THE

GEORGE WASHINGTON UNIVERSITY

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# A CRITICAL ANALYSIS OF THE NATURE AND SIGNIFICANCE OF CORPORATE MERGERS

PART II


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For

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# PREFACE

The subject of mergers first became of interest to me in July of 1954 when, as part of an assignment at Northeastern University, a paper on the topic was required. The Preface of that work stated that it was hoped further study could justify more valid assumptions.

An opportunity for such study was soon available when the subject was considered for thesis work in partial satisfaction of a Master of Business Administration Degree at Northeastern University. However, the scope was determined to be of unmanageable length for such a purpose, and additional time was necessary if the study was to be accomplished. The completion of the project was assured when the extent of the undertaking was recognized at George Washington University. The required time was granted by allowing the thesis to be submitted in two parts to cover two term papers necessary in partial satisfaction of a Master of Public Administration Degree at that University. Part I was submitted on January 14, 1955. This is Part II.

In addition to the problem of time, the study could not have been undertaken had it not been for the inspirational leadership of Dr. Vincent P. Wright, Director of the Graduate School at Northeastern University and Dr. A. Rex Johnson, Director of the Navy Graduate Comptrollership Program at George Washington University. I am deeply indebted to these men for their help and understanding. A special note of gratitude is due Dr. Richard Norman Owens and Professor Walter Fackler of George Washington University

who gave generously of their time and criticism. In addition, personnel in the Federal Trade Commission and the Department of Justice have been most cooperative and offered many suggestions along with technical advice.

In making investigations for the original paper it was found that considerable writings had been accomplished on the various segments of the subject. Economic books offered a wealth of information on monopoly and competition. Law journals, U. S. Statutes, and books on government regulation of business, fully covered the law. Many writers had attacked the problem of concentration of industry as a result of mergers, and business periodicals had a considerable number of articles on the reasons for the present wave of mergers. In no place, however, was any current writings found covering the full subject of mergers, per se.

It was difficult to understand such a lack of coverage on so important an aspect of business. From a student's point of view such writings were eagerly sought for a full but easy understanding of the basic concepts of the subject. As a result of this fruitless search the form of the thesis took shape. Considerable space is devoted to the early history of mergers while the law of mergers is developed from its inception. This coverage was deemed necessary to bring into focus conditions that may have set the stage for the present merger movement.

A large portion of the material represents information from secondary sources and liberal use is made of footnotes. Considerable insight has been gained, however, from personal interviews with senior corporate officials from forty of the two hun-

dred largest industrial firms in the United States. These officials were most generous in answering questions; however, misunderstandings may have resulted from the interviews. If so, any errors of interpretation are entirely my responsibility and, therefore, no authority is given for any quotations from this study where such interviews are discussed.

The timing of the paper is regrettable in view of the fact that the Federal Trade Commission and the Congress are working on reports concerning the subject of mergers which will not be issued in time for consideration here. In addition, the Attorney General's National Committee to Study the Antitrust Laws issued its report to the public on April 6, 1955. In view of the fact that this paper had been completed at that time no opportunity was available to incorporate the Committee's findings within the framework of the study. However, the report of the Committee in no way reversed the findings, conclusions, or recommendations of the work. A brief outline of the majority and minority opinions of the Committee are included as Appendix B.

It is hoped, that by the form of presentation and the inclusion of current information gained from industry and governmental agencies, the work will contribute to an understanding of the nature, extent, and future implications of the present merger movement.

E. R. Kingman

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# CHAPTER IV

## SOME ECONOMIC ASPECTS OF MERGERS

> "Every single economic fact is always related to some other equally important fact - and the practical man's job is to measure the relationship between the two."
> R. D. Skinner, Seven Kinds of Inflation[1]

An investigation of the writings on the economic aspects of mergers reveals countless volumes, books, reports, papers, dissertations, and treatises, dealing with the subject. Perhaps one of the most complete works yet assembled is that prepared by the Temporary National Economic Committee. During the years 1938-1941 extensive hearings were conducted by this committee which resulted in the publishing of 64 volumes dealing with most facets of the subject.

It is, therefore, obvious that no one chapter in a thesis could pretend to outline and analyze the subject. It is just as obvious that a thesis dealing with the nature and significance of mergers would be incomplete without an examination of some of the basic economic thinking in relationship to the formation and operation of business enterprise.

The purpose of this examination is to define and analyze "monopoly," "big business," "competition," and other such terms used in connection with the growth of firms through merger. In addition, the economic advantages of mergers are explored as well

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[1]Quoted in Edmund Fuller, Thesaurus of Quotations, (New York: Crown Publishers, 1941), p. 310.

as the possible success of such ventures. Special attention is paid to the difference between the businessman's concept of competition as opposed to the economist's concept.

The scope of the study takes the form of a general summation of views expressed by the economist, businessman, and government, concerning the competitive structure of business, and the effect on that structure of the growth of firms through merger. It is important to note that this is considered only a general summation of views. The divergence of opinion as described by John Miller could well be the subject of a book.

> Over a half-century of discussion . . . of the effects of big business on the character of the competitive process in the American economy leaves us as far from a consensus as when the debate began.[1]

## Definitions and Appraisals

In analyzing the various aspects of economics as they pertain to mergers, it is necessary to define many of the terms used by those discussing the subject of mergers and to appraise their relationships. While the varied types of competition are considered, this is done from the layman's point of view and no such narrow distinctions are made as those developed by Fritz Machlup in his Monopoly and Competition.

### Pure Competition

The basic condition of pure competition is that of price. Only under pure competition will price actually be an accurate

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[1]John Perry Miller, "Competition and Countervailing Power: Their Roles in the American Economy," American Economic Review, Vol. XLIV No. 2, May 1954, p. 15.

index of scarcity. It assumes that the only element which will cause a buyer to prefer one seller to another is the factor of lower price. This condition must have as a prerequisite that the product offered be standardized or uniform and of such a small proportion to the total supply that any change in the amount offered for sale by one seller will not affect the price.

While "pure" competition and "perfect" competition are most often used interchangeably some economists make the distinction that in perfect competition there is complete mobility of resources with free markets.[1]

Pure competition is considered as an ideal norm, or as a measure of the freedom of business enterprise. Such measure to the average businessman is as unobtainable as the measure of par is to the average golfer. However, even this average golfer would admit that such an "unobtainable" measure has its merits.

Few people would advocate today that the economy of the United States could or should comply with the classical theory of pure competition. Just as few people would advocate that it is not feasible to preserve and to increase effective competition. The problem, therefore, is not in the definition of pure competition as opposed to monopoly. It is one of defining effective competition! It is here that the economist and the businessman most often part company.

The economist looks at competition as economic activity carried on by a large number of small units of business enterprise.

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[1]See for example: E. H. Chamberlin, The Theory of Monopolistic Competition, (Cambridge: Harvard University Press, 1933).

He will accept a lessening of the idea that there must be great numbers of these units but when merger activity whittles away at these numbers until there are but a few left, he can visualize business rivalry but not competition. The businessman on the other hand, faced with even one other enterprise in his field usually looks upon it as a fierce competitor. It normally follows that at this latter point of competition business will not automatically be freely competitive.

Government then enters as the protector to preserve active competition in private industry. As we have already seen, the definition of active competition in the application of the anti-trust laws differs considerably between the agencies of government administering the laws enacted by the Congress and the courts that have interpreted those laws.

## Monopolistic Competition

Monopolistic competition recognizes that in every market there are competitive as well as monopolistic elements. It is usually referred to, however, as that portion of competition that lies somewhere between pure competition and pure monopoly. It is an area of competition that may or may not be called "effective competition."

For some time writers have spoken of the "decline of competition," or the "growth of monopoly." For perhaps an equal amount of time others have questioned whether the economy of the United States, or the economy of any country, ever really was competitive. In this regard Edward Mason concludes:

> At least a part of the present emphasis on concentration arises, in all probability, from the illusion that at some

not too remote period the economy was competitive.[1]

Monopolistic competition encompasses such a wide range of conditions that it is broken down here into two groups.[2] The first of these is what is quite generally termed the large group area. This is an area of workable competition involving many concerns within an industry. The second of these is the small group area, where only a few concerns make up an industry. This latter situation is known as oligopoly or duopoly in case of only two sellers.

Large Group Area.--Product differentiation is the point of departure from pure competition into monopolistic competition. Any consideration which causes a buyer to prefer one seller to another is product differentiation. This still holds even though the price of both dealers is the same.

The considerations which cause a buyer to prefer one seller to another may be wide or very slight, real or imagined. A preference for a particular brand of cigarette due to taste or smell (real or imagined) is a classic example. The color of the wrappings of a product, type of wrapping, availability of the product, privilege of credit or exchange, advertising appeal, the ability of salesmen to influence, and many more such differences make for product variation. In some cases price is a factor, such as willingness to pay for delivery, or willingness to walk a few blocks to save money due to a lower price.

The effects of this type of competition may not be a great

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[1]Edward S. Mason, Explorations in Economics, (New York: McGraw-Hill Book Co., 1936), p. 433.

[2]As described by Chamberlin, op. cit.

deal different than under pure competition. Concerns are still free to enter production areas. With some exceptions resource allocation closely approximates that of pure competition. Incentives to maximize efficiency are unchanged. Prices in most cases remain market determined.

Contrary to production scales under pure competition, an industry operating under monopolistic competition normally finds that production in the long run will stop short of lowest possible average costs. It should be noted that this type of competition may well be far from monopolistic. In the large group area there may be too many concerns - all of them of less than optimum size or operating under capacity. In either case it would be a waste of resources as viewed by the economist.

Immobility of resources is a condition that can affect the functioning of workable competition under either the large or small unit category. Labor is becoming increasingly immobile. Competitive bidding for resources or services is greatly hindered under these conditions.

In analyzing the antitrust laws and the objections to some of the mergers, monopolies of buyers must also be considered. These are termed as monopsony. This can be illustrated as a buyer or group of buyers restricting bids for products so that a price change may be forced for their advantage.

If the area of monopolistic competition approximates pure competition, it might logically be asked why government policy has been suggestive of control. The Temporary National Economic Committee made this point clear when it reported:

> Non-price competition is of particular importance to the standard of living of consumers because of the extent to

which it affects retail markets and the everyday necessities of life. The amount which a family must spend for food, clothing, groceries, drugs and cosmetics is related to the manner in which business concerns selling these products choose to compete, by the decisions to stress or skimp quality, to advertize more or less intensively, to pack simply or elaborately, to favor or oppose retail price-cutting, and so on. This is clearly a matter of broad public concern.[1]

Small Group Area.--In reference to mergers, the concern of the economist or government usually centers on the small group area of monopolistic competition. The word small in no way indicates the importance of the group. Quite the contrary, it is the predominant group which concerns this thesis. The word "small" is used to indicate a small number of concerns making up an industry. As previously stated, this is defined as duopoly or oligopoly. It is the contention of the Federal Trade Commission that this group is increasing at an alarming rate, and that the resulting concentration of industry within a few concerns is a matter of grave concern.[2]

The investment banker and the corporate device of organization have been credited with making possible much of the early advances in this country's economy. So also were they responsible for making a system whereby capital funds required for the operation of huge concerns could be accumulated to an extent that market dominance resulted.

It is this market dominance by a few concerns that distinguishes an oligopolistic industry. It has often been considered

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[1]Temporary National Economic Committee, Price Behavior and Business Policy, Monograph No. I, (Washington: Government Printing Office, 1939), p. 59.

[2]Federal Trade Commission, The Merger Movement: A Summary Report, op. cit., p. 7.

that this group represents a form of monopoly, which is probably true to some degree. However, the businessman who finds himself in this situation of market dominance more often than not considers that he is operating in the most brutal form of competition yet invented.

In the discussion of pure competition it was found that a seller had to concern himself little with other sellers. One of the characteristics of oligopoly is that each of the concerns takes specifically into account the policies of its major competitors in setting their own policies. It is here that the economist looks with distrust at administered prices, legal protective devices, exclusion of competitors, growth by merger, and nonaggressive competition. It is here, also, that the antitrust laws have endeavored to outlaw collusive price fixing, restraints of trade, and spell out aggressive competition and permissable integration of industry.

It was considered under the large group area that product differentiation with or without price considerations, was the basis for monopolistic competition. In oligopoly, nonprice competition has, for practical purposes, replaced price competition in many sectors of the economy.

George Stigler points up the views of the alarmists when he states:

> When a small number of firms control most or all of the output of an industry, they can individually and collectively profit more by cooperation than by competition . . . (such as the charging of non-competitive prices). . . . These few companies, therefore, will usually cooperate.[1]

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[1]George J. Stigler, "The Case Against Big Business," _Fortune_, May 1952, p. 123.

One of the best examples of an oligopoly is in the automobile industry. There are three predominant firms, i.e., General Motors, Ford, and Chrysler. Stigler's views of cooperation would fall on deaf ears in this industry, even although he might be able to prove that prices follow a pattern.

The automobile industry can make a good case for itself as a competitive industry, yet it is in areas such as this that the Federal Trade Commission and the Department of Justice keep a watchful eye. Of this J. K. Galbraith takes exception and notes:

> . . . the Federal Trade Commission's stand that identical pricing and "conscious parallelism" are the same as collusion if their consequence is substantially to lessen competition has set a legal basis for prosecuting bona fide competitors.[1]

Monopoly

The man who owns and operates the only theater in a town has in a real sense a monopoly. So also do the owners of certain gas stations or grocery stores in small towns have monopoly enterprises. However, the monopoly that concerns the subject of mergers is the one where a firm controls 100 per cent of the production of a product (or demand in the case of monopsony) or such portion of the production that it can, by restriction of output, bring about a favorable price change.

The most common monopolies are those that are fostered and protected by law, namely telephone, telegraph, water, gas, electric light, street railway, etc. In addition, this country has through laws enacted by Congress given monopolistic status to the bituminous

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[1]J. K. Galbraith, American Capitalism, as cited in Fortune, June 1952, p. 194.

coal industry, and by many of its practices (such as regulation of crop acreage) built into the laws or regulations monopolistic tendencies.

Beyond this, most cases of monopoly, especially in the manufacturing field, rest on patents or other barriers to entry. Patent monopolies are protected and fostered by the laws of the country. Other simple monopolies have as their basis, the control of raw materials or financial backing.

Perhaps with the exception of the public utilities and possible patent control, few concerns could be listed that had 100 per cent control of an industry. The Aluminum Company of America at one time had this maximum. However, by the entry of Reynolds Metal, among others, and a wave of substitute products, their position is anything but a pure monopoly now.

The problem of defining monopolies, when control is something less than 100 per cent, becomes increasingly difficult. Once concerns were found with substantial holdings of raw materials, it would have to be proved that these holdings were sufficient to administer prices. So also would it be difficult to prove that entry into an industry was impossible even though it might take one hundred million dollars.

As was pointed out in the chapter on "The Law of Mergers," market control of a product no longer guarantees monopoly. In the case concerning duPont's control of 75% of the cellophane wrapper industry it was proven by the dependent company that this control only constituted 17.9 per cent of the total flexible wrapper industry and the court, therefore, dismissed the government's

contention of "a monopoly in restraint of trade."[1]

For a better understanding of the problem of defining monopolistic concerns, when control is less than the 100 per cent, unquestionably the duopoly or oligopoly has to be considered. While there are other shoe machinery concerns, it is questionable whether they have significant influence on the practices of the United Shoe Machinery Corporation. It is just as interesting to explore market control in the plate glass field.

Pittsburg Plate Glass and Libby-Owens control 90 per cent of the industry. While it might possibly be proven that there was not the aggressive competition between these two concerns required for pure competition, it would be impossible to prove that either could control prices by withholding production. Such might be the case for a period of months, but the other concern would soon take up the demand by increased output.[2]

While his views are not shared by all,[3] Schumpeter's thoughts on the subject of competition are challenging.

> The competition that counts is the competition from the new commodity, the new technology, the new source of supply, the new type of organization (the largest-scale unit of control for instance) - competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and their outputs of the existing firms but at their foundations and their very lives. This kind of competition is as much more effective than the other as a bombardment

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[1] United States v. E. I. duPont de Nemours, 118 F. Sup. 41 (1953).

[2] Discussions with T. W. Collins, General Personnel Director, Pittsburg Plate Glass Co., Pittsburgh, Pa., personal interview, November 1954.

[3] See The Review of Economics and Statistics, Vol. XXXIII November 1951 for an outline of contrasting opinions on Joseph A. Schumpeter's work.

> is in comparison with forcing a door, and so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly. The powerful lever that in the long run expands output and brings down prices is in any case made of other stuff.[1]

## Big Business

Big business has been variously described as "giant corporations," "mammoth corporations," "corporate empires," "large business," "massed capital," "modern business," and in many more like phrases. Seldom are these used in a favorable sense,[2] especially in view of the fact that many of them grew by way of merger. Just as seldom has a uniform definition of big business been acceptable to writers on the subject. Stigler states his opinion thus:

> Texas Gulf Sulphur is big business as it produces more than half the sulphur in America and Macy's is small (whose annual sales are much larger) because it sells only a very small fraction of the goods sold by New York City retail stores.[3]

It can be seen that by such a definition every one of the more than three hundred thousand manufacturing enterprises would have to be analyzed to consider whether they would fall into patterns of market control that would indicate a meeting of the terms of the definition. It might well be, also, that by the use of this standard, many partnerships, or sole proprietorships, dealing in unimportant commodities, could be classed as "big business."

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[1] Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (New York: Harper & Brothers, 1947), pp. 84, 85.

[2] See John D. Glover, The Attack on Big Business (Norwood, Massachusetts: The Plympton Press, 1954), pp. 1-14.

[3] Stigler, op. cit., p. 123.

While such classifications as suggested above might seem improper, an examination of economic writings reveals the opinion by many that any departure from pure competition makes for big business tendencies - tendencies that will make concerns act monopolistically.[1]

Glover indicates that this term "big business" means more to the critics than just a noun with a definition. He suggests anything that opposes the social, economic, or political philosophies of an individual writer on the subject becomes big business to them.[2]

It has been common for many writers and most U.S. government agencies to speak of the 200 largest enterprises in differentiating among the various concerns in the economy. For this reason such a breakdown is considered appropriate to this study. However, in no way would this eliminate the 201st concern or even the 301st, if circumstances made it necessary.

What businesses constitute the 200 largest will in itself be subject to considerable disagreement. Size can be measured by total assets, net worth, gross sales, profits, etc.

If the term "big business" has taken on a connotation that is not entirely desirable then where have these expressions of distrust come from? Certainly the businessman is not writing of how the economy is being disrupted by his actions. We have already explored the fact that the courts have not outlawed bigness in

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[1]See for example Stigler, <u>op. cit.</u>, p. 123.

[2]Glover, <u>op. cit.</u>, pp. 6, 7.

industry. Even Congress has not rushed in to plug any so called loopholes in the antitrust laws. The amendment of the Clayton Act in 1950 was the first such action dealing with mergers since the passage of the act in 1914.

An examination of the critics of business quickly reveals that the FTC, the Department of Justice, and a goodly portion of the economists are the principal exponents of distrust. Stigler's comments are typical of many when he says:

> But in light of the widespread monopolistic practices - our first criticism of bigness - it is impossible to tell the public that its fears of big business are groundless. We have no right to ask public opinion to veer away from big unions and big government - and toward big business.[1]

Such comments as Stigler's are perhaps startling to the layman but must be examined in the light of other facts. Public opinion has been polled as being just the opposite from what Stigler paints it. The Opinion Research Corporation has given the following breakdown of public opinion on big business, big unions, and big government.[2]

Question: In general has big business been a good thing or not for the nation?

| | |
|---|---|
| Good | 80% |
| Not Good | 8% |
| Good & Bad | 7% |
| No Opinion | 5% |

Question: Where do you feel this problem of bigness is greatest today?

| | |
|---|---|
| Big Labor | 46% |
| Big Gov't. | 16% |

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[1]Stigler, op. cit., p. 158.

[2]Opinion Research Corporation, Princeton, N. J., as cited by Gardner Cowles in Look, February 8, 1955, pp. 19-20.

| | |
|---|---|
| Big Business | 16% |
| All | 13% |
| None | 4% |
| No Opinion | 11% |

One economist who appears to reflect the public's views in this regard is John Galbraith, who reports:

> If business feels it hasn't fared well in presenting its point of view it may be because it doesn't have a real audience for its argument. The virtues of cleanliness as it were, are being sold to a people who already appreciate the value of soap.[1]

If public opinion is truly reflected in the opinion poll, it is evident that little public support will come for any anti-big business drives if proposed by the Department of Justice, the FTC, or the Congress.

## Small Business

If it has been determined that for this thesis big business will be interpreted as embodying the 200 largest concerns, it is evident that the remaining firms will be classified as small concerns. The problem, however, of identifying what small business consists of in the eyes of the critics of big business is something else again.

Small business is usually spoken of as "separate concerns," "independents," "representative firms," "the small businessman," and in like terms. From the approximately three hundred thousand manufacturing concerns, if we deduct the 200 largest corporations, it is simple arithmetic to determine that we still have approximately

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[1]John Kenneth Galbraith, "The Defense of Business: A Strategic Appraisal," Harvard Business Review, Vol. 32, No. 2, March-April 1954, p. 38.

three hundred thousand manufacturing concerns which can be classed as small business.

The growth of concerns in this country has previously been mentioned, but it is important to re-emphasize the significance of this so called "threat" to small business by way of the merger process. Notwithstanding approximately five thousand mergers between the years 1935 to 1954, there were still 50 per cent more manufacturing concerns in 1954 than in 1935. Figure 1 illustrates this growth. However, for true correlation, it would have to be compared to normal growth and related factors. It still indicates that small business has a permanent place in our economy. However, notwithstanding these figures, there are disbelievers.

John Blair comments:

> New entrants, while impressive in numbers, account for only a microscopic share of total resources or activity, and consequently have, little, if any, effect on the level of concentration. . . .
>
> The patent absurdity of this type of approach, which for convenience, might be referred to as the "numbers racket," was brought out by Mr. T. K. Quinn, formerly a vice president of General Electric. . . . 'It is said that there are more small firms in business today than there were before the war, and that, therefore, economic power is less concentrated - which is precisely like saying that because another million Russians have been born, the Politburo has less control than it had before.[1]

### Are Mergers Advantageous to the Businessman or Society?

Not only are the critics of big business active on the argument of competitive enterprise but they seriously question

[1]John M. Blair, "Statistical Measures of Concentration in Business," Paper presented before the American Statistical Association, December 29, 1950. Mimeo Report as cited in personal interview, Federal Trade Commission, Washington, D.C., March 1955.

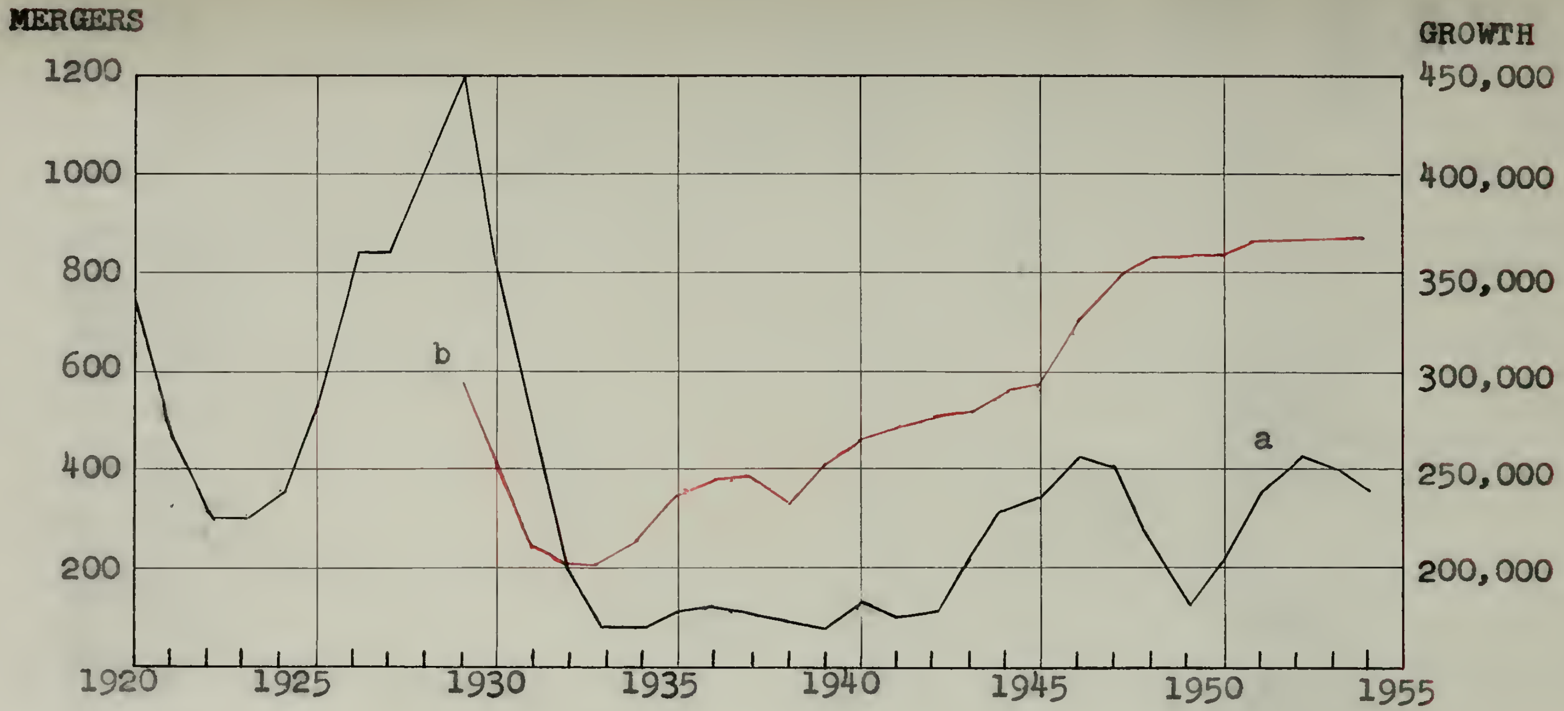


Fig. 1.--Comparison of the Growth of Manufacturing and Mining Concerns with Mergers Reported.

GROWTH
MERGERS

[a]Source: Federal Trade Commission, Press Release, "FTC to Survey Mergers," October 26, 1954. (Estimates 1951-54 - See note on Table I and Appendix A.)

[b]Source: Department of Commerce, Business Economics Office, Washington, D.C. (Figures not acquired prior 1929 by Dept. of Commerce.)

the efficiency, ethics, success, and political implications of the large industrial concern as well.

There has been little written by the businessman proving that efficiency and the common good result from mergers of business enterprise. This may be from lack of initiative or from lack of facts. However, there has been a considerable amount of initiative taken to disprove any such theories.

In the chapter on "Why Merge?" the reason of efficiency as a significant cause of mergers was discounted. However, this does not mean that it is believed that such factors are not important to the success of big business.

Advantages of Mergers and Big Business

Owens lists an imposing array of possible advantages to large scale operations but cautions that all probably would not ensue to any one firm. The list includes:[1]

1. Greater certainty of the supply of raw material.
2. The assurance of raw material of uniform quality.
3. Unification of purchasing departments.
4. The purchase of large quantities.
5. Specialization between plants.
6. Utilization of scrap in the manufacture of by-products.
7. Reduction in the number of styles and sizes.
8. Closing of high-cost plants.
9. Saving on insurance.
10. More effective use of patents.
11. Reduction in number of salesmen.
12. Better service to customers.
13. Lower delivery costs.
14. Saving in cross-freights.
15. Seasonal dovetailing of products.
16. Extension of the export trade.
17. Greater stability of earnings.

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[1]Richard Norman Owens, Business Organization and Combination, (New York: Prentice-Hall, 1951-1953), pp. 421, 426.

18. Better market for securities.
19. Greater financial reserves.
20. Better industrial planning.
21. Productive scientific research.
22. The exchange of information on costs.
23. Expert technical advice.
24. Economics of monopoly.

In addition to the advantages listed above, which might accrue to the businessman, there must be added the advantages to society. While such advantages may be denied by the critics, as noted in the following section, it is highly questionable if small business could have brought about the inventions and production know-how that has characterized the American business scene, let alone successfully produced the requirements for World War II.

As Owens goes on to point out, advantages of large scale enterprise do not guarantee efficiency - neither are they a measure of it. The measurement of efficiency is an almost impossible task. It is often based on resulting profits which at best is a poor measure and might well not be for the common good. Other measures might be lower prices to consumers, higher wages to employees or better quality products. None of these last three are subject to general measurement due to lack of an appropriate yardstick with which to make comparisons.

## Disadvantages of Mergers and Big Business

The critics of big business date back at least to Adam Smith and his Wealth of Nations. Glover made an intensive study of these critics and lists the following as the consensus of rejoinders to the proponents of the advantages of mergers or big business:

1. Big business can't be managed efficiently.
2. Big business does not owe its growth to efficiency.

3. Statistics show that big business isn't efficient.
4. The economies of big business are not net for society.
5. Big business holds back invention.
6. Big business is monopolistic.
7. Big business runs the country.
8. A big business oligarchy controls American business.
9. Big business controls the schools, the press, etc.
10. Big business runs the government.
11. Big business leads to fascism.
12. Big business has too much power.
13. The power of big business is irresponsible.
14. Their power is used for antisocial ends.
15. Big business is responsible for big government and big labor.
16. Big business is driving out small business.
17. Big business blights social advance and communal life.
18. Big business is transforming society.[1]

Glover summarizes one wing of the economic attack on the desirability of big business as: "We could have had an efficient, prosperous, dynamic economy without big business, perhaps--or probably--even more efficient and prosperous, and more dynamic."[2]

R. S. Merian comes to the defense of the economist and business when he points out:

> A considerable number of economists, their curiosity stimulated by monopolistic competition theorizing, have tried to examine business behavior and policy formulation on a realistic basis and have found that businesses do not, in fact, act and think in terms of maximizing profits.[3]

Another economist, A. D. H. Kaplan, puts in a strong plug for big business and against its critics in saying:

> Mergers and integration, though obviously departures from pure competition, can no more than business size be regarded as having been predominantly anti-competitive in their conse-

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[1]See for many examples, Glover, op. cit.

[2]Glover, op. cit., p. 63.

[3]R. S. Merian, "Bigness and the Economic Analysis of Competition," Harvard Business Review, Vol. XXVIII, No. 2, March, 1950, p. 117.

quences. A public policy that is hostile to integration per se is on balance an anti-competitive policy.[1]

Still another economist, J. K. Galbraith, states the case for business in a more dynamic way:

> It is certainly hard to describe as monopolistic and therefore antisocial an economy whose refrigerator industry sold the astonishing number of 48 million units since 1940; whose radio industry has sold the even more astonishing number of 188 million units since 1929; and whose television industry has sold some 18 million units in five years. The competition that made this possible may not have been classically perfect, but who can deny that it has been effective?[2]

## Are Mergers Successful?

The measurement of success of mergers is compounded by the difficulty in first measuring efficiency, as well as a determination as to what is meant by success. Success to the businessman might not be success as viewed for society as a whole. Due to the impossibility of measurement no statistics are available for the latter.

Two studies of the success of mergers are the ones most often quoted. These deal in success only as measured by earnings. The first was by A. S. Dewing in 1921[3] and the second by Shaw Livermore in 1935.[4]

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[1] A. D. H. Kaplan and Alfred E. Kahn, Big Business in a Competitive Society, as cited by Fortune, Section 2, February, 1953, p. 13.

[2] Galbraith, "The Defense of Business," op. cit., p. 188.

[3] A. S. Dewing, "A Statistical Test of the Success of Consolidations," The Quarterly Journal of Economics, Vol. 36, November, 1921, pp. 84-101.

[4] Shaw Livermore, "The Success of Industrial Mergers," The Quarterly Journal of Economics, Vol. 50, No. 1, November, 1935, pp. 68-96.

Dewing studied the earnings of thirty-five corporations which were the results of the merger of five or more "separate, independent, and competing plants." This small number of examples has at times been used to discount the importance of the study.

It was found by Dewing that the earnings of the component individual companies previous to merger were, in general, more than their average earnings during the ten years following such consolidation.

Livermore, on the other hand, found that of 156 concerns classified as obtaining a high degree of market control, 40.4 percent were failures, 10.9 per cent marginal, and 48.7 per cent successes. Of 172 companies studied that did not have a high degree of market control, 45.3 per cent were failures; 6.4 per cent marginal; and 48.3, successes.

The National Industrial Conference Board also did a somewhat similar study and their conclusions were summarized as follows:[1]

> 1. In a declining industry, mergers are unable to prevent the prevalent drift toward ruin. In an expanding industry both the small and the large company share in the general prosperity.
> 2. In time of depression, the earnings of large companies decline as do the earnings of smaller companies.
> 3. Some large companies have failed because of poor financial structure.
> 4. Mergers offer no substitute for competent management.

All three studies are so old that it appears inappropriate to be using them at this time. However, as they seem to be the

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[1]National Industrial Conference Board, Mergers in Industry (New York: The Board, 1929) as cited by Richard Norman Owens in Business Organization and Combination, op. cit., p. 430.

only such studies available we must surmise as to whether they still apply. It appears safe to say that the report of the National Industrial Conference Board would probably have considerable significance at the present time.

A measure of success of big business, but not necessarily big business formed by mergers, might be the success of small business. Over the past twenty five years it appears that small business has done better in relation to the national economy than has big business. In 1929 the 100 largest industrial corporations earned 3.7 per cent of the national income as profits before taxes; in 1948 the figure was 3.3. The small or middle group of business firms increased their share.[1] While this study was an important contribution to the understanding of the growth of business in a competitive society, probably a study of the 200 largest firms would have produced more pertinent figures.

Of the 100 largest corporations in 1909 only 31 remain today.[2] This is indicative of the ever changing pattern of business. Figure 2 more vividly portrays the fact that, if big business is taking over the country, it is a big business that appears to have almost as many pitfalls as the "unprotected" small business.

If business believes that mergers are the quick way to efficiency and wealth, why are there not more such actions? Table I clearly indicates that there are periods in our history

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[1] A.D.H. Kaplan and Alfred E. Kahn, op. cit., as cited in Business Week, February 7, 1953, p. 30.

[2] Kaplan and Kahn, Fortune, op. cit., p. 5.

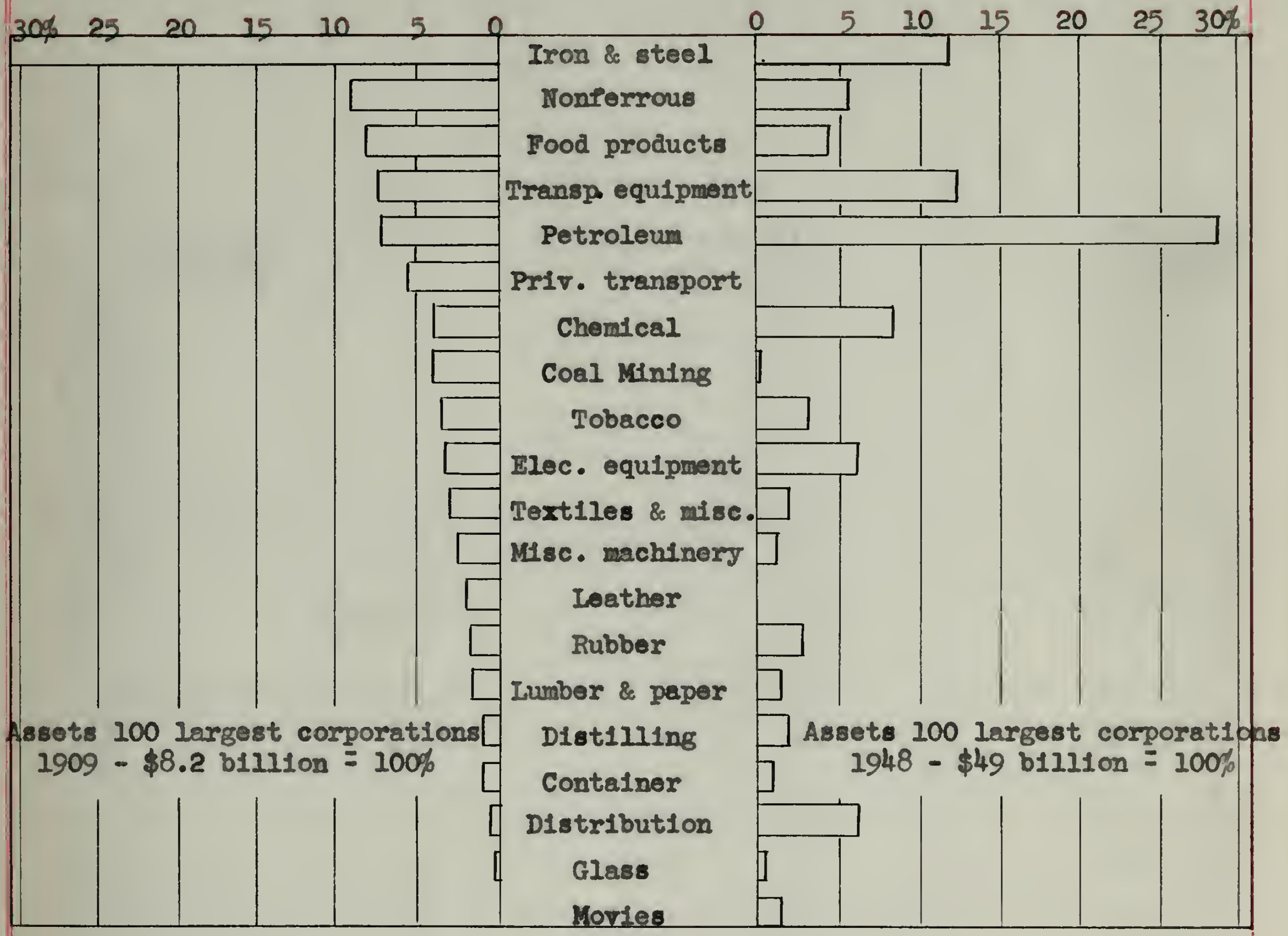


Fig. 2.--The Changing Shares of Industries Represented in the 100 Largest Corporations (by assets).

Source: A. D. H. Kaplan and Alfred E. Kahn, <u>Big Business in a Competitive Society</u> as cited in <u>Fortune</u>, Section 2, February 1953, p. 5.

when very few such consolidations take place. In addition, there is little written about the breakup of business empires or the sales of unprofitable merged companies. Just because such sales don't make as interesting reading as, for instance, the headlines of another proposed Youngstown-Bethlehem merger would be, does not make them any the less significant.

Figure 2 and several writers have indicated the heavy integration in the oil industry. That is true. However, in no place has it been found that much was made of the recent sale by the Atlantic Refining Company of most of their foreign sales organization to Anglo-Iranian Oil.[1] Nor could more than passing notice be found concerning the sale by Standard Oil of New Jersey to Naugatuck Chemical of Standard's rubber plants in Baton Rouge.[2]

The FTC has said nothing in its reports of the disposal of whole divisions or individual companies by big business, although considerable activity in this direction can always be found. Recent sales, for instance, were made by Eastman Kodak, Celanese Corp., Phillips Petroleum, and others.[3] Argus Camera and National Distillers are two corporations who tried the merger route to bigger success. They are still staggering from their losses which

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[1]Discussions with John M. Schultz, Budget Manager, Atlantic Refining Co., Philadelphia, Penn., personal interview, October, 1954.

[2]Discussions with J. P. Monahan, General Control Manager, Naugatuck Chemical Company, Naugutuck, Connecticut, personal interview, November, 1954.

[3]"Merger Trends in the Chemical Industry," Commercial and Financial Chronicle, March 26, 1953, pp. 1-43.

ended by eventual sale.[1] That there is a limit to bigness does not have to be proved to the businessman. If he wasn't ready to accept this doctrine the 200 largest firms would probably long hence have owned the firms that they were capable of acquiring.

In the Chapter on "Why Merge?" the need of capable management was discussed and this was listed as one of the present causes of merger activity. It is interesting to note that in investigating the subject of the divestiture of segments of corporations making up big business, one case was found where a major subsidiary was sold for the purpose of selling the management with it - management that could not be disposed of otherwise!

### Businessman's Competition vs. Economist's Competition

It is worth while to consider here whether the difference of opinion between the economist and the businessman as to the value of big business and, therefore, the merits of mergers, isn't primarily a difference of position. The businessman is the actor while the economist observes. They are looking at the same set of facts but can't seem to agree on what they see. The reason appears simply that the economist is looking at all the ramifications. He thinks in relationship to the total national income, the allocation of resources, the distribution of income, etc. On the other hand, the businessman usually looks at the profits that ensue from his endeavors and nothing else.

There are indications that the economists are looking to

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[1]William B. Harris, "The Urge to Merge," Fortune, November 1954, pp. 102-104.

business for some answers. The businessman's attempts at an understanding of the economy have not been as notable.

Again, quoting from Glover on this matter:

> There are signs that a number of economists are becoming more interested in the dynamic processes of growth, change, and decline of firms and industries, processes, products, and markets. More economists, also, may come to be much more interested than they have been in the past in firsthand clinical observation of business behavior and motivation. They may come to be more interested in the vast range of human diversity to be observed in concrete organizations, and less interested in deducing, from a priori assumptions, the attributes of idealized theoretical models. If this happens, big business might once again come to be supported by a powerful intellectual justification. New concepts, new research methods, and so on, could lead to new conclusions. Conceivably, that could happen. Perhaps this may come to pass. Perhaps not.[1]

Before exploring these differences of opinions, once again we should look back at what a monopolist is. Paul A. Samuelson describes him so:

> A monopolist is not a fat, greedy man with a big moustache and cigar who goes around violating the law. . . . He is anyone important enough to affect the prices of the things that he sells and buys. To some degree that means almost every businessman, except possibly the millions of farmers who individually produce a negligible fraction of the total crop . . .[2]

Economist's View of Competition

As stated previously, the economist views the goal of competition as an organized system which makes economical use of scarce resources. In looking at business firms or industries, certain tests are applied as a measure of that goal. Is the

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[1]Glover, op. cit., p. 99.

[2]Paul A. Samuelson, Economics, An Introductory Analysis, p. 39, as cited in J. D. Glover, The Attack on Big Business, op. cit., p. 90.

company or industry efficient? Is there rivalry that tends to push prices down toward the costs of the most efficient producer? Is there proper quality competition? Is the firm or industry progressive? Is there freedom of entry for other firms? Is there a wide range of choice for buyers with adequate knowledge to exercise this choice? Are its profits the result of efficiency and progress or the result of monopolistic position? Is its ownership widely held?

These tests are often applied against the model of pure competition. That is because the economist gauges the intensity of competition by its effectiveness in promoting consumer welfare; an effectiveness that is believed more probable under price competition.

He views with alarm the many substitutes for this price competition. Advertizing, salesmanship, merchandising skills, price discrimination, price leadership, differentiation of products, patents, franchises, dealer organizations, market share, and many other such "monopolistic practices" which lead to charges of collusion in restraint of trade.

His views are based not only on the classical theories of competition, but on volumes of proven charges against the businessman!

Businessman's View of Competition

The businessman's concept of competition is far less theoretical and certainly less discriminating. His first comment is that pure competition never existed and, therefore, it has no place in assessing the merits of the present accepted term of

workable competition.

To the charge that price uniformity is evidence of collusion the businessman turns a deaf ear. To him it is a sign that unions have taken competition out of wages with strong government support and he is compelled to pay the same as his competitor. Freight rates have been set by an agency of the government and are no longer subject to competition. Taxes are uniformly set by the Congress. For a considerable portion of time in the past fifteen years, the government set prices on commodities and still controls certain segments of the economy in this respect. In addition, it is claimed that a uniformity of price in rival products indicates the competitive position of substitutes, thus debunking the claims of monopoly positions due to patents or other market advantages. In examining the cost of automobiles it can be seen that the prices are uniform beyond question. However, a cost accountant might quickly note that there is not much room for competition in prices. After labor, freight, taxes, interest on investment, and certain materials are procured, such as those requiring manufacture by bituminous coal which has its prices protected by the government, the only costs left subject to possible differences are overhead and profit. As all firms have overhead and try for a profit, the margin of possible differences is small.

Product differentiation and selling expenses are to him the answer to monopoly or failure of the consumer to know that substitute products are available to him. It is the heart of the competitive struggle to meet his rivals with new and better products.

In essence, the businessman can't afford the luxury of competitive theories (which he sees as not suitable for use by unions or government in his behalf). He hasn't the time or inclination to dwell on the effects of his rivalry on the consumer welfare. The goal of his competition is his own welfare. His competitive practices depend on how hard his competitors press him in his struggles to stay in business.

## Summary

To the student, the vast differences of opinion held by respected economists, businessmen, and government agencies is more than confusing. It seems like a paradox that we live in what is believed to be the greatest country on earth, yet important segments of the population still believe that we are heading for a concentration of industry, through merger, that might well spell ruination for our economy. Ross M. Robertson parallels this belief:

> By any measure we choose to take, the American consumer has been progressively better off over the past half-century. But in an economy bowed down by monopolistic restrictions this cannot be! How has it come about that, despite the omnipresence of oligopoly, more and more of this world's goods and services have been made available to the run of humankind?[1]

Are the fears of the critics of big business and mergers as the route to big business justified? How much attention should be paid to the critics? We might repeat the prediction of Berle and Means in 1932 and see how empty their warning was on the

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[1]Ross M. Robertson, "On the Changing Apparatus of Competition," American Economic Review, Vol. XLIV, No. 2, May, 1954, p. 52.

expected day of disaster:

> Just what does this rapid growth of the big companies promise for the future? Let us project the trend of the growth of . . . the twenty years 1909 to 1929, then 70 per cent of all corporate activity would be carried on by two hundred corporations by 1950. If the more rapid rates of growth from 1924 to 1929 were maintained for the next twenty years, 85 per cent of corporate wealth would be held by the 200 large units.[1]

We have already noted that during this period of twenty years projected by Berle and Means, small business has been shown to have gained! The concentration of business enterprise will be explored more fully in the following chapter. At this time it only has to be stated that business concentration has changed little since 1932.

Perhaps the answer lies in the comments of John Perry Miller.

> Despite the long usage of the term competition and the central place which it has in contemporary economic analysis and policy, it is a concept more often used than defined. Moreover, it is a concept which has undergone a substantial, if imperceptible, transformation since the days of Adam Smith. . . . Smith and his successors were detailed in their description of what they were against. It remained for others to detail the institutional requirements to preserve perfect liberty.[2]

Another possibility is in the concept of "countervailing power" expounded by Galbraith. It is his theory that:

1. Competition means that a seller's power is checked by those who provide a similar or substitute product. In a system of competition the role of the buyer is passive.
2. New restraints on private power have appeared on the opposite side of the market: the countervailing power of buyers or suppliers.

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[1] A. A. Berle and Gardner C. Means, The Modern Corporation and Private Property, (New York: Commerce Clearing House, 1932), pp. 40-41.

[2] John Perry Miller, "Competition and Countervailing Power," American Economic Review, Vol. XLIV, No. 2, May, 1954, p. 15.

3. This countervailing power is a self-generating force. Private economic power begets the countervailing power of those who are subject to it.[1]

Another advocate of the theory that the change is indicative of a new force added to the economy is Arthur H. Cole:

> More particularly I would raise the questions--which surely I cannot pretend yet to answer; (a) whether there are not, in the recently evolved structure of American entrepreneurship, elements of self-justifying practices and points of view, which have important economic or social consequences--not another "invisible hand," but at least a fruitful disposition of forces--and (b) whether the course of development within American business life, in part forced by alterations in social structure and by concurrent sophistication of governmental controls, does not hold promise of a somewhat enduring compromise position between the supposed necessary alternatives of unfettered free enterprise and a planned economy.[2]

A suggestion for the government, posed by Frank H. Knight, might well add another answer:

> If society itself (the government) would stop fostering monopoly and restrictive practices and prevent admittedly "unfair" action, the problem would be vastly reduced in scope and severity, one may even say well advanced toward solution--solution as the facts of life make possible.[3]

The above statements appear to indicate that all is well with our competition and that consolidations of business enterprise might well not be the danger believed. If these comments produce any such sedative effect on the critics, it is not evident. We can let Senator Joseph C. O'Mahoney of Wyoming speak for those desirous of outlawing mergers and big business:

> . . . private enterprise is threatened . . . by a general failure to comprehend the change that has taken place and

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[1]As stated by John Perry Miller, ibid., p. 19.

[2]Arthur H. Cole, "An Appraisal of Economic Change," American Economic Review, Vol. XLIV, No. 2, May, 1954, p. 36.

[3]Frank K. Knight, "Discussion," American Economic Review, Vol. XLIV, No. 2, May, 1954, p. 63.

> a failure properly to coordinate Government and business in their relation to people. . . . We have persisted in treating these organizations as though they were clothed with human rights instead of having only the rights which the people, acting through their Government, see fit to bestow on them. It will be impossible even to begin the task of adjusting Government to business until we realize that the modern business organization has grown to such proportions that neither the people, as individuals, nor through their local governments are able to cope with it.[1]

In viewing the position taken by the FTC, the Department of Justice, and the critics of big business, there appear to be two answers. The government could go beyond anything it has yet attempted in fostering monopolies, and take over many of the large corporations in the form of foreign cartels. On the other extreme it could abolish big business, if it could be defined, and go back to an economy of small firms. Both conclusions seem ridiculous.

In this country big business has been a compromise between cartels and a form of enterprise that would not have had the features necessary to bring about large scale production--let alone prosecute a war of the extent found in World War II. This does not mean that the organization and policies of big business are believed to be above reproach. Quite the contrary. Neither does it mean that the government should not attempt to be the guiding hand as a regulator of this so called "workable competition." It does mean, very decidedly, that it is high time that the businessman, the government, and the economists sat down together to work out the best ways to carry on "workable competition"--workable competition as defined by Galbraith:

> Workable competition has no use for collusion, monopoly, or deliberate restraints of trade. But it puts the consumer's

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[1]Temporary National Economic Committee, Investigation of Concentration of Economic Power, Final Report and Recommendations, 77th Cong., 1st Sess., pp. 675, 677.

> interest ahead of theory, and shuns perfect competition for the sake of perfect competition. It makes allowance for the fact that the American economy has delivered to people the benefits that perfect competition was calculated to give.[1]

Merger for merger's sake is to be condemned, and no economic justification for their existence can be seen. On the other hand a prohibition of mergers, just because they often cause what is known as big business and a change in economic theory of operation, also does not seem to make sense.

It is anticipated that mergers will go on within their cycles, business will measure the success of such ventures and cast out the unprofitable ones, government will continue to make loud outcries against big business taking over the country (in the hope of stirring up enough attention so that proper controls can be continued), and the economists will continue their debates in line with their individual beliefs. Meanwhile, the economy of the nation will continue to prosper.

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[1]Galbraith, American Capitalism, as cited by Fortune, op. cit., p. 99.

## CHAPTER V

## THE EFFECT OF MERGERS ON INDUSTRIAL CONCENTRATION

"Concentration may be a problem, but for better or worse it is not threatening to engulf the economy." M. A. Adelman, Review of Economics & Statistics, November, 1951.

Although controversy has run rampant throughout the study of mergers, in no place has it been greater than in the effect of mergers on industrial concentration. Undoubtedly that is because concentration ratios have often been taken as the "proof" of whether big business is taking over the country or not. It would appear that the facts, themselves, could produce a greater unanimity of opinion among the authorities. However, such does not seem to be the case.

At this writing the controversy appears to have become a shameful display of temper. It has been reduced more to an argument of methods of measurement than one of increased or decreased concentration and less often than not is the role of mergers considered in the problem of concentration.

A. A. Berle, Jr. says of the writings that "Bias or at least prediliction exists to a high degree wherever the problem of concentration is touched."[1]

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[1]A. A. Berle, Jr., "Four Comments on The Measurement of Industrial Concentration," Review of Economics and Statistics, Vol. XXXIV, May, 1952, p. 172.

### Measurement of Industrial Concentration

While this chapter deals more with the effect of mergers on industrial concentration and concerns itself less with the technical statistical measurement tools used by the various writers, some comment on the problem of measurement is deemed necessary.

No great effort is required to find continual reference to phrases such as "concentration of economic power" in any writings dealing with business or mergers. It is easy to say and is just as easy to "prove" that if one concern has assets of 100 million dollars and another has assets of 50 million dollars the first concern has twice the economic power of the other. From such an assumption many questions develop. What is economic power? What are assets? How are they measured?

It probably can be deduced that these questions are more often asked than answered or defined. It appears that if they have been answered they have never been precisely measured!

There are many measures of the size of a business. A few examples might be sales, numbers of employees, income generated, assets, and net worth. Of these, there have been many subdivisions such as net capital assets, numbers of research workers, primary sales not including vertical integration, and income returned to business as opposed to total income. Adelman in his "Measurement of Industrial Concentration,"[1] uses sales, employees, income, and assets. On the other hand the Federal Trade Commission

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[1] M. A. Adelman, "The Measurement of Industrial Concentration," The Review of Economics and Statistics, Vol. XXXIII (November 1951), pp. 270 ff.

in its "Report on the Concentration of Productive Facilities," used primarily the measure of net capital assets.[1] Adelman dismisses the FTC report with the comment that "the percentage of net capital assets is the best measure of concentration if and only if one wishes to maximize the probable error of estimate.[2]

Sales as a Measure of Size

The measurement of industrial size is very often based on the criterion of sales, as that is the most readily available figure among business enterprises. It is not, however, considered the best measure because it disregards the amount of fixed assets required to generate such sales, the extent of vertical integration, and the costs incident to distribution which make such sales possible.

Employees as a Measure of Size

The advantage of such a measure is that price levels, changes in products, or productivity changes of employees do not have to be considered in statistical calculations. It is the one non-monetary measure of concentration. The advantage of this criterion is that while a company might double its sales, if such doubling came about by the increased productivity of the workers and had no significance to investment, or external growth factors, it would be hard to say that the company has doubled in size, as would be "proven" under the sales method.

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[1]Federal Trade Commission, "Report on the Concentration of Productive Facilities," as cited by Adelman, ibid., p. 273.

[2]Adelman, op. cit., p. 274.

### Income as a Measure of Size

It would appear that income might be the best single measure of economic size of a firm. Seldom, however, is the true income known. The financial statements issued by firms have been refined to such a point that disclosure of this item has been well covered. There is little likelihood that corporations will be any more willing to pass such information along in the future.

Rate of return on net worth has been used as a measure of size and concentration. However, an examination of rates of return indicates that the larger the company the smaller the rate of return on the average.[1]

### Assets as a Measure of Size

The problem of dealing with assets becomes even more clouded than that with income. Income might be used as profits after taxes and at least a definable figure could be arrived at, though the "profits" be indeterminable. In the case of assets, however, it brings about statistical problems that are almost insurmountable. Were the assets purchased at present prices? Were they purchased twenty years ago and are now worth considerably more than shown on the books? Has a company assets that have been fully depreciated and not shown, yet worth a great deal on today's market? Do some carry trademarks, leases, goodwill, etc., at a nominal figure of one dollar, while others put millions into their statements covering these items? The definition of assets becomes

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[1]Joseph L. McConnell, "1942 Corporate Profits by Size of Firms," Survey of Current Business, January, 1946, Table 5.

a definition of accounting theory!

### Size or Numbers

In the consideration of the measurement of industrial concentration the question of numbers of mergers continually enters the discussions. Whether numbers is a proper measure is questionable. Lintner and Butters in their study of the problem state:

> For the most part the apparent contradiction between many of our findings and those of the Commission is explained by the fact that the Commission analyzed primarily data on the number of mergers, whereas our analysis also takes full account of the size of the merged companies.[1]

### Relative Growth vs Absolute Growth

In addition to the problem of direct measurement of size there enters the problem of measurement in relative growth or absolute growth. The authors of the previously mentioned Lintner and Butters study of the "Effect of Mergers on Industrial Concentration," were accused by John Blair and Harrison Houghton of "statistical biases" and with having a "joker" in their analysis when they measured concentration by relative size rather than absolute size. By using absolute size Blair and Houghton "reversed" the Lintner Butters findings. They explained, "Hence, in terms of both number and assets, the absolute growth of large business resulting from mergers was clearly greater than that of small business."[2]

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[1] John Lintner and J. Keith Butters, "Effects of Mergers on Industrial Concentration, 1940-1947," Review of Economics and Statistics, Vol. XXXI, No. I, February 1950, p. 31.

[2] John M. Blair and Harrison F. Houghton, "The Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration," Review of Economics and Statistics, Vol. XXXIII, No. I, February, 1951, p. 64.

Lintner and Butters dismissed this comment by saying,

> Drs. Blair and Houghton simply ignored our detailed treatment. . . . ratios on which their "revised figures" and chart are based, and from which they draw conclusions contrary to ours are fallacious in their construction and hence misleading in their implications.[1]

### Measurement by Concentration Ratios

Once a method of "measurement" has been determined, the procedure for obtaining concentration ratios within industries is quite standard with writers as well as with the Department of Commerce and the FTC.

These concentration ratios are obtained by dividing the assets, (or other dimensions of size decided upon) of the largest four sellers within an industry by the total sales for the industry.

If an industry is significant for its high degree of concentration perhaps the largest three concerns (or in some cases two concerns) are used as the measure of concentration.

By the use of these concentration ratios the extent of oligopoly can be indicated, but regardless of the degree of this oligopoly it will measure the relative size of the largest units in relation to the total. Changes in industry ratios can be compared with other industries to note trends either towards or away from further concentration.

## Is Concentration of Industry Increasing?

According to the Federal Trade Commission, which is charged with the knowledge of what is happening to business by way of

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[1] John Lintner and J. Keith Butters, "Rejoinder to Drs. Blair and Houghton," Review of Economics and Statistics, Vol. XXXIII, No. 1, February 1951, p. 68.

mergers, concentration of industry, as a result of mergers, is increasing at a rate that is threatening the free enterprise system.

> No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation in the public interest. In either event, collectivism will have triumphed over free enterprise, and the theory of competition will have been relegated to the limbo of well-intentioned but ineffective ideals. This is a warning which the Commission has repeated time and again, and one which some of those who have the most to gain by the preservation of competition seem determined to ignore.
>
> The Commission believes that the economic forces, on which it has been basing its warnings, require that a definite choice be made. Either this country is going down the road to collectivism or it must stand and fight for competition as the protector of all that is embodied in free enterprise.
>
> Crucial in that fight must be some effective means of preventing giant corporations from steadily increasing their power at the expense of small business.[1]

It is evident that the nature of the comments contained in the above was the signal that set off the great number of articles, comments, rejoinders, and rebuttals that have appeared through the years since its publishing. The economists and businessmen have set out to prove or disprove the "facts."

One of the first such studies was made by Celeste Stokes in November of 1947, and it was reported that the growth of assets of the largest 200 manufacturing concerns had been compared with that of 800 other corporations of medium to large size. For the period 1939-1946 the former group increased assets by 41% and the latter group by 102%.[2] The sampling technique in the selection of

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[1]Federal Trade Commission, The Merger Movement: A Summary Report, *op. cit.*, p. 17.

[2]K. Celeste Stokes, "Financial Trends of Large Manufacturing Corporations," Survey of Current Business, November 1947, as cited by Adelman, *op. cit.*, p. 283.

the 800 concerns has since been challenged and other statistics of the report questioned.

As previously mentioned, Lintner and Butters completed a study on the effects of mergers on industrial concentration for the period 1940-1947. Their findings were reported in an article by that name in 1950. The results of the findings were to "essentially reverse the FTC" and that "as a result of mergers, small business made greater gains than large business."[1]

Coal was added to the fire by the Attorney General in a report to congress during 1950. Apparently using the basic thinking of the FTC, he said:

> . . . during the last war the long standing tendency toward economic concentration was accelerated. . . . Since increased concentration is regarded as undesirable, it is considered necessary to counteract it even if this means that the government will have to pay higher prices for defense supplies . . . or accept non-combat items of less reliable quality.[2]

This report by the Attorney General made it appear that increased concentration was a proven fact and that such drastic action as the procurement of inferior goods at higher prices should result. This "proven fact" was also the result of a report of the Smaller War Plants Corporation who made a study, at the direction of the 79th Congress, entitled "Economic Concentration and World War II."[3] This report made no mention of any statistics

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[1]Lintner and Butters, op. cit., p. 31.

[2]Letter of transmittal attached to the Report of the Attorney General of the United States prepared pursuant to Section 708 (e) of the Defense Act of 1950, pp. 4-39-36.

[3]Smaller War Plants Corporation, "Economic Concentration and World War II," Report to 79th Congress, 2d Sess., Senate Committee Print No. 6 (Washington: Government Printing Office, 1949).

or writings that had endeavored to prove that increased concentration had not taken place during the period. It appeared so biased in its approach that little came of the work of the committee. Of this, Adelman remarked "The authors of the SWPC report had the opportunity to make a real contribution in a field important both in peace and war. Unfortunately, their data are simply irrelevant." He added that, "There is every reason to urge that public policy be made on the basis of fact rather than warmed-over fiction."[1]

In 1951, Blair and Houghton made their reply to the Lintner and Butters analysis of concentration. They say of the work that, "If Lintner and Butters statistical procedure is carried to its logical conclusions, absurd results are reached." Thus they not only disagreed with the findings but with the statistical measurement and procedures as well. In defense of the FTC position, of which they were the foremost supporters they then went on to remark:

> Indeed if the Commission had made any general statement on this point, it would probably have concluded, based on its own data, that the recent merger movement had not "substantially" increased concentration in manufacturing as a whole.[2]

In a "Rejoinder" to the Blair-Houghton analysis of their work, Lintner and Butters were quick to take to task the authors for their comments. They were happy, they said, to note that finally the FTC agreed with them that substantial increases in concentration hadn't taken place but if this were the case, why had the FTC made dire predictions and warnings of such an event.

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[1]Adelman, op. cit., p. 284.

[2]Blair and Houghton, op. cit., pp. 65 f.

They conclude:

> In any event, in direct contrast to the erroneous ratios computed by Drs. Blair and Houghton, the corrected ratios definitely would show a larger growth by all "small" companies from mergers than by all companies with assets over $10 million.[1]

J. Fred Weston, prior to the publishing of his book on The Role of Mergers in the Growth of Large Firms, entered the controversy, took exception to some of the Lintner-Butters statistics, and defended a good part of the Blair-Houghton writings. His conclusions were considerably more guarded, however, and he said:

> (1) During 1940-47 small firms were acquired to an extent neither greater nor less than their relative numbers in the business population.
>
> (2) When measured by numbers of acquisitions or the absolute amount of assets acquired, the largest firms were relatively more important acquirers than smaller firms. When measured by the percentage of increase in assets secured through acquisitions, small firms grew to a greater extent by merger than large firms. Neither measure yields conclusive evidence on the nature of extent of concentration associated with merger activity during the period.[2]

Perhaps Weston's greatest contribution at this time was pouring oil on the troubled waters by pointing out that there are elements of arbitrariness in any measure of concentration and that such measures should be selected carefully to assure that they are appropriate for guidance in the problem at hand.

In a "Rejoinder to Dr. Weston," Lintner and Butters dismissed his criticism by saying that either he didn't read their

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[1] John Lintner and J. Keith Butters, "Rejoinder to Drs. Blair and Houghton," Review of Economics and Statistics, Vol. XXXIII, No. 1, February 1951, p. 68.

[2] J. Fred Weston, "Comments on Lintner-Butters Analysis," Review of Economics and Statistics, Vol. XXXIII, No. 1, February 1951, p. 73.

article or, if he did, he didn't understand it.[1]

It is most interesting to note that three years later, on the publishing of his book, Weston's position had veered to a strong one in opposition to the Blair-Houghton-FTC findings. He now says that "The evidence is consistent and persuasive,. . . . The recent merger movement appears not to have accentuated the level of industrial concentration significantly."[2] In another portion of his book, he comments:

> . . . the data on changes in absolute concentration afford a basis for general agreement that the merger movement of 1940-47 did not substantially increase industrial concentration, either over all or in more than two or three product lines.[3]

In November of 1951, Adelman published his work on "The Measurement of Industrial Concentration," which has been commented on so often in this thesis. His conclusions were:

> (1) The American economy is highly concentrated.
> (2) Concentration is highly uneven.
> (3) The extent of concentration shows no tendency to grow, and it may possibly be declining. Any tendency either way, if it does exist, must be at the pace of a glacial drift.[4]

Adelman continues, in commenting on the assets of the 139 largest firms, (although his statistics are cautious) that "The data shows a reduction of nearly 10 per cent in the share held by the largest 139." His conclusion is without reservation: "It is

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[1] John Lintner and J. Keith Butters, "Rejoinder to Dr. Weston," Review of Economics and Statistics, Vol. XXXIII, No. 1, February 1951, p. 73.

[2] J. Fred Weston, The Role of Mergers in the Growth of Large Firms, (Berkeley and Los Angeles: University of California Press, 1953), p. 58.

[3] Ibid., p. 55.

[4] Adelman, op. cit., p. 295.

also a statement of fact, there has been no increase in concentration. . ."[1]

The proponents of increased concentration were not long in attacking Adelman's article, his statistics, his procedures, and his findings. Gecrge Stocking was cryptic in his comments:

> Professor Adelman is looking at the forest, hence he does not see the trees. Some of the trees have grown pretty big. . . . Recent mergers in the textile field, for example, have gone far enough to change the structure of the industry.[2]

Weston had warned of the increase of concentration in the textile field:

> Foods and textiles were the only broad industry groups in which marked increases in concentration took place during the merger movement of 1940-47.[3]

It was strange to hear one of the strongest opponents of big business, George Stigler, reverse Weston's and Stocking's findings in his comment: "Some of our biggest industries, such as textiles, shoes, and most food industries will require no anti-trust action."[4]

Jesse W. Markham was another writer who did not agree that integration in the textile industry had gone far enough to affect market behavior.[5]

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[1]Adelman, <u>ibid.</u>, pp. 289-295.

[2]George W. Stocking, "Four Comments on The Measurement of Industrial Concentration," <u>Review of Economics and Statistics</u>, Vol. XXXIV, No. II, May 1952, p. 167.

[3]Weston, <u>op. cit.</u>, p. 58.

[4]Stigler, "The Case Against Big Business," <u>op. cit.</u>, p. 165.

[5]Jesse W. Markham, "Integration in the Textile Industry," <u>Harvard Business Review</u>, Vol. XXXVIII, January 1950, pp. 74-88.

Corwin D. Edwards went further than Stocking with his comments concerning Adelman's work. He defended the Attorney General's report as well as the reports of the FTC but stated that the FTC made no attempt to measure the over-all trend of concentration during World War II.

> The words concerning increasing concentration (in the reports) are designed merely to record that the purpose of the reports is to help prevent undue concentration of economic power by pointing out conditions that tend to envoke it.[1]

The above quotation by Edwards is all the more important as it was made in his capacity as Director of the Bureau of Economics in the Federal Trade Commission. The Commission had warned that "either the giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation in the public interest," and that "The importance of external expansion in promoting concentration has never been more clearly revealed than in the acquisition movement that is taking place at the present time."[2] These statements should now be re-evaluated.

Edwards' article went on to defend the use of "net capital assets" as a measure of concentration and took issue with Adelman's question of its correctness. He added that "It merely presents one measure of concentration at one level of business organization for one period of time." This should have been enough to discredit

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[1]Corwin D. Edwards, "Four Comments on The Measurement of Industrial Concentration," Review of Economics and Statistics, Vol. XXXIV, No. II, May 1952, p. 158.

[2]Federal Trade Commission, The Merger Movement: A Summary Report, op. cit., pp. 4-7.

the FTC report, but Edwards continued:

> The Commission's report was concerned primarily with the levels of concentration in 26 manufacturing industries and only incidentally with manufacturing as a whole.[1]

It has been previously pointed out that Blair and Houghton, economists at the FTC, while challenging all proponents of "no increased concentration" finally backed down to admit that the FTC didn't mean that concentration had been "substantially increased." Now the Director of the Economic Bureau states that their report was designed merely to help prevent undue concentration by pointing out conditions that tend to evoke it, that it used only one method of measurement, and that it was only concerned incidentally with manufacturing as a whole!

Stocking continues his criticism of Adelman's work by saying that "Even Professor Adelman seems surer of his results in criticizing the Commission's findings than in analyzing his own statistical data." In commenting on the people who might use Adelman's work, he expressed the following opinion:

> It is to be hoped that they will not recklessly use Professor Adelman's cautiously worded findings as a cloak to conceal a program to discredit an agency now required by law to determine whether specific mergers do in fact tend to substantially lessen competition or create a monopoly.[2]

Adelman disposes of his critics by saying:

> It is not clear that Messrs. Stocking and Edwards agree or disagree. . . . Mr. Edwards' criticisms are invalid, but even if they were valid they would be quantitatively unimportant and would in no case change the indicated tendency.[3]

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[1]Edwards, op. cit., pp. 159, 160.

[2]Stocking, op. cit., p. 168.

[3]M. A. Adelman, "Rejoinder," Review of Economics and Statistics, Vol. XXXIV, No. II, May 1952, p. 174.

Edwin B. George defends Adelman's work to a considerable degree and therefore lends credence to it. George's opinions are expressed as follows:

> Primarily, however, it reflects my views that his constructive presentation, itself, is in general excellent and so far as I know not open to serious criticism at vital points.[1]

A. A. Berle Jr. is another writer of considerable stature who came to the defense of Adelman. He says "Adelman's able statistical review is a refreshing dose of fact in a welter of controversy."[2]

In November of 1952, Blair again took up the challenge of his critics and replied to Adelman's work, much in the same fashion as he did with the Lintner-Butters findings. His comments began in a note of agreement with some of the findings. He then proceeded to defend the SWPC report and explain in technical statistical detail his objections to the Adelman findings.[3] He added a contribution to the conflict in opinions by once again bringing emphasis on the task of measuring concentration.

> Most of the shortcomings of the concentration measures developed in the past have stemmed from (a) the fact that the basic data used have been collected frequently for different purposes, and (b) the lack of resources to adjust, correct, and interpret these admittedly imperfect bodies of data. Under such circumstances it is almost inevitable that differ-

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[1]Edwin B. George, "Four Comments on The Measurement of Industrial Concentration," Review of Economics and Statistics Vol. XXXIV, No. II, May 1952, p. 168.

[2]A. A. Berle, Jr., "Four Comments on the Measurement of Industrial Concentration," Review of Economics and Statistics Vol. XXXIV, No. II, May 1952, p. 172.

[3]John M. Blair, "The Measurement of Industrial Concentration, A Reply," Review of Economics and Statistics, Vol. XXXIV, No. IV, November 1952, pp. 343-355.

ences among economists will arise as to the validity of specific measures and the appropriateness of the accompanying analysis.[1]

After a rather comprehensive analysis of the over-all problem and comment on his disagreement with Adelman that concentration had possibly decreased, he concludes:

> Finally it is questionable whether his frequent indulgence in argumentum ad hominem (as in likening his opponents to "scurvy politicians") constitutes any significant contribution to knowledge in this admittedly difficult field of economic analysis.[2]

At this point Adelman, in a further "Rejoinder," commented on Blair's article as follows:

> Mr. Blair will nowhere assert that concentration increased during World War II or increased through mergers during 1940-47. The issue of fact, then, is no longer in dispute - there is no evidence of increasing concentration. . . .
>
> In point of fact, I went to some pains to avoid mentioning Mr. Blair's name, and for reasons indicated in the next paragraph, I now regret the avoidance.
>
> Dr. Blair's article is void of facts or correct analysis, but it serves a highly useful purpose. . . . In the future, having fixed responsibility for particular reports, we will be better able to appraise the commission's output.[3]

While these are harsh words put out by Adelman, he has considerable support in his findings and beliefs. In this particular instance Lintner and Butters came to his defense and in a "Further Rejoinder" took Blair to task:

> He is now in a position where - in order to defend spurious "conclusions" regarding the relative importance of mergers to different size classes of firms - he himself is going to

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[1]Ibid., p. 343.

[2]Ibid., p. 355.

[3]M. A. Adelman, "Rejoinder," Review of Economics and Statistics, Vol. XXXIV, No. IV, November 1952, pp. 356, 363.

extreme lengths to deflate the importance of the recent merger movement.[1]

In reference to Adelman's latest charge against him and the position of the FTC, Dr. Blair indicated that Adelman's work was obnoxious, outrageous, and not worthy of further comment![2]

The year 1954 brought the publication of the FTC's Changes in Concentration in Manufacturing 1935 to 1947 and 1950. Results of those studies indicate that they had found that concentration during the period under study increased a maximum of 2.8 percentage points within the largest 200 firms (see Table II and Figure 3). Such an increase does not appear to be alarming over a fifteen year period, however the Commission does point out that changes in concentration in certain fields such as the food, beverage and tobacco industries, has considerably exceeded the average.[3] It is doubtful that this report, as important as it is, will do much to settle the dispute. First the FTC points emphasis on the individual industries and discounts the importance of the average increase in rate of 2.8 percentage points, while its critics point to the average rate and note the fact that the Commission states that their figures are only accurate to 2 percentage points.[4] The

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[1]John Lintner and J. Keith Butters, "Further Rejoinder," Review of Economics and Statistics, Vol. XXXIV, No. IV, November 1952, p. 367.

[2]Discussions with John M. Blair, personal interviews, Federal Trade Commission, Washington, D.C., December 1954, and March 1955.

[3]Federal Trade Commission, Changes in Concentration in Manufacturing 1935 to 1947 and 1950, (Washington: Government Printing Office, 1954), p. 28.

[4]Ibid.

TABLE II

PERCENTAGE OF TOTAL VALUE OF PRODUCT OF ALL MANUFACTURING INDUSTRIES ACCOUNTED FOR BY THE LARGEST MANUFACTURING CONCERNS, 1935 AND 1950*

| | 1935 | 1950 | Change (percentage points) |
|---|---|---|---|
| | Percent | Percent | |
| First 5 companies ............ | 10.6 | 11.4 | 0.8 |
| First 50 companies ........... | 26.2 | 26.6 | .4 |
| First 100 companies .......... | 32.4 | 33.3 | .9 |
| First 200 companies .......... | 37.7 | 40.5 | 2.8 |

*Federal Trade Commission, Report on Changes in Concentration in Manufacturing, 1935 to 1947 and 1950 (Washington: Government Printing Office, 1954), p. 17.

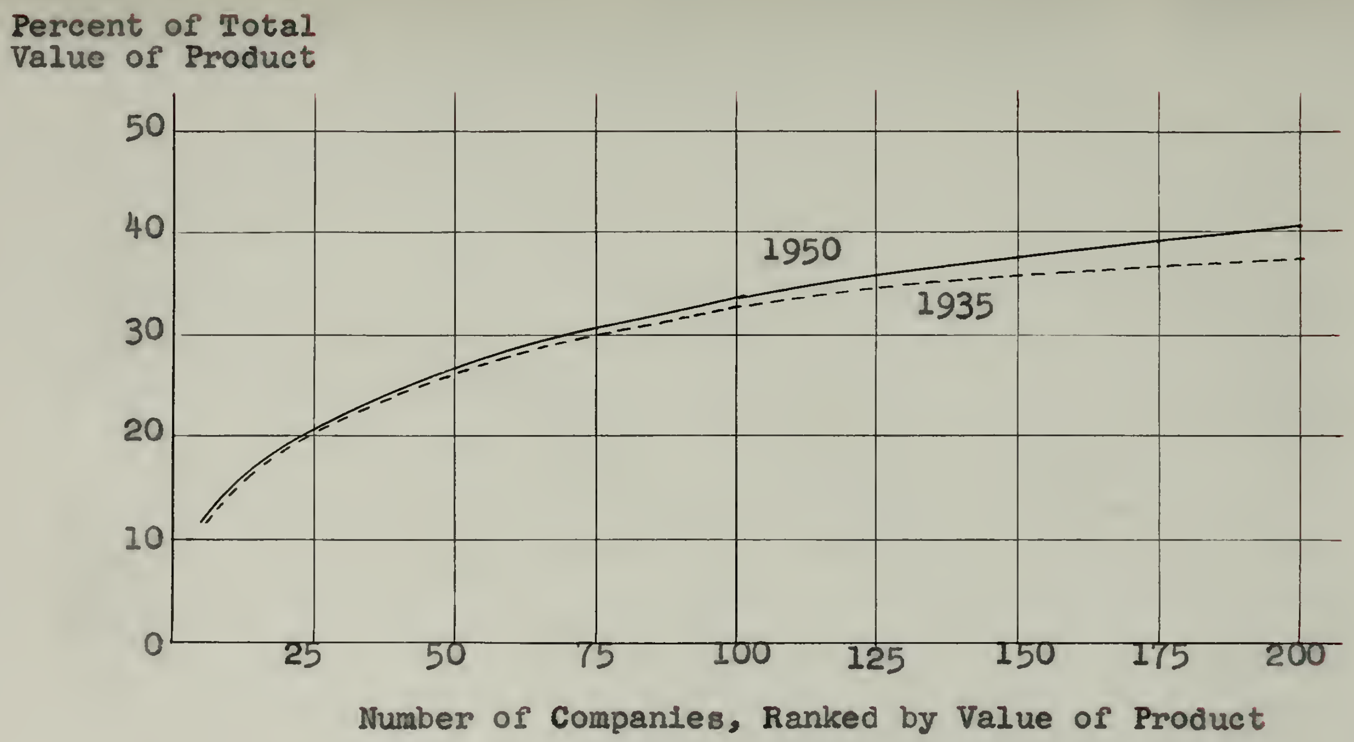


Fig. 3.--Concentration in Manufacturing: 1935 and 1950

Cumulative Percentages of Total Value of Product
Accounted for by the 200 Largest Manufacturing Companies

Source: Federal Trade Commission, Report on Changes in Concentration in Manufacturing, 1935 to 1947 and 1950 (Washington: Government Printing Office, 1954), p. 18.

critics only have to turn to the report itself for defense of their position.

The Commission says of its work, "Because of the fact that the 1950 data were obtained through a sample survey, rather than through a complete canvass, the figures for a number of industries in the 1935-50 comparisons are in the nature of estimates."[1] In another part of the report, the Commission state "In the case of a number of industries for which the Census Bureau published no figures on value of product, it was necessary to prepare special estimates."[2] The report commences with a full chapter devoted to cautioning the reader on the incompleteness of the statistics used.[3]

## Effect of Mergers on Industrial Concentration

The subject being investigated in this chapter is concerned more with the effect of mergers on industrial concentration than on concentration, itself. As previously pointed out, to arrive at any proper conclusions the subject of measurement and concentration had to be explored. It stands to reason that if there has been no increase in concentration of industry during the past fifteen years then certainly mergers could not be condemned on that score. On the other hand, if there had been considerable increase in concentration, and it could be found that mergers were largely responsible, then it would appear that further government control

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[1] Ibid.

[2] Ibid., p. 16.

[3] Ibid., Chapter I.

might well be in order.

Not unlike the controversy on concentration, itself, the effect of mergers on such concentration is no less disputed. Adelman's position, more or less concurred in by Weston, Lintner, Butters, George, and Berle, is:

> Whatever the effects of mergers, they were swamped, and submerged by other forms of growth. A generous estimate is that not over $5 billion was involved in all manufacturing and mining during 1940-47. But during the period according to a source which is biased downward, the total assets of all corporations in these fields increased from $67.8 billion to $118.6 billion; the increase was over ten times the amount involved in mergers.[1]

Edwards, as Director of the Economic Bureau of the FTC, might well be speaking for Blair, Houghton, and Stocking, when he refutes Adelman:

> Apparently, Mr. Adelman, like Lintner and Butters, regards the effect of corporate mergers as negligible partly on the ground that it was overshadowed by other factors such as the reinvestment of corporate earnings. To take this position is to deny that there is a significant difference in kind between a reshuffling of sizes which leaves the corporate entities in existence, on the one hand, and the permanent disappearance of corporate entities, on the other.[2]

It appears that the FTC might be able to prove that mergers had accounted for increases in concentration in certain industries, but it likewise appears unlikely that any great over-all increase could be proved such as their original "Merger Movement" report indicated. In reference to the burden of such proofs, George comments that "Economists sponsoring the new approach have a strong obligation to come down to cases. The burden should not

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[1]Adelman, "The Measurement of Industrial Concentration," op. cit., p. 294.

[2]Edwards, "Four Comments on The Measurement of Industrial Concentration," op. cit., p. 159.

all be on the proponents of workable competition."[1]

Summary

From the evidence submitted it would appear that the original charges by the FTC were more a "cry of wolf" than a factual, documented reports about substantial increases in concentration as a result of the recent merger movement. Although the economists from the FTC go to great lengths to refute Adelman, Lintner-Butters, and others, by their comments it appears that they backtrack considerably from their original position. In a defense of the FTC position Stocking used the following words which seemed to further weaken the FTC case and discredit the agency charged by law to control business:

> The democratic way of life permits pressure groups both within and without the government to resort to propaganda in an effort to modify statutes.[2]

Taken literally, this could only mean that Stocking is suggesting that perhaps some of the FTC report was propaganda. Which part, would be the first question? Much of the reading public might conclude that if some of it was propaganda, then perhaps all of it was. Such procedures, if in fact used, by an agency of the government are questionable!

After an examination of the evidence, Adelman's comment which prefaced this chapter can best be used to sum up the findings on concentration: "Concentration may be a problem, but, for better or worse, it is not threatening to engulf the economy."

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[1]George, op. cit., p. 171.

[2]Stocking, op. cit., p. 168.

Moreover, it should be added, that mergers as a cause of increased concentration may have had some effect in selected industries but negligible effect in industry as a whole.

# CHAPTER VI

## THE CONTROVERSY BETWEEN THE GOVERNMENT, THE BUSINESSMAN, AND PUBLIC POLICY

> "There is sound logic to the development of public policy against restraints of trade, but it is a logic that has its limits; and the ends sought must be considered in relation to other social goals and to the practical realities of economic life." Bowman and Bach, Economic Analysis and Public Policy, p. 82.

The previous chapters have dealt with specific problems in relation to the nature and significance of industrial mergers. While continuing reference was made to the positions of government, business, and the public, no critical analysis of these segments of the economy was given. It is the purpose of this chapter to discuss them in more detail so that a better understanding of much of the controversy over the subject of mergers may be obtained.

### Government Operations and Mergers

An examination of the wealth of writings on the pros and cons of government agencies and the Congress in relation to their work on monopoly and competition makes fascinating reading. The results of such study are no less interesting.

In the government of the United States there are three areas of power. These are the Legislative Branch, the Judicial Branch, and the Executive Branch. Each is represented in the control of mergers. The Congress legislates the laws, the courts interpret the laws, and the executive agencies administer the laws.

CHAPTER VI

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The previous chapters have dealt with specific problems in relation to the nature and significance of industrial mergers. While continuous reference was made to the positions of govern-ment, business, and the public, no detailed analysis of these segments of the economy was given. It is the purpose of this chapter to analyze them in more detail so that a better under-standing of some of the controversy over the subject of mergers may be obtained.

Government Regulation and Mergers

An examination of the record of attitudes on the part and uses of government agencies and the Congress in relation to legis-lation on monopoly and competition shows interesting results. The results of such study are no less interesting.

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Each has come in for its share of praise or criticism, as the case may be. However, the Department of Justice has been so free from criticism in this area that for the purpose of this thesis it is concluded that this agency generally has the respect of business, the Congress and the courts.

The position of the courts was well described under the Law of Mergers. That they have problems in understanding and matching the laws with the interpretations of the Federal Trade Commission is obvious. Justice Jackson indicated his views on this matter in the following statement:

> I have difficulty in knowing where we are with this, and I should think the people who are trying to do business would find it much more troublesome than we do, for it does not trouble me but once a term, but it must trouble them every day.[1]

The two areas of most conflict appear to be in the making of the laws by the Congress and the administration of those laws by the Federal Trade Commission. The Congress is blamed by business, the FTC, and the courts for not making the laws clear in intent. Thomas Cristopher says that the phrase, "restraint of trade," and the statement, "unfair methods of competition in commerce, and unfair and deceptive acts or practices in commerce, are hereby declared unlawful," are about as definite as "Sin is hereby declared unlawful." He asks, "Murder is murder but what is unfair competition?"[2] On the other hand, there are many[3] who believe

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[1]Standard Oil Co. (Indiana) v. FTC, 340 US, 231 (1951).

[2]Thomas W. Christopher, "Use and Misuse of Authority by Federal Agencies," <u>Harvard Business Review</u>, Vol. XXX, No. 6, November December 1952, p. 48.

[3]See for example, Stigler, <u>op. cit.</u>, p. 164.

that it would not only be unwise but impossible to spell out all forms of prohibitive action for business. Yet the present language appears impossible! Justice Brandeis once observed, "Every agreement concerning trade, every regulation of trade, restrains."[1]

The laws concerning mergers undoubtedly have to be broad in scope. If every prohibitive act was spelled out by legislation then each new act of business that was challenged would have to go through the process of legislation before it was found to be legal or illegal. In addition, the statutes setting up agencies such as the FTC also, undoubtedly, have to be as broad in scope, leaving direct application of the laws to the discretion of the Commission itself.

The problem then resolves itself to one of giving necessary authority to an agency to carry out the desired and required ends without that authority being used in illegal and improper ways. Thus the emphasis in this section will be on the Federal Trade Commission and how it has been considered in relationship to those ends.

## The Case Against the Federal Trade Commission

The charges against the FTC are many and varied but generally fall into broad categories of: (1) not carrying out the purpose intended of the Commission, (2) adding to the confusion of the antitrust laws by refusing information, conflicting statements, and acting contrary to the laws as laid down by Congress, (3) acting arbitrarily and expounding private economic views,

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[1] "A Businesslike Antitrust Policy," Fortune, November 1953, p. 115.

(4) inefficient operation, and (5) hostility to business.

One of the most condemning articles concerning the Commission appeared in the University of Chicago Law Review by William Simon, in 1952.[1] Considerable support has been found for his views.[2]

President Woodrow Wilson, in setting up the framework for the Federal Trade Commission, stated its purpose to be "only as an indispensable instrument of information and publicity."[3] He went on to discuss its function as one of informing businesses of the requirements of the laws.

A Senate Subcommittee which had been appointed in 1950 to inquire into the extent to which the Commission clarified the law on the subject of freight absorption, had this to say concerning its purpose:

> The Commission does not consider itself a body such as that envisioned by President Wilson. In the hearings before this subcommittee, the Commission has taken the position that it cannot indicate, in advance of specific litigation before it, the rules of law applicable to business in interstate commerce.[4]

The Hoover Commission went further in exploring the carrying out of this "purpose of the commission" and said:

> Over the years, the Commission has engaged mainly in activities contributing little toward accomplishing the primary

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[1]William Simon, "The Case Against the Federal Trade Commission," University of Chicago Law Review, Vol. 19, Winter 1952.

[2]Author's note: Simon's article is heavily documented and much credit is given to his documentation here, however, most of his sources were examined to expand on his thoughts.

[3]President Woodrow Wilson, Message to Congress, January 20, 1914, as cited by Simon, op. cit., p. 299.

[4]Senate Report No. 2627, 81st Cong., 2d Sess., p. 5 (1950) as cited by Simon, ibid., p. 299.

Congressional objectives of assuring widespread effective competition.[1]

Failure to receive information from the Commission is a complaint running throughout the critics' writings. The Hoover Commission commented, "In a field of such public interest, the Commission has a duty to be truly informative, concerning its own standards and policies."[2]

It is only after litigation has been started and a complaint issued that the businessman can be aware of the Commission's charge. Cristopher says:

> When a man is sued for a million dollars in a civil suit, he expects a number of things of the court. He expects to be informed of the exact complaints. He expects an orderly proceeding. He assumes that the judge will not act for the plaintiff.[3]

With proceedings before the Commission the defendants have little or none of the above assurances. Simon attacks the Commission on this point also:

> The Commission's failure to be informative, and its refusal to admit publicly the statutory construction which it advocates in the courts, appears to be the result of its, or at least some of its, staff's desire to achieve a judicial construction of the statutes in accord with their economic ideologies, without the public being aware of the effect on our economy of those constructions.[4]

A Senate Subcommittee was very direct in commenting on the problem of information either given or not given by the

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[1]The Commission on Organization of the Executive Branch of the Government, Task Force Report on Regulatory Commissions, (Washington: Government Printing Office, 1949), p. 122.

[2]Ibid., p. 131.

[3]Cristopher, op. cit., p. 53.

[4]Simon, op. cit., p. 300.

Commission. It reported "much of this confusion - conceded by everyone to exist - is directly attributable to the Federal Trade Commission."[1]

In reference to Simon's charge that the staff of the FTC put forth their own economic ideologies[2] it was at first strange to find that Lowell B. Mason, a Commissioner of the FTC, agreed. It was even stranger to find that several of the Commissioners not only agreed with the critics of the FTC, but in some cases went further, as will be indicated later. Commissioner Mason commented on the economic views as follows:

> It was a natural consequence of a decline in administrative leadership by the Commissioners. Into a vacuum it was natural and necessary for the staff to step into leadership. The Commission became the trial ground for new theories of industrial control sponsored by men of personal integrity, ability and vigor. . . . The point is made that when decisions are abandoned to those without responsible authority, an agency, like a society, declines in its effectiveness even though it appears to increase its powers.[3]

Although Mason upheld the "integrity, ability and vigor" of the staff that expounded these economic theories, others were not as kind to them. The Hoover Commission notes "With notable exceptions, appointments to the FTC have been made with too little interest in the skills and experience pertinent to the problems of competition and monopoly . . . "[4] Representative Patman, a proponent of the FTC, was chairman of the Patman Small Business

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[1]Senate Report No. 2627, op. cit., p. 11.

[2]Simon, op. cit., p. 297.

[3]Lowell B. Mason, Paper presented before the New York Bar Association, New York City, January 24, 1951. Mimeo. report.

[4]The Commission on Organization of the Executive Branch of the Government, op. cit., p. 125.

Committee which characterized the Commission as a "palace of internal strife and office politics."[1]

The policies of the FTC often appear totally irresponsible. Speaking on the broader policy issues, Edward Mason notes that "anti-trust policy has not been consistent. Large firms with great power have been left immune while associates with less power have been broken up."[2]

On the day to day issues the policies of the Commission on "basing-point" pricing is a case in point. The Commission had advocated against basing-point pricing for over fifteen years, and, in 1948, the Supreme Court issued a sweeping affirmation of the Commission's findings and ruled that the basing-point system was collusive price-fixing which was in violation of the antitrust acts.[3]

Since that time the Commission dropped the American Iron and Steel Institute case dealing with the same problem and commented, "The Commission is not acting to prohibit or interfere with delivered pricing or freight asorption as such . . . "[4]

The Senate Sub-Committee studying the problem reported:

> For almost 3 years businessmen have been terribly confused as to whether they can lawfully absorb. Much of this confusion . . . is directly attributable to the Federal Trade Commission. It must accept responsibility for the adverse

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[1]House Report No. 3236, 81st Cong., 2d Sess., p. 16 (1951).

[2]Edward S. Mason, "Schumpeter on Monopoly and the Large Firm," Review of Economics and Statistics, Vol. XXXIII, February 1951, p. 140.

[3]Federal Trade Commission, The Merger Movement: A Summary Report, op. cit., p. 2.

[4]FTC Docket #5508, 1951.

> effects on our economy in this confusion.
>
> Even after careful study of those lengthy answers (by the Commission) we are still unable to determine when and under what circumstances the FTC regards freight absorption as constituting an injury to competition.[1]

The Senate Committee went further:

> Even at the painful expense of a slight loss of face, it would be far preferable for the Commission to admit that it has reversed its position than to compel businessmen to speculate on whether to accept what the Commission now says unofficaly or what it previously argued in litigated cases.[2]

It has often been charged that the Commission, in fact, is against competition and takes steps to restrict it. In their cease and desist order against Standard Oil Company of Indiana, they required that company to "discontinue selling to any wholesaler who resold below the price which it charged to its retailers."[3]

Had Standard Oil complied with this order it would have been indicted by the Attorney General under the Sherman Act for "conspiracy to fix prices." Justice Jackson wrote of this, " . . . what troubles me - the whole philosophy of the Sherman Antitrust Act is to go out and compete, get business, fight for it. Now, the whole philosophy we are asked to enforce here (under the Robinson-Patman Act) is that you really must not." The court in reversing the Commission stated that the Congress had not intended "either to abolish competition or . . . radically to curtail it." as the Commission's order had done.[4]

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[1]Senate Report No. 2627, op. cit., pp. 6, 7, 11.

[2]Ibid., p. 9.

[3]Order dated August 9, 1946 in FTC Docket No. 4389.

[4]Standard Oil Co. (Indiana) v. FTC, 340 US. 231 (1951).

While the above comments have little to do with merger cases handled by the FTC, it is pertinent to note that this is part of the criticism by the Hoover commission, mentioned previously, that the Commission "has engaged mainly in activities contributing little toward accomplishing the primary Congressional objectives of assuring widespread effective competition."[1] The Staff Report to the Monopoly Subcommittee of the Select House Committee on Small Business said, "The campaign to which the Commission has pointed with greatest pride was not beneficial to anyone, and least of all to small business."[2]

The hostile climate that business finds itself in at the Commission is not to its credit. Edward Mason puts this very clearly:

> One of the conclusions deriving from these political consequences is the improbability of shaping through current democratic processes, a public policy toward the large firm in particular, and business practice in general, that will give due consideration to efficiency and to conditions conducive to progress in efficiency. Much more likely is a policy of vindictive business harassment.[3]

Simon sums up his attitude toward the Federal Trade Commission as follows:

> The concensus of informed people -- including committees of both houses of Congress -- is that the Federal Trade Commission has utterly failed in its intended purpose. The record of its accomplishments, including its own public statements, show that it has inflicted substantial injury on our way of business life. This failure of the Commission in its

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[1]The Commission on Organization of the Executive Branch of the Government, op. cit., p. 122.

[2]Staff Report to the Monopoly Subcommittee of the Select House Committee on Small Business, 79th Congress, 2d Sess., p. 33 (1946).

[3]Edward S. Mason, op. cit., p. 144.

> statutory mission is due largely to its staff, the "unorthodox" ideologies for which they have crusaded, and their unwillingness to enforce the laws as promulgated by Congress.[1]

The fact that William Simon has represented business against many of the cases brought by the FTC, and that he has been a lobbyist for many of the principles for which business has fought, makes for considerable knowledge of the operations of the Commission; it no less makes such a condemnation of the Commission somewhat suspect. However, Simon has the backing of many of the Commissioners, themselves.

James Landis, former Dean of the Harvard Law School, former Commissioner of the Federal Trade Commission, former Commissioner of the Security and Exchange Commission, and former Clerk to Justice Brandeis of the Supreme Court, had this to say of his former charges:

> . . . reference must be made to what I would call the utter bankruptcy of the Federal Trade Commission. As a practical matter the deterioration of that Commission has gone beyond the possibility of redemption. If duties of this kind are to be thrust on some agency, there is really only one thing to do, and that is to wipe out the FTC completely and start afresh.[2]

Commissioner Landis was not alone in the condemnation of the FTC. Lowell B. Mason, a present commissioner, who was previously quoted, stated:

> We lost the confidence of industry. We were reviled and berated by House and Senate. We allowed our staff to roam the halls of Congress, spreading discord, discontent and disrespect for our vain pretentions.
>
> Clyde Reed, . . . once characterized the Commission as

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[1]Simon, op. cit., p. 297.

[2]James M. Landis, as cited in George W. Stocking, Monopoly and Free Enterprise, (New York: Twentieth Century Fund, 1951), p. 548.

[illegible] is due largely to the [illegible], the "unreason- able" [illegible] for which they have provided, and their un- willingness to enforce the law as [illegible] by Congress.[1]

The late Lord William Young [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

James Landis, former Dean of the Harvard Law School, for- mer Commissioner of the Federal Trade Commission, former Commis- [illegible] [illegible] [illegible] [illegible] [illegible]:

> . . . [illegible] [illegible] [illegible] [illegible]

Commissioner Landis was not alone in the condemnation of the [illegible]. [illegible] [illegible] [illegible]:

> [illegible] [illegible] [illegible] . . . [illegible]

[1] Gleason, op. cit., p. 201.

[2] [illegible] [illegible] (New York: [illegible], [illegible]), p. [illegible].

> having dried up and blown away, an entirely unfair and inaccurate description of us because as a matter of fact, we have not blown away.[1]

Commissioner Spingain was not quite as convinced as his colleagues, but he added:

> Frankly, I could not say that the Commission has been a howling success in that respect (suppressing practices leading to monopoly, unfair competition and deception) neither, I think, has it been a failure. Some people say it has. The truth is probably somewhere in between.[2]

To the continual claim by the Commission that it is hampered by shortages of funds and personnel, the Small Business Committee of the House of Representatives said:

> We are not convinced, however, that the lack of manpower is the basic source of the present difficulty or that reform can be achieved only through larger appropriations.
>
> The conclusion reached by the committee in respect to the need on the part of the FTC for additional funds presupposes the maximum degree of operating efficiency and an ability to render a dollar's worth of public service for each dollar appropriated. Unfortunately, this high level of operating efficiency does not exist today.[3]

Although many, many examples can be cited of open attempts of the FTC to exert greater power than that designed by the framers of the antitrust acts or the Congress,[4] the following quotation from one of their briefs would be sufficient to make any businessman shrink with horror at the stated power.

> The Commission is the trier of the facts, and its findings if supported by substantial evidence, are conclusive. It is therefore of no consequence that, if Congress had

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[1]Lowell B. Mason, op. cit.

[2]Stephen J. Spingain in testimony before the House Committee on the Judiciary, Subcommittee on Monopoly Power, on H. R. 2820, 82d Cong., 1st Sess., p. 25 (1951) as cited by Simon, op. cit., p. 329.

[3]House Report No. 3236, op. cit., pp. 21, 44, 45.

[4]See Simon, op. cit., for a considerable number of examples.

> conferred fact finding power upon the court, it might have reached a conclusion other than that of the Commission. . . . The weight to be given to the evidence as well as the inferences reasonably to be drawn therefrom is for the Commission to determine, and the possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Commission from drawing one of them.[1]

This power might best be described by once again using the words of Commissioner Mason. In commenting on the FTC, he said that it was "The most powerful concentration of bureaucratic power over business in the world."[2]

The courts, however, have not agreed to this power as was pointed out in the "Law of Mergers." Fortune claims that Judge Medina put an end to the FTC "fishing expedition" type of anti-trust cases in September 1953, by not even requiring the defendents in the "investment banker" case to defend themselves and therefore dismissed the case after five million words of FTC testimony.[3] While the case was dismissed, the businessman will remember the $4 million in defense costs that accumulated over a period of six years that the case was pending. The taxpayer might have even more cause for concern if the total expense to the government could be ascertained.

The Hoover Commission, The Small Business Committee, and most writers on the subject have made many possible suggestions on corrections for the situation the public finds itself in while

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[1]Brief for FTC, Bond Crown & Cork Co. v. FTC, 176 F. 2nd 874 (1949).

[2]Lowell B. Mason, as cited in "A Businesslike Antitrust Policy," Fortune, November 1953, p. 115.

[3]"A Businesslike Antitrust Policy," Fortune, November 1953, p. 116.

dealing with the Federal Trade Commission. With modifications, many of the critics of the Commission, including James M. Landis, the former Commissioner, appear to be in general agreement with Simon when he concludes:

> The Federal Trade Commission's orders should be subject to review on the weight of the evidence, its economic functions should be terminated and transferred to the Department of Commerce; and its antitrust activities should be transferred to the Department of Justice. The very minimum required for an intelligent, efficient and coordinated government antitrust policy is that it be formulated at one agency - this should be the Department of Justice.[1]

The Case for the Federal Trade Commission

The proponents of the FTC make strong rebuttals against those who suggest its abolition. As critical as the Hoover Commission was it still suggested that there was a place for such an agency and said, "[we] believe that the independent regulatory commissions have a proper place in the machinery of our Government, a place very like that originally conceived."[2] The critics take this statement apart by suggesting that the Hoover Commission only "believed" that such was the case and even then emphasized that this should be "like that originally conceived." However, the proponents point out that the Task Force Report of the Hoover Commission went much further:

> The independent regulatory commission is a useful and desirable agency where constant adaptation to changing conditions and delegation of wide discretion in administration are essential to effective regulation.
> We have carefully considered whether the FTC should be

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[1]Simon, op. cit., p. 338.

[2]The Commission on Organization of the Executive Branch of the Government, The Hoover Commission Report (Washington: Government Printing Office, 1949), p. 431.

> continued as an independent regulatory commission, and especially whether its functions in the broad anti-monopoly field should be transferred to the Department of Justice. Our conclusions, as already indicated, is that the Commission should be maintained in order to implement the policy of the antitrust laws.[1]

The question might well be asked as to what other countries have in the way of regulatory commissions. It is readily found that the United States is unique in this type of commission. Under Socialism, the government exerts direct control much like that used in administering our own public utilities. Under Communism, there is no private business to be controlled! This becomes one of the strongest arguments for the retention of the Commission. The substitute might well be socialism. Senator Paul Douglas and Robert Wallace, in their answer to Simon's charges, state this possibility very strongly:

> The growth of monopoly power in the hands of private corporations in this country will lead inevitably to monopoly power in the hands of government officials, with a corresponding lessening of individual freedom.[2]

Douglas and Wallace take the side of the FTC in their article entitled "Antitrust Policies and the New Attack on the Federal Trade Commission," and endeavor to answer Simon's charges item for item. In some cases they appear to do this quite convincingly; in others they appear weak. An example is the dismissal of Commissioner Mason's charges by the remark that "The nature of his recommendations, however, places them outside the

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[1]HR Doc. No. 116, 81st Cong., 1st Sess., viii (app. N.1949) and p. 123.

[2]Robert A. Wallace and Paul H. Douglas, "Antitrust Policies and the New Attack on the Federal Trade Commission," <u>Chicago Law Review</u>, Vol. 19, Summer 1952, No. 4, p. 723.

scope of the issues here under discussion." Then there is the dismissal of Commissioner Landis by the comment that he didn't say that the functions of the Commission should be transferred, only that the present FTC should be abolished, and Wallace and Douglas indicated this meant that Landis desired only to recreate the FTC.[1]

It was the contention of these writers that the functions of the Commission not only shouldn't be transferred or abolished but should be vigorously maintained and increased for the good of competition and the community.[2] They refute the point that the Small Business Committee was against the Commission, although they acknowledged that at times the Committee dealt harshly with the Commission. They cited the Committee as chastising the Commission for "losing some of its earlier enthusiasm" and weakening before the pressures of "special interests seeking to sell the public on these systems."[3]

In defending the Commission on the charges of confusion over its legal position, Douglas and Wallace go to great pains to prove that this condition was due to the "business interests." They remark of the admitted confusion on the basing point system:

> On the other hand, the business community had statements to the contrary from no less a business authority than the United States Steel Corporation. "Confusion" then became the new campaign slogan, and it was exploited to the fullest.[4]

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[1] *Ibid.*, pp. 689, 690.

[2] *Ibid.*, p. 724.

[3] *Ibid.*, p. 687.

[4] *Ibid.*, p. 696.

The authors then take up the challenge of lack of information in even stronger terms.

> The Commission has been extensively informative to business. It has engaged successfully in trade practice conference work for the last thirty years. . . . Such trade practice rules have been worked out between the Commission and business firms for more than 166 industries.
>
> What seems more nearly correct is that the Commission has refused to give the kind of information Mr. Simon wishes it to give.[1]

Douglas and Wallace, as previously stated, made a good case for the FTC. Their conclusion, however, appeared to be an apology with a final appeal for condemnation of business on size alone:

> . . . both the FTC and the Department of Justice are needed. Administration of the antitrust laws, both in the FTC and the Department of Justice, leaves much to be desired. . . . We do not question that these criticisms are valid. We cannot agree that Mr. Simmon's proposals would meet these criticisms.
>
> We insist, equally, that abuse of size ought to be restrained, so that success or failure in the competitive struggle may be determined not by size, but by efficiency. It is only under such a rule of competition that smaller business firms can grow and prosper and that the door of opportunity can be kept open.[2]

Fortune also comes to the defense of the "new" FTC and states that "the present Commission is more concerned with helping business stay on the straight and narrow than with waiting for firms to wander off and then pouncing on them."[3] The Fortune article goes on to say:

> FTC's new view of its functions seems to correspond to that of experts like Myron Watkins, one of the leading

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[1] Ibid., p. 711.

[2] Ibid., p. 724.

[3] "A Businesslike Antitrust Policy," op. cit., p. 115.

> authorities on antitrust, who believes that FTC is "fundamentally a fact-finding body, empowered to eliminate the trade abuses it finds, either by simple counsel or prosecution." FTC was set up to forestall, not to punish, monopoly. Moreover, the functions of FTC and the Department of Justice have seriously overlapped in the past, and the present intent is to make them complement one another.[1]

In the "Case Against the Federal Trade Commission, certain Commissioners were quoted extensively in comments detrimental to the Commission they represented. That all Commissioners are not in agreement is quite evident. Commissioner John W. Gwynne defends the FTC as follows:

> 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. . . . 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 end result, whether good, bad, or insignificant will depend largely upon the skill, the judgment and the common sense of the bar, the agencies, and the courts, whose duty it will be to wield this weapon in the public interest.[2]

Commissioner Edward Howrey had this to say on the duties and responsibilities of the Bureau of Consultation, FTC:

> The purpose of the Bureau is:
>
> (1) To act in a cooperative and consultative capacity to business, particularly small business;

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[1] *Ibid.*

[2] John W. Gwynne, Commissioner, Federal Trade Commission, paper presented before the Antitrust Section of the Illinois Bar Association, Chicago, Illinois, November 5, 1954. Mimeo Report, p. 7.

(2) To give informal advice on all kinds of matters involving the laws administered by the Commission;
(3) To seek voluntary compliance with such laws by means of conferences, informal hearings and other types of informal procedures.[1]

Cristopher, in his article in the Harvard Business Review entitled "Use and Misuse of Authority by Federal Agencies," pointed out that "you can secure changes and controls through administrative agencies that you could never secure from Congress,"[2] and goes on to describe the problems of interpreting the regulations and of bringing test cases in areas that have doubtful questions that should be decided by the courts.

Cristopher, as noted under the "Case Against the Federal Trade Commission," condemned it for its "one viewpoint idea." His conclusion, however, is one that requires considerable thought, and one on which we can leave this section:

> The danger with which businessmen should be actually concerned is not that government agencies will destroy our democratic way of life or our system of private enterprise. The danger is that the device of regulating by administrative tribunals will prove defective and fail. If this should happen, private business would be in the front ranks of the sufferers.[3]

## The Business Case

The case for and against business was covered to a considerable extent in the chapter dealing with "Economics and Mergers." There is more that can be added of a different nature, however.

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[1]Edward F. Howrey, Chairman, FTC, "Revaluation of Commission's Responsibilities," paper presented before the 1953 Institute Federal Antitrust Laws at the University of Michigan Law School. Mimeo Report.

[2]Cristopher, op. cit., p. 53.

[3]Ibid., p. 58.

The Case Against Business

W. H. McComb, in The Businessman Must Save Himself, puts a touch of humor in the case against the businessman by saying, "Any defense counsel for the businessman must encounter a serious difficulty. So many of the charges against him are true."[1]

Stigler in "The Case Against Big Business," remarks that "The answer is that most giant firms arose out of mergers of many competing firms, and were created to eliminate competition."[2] Once these giants are created Stigler goes on to say that the "Fundamental criticisms to be made of big businesses are that they act monopolistically, and they encourage and justify bigness in labor and government."[3]

Many of Stigler's anti-business comments were previously quoted. If it were not for his position as Professor of Economics at Columbia University, such comments would require considerable questioning. His conclusions appear to require that questioning regardless of his position:

> The obvious and economical solution, . . . is to break up the giant companies. This, I would emphasize, is the minimum program, and is essentially a conservative program.[4]

The various charges against business of price-fixing, price discrimination, ruinous competition to force competitors out

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[1]W. H. McComb, The Businessman Must Save Himself (New York: Harper & Brothers, 1954), pp. 5, 6, as cited by J. K. Galbraith in Harvard Business Review, Vol. XXXII, No. 2, March April 1954, p. 43.

[2]Stigler, op. cit., p. 162.

[3]Ibid., p. 123.

[4]Ibid., p. 164.

of business, mergers for monopoly purposes, and many others have been proved true by the courts over the last half century. It does not make good reading for the defenders of business! But what of these recommendations by Stigler to "break up the giant companies?" Is it an "economical solution?" Is it a "conservative program?" Certainly with all the prosperity that abounds in the United States today, it appears to be a program that is based more on ideals than common sense.

The Case for Business

During the 1920's the businessman and the capitalistic system was riding the crest of the waves in spite of many charges of wrongdoing. It was often commented upon that some of the lack of competition was the price that had to be paid for progress. This concept was quite generally accepted until the great depression of the thirties. It was then found that business and free enterprise were not able to bring this country to the prosperity that was expected of them. In fact, business soon was the scapegoat for the depression itself.

Perhaps the war years rescued our economic system; perhaps it would have resisted the trend toward socialism regardless of whether or not there was a war. The latter is pure speculation, but the prosperity that has come to this country since 1945 and the contemplated prosperity that lies ahead has once more brought the businessman or "big business" back in favor to much of the community. The question now is "Will big business and the free enterprise system fail again?" If they do, even their strongest backers agree that it might be their final chance.

The problem that faces business is whether it will be allowed to let the so called free enterprise system work. Edward Mason comments that:

> Among the intellectuals responsible for fomenting hostility to big business are those economists both in and out of government who propound an anti-monopoly policy running in terms of standards derived from a static analysis of the conditions of pure competition.[1]

Schumpeter stated, "Even if the giant concerns were all managed so perfectly as to call forth applause from angels in heaven, the political consequences of concentration would be what they are."[2]

Jerrold VanCise in the <u>Chicago Law Review</u> sets the stage for the government's ideas of the rights of business:

> Business should deal not with those with whom it wishes to deal but with those with whom the government wishes it to deal. It should buy, sell and license on a non discriminatory, non restrictive basis. Aggressive solicitation of new business opportunities should be barred if the company is unduly successful; instead industry should wait for business to be thrust upon it. Finally, self-regulation of industry should be so completely proscribed as to make government regulation alone the vehicle for eliminating trade evils.[3]

It is little wonder that business fears the environment that it finds itself in. VanCise coined a phrase that perhaps fits the picture. The sub-title to his article mentioned above was "Trusts to Distrust." But does business merit the distrust? The evidence appears to warrant a "case." Whether it has been proved sufficiently to carry out Stigler's recommendations is

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[1]Edward S. Mason, <u>op. cit.</u>, p. 144.

[2]Schumpeter, <u>Capitalism, Socialism, and Democracy</u>, <u>op. cit.</u>, p. 140.

[3]Jerrold G. VanCise, "The Modern Corporation and the Anti-trust Laws," <u>Chicago Law Review</u>, Vol. 19, No. 4, Summer 1952, p. 681.

highly questionable.

Galbraith, in his "Defense of Business," concludes:

> Nor is the claim of competition necessary. While we ascribe to it original virtues, in fact we are interested only in the results of competition. On this, as in all matters connected with the business case, it is final performance that counts. And this, if any, is the present lesson. If the business case must be offered, it had best be based on performance - performance fully and carefully argued, and directed not at those who are already disposed to believe, but rather at those with a critical tendency to disbelief.[1]

McComb closes the case for the businessman with a picture that bears considerable reflection:

> When the great day comes in the people's supreme court, the businessman may need a Clarence Darrow to defend him.
> Darrow has saved some culprits whose plight appeared just as desperate. . . . We might expect to hear Darrow roar:
> "Sure the businessman is guilty of a lot of things. Who isn't? In the infinite processes of building this world of ours, a lot of things have slipped. I file a warning. Before you turn this defendant over to the Commissars, I want to remind you of what he has been building while the rest of us were talking; and I have a few words to say about those pink-punks who want to take over the business."[2]

## Public Policy

Edward Mason has emphasized that, in anti-monopoly work of most other countries, abuse of power is attacked and not market power per se, as is done in this country.[3] In addition, when the Federal Communications Commission approved the Columbia Broadcasting System of color television and denied the Radio Corporation of America the right to produce a competitive product it

[1] Galbraith, "The Defense of Business: A Strategic Appraisal," op. cit., p. 43.

[2] McComb, op. cit., pp. 5-6.

[3] Edward S. Mason, op. cit., p. 140.

looked little like a policy of free enterprise. When the Civil Aeronautics Board approves a line for Pan American Airways and bars any other airline to the route it likewise appears that competition has left the American scene under government compulsion. It is paradoxical for the United States Government to continue to approve more and more government monopolistic ideas in public utilities, agriculture, and industry, while continuing to deny that there might be "good" monopolies or oligopolies in industry.

Kaplan and Kahn in their previously quoted book Big Business in a Competitive Society state:

> Mergers and integration, though obviously departures from pure competition, can no more than business size be regarded as having been predominantly anti-competitive in their consequences. A public policy that is hostile to integration per se is on balance an anti-competitive policy.[1]

It should be the policy of this government to encourage socially desirable mergers and to discourage the socially undesirable mergers. As McLean and Haigh say, "If we limit the types of growth that corporations may undertake, we may reduce the vigor of competition in our industrial society."[2]

In speaking of the public policy that is being followed by this government, Sumner Slichter commented:

> Legal limits on the proportion of business that an enterprise may do would compel some concerns to behave like monopolies--no matter how far from being monopolies they might be. They would be compelled to be interested in making money by charging a higher price rather than by increasing their sales. If concerns are to be broken up because they do too large a business it should only be those concerns that are behaving monopolistically by not attempting to grow at the expense of

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[1] Kaplan and Kahn, op. cit., p. 13.

[2] McLean and Haigh, op. cit., p. 81.

rivals. There is no reason to break up enterprises that are behaving as good competitors should behave--namely attempting to grow faster than the rest of the industry.[1]

## Summary

In commenting on the present trend of fewer mergers, Blair and Houghton made a statement that might describe a summary for the present controversy between the government, the businessman, and the public. They said:

> It is not so much to the absence of "new worlds to conquer," but to other explanations such as the greater sense of public responsibility on the part of businessmen, the changed character of competition, and the more effective policing action of the Dept. of Justice and the Federal Trade Commission - that one must look for the main explanation of the relatively much smaller scope of the recent merger movement.[2]

If this is so, then perhaps a compromise has come about without formal recognition. That such a compromise is necessary is without question and in the mechanics of such agreement VanCise concludes:

> Why either business or government should claim infallibility is a mystery understood only by its devotees, as each in the last analysis is merely a corporate fiction describing an aggregation of fallible human beings.[3]

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[1] Sumner H. Slichter, What's Ahead for American Business (Cambridge: Harvard University Press, 1951), pp. 117, 118.

[2] Blair and Houghton, op. cit., p. 68.

[3] VanCise, op. cit., p. 683.

## CHAPTER VII

## CONCLUSIONS AND RECOMMENDATIONS

> "Listening to the opposite views of the businessman and the economist in our attempt to comprehend the complex phenomenon of modern competition, we are reassured. . . . The bogy of bigness and the Spenglerian specter of inevitable decay of competition can both have decent burial.
>
> Joel Dean, Harvard Business Review, November-December 1952, p. 63.

The mass of contradiction that has been presented within these pages is convincing proof that there are three powerful opposing views on the subject of industrial mergers. It has been seen that William Simon recommends abolishment of the FTC. He has many adherents. Taking a moderate position is M. A. Adelman who states, "But clearly the results presented in this paper do not imply that public policy ought to be modified or, in particular, that antitrust policy should be changed."[1] George Stigler, on the extreme left, recommends the abolishment of big business! Moreover, John Blair indicates that conditions at this moment, more than ever before, show that the FTC's original fear of mergers and big business (as expressed in its 1948 report) was correct.[2]

### Conclusions

The conclusions reached as a result of this study are:

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[1]Adelman, "The Measurement of Industrial Concentration," op. cit., p. 296.

[2]Discussions with John M. Blair, op. cit.

1. Mergers have cyclical tendencies. In the past, the peaks of these cycles have been associated with high stock prices and good business.
2. Any projection at this time of future numbers of mergers or their resulting effect on industrial concentration would undoubtedly contain results as erroneous as those published by Berle and Means in 1934.[1] The history of mergers is far from complete but so also is the data that must be used to project their effect on the future economy of the nation.
3. The reasons for the present merger movement encompass much of the history and legal aspects of the past merger movements. The stage has been set by the inability of the Federal Trade Commission to get substantial backing by the courts. In addition, evidence was found to indicate that the Congress was responsible for much of the current activity through the enactment of tax laws that favor merging companies in many cases. Low price-earning ratios of common stocks, a desire to achieve rapid production expansion in order to increase sales in a strong sellers' market, and the need for raw materials or business protection have caused their share of combinations.

   The greatest single reason was found to be the demands placed on the managers of industry to keep up with

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[1]Berle and Means, op. cit., pp. 40, 41.

competition and to grow in the spirit of successful business. One of the fastest and most profitable ways to meet competition and growth problems is through merger.

4. There appears to be duplication and mixed jurisdiction between the Department of Justice and the Federal Trade Commission in the control of mergers.
5. The Federal Trade Commission has appeared to disregard its intended purpose and has embarked on a program of business harassment.
6. There is considerable confusion over the intent and use of the Sherman and Clayton Acts. That the government has found appropriate rules for the conduct of business is questionable.
7. The advent of big business has changed the classical ideas of competition. Pure competition could not serve society as well as the "workable competition" theory of today.
8. The success (measured by social as well as business standards) of many mergers is as questionable as are the efficiency and the advantages of many large business enterprises. (It is difficult, however, to say that big business has not been effective!)
9. If internal growth of big business actually exceeds external growth by approximately nine to one,[1] no

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[1]Adelman, "The Measurement of Industrial Concentration," op. cit., p. 294.

serious consequences upon our economy or business structure will result from mergers.

10. The evidence does not substantiate the Federal Trade Commission's claim that industrial concentration as a result of mergers is increasing at an alarming rate.
11. Business has been guilty of many practices which require appropriate laws and governmental controls for the public welfare. At the same time, it has contributed to the unprecedented growth in the economy of this nation in a manner that doesn't appear to warrant the environment in which it finds itself.
12. Public policy has been unnecessarily hostile to industrial mergers. That there can be good mergers with beneficial results must be recognized by the agencies of government.
13. The problem if there is one, is not mergers per se but what mergers will tend to substantially monopolize a market. Sufficient, up-to-date, and unbiased data is not available to bring the opposing views into agreement at the present time.

The question is basic: "Shall mergers be permitted or not? It is believed John Clark supplies the answer:

> . . . many people can see one or the other of these propositions. It is harder to see both, and hardest of all to see how they can be fitted together. Yet a healthy economy requires some tolerable and workable resolution of this incompatability. It must obviously be an imperfect adjustment, and almost as obviously a moving and changing one.[1]

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[1]John M. Clark, Guideposts in Time of Change (New York: Harper & Brothers, 1949), p. 147.

## Recommendations

As a result of the stated conclusions to this study the following recommendations are made:

1. That the Federal Trade Commission be accepted as the logical agency for the control of business. However, such acceptance must come wholeheartedly from the Congress, the Courts, other governmental agencies, and business. Such acceptance will enhance its prestige in such a manner as to bear sufficient weight to permit the Commission to carry out its charter.
2. That sufficient, properly paid, and appropriate staffs be made available to the Federal Trade Commission. Its inability to check properly on mergers and their effects and to properly advise and aid business appears to be directly attributable to the lack of qualified personnel.
3. That the duplication between the Commission and the Department of Justice be ended. The Commission's area of operation should be limited to aid to business, investigation, administrative findings, and cease and desist orders under both the Sherman and Clayton Acts. The Department of Justice should be limited to prosecution under the Acts on request of the Commission.
4. That the Commission institute an extensive program of making public its orders and policies.
5. That the Congress use every possible means within its power to determine the best way in which to control

the growth of business by way of merger, if, in fact, it is found that it needs control. Such considerations should reject the contention that there be a limit to the size of business.[1] The Congress has recognized good monopolies in almost every field but industry. It is high time that appropriate recognition be given to this area.

6. That the Congress make funds available to respected agencies, such as the Committee for Economic Development, for the continuing study of the problem by independent groups.
7. That a commission, much like the Hoover Commission (and unlike the Temporary National Economic Committee), be established to review all the present investigations, "facts" and controversy so that the Congress may be properly advised of the situation on an impartial basis.
8. That, once appropriate rules and regulations have been made and concerted attempts made to place a coordinated program before business, penalties for willful failure to comply be considerably heavier than they are at present.
9. That present litigation procedures be considerably speeded up in practice so that costs to government and business be on a more economical scale.

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[1]As suggested among others, by The Committee on Cartels & Monopoly, as cited by Stocking and Watkins, <u>op. cit.</u>, p. 564.

10. That, until appropriate rules for business are laid down and followed by the FTC, the government be required to pay for defense costs when cases brought to trial result in the acquittal of the defendant.

11. That a cautious attitude be taken in condemning industrial mergers per se, and the "rule of reason" be the major consideration in their acceptance or rejection.

The Committee on Cartels and Monopoly of the Twentieth Century Fund has this to say about the problem:

> The problems confronting antitrust keep changing from industry to industry from day to day. If competition is to be preserved, the organization and practices of business, market by market, must be the subject of extensive and continual investigation by both public and private agencies. Otherwise, for want of knowledge, policy will be misdirected or will go by default. Eternal vigilance is the price of free enterprise.[1]

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[1]The Committee on Cartels and Monopoly, as cited by Stocking and Watkins, op. cit., p. 569.

## APPENDIX A

## LETTER OF LOWELL B. MASON, COMMISSIONER, FEDERAL TRADE COMMISSION, WASHINGTON.

March 11, 1955

Commander E. R. Kingman, USN
Navy Graduate Program
George Washington University
Washington, D. C.

Dear Commander Kingman:

I would be glad to help out on the question of mergers even if I had to give you an unofficial guess, but I find when our staff advised you the statistics were "unavailable" they weren't being coy, because the truth is we just don't have any. I understand even when Congress asked us for some estimate, our Bureau of Economics was unable to furnish any.

So it looks like your guess is as good as ours.

You would think that in view of the plethora of mergers that receive notice in the press, our Bureau of Economics ought to be able to come up with something.

Well, that's Government for you.

With kindest regards.

Sincerely yours,

/s/ Lowell B. Mason

APPENDIX B

# THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS

On July 9, 1953, Attorney General Herbert Brownell, Jr., created the National Committee to Study the Antitrust Laws. Its goal was stated to be, "a thoughtful and comprehensive study of our antitrust laws."[1] The President of the United States added his blessings and expressed the hope that the Committee would "provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition."[2]

The Chairman of the Committee was Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, and the Co-Chairman was S. Chesterfield Oppenheim, Professor of Law, University of Michigan. The membership of the Committee was selected to reflect "interacting views on issues of antitrust policy."[3] This membership included among others, M. A. Adelman, Edward F. Howrey, Alfred E. Kahn, William Simon, Sumner H. Slichter, George J. Stigler, and Jerrold G. VanCise. All of these men have been quoted throughout the thesis and their views on the subject of mergers and anti-

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[1] Report of the Attorney General's National Committee to Study the Antitrust Laws (Washington: Government Printing Office, 1955), p. iv.

[2] Ibid.

[3] Ibid.

monopoly work are well represented.

In reference to mergers, the majority opinion of the Committee is reflected in the following:

> Summing up, then, mergers are a common form of growth; they may lessen, increase, or have no effect upon competition. A merger as such involves no necessary connotations of coercion, dominance, or lack of effective competitive pressures. In addition, mergers may ease from the market companies which have failed in the competitive struggle and thus prevent potential bankruptcies. Finally they may spur operating economies by spreading overhead costs or enabling improved technology or management.
>
> Similarly, in a vertical acquisition, the fact that competitors of one company are foreclosed from selling to the other need of itself signal no reasonable probability of a substantial lessening of competition or tendency to monopoly. On the contrary, the integration may create a company better able to compete with larger rivals. In addition, it may mean economies which in a competitive market may spell consumer savings. The question therefore is not merely whether competitors of either of the merging companies are denied access to outlets or sources of supply but whether companies competing, buying, or selling in the markets in which either company operated may, as a result of the acquisition, face a substantial lessening in their opportunity to take independent competitive action.
>
> This analysis required by Section 7 is no more beyond the competence of the courts than the Federal Trade Commission. For both, the following market factors may be helpful in determining the competitive consequences of any particular acquisition. 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.
>
> It may be relevant, however, to study: (1) The character of the acquiring and the acquired company, (2) the characteristics of the markets affected, (3) immediate changes in the size and competitive range of the acquiring company and in the adjustments of other companies operating in the markets directly affected, and (4) probable long-range differences that the acquisition may make for companies actually or potentially operating in these markets. . . .
>
> Initially relevant are the salient characteristics of the merging companies. These include: the size of each (measured perhaps by assets, total sales, total capacity, etc.); their major products; location of their plants; geographic market areas in which each sells or buys; their methods of sale, and classes of customers; sales of major products in major markets prior to the acquisition; special technologies or know-how; and growth history.[1]

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[1] Ibid., pp. 124-125.

The minority opinion of the Committee, which was represented by only a few members, is expressed by Walter Adams:

> Section 7 condemns mergers not only where they lead in the direction of oligopoly or monopoly, but also where their effect "may be to substantially lessen competition." The test is whether the amount of competition lost is substantial, or whether competition has been foreclosed or eliminated from a significant segment of the market. The Clayton Act is a prohibitory, not a regulatory statute. By its enactment, Congress did not intend to authorize the courts or the Commission to determine whether particular mergers are good or bad or in the public interest. Instead, Congress acted on the presumption that a substantial foreclosure or elimination of competition was in itself a derogation of the public interest. Once we accept the notion that small companies may merge to compete more effectively with the large ones, or that large companies may merge to compete more effectively with the giants, we are in fact inviting the proliferation of oligopoly. This could hardly have been the intent of Congress, and I am persuaded that it was not.[1]

Eugene V. Rostow, another dissenter, states:

> Thus we have not commented even on the conspicuous failure of the Department of Justice and the Federal Trade Commission to undertake seriously the enforcement of Section 7 of the Clayton Act. In the midst of a merger movement raising obvious antitrust questions in almost every day's newspaper, it is, in my view, a defect of the Report that we have not urged prompt action in an appropriate case to obtain an authoritative clarification of Section 7.[2]

Louis B. Schwartz, the major dissenter, sums up for the minority:

> . . . we are presented with an excellent technical analysis and a series of proposals many of which standing alone would seem reasonable enough. 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 exercise of prosecutor's discretion with novel internal administrative reviews on request of a defendant, to expand the use of the consent decree in a manner calculated to remove the last possibility of public scrutiny

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[1] Ibid., pp. 127-128

[2] Ibid., p. 386.

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 treble damage recovery, etc.[1]

Representative Wright Patman of the House Small Business Committee was one of the first, outside the minority committee members, to attack the report. He stated, "The Committee should be investigated as a high-pressure private lobby operating under White House sanctions . . . to get the antitrust laws repealed."[2] Representative Cellar of the House Judiciary Committee stated that the Committee's recommendations "advocate a substantial weakening of the antitrust laws."[3] However, Representative Cellar did praise much of the report.[4]

By the nature of the minority reports and the challenge made by Representative Patman, it appears that in the months ahead many opinions of the report will be expressed both pro and con. It can suffice here to repeat the comment made early in the "Introduction" that the new investigations are unlikely to bring forth any new solutions or radical departure from the old.

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[1] Ibid., p. 388.

[2] "'Fair Trade' Repeal and Curbs on Unions Urged by U.S. Study," The Evening Star, Washington, D. C., March 31, 1955, p. 1.

[3] Ibid.

[4] Ibid.

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