

ANTITRUST ENFORCEMENT AT THE TURNING POINT

SPEECH BY ROBERT MORGAN
UNITED STATES SENATOR
PROFESSIONAL ASSOCIATION OF THE
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.
SEPTEMBER 18, 1975

IT PLEASES ME VERY MUCH TO BE HERE TODAY AMONG PEOPLE WHO SHARE ONE OF MY OWN DEEPLY-FELT CONCERNS -- THE ENFORCEMENT OF OUR ANTITRUST LAWS.

AND I'D LIKE TO THANK YOU VERY MUCH FOR INVITING ME HERE AT THIS JUNCTURE, WHEN ALL THOSE WHO HAVE FOUGHT FOR ANTITRUST EFFORTS HAVE SUCH REASON TO BE OPTIMISTIC.

ALTHOUGH I AM NOW ON THE OTHER SIDE OF THE LEGISLATIVE FENCE, I HAVE UNTIL RECENTLY BEEN INVOLVED IN ANTITRUST ENFORCEMENT, AS A STATE ATTORNEY GENERAL.

BUT I ALSO CONSIDERED IT MY DUTY NOT JUST TO PROSECUTE VIOLATORS, BUT TO GO OUT AND TALK TO THE PEOPLE ABOUT ANTITRUST, TO MAKE A CASE FOR WHAT WE WERE DOING.

AS MANY OF YOU HAVE KNOWN FOR A LONG TIME, THERE IS A GREAT DEAL OF MISUNDERSTANDING ON THIS PARTICULAR SUBJECT.

WHAT THE PEOPLE DON'T UNDERSTAND, THEY WON'T SUPPORT. THAT LEADS TO THE LACK OF POLITICAL SUPPORT, AND THAT, IN TURN, IS BOUND TO SLOW DOWN ENFORCEMENT.

ANTITRUST LAW HAS ALWAYS SEEMED A DRY SUBJECT TO THE PEOPLE. LET'S FACE IT, YOU ARE NOT GOING TO RALLY MUCH GRASS ROOTS SUPPORT IF YOUR BATTLE CRY IS SOMETHING AS HARD TO PRONOUNCE AS "DOWN WITH THE OLIGOPOLY!" THAT HARDLY COMES TRIPPING OFF THE TONGUE.

BUT THINGS ARE CHANGING. I THINK THAT RIGHT NOW OUR CHANCES ARE BETTER THAN EVER FOR MAKING THE IMPORTANT, BASIC IDEAS OF ANTITRUST LAW ENFORCEMENT PREVAIL.

AS I SAID IN A SPEECH SEVERAL YEARS BACK, "THE BIGGEST SINGLE THING WRONG WITH AMERICA IN 1971 IS BIGNESS -- CORPORATE BIGNESS, GOVERNMENTAL BIGNESS, LABOR UNION BIGNESS, MUNICIPAL BIGNESS. AT ALL LEVELS, BIGNESS HAS REDUCED ACCOUNTABILITY AND ISOLATED THE DECISION-MAKING PROCESS FROM THOSE AFFECTED BY THE DECISIONS. I THINK ANTITRUST LAW AND POLICY IS ONE AVENUE THROUGH WHICH THINGS CAN BE REDUCED AGAIN TO MANAGEABLE SIZE."

BACK IN 1971, PEOPLE WOULD HAVE NODDED THEIR HEADS AND AGREED WITH THAT IN PRINCIPLE. BUT I THINK NOW THEY ARE ALSO READY TO GRASP ONE THING -- THAT THERE IS A CONNECTION BETWEEN BIGNESS AND HIGH PRICES IN THE MARKET-PLACE.

HEAVEN KNOWS, THE PEOPLE HAVE COME TO UNDERSTAND

INFLATION. AND I THINK THEY ARE READY TO SEE THE CONNECTION BETWEEN INFLATION AND THE LACK OF REAL FREE ENTERPRISE IN THIS NATION.

IT IS ONE THING TO HAVE YOUR CREDIT CARD ACCOUNT FOULED UP BY SOME BIG OIL COMPANY'S RUNAWAY COMPUTER. BUT IT IS ANOTHER THING TO BE SITTING IN A LINE OF CARS WAITING TO BUY OVERPRICED GASOLINE, WHEN THE SERVICE STATION ACROSS THE STREET HAS ITS WINDOWS BOARDED UP AND HAS SHUT DOWN.

THE BIGNESS OF CORPORATIONS HAS ALWAYS BEEN A NUISANCE TO PEOPLE. BUT NOW THEY ARE BEGINNING TO FEEL THE PROBLEM IN THEIR POCKETBOOKS.

THERE MAY ALSO BE ANOTHER IMPORTANT SHIFT IN PUBLIC OPINION. YOU KNOW FROM EXPERIENCE THAT PEOPLE HAVE SUFFERED FROM TWO INGRAINED MISCONCEPTIONS ABOUT ANTITRUST.

ONE OF THESE IS THAT ANTITRUST ENFORCEMENT IS SOMEHOW "ANTI-BUSINESS." THE OTHER IS THAT IN AN ANTITRUST CASE, BIG GOVERNMENT IS THE HEAVY AND BUSINESS IS THE UNDERDOG.

THOSE WITH CONCENTRATED ECONOMIC POWER ARE THE VERY ONES WHO ARE ABLE TO MOUNT BIG PUBLIC RELATIONS CAMPAIGNS TO CONVEY THESE UNFORTUNATE IDEAS.

BUT I BELIEVE THE GROWTH OF THE CONSUMER MOVEMENT MAY WELL MAKE A DIFFERENCE IN THIS AREA. CONSUMERISM HAS ACCUSTOMED PEOPLE TO THINK DIFFERENTLY, AND TO HAVE DIFFERENT EXPECTATIONS.

CONSUMERISM HAS MADE IT LESS LIKELY THAT WRONGDOING IN BUSINESS AND INDUSTRY CAN BE DEFENDED WITH EMOTIONAL APPEALS TO PATRIOTISM. PEOPLE ARE LESS AFRAID TO FACE FACTS.

IT IS A FACT THAT THERE IS NOTHING MORE FUNDAMENTALLY ANTI-BUSINESS, AND CONTRARY TO THE PURSUIT OF FREE ENTERPRISE, THAN VIOLATION OF ANTITRUST LAWS. IT IS A FACT THAT THERE IS NOTHING MORE PRO-BUSINESS THAN ANTITRUST ENFORCEMENT.

IT IS A FACT THAT IN ANTITRUST CASES, UNDERSTAFFED, UNDERFUNDED AND OVERWORKED ANTITRUST DEPARTMENTS IN GOVERNMENT ARE THE REAL UNDERDOGS. BECAUSE OF THE EFFECT OF CONSUMERISM, I THINK PEOPLE WILL BE LESS AND LESS LIKELY TO BELIEVE SOME HUGE CORPORATION WHEN IT CLAIMS IT IS BEING PICKED ON BY THE DEPARTMENT OF JUSTICE.

AS THE PUBLIC COMES TO UNDERSTAND, THOSE WHO OPPOSE ANTITRUST ENFORCEMENT WILL HAVE LESS AND LESS EFFECT WHEN THEY TRY TO WRAP THEMSELVES IN THE UNDESERVED FLAG OF

FREE ENTERPRISE -- AND THEREFORE THEY WILL HAVE LESS AND LESS POLITICAL EFFECT.

BUT ANTITRUST LAW AND ENFORCEMENT IS NOT ONLY AT A TURNING POINT IN THE REALM OF PUBLIC OPINION.

WE ARE AT A HISTORICAL MOMENT BECAUSE THE YEARS OF LAGGING ANTITRUST ENFORCEMENT HAVE BORNE BITTER FRUIT. THERE IS NO DOUBT THAT THE RASH OF BUSINESS MERGERS IN THE 1960'S HAS SUBSTANTIALLY CONTRIBUTED TO THE INFLATION OF THE 1970'S.

IT IS MY OPINION THAT WE HAVE LET THINGS GO FOR SO LONG THAT A FUNDAMENTALLY ANTICOMPETITIVE STATE OF AFFAIRS EXISTS IN THE AMERICAN ECONOMY. I BELIEVE WE ARE IN TROUBLE BECAUSE OF IT, AND THAT WE ARE IN FOR MORE TROUBLE IF WE DO NOT ACT.

WE ARE ALSO AT A HISTORICAL MOMENT BECAUSE COURT DECISIONS CONCERNING CLASS ACTIONS HAVE HAD A NEGATIVE IMPACT ON ANTITRUST ENFORCEMENT, MAKING IT HARDER TO ATTACK THE PROBLEM JUST WHEN IT COMES TO A HEAD.

WE ARE ALSO AT A HISTORICAL MOMENT BECAUSE THE PASSAGE OF TIME AND THE DEVELOPMENT OF PUBLIC OPINION HAVE CREATED AN INTERESTING AND ENCOURAGING POLITICAL SITUATION. THERE

IS A REALIZATION IN THE CONGRESS, AND TO SOME EXTENT IN THE WHITE HOUSE, THAT ANTITRUST ACTION IS NOW BOTH SORELY NEEDED AND PUBLICLY ACCEPTABLE.

AS A RESULT, THERE IS PRESENTLY BEFORE THE COMMITTEES OF CONGRESS A GROUP OF BILLS AS IMPORTANT AS ANY WE HAVE SEEN LATELY.

THESE RANGE FROM BILLS WHICH PROPOSE IDEAS WHOSE TIME HAVE CLEARLY COME, TO THOSE WHICH PROPOSE BASIC CHANGES IN THE RELATIONSHIPS BETWEEN GOVERNMENT AND BUSINESS. FOR THE FORMER, SUCH AS THE REPEAL OF THE FAIR TRADE LAWS, THERE OUGHT NOT TO BE SIGNIFICANT OPPOSITION. AS TO THE LATTER, THERE ARE SERIOUS QUESTIONS INVOLVED, AND THEREFORE THERE IS LIABLE TO BE A FIGHT.

A FAIR TRADE REPEAL BILL HAS ALREADY PASSED THE HOUSE, BY A THUMPING MARGIN. THE COMPANION SENATE BILL OFFERED BY MR. BROOKE MAY BE REPORTED OUT OF JUDICIARY SOON.

THE RIGHTNESS AND POPULARITY OF THIS LEGISLATION HAS ALREADY HAD AN EFFECT UPON THE ABUSE IN QUESTION, EVEN BEFORE ENACTMENT. SEVERAL OF THE STATES HAVE ALREADY REPEALED THEIR SO-CALLED FAIR TRADE LAWS, AND INDUSTRIES WHICH HAVE TAKEN ADVANTAGE OF THIS GOVERNMENT-CONDONED PRICE-FIXING HAVE DROPPED THE PRACTICE, IN ANTICIPATION

OF THE INEVITABLE.

AMONG THE MOST IMPORTANT OF OTHER BILLS NOW IN THE LEGISLATIVE PROCESS ARE THOSE SUPPORTING PARENS PATRIAE SUITS BY ATTORNEYS GENERAL ON BEHALF OF THE GENERAL ECONOMIES OF THE STATES, WITHOUT THE NECESSITY OF PROVING INDIVIDUAL DAMAGES.

OTHERS CALL FOR IMPROVING THE INFORMATION-GATHERING POWERS OF FEDERAL ANTITRUST AGENCIES, INCLUDING IMPORTANT PROVISIONS FOR PRE-MERGER NOTIFICATION.

CONGRESS IS BEING CONFRONTED WITH THE ABSOLUTELY BASIC QUESTION OF WHETHER THE POSSESSION OF CONCENTRATED POWER IS IN ITSELF CAUSE FOR REORGANIZATION, WITHOUT REGARD TO THE MATTER OF COLLUSION. THIS MAY COME IN SENATOR PHILLIP HART'S INDUSTRIAL REORGANIZATION ACT, OR PERHAPS IN AN AMENDMENT TO THE SHERMAN ACT ITSELF.

AND IN THE IMPORTANT AND AGITATED FIELD OF ENERGY, A MOVEMENT IS AFOOT WHICH IN THE LONG RUN COULD HAVE MORE IMPACT ON THE NATION'S ENERGY PROBLEMS THAN PRESENT PROPOSALS FOR REGULATION, DEREGULATION, AND TAX PACKAGES.

THE HOUSE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY WILL HOLD HEARINGS THIS FALL ON THE QUESTIONS OF JOINT VENTURES AMONG MAJOR OIL COMPANIES, PIPELINE OWNERSHIP, AND

EXPANSION OF THESE BIG COMPANIES INTO ALTERNATIVE FUELS.

IN THE SENATE, A BILL HAS ALREADY BEEN INTRODUCED BY SENATOR ABOUREZK WHICH WOULD PROHIBIT OWNERSHIP OF ALTERNATIVE FUEL SOURCES BY OIL COMPANIES. SENATOR HART, WITH SENATOR BAYH CO-SPONSORING, INTENDS TO INTRODUCE A BILL NEXT WEEK TO REQUIRE VERTICAL DIVESTITURE OF OIL COMPANIES, WHO NOW CONTROL THE MARKET FROM EXPLORATION TO PRODUCTION TO IMPORTING TO RETAILING. I UNDERSTAND SENATOR BAYH WILL HOLD HEARINGS ON THIS BILL SHORTLY.

THIS ACCOUNT JUST SKIMS THE SURFACE, OF COURSE, BUT ONE THING SHOULD BE CLEAR: THE CONGRESS IS DEEPLY INTERESTED NOW IN ANTITRUST LAW, AND A GREAT MANY WORDS WILL BE SPOKEN ON THE SUBJECT IN THE COMING SESSION.

THAT'S GOOD. BUT WE WANT TO MAKE SURE WE WILL NOT END UP WITH THE WORD, AND NOT THE DEED. AS EVERYONE KNOWS, DEEDS COST MORE THAN WORDS. THAT IS WHY I THINK ONE OF THE MOST PROFOUNDLY IMPORTANT BILLS HAVING TO DO WITH ANTITRUST IS S. 1136, WHICH I AM PLEASED TO CO-SPONSOR.

S. 1136 IS A MONEY BILL, IT IS A BILL WHICH WILL INCREASE FUNDING, AND THEREFORE WILL INCREASE THE EFFECT OF LAWS ALREADY ON THE BOOKS, EVEN IF WE DON'T GET A SINGLE NEW ONE.

I AM SURE YOU KNOW THE BASIC PROVISIONS: FUNDING OF \$25 MILLION EACH FOR THE ANTITRUST DIVISION AND THE FTC'S BUREAU OF COMPETITION IN FISCAL 1976; \$35 MILLION IN 1977; AND \$45 MILLION IN 1978.

BUT I AM ESPECIALLY PLEASED THAT A SUGGESTION OF MINE HAS BEEN INCLUDED IN THE BILL -- AN AUTHORIZATION OF \$10 MILLION TO HELP STATES PROSECUTE ANTITRUST CASES.

STATE PARTICIPATION IN ANTITRUST ACTIVITY IS ESSENTIAL. THE FEDERAL GOVERNMENT CANNOT AND SHOULD NOT ATTEMPT TO DEAL WITH ANTITRUST VIOLATIONS OF MOSTLY LOCAL IMPORTANCE. BUT THE STATES CAN AND MOST CERTAINLY SHOULD.

A DIVISION OF LABOR, WITH THE FEDERAL PROSECUTORS TAKING ON THE GIANT CASES OF MONOPOLY AND MERGER, LIKE AN IBM SUIT, AND THE STATES TAKING ON SUCH ISSUES AS LOCAL RESTRAINTS OF TRADE, PRICE-FIXING AND BID-RIGGING, IS RIGHT AND PROPER.

NOT ONLY WILL SUCH A DIVISION MEAN THAT ANTITRUST WORK WILL BE GOING ON AT BOTH ENDS OF THE ECONOMIC SPECTRUM, BUT IT WILL ALSO HELP DESTROY THE MYTH THAT ANTITRUST SUITS ARE THE ACTIONS OF A "BIG BROTHER" GOVERNMENT IN WASHINGTON.

MOST OF THE STATES HAVE ANTITRUST LAWS, SOME OF WHICH ARE OLDER THAN THE SHERMAN ACT. NORTH CAROLINA IS ONE OF

THOSE STATES. FOR THE MOST PART, THESE ARE GOOD LAWS.

IN A STUDY CONDUCTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, IT WAS FOUND THAT IN 1974 ALL BUT NINE OF THE STATES AND TERRITORIES WERE CONDUCTING SOME KIND OF ANTITRUST ACTIVITY. OF THESE, HOWEVER, ONLY TWENTY HAD ATTORNEYS ASSIGNED FULL-TIME TO ANTITRUST, AND ONLY NINE HAD MORE THAN TWO FULL-TIME ATTORNEYS SO ASSIGNED.

STATE ACTIVITY THEREFORE IS SMALL, BUT IT HAS BEEN GROWING, AND THE FEDERAL GOVERNMENT WILL DO WELL TO HELP PRIME THE PUMP WITH THREE YEARS OF FUNDING.

THIS IS A BILL WHICH IS ECONOMICALLY SOUND -- IT IS ANTI-INFLATIONARY AND BOUND TO HELP CONSUMERS. AND I WOULD ADD THAT THE STATE MONEY WILL BE ESPECIALLY WELL-SPENT.

WELL-CONSIDERED ACTIONS AS CLOSE AS POSSIBLE TO THE GRASS ROOTS LEVEL WILL HAVE MAXIMUM EFFECT, EVEN IF THE MONEY AMOUNTS ARE RELATIVELY SMALL. ANTITRUST SUITS GET PERHAPS EVEN MORE ATTENTION, AT THE LOCAL LEVEL, THAN BIG FEDERAL ACTIONS.

IN NORTH CAROLINA, OUR ACTION TOOK TWO FORMS. WE BROUGHT SUIT FOR TREBLE DAMAGES AGAINST VIOLATORS WHO HAD ALREADY BEEN SUCCESSFULLY SUED BY THE FEDERAL GOVERNMENT.

BUT WE ALSO CONDUCTED OUR OWN INVESTIGATIONS AND BROUGHT OUR OWN SUITS AGAINST VIOLATORS OPERATING AT THE STATE LEVEL.

FOR EXAMPLE, WE WERE SUCCESSFUL IN PROSECUTING THE VENDORS OF MILK TO SCHOOL LUNCH PROGRAMS, WITH A SUBSEQUENT LOWERING OF PRICES.

NOW, THAT IS AN ANTITRUST SUIT WHICH WILL BE NOTICED BY THE PARENTS OF EVERY SCHOOLBOY OR SCHOOLGIRL IN THE STATE.

I AM CONVINCED ANTITRUST ACTION MUST BE VISIBLE TO THE PEOPLE. THEY ARE READY TO TAKE NOTICE NOW, BECAUSE HISTORY HAS HAD ITS SAD EFFECT. AS CONGRESSMAN TOM L. JOHNSON SAID OF MONOPOLIES, BACK AT THE TURN OF THE CENTURY: "THEY WILL RULE YOUR POLITICS, CORRUPT YOUR INSTITUTIONS, AND FINALLY DESTROY YOUR LIBERTIES."

IN A VERY REAL SENSE OUR LIBERTIES HAVE BEEN AT LEAST ERODED IN THIS WAY. EVERY AMERICAN HAS HAD HIS ECONOMIC LIBERTIES REDUCED BY INFLATION.

I BELIEVE WE ARE NOW AT A TURNING POINT. WE WILL EITHER TAKE THE ROAD BACK TO ECONOMIC HEALTH, OR WE WILL SLIDE INTO THE NIGHTMARE ECONOMY OF GOVERNMENT-REGULATED GIANTS.

IN THE LATTER CASE, WE WILL HAVE POSITIVELY TERRIFYING INFLATION, AND A GOVERNMENTAL REACTION WHICH WILL IN THE LONG RUN BE WORSE MEDICINE THAN THE DISEASE.

I BELIEVE THE PEOPLE SENSE WHAT'S WRONG. THEY CAN SEE THE HIGH PRICES AND THEY CAN SEE THE PERVASIVE BIGNESS AND ARROGANCE OF OUR COMMERCE. BUT WILL THEY PUT TWO AND TWO TOGETHER?

I BELIEVE THEY CAN. I BELIEVE THEY CAN NOW SEE TWO THINGS -- THAT THE PRESENT HISTORICAL DISASTER WAS IN NO SMALL MEASURE THE RESULT OF BUSINESS GIANTISM, AND THAT OUR GREATEST WEAPON NEEDS NOW TO BE USED.

POLLS TAKEN IN 1965 SHOWED THAT FIFTY-TWO PERCENT OF THE PEOPLE THOUGHT TOO MUCH POWER WAS HELD BY TOO FEW COMPANIES. IN 1973, THAT FIGURE WAS UP TO SEVENTY-FIVE PERCENT. AND BY THEN MORE THAN HALF OF THE PEOPLE POLLED THOUGHT THESE GIANTS SHOULD BE BROKEN UP.

THE LESSONS ARE CLEAR. BOTH LAW ENFORCEMENT AND THE POLITICAL PROCESS DEPEND UPON THE INFORMED WILL OF THE PEOPLE. THE PEOPLE HAVE BEEN INFORMED -- THE HARD WAY.

I HOPE WE HERE IN WASHINGTON WILL TAKE THE HINT AND DO WHAT SHOULD HAVE BEEN DONE LONG AGO -- TAKE THE POLITICAL BRAKES OFF ANTITRUST ENFORCEMENT.

THANK YOU VERY MUCH.