching certain areas in the conglomerate merger area.

The CHAIRMAN. Let's get back again to Du Pont and General Motors. Du Pont connects with the United States Rubber; it is connected with General Motors. It is a rather peculiar coincidence; General Motors cars come not only equipped with United States tires, but the dealers refuse to let you swap to another make even though you are willing to pay the difference.

Mr. BARNES. If you have—

The CHAIRMAN. Your only chance then is to go out and do your own swapping.

Mr. BARNES. If you have evidence of that, Senator, I would like to get it. This last week we wrote a letter of inquiry having to do with the requirement that if there is to be any change of tires that it must be with the written request of the purchaser. I know that that was the procedure that was being followed, but if a customer is willing to pay, I thought they were still changing the tires.

The CHAIRMAN. The legislative history of the act specifically holds that the failing company defense is still preserved if, for instance, the acquired company was bankrupt or on the verge of bankruptcy and only the acquiring company was able to purchase it. That was the argument put up in 1950 on the question of the purchase of assets that we took away from the failing companies and, shall we say, aged owners sometimes, the right to dispose of their property where they wanted to.

Now, suppose for personal reasons, old age, health, estate planning, and so forth, stockholders found it necessary to sell a relatively successful corporation and the only purchaser was a dominant company, and such an acquisition would, in fact, substantially lessen competition in some markets, under those cases does the act apply?

Mr. BARNES. It may or may not, Senator. I point out to you that the failing corporation defense doctrine does not depend upon statutory language, but depends upon the interpretation of the Supreme Court in the International Shoe case, and there is a very important proviso in there that I mention frequently in speaking before bar associations that most lawyers when they seek clear answers before us seem to overlook, and that is a little statement in parentheses that such an acquisition is permissible "there being no other buyer available."

Now that means that there must be some good faith effort to sell to someone other than the dominant company within the industry before they can expect the Department of Justice to take the view that they have no other person available to buy it.

Now we have had some very interesting examples of that. We approved a merger of a company in the acquisition of a company, an eastern company that was No. 2, I believe, in the United States, within a rather small industry, and it acquired, it was either 1 or 2, it may have been 1, and it acquired the largest competitor of its kind west of the Rockies. But we found out by very careful investigation that some efforts were made in some 8 or 9 places to try to sell to their less larger competitors of the failing corporation. Nobody wanted to touch it, and finally, because of the fact it was legitimately a failing corporation, if they had not been able to sell, it would have gone out of business, we approved the acquisition. So, again, each case must stand on its own bottom, and we have to determine it on the merits of the question.

The CHAIRMAN. In other words, if they show bona fide effort to sell to 1 or 2—2 or 3 more—

Mr. BARNES. If they show first that they are what can be considered a failing corporation. It cannot be that they just don't like the business and want to get out of it, but if they show some indication of a downward pattern in their assets and in their earnings and that they have made honest efforts to refinance, to sell to some of their smaller competitors, then we say just because a business competitor is the only one that can afford to buy it, we cannot interfere under the doctrine of the International Shoe case and don't propose to.

The CHAIRMAN. Even though it does tend toward eliminating a competitor?

Mr. BARNES. It eliminates a competitor, but you compare that with what would happen if the producer was eliminated entirely.

The CHAIRMAN. Yes. In other words, the producer went broke?

Mr. BARNES. The producer went broke; yes, sir.

The CHAIRMAN. Thereby the production was decreased to that extent, which in turn would occasion a shortage and possibly higher prices?

Mr. BARNES. That's right.

The CHAIRMAN. You have to take all those things into consideration.

Mr. BARNES. All factors into consideration.

The CHAIRMAN. We had quite a bit of discussion the other day over the fact that much attention is given in the Federal Trade

Commission report to the economic facts and motives underlying acquisitions and mergers. For instance, there is much discussion of the tax savings in some mergers. Wasn't it one of the specific purposes of the amendment to eliminate the inquiry into what was in the minds of companies entering into the merger, and to look only to competitive consequences; is that right?

Mr. BARNES. Yes; that is right.

The CHAIRMAN. What importance does the Department place on the intention of the parties in considering the legality of mergers?

Mr. BARNES. The only exception that we can make under the adjudicated cases, other than specific exceptions in the statute, is this failing corporation theory.

As I pointed out before, simply because a man wants to get out of business, if he has got a good one and if he is selling that to the largest competitor, that would fall within the statute; we do not believe that we can give our approval. Now that means, of course, that we turn it down. Then, if the company believes that it is justified, it can go right ahead with it and then we have the next problem, do we want to sue them under those circumstances. The decision may be yes or no. Then it is up to the court to determine whether or not they have a reason for it, or whether it might tend to substantially lessen competition or tend to create a monopoly, and then, of course, the man has his day in court.

The CHAIRMAN. I hope you will pardon me for going so deeply into the Federal Trade Commission's report, but we did want to get your viewpoint on a lot of the questions raised on that report.

Mr. BARNES. Perfectly glad to have you do that, Senator; that is why I am here.

The CHAIRMAN. The Federal Trade Commission in its report suggests a great variety of economic factors which should be considered in determining whether the prohibited effect upon a relevant market has been achieved by an acquisition. The criticism has been made that this entails the same detailed study required in determining whether there has been a Sherman Act violation and would defeat the purpose of the act.

Would you care to comment on that?

Mr. BARNES. Well, I think that the comment in the Attorney General's report is quite adequate on that.

I am old fashioned enough to believe that the more facts I have on any particular problem, the better conclusion I can come to and when we have a merger it requires inquiry into a lot of facts.

However, some facts may very rapidly and quickly convince you that it would or would not be a violation of the law. This information, this study of the relevant market and the details to which one must go should be modified, I think, by the language in the Attorney General's report as follows:

The act does not demand an exhaustive economic inquiry for its own sake. And further on, where it says:

We do not, of course, imply that all, several or any one of these guides may be significant or even relevant in a given case.

That is after it discusses the score or more factors that are usually necessary to be considered in a merger case. Any one of them may be such as to bring you to the conclusion that you could not approve it.

However, as I say, I think the more care we use in examination of the facts, the better the results will be. But I don't think there is any need to be bogged down in hearings or never-ending analyses of economic problems. You come to a point where you have got to move, and I think that the Attorney General's report leaves us that leeway and I approve of that most heartily.

The CHAIRMAN. Do you agree with the Commission's reasoning in the Pillsbury decision that even in a case where the second largest miller in the country increased its share of the mix market in the southeast from approximately 23 percent to 45 percent, it is necessary to consider every possible market factor before declaring the merger legal?

Mr. BARNES. No, I don't think it is necessary to consider every possible market factor and I don't think that the Pillsbury case goes that far, although I will likewise say that there has not been a complete unanimity between the Federal Trade Commission and the Department of Justice on the interpretation and extent of what the Pillsbury doctrine may be.

The CHAIRMAN. Now in accordance with the Commission's decision, the defense in the Pillsbury case has now been proceeding for nearly a year before the hearing examiner. Doesn't this frustrate the avowed purpose of checking incipient lessening of competition?

Mr. BARNES. Any delay has its effect, yes. I think it is bad so far as stopping incipiency. Again that is why we ought to be notified in advance and I think we ought to be able to move, and that is why we have announced in a couple of cases in advance that we are ready to move if mergers go through.

The CHAIRMAN. Well now, given a section 7 case where the percentage control resulting from the acquisition, or the dollar volume of sales affected, is extremely large, would you at trial oppose the introduction by defendants of all possible market data bearing upon the competitive picture?

Mr. BARNES. The position that I take on that is stated in the Attorney General's report: "In some cases," and I read from page 123, "the market share in which competition is eliminated may be of primary importance." Now the figures that you suggest there may be the amount of competition that is eliminated in dollars and cents, and therefore, it would be material, in my opinion.

Now to go on, it says:

In others, different market factors may be equally important in measuring the effect of merger on competition.

The CHAIRMAN. The House Judiciary report stated that the two tests of illegality under section 7 are, and I quote:

are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.

Now since the Supreme Court in Standard Stations and International Salt gave these tests a per se application in section 3 cases, does it not appear that Congress intended section 7 to have a per se application in some instances?

Mr. BARNES. No, I do not agree entirely with that statement. I think when we refer to the quantitative basis of a decision, if you refer to percentages, it is a hundred percent right. If you refer to dollars, it is not necessarily right. I don't think you can refer to dollars and

still consider it relative. It would still have its relative effect and that is why I prefer to rely on the quantitative percentage basis.

The CHAIRMAN. Then, of course, if that tends, however, toward an increase in price, then of course that really gets into it, is that a fact?

Mr. BARNES. It is a very difficult subject, Senator, I agree with you.

The CHAIRMAN. In other words, if by reason of the increased business that creates a market condition which results in a rising market on the price to the consumer, then don't you think we are hitting a rather dangerous phase if we overlook it?

Mr. BARNES. Yes, it should not be overlooked. After all, that is ultimately what we are supposed to be enforcing the law for—the benefit of the consumer.

The CHAIRMAN. Right.

Now, can you tell us of any situation you have considered since the Antimerger Act where the percentage control or dollar volume of sales after the acquisition was practically sufficient in itself to bar the merger without considering all the other market data?

Mr. BARNES. I think Youngstown-Bethlehem would be the best answer to that. I don't think there could be much question of that. You have got enough dollars there.

The CHAIRMAN. Will you tell us exactly what market factors you considered in making your decision and explain what type of market data there is which might be relevant generally in mergers, but which you did not deem significant in this case?

Mr. BARNES. In the Youngstown case?

The CHAIRMAN. Or did you deem it significant?

Mr. BARNES. Well, you are in for a long session, Senator. It is all right with me. Let's see what we can do here.

We had various matters to consider. In the first place, we had the entire market picture, that is, the totals. We then divided it down into different products, and the percentage of the industry's total capacity; we divided it into iron and steel facilities, that is, coke, blast furnaces, steel ingot, then into finished steel mill products, hot rolled steel, sheets, hot rolled and cold rolled, those are two different classifications, then bar mill products, the hot rolled bars, the cold finished bars, then the rod mill products, the wire rod, the galvanized wire, the pipe and tubes, and in that we considered the butt-weld pipe, the galvanized pipe, the tin-mill products, including electrical tin plate, the hot dipped tin and turnplate.

The CHAIRMAN. You are considering two types of tin, one in which you put it in by the electrolysis method and the other one just a thin plating of tin, is that right?

Mr. BARNES. That is my understanding.

The CHAIRMAN. In other words, in which you dip the sheet in the tin.

Mr. BARNES. I believe that is the way I understood it, at the time I passed on it. I could not be too sure at this time, Senator, but I believe that is correct.

The CHAIRMAN. I know because the electrolysis method was developed during World War II to overcome a shortage of tin.

Mr. BARNES. That's right. Now, we considered the percentages in each one of those categories. And we considered what in each one of those categories the present facilities of Bethlehem would produce, and the present facilities of Youngstown would produce and what

their combined production would be. That varied from 3.9 percent of the American market to 27.2 percent in the galvanized pipe.

We next considered the blast furnace problem. We considered what the structure of the iron and steel industry was before and after this proposed merger. The total, the percent total of industry capacity, as far as blast furnaces were concerned, we considered. We then went to the ingots and steel for castings to consider what percentage—I can give you these percentages if you want them—

The CHAIRMAN. Oh, no.

Mr. BARNES. In detail, what they would be. All right. Then we went to the hot rolled sheets and considered each of the first 10 in the industry and the 25 other companies that produced hot rolled sheets and where the 2 companies would be before and after the merger.

Then we went to the cold rolled sheets and considered the first 10 companies and the 9 additional companies that are in that particular area of the steel business, and considered where they would be before and after merger.

Then the hot rolled bars, and light structural shapes, the 10 leaders individually and then 51 other companies, in that particular area that produced between them, the 51, 19 percent, and after the merger what the first 10 would be in the 50 additional companies.

Then we went to butt-weld pipe and tubing, and considered again what this capacity was. We used capacity figures because those are the figures that are collected by the industry itself and they are figures that were submitted to us by the interested parties as the most accurate. That does not necessarily mean production, it means capacity.

Then we went to galvanized pipe and considered the 10 largest companies in that business, and the 4 other companies. You understand in some of those areas there would be as many as 60 companies and in some as many as 12. It varies in each particular area you are discussing in the overall steel business. Then we went to electro-processed tinplate there and considered only the 11 companies in the business in the United States, and the 10, if 1 would be eliminated by this merger.

Then we went into the hot dipped tin and terneplate capacity and found out what the situation was there. There were again only 10 companies in that, 9 if the merger were to go through.

Then we went into some of the problems of location of plants, and transportation costs, and markets, and not only in steel generally, but in the various subdivisions that I have just pointed out. We found, for example, that despite the fact that Bethlehem maintained they had no plants in the so-called midcontinent area that they had drawn what we felt was an artificial line in saying that the line between the mid-continent area and the eastern area should and could only start down from the Great Lakes, follow the northern line of New York across the top of Pennsylvania, and then down between Ohio and Pennsylvania because, of course, the Youngstown plant is immediately west of that line and the Johnstown plant is not very far east of that line. And as I pointed out a little earlier, the Lackawanna plant up in New York, because it is on the water, can lay down steel in Detroit and does lay down steel in Detroit at a cheaper rate and in greater quantity than the Ohio plant or even the Chicago plants of Youngstown and we were able to figure out, we think, where the markets were for these

different plants, Bethlehem and Youngstown, what States they were going into.

For example, because of the Sparrows Point plant in Maryland, Bethlehem can deliver in Texas to a great advantage over Youngstown even from Youngstown's Chicago plant which is on the Great Lakes.

The CHAIRMAN. Isn't it possible also, you talk about going into Detroit, to get into the Chicago steel market at a very low rate from the same plant and also into Cleveland, both of which have rather heavy steel fabrication?

Mr. BARNES. Yes, there is a lot of fabrication there and, of course, a lot of other companies that are in on the business there.

We are only talking about the competition between these two companies.

The CHAIRMAN. I see.

Mr. BARNES. And where they do their selling. The Steelton plant, for example, puts out only bars other than concrete reinforcement. The Bethlehem, Pa., plant puts out only bars. The Lackawanna plant, Bethlehem has in bars, plates, and sheets, and you had to consider of course all the various products of these different plants.

The CHAIRMAN. Now, to save time, would it be possible for you to let the committee have that record for a little time to study it?

Mr. BARNES. Well, I would suggest this: Inasmuch as this is a case that may be litigated, Senator, I would prefer to have you ask the steel companies to produce the facts and figures, because they know better than we what business they are doing.

The CHAIRMAN. Our own thought was that then we would be better able to ask the questions.

Mr. BARNES. Well, I don't want to keep the information from you, but I hope you won't ask me to do that because we have litigation staring us in the face, you know, possible litigation.

The CHAIRMAN. I will withdraw the request. I have had the same problem many times before.

Mr. BARNES. I am sure you have. Then we got into the question of these various plants, their location and capacities, not only in steel, but in these various products I have mentioned, and what they could do, in the way of products.

Then we got into a rather interesting analysis not of production, not of capacity, but of shipments and where the shipments went, what the percentage was in the industry, not only in the eastern part of the United States and western part would Bethlehem predominate so largely, but likewise in the midcontinent area in which the companies claimed there was no competition and which we think we were able to establish there was considerable.

Then we went into the market area not only by the United States as a whole, in the eastern, western, and midcontinental United States, but also into the principal steel-consuming States, Ohio, Texas, Michigan, Illinois, and considered what the relative position was.

Then we took the various separate products in these different geographical areas. Then we considered the reasons that were given for the proposed acquisition, the necessity for it. For example, one of the arguments that was used, as I recall it, was that at the rate of production that existed in the steel industry at the time that they sought permission to merge, that the competitors of Bethlehem and Youngstown could supply the total demand irrespective of anything

sold by Bethlehem or Youngstown, and that, therefore, their merger could not affect competition, because there were other sources of supply.

We could not buy that as a legitimate reason for any merger because we asked them a simple question: "Then would you say that if steel production in the United States was at 50 percent capacity that it would be perfectly proper under section 7 for a manufacturer of 50 percent of the steel production of the United States to merge and not violate the act?"

And we had some interesting discussions about problems of that kind, and—

The CHAIRMAN. Is it not a fact at the present time, for instance, that steel is in about 105 percent of normal production?

Mr. BARNES. I believe that it is in excess of 100 percent.

The CHAIRMAN. Because of demand, it is in excess of 100 percent?

Mr. BARNES. Yes. Of course, it has not been that for any long period of time although it has been extremely steady and extremely high for the past several months.

We considered our facts in relation to the reports. For example, the Senate report stated on page 5 at the time of the enactment of section 7—

It is intended that acquisitions which substantially lessen competition as well as those which tend to create a monopoly will be unlawful if they have the specified effect in any line of commerce whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.

That congressional intent is very significant in determining whether we should draw the line.

We considered the proposition that the merger might reduce costs, it might economically permit the allocation of orders for steel products, and it might eliminate duplication and cross handling and warehousing, and we considered the raw materials of the two corporations that proposed to merge, and we considered the problem at considerable length, a problem which I have not touched upon here, the question of diversification, because Bethlehem claimed that they produced, I believe it was 23 products that Youngstown did not produce and that Youngstown produced 4 products, I believe it was, don't hold me to these figures, that Bethlehem did not produce, and there were only 10 products that they produced together, but they neglected to emphasize as we emphasized that those 10 products accounted for 86 percent, as I recall, of their total production.

I could go on at some length, Senator, as to the detailed examination we gave it.

The CHAIRMAN. Don't be embarrassed about this question: Would it be possible for us to get from you the reasons advanced by them as to why the merger should be—

Mr. BARNES. I think I have already commented on several of them and I think that is about as far as we should go.

The CHAIRMAN. I believe we have a copy of their brief.

Mr. BARNES. Yes; that is right.

The CHAIRMAN. That is all I wanted to see, what their brief said on the point.

Mr. BARNES. Yes; we have it.

The CHAIRMAN. Now getting back to automobiles, and I am getting back to the House Judiciary Committee's report, where there are only a relatively few companies manufacturing automobiles, would the elimination of any one company by merger create the prohibited effect that the House Judiciary report said would be accomplished among other ways by, quote, "undue reduction of competing enterprises"?

Mr. BARNES. I don't think you can give an absolute answer to that. For example, we have a problem when you have 10 producers—I say "we," I mean the Federal Trade Commission and the Department of Justice—by authorizing 3 of those 10 to combine with 3 others to produce 3 relatively stronger producers. Now, query: Suppose those 3 wanted to get together or 2 of them?

The CHAIRMAN. That was going to be my next question.

Mr. BARNES. I don't think you can give any answer in advance. That depends upon the circumstances as they develop at the time and market conditions.

The CHAIRMAN. In other words, isn't this the situation, that in the case of the three mergers there were companies there that might have followed otherwise and thereby cut the production to that extent; isn't that a fact?

Mr. BARNES. You are asking me as to a fact. I believe that that was the fact, a present fact.

The CHAIRMAN. Yes.

Mr. BARNES. In but one case.

The CHAIRMAN. Well then—

Mr. BARNES. But it was a possible fact in three cases.

The CHAIRMAN. Three cases?

Mr. BARNES. Certainly.

The CHAIRMAN. Was it not—I think you have already stated your answer; what would be the attitude of the Department in case, say, Studebaker-Packard attempted to merger with, say, American Motors? You would have to wait then on the brief and the showing of facts?

Mr. BARNES. Yes, sir; I would want to see what their total non-merged percentage of the industry was, what had happened in the recent period of time as far as the change, if any, of the first three, what their individual financial condition was, and I could go on for half an hour in pointing out things that would have to be taken into consideration before you could come to an intelligent conclusion. You cannot judge them in a vacuum and it is extremely dangerous to judge them in advance.

The CHAIRMAN. If it can be shown that some of the smaller companies like, say, American Motors, are large enough to operate successfully, wouldn't that indicate the great size of General Motors and Ford is not a necessity in the automobile industry?

Mr. BARNES. Well, I don't want to comment on specific companies in that way. But I will say this—

The CHAIRMAN. What I mean by that—

Mr. BARNES. I know what you mean.

The CHAIRMAN. I mean that enormous size is not necessary to produce automobiles.

Mr. BARNES. Let me point it out this way: I don't know what the cause of it is, but if you want to look at the facts you will see that Bethlehem and Youngstown have no need to combine to compete

against United States Steel. They are taking United States Steel's business month by month and day by day now, they and the other competitors. They do not have to combine in order to do better against United States Steel; they are already doing it.

Now, just where that dividing line is, I cannot tell you, as to whether or not the three smaller automobile companies by combining could do better against the big ones; I don't know. I don't think anybody can tell that. Where it is, where the limit is where big business becomes a handicap rather than a help, if you knew that, you could decide a lot of things.

The CHAIRMAN. Now, Chairman Howrey, of the Federal Trade Commission, recently stated before the House Appropriations Committee that there was too much concentration in the automobile industry but there was no law under which they could dissolve General Motors, Ford, or Chrysler into a great number of companies.

Do you believe legislation is necessary to break up the big companies in order to make the industry more competitive? Now that is the—

Mr. BARNES. As I stated this morning, Senator, we have this problem of concentration in the automotive industry with us. It is the most vexing problem we have. The Department of Justice has come to no conclusion as to what it can and cannot do. If it came to the conclusion that it could not move, why we would stop any investigations. If it came to the conclusion that it should move, we would file suit. We just simply have not come to the point where we have reached any conclusions.

The CHAIRMAN. Judge, you have been studying this unquestionably, and your staff probably has the information. Isn't there a corporate structural difference, shall we say, between General Motors and Ford? Isn't General Motors almost what one might call a holding company owning a great many producing companies, isn't that right, whereas Ford—

Mr. BARNES. I would agree with you whole-heartedly, there is a great difference.

The CHAIRMAN. Whereas Ford is a company owning a great number of producing plants, isn't that the difference?

Mr. BARNES. I am not qualified to comment on that. I have not studied the intricate financial corporate structure either of General Motors or Ford. But it is common knowledge, I believe, that Ford is more centralized.

The CHAIRMAN. They have some subsidiary companies, but the general production of automobiles is all Ford Motor Co., isn't that right?

Mr. BARNES. I cannot answer that question, Senator; I don't know.

The CHAIRMAN. That is my recollection, unless the situation has changed.

Now, you testified previously before this subcommittee that the automobile manufacturers compete in just about everything but price. Just what did you mean by that?

Mr. BARNES. Well, that question has been asked me several times. What I meant was this: That if I go out to buy a bicycle, why, I will look at the advertisements and I have got a pretty good chance of finding out what each manufacturer thinks his bicycle is worth, but if I read an advertisement about an automobile, I don't find any price

put on there by the producer. I may find a price in a particular locality.

Now I think that most economists agree that the greatest competitive factor in any market is price. There may be other influences, but the average person wants the best price, that is what he is primarily interested in, and I would like to see motor manufacturers advertise that they were giving you more for so many dollars rather than just more in the way of beauty, or in chrome or in comfort. I would like to see price emphasized a little, because I think that it might help to reduce price, if there was an emphasis on it.

That is just a personal opinion. Maybe I am wrong. I probably don't know anything about merchandising.

The CHAIRMAN. I noted in some places, for instance, I have heard Mercury classed as being in the low-priced field in national advertising, but I discovered that we have gone back to the early days of the automobile industry when you bought an engine, four wheels, a frame and a set of brakes and a body, and you bought your top, bumpers, lights, and everything else extra. I find now in the advertising field they have gone back to the extras and even the spare tire is extra.

Mr. BARNES. I think about 20 extras are usually accepted if you want the full treatment. I mean if you go into power-steering and air-conditioning.

The CHAIRMAN. If you want the noneconomy sized package, shall we say.

One of the great objections to mergers is that it's a device contributing to the dominant position in an industry of certain companies. Doesn't a program of internal expansion accomplish the same result? Would you comment on the different consequences to competition of these two methods, and do you think anything should be done to restrict growth by expansion?

Mr. BARNES. Well, very obviously, if I am in one locality and I am considering another market, I have only been in there to a limited degree, and I acquire a competitor in there, I immediately eliminate any competition between us.

Now, if instead of acquiring a competitor I would go into his market area and set up my own factory, I am not decreasing competition, I am increasing it, and that is the great difference between your merger and your expansion by additional capital investment.

The CHAIRMAN. Therefore, you would—

Mr. BARNES. Therefore, I obviously would—an antitrust enforcement officer favors more competition.

The CHAIRMAN. Naturally. I want to ask one other question and then I will quit. In this expansion, however, has not the Government—with a somewhat detrimental effect on smaller companies—contributed greatly to the expansion program by tax writeoffs and certificates of necessity?

Mr. BARNES. I am not thoroughly familiar with all the aspects of tax writeoffs and certificates of necessity. I know that they are applicable to the different-sized plants. I do not think for a minute that the larger corporations are the only ones that are getting them.

However, you must recognize this fact, I think, that in any consideration of fast amortization and fast writeoffs on plant investment, it is usually only the larger corporations that can afford to take the financial risk—

The CHAIRMAN. That is the point I am getting at.

Mr. BARNES. The risk of additional plants, even though a small concern may be technically entitled to take advantage of some rapid amortization or tax amortization program; the query is, Do they have the financial capital to go into the area in the first place?

That is a matter I cannot give you the answer on, but I can readily see how a corporation with larger financial assets and background could legitimately take chances on new products and new plants and a smaller outfit could not.

Now that is all to the good if it produces more competition and products.

The CHAIRMAN. But on the other hand, does that not place—I am not just thinking of this as monopoly, I am thinking of the price structure of the smaller company, that places the smaller company under a certain tax handicap on the product.

Mr. BARNES. I don't know enough about the tax situation to state anything. But I think we can assume that there are advantages that, taxwise, large corporations have and advantages, some anyway, that small corporations have.

A small corporation can pay a big salary and it may be a large percentage of the total. A large corporation does not get that same advantage, relatively speaking, if you understand what I mean.

The CHAIRMAN. Anything else? All right. Well, thank you very much, Judge. We may ask for a few more answers in writing.

Mr. BARNES. I am excused, sir?

The CHAIRMAN. You are, and thank you very much. We will recess until 10 o'clock in the morning in this room.

(Whereupon, at 3:45 p. m., recess was taken until 10 a. m., Wednesday, June 8, 1955.)

A STUDY OF THE ANTITRUST LAWS

WEDNESDAY, JUNE 8, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10:10 a. m., in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore, Kefauver, and Wiley.

Also present: Joseph W. Burns, chief counsel; and Donald P. McHugh, assistant counsel.

The CHAIRMAN. The committee will come to order.

The first witness today will be Mr. L. L. Colbert, president of Chrysler Corp.

Mr. Colbert, I understand you have a prepared statement. Do you want to read it or put it in the record and comment on it, or do anything else? We are very informal in these hearings. All we are after are facts.

Mr. COLBERT. I would like very much to read it, Senator. It will take a little less than 30 minutes, if that is permissible.

The CHAIRMAN. Do you object to being interrupted occasionally by questions?

Mr. COLBERT. I do not.

The CHAIRMAN. I might want to ask a particular question while it is still fresh in my mind; and then we may have some questions we would like to ask you afterward.

Mr. COLBERT. All right, sir.

The CHAIRMAN. We will ask you some questions and you can answer them or refer them to one of your assistants, just so that we can get your answer.

Mr. COLBERT. Thank you, sir.

The CHAIRMAN. All right; please go ahead.

STATEMENT OF L. L. COLBERT, PRESIDENT, CHRYSLER CORP., ACCOMPANIED BY GEORGE W. TROOST, VICE PRESIDENT

Mr. COLBERT. Mr. Chairman, my name is L. L. Colbert. I am president of Chrysler Corp. My business address is 341 Massachusetts Avenue, Detroit, Mich.

I am glad to be here at your invitation to take part in this hearing. The study you are making of recent mergers in American industry and their effect upon competition can be highly important not only

to individual companies but to the economy and in the end to the safety of our country. I know it is your purpose to safeguard the health of our competitive free-enterprise system, and we at Chrysler are glad to cooperate with you in accomplishing that end.

I understand from Senator Kilgore's letter that you would like me to state my views on competition in the automobile industry and the effect upon that competition of recent mergers.

I have not come here today to testify as a specialist in the more theoretical aspects of competition and the laws affecting it. I believe it would be more helpful for me to tell you from firsthand knowledge about the competitive experience of Chrysler Corp. Anyone who has followed events in the automobile industry over the past year or so knows what our company has been doing. It has shown how a business concern can bring about a sharp turnaround in an unfavorable market position by offering the public old innovations in its product and by selling that product aggressively.

Those of us who work in this industry believe that the present period is more competitive than any we have ever known. Competition in the designing, producing, pricing, and selling of automobiles is in constant, accelerating motion in every part of our business. It goes on in the drafting rooms, on the assembly lines, on the proving grounds, on the advertising pages of magazines and newspapers, on the radio and television networks, and in the showrooms of the Nation's 40,000 automobile dealerships. We compete for markets, we compete for supplies, and we compete for men.

The CHAIRMAN. Let me ask a question at that point because I want to get a little background history which, I think, is necessary.

Mr. COLBERT. Yes, sir.

The CHAIRMAN. The Chrysler Corp., of course, in its present status, was formed by the acquisition of certain companies.

As I understand it, those companies were acquired in order to give you a selective price range from the very expensive type of car down to the cheaper car, so that you would have types of cars in all fields; is that right?

Mr. COLBERT. We started off, Senator, with one company, the Maxwell Motor Co.

The CHAIRMAN. Yes.

Mr. COLBERT. And from there, after we acquired Maxwell in 1928, we acquired Dodge, and then in 1929 we added De Soto and Plymouth, which did give us a coverage of the field in the four price ranges.

The CHAIRMAN. In the four price ranges.

Mr. COLBERT. Yes, sir.

The CHAIRMAN. That was the purpose of building up Chrysler Corp. in its present status; that was so that you could compete with any other company in the various price brackets; is that right?

Mr. COLBERT. That is right.

The CHAIRMAN. All right; thank you; please go ahead.

Mr. COLBERT. The automotive industry is in a period of intense creative activity, with every company attempting to bring all its resources to bear on satisfying the healthy public appetite for vehicles of modern design and modern performance. I believe this activity will continue in the years ahead to produce a continuous series of advances in the product we build and sell.

In this extraordinary period of innovation no company, large or small, can consider itself beyond the reach of competitors who have new ideas and determination and skill to market them effectively. There is no such thing as an entrenched and unassailable position in the automobile business. There never has been and I do not believe there ever will be.

I speak with conviction and feeling on this matter because for the past 22 years I have been associated with a concern that stands as a living proof of the opportunity that exists in this industry for a company with a new-product idea and a will to challenge and change existing shares of the market.

It may contribute to the purpose of this hearing to review briefly the way Chrysler Corp. made good on the first successful challenge it laid down 30 years ago to bigger and already well-established automobile companies.

You may remember that Walter Chrysler was called upon in 1921 to reorganize the Maxwell Motor Co. At that time Maxwell, along with its subsidiary Chalmers, had less than 2 percent of the automobile market. It was this modest beginning which served as a base of operations from which Walter Chrysler and his management team launched their drive toward a major penetration of the automobile market. Virtually everyone who knew anything about the industry told them that there was no room for a newcomer—that the industry was all sewed up by the giants. But within 8 years of the time Walter Chrysler had reorganized the Maxwell Co. and renamed it as Chrysler Corp. in 1925, this new, young challenger had gained second place in the sale of passenger cars. And it is worth mentioning that the company made its most important gains against the background of depression in the early thirties.

The CHAIRMAN. Don't you think one thing that helped out with that gain was the fact that they were the first people to come in with fluid-activated four-wheel brakes?

Mr. COLBERT. Very definitely. The thing, the reason—and I get to that later on in my statement—

The CHAIRMAN. At one time that sold more cars than anything else.

Mr. COLBERT. The new innovations that Walter Chrysler brought in with his engineers were the things that put him in competition with these other fellows; new innovations, new ideas, new management skills, but principally the thing that put him in a position to challenge all the rest were new ideas in the automobiles that they built. That develops as we go along in this story.

This well-known success story of American industry was the result of many contributing forces. Among them were the engineering genius that produced a radically new and different kind of automobile—a production team that knew how to build in quality and cut costs—and a management that placed balanced emphasis on sound financing, inspired selling, and vigorous and continuous engineering research.

There is one element in that success story that bears heavily upon the object of your inquiry here today. I speak of the buying of Dodge in 1928, which gave the young Chrysler Corp. a leg up and a fast start in the competitive race.

By the beginning of 1928 Chrysler had gained fourth place in the automobile industry as the result of the success of its Chrysler fours

and sixes. It was then selling just under 6 percent of the market. It had designed and tested two new automobiles, the Plymouth and the DeSoto. But to make further advances the company needed more producing capacity and supervisory talent. It also needed more retail outlets and an additional force of experienced dealers. It got these things through buying the assets of Dodge Bros., Inc. This had been one of the largest and most successful companies in the business, but after its founders died it lost much of its ability to compete and much of its market.

In exchange for the Dodge assets Chrysler gave 1,253,557 shares of Chrysler stock and assumed a funded debt of \$59 million. One financial observer remarked at the time that this trade was like "a minnow swallowing a whale."

This is now known as one of the most successful mergers in the history of American business. At the earliest moment Chrysler put the new facilities to work to turn out Plymouths and DeSotos as well as Dodges. Within 5 years the company had gained second place in the market for passenger cars. Chrysler Corp. had made its first gains by offering a new and different kind of product. Buying Dodge gave it the productive and merchandising strength to take on the leaders.

I have reminded you of this chapter in the earlier history of our company for a very good reason. To me, it illustrates a truth—the truth that a merger can be a positive and constructive support to the health of our competitive system by helping a company make a successful drive against bigger and more solidly based rivals. Our experience has become a classic illustration of this kind of merger.

A recent book entitled "Big Enterprise in a Competitive System," published by the Brookings Institution, points out Chrysler's taking over Dodge as an instance of the merging of smaller firms "to produce one that could compete successfully with the leading firms in the industry."

As you know, Chrysler Corp., has had a more recent experience in buying additional facilities. On December 29, 1953, we bought the principal automotive plants, machinery, and equipment of the Briggs Manufacturing Co. We paid \$35 million for the property, plants, and equipment of Briggs, and about \$27,500,000 for its automotive inventory.

For many years Briggs had made bodies for our Plymouth cars. The cost of passenger-car bodies, painted and ready for the chassis, and including doors, interior trim, seats, upholstery, glass, and overhead wiring, represents roughly 40 percent of the cost of a finished automobile. Since Plymouth regularly accounts for at least 50 percent of our sales, the cost of Plymouth bodies is one of our major outlays.

Our other three car divisions, Chrysler, Dodge, and DeSoto, had been making their own bodies, and we had been expanding our own facilities for making body components. This was consistent with developments in the industry. Nearly all of our competitors were building their own bodies.

After the death of the senior Mr. Briggs, representatives of the Briggs family approached us, indicating they wished to dispose of their holdings. The Briggs property and personnel were a going concern that it would have taken us years to replace.

The CHAIRMAN. That is the same company that makes the pressed-steel bathtubs?

Mr. COLBERT. Yes, sir.

We did not buy that part of the company when we acquired the assets.

The CHAIRMAN. That is not run as Briggs?

Mr. COLBERT. That is still run by the Briggs people as Briggs Manufacturing Co., bathtubs and other hardware.

The CHAIRMAN. I see. All right.

Mr. COLBERT. Inasmuch as Briggs was the source of half of our body requirements, and since there was no alternative body capacity to assure us of the number of bodies we needed, it became clear that we should buy Briggs.

This purchase had further advantages.

In the acutely competitive state of the industry, the styling of passenger cars was becoming critically important as a selling feature. Already we had designed the cars that are now known to the public as the Forward Look models. We were glad to own the facilities that would produce the crucially important new Plymouth bodies.

We also had felt the need of getting direct control of the cost of Plymouth bodies. I have referred to the major importance of this cost item. Anything we could do to reduce this cost, which seemed to be getting out of hand, would help us in the increasingly competitive market. Owning the Briggs plant would also enable us to strengthen the management of them.

Furthermore, since our other car divisions were making their own bodies, other advantages would come from being able to combine, adapt, develop, and modernize our facilities for making these major and basic components. To be fully competitive, we no longer could afford to go without these advantages for our Plymouth division.

When we bought Briggs, it was also making bodies for Packard Motor Car Co. In our contract with Briggs we included a clause that protected Packard by agreeing to supply it with bodies if it wished us to do so. Later we concluded with Packard a lease of the Briggs Conner plant, in which it now makes its own bodies, and we did make bodies for a period of a number of months until we completed this lease.

In summary, I can say that the Briggs purchase has worked out satisfactorily. We have been modernizing the plants steadily over the past year and a half, and integrating them with our other bodymaking facilities so as to have greater flexibility than ever before. Having Briggs has been a major factor in our effort to regain our share of the automobile market. We believe this is in the public interest as well as our own.

Recently, mergers in the automobile industry have consolidated 6 companies into 3. The companies merged, I am sure, because they believed that by combining their resources they could compete more effectively.

Mergers like those in our own experience and the recent ones I have mentioned involving other automobile companies can be one of the most effective ways of stimulating competition or saving it. They may bring about more efficient use of facilities and talents. They may furnish opportunities for bringing costs more nearly into line with those of competitors. In short, the effect of bringing together

companies with complementary facilities and talents can be to increase rather than decrease competition in our industry.

Only strong competitors can keep on competing when competition is severe. It does not preserve competition to prevent weaker competitors from making themselves strong.

I can think of no better way to describe the present state of competition in the automobile industry than to tell you some of the principal events in our recent drive and the story behind those events.

In every peacetime year from 1933 to 1953 Chrysler products accounted for better than 20 percent of the automobile market—with the single exception of 1950 when a 100-day strike cut our output. Then in 1954 our share was slightly less than 13 percent of the market. Fluctuations like this have occurred before in this industry. What actually happened at Chrysler as a competitive response was that our share of the market during the first 5 months of 1955 increased to over 18 percent. This is a sizable share of a very big market—the biggest market on record for any similar period. Since we started to produce our 1955 models late last year we have built nearly a million passenger cars. The millionth unit of the 1955 line will roll off one of our assembly lines sometime this week.

The CHAIRMAN. You keep mentioning passenger cars. Your passenger car percentage has been higher than your product percentage of your market?

Mr. COLBERT. Yes, sir.

The CHAIRMAN. You make a Dodge truck?

Mr. COLBERT. Yes, sir.

The CHAIRMAN. Is there any other field you are involved in?

Mr. COLBERT. Passenger cars and trucks are our principal automotive vehicles.

We build special trucks for the Government, in substantial volume, but passenger cars and trucks are our principal automotive vehicles.

We are also in the air-conditioning business, and a number of businesses, but related to vehicles, passenger cars and trucks.

The CHAIRMAN. That is right; you make air-conditioning equipment, too?

Mr. COLBERT. Yes, sir.

The CHAIRMAN. All right; continue.

Mr. COLBERT. Our drive to recapture our traditional share of the business has helped to create the unusually large market for automobiles this year. But I believe that what we have done has an even larger meaning. We have shown that there is nothing guaranteed, or fixed, or permanent in the market standings of the automobile makers. In this industry any company led by a forward-looking management and staffed by men with ideas, energy, and imagination can, if it will, change established positions. No company in the automobile business is so deeply dug in, so well placed, that it lies beyond the reach of an able and determined competitor.

Now, what were the main elements in our competitive bid to regain our market?

First of all, and above all, were the many advances in our 1955 cars. These cars were new from bumper to bumper. Their appearance was new and their performance and value were superior to anything we had ever produced before. We were so confident of the success of the new cars that we priced them on the basis of a

big increase in our sales. We brought them through from the idea and drafting-board stage to the assembly line in record time.

Besides what was new in the product itself, we placed increased emphasis on giving our dealers every possible assistance in making their merchandising effective, and strengthened our advertising efforts all across the board.

Today, in addition to selling vigorously in the current market, we are also preparing for the years ahead. We are building new plants and modernizing old ones. We are expanding our research facilities and adding to our research personnel. We are giving vigorous attention to the forward planning of our products, to assessing future markets, and setting of goals relative to those markets.

The CHAIRMAN. Does not the automotive industry, as an industry, operate a patent-exchange pool?

Mr. COLBERT. Yes, sir; the patent situation in the automobile industry at one time was very complex, and there were lots of suits, and we got together and worked out a patent-exchange pool, if that is what you want to call it.

The CHAIRMAN. I do not know what you call it.

Mr. COLBERT. That is what it is; it is an exchange of patents among the companies. That was to apply to all patents, as I recall it, that were issued up to 1940, and that agreement has another year or two to run.

The CHAIRMAN. In other words, any company has a right to go in, up to 1940, and get information on patents and they can license their patents?

Mr. COLBERT. Cross-licensing agreements is what it was; yes, sir; agreements to cross-license.

The CHAIRMAN. Yes, sir.

Mr. COLBERT. That is true; and I talked to our patent department about this point, and they tell me in recent years there have been practically no lawsuits among automobile companies on those old patents. There cannot be on the old ones before 1940 or anything that has been added to them in recent years.

The patent suits among automobile companies have practically become a thing of the past. You are on your own to build a product, and if your competitor wants to copy it, he copies it at his own risk, because the thing you want to do in the automobile industry is to get the credit of being the first with it, doing it yourself, and if anyone wants to copy it, there have not been any suits in the automobile industry. It is a part of the competition, that is what it amounts to. It is a part of the competition.

The CHAIRMAN. That is one reason why practically all automobile companies now have some species of automatic gear shifting. They call it by different names. Of course, I think there are two general plans, are ther not, one which originated out of the liquid drive, and one which is the gear drive?

Mr. COLBERT. There are at least a half dozen others.

The CHAIRMAN. I know, but they are all variations on those two theories. That has given accessibility of automatic gearshifting to any manufacturing company.

Mr. COLBERT. I think it is fair to say today that the patent situation is no deterrent to anyone entering the automobile business or staying in it. It is no deterrent.

The CHAIRMAN. All right. Go ahead.

Mr. COLBERT. We are putting great emphasis on increasing the competitive activity between divisions and extending authority, responsibility, and incentive downward and outward into all parts of Chrysler. We are using every means for encouraging to the full development of initiative, drive, and imagination among the many hundreds of men who manage all our activities.

This program, which we call divisionalization, is aimed at making the company as a whole more competitive by delegating authority and responsibility to make decisions to those who work close to the points where crucial problems arise. We look upon the program as a way of bringing every division, every plant into full participation in setting as well as reaching the company's goals.

In view of the kind of competition now taking place in the automobile industry, the kind I have been describing from the standpoint of Chrysler Corp., you may wonder how a small new company could ever gather together enough resources to match the efforts of any of the presently established companies.

This is the familiar problem of size and its bearing on the health of the competitive system. I would like to say what I think on this matter as it applies to the automotive industry.

The making and selling of automobiles as we know it in the United States is a large-scale undertaking. To build and equip modern factories geared to assembly-line production requires extensive capital outlays that place this industry automatically outside the category of small business. Besides the capital resources necessary to build already designed automotive products, large additional funds are needed for engineering and testing of products for the years ahead.

Designing, testing, and manufacturing automotive products is only part of the business. Equally important is selling those products. And here the fact of first importance is that we sell automobiles in a national market.

The great gains in making and using automobiles in this country are attributable not only to the development of mass production but also of mass distribution. In the early years of the century there were hundreds of automobile makers, most of them custom building their cars and selling them to a limited clientele. That period was highly important in developing the modern automobile. Almost immediately the emphasis shifted to finding more efficient methods of producing and distributing them. The result was to bring prices within the reach of the average family. Today there are close to 50 million passenger cars in use.

This fabulous number of cars has resulted in part from the competitive efforts of nationwide selling, both through the national advertising by the manufacturers and the selling by each maker's nationwide group of dealers. In the successful methods the American automobile business has worked out, both of these elements are necessary.

At a time when we are hearing more and more about the automatic factory and automatic methods of producing, or automation as some call it, it might seem that this trend too would make it difficult for relatively small manufacturers either to enter or to stay in the automobile business. This is not necessarily true. Automation can be used on a small scale as well as on a big scale. Many of our small suppliers

use automation. Automatic machinery for producing engines is in general use throughout the industry, regardless of the size of the company.

The CHAIRMAN. You use the word "suppliers."

Mr. COLBERT. Yes, sir.

The CHAIRMAN. Approximately how many suppliers of finished products does Chrysler buy from over and above what they control themselves, such as Briggs Body?

Mr. COLBERT. Yes; about 8,000.

The CHAIRMAN. Eight thousand?

Mr. COLBERT. Yes. We buy from over 8,000 suppliers, and in very large volume from some of them, and from about 250 of those suppliers we buy approximately a half million dollars a year.

The CHAIRMAN. You have no control over those companies, except your contract control?

Mr. COLBERT. That is right.

The CHAIRMAN. That is, your contract for delivery at stated intervals, stated amounts of product; is that right?

Mr. COLBERT. That is right; and most of those suppliers that are awarded business from us have gotten it on competitive bids.

We go out and we give the blueprint to the supplier we know can make the particular product and ask him to bid on it. He knows the volume we want from him, and he knows the quality, of course, has got to be there, and most of our business, practically all of it, where we can get it, where there are available sources, we let our business on competitive bids to these suppliers.

The CHAIRMAN. Now, a further question along the same line. You said—you were referring to Plymouth—that 40 percent of the cost of Plymouth was body.

Mr. COLBERT. Yes.

The CHAIRMAN. Including now—

Mr. COLBERT. Completed body.

The CHAIRMAN. Completed body.

How much of that body is fabricated by others outside of Briggs Hardware?

Mr. COLBERT. There is some of that hardware, some of the molding, some of the stampings have been. They will not be a little later on because we have just built a stamping plant of our own right next to Briggs where some stampings we have been acquiring from an outside supplier will now come into our own plants because we are convinced we can make them at better cost prices than we have been paying for them.

I do not know what the percentage would be. I just do not know, Senator, what percentage of the body, say, that we made ourselves and what parts were made from outside sources.

Mr. TROOST. Roughly, we spend about 57 cents out of every dollar we take in in buying, purchasing supplies and services, and the same would hold for the body. It would follow that same average.

The CHAIRMAN. Then what percentage shall we say of the total cost of the car is purchased from vendors?

Mr. TROOST. About 57 percent.

Mr. COLBERT. That approaches 60 percent.

The CHAIRMAN. Then people who bid on an annual contract basis—

Mr. COLBERT. That is right; model basis.

Mr. TROOST. That is 58 percent of the selling price.

The CHAIRMAN. That is what I mean. All right, please go ahead.

Mr. COLBERT. No development in the future is likely to change automobile making in America from an unusually large-scale enterprise, even for the so-called smaller companies. This is not to say, however, that the requirements of size form an insuperable obstacle to the entry of new companies into the industry. With a radical new concept of mechanical efficiency and convenience to the passengers, I believe that a capable newcomer could attract sufficient capital and dealers and could acquire the necessary production facilities to invade the industry successfully.

It must be remembered that the automobile industry has been preparing the public year after year to look for innovations and to judge companies by the new and practical features they introduce. The appetite for innovation in automobiles is very well developed. In a period that holds so many potentialities for radical new developments in automobile engines and in general automobile design it is always possible that someone will come along again, as Walter Chrysler did over 30 years ago, with a new idea that will obsolete the automobile as we know it.

Apart from the question of getting into the manufacturing side of the automobile business, it is true that the industry makes possible the existence of many thousands of smaller businesses. The automobile manufacturer buys from thousands of smaller firms and sells his products to thousands of dealers. Chrysler spends about 58 cents out of every sales dollar to buy materials, parts, and services from over 8,000 independent businessmen in 42 States, 7,000 of these firms have fewer than 500 employees. To fill our needs for many of the products we purchase we tap all available sources.

We sell our vehicles to approximately 10,000 dealers in the United States. These dealers put up their own capital and operate their firms as independent business enterprises, cooperating with us to sell the cars and parts that we make. They order from us the cars they need to supply their market.

We at Chrysler are interested in the performance of our dealers in selling the automobiles we make. It is in the dealer's interest as well as our own to keep the sights set high on the number of cars he sells. To help him sell them profitably and up to the full possibilities of the area in which he does business we furnish him a variety of services through our own field staffs. Our objective is to have them manage all phases of their business effectively and so that they can make money. At the present time, when competition in the automobile business is so intense, it is particularly important that the dealer have at his command every possible technique for selling his automobiles and for controlling his costs of operating.

We at Chrysler know that we have many other important obligations to the dealer. Among them is doing what we can to create a favorable atmosphere of public acceptance in which the dealer will do his selling. We do this, in part, by designing and building vehicles that meet the taste and needs of his customers. We consider it our responsibility to increase year after year the value we build into our product.

The CHAIRMAN. I want to get back a little bit. Does Chrysler have its own distributors? Do you own the distributors, or are they independents? You know at one time the distributors were independent contractors for all automobile companies, and each one was assigned a territory, and he built up the dealerships and furnished the service to the dealers, and that sort of thing. Is that in vogue with Chrysler or not?

Mr. COLBERT. Right now there are two kinds of dealers. There are direct dealers that are distributors, if you want to call them that, and then there are associate dealers under them. The associate dealers are practically reduced to just a few hundred now.

Most of our dealers are what you would call distributors, direct dealers in the first instance.

The CHAIRMAN. In other words, they buy direct?

Mr. COLBERT. They buy direct from the corporation, yes, sir; and sell their products. In some few cases, I think we have about 1,200 associate dealers who are dealers under these direct dealers in outlying territories who buy from the direct dealers, but they are practically eliminated from the industry.

The CHAIRMAN. All right.

Mr. COLBERT. It may be useful to take a minute or two to illustrate concretely the constantly increasing value we have been able to offer to our customers.

A short time ago I had reason to look at the specifications of the first Chrysler car that Walter Chrysler presented to the public back in 1924. That first Chrysler was revolutionary, with many features new to volume-built cars. It had four-wheel hydraulic brakes. It had a high-speed, high-compression engine with the highest compression ratio found at that time in production cars. The pistons were made of aluminum. The engine was lubricated by filtered oil under pressure.

Certain other features of that 1924 Chrysler, however, show how far we have come in 31 years of creative competition. The standard model of that first Chrysler 6 was a touring car equipped with curtains. Our company advertised with pride that the top could be folded or raised by one man. The standard wheels were made of wood. The horsepower rating was 68. And the body was made of pressed steel over a hardwood frame.

Some of us might like to own one of those first Chryslers, but only for sentimental reasons. Compare that car, a sensation in its day, with 1 of our current almost completely automatic models, which is nearly 60 inches longer, nearly 1,300 pounds heavier, and in which you can ride in complete ease and with 2½ times as much power at your command.

Then compare the prices of these cars built a generation apart. The factory retail price of the 1924 six-cylinder Chrysler was \$1,595. The factory retail price today of a valve-in-head V-8 Chrysler Windsor Deluxe 4-door sedan with power steering, power brakes, and Power-Flite transmission, is \$2,947. This current price includes \$800 worth of inflation—since today's dollar will buy less than two-thirds as much as the 1924 dollar. It also includes about \$700 in Federal and State taxes. In 1924 the tax hidden in the price of a car was certainly not much over \$100.

So, in terms of what the customer's dollars will buy, the price of one of today's Chryslers is about \$100 less than the price of that first 1924 Chrysler. And the difference between the 2 cars in performance, effortless automatic operation, dependability, durability, beauty, comfort, safety, and convenience is the measure of the value added by the competitive efforts of the industry over the past 3 decades. These are the real fruits of competition.

We have always placed our main emphasis on sending the best possible car and truck values to the market. To that end we have brought to the mass market a great many automotive achievements, including the high-compression engine, four-wheel hydraulic brakes, the all-steel body, floating power, automatic overdrive, safety rim wheels, power steering, and many others.

The steady stream of new things that have come and will continue to come to the public from us and other automobile manufacturers is the clearest possible proof of the competitive vitality of our industry. These new things create new markets, new energies, new vitality not only for the automobile business but for many other kinds of activity throughout the economy.

I suggest that it is the flow of competitive innovation that is the surest index to competitive health in this or any other sector of the economy. I would like to suggest further that the performance of the automobile companies as innovators is judged day after day by many millions of automobile users, and no automobile company can flourish unless its products pass the critical review of the American public. No other industry, I submit, is under the watchful eye of so many people with so lively an interest to quite the extent that we are. In these rigorous circumstances there is little danger of stagnating, little danger that any company will be able to rest safe and easy on its past performance.

I and my associates at Chrysler Corp., urge that in your study of competitive realities and of laws affecting competition you give full consideration to sustaining and promoting the forward momentum of the competitive system.

Thank you, Mr. Chairman.

The CHAIRMAN. I have some questions I want to ask you. But before I do, Senator Wiley, do you have any questions?

Senator WILEY. You are doing first-rate.

I want to compliment the witness here. I have enjoyed listening to this, what you call, Americana, because it really is such. I once was fortunate enough to possess a Chrysler, but that is a long time ago.

I probably will have a few questions after the chairman has gone through with his questions.

The CHAIRMAN. All right.

Yesterday, Judge Barnes, the head of the Antitrust Division of the Department of Justice, stated to this committee that, in his view, producer concentration lies at the heart of the antitrust problem in the automobile industry.

The Chairman of the Federal Trade Commission also declared that there is already undesirable concentration of production in the automotive field.

I wish you would comment on that.

Mr. COLBERT. I did not hear the first part of Judge Barnes' statement.

The CHAIRMAN. Judge Barnes said in his view producer concentration lies at the heart of the antitrust problem in the automobile industry.

Mr. COLBERT. Well, I do not know exactly what Judge Barnes meant by that, but I certainly do not think that you have in the automobile industry any concentration of production now that is in any way interfering with competition in the industry.

Senator WILEY. Will you pardon me, Mr. Chairman?

The CHAIRMAN. Yes; go right ahead.

Senator WILEY. I remember that statement. There are several angles raised by that very suggestion. The fact that you have, I suppose, 3 or 4 big companies now in the automobile industry, or just 3 of you?

The CHAIRMAN. Three.

Senator WILEY. Three, all right.

In the public interest, your institutions are of such a character that if they are needed in the nature of self-defense by virtue of being big and by virtue of having the facilities, you would immediately turn to do that which is necessary for the defense of the country; would you not?

Mr. COLBERT. I think that is definitely proven in times of war or for the defense efforts that big companies are very helpful, and that they can make the turnaround and get into production and produce items that the smaller companies cannot produce.

Senator WILEY. And yet you have some 8,000 small companies from which you get, you might say, the strength to carry on and do your big job?

Mr. COLBERT. Right, sir.

Senator WILEY. And in case of national defense, as much as the material and effort that they would produce, they would keep on feeding into your institution?

Mr. COLBERT. We would turn to those same suppliers for the things we knew from our automobile experience whether they can produce. We would turn to them for bids on the war or defense items, just the same as we do on our automobile items.

We have done that before in World War II, and in the Korean war, and we are doing it now in defense items that we are producing.

Senator WILEY. You are buying from the smaller operations the material that you have to have, and you are in direct competition with the other two big fellows?

Mr. COLBERT. The other big fellows buy from them also; yes.

Now, whether they buy the same items we buy from them or not, I do not know.

One of the advantages you get in this case by having these many suppliers they buy from, in having the volume not only from us but from other automobile companies, is that you can in many instances produce at better costs than you can in your own shop.

Senator WILEY. That is why you buy from them?

Mr. COLBERT. Yes, sir.

We are constantly searching to see whether we can make it ourselves or buy.

The picture changes. Some items we bought last year we make this year; some items we were making last year, we may be buying. That

is a situation we study constantly, and the thing that governs that is largely cost.

The purpose is to get the costs down.

Senator WILEY. It is interesting to note, in other words, the little fellow can make things cheaper than even the big fellow.

Mr. COLBERT. That is true.

Senator WILEY. And that has been your experience?

Mr. COLBERT. That is right.

Senator WILEY. And vice versa.

Mr. COLBERT. Right.

Senator WILEY. So there is, then, no association whatever with the other big fellows in anything else except competition; there is nothing in relation to prices?

Mr. COLBERT. You gentlemen have to be out there and live with us a bit to realize the intense competition that there is in every phase of our business and that is what, as I said in this talk here, is the thing that, I think, made the industry what it is today.

It is competition that goes on; it is every day in every phase of the business. It starts in the engineering, in your designing, it goes on through your production, trying to build in your own plants, of course, goes into your buying, whether your purchasing department can buy competitively the parts that they buy from these 8,000 fellows.

They want to be sure they are getting them at as reasonable a basis as General Motors or Ford or any of the other competitors are getting them.

It runs all the way through, your competition does. It starts, as I say, with your engineering and runs clear through to your selling; and you get out to your sales, and you get into competition with your field force and the other fellow's field force, and then your dealers' competition with the other dealers, so it is there from A to Z.

Senator WILEY. In the development of your engines, are you doing anything with respect to atomic energy?

Mr. COLBERT. Well, sir, I would not, unless you want to press me, like to get into the future development we are working on in our engineering department.

Senator WILEY. No, I would not ask it. You have answered it. You are. In other words, the sky is the limit. There is never, in this America of ours, because of the free enterprise system, there is never any limitation. Day by day new horizons come into view.

Mr. COLBERT. That is the way I feel about it; yes, sir. I believe in it.

Senator WILEY. That is all, Mr. Chairman.

The CHAIRMAN. Senator Kefauver, do you have any questions at that point or do you want us to go ahead a little further?

Senator KEFAUVER. Mr. Chairman, I know Mr. Colbert a long time, and I have great admiration for him personally and for the way he runs his business, and I want to congratulate him on this statement he has made.

There is one matter that I would like to ask you about, Mr. Colbert which is not covered in your statement.

Last year and the year before or the year before last, we had a hearing before the Armed Service Committee with reference to the medium tanks, the M-48 tanks, which you and General Motors were

making, and prior to that time American Locomotive at Schenectady had also made. You had a plant out at Newark, Del.

On the bid for the tanks you were a little bit higher than General Motors, so that they, at one time, canceled your contract, and gave all the tanks to General Motors, which would have meant that they would have been making in their Cadillac division the light tanks. They were also making heavy tanks, and they would have been making all of the medium tanks which, I thought, was a bad business in not having, two supply lines, and also concentrating all the tank business, medium-tank business, in one company.

So some of us on the committee, particularly myself, were quite critical about it, and also our feeling was that the cost of multiplying all of the equipment and keeping it would have been many times more than the small difference between your bid and that of General Motors.

But one of the distressing things that came out of the hearing was that one reason why General Motors was able to bid lower than you was that they were purchasing supplies from their producers at a lower price than you could purchase the same supplies, that you had to purchase some of them in order to meet the specifications.

So my question is, Is this consolidation of industries and supplies in the automobile industry, where they can—they, to a large extent and you to a smaller extent—have your own suppliers, is that not reducing competition, and is that not reducing the chance of the other fellow to survive?

Mr. COLBERT. Well, Senator, I do not think so, because we have the same right to integrate, let me use the word "integration" further, if we choose to do that, that our two principal competitors have. They have gone further into integration than Chrysler.

At the time Chrysler was set up we learned more toward engineering and research than we did toward controlling our own facilities. The critical items we built, the motors and transmissions, and the things we wanted to be darned sure functioned properly, we built plants to build those items, but we went further in our idea then, and it has worked out to be fairly successful over a period of many years. We went more into looking to our suppliers to supply other items to us than have our two principal competitors.

Now, on this tank bid that you talk about—

Senator KEFAUVER. Let me explain a little further. As I remember the testimony, you were low on overhead, you were low on labor costs, you were low on the profits. The only thing that made the difference was the cost of supplies, and one of the items in the cost of supplies was that they purchased many things at a lower price from their own producers in their integrated system than you would have to pay. In other words, you would have to pay a higher price for certain things that you bought from their integrated companies; so that in that deal the integration adversely affected you.

You also have some integration that probably adversely affects the other little automobile companies. General Motors has more integration that more adversely affects the entire picture.

Do you think that is a good healthy situation for the country?

Mr. COLBERT. I do not think you can answer that question categorically, Senator. I will tell you this on your tank business: I do not remember the items that went into making us higher on that bid. I

do know they made the transmission, which is a very substantial part of the cost of that tank.

Senator KEFAUVER. Well, I have the testimony here, and I do not find the exact place, but somewhere around 12 to 20 percent of what went into the tank, whether you made it or whether General Motors made it, you had to buy it from General Motors or, I mean, one of their affiliates.

Mr. COLBERT. That is right. If that is the testimony, that is what it was, and I know we were very disappointed at not being able to get our bid down to where we got that business.

Now, I also went down and talked to the Secretary, Mr. Troost and I did, about whether or not even though we might be high—and we did not know how high we were at the time, they would not disclose that to us—we found out the award was about to be made to General Motors, and we protested right up to the top. All we knew is that we were high, and we did not know what any of those items were as to what was the basis for our bid being high, and we also argued as to whether or not it was good for the defense of the country for this all to be placed in one hand, but we had to defer to their judgment on that because they are American men who, I am sure, have the defense of their country at heart.

Senator KEFAUVER. Well, they finally changed their minds and gave you part of the contract.

Mr. COLBERT. No, sir: not on that one.

Senator KEFAUVER. But they put out another bid on which you were low?

Mr. COLBERT. That is right. What I was getting around to was on that contract, which was 1,700 or 1,800 tanks or 2,000, we lost it on a competitive bid. We were higher than they were. We put up all the arguments to get part of it because of the defense idea, that it was better for the defense of our country, but we could not argue any further.

Then they asked for new bids on an additional 1,800 tanks a few months ago, and we bid on that and General Motors did. That went to us.

Now, what items were in this bid that were in the other one, I do not know, but we got this last contract for 1,800 tanks on a competitive bid.

Senator KEFAUVER. You were just determined that you were going to get it despite anything.

Mr. COLBERT. We have got it, and are making some of those tanks now.

Senator WILEY. You are not going to lose any money on it?

Mr. COLBERT. We do not think we will; no, sir. I think we got a fair profit on it.

Senator KEFAUVER. I felt, Mr. Colbert, that Chrysler was really timid in not fighting for the contract that I am talking about. Nobody, none of your people, said anything to me. I was not trying to help you, but I did get into the fight because I thought it was a very bad business to only have one supply line in the face of ODM recommendations that you ought to keep as many suppliers as possible, and have two sources of supply. I protested it on my own behalf and, frankly, we could never get any cooperation from Chrysler. You all were very timid in not fighting for that contract.

Mr. COLBERT. That might have been my fault, Senator, because, as I say, Mr. Troost and I personally went down to the Secretary's Office, and protested as loudly as we knew how.

Senator KEFAUVER. We tried to get some of you in here to testify, but you were afraid you might hurt the feelings of the Defense Department.

Mr. COLBERT. Well, I am not sure that was not the reason—I do not recall that as being the reason—for it. We do not have any questions about that.

Senator WILEY. How much time elapsed between that contract and the one you got?

Mr. COLBERT. About a year and a half.

Senator KEFAUVER. A year and a half.

In the meantime, they dismantled a lot of facilities, had to put them in mothballs. There was a lot of unemployment in the country, down at the steel company, and many other places, and you finally did get a contract which helped you out.

Mr. COLBERT. Is that not the important thing, Senator, that they got one contract on a competitive basis—I say, I cannot talk about the merits, the rights or wrongs of what the Defense Department did—but is it not an important thing that they got one contract on a competitive bid, and we got the next one on a competitive bid?

Senator KEFAUVER. Well, the important thing was, I thought, at that time there should be two supply lines.

Mr. COLBERT. Well, I do not know; I cannot argue with you.

Senator KEFAUVER. Anyway, in the testimony, and I have it here, before the Armed Services Committee, parts that went into the medium tank came from General Motors or some of its subsidiaries. You were buying those parts, when you were making tanks, from them.

Here is the transmission, which is made by General Motors; Ternsteadt, whatever that is—T-e-r-n-s-t-e-a-d-t—

Mr. COLBERT. Ternsteadt, that is a division of General Motors.

Senator KEFAUVER. That is right.

Auxiliary motor made at Detroit Diesel; that is a General Motors subsidiary.

Mr. COLBERT. The transmission is the biggest item.

Senator KEFAUVER. Transmission is the big item.

Then, there are lamps from the Guided Lamp Co., which is a subsidiary of General Motors; AC spark plugs made by the General Motors Spark Plug Co. What is that company?

Mr. COLBERT. AC is a subsidiary of General Motors.

Senator KEFAUVER. And batteries made by Delco, which is a General Motors subsidiary.

Mr. COLBERT. That is a subsidiary.

Senator KEFAUVER. And they actually had the specifications for the tanks "Delco or equal." Several of the General Motors' products were actually specified in the specifications for the medium tank, so that you practically had to buy from General Motors in order to make the M-48 tank.

My general question is that this seemed to have adversely affected competition insofar as you and General Motors were concerned at that time.

Now, what General Motors is doing and what you are doing to a lesser extent in having your integrated supply companies, does that

not adversely affect competition and cause some damage to the smaller motor companies who are trying to compete with you and who are endeavoring in an even more difficult way to compete with General Motors?

Mr. COLBERT. I do not see that it does.

Senator KEFAUVER. You do not think so.

You do not think that if General Motors' subsidiaries sell these supplies to themselves at a lower price than they sell them to you, that that adversely affects competition?

Mr. COLBERT. I do not know enough about that phase of those—

Senator KEFAUVER. Well, assuming that they do.

Mr. COLBERT. Well, I do not like to answer a question based on assumptions where I do not know any more about the situation than I know about here.

Senator KEFAUVER. I thought you were familiar with this contract.

Mr. COLBERT. I am familiar with it, generally. I know that we were higher than General Motors; I know we did not get the bid. I know that I did everything, including going into Bob Stevens' office protesting about it, and I know all the reasons he told me why they had to award it the way they did, and I accepted his statements as being accurate and true, and I believed him, and I did not say anything more about the tanks after that. I said we would make up our minds to go after the tanks, and we got the contract.

Senator KEFAUVER. Here Mr. Slezak testified; I asked him, and we had the prices there to show that they were charging themselves less or selling themselves these supplies at less than they were selling them to you, and I asked Mr. Slezak:

"Does General Motors sell at the same price to Chrysler as they do to General Motors?" That was on all these things.

Mr. COLBERT. Yes, sir.

Senator KEFAUVER. Mr. Slezak said: "I would say they charged Chrysler more than General Motors because they have one profit principally in General Motors' structure. But before we arrived at making a true comparison to this \$18 million debt, we made allowance for that," so that Mr. Slezak confirmed the fact that they were charging you more than they were General Motors for Delco and for transmissions and many of these other parts.

Do you think that is a good situation? In other words, with your integrated companies, do you charge yourself less than you do outsiders?

Mr. TROOST. We try to charge a competitive price for anything that we make and sell between one division and another, and we have always been told that General Motors did, too; but, of course, we do not know exactly what General Motors did.

Senator KEFAUVER. It looks like you would have known about that. Mr. Slezak confirmed it.

Mr. TROOST. That is true in the tank business.

Senator KEFAUVER. You knew that, sir, did you not?

Mr. TROOST. Yes, sir. But we won the second tank bid not because of the parts General Motors made but on the other purchases, the hulls and the turrets and all the rest of the things. We did a tremendous job in getting that second bid, and we still had to buy the principal items that you have named from General Motors. That was the only source.

Senator KEFAUVER. Well, you just had to cut way down because you were placed at a disadvantage; you had to buy many things from General Motors.

Mr. TROOST. That is part of business.

Senator KEFAUVER. Well, my question is, Don't you think it is unfair for General Motors to sell itself at one price and to sell you at a higher price, that is, its subsidiaries, where these are the parts and things that have to go into the tank, and don't you think it would be unfair, where your company was the exclusive maker of some part, to sell to yourself at a lower price than you would sell to someone who was competing with you?

Mr. TROOST. Our principle on that, the policy we try to follow, is that where we sell the same part to somebody else that we sell to ourselves, we try to sell it at the same price, all things being equal, in equal quantities and terms and conditions, and so forth. I cannot answer for General Motors.

Senator KEFAUVER. Well, I am just asking whether you do not think it would be unfair to sell to yourself at a lower price than you would sell to the other fellow.

Mr. TROOST. I think it would be a mistake to do that.

Senator KEFAUVER. Well, as a matter of fact, don't you think it would be a violation of the Robinson-Patman Act?

Mr. TROOST. Of course that is a legal question; but I would think it would be a mistake, because the whole essence of competition is to do the best job you can under all the circumstances, and if you could actually buy a part cheaper than you can make it, you should buy it.

Senator KEFAUVER. I know, but when a Government specification "Delco" or says "Allison transmission" or says something that nobody makes but General Motors, then is not it true that is not competition when they sell themselves at one price and you at a higher price?

Mr. TROOST. It is a little hard to see the distinction between Government business on one side with specifications written by the Government, and your own business, on the other hand, where we write our own specifications. You do have a situation—

Senator KEFAUVER. I am talking about this tank contract here. Here it is where Mr. Slezak says they were selling parts to you at a higher price, and you knew that, of course, than they were to themselves.

Mr. TROOST. That is right.

Senator KEFAUVER. And yet the specifications demanded that these things be purchased from General Motors. Don't you think that is a bad situation?

Mr. TROOST. Probably in writing the specifications is where the trouble lies.

Senator KEFAUVER. Well, in your present tank contract, what are you buying from General Motors?

Mr. TROOST. We are still buying the transmission unit because it is the only source and it is specified in the—

Senator KEFAUVER. It is in the specifications.

Mr. TROOST. In the terms and specifications.

Senator KEFAUVER. Are you paying a higher price for it than General Motors is?

Mr. TROOST. They are not making the medium tank any more; they are making the smaller tank in their Cadillac plant at Cleveland.

Senator KEFAUVER. Well, they are making the medium tank at Grand Blanc.

Mr. TROOST. No; that is finished. They are out of the medium-tank business.

Senator KEFAUVER. At one time they were making a medium tank, and you were making a medium tank. Were you paying the same price for transmissions that they were?

Mr. TROOST. Of course we do not have any firsthand knowledge of what they charge themselves for transmissions. We do the best job we can of negotiating a price from them on transmissions. I think the price should be the same, and I agree with you, on that score.

The CHAIRMAN. In other words, what you need is a competing transmission.

Mr. TROOST. That is a possibility if there is enough business to warrant it, but it is a very costly job to tool it, and it is tooled by General Motors, and it might be questionable whether somebody else tooling a similar or a competing transmission would, in the long run, save money.

Another item we buy from them, to continue with your question, Senator, is this auxiliary motor; we call it the Little Joe. That is the other big item.

On these batteries and things, I am not quite sure whether we buy them from General Motors any more. We have found a source that was equal.

Senator KEFAUVER. The thing is, if there is no equal or competitive source, don't you feel, as a matter of fairness, if some big company is the only source, that you just stifle competition unless they are required to sell to everybody at the same price they sell to themselves?

Mr. TROOST. I do not think it is good business to do it otherwise.

Senator KEFAUVER. Well, it ought to be unlawful, ought it not?

Mr. TROOST. I would not pose as an expert on legality. I am a great believer in competition, in the open market. I think these things handle themselves without the necessity of a lot of Government intervention. But to me it is not just good business to do that.

Senator KEFAUVER. In the first place, in mergers where firms integrate and get the whole and entire supply, such mergers should not be allowed to take place; don't you think that is correct?

Mr. TROOST. I do not know. I do not know the situation.

Senator KEFAUVER. Do you think that is so, Mr. Colbert?

Mr. COLBERT. I do not know, Senator. I can tell you how competition would work on the thing if we did not have the defense angle and all these things when the Secretary of the Army got into it. We were once General Motors' biggest customer with respect to electrical things—Delco—we do not know what they were charging on them. But we got the idea that they were charging us too much, and there really was not any other source that we could turn to, and one had to be developed.

We found a man who wanted to buy a company and build it up and said he would furnish us electric equipment; he would go into competition with General Motors on it. That is how Autolite got our business, and they did give us better prices. So in a competitive system General Motors lost the biggest customer they had because a competitor came in on all this starting equipment, which is a big part of the automobile, to get business away from them.

Senator KEFAUVER. Well, fortunately, Mr. Colbert, you were big enough to inspire and to finance, if necessary, a competitor.

Mr. COLBERT. We did not finance them.

Senator KEFAUVER. Well, I mean, you were big enough to place a lot of orders, so he knew he would be successful. If it had been a little fellow who was having to buy General Motors parts, he would have been in bad shape. He would have to keep on buying them at an exorbitant price.

Mr. COLBERT. Well, it worked out that another fellow came in the field. That was over 20 years ago, and not only did very well himself, but General Motors lost our business, and lost some of the other smaller companies' business, too. They took their business away.

Senator KEFAUVER. What is the name of that company?

Mr. COLBERT. Autolite, Electric Autolite.

Senator KEFAUVER. Who owns that now?

Mr. COLBERT. Stockholders, stock-owned company, widely held.

Senator KEFAUVER. An independent?

Mr. COLBERT. Yes, sir.

Mr. TROOST. We have absolutely no interest in it.

Mr. COLBERT. We own no stock interest in it.

Senator KEFAUVER. What other companies do you own, Mr. Colbert?

Mr. COLBERT. Well, we own the companies which are listed as part of our regular subsidiary companies.

We own in this country only two companies that are not listed in all of our public statements. Those two companies we have disclosed to the proper authorities here in Washington and asked to keep them confidential. They are small, relatively small, companies. They only do a very small percentage—less, as I recall the figures, less than one-half of 1 percent or something like that. But those 2 companies, they are the only 2 companies we own in this country.

We own a couple of companies in other countries.

Senator KEFAUVER. I mean what big supply companies do you own?

Mr. COLBERT. We do not own any big supply companies.

Senator KEFAUVER. Do you own any that you get your supplies from outside of Chrysler and Plymouth?

Mr. COLBERT. No, sir. Only these two.

Senator KEFAUVER. What is the idea of having to keep them secret?

Mr. COLBERT. These two companies?

Senator KEFAUVER. Yes.

Mr. COLBERT. They are very small companies. One of them, we take all of their output; the second company sells to a number of our competitors.

At one time we did not want to disclose to our competitors that we owned that company and we asked for confidential treatment on it; it is such a small volume.

Senator KEFAUVER. Do you sell to your competitors at the same price you sell to yourself?

Mr. COLBERT. I do not know.

Mr. TROOST. We do. As I say, we think that is good business, under the same set of circumstances.

Senator KEFAUVER. It ought to be the law, ought it not?

Mr. TROOST. I could not pose as an expert on that. I think the market place takes care of a lot of things. I think it would be bad business to do otherwise.

Senator KEFAUVER. The market place will take care of it where there is competition.

Mr. TROOST. There is competition.

Senator KEFAUVER. If you and General Motors own the only supplier, there cannot be much competition.

Mr. TROOST. Of course, that situation does not exist in the automobile business.

Senator KEFAUVER. It exists as to transmissions here.

Mr. TROOST. Well, that was a special transmission to operate tanks, but that is not a transmission in the automobile business.

Senator KEFAUVER. This is big business I am talking about. It was big business amounting to \$205 million.

Mr. TROOST. That is right.

Senator KEFAUVER. And the contract you got now is for a whole lot more than that, is it not?

Mr. TROOST. No. The contract now is \$160 million.

Senator KEFAUVER. \$160 million. The other contract was \$205 million.

Mr. COLBERT. A couple of hundred more tanks, as I recall it.

Mr. TROOST. They are not comparable situations. There are places to go for transmissions in the automobile business. We make our own; so does Borg-Warner make them; General Motors makes them for other manufacturers.

Senator KEFAUVER. I thought the unusual thing about this tank contract was that you had engineered the thing in the first place.

Mr. COLBERT. That is correct.

Senator KEFAUVER. And it was your pride and joy.

Mr. COLBERT. That is correct. We put forth all those arguments when we were trying to make them reconsider that bid. Slezak, incidentally, was in that meeting where we were.

Mr. TROOST. Yes; with the Secretary.

Mr. COLBERT. He was there.

We put forth, you can rest assured, we put forth our arguments on getting that business on any reasonable basis we could think of.

Senator KEFAUVER. As a matter of fact, we should have the Defense Department increase competition among the automobile manufacturers, to spread out these engineering contracts and these procurement contracts; do you not think so?

Mr. COLBERT. Well, we have got a department, which we have had in operation for 2 years now, called our Defense Department, which works Washington, the west coast, east coast, anywhere we hear there is any business pending. We try to get defense business, all of it that we are qualified with facilities or in any way to bid on, and we bid on it.

Now, I do not know of any other situation we have run into comparable to that tank award, do you?

Mr. TROOST. No; I do not either.

Senator KEFAUVER. You know Hudson had an engineering contract that was taken away from them and given to General Motors.

Mr. TROOST. I do not know if they did.

Senator KEFAUVER. Yes.

Mr. COLBERT. I do not know that.

The CHAIRMAN. Let me interject a question. How about passenger vehicles?

Mr. TROOST. Passenger vehicles, you mean with the Government?

The CHAIRMAN. Yes.

Mr. TROOST. They are all bought on competitive bids, so far as I know.

The CHAIRMAN. How about the specifications on—

Mr. COLBERT. Trucks more than passenger cars.

The CHAIRMAN. No; sedans, passenger cars.

Mr. COLBERT. I do not know whether we have any substantial passenger vehicles with the Government; I do not know of it.

The CHAIRMAN. I have a complaint from one of the automobile companies, that the specifications are such that only Chevrolet and Cadillac can make a car.

Mr. COLBERT. I do not know that.

Senator KEFAUVER. Have you protested this writing of specification in here so that only General Motors can be the supplier?

Mr. COLBERT. If it is true in those specifications on those tanks that they were written so that only General Motors could be the supplier, I did not know it at that time, and I do not know it at this time.

Senator KEFAUVER. Here is testimony from Mr. Slezak.

Mr. TROOST. We have not so protested the transmission because no one else in the United States or anywhere else in the world, so far as we know, is tooled to make that transmission, so there would be nowhere else to go.

Senator KEFAUVER. Well, they had Colonel Engler who said there are two other items in which General Motors was the only source, so they were specified.

Mr. TROOST. The engine was a Continental Motors engine, and we had a plant equipped to make that same engine, the same design, so that there were 2 sources for the same engines, 2 chances to compare the costs, if you will. But the volume of business was so small that that plant was put into mothballs, and is still in mothballs, so, therefore, there was only one source for engines, that is true, Continental Motors.

Senator KEFAUVER. What was that, the Continental engine?

Mr. TROOST. Continental Motors.

Senator KEFAUVER. Yes. Where is your plant that is in mothballs?

Mr. TROOST. It is in New Orleans.

Senator KEFAUVER. That is not competitive, is it?

Mr. TROOST. I think it would be quite competitive.

Senator KEFAUVER. Is that the plant you bought from Higgins?

Mr. TROOST. We did not buy it; we leased it.

Senator KEFAUVER. Leased it?

Mr. TROOST. I think it would be quite competitive, and it was quite competitive, but, of course, the volume may not be sufficient to support two plants. But that plant is there and available at any point of time it is required, and I think it will do a good competitive job.

Mr. COLBERT. We can get the business, the Continental business, we had before, during Korea.

Mr. TROOST. On competition our prices were right in line; yes, sir. I think it is a good plant, a good competitive plant.

Senator KEFAUVER. That is all, Mr. Chairman, except that I would like to have inserted in the record pages 48 to 52 of the hearing before the Senate Armed Services Committee on tank contracts dated January 29, 1954.

(The document referred to follows:)

EXCERPT FROM HEARINGS HELD BEFORE COMMITTEE ON ARMED SERVICES, TANK CONTRACTS (JAN. 29, 1954, VOL. V, PP. 48-52)

Senator KEFAUVER. You said that only two items in the specifications of the tank had to be secured from General Motors or its subsidiaries; is that what I understood?

Colonel ENGLER. That is right.

Senator KEFAUVER. Well, I have a list of some items that go into this tank that Chrysler made: Transmission secured from Allison Motors, a part of General Motors.

Colonel ENGLER. That is correct, sir.

Senator KEFAUVER. Transmission spare parts from Buick Motors. That is a part of General Motors.

Colonel ENGLER. But Buick and Allison were both making transmissions, the identical item. Buick has been taken out of production, sir. The only remaining producer of transmissions is the Allison Division of General Motors.

Senator KEFAUVER. I know, but spare parts have to be bought from Buick Motors.

Colonel ENGLER. The spare parts have to be procured from Allison.

Senator KEFAUVER. Then Chevrolet Motors makes transmission spare parts; isn't that correct?

Colonel ENGLER. Chevrolet does make spare parts of the transmission for Allison, sir. We are still talking about the transmission, sir.

Senator KEFAUVER. Then transmission spare parts, Cadillac Motors makes—

Colonel ENGLER. Cadillac was making spare parts, was a subcontractor to Allison, sir.

Senator KEFAUVER. Then we have the name Ternsteadt. They make spare parts for the tanks, don't they?

Colonel ENGLER. They made rangefinders. They were not a sole source. Chrysler was getting rangefinders from Airtemp, one of their own divisions, as well as other sources.

Senator KEFAUVER. Here is auxiliary motor generator, made by Detroit Diesel.

Colonel ENGLER. That is correct.

Senator KEFAUVER. Here are four items of lamp made by Guided Lamp. That is a subsidiary of General Motors.

Colonel ENGLER. That is, and there are also other sources.

Senator KEFAUVER. This is the source you were using for this tank.

Colonel ENGLER. But there are only two items, sir, for which the General Motors Division is the sole source of the component, and from which other manufacturers—

Senator KEFAUVER. Anyway you do secure four items of lamp from the Guided Lamp Co., which is a subsidiary of General Motors?

Colonel ENGLER. It is, sir, and other sources are available.

Senator KEFAUVER. Here is coupling electric, A. C. Spark Plug, that is a subsidiary of General Motors, isn't it?

Colonel ENGLER. A C. Spark Plug is.

Senator KEFAUVER. Then you have shaft, adapter, electric, also from A. C. Spark Plugs; is that correct?

Mr. SLEZAK. But, Senator Kefauver, they are subcontractors as any other subcontractor would be for one of the General Motors divisions.

Senator KEFAUVER. You get batteries from Delco, that is a subsidiary of General Motors, isn't it?

Colonel ENGLER. Yes, sir, and there are other sources making batteries.

Senator KEFAUVER. Well, in the specifications you specified "Delco or equal."

Colonel ENGLER. That's right, sir, and other sources are making the same product, sir.

Senator KEFAUVER. You specified "Delco or equal," that is the specification.

Shock absorbers you specified "Delco or equal," isn't that correct?

Colonel ENGLER. That is probably correct, sir. I am not certain of that, but I believe it is.

Senator KEFAUVER. Then electrical harness and so forth, you specified "Packard electric," didn't you? Isn't that a General Motors subsidiary?

Colonel ENGLER. Yes, sir, and other sources are also making that item.

Senator KEFAUVER. Anyway your specification is "Packard electric." Then here is electric harness, also you specify—but anyway, the point I wanted to make, quite a number of suppliers even for the tank when made by Chrysler have to be General Motors or its subsidiaries, or at least two of them, you say?

Colonel ENGLER. Two of them do, sir.

Senator KEFAUVER. Does General Motors bid the same amount to Chrysler as they do to General Motors?

Mr. SLEZAK. I would say they charge Chrysler more than General Motors, because they have one profit principally in the General Motors structure, but before we arrived at making a true comparison to this \$18 million, we made allowances for that.

Senator KEFAUVER. That is one of the reasons why Chrysler had to charge a little more, because they have to buy things from General Motors, and General Motors charges Chrysler more for the products than they do themselves; is that correct?

Mr. SLEZAK. Well, I would say this: When we consider the allowances, I mean we in making the comparison, as I mentioned, we allowed an estimated amount in the picture. In other words, if we did not, the difference would be more than \$18 million. It would be over twenty-odd million dollars.

Senator KEFAUVER. But if General Motors would sell parts to Chrysler at the same price they sell them to their own subsidiary, Chrysler's bid would be nearer that of General Motors, isn't that correct?

Mr. SLEZAK. It could be, but I mean in our evaluation that was taken into consideration.

The CHAIRMAN. Can there be real competition in the automobile business when General Motors, Ford, and Chrysler do 96 percent of the business, as they did in 1954? Can there be real competition?

Mr. COLBERT. Well, Senator, if there is no real competition in that industry, I would like for you to show me some place where there is real competition.

The CHAIRMAN. All right.

Now we get down to one point. Recently there was a new word invented called oligopoly. Is this a picture of oligopoly?

Mr. COLBERT. I remember that word, but I cannot remember in what connection it was used.

The CHAIRMAN. That means where more than one company are in position to practically monopolize the field, and where prices are about the same, and everything else, and that freezes out any competitors from coming into it.

Mr. COLBERT. Well, I just do not agree with that theory. I believe that a new competitor with new innovations, new ideas on passenger cars, either on performance or style or comfort that will outmode existing cars today, I think such a man can and will come along.

The CHAIRMAN. How about Tucker?

Mr. COLBERT. I do not like to stand in judgment on one of our ex-competitors, but I do not think he had those qualifications. I do not think he had the new ideas, the new product, and the management team to put it over.

The CHAIRMAN. He stated it was a fact that he could not get steel, that nobody would sell him steel.

Mr. COLBERT. Well, that is a different set of circumstances from the kind of situation you mention. But there will be other people, I believe, who will come into the automobile industry and do well in it. They would have to be fellows with new innovations, new ideas, vigor, and develop a management team and carry through those ideas, but it is not closed.

This industry is not closed to men of that type. You could not get a better illustration than when fellows were telling you a year ago, or the fellows around this table, we were down to 12 percent of the industry, and we were going to stay there.

We did not believe it for a minute. We would not accept it. We already had these forward-look cars developed, and we had every confidence in the world we were going to come back and take up to somewhere around, we are going for 20 percent of this industry, which we have not got yet, but we have got over 18 percent of it, and we were so confident of it that when we priced these cars last November we priced them for the amount of volume which we have been able to acquire.

Now, you might say, "Well, gentlemen, you are taking an awful chance."

Sure, you are taking a chance, but that is what business in competition is. We took the chance. We priced the cars, we built our advertising program, we built our whole operation to that amount of volume, and we are getting the volume.

The CHAIRMAN. Now, is there not great danger of concentration, if it continues to increase in the hands of the Big Three, that there will be less incentive to cut prices and give the consumer a cheaper car?

Mr. COLBERT. I do not think so. The best value you can get for your dollar in the marketplace today is in an automobile, and the fellow that keeps his prices down is going to increase his share of the business.

The CHAIRMAN. That is right. In other words, depending on greater and greater volume, is that not right, that is what will hold the price down?

Mr. COLBERT. Well, he has got to make a reasonable profit.

The CHAIRMAN. I know.

Mr. COLBERT. He has got to make a reasonable return.

The CHAIRMAN. There will be an incentive in his desire to sell more and more cars. To get a little facetious, one of these days we are going to run out of roads to run them on.

Mr. COLBERT. No, sir; we are going to build some more roads; that is a part of the plan, too, you see. We are not going to run out of roads. There is no reason to run out of roads at all, and it is going to take more roads to build this bigger volume of automobiles we have got running.

The CHAIRMAN. Now, do you think that some legislative proposal should be considered looking toward the breakup into smaller companies of General Motors and Ford?

Mr. COLBERT. I don't

The CHAIRMAN. Into smaller operating units, shall we say.

Mr. COLBERT. I do not.

The CHAIRMAN. In other words, you think that integration is distinctly beneficial and necessary?

Mr. COLBERT. There is not categorical answer to whether and how far integration is beneficial.

We are going further with our integration in the last 2 years than we had gone in the past, in the last couple of years we have carried it further. Every company that is offered to us for sale or merger or anything else, we want to look into it as to whether or not we can integrate that company or expand our own facilities and build whatever part of the car that that company furnishes.

Quality, of course, has always to be there and the question is whether we can build that part at a lesser cost than we can buy from that company. Each one of the integration decisions has to be made on the basis of—

The CHAIRMAN. The point I am getting at is: You have a good picture of small vendors furnishing you parts.

Mr. COLBERT. Yes.

The CHAIRMAN. The complete integration, however, of the vendor situation might be disastrous to the American businessman.

Mr. COLBERT. I don't think there can be complete integration.

The CHAIRMAN. Well, now, for instance, here you have described in your statement certain mergers effected by your company in the past. Would you please advise the subcommittee to what extent, if any, such mergers extended your control, first, backward to raw material and, second, forward to control of finished product?

Mr. COLBERT. None of them tended backward to the control of the raw materials, Senator, that I can think of.

The CHAIRMAN. In other words, and looking forward—you do not operate your own collision insurance company, do you?

Mr. COLBERT. No, sir, we do not.

The CHAIRMAN. Do you operate a finance company?

Mr. COLBERT. No, sir, we do not.

The CHAIRMAN. Now, insofar as the Briggs merger is concerned, did Briggs sell bodies to anyone besides Packard prior to the merger?

Mr. COLBERT. Some time during their operations they had sold to other people.

I remember that they sold Willys some bodies at one time, but at the time we bought them, they were not selling bodies to any other than Packard, and for several years they had not sold to anyone besides Packard.

The CHAIRMAN. I will ask you this: This is a mechanization problem and—well, taking Briggs, do you subcontract your diemaking, do you subcontract that out to the diemakers or do you maintain your own diemaking facilities and staff?

Mr. COLBERT. Both things. We have our own and we subcontract.

Mr. TROOST. We subcontract many more than we make ourselves.

The CHAIRMAN. Now, when you took over Briggs, and you have stated that the automobile body constituted about 40 percent of the total cost of the finished car, did that eliminate them as a potential automobile producer? Did they ever build an automobile?

Mr. COLBERT. No, sir; Briggs has never built an automobile, never been an automobile producer and, as far as I know, never had any plans for being an automobile producer.

The CHAIRMAN. Do you think you could have obtained your present market position without the acquisition of Briggs?

Mr. COLBERT. I think the acquisition of Briggs is one of the factors in our attaining as much of the market as we have in the last year.

The CHAIRMAN. In other words, the acquisition of Briggs put you in a better competitive position; is that right?

Mr. COLBERT. Yes, sir; yes, sir.

The CHAIRMAN. If you had to go into manufacturing, for instance, your own bodies, you would not have been in as good a market position?

Mr. COLBERT. I don't think so.

Now, we had a study made of that, Senator, of what was involved in building our own body plant, the time involved, and so forth. We concluded that it would be better to make the deal with Briggs.

The CHAIRMAN. Let me ask you this now. Is it a necessity in order to compete in the automobile industry that a company be integrated to a very large extent?

Mr. COLBERT. I don't think—

The CHAIRMAN. And here I am going back into history, as a preliminary. In the early days of the industry I can remember driving the old Maxwell when they had the gearshift lever on the right, on the running board.

Then we had two types of cars. We had what we called a manufactured car and then we had the assembled car, and a lot of little outfits went into business just simply by buying parts and putting them together. There was the Moon and the Michigan—hundreds of them.

Mr. COLBERT. Yes, sir.

The CHAIRMAN. And gradually they went into—well, Ford made the whole car themselves, practically, and I think they were the first outfit that really did that job, and then they went back to a totally fabricated car themselves, and then finally got back into the vendor field before world war. Well, even in the twenties they were heavy in the vendor field and then gradually, by the end of World War II, the Big Three had become pretty highly integrated; isn't that right?

Mr. COLBERT. Well, you put your finger right on it, Senator.

Integration can be valuable at certain times and it can also be costly at certain other times.

Now, in times like the present, such as we have now, where inflation goes on and has for many years and business stays good, highly integrated companies will probably do better than those that are less highly integrated; but in other times, particularly if business falls off, a less integrated company would do better.

So there isn't any categorical answer to it. If you assume that over the period of the next 25 or 50 years we are going to continue as we have been on this fine plateau of increasing business, then I would say probably high integration would reduce the costs of the manufacturer and also give him a better profit picture.

Now, as I stated earlier, Chrysler did not go into integration, for instance, as the two principal competitors have—but they have varied, they have been up and down in their integration a certain amount, and our whole tendency in the last few years has been toward more integration in Chrysler.

The CHAIRMAN. The whole unit operates as Chrysler Corp.; doesn't it?

Mr. COLBERT. Yes—parent company.

The CHAIRMAN. Now, when you add an integrated company, you just make it a division of Chrysler Corp.; do you not?

Mr. COLBERT. That is right.

The CHAIRMAN. It is not operated as a completely separate corporation?

Mr. COLBERT. No, sir.

The CHAIRMAN. What you call a totally owned subsidiary; is that right?

Mr. COLBERT. They are each—it is part of this divisionalization program I mentioned, the decentralization—"decentralization" is an

unpalatable word to some people, so we call our program of decentralization the divisionalization program.

The CHAIRMAN. Yes.

Mr. COLBERT. But the whole theory is to put the responsibility out in these divisions in the hands of the people who are operating the property from day to day and they have their own accounting systems now, and that is one of the first things that we did, was to give them their own set of books and accounts, and we are moving along and some of them now have their own purchasing departments, but when they all tally up—the books are kept and reports are made to the parent corporation, which is Chrysler Corp.

The CHAIRMAN. The point I am getting at is, under the system, however, that Briggs is a group of plants operated by Chrysler Corp., not operated by Briggs Body Co., a subsidiary of Chrysler Corp.; isn't that right?

Mr. COLBERT. Yes.

The CHAIRMAN. The same, I believe, applies to Ford; isn't that right? I think they operate that way; do they not?

Mr. COLBERT. Practically.

The CHAIRMAN. My information is that General Motors operates somewhat differently, in which they have what we might almost call a holding company and various subsidiary corporations; isn't that right, each operated by themselves?

Mr. TROOST. The same thing.

Mr. COLBERT. Yes, they do not have presidents of divisions for General Motors, but I think that the basis is similar.

The CHAIRMAN. All right. Now, do you think there is an optimum size in the production of automobiles beyond which economies are no longer realized?

Mr. COLBERT. No, sir, I don't know. I don't see how you can say that any size is the proper size for an automobile company to be.

If they can make up their minds what type of cars they are going to produce and what volume they are going into, a company can decide they are going to produce 1 automobile and go into that for any number of units a year, say 100,000 or 200,000 of that 1 car, and they can be very successful in that. They can get that volume at the price they put on that car.

The CHAIRMAN. Well, don't you think that Chevrolet would be a successful company if there was just one company making Chevrolets?

Mr. COLBERT. Well, you know, Chevrolet has been in serious trouble at one time or another in its existence—not right now.

I don't know quite how to answer your question, but it is so closely tied in to other items they get from General Motors, that I don't know how to answer that. Do you, George?

Mr. TROOST. No. I wouldn't answer for Chevrolet, I am sure.

The CHAIRMAN. Well, take Plymouth, for instance, in your own setup.

Mr. TROOST. No.

The CHAIRMAN. Operated as a separate company.

Mr. COLBERT. Oh, no, sir. It is too closely tied in with the other divisions—Dodge, for instance, has been building Plymouth's 8-cylinder motors this year. Plymouth now is building its own 8-cylinder

engines, but they would not have had any 8-cylinder engines had it not been for the Dodge division.

The CHAIRMAN. Now, Briggs, I understand, only make bodies?

Mr. COLBERT. Briggs only make bodies, for Plymouth.

The CHAIRMAN. Do you still make your own Chrysler bodies?

Mr. COLBERT. Chrysler, DeSoto, and Dodge, each of those plants makes its own bodies.

The CHAIRMAN. Now, what is the extent, if any, to which Chrysler Corp. sells parts and accessories to other producers in the automobile industry?

Mr. COLBERT. We sell a very low volume, although we do sell some items to, I believe, every other company in the industry.

But I looked at the dollar volume on that a few days ago and it seems to me that it totals less than two-tenths of 1 percent of our sales in 1954. It was just a very insignificant amount, but we do sell some items to each of the automobile companies.

The CHAIRMAN. Now, could you list for us, not necessarily now, you can furnish the list later, if you don't object, the source of the principal parts which make up your cars? For example, where and from whom do you obtain steel, tires, transmissions, paint, glass, and so forth?

Mr. COLBERT. I could tell you, but if you would rather have a complete list, I will furnish you the list, if you want to see the list.

The CHAIRMAN. Well, let us list glass and tires, then.

Mr. COLBERT. All right. On glass, we get practically all our glass from Pittsburgh Plate Glass Co.

The only two major suppliers in the United States of glass are Libby-Owens-Ford and Pittsburgh Plate Glass, and we have dealt with them for glass for many years, and they work with our engineers for specifications.

Really, as I say, there are no places to turn to for glass in major volume in this country except those two, and we buy from Pittsburgh and we have had very good business relationships with them over a period of years.

Now, you mentioned paint?

The CHAIRMAN. Yes.

Mr. COLBERT. We buy paint from 6 or 7 different companies. Ditsler, which is a subsidiary of Pittsburgh Plate Glass, I believe is our biggest supplier of paint, but we buy from 5 or 6 other companies in substantial volume from each of those companies, competitionwise.

The CHAIRMAN. How about tires?

Mr. COLBERT. On tires, we get practically all of them from Goodyear Tire & Rubber Co.

We recently asked for and got competitive bids from another tire company on a special tire we wanted and they were unable to deliver it. There was such a demand for their products and they had their older customers that they had to handle first.

So for all practical purposes I would say that we buy over 95 percent of our tires from Goodyear. There is a reason for that. The tire you have on your automobile has to be changed each time you change your brakes and suspension or any one of a dozen items on your chassis. You cannot change it without an effect, until you see the effect on the tires, and the Goodyear engineering department and

our engineering department work very closely on tires. So the biggest percentage comes from Goodyear, over 90 percent.

The CHAIRMAN. Is there any corporate connection between Good-year and Chrysler?

Mr. COLBERT. No, sir; none.

The CHAIRMAN. They are just bidders and cooperate in fabricating tires that fit the type of car that you want to put out; is that it?

Mr. COLBERT. Yes, sir; that is right.

The CHAIRMAN. Now, getting back to the plate glass, you say there are only two companies that furnish that?

Mr. COLBERT. In big volume; yes, sir.

The CHAIRMAN. And do you have any agreement with them that they will be your exclusive furnishers?

Mr. COLBERT. No. We asked the second supplier to bid on a substantial portion of one of our divisions for glass this year, and they submitted a bid, and told us that their bid was higher than Pittsburgh's on the same glass, and they also told us their facilities were so crowded that they could not furnish it.

The CHAIRMAN. And you say there are only two furnishers?

Mr. COLBERT. Major, where you can get glass in volume, that I know of. Isn't that right, Em?

Mr. LLOYD. That is right.

The CHAIRMAN. What effect do the arrangements between the Big Three with their glass suppliers have upon, first, the supply of glass available to independent car manufacturers and, second, entry into the market of new glass producers?

Mr. COLBERT. I don't know why there aren't any new glass producers in the industry, but I have not heard—we have had glass shortages in this country in the last 10 years. There have been several occasions where glass was in very tight demand, but I don't know of any case where it has affected the competitive position of anyone in the industry, because when it is short for one, it is short for all.

The CHAIRMAN. My interest in this is perhaps a little bit selfish, because my State is a glass producer and we do have Libby-Owens-Ford and Pittsburgh Plate Glass in there.

Mr. COLBERT. You do.

The CHAIRMAN. And we also have some independent companies that produce glass and I am just wondering whether they are hampered in getting into that type of production, because they might need the business.

As I understand, the new type of windshield—and you have a new rear-vision window—requires special machinery to make that product; isn't that right?

Mr. COLBERT. That is right, and now that you have brought that question up, when they put the cost on that to us, which was a year ago, it was substantially more than the cost of our other windshield was, and that is where we went to competitive bids. We went to L-O-F and said, "Could you give us a price on that?" And they made a very detailed study and worked with our purchasing department and came up with a price which was not attractive to us.

Also they had a problem on facilities because of so much business they got, with their facilities, and those were the two reasons we did not place our business with them.

The CHAIRMAN. In your opinion, is the General Motors Corp. able to exert any market control over your company by reason of the strong position which General Motors holds in the parts and automotive accessory field through its subsidiaries?

Mr. COLBERT. If they can, I don't know about it. I don't know about it; no.

The CHAIRMAN. You must realize that is one of the greatest price-fixing schemes in the world, if you can control the price to the finished producer of the necessary parts, you could very nearly control his price. At least you could put a certain floor under it.

Mr. COLBERT. We do not, on General Motors parts. I don't see any occasion for our dealers or us to be buying parts from General Motors.

The CHAIRMAN. You don't buy parts, then, from General Motors?

Mr. COLBERT. No.

The CHAIRMAN. Except on the tank contract?

Mr. COLBERT. Well, that was on a defense contract.

Em, do we buy any items from General Motors now?

Mr. LLOYD. We buy some things from General Motors, but strictly on competitive bid.

The CHAIRMAN. Now, Mr. Colbert, you speak of the large number of independent business firms from whom the Chrysler Corp. obtains parts and supplies. Is it not true that the more highly integrated your corporation becomes, the greater the foreclosure of the market insofar as the independent parts supplier is concerned? In other words, you close off their market.

The basis of that question, I will say, is this: I was in the West during the war.

Mr. COLBERT. Yes, sir.

The CHAIRMAN. Suddenly the airframe manufacturers decided to go into the parts manufacture business and supplant their vendors, and they were almost ready to close down a few sections of Los Angeles and other places for that very reason. And, of course, they were in a beautiful position to do it because they were working on a cost-plus-fixed-fee basis, a situation where you were going to wind up with the taxpayer paying the bill.

Mr. COLBERT. Well, you have people that are suppliers now who are ready to go out of the business, and yet you have new ones coming in all the time, and it is surprising in this last 2 years, when the really tough competition started, how many new suppliers have come into the picture and underbid the old, established suppliers.

Now, the ones that we find fading mostly in this tough competitive era are the ones who have not faced up to it, and we have many new suppliers coming and bidding to us at much lower figures than the old suppliers, and making a profit on it.

The CHAIRMAN. Let me ask you this: Have imported cars now become a substantial competitive factor in the automobile field in the United States?

Mr. COLBERT. No, sir. Last year there were, oh, approximately a total of 30,000 cars imported into this country and it is running a little higher rate this year, but not much more, and over a period of years I would say less than one-half of 1 percent of the sales in this country are imported cars. They are not a factor in our market.

The CHAIRMAN. I ask that question because in Yuma in January for the first time for a number of years I found foreign-made cars,

whereas heretofore the American manufacturers had completely dominated the field down there.

Mr. COLBERT. Yes. Well, I have seen the figure for the first 3 months of this year, and although it is a little higher this year, they are still less than 1 percent.

The CHAIRMAN. Aren't your franchise dealers required to pay cash for their cars either as they come off the assembly line or upon delivery?

Mr. COLBERT. They pay cash for them on delivery. They make credit arrangements and pay us cash for the cars when turned over to them.

The CHAIRMAN. In other words, does that make the dealer assume practically all of the financial risk?

Mr. COLBERT. No. When he buys the property, it is his to do as he sees fit, from that point on, and the business has always been run on that basis.

The CHAIRMAN. I know it has since it went on the installment-plan basis. I remember when it was not on that basis.

Mr. COLBERT. And there is a lot of competition for the dealership business, so he can pay the cash, not only by the finance companies but the banks have become very active in that field, and so a good aggressive dealer with a good reputation has no trouble getting financial arrangements.

The CHAIRMAN. Incidentally, I ran into that situation over in Virginia recently, when a number of the dealers were referring their customers to banks, who were offering a substantially lower interest rate on the money on installment sales. I believe it was as low as 3 percent, 3½ percent, 4 percent.

Mr. COLBERT. The banks are actually getting into the automobile financing all over the country.

The CHAIRMAN. Now, Judge Barnes told us yesterday that the Antitrust Division was investigating complaints that Ford requires its dealers to handle only parts manufactured by it. Do you permit your franchise dealers to deal in cars or parts other than your own?

Mr. COLBERT. Yes, sir; we do. Under our contract they may deal in cars or parts other than ours. We have got some dealers who handle competing lines of automobiles, but by and large I think the dealers will agree, and we think it is not a good thing for them to do that, that they will do a better job if they stick to one line of automobiles, but we have exceptional cases where they have another line of cars.

The CHAIRMAN. In your own line of cars do you limit your dealers to 1 or 2 brands?

Mr. COLBERT. Yes—no, we don't limit to 1 or 2, because we have some dealers who handle Chrysler, DeSoto, Dodge, Plymouth, all 4, but they handle them on separate dealerships. In other words, we have what we call a three-way distribution system, where a Chrysler dealer also sells Plymouth and a Dodge dealer also sells Plymouth and a DeSoto dealer also sells Plymouth—we have no separate dealer organization.

The CHAIRMAN. In other words, you use Plymouth as the trade leader, as they say in the retail-store business?

Mr. COLBERT. Well, we have three-way distribution; and, don't forget, the Plymouth is the only really low-priced car that broke into

competition with Ford and Chevrolet, and it has been a very effective distribution system for us.

We have dealers of Chrysler, DeSoto, and Dodge who sell Plymouth, and we have some cases where a dealer will be selling not only DeSoto but also Dodge and Chrysler, but he has three separate establishments when that is true.

The CHAIRMAN. Do you require him to buy exclusively Chrysler parts?

Mr. COLBERT. No, sir; no, sir. We encourage him to, because we know our parts are engineered for our cars, but we don't have any exclusive feature.

The CHAIRMAN. Don't you have the right to cancel any dealer's franchise at will?

Mr. COLBERT. There is a provision where either the dealer or we can cancel. We have a continuing dealer agreement that runs on indefinitely, either party having the right to terminate on 90 days' notice. I don't know what that exact provision is, but practically it does not work that way at all, Senator.

If we and the dealer are not getting along, we sit down with him and reason with him, and try to execute what we call a mutual termination agreement, one that satisfies him and us, and we have a regular arrangement for working that out, taking over his parts and the cars that he has on hand—

The CHAIRMAN. That is what I was going to get to next. You relieve him of his stock of parts?

Mr. COLBERT. That is covered by our agreement, in the event of termination, which part we take over. And always, when you have a termination of that kind, you have a negotiation and, when you get through with it, you and the dealer are both satisfied in 99 cases out of 100.

The CHAIRMAN. What is the present profit picture of the Chrysler Corp?

Mr. COLBERT. Well, our first quarterly statement came out a couple of weeks ago. It was better than our last year's statement. We had about 3.6 percent on sales after taxes, which is low in our industry but it is better than it was last year.

You know, last year we made less than 1 percent on sales. We had a year which was not at all satisfactory to us.

Now, this 3.6 percent on sales after taxes is low. Historically we run 5 percent or better on sales after taxes—in fact, nearer 6 percent; isn't that right?

Mr. TROOST. Over our long history it has been about 5½ percent.

Mr. COLBERT. So we are still low on sales after taxes.

The CHAIRMAN. Now, the Antitrust Division has been investigating for a year complaints that General Motors monopolizes the manufacture and distribution of motorbuses. Has Chrysler ever attempted to manufacture buses and, if not, will you explain why not?

Mr. COLBERT. We have not been in the bus business. We have built chassis, but, as you may know, we sent those over to special body-builders to mount buses on them for school buses, but we have never been in the bus business—and I don't know what General Motors' position is.

The CHAIRMAN. In other words, you don't manufacture buses, including the body?

Mr. COLBERT. No, sir; but we manufacture—

The CHAIRMAN. But you will sell the chassis?

Mr. COLBERT. We will manufacture a truck chassis, where a school in West Virginia or Texas wanted a particular body put on, we will provide the chassis to the specifications and take it over to the body manufacturer and he mounts the body and that is the way they get it, but we have never been a bus manufacturer.

The CHAIRMAN. Now, here is a question I am interested in.

To what extent does Government buying policies, particularly in the Defense Department, contribute to monopoly?

Mr. COLBERT. Well, that is a question that Senator Kefauver is concerned about. And all I know about Government buying policy is that I find that there is a tremendous amount of that business now and has been and it looks as though it will continue to be, and we have set up a division called our defense division staff, with a large number of staffmen who are trying to get all of that defense business for us that we can. We have never been awarded anything yet that I know of on a defense job that we did not have competitive bidding on, unless it was an item our engineers designed specifically in small volume.

But I just don't know how to answer the question. We were disappointed on this one tank bid, but outside of that, as far as I know, our boys in our defense department are satisfied that we bid competitively, the bids are asked for, and we have had a fair shake to get the business, and if we are low we get the business, and if we are not low we do not get it. Whether that contributes to your question, I don't know.

The CHAIRMAN. One of the big problems, of course, in Government business is the problem of the specifications.

Mr. COLBERT. Yes, sir; that is right.

The CHAIRMAN. All too frequently they almost expect the bidder to do his own specifying and I think that does contribute to monopoly, myself, and I think that if they prepared specific specifications so that everybody could bid on it, then I think it would have a tendency to invoke more competition.

Mr. COLBERT. I think you have to look at the product concerned. It may be—for instance, if it is transmission, if nobody else has the transmission, nobody else could have that type of transmission because it is a General Motors design and build, then I don't know how anybody could go into competition with General Motors to design a transmission.

Mr. TROOST. Not unless there was big enough volume, then we could do it.

The CHAIRMAN. There are certain items of that type.

Mr. COLBERT. It has got to get enough volume to justify it.

The CHAIRMAN. But when you start putting in trade names in asking for bids, as that complaint has been made to me, then you do contribute to monopoly, don't you? In other words, if you say that a car must have "hydramatic," not any other kind, not Fordomatic or any other "omatic"—

Mr. COLBERT. It is pointed out to me that the bid we get usually says something like "or equal."

The CHAIRMAN. This particular specification did not say "or equal." They left out that little phrase. I know it has been customary in the

past to use those words and I thought they were being used until I got some complaints on it.

Now, Judge Barnes made the statement that car manufacturers compete in every way but price. I wish you would comment on that.

Mr. COLBERT. Well, I don't know the basis of Judge Barnes' statement. I know that one of the major facets of competition as far as we are concerned is price, and right now we have that on the automobiles that will come out toward the end of the year, we are working on cost and the pricing of them.

Now, you want to price them as low as you can reasonably price them. We have no idea how our competitors are going to price their cars at the end of the year. That is one of the toughest problems of the competitive situation, on pricing, and as I say, we don't know what our competitors will do, how they are going to price their cars until they announce them.

The CHAIRMAN. Well, isn't there another factor there, that is, resale value of a used car?

Mr. COLBERT. Yes.

The CHAIRMAN. I know there is a lot of advertising by your company dealers on trade-ins.

Mr. COLBERT. That is right, but I don't think we take that into consideration in pricing our new cars, what we think our dealers' experience will be in selling new cars. I have never heard of it.

Mr. TROOST. Not directly.

The CHAIRMAN. It does have a certain effect?

Mr. TROOST. It does have an effect.

Mr. COLBERT. But we cannot evaluate it. We cannot put it at \$1 or \$5 or anything of that sort.

The CHAIRMAN. This question has been propounded: Do you believe that General Motors could reduce prices substantially for its cars but is unwilling to do so because of the danger of antitrust action if its market share increases?

Mr. COLBERT. I don't have any comment on that question.

The CHAIRMAN. You have no comment?

Mr. COLBERT. No, sir.

The CHAIRMAN. I figured that would be the answer.

I think that is all I have. Thank you very much for coming down, Mr. Colbert.

We will resume the hearings at 10:30 tomorrow morning.

(Whereupon, at 12:05 p. m., the subcommittee adjourned, to reconvene on Thursday, June 9, 1955, at 10:30 a. m.)

(Mr. Colbert requested that the following letter be inserted after his testimony.)

CHRYSLER CORP.,
June 29, 1955.

Hon. HARLEY M. KILGORE,

United States Senate Committee on the Judiciary,

Subcommittee on Antitrust and Monopoly, Washington 25, D. C.

DEAR SENATOR KILGORE: On reviewing our testimony before the Subcommittee on Antitrust and Monopoly on June 8, 1955, the thought has occurred to me that the record does not show what I intended to say. Naturally we do not want any doubt in the mind of the subcommittee as to our position on the questions Senator Kefauver asked concerning tank transmissions.

In making bids for Government business of the size and type we discussed at the hearing, it is customary to show estimated profit on the complete contract

as a whole as a separate item. This means that if there is an itemizing of the major individual components of the tank, they appear at estimated cost without profit, and estimated profit for the contract as a whole is separately shown for the entire bid and is not related to any particular item. In these circumstances, if we built a major item such as a tank engine, which we included in a bid for tanks we were making but which we were also quoting separately to another tank builder, the figure for this item appearing in our bid to the Government would not include profit (estimated profit on the entire bid would be stated separately) while the price quoted to the other bidder would include profit, resulting in two different figures for this item.

Since the transcript of the testimony might be interpreted otherwise than the above, I would appreciate it if you would insert this letter at the end of Mr. Colbert's testimony.

It was nice to meet you and the other Senators.

Yours very truly,

G. W. TROOST, *Vice President.*

A STUDY OF THE ANTITRUST LAWS

THURSDAY, JUNE 9, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10:35 a. m. in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore (chairman) and Wiley.

Also present: Joseph W. Burns, chief counsel, and Joseph A. Seeley, assistant counsel.

The CHAIRMAN. The committee will come to order.

The first witness today will be Prof. Clare E. Griffin, of the University of Michigan.

Mr. Griffin, you just go ahead, and if you want to read your statement, you may do so, or you can put it in the record and comment on it, whichever way you want to do.

STATEMENT OF CLARE E. GRIFFIN, PROFESSOR OF BUSINESS ECONOMICS, UNIVERSITY OF MICHIGAN

Mr. GRIFFIN. I am Clare E. Griffin. I am professor of business economics at the University of Michigan, holding the Fred M. Taylor chair in business economics in that place, and I was for some 15 years dean of the School of Business. Now I occupy the chair described.

My special field of study has been the requirements of a free-enterprise system and the characteristics of a free-enterprise system.

My writing in recent years includes a book, *Enterprise in a Free Society*, and special monographs and articles dealing with an economic approach to antitrust problems.

I wish to make it clear that I am not an antitrust lawyer. My testimony, therefore, will deal not with an analysis of court decisions nor in the detailed legal implications of the statutes.

If my statement can be of any help to this committee it will presumably be by way of encouraging your thought on the kind of economic society which we want in this country, and the place of competition in bringing about that good society, and the kinds of competition which will best advance that end.

Senator WILEY. You say you are not an antitrust lawyer. Are you a protrust lawyer?

Mr. GRIFFIN. I am not a lawyer.

The CHAIRMAN. May I say, Professor, we did not bring you here as a legal expert. You come in as an expert on business economics.

Mr. GRIFFIN. That is right, sir.

I will deal, therefore, with some rather general concepts that the economists hold, I think, and toward the end of my statement I would like to comment on some current problem, such as oligopoly, the term that you used yesterday.

The CHAIRMAN. That newly invented word.

Mr. GRIFFIN. That I heard you use yesterday, Senator, and on the problem of price competition versus nonprice competition; mergers and bigness, but I come to that in the latter part of my statement, if you are patient enough to listen to my general statement which, I think, lays the foundation for that.

So I think if we ask the most fundamental question, what kind of a society we want in this country, I think that most Americans would place individual freedom very high in their scale of values, perhaps without always realizing the implications of freedom.

By freedom I mean, of course, both political and economic freedom. The two are closely related, and, indeed, I am very doubtful if, in the long run, any society can maintain its civil and political rights without maintaining the right of private property both in the means of production and in the means of consumption, the right to choose one's own line of activity, to spend or to save and to enjoy reasonable alternatives in directing one's spending.

The CHAIRMAN. Is it not a fact, Professor—

Mr. GRIFFIN. Yes.

The CHAIRMAN. That any time you try to assign somebody to do a job, his interest in that job drops off a little bit, unless that is the type of work he prefers to do? Is that not correct?

Mr. GRIFFIN. I think so.

The CHAIRMAN. And you thereby curtail production about 50 or 60 percent, and if you try to do that to a whole nation you just ruin the nation's economy right off the bat.

Mr. GRIFFIN. Yes. You stated it very well, and I was just going to state it in the next paragraph.

So, I take it, these things I mentioned, the freedom to choose your line of activity, and so on, are the elementary economic rights that are essential in a free society.

But another requirement of a good society is that it shall be productive. High productivity is a basis not only for the material things we desire, but provides a basis for freedom, for the simple reason that hungry people are not in a position to insist upon the preservation of those freedoms.

The one common characteristic, as I have observed it, of the countries which have embraced communism is that the masses have been poor and that the prospects of improving their lot seemed remote.

This, I would remind you, is exactly the opposite of the Marxian prediction that communism would first come in the most highly developed and productive countries; it has been just the opposite.

The CHAIRMAN. Professor, that stems from the fact that under imperialism they were in the same shape, and when they adopted communism it was just a catch phrase to put a new form of imperialism into effect over there.

Mr. GRIFFIN. That is right.

The CHAIRMAN. But they still see no hope for the future, and hunger and want are the biggest breeders of communism in the world. They are, in fact, the only breeders.

Mr. GRIFFIN. But you see, Senator, Marx said that communism would emerge from capitalism, and the country that had the highest development of capitalism was the most ripe for communism.

Well, actually, the experience has been just the opposite, that communism has come in those countries where capitalism was not very highly developed. It is just an incidental point.

Senator WILEY. Well, capitalism would not necessarily be synonymous with materialism. Too much materialism sometimes degenerates into license.

Mr. GRIFFIN. By capitalism I mean the free-enterprise system. They are two words with the same idea.

The CHAIRMAN. In fact, in capitalism our approach in the United States is that employees then try to buy into the company for which they work; is that not correct?

Mr. GRIFFIN. Right; either directly into that company or some other company. They get a stake in the economy.

The CHAIRMAN. Yes.

Mr. GRIFFIN. Then I remark that in modern countries the relation between productivity and freedom poses a basic problem, for, as we have advanced in production and we have become more interdependent, the economic welfare of everyone depends upon the actions of everyone else.

The requirement of society thus is that workers, businessmen, and all others should produce those things that the society wants, that they should produce them in the most effective way, and deliver them at the time and places where they are most desired.

The basic problem to which I referred is how can the strict requirements of society placed upon all of us as producers be reconciled with our aspiration to do entirely as we please.

It seems obvious that there is no perfect answer to this question. If we install a "big brother" dictator as the boss to direct and enforce the activities of all of us, we might get the production, but we would lose the freedom.

If, on the other hand, individuals were completely free to produce this or that product, without any pressures, to work effectively, or ineffectively, or to work or loaf, the kind of goods and services which we want would not be forthcoming, so there is your dilemma.

All of this is by way of pointing to the importance of competition in a free society, for the essence of a free competitive society is that we, in effect, say to each individual, "You are, indeed, literally free to do as you please, but you will find it more profitable to act in such a way as will best satisfy the needs of the market, that is to say, of other people," if society were talking to the individual.

The CHAIRMAN. What you just said makes me think of something.

I have been told by manufacturers from European countries that it was hard for them to get the assembly line working such as we had, and thereby achieve mass production in quantity.

Now, the secret of the assembly line and mass production is getting the parts in the required number at the exact time necessary to place them on the article being finished; is that not correct?

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN. And that is your whole theory on the way to run a nation?

Mr. GRIFFIN. Yes. It is a question of timing and quantity. Competition directs this production to getting the right goods at the right places at the right time.

The CHAIRMAN. And our industries have solved that in our assembly-line production.

Mr. GRIFFIN. And through a system of competition.

The CHAIRMAN. Through a system of competition; but there must be competition in order to get it that way.

Mr. GRIFFIN. So this pressure, the pressure of competition, does place a pressure upon people, and it is a pressure which they will not always like, but it is a more gentle pressure, and it is less objectionable than the pressure of authority which seems to be the only possible alternative.

One economist who, unfortunately, died a few years ago, Henry Simons, said a country that is not willing to submit to the discipline of competition will sooner or later find itself submitting to the discipline of authority.

The CHAIRMAN. You know that again bears out the assembly line. The man who reaches around and finds a part there, when he needs it, is impelled to keep up his production record just from his own desire, and he puts it on in the minimum amount of time to get the next piece.

Mr. GRIFFIN. That is a good illustration.

So it means that this pressure of competition is a form of discipline, and it means that we are relying to the greatest possible extent upon the "carrot" and to the minimum extent upon the "stick."

That is the prodding from behind.

Thus we get the necessary direction of the economy and of the activities of the people within it with the minimum infringement of freedom. That, in general, is my reason for my faith in competition as a regulator of society.

But this necessary direction which competition provides in the form of hope of gain and fear of loss extends not merely to producing known things in the most effective ways known at the time, but also extend to economic progress which includes mainly conceiving and producing new things and planning ways of producing old things more abundantly, two things.

There are various theories of how economic progress comes about.

The CHAIRMAN. There is also a thing in that, too, which is illustrated in production. A man takes a pride, the worker takes a pride, in doing the job at the time, and he will raise a fuss with somebody else on that line who is not keeping up with his work.

Mr. GRIFFIN. Right.

The CHAIRMAN. In other words, they take a pride in doing the work effectively.

Mr. GRIFFIN. Yes.

The CHAIRMAN. And that is competition—

Mr. GRIFFIN. Yes.

The CHAIRMAN. Between individuals.

Mr. GRIFFIN. Yes; it certainly takes many forms, competition does.

The CHAIRMAN. Yes.

Mr. GRIFFIN. It pervades the whole system.

As I say, there are various theories of how economic progress comes about, and I would like to state my own for what it is worth.

I hold that progress comes about through the relation of leaders and followers. It is my view that most people are not notably progressive; their natural inclination is to go on doing things in the same way as it has been done before.

But there are always some restless and creative people who are seeking the opportunity for extra large rewards by trying a new way or by offering a new thing, and are willing to take the risks which that forward step implies in order to get those rewards.

Once this forward step has been taken and has proved successful which, in many cases will not be true, the others, that is the followers, in order to stay in the race must go, perhaps grudgingly, and adopt the new idea.

The leaders would, perhaps, be more happy if the others did not follow, but they must do so as the price of survival.

One writer has described this relation of leader and followers by saying that "under this system the followers get leaders whom they do not particularly want and the leaders get followers whom they do not want."

Under this system this country has made a more rapid rate of sustained progress than has ever before been known.

But we should recognize that this method of making progress imposes certain requirements, and that these have certain implications for the kind of competition that we desire.

The first of these requirements is that the leaders must see the opportunity of gaining an extra large reward, that is, a larger reward than he would get by doing things in the old way.

This is necessary in order to provide the incentive and the means for the leaders to perform their function.

On the other hand, the potential followers must be free to follow within a reasonable period of time, for, otherwise, the benefits of the forward step will not be generally diffused throughout the economy.

Now, this reasonable period of time is, of course, impossible to define precisely.

In general, I would say that the natural obstacles of designing a new product, of acquiring the know-how and of developing the market for a new brand and corresponding requirements in various other fields, provide the desired time lag to encourage progress; that is, the leader has to have some time during which he is out ahead.

Any artificial barriers, such as agreements to divide markets, arrangements for tying up sources of supply or unreasonably tying up distribution outlets should, in principle, be discouraged; and in these areas the antitrust laws have a function to perform.

I have stressed this requirement of progress because I think it is a primary economic requirement for a good society, as Americans conceive it. And it is one which imposes a special requirement of understanding and self-restraint upon a democracy.

The reason is that if the majority has vested interests in existing skills, capital investments and ways of doing business, and if this majority has the power, as it has in a democracy, to place handicaps upon those who would introduce new forms and ways of doing business, this progress could easily be stifled.

Indeed, certain writers in the past, and the present, have been very pessimistic about the future of democracy on just this ground.

While I do not share their pessimistic conclusion, I believe that this is the greatest danger which a modern democracy faces, and that it will require a very high degree of responsible statesmanship to avoid it.

The temptation appears in many areas of public policy, such as the levying of tariffs and taxes, and various others. In general, antitrust laws should, and I think they do, protect the necessary freedom of the innovators by preventing the established concerns from ganging up against the newcomer.

But there is also the possibility that the aim of preserving competition can be perverted to preserving particular competitors.

I would respectfully urge that this distinction always be borne in mind and that, concerning any proposed legislation in this field, the question should always be asked, "Is this proposal aimed at fostering competition in which every businessman must take his fair chances in the market, or is it designed to protect certain individuals or classes of businessmen from the unpleasant effects of fair competition?"

Protecting competitors can become the precise opposite of protecting competition, and if confusion on this point exists, the Government could become a powerful agent for retarding progress.

The CHAIRMAN. In other words, that is where you get into this word "oligopoly," to protect competitors, is that not right, or, rather, competitors protect one another?

Mr. GRIFFIN. Well, that is conceivable. What I had in mind was the use of legislation or the application of legislation to protect particular individuals against the forces of competition, against the pressure of competition.

The principle of competition, as the regulator of our system is, I believe, very generally, if not universally, accepted by American businessmen.

In other words, I think the principle underlying the Sherman Act is generally accepted—if this statement is true, as I think it is—it means that the prevailing business philosophy and attitudes in the United States are quite different from those of many foreign countries.

I have personally talked with many businessmen in Britain about this question, and many of them repudiate the principle of a competitive society and economy, and deny the merits, at least for their own country, of our antitrust policy.

I mention the British merely to suggest that the general acceptance of the principles of antitrust by businessmen in this country is not to be easily taken for granted.

The CHAIRMAN. Professor, I do not know whether you remember, but back in the period 1946 on up for a time, certain groups of British industrialists hoped to step into positions formerly held by the German industrialists as the head of the world cartel system. I do not know whether you remember the meetings at Rye, N. Y.—

Mr. GRIFFIN. Yes.

The CHAIRMAN (continuing). Over here where they tried to get us to go along with them; and you still have that feeling in certain groups in England.

However, here is an interesting thing: Some of the banks, other than the Bank of England, have come out rather bitterly against that

feature, and they say that they must expand and get competition into England if England is to survive as an industrial power.

Mr. GRIFFIN. I think there is recognition that Britain, as a nation, must be competitive with other nations, particularly Germany; but they are not willing, I believe, to accept the principle of competition between one Englishman and another; they want to act as a group.

The CHAIRMAN. As yet, no; but I say there is a growing sentiment in England among certain groups over there, particularly some of the banking groups—

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN (continuing). Outside of the Bank of England. Now, the Bank of England refused to participate.

Mr. GRIFFIN. Yes.

The CHAIRMAN. But some of the other banks feel that competition between English companies would immeasurably help the English economic picture.

Mr. GRIFFIN. Lord Balfour is a notable example of that, a good free enterpriser.

The CHAIRMAN. Yes.

Senator WILEY. This philosophy of competition is a wonderful thing if the rules are all used to treat everybody alike, if there are no particular special privileges in the shape of this or that.

Mr. GRIFFIN. Right.

Senator WILEY. Or if there is not any dealing under the table and all that, where human nature comes in.

Mr. GRIFFIN. Right.

Senator WILEY. In other words, play the poker game according to the rules in poker, and it is all right; but to get a pistol out and tell you to do so and so, that is not so good.

Mr. GRIFFIN. That is the proper function of the antitrust laws, to see that the game is played fairly.

The CHAIRMAN. Yes.

Senator WILEY. I know, but even under the antitrust laws, you have got in this country barriers against interstate shipments.

Mr. GRIFFIN. Right.

Senator WILEY. All right; you have got a question of wages that are not equal, and you have got situations, as it was developed yesterday, where one fellow could buy a commodity cheaper than another fellow could.

So it is all right to philosophize about free enterprise, but what we want to be sure of is that enterprise is free in the highest sense.

Mr. GRIFFIN. But the point I want to make, Senator, is that the regulation and the spirit you are talking about could hardly take place if there were not a general acceptance of the principle, the basic principle, of competition.

Senator WILEY. I agree with that.

Mr. GRIFFIN. And that is a very precious thing. •

The CHAIRMAN. Of course, Senator Wiley, you must remember yesterday in that particular instance cited there, there was only one producer, and they had a complete monopoly and, naturally, they quoted to themselves cheaper prices than they did to their competitors.

Mr. GRIFFIN. Yes; that is an interesting question.

The CHAIRMAN. They were the only source of supply.

Senator WILEY. I only use that as an illustration of the fact that when we are talking about free enterprise, we have to look around the whole perimeter of the problem and realize that free enterprise as a philosophy is a wonderful thing, but when you come to a question between nations where you have all kinds of barriers and unfair dealings, and so forth, you had better look after your own affairs, too, so they do not take you for a ride.

Mr. GRIFFIN. Yes, sir; that is an understandable point of view.

The CHAIRMAN. I want to say, Senator Wiley, that that case talked about yesterday should bear further investigation because, as I remember it, that particular gear plant was built up during the war, and I believe at that time tanks were on a cost-plus-fixed-fee basis, and the United States Government probably built that plant, or at least put the tooling into it.

Mr. GRIFFIN. That is not the best example of a free competitive market.

The CHAIRMAN. Yes.

Mr. GRIFFIN. I think we are very fortunate that this general acceptance—I would like to stress that, the general acceptance of businessmen of the principle of competition is present. Let me interpolate here to say that I have talked to a great many businessmen about antitrust laws, and I find them complaining about the law as it applies to their particular case.

So, after hearing their gripes for a while, I say, "Well, O. K., then we should repeal the Sherman Act."

I have not yet found a single responsible American businessman who has ever said, "Yes, that is the answer."

In other words, they accept the principle of the thing, even though they may have questions about its particular application; and I do not think you could say that, concerning any other country in the world that I know of, and I have studied several of them.

The CHAIRMAN. You know, I have a rather interesting commentary on that. In the main, the coal operators have been opposed to labor organizations and wage contracts. But very early one prominent coal operator, who had achieved a great success, said to me that he did not object to a union contract. He said, "All I want is the same contract the other fellow gets. If we could get union contracts on all labor in the coal industry, then it would become a question of which operator had the best organization to get his coal out, and get it on the market," and he said "I believe I have got such an organization, so I think I will survive."

I think when you get down to the crux of it, most of our industrial leaders feel that way.

Senator WILEY. When you talk about free competition, do you talk about free cutthroat competition?

Mr. GRIFFIN. It is a bad word, is it not?

Senator WILEY. Yes, it is.

Mr. GRIFFIN. No. I recognize unfair methods of competition, and it is the proper function of the antitrust laws to see those are eliminated as far as possible.

But I am simply trying to lay the groundwork here of why there is competition and the kind of competition that is of particular importance.

So I want to say that I think it is very fortunate that this attitude of businessmen does exist in this country. If it did not, if the anti-trust policy did not have this general approval, I do not think it could be effectively enforced.

The conclusion should not be drawn from that, of course, Senator Wiley, and, I think, perhaps that is what you have in mind, that because this general principle is accepted there is no need for laws that have teeth in them, for it is a common trait of human nature that people are often willing to approve a general principle, even though they may be tempted to violate the principle in particular cases.

Senator WILEY. There you hit the nub of the thing, human nature.

Mr. GRIFFIN. Everyone approves of traffic laws, but it is still necessary to have the traffic laws, because they will be violated.

Senator WILEY. And a few policemen to see that they are observed.

Mr. GRIFFIN. That is right.

Another conclusion is that changes in the statutes or radical changes in the interpretation of them cannot successfully run very far ahead of the established mores, customs, and common opinion of the businessmen who are to be affected.

A particular application of this point is that any legislation or any legislative restriction upon the size of a company or the proportion of the market which it will be permitted to serve would run counter to the strongly held view of business enterprisers and, I think, of most Americans, namely that anyone should be allowed to grow without legal interference as long as his methods are fair, and this growth represents only increased consumer acceptance of his products.

Growth by merger or acquisition seems to me to be another matter, and appropriate regulation and limitations can properly be made by a government which has assumed responsibility for the preservation of the competitive system.

I would like to say a word now about competition and the meaning of the word because that has been disputed some.

The CHAIRMAN. Is it not a fact that when you get what you might call merger perpendicularly, that one little item in that setup may amount to monopoly in that whole thing? It might give that company a monopoly although normally otherwise it was completely competitive?

Mr. GRIFFIN. That is conceivable.

The CHAIRMAN. I think the Standard Oil Co.'s first conception was the fact that it was the only one that had pipelines; transportation then became the secret of the Standard Oil monopoly.

Mr. GRIFFIN. That is right. In that case the courts concluded, I believe, there was a deliberate effort to obtain a monopoly and, therefore, while I am not a lawyer, I think it falls within the violation of section 2 of the Sherman Act.

The CHAIRMAN. Yes.

Mr. GRIFFIN. Could I say a word about the term "competition"?

The word "competition" has, in the hands of economists, been given a number of rather specialized definitions. While these may serve the purpose of logical analysis, I think there is a danger in economists inventing a special jargon of their own.

The danger is that they will get out of touch with reality, and lose the power of communication with the business community and others.

For my own part, I accept the concept of competition which I think is held quite generally by those outside the specialized economic fraternity. It is that competition is rivalry between the members of one economic group to secure or retain the patronage of the members of another economic group.

For example, it is the rivalry of a number of retailers to secure the patronage of customers; it is the rivalry of manufacturers to secure the patronage of retailers; indeed, it may be rivalry of buyers to secure the patronage of sellers, although in our system the active rivalry is usually between the sellers for the favor of the buyers rather than the reverse.

According to this definition, competition is a relation between the sellers and not the relationship between a seller, on the one hand, and a buyer, on the other.

This latter relationship is a bargaining relationship in which one party to the bargain tries to increase his power of resistance as against the other. This sometimes leads to a balancing of power units, which one economist has called the principle of countervailing power.

The necessity for building up such power is reduced when competition is effective. My protection as an individual buyer of groceries does not depend upon my economic power compared to that of the chain store or supermarket from which I buy. It rather depends upon the fact that there are other stores in rivalry with this one and, if the market is fairly competitive, the only way this store or any other can increase its patronage is by treating me and the other consumers reasonably well. It is thus a merit of competition that the small person is protected by the rivalry of the sellers—large or small—who are seeking his patronage.

If the essential characteristic of competition is rivalry then it is clear that the essential requirement of competition is an attitude of rivalry on the part of the people in a line of trade. I am convinced from a study of the businessmen and institutions of the United States and Europe that when you find a low level of competition as you do in some of the European countries, it is traceable basically to a low level of competitive spirit among the businessmen and this frequently reflects a similar noncompetitive attitude on the part of the people at large.

The CHAIRMAN. It might be that there were too many people excluded by low-income situations from the consumer market in a particular industry involved.

Mr. GRIFFIN. That is right.

Another factor, of course, that is favorable to competition in this country is the rapidly expanding economy.

The widespread interest of Americans in competitive sports and the strong desire to win or to have your team win has often been remarked upon and sometimes mildly criticized by the foreigners. It is a part of our national psychology and it is found to a high degree among businessmen as well as other groups in the society. If it is not an ~~inappropriate~~ digression I should like to remark that I think those educators who for one reason or another are trying to reduce the element of competition in our educational system are doing a profound disservice to the country and to our way of life. At various times in the history of the world nations have been imbued with this keen competitive spirit and those have been their periods of expansion and

greatness. Then for some mysterious reason it passes away and with it the leadership that the country had maintained.

If this competitive spirit is not present among the businessmen of a country there can be a general sluggishness and a failure to blaze new trails either in methods of production or in kinds of products. This nonprogressive policy may be equally bad whether it arises as a natural reflection of complacent and noncompetitive attitude of the businessmen or whether it is implemented by agreements as to price, quality, or division of markets.

My reason for emphasizing all this is to suggest that fundamentally a competitive system must be based upon competitive attitudes and that this aggressive and competitive attitude of businessmen is a very precious thing. It cannot, I believe, be produced by government. It may be suggested that government can, nevertheless, prohibit certain of the devices which such a noncompetitive group of businessmen might wish to adopt. A telling reply is that if the whole country is characterized by these noncompetitive attitudes, then a representative government will not even want to lay such prohibitions.

This seems to have been the case in some of the European countries in recent decades. For in those it seems to be true that individuals and groups in the society—I mean by that the workers, consumers, and manufacturers—not only do not wish competition for themselves but they do not insist upon it for others.

If this aggressive and competitive attitude is so important, what then can government do about it? Even though such an attitude cannot be created by government or by anyone else, it can be damped and discouraged by governmental policies which would discourage the incentives to grow. Also, government can play a positive role by proscribing certain methods of growth which it is believed do not encourage competition and thus may help to channel the natural desire to grow into socially productive lines. In this latter remark I have in mind a possible reasonable regulation of mergers, which, I think, is quite appropriate.

Now, I would like to say a word about the number of competitors. This is on your subject of oligopoly. If it is true that the essential feature of competition is rivalry, a question then arises as to how many people must be involved in this rivalry. I believe that no hard and fast answer can be given to this question. Effective rivalry may exist between any number of independent businessmen providing, of course, that there is more than one. Some economists are inclined to attach very great importance to the number involved. They would support this position by the argument among others that the larger the number of concerns, the more difficult it is for them to make agreements. All other things being equal, there may be some truth in this, but as a matter of fact in this case the "all other things" are usually not equal, and I believe that in fact agreements are as often made between the many small members of a trade through its trade association or by other means as are made in other industries in which the number of enterprises is relatively small.

At any rate, it is my judgment that there are other factors which are more important than the number involved. Among these are the rate of technological change, which always makes it difficult for any one or an established group to maintain a monopolistic position. Another factor is the rapidity and pervasiveness of changes in con-

sumer tastes as to style, appearance, form of product, and so on. Still another factor is a variety of what manufacturers refer to as product mix.

By this I mean that one competitor may be producing product A along with B, C, and D, whereas the other company is producing product A in combination with products E, F, and G or, possibly, producing it alone. Under these conditions the actual cost of producing product A or at least the cost allocated to product A may be quite different between the different concerns and this fact in itself tends to foster effective competition. There are a number of other factors recognized by economists that tend to produce a competitive situation. But as I remarked previously, I think the most important one is the kind of people, their aspirations, and attitudes.

The CHAIRMAN. Let us take the steel industry, for example. You know we have Big Steel and so-called Little Steel, and then what we call the independent fabricators, which are partially, although not fully, integrated plants.

Shortly after the war, the steel price was fixed by OPA, and I discovered that Big Steel wanted that price. Little Steel said they could not take it.

An analysis of the market situation showed a situation like this: That Little Steel was producing steel, whereas Big Steel also had a lot of sidelines like shipyards, fabricating plants, bridge construction plants, railroads, ore beds, coal mines, and what they lost on the bananas they made on the peanuts, and they could hold the cost of billet low, and still make a profit, whereas the fellow who just produced billet and rod or rolled out sheet, and then sold it to the small independent fabricators, he just could not exist on the prices.

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN. Isn't that a situation in which you get into ticklish—

Mr. GRIFFIN. You do; it makes it difficult.

The CHAIRMAN. That is what you call the conglomerate mass in size.

Mr. GRIFFIN. That is right.

The CHAIRMAN. In which one part of the conglomeration can take care of losses on the other parts, and thereby make it tough on competitors who only make the other parts.

Mr. GRIFFIN. I am simply suggesting as my view that it is desirable that we have companies that are producing products in different combinations, because then that—

The CHAIRMAN. Yes. But the company which just makes one combination may suffer a terrific handicap.

Mr. GRIFFIN. Perhaps it should engage in other combinations.

The CHAIRMAN. It would have to.

Mr. GRIFFIN. Not necessarily the same one as the first one. In fact, I like variety. My whole philosophy of this system is that the merit of it is variety, and you cannot be sure that your competitor down the line is doing the same thing you are doing in exactly the same way, and I think it is a healthy sign.

The CHAIRMAN. It is a healthy sign, but sometimes it is a rather severe hardship.

Mr. GRIFFIN. Competition is always hard on somebody.

The CHAIRMAN. Yes.

Mr. GRIFFIN. This question of competition among the few, to which economists give the name oligopoly, does not, therefore, seem to me to present the serious problem that some people see in it. The competition among the few may, indeed, present certain special aspects, but I believe there is no evidence that this competition will be less intense nor that it is less socially fruitful in terms of product improvement, cost reduction, or other aspects of economic progress.

The history of the past 50 years throws some light on the effectiveness of competition of the few. If one thinks of the lines in which great progress has been made in that half century, he surely would include airplanes, telephone service, chemicals (including fertilizers) agricultural implements, automobiles, electrical equipment, and light metals.

Surely anyone would include them. I am not saying they were the only ones. But in none of these have we had the large number of small concerns which is the ideal of certain theoretical economists, which I cite to suggest that competition among the few can be very socially effective, and I think has been in the last 50 years.

The CHAIRMAN. However, you are discussing subjects there in which to go into it requires a pretty big capital outlay. The small competitor has a tough time breaking into the field. He can break in in one stage, maybe like in the aluminum industry, where he breaks in at the level of fabrication, as long as he is assured of a sufficient supply of metal, and he can go ahead and make a success of a small fabricating business.

Mr. GRIFFIN. I am merely citing this, Senator to counter the argument that when you have a very few, they are going to act like monopolists, and that you will not get economic progress.

The CHAIRMAN. That is right.

Mr. GRIFFIN. If anyone says that, he has got to face the example of the 6 or 8 industries which I have just mentioned.

In all fairness, I think that we should recognize that the pattern of many small concerns in an industry may have the effect of keeping price close to cost and at any moment of time the resulting narrow profit margin may yield an advantage to the consumer. But in a longer view, more is to be gained by reducing the cost or improving the product. Of course, both results are desirable, but if there is any merit in the theory of progress which I have described, it may be that the two are not always compatible.

Now I would like to say a word about price competition, which I think is of some interest to you, Senator.

Going back again to our definition of competition, if the essence of it is rivalry to gain the patronage of others, it seems clear that this rivalry can show itself in any of the elements of the offer which is made by the competitor and which is designed to attract that patronage. That is to say, it can be in terms of the quality of the product, the promptness or quality of the service connected with it or in the numbers of dollars and cents that are demanded.

Indeed, it is my view that there is no essential difference between price competition and any other kind of competition. This point might be challenged by some economists.

Price, in fact, is really a ratio. It is a ratio between the dollars and cents asked and the bundle of goods and services which is offered. This will be readily seen if we consider that you cannot possibly

conceive of a price unless you know what is given in return for the money. To say that potatoes have a price of \$2 would surely be a meaningless phrase unless it is known that the amount involved is one bushel and unless something is assumed as to the grade or quality of the potatoes, the place and time of delivery, and so on. Price being a ratio can, therefore, be as effectively lowered by increasing the product side of the equation as by reducing the money side of the equation or the other. For example, in the women's dress industry I understand that there are certain well-recognized price points. The retailer wants a stock of dresses to sell at \$14.95 and another to sell at \$19.95. Under these conditions the manufacturer starts out to produce a dress to be sold at \$19.95 and his competitors do the same. If now we say that the only effective competition is "price competition," we would say that it did not exist in this case. However, we know that the business is highly competitive and that rivalry is very pronounced. The rivalry takes the form of putting as much style and quality into a dress which can be retailed for \$19.95 as possible, and the manufacturer who can produce the most attractive dresses at that price (minus the customary discount) will get the business.

Likewise, the newspapers of a city may all sell at the same customary price and that price may be very infrequently changed, but the rivalry of the different publishers for the patronage of advertisers and readers may be, and usually is, very intense, and I believe is socially effective. Indeed, it is my belief that the advertising and reading public are better served by a number of newspapers which differ in their editorial policy, format, time of publication, and so forth, and all sell for the same number of cents than it would be by the same number of newspapers which were standardized in these respects but which sought consumer patronage by variations in the number of pennies charged.

The CHAIRMAN. Isn't that a foundation stone of a democracy, news dissemination of varying views?

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN. So that the citizen may be fully informed of all sides?

Mr. GRIFFIN. Yes; and it is my view, and the point I am making here is that this rivalry of papers on the basis of the kind of views they express is much more important than their rivalry in the number of cents they charge for a paper.

The CHAIRMAN. You are absolutely correct.

Mr. GRIFFIN. Yes.

One cannot generalize on this subject. In either case, whether you have rivalry in changing the number of dollars and cents or in changing of the product that is offered, there may be an intense effort on the part of all of the producers in an industry to reduce costs. With some of them the cost reduction may be desired in order to mark down the price tag. In other industries the result may be to enable the producer to put more into the product. The object in either case is to make a more attractive offer to the consumer and thereby to gain his patronage.

I want to drive home my own view that there is no particular preference for the competition that takes the form of changes in the price

as opposed to the competition that takes the form of improving the product; in fact, they come to pretty much the same thing.

Then, with respect to freedom of entry, one of the conditions favorable to the preservation of effective competition is freedom of new concerns to enter a line of trade. The development of modern methods of mass production and mass distribution which have done so much to raise the living standards of this country obviously creates a problem as to this freedom of entry. It clearly cannot be as easy to establish a new steel mill as it was to establish a small forge. Likewise, in the days when wheat was ground into flour at little mills operated directly by waterpower, it was easier to break into the flour-milling business than it is today. It was obviously easier to establish a buggy- or wagon-making establishment of which there were thousands in the country than it is to break into the automobile manufacturing business. These difficulties are largely unavoidable unless we are to try to go back to the older methods of production and distribution.

What Government can do, and what I think it should do, is to try to prevent an aggravation of the problem by concerted action of those who are in to prevent others from coming in. Devices of this kind are quite evidently in restraint of trade and indeed more seriously so even than restraints of competition between those who are already in. We should be most alert to see that no "artificial handicaps or barriers," to use the words of Abraham Lincoln, are placed in the way of the potential newcomer. A newcomer is likely to bring fresh, new ways of doing things and thus he is an enemy of the sluggishness which a progressive society must try to avoid.

I should like to emphasize, however, that the problem of encouraging newcomers is not the same as the problem of protecting small concerns. They are two quite different problems, each of which may deserve our attention but for quite different reasons. The new concern, it is true, is likely to be small; but we cannot likewise generalize that the small concerns are usually new or that they have any particular prospect of growth.

We can observe from the long history of western countries that one of the greatest dangers to the forward movement of an economy is that those who are already established, be they large or small, will throw up barriers against the newcomers into their line of trade, especially those who rely upon new methods or products. In the past the Government has often lent its aid in this effort. That happened in centuries past in other countries and the opposition to the development of the department stores, mail-order houses, chainstores, and supermarkets are examples in our own history. I am not denying that there are special problems of small business and that genuinely unfair methods of competition with them should be an object of concern by the Government, but I would suggest that in our solicitude for small business we do not make it more difficult for new business, be it large or small.

There are two problems which are currently receiving much attention and on which I would like to comment specifically, though much of what I have already said has a bearing upon them. The first is the question of bigness. On this subject the American people have a certain "split-mindness." This, I think, is evident from general observation and even from examination of our own ideas. It was also substantiated by a study made by the survey research center of

my university. This survey indicated that a substantial majority—around three-quarters of the people—believed that big business in general was good for the country. People generally believe this because of working conditions and terms of employment provided by big business and because it produced good products and was progressive in bringing forth new products and reducing cost. On the other hand, some of them—and many who held these favorable views—had misgivings about the economic power which they felt accompanied big business. Since the people apparently like the fruits of big business, but are doubtful about the bigness itself—that is what I mean by this split-mindness—it is not surprising that a very difficult, if not insoluble, problem is presented.

To this problem of bigness in business an obvious but much too simplified suggestion is that a legal limit be placed on size, either in absolute terms or as to percent of the market served by a firm. The fundamental weakness with this approach is that there is no conceivable way of limiting size without also limiting growth. In my judgment, the most important factor in many lines leading to product improvement, cost and price reduction, and other benefits to the public has been the constant and persuasive drive, at least on the part of some concerns, to gain a larger part of consumer patronage. This imposes upon the others the necessity of doing their level best to maintain their own position in the market. This sort of struggle for the market leads to efforts at cost reduction, the passing of these savings on to the consumers, improvement of the product in basic quality and appearance and convenience. These, of course, are among the fruits that we hope to get from competition. If now—and this, I think, is an important point—you place a hard-and-fast limit upon size, then any concern which would be affected by that limit will be strongly encouraged to adopt noncompetitive policies. They would find it prudent to relax efforts at product improvement, to refrain from passing cost savings on to consumers in lower prices or otherwise to improve the attractiveness of its offers to consumers, for any of these competitive policies are likely to lead to increased sales and therefore to increase of its size to a point where it will be in violation of the law. In short, by putting a definite limit on size, you would be placing a requirement upon these concerns that they must, in fact, act like monopolists in order to avoid the charge of being monopolists.

The CHAIRMAN. Then you agree, at least partially, with what Dr. Watkins said the other day?

Mr. GRIFFIN. I did not read his testimony; I am sorry.

The CHAIRMAN. When it came down to a final delineation, he said that monopoly largely consisted of the intent of the company in achieving its size—

Mr. GRIFFIN. I agree.

The CHAIRMAN. Not in the size.

Mr. GRIFFIN. I agree. Monopolizing, which is the thing prohibited by section 2, should involve a certain element of deliberateness—efforts to obtain a monopoly. The mere effort to become larger, by the normal consumer acceptance of a superior product, ought not to be checked, for it is a very fruitful force.

It is not surprising, therefore, that much confusion exists on the subject. It is quite possible for an economist—and some economists who have appeared before you, I believe, have taken this view—to

look at a certain industry and to say that he would be happier if there were somewhat more companies in it and if the largest one were not so large. That is expressing an understandable view as to a static situation. But it is a very different matter to say that he would not permit any company to grow beyond some specified size. When you make that statement you are dealing with the dynamics of the industry. You are saying that growth shall be prohibited beyond some specified limit and that means that, for the large companies, you have impaired or destroyed the healthy competitive motivation upon which we rely to bring forth good service to consumers.

I believe that one practical approach to this problem, and I admit, there is a problem, is to regulate growth by merger, for this form of growth does not necessarily rest upon this continual effort to make more attractive offers to consumers. In making this remark I am not passing judgment upon the propriety of any particular mergers, nor do I think that anyone can properly do so without an examination of the facts in that particular case. I believe there are a number of good reasons for mergers. I am merely saying that growth by merger has a different economic significance than growth by increased consumer acceptance. In general I feel that section 7 of the Clayton Act lays the basis for a reasonable and wise policy on that subject.

Another reasonable approach to the question of bigness is enforcement of the Sherman Act prohibition against restraints of trade and deliberate efforts to monopolize. I believe that this general prohibition of monopolizing, enriched by the interpretation of the courts in particular cases, provides a much better governmental policy than would any statutory limits or attacks on bigness per se.

Now, a final paragraph about the success or lack of success of the antitrust laws.

In my opinion, the Sherman Act passed some 65 years ago has been eminently successful. The obvious monopolization in the form of trusts and the outright price agreements and divisions of territory are so clearly in violation of the law that I am convinced that they are much less common today than they were when the act was passed and that they are much less common than they would have been without the act. This latter observation is reenforced by the experience of Britain in the last half century where no such law did exist, such as we have.

A strong merit of the law which reflects the wisdom of the Congress of 1890 is the generality of its prohibitions which could then, under our case system of law, be adapted by the courts to new conditions as they arose. The possibilities of a continuing adaptation to new conditions are still there and inherent in this law and these adaptations are being made. I conclude that the law should be supported as I believe it is supported in principle by the great mass of American businessmen as the core of our antitrust policy. I think it is not an exaggeration to say that almost like a constitutional provision, it provides the legal framework for an economic system which will be free, competitive, and progressive.

Thank you for your attention, sir.

The CHAIRMAN. Thank you.

I have a few questions to ask you.

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN. Do you attach any significance to the fact that after wars during which we expend a great deal of money, a great deal of purchasing power results, bringing a rash of mergers?

Mr. GRIFFIN. I am not sure whether this rash of mergers comes about because of the war, Senator, or because of a period of prosperity.

The CHAIRMAN. That is the question I am getting at. The availability of capital after a war, due to war profits encourages mergers, and also the war makes industries conscious of the advantage of merging certain groups or attaining a merger or an acquisition.

Mr. GRIFFIN. It is a very large question, Senator.

I would think that you will naturally find more mergers, that is to say, a realinement of ownership of companies, during a time when business is very active than you would at a time when business is sluggish, and it does happen, perhaps, for some good reason, it does happen that the periods after the wars, at least the last two that we have had, have been periods of intense prosperity and, therefore, I think you would likely find a great deal of this shifting of ownership.

The CHAIRMAN. And also, is it not a fact, that in the past, and we hope it will not happen again, these periods have been followed by what at one time we called panics, and now we call depressions, either major or minor?

Mr. GRIFFIN. That is true, they have been.

It is a matter of history. I do not think there is any reason that we should assume that history must repeat itself.

The CHAIRMAN. I know, but is there a possibility—and I am not an economist—is there not a possibility that the drawing out of the consumer market, I mean out of the consumer pool of funds for acquisitions, mergers, and expansions, may cause a lack of market which eventually results in a depression or a recession?

Mr. GRIFFIN. I would not attach great importance to that in any case, but, perhaps, there was more possibility of it in the period of the twenties.

In the period of the twenties, mergers were very often motivated by financial considerations, that is, they were arranged for financial purposes, we will say, of stock, and so on.

The merger period at the present time, I think, differs from that, if we can generalize, in that the reason are more often managerial reasons, if we can go back—

The CHAIRMAN. But managerial reasons would not prevail if the capital were not available to effectuate the acquisition by the merger.

No matter how much X company wanted to acquire Y company, it could not do it unless it could get capital to do it.

Mr. GRIFFIN. It can be done by the exchange of stock; there are other things you can do.

The CHAIRMAN. That is a merger. To my mind, a merger is an exchange of stock, and an acquisition is an outright buy.

Mr. GRIFFIN. Well, I do not know that there would be any essential difference.

The CHAIRMAN. Of course, after the Civil War you did not have the merger problem because industry started on the upgrade after that, with an enormous business expansion which, of course, wound up in the panic of the eighties.

Mr. GRIFFIN. Well, while I make no particular defense of mergers, and you noted that I have been slightly critical at times, I do not

see that there is any essential difference between a firm raising half a million dollars to buy another concern, or raising a half million dollars to build another plant, and either one would have the effect of—

The CHAIRMAN. One moment. What I am after is not the question of legality or illegality—

Mr. GRIFFIN. I know.

The CHAIRMAN. Or bad intent. I am after the question of cause and effect.

Mr. GRIFFIN. Yes. I understood your point was that to get the funds to buy, a new company withdrew funds from, what did you say, the consumer market?

The CHAIRMAN. Yes.

Mr. GRIFFIN. Well, I think the need for funds, you see, is just as great, Senator, if you are going to buy another company as it is to go out and build an additional plant.

The CHAIRMAN. I well remember when a stock-market expert wrote a column for a paper back in the thirties, back about 1936, commenting upon the fact that the recession which took place about that time was occasioned by taking too much profit at the top, thereby withdrawing money from the consumer level, and thereby reducing the market.

Mr. GRIFFIN. I would say in this present situation there has been a marked tendency to reinvest the profits rather than to take them out of the market.

The CHAIRMAN. Yes.

Now, I am going to ask you what an oligopoly is.

Mr. GRIFFIN. Competition of the few.

The CHAIRMAN. Competition between the few which might, in turn, become monopoly in one sense of the word. I mean, it might have the same effect as a monopoly, if wrongly used.

But it would have to practically amount to a conspiracy in order to get into that stage; is that not right?

Mr. GRIFFIN. Right; and that is prohibited under the law.

The CHAIRMAN. Is that term useful from either the economic or antitrust standpoint?

Mr. GRIFFIN. Oh, I think it is useful, although I think the English words of "competition of the few" would have been just as good in pointing to certain special characteristics of competition that may arise under those conditions that would not arise when you had many concerns.

For instance, the competition may be in the case of the oligopoly, it may be more on the basis of quality of product and quality of service and style, appearance, and so forth, than upon the price tag.

I am trying to suggest that I think that form of competition is just as valuable and, perhaps more valuable, than the competition in marking down the price tag.

The CHAIRMAN. Now, are oligopoly markets inherently incompatible with active competition?

Mr. GRIFFIN. No, not in my opinion. I heard Mr. Colbert's testimony yesterday, and certainly one could hardly say that the automobile industry was not competitive.

The CHAIRMAN. I am thinking, however, that there are certain aspects that might be not so good.

For instance, one group would have the dominance of a market, and would thereby be able to advertise better. Recently I have heard mentioned more and more among automobile dealers the fact that such and such a car does not sell well because it does not have as good a resale value as a car from a Big Three. I have noticed that the Big Three advertise heavily in that way.

Mr. GRIFFIN. So do the smaller ones, do they not?

The CHAIRMAN. Not to nearly the extent at the national level. In other words, the used-car market of certain brands is very inactive.

Mr. GRIFFIN. There is always the question of cause and effect, is there not, Senator?

The CHAIRMAN. Yes.

Mr. GRIFFIN. There is the question: Are the companies large because their products do have acceptance, both as new cars and used cars, or do their products have acceptance because the companies are large? I would rather lean to the former.

The CHAIRMAN. For instance, I can remember when Packard was one of the leading cars in the United States within the high-priced field, and it was what we called a real good automobile. Now they are struggling for existence, practically.

Mr. GRIFFIN. They found it, apparently—just to speak as an observer of the industry—found it very difficult to adapt themselves to the conditions of the thirties in which the high-priced car was not so popular.

The CHAIRMAN. Yes.

Mr. GRIFFIN. They never did quite recover, although I think they are making very good strides right now.

The CHAIRMAN. Yes; and, of course, they have always had the engineering skills.

Mr. GRIFFIN. Oh, yes.

The CHAIRMAN. It was well evidenced in World War II. They took the Rolls Royce-Merlin engine and produced a superior engine to what Rolls Royce themselves could build.

Mr. GRIFFIN. The major requirement of competition is not merely that a product shall be well-engineered, but that you should be giving the public what the public wants—

The CHAIRMAN. That is right.

Mr. GRIFFIN. As to price, quality, appearance, and so forth.

The CHAIRMAN. Now, what is your definition of big business? How big is big, in other words?

Mr. GRIFFIN. Well, I have not attempted any hard and fast definition.

The CHAIRMAN. But speaking as an economist, when would you say a company was definitely big business?

Mr. GRIFFIN. I do not think one can say one is definitely big, as an economist or as an individual.

One could ask how tall is a man when he is tall. I do not know.

There have been, for statistical purposes, some measures put down that a concern that employed, what was it, a hundred thousand men, or something like that, should be classified as big business.

The CHAIRMAN. I think we once laid down the rule that anybody employing less than 10,000 should be classified as little business, or was it 5,000, in an endeavor to help little business keep going, by seeing if we could get orders from them.

Mr. GRIFFIN. A very important category, of course, there is the middle-sized business and, of course, bigness, Senator, as you must recognize, obviously is relative to an industry.

You have spoken of Packard and Studebaker as being small business where, by most standards, they are pretty big business, outside that industry.

I think the important requirement, at least I am happy about an industry when I see a variety, large ones and small ones, they each have their advantages, and that continual competition between companies of different sizes is the test that the market applies as to whether a company is too big. If it is too big, then that is going to show up in lack of acceptance of its products by the consumers.

The only way a company gets big is by a lot of people buying its products, is it not?

The CHAIRMAN. Yes.

Mr. GRIFFIN. I should say the chief way in which it gets big.

The CHAIRMAN. Yes.

Mr. GRIFFIN. It can hardly get big if that does not happen.

The CHAIRMAN. Not if they do not have a market.

Mr. GRIFFIN. That is right.

The CHAIRMAN. No company can achieve bigness—

Mr. GRIFFIN. In other words, it is the customers that make a company.

The CHAIRMAN. No company can achieve it without customers.

Mr. GRIFFIN. That is right.

The CHAIRMAN. Now, giving your personal opinion, do you think American industry is unduly concentrated?

Mr. GRIFFIN. I do not; no, sir.

The CHAIRMAN. Is it unduly concentrated in certain fields, possibly? I mean, not generally throughout the United States, but in certain fields?

Mr. GRIFFIN. Well, certain fields naturally lead to greater concentration than do others, and I do not think one could generalize to say that certain fields are.

I think the play of the market, as Mr. Colbert said yesterday in the case of the automobile industry, that that field is still open, and that nobody has an entrenched position.

The CHAIRMAN. I am getting right back into the automobile industry as well as the airplane industry. Do you think we would be better off—and I am speaking as a nation—nationally better off—

Mr. GRIFFIN. Certainly.

The CHAIRMAN. If, shall we say, parts manufacturers for automobiles were competitive among themselves and sold to the fabricators of the finished product, or if the fabricators themselves owned their parts-manufacturing establishments?

Mr. GRIFFIN. I think that depends upon the effectiveness of one method of organization or another.

There are arguments for integration and there are arguments for nonintegration. Some of the automobile companies have definitely moved away from integration at times, and at other times toward it.

Now, what I would like to see, as an economist and looking at it from the point of view of public welfare, what I would like to see is a variety which is being constantly tested, one company trying integra-

tion and another company trying the policy of buying from everybody, and I would rely upon the verdict of the market.

The CHAIRMAN. What brings me to that question and makes me think of it more is this—you have probably had experience of the methods in England, operated by the British Board of Trade, in which they spread their manufacturing economy all over England in order to prevent great concentrations of people in crowded areas, which of itself brings on high living costs.

I remember one man who had a great deal to do with this during the war, who said to me that if he had his way, he would spread his company all over the United States of America; he would never have a plant employing more than 5,000 men in that plant, and that by so doing he thought that he could work an economy for his company, by getting lower and better living conditions for his employees, by spreading out—

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN. Then he could by the concentration of all of the plants in 4 or 5 areas, where there was a high congestion of population and, of necessity of course, a higher living cost.

Mr. GRIFFIN. Speaking as a business economist, I think there is much merit in his point of view.

The CHAIRMAN. In other words, he used this expression, "The time has come to make little ones out of big ones."

Mr. GRIFFIN. That is right.

The CHAIRMAN. He did not mean that they would not own their plants; he meant they would spread their plants.

Mr. GRIFFIN. Yes. Now, the illustration you used is one of the physical decentralization of plants and that has little to do, I think, with the question of breaking up or limiting the size of the organization.

In the case of Britain, for example, the policy was one of physical deconcentration of plants, not of deconcentration of ownership, and the question of deconcentration of plants, you see, is a question of business policy.

The CHAIRMAN. Yes. My mind goes to the steel industry. If the Pittsburgh area is crippled, our steel industry is destroyed.

Mr. GRIFFIN. Yes.

The CHAIRMAN. Also, you run into the counterdistinction of the chambers of commerce.

Mr. GRIFFIN. Yes.

The CHAIRMAN. We had a very amusing incident in this subcommittee recently, when the chamber of commerce of one city did not want anything said about the steel industry because it might get out that they were not the second biggest producer in that city, but the fifth, and they thought it was bad publicity for that community.

Mr. GRIFFIN. Yes. Don't you think this question of business policy, as to whether to spread our plants around or concentrate them in one place is being constantly considered by businessmen, and they are striving to find the most effective way of handling that?

And one of the things, certainly, is the question of labor supply and good living conditions for the workers and so on, which would be an argument in favor, perhaps, of the decentralization.

And there are arguments on the other side. All I can say is that, although I have spent a lifetime studying some of these questions of business policy, I do not think that I can generalize.

The only test I would be willing to accept is the test of the market. Let one concern try it one way and another concern try another.

The CHAIRMAN. Yes. My question was directed not at, shall we say, concentration of business power, but at a concentration of population.

Mr. GRIFFIN. Yes, sir.

The CHAIRMAN. And its impact upon the Nation as a whole.

Mr. GRIFFIN. Yes, sir.

The growth of industry on the west coast, for example, is a notable example of this decentralization of physical equipment and plants.

The CHAIRMAN. Mr. Burns, I wish you would go into this analysis worked out here and ask the questions.

Mr. BURNS. In your opening statement you say that your concept of competition is that "Competition is rivalry of the members of one economic group for the patronage of members of another economic group."

Under your definition, how do you determine what constitutes the economic group from the standpoint of effective competition?

Mr. GRIFFIN. Well, by an economic group, I meant the sellers of a product in rivalry with one another and I wanted to make the contrast between that concept and the concept of bargaining.

The bargaining relation is the relation between the seller and the buyer.

Under that, if one is looking at that, one would be tempted to say that the buyer, if he is just a simple, single individual facing a great chainstore would be utterly helpless because the bargaining powers are not equal.

But if you have a really competitive system, it is not necessary to have the bargaining powers equal.

The protection of the consumer in that case is that if he does not like the kind of service that he gets from one chainstore, he can go across the street to another chainstore.

So, the merit of competition, in my mind, is that it protects the weak.

Mr. BURNS. Do you believe that the rivalry which is an essential element of competition, under your definition, must necessarily take the form of price rivalry?

Mr. GRIFFIN. No. I had gone to some pains here to suggest that the rivalry can be just as well on one side of the equation as the other.

Or, to put it more precisely, Mr. Burns, I would rather say there is no essential difference between price competition, so-called, and any other competition, because "price" does not have any meaning, except as we consider what is offered on one side of the equation and what is asked on the other side of that equation, and you can make that equation more attractive to the consumer either by charging less or offering more, and I think that one is just as effective as the other.

Mr. BURNS. In your book, entitled "An Economic Approach to Antitrust Problems," published in 1951, you stated that serious inroads have been made upon the area of competition in this country.

Will you tell us where there has been any marked decline in competition in our economy in recent years?

Mr. GRIFFIN. Did I indicate in the context what the—well, I would say that antichainstore legislation, for example, was an inroad upon competition.

That is an effort to protect certain competitors as against other competitors, rather than to encourage the competitiveness of the system.

Mr. BURNS. Do you believe it is possible to have keen and effective competition in an industry such as the automobile industry, where there are only two or three large automobile manufacturers and a few small ones?

Mr. GRIFFIN. Yes, I certainly do. Not only is it possible, but I think it is present. There are a number of reasons for that, and one of them is the high importance of technological change.

It is very difficult for anyone to maintain an established position in an industry in which technological change and improvement is as rapid and as possible as it is in the automobile industry.

Another factor in that industry is the shifting tastes of consumers. I think Mr. Colbert emphasized that yesterday.

You never can tell when the consumer is going to come up and say to you, "Here is a product which your engineers think is a good product, but we don't want it," and then that company is going to lose volume of sales.

The CHAIRMAN. Suppose progress is stifled by the fact that you find one or two companies control the field, and new inventions which would be of tremendous advantage, are kept secret and not put on the market—isn't that an evidence of a dangerous monopoly?

Mr. GRIFFIN. Well, the condition you have assumed would be evidence, yes, but I don't think that it is—

The CHAIRMAN. Well, for instance, I will point out a specific case.

It so happens that at one time there were only three companies making motors for the coal industry. The coal producers were asking for more tons per kilowatt to be hauled by their motors, constantly.

One engineer I happened to know perfected a new motor that almost doubled the ton-mileage. Then the company retired him. He was getting along in years, but his mind was still energetic so he just kept right on and when he retired, he took his drafting board with him and got to working and developed another and newer motor that was still more effective.

He promptly went back to his old employers and told them of the new design and they said, "Pick out the staff you want and build a pilot model."

Well, he went down to the shop and started to work, and he saw something covered up with canvas in the back of the shop and there was his pilot motor, and then he went out and got the catalog and discovered it was not on the market.

So, he went back to the head of the company and said, "Why haven't you marketed this one?"

And the official said, "Well, we are still in a good competitive field without putting it on the market. Why tool up for a new machine?"

Mr. GRIFFIN. Well, I would say that in that industry, competition was at a rather low level.

The CHAIRMAN. Yes.

Mr. GRIFFIN. And that the desirable thing would be that there should be some new challengers coming in there who would make it impossible for him to take that complacent attitude of resting on his oars—and, speaking of the automobile industry, I don't think any

company can afford to rest on their oars, assuming that their percent of the market is going to continue.

The CHAIRMAN. All right. Go ahead, please, Mr. Burns.

Mr. BURNS. In the book by Stocking and Watkins entitled "Monopoly and Free Enterprise," at page 553, they suggested that the Sherman Act might be amended to establish a rebuttable presumption that concentration in an industry which exceeds a specific percentage of the market for any one product or related group of products is prejudicial to the public interest.

What is your view of this proposal as a remedy for undue concentration of economic power?

Mr. GRIFFIN. I would be entirely opposed to it. I am opposed to it for the reason I mentioned awhile ago.

While it is quite possible for Drs. Stocking and Watkins to look out upon an industry and say, "Well, I think there are too few companies here, and maybe you are too large," it is a very different thing from saying, "We are going to prevent you from being that large," because the first question is a static question. You can look and say, "Well, I don't like that too well," and I sympathize with that myself, but if you look at a company that has, say, 30 percent of the market and you say that the limit is going to be 33 percent of the market, then the president of that company, it seems to me, is bound to send word to all of his people and say, "Look, boys, you must not be so eager to reduce prices or put in new models, and so on"—like the new model you were speaking of, Mr. Chairman—"because if you do, you are going to get 33 percent of the market and then you are in violation of the law."

In other words, that concern would be prompted or almost forced to act as though it were a monopolist.

What we do not like about a monopolist is that he does not feel it necessary to pass on cost savings to the consumer. And here you are putting him in a position where he is almost forced to do that in order to avoid being charged with monopoly.

Certainly, it would be an ironical thing to pass a law which would require that they act like monopolists in order to avoid the charge of being monopolists.

The CHAIRMAN. Don't you think that we have probably contributed to the growth of bigness by Government policy—and I am not just specifying any one time, but after some time, for instance, the certificates of convenience, or rather certificates of necessity, are granted, enabling the company that had access to an abundance of capital to write off their plants over a 5-year period, thereby giving to them a tax advantage over the less fortunate competitors who could not get a certificate of necessity—don't you think that, in principle, is bad?

Mr. GRIFFIN. In principle, I would underline, yes. I do not like certificates of convenience and necessity unless they absolutely must be used.

I think that the tendency toward regulation of some industries, for example, the railroads of the country, may very well have a cumulative effect.

That is, they may lead on to regulation of more and more industries, for example, the bus industry and the trucking industry and so on,

and thus to remove industries that would normally have been competitive from the competitive sector.

Do I answer your question?

The CHAIRMAN. Yes; but I do think, and I have often thought, that possibly it might be better if we gave every new plant a tax writeoff.

Mr. GRIFFIN. Yes; it is quite conceivable——

The CHAIRMAN. Of course they might be overexpanded.

Mr. GRIFFIN. It is quite conceivable, Senator, that a government which started out to protect competition can be used as a means of thwarting competition.

The CHAIRMAN. Yes.

Mr. GRIFFIN. And that is the job of statesmanship, to distinguish between the two.

The CHAIRMAN. But I was thinking of that tax saving.

Mr. GRIFFIN. Yes.

The CHAIRMAN. Just a short time ago, an industrialist was talking to me and he said, "If a certificate of necessity that we have applied for is granted, we are going to place that plant in a certain position," and he said, "We are just not going to build that plant unless we get a certificate of necessity."

Mr. GRIFFIN. I think it is unfortunate when business decisions are made with a primary eye as to what the tax effect is going to be. I am no tax expert, but I would make that as a general observation.

The CHAIRMAN. Well, the explanation is, eventually we get the taxes back after the 5-year period.

Mr. GRIFFIN. Yes.

The CHAIRMAN. And I know one thing, on stream pollution, I have felt that a certificate of necessity should be granted to every plant.

Mr. GRIFFIN. Yes.

The CHAIRMAN. To remove chemical stream pollution.

Mr. GRIFFIN. That is right.

The CHAIRMAN. And allow the charges to be written off over a 5-year period under the statute.

I think that would be one of the greatest benefits we could confer on the whole people, to get rid of that chemical pollution in our streams.

Mr. GRIFFIN. Right.

The CHAIRMAN. And the only way to get it done is—well, if this factory up the river removes the pollution, it does not benefit, but the factory below does.

Mr. GRIFFIN. Yes; and that is why I say, as a matter of principle, I would agree on tax policy. There are exceptions in the case of public health and other areas.

The CHAIRMAN. Go right ahead, Mr. Burns.

Mr. BURNS. Do you know of any satisfactory percentage or formula basis for evaluating the degree of concentration in industry?

Mr. GRIFFIN. You mean, to measure the degree of concentration?

Mr. BURNS. Yes.

Mr. GRIFFIN. No, no very satisfactory one. I am familiar with a number that have been used and perhaps the people that use them are justified in taking the best ones they can get; but there is no satisfactory test of concentration.

Mr. BURNS. Do you believe that it is feasible to make a quantitative analysis of the degree of competition, or lack of competition, in a given industry?

Mr. GRIFFIN. I do not. I think that competition is rivalry. Rivalry is an intangible thing. We cannot weigh it; we cannot measure it by a yardstick. You may, by common observation, sense that you have it or you don't have it, but I don't think you can measure it quantitatively.

Mr. BURNS. Well, Doctor, opinions have been expressed that organizations of the size of General Motors Corp. and United States Steel Corp. should be reduced in size in order that we could maintain a truly competitive economy. Do you agree with that point of view?

Mr. GRIFFIN. No; I do not. Principally for the reason I mentioned back here, that you cannot limit size without limiting the possibility of growth, and the desire to grow on the part of American business, I think, is the most socially useful force that we have in this country.

So, I should hate to see any company be put in a position where it is told, "It would be dangerous for you to get any more concentration."

Mr. BURNS. Well, in a situation such as the Alcoa case, where there was a showing of planned corporate action aimed at monopoly and the employment of predatory methods in bringing it about——

Mr. GRIFFIN. I have read Judge Hand's decision and I don't think I would like to enter into an argument with the judge on that point. Let me put it this way, in general.

I think that if monopoly has actually been attained, then I think one can reasonably say that, "If the things which you did were things that would lead to monopoly, then you are in violation, whether you particularly desired monopoly or not, if you knew that the things that you were doing were going to lead that way."

On the other hand, if the company has not yet attained a monopoly and you are charging them with an effort to monopolize, or attempt to monopolize, as the term is, then I think there should be a showing that there is a deliberate desire and effort on the part of this company to attain that.

I am sorry, I am wandering a bit out of my field; there are a lot of technical and legal points, but that would be my point of view.

Mr. BURNS. Well, Judge Hand seemed to find that the fact that Alcoa constantly expanded its capacity in anticipation of demand, so that it was always ahead of the actual demand, was an effort to monopolize, because it precluded to a large extent newcomers from attempting to get into the market.

Now, do you agree with his decisions, from the economic standpoint?

Mr. GRIFFIN. That was a very difficult decision which Judge Hand had to make. He had to face the fact that there was a monopoly.

The CHAIRMAN. There was an unusual monopoly at that time——

Mr. GRIFFIN. Well, at least, to accept his definition of market, which was for virgin ingot aluminum.

The CHAIRMAN. Yes.

Mr. GRIFFIN. There is some debate on that, and some people think it should have included in the market, reclaimed aluminum as well, in which case Alcoa would not have had the monopoly.

But, being faced with that fact, then it seems to me the test can properly be somewhat different than when a company is merely charged with striving for a monopoly.

The CHAIRMAN. But I want to ask you if you don't remember that prior to that decision, the price of aluminum was pretty high in this country. As a matter of fact, you can get about four times as much aluminum now as you could at that time, despite the present high price of aluminum.

Mr. GRIFFIN. Now, I do not have the figures at my fingertips, but it is my impression that the price of aluminum had also gone down under the control of the Aluminum Co., that there had been a downward trend in prices.

The CHAIRMAN. I don't remember. Go ahead, Mr. Burns.

Mr. BURNS. What are your views as to the overlapping jurisdiction in the enforcement of antitrust statutes between the Department of Justice and the Federal Trade Commission?

Mr. GRIFFIN. Again, it is a technical question. I don't pose as an expert on it, but I would think that there is no objection to that overlapping.

Mr. BURNS. Well, do you believe that the original theory upon which the Federal Trade Commission was organized, that there would be a body of experts, would indicate that there might be realinement of authority, that it would pass in the first instance on economic problems which were not clearly defined in the statute?

Mr. GRIFFIN. As to some of them, probably, the experts in the service of the Federal Trade Commission might be desirable or essential, but I think that the courts are quite competent also to analyze the economic effects, particularly violations under the Sherman Act.

Mr. BURNS. Do you consider that there is any basic fundamental conflict between the philosophy of the Sherman Act and that of the Robinson-Patman Act?

Mr. GRIFFIN. The Supreme Court has suggested that there was, and I am inclined to agree with the Supreme Court.

Mr. BURNS. Now, were you a member of the Attorney General's National Committee To Study the Antitrust Laws?

Mr. GRIFFIN. Yes, sir.

Mr. BURNS. Do you believe that the recommendations of the majority report would weaken or strengthen the antitrust laws in any respect?

Mr. GRIFFIN. Unequivocably, I can say that I think they would strengthen the antitrust laws, or I never would have subscribed to the report. I cannot say that I would have written all parts of the report exactly as it was written, but in general I think that was the case, and certainly the principle of strengthening the Sherman Act was accepted, I should say, by every member of that 60-man committee.

The CHAIRMAN. Are you through?

Mr. BURNS. Yes.

The CHAIRMAN. All right, we will recess, then, until 2 o'clock this afternoon.

Thank you very much for coming.

Mr. GRIFFIN. Thank you for your attention.

(Whereupon, at 12:10 p. m., the subcommittee recessed, to reconvene at 2 p. m., of the same day.)

AFTERNOON SESSION

(Also present: Earl W. Kintner, General Counsel, Federal Trade Commission.)

The CHAIRMAN. The committee will come to order. I wish to make a statement off the record.)

(Discussion off the record.)

The CHAIRMAN. Let us proceed.

Professor Markham, you come from Princeton?

Mr. MARKHAM. That is correct, Senator.

The CHAIRMAN. Identify yourself in the record, and if you want to, you can put your statement in and comment on it, or we will ask you questions, whichever you wish.

STATEMENT OF JESSE W. MARKHAM, ASSOCIATE PROFESSOR OF ECONOMICS, PRINCETON UNIVERSITY

Mr. MARKHAM. Well, suppose I identify myself and just submit the statement for the record.

The CHAIRMAN. I am very sorry to do it this way. I would much rather have quite a lengthy conversation with you, and also with the gentleman from California, but due to this 1-hour delay and the limited time schedule we have, I am afraid we must do it this way.

Mr. MARKHAM. Mr. Chairman, I am Jesse W. Markham, associate professor of economics at Princeton University.

I was educated at the University of Richmond, Johns Hopkins, and Harvard University.

I served in the United States Navy as an antiaircraft gunnery officer on the U. S. S. *Augusta* during the war; and over the past 7 years I have taught economics at Vanderbilt University, served as economic consultant to the Tennessee Valley Authority, served for 1 year as Acting Director of the Federal Trade Commission's Bureau of Economics, and am currently serving as an economic consultant to the Federal Trade Commission.

Most of my teaching, consulting, and publications have been concerned with public policy toward business. My publications include *Competition in the Rayon Industry*, a book published in 1952 by the Harvard University Press; a workbook in introductory economics, coauthored with Professor Fels, of Vanderbilt, and published in 1953 by Harcourt, Brace & Co., and articles in the American Economic Review, the Southern Economic Journal, the Harvard Business Review, the Journal of Public Law, Land Economics, Trade Practice Bulletin, the Proceedings of the American Bar Association: Section on Antitrust, and other trade and professional journals.

These books and articles deal principally with such public-policy problems as oligopoly, a word that has been used rather frequently in these hearings—

The CHAIRMAN. In the most recent months, however.

Mr. MARKHAM. Price leadership, competitive standards, and antitrust administration.

I am currently preparing for the Vanderbilt University Press a book-length manuscript entitled "The Phosphate Fertilizer Industry; A Case Study in Market Imperfections and Public Policy."

My direct testimony appears in the next six pages which, I think, we may as well put into the record as it is, Senator, if that is all right with you.

The CHAIRMAN. You have had considerable experience at TVA?

Mr. MARKHAM. Considerable.

The CHAIRMAN. In the economics field and the question of competition and other things in the South?

Mr. MARKHAM. Yes.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. We will place your statement in the record at this point.

(The prepared statement of Mr. Markham is as follows:)

STATEMENT OF JESSE W. MARKHAM

The views of any individual holds about antitrust law administration have very likely been shaped by his social values, his political activities, and his knowledge of law and the economic process. Since my political activities have been exceedingly limited, my own views on the matter have been shaped by my social values and my knowledge of economics and the law, the latter of which is also limited. While these views are not at variance from many of those who have testified here, this committee has a right to know what some of them are.

I am neither for nor against big business or small business per se. I would be opposed to the imposition of a legal limit on the size of individual firms; I am very much opposed to certain legislation having the ostensible purpose of protecting small business but which clearly circumvents the competitive process. Specifically I am opposed to the Miller-Tydings Act, the McGuire amendment to the Federal Trade Commission Act, and to high and rigid agricultural price supports. On the other hand, I believe that the growth of big business through the absorption of other business units should be checked by vigorous antitrust law enforcement, and I am not opposed to dissolution suits against large corporations whose size far exceeds that consistent with the economies of modern research, production, and distribution techniques. My opposition to such mergers and to such large firms possessing power over the market stems from the same source as my opposition to so-called small business protective legislation: They both impair competition and interfere with the dynamics of economic adjustment whereby our resources are allocated to best serve our wants.

These views of broad principle will undoubtedly parallel those of many who testify here. However, serious differences of opinion are likely to arise among us on how the law should cope with mergers and bigness. Already there is discernible in antitrust literature two distinct schools of thought, one of which identifies itself with the per se approach and the other with the so-called rule of reason.

As I understand them, proponents of the per se approach would employ section 2 of the Sherman Act and section 7 of the Clayton Act in the same way the courts have construed price fixing under section 1 of the Sherman Act. Here the courts have not raised the question of the reasonableness of the price fixed by sellers, or of the effect of the price so fixed on competition. With few exceptions since the Addyston Pipe case (1898) the courts have reasoned, justifiably, I believe, that price fixing is clearly presumed to injure competition and restrain trade; hence the Government needs only to establish the fact that prices were fixed.

As an economist I subscribe to this interpretation of section 1. I do so because to my knowledge no economist has yet constructed a valid theory to show that price fixing could possibly increase competition, or to show that price fixing is likely to leave competition unaffected. There is, therefore, every reason to ascribe to all price fixing agreements one common attribute—they all presumably circumvent competition and they all violate section 1.

But proponents of the per se approach have not made it clear to me how this line of reasoning can be carried over into the administration of section 2 of the Sherman Act and section 7 of the Clayton Act, as they are presently framed, or how these laws should be amended to accommodate per se litigation of mergers

and bigness. They have made perfectly clear what they are against. They are against monopoly. They generally are against the employment of standards of "workable competition" in antitrust policy, and they sometimes suggest that they are against big business. They have not yet made clear what they are for. This negative position is of no positive help to antitrust thought and policy. It leaves completely unanswered such questions as how big is too big. What standards for judging the presence or absence of competition are to replace the admittedly imperfect standards of "workable competition"? How does the per se approach deal with the firm which introduces a new commodity and accordingly by definition has a momentary monopoly? What restrictions are to be placed upon the sale of the stock or assets of a financially foundering firm? What percent of a market can be merged before the law is violated—5 percent; 10 percent; 30 percent?

As has already been mentioned in these hearings, I was Director of the Federal Trade Commission's Bureau of Economics when its recent Report on Corporate Mergers and Acquisitions was initiated, and stayed on as consultant until the report was finished. In that report are recorded 2,135 acquisitions and partial acquisitions for the period January 1, 1951, to July 31, 1954. While I do not pretend to know all the facts underlying most of these acquisitions, and I certainly do not speak for the Commission or its staff on this point, it is clear to me that many of them simply reflected competition in the market for assets while others very likely tended to injure competition. But these two consequences cannot be identified by employing absolute standards of size. The merger of two men's shoestores in a small town containing only two men's shoestores may inflict greater competitive injury than the Kaiser-Willys automobile merger which would be thousands of times larger.

Similarly, those subscribing to the "rule of reason" approach have left some vital questions unanswered. Some who have offered it as a policy guide have not made it clear whether they mean the historical rule of reason enunciated in the old Standard Oil decision of 1911 or whether they have something new in mind. If they have in mind the historical rule—namely, that monopoly power is to be judged as good or bad, according to how reasonably the monopolist exercises it, I do not subscribe to it. The recently published Report of the Attorney General's National Committee To Study the Antitrust Laws contained this statement (at p. 318):

"* * * The existence of monopoly power, lodged in private hands which are free to pursue their own advantage, is generally condemned by economists, aside from the question whether such power is used 'reasonably' or 'progressively.' It is an unsafe power to lodge in private hands, making the monopolist a judge in his own case."

If this is a negative statement of what is currently meant by the rule of reason, I do subscribe to it. But it has been stated more positively with respect to mergers in the Pillsbury remand, where the Commission directed the hearing examiner to consider the relevant market facts, but at the same time reminded him that it was unnecessarily to fill the record with every conceivable fact that may in some way be relevant. What the rule of reason has to say about bigness or oligopoly as such, I do not know.

I doubt that anything can be accomplished by pursuing further the strengths and weaknesses of either of these two policy guides that have emerged from the recent writings on the monopoly question. However, a brief discussion of each has helped identify my own position on the subject of mergers, the subject I was called here to discuss. I find in the present law a sufficiently effective instrument to proceed against those mergers that really count. In fact, section 7 of the Clayton Act empowers antitrust agencies to proceed against mergers that may tend to injure competition substantially—which means that the law can prohibit mergers when there is a reasonable probability of competitive injury. I don't think we need a stronger law. I do think that Congress should give some serious consideration to the question of how much in the way of staff it takes to effectively administer the law. Mergers comprise a problem in public policy for which there are no easy or cheap answers. The only way I know of fairly dealing with the problem in a society dedicated to liberty under law is to assemble all the facts we can get in each case and decide on a basis of the resulting evidence whether to the reasonable mind it constitutes a probably competitive injury. This is consistent with what has been called the rule of reason approach, which is to be distinguished from the old rule of reason.

On the matter of bigness as such I have less to say, but I agree with Professor Kaysen, who testified here last Thursday that the big problem is oligopoly, not

single-firm monopoly, and that most oligopoly lies beyond the antitrust laws. Here I feel that antitrust agencies should try to prosecute whatever artificial barriers they can identify that perpetuate oligopoly, and that other Government policies should be considered which may promote the entry of new firms. In some cases dissolution of large multiplant firms may be necessary. In short, I do not feel that oligopoly can or should be outlawed, but I am certain that its noncompetitive effects can be greatly ameliorated within the context of existing antitrust statutes.

The CHAIRMAN. Let us get the next witness qualified and then we will start asking some questions.

STATEMENT OF J. FRED WESTON, ASSOCIATE PROFESSOR OF FINANCE, UNIVERSITY OF CALIFORNIA

Mr. WESTON. My name is J. Fred Weston. I am associate professor of finance at the University of California, Los Angeles.

I studied at the University of Chicago where I took my doctorate degree. I published a book in 1942 on the investment banking industry, a book in 1953 on the role of mergers in the growth of large firms.

The CHAIRMAN. Have you ever studied the interlock between life insurance company surpluses and investment banking?

Mr. WESTON. No, I have not.

The CHAIRMAN. It might be a very interesting study, may I say.

Mr. WESTON. I have been associate editor of the Journal of Finance since 1948; I have published articles in the American Economic Review, Quarterly Journal of Economics, the Journal of Finance, various other accounting and economic journals.

I am also at present a member of the Committee on Business Enterprise Research of the Social Science Research Council.

My testimony is in these pages.

The CHAIRMAN. We will insert your statement in the record at this point.

(The prepared statement of Mr. Weston follows:)

EFFECT OF MERGERS ON BUSINESS SIZE AND INDUSTRIAL STRUCTURE

(By J. Fred Weston)

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I. ECONOMIC ORGANIZATION AND POWER

A. Point of view and preference system

It has been said that impartiality consists in being aware of the nature of one's prejudices. It is indeed useful in approaching public policy problems to know the value system or preference system (prejudices) of the witness. My own views are as follows: (1) Private ownership of property; (2) economic decisions organized by relative prices and free markets, (3) decentralized decision making through the price system and through small economic units with wide diffusion of power; (4) considerable mobility of the population in the social, economic, and political spheres of life.

My reasons for holding these preferences are both political and economic in nature. They seek to achieve certain goals in the realm of political organization. Such arrangements would militate against the concentration of power. It would be extremely unlikely that any one small group could influence the action of the population as a whole. Recently the theory has been developed that large organizations of power may be justified on grounds that one large organization of power may be balanced by some other organization of power. This is akin to the theory of the balance of power as a policy for international relations. One cannot deny that this concept has been and is a basis for international statecraft. However, long history demonstrates that the balance of

power approach never attains more than a precarious armed truce. It may be a necessary and useful expedient but is no longer a solution to international problems. In a like manner, it has deficiencies as a theory of the organization of power domestically. American experience cannot be cited in support of the theory of countervailing power because such an arrangement has not in fact existed in the United States. Although we have seen the development of some blocs of power in this country, the distribution of power among business units has been so dispersed that the conditions for illustrating the operation of countervailing power can hardly be said to have existed.

Small units of private ownership of property; social, economic, and political mobility; and decentralized decision making in small units through the operation of the price system in free markets support some fundamental and important political goals. Such an economic organization would operate in the direction of preventing undesirable aggregations of power which might result in loss of freedom or tyrannical and arbitrary exercise of authority by individual groups over the population as a whole.

But in addition to the desirable political goals attained by a competitive price system, would desirable economic goals be attained as well? The relationship of economic organization to economic goals is treated in the subsequent discussion. At this point the goals are briefly stated: (1) an equitable distribution of income per person; (2) a progressive rise in real income per person; (3) reasonable and adequate stability in the real income per person and its distribution; and (4) an amount of technical progress vital for the self-preservation of the Nation.

B. Size and power

By the criterion of the objective of dispersal of power, big firms represent an undesirable form of economic organization in the economic system. On the other hand, the position of big firms must be evaluated in terms of reasonable and realistic alternatives. Judged by the economic goals stated above, big firms in the United States have an impressive record: (1) They have been associated with a high and growing income per capita; (2) they have been associated with a rate of technological progress which has been the envy and model of the world at large; (3) our experience in both the 1949 and 1954 recessions indicates that large firms can perform a most desirable role in conducting the kind of long-range planning which is conducive to economic stability.

C. Power in modern society

Our concepts of the nature and characteristics of power in modern social organization need revision. In a highly interdependent society it is difficult to determine which units have the most power. A relatively small segment may perform an extremely vital role in the economic organism. In an automobile one can readily recognize that it is meaningless to raise the question of which component amongst spark plugs, tires, battery, pistons, etc., is most important. Without any one of them, there is a considerable loss in effectiveness of the operation of the machine. Similarly, in modern society—a highly interdependent organization—it is difficult to state which group in actuality has the most power.

The great objection to concentration of power is that it may be arbitrarily exercised by a minority to frustrate the desires and will of the majority. But the danger of arbitrary exercise of power by business units today is slight indeed. I believe there is considerable cultural lag in our attitude toward the role of big business today. With institutional developments of the late 1920's and early 1930's, the era of finance capitalism has undergone a substantial transformation. Nevertheless, we observe a persistence of attacks on devils, witches, and evil giants. It is fashionable and always popular to complain about monopolies, trusts, and giants. Even a popular play has been written suggesting how an apparent monopoly of a certain baseball team on pennants and world series could be broken with the help of another evil, the Devil himself. However, characteristically by the time the play was produced, fundamental competitive processes had already done the job. Our attitudes toward power are doubtless unduly influenced by memories of feudal lords, absolute monarchs, Fascist dictatorships, and Communist commisars. But these examples are hardly applicable to the pattern of conditions in the United States.

The constraints on large corporations are numerous and powerful. Organized labor and agriculture, big government and free consumers are the ultimate arbiters of corporate action. Large corporate activity is highly formalized. In the typical large-business corporation it has been found efficient to decentralize many decisions. This is illustrative of dispersal of power and proliferation of links of interdependence. Broad economic processes themselves provide

a powerful discipline. Product innovation is a strong competitive factor. A dramatic illustration is the relative decline in demand for diesel locomotives which has caused General Motors Corp. to seek an outlet in the farm-implement field to counterbalance the decline in its sales in the electromotive area. Corporations do not have the power to stem the ineluctable march of economic obsolescence.

D. Policy toward bigness

However, despite the reasonable defensible record of big business by most criteria, aggregations of power are in the wrong direction in terms of the optimal power distribution. Therefore, a strong basis exists for favoring the influence of Government in the direction of smallness and large numbers of economic units. It is appropriate, therefore, in connection with the development of a policy toward mergers to examine the relationship between mergers and the growth of bigness among business corporations in the United States.

II. MERGERS AND BIGNESS

It has often been asserted that the development of big-business firms was not a natural development, but rather a consequence which came about due to merger activity by aggressive promoters. In part, the answer to questions raised about the influence of mergers on large size depends on methods of measurement, the details of which are too complex for discussion here. However, resolving these measurement questions in as fair a manner as possible, it appears that for firms in industries of highest concentration in 1935 and 1947, mergers overall accounted for about one-third of their growth. However, perhaps for as many as one-fifth of the firms studied, over 50 percent of their growth was accounted for by mergers.

If the terminal date of measurement is taken as 1940, the role of mergers appears to be even more significant. Perhaps as much as 50 percent of the growth in the aggregate of the 74 firms studied was due to mergers. Using 1940 as a terminal date for one-third of the firms 50 percent or more of the growth was due to mergers. The reason such different results are obtained by choosing 1940 as a terminal date rather than 1948 (which I used in my original study) is that early mergers at the turn of the century had a substantial influence on size, but the growth of the economy subsequent to 1900 was so great that the direct effects of mergers on total growth in absolute terms is small when measured over a broad span of time. This suggests the question of the role of mergers in development of industrial concentration.

III. MERGERS AND CONCENTRATION

A. Early mergers

It is clear that the merger movement at the turn of the century resulted in widespread concentration in the United States. At the end of the merger movement of 1898-1903, some 300 industrial combinations had been formed with 78 of these firms controlling one-half or more of the total production in their respective fields. In my study of the 22 industries with greatest concentration in 1935 and 1947, I found that virtually all of the concentration was accounted for by mergers which took place at the turn of the century, that subsequent internal growth of the leading firms in these industries accounted for virtually none of the concentration which existed in these 22 industries. Indeed, in a majority of these industries concentration after the turn of the century actually decreased rather than increased. However, mergers since approximately 1904 had little effect on concentration.

We have something of a paradox here. The mergers at the turn of the century accounted for a high degree of concentration. On the other hand, mergers at the turn of the century do not in the main account for bigness that exists in the American economy today, at least not directly. It may be argued, of course, that the concentration which existed at the turn of the century put these firms in a position to keep pace with the growth of the economy and hence attain their present bigness. This hypothesis has not been adequately tested. But there is no doubt that the merger movement at the turn of the century was a potent factor in the development of industrial concentration in the United States.

B. Significance of early mergers

However, a balanced appraisal of the significance of the merger movement at the turn of the century requires consideration of other factors as well. Dominant firms which emerged from the combination movement at the turn of the century

were not formed by bringing together thousands of atomistic firms. I tabulated the number of plants or firms acquired by the 305 large trusts formed at the turn of the century. I found that the average number of plants or firms acquired by these trusts was 16. Over half of the trusts—183—were formed from 8 or fewer plants or firms and one-third of the trusts were formed from 4 or fewer plants or firms. If a substantial number of these firms controlled one-half or more of the total production in their respective fields, and if they were formed from as few as 4 to 16 individual plant or firm components, it must follow that industrial operations must have been relatively concentrated by the time the great merger movement itself took place. In fact, when one reads the history of the mergers which took place in the large number of industries, he is impressed with the unstable economic warfare which had obtained prior to the mergers.

C. Alternatives to the early mergers

It is instructive to contemplate what the alternatives might have been if the merger movement at the turn of the century had not taken place. It is possible that the fierce struggles which were taking place between the existing large firms at that time might have resulted in the bankruptcy of the unsuccessful. At such bankruptcy proceedings the purchase of the decedent firm's assets would undoubtedly have been made by the existing firms in a very high percentage of cases. Hence, it is likely that the outcome of such a competitive struggle would have been a degree of concentration similar to that caused by the merger movement. This, of course, is only an hypothesis, but it appears to be a plausible one.

The most persuasive alternative to this hypothesis is one which is suggested by the economic history of industrial structures in a large number of foreign countries. In a survey of foreign experience we see the development of cartels as a device for dealing with fierce commercial rivalry. The merger movement which took place in the United States at the turn of the century did not take place in most foreign countries at this time. My preliminary investigation indicates that the merger movement in Great Britain took place during the years 1920 through 1939. The merger movement in Italy took place in 1927 through 1939. However, it appears that no merger movement of comparable magnitude took place in France, Germany, or in the Scandinavian countries. Why did mergers not take place in these countries last listed? It appears that the substitute for a merger arrangement in these countries was the development of cartel agreements to fix prices, output, and kinds of products produced. It is possible, therefore, that if the merger movement resulting in the development of oligopoly or fewness had not taken place, in the United States, cartels might instead have been developed.

This raises a host of possibilities. It may be asserted that formal cartels would have been easier to move against than spontaneous collusion (another form of cartel practice) achieved by oligopolists. This is possible. But foreign experience indicates that it is not easy to regulate complex cartels successfully. Oligopoly acting in concert may be more amenable to Government control. If the merger movement at the turn of the century had not taken place and American industry had been cartelized as a device for regulating rivalry between large firms, our situation might have been less desirable than it turned out to be.

It might be urged further that an industrial structure characterized by oligopoly is superior to one of cartels. Despite the possibilities and sometimes the actuality of spontaneous collusion or coordination among 2 or 3 large firms that account for a high percentage of industry sales, we nevertheless have substantial evidence of continuing strong competition between oligopolists. Oligopoly gives abundant evidence of continuous rivalry between firms and in impressive record of product improvements.

It is difficult to generalize in these areas. Frequently, it is argued that dynamic oligopoly is much superior to cartels, that cartels always protect inefficiency and the easy life. But the evidence is conflicting. The cartels of Germany appeared to have fostered the industrial research and progress which made German industry an effective competitor on the Continent and abroad. It would be interesting to investigate the conditions under which cartels are instruments of progress and the conditions under which they become instruments of protection.

The fact remains, however, that the merger movement at the turn of the century resulted in a great increase in concentration in the United States. This raises the question of whether fewness (concentration or oligopoly) is incompatible with competition.

IV. FEWNES AND COMPETITION

Given the existence of a high, but perhaps often exaggerated degree of oligopoly in the economy, the question we confront is whether fewness or oligopoly is incompatible with competition. To approach this question we must first define competition. Traditionally, competition has been defined in very formal and vigorous terms to include at least the following: (1) Large numbers of firms or bargaining units; (2) each unit is of such a small size it has little or no influence on the total market situation—this is the condition of atomistic-sized units; (3) the relationship among the units is impersonal—competition on the market place. Sometimes a further factor is set out as a requirement—that there be complete knowledge of all alternatives or at least the important alternatives available to the bargaining unit.

This traditional approach toward competition has been replaced by the new concept of workable competition or economic rivalry. In this approach a performance test is substituted for a structure test. It recognizes product rivalry in many dimensions and centers attention on innovations as an important competitive weapon.

Some measures of performance may be set out as tests or criteria for the existence of competition in an economic area. I will not refer to such matters as predatory practices or restrictive practices which are clearly proper objects of action by the antitrust authorities. Since a complete explanation for these factors would involve many pages inappropriate for presentation here, I shall simply list them with a few illustrative or explanatory comments.

(1) Record of product innovation and process innovation. To what extent have new products been invented? To what extent have products been improved? To what extent have cost reductions been achieved? None of these is an absolute test, but taken with some of the tests suggested below, they may provide a basis for an inference.

(2) The rate of growth of the firm and industry, taking the stage of the life cycle of the industry into account. The monopolist tends to become lethargic. His industry and the firms in it tend to grow less fast than the rest of the economy. However, one must take into account the life cycle of the industry. Again, qualitative judgments must be brought in.

(3) The yield basis on which the securities of the firm sell. It may be argued that a low yield will indicate a monopoly position because competitive pressures are not present. If a firm has a monopoly position, investors may reason that the earnings of such a firm may be capitalized at a lower rate than the earnings of a firm whose earnings may be eroded through competitive pressures. This is no completely dependable test either, because the earnings of a firm may be regarded as stable because of the highly efficient and long record of accomplishment of the management of the firm. A relatively dependable test of efficiency of operations is likely to be the relative movements of stock prices of individual firms. I am aware of the degree of irrationality, supply-and-demand factors, and broad money market conditions as influences on stock price movements. Nevertheless, it appears that a research study along these lines would be highly fruitful.

(4) Stability in the shares of market output or sales. Usually stability in shares of the market is taken as evidence of lack of competition. However, this is not likely to be conclusive evidence. Stability in market shares may result from a complex of competitive forces. When one considers that often the goals of the firm are set in terms of maintaining the firm's share of the market, one can readily see how stability in shares might obtain. If a firm loses 2 or 3 percentage points of market shares, it will intensify efforts to regain its position.

(5) Profit behavior may provide some clue to degree of competitive behavior. Profit rates which are consistently higher than those of other industries with comparable growth rates may be some index of lack of competitiveness in the industry. On the other hand it must be recognized that an industry in a rapid-growth stage must have relatively higher profit rates in order to attract the requisite resources for development. Another possibility in the use of profit data is to examine historical correlation relationships which ordinarily exhibit stability. Sudden distortions in these relationships may provide an index of the attainment of some noncompetitive position.

(6) Price movements and flexibility in prices, taking durability, direct cost to selling price relationships, and other product and market characteristics into account. In this connection investigation of price leadership patterns would be informative. Further, the extent to which price discrimination characteristics obtain in price and product policy would be relevant.

(7) Entry and exit rates, taking the nature of barriers to entry and exit into account. Are the barriers to entry natural or artificial?

(8) The time pattern and the amount of excess capacity in an industry in relation to Government action. Excess capacity is sometimes taken as a measure of monopoly or lack of competitive elements. But excess capacity may also result from fierce efforts to obtain shares of the market which are not realized.

None of these eight indexes of competition is conclusive by itself. None can be applied in a mechanical manner or by the use of formulas. No single measure alone is adequate. However, if all evidence points in a given direction, used as a group, they might provide a basis for a presumptive conclusion.

In any event, when the multidimensional aspects of the definition of competition are taken into consideration, it is not clear that industrial concentration and fewness alone will result in a decline of competition. It is entirely conceivable that, in an oligopolistic-market structure, vigorous competition may prevail and flourish.

This suggests turning attention to central questions of public policy toward mergers. Two questions are raised: (1) Should the results of past mergers be reversed by the dissolution of large firms? (2) What should be the criteria for judging current and future mergers?

VI. PUBLIC POLICY TOWARD PAST MERGERS

Should the Government attempt to unscramble the industrial omelet at this time by requiring dissolution of large firms? Despite the difficulty of applying criteria in this area and the uncertainty of the consequences, I would take the following position toward dissolution:

I would counsel against a doctrinaire program of dissolution of large firms. My reasons for this position are as follows: There is abundant evidence of interproduct competition and competition in product innovation. These reduce the danger of collusion among the few. By the performance test, big business shows up well. The record of technological progress and flexibility in response to major national defense crises are strong evidence of a good record on the part of big business.

Two arguments in this connection, however, might well be considered. During the thirties the big depression was blamed on bigness and concentration. However, with the relative postwar stability in business, this charge has subsided somewhat. It is interesting to raise the question of what particular crime is charged now. Real income, growth, etc., are all favorable indicators.

A second argument made is that the existence of multiplant and multiproduct operations of large and concentrated firms raises serious questions of the soundness of the economic basis for their organization. It is said that there is no reason why these firms should not be broken up into the units of product or units of plant which compose them. While evidence on these matters is not conclusive and more information on factual matters is needed, four important reasons suggest why multiplant and multiproduct operations may be defensible and indeed confer desirable benefits on the American economy:

(1) Especially crucial are research activities. The large firm can finance large-scale research which may benefit a large number of its diverse operations, joined by some common chemical or metallurgical processes. But it is sometimes said, "Suppose a large firm were broken into 10 units. Could not the 10 units each contract to hire research from a research organization?"

It is true that research in the large firm is often conducted by executives who are hired on a salary basis. In addition, independent research firms sell their services on a fee basis. However, the persuasive hypothesis exists that there are some kinds of research that are the unique contribution of the large firm. Let us illustrate this: Suppose we have a large firm which spends \$50 million a year on research. Suppose it were broken into 10 firms, each of which could allocate \$5 million a year for research. If each of these 10 firms hired the services of a research organization, each would attempt to buy \$5 million worth of research which would give it a competitive advantage over the 9 rivals and any other firms which might also exist in the industry. It seems reasonable that there are certain kinds of research which the \$5 million per year could not effectively purchase, but which could be achieved by the \$50 million budget. It seems possible that these 10 independent firms would seek to organize their research operations in such a way that, after a relatively short period of time, they would be buying research in a manner which would approximate the operation of the large firm from which they had been split. Modern large-scale

business organizations represent the combination of centralized and decentralized decisions. Those decisions are centralized which appear to be most efficiently handled in a central organization. Research is one of the important ones. Although the amounts of money spent on research are relatively small, their significance is tremendously great for the progress of the firm and for the progress and survival of the economy as well.

(2) Related to indivisibility of research expenditures is the value of the highly able executive. A highly able executive will have inestimable value for the individual firm. This suggests that the very competent individual is another one of the indivisible factors which makes for an advantage of large-scale operations. This is not to deny that many decisions are decentralized and that for many matters delegation of authority to committees and subordinates takes place. On the other hand, some of the centralized decisions and the catalytic process of a great mind on policy matters are of pervasive and powerful influence on the growth pattern and prospects of an organization.

(3) Often there are operating and distributing economies of various kinds as well. For example, increased possibilities of automation were discussed in recent mergers in the automobile industry.

(4) Still another important factor is the risk reduction of multiplant operations which is heightened by the tax structure. If a new firm attempts an innovation or a new product line and fails, the loss is complete. On the other hand, if an established firm attempts a change or an innovation, any loss can be offset against its assured income from other sources. The higher the tax rate, the higher the proportion that reductions in taxes bear the costs of innovation. This is another reason why large-product and multiplant firms confer economic advantages, not only on the firm itself but on the economy as a whole in terms of the potential rate of economic progress.

These four factors provide a plausible rationale for the existence and effective operation of large firms. They support the case again dissolution of existing multiproduct and multiplant firms.

A final argument in connection with the position of the large firm may be briefly considered. It is sometimes said that the coexistence of large firms and small firms in a given industry demonstrates that the small firms are as efficient as the large firms, and hence, there would be no losses from breaking the large firms into smaller firms. There are many things that can be said about this argument, but it appears to pose a dilemma with reference to its public policy implications. Small firms are as efficient as large firms or they are not. If the small firms are not as efficient as the large firms, this provides justification for the large firms since they can provide more and better products at lower prices. If, on the other hand, it is argued that small firms are as efficient as large firms, there is no necessity for breaking up large firms because the small firms can be relied upon to apply competitive pressures which will prevent the large firms from exploiting their markets.

VI. POLICY TOWARD FUTURE MERGERS

If the case for dissolution of existing large firms is weak, what about public policy toward current and future mergers? Interest in this question is highlighted by two factors: In 1950 the Federal Trade Commission was provided with power which closed a loophole in their authority over mergers. This coincided with heightened merger activity which had been taking place since 1940. The interesting question, therefore, is how the Federal Trade Commission shall exercise this power.

A. Recent mergers and concentration

The available factual evidence on the merger movement which began in 1940 indicates that no appreciable effects on overall concentration have resulted. The number of industries in which concentration may have increased in an undesirable fashion are few indeed. Despite the large numbers of mergers, there is no clear case that they have had undesirable economic consequences.

On the contrary, much evidence indicates desirable economic achievements from these mergers. The industries which have been most active in mergers in the 1948-54 period have been: Nonelectrical machinery, food and kindred products, chemicals, fabricated metals, and transportation equipment. In these industries, the primary motive for merging has been diversification of products, the acquisition of able management or other business advantages.

Next in the list is textiles. The mergers in the textile industry may be characterized as mergers for revival. The large and well-known mergers in the

automobile industries were for survival. The dramatic mergers in the banking industry have been for the purpose of strengthening individual banks to compete more effectively with other banks in their local areas and also to enable the banks to render more effective interinstitutional competition.

B. General reason for mergers

The review of the reasons for the recent mergers suggests an analysis of the general factors which lead firms to engage in mergers. They may be briefly listed as follows:

- (1) The desire to achieve production economies of large-scale and multi-unit operations;
- (2) Possibility of achieving distribution and advertising economies;
- (3) Financial advantages of large size;
- (4) Strategic control of patents;
- (5) Acquisition of financial resources;
- (6) Possibility of obtaining able managers and executives;
- (7) Tax advantages;
- (8) Gains from the sale of securities;
- (9) Gains of promoters; and
- (10) The desire to limit competition.

Many of the factors listed are goals that can likewise be achieved through internal growth as well as external growth through mergers. The distinctive reasons why mergers may be utilized instead of internal growth may likewise be indicated.

C. Advantages of mergers in comparison with internal growth

(1) New facilities may be acquired more quickly through mergers. New products, new processes, new plants, and new productive organizations can be established with little delay through merger as compared to internal growth.

(2) The desired facilities may be obtained more cheaply by purchasing the ownership stock of an existing company. For many reasons the securities of a company may be selling below replacement costs of the firm's assets. Arrangements may be made whereby the stock of such a company may be acquired without causing a precipitous rise in price. Similarly the services of desired personnel may be obtained by buying outright the company employing them. The inducement of higher compensation might have been either unduly expensive or useless. In such circumstances, a merger may be the only practicable method of obtaining the kind of superior management and talent the firm requires.

(3) The desired new product, new process, or new organization may be developed with less uncertainty of investment loss. The purchased facility may have already demonstrated its revenue-yielding capacity. By obtaining new products and new processes through merger the company may be able to obtain qualities which have been established as revenue-producing sources.

(4) Sometimes it is possible to finance an acquisition when it would not be possible to finance internal growth. A large steel plant, for example, involves a tremendous investment. Steel capacity may be acquired through merger through an exchange of stock more quickly and, under certain price-cut conditions, more cheaply than could be obtained by the facilities themselves. Sellers may be more willing to accept the stock of the purchaser in payment for the facilities sold than could investors in a public distribution.

(5) The development of new products and market areas may be accomplished through mergers, thereby avoiding the necessity of combating difficult competition in the early stages of development.

(6) Mergers may represent the most effective method of achieving stability and progress at certain stages of industrial development. It may represent the most efficient method of combining facilities and disposing of obsolete and inefficient properties. This was probably true at some stages in the development of industries such as the following: Railroad transport, air transport, banking, agricultural implements, and steel.

(7) It must be fully recognized also that market control may be obtained more rapidly and with less risk through mergers than by internal expansion. The merger of two large firms may result in market dominance by the combined firms. Coordinated price and output policies that might be illegal by separate firms would be entirely respectable for a single, consolidated enterprise.

D. Special factors stimulating post World War II mergers

Special influences explain the heightened merger activity which has taken place in the post World War II period.

In the immediate postwar period three factors were of prime importance:

(1) The postwar shortages gave an incentive to expansion through mergers in that acquiring firms could obtain capacity more quickly through buying individual firms than by building new plants or other facilities. This was undoubtedly a factor in the mergers which took place in the whisky distilling industries.

(2) Stock market prices were relatively depressed after 1946; market values of common stocks were low in relation to earnings levels. A basis was provided for developing favorable merger terms. A company had a value to the acquirer greater than the value placed on it by the existing stockholders. Hence the likelihood of arriving at favorable merger terms was greatly enhanced.

(3) Without question, the high level of taxation was a factor in the postwar period. A study by a Harvard group indicated that taxes were an important factor in the sale of about one-tenth of the total number of selling companies and of one-fourth of selling companies with total assets of over \$1 million. Taxes appear to have been a major reason for the sale of about one-fourth of the assets of all companies sold and one one-third of the total assets of all acquired companies with assets over \$1 million. They assert that tax considerations were of little consequence in the motives of the purchasers. If anything, I believe that these estimates underestimate the influence of tax considerations. One of the great advantages to the purchaser, in addition to the possibility of acquiring a tax loss, is that the relatively high levels of taxes provide a strong inducement to achieve diversification through the merger route. Any loss from the acquisition can be offset against the assured income from the other operations of the company.

E. Criteria for judging mergers

Granted that valid reasons exist for mergers, the problem still remains of distinguishing between good and bad mergers. Any rule or formula is certain to be arbitrary. Only broad criteria can be set forth. Clearly, if the largest firms in an industry merge, strong grounds would exist for preventing the merger on antimonopoly considerations. If, for example, a merger were proposed between General Motors and Ford Co., it would clearly violate the public interest, or a merger between the General Electric Co. and Westinghouse would appear to destroy valuable competitive forces. On the other hand, if in an area in which many other units exist a merger took place between two small units, it is doubtful whether antimonopoly forces would thereby have been engendered.

As a general rule, it may be stated that the criterion on desirable market structure is not per se violated if the largest firm in the industry is not involved in the merger and if, after the merger, the resulting firm is not the largest firm in the industry. Even this, however, is not an absolute rule and for a final decision many detailed effects must be looked at. One must agree with the May 1955 report of the Federal Trade Commission, entitled "Report on Corporate Mergers and Acquisitions," that it is not possible to generalize on whether individual mergers are desirable or undesirable. Each individual merger must be assessed on its merits to determine the effects on competition and possible tendencies toward monopoly.

It is not certain that if two firms merge, *prima facie*, competition has been reduced. Under ancient concepts of competition this might be true. Under modern concepts of workable competition, competition may, in fact, be increased through changes in industrial organization and processes which have been developed through mergers.

In rendering judgments on individual mergers, one must make a choice. On the one hand, mergers which result in appreciable increases in concentration, increase the dangers of market controls or collusion. On the other hand, a doctrinaire prohibition of mergers would involve equally important dangers. One is the loss of significant economies that might be achieved through the development of new products, improved processes, and lowered prices. Another is retardation of advances in technology which are essential for the very survival of the Nation.

Any conclusion that the above observations seem to fail to present a positive program is misleading. In terms of the relationships involved, a positive program is explicit in the above formulations. But a program for a desirable competitive structure in the United States involves factors broader than merger

activity alone. In this presentation the elements of the program are stated categorically. For a full defense more detail would be required.

VII. THE BROADER RESPONSIBILITIES OF GOVERNMENT POLICY

A. *Restrictionist actions of government*

The responsibility of government for encouraging a competitive industrial structure is much wider than antitrust and antimonopoly actions. Antitrust actions are but as a small ripple in a great ocean tide of fundamental economic forces compared with the effects of Government actions in other spheres. A list of the areas in which present Government policy is restrictionist and works in anticompetitive directions may be briefly listed.

(1) A further shift in emphasis from corporation taxes to personal taxes would increase the ability of small firms to grow. Under a system of progressive personal income taxation, the owners of small firms who typically are in middle- and low-income brackets would be penalized less from taxation than they are at the present by corporation taxes, which, when a firm's income is above \$50,000, treats the small firm the same as a large firm. If the firm has an income of \$75,000, the rate of corporate taxes is the same as that for a firm with an income of \$500 million.

(2) The existence of tax-exempt securities attract funds which might otherwise flow into venture or equity capital sources. This reduces the willingness of holders of funds who might otherwise invest in risky outlets, to take refuge in tax-exempt securities.

(3) Aside from other limitations of high tariffs, given the creditor position of the United States, tariffs have a further undesirable effect in that they limit competitive pressures from abroad.

(4) Limitations on price competition through fair-trade laws have been established by governmental authorities and these are anticompetitive in their consequences.

(5) Governmental authorities, Federal and States, sponsor restrictions on output in agriculture and petroleum as well as other commodities. These restrictions on output have anticompetitive consequences. Agricultural production and marketing cooperatives are sponsored and protected by Government authority. While they may have defensible purposes and functions from some standpoints, they are anticompetitive in their consequences.

B. *A positive program for Government*

Certain Government actions may be listed which would be more helpful and much more effective in promoting the aims of competitive business behavior as well as a favorable climate for economic growth and stability than unduly stringent antitrust and antimerger actions. These again will be briefly stated. A full development of any of them would require much more discussion than the present situation makes appropriate.

(1) The Government should reverse their support of the restrictive practices cited above. Especially important in this connection are two devices: (a) Where there is reasonable doubt about the competitive structure and behavior of an individual industry, an effective device testing whether the industry is competitive and efficient would be to lower tariffs on the products of that industry. This would subject the industry to competitive pressures from abroad which would apply to it the test of ability to meet competition in a world market. (b) Similarly, if it is felt that the restrictionist policies are being conducted by an individual firm or firms in an industry, it might be appropriate in such circumstances to withdraw the protection afforded such firms by patent privileges. This involves some legal complications which have apparently been worked out in foreign countries where such a program has been followed.

(2) In addition to a reversal of active anticompetitive programs followed by the Government itself, another area of significance is continued financing for small business so that financial barriers to entry will be minimized. The excellent program of the Department of Commerce by the operation of its field-service organizations in providing information to small-business firms deserves commendation in this regard.

(3) More effective labor-market information should be provided to make it easier for employment shifts to be made. In this connection, subsidies should be provided to workers, farmers, and businessmen in return for shifting out of occupations and businesses which economic progress obsoletes.

(4) More information should be provided to consumers in order to render less effective advertising which is not informative. Informed buyers are a powerful stimulus to competitive behavior.

(5) The support of education at all levels, and particularly higher liberal education for adults, as well as technical education, so that the skill, know-how, and judging for independent business operations will be developed. This will also provide a basis for experimentation, innovation, and technical progress which is so crucial for our welfare in the developing world.

(6) Of considerable significance for competitive practices is the continuation of policies to provide a stable economic environment to reduce the duration and severity of economic fluctuations. Restrictive practices which often develop in sick industries and during recessions would thereby be discouraged. Furthermore, this facilitates long-range planning by business firms and consumers which in itself is stabilizing in effect and operates to reduce restrictive predatory behavior.

VIII. CONCLUSIONS

The foregoing statement of the elements of broader Government policy should not be taken as an indication that it is my opinion that antitrust action is unimportant. Quite contrary, antitrust and antimonopoly action conducted by the Department of Justice and the Federal Trade Commission are of great significance. Indeed the continued attention to antitrust actions by Government officials in their official capacity and by committees of the Senate and House of Representatives have had salutary effects. These efforts have preserved an industrial structure in the United States which rates high by most criteria. (a) In comparison with industrial structures in foreign countries it appears that concentration and anticompetitive behavior are much lower in the United States. (b) When one observes trends in industrial concentration in the United States since 1900, the movements of the indexes is reassuring. (c) Performance measured by levels and trends of real income per capita, distribution of income, meeting national defense needs and by the criterion of economic progress rates high.

This pattern should be continued. Government action should be broad and positive rather than negative, stimulating rather than restrictive. In these directions lie the path of continued progress.

The CHAIRMAN. I am going to ask Mr. Burns to ask the questions, please.

We have some questions based upon your testimony, which will tend to draw out the information we wish.

Mr. BURNS. I address this to Professor Markham.

You were closely associated with the merger study recently released by the Federal Trade Commission, and we would like your views concerning some of the problems posed in that.

Since the number of mergers from 1954, as shown by the Federal Trade Commission report, was three times that of 1949, and slightly less than the high for 1946-47, does it not appear that the antimerger amendment of 1950 has not noticeably affected the merger movement?

Mr. MARKHAM. Well, no, I would not say that this in and of itself is evidence that the antimerger amendment has not noticeably affected the merger movement.

There are quite a few mergers, of course, that would otherwise take place, that do not take place just because of the existence of that amended section 7.

It is very much like any other law. We can assume that many people stay under 50 miles an hour on a highway, I think, simply because there is a law that says if you exceed it, it is illegal.

Another comment I would like to make is that it is true that the number of mergers and acquisitions and partial acquisitions came very close to the peak that was reached in 1947, and I want to make it clear that I do not presume to know all of the economic facts underlying all of these mergers, acquisitions, and partial acquisitions, but it

is pretty evident to me there, here is a case where numbers are not too indicative, that there are many of these that are simple business transactions.

I think you can explain many of them in terms of what was going on in the economy generally, such as the Korean conflict, and whenever you get something that hits the economy with a great deal of force, you have a great deal of difference of opinion arising among owners and potential owners over the value of particular assets, and you would expect traffic in those assets to be pretty high during times of flourishing business and during times of uncertainty.

Moreover, I do not think we ought to ignore the fact that a reasonably large number of these mergers have been stopped in the beginning at the consultation level.

When I was with the Commission, quite frequently we would get felt out, "Do you think, on the basis of this very slim evidence, that this would constitute a case under section 7?"

And there were occasions when we would say, "Yes."

The one that was given the most publicity on this, of course, was the Youngstown-Bethlehem proposed merger, where they were told quite flatly, "If you merge, you will have a complaint issued against you."

The CHAIRMAN. Were they told that by the Federal Trade Commission?

Mr. MARKHAM. I will have to rely upon the General Counsel of the Federal Trade Commission here. My impression is that the Commission concurred on this; is that correct, on Youngstown-Bethlehem?

Mr. KINTNER. The primary review of that transaction was given by the Department of Justice.

The CHAIRMAN. We are getting into a field that is not exactly definite on the basis of the question. We talk about the amendment of 1950, I believe it was; is that not correct?

Mr. MARKHAM. That is correct.

The CHAIRMAN. Which forbade the acquisition of the physical assets.

You get into the question of the acquisition of physical assets. Is that not really an acquisition of what might more properly be called a merger? A merger, the common acceptance of the idea, is when two companies get together and mutually exchange stocks in a parent company; whereas when you get into that you actually buy out the plant; is that not correct?

Mr. MARKHAM. That is correct.

The CHAIRMAN. I would like to get that distinguished, because I think that act should better be determined as an acquisition, you see.

Mr. MARKHAM. Well, we use the term around the Commission—

The CHAIRMAN. Acquisition, prior to that time, was an acquisition of the actual corporate charter, the stock and everything else; whereas a merger usually was either an acquisition of a controlling interest or an exchange of stock which amounted to a merger of two industries; is that not right?

Mr. MARKHAM. That is the popular conception.

The CHAIRMAN. But when you get into the actual purchase of physical assets, that is a situation where it must be an acquisition. You just buy out their physical assets, and the corporation has nothing

further to do; it just dissolves, goes out of existence, and its physical assets become the property of the acquiring corporation; is that right?

Mr. MARKHAM. That is right.

The CHAIRMAN. I just wanted to get that clear for the record, because all too frequently in this record we get ourselves mixed up between the word "acquisition" which, of course, is a merger, and merger in its true type.

Mr. MARKHAM. Well, legally we have generally regarded a merger just to be the bringing together of two corporations or more, and they all operating henceforth under a single corporate charter.

Many of these that we have called acquisitions in this report were acquisitions of partial assets, warehouses, a particular product line, but in many cases 2 surviving corporations went on about their business, 1 of them just minus a line, 1 having added this line.

The CHAIRMAN. The reason I brought this question up is that we in the last year had a case in which Republic Steel was first alleged to have been acquiring Follansbee Steel. Upon detailed investigation it developed that they were merely acquiring the assets of Follansbee Steel; that the corporate charter was to remain in effect, and it was going to be "peddled," and I use the word rightly, by the acquirer to a company that had no rating on the stock exchange, which was going to adopt that new name or to sell some more stocks and bonds very beneficial to them and very beneficial to the original acquirer.

So I always like to keep that contradistinction in there because it is a distinction. If you buy out the XYZ company and the XYZ company ceases to exist as a corporation, it becomes a part of the ABC company, that is a lot different from where ABC company and XYZ company merge their interests in the interest of economy or anything else. That is a real and true merger.

Mr. MARKHAM. That is correct.

The CHAIRMAN. Isn't that a better economic differentiation?

I wanted to get that into the record, because I think it is very advantageous to have that kind of a definition in there.

Mr. MARKHAM. Well, I think that distinction needs to be made.

The CHAIRMAN. All right, please go ahead, Mr. Burns.

Mr. MARKHAM. I do not know, Mr. Burns; did I answer your first question?

Mr. BURNS. I have some other questions which I think will carry on with the first.

The report of the Federal Trade Commission indicated that two-thirds of the acquisitions during the 1948-54 period were by companies with assets over \$10 million..

Does that finding support the fear that has been expressed by some of growing concentration of power by the big corporations?

Mr. MARKHAM. No; I do not think so in and of itself.

What it does show, I think, quite clearly, Mr. Burns, is that more firms having assets over \$10 million were active during this period than during the previous period.

I would like to remind you that a \$10 million corporation is no longer regarded as a big corporation, that is, it is not what I believe people who have this fear of growing concentration have in mind when they speak of big companies, because there are many corporations today having assets over \$10 million.

Now, our statistics are not sufficiently well broken down to be able to tell how many of these, say, were over \$100 million, how many \$1 billion concerns made acquisitions, which would be an interesting question to ask, and one for which we need an answer, and these data can be refined some subsequent date, I hope, to find this out.

But we generally regard, I think, certainly as to people who fear growing concentration of power in the American economy, they have in mind corporations like Du Pont, General Motors, United States Steel, corporations which are way in excess of \$10 million in assets.

In fact, we regard \$10 million today to be pretty much a middle-sized company.

In view of the absence of any great publicity given to acquisitions or any public record of acquisitions made by these really large corporations that I have mentioned, my conclusion on the basis of very slim evidence would be that the middle-sized firms have been quite active during this merger wave.

The CHAIRMAN. However, is it not a fact that even a \$10 million steel company would have trouble building new blast furnaces?

Mr. MARKHAM. Yes. I am not so sure \$10 million will build a blast furnace.

The CHAIRMAN. I agree with you.

I had an experience one time, when I was trying, during the war, when we were short on steel and particularly short on scrap, I was trying to get the sponge-iron process introduced. It has worked in the past. I ran into a very long document written by a metallurgist condemning the sponge-iron process. It was presented to me by a representative of United States Steel.

He evidently had not read it thoroughly, because the fundamental principle involved in that manuscript was that sponge iron was not useful in the low-grade ores, of which my State has a great abundance, but his concluding paragraph was this:

The Japanese have been using the sponge-iron process to reduce the low-grade ores of Manchuria.

You must realize that the sponge-iron process is a process where you do not get pig, you get malleable and, of course, a sponge-iron plant is much cheaper to build than a blast furnace.

My thought was that we could expand more cheaply by building up the sponge-iron process to replace the very great shortage we had in scrap. The man who had written this article was honest in the last paragraph when he said that the Japanese were using the sponge-iron process in Manchuria to reduce the low-grade ores, although the whole sense of it was that the sponge-iron process would not work in the low-grade ores.

I sometimes think it was written for my own consumption because the great preponderance of low-grade ores which exist are in West Virginia and southeast Pennsylvania.

Mr. MARKHAM. Well, that process, if it ever flourishes, Senator, may shift the center of the steel industry from Pittsburgh to West Virginia.

The CHAIRMAN. I do not know whether you realize it or not, but it used to be in southeastern Pennsylvania, Virginia, and West Virginia.

They were using a derivative, or, rather, the system from which the sponge-iron process was derived, was the old charcoal furnace. Of course, with the shortage of charcoal we went to the blast furnace

where they used coke. The sponge-iron process is very similar to the manufacture of cement, which will burn out the impurities and leave only the raw iron, without putting all the air bubbles and everything else in it which you have in pig. It was the original iron process which came over to this country from Europe, was extensively used throughout the East, up until long after the Civil War, when the blast-furnace idea was evolved.

When that came out, it involved a tremendous amount of capital and installation, and it became the foundation stone of most of your big integrated steel industries. Of course, the little fellow simply cannot put in a blast furnace.

Please go ahead ; I am sorry to interrupt you.

Mr. BURNS. The Commission indicated in its report that it had made a detailed study of the economic forces and motives underlying acquisitions and mergers.

Now, how did the Commission obtain its facts upon which it based its conclusions? Were they conclusions as to motives based entirely upon admissions of the companies, or did the Commission make independent studies?

Mr. MARKHAM. Well, we steered pretty clear of the word "motive." What we tried to do in that study was to infer from the type of acquisition what seemed to be the intent of the merger or acquisition, and we broke these down, you might recall, into about seven categories: acquiring capacity, say, in its same line, in the same market; acquiring capacity in the same line of product, but in a different geographical market; forward integration closer to the customer; backward integration closer to its source of supply; or whether the assets that were acquired seemed to be completely unrelated to the assets that the company previously held; and it was for that reason that we steered clear of the word "motive" but tried to infer from the type of acquisition what seemed to be the intent here; that is, we did not think that we were violating the sensibilities of a good logician, or a statistician, when we said that if a firm bought out assets closer to the consumer, then it must have been the intent of the merger to get closer to the consumer.

But we did not rely on anything that the companies themselves said, although in the merger study you will see in some cases, those that we took up in detail, what we quoted of what the acquiring company said at the time of the acquisition.

This was true of Western Auto, several of the others, but, for the most part, we stuck by a rather rigid seven-class breakdown, and just observed the facts, but did not try to interrogate the companies at all on what they thought they were trying to do, but we inferred it from the action itself.

Mr. BURNS. Does it have any significance in determining the competitive consequences of the merger as to what the motive or what the reasons may have been why the parties entered into the merger?

Mr. MARKHAM. Well, you mean in relation to this seven-category breakdown?

Mr. BURNS. Yes.

Mr. MARKHAM. It has a great deal of meaning for us. I say "us" at the Federal Trade Commission. When this was first started I was bureau director there. We particularly wanted to identify the horizontal mergers, because while it is true that section 7 holds against

conglomerate and vertical mergers, the most obvious cases of injury to competition, the tendency to injure competition, the tendency to create a monopoly, is still to be found, the most clearcut cases are still to be found, in horizontal acquisitions.

You have to develop a much more complicated and subtle argument to show where conglomerate mergers are illegal under section 7. But we especially wanted to identify the horizontal ones, because we feel here is where the staff should put its primary efforts.

The CHAIRMAN. That is where you definitely eliminate competition.

Mr. MARKHAM. This, it seems to me, is where you are definitely going to find those mergers that make the best cases under the law.

Now, I do not want to leave the impression here that we overlooked vertical acquisitions. That is not so, but I think it adds up to commonsense that when two producers producing the same commodity in the same market get together, that this is the most likely injury to competition.

Mr. BURNS. Do you feel that the antimerger amendment is now adequate to prevent concentration of economic power?

Mr. MARKHAM. I certainly do. I like section 7, the way it is worded. It is, I think, a great improvement, or it makes admissible tests that are not quite so strong as those under the Sherman Act. It permits the introduction of evidence that, when added up, although no particular piece of evidence may be all-persuasive here, when you add it all up, if you can reach a decision that there is a reasonable probability here that competition is being injured, this affords you a chance to catch the development of monopoly in its stage of incipiency.

I use "incipiency" because I guess this word is generally understood. You do not have to wait, say, for the creation of a United States Steel Corp., as was created in 1901.

Had section 7 been on the books at that time, I am convinced after the third or fourth acquisition by United States Steel or, in fact, the mergers that preceded the formation of United States Steel, that those earlier acquisitions would probably have been caught under section 7.

The CHAIRMAN. What do you think, however, in the case of a vertical monopoly; at the upper echelon you have an acquisition that might affect the operation of either one of the companies?

Mr. MARKHAM. Yes, it might very well. The thing that I would be more interested in in a vertical acquisition is the condition of entry at each successive stage.

I could get greatly alarmed about a vertical integration backward, an acquisition backward, where one firm acquired a substantial part of an indispensable resource that was greatly limited in quantity and, therefore, foreclosed other firms from entering at any successive stage of integration.

The CHAIRMAN. How about an integration vertically where you relied upon fabricated parts, and one of the companies acquired the fabrication facilities that had formerly been available to both?

Mr. MARKHAM. Well, here again I would be most interested in what are the conditions of entry in the parts section of the industry. I would not get greatly alarmed if you could get in with a minimum amount of capital, because here, I think, the vertical integration is not likely to lead to monopolizing the market.

If you integrated backward and acquired a plant that was exceedingly difficult to produce, if it was an industry that was difficult to get

into, then this is one of the factors, I think, that would have tremendous bearing on whether or not this particular vertical integration or vertical acquisition potentially injured competition. It depends, really, upon the reproducibility of the facility that is being acquired and on what is preventing people from entering this industry.

The CHAIRMAN. Or the operation after its acquisition.

Mr. MARKHAM. Or its operation afterward; yes, sir.

The CHAIRMAN. If it continued to produce for the other company, it would not be monopolistic.

Mr. MARKHAM. No, that is right.

The CHAIRMAN. Go ahead.

Mr. BURNS. In its report, the Commission suggests a great variety of economic factors which should be considered in determining whether the prohibited effects upon a relevant market have been achieved by acquisition.

The criticism has been made that this entails the same detailed study required in determining whether there has been a Sherman Act violation, and would defeat the purpose of the act.

Would you care to comment on this?

Mr. MARKHAM. Yes, I would. I do not think this defeats the purpose of the act. I do not think under section 7 you have to make as strong a case as you have to make under the Sherman Act.

I think you can be satisfied with less convincing evidence that monopoly is, in fact, being created, or that a restraint of trade is in being.

I have commented on this before, that the intent of section 7 to me is to the reasonable mind—does it look as though competition is being injured, and you can rely here on probability tests; that is, is there a reasonable probability? These are the words, I believe, that were used in the hearing on this act itself; you look toward a lower order of proof under section 7 than you do under the Sherman Act.

That is to say, I think, there are many mergers that you could not develop into an antitrust case under, say, section 2 of the Sherman Act, that become quite good cases under section 7 of the Clayton Act.

I have rather strong doubts, for example, that the Pillsbury case could have gotten as far as it has gone already under Sherman Act tests.

Mr. BURNS. In the recent Hamilton-Benrus case, did not the court in its decision rely almost entirely upon the size of the two companies and the amount of their business in relation to other companies without considering questions of prior acquisitions, whether the other companies were making acquisitions, whether the number of manufacturers were decreasing, and whether there were new entries in the business?

Mr. MARKHAM. I have read that decision briefly, and I believe you are correct, that this is what the court considered.

Mr. BURNS. How does that compare with the Commissioners' reasoning in the Pillsbury case?

Mr. MARKHAM. Well, in the Pillsbury case the Commission considered many other economic forces that were at work, and I do not view the Pillsbury decision as being inconsistent with the Hamilton-Benrus decision.

After all, you were dealing with totally different structured industries here. If I am not mistaken, Hamilton was the only jewel-watch

producer in the United States that produced its own parts; isn't that correct?

Mr. BURNS. I think Elgin does, also.

Mr. MARKHAM. Well, that is a fact we can verify; I am not sure. But it is true that concentration was exceedingly high already in the jewel-watch industry in the United States.

It is an industry, as you know, that depends upon a certain amount of tariff protection in order to survive, at least that is the argument that is being given before Congress for the imposition of tariffs on imported watch parts; and where you have an industry structured this way, I do not think you have to look very far for other things, other forces at work.

As an analogy, I would guess that if Ford and General Motors were about to merge, you would not have to look very long at the merger history behind either of these companies. The mere market occupancy of both of these firms, the fact that neither is about to go bankrupt and, therefore, has its assets up for sale and, as I say, the fact that the 2 together control about 85 percent of the entire automobile industry, that when you get concentration that high, this is, perhaps, as far as one might have to look. But you run into a completely different thing in the Pillsbury decision, where in some product lines you were bringing together rather small percentages of the market; in others you were getting up to about forty-some percent.

But then, on the other hand, certain of these markets looked as though they should be quite easy for anyone to get into.

The capital requirements did not seem to be too high, after all, to mix flour with certain other ingredients and have a prepared mix; so in that case you had to dig deeper and take a look at the diminishing number of independent firms, the rise of the larger ones in the industry, and the merger record in the industry, because the percentages involved in and of themselves and the conditions of entry did not seem to be sufficient evidence to build a case on.

Mr. BURNS. Well, have you found that the Department of Justice does not deem it necessary to consider all the factors relied upon by the Commission in its Pillsbury decision in deciding the legality of certain horizontal acquisitions?

Mr. MARKHAM. Well, I would like to make it quite clear that I cannot speak with any authority for the Department of Justice, and I have not been working with the Department of Justice so closely that I know precisely what they do look for.

If you mean that in bringing Sherman Act cases, they are not likely to examine all the types of evidence that the Federal Trade Commission might examine in trying a section 7 case, it would be my guess that this is correct.

I do not think, however, that they would use entirely different criteria in bringing a section 7 case.

Mr. BURNS. Have your studies or investigations revealed any dangerous tendencies of conglomerate mergers by any particular corporations?

Mr. MARKHAM. Do you mean my private studies here, Mr. Burns?

Mr. BURNS. Well, either that you have made or that you know of that were made while you were with the Commission.

Mr. MARKHAM. With the Commission? We have at the Commission under study some acquisitions of the conglomerate type. I think

it would be inappropriate for me to reveal company names at this hearing, because those files are still open, so I think I could answer: Yes, there have been some conglomerate mergers that have attracted our attention enough to assign personnel to work on them, to see whether they do reach this result or not.

We have not reached a conclusion at the staff level yet that we have a conglomerate merger that clearly injures competition, but that is because we have not progressed that far with these particular types of acquisitions.

Mr. BURNS. The House Judiciary report spoke of preventing an acquisition because the increase in relative size of the acquiring company gave it advantages over its competitors which threatened to become decisive.

Suppose an acquisition resulted in economies enabling the acquiring company to undersell its competitors in a given market, in other words, an advantage which threatens to be decisive.

Could such an acquisition be barred by the Antimerger Act?

Mr. MARKHAM. I think I would have to answer in all candor here that I really do not know. I cannot quite visualize a merger that is cost reducing and which, at the same time, necessarily brought about a long-run monopoly position in the industry.

It seems to me that if a merger brings about a good deal of cost reducing, which is really what you are saying, that this would set up a type of business organization that would be emulated by others, because I do not think that there is any monopoly on a certain type of arrangement, that it may be—

The CHAIRMAN. Suppose, however, it squeezed out the others?

Mr. MARKHAM. Well, if it squeezed them out, Senator, because it was acquiring a scarce resource that could not be duplicated, then we are confronted with a choice.

The CHAIRMAN. Suppose it acquired, shall we say, a prefabricating company or prefabricating companies that sold to the other customers at much higher than they did, but they could still undersell them and make a profit.

Mr. MARKHAM. Would you mind stating that again?

The CHAIRMAN. Let me give you an illustration. It was brought up yesterday that in the question of medium tanks, Chrysler lost out because they had to buy the gearcase from General Motors. General Motors charged them more for the gearcase than they did their other affiliates; therefore, their other affiliates were able to underbid Chrysler.

How about a situation like that, brought about because one of the affiliates of General Motors owned the entire gearcase assembly?

It was the only one capable of producing it.

Mr. MARKHAM. There is no question about the fact that this jeopardizes the market position of independents.

However, I think you can attach more significance to this type of selling than—

The CHAIRMAN. Let us take one further step. Suppose the possession of this gear case assembly had been made possible by a heavy investment of the United States Government. Don't you think some correction of that law should be made to protect the United States Government in a case like that?

Mr. MARKHAM. Well, I think this is a situation that clearly needs investigating. I do not know whether you can legislate the remedy or not. That is, the problem that you have given is that here is a gear—

The CHAIRMAN. You must realize that one of the big problems we have faced is that since the war the fact that under the cost-plus-fixed-fee contract various companies were able to build up their facilities enormously at the expense of the taxpayers, not by a writeoff policy, but merely by buying tools and other things.

I do not know if this was true in the General Motors case. Apparently in Cadillac Motors we set up a plant which would be enormously expensive to build for anybody else, so anybody who wants to build tanks for the United States Government must buy that gear assembly from Cadillac.

Cadillac naturally preferred General Motors, and gave them a much lower price in the building of medium tanks than they would a competitor.

What do you think of a situation like that?

Mr. MARKHAM. This is a situation where, as you have indicated, you have a virtual monopoly in the gear case industry; is that correct?

The CHAIRMAN. Not only virtual, but an actual monopoly.

Mr. MARKHAM. An actual monopoly.

The CHAIRMAN. And the expense of equipping and building such a plant would be prohibitive to anybody else.

In the event, particularly, that that plant had been built with Government funds under a cost-plus-fixed-fee basis, that would be the correct steps for the Government to take?

One thing that is worrying me is what happened during World War II, and later on during the Korean war, which complicated the industrial picture in this country to a tremendous extent, not only at the taxpayers' expense, but also at the expense of competitive industry.

For instance, we have general contractors in the construction industry who were probably bricklaying contractors before World War II, and they were able to build up all the necessary departments at the expense of the United States Government during World War II. They are completely integrated corporations, and then they come up against the fellow who helped to pay for building up these organizations, to the great detriment of the people who were not able to get that money. That is one of the things that is worrying me in this whole monopoly picture, that one factor, of squeezing out the bona fide investor who puts his money on the line to produce something, and finds himself faced by somebody who has been partially, in the past at least, capitalized by the taxpayers, and it provides a tremendous advantage. In other words, if I could build up a \$200 million company, and only put \$50 million into it, and I come up against a man who puts up \$150 million in his company, then I have got an advantage.

Mr. MARKHAM. Well, the case you have given me supports the thesis I have made, Senator.

The CHAIRMAN. Let me give you an example. During that period I went to a certain airplane plant on the west coast and somebody had inadvertently left the last credit statement of the company lying on the desk. Being of a curious nature and representing our Govern-

ment, I read it over. The figures were very confusing, because it started out with a stock issue of \$1,250,000. Well, being from the East where we considered the normal price of a share of stock as a hundred dollars, I just could not see that much in the plant.

So I made an inquiry and I discovered their value was charged at \$1 a share, which was one one-hundredth of that. I discovered that during the first 10 months of that year, they had earned, after taxes, \$3 per share. They had put into their cash reserve \$2 per share and put into surplus a dollar and forty-seven cents per share. When I found those shares were worth a dollar, that looked to me like an awful dividend. I went to the president and he said: "Well, but you must realize this stock is now selling at \$75 a share," and the people who now control it paid \$75 a share. But the Government of the United States built up that \$75 a share, because they had vastly enhanced the plant, and also enhanced its credit standing. Republic Steel went in and bought 51 percent of the stock and paid about \$50 a share in the company, and we were actually paying 647 percent profit in 10 months after taxes, on a \$1 initial investment. About all of this was put in the plant at Government expense. I am not getting the least bit political because it has occurred under both Republican and Democratic contracts.

Whether or not our present system of Government contracts, which has been in existence for a long time, is contributing to monopoly to a greater degree than private investment, that is what worries me.

Mr. MARKHAM. Well, the argument has been made, Senator, that the people who sit on the subcommittee of the Judiciary Committee ought to be in touch with the Congressmen and Senators who devise laws for taxation and for Government contracts, because quite frequently, these two activities conflict with each other. Monopoly is not always a natural outgrowth of the market.

The CHAIRMAN. You must realize there are only 24 hours in the day. If you try to sit on the Taxation, Appropriations, and Judiciary Committees 60 hours a day, you just don't have sufficient hours. And then, of course, we have to rely on the executive department to correlate the whole picture. We must rely on the Federal Trade Commission, for instance, on the Antitrust Division of the Department of Justice, on the Department of Defense, to see that this subcommittee, for instance, gets the necessary information so that it can take appropriate action, and also that the Appropriations Committee gets the necessary information, and the Finance Committee gets it. That is why you have an executive department. There are only 96 Senators, and every one of them sits on at least 2 committees from 6 to 7 subcommittees. Over in the House where you have 435 Members, they have more time. We simply do not have any. So we must rely on these departments and that is why the Federal Trade Commission is so immensely valuable if they just come and tell us about it.

And that is the only reason this subcommittee is in existence, to get them up here to inform us.

I see Mr. Burns has a few more questions. Go ahead, please.

Mr. BURNS. In your statement you said that the problem of bigness is oligopoly and that most oligopoly lies beyond antitrust laws. Will you explain what you consider the problem of bigness to be?

Mr. MARKHAM. Well, what I meant by that statement was that I do not think we are confronted with a lot of monopolies in the dic-

tionary sense of the word, where you have a single firm controlling substantially all the output. These situations are very few and far between. You do have, however, in the American economy substantial industries where the largest 4 or 5 control substantially all of the output, and under certain conditions they are not likely to compete as vigorously with each other as they would if you had 10 or 12 in those industries.

Yet, if you examine the behavior of each of these firms, they are pursuing a perfectly rational course and you cannot, it seems to me, pass a law to force them to behave irrationally. This is what I deem to be the essence of the monopoly problem, which is in industries where the individual firms do not find it to their advantage to compete vigorously with each other. Now I do not mean to imply here that oligopoly is monopolistic in character, that oligopolists always sit back and proceed to establish a price in the market that would be established by a monopolist and stay there.

I have recently had occasion to write a book on one oligopoly, where I found competition pretty vigorous.

Mr. BURNS. What was the name of that?

Mr. MARKHAM. This was Competition in the Rayon Industry. Although the largest 4 control about 60 to 70 percent, at one time 80 percent, of the total output, nevertheless, you had some small rayon firms around that when the going got a little rough, would undercut their list price. They would undercut the list price of their larger competitors in order to sell a greater quantity of their output, and the only real distinction that could be made between oligopoly in the rayon industry and the most intense kind of competition was that there might be a month or two lag before prices would start getting cut, a month or two lag that would not be evident in, let us say, the cotton-textile industry, in branches where you had a thousand producers. But this was the only price we were paying for oligopoly in the rayon industry.

The CHAIRMAN. I wonder if it was.

Mr. MARKHAM. Well, that is what I would view to be the principle—

The CHAIRMAN. Have you ever heard of Kohorn?

Mr. MARKHAM. No; I don't believe I have.

The CHAIRMAN. You had better check up on him before you make a final statement, and I suggest you interview him. Kohorn is the greatest living authority on rayon. He has plants all over the world, but he has never been able to get a plant in the United States. He makes it from bagasse, from sugarcane; he gets it from all sorts of things, in the Philippines, Australia, South America, Egypt, the Sudan, India. Although he is an American citizen, he cannot put a plant in the United States.

Mr. MARKHAM. Why can't he put a plant in the United States?

The CHAIRMAN. He simply cannot get the necessary financing in the United States. They all combine against him every time he tries to put a plant in.

Mr. MARKHAM. Well, you had three new entrants after World War II.

The CHAIRMAN. I know, but they had to play ball with the rest of the industry. Kohorn has a peculiar theory that inasmuch as they are using his own machines, he has refused to charge royalties for

his equipment and they don't like that at all. I have been through that for 13 years, keeping very close touch with the textile, rayon situation. Oh, yes; he has a plant in Czechoslovakia, he has one in Austria, but outside of that he can't get any place else because he runs into DuPont, Viscose, the rest of them, and he simply cannot get the financing for a plant in the United States, which would use our waste cotton products. It is a process in which you use scrap cotton rags to make the rayon from, but he just can't get started over here. Incidentally, he is building a plant in Cuba and one in the Dominican Republic.

Mr. MARKHAM. I am surprised he cannot—

The CHAIRMAN. He simply cannot get financing here. I remember once when he had a contract with the Goodrich Co. for 5 years' output and he put up the contract to pay off all the money he wanted to borrow, but he could not borrow a dime.

Mr. MARKHAM. Well, the War Assets Administration disposed of about three rayon plants at the end of World War II, sold them under competitive bidding.

The CHAIRMAN. I remember the bids and I know just exactly what turned out because his bid was not even considered.

Mr. MARKHAM. None of these firms bought any.

The CHAIRMAN. He was a member of the Nobel family. He became an American citizen and established his laboratories in New York. He said, "I will operate out of New York, but not in the United States," which proves to me that oligopoly is dominant in this case. I think the real dominant factor in both oligopoly and monopoly is finances.

Mr. MARKHAM. Well, I think technological know-how is also quite important.

The CHAIRMAN. But this man has it. I have loads of letters in my office from leading experts which were furnished to me one time when he asked for an opinion. All you have to say is that he is the greatest expert in the world and he knows it.

Mr. MARKHAM. Well, Mr. Burns, you see the Senator agrees with me—oligopoly is the greatest monopoly problems we have.

The CHAIRMAN. It can be. For instance, let me give you an illustration I had during the war in steel. I was in hopes of building big steel into more companies. In other words, when we tried to expand the steel industry, I wanted to expand it by building up the smaller companies that had the capital, the assets, and were willing to enlarge their facilities and integrate them completely.

Mr. MARKHAM. The Government was very successful in the nitrogen industry on that.

The CHAIRMAN. When I got into it, I found the little fellows were terrorized. They talked to me behind closed doors, but I could not get them to come in before a committee.

Mr. MARKHAM. This is still steel?

The CHAIRMAN. And I was trying to integrate the steel industry, not a steel company. I did not want to build a plant in Utah, for instance. I thought it was foolish. But I wanted to increase the blast-furnace capacity and the operating capacities of the little steel companies and get a greater plate and sheet and structural production out of them. What was the use of building some new plants? They went ahead and built the new plant and wasted a lot of money

on it. But I discovered the little fellows were just afraid to talk because they were afraid they would get into a price war which would eliminate them, and that is the danger, in my humble opinion, of oligopoly.

I found out that the smaller companies are fearful, if you have a few firms dominating the market, that they, by a price arrangement, will just drive the smaller companies out of business.

And that, in my humble opinion, is a danger we face. I may be wrong. I am just a lawyer.

Mr. MARKHAM. I concur with you.

The CHAIRMAN. I am not an economist, but what worries me is the fear of the smaller manufacturer that the whole price is set against him and against which he cannot compete. Therefore, in the end, even to his own detriment, he plays ball.

What do you think of that?

Mr. MARKHAM. Well, I agree. I cannot name the specific industries, but this is my principal concern—

The CHAIRMAN. I know in my State, on gasoline, we frequently have gasoline wars, as we call them. When some independent came in and tried to compete with the empire of existing companies, invariably in a certain area we would have a gasoline price-cutting situation which would be against him and he would be eliminated.

Mr. MARKHAM. Isn't this unfair competition?

The CHAIRMAN. Certainly it is. What are you going to do about it? I had the Federal Trade Commission in on two of these situations.

Mr. MARKHAM. Well, we have the General Counsel of the Federal Trade Commission here.

The CHAIRMAN. I am just telling you what is my worry about the oligopoly picture. As I say, I did not realize it, but you take even a State like West Virginia, where you have Standard, Shell, Gulf, the Texas Co.; they predominate. Here comes an independent from Kentucky who has his own little refinery down there, who wants to get in on the business and the next thing you know, he is in trouble unless he conforms.

You may remember when I raised a fuss about gasoline prices at the Commission.

Mr. KINTNER. Yes, Senator, we were also concerned with your complaint.

The CHAIRMAN. I understood the dealers had gotten together in an association and marked up the price 8½ cents a gallon. As a result, the State was losing a tremendous amount of money in gasoline taxes and the smaller dealers in the State were quietly going broke. I went to a couple of the independents—we have 3 or 4 little independent operators down there—and they said they had to go along or they would be put out of business, that the parent company would cut the wholesale price of gasoline so they just had to go along.

I don't know whether or not you were present in my office when we said we would have to prosecute the dealers. So it was not the dealers that won out. It was a threat of price cutting at the top.

Mr. KINTNER. That is one of the most difficult problems—

The CHAIRMAN. It is.

Mr. KINTNER. That we have today if you consider it from the point of view of the Federal Trade Commission, these gasoline price wars.

The CHAIRMAN. Right.

Mr. KINTNER. And we have spent a considerable portion of our funds making investigations of those situations.

The CHAIRMAN. I know you sent people down to my State to check it and you explained the situation very thoroughly. I checked it when you finished your investigation and your report was absolutely correct. But what they were faced with was this: If a few of the independent dealers would come back to the former markup of $4\frac{1}{2}$ cents a gallon, the others would start cutting a couple of cents a gallon. The big dealers could survive, but the independent dealers had to take the cut out of their profit and eventually they could not cut any more and could not pay their employees; therefore, they were all afraid.

We could not get them to cut back to a normal figure, you remember; we could not get them to cut back to a normal markup, the normal markup being $4\frac{1}{2}$ cents. They had an $8\frac{1}{2}$ -cent markup arranged by the association. The association penalized the dealer on behalf of the four big companies. But the independents did not dare cut back, and actually I think were losing about 50 percent of their business.

That is what I maintain is your danger in oligopoly. You can say there is no conspiracy, but strange to say, it happened simultaneously in all four companies. I have been in four territories when the price wars were on, and no matter which gas station you went to owned by the Big Four, you had the same cuts in price.

Mr. MARKHAM. That is the difficulty of oligopoly. You need not have an overt conspiracy. You have so few producers on the market that they can act parallel, of course, thoroughly understanding each other without going on the telephone and without writing to each other.

The CHAIRMAN. Or just have lunch together occasionally.

Mr. MARKHAM. Yes.

The CHAIRMAN. All right, fine; thank you.

Mr. BURNS. I would like to ask Professor Weston some questions. Professor Weston, you made a study of mergers which was published under the title "The Role of Mergers." Now in that book you described the method you followed in measuring internal versus external growth and you made this statement:

Should the growth of the amalgamated firm following the acquisition of another firm be treated as internal growth, external growth, or some combination of the two? The policy actually adopted was to record all growth of a firm subsequent to a merger as internal growth.

Now, in using that method was there any danger you might have overstated the extent of the internal growth in the corporations you listed?

Mr. WESTON. In my book I explained that I measured the direct effect of mergers on growth. I think there is danger of either understating or of stating the extent of internal growth. I think people generally get the impression that this overstates the extent of internal growth because they feel that automatically mergers are successful. But we have a large number of mergers that turn out to be failures. Professor Dewing, back in 1914, wrote a book called *Corporate Promotions and Reorganizations*, in which he discusses 14 mergers which

went through the reorganization wringer and 12 of these 14 have disappeared since that time, so that sometimes there were mistakes in making these acquisitions or engaging in mergers.

Mr. BURNS. In the case of the Bethlehem Steel Co., is there any reason to assume that the Sparrows Point plant would not have grown in accordance with the general steel-industry expansion, had it not been acquired by Bethlehem?

Mr. WESTON. It is difficult to rewrite economic history. The company may have failed independently. It might have grown even more. We do have companies in the steel industry that failed during this period of time. The question really cannot be answered.

Mr. BURNS. In the case of Bethlehem, the study indicated that the percentage of growth by Bethlehem showed about half of it due to internal expansion and the rest due to acquisition. Do you take that to mean that the entire 50 percent that was due to what you called internal expansion related to plants that it originally owned and not to any that were acquired by merger?

Mr. WESTON. No; I would count all subsequent growth as internal growth.

Mr. BURNS. In stating the percentages of internal versus external growth, did you consider the expansion of the Bethlehem plant at the original Bethlehem location as compared with all other locations?

Mr. WESTON. No; because it would be impossible to know how Bethlehem would have progressed if it had not acquired these other properties.

Mr. BURNS. Would you consider dominance in a highly concentrated industry to be more of a problem insofar as competition is concerned than in an industry comprised of many small units?

Mr. WESTON. How would it be possible for dominance to exist in an industry of many small units? The two seem to be incompatible.

Mr. BURNS. Well, in the steel industry, I think that the statement has been made that there are 80 or more units, but that there is domination by United States Steel because it has approximately one-third of the total capacity. That would be an example of one where there are many small units.

In the automobile industry, at the present time, there are only six companies and it would be considered more highly concentrated.

Mr. WESTON. I see.

Mr. BURNS. So the question was whether the dominance is more of a problem in an industry like automobiles than it would be in an industry like steel or would it be the same problem?

Mr. WESTON. I do not think this question could be answered either because it would depend upon a large number of other factors, market-structure factors.

The CHAIRMAN. Let me ask a question: If the basing point plan was invoked, what effect does that have?

Mr. WESTON. Well, this is an arrangement, of course, for having some agreement on methods of setting prices.

The CHAIRMAN. For instance, in steel the basing point plan, the old one, was that prices would all be f. o. b. Pittsburgh. It might come from Ashland, Ky., or Ironton, Ohio, Wheeling, W. Va., Youngstown, Ohio, and still the same price would prevail, which would be the Pittsburgh f. o. b. price.

Mr. WESTON. Sure. This is interesting that this kind of price arrangement developed in an industry that is described as one comprised of many small units, whereas in a concentrated industry such as the automobile industry, you have not had that kind of a program. So I think this illustrates that numbers alone is not the critical factor. Here you have the automobile industry where presumably the possibility for parallel action is greater and yet it did not occur.

The CHAIRMAN. I know, but does not the basing point plan offer unfair competition, say, to a southern market for Armco of Ashland, Ky., which is some 400 miles nearer their market?

Mr. WESTON. It depends on where you happen to choose the basing point.

The CHAIRMAN. Well, if the basing point was Pittsburgh, which is the traditional basing point.

Mr. WESTON. That's right.

The CHAIRMAN. Suppose we take the South. They would be handicapped, shall we say, by Birmingham which would definitely undersell in the market unless it were put on the Pittsburgh f. o. b. basing-point plan. If Birmingham had a United States Steel plant and joined in the basing-point plan, then they would make a much better profit.

Mr. WESTON. That is right, although firms that are closer physically to their market even under a basing point pricing system are likely to use nonprice methods of competition, and get more of the market than they otherwise would have gotten. That is, all during the period of the basing point pricing, it is a fact that United States Steel lost ground.

The CHAIRMAN. The reason I raise that question is that 3 years ago they asked the Congress to legalize the basing-point plan, which we declined to do. Had we done that, I think we would have put ourselves and the country in very bad shape.

Mr. WESTON. As I say, it is interesting to observe that during this period of time United States Steel declined in their share of the market, despite that.

The CHAIRMAN. All right, go ahead, please, Mr. Burns.

Mr. BURNS. On the basis of your studies, did you find that mergers, both old and new, have been chiefly responsible for the high concentration of industry?

Mr. WESTON. I found that mergers up to and around the turn of the century accounted for the high degree of concentration that existed at that point, but that mergers since approximately 1904 have had a negligible effect on the degree of concentration. In fact, it is interesting to observe that in a long list of industries, we had declines in concentration between 1904 and the present. A good illustration is steel, where United States Steel in 1901 had 62 percent of steel-ingot capacity, and in 1954 only 30 percent, a decline by a substantial percentage.

I think another interesting case is the automobile industry, which people are quite concerned about, and which you have examined at great length in these hearings, where, according to a Federal Trade Commission study, in 1921 Ford had 55 percent of the market, three more percentage points than General Motors has today at 52 percent, and General Motors at that time had only 12 percent of the market.

Now, the only substantial merger activity that took place since 1921 was Ford's acquisition of Lincoln in 1922.

Now, despite this, in 1954 General Motors has 52 percent of the market; Ford declined to 31 percent of the market. This, by way of illustration that mergers since the turn of the century have not had great influence on concentration and in fact, you have had declines in concentration in a large number of important industries.

The CHAIRMAN. Well, but isn't that Ford decline partly due to the fact that they have had more competition in the low-priced field since the date that you mentioned?

Mr. WESTON. That is right.

The CHAIRMAN. And the Chevrolet capacity has been built up, as has the Plymouth capacity. Prior to that, the localized field was practically dominated by Ford.

Mr. WESTON. That's right. But I think this does—

The CHAIRMAN. You did have the Metz and two or three other little cars, but they did not offer any competition.

Mr. WESTON. That's right. I think from the illustration of how dynamic competition can be viewed as of 1921, one might have been very afraid of Ford's position in the automobile industry, 55 percent. But by the middle of the 1920's, Ford was in danger of losing their entire market.

The CHAIRMAN. Then they had to go into the higher priced market in order to sustain it and they bought Lincoln and developed Mercury in order to hold any position at all; isn't that right?

Mr. WESTON. That is right.

Mr. BURNS. Do you know whether that 55 percent figure was for the entire automobile market or only for some part, like the low-priced field?

Mr. WESTON. The entire market.

Mr. BURNS. On the basis of your studies, do you believe it possible to solve the problem of industrial concentration only by preventing future mergers?

Mr. WESTON. I think if you prevented all future mergers that this would have a negligible effect on future concentration in the United States.

Mr. BURNS. Do you consider that the problem of economic concentration is sufficiently grave to warrant some form of divestiture proceedings?

Mr. WESTON. I do not.

Mr. BURNS. Do you believe that there is any standard which could be used to determine the size to which a corporation should be permitted to grow in any industry?

Mr. WESTON. I do not believe you could develop any absolute standards for absolute size of a firm, its relative size in terms of its percentage of the share of the market without running into grave difficulties. As far as possible, I would rely upon the operation of market forces on the one hand, and on the other, the kind of Government regulation you have had through the Federal Trade Commission and the Department of Justice.

Mr. BURNS. Can you give us a definition of market power? In your book, you discuss market power of some firms such as United States Steel, General Motors, Underwood Typewriter, and International Business Machines. Would you tell us what your definition of market

power is, in trying to describe the extent of market power held by any of those companies?

Mr. WESTON. I think the term I used was market position rather than power, and I was referring to their percentage occupancy of the market. I do not think that this is the same as market power. I think market power is a very complex term that we would not have time to go into this afternoon.

Mr. BURNS. What factors do you think should be considered by enforcement agencies in conducting a market analysis for the purpose of determining competitive relationships?

Mr. WESTON. I have indicated a list of eight factors in the statement which I have put into the record, and they are quite detailed, and it takes a considerable amount of time to explain them. I think if the chairman would like a statement on that question—

Mr. BURNS. It is in the record.

Mr. WESTON. I have it in the statement.

The CHAIRMAN. It is in your statement? All right.

Mr. WESTON. At pages 8 and 9—well, it really begins at page 6, pages 6 through 9.

Mr. BURNS. Some economists urge that the evils of oligopoly are more far-reaching than those of monopoly. What is your viewpoint on that question?

Mr. WESTON. I think this is a somewhat different question than the one you asked Doctor Markham, the assessment of the comparative dangers. I think that monopoly as such is something worse than oligopoly. Monopolies that you are able to prevent and take action against, obviously with them you have dealt with the problem. With oligopoly, as has been pointed out fully, it is less easy to move against.

Whether oligopoly is more dangerous than monopoly depends upon the way the oligopolists behave. I would say that oligopoly that coincides in behavior with monopoly may be worse than monopoly in that you may be less likely to move in on oligopoly. But on the other hand, I think it must be recognized that among many industries characterized as oligopolies, particularly vigorous competition has prevailed. In oligopolies of this kind where you have had vigorous competition, where you have had product improvements, where you have had technological advances, you have something that is valuable for the economy as well, that is, in terms of ability to produce the kind of equipment in quantity and quality that enables you to survive in a world where power is an important consideration.

The CHAIRMAN. Don't you think that the danger of oligopoly, as such, is as difficult to prove? You must practically prove a conspiracy under the Sherman Act or under the Clayton Act, whereas a monopoly becomes self-evident much more easily. It is much easier to break up a monopoly than it is an oligopoly.

On the other hand, an oligopoly may be a rather beneficial operation which keeps prices down and gets production up and so on.

Mr. WESTON. You have the further protection that if the oligopolists are not low-cost producers, the small firms in the industry will make inroads into their market shares. This is a protection as well.

The CHAIRMAN. Go ahead, Mr. Burns.

Mr. BURNS. Has not the pattern of vertical integration as exemplified by the steel and automobile industries set the price of new entry into the fields at practically prohibitive levels?

Mr. WESTON. It may have. I do not know the facts of these two industries with regard to this particular point. It is my impression that technically a small firm enters an industry not by becoming a fully integrated producer, but rather by starting out at one segment where it may be able to do the job more effectively than the existing firms. Having established a foothold in this way, if its management, the management of the firm, is competent and aggressive, it may grow and become an important factor in the industry.

Mr. BURNS. Do you believe that ease of entry into an industry is one of the more important economic problems today?

Mr. WESTON. Well, I would say it is an important economic consideration. I am not aware of factual evidence which would demonstrate one way or the other that ease of entry is a problem or is not a problem.

The CHAIRMAN. Let me give you a hypothetical situation: Back in the interval from 1909 to 1917, you had a period in which you could use an oversized garage, almost, to start an automobile company. That was in the days when you had the Moon and other cars. It took relatively little capital, some hand tools and some shop tools, and you could go into the automobile business, manufacturing, and selling cars.

Now it is true many of those companies went out of business. But that situation did help to build up competition so that now we have a strong automotive industry, because it did spread automobiles all over the country, and did bring in a lot of new ideas in the automotive field. I can remember when you bought a chassis and the body, and you paid extra for even the bumpers and the headlights and everything else. I think that ease of entry really was the dominating factor in the present automobile industry. All of those companies like, oh, Flanders, Maxwell, the real inventors of the automobile, Haynes and others—they didn't have to have a whole lot of capital. They just had to have the inventive genius of making things work.

Mr. WESTON. I think for a balanced view on this, however, Senator Kilgore, you have to look at the economy as a whole. There is a life cycle to individual industries. In the mature stage of the industry entry is likely to be difficult. The established firms have the know-how and ability and existing organizations are set. Whereas there is greater ease of entry in electronics or aircraft components.

Out in Los Angeles we have thousands of firms entering these industries, and the inventiveness and know-how and tinkering around that characterized Henry Ford when he got into the automobile industry, I see the same qualities in these persons now developing electronics or aircraft or welding components.

The CHAIRMAN. However, you must realize if it had not been for the activity of a couple of congressional committees those little companies out in California would not be functioning right now; did you know that? They were just on the verge of being wiped out.

Mr. WESTON. Well, I think this illustrates the value of having both, that is, the competitive forces and the congressional committees.

The CHAIRMAN. We went out and succeeded in blocking the expenditure of the necessary Government funds which would have put them out of business and would have made the plane manufacturers into vertical monopolies in their own fields. But the point I am getting

at is that in the development stage, as you well stated, ease of entry is of tremendous value.

Mr. WESTON. Yes, indeed it is.

The CHAIRMAN. For instance, down in West Virginia we had four seamen who were in the submarine service. They got out of the Navy and then developed an electric fan. They developed a fan which was the only accepted fan for submarines which could be used in refrigeration as well. They developed a lot of cheap fans to be used in hair driers for women and they built up a nice little business.

Now they could not have done that to save their souls if they had to, but they started out by buying parts and assembling them until now they have a small integrated plant where they make their own parts. So I do think that entry into a field should not be prohibited if we want to keep competition going.

If they had had to build up a plant like Westinghouse or General Electric to go into the fan business, they would have been just out of luck. They were able to take their mustering-out pay plus the money they could borrow on their insurance policies, rent a building, hire about 25 or 30 people, take advantage of a market, and then with their own experience in the Navy, coupled with good seamanship, they mustered in a couple of good engineers with them, and built a very successful little plant. And it was later expanded.

So I always am opposed to making entry into a field too tough, because a fellow coming in there may have an idea that is very badly needed, even though it may be an old and well-established industry.

Mr. WESTON. But I think it is true—

The CHAIRMAN. And by his bringing that in on a small scale, he gets the rest of the industry to adopt it and so the whole industry benefits from it.

Mr. WESTON. I think it is true, however, that because an individual cannot duplicate General Motors or United States Steel, I think that this is not sufficient evidence to establish that there is not still a tremendous scope for opportunity and individualism in the country.

I think the data from the Department of Commerce on the number of new firms established each year amply demonstrates this, and that, as I say, while in particular areas entry may be difficult, I think that if you compare entry possibilities for the newcomer in 1905, compare it with 1955, I think 1955 offers him more opportunity than 1905 did.

Mr. BURNS. Some people have expressed the point of view that companies of dominant size, such as General Motors and United States Steel, should be broken up and that a law should be enacted to accomplish that purpose. Do you agree with that point of view?

Mr. WESTON. I do not. I think the case has not been made for dissolution of General Motors or United States Steel. On the contrary, I would argue that there are two factors that probably justify firms of this size: One is that certain kinds of research can more effectively be carried on by large organizations of this kind. This is not to say that they produce all research. Some small firms effectively produce many kinds of research. But certain kinds of research, the large multiproduct plant most effectively develops. I say this is crucial for national survival because in the development of certain products to maintain our equality or superiority and fighting power, to stay with Russia, we need large firms to develop some of these things.

I think the other place where large firms make a great contribution is that great executive ability can more effectively be utilized in a large operation than in a small operation and the effect, it would seem to me, of a great mind of great ability in a large organization is a very pervasive one.

The CHAIRMAN. Doctor, you did not go through the barrage of letters we received in the Congress back in 1940, 1941, and 1942 when we tried to build up for war in these very firms you mentioned who objected strenuously giving up their lucrative private manufacturing in favor of concentrating on defense activities. Did you know that?

Did you know that we had to deny material to some firms in order to get them to go into defense production; did you know that?

Mr. WESTON. Yes; I was aware of that.

The CHAIRMAN. And lots of them. Do you know who the first company was that went into tank production?

Mr. WESTON. No.

The CHAIRMAN. The American Locomotive Works. The second one was Chrysler, the third one was Studebaker, and the last one was General Motors.

Mr. WESTON. Who produced the most tanks during the war period?

The CHAIRMAN. The others did; so sometimes the big companies don't like to go into war production. And you know what a terrible time we had with Ford, to get them to produce engines and other things to build up our plane production. I could go on down the line indefinitely. This was particularly applicable to the big companies who were making a lot of money out of commercial production, and who resented converting to wartime production.

Mr. WESTON. That is a good point.

The CHAIRMAN. On the other hand, the smaller outfits were coming in and volunteering. The big problem then was to see the Defense Department about buying from these little companies, because they had been accustomed to buying from the big ones.

Yes, the big companies would sell you standard brand trucks that came right off the assembly line without any changes, but when you went into tanks and airplanes and engines, nobody wanted to change their tooling.

I remember we had to shut down the refrigerator plants in order to build depth bombs and things of that kind. Some of the big companies are not as cooperative during a war as you might think. It is purely a commercial proposition.

Mr. BURNS. That is all I have.

The CHAIRMAN. All right, gentlemen, thank you very much.

Mr. MARKHAM. I would like to make one more statement for the record. May I, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. MARKHAM. I would like to get this in because I am not so sure it is going to be mentioned by any one else. I am not trying to make any ridiculous comparisons on budgets, but I do think it is important because this committee is very interested in how effective the antitrust laws can be made.

The CHAIRMAN. Plus one thing. We are also very much interested in clarifying them so that business people in setting up mergers, acquisitions of properties and so on, will not have to wait to have a

suit determined in the courts before they can know what they can do.

Mr. MARKHAM. Well, a good deal has been said about the increase in the rate of merger and acquisition activity. The Federal Trade Commission and the Department of Justice are the agencies that have to investigate these, and if I were still a bureaucrat I would never mention the matter of budget, but having no longer anything to do with the bureaucratic life, I think it is worth while to point out 1 or 2 of these statistics.

I do not know how many here realize it, but for the fiscal years '53, '54, and '55, during this upsurge of merger activities, the FTC's budget stayed at just about the same level as that for the Battle Monuments Commission and for the Smithsonian Institution, exactly the same, at around \$4 million.

This is only eight-tenths of 1 percent of what the Government lost on its agricultural price-propping program for the first 10 months of fiscal 1955, and it is only one two-thousandth of what the Government had invested in price support loans as of April 30, 1955.

In fact, the Federal Trade Commission has had less to administer section 7 than the Senate and the House combined has had to spend on stationery and postage stamps.

If you were to rank—and this I think is exceedingly significant because the Federal Trade Commission does have to police almost all advertising—its entire budget during the course of the last 3 years has been only one-third of what the Reynolds Tobacco Co. has had to spend on advertising of cigarettes and tobacco products. It has been only one-third of what the American Tobacco Co. has spent on advertising cigarettes and tobacco products; it has had considerably less than half of what Liggett & Myers has had; considerably less than half of Philip Morris; and considerably less than Lorillard.

In short, you have to get to the sixth largest cigarette and tobacco product producer to find an advertising outlay that is smaller than the entire FTC budget.

Now, I don't want to make a special plea for budget considerations when you are examining these problems. But it does show one of the problems, I think, that one of the antitrust agencies is confronted with, that as its activity rises, its budget does not rise in proportion, and this is an explanation of why sometimes cases are necessarily delayed.

I don't know whether this adds anything.

The CHAIRMAN. As a member of the Appropriations Committee, may I say on that the principal handicap that has been facing the Congress has been the activities of the budget office. It is very hard to get a budget in excess of what they approve, despite the fact that a number of us have tried to increase the appropriation for the Antitrust Division in the Justice Department and the Federal Trade Commission. We have not been able successfully to get above the budget recommendation.

Mr. MARKHAM. But I don't think, Senator, they met what the budget—

The CHAIRMAN. No, not quite, but invariably we have met opposition in the House. If you will watch, you will find the Senate always increases the House appropriations considerably and then we have to compromise. We have recognized that fact in the Senate. But we

have had our limitations in both fields. I well remember some of the bitter fights that have been engaged in concerning the Antitrust Division of the Department of Justice.

There is another related agency that is extremely valuable and that is the Bureau of Labor Statistics, which is tremendously helpful in arriving at basic figures. It has been very hard to get the money to let them carry out the mandates of Congress when a big issue arises.

Mr. MARKHAM. I am a rather conservative person when it comes to Federal budgets at large, but I do think that these are significant data to show.

The CHAIRMAN. I know they are significant.

Mr. MARKHAM. To show the priority that is given antitrust activities.

The CHAIRMAN. There are a number of others.

(Discussion off the record.)

The CHAIRMAN. Thank you so very much, gentlemen.

We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:53 p. m. a recess was taken until 10 a. m., Friday, June 10, 1955.)

(Attached is a list of replies by Prof. J. Fred Weston to supplemental questions sent to him by the subcommittee.)

Will you please define the following in terms of their meaning, as used in your testimony before this subcommittee:

Question. Monopoly.

Answer. Monopoly literally means a single seller. More generally it refers to control over supply by the seller. It implies higher prices and lower outputs and therefore undesirable public welfare consequences.

Question. Duopoly.

Answer. Two sellers.

Question. Oligopoly.

Answer. Oligopoly—a small number of sellers. The product may be homogeneous or heterogeneous.

Question. Is the term "oligopoly" useful from either an economic or antitrust standpoint?

Answer. The concept "oligopoly" is useful from both an economic and antitrust standpoint because the danger of spontaneous cartel action or collusion is greater among a small number of large firms than among a large number of small firms. Hence the performance of firms in oligopolistic industries should be continuously reviewed by Government agencies, such as the Federal Trade Commission or Department of Justice.

Question. Are oligopoly markets inherently incompatible with active competition?

Answer. Oligopoly markets are not inherently incompatible with active competition. We have observed dramatic illustrations of competition among oligopolists in automobiles, textile, chemicals, and so forth.

Question. Competition and workable competition.

Answer. Competition as formally defined by economists requires the following conditions:

(1) Large numbers of buyers and sellers.

(2) Homogeneous products.

(3) Knowledge of relevant information and no major frictions in mobility of resources.

Competition implies the impersonal operation of markets. Workable competition recognizes that atomistic conditions and homogeneity of product may not actually obtain. It recognizes the rivalry between large units as a type of economic struggle for increasing one's share of the market.

Question. Do you advocate the adoption of the concept of effective or workable competition?

Answer. The concept of effective or workable competition is indispensable for a realistic analysis and understanding of the operation of more modern economic organizations.

Question. Market or market place.

Answer. Market or market place is formally defined as a commodity for which a unique price exists. However, within the framework of the concept of workable competition it refers to the range of alternatives available to buyers in choosing among alternative ways in seeking to attain certain specified satisfactions.

The existence of close-substitute products makes the job of defining a market or market place empirically a very difficult one.

Question. Economic concentration as related to competition and markets.

Answer. Economic concentration is defined in terms of some agreed-upon criteria. Many measures of concentration are employed. The most familiar one is the percentage of total market sales or employment accounted for by a specified number of firms, such as 4 or 8.

Question. Big business.

Answer. Big business refers to the existence of firms which are large in absolute size. Large being defined by some agreed-upon arbitrary criteria.

Question. Is "big business" the same as monopoly?

Answer. Big business is not the same as monopoly because many examples may be found of large firms which are engaged in active rivalry with other firms.

Question. Integration, vertical, horizontal, conglomerate.

Answer. Vertical mergers consist of combinations of firms producing components at different stages of production of the product.

Horizontal mergers consist of combinations of firms producing the same product or close substitutes.

Circular mergers consist of combinations of firms producing items which may be sold by a single sales force.

Conglomerate or heterogeneous mergers consist of combinations of firms with no apparent similarities in production or sales activities.

Question. Do you think that American industry is unduly concentrated?

Answer. I do not think that American industry is unduly concentrated. American industry is more concentrated than I would prefer on purely emotional grounds. It would be difficult to establish that less concentration would be more desirable if other possible consequences of reductions in concentration were taken into account. If less concentration meant more cartel activity or more Government regulation of production or less efficient operation, it would be undesirable.

Question. Do you consider the present degree of concentration as a possible danger to economic freedom and, as propounded by some schools of thought, the political freedom of the country?

Answer. I have never seen an adequate case developed that the present degree of concentration among business firms constitutes danger to economic freedom or political freedom of the country.

Question. Would there be an increase in the number of rivals and hence the amount of rivalry if we did not have so much concentration of economic power in certain industries?

Answer. Whether an increase in the number of rivals and rivalry would result from less concentration depends upon the nature of the industry and many other factors. It is not possible to make a prediction on a priori grounds.

Question. Do you believe that economic concentration must be stopped, and the trend reversed, as a safeguard against the possible necessity of Government regulations?

Answer. Available evidence indicates that economic concentration has either diminished or changed negligibly since 1904 in the United States. The forces of competition buttressed by Government supervision through the Department of Justice and the Federal Trade Commission have been effective safeguards. Government may further promote competitive behavior by the reversing of its restrictionist actions and following a positive program as set out in part VII of the statement submitted by me to the subcommittee on June 9, 1955.

Question. Do you believe that in many American industries or markets competition is actually imperfect in various forms and degrees?

Answer. I would estimate that oligopolistic market structures exist in industries which account for no more than 20 percent of income produced in the United States. Workable competition prevails in a high percentage of the oligopolistic industries. From a realistic standpoint therefore the extent to which markets are imperfect must be relatively small.

Question. Considering the definition which you have already given for "big business," do you believe that "big business" is compatible with a competitive system?

Answer. I believe that "big business" can be and is compatible with a workable competitive system.

Question. From an economic point of view, what kinds and degrees of competition are contemplated by the antitrust laws?

Answer. This question is too technical for brief treatment.

Question. As an economist, do you see different standards of competition contemplated by different laws—as for example, under the Sherman and Clayton Acts and the Robinson-Patman Act?

Answer. This question is too technical for brief treatment.

Question. As an economist, would you say that dissolution, divestiture, or divorcement is the only effective remedy for oligopolistic industries? If not, what would you suggest?

Answer. My answer to this question would be the same as answer to question 5 or last question on page 3.

Question. Do you believe that section 7 of the Clayton Act, as amended, is adequate to stem incipient monopoly and the substantial lessening of competition throughout the economy?

Answer. Yes; if adequate appropriations are made to the Federal Trade Commission for carrying out its increased responsibilities under section 7 of the Clayton Act.

Question. Would a more rigorous enforcement policy since 1950 have checked the tide of mergers which had developed throughout the economy?

Answer. I think it is extremely unlikely that the number of mergers since 1950 reflects any lack of rigorous enforcement policy.

Question. Several times Congress has passed laws for the purpose of putting a brake on merger movements. Yet, mergers have continued at a rapid pace. Why?

(a) Was it because the laws were not properly framed?

(b) Properly enforced?

(c) Because the economic facts presented perplexing problems, difficult to solve by legislation and court action?

Answer. It is my judgment that the large number of mergers represent (1) the joint influence of the existence of business reasons which made the mergers advantageous from an efficiency standpoint, and (2) special factors in the economic environment which made these advantages even more powerful. These influences are detailed in part VI of my prepared statement. Because most of these mergers did not have anticompetitive consequences, it was neither appropriate nor desirable under the laws to prevent them.

Question. What type of mergers would you consider harmful to the economy from the standpoint of the national antitrust policy?

Answer. Also covered by part VI of my prepared statement.

Question. What economic facts, or situations, do you think should be of prime importance in determining whether a proposed merger would be harmful to the economy?

Answer. Covered by part VI of my prepared statement.

Question. Will you comment upon the three factors which the FTC says shall be considered in analyzing a merger?

(a) The character of the acquiring and acquired company and the transaction.

(b) The character of the markets affected.

(c) Immediate changes in the acquiring company and in the adjustments of other companies operating in these markets.

Answer. Covered by part VI of my prepared statement.

Question. Do you think greater emphasis should be given to other considerations?

Answer. Covered by part VI of my prepared statement.

Question. How do you view the tendency of big companies taking over their customers? For example, the steel companies taking over most of the steel drum industry.

Answer. I do not find it possible to generalize with regard to this tendency. A judgment would require an industry-by-industry analysis.

Question. Has not the pattern of vertical integration, as exemplified by steel and later by automobiles, set the price of new entry into the fields at practically prohibitive levels?

Answer. I do not feel that vertical integration makes new entry virtually prohibitive. New firms may enter the industry by performing certain specific operations. If these operations are performed effectively, the firm is likely to expand into other levels of operation and thus finally into completely integrated activity.

Question. Do you believe that ease of entry into an industry is one of the large economic problems of today?

Answer. I do not feel that ease of entry is one of the large economic problems today. I think that ease of entry is a function of the stage of an industry. It is probably less easy to enter a mature industry in which large integrated units already exist. However, new and growing industries as well as the services and trades provide considerable opportunity for entry.

Question. What recommendations would you have to reducing this barrier?

Answer. My recommendations on this are set out in part VII of my prepared statement.

Question. Even though a company may dominate a market because of internal growth, would the fact that its domination alone gave it undue monopoly power be objectionable?

Answer. The fact that a company has come to dominate a market through internal growth carries the presumption that it has grown because of relatively greater efficiency. If predatory and restrictionist activities are not practiced, domination alone would not be objectionable. To prohibit dominance per se might inhibit the growth and contributions of efficient firms. But dominance involves dangers to competition which necessitate supervision.

Question. Would you be opposed to dominance regardless of whether it was achieved by internal or external growth?

Answer. This was answered in my reply to the previous question.

Question. Is the real evil of dominant companies their power to fix prices, control the market, and dominate their field of endeavor?

Answer. I do not think it has been established that there is "real evil" associated with the behavior of dominant companies. When workable competition prevails, large firms do not have the power to fix prices or control markets.

Question. Do you believe that so-called stabilization of an industry through economic concentration can ever be justified?

Answer. I believe that the answer to this question depends upon what is meant by stabilization. If concentration results in a "workably competitive" industry, this process could be justified on performance grounds.

Question. At what point in the development of an industry do you consider optimum size to be in the public good? And what steps would you take to control optimum size?

Answer. I think that optimum size is a nebulous concept. If performance in the industry rates high by the criteria set out in section IV of my prepared statement, the optimum size is the existing size. Optimum must be defined in terms of performance rather than arbitrary standards of absolute or relative position in the market.

A STUDY OF THE ANTITRUST LAWS

FRIDAY, JUNE 10, 1955

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10:05 a. m., in room 424, Senate Office Building, Senator Harley M. Kilgore (chairman) presiding.

Present: Senators Kilgore, Kefauver, and Wiley.

Also present: Joseph W. Burns, chief counsel; and Donald P. McHugh, assistant counsel.

The CHAIRMAN. The committee will come to order.

The witness today will be Mr. George Romney, of the American Motors Corp.

Off the record.

(Discussion off the record.)

The CHAIRMAN. You have a prepared statement, I believe. Please go right ahead with it.

STATEMENT OF GEORGE ROMNEY, PRESIDENT, AMERICAN MOTORS CORP.

Mr. ROMNEY. I would like to go through it and make a few comments on it, Senator.

Do you want me to identify myself, or is that necessary?

The CHAIRMAN. Identify yourself and your connections with the company.

Mr. ROMNEY. With the company and—

The CHAIRMAN. And your past experience.

Mr. ROMNEY. My name is George Romney. I am president of the American Motors Corp.

I originally joined the industry as Detroit manager of the Automobile Manufacturers Association, and then became managing director; and up until 1948 I worked for the whole industry in primarily that capacity.

In 1948 I joined the Nash-Kelvinator Corp. as assistant to the president, and continued in that capacity until I was made vice president, executive vice president, and then on the merger, executive vice president of American Motors, and on my predecessor's death last October, the president of American Motors.

So, briefly, that will give you a little of my background.

Before I was in the automobile business I was with the Aluminum Company of America, and so, my background, my experience includes

personal experience in an industry that certainly was monopolistic in the period when I was with it, and one reason I left it—

The CHAIRMAN. At least the sole furnisher part of that time.

Mr. ROMNEY. Pardon?

The CHAIRMAN. At least the sole furnisher of aluminum in this country.

Mr. ROMNEY. That is right.

As a matter of fact, I represented the Aluminum Co. here in Washington, so I am quite familiar with the background of the antitrust proceedings in the case.

I left them to go into the automobile business because I felt it represented an industry where there would be greater opportunity. So, as a result of that, I have had a little experience in competition.

Now, to get to the statement: American Motors Corp. is the result of the merger on May 1, 1954, of Hudson Motor Car Co. with Nash-Kelvinator Corp. American Motors manufactures Hudson, Nash, and Rambler automobiles and Kelvinator and Leonard appliances.

Presumably you would like me to discuss the reasons for and results of the merger of the two companies—

The CHAIRMAN. You are now manufacturing refrigeration?

Mr. ROMNEY. Yes.

The CHAIRMAN. Kelvinator and what else?

Mr. ROMNEY. We manufacture a fairly full line of major appliances; in other words, refrigerators, ranges, home freezers, laundry equipment—

The CHAIRMAN. Electrical appliances?

Mr. ROMNEY. All sorts of major electrical appliances.

We are also manufacturers of injection molded plastic parts. We have more capacity for large parts than any other company in the country, as a matter of fact.

We also manufacture thermostatic and pressure controls for automobiles and appliances, and we are the biggest company in that field. A subsidiary of ours (we own 60 percent of it) is the biggest manufacturer of car heater controls, and controls for electrical appliances. So we have a wide range of activity outside of the automobile business ourselves.

The CHAIRMAN. Most of that originally was the property of Nash-Kelvinator?

Mr. ROMNEY. Yes. So far as Hudson is concerned, it was primarily an automobile manufacturer. These other activities were all a part of the Nash-Kelvinator Corp.

The CHAIRMAN. Do you know that at one time Hudson controlled, what was it, what was the engine company, Red Seal Continental?

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. All right, please proceed.

Mr. ROMNEY. Probably you would like me to discuss the reasons for and the results of the merger of the 2 companies, 1 of which, Hudson, has engaged in the manufacture and sale of automobiles since 1909 and the other since 1916.

Since Nash-Kelvinator was the surviving corporation, I will detail its premerger situation more fully than Hudson's. In its last complete fiscal year, ending September 30, 1953, Nash-Kelvinator enjoyed net sales of more than \$480 million—that does not include the

sales of subsidiaries, Senator, just the parent corporation—profit before taxes in excess of \$31 million and net earnings of \$14,123,000.

It operated manufacturing plants in Wisconsin, Michigan, California, Canada, and England and supplied parts and components to assembly plants in more than 40 communities around the world. It was a highly integrated manufacturing company, possessing facilities for forgings, castings, stampings, transmissions, axles, engines and bodies for automobiles, as well as facilities for the manufacture of refrigerators, ranges and other major appliances.

The merger proxy statement issued February 8, 1954, showed Nash-Kelvinator's total assets to be \$233 million, with working capital of \$67,700,000. In addition, it owned all the capital stock of Refrigeration Discount Corp., which finances appliance dealers and distributors, and had sizable investments in manufacturing concerns here and abroad, from which regular dividends were received.

In view of its size, strength, and diversification, why was Nash-Kelvinator receptive to overtures from Hudson for a merger?

Now, Senator, we are ordinarily thought of as being a small automobile company in the field. We are a major appliance manufacturer, and all told are one of the 100 largest corporations in the United States; so we are not a small company in terms—

The CHAIRMAN. Didn't Nash make four-wheel drives during World War I?

Mr. ROMNEY. Yes, quads.

The CHAIRMAN. Quads.

Mr. ROMNEY. Yes. So we are not a small corporation, as corporations go, although we are a small corporation in the automobile business.

The CHAIRMAN. I know that was one of our mud trucks that was used quite extensively by the Army on the muddy roads.

Mr. ROMNEY. That is right. That was probably blessed and cursed as much as any vehicle in World War I.

Since the greater part of Nash-Kelvinator's total dollar sales volume was in automobiles, let's first analyze the company's position in the United States automobile market. Of eight principal companies manufacturing automobiles in the United States at the time, Nash-Kelvinator ranked fifth in volume of automobiles produced. Its percentage of total passenger car sales in the industry for the year ended December 31, 1953, was 2.2. A year earlier its percentage of industry had been 3.5.

The merger proxy statement showed Hudson Motor Car Co.'s total assets to be \$123 million, with working capital of \$36 million. Hudson's net sales and other income for the calendar year were \$192,971,000. Hudson at the close of 1953 had a percentage of industry sales of 1.2. In the year previous it had been 1.7.

The CHAIRMAN. Speaking of Nash, did Nash make its own bodies?

Mr. ROMNEY. Yes.

The CHAIRMAN. How about Hudson?

Mr. ROMNEY. Hudson did, too. As a matter of fact, our plants in Wisconsin are much more highly integrated than people realize.

We make not only stampings, not only the bodies, but the trim for the bodies. We have a foundry there, so we actually make our castings, and start right from the raw castings, so far as the engine is

concerned. We have our own forge plants, so we make our own forgings, and we make plastic parts, as I have indicated.

The CHAIRMAN. You make and manufacture your own engines?

Mr. ROMNEY. We make our own engines, axles, differentials, torque tube drives.

Nash-Kelvinator was a well-integrated company, as automobile companies go, and much more fully integrated than people realize.

The CHAIRMAN. How many vendors did you buy from?

Mr. ROMNEY. About 3,500, Senator.

The CHAIRMAN. Three thousand five hundred?

Mr. ROMNEY. If you take both sides of the house, both appliances and cars, we probably buy from about 5,000 different suppliers.

The CHAIRMAN. Suppliers of small items?

Mr. ROMNEY. All sorts of items.

The CHAIRMAN. Hardware?

Mr. ROMNEY. Yes; hardware, electrical equipment, shock absorbers, and so on.

We both buy and sell. We sell controls, and so on, to other automobile companies, you see. This Ranco Co. that manufactures heater controls sells them to all the other passenger-car companies. We sell 50 percent of GM's requirements.

This slump in sales in the spring of 1953, which was felt particularly by the smaller companies, came simultaneously with the tightened credit policies of the Federal Administration, both of which caused finance companies to restrict credit to many automobile dealers.

The CHAIRMAN. You mean when they tightened up on the length of the conditional sales contract; is that it? Plus the amount—

Mr. ROMNEY. That, plus the—

The CHAIRMAN (continuing). The initial payment?

Mr. ROMNEY. That is right. It was a stricter restriction on the acceptance of retail paper; that is, retail sales paper, and it was also—and this was more important—a restriction on the wholesale credit extended to dealers, so that it tended to cut down the stocks of cars they could have on hand.

The CHAIRMAN. Neither company had its own finance company for financing—

Mr. ROMNEY. Not in the automobile field. We have a finance company of our own in the appliance field, one of the biggest, but not in automobiles.

The CHAIRMAN. I see.

Mr. ROMNEY. Now, beginning in the spring of 1953, the effect was so severe that some of these dealers were forced out of business and others lacked adequate credit for normal volume operations. This worked particular hardship on Nash-Kelvinator, which had deliberately limited its number of dealers during the postwar period so that the individual dealers would enjoy a relatively larger volume of business at a time when production was held below demand by material shortages. In other words, we deliberately elected in the early post-war period to hold down our dealer franchising so the dealers would have an adequate number of cars.

The CHAIRMAN. They would have a bigger territory.

Mr. ROMNEY. A bigger territory and more volume.

With fewer dealers, both Nash-Kelvinator and Hudson experienced sharp reductions in their volume of sales.

The CHAIRMAN. Let me ask one other question, before we get off the dealer question.

Mr. ROMNEY. Yes.

The CHAIRMAN. Some of the automobile companies have their own distribution; in other words, the company has its distributors scattered over the United States who, in turn, deal with the dealers.

I understand Chrysler has mostly direct dealer to factory contact, and I know before the war some of them had distributor contracts and dealer contracts, the distributor being responsible, however, for the dealer contracts to the company through which he dealt.

Mr. ROMNEY. That is right.

The CHAIRMAN. And in each case, however, the distributor furnishes the field servicemen for inspections and that kind of thing of the automobiles.

Which plan did you follow?

Mr. ROMNEY. Well, in the case of Nash, all of our relationships are direct factory to dealer. In other words, we have a factory zone organization that now performs the functions, most of the functions, of the old distributor.

The CHAIRMAN. The distributor.

Mr. ROMNEY. So our dealers are direct dealer-factory.

The CHAIRMAN. Then you ship directly to the dealer?

Mr. ROMNEY. Directly to the dealer.

Now, in the case of Hudson, at the time the companies joined, Hudson had 11 distributors, but they handled only a small section of the total market. The rest of it was handled on a direct factory-dealer basis.

We still have about the same setup on the Hudson side. So we have some distributors, but mostly direct dealer-factory on the Hudson side.

The CHAIRMAN. I see.

Mr. ROMNEY. It was readily apparent that our major competitors, some of whom had grown as a result of past consolidations, had been aided in their drives for a larger share of the automotive market by competitive advantages resulting from their comparatively greater size and volume operations.

The outstanding example of the advantage of size is body-tooling cost—the largest single cost in an automobile. Since World War II, body-tooling costs have increased 4 or 5 times from prewar. Today, to tool a complete body for single-plant production costs in the area of \$20 million.

Of course, the cost of tooling a body in a multiplant company is many times even this figure. Since this outlay of money has to be written off over the number of cars produced by the tooling, it is obvious that the larger the number of cars the lower is the tooling cost per unit. With the sizable amount of money involved, this is a most significant factor.

It is a well-known fact that the Big Three operate with relatively few basic bodies. For example, Ford has 2 and General Motors has 3, and Chrysler has 2.

Before the merger, Hudson had 2 and Nash had 2. So Hudson and Nash together used more basic bodies than either Ford or General Motors or Chrysler.

While the reasons for the merger were many, the paramount one was this:

Because of the compatibility of Nash and Hudson bodies—they were the only 2 American companies using the advanced monocoque body, or single-unit type, body construction—we saw an opportunity to take swift advantage of building the 2 lines of cars with 1 basic body. This use of common tooling for more than one make of car was perhaps the biggest single manufacturing and tooling advantage enjoyed by the Big Three and our ability to adopt this approach with Nash and Hudson would enormously improve our ability to compete.

Our respective directors, stockholders and several governmental agencies with which we consulted were in agreement.

The CHAIRMAN. Let me ask you something. You talk about one basic body.

Mr. ROMNEY. Yes.

The CHAIRMAN. In your different sizes, don't you have different sized bodies?

Mr. ROMNEY. Well, you can take the same basic body and build more than one size.

The CHAIRMAN. You can?

Mr. ROMNEY. Yes.

When I talk about the basic body I am talking primarily of the underneath structural parts rather than the exterior appearance parts.

The basic approach is to use the structural parts over as broad a program as you can, and achieve your appearance distinction with exterior appearance parts, like fenders and hoods and roofs, and so on.

The CHAIRMAN. What I was thinking about were the dies necessary to press out—

Mr. ROMNEY. That is right. You can use the same dies basically; you can use the same big dies, the most expensive dies you have got, and build, oh, gosh, you could build, 2, 3—you could build 4 bodies of different sizes with only a limited amount of additional tooling.

The CHAIRMAN. In other words, you can put sections into your dies, to lengthen the body, lengthen the roof?

Mr. ROMNEY. You can attach sections to bigger sections stamped out for a smaller car, to make a longer car.

The CHAIRMAN. I see.

Mr. ROMNEY. If you are familiar with building, you know what a Dutchman is?

The CHAIRMAN. Yes.

Mr. ROMNEY. You can put Dutchmen on some of these parts to lengthen them out and build more than one size vehicle.

The CHAIRMAN. Now, if you are to go into station wagons, touring cars, and various things, each one of those makes a different basic body, do they not?

Mr. ROMNEY. No.

The CHAIRMAN. They do not?

Mr. ROMNEY. There can be a high degree, not complete, but there can be a high degree of interchangeability between the major stampings of a four-door sedan and a station wagon.

The CHAIRMAN. I see. Thank you.

Mr. ROMNEY. Now, you have to have some distinctive stampings, but the bulk of the stampings can be common, particularly, Senator, where it is a four-door sedan, and the station wagon in the same line, because then your exterior parts, many of them, can be common, too; you are not worried about external appearance differences.

The CHAIRMAN. Why is it that a 2-door sedan is cheaper than a 4-door sedan?

Mr. ROMNEY. Well, because you have only 1 set of door stampings, you have only 1 set of doors, and 1 set of equipment.

The CHAIRMAN. You get rid of the hardware.

Mr. ROMNEY. Sure; and there are other differences that make a difference in production costs.

The CHAIRMAN. I see. All right, please go ahead.

Mr. ROMNEY. Some of your most expensive dies are your interior door panels, you see.

Under the terms of the merger, the dealer organizations of all three divisions—Hudson, Nash, and Kelvinator—were maintained intact. We firmly believe in competition, and we believe we will get better results if Hudson dealers are competing for sales with Nash dealers, and vice versa. While it is much too early to generalize on the results, we think the trend indicates the 2 automobile dealer bodies are doing a better job of competing against the rest of the industry; and I might say that was another basic reason for the merger, which was because we felt it was desirable to have at least 2 major dealer bodies selling our advanced product.

Hudson dealers handle their own lines of Hornet and Wasp cars, while Nash dealers sell the Ambassador and Statesman.

With the introduction of the 1955 line of Ramblers, however, we began to merchandise this established car through both groups of dealers, with the result that Rambler factory sales in the first 5 months of 1955 have increased more than 3 times the total during the corresponding period last year.

Trade figures for the first 5 months of this year indicate that American Motors is getting 2.46 percent of industry factory sales against a Nash-Hudson total of 1.69 percent in the same period a year ago.

I might point out that that percentage increase is as great as the percentage increase enjoyed by Chrysler Corp. this year. In other words, while the percentages that I am talking about are smaller, the actual increase is as great as the improvement that Chrysler has experienced.

And I might say it is harder to start from a small figure and go up than it is to start from a big figure and go up.

It is significant, too, that most of our automobile dealers are making substantially more profits this year than last year, when many of them were operating in the red. Our dealers, as a whole, are doing very well this year.

Now, within 6 months of the merger, American Motors was able to realize some important manufacturing economies. By dispensing with completely separate tooling for each Hudson and Nash, American Motors saved \$15 million in 1955 model tooling. Manufacturing and assembly operations of Hudson and Nash were largely concentrated in our Wisconsin plants.

In addition to tooling expense reduction, overhead costs were substantially reduced. As an example, before the merger Nash had excess forging capacity in Kenosha, while Hudson in Detroit was purchasing forgings from outside suppliers. After the merger, the huge hammers in Kenosha beat out parts for both Hudson and Nash at a lower cost for each.

The CHAIRMAN. Is it not a fact that what we might call the annual change in styling on bodies adds pretty heavily to the cost of manufacturing automobiles?

Mr. ROMNEY. Well, as I have indicated, probably the largest single element of cost in an automobile is this cost of tooling basic bodies.

Now, while you do not change a basic body every year, the frequency of those changes has been going up in recent years, and even the annual change is tending to accelerate right now.

Now, that was not true in the immediate postwar period, because, after all, there was a pent-up wartime demand, so styling was not playing quite the part that it is today.

But obviously this change in body styling and in basic bodies is a big element in the costs of an automobile.

The CHAIRMAN. Isn't that, however, brought about by what one might say is a bid for the market?

Mr. ROMNEY. Oh, sure; we are in a style industry, Senator, and we are in a styling industry because—

The CHAIRMAN. Don't those things add to the problem of what you might call the resale of used cars?

Mr. ROMNEY. Well, let me put it this way, Senator: This styling, this change in styling, helps to provide used cars at prices and values that enable many people to own cars that would not otherwise be able to own cars.

The CHAIRMAN. That is right; you have two angles to it there.

Mr. ROMNEY. That is right. Obviously, the changes in styling tend to obsolete previous cars in the minds of owners, and thus used cars become available on a basis that would not otherwise be the case.

The CHAIRMAN. Of course, a great deal of demand is built upon new inventions, too.

Mr. ROMNEY. That is right.

The CHAIRMAN. I know lots of people who wanted to trade when power steering came in, to get power steering and power brakes.

Mr. ROMNEY. That is right.

The CHAIRMAN. Of course, that was a distinct advantage to the operator, particularly the women operators of cars. But I am just thinking of the body changes, what effect they have on the cost of new automobiles.

Mr. ROMNEY. I would like to touch on what you are talking about a little later on, if I may, when I get around to it.

The CHAIRMAN. All right.

Mr. ROMNEY. Consolidation of facilities continues in other areas where important savings in overhead are possible. For example, the 2 companies had 34 parts warehouses, while today these operations are consolidated into 18 warehouses. Zone and regional offices have been consolidated in most cities.

The organizations have not been consolidated by the merger, but the use of space has been.

American Motors has been able to make a more effective impact on the public consciousness of its products by combining, where feasible, its advertising and sales promotion expenditures. In national newspaper advertising alone, 1 Big Three company in 1953 spent \$32,944,248; by comparison Hudson spent \$3,221,918 and Nash spent \$2,318,764 the same year.

While our advertising budgets still are modest compared to Big Three totals, money put into Rambler advertising, for instance, does double duty in that it helps both automobile sales divisions. More importantly, the pooling of advertising funds has enabled us to become a consistent advertiser in one important national medium, television. Hudson and Nash dollars spent on Disneyland are working harder, and getting more results, than comparable sums spent individually by Hudson and Nash on a sporadic basis in the past.

The cost of advertising and merchandising cars is well up beyond what it used to be, Senator.

The CHAIRMAN. Has not one of the biggest dollar items in that rise been from television?

Mr. ROMNEY. Yes.

The CHAIRMAN. The cost of television shows?

Mr. ROMNEY. It is a very expensive medium.

The CHAIRMAN. Yes.

Mr. ROMNEY. Although we think we are getting our money's worth with our program because we think we have been very fortunate.

The CHAIRMAN. Were you not forced into a situation where you have to take advantage of it by reason of competition?

Mr. ROMNEY. I did not quite get your question.

The CHAIRMAN. Have you not been forced into that position by reason of competition where you had to take advantage of it?

Mr. ROMNEY. That's right. We had to go into that medium. Nash and Hudson could not be in it effectively before the merger.

The CHAIRMAN. In other words, you could not balance the small cut in price against the advertising?

Mr. ROMNEY. That is right. We needed the added impact on the market and the added advantage of that medium.

Not all the merger results, however, were on the plus side. Transfer of Hudson operations from Detroit to Wisconsin plants—you see, we have consolidated our automobile manufacturing operations in Wisconsin—results in the dislocation of about 4,700 hourly workers out of 8,600 on the payroll around the time of the merger. With the cooperation of the union, displaced Hudson workers were offered available jobs in Wisconsin.

The shift of automotive operations left American Motors with a considerable amount of idle plant in Detroit, which is a financial burden. The Hudson special products division, with an experienced corps of executives, has been given the task of obtaining defense or other work and of disposing of excess facilities; and, I might say, we have obtained some such work, and we are hopeful that we will secure additional such work.

We wrote off the heavy expense of obsolete Hudson tooling, inventories and commitments against a merger reserve. The first 4 months of the fiscal year results in a substantial loss—our fiscal year had commenced October 1 last fall—we are not on a calendar-year basis.

The first 4 months of the fiscal year resulted in a substantial loss, largely from the completion of production of the 1954 Hudson models in the Detroit plant and the expense of consolidating 1955 Nash and Hudson production in the Wisconsin plants. Because of expense reduction and increased sales volume, we have steadily improved our financial results. Both companies were losing money before the

merger, but since the middle of February, we have been operating in the black.

As a result of the merger, we're better able to cope with our competitive problems.

For example, in recent years the bigger companies have given working capital assistance to some dealers. The financial resources of the larger companies are thus being used as an added inducement to dealer prospects. Lacking comparable resources, last fall we initiated a dealer volume investment fund, which provides for graduated payments to dealers based on the volume of cars sold by dealers throughout the country during the year. This fund increases the dealer's opportunity to make a profit, and thus helps relax the credit pressure on our dealers, and also assists Hudson and Nash in their efforts to acquire new dealers.

The CHAIRMAN. How does that operate? If they make a certain quota, you give them a certain discount?

Mr. ROMNEY. That is right; depending on volume, and it is for all dealers, Senator.

Other companies have a discount for the dealer, and then they have an area bonus plan in many cases. Now, we have both of those, and then in addition we have a bonus for dealers based on total national volume of factory sales to dealers, you see.

For example, in the case of the rambler, on the first 25,000 cars purchased by dealers, they get a certain additional discount per car. From 25,000 to 50,000, they get a higher discount per car; from 50,000 to 75,000, they get a higher one, you see.

Now, that was done to strengthen the credit position and financial position of our dealers, to enable us to attract new dealers, and offset this dealer financing by the bigger companies. It was done also to share with our dealers and to make it perfectly clear to our dealers that we were sharing with them any benefits from increased volume because, obviously, many of these cost factors become much less as volume goes up.

The CHAIRMAN. In other words, that is what, in labor circles, is called an incentive payment plan.

Mr. ROMNEY. That is right.

But it is for a group, for all of our dealers—not on an individual dealer basis, but on a total dealer basis—so the smaller dealers benefit as much as the bigger dealers from the plan.

Other significant results of the merger have been consolidation of administrative, research, engineering, and purchasing expenses.

American Motors is seeking to improve its percentage of passenger-car sales by forging a distinctive product position in the automobile industry.

I want to touch on that later. We do have products that are radically different from the products being built by the other automobile companies, and I want to touch on that a little bit later because we think therein lies the future of American Motors.

We offer features available on no other cars, such as single-unit bodies and reclining seats.

Let me just stop and tell you what a single unit body is. You know, an oxcart, a wagon, and the buggy used to be built with a frame of solid oak, a solid oak frame or wood frame, and then you mounted the body on top, you see.

Now, that is the way all other automobile companies in this country are still building cars, just the way we used to build oxcarts.

The only company that is building cars with the latest engineering principles and methods being used in all other forms of transportation in this country is American Motors, and what we do is to build the frame and the body as a single integral unit. The structural members are composed of box sections where you build up a structural member, and the outside body sheet itself become the fourth side of that structural member, and it runs all the way through a car just like the structural design of an airplane.

You see, the airplane strength does not result from a frame with a body bolted to it. The airplane strength is the structural strength all the way through the fuselage, and largely through these box sections.

Now, the result is that our cars are as different from the other cars on the road as a streamlined train is from an old-fashioned train, and every consumer benefit from an automobile is improved by our type construction. Even the big companies are using it in the new cars they have tooled abroad since the war.

So when I say we have made fundamental and radical changes in cars, that's one of the things I referred to, because all our cars are built that way.

It makes the car twice as strong, it makes it twice as safe, it lasts longer, it is rattle free, it is more economical, it improves performance, it improves comfort.

The CHAIRMAN. In other words, you simply reverse your frame members so that the channel is covered by the body, and the body goes to the bottom of the channel, instead of resting on the channel steel, whereas in the other frame, the channel is inside, and the body rests down on that; isn't that about right?

Mr. ROMNEY. In the one it rests down like this; there are two separate units, and the body is bolted to the frame. In the other case the two are built integrally and the structural strength you will find up in the top, in the roof of the car and down the sides of the car, and out in front of the car under the fenders, and structurally you have got a car that is twice as strong as the other type car.

Now, it is not as heavy. It does not have a lot of deadweight. You see, the other car depends primarily for its strength, Senator, on that frame, whereas this type of construction uses the whole body for its strength.

Our air-conditioning unit for cars is the lowest priced installed system in the industry. Ours are half the price of others, and based on outside tests, they are superior in their performance. That is because we are in the refrigeration business, too.

We believe it is significant that each of the Big Three has a basic volume car. By that I mean they have the Ford, the Chevrolet, and the Plymouth. We are making progress in the development of the Rambler as the basic volume car of American Motors; and I think if you would be fully successful in the automobile business today in this country, and to compete effectively with the Big Three, you have got to have a basic volume car.

American Motors pioneered in the compact car field with the Rambler, thus providing American customers with the most economical

American car on the market and one better adapted to the basic changes that are occurring in the pattern of car use and ownership.

We believe that as a result of a lot of things, urban congestion, movement to suburban area, higher family incomes, that a terrific change is in its early stages as far as the automobile market is concerned—and I will develop that—and that this car is better suited for that change, and we are ahead of others in respect to that basic change that is taking place.

The CHAIRMAN. The Rambler is your smaller model, is it not?

Mr. ROMNEY. That is right.

One result of these changes is the accelerating increase in multiple car ownership which is rapidly becoming a major factor in new and used car sales.

You see, it has gone up from 4.8 in 1946 to around 15 percent at the present time. It has increased 3 times in the postwar period; and I am convinced that by 1965, bar war or economic depression, more than 50 percent of the families in this country will be owning and operating more than 1 car, Senator.

The CHAIRMAN. You should move them all to Texas, and then they would certainly be sold. [Laughter.]

Mr. ROMNEY Two-thirds of those families owning more than one car today have family incomes of much less than \$7,000 a year. This is not a wealthy family pattern that is developing. It is a basic pattern that is developing as far as multiple car ownership is concerned.

The premium on compactness and ease of maneuverability and handling and parking of the compact car is increasing every day. Despite the highway program you have down here, it is not going to come along fast enough to keep congestion and parking from becoming more difficult rather than less difficult.

The CHAIRMAN. Are you going in for gasoline economy in that car?

Mr. ROMNEY. It is the most economical car on the road.

Senator, the Chevrolet and Ford and Plymouth are getting bigger and less and less economical. If you will get the results of the last Mobilgas economy run out West, you'll find that the volume of cars of the Big Three had less miles per gallon than the average of all cars. That is what has happened in that area.

On the other hand, this Rambler job of ours established the mileage record in that race, both with a standard transmission and with an automatic transmission.

In styling and comfort, we offer motor products that are distinctive. We believe that there are a sufficient number of discriminating buyers in the total car market to enable us to enjoy a profitable sales volume.

We were advised that your committee wanted comments on any competitive disadvantages we experience as a result of the size of our competitors. Let me preface my comments on this request by making it clear that I question whether companies in any industry have adhered to the principle of competition as sincerely and effectively as the manufacturers of automobiles. I admire the larger automobile companies for the success of their achievements. To an unparalleled extent—I do not say to a complete extent, but to an unparalleled extent—they have not reached their present positions through practices or

policies that are, in and of themselves, subject to criticism of competitors or customers.

Nevertheless, the present size of the largest companies, coupled with other recent developments, has created for them competitive advantages in areas which they now dominate.

In an industry where style is a primary sales tool, public acceptance of a styling approach can be achieved by the sheer impact of product volume. Familiarity helps shape styling preferences.

What I am really saying there, Senator, is this: That automobiles and women's hats and sin have something in common. The thing they have in common is what Alexander Pope had in mind when he wrote:

"That sin, if seen too oft, too familiar with its face, is first endured, then pitied, and then embraced," you see.

Now, the same thing is true in women's hats, goodness knows, because once the idea develops that this new style, regardless of its merits from the standpoint of beauty, is the thing, it gets a public acceptance, and pretty soon we say, "Well, that doesn't look as bad as it did 3 months ago," and pretty soon we say, "It looks pretty good."

We get adjusted because our attitude and prejudices adjust to style changes. Now, the sheer impact of volume is a big factor in this styling picture.

Styling or product innovations, undertaken by a company doing 50, 30, or 20 percent of the business, are more certain of public acceptance than equally good or better innovations by smaller firms.

These improvements that we have—in bodies, for example—Senator, if a company doing 20, 30, or 50 percent of the business had pioneered that construction in this country the way we have, there would not be an American customer in this country who would accept a car built any other way, or at least on an equivalent basis.

There are more than one way of doing the same thing, but at least on an equivalent basis, they would not have accepted a car built in any other way.

Now, with our smaller volume and our smaller advertising and sales and merchandising facilities, it is a much different thing for us to get a public acceptance of a styling or product innovation than it is when you have the volumes that are being dealt with by the larger companies.

Furthermore, domination of television, radio, newspaper and magazine advertising, and even of news pages, contributes to this acceptance, even to the point where improvements of questionable consumer value can become a "must" in the products of all other companies.

Let me illustrate what I am talking about there a little bit. In every other form of land and air transportation, Senator, the latest engineering principles and methods have been used to eliminate bulk and weight and the handicaps of bulk and weight, without giving up the advantages of size and comfort and safety, and so on.

That is true with the streamlined train, it is true with the airplane, it is true with trucks, and it is true with buses.

Now, only in the passenger car do people still have the misconception—and it is a misconception—that weight and bulk are an advantage, and that you have got to have weight and bulk in order to have American standards of comfort, spaciousness, and safety.

Now, the sheer impact of reiterating an idea, plus the historical background, because there is some historical background for this weight and bulk thing during the early days of bad roads, and so on, you see, but the sheer impact continues a misconception that really is a misconception.

Let us take art. The attitudes and prejudices that you can create with respect to a product or that exist with respect to a product play a big part in the public acceptance of a product.

In the field of art, Senator, I think we would all agree that the most beautiful thing in the world is a beautiful woman, but I think we have amassed national prejudices and attitudes even on that score.

You go back to the days of Rubens and the Dutch painters, when they thought these great big fat women were beautiful women. That was their concept at that time.

The CHAIRMAN. They still do.

Mr. ROMNEY. They still do in Africa, that is right, Senator.

As a matter of fact, it reminds me of the Peter Arno stories. You know, Peter Arno draws these cartoons in the New Yorker magazine of these great big muscular men and these great big obese women, and one of his friends said to him one day, "Peter, why don't you draw some women who have got some sex appeal?"

And Arno said, "Well, my friend, you don't understand. My women have got sex appeal for my men." [Laughter.]

Now, in style and in product attitudes and prejudices you can do great things, you see, and familiarity plays a big part.

We used to have a national industry automobile show where everybody in the industry had an equal opportunity to put their products on display and have them considered on the basis of comparative merits.

We still have dealer shows, and I am not talking about that, because the dealer shows have never played the part that the national automobile show played, that influenced public concepts on styling and product, and so forth.

Now, that has not been resumed, which, in my book, has been a great mistake, and it is being replaced by a single company show that far exceeds anything that the industry as a whole used to do.

The CHAIRMAN. I am just wondering now why a national show, televised, would not be a good thing.

Mr. ROMNEY. Well, a national show today—

The CHAIRMAN. People cannot get to go to New York to see the show.

Mr. ROMNEY. A national automobile show today, properly put on, would reach people in this country to an extent that was never true of the old automobile shows, because you do have television, you do have new techniques, you do have new methods that can be used.

It is not impossible now for the bigger companies to duplicate a smaller company's product improvement and, through sheer volume, merchandise it as a big company innovation.

I can validate that, if you want me to, with a specific example.

On the other hand, the smaller company faces a tougher job of building customer familiarity with its product improvements because of its smaller relative volume and lesser advertising, sales, and promotion expenditures.

Another point at which sheer size is an important competitive factor is in the area of labor contracts, and labor costs. The possible impact of the guaranteed annual wage issue and the Ford settlement on the smaller companies makes this question particularly timely.

Contrary to popular impression, the larger automobile companies do not have the most liberal labor contracts in the industry.

Senator, we pay our workers, except for some of our skilled workers, in most classifications higher wages than any of the Big Three. They enjoy fringe benefits now in the vacation area, the pension area, the group health and insurance area that they are only now getting from Ford in the new contract.

Now, postwar labor negotiations have followed the pattern of basic agreement with one of the larger companies, followed by a more costly settlement with the smaller companies.

The CHAIRMAN. I want to ask a question on that point because it was brought up by a newspaper article this morning—a newspaper article that gets into the wage picture. There was criticism in this morning's Washington Post of the new Ford contract, and it said it would be a severe handicap to smaller manufacturers.

Does the merging of companies tend to create more actual working months per year to employees and less layoff periods, due to change in models and market conditions and things of that kind, than did the more highly competitive situation in those days when you had a great number of small companies?

In other words, can a small company maintain a year-round wage?

Mr. ROMNEY. Senator, I do not think the basic consideration is size, as I understand your question, Senator, and let me be sure I understand it.

The CHAIRMAN. Yes.

Mr. ROMNEY. As I understand your question, what you are asking is, Does size increase employees stability—that is, work stability—

The CHAIRMAN. Yes.

Mr. ROMNEY. And income stability?

The CHAIRMAN. Yes.

Mr. ROMNEY. I do not believe it is accurate to assume that income and work stability—employment stability—is a factor of size. I think it is rather a factor of growth and stability of market.

Now, obviously—you take the meat industry, the Hormel Co., which has an annual wage—I do not know what they call their program, but is in that area anyway—

The CHAIRMAN. It is an annual wage; that is what it amounts to.

Mr. ROMNEY. It is an annual wage in the way of time. They are a smaller company than some of the bigger companies in the meat industry.

The CHAIRMAN. Yes. But the point I am getting to is this: There is a certain tooling-up period in the automobile industry that has to occur every year by reason of styling changes.

Mr. ROMNEY. That is right.

The CHAIRMAN. In which you cannot work your production lines at full capacity.

Mr. ROMNEY. That is right; you cannot avoid shutdowns for model changes completely. A great deal has been done to reduce the amount of time for those changeovers.

The CHAIRMAN. That was the point I was getting at, as to possible reason for merger.

Mr. ROMNEY. Well, the effect of this merger on employment stability—

The CHAIRMAN. For instance, I can see where a merger of what you might call one set of dies for all models of a company would cause less dislocation when you change models at the beginning of the year. There would be less reason to shut down your assembly lines for a period of time.

Mr. ROMNEY. Senator, I do not know that that would be the case. As a matter of fact, I do not think this question of worker stability—employment stability—is related to size as much as it is to the success or lack of success of the operation to the growth or lack of growth of the operation.

After all, a small company that is growing, Senator, and has a stable market for its products, can stabilize employment as well as the big company, as far as I can see.

The CHAIRMAN. However, in the merger of Kelvinator, Nash, and Hudson, one of your chief gains was in the price field, cutting down on the cost of manufacture; is that not right?

Mr. ROMNEY. That is correct; and that has been reflected in increased sales, and, therefore, in more employment, and, therefore, in greater stability of employment; and then one of the first things we did after the merger was to discontinue a pattern of working this week and maybe not working next week, and then working a few days the following week.

They were working 2 and 3 and 4 days a week; and we organized the program and scheduled it so that we ran the Hudson plants steadily until we completed the 1954 car-building program, and avoided the constant interruptions that were occurring.

Now, actually we are spending \$3 million this year, Senator, to modify and expand our assembly facilities in Wisconsin to reduce the amount of time that it takes, after starting up on a new model, to hit peak production, you see, which will contribute to employment stability.

It also contributes to our capacity, and also contributes to the availability of cars following a new model announcement, which is a highly desirable thing.

Thus, a major problem confronting the smaller automobile manufacturer is that occasioned by union insistence on not only following the pattern set with the largest and most successful manufacturers, but also demanding even higher wage rates and more liberal employee benefits.

This method of bargaining is not peculiar to the automobile industry. The concentration of great economic power in large corporations which dominate a market and in a labor organization embracing in its membership substantially all employees in a given industry, places such corporations in a peculiarly favorable role in the marketplace.

That role has been made even more favorable because of the union's past unwillingness to enter into agreements designed to deal with the particular economic factors affecting the smaller automobile manufacturers. Of course, other postwar negotiations, up until this year, have occurred when the smaller companies were consistently making profits.

The result has been that pattern bargaining has been an important factor in the recent trend toward mergers and liquidations of industrial enterprises. It is our intention to insist vigorously on collective bargaining this year that is based on the economic facts of American Motors and not of Ford or General Motors.

The CHAIRMAN. On that pattern of bargaining, was this a factor that the companies considered in deciding to merge, and what importance did you attach to it?

Mr. ROMNEY. No; I would not say that the pattern bargaining was an element in deciding to merge. It was not an important consideration. It is one of the problems in the automobile industry that results from the size of the larger companies, and the fact that the union represents the employees of the entire industry.

It has developed a pattern, Senator, where the smaller companies are paying higher wages and paying higher fringe benefits.

The CHAIRMAN. What is the reason for that?

Mr. ROMNEY. Let me get in one thought there, and that is this: I do not think that the fact that the smaller companies are paying high wage rates and higher fringe benefits is solely the fault of the union. I am not saying that. As a matter of fact, in undertaking to straighten out the labor conditions in one of our plants in the Detroit area from this angle as well as other angles, I prefaced the whole program, a program which involved mass meetings with the hourly employees, as well as with the union leaders and supervisory people, by saying that top management was primarily at fault for the existence of the conditions that had to be corrected, you see.

The CHAIRMAN. What reason do the unions advance for asking for better terms in their contracts with the independents?

Mr. ROMNEY. Well, Senator, we have not yet commenced our negotiations this year.

I think that the management was as much at fault as the union for permitting this situation to develop. We are hopeful that, as a result of taking a look at the facts of bargaining on the basis of the facts, that the union will recognize, as we do, that it is in the interests of its members who are employees of American Motors, to keep wage rates and fringe benefits at least in the area of the Big Three wage rates, and fringe benefits, including whatever comes out of the present negotiations.

The CHAIRMAN. Do you think that General Motors and Ford agreed to certain wage rates or other labor terms upon the understanding that the union will obtain higher wages from the independents?

Mr. ROMNEY. No, I do not; I do not.

No; I think that responsibility for this situation rests entirely outside of the Big Three. I do not think they are responsible for this situation. I mean the fact that our picture is higher than theirs is not their fault, as I see it.

I do think this, Senator: I think we face a question in the automobile industry of whether all the companies in the automobile industry can keep up with the most profitable and successful firms in the industry. In terms of everyday life, I think it gets into the area of whether everybody can live on the same scale that the Rockefellers live on.

The CHAIRMAN. The point I am getting at is this: What would you think of industrywide bargaining, a standard wage scale, as the steel industry has done in the past?

Mr. ROMNEY. Well, I have given a lot of thought to that subject and, as a matter of fact, I have testified on it before Senate committees previously. I testified before the old Mead committee, the committee headed by Senator Mead, the old Truman committee that Senator Mead later chaired and, Senator, I personally believe that industry-wide bargaining could push us in the direction of cartelism in this country, or nationalization because, after all, when you begin to deal with the cost factors, with labor costs—

The CHAIRMAN. Of course, it could not push us to cartels because cartels must have Government sanction in order to be allowed to exist. We can have monopolies, but not cartels, because the Government will not guarantee them.

But, in Europe we do have cartels because the government would be a party to the cartel, and that does lead to nationalization.

Mr. ROMNEY. Senator, I am opposed to industrywide bargaining, because I think it tends toward greater concentration of economic power in this country, not less.

The CHAIRMAN. That is what I wanted to get, I wanted to get your experience in the automobile industry.

I discovered in the steel industry that industrywide bargaining resulted in the biggest steel company fixing the pattern for everybody.

Mr. ROMNEY. I am not opposed, Senator, to this pattern of the union securing what they can in bargaining with the companies.

The CHAIRMAN. My question was—

Mr. ROMNEY. And I think we will continue to make, Senator, greater social and economic progress in this country if this area of labor costs and wages—in other words—wage rates, fringe benefits, and so on, are dealt with primarily by separate units rather than combined units, because if you go on a combined-unit basis, Senator, it seems to me you have got to do 1 of 3 things: You have got to put everybody on the basis of the highest paying, or you have got to put everybody on the basis of the lowest paying, or you have got to strike a compromise somewhere in between.

Now, I think this pattern, where some are doing better than others, where some are paying more than others, is all right in terms of economic progress and avoiding economic concentration in this country.

What I am objecting to is a form of bargaining that is not based on the facts of an individual enterprise, and in industry bargaining you get away from the facts of an individual enterprise, and you get on to the basis of the facts of an industry or a few in the industry or some other basis of facts, you see; and I think that we have to live industrially on the basis of the facts of our own corporate families, just as we have to live individually on the basis of the economic facts of individual families in this country.

The CHAIRMAN. I just wanted to get your reaction to that.

Some people have said if you did have that, that would tend to equalize the chance for competition.

On the other hand, you get into a situation of this kind, that tends toward concentration of industry—

Mr. ROMNEY. That is right.

The CHAIRMAN. In limited areas—

Mr. ROMNEY. That is right.

The CHAIRMAN. Which is bad for the national economy, and also bad for security.

Mr. ROMNEY. It seems to me it gets into that area; and, furthermore, Senator, I think it is a good thing to have a situation where a Henry Ford can come along and give a \$5-a-day wage—at the time we would not have had a \$5-per-day wage on the basis of industry-wide bargaining. The rest of the people in the industry have not gone along with the \$5-a-day wage.

I do not know whether you would have had a supplementary unemployment compensation program on an industrywide basis, I do not know.

It seems to me the thing we are interested in is an economy that operates on the basis that will bring about the greatest progress in economic and social terms; and it seems to me that this country has demonstrated, as no other country in the world has demonstrated, that where individual employers are freely dealing with this problem, as well as many others, that more progress is made, because you have some employers that take a position of leadership.

I think this labor-management relationship is in its early stages in this country. It is not very old in its present form.

The CHAIRMAN. It only really started—we had no conception of it—until 1934.

Mr. ROMNEY. I expect to see many innovations come into the picture that will be in the interests of the employees and the unions and the employers and stockholders and everybody else involved.

I do not like to see it frozen by letting a majority in an industry decide what the position is going to be.

We know that if the union will bargain on the facts, and not on the basis of sheer power, the results will eliminate the competitive advantage that has been enjoyed by General Motors and Ford in this area of cost. We are hopeful that the union will recognize this approach as being in the interest of its American Motors members.

For the above reasons, and others, American Motors is basing its future on cars that are distinctive and unique—cars that do not compete head on with automobiles of the Big Three.

As a matter of fact, we feel we have two basic concepts in our cars that are radically new approaches to mechanical efficiency and convenience as far as passengers are concerned.

Those two concepts are this body construction that I have mentioned—or rather, car construction, because it affects the whole car—and the Rambler type of car, which is a radically different car concept.

The size of these companies, that is, the Big Three, makes it much more costly for them to pioneer in new product fields, such as the Rambler type car and the single type unit body construction. In other words, a company like ours can pioneer in a field like that at much less cost, and we are more inclined to do it and, as a matter of fact, we have done it.

In our judgment, the country is in the early stages of basic changes in the pattern of car ownership and use, and some of our products are better suited to meet the demands of this new pattern.

We think the age of dinosaur-type cars is at its peak, and that from here on in you are going to see an increasing percentage of

cars sold that are more compact and more suitable to today's traffic and use patterns than the dinosaurs of the past, Senator.

The CHAIRMAN. Mr. Romney, that is one other thing that I am thinking about.

Mr. ROMNEY. Yes.

The CHAIRMAN. One of the big selling talks put up now, in television, advertising, and everything else, is a question of horsepower and speed.

Have you ever talked to your highway patrolmen? I have had them tell me, "What chance do I have of catching one of these cars with a Chevrolet, no matter how fast it goes," and we have had some terrible automobile accidents by reason of this terrific speed.

Mr. ROMNEY. Senator, some of the statements I made here today have a very direct application on the question of horsepower and speed.

The CHAIRMAN. I think we have gone overboard on them, too much for the safety of the country.

When you think that there are too many teen-agers driving those high-powered cars, you can see what a difficult problem it is.

Mr. ROMNEY. Senator, we have concentrated on economy more than we have on horsepower and speed, as a company.

The CHAIRMAN. In that I think you are very wise.

Mr. ROMNEY. We have not engaged in the horsepower race.

The CHAIRMAN. We had a 4-lane highway in West Virginia, and 4 months ago a number of boys had a race. Two of them were driving Cadillacs, and two of them were driving Oldsmobiles. They took up all four lanes. As a result, we had a couple of very serious casualties from it.

Turning loose on the highways too much power and speed has gotten to be a dangerous problem.

Mr. ROMNEY. Senator, sometimes through sheer volume, through familiarity, you can create attitudes and prejudices that require things and products that do not represent the degree of consumer benefit the purchaser thinks is in the product as a result of the attitudes that have been built up.

We are backing our confidence in the future with a \$60 million product development program by the end of 1956. This will enable us to compete still more effectively in the market place by continuing to offer something new and different from our competitors' products.

At this stage of American Motors' progress, we haven't realized the full benefits of the merger. The period since the merger has been much too brief to permit us to develop the new products needed to take advantage of our combined facilities, tooling, and personnel. Not until our first new postmerger products reach the market will we realize the full merger benefits.

Experienced industry executives agree—and this is a very important point, Senator—that Big Three production volumes are not required to achieve optimum cost results in the automobile industry.

If you already have the facilities and the organization and the expense that goes with the type volume they have, why, obviously, you have got to continue to operate on that big volume basis.

But if you are in the position that we are in, or others who are seeking the optimum tooling and manufacturing results with from

800 to 1,000 cars a day of the same basic type, you can achieve the maximum tooling and manufacturing economies.

The CHAIRMAN. No question about it.

Mr. ROMNEY. That is why we say, that is why we know, that if we can build this Rambler volume to that level—and we are taking a big step this year with our sales well above what they have ever been before—we will have achieved a position where we will have for the Rambler a basic volume car position in terms of tooling and manufacturing costs.

The CHAIRMAN. You think on the continuation of the present system it will not be necessary for you to participate in any further mergers with other automobile companies in order to maintain a profitable enterprise and turn out a good product?

Mr. ROMNEY. Senator, we are not looking to merge with any other passenger car company to assure a bright future for this company.

The CHAIRMAN. In other words, you think, although a smaller company, you are in a position to compete for a fair share of the market with the big companies; is that right?

Mr. ROMNEY. Well, I touch on that a little bit further. Let me complete this statement.

The CHAIRMAN. Could I ask this as a leading question, too? Do you think that your merger puts you in this position?

Mr. ROMNEY. We believe the merger puts us in a stronger position to compete with them and to grow against their competition; yes, sir. There is not any question about that in our minds.

Now, optimum cost results are within reach of American Motors, and its current products are second to none in consumer benefits and values.

However, the merger has enabled us to make important progress. Unquestionably, American Motors is better able to cope with the highly competitive situation in the automobile industry than either Nash-Kelvinator or Hudson alone, and the creation of American Motors means more—not less—competition in the industry.

And in conclusion, Senator, let me say this: There is probably no company in the country that competes with size to the extent we do, because in the automobile business we compete with the larger automobile companies; in the appliance business we compete with General Electric, Frigidaire, which is General Motors, Westinghouse, International Harvester, Philco, Admiral, RCA to an extent, and many others, all large companies.

So every day we are dealing with size in all of its aspects from a competitive standpoint.

Senator, it is our considered judgment that we are at a greater disadvantage as a result of misconceptions that have been built up around size than we are by size itself.

Let me repeat it.

It is our considered judgment that we are at a greater disadvantage as a result of misconceptions that have been built up around size than we are by size itself.

Now, what are those misconceptions? Here are the misconceptions: One, that bigness means superior products at superior value, which is a misconception.

Senator WILEY. At less cost.

Mr. ROMNEY. Pardon?

Senator WILEY. And at less cost.

Mr. ROMNEY. That is right, which is a misconception.

Of course, value covers the price angle, Senator, because value is quality and price combined, which is more basic than price.

Two, that bigness means greater efficiency and greater progress; that is another misconception.

Three, that the resale value of small company cars is less than that of Big Three cars; that is another misconception. Our Rambler is a red-hot car on used-car markets, and I have got prices here showing the Rambler resale value in relationship to the other cars in the industry to show you that it sells at a premium as a used car in relationship to used cars of other companies.

The CHAIRMAN. Tell me something else, then: You talked a little while ago about light cars, getting lighter cars, all that sort of thing. What was the cause of the Franklin going out of operation?

Mr. ROMNEY. Senator, let me cover these three, and I will come back to that.

I just said that the resale value—there are six misconceptions that hurt us more than size itself: (1) That bigness means superior products and superior values; (2) that bigness means greater efficiency and greater progress; (3) that the resale value of small company cars is less than that of Big Three cars; (4) that the Big Three pay their workers more than the smaller companies, and give them superior fringe benefits. That is another misconception.

No. 5 is that weight and bulk are necessary in cars to give them American standards of comfort, spaciousness, and safety.

No. 6 is that automobile dinosaurs are superior to modern compact cars, built the way all other forms of modern transportation are built.

Now, we sincerely believe that misconceptions of the type I have enumerated are far more serious from a competitive standpoint than mere size itself.

The CHAIRMAN. I am going to ask you a little historical question, a question of recent history.

With whom did the idea of the recent merger of Nash and Hudson into American originate?

Mr. ROMNEY. Well, the history of it is this: George Mason, my predecessor, recognized the trends that make increased volume in handling tooling costs an important factor in the automobile as the buyer's market returned.

He first talked merger with the Hudson Co. back in 1946. At that time they were not interested, and it was not until the spring of 1953—

The CHAIRMAN. Was that one of the principal reasons why the merger was finally concluded?

Mr. ROMNEY. The increase in tooling costs and the desirability of spreading tooling costs over a larger volume was one of the primary reasons.

The CHAIRMAN. Were there any other reasons?

Mr. ROMNEY. Oh, yes, there were a number of other reasons. I have cited other reasons earlier.

From Nash-Kelvinator's standpoint we were very anxious to see a company with two dealer organizations, rather than a single dealer organization, because we felt that we had product superiority that could be better sold through two dealer organizations, and that

through a combination of advertising and sales efforts we could make greater progress as against the larger companies.

The CHAIRMAN. In the larger companies, you did hit the 2-and 3-dealer sales organizations?

Mr. ROMNEY. That is correct.

The CHAIRMAN. You had Mercury-Lincoln dealers.

Mr. ROMNEY. That is right.

The CHAIRMAN. Ford-Lincoln dealers.

Mr. ROMNEY. That is right.

The CHAIRMAN. Chevrolet-Oldsmobile dealers and Chevrolet-Buick dealers.

Mr. ROMNEY. That is right.

The CHAIRMAN. In those companies?

Mr. ROMNEY. That is right.

There were other administrative benefits to be secured. We knew we could consolidate parts warehouses and servicing and certain other activities. We felt that through consolidation of purchasing there might be some advantages.

The CHAIRMAN. Have you not really, in the final windup, said, in substance, that you were really forced into merger, because of the great concentration of the three big companies, and a single line could not compete with them; is that right?

Mr. ROMNEY. Well, the competitive changes in the industry, of which that was only one part, certainly made merger a desirable thing.

That is only one part of it, Senator.

After all, tooling costs have gone up as a result of other factors, factors other than that.

The CHAIRMAN. I think you stated it was generally agreed that the Big Three volumes are not required to achieve optimum cost results; is that not correct?

Mr. ROMNEY. That is right.

The CHAIRMAN. Would you discuss the size of your own company's operations at which you believe optimum cost results will be achieved?

Mr. ROMNEY. I did not hear you, Senator.

The CHAIRMAN. Can you discuss the size of your company's operations at which you believe optimum cost results will be achieved?

Mr. ROMNEY. Yes, sir.

Our operations are set up on a basis where at 200,000 to 250,000, we would have optimum cost results in our operation, 200,000 to 250,000 a year.

Now, we are in the process of establishing capacity for the Rambler line that will achieve maximum cost results on that particular line of cars that are on an annual volume of between 160,000 and 200,000.

Our maximum Rambler capacity, Senator, at the present time, prior to this recent expansion, was a little over 100,000 vehicles a year, and we will sell pretty close to that this year, Senator.

The CHAIRMAN. Would competition be best served by some plan to restrict the size of a manufacturer at the point where optimum cost results would be effectuated?

Mr. ROMNEY. Senator, that is a pretty big question.

The CHAIRMAN. I know it is.

Mr. ROMNEY. It is a pretty big question, and I think it is an "iffy" question at this point because, after all, you have companies in exist-

ence that have operations on a basis where they could not achieve optimum costs at that level, you see.

The CHAIRMAN. Sometimes they might get too big to achieve optimum results.

Mr. ROMNEY. Well, I do not think that it could be shown at this point. I do not think that at this point it would be shown that size in and of itself is preventing optimum costs in the automobile industry.

Now, Senator, the question of what size will result in optimum costs is a very relative thing, that is what I am trying to say, you see.

After all, I know a little bit about the three big companies in this industry, and it takes more than just size to be efficient.

The CHAIRMAN. That is just the point I am getting at.

Mr. ROMNEY. Now, it takes management, it takes policy, it takes organization, it takes a lot of things, resources, and so on.

Now, actually, the biggest company in the automobile business has been more successful than its two immediately lesser competitors for many years.

The CHAIRMAN. You must realize that we must always deal with the human element, and there comes an idea in a man's mind sometimes that "I want to be bigger and bigger and bigger," until finally you can get topheavy.

Mr. ROMNEY. Senator, let me answer your question in another way, if I can, because I think your question is certainly one that is important.

I indicated that I was in the aluminum industry. I left the Aluminum Company of America because it was the only producer of aluminum, and while it had contributed immensely to the development of a new metal and new art, I felt that there would be more opportunity in an industry where there was more competition, so I left the Aluminum Company of America. I did that 15 years ago.

In that time—at the time I went with the automobile industry—there were 10 manufacturers of passenger cars; and since then 1 company has tried to establish itself in the manufacture of passenger cars, essentially without success.

Now, today there are four companies manufacturing basic aluminum largely as a result of Government policy.

From what I know about the aluminum industry, I have no reservation in saying that the country is better off, the industry is better off, everybody is better off, with 4 companies producing aluminum than with 1 company producing aluminum. As a matter of fact, I think it has been a good thing for the Aluminum Company of America itself, and I have a personal debt to the Aluminum Company of America, because they did a lot for me.

There are now five companies essentially manufacturing automobiles, passenger cars. The size of these industries is not to be compared. The automobile industry is many-fold the size of the aluminum industry, many-fold its importance in terms of customers, not only individual customers but also industrial suppliers and customers, and I will say this without reservation: That if it is sound public policy, as I think it is, to have four companies producing basic aluminum, I think it is sound public policy to have more than three companies producing passenger cars.

The CHAIRMAN. I agree with you.

The only thing is the idea of wanting to excel. I will give you an illustration.

On the old Defense Investigating Committee, we set a target—if you will remember in 1942—no, 1941—the President set a target of 100,000 combat planes a year, at which everybody laughed.

Mr. ROMNEY. Senator, let me interrupt—I am not getting ahead of your question, because I want to add just one thought to what I said, and I believe so strongly that it is desirable to have more than three companies successfully producing automobiles that, as far as I am concerned, I think it is important to the customer interests and the national interests for American Motors to succeed in its plans, as I am sure we will, in establishing a firm foothold in this passenger car business, and I think we have got what it takes to do it.

The CHAIRMAN. Getting back to this original problem—

Mr. ROMNEY. I did not get your question.

The CHAIRMAN. We were getting about 20 percent of that production in 1942.

Mr. ROMNEY. Twenty percent of—

Senator WILEY. Planes, you mean.

The CHAIRMAN. Of 100,000 combat planes.

Mr. ROMNEY. Plane production; yes, sir.

The CHAIRMAN. After a detailed investigation lasting about 2 weeks, we discovered this: That the individual plane manufacturers, each in his desire to excel in his field by out-producing the other fellow, because he has the market, was filling the airfields all over the country with partly finished planes, because each one of them in his own way had gone out and tied up all of the facilities of a number of forging plants or a number of extrusion plants and all of them were short on forging, and all of them were short on extrusions, or what-have-you.

Finally, the Government had to step in and take control of the entire picture. I remember when Douglas Aircraft had so many forgings stored away in Los Angeles that it was simply pitiful. It would have become obsolete long before they ever came to that, which, in turn, was keeping North American from getting any forgings, and vice versa.

I am just wondering, when you reach optimum production, whether there should not be a limitation placed upon the company. That is what brought that about, because there is always a tendency on the part of any human being to want to be the top dog in the field, and frequently he will do it at a loss.

Mr. ROMNEY. Yes. Senator, mind you, what I said was that you reach optimum tooling and manufacturing costs at 800 to 1,000 a day. Now, obviously, there are other costs in the picture, and I am not saying that you can achieve a level of complete optimum cost results at 800 to 1,000 a day. But in the area that is most important to us, I think 800 to 1,000 a day would do it.

The CHAIRMAN. Well, does not advertising come into that picture?

Mr. ROMNEY. Again this question of optimum-cost level gets back to the question of relativity, really.

Now, in our case, and our case differs from that of other companies, because there are no two companies in this industry that have the same facts to deal with. Senator—in our case, prior to the expansion we are currently making in the Rambler at from 200 to 250 thousand cars a year, we would have optimum costs with our setup, you see.

Now, with the Rambler expansion, it is going to be in the area of 300,000, you see, 250,000 to 300,000.

But in the case of the larger companies, obviously they will have to have a much larger volume in order to achieve optimum-cost results.

The CHAIRMAN. Yes. Well, is not part of the need for that large volume occasioned by terrific advertising expense which, in turn—in other words, it is a case of this way, they have to spend a lot on advertising to get the volume of sales and that, in turn, helps to keep the cost up when they get too big?

Mr. ROMNEY. Certainly, you have to spread your advertising expenditures over a volume.

The CHAIRMAN. Yes.

Mr. ROMNEY. And if you get advertising expenditures way up there, why, you have to have the volume to spread it over.

The CHAIRMAN. That is it; and the risk of advertising expenditures in order to get the volume to pay for it, don't you see, is what I am wondering about on this question of optimum costs?

Mr. ROMNEY. That is right.

The CHAIRMAN. And with reference to bigness.

Mr. ROMNEY. Certainly you can get too much concentration in an industry. Certainly you can get too much concentration in an industry for the economic and social good of the country, and I think it is an important question of public policy as to what that point is.

The CHAIRMAN. Well now, don't you think, then, it is dangerous to our competitive economy that General Motors, Ford, and Chrysler have 96 percent of the business, as they did in 1954?

Mr. ROMNEY. Senator, currently I do not think the consumer is suffering as a result of the competition in the automobile industry. I think the consumer is benefiting from the competition in the automobile industry.

I do think it is highly important to the future of the automobile industry that the smaller companies in this industry succeed in their efforts to continue as effective competitors for the three larger companies.

For instance, you would not have on the market today in this country a Rambler-type car that is meeting with success. It is beyond the stage of whether it is going to be successful; it is meeting with success.

You could not have such a car on the market today if it had not been for the smaller companies.

Now, we took the lead in that. Two of the Big Three took a look at that type of car. As a matter of fact, one of them went so far as to design such a car, to appoint the man to head up the organization to build it, to build the plant, and was about ready to begin to tool and produce the car, when they decided not to build it, you see.

It took a smaller company, with the necessity, the economic necessity of innovation, I admit, to its future, to pioneer a new field.

Now, the same thing is true in this body construction type. As a matter of fact, one of the misconceptions in this country is that proportionately more of the product improvement comes from the big companies than from the small companies, and that is not so.

The CHAIRMAN. I think you misapprehend the purpose of my questions. I think there must be additional competitors, or the situation

would freeze at the top. It is very easy for 3 manufacturers to get together down at the club sometimes, and it is a whole lot harder for 5 or 6 or 7.

Mr. ROMNEY. Senator, let me say this: Considering the competitive intensity between the Big Three, I have a hard time visualizing the three of them getting together.

The CHAIRMAN. Why did this company give up the idea of the small-type Rambler car?

Mr. ROMNEY. Why?

The CHAIRMAN. Yes.

Mr. ROMNEY. I think the primary reason they gave it up—they have indicated many reasons at different times—I think the primary reason they gave it up was that if they had gone ahead and toolled it, it would have competed with their own products that they already had on the market that were already successful, and for which they had adequate capacity, and there was no point in reducing—no point at that time, after all, that was back in 1946 and 1947—no point at that time in building additional capacity to reduce the market for their own products.

The CHAIRMAN. Isn't that one of the dangers of too great size?

Mr. ROMNEY. Certainly what I have been indicating is that if the aluminum industry needs 4 companies to produce aluminum, certainly the automobile industry needs at least 5.

The CHAIRMAN. Possibly more, because they will do just exactly what you do; will they not?

With that competition they can afford to go out and pioneer in something, one of the smaller companies can, and give to the public something they need badly.

Mr. ROMNEY. Of course, Senator, necessity is still the mother of invention, you know. In other words, individuals and organizations that are striving for success are more likely to come up with innovations than those who have fully met with success, no question about that.

The CHAIRMAN. For instance, if Ford had not gone into the Model T Ford, nobody would ever have advanced that, and few people would have been driving.

We would not have any new roads of the type we have; there would not be any need for them because the horsedrivers did not want those new roads.

I remember when they used to have dirt tracks on both sides of the old macadamized roads so that the teams of horses and buggies could ride on the dirt tracks to save the horses' hooves, and it was only when the automobile penetrated to the farm, to the common folks, that that need disappeared; and then we got the tractors, and then we went on from that to the trucks.

Mr. ROMNEY. Senator, 2 things have operated, 2 principles—

The CHAIRMAN. But in each case some little fellow had to go in and pioneer with those things, just like Henry Ford did, with a new design.

Mr. ROMNEY. Of course, Senator, let us not overlook the fact that small supplier companies have made some of the major contributions in the improvement of the automobile, parts firms, and companies striving to find something new that they could sell to the automobile companies; and that is an important factor in this picture.

Senator, 2 things, 2 principles, in my judgment, have contributed more to the building of the automobile business, and all it has meant, than any other principle.

One is the principle of competition, and the other is the principle of cooperation, voluntary cooperation, on problems outside the competitive area that involved the industry interests and the public interests.

The CHAIRMAN. Do you think some legislative proposals should be considered, looking toward the breakup into similar companies of General Motors and Ford in order to have more competition?

Mr. ROMNEY. Senator, I have not been thinking in those terms. I have been thinking in terms of making the operation of American Motors completely successful.

The CHAIRMAN. And, incidentally, big enough to fight them.

Mr. ROMNEY. Yes, sir.

The CHAIRMAN. Now, you state that the first 5 months of this year American Motors was getting 2.46 percent of industry sales against a Nash-Hudson total of 1.69 for the same period a year ago; is that right?

Mr. ROMNEY. That is right.

The CHAIRMAN. In what way did the merger contribute to this?

Mr. ROMNEY. Well, primarily from the standpoint of permitting us to put our product programs on a tooling and manufacturing basis that would enable us to price our products more favorably.

Then, for the first time, we priced all of our Rambler models below the competitive models. Previously, most of our Rambler models, as a matter of fact, had been priced higher than others.

The CHAIRMAN. So you were able to sell to the dealers at a lower price, and that built up your sales volume?

Mr. ROMNEY. That is right. Dealers and suggested retail prices to customers at lower prices. Actually, what we did, Senator, was to increase discounts to dealers, and, at the same time, reduce prices to customers.

The CHAIRMAN. Have you tried to see that your dealers passed on these savings to their customers or have you left that completely up to competition?

Mr. ROMNEY. Well, the competitive influences are the primary factor there, Senator.

The CHAIRMAN. You stated that the great size of the Big Three made it more costly for them to pioneer in new product fields, such as your single-unit-body type construction.

Mr. ROMNEY. Yes, sir.

The CHAIRMAN. Can you tell us of any important innovation or engineering advances by the independents which the Big Three did not adopt, or were slow to adopt because their size made it too costly?

Mr. ROMNEY. Because it made it too costly?

The CHAIRMAN. Yes.

Mr. ROMNEY. I think in the area of being too costly, that with experimentation with the Rambler-type car, it was an expensive thing for the Big Three, considering their volume levels, and considering the impact on their own business; and the two things I had in mind, primarily, in making that statement, were the single-unit-body construction, and also the Rambler-type car, which are very radically new concepts, you see, in automotive transportation.

Now, we have made many other improvements that they have been slow to adopt. Let me cite just one.

We were the first people to come out with a really successful car heater. As a result of that, we have built this business of selling the other companies through Ranco heater controls.

Now, one of the important aspects from a functional standpoint of that more successful heater was taking the air in right under the windshield, rather than down near the ground at the front of the car. It had to do with interior car pressures, and also you were not taking in dirt and gas fumes of other cars.

We have done that for 15 years. We started doing it at a time when that air intake stood up on the cowl of our car like a sore thumb; it was not integrated stylewise.

The CHAIRMAN. I noticed the Buick has that.

Mr. ROMNEY. We did not get it integrated until 1952 from a styling standpoint.

Now, in 1954 the other companies began to copy our heater. We all do some cribbing in the automobile business, you know. It is not one way, and I do not want to leave that impression.

The CHAIRMAN. You have a patent exchange?

Mr. ROMNEY. Cross-licensing. It was not until 1954 that Cadillac, Buick, and Olds put the air intake up there in the same position, and this year Pontiac and Chevrolet have done the same thing, and if you will look at some of their advertising you would think they were the first ones to ever do it.

Now, here is another example. Senator, we are way ahead of them on air conditioning today.

The CHAIRMAN. I was just going to ask you if you made your own air-conditioning units.

Mr. ROMNEY. We do, although we buy quite a few of the parts that we use, to make the air-conditioning unit.

But, look, Senator, you can get a combined air-conditioning and heating unit on a Nash Rambler, for example, for \$345, and on other cars it would be from \$200 to \$300 to \$400 more than that.

The CHAIRMAN. Now, I want to get back to your testimony again. As one of the dangers of size, you indicated that volume sales shaped public acceptance, and in some cases forced smaller manufacturers to adopt improvements of questionable consumer value.

Can you give us any examples of this, either from your company's experience, or any other manufacturers'?

Mr. ROMNEY. Well, I cited one in my testimony.

Currently, sheer volume of sales and the impact of customer thinking is perpetuating the prejudice of preference for big, bulky cars at the time when weight and bulk are a disadvantage in automobile use.

Now that is a fundamental type of thing that is being perpetuated.

Senator, if we had undertaken some of the styling innovations that some of the bigger companies have undertaken, I do not think we would have been successful. I think an example of that, if you want one, is this current wraparound windshield.

Its consumer benefits are certainly subject to some question from the standpoint of increased vision and visibility.

It certainly is subject to some question from the standpoint of styling, the way it is treated now.

Now, I think it is going to evolve into a more attractive thing from a styling standpoint, and I think it is going to evolve into a better thing from the standpoint of visibility. But overnight the sheer impact of volume in the area made it a must, because the public adopted attitudes and prejudices with respect to a product as a result of familiarity.

Now, I will say another thing, Senator.

The CHAIRMAN. And practically created a monopoly in two companies making windshields, too.

Mr. ROMNEY. I will say another thing, Senator, that the idea that the most efficient way to build an automobile engine, the most satisfactory way to build an automobile engine, and the only modern way to build an automobile engine, is to build it as a V-8, is another thing that has been put across importantly as a result of sheer volume advertising and sales impact.

The CHAIRMAN. A pancake-type engine, however, would be even more efficient than a V-8. It would be more in balance.

Mr. ROMNEY. The V-8 engine is not a new engine.

The CHAIRMAN. A very old engine.

Mr. ROMNEY. There have been engines with a greater number of cylinders.

The CHAIRMAN. Yes. I can remember when Packard built the V-12.

Mr. ROMNEY. Senator, the point is, the best way to build an engine, an internal-combustion engine for an automobile, is a relative thing, and is not an absolute thing. What I am saying is that the idea that it has to be a V-8 in order to be a modern efficient engine is not correct.

Now, there are certain cars for which a V-8 engine is superior for those cars with a particular design, and so on that you want to get.

But there are also cars where a six-cylinder engine is superior.

After all, Senator, all the cars used at Indianapolis are four-cylinder cars.

The CHAIRMAN. That is right; and I can remember the time when four cylinders were considered the most efficient engine of all.

Mr. ROMNEY. And then it shifted to sixes.

The CHAIRMAN. And particularly for speed.

Mr. ROMNEY. Yes.

Senator WILEY. Mr Chairman, may I interrupt here? I am very sorry that I did not hear the first part of Mr. Romney's report to us. I shall read it with interest.

I want to say that I was out of town and came in on a plane, which accounts for my being late.

Let me say, as the senior Senator from Wisconsin, that I am proud of the great job that American Motors is doing, and I am hopeful this merger will mean, as I am sure it will, greater versatility and vitality for your company, and will mean even more in terms of prosperity for my own State.

Wisconsin is proud of American Motors, and we certainly want to wish you well, sir.

Mr. ROMNEY. Thank you, sir.

Senator WILEY. If you have no objection, Mr. Chairman, I just have 1 or 2 questions I would like to ask before I have to leave.

The CHAIRMAN. Go right ahead.

Senator WILEY. Maybe you covered this, but would you have any comments as to the effect of the new guaranteed annual wage-contract negotiated at Ford, and now being negotiated at General Motors, the effect of such a contract on American Motors?

Have you covered that in the testimony?

Mr. ROMNEY. Well, to an extent, Senator, I have covered that.

We are certainly going to take a good objective look at the whole picture, and we are going to ask the union to do the same thing.

I am certainly hopeful that union will do the same thing on the basis of the facts of American Motors.

Senator WILEY. Would you want to comment further upon the labor-relations picture, as you see it, in Wisconsin, affecting American Motors?

Mr. ROMNEY. Well, we think that our labor relations have improved importantly since the merger, and in cooperation with the union, steps have been taken over there that have resulted in improved results, and we are hopeful that that type of relationship can continue as we take a look at these newer problems in the light of recent developments.

Senator WILEY. In your carrying forward this new program that you have, are you obliged to buy from your competitors many items for your cars?

Mr. ROMNEY. Well, we both buy and sell to our competitors, Senator. We sell things to our competitors, and we buy things from our competitors.

Senator WILEY. And those arrangements you feel are satisfactory and are not injurious to the size of the business you have been in?

Mr. ROMNEY. As a matter of fact, they have been very helpful, and I want to say here that certainly General Motors has been very fine in its supplier relationship with us, because we do buy quite a number of parts from General Motors.

We buy automatic transmissions from General Motors for some of our cars, and when they had the fire in Detroit, there is not any question but that they went out of their way to make sure not only that they got back into production as quickly as possible, but that their other automobile company customers received preferential treatment as automatic transmissions became available.

Senator WILEY. In your opinion, there is not any, what you would call, monopolistic hold on the commodities that you buy? They are not using the fact that they are making them as a means of gouging you or gouging anybody else?

Mr. ROMNEY. Senator, certainly competition has been the prevailing practice in the automobile industry, and I have no feeling that there is any intent on the part of any automobile company to monopolize the automobile industry.

I do not think that intent exists as far as the passenger car companies are concerned. Now, I do not say there may not be companies in some other areas of the economy that have positions that are not sufficiently competitive to bring the full fruits of competition into play. I do not say that.

So far as the vehicle companies are concerned, I think that all of them are actuated by the principle of competition and not monopoly.

Senator WILEY. Are you not always at some competitive disadvantage when you have to depend upon a competitor for materials?

Mr. ROMNEY. No, you are not always at a disadvantage. If you are not producing it yourself, frequently it is a distinct advantage for your competitor to be willing to supply you with things you are not producing yourself.

Certainly that was the case in General Motors selling us automatic transmissions; that was a very definite help to this company.

Senator WILEY. Well, is it your opinion that the fact that you have, let us say, five automobile manufacturers, the Big Three, and you and someone else, that that is to the advantage of the buying public?

Mr. ROMNEY. Senator, the thing that protects the customer in buying the automobile is the fact that there are five companies trying to supply his needs.

Senator WILEY. One other question: What goes into your automobiles; do you buy any vital materials that come from abroad?

Mr. ROMNEY. Of course, we buy parts that are made with materials that are produced abroad.

Senator WILEY. Chrome?

Mr. ROMNEY. Sure; lots of raw materials, Senator, after all, are brought into this country from abroad and we use them in our cars.

We are actually carrying out an experiment—a market research experiment—with a car even smaller than the Rambler that we have had produced abroad because we could not test the American market for a car smaller than the Rambler except on that basis; we are actually importing a car that is built abroad and built with foreign components.

Senator WILEY. Is there any danger that you will have a monopoly on producing small cars in America?

Mr. ROMNEY. Small cars?

Senator WILEY. Yes.

Mr. ROMNEY. Well, we have at the present time. But, you see, other companies apparently feel that this was not a sound approach.

As a matter of fact, Senator, human prejudices and habits are difficult things to change and people get fixed ideas with respect to products.

Senator WILEY. Are you talking politics now or business?
[Laughter.]

Mr. ROMNEY. Both.

Now, when we came out with the Rambler car there were more people in the automobile industry that would have told you in 3 or 4 years it would be a dead duck than would have told you that it would be a success.

Even within our own company there were only three top officials who believed in the Rambler. The rest of them were opposed to it, you see, and yet the thing has been a success, and it has every promise of growing, in its continuing to grow, in its public acceptance, so it takes time to sell it.

Senator WILEY. You are not dissimilar to a political party.

Mr. ROMNEY. Oh, sure, we are selling a new idea in transportation, and we think we have a bright future because our future is linked to radically new concepts in automotive transportation rather than just a new wrinkle on the old concept.

Senator WILEY. I think you have got something there and, as I say, I shall read with profit your talk to us this morning.

Will you excuse me, Mr. Chairman?

Mr. ROMNEY. Thank you, Senator.

The CHAIRMAN. Senator Kefauver, will you take over for a little while? I have to go over to the floor of the Senate. You just go right ahead.

Senator KEFAUVER. Mr. Chairman, are you about finished, though?

The CHAIRMAN. I am through with my questions.

Senator KEFAUVER. All right.

Mr. Romney, I have read your statement with a great deal of interest, and I certainly want to compliment you upon the success you have made with American Motors.

Mr. ROMNEY. Thank you.

Senator KEFAUVER. I hope you have continued success, good luck, and good business.

On page 7 of your statement you said that the present size of the largest companies, coupled with other recent developments, have created for them competitive advantages in areas which they now dominate. You are now talking of areas of the type of automobiles, is that what you refer to?

Mr. ROMNEY. Well, actually, I had in mind more, such areas as styling and advertising and the things that I mentioned immediately following this statement, because I go on to discuss the styling picture and the advertising picture and the labor contract picture, Senator, because they all have new elements in them that are affected by volume, the volume of the product you are putting on the market.

Senator KEFAUVER. You were not talking about types of automobiles?

Mr. ROMNEY. Not necessarily; no, sir.

Senator, I have made it clear, I think, that we have deliberately elected to build cars that are distinct and different, and base our future on buildings cars that are distinct and different rather than to simply build cars that are essentially the same as cars being built by the Big Three, but with maybe some different feature or different lines, and so on.

Now, actually in the styling field we have done some pioneering in the postwar period that has been picked up and copied.

Senator KEFAUVER. Yes, I know that is true.

Mr. ROMNEY. As have other smaller companies.

Senator KEFAUVER. American Motors is now producing—what are the cars that you now produce?

Mr. ROMNEY. We manufacture the Hudson Hornet and Wasp, and the Nash Ambassador and Statesman, and the Rambler. The Rambler is distributed by both our Hudson dealers and our Nash dealers, so it is a car that is distributed now as a Plymouth is distributed. You see, the Plymouth of the Chrysler Corp. is distributed through more than one line of dealers, and our Rambler is distributed the same way.

Senator KEFAUVER. With this merger, did you keep and continue most of the Hudson as well as the Nash dealers?

Mr. ROMNEY. We have—yes, sir; we have maintained two separate dealer organizations, and one of the purposes of the merger was to have two separate dealer organizations and not to dual them or combine them.

We have not established any dealers who are selling both Nash and Hudson cars.

Senator KEFAUVER. Except the Rambler.

Mr. ROMNEY. Except the Rambler, that is correct. Of course, the Rambler is American Motors, an American Motors car. It was introduced as a Nash car originally, but with the merger we dropped the Hudson Jet. You see, the Hudson Co. was building a car known as the Jet, which was also a compact car, and we dropped that and made the Rambler available through both dealers.

Senator KEFAUVER. Where are you making your motors now?

Mr. ROMNEY. We make our motors in two places. We make the Hudson motors in Detroit, and we make the Nash motors in Kenosha, Wis.

Senator KEFAUVER. What has been your experience with Government procurement in getting the Government to purchase your cars?

Mr. ROMNEY. Well, we have to deal, I think, with somewhat the same attitudes on the part of Government procurement officials that we have had to deal with on the part of the private buyer, particularly where the Rambler is concerned.

We are beginning to sell some Ramblers to the Government in limited quantities. They have been tested; the results have been very favorable, and we are hopeful that business is going to be increased, because it certainly would be more economical, Senator, both in first costs and in operating costs and in length of life.

A number of the Government procurement officials are now favorable, and they have been included in Government specifications, and it is up to us to do a selling job because, Senator, it is only occasionally that a true concept on a product catches hold overnight. Most new concepts have to be sold.

Boss Kettering used to say that it took 15 years from the point of conceiving something completely new to getting it successfully out on the market. It took about 7 years to sell it internally, and then about 8 years to sell it to the public.

Senator KEFAUVER. You say the Government has now decided that the Rambler meets its specifications, and you mean the sales job is up to you to sell?

Mr. ROMNEY. The procurements agencies.

Senator KEFAUVER. To sell the various procurement agencies.

Mr. ROMNEY. You see, originally the specifications for new car purchases were such as not to include the Rambler, because the Rambler was a different size car, so specifications had to be written to permit government agencies to buy that type car, and those have been written.

Senator KEFAUVER. Do your other cars meet Government specifications?

Mr. ROMNEY. Yes, they do.

Senator KEFAUVER. Have you had success in selling the Government some?

Mr. ROMNEY. Yes; we are selling the Government some, all of the other cars to some extent to the Government services.

Senator KEFAUVER. Do you have any development or experimental contracts from the Defense Department?

Mr. ROMNEY. We have secured some in the last 9 months, Senator. Actually, one of the things we are trying very hard to do is to

establish American Motors as a prime contractor in the minds of the defense procurement officials. We have made some progress in that respect.

Prior to the merger of American Motors, we were primarily a subcontractor to other prime contractors, defensewise.

One of the policies that we have changed is the policy of seeking subcontracts rather than prime contracts. Here is a company that is one of the hundred largest companies in the United States in sales.

Senator KEFAUVER. You mean you are getting to the place where you are now seeking prime contracts rather than subcontracts?

Mr. ROMNEY. Yes; we are seeking prime contracts, and we have been given three development and research contracts in recent months.

Senator KEFAUVER. Do you mind telling what kind of prime contracts you are seeking?

Mr. ROMNEY. Well—

Senator KEFAUVER. I do not want you to tell or have you state anything that would interfere with your business.

Mr. ROMNEY. Yes; they are prime contracts in the field of metal fabrication; they are in the field of military hard goods, so to speak, where we can use our engineering know-how on design and so on, and our manufacturing know-how.

One of the important areas in which we are seeking a prime contract is the development of a suitable lightweight vehicle, a lightweight airborne vehicle, for the armed services.

We think that is a very important type product, and I am sure the services do.

Senator KEFAUVER. Have you gotten the experimental contract, or the development contract on that?

Mr. ROMNEY. Well, we have had such contracts with the Marine Corps on one such vehicle known as the Mighty Mite. And we have delivered prototypes and, as a matter of fact, they are currently testing a prototype that has an American Motors air-cooled engine in it of our own design.

Senator KEFAUVER. You mean a combination land and air vehicle?

Mr. ROMNEY. No—well, yes, it actually is. It is primarily a vehicle of less weight and size than the jeep, and yet one that will give the performance and results of the jeep in terms of type of terrain it will go over, the type of grades that it will climb, the loads it will carry, and this vehicle will operate on land or water.

In water its maximum speed is 8 miles an hour. All you have to do is put a rubber tube around it, and it goes right through the water, with the wheels and tires providing the propulsion.

We are working on other lightweight vehicle concepts with the armed services, and we have, Senator, the Hudson organization, the Hudson facilities, that could be very useful in that program.

Senator KEFAUVER. I thought you said you were working on a combination lighter-than-air, a plane and land vehicle.

Mr. ROMNEY. Oh, plane and land?

Senator KEFAUVER. Yes.

Mr. ROMNEY. No, sir; land and water.

But it is an airborne vehicle that is carried by a plane. They can suspend them from helicopters, as a matter of fact, and carry them in and drop them, along with troops, in parachutes.

Senator KEFAUVER. Do you actually have these development contracts or any of them?

Mr. ROMNEY. We have three of them; yes.

Senator KEFAUVER. Are these new contracts, or did you get them from someone else?

Mr. ROMNEY. No; these are new contracts. These are new contracts secured from the Navy Department.

Senator KEFAUVER. You told us about one of your contracts with the Marine Corps. What are the other two?

Mr. ROMNEY. Well, actually there are 3 besides that 1, Senator, and they are in classified areas.

Senator KEFAUVER. I do not want to ask you about them if that is so.

Senator Wiley has asked you if you are required to buy any of your parts from your competitors.

Mr. ROMNEY. Senator, one of them, one of the others is not in a classified area. One of them is converting or developing a vehicle that will be suitable for Antarctic use. That is not classified, so far as I know.

The other two, so far as I know, are.

Pardon, I interrupted you.

Senator KEFAUVER. What kind of vehicle is that, Mr. Romney?

Mr. ROMNEY. Well it is a motor vehicle that will be converted for that purpose.

Senator KEFAUVER. Senator Wiley asked you if you were forced or if you had to look to one of your competitors for any of your parts.

In all the things you buy, is there competition, or are there any thing you must have for your automobiles in which there is only one source of supply?

Mr. ROMNEY. Senator, of course, in the process of designing an automobile you sometimes have to make a choice as to which of several types of, for instance, transmissions, you are going to use in your car, and once you freeze the design and tool up for a particular approach, why, you are tied pretty much to that supplier, so you get into the question of procurement before you design.

Now, we are in that position with a number of components as far as our car is concerned, where we, as long as we use that component, we have to use the particular component of a particular company. But I am not conscious of major components where we do not have flexibility of choice in the design stage.

Senator KEFAUVER. Are you in that position on automatic transmissions now?

Mr. ROMNEY. No, sir.

Senator KEFAUVER. You make your own automatic transmissions?

Mr. ROMNEY. No, sir. We buy them, and currently we actually buy automatic transmissions from two sources. Now, there is a third source that would like to sell to us, but we have never purchased automatic transmissions from a third source. Currently we buy most of our automatic transmissions from General Motors.

Senator KEFAUVER. Mr. Romney, I heard the other day on, I think it was, the radio where Hudson Motors, the Hornet, where you worked out a plan where a purchaser or a person can pay so much a month and have an automobile for 12 months, and you pay the gas bill up

to 12,000 miles a year and keep it in repair. At the end of the 12 months you bring it back and get a new one.

Have you gone into that in a big way?

Mr. ROMNEY. No; we have not gone into that on a national basis, but one of our very enterprising dealers over here in Alexandria has developed that program as his program.

Senator KEFAUVER. That is not your company's policy?

Mr. ROMNEY. It is not a parent company program; it is a program that he has developed, and we are familiar with it.

Senator KEFAUVER. I have forgotten which dealer it was. I did hear it on the radio, though.

Mr. ROMNEY. Well, it is the Hudson dealer in Alexandria, Va.

Senator KEFAUVER. Do you think that is the new approach to transportation services?

Mr. ROMNEY. Yes; I think it is a new approach; I think it is a new merchandising approach. I think it shows a good deal of enterprise on his part.

Senator KEFAUVER. I thought so, too. I can see how it would involve a good deal of supervision and paperwork—

Mr. ROMNEY. That is right.

Senator KEFAUVER. Keeping up with insurance and accidents.

Mr. ROMNEY. That is right.

Senator KEFAUVER. And knowing who you are selling to.

Mr. ROMNEY. That is correct.

I know that the program has meant a good deal to him in his sales program.

Senator KEFAUVER. Is he making a success of it, do you think?

Mr. ROMNEY. Yes; I think it has been successful so far.

Senator KEFAUVER. Mr. Burns, I do not have any more questions.

Do you have anything else you want to tell us about?

Mr. ROMNEY. No, sir.

Senator KEFAUVER. That you would like for this committee to consider?

Mr. ROMNEY. No, sir.

Senator KEFAUVER. If there is nothing else, Mr. Burns tells me, that we will stand in recess until June 14, at 10 o'clock.

Who will be heard at that time?

Mr. BURNS. Bethlehem Steel and Youngstown Sheet & Tube.

(Whereupon, at 12:25 p. m., the subcommittee recessed, to reconvene at 10 a. m., Tuesday, June 14, 1955.)

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