The Future of Anti-Trust

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Our economy is in deep trouble. We are in the worst recession since the '30's and things aren't going to get any better for a while. We are suffering from inflation and rising unemployment at the same time -- a combination economists used to think impossible.

We face shortages of raw materials. We face really serious environmental problems. We face sagging productivity.

These difficulties are serious, but they are not fatal.

What can be fatal is our continued reluctance to face the issue squarely -- to admit that the economy has fundamental problems and that it needs fundamental solutions.

Instead, what we are getting is blind flailing. Last year the President told us we were going to whip inflation and passed out WIN buttons. This year he proposes energy taxes so heavy and so broad that the price of absolutely everything will go up. Maybe he'll soften the blow by passing out LOSE buttons. I believe that our economy is basically strong. It can provide jobs and a decent standard of living to all Americans.

But it will do so only if we have the vision to look at the long-range problems, and the courage to undertake the necessary reforms.

We Americans pride ourselves on having a free enterprise system in which producers compete freely for the consumer's dollar. We believe that through vigorous competition this kind of system stimulates innovation and discovery, promotes efficiency and best distributes resources to serve consumer desires.

I agree with that philosophy. I believe in free enterprise. But I am afraid that there is a wide gap between the philosophy we preach and the business we practice, for the vigorous competition on which our system is based has disappeared from broad sectors of the economy.

We have 400,000 manufacturing firms in this country, but a mere 200 control two-thirds of all their assets. Industry after industry is dominated by a handful of giant companies. Whether the concentration takes the form of monopoly or oligopoly, the result is the same. Competition is stifled, and the foundations of the free enterprise system are undercut.

We all know the cost. We see it in lack of innovation, in inefficiency, and in higher prices. And we see it in the loss of markets to foreign competitors and in the inevitable government intervention and regulation.

Let's look at a few examples.

With four firms controlling nearly half the market, price competition has always been sluggish in the steel business. Each company knows that if it cuts prices the others will match it, and nothing will be gained, and that if it alone raises prices, it will lose its shirt. So in steel we have follow-the-leader pricing. Not a conspiracy -- but the effect can be the same.

Moreover, lack of competition has led to sluggishness in the industry. The basic oxygen process -- the most important technological breakthrough in this century -- was perfected by an Austrian company in 1950. Why, then, did it take American companies a decade or more to make the switch? Hundreds of millions of dollars were wasted as a result. In fact, even though we have the biggest steel industry in the world, almost all the major advances in the business for the last two decades have come from abroad.

Take an industry of more immediate concern to the consumer: food.

Food prices have gone through the roof -- up 35% in the last two years, but Secretary Butz tells us that the amount the farmer gets has barely changed.

The middlemen and the supermarket chains, which collect 2/3 of the American food dollar, tell us that higher costs are to blame. What about lack of competition?

In 1966 the National Commission on Food Marketing recognized the anti-competitive effects of excessive concentration in the food industry. Yet, today, three companies sell 82% of our cold breakfast cereal. Four sell 70% of our dairy products, and 80% of our canned goods. And just one sells 90% of the soup in the country.

At the retail level, 2 to 4 chains sell the vast bulk of the food in almost every one of our metropolitan areas.

Last year Safeway's profits went up 51%; DelMonte, 43%; American Can, 52%; and Amstar -- which dominates the sugar business -- was up 250%.

We know that when companies don't compete on price, they tend to compete on other things -- particularly advertising. Food processors and distributors spend over $4 billion a year on advertising -- much of it on new products that no one wants.

The Federal Trade Commission has attempted to estimate the cost of concentration in this industry. In just 13 food lines the FTC estimates that overcharges amount to $2 billion per year. A yet-to-be-released staff study concludes that if the food oligopolies were broken up, prices would drop by 25%. Now there's a way to whip inflation.

Or, look at automobiles. In 1921 we had 88 firms in this industry. By 1935 there were 10 left, and you know where we are today: the big 3 make 97% of the cars manufactured in the United States, Even counting imports, they control 83% of the sales.

That doesn't just mean high prices -- it means limited choice. It took the big 3 years to come up with the small cars -- they might never have done so if it hadn't been for increasing competition from abroad.

To a certain extent they also control our future choices, for they control all research into alternative engines, auto safety, and emissions control.

The same big 3 that control the car industry also dominate the production of buses and trains. Last year, GM manufactured more than half our city buses, 90% of the bus engines, and 80% of our rail locomotives.

This kind of control has had disastrous effects on our transportation system. Since a bus or train can carry many more people than a car, GM had every incentive to push car sales and discourage mass transit.

Testimony to a Senate committee last year indicated that over the years GM bought and tore up electric railway systems in 56 cities throughout the country -- including New York, Philadelphia, Baltimore, and Los Angeles. Some riders switched to GM buses -- more bought GM cars.

The fact is that the big 3 shape America's ground transport system. And the system they have produced -- roads clogged with millions of cars and trucks, pouring out pollution and consuming vast amounts of oil, while mass transit remains virtually nonexistent -- that system simply won't do.

The Federal Government may have to reorganize the rail and bus equipment industries, building new plants and selling them to private investors if necessary, to increase capacity and promote competition.

The energy industry poses even bigger problems. A few huge corporations dominate the oil and natural gas businesses from the ground to the refinery, and for gasoline, of course, all the way to the pump. While the industry is not statistically very concentrated, it has hardly behaved in a competitive fashion. The oil majors are tied more subtly together through a complex network of overlapping directorates, joint ventures, and product exchange agreements.

We all know about the price rises in the last year. But did you know that in the ten months of 1973 before the Arab boycott and the cartel, the price of refined oil went up 40%?

The major oil companies control most of the supplies of crude oil. That has made it hard for independents to build badly needed new refineries. The main pipelines have been routed for the convenience of the majors, putting the independents at a competitive disadvantage.

The majors commonly engage in joint ventures in exploration and development, making competition with each other unlikely or impossible.

The Trade Commission has alleged in a current suit, that the majors manipulated the prices they charge at each stage of production to freeze out competitors.

The Federal Government is auctioning off vast areas of off-shore land for oil and gas exploration. Unfortunately, the way the system works, the winning bidders have to put out large amounts of cash -- as much as $200 million -- for each tract. And they must do so before they know whether they will find any oil. That is too risky and expensive for small companies. So the same big oil companies are buying up most of the oil lands of the future -- making the industry even less competitive.

Moreover, the oil majors now have heavy holdings in alternative fuels -- natural gas, coal, shale, and nuclear power. The oil majors are now in a position to limit future energy supplies and new energy technologies to maintain their profits.

From automobiles to cigarettes to chewing gum to soap, the story is repeated over and over again -- concentration is now a prominent, perhaps a dominant, characteristic of our economy.

Concentration means high prices. That is a burden at any time. It is a burden we simply cannot afford at a time when spiralling inflation threatens both progress and prosperity. Concentration can also mean inefficiency, lack of innovation, and stagnation. That, too, is a burden we cannot afford. With raw materials getting scarcer and the environment getting dirtier, the free ride of the last century is over. But we can always afford the kind of growth that comes from efficiency -- from the ability to produce more from less, and from the ability to innovate.

We must increase productivity if we are to meet the rising challenge of foreign competition, and if we are to restore economic growth.

Finally, concentration means power. It means too much control over our lives in the hands of corporate executives answerable to neither the public nor the marketplace.

Is concentration the cause? Is it the source of our economic maladies? Of inflation? Of slumping productivity?

In some industries, the answer is clearly yes. But in many cases we just don't know. Simple rules can often be powerful tools for understanding a complex situation, but often they will prove to be inadequate.

That there are two or three companies which share the bulk of the market and make substantial profits, does not necessarily give us the answer we need.

A commitment to a free enterprise system means a commitment to competition; and when there is competition, there are always some who lead the race, and some who win it. Indeed, the opportunity to lead is the incentive we count on to get competitors in the race, and, once in, to encourage them to compete hard, to take risks, to get in front and stay there.

We choose to play the game by not telling each competitor exactly how fast he can and must run, what his style should be or what course to follow. Our free enterprise view has been that each competitor does best and the public benefits the most if we act merely to prevent obstacles and hindrances to their forward motion.

We don't allow those in the lead to put up barriers behind them or to trip those who want to take the lead away. Each competitor must depend on moving forward himself -- rather than on slowing down those behind him.

And we prohibit the front runners from agreeing to bunch together to prevent those behind from breaking through their lines. If the front few happen to come together on the track when all are moving forward at top speed, they are within the rules. But not if they do so deliberately.

The trouble, of course, is that it is very hard to tell whether the four steel companies or the three automobile or two bleach companies out in front are still racing, or whether they have all slowed down at the same time to block the others on the field.

But when you see prices and profits going up, and innovation going down, it's not hard to believe that they decided it was easier to coast along together than to compete alone.

And when you look out across the economy and see many races slowing down and the racers in front getting fat and sluggish, it's not hard not to conclude that the rules don't work well enough any more.

Our racing rules have always been the anti-trust laws. Enforcement of these laws is the responsibility of both the Federal Trade Commission and the Justice Department.

Both have shown increasing vigor in the last two years, and I hope that trend continues. Their efforts will be aided by new legislation passed in the last session of Congress, which stiffens penalties for price fixing and expanded the Trade Commission's authority to protect consumers from unfair practices.

We must do more, however. These two agencies need a greatly enlarged staff if they are to adequately meet their responsibilities, and we must seek ways to keep politics out of anti-trust cases -- to guarantee that there is no repetition of the ITT case.

Better enforcement will help, but it is not enough. We may have to rewrite the rules.

The Clayton Act prevents anti-competitive mergers regardless of intent. But when a giant grows more gigantic without merger, the only way to attack existing monopolies and prevent new ones is through section 2 of the Sherman Act. That statute makes it unlawful to try to monopolize an industry, but again the issue is usually intent -- as inferred from behavior.

As trial lawyers, you can appreciate that analyzing the behavior of a huge corporation to prove its intent is a massive undertaking -- often an impossible and generally an unrewarding one. Should intent really be the only touchstone for effecting structural change? I don't think so.

Six years ago the Government charged IBM with monopolizing the computer industry. In the discovery that followed, IBM produced 40 million documents. The anti-trust division of the Justice Department was making little headway with this mountain of paper until it obtained access to the retrieval and data bank system Control Data set up for a parallel civil suit. Control Data apparently spent three million dollars on that system. That compares with the anti-trust divisions' entire yearly budget of $15 million.

Obviously, the Government cannot police the whole economy this way.

We must recognize that the existing rules are not adequate for the task ahead. We all wish for easy formulas -- a list of ten do's and don't -- you turn the key and presto! economic propriety. That has not worked and I don't think adding a few more such rules will work either.

The answer, I believe, lies in approaching the problem industry-by-industry, determining what ails each critical sector, and prescribing the precise remedy that it requires.

This is not a difficult undertaking if the commitment is there. The number of really critical industries in our country is small -- ten, perhaps twenty at the very most, dominate our economic health. First we must look at how each economically crucial industry is performing, considering criteria of efficiency, innovation, price and profit. If it is performing well, then it is of no consequence whether there are two or two hundred competitors in the field.

For those which are not performing well, we analyze the peculiar factors which contribute to the problem and prescribe a set of remedies tailored to the specific conditions. These might take any of several forms: Government subsidies of a new competitor, changes in Government procurement practices, regulation, deconcentration, and many others.

This job can be performed by an *ad hoc* commission created by the Congress with a limited life-span and a clearly defined goal. Congress then must be prepared to consider and act on the commission's recommendations.

The procedure I have just outlined would be a giant step towards a healthy, competitive economy -- but only a first step. There are several other major changes that would have to be made. Let me touch on some of them briefly.

We have got to ferret out and correct the myriad ways in which the tax code favors big companies over small ones.

The corporate income tax is riddled with concessions, exceptions, loopholes, and just plain give-aways. Except for the first $25,000 in earnings, corporations are supposed to pay a flat 48% tax. But in 1973, the average for the 143 biggest corporations for which data was available, was less than 24%.

There are many reasons: Export tax subsidies, foreign tax credits, and an investment tax credit based on the size of a company's earnings. Then of course there is the oil depletion allowance, which is based on the amount of oil produced, rather than the number of new holes drilled, and therefore helps the giant firms more than the small wildcatter who shoulders much more of the risk.

These sorts of tax provisions -- as well as many others, including the estate tax and various excise taxes -- are helping to push the whole economy towards bigness and away from competition.

Yet another source of trouble is the patent system. Originally designed to promote progress by encouraging inventors, today the system frequently allows big companies to get bigger by keeping inventions -- often ones that are not properly patentable -- out of the hands of their smaller competitors.

That is one of the ways that GE, AT&T and Xerox came to dominate their industries.

Part of the problem is in the Patent Office. The Office has a two and one half year backlog. Its staff is overworked and relies heavily on what applicants allege. Fully 70% of the litigated patents are eventually held invalid. But such challenges are time-consuming, costly, and risky, and few small companies can afford the cost.

The Patent Office should be given the resources it needs to streamline its procedures and improve its investigations. Applications that should be denied, should be denied quickly.

In addition, we should consider shortening the period of patent protection.

And we should look for ways to prevent patent holders from stifling competition by putting greater limits on restrictive licensing.

Anti-competitive policies pervade the Federal Government, but probably the worst culprit of all is the regulatory agency.

Government policies have protected concentration -- not competition -- in many of the regulated industries, often they have erected impenetrable barriers to any company which seeks to enter the field with better products or lower prices.

Transportation economists estimate that price fixing and waste allowed by the three regulatory agencies in this field -- the CAB, the ICC, and the Maritime Commission -- the cost consumers between $8 and $16 billion a year.

From its creation, the CAB has restricted competition in the airline industry. It has not approved entry of a new trunk carrier since 1938.

Just last fall it rejected an application by Laker Airways, a private British carrier, to fly regularly scheduled New York to London flights for $125 each way -- less than half of the present fare.

The CAB does not have jurisdiction over flights within a single State. As a result, there is vigorous competition, for example, on the Los Angeles to San Francisco route. That competition has driven the price down to $21.

The Washington to Boston flight is only a few miles longer, but is regulated by the CAB. Result? -- The fare is $45 -- more than double.

That's the good news. Now, for the bad news -- the ICC.

This agency divides up the country and allocates each area to just a few trucking firms. In other words, it creates oligopolies.

One ambitious firm -- Gateway Transportation -- is trying to compete on the route from Pittsburgh to Jacksonville, Florida. Because the ICC has awarded the direct route to someone else, Gateway's truck must make the trip via Cincinnati, Ohio -- more than 200 miles out of the way.

The ICC, in fact, is so busy preventing competition in interstate trucking that it forces truckers to travel empty about 40% of the time. Somebody over there still hasn't gotten the message about the energy crisis.

We need to limit the authority of the regulatory agencies -- to get them out of the business of regulating competition -- whenever and wherever possible.

We should end the CAB's authority to set fares and restrict routes. I think you would be amazed at how the airlines could discover ways to reduce rates if they had to compete for their business.

As a matter of national policy, we may want to maintain service on low-traffic routes to small cities, and that may require some kind of subsidy, but the savings would far outweigh the cost.

As for the ICC, the time has come to abolish it. The Commission was established in 1880's to prevent price gouging by the monopolistic railroads, but the railroads lost their monopoly when the truck arrived on the scene, and the ICC lost its function. Since then, the ICC has stood firmly and steadfastly -- in the *way* of competition.

I have taken you on just a quick tour of the field -- but I hope I have been able to make my case. If we are to strengthen and preserve our free economy, we must act. We must take the power from the board room and return it to the market. We must replace concentration with competition to keep prices down, efficiency up, and economic power responsible.

The vitality of competition comes from the desire of business to grow and prosper. There is no villainy in that instinct -- it is essential to a vigorous economy.

But when businesses get too successful or too big, they may begin to strangle competition.

Then Government must intervene. It must act as a referee, to limit and redirect growth when it threatens competition. This creative tension between business and government means litigation, which cannot displease you. But it also means an economy able to meet the challenges of the last quarter of the 20th century -- an economy which truly serves its true masters -- the American people.