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TO OUR ALUMNI IN THE EIGHTIETH CONGRESS

We dedicate this issue of "Confidential—from Washington" to the George Washington University graduates and former students ing in the Congress of the United States: Senators Wallace H. White, '02, and J. William Fulbright, '26, and Representatives ris Cotton, '28, Joe L. Evins, '41, Ralph A. Gamble, '11, Franck R. Havenner, '02, Brooks Hays, '22, Earl C. Michener, '03, ard T. Miller, '17, and Francis E. Walter, '19.

CLOYD H. MARVIN, *President,*
The George Washington University.

Our National Policy Regarding Industrial Mergers: A Critique

By
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'e have a declared public policy regarding monopoly that oted in the principles of the common law and which has embodied in and implemented by a series of antitrust ıtes including the Sherman and Clayton Acts. But in dynamic development of industry based on modern tech- gy, the facts of concentration constantly tend to outrun aw.

he factual diagnosis showing the relation of corporate ;ers to concentration is as complete and as exact as alists in the field can make it. Today's choice is one be- n legislative action recommended by the Federal Trade mission to plug a loophole in the present laws against mergers and continued frustration of our declared public :y.

mply stated, the Commission's proposal is that the Clayton be so amended that acquisition by a corporation en- d in interstate commerce of the *assets* of a competing oration also engaged in interstate commerce be made un- ul where the result tends to monopoly. Presently only k (not *asset*) acquisitions so tending are unlawful under Act and legal actions against even such unlawful acquisi- s easily may be defeated.

PRESENT TREND TOWARD MONOPOLISTIC CONCENTRATION OF ECONOMIC POWER

More than 1,800 formerly independent manufacturing and mining concerns have been swallowed up through merger and acquisition since 1940. Their combined asset value was $4.1 billion, or nearly 5 per cent of the total asset value of all manufacturing concerns in 1943. Moreover, it was the larger corporations each having assets of over $5 million (in many instances achieved through earlier acquisitions) that accounted for some three-fourths of these recent 1,800 acquisitions.

War Contract Awards

The War contributed powerfully to the trend of concentration. Government purchases and government financing of productive facilities were channeled predominantly into the hand of corporations which already occupied positions of dominance. Surplus profits created by such channeling have given a strong impetus to the trend by providing funds for additional wartime and postwar expansion through acquisition of former competitors. Out of $175 billion of government

contract awards between June 1940 and September 1944, $107 billion or 67 per cent, went to only 100 of the more than 18,000 corporations receiving such awards. During the war 68 corporations received two-thirds of the $1 billion appropriated by the government for research and development purposes in industrial laboratories.

The Disposal of Government-Owned War Surplus Plants

The level of industrial concentration apparently has been raised by the disposal of surplus war facilities. Six large corporations, alone, which had less than 10 per cent of all manufacturing facilities in 1939 had acquired 48 per cent of the value of the war plants sold as of June 30, 1946.

The most recent information on the wartime growth of concentration available from the Bureau of Internal Revenue shows that the larger manufacturing corporations, those with assets of $50 million or more each, increased their share of total assets from 42 per cent in 1939 to 52 per cent in 1943.

An even more precipitous increase in concentration took place in the metal products industries—the field most vitally affected by the war. In these industries, corporations with $50 million or more in assets increased their share of total assets from 49 per cent in 1939 to 59 per cent in 1943, and their proportion of gross sales from 38 per cent to 51 per cent.

The effect of war contract awards upon concentration was forecast in 1941 by the Final Report of the Temporary National Economic Committee. That report had warned that "It is quite conceivable that the democracies might obtain a military victory over the aggressors only to find themselves under the domination of economic authority far more concentrated and influential than that which existed prior to the war" (Final Report, P. 3). What another war would do to extend and entrench such domination by a few over the many needs no comment.

Pre-War Concentration

The degree of pre-war concentration in the economy as a whole and in manufacturing industries in particular was stated in the report of the Senate Small Business Committee, submitted in January 1946:

> The 200 largest nonfinancial corporations owned about 55 per cent of all the assets of all the nonfinancial corporations in the country.
>
> One-tenth of 1 per cent of all the corporations owned 52 per cent of the total corporate assets.
>
> Less than 4 per cent of all the manufacturing corporations earned 84 per cent of all the net profits of all manufacturing corporations.
>
> More than 57 per cent of the total value of manufactured products was produced under conditions where the four largest producers of each product turned out over 50 per cent of the total United States output.
>
> One-tenth of 1 per cent of all the firms in the country in 1939 employed 500 or more workers and accounted for 40 per cent of all the nonagricultural employment in the country.
>
> One-third of the industrial research personnel was employed by 13 companies.

Post-War Mergers and Acquisitions

More mergers and acquisitions in the manufacturing and mining industries took place in 1946 than in any of the previous 15 years. In 1946, the number of mergers was [illegible] per cent above the number in 1945, and 225 per cent above the annual average of the years, 1940-1941. Years of great business activity and high price levels are the years in which the greatest number of mergers take place. In 1920, the number of mergers increased more than six times over number during 1919. It may not be irrelevant to note that it was in March 1920 that the Supreme Court handed down its decision upholding the legality of the United States Steel Corporation's numerous corporate acquisitions and mergers. Beginning in 1926, the number of mergers substantially surpassed the number for 1920 and increased each year thereafter until 1929 when it reached a record figure. Again it may not be irrelevant to note that it was in November 1926 that the Supreme Court handed down its decision curtailing the power of the Federal Trade Commission to order the divestiture of stock unlawfully acquired whenever the merger was completed by an acquisition of physical assets, even though such assets were acquired as a result of the use of power obtained through unlawful stock acquisitions. In 1943, there began a new wave of mergers, which is still continuing.

The stock market crash of 1929 which heralded the onset of the great depression was preceded by a great wave of corporate mergers and a wild speculation in their securities. Today speculation in the future of merged concerns, supported by war-swollen profits, is again operating as one of the important causes of the present upward trend in merger activity. This speculation, which stems from the expectation of greater profits resulting from the elimination of former competing concerns, leads inexorably to the elimination of our competitive economy and thus to the elimination of the possibility of legitimate speculation.

LEGISLATIVE ACTION NECESSARY

Assuming as we must that the government, acting in the general public interest, can, if Congress so directs, prevent the further growth of monopolistic power through mergers of competing corporations, the question is one of ways and means, of halting mergers that tend toward monopoly regardless of whether consummated by sale of stock or of assets. However, only by a frank recognition of our failure concerning which the facts "day unto day uttereth speech" and a clear understanding of the legal futilities in which we so long have been enmeshed, can we hope to replace such futilities with effective legal weapons.

Legal Futilities Summarized

When Section 7 of the Clayton Act was passed in 1914, it was assumed that consummated monopolies could be dissolved under the Sherman Act pursuant to the Supreme Court's decrees of dissolution in the Standard Oil and American Tobacco cases decided in 1911. It was assumed that the only remaining problem was how to prevent the formation of monopoly—*how to nip incipient monopoly in the bud.* Owing to the fact that the characteristic and prevailing method of creating monopolisitic aggregations of corporate power up to that time had been through acquisition of the capital stock of competing corporations, that was the method forbidden by Section 7 in the expectation that monopoly would thus be rooted out in its incipiency.

However, about the time that the Federal Trade Commission began to institute a number of proceedings for enforcement of Section 7 the Supreme Court interpreted the Sherman Act to mean that huge size and power acquired through acquisition of competing corporations did not

ssarily violate that Act and that it was only the abuse of
u power and not its existence which would make such
isitions unlawful. A few years later when the Com-
ion's cases under Section 7 reached the court, it was held
the Commission had no power under Section 7 to halt
incipient monopolies where the unlawful acquisition
tock was followed by an acquisition of the physical prop-
s without which the stock had no value, and where this
done before the Commission could complete the hearings
enter its order requiring divestiture of the stock unlaw-
y acquired.

typical current instance of the futility of any further
mpt to enforce Section 7 under such circumstances is the
se of the Consolidated Grocers Corporation. Through a
ber of stock acquisitions in competing corporations, that
pany became, in 1945, the largest wholesale grocery
he country with assets of $20 million and annual sales
100 million. It occupied an allegedly dominant position
he wholesale grocery trade in numerous important trade
s, including Chicago, Baltimore, and Canton, Ohio. A
plaint was issued in 1946, charging a violation of Sec-
7; but while the case was being tried, the respondent
oration took title to the assets, which it previously
rolled only through stock ownership, and dissolved the
diary corporations whose stock it had acquired. There
g no effective way by which the stock acquired could
ivested, even though it were later held to have been un-
fully acquired, the Commission had no alternative to
issing the case, which it did in February 1947.

he practical status of Section 7 is that no matter how
wful an acquisition of stock in a competing corporation
be, the remedy provided by the statute easily can be de-
ed, leaving the acquiring corporation in possession of the
ss which are the fruits of its unlawful acquisition of stock.
if the assets be acquired directly without any intervening
isition of stock, as has become the prevailing method,
e has never been any legal ground for a contention that
was prohibited under Section 7.

hus the brave start, under the Clayton Act, has ended in
plete frustration. And at the same time, the Sherman
c has been so construed that it seldom has served to un-
mble corporate mergers, no matter how great the size and
of the acquiring or of the consolidated corporation. In
ternational Harvester case, the Supreme Court did not
that such a corporation which constituted from 64 to
rcent of an industry was an unlawful monopoly. (274
. 693, 701, 708 [1927].) This condition of legal im-
unce has continued for over twenty years, notwithstanding
curring cycles of corporate mergers and repeated demonstra-
tions of the facts by the Commission and other students of the problem. The contrast between the rapid evolution of economic concentration of power and the feebleness and slowness with which effective legal remedies have been and are being applied is striking. It is sufficient to call in question the reality of our faith in the validity of the competition presupposed by the free enterprise competitive system.

A paradoxical aspect of this problem is that while corporate mergers and acquisitions proceed unrestrained and unrestrainable by law toward an ultimate maximum in unified ownership and concentrated economic power, we still enforce the law against the more transient and more vulnerable forms of trade restraint represented by price agreements and conspiracies among competitors. The process of corporate acquisition proceeds side by side with such forms of trade restraint among competitors. The presence of large scale unified ownership in any industry is a most powerful guarantee of success in the operation of a price-fixing combination among the competitive units of that industry. The very success of law enforcement against such combinations highlights the advantage of unified corporate ownership as a legally invulnerable means of accomplishing similar ends. Carried to its logical result, there will probably be less and less opportunity to score victories against price-fixing combinations as corporate mergers immune from legal attack take their place.

The responsibility for action on the problem of monopoly is traditionally non-partisan. The Sherman Act was enacted in 1890 with but one dissenting vote in Congress. The legislative strengthening of that policy in 1914 by the Clayton Act, designed to curb monopoly in its incipiency, likewise was forecast in 1912 by planks in the platforms of all the major political parties. No one has summarized the danger of monopoly any better than President William Howard Taft, under whose administration some of the most far-reaching antitrust actions of all time were taken. On December 5, 1911, he stated:

> "When all energies are directed, not toward the reduction of the cost of production for the public benefit by a healthful competition, but toward new ways and means for making permanent in a few hands the absolute control of the conditions and prices prevailing in the whole field of industry, then individual enterprise and effort will be paralyzed and the spirit of commercial freedom will be dead."

The facts of the present situation constitute an increasing threat not only to our traditional antitrust policy but also to the American system of free competitive enterprise which that policy is designed to foster and to protect.

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rlier issues if desired. Your comment is welcomed.

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PREVIOUS ISSUES