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*Concentration of Economic Power*

No topic could be more timely than that chosen for your discussions for this meeting—Concentration of Economic Power. Nothing in my generation seems so striking as the bigness of everything. There are certain advantages in size, readily appreciated when you are a part of that group, whether it is a business, a brotherhood, a political party or a nation. Our forefathers came into a trackless land of forests, great plains and lofty mountains, dotted here and there with a few unlettered, chiefly nomadic, savages. With our hands and brains we have changed that wild continent into this civilized land. What a series of concentrations that development has seen: from the wigwams of Manhattan to the Empire State Building; from Fort Dearborn to Chicago; from a few thousand scattered Indians to a multitude of inhabitants, numbered by the tens of millions; from a lone ironworker to the rolled-steel mill.

Each generation has gone through a metamorphosis. The population has almost tripled in my lifetime. My father saw the first railroad and the first aeroplane, with the telephone, the electric light and the automobile sandwiched in between. Today we deal with the wonders of electronics and atomic energy.

The post-Revolution land speculations, the Bank of the United States under Nicholas Biddle, the transcontinental railroads, the tariff beneficiaries, the trusts, and labor unions have in their turn raised fears because of their concentrated economic power. The shift from a rural to an urban economy not only ended Thomas Jefferson's dream of an agricultural society, law-abiding and moral, because self-supporting, scattered and away from temptation, but

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created apprehension as to sickness and crime in more congested areas. Now we face "Megalopolis," that concentration of humanity that crowds the Atlantic littoral from Boston through Washington, and its western counterpart from the Golden Gate to the Mexican Border.

The decreasing death rate has assuaged our fears of unhealthy cities, aided as it has been by improved sanitation. As for crime our best efforts have not slowed its increase in excess of the growth of population.<sup>1</sup> Whatever the crime, wherever its scene, available reports emphasize the growth.

But we should be neither surprised nor frightened. Such shifts and changes are normal. They are the natural social and economic evolutions, and they are accompanied by political adaptations as well. It is Darwin's theory of evolution as applied to institutions. Gone is the rural society of the eighteenth century, replaced by mechanization and urban concentration, but that very concentration has induced many of us to turn again to the suburbs or to the villages, if not to the farms, to find space for our factories and our homes. We repeat the lament of Daniel Boone in departing from Kentucky in the 1790's for the then open prairies of Missouri, "It is too crowded here." Fortunately perfection appears only in a mirage of the future. Of course, the individualism of the frontiersman has been swamped by organized groups. Though some deplore the change, it is hard to see how even a lot of Paul Bunyans could accomplish the myriad of tasks necessary for our present economy.

With the concentration of economic power, there has proceeded step by step an increasing exercise of governmental power—state and national. The use of that power has varied with the need. Political power was used to achieve federal supremacy and state control, as distinct from district, precinct, township or county, over human safety and welfare, roads and schools. It is an ever-changing but never-ending force, made up of the activities and influence of all, not of men in public life

alone. As Americans, the circle of our responsibilities cannot be narrower than the welfare of all our citizens, perhaps of all humanity, though each one's actual contribution is necessarily more limited. "No man is an *Island*, intire of it selfe." Our broad aim is social welfare.

In our Country such concentrations seem the natural result of the growth of population and business. No personal leadership has created the situation, and the resolution of the difficulties inherent in their development depends upon the conclusions as to their social value. Generalizations are easy. Everyone admits the advantages of organizations. In industry they must be adequate for large-scale economies and production, but they must not use their power to command the market in any line of commerce. In nonpolitical associations their size should not be used so as to compel unfairly the adoption of measures they support. In public life we are happily spared the disadvantages of government by splinter parties and we believe the varying points of view of members of the dominant organizations give sufficient competition in the market place of political ideas. An effective approach to the seething and changing problems tendered by concentrations of power must be psychologically, philosophically and politically sound. No wonder one trembles to comment. There is fear and aggressiveness, selfishness and group pressures, stupidity and ignorance. All evils cannot be eradicated but at least they can be counterbalanced within tolerable limits. There will be shifts of interest and of facts. One gigantic effort will not produce a final solution for the problems arising from misuse of power. They are unending and change with the holders.

This meeting invites reflection on how to handle our concentrations of economic power to further the betterment of society in the approaching decades. Recognizing the truism that it is easier to criticize than to construct, I am sure the points of view expressed during this conference will bear useful fruit. As you would expect, my

comments will approach the topic from the standpoint of an arbiter between conflicting interests.

If the law contributes only punishment or damages in the functioning of society, it will fall short of its obligation. Judged either by cultures or religions, no ethical question arises from the concentration of economic power. Certain civilized nations, believing them beneficial, allow cartels and governmental monopolies. The United States itself finds some limitations on competition advisable. So, under regulations, we grant exclusive franchises to public utilities, certificates of convenience and necessity to transportation operators, wage floors and closed shops to labor unions, and fix production quotas for farmers.<sup>2</sup> No specific constitutional provisions interfere with the control of economic power. Legislation regulating business—like any legislation in a democratic society—must have its roots in the consensus of what is generally useful. The law is framed on that basis, with sanctions for violations of the determination of the lawmakers. In problems of concentration of economic power, however, strong feelings emerge. Jefferson's quotation is applicable to some on either side, "But we have a faction, to whose hostile passions, the torture even of right into wrong is a delicious gratification."<sup>3</sup>

In this Nation no one questions the desirability of a competitive economy. Open competition is looked upon as a phase of freedom. Liberty "is jeopardized if economic power drifts into relatively few hands." We demand the utmost personal mobility, geographically and in business life.<sup>4</sup> With the help of general education, individuals move from places as farm or industrial laborers to business executives in one generation.<sup>5</sup> It is that spirit of free enterprise, with its adoption of public welfare programs, that has blocked socialism and its reach for power in the state to determine the destinies of communities and individuals. We have long held, and there is no discernible tendency to depart from that conviction, that the foundation of such a desirable economy is open com-

petition. Despite possible advantages to a stable economy from efficient cartels with firm or legally fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the anti-monopoly statutes that competition is the authentic rule for American business.<sup>6</sup> The Sherman, the Clayton and the Federal Trade Commission acts stand as a bar to practices deemed unfair. The dangers implicit in undue concentration of economic power are under continuous examination by Congress and the Executive Branch.<sup>7</sup> The presently functioning inquiry under S. Res. No. 57 of this Congress offers substantial hope of real progress in the field of business monopoly.

Whatever may be the evil social effect of cutthroat competition on producers and consumers through the lowering of labor standards and the quality of the produce and the obliteration of the marginal to the benefit of the surviving and low-cost producers, who thus gain increased opportunity for exploitation, the advantages of competition in opening rewards to management, in encouraging initiative, in giving labor in each industry an opportunity to choose employment conditions and consumers a selection of product and price, have been considered to overbalance the disadvantages.

One interested in the future movements of our economy must needs take increasing account of the advancing concentration of economic power, for the strength of size alone is an ever-present danger to competition. That growth is organizational rather than personal. It is not solely that more people are employed by one corporation than formerly, or that more employees belong to a nationwide union. Those factors are made less dangerous because the head of either such organizations cannot, in view of his stockholders, directors and board personnel, move with the unfettered discretion exercised by the sole owner of the small business of the early nineteenth century or of the first local unions. But one must envisage the concentration now in the knowledge that such organi-

zations are apt to move in concert with others, perhaps of an entirely different type—television, for instance, or foreign trade groups with a common objective. Organizations such as those represented here at this Conference—business associations, federations, veterans' groups, congresses and councils—can quickly rally support for movements that may vitally affect our lives for good or evil.

Fear arises of the use of the power to obtain the ablest professional minds, and to influence public opinion through newspapers and lobbyists to mold the action of the Government. Such positions must be taken into consideration, however extreme may seem the fear that power may successfully be so wrongly exercised.<sup>8</sup>

The trends toward bigness seem inevitably to create parallel concentrations of economic and political power. One requires the other. Government no longer appears only in a policeman's uniform. Formerly the maintenance of safety and order, the primary responsibility of government, fulfilled its purpose. There is an inspiring paragraph in the final report of the Temporary National Economic Committee:

“Governments are instituted among men to serve men; men were not created to serve government. It is not the function of government nor of those to whom the duties and responsibilities of government are temporarily entrusted to direct and command the activities and the lives of men. It is the sole function of government to produce and preserve that order which will permit men to enjoy to the utmost that free will with which they were endowed by an all-wise Creator.” Page 5. The ideal of the best government as the one that interferes least in the affairs of man persists, but conditions requiring governmental interposition have increased so as to broaden its duties to include regulations for health, disability, education, transportation, labor relations and business competition.

Actual growth of economic power of organizations in a healthy economy is natural. It is the comparative statistics of assets, production or membership that are significant. The most available synopsis of the concentration position of industrial producers is the Census of Manufactures of 1947 compared with that of 1935. Referring only to the 38 industries with shipments valued at one billion dollars annually or more, this showed, not surprisingly, that cigarettes lead. The first four companies in 1947 produced 90.4 per cent, as compared with 89.7 per cent in 1935. Other great industries, with like concentration ratios of more than 50 per cent, were motor vehicles, blast furnaces, rubber tires, soap, copper, motors and generators. The percentage changes, between the years, were small, generally a slight increase. The picture in the smaller industries is essentially the same. Interestingly men's and women's clothing showed about the lowest ratios of concentration. Dresses were the lowest, 2.6 per cent. With such competition and opportunity for selection, we must assume our wives buy at the very best bargain prices. No figures appeared as to ladies' hats.

The concentration of bank resources follows the industrial trend. In 1921 the 10 largest American banks showed 9 per cent of all bank assets; in 1930, 21 per cent; in 1940, 26 per cent; and in 1950, 20 per cent. The largest bank held less than 5 per cent of bank assets. You will be interested in this comment from the collector of these bank statistics:

"The accompanying summary table indicates that the ten largest banks held about 10 per cent of the total resources of all commercial banks until the late 1920's, when the proportion rose to about 20 per cent. After rising further to 26 per cent in 1940, the ratio declined to 20 per cent in 1950. The fluctuation between 1930 and 1950 appears to have been due in large part to changes in the distribution of banking resources between the leading financial centers,

where the largest banks are located, and the rest of the country. For example, total resources of banks in New York and Chicago declined less than at other banks during the depression years 1930–1933 and expanded more from 1933–1940. In this decade, the depression and the large gold inflow served to concentrate balances in the large money centers. In the decade from 1940–1950, resources of New York and Chicago banks rose less than at outside banks, reflecting major shifts in population and economic activity to the South and West and the rise in importance of other cities as financial centers.”<sup>9</sup>

Naturally the growth of the employer organizations has brought increase in the number of employees in the establishments. Some 80 per cent of the Nation’s gainfully employed are in the employee group, comparatively few of whom hold proprietary interests, even corporate stocks.<sup>10</sup> Before 1860 Brady’s Bend Iron Company with its five hundred plus “laboring families” was the largest industrial employer. Compare that with the corporations of today which have hundreds of thousands of employees.<sup>11</sup> We are all familiar with the growth of unions, paralleling corporate growth—their investments in office buildings, securities for welfare funds, and other financial enterprises.

These concentrations of economic power may use the economies of integration to eliminate competitors. “The powerful exact what they can, and the weak grant what they must.”<sup>12</sup> On the other hand, wisely used, such concentrations may result in beneficial economies. Consumer, as well as competitor, interests should be weighed. Chain and mail order retail stores offer an excellent example of the benefits. During the depression years a favorite quip was, “No one helps the farmer except Providence and Sears-Roebuck.” In the Fair Trade Act, Congress was careful to provide that resale price agreements between competitors are invalid.<sup>13</sup> When the Bank Holding

Company Act was enacted recently, acquisitions under its terms were allowed with prior approval of the Board of Governors of the Federal Reserve System.<sup>14</sup> These laws adapted to these businesses are a means of preserving both workable competition, and the economies and the advantages of size in operations and facilities beneficial to the consumer.<sup>15</sup>

However much we gain from the teaching of the free and independent mind, modern experience shows that the new ideas can be put to effective use only through organized groups—that is, by the use of concentrations of power. The adjustment of these conflicts of interest fall in the domain of legislation.

While restraints on trade are not the sole evil from concentrations of power, they are the most flagrant. They are intolerable in our free enterprise system—as destructive of sound social function as over-large expenditures in politics. They fall under universal condemnation both of law and public opinion. The gross violations of the days of industrial buccaneering through criminal interfering, destructive price cutting, division of territory,<sup>16</sup> boycotts,<sup>17</sup> price fixing,<sup>18</sup> tying clauses,<sup>19</sup> have been found detrimental and invalid per se.<sup>20</sup> Legislative bodies may well believe that smaller aggregations give better opportunity for the development of capacity and leadership.

Congressional authority to legislate for avoidance of threatening situations is recognized. Its existence assures the Country that means are available to control the evils that may develop from concentrations of power, economic or of other kinds. Its use can then follow the current consensus of view as to its need. Legislation was enacted to meet the weakness of the Clayton Act on acquisitions of corporate assets where such acquisitions substantially lessened competition or tended to create a monopoly. Other enactments protected the economy against the dangers of interlocking directorships in banks, investment companies, railroads and distilling corporations. When

organizations exercise powers that interfere with governmental responsibilities, they must expect regulation from the state. That sovereign prerogative reaches far. "Legislation may begin where an evil begins."<sup>21</sup>

During the last decade the public's interest in legislation apparently has been focused on civil rights and national safety. The importance of the business phases of our economy, however, merits comparable attention, if we are to develop employment and production and achieve the desired balance between wages and capital earnings. Legislation dealing with concentrations of economic power plays and will play an important part in the economic adjustment necessary to enable industry to assist in and apply to production the discoveries of the "hard" sciences.

In legislation for the regulation of concentrations of power, where economics and the social sciences meet, the public is confronted with uncertainty as to the path to follow. No laboratory exists for controlled experimentation, there is little agreement on premises, and results can be told only after years of experience. Some are timid about big business. Some about big unions. Some about big government. Industrial absolutism disappeared with the National Labor Relations Act, but the possibility of abuse of economic power continued.

When business is confronted with the problems of uniform industry prices, of action through trade associations on practices, of mergers, consolidations or purchases of limited available sources of raw materials, such as bauxite, iron-ore, or pulp-wood, its insistent demand is for assurance of legality. Notwithstanding the competitive drive for success, it is fair to assume that executives in organizations with concentrated economic power wish to work within legal limits. Enlightened self-interest alone would prompt avoidance of the heavy penalties for variation from established norms. It is dangerous to try to cut closest to the edge of the law. Competition makes its hard to avoid danger as far as possible while its com-

petitors scrape the boundary wall of legality, scathelessly. Neither morals nor self-interest permit experimentation. Are the uncertainties of the law to be kept as a threat to limit the law-abiding and reward the successful gamblers? Such situations beget civil disobedience.

In the industrial field uncertainties, which create problems in mergers, horizontal and perpendicular expansions or integrations, could be considerably lessened by more specific legislation. This would make enforcement of the statutes against restraint of trade simpler and reduce the high cost in money and time of litigation. The judicial adoption of the rule of reason as to contracts and combinations and mergers was a necessary step for enforcement of a statute with the generality of § 1 of the Sherman Act. Likewise, as to the words forbidding monopoly of "any part of the trade or commerce among the several States," judicial definition for determining the market monopolized seemed essential.<sup>22</sup> The possible danger to business of such uncertainties was strikingly indicated only last Monday by the decision of the Supreme Court in *United States v. E. I. du Pont*, case No. 3 of the 1956 Term. The 23% stock interest of du Pont in General Motors, acquired between 1917-1919, was declared to be held in violation of the first paragraph of the Clayton Act as a purchase tending to "create a monopoly" in "a line of commerce" consisting of "automobile finishes and fabrics," as distinguished from "all other finishes and fabrics."

In the complicated economy of today, Congress should not be expected to envisage the detailed enactments that might become necessary to maintain competition. Under legislative standards for guidance, administration by trained personnel could more satisfactorily preserve open markets. If practices, inimical to competition, develop, they can be promptly controlled by administrative regulation.<sup>23</sup> The preservation of competition depends more on efficient administration than on penalties and punishment for violations of obscure laws.

As far back as 1941, the T. N. E. C. recommended that the Federal Trade Commission be used to forbid mergers of competing corporations over a certain size, unless it was shown to the Commission that such merger was desirable. As late as 1954 Congress adopted a similar plan for certain business licenses under the Atomic Energy Act of that year.<sup>24</sup> This practice of prior determination of legality, with which we have had experience in the consolidations of transportation facilities, seems worth a trial. If we really think that vertical integration of industry is bad, a statute could be drafted that forbids a manufacturer to have retail outlets, or a producer of raw or partly finished goods to enter into later fabricating processes. If we do not want management to expand horizontally into noncompetitive lines, we can say so, even to forbidding a producer of chemicals from manufacturing textiles. If we are against large corporations, we can limit their size.<sup>25</sup> But with those powers go responsibility to see that the laws are made plain enough for business to understand the limits, or if that seems inadvisable or impractical, to create an agency to pass upon proposals for expansion in advance of their consummation.

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Something approaching these suggestions emerges from the growing practice of consent decrees. When specific charges of violations of the antitrust laws come before the Department of Justice or evidences of unfair practices are uncovered by investigations of the Federal Trade Commission, consent decrees can be entered which eliminate objectionable practices or enjoin continuance of corporate structures that promote monopoly.<sup>26</sup> An instance of this type of proceeding occurred in the recent consent judgment against the A. & P.<sup>26</sup>

Uncertainty, if not vagueness, in the scope of the antitrust laws and the desirability of clarification has long been recognized.<sup>27</sup> The effort to achieve the desirable goal of certainty is expressed in subparagraph (1) of Senate Resolution 57 of this (85th) Congress, authorizing a broad-scale study of our antitrust and antimonopoly

laws. Of course the limits of those laws are hard to define since what they control is a course of conduct, perhaps an intent. That makes advance determination by a disinterested agency of the propriety of actions so important.

Courts ought not to be required to improvise a judgment to meet vague situations which could be clarified by prior legislation. The plans of our leaders should attempt to cover the foreseeable situations. The others will rarely occur or then be important. They can be handled at that time.

The results of the Senate's new investigation, if carried into appropriate legislation, may well have a pronounced effect on the maintenance of our free enterprise system with its free choice of occupations and its stimulus of individual rewards for contributions to the public welfare.

It should have careful attention from those members of the public who are interested in the maintenance of a strong and vigorous competitive economy. It is public opinion that controls the course of legislation. As we are a free people, we determine the direction of the legislative actions of our representatives. Our public policy is distilled from the conclusions of the electorate.

FOOTNOTES.

<sup>1</sup> F. B. I. Uniform Crime Reports of 1956.

<sup>2</sup> See *United States v. du Pont*, 351 U. S. 377, 388; Labor Management Relations Act, 61 Stat. 140, § 8 (a) (3); Agricultural Adjustment Act of 1938; *Wickard v. Filburn*, 317 U. S. 111; Schwartz, Competition in Regulated Industries, 67 Harv. L. Rev. 436.

<sup>3</sup> 12 Writings—Memorial Ed. 254.

<sup>4</sup> Cf. *Edwards v. California*, 314 U. S. 160.

<sup>5</sup> Cf. Newcomer, Big Business Executive; W. L. Warner, Business Leaders.

<sup>6</sup> See *United States v. Line Material Co.*, 333 U. S. 287, 309–310.

<sup>7</sup> Investigation of Concentration of Economic Power, Final Report, S. Doc. No. 35, 77th Cong., 1st Sess.; Report of Federal Trade Commission, Resale Price Maintenance, Dec. 13, 1945; F. T. C. Report on Corporate Mergers and Acquisitions, May, 1955; F. T. C. Annual Reports 1955 and 1956; Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955; 1 Antitrust Bulletin 1, April 1955; Annual Report of Attorney General (1956) 183; Publications of the Joint Economic Committee and the Judiciary Committees of the Senate and House.

<sup>8</sup> Cf. Oppenheim, Federal Antitrust Legislation, 60 Mich. L. Rev. 1139, 1146 (1). The Schwartz Dissent, 1 Antitrust Bulletin 39.

<sup>9</sup> From a compilation of data by the staff of the Federal Reserve Board.

<sup>10</sup> Adelman, Effective Competition and the Anti-Trust Laws, 61 Harv. L. Rev. 1289 (1948).

<sup>11</sup> Clark, History of Manufactures in the United States, vol. I, p. 438 ff.

<sup>12</sup> William James, Moral Equivalent of War, p. 5; cf. Message of President Franklin D. Roosevelt, S. Doc. No. 173, 75th Cong., 3d Sess.

<sup>13</sup> 81 Cong. Rec. 7487; *United States v. McKesson & Robbins*, 351 U. S. 305.

<sup>14</sup> 70 Stat. 133 *et seq.*

<sup>15</sup> Cf. Herman, Free and Open Competition, 9 Stan. L. Rev. 323.

<sup>16</sup> *Timken Co. v. United States*, 341 U. S. 593.

<sup>17</sup> *Fashion Guild v. Federal Trade Comm'n*, 312 U. S. 457.

<sup>18</sup> *United States v. Trenton Potteries*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221.

<sup>19</sup> *International Salt Co. v. United States*, 332 U. S. 392.

<sup>20</sup> *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 497.

<sup>21</sup> *Truax v. Corrigan*, 257 U. S. 312, Holmes, dissenting, 343.

<sup>22</sup> See *United States v. du Pont*, 351 U. S. 377.

<sup>23</sup> Cf. *United States v. Storer Broadcasting Co.*, 351 U. S. 192; *United States v. Rock Island Co.*, 340 U. S. 419, 430 *et seq.*; Antitrust Legislation and Policy in Germany, 105 U. Pa. L. Rev. 617, 644, 689.

<sup>24</sup> S. Doc. No. 35, 77th Cong., 1st Sess.; Atomic Energy Act, 42 U. S. C. § 2135 (c).

<sup>25</sup> *Liggett Co. v. Lee*, 288 U. S. 517, dissenting opinion, 550 (a).

<sup>26</sup> *United States v. The New York Great Atlantic & Pacific Tea Co., Inc., et al.*, in the District Court for the Southern District of New York, Civil Action No. 52-139; Report of Attorney General, fiscal year 1956, p. 190.

<sup>27</sup> Cf. The Solution of the Trust Problem, Louis D. Brandeis; Adams, The "Rule of Reason": Workable Competition or Workable Monopoly? 63 Yale L. J. 348, 350; Effective Competition, Report to Secretary of Commerce Sawyer, Dec. 18, 1952, p. 5; Handler, Construction and Enforcement of the Antitrust Laws, Monograph No. 38, T. N. E. C.