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NOMINATION OF DONALD F. TURNER TO BE ASSISTANT ATTORNEY
GENERAL, ANTITRUST DIVISION, JUSTICE DEPARTMENT

GOVERNMENT
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HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-NINTH CONGRESS

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**NOMINATION OF DONALD F. TURNER TO BE ASSISTANT
ATTORNEY GENERAL IN THE ANTITRUST DIVISION,
DEPARTMENT OF JUSTICE**

THURSDAY, JUNE 10, 1965

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:12 a.m., in room 5302, New Senate Office Building, Senator Philip A. Hart (chairman) presiding.

Present: Senators Hart, Kennedy of Massachusetts, and Hruska.

Also present: S. Jerry Cohen, staff director and chief counsel; Horace L. Flurry, assistant staff director and chief counsel; Dr. John M. Blair, chief economist; Peter N. Chumbris, chief counsel for the minority; James E. Bailey, counsel for the minority; Kirkley S. Coulter, economist for the minority; Walter S. Measday, economist; Paul S. Green, editor; and Gladys E. Montier, clerk.

Also present: Thomas B. Collins, professional staff member of the Judiciary committee.

Senator HART. The committee will be in order.

Our hearing this morning is scheduled for the purpose of considering the nomination of Donald F. Turner, of Massachusetts, to be Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, succeeding William H. Orrick, Jr., resigned. The notice of this hearing was published in the Congressional Record on May 26.

Senator Hruska, did you have a statement?

Senator HRUSKA. No.

Senator HART. I am delighted that our colleague on the committee is at the moment at the witness table. We recognize Senator Kennedy.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Mr. Chairman, it is an honor for me to present a Yale man to this committee, Donald F. Turner, the nominee for appointment as Assistant Attorney General for the Antitrust Division of the Department of Justice.

Mr. Turner is also a Northwestern man, holding degrees from Harvard University, was a practicing attorney here in Washington before returning to Harvard College and the Harvard Law School as a professor.

He has been recently the visiting professor at Stanford University; he is a man who is extremely highly regarded and well respected in the

State of Massachusetts for his knowledge and contributions in this very important field.

It is a very deep pleasure and considerable honor to me to present Dr. Turner to this committee, a constituent of mine from Lexington, Mass.

Dr. Turner.

STATEMENT OF DONALD F. TURNER, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL IN THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Senator HART. Thank you, Senator. We have a summary biography of the man you just introduced.

The senior Senator from Massachusetts, Mr. Saltonstall, has by return mail, dated May 7, formally notified the committee that he is in favor of this appointment.

We realize that you were not talking with tongue in cheek when you said it is an honor to present him.

I think it would be in order at this point in the record to have printed the summary biography to which I referred.

Professor, this biography has been corrected by you, I understand.

Mr. TURNER. That is correct, Senator.

Senator HART. It reflects accurately the chronology that it seems to outline?

Mr. TURNER. Yes.

Senator HART. I notice that included in your experience is a period of two years as a law clerk in the Supreme Court. For whom, may I ask, were you clerk?

Mr. TURNER. I clerked for Mr. Justice Tom C. Clark.

Senator HART. I should indicate for the record that you are accompanied not alone by the Senator from Massachusetts, but the Deputy Attorney General, Mr. Clark, is here.

(The biography summary follows:)

DONALD FRANK TURNER

Born: March 19, 1921, Chippewa Falls, Wis.

Education: 1937-41, Northwestern University, B.A. degree. 1941-43, Harvard University, M.A. degree. 1946-47, Ph. D. degree. 1947-50, Yale University, LL.B. degree.

Bar: 1951, Washington, D.C.

Experience: 1942-46, U.S. Navy lieutenant. 1947-50, instructor in economics, Yale University. 1950-51, law clerk, U.S. Supreme Court. 1951-54, Cox, Langford, Stoddard & Gutler, Washington, D.C., associate attorney. 1954 to present, Harvard Law School, assistant professor and professor of law. 1964-65, visiting law professor, Stanford, University.

Marital status: Married, two children.

Office: Harvard Law School, Cambridge, Mass.

Home: 21 Robbins Road, Lexington, Mass.

Senator HART. I would like to be direct in the record with respect to just what in your distinguished background you have established clearly. You have a brilliant mind and you have demonstrated a willingness to serve in the Department of Justice and this is laudatory. I am sure the IQ of the Department will be even higher.

You were the author of a Harvard Law Review article not too long ago, the citation of which I have for the record—78 Harvard Law Review, 1313. This is a rather long article of 80-odd pages.

I suspect that it has been more carefully reviewed in the last several weeks by those interested in antitrust than perhaps any other current best seller.

Mr. TURNER. Perhaps the safest thing to say is that the article was written not by me but by another man with the same name.

Senator HART. With an answer like that already given, there is no attempt to clarify the point that I have in mind. I am sure you would be able to run me around in circles.

It is to the point of the seriousness of conglomerate mergers. I would not presume to paraphrase the point that you were making, as I understand that point from the article. But clearly, the suggestion is made that the greatest concern should be directed toward the horizontal merger and next the vertical and last the conglomerate.

This subcommittee—and with Senator Hruska here, I am sure it will become evident that there is not unanimity within the committee concerning the answer that should be written from the data that has been developed—but the subcommittee, without any inhibition from any member, has genuinely been making an effort to assemble all of the data on economic concentration on which a solid judgment can be made with respect to where we are headed and whether that direction is one that we should seek to change or not.

Now, as I read the materials thus far developed by the subcommittee on concentration, whatever rule of thumb we may apply, there has been an increase since 1947 of some 8 or 10 percentage points in the concentration in manufacturing assets by the top 100 or 200 companies. Dr. Mueller, of the Federal Trade Commission, in this series of hearings suggested that by 1975, if the trend continued at this rate, he would anticipate that the 200 largest would hold about two-thirds of manufacturing assets in this country.

The increase in overall concentration, I feel, has come importantly, if not largely, through conglomerate mergers. If this data would confirm my summary of it, would it not suggest that a very high degree of concern should be entertained by the Antitrust Division with respect to conglomerate acquisitions?

Mr. TURNER. Let me say several things.

First, let me restate a couple of points with regard to my article.

The comparison that I drew early in the article, among horizontal-vertical-conglomerate mergers, was sort of a preliminary introductory kind of assessment on a crude basis which I would take to be modified by my later discussion.

One of the problems is one of definition. What is a conglomerate merger? Actually, most mergers that we call conglomerate have very pronounced horizontal and/or vertical elements in them. In the balance of my article I did suggest several situations in which I thought that the threat of anticompetitive consequences was sufficiently serious to warrant striking those classes of mergers down. And with regard to those classes of conglomerate mergers I would say that at least some of them, not all of them, but at least some of them, the potential adverse consequences I felt were as serious as the ordinary classic variety of horizontal or vertical merger.

Now, the one thing that I did not make any endeavor to estimate, and I did not have the information on which I could have estimated it, was how quantitatively significant those classes of conglomerate mergers were. And I would be quick to say that if, quantitatively

speaking, those classes of conglomerate mergers which I thought have reasonably serious threats to competition, if they were quantitatively more significant than other classes of mergers, then, of course, the Antitrust Division ought to direct a good part of its resources to them.

Senator HART. All right.

Mr. TURNER. I have not had the opportunity, sir, to study the materials that have been developed before your committee and I will certainly find that opportunity quite rapidly.

Senator HART. Well, that, Professor, really is the most any of us could ask—an assurance that you would consider the data that has been and will be developed.

Again, this is an individual point of view on the subject, but I think that it reflects not just an overall increase—an increase in overall concentration—but the share that this group has in individual manufacturing industries—this is the thing that very frankly alarms me. I think this is the new dimension that the study of the committee is making.

Mr. TURNER. I would like to add one other point which I believe I made in my article, and that is, insofar as raw concentration of assets is concerned, if this deemed to be a problem beyond the dimensions of normal antitrust considerations, different kinds of legislation, it seems to me, would be more appropriate.

Senator HART. The uses, nonetheless, to which this power of concentration can be put, and I include in this reciprocity—which in your article gets a rather minor reference—practices, in other words, engaged in, within existing law, are, I am sure, going to be the concern of the Division.

Mr. TURNER. Yes.

Senator HART. Whatever we do or do not do about legislation.

Mr. TURNER. I didn't spend many pages on reciprocity, but I think I did say I thought it was a very bad competitive tactic and had to be taken into account in considering conglomerate mergers.

Senator HART. Yes, you make clear there is no economic justification for it.

Mr. TURNER. I just, from an antitrust standpoint, attempted to define the conditions under which I thought the threat of reciprocity was sufficiently serious to warrant blocking the merger.

Senator HART. We have all been helped from a nongovernmental source on this question of reciprocity. You may have noticed a very thorough article in Fortune magazine—I will give the citation to that if you want it. It is on this business of reciprocity, in fact, if not in theory.

Mr. TURNER. Yes, sir.

Senator HRUSKA. In regard to reciprocity, Mr. Turner, in your article you discuss the *Consolidated Foods* case. I understand your discussion was prior to the Supreme Court decision on that case. It was pending in the circuit court at that time?

Mr. TURNER. It was pending in the Supreme Court, sir.

Senator HRUSKA. In the Supreme Court—it had been decided by the U.S. court of appeals.

Mr. TURNER. Yes.

Senator HRUSKA. Ignoring that fact for a moment, you did point out there was a grave doubt that the reciprocity policy allegedly followed by Consolidated had any great effect in gaining sales. One

of the quotes is this, that Consolidated testimony was pointless to exert pressure on national suppliers is more than plausible. To refuse to carry national brands to commend widespread consumer acceptance would probably cost Consolidated far more money at the retail level than it would gain from even greatly increased sales of onion and garlic, which was the commodity in question.

Do I understand that you believe a merger such as this one should not be blocked merely because it opens the door to the use of reciprocity policy when such a policy is likely to be ineffective in practice?

Mr. TURNER. My position was, sir, and is, that I think the threat of reciprocity has to be sufficiently serious that a substantial share of the market may be foreclosed and in that particular case the evidence—the evidence that was recounted in the opinions of the Commission and the court of appeals—did not seem to me to be sufficient to establish that. The Supreme Court was satisfied that there was sufficient evidence of record to support the Federal Trade Commission's conclusion, and as I read the opinion, that was the basis on which the opinion of the Commission was affirmed. It was giving deference to the finding of the Government administrative agency on the basis of evidence of record which, as I indicated in my article, I had not myself examined.

Senator HRUSKA. In your article you also commented and criticized, as I remember, several of the antitrust cases recently filed by the Government which rested on allegations that competition had been injured by the increased company efficiency which flowed from those mergers.

I remember that you commented on this as being in that *Foremost Dairy* case as not being only bad law, but bad economics. Why would it be bad economics, Professor Turner?

Mr. TURNER. Well, sir, I believe one of the major purposes of protecting competition is to insure that our economy will obtain the benefits of competition and one of the principal benefits of competition is increased efficiency.

Senator HRUSKA. That inures to the customer, does it not?

Mr. TURNER. It inures to everybody.

Senator HRUSKA. To the customer, to the consumer. We are interested in them, also, in addition to the companies, are we not?

Mr. TURNER. Yes, sir; that is correct; and that is why I felt it was not appropriate for the Government to attack merger on the basis that it would promote efficiency.

Senator HRUSKA. Yet that *Foremost Dairy Company* case is pretty much the law of the land now and the most recent view of the Supreme Court, is it not?

Mr. TURNER. I would not be so pessimistic. This sentence that in the *Foremost Dairy* opinion was but one sentence in the opinion. The very brief discussion in the Supreme Court opinion in the *Brown Shoe* case that I referred to is rather ambiguous. I would say that the law has not firmed up in this respect.

Senator HRUSKA. Do you think that maybe in later decisions they may square around on that a little bit?

Mr. TURNER. I hope so.

Senator HRUSKA. In your discussion of predatory pricing you point out there have been very few cases actually proved of such a practice, even in the *A. & P.* case. Professor Adelman has shown that the

Government's case was wholly inadequate in this regard. We have been holding lengthy hearings on these conglomerate mergers and as the chairman indicated we have been told by some witnesses that such conglomerate mergers are dangerous because they have the power to engage in such predatory pricing. Do you consider that there is any such danger to be feared?

Mr. TURNER. I have seen little or no evidence of that.

Senator HRUSKA. Of course, a company does not have to get into conglomerate mergers and still possess that kind of power.

Mr. TURNER. Well, one of the difficulties of that theory is that anybody who has money and a deeper pocket has the power to indulge in predatory pricing—the capacity to indulge in predatory pricing.

The question is whether rational men are going to do this and if so under what circumstances, and as I indicated in my article, I see very little evidence that businessmen have resorted to this practice. It does not make sense except in very limited situations and even in those situations where it makes economic sense, it is such a plain violation of the antitrust laws that people are at least under some inhibitions not to do it.

Senator HRUSKA. In the field of mergers and in the field of growth which we have in the mergers the chairman has indicated that there has been an increase since 1947 of a given number of percentage points. There are some of us who believe that measurement should not be from a trough to a peak, but there should be a measurement from a peak to a peak over a period of years and perhaps a little bit longer in terms of years.

It is my recollection that if we started that measurement for example in 1931 to 1959 or 1961, that if anything, there would be just about a draw and no increase at all in some fields, an increase of concentration in some fields, and in some fields a decrease. So that it probably would be pretty neutral rather than an increase. Are you familiar with that conflict among economists and the differences expressed by them?

Mr. TURNER. I am aware there is a conflict and there has been a running conflict for a long time. I am not really able, sir, to evaluate those conflicting contentions.

As I told Senator Hart, I have not studied the more recent data and whereas I consider myself as having a fair economics background, I am not really a card-carrying economist and I would have, I think, limited capability myself of making a full statistical evaluation. I would have to rely more on other people.

Senator HRUSKA. You wrote a book one time, Professor. You are a coauthor—is that the way we put it?

Mr. TURNER. That is correct.

Senator HRUSKA. The book is "Antitrust Policy—An Economic and Legal Analysis," by Carl Kaysen and yourself, published by Harvard University Press, 1959.

In that book there is set out a model statute that is called draft antitrust law, and the object of the law would be to deal with unreasonable market power injurious to trade and commerce.

Mr. Chairman, I ask permission that the text of this bill be placed in the record at this point because I am going to direct a question or two on it.

Senator HART. It will be printed.

(The draft antitrust law is as follows:)

DRAFT ANTITRUST LAW

"SECTION 1. UNREASONABLE MARKET POWER INJURIOUS TO TRADE AND COMMERCE. Possession, by any one or more persons, of unreasonable market power in trade and commerce among the several States or with foreign nations is hereby declared to be injurious to such trade or commerce."

Comments.—This is simply a declaration of policy, in preface to provisions providing for proceedings against unreasonable market power.

"SECTION 2. MARKET POWER DEFINED—UNREASONABLE MARKET POWER. (a) For the purposes of this Act, market power shall mean the persistent ability of a person, or of a group of persons whether or not acting pursuant to agreement or conspiracy, to restrict output or determine prices without losing a substantial share of the market, or without losing substantial profits or incurring heavier losses, because of the increased output or lower prices of rivals. Evidence of market power may include, but shall not be limited to:

"(1) persistent failure of prices to reflect substantial declines of demand or costs, or to reflect substantial excess capacity;

"(2) persistence of profits that are abnormally high, taking into account such factors as risks and excess capacity; or

"(3) failure of new rivals to enter the market during prolonged periods of abnormally high profits or of persistent or recurring rationing."

Comments.—The core of market power is the possession of a substantial range of price and output choices, not decisively affected by the response of rivals or would-be rivals. It may be held by a single corporation, or it may be held by several corporations who are able to, or sometimes economically compelled to, behave jointly in such a way as to enhance their profits and/or positions over what would be attained if they competed against each other or if others were able to compete effectively against them. The draft definition specifically states that proof of agreement or conspiracy is not an essential ingredient of "group power." Indeed, the principal purpose of the statute is to cover oligopolistic industries in which effective "shared" market power exists without the ingredient of agreement essential to a Sherman Act charge. The definition technically covers the large-numbers cartel case as well, and in this respect is somewhat redundant. However, we think the coverage is desirable in order to eliminate the possibility that defendants could evade the statute of pointing to minor agreements of one sort or another and arguing that the statute covered wholly noncollusive market power only.

Market power is defined as the ability to restrict output or to determine prices either without losing a substantial share of the market or without losing profits or incurring heavier losses. This reflects the fact that sellers with market power usually have a choice between earning high unit profits on a small volume of sales, or lower unit profits on a higher volume of sales. Thus, the mere fact that defendants cannot raise prices without losing a substantial share of the market does not disprove the existence of substantial market power.

The categories of evidence are not exclusive, but probably indicate the most common indicia of substantial market power. The term "abnormally high profits" is admittedly imprecise, but we believe that it is workably determinable in most specific instances. It is often possible to say that profits are abnormally high without determining precisely what normal profits would be. Some cases would be clear, as, for example, a firm or group of firms persistently earning positive profits of any amount during a prolonged period of excess capacity.

"(b) Market power, as defined in section 2(a), shall be conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales."

Comments.—We have discussed the pros and cons of this provision in chapter III. We think it highly likely that this arbitrary definition would cover some situations in which substantial market power did not in fact exist, most likely in declining industries. However, we are inclined to favor it on the ground that it would simplify proof in a large number of cases where fuller study would substantiate the conclusion that these percentage figures would suggest; and on the ground that the enforcement agency, particularly with inevitably limited resources, would have the commonsense to avoid inappropriate proceedings.

"(c) Market power shall be deemed unreasonable unless shown by defendant or defendants to have been created and maintained, entirely or almost entirely, by one or more of the following:

"(1) such economies as are dependent upon size in relation to the market;

"(2) ownership of valid patents, lawfully acquired and lawfully used: *Provided*, That, on a showing that market power has been created and maintained by patents, the Government shall have the burden of showing invalidity, unlawful acquisition, or unlawful use;

"(3) low prices or superior products attributable to the introduction of new processes, product improvements or marketing methods, or to extraordinary efficiency of a single firm in comparison with that of other firms having a substantial share of the market."

Comments.—The "justifications" of market power, which defendants have the burden of establishing, closely resemble those suggested by Judge Wyzanski in *United Shoe*. The first and second are fairly obvious. The third deserves some elaboration. We believe that some defense of this kind is essential in order to protect the kind of behavior that competition is thought to foster. On the other hand, we have incorporated some limitations. Low prices or superior products are a justification only if attributable to factors specified. The efficiency justification is available only to a firm having substantial competitors in its market; in other cases, there is no satisfactory standard of comparison.

"SECTION 3. JURISDICTION OF ECONOMIC COURT—DIVISION AND DIVESTITURE. (a) The Economic Court is invested with jurisdiction to prevent and restrain injuries to trade or commerce resulting from the possession of unreasonable market power; and it shall be the duty of the Industrial Reorganization Commission to institute proceedings in equity before said court to prevent and restrain such injuries. Pending determination of the case, the court may at any time make such temporary restraining order or prohibition as shall be deemed appropriate in the circumstances.

"(b) On a judgment that defendant or defendants possess unreasonable market power, the court shall, to the extent that such relief is feasible, order the division or divestiture of assets of defendant or defendants, and, whether or not division or divestiture of assets is ordered, the court may grant such other or further relief as shall be deemed appropriate in the circumstances: *Provided, That*:

"(1) the court shall not approve a plan involving division of the assets of a single plant;

"(2) in determining the feasibility of division or divestiture of assets, the court shall take into account any probable permanent loss of substantial economies intrinsic to the defendant company or companies as currently constituted;

"(3) the court shall not order division or divestiture of assets where defendants show that such relief would not materially improve the competitive conditions which other relief, proposed by defendants, would achieve; and

"(4) the court shall not approve a proposed plan of divestiture or division of assets where defendants show that one or more companies resulting from the plan would lack reasonable prospects for survival under the competitive conditions likely to prevail."

Comments.—Structural reorganization of one or more firms, and creation of new independent companies, would be the usual and normal remedy for unreasonable market power, rather than a last resort. Defendants have the burden of showing that structural reorganization is inappropriate, or that any proposed plan is not feasible, except in the "single plant" case. Whenever it is apparent from evidence received on market power that some reorganization is feasible—which is likely to be the usual case—the court should not allow defendants to pursue the purely negative role of objecting to specific plans proposed by the enforcement agency, but should direct defendants to submit a specific plan or plans of their own.

"SECTION 4. AMENDMENT AND REPEAL OF EXISTING LAW. (a) Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C.). Section 1, as amended, is hereby amended to read in its entirety as follows: 'SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be unlawful.'

"(b) [Similar amendment of section 3, covering trade and commerce in and with the District of Columbia and the Territories.]

"(c) Section 2 of the Sherman Act (26 Stat. 209, 15 U.S.C.). Section 2 is hereby repealed.

"(d) The McGuire Act (66 Stat. 632, 15 U.S.C. 845) is hereby repealed."

Comments.—The amendment of sections 1 and 3 of the Sherman Act removes criminal penalties. The amendment of section 1 also repeals the Miller-Tydings Act. Parts of section 2 of the Sherman Act are reinstated in section 5 of the draft act.

"SECTION 5. SPECIFIC RESTRAINTS PROHIBITED—CRIMINAL PENALTIES. (a) It shall be unlawful for any person, in or affecting commerce among the several states or with foreign nations, to agree or conspire with actual or potential competitors for the purpose or with the effect of:

"(1) fixing or substantially affecting the price of any goods or services;

"(2) dividing or sharing the market for any goods or services;

"(3) fixing or limiting the production of goods or services; or

"(4) boycotting any other person or persons, whether competitors or not.

"(b) It shall be unlawful for any person to attempt to monopolize, or conspire with any other person or persons with an intent to monopolize, any part of the trade or commerce among the several States or with foreign nations.

"(c) It shall be unlawful for two or more competitors, in or affecting commerce among the several States, or with foreign nations, to agree, through a trade association or otherwise:

"(1) to abide by reported list prices;

"(2) to report offers at which no sales are made;

"(3) to inform each other of the individual buyers and sellers in all transactions;

"(4) to refuse to make reports, submitted, to each other, available to buyers or buyers' trade associations;

"(5) to submit books and accounts to the inspection of any member of the group or representative thereof; or

"(6) to report transactions to each other, or to a representative of the group, within a period of seven days or less after said transactions take place.

"(d) It shall be unlawful for a patentee or for any person purporting to exercise rights granted to a patentee;

"(1) to license the sale, or the manufacture and sale, of patented products, of products incorporating the patent, or of products involving a patented process, on condition that the licensee abide by price restrictions imposed by the licensor;

"(2) to license on condition that the licensee assign future patents to the licensor, or grant exclusive licenses under future patents to the licensor; or

"(3) to participate in cross-licensing or patent-pooling arrangements containing any restrictions on the participants other than restrictions on fields of use.

"(e) The several district courts of the United States are invested with jurisdiction to retrain violations of this section.

"(f) Every person who shall willfully violate any provision of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Comments.—This action sets forth per se offenses. Subparagraph (b) limits existing section 2 of the Sherman Act to cases involving specific intent.

"SECTION 6. PRIVATE SUITS. (a) Possession of unreasonable market power as defined in this Act, shall not be deemed a violation of the antitrust laws for the purposes of private suit under sections 4 and 16 of the Clayton Act (38 Stat. 731, 15 U.S.C. 15, 26); nor shall a final judgment or decree as to possession of such power be deemed a final judgment or decree under the antitrust laws for the purposes of section 5 of the Clayton Act (38 Stat. 731, 15 U.S.C. 16).

"(b) Violations of sections 1 and 3 of the Sherman Act as amended by section 4 of this Act, and violations of section 5 of this Act shall be deemed violations of the antitrust laws for the purposes of private suit under sections 4 and 16 of the Clayton Act; and final judgments or decrees as to such violations shall be deemed final judgments or decrees under the antitrust laws for the purposes of section 5 of the Clayton Act: *Provided, however,* That, except as to private suits based on willful violations of section 5 of this Act, recovery shall be limited to actual damages and the costs of suit, including reasonable attorney's fee."

Comments.—This section is self-explanatory. No private suit may be based on a violation of the unreasonable market power prohibition. Recovery of triple damages is limited to the per se offenses.

Senator HRUSKA. It is not too long.

In section 2 of the bill, which is found on page 267, you get into the field of trying to establish limits on sizes of companies. The text of that section reads as follows: "Market power, as defined in section 2(a), shall be conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales."

Now, do you still think today that that would be a good criterion upon which market power of a suspect character should be determined?

Mr. TURNER. I think you have to separate the last sentence, Senator, into two parts, one, whether there is market power; and two, whether it is suspect or should be subject to corrective measures.

On the first point I think that is a reasonably fair presumption. It of course would not be true in all cases. I think it would be true in most, and we suggest—Mr. Kaysen and I suggested—that as a test because we felt that as a practical matter it is extraordinarily difficult to get a much better impression in a lot of situations as to whether or not there is market power by introducing additional volumes of evidence. We suggested it more as a rule to promote administration rather than a rule that would accurately indicate from an economic standpoint and in any individual case whether there is market power in fact—whether market power in fact existed.

The second question as to whether market power, when found to exist on this or any other basis, should be dealt with was of course the subject of our proposal here. I have not thought about this for quite a while since we wrote this book. When we proposed this, we proposed this as a legislative recommendation, of course. We proposed it as a legislative recommendation because in our opinion existing antitrust laws were not adequate to cope with all of the situations of what we thought were unreasonable market power and a statute of this kind would fill that gap.

Now, as I say, this was a legislative proposal and we advanced it not with 100 percent confidence that it would be appropriate. It essentially was an academic recommendation and academics I think, typically and with good reason, if I may say so in our self-defense, look upon it as our principal job to propose what we think would be appropriate economic policy with rather minimal regard to political considerations.

And I would be inclined, I think, writing this book again, to come out about the same way as an academician.

The only reason I hesitate is that there are alternatives, longrun alternatives to a statute of this kind, one of which we suggested in our book, principally built around a very strong antimerger policy which does minimize the disruptions that would be caused by restructuring existing concentrated industries.

Now, as we indicated, a strong antitrust merger policy coupled with strong antitrust enforcement in other respects might possibly, over the course of time, coupled with economic changes that take place in the economy, lead to a deconcentration of a lot of industries that are currently heavily concentrated.

○ We felt, when we wrote this book, and I think we were guessing about it as much as anybody is guessing, because you cannot know for sure about things like this—we felt that that as a practical matter

would not be a satisfactory alternative. That is why we proposed this statute. And I think, as I say, as an academician, making legislative recommendations that I would come out about the same way now.

Senator HRUSKA. You prefer a strong antitrust policy and enforcement in other respects. In what other respects, other than size?

Mr. TURNER. I mean the usual regulations of conduct, prohibition of price fixing agreements, prohibition of unduly restrictive patent licensing arrangements.

Senator HRUSKA. Territorial?

Mr. TURNER. Territorial restrictions—that sort of thing; that is right.

Senator HRUSKA. This definition which is contained in section 2, how close does that get to the idea that bigness is badness—something that we have heretofore sort of shied away from in judicial decisions in all of our pious statements. How close is bigness to badness?

Mr. TURNER. I think it is quite a ways away from it, Senator, for this reason, that we have three very important exceptions here. We would not strike down—it is over on page 268—we said the market power shall be deemed unreasonable unless shown to have been created and maintained entirely or almost entirely, by one or more of the following. Now, these are situations in which we would not apply the remedy of dissolution. First, such economies as are dependent upon size in relation to the market. In other words, if the size is required by efficiency considerations, we would do nothing about that.

Second, ownership of valid patents, lawfully acquired and lawfully used, and finally low prices or superior products attributable to the introduction of new processes, product improvements or marketing methods, or to extraordinary efficiency of a single firm in comparison with that of other firms having a substantial share of the market.

In other words, I think it is fair to say that we would not contend that bigness is badness and where such relevant policies as the patent law are involved, we would not think that is bad. We would not do anything about it. But where you had market power which was excessive in relation to economic considerations, we thought it would be appropriate to do something about that.

Senator HRUSKA. Do you not, in the case of patents, if there is any showing now of market power having been created or maintained by patents, that are invalid or that are unlawful or unlawfully used, are there not remedies available now?

Mr. TURNER. Yes, this is just preserving what the law now is.

Senator HRUSKA. That is why I say, if we have those remedies for any transgressions of the law which are contained in section 2(c) and the three subdivisions that you have just referred to, too, what is really being done in your proposed legislation is saying, "These are especially bad if they are of bigger size." Why do we have to wait until companies get to a bigger size if we can invoke the sanctions of the law which are available right now for illegal and improper activities?

Mr. TURNER. Let me see if I can clarify this, Senator.

This was proposed as supplementary legislation. We were not proposing this as a substitute for existing antitrust laws. This was

proposed as an additional piece of antitrust legislation. We would, of course, continue, and indeed, we made several other suggestions of what we thought would be strengthening amendments to existing antitrust law of the ordinary variety.

In other words, what this proposal was directed at was business size yielding market power which was beyond what was necessary to achieve economies of scale, but which, for various reasons, could not be reached under existing antitrust law and more specifically this would refer, I think, to what the economists call an oligopoly industry, an industry dominated by very few firms operating in such circumstances that they could without collusion pursue noncompetitive policies.

In other words, situations where you get noncompetitive behavior, and absence of price competition, which, if reached by a price-fixing agreement would be subject to the antitrust law but which could not be reached if there was no agreement in the usual legal sense. That was the target of this proposal.

Senator HRUSKA. Now, notwithstanding your suggestion or your statement that bigness is not badness by your definition, I find it difficult to follow because in section 2(a) you say you are defining unreasonable market power. You say for the purposes of this act, market power shall mean the persistent ability of a person, or of a group of persons, whether or not acting pursuant to agreement or conspiracy, to restrict output or determine prices without losing a substantial share of the market, or without losing substantial profits or incurring heavy losses, because of the increased output or lower prices of rivals.

Now, that is a definition, and then you go on with the evidence that will show what goes into this. Then you say that market power as defined in section 2(a) shall be conclusively presumed where, for 5 years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales.

Now, in my understanding of the English language, when something is conclusively presumed and you make a size determination thereof, that pretty much attaches a label which makes bigness into the category of badness. Now, maybe you understand differently, but could you enlighten me on this?

Mr. TURNER. Would it help, sir, if I said in effect our proposal made some bigness badness?

Senator HRUSKA. But it is conclusively presumed.

Mr. TURNER. But then there are exceptions provided, you see. The market power is conclusively, presumed but we then provide that it shall not be deemed unreasonable if certain showings can be made.

Senator HRUSKA. But you shift the burden of proof to the defendants, do you not?

Mr. TURNER. That is right.

Senator HRUSKA. That is a pretty hard burden sometimes to sustain, to say you are guilty unless you prove yourself not guilty. That is a pretty heavy burden, is it not?

Mr. TURNER. Yes, it is—let me say two things about that.

First, that here, as in other legal issues, you often locate the burden of proof on the party that has the evidence most readily at its disposal.

Senator HRUSKA. With the powers of discovery that are available to the majestic and very, very powerful U.S. Government? Is there anything you cannot learn from these companies if you wanted to as Assistant Attorney General?

Mr. TURNER. I will find out. I will find out what the answer to that question really is, I guess. I have not had the opportunity to discuss it with the personnel in the Antitrust Division, but there is some indication that their answer to that would be no.

Senator HRUSKA. Three years ago we passed a very helpful statute, a discovery procedure, which is a very fine procedure, and we were told it would do everything necessary to get all the information the Department wanted without filing criminal charges or a lawsuit, which is fine, and that is why we approved it in the Congress. So I do not know that there was not anything you could not learn, but maybe you will find out.

Mr. TURNER. So, with regard to these particular issues, I think we felt that companies would be much more—could [more readily provide evidence on economies, evidence on patents, evidence of peculiar efficiencies that they themselves had than the Government. But this is an arguable issue. This was one of the main arguable issues that we faced and I would be the last to say that we were clearly right.

Again, let me point out that this was a legislative proposal which went beyond what we thought existed in the antitrust law at the time.

Senator HRUSKA. Have you made a survey to determine how many companies fall in that 50-or-more-percent classification?

Mr. TURNER. I have not; no.

Senator HRUSKA. Had one been made in the writing of the book or in preparation of it?

Mr. TURNER. There was a rather crude statistical study made in chapter 2 of the book which I frankly myself had very little or nothing to do with. It was basically an economic study.

Senator HRUSKA. Would it pertain to the automobile field, for example?

Mr. TURNER. Three companies hold well over 80 percent; that is correct.

Senator HRUSKA. What about steel, do you remember?

Mr. TURNER. I think not.

Senator HRUSKA. What would be the corrective procedure here? If 50 percent or more, or if 80 percent with four was shown, and there is a conclusive presumption, then what happens under the bill?

Mr. TURNER. Our recommendation was that to the extent it was feasible and to the extent that it would not destroy efficiencies, that additional firms be created by dissolution.

Senator HRUSKA. They would spin off the big companies there?

Mr. TURNER. That's right; they would have to be viable. If you could not create viable competitors, that would impose a limitation.

Senator HRUSKA. On page 27 of your book you get into the business of type 1 oligopoly—the first 8 firms have at least 50 percent of total market sales and the first 20 have at least 75 percent of total market sales.

What recommendations, if any, would you have to limit the power of type 1 or type 2 oligopoly?

Mr. TURNER. Those figures fall below the presumptive figures that we created in our proposed statute and the Government in cases of that kind would have had to establish market power by more direct evidence.

Senator HRUSKA. What views have you on premerger notification, Professor Turner? What comments would you have in mind? As you know, there have been attempts to ripen that into legislation here in Congress, and Congress has steadfastly refused to enact such a bill.

Mr. TURNER. I haven't considered it in detail. I would be favorably disposed to it. It certainly would be helpful to the enforcement agencies. I am not entirely clear what the objections are.

Senator HRUSKA. It is my recollection that there is comment in the book on it.

Mr. TURNER. Yes, I think we recommended that.

Senator HRUSKA. With respect to the above two alternatives—page 46, the paragraph numbered 3, the policy might be carried out either under a statute in which market power is defined in general terms, requiring a fairly expensive economic inquiry for determination of each case, or, under a statute in which market power is more arbitrarily defined, which would facilitate the disposition of cases and more clearly identify the targets, but could possibly to firms that, in fact, lacked market power.

You recall that passage, do you not?

Mr. TURNER. Yes.

Senator HRUSKA. In view of that would you have any comment?

Mr. TURNER. No, sir.

Senator HRUSKA. Does it contain any different interpretation of views than those discussed in your Harvard Law article?

Mr. TURNER. Which one—the last one?

Senator HRUSKA. The last one.

Mr. TURNER. I don't believe so. It was on a quite different subject.

Senator HRUSKA. On another subject, not that it makes it either good or bad, but there is a recommendation in the book that the treble damages provisions in the antitrust laws should be amended so that they would apply to only per se violation of the antitrust law.

What is your view and recommendation on that?

Mr. TURNER. I would have to think about that one again. We proposed two limitations of that kind. One is that criminal sanctions be limited to well-defined defenses. That we felt very strongly about and I still feel quite strongly about.

The second was that treble damages be limited to per se offenses. This is a somewhat more debatable issue.

As I say, I probably would want to think that one over again before I give a final opinion on that. As of the moment, I will assume that I was right when I first wrote this, but I would want to reconsider.

Senator HRUSKA. That is fair. Thank you very much.

Now, in your article, you do also discuss advertising which bears, of course, on the competitive picture. You state that the vast bulk of advertising with which we may be concerned in this regard has hardly been touched. Would you care to comment on the extent to which you feel the advertising industry might be affected by antitrust laws in the foreseeable future?

Mr. TURNER. That is a terribly difficult question, Senator.

Senator HRUSKA. Would you give us your thoughts why you believe that field has been neglected a good deal? What led you to say that or how important is it, or in what way?

Mr. TURNER. Well, let me put it in that context. I think that sentence—what is the page on that?

Senator HRUSKA. 1335.

Mr. TURNER. The issue that I was discussing there was the question whether or not promotional economies or advertising economies should be deemed a reason for invalidating a conglomerate or any other merger, and I was casting considerable doubt on that proposition, and one of the reasons I gave, and I think that is what that sentence referred to, was that the bulk of advertising does not—is perfectly lawful—does not fall within the category of false and misleading advertising as defined by the Trade Commission in the courts, and since this was so, it seemed to me that it was at best not clear that enforcement agencies should use promotional economies as an affirmative reason for invalidating a merger.

Senator HRUSKA. The particular passage that I had in mind reads:

that generally the only legislative action taken against salesmanship has to be to curb advertising and labeling that is false and misleading. What is false and misleading as defined by the Federal Trade Commission and the courts is undoubtedly an expanding category, but the vast bulk of advertising with which we may be concerned here has hardly been touched. It seems particularly difficult therefore to defend the proposition that promotional economies should be treated more harshly than other economies in any case where the real product differentiation is involved.

That is the passage to which you referred?

Mr. TURNER. That is correct.

Senator HRUSKA. And it is in that context that you discussed that subject?

Mr. TURNER. That is right. I am really not competent to comment on the issues as to how much further inroads, if any, should be made on advertising. I am not prepared on that.

Senator HRUSKA. Now, we have witnessed in recent years a terrific competition among various Government enforcement agencies in this field of antitrust and it has been somewhat disquieting to some segments of business and also to the particular industry involved. The banking industry is one example. Congress had thought we had passed a law saying that in this business of mergers, the jurisdiction would stay within the agencies that had always exercised exclusively the jurisdiction in that field. The Supreme Court decided that was not the way it was. That in their wisdom they thought that Congress did not do it that way, notwithstanding the assurances from the majority leader of the Senate who now occupies the White House. But that was the fact. There is legislation pending to expressly say once more, with the hope that the highest judicial body in the Nation will believe it at this time that the jurisdiction should stay in the banking agencies rather than in the Department of Justice.

To the extent that there is that competition for jurisdiction, there is added a tremendously greater quantity of confusion and uncertainty in a field in which those things already abound. Have you any general comments in that area on that subject?

Mr. TURNER. I do not believe so, Senator. I have not considered that issue very carefully and I have not had any opportunity to talk

it over with any of the people in the Department of Justice. I do not believe, although I may be wrong, the Department has submitted any recommendations on this. I do not really feel prepared to comment on it.

Senator HRUSKA. There was an amendment to the Robertson bill made late yesterday, but I will not bother you with it at this time. Sometime I would like to get your views on it when we get close to legislation in that field.

There is one interesting conclusion you make in your article; you do not believe that the Congress has given the courts and the FTC a mandate to campaign against superconcentration in the absence of any harm to competition. I imagine that is an invitation to Congress to speak in legislative form, is it not?

Mr. TURNER. It was not an invitation. It was just a statement of what I felt to be a fact.

Senator HRUSKA. The what?

Mr. TURNER. It was not an invitation, sir; it was just a comment on what I thought the current situation is. I was not making a recommendation one way or the other on that issue.

Senator HRUSKA. Mr. Chairman, I have just one other item here and that has to do with the background of our candidate. In Nebraska we are very proud of him. He is a graduate of Benson High School of Omaha, Nebr., where he was a member of the debating squad and we do believe that he has really attained tremendous stature in his chosen field of law.

I would very much like to have included in the record at this point an article from the Omaha World-Herald of April 28, 1965, and, although it deals with other matters, the headline is "Benson Graduate Appointed Antitrust Division Chief." Good old Benson has come into its own once more.

Among many of its achievements this is one of the most brilliant and I would like to have that included in the record because it does recite other facets of Mr. Turner's career and I for one want to wish him well in his duties that he is assuming. We expect to be seeing you from time to time within our Judiciary Committee and Antitrust Subcommittee whenever we have legislation that does affect your particular field.

Mr. TURNER. Thank you very much.

Senator HART. The Omaha World-Herald article will be printed.

Senator HRUSKA. Thank you, Mr. Chairman.

(The article referred to follows:)

[From the Omaha World-Herald, April 28, 1965]

BENSON GRADUATE APPOINTED ANTITRUST DIVISION CHIEF

As a Benson High School senior in May 1937, Donald F. Turner and President Franklin Roosevelt spoke from the same platform in Washington, D.C.

Now, 28 years later, President Lyndon Johnson has appointed the former Omahan Assistant Attorney General in charge of the Antitrust Division.

President Johnson chose Tuesday's nationally televised news conference to announce the appointment.

Mr. Turner, a former U.S. Supreme Court law clerk, is a visiting professor at Stanford University.

Honors came early to Mr. Turner, a minister's son.

He was one of five boys named in the finals of the 1936 Nebraska Young Citizens' contest sponsored by the American Legion and the World-Herald.

He and Richard Abernathy, Jr., now vice president of N. P. Dodge Co., teamed to win the Nebraska debate title in 1937.

Mr. Turner was chosen that same year to speak with President Roosevelt at the opening session of the National Red Cross conference. He won the trip in a Junior Red Cross oratory contest against four competitors.

Mr. Turner earned his undergraduate degree at Northwestern University and a postgraduate degree in economics at Harvard University.

After serving 4 years in the Navy during World War II, Mr. Turner taught economics at Yale University, attending Yale Law School at the same time.

Editor of the Yale Law Review, Mr. Turner was graduated from law school at the top of his class.

After serving as a clerk to the U.S. Supreme Court, the former Omahan joined the faculty at Harvard as a professor of law.

Senator HART. It does make comment with respect to matters not included in the biography which I think the readers of this record will find interesting.

Just by way of an added footnote and comment on two of the matters raised by the distinguished Senator, and your responses, on this business of efficiency. You make a point of agreeing with Senator Hruska that the effect on consumers is a darn good rule of thumb to apply in any of these economic controversies that develop. I am sure that you would agree that when we consider efficiency in terms of evaluating a proposed merger, we should be conscious that efficiency in theory is of no value to the consumer unless there is sufficient competition remaining to persuade the passage of that theoretical efficiency on to the consumer.

Mr. TURNER. Yes, sir; that efficiency is a good thing; it is not a bad thing. But this does not necessarily mean in any case where some increase in efficiency could be shown that this would protect a merger which in other respects might cause a significant decline in competition. For one thing, mergers are not the only way to achieve efficiencies. You can also do it by internal growth.

Senator HART. The second point was again on this matter of predatory pricing. Senator Hruska properly and correctly summarized the presentation made by Professor Adelman. I would hope that you would also be aware of what Professor Dirlam had to say with respect to Professor Adelman's approach.

I think it is not out of order to suggest that you might sometime visit with a very able member of the committee staff, Mr. Flurry who I had in mind to comment on that *A. & P.* case. Mr. Flurry lived with that case for a number of years and examined over 100,000 documents, many of which bore on the predatory pricing. You might find such a visit would show you that he has some pretty strong views.

Mr. TURNER. None of us is infallible, Senator. I am sure Professor Adelman would agree that he was not.

Senator HRUSKA. Would the chairman yield on that point?

Would you say our laws on predatory pricing are quite adequate and if there is any evidence of such practices that prosecution would not be too difficult so far as statutory provisions concerned for that purpose?

Mr. TURNER. I think it is quite adequate.

Senator HART. The problem is to recognize it before it becomes a fait accompli.

Senator HRUSKA. There we get into the business again of the capability to predatory pricings. It is just like the ownership of an ax or the ownership of a shotgun. Normally, you chop down wood with an ax and you normally shoot game with a shotgun, but there is the capability of the owner of both those items to put them to illegal use and does not know how to get at this use of anticipating predatory pricing in advance. That would be kind of hard to interpret.

Senator HART. Senator Hruska and I go around this circle periodically. Mr. TURNER. I think I better stay on the outside.

Senator HART. I do not know whether the moral of this hearing is that you should or should not write books and law-review articles. But clearly, the action of those of us present is favorable and notwithstanding the sections and paragraphs that we may pull out of your text of the article and proceed to worry over.

Senator HRUSKA. I think books should be written and so should law articles be written, Mr. Chairman. If they were written as purposefully as these two in this instant case, we would all be better off. I do hope the witness did not think that I endeavored to pull any of these concepts out of context from the book because I did strive not to do that. But by referring to specific passages I wanted to focus on the very concept which was symbolized by those passages. But I think it is helpful to get these things from the people who spend almost a lifetime in studying and teaching and also practicing the law that is involved in the Antitrust Division.

Senator HART. Unless the Senator from Nebraska thought that I was suggesting that he might pull something out of it, the chairman had in mind some of the comments that he made.

Because readers of this record, which is really more expansive and goes into more substance than normally occurs in these hearings on nominations, I would like to have printed in the record a table that deals on the discussion that we had over the proposed draft of the antitrust laws bearing on 50 percent or more and 80 percent or more of the market in individual industries. It is table A, on page 89 of part 1 of the economic concentration record of the committee, which will point up specifics of some of the additional consequences of the effect of such a draft of the law on the books. The chairman is entering it not because he feels the law should or should not be enacted, but for the reader this will give a substantial advantage of what would be reached.

(The document referred to follows:)

TABLE A.—Major industries¹ with the 4 largest companies accounting for more than 50 percent and the 8 largest for 75 percent or more of the value of shipments, 1958

Industry code	Industry	Percent of value of shipments accounted for by—		4 largest companies change, 1947-58, percentage points
		4 largest companies	8 largest companies	
3723	Aircraft propellers.....	97	99	-1
3534	Primary aluminum.....	96	100	-4
3741	Locomotives and parts.....	95	99	+4
3211	Flat glass.....	92	99	+2
3651	Electric lamps (bulbs).....	92	97	0
3664	Telephone and telegraph equipment.....	92	94	+2
2841	Soap andlycerin.....	90	94	+11
2862	Softwood distillation.....	89	96	+3
2073	Cheewing gum.....	88	95	+18
3272	Gypsum products.....	88	96	+8
3612	Carbon and graphite products.....	87	92	0
3511	Steam engines and turbines.....	87	97	-1
3692	Primary batteries.....	84	95	+8
2043	Cereal breakfast foods.....	83	95	+4
2274	Hard-surfaced floor coverings.....	83	(4)	+3
3411	Tin cans and other tinware.....	80	89	+2
2111	Cigarettes.....	79	99+	-11
2811	Sulfuric acid.....	79	93	+3
2896	Compressed and liquefied gases.....	79	88	-4
3572	Typewriters.....	79	99	0
2825	Synthetic fibers.....	78	96	0
3353	Aluminum rolling and drawing.....	78	85	-16
2826	Explosives.....	77	89	-3
3571	Computing and related machines.....	77	85	+8
3663	Phonograph records.....	76	83	-3
2045	Flour mixes.....	75	86	+34
2216	Finishing wool textiles.....	75	85	(5)
3717	Motor vehicles and parts.....	75	81	+19
3011	Tires and inner tubes.....	74	88	-3
2094	Corn wet milling.....	73	92	-4
2141	Tobacco stemming and redrying.....	73	90	-15
2895	Carbon black.....	73	98	-5
3313	Electrometallurgical products.....	73	91	-15
2072	Chocolate and cocoa products.....	71	84	+3
3581	Domestic laundry equipment.....	71	90	+31
3615	Transformers.....	71	84	-2
3584	Vacuum cleaners.....	70	89	+9
2852	Inorganic color pigments.....	69	83	+2
3521	Tractors.....	69	90	+2
2223	Threadmills.....	68	79	+3
3021	Rubber footwear.....	65	82	-16
3275	Mineral wool.....	65	79	+8
2812	Alkalies and chlorine.....	64	89	-6
2833	Medicinal chemicals, including botanicals.....	64	77	+8
3229	Pressed and blown glass, not elsewhere classified.....	64	79	+13
3691	Storage batteries.....	64	81	+2
3641	Engine electrical equipment.....	63	79	-4
2093	Margarine.....	62	86	-2
3497	Metal foil.....	62	76	+12
2824	Synthetic rubber.....	60	86	+7
3721	Aircraft.....	59	83	(5)
3292	Asbestos products.....	59	76	+1
3221	Glass containers.....	58	75	-5
3742	Railroad and street cars.....	58	81	+2
2131	Cheewing and smoking tobacco.....	57	82	-4
3593	Ball and roller bearings.....	57	77	-5
3722	Aircraft engines.....	56	77	-16
2121	Cigars.....	54	75	+13
3261	Vitreous plumbing fixtures.....	54	75	-4
3586	Measuring and dispensing pumps.....	52	85	+3

¹ Industries with a value of shipments in 1958 of more than \$100,000,000.

² Percentage withheld by Bureau of the Census to avoid disclosing figure for individual companies. This figure was calculated from data in Standard & Poor's "Industry Surveys."

³ 1954-58.

⁴ Percentage withheld to avoid disclosing figure for individual companies.

⁵ Not available.

Source: Concentration Ratios in Manufacturing Industry, 1958, table 2-A.

Senator HRUSKA. Mr. Chairman, I am indulging in the observation that the first time, on a national basis, that we had one company producing or accounting for more than 50 percent of the products in a given field as indicating monopoly, and was very bad and should be dealt with and strictly and sternly, came during the candidacy of one William Jennings Bryan, another distinguished Nebraskan, back in 1908. Those were the early days of antitrust and Bryan's statement of quantitative basis has gone far and I imagine it is this reason that bigness is not badness, per se. Maybe that will be shattered one of these days but there is that historic footnote to which I would like to refer.

Senator HART. Did he go to Benson?

Senator HRUSKA. No, he did not go to Benson. He was educated in Illinois. I would also ask, Mr. Chairman, to convey the regrets of the Senator from Illinois, Mr. Dirksen. He is busily engaged in the Finance Committee reducing people's taxes and he thought that was so important that he asked me to say that he felt he ought to be there. And it is to his State that we will give credit to the education of William Jennings Bryan.

Senator HART. I am sure he would want the record correct in that regard.

Thank you very much.

(Whereupon, at 11:18 a.m., the subcommittee adjourned.)

