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# Emerging Issues with Respect to Merger Enforcement Standards

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**Authors**

Daniel F. Kolb, Edward W. Large, David Boies, Thomas Dieterich, Malcolm R. Pfunder, and Joseph P. Bauer

## PANEL DISCUSSION

DANIEL F. KOLB

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JOSEPH P. BAUER

*Associate Professor of Law  
Notre Dame Law School*

EDWARD W. LARGE

*Senior Vice-President and General Counsel  
United Technologies Corporation*

DAVID BOIES

*Chief Counsel  
Senate Judiciary Committee*

THOMAS DIETERICH

*Member of the New York Bar*

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*Assistant Director for Evaluation  
Bureau of Competition  
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MR. KOLB: I think we are particularly fortunate in the panelists who have assembled for this discussion. And I want to introduce each of them in a moment. Let me first just take a brief bit of time to describe for you what we hope to do today, which is to focus on what we think, within the general scope of merger standards, is the most important issue that we are facing at this time.

We think the key issue is the new legislation that has been proposed in Congress, which is aimed squarely at putting a limit on the size of corporations through limitations on their ability to enter into mergers. The principal focus is conglomerate mergers. And without stating the case for the pro and the con view on the legislation, let me just say that it appears to present for our country a very substantial question of policy.

The best way to define the legislation is to simply state that each of the forms of legislation proposed suggests that a cap, a numerical value, be placed on the size of mergers that will be permitted or mergers that will be permitted by corporations of particular size. A figure such as \$2 billion, \$3 billion, etc., may be used as the threshold figure, and over and above that figure, a corporation of that size could not merge with another corporation of a particular size. There is enough variation in the threshold tests that I do not think we should try to be more specific now, except to tell you that that is step one in the legislation.

Step two in most of the proposed drafts is to provide defenses, defenses that a party trying to undertake such a merger would be able to assert as a basis for justifying the merger, even though it was over the threshold test. For purposes of introduction, following is the statement of some of the defenses that might be permitted from one of the draft bills.

One, the transaction will have the preponderant effect of substantially enhancing competition; two, the transaction will result in substantial efficiencies; three, within one year before or after the consummation of the transaction, the parties thereto shall have divested one or more viable business units, the assets and revenues of which are equal to or greater than the assets and revenues of the smaller party to the transaction.

Others have proposed that there be no defenses, but for the most part the view up to now has been that some defense should be allowed, so as to permit corporations to acquire at least something after they have passed over the threshold test.

Just one further thing. A fundamental tenet for the proponents of this legislation is that it represents an effort to deal with bigness. We have for years in our antitrust legislation heard that it does not quite reach the point of declaring bigness to be bad. This legislation, in a somewhat less varnished form, basically would say that beyond a point we will regard bigness as having effects detrimental to our society.

Now, let me introduce for you the people we have assembled for this panel. I am very grateful that they all could attend. First of all, down on my left, the far left, is David Boies. David is Chief Counsel for the Senate Judiciary Committee, the committee before which much of the legislation will be discussed. I think it would be fair to identify David in general terms as a proponent of legislation in this area, though I do not want to speak for him.

Sitting next to David—and we put the two of them together for obvious reasons—is Ed Large, who is General Counsel and Vice-President of United Technologies Corporation (UT), one of the fine

corporations of America that has made a habit in recent years of entering into very large acquisitions. Mr. Large is not a proponent of the legislation.

Directly next to me, on the other side of Mr. Large, is Sandy Pfunder. Sandy is the Assistant Director for Evaluation of the Federal Trade Commission. He is known to many of you as the father of Hart-Scott-Rodino regulations. And most importantly, he is here today to speak for the Federal Trade Commission (FTC), which is for the legislation.

On my immediate right is Joseph Bauer. Professor Bauer is from Notre Dame Law School. He has written an important article on the subject of conglomerate mergers. Professor Bauer purports to be objective on the subject.

On my far right is Tom Dieterich. Tom is a partner at Sherman and Sterling. He specializes in antitrust work. And he has just completed what we hope will be close to the final draft of the merger standards monograph that this committee has been working on for some years. Tom is the chairman of the committee that has done the tremendous work on that document. It traces the history of merger standards in the United States. And he is, I think, in a particularly fine position to give us a historical perspective. As to Tom's position, I will say nothing.

Now, let me say first that some of the speakers particularly would like to make an opening statement. For the most part, we intend to conduct this program in as free flow a form as possible. We do not have a fixed format. But we do think it would be useful for those persons who would like to make an opening statement to do so, and then for the others to respond if they wish. After that, I am going to ask some very broad questions and let the speakers debate these very important subjects back and forth.

Professor Bauer has indicated that what he would like to do first—and we are going to let him start off—is to try to give us a broad indication of what the issues are, to try to set the scene. And following that, Ed Large is going to want to make a statement, which I think is very much against this legislation. And we will follow with the other speakers. Professor Bauer.

PROFESSOR BAUER: Thank you. I appreciate the plug for my article.<sup>1</sup> I did not even pay for that. But I think it is fair to say that the conclusions

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<sup>1</sup>Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, 58 BOSTON U.L. REV. 199 (1978).

from the article that I wrote are that conglomerate mergers, by and large, are getting out of hand. And I proposed legislation which was not identical to the Kennedy bill, but which offered the same general approach.

The billing that I have is as an academician, so what I am going to do is bring back some of those lovely days at law school, by asking questions and not giving you any answers. What I thought would be useful is to attempt to identify some of the issues raised in the conglomerate merger area. I am afraid, however, that, although discussions of these proposals are provocative and controversial, they may not be terribly fruitful. It is the reasons for this lack of productivity which I would like to attempt to identify.

First of all, let us start with the area in which there is little, if any, disagreement. Although one could quarrel with the relevant statistics to choose, the base years to be chosen, the effects of inflation, and so on, an examination of the raw data will indicate that the absolute size of American corporations has grown over the past several decades. Furthermore, there has been some increase in the concentration ratios—the share of the market held by the four largest firms—in a number of major industries. And there also has been a growth in total industrial concentration—the share of the American economy held by the 200 or 500 largest corporations.

There is greater disagreement as to what I will call the “why” question. Is this growth, both of relative and in absolute size of American industries, the result of internal expansion or the result of mergers, including those of the conglomerate variety? I believe the evidence is ambiguous. And I would suggest that we answer this question by admitting that some, but clearly not all, growth is the result of mergers and that, for the moment, we ought not seek to identify statistically how dramatic the effect of mergers has been.

Now on to the area of true disagreement, which I will label the “so what?” inquiry. Even if it is true that mergers have resulted in some increases in size and concentration, should we be concerned about this phenomenon? Here it is important to identify some of the specific battlegrounds. Some argue that mergers, including the conglomerate variety, yield economic benefits. They produce companies which are more efficient, allowing the production of more and better goods and services at lower prices. Others argue that there are no true economic efficiencies, but only greater ease of access to capital or financial markets. Next, some argue that mergers are useful ways to replace old and inefficient management. Opponents of conglomerate mergers, on the

other hand, urge that they may contribute to oligopolistic practices. The argument is made that America needs the large companies which flow from these mergers better to compete in international markets against monopolies assisted by foreign governments. Some argue that the larger companies resulting from the mergers will have an undesirable amount of political power or will cause social disruption. Others argue that not only is this premise unproven, but even if true, it is an irrelevant consideration for the antitrust laws. And the list of disagreements could be extended for several more hours.

Finally, why the disagreements? What hope is there for consensus? The difficulty, I suggest, flows from at least three phenomena. First, most, if not all, of the assertions are simply not subject to empirical proof. The scientists would run an experiment. Two test tubes would be filled with the same chemicals; then, one would be treated differently from the other controlled sample. But we have no way of running such an experiment in our economy. We simply cannot say what would have happened had the merger not taken place, after it is consummated.

The second source of disagreement is whether the merger question is itself the problem or only one aspect of a larger problem, *i.e.*, the growing size of American companies. Does it make any difference whether Exxon or General Motors get to be \$60 billion corporations through mergers or through internal growth? If the answer is no, then opposing large conglomerate mergers only attacks a portion of the problem. Perhaps the focus of the debate should shift back to the proposal made by the late Senator Philip Hart, to break up many large American corporations in oligopolistic industries.

The final source of disagreement is obvious once we expressly admit what we all recognize—that antitrust is not a value free enterprise. Should the antitrust laws be limited, as Professors Bork and Posner would argue, solely to the advancement of economic goals? Is there not room for achieving political and social objectives as well? And what presumptions or burdens of proof are appropriate? Is the Business Roundtable right, that we must leave American industry alone until and unless the government can meet the burden of proof of showing that a merger will have adverse effects? Or should we admit that it may be quite difficult to prove that the damage is clear, but that we should nonetheless lock the barn door before the horses escape?

The debate could continue. But I suggest that, although this discussion is—at least I hope it will be—interesting and provocative, we are unlikely to reach any kind of concrete result. What we are going to achieve—either today or more likely sometime down the road—is some

sort of compromise. That is inevitable, because what we are doing is attempting to resolve economic questions in a political arena.

MR. KOLB: The next speaker, I think, is not in doubt as to his position on how we are to answer the questions which Professor Bauer has listed. Let me turn to Ed Large, who is the Senior Vice-President and General Counsel of United Technologies, and hear the point of view that is very much against this legislation.

MR. LARGE: I welcome this opportunity to present the view from United Technologies.

United Technologies was billed here as “acquisitive” and I guess you can call us that—at least if you define the word *acquisitive* as having a desire to acquire. Certainly the four major acquisitions we’ve made in the last five years couldn’t have been made without a strong desire. But if you define *acquisitive* as the desire to acquire merely for the sake of acquiring and possessing, then, just as certainly, we would not qualify at United Technologies.

We never have had any desire to acquire just for the sake of acquiring. The acquisitions we have made were part of a carefully reasoned strategy to diversify, to build greater stability by expanding our industrial-commercial base and by increasing our international presence. I believe our growth at United Technologies has been good for everyone—shareowners, employees, customers, suppliers, and the communities where we do business.

But as I look at the current American business scene, I feel very much like Alice in Wonderland. We’ve got Mad Hatters spouting nonsense rhymes about the need for ever more legislation. We’ve got antibusiness, antimerger advocates seeking simplistic solutions under the guise of antitrust, by emulating the Queen of Hearts and shouting at business: “Off with their heads.”

Of course, challenge is nothing new to American business. Competition has always been the catalyst for achievement in our free-market system. But more and more, we’re facing competition of a new kind. We don’t welcome it because it’s not fair. The challenge is coming from the deliberately orchestrated policies of some foreign governments. Their goal is to increase the consolidation of their large industrial-based corporations to achieve economies of scale. They do this through carefully planned merger programs, through lavish tax and financing incentives, through protective national purchasing policies, and sometimes even through direct government ownership.



State-owned or state-controlled companies have obvious built-in advantages in their home markets. As extensions of the state, they are given special preference when dealing with their government. They can be and are used to support local enterprises. Perhaps most important, many of them operate at home and abroad *without* the need to earn a profit. New investment capital flows as needed from a seemingly bottomless well of government grants, loans, and subsidies. Although Britain's new government is moving to rein in their investment subsidy programs, the rest of Europe is not following suit. As one top French official recently said: "We're going in the opposite direction." French investor subsidies are expected to top \$1 billion this year. The Italian government has dispensed nearly \$20 billion in the past decade. And just two weeks ago, the West German government urged Germany's two *largest* aircraft manufacturers, MBB and VFW-Fokker, to merge *to remain competitive internationally*.

At a time when other governments are openly supporting efforts by their national companies to combine for greater marketing strength and economies of scale, some people in our government are preaching a gospel of limited growth—that bigness is badness. The proponents of the bigness is badness legislation seek to correct what they *imagine* to be the political and social evils produced by our economic system. They seem to be saying our system is bad because it breeds corporations so big they are politically accountable to no one, so profit-oriented they threaten our social well-being.

Now, I've looked long and hard for this political muscle we are *supposed* to have. I just can't find it. What I *do* find is American business being tied up more and more in a tangle of regulatory red tape—that restricts and governs its decisions on how to hire and pay employees, how to finance plants and where to locate them, how to compete and expand, how to advertise, what to report to shareowners, and what new products to market.

Quite simply, what the antimerger advocates are afraid of *just is not happening*. Let me give you an example of what *is happening*. One of the reasons for the modest success we've enjoyed was our merger with Otis Elevator in 1976. The merger was good for us, but it was also good for Otis. Otis's market share since the acquisition has remained fairly constant. To maintain this share against such large companies as Hitachi of Japan, Thyssen of Germany, and Westinghouse, Otis simply had to be of comparable scale. The merger with United Technologies has given Otis that scale. As a result, Otis's investment in R&D and product improvement has nearly doubled since the merger. Its operating

performance and efficiency have also improved. Despite sluggishness in the construction industry, with new starts way down, 1978 was the best year ever in the one-hundred-twenty-five-year history of Otis.

Building companies that are successful improves more than just their own balance sheets. It also improves the lot of other companies and individuals and, through them, has a multiplier effect on the communities where they operate. For example, prior to the merger, Otis had more than 13,000 vendors in North America. Today, Otis has more than 17,000. Otis's headquarters in New York City continues to support a broad variety of health and welfare, educational, and cultural activities. Since the merger, Otis's contributions have increased by more than one-third. The merger has been sound for Otis employees as well. There have been wide-ranging improvements in employee benefits and programs. We have instituted a savings plan, a dental assistance plan, and more than 100 affirmative action programs.

Otis, its employees, its suppliers, and the communities where it is located have *all* been helped by the merger with United Technologies. Truly, everyone has benefited. But under the restrictions on size in the proposed legislation, our merger with Otis would not have been allowed. It's ironic to me that at a time when American industry is struggling to curb inflation, create jobs, and sharpen its competitiveness in the world marketplace, our government would be dreaming up ever more legislative ways to tighten the handcuffs of business.

More than ever, markets are nowadays transcending national boundaries. America sells abroad. Foreign producers sell here. Industrialized nations everywhere are vying for trade. How many of you, for example, drive German cars, watch Japanese television sets, use Italian typewriters, drink French wine, or fly British-powered aircraft? For American companies to compete against huge foreign enterprises, we have to be big and we have to be efficient. It takes a lot of people and resources to develop, manufacture, market, and service something as complex as a jet engine or a modern elevator system.

We're hearing a lot these days about Chrysler and its problems, and that with its \$16 billion plus of sales in 1978, it's the tenth largest industrial firm in the United States. Chrysler is big. But I wonder how many Americans know that Chrysler's Japanese partner, the Mitsubishi Group, is nearly three times larger with annual sales of \$44 billion! And the Japanese government certainly isn't concerned about Mitsubishi's size—except to hope it gets even larger.

Instead of devising ways to shackle American business, it seems to me our government should be trying to help it become more competitive.

Rather than stifle corporate growth through unwarranted and artificial barriers, the U.S. government should be stimulating its companies to achieve the strength and diversity and efficiency needed to book business abroad and provide jobs here at home.

It's time for government and business to *stop* working at cross-purposes and *start* working together to keep our economy healthy, competitive, and growing. If we are unable or unwilling to work together to meet these new challenges to our free-market system, our businesses will lose more and more sales. Without sales, we won't need production. And without production, we certainly won't need people. And while some may have other opinions, we all know that lawyers are people too!

That's the view of United Technologies.

MR. KOLB: Thank you, Ed. As Professor Bauer would say, there are many questions and we are not sure that we can get an answer to any of them. And Ed Large would say that we do not need this legislation particularly because of the importance of competing with companies from nations abroad.

I would like to now turn to David Boies to see if, as a proponent of the legislation, he has a point of view as to either of the first two opening statements.

MR. BOIES: I am, as Dan suggests, a proponent of the legislation. The purpose of the legislation is to restrict unnecessary increases in concentration. The antitrust laws have traditionally focused on competition within a particular market and concentration within a particular market and not on so-called aggregate economic concentration or concentration in the economy in general. But the economic, social, and political costs of aggregate concentration may be as troubling—and even more troubling—as the costs of concentration within a particular market. And it is to the issues raised by such so-called aggregate concentration that this legislation restricting large conglomerate mergers relates.

Large mergers inevitably reduce the number of independent businesses. This loss of diversity can limit the choices available to consumers. It can also stunt the process of growth through innovation. As conglomerates buy up more and more formerly independent companies, a new layer of business bureaucracy is imposed on the acquired companies. This loss of diversity has economic effects—it reduces the number of decision-making centers, imposes additional layers of intracorporate bureaucratic review, and impedes experimentation and innovation. The principle of federalism that holds that innovation and

experimentation are promoted by dispersion of power has its application to economic affairs as well. The loss of independence may also adversely affect company-community and employer-employee relations as absentee management becomes increasingly distant and isolated from employee and community interests.

Economic concentration and the loss of diversity, particularly on the kind of scale that mergers are taking place today, can have significant social and political implications as well as economic effects. One of the trends that we have seen in Washington over the last five years has been the increasing political activity of business political action committees (PACs). There are about 800 active business PACs today. If the resources and activities of those 800 business PACs were concentrated in 80 PACs, or in 8, I think that the loss of diversity and the concentration of political power that would result is something that is very troubling in any kind of society, but particularly one like ours that prides itself on diversity and prides itself on political, social, and economic democracy. Large corporations, entirely aside from organized political activity, have profound effects on our society—the tastes we acquire, the activities that are encouraged or discouraged, the attitudes that are advertised or attacked, the products and services that are offered or discontinued, and the charities and public activities that are supported or starved for funds. Only the most naive among us would suggest that in these areas large corporations are guided and controlled wholly by the “invisible hand” of the marketplace. We can argue about how much discretion large corporations have in exercising their power—but there can be no argument that they have some significant discretion. It is an article of democratic faith that such discretionary power is best when it is dispersed and most troubling when it is concentrated in a few hands—however benign.

Large mergers contribute significantly to the level of industrial concentration. In 1975, there were fourteen mergers with a value in excess of \$100 million. In 1977 there were forty-one such mergers, in 1978 there were eighty such mergers, in 1979 there have already been ninety such mergers and obviously the year isn't over yet. We can argue over how much concentration is rising. Whether concentration is greater today than it was five years ago or ten years ago, I think, depends to some extent on what figures you look at. The one thing that is clear is that the concentration is higher than it would have been in the absence of the merger activity that has taken place.

Let me respond briefly to some of the issues Ed raises. First, I agree that there are no mathematical equations that can tell us how much concentration, how much loss of diversity, is too much. Much as we may

dislike the fact, the fact is that such judgments—like the judgments in favor of free speech and universal suffrage—are value judgments rooted in social and political, as well as economic, values.

Second, Ed raises the concern as to how this legislation will affect the ability of American corporations to compete in world markets. I think that this is an appropriate inquiry—particularly today with our justifiable concern with balance-of-trade deficits and the growing dominance of foreign competition. However, the focus of this legislation is large conglomerate mergers—and restricting such mergers should not have an adverse effect on the ability of American corporations to compete either here or abroad. It seems to me that Ed's remarks about the need to get American aircraft manufacturers to combine so that they can compete with German companies, or about foreign nations encouraging their companies to get together, like their aircraft manufacturers, or like their computer companies, or like their steel companies, misses the mark since this legislation essentially relates not to horizontal mergers, where there are or can be substantial economies of scale and substantial efficiencies, but to conglomerate mergers in which those efficiencies are likely at the minimum to be much more attenuated and, at least in most of the cases that we have looked at, from the standpoint of the committee, either nonexistent or, at best, very, very speculative. It may take, as Ed says, a large number of people to service elevators. It does not, I think, help to increase the number of elevator servicemen that you have to merge with a company that does not have any elevator servicemen. You may want to have a lot of automobile dealerships. It would not help Chrysler increase the economies of scale that it has in its automobile manufacturing operation to merge it with a bakery or with a conglomerate that was not involved in the automobile industry.

I think we have to face the issue of the extent to which, in the horizontal area where there are substantial economies of scale possible, we want to forgo what may be some of the benefits of competition for some of the benefits of economies of scale. We do not have to face that very difficult question in this area. In this area, we are talking about very, very large mergers—mergers involving companies, each of which will have most of the access to capital that is required.

The ability of firms to continue to merge where such mergers have demonstrable benefits in enhancing competition or improving efficiencies is preserved by the affirmative defenses which permit even very large mergers to take place if the acquiring company—

- (a) can demonstrate that the merger will substantially enhance competition;

- (b) can demonstrate that the merger will substantially increase efficiencies; or
- (c) divests itself of a portion of its existing business equal in sales and assets to the business acquired.

Third, it has been suggested that restrictions on mergers will prevent the replacement of inefficient management. I think that is an issue, and I think that is a disadvantage with absolute limits on mergers. It is one of the reasons why I favor some defenses to mergers, so that if you have got a situation where you genuinely are going to have improved efficiencies, you have an opportunity to prove it.

But in the main, I think the experience has been that the companies that have been acquired have not been companies that have been poorly run with poor operating ratios, or with inadequate earnings, but have been basically efficiently managed companies. That is at least what United Technologies always says when it is taking over a company, that the management is very efficient and will be continued. And I think that is true not only in United Technologies, but in most efficient and well-run acquiring companies. They are looking not for inefficient management, but for efficient management.

MR. KOLB: David would indicate, then, that the case for the conglomerate merger legislation is directed not so much at efficiency, such as Ed Large described, but at something else indeed. I may say that one of the things that has been stressed about this legislation is that it does have a very strong political foundation, a social foundation; that it is aimed at a broader scope than just economics.

At this point, I would like to turn to Tom Dieterich, who has been working with our monograph and would, I think, be able to lend an historical perspective to this that is especially important. Tom, please feel free to say anything else you would like about the opening statements that have been made so far.

MR. DIETERICH: I will not say anything about any of the three preceding opening statements. But I do want to make one observation related primarily to David's remarks.

I think it is historically accurate to say that heretofore the federal antitrust laws have been concerned with conduct that has an anticompetitive consequence in an economic sense. The traditional "hard core" antitrust offenses—such as price-fixing, horizontal business sharing agreements, tying arrangements, and group boycotts—are all activities that have been placed in the illegal *per se* category because the Supreme Court has found that experience demonstrates that such activities have

an immediate, direct and anticompetitive impact on the functioning of a free market.

Where activity does not have that kind of impact, it has been placed outside of the illegal per se area—and must be evaluated under the rule of reason. Requirements contracts, exclusive dealing arrangements, and vertical limitations upon the marketing activities of reselling customers are so approached, and so, traditionally, has been merger activity.

Where a regulatory statute is not immediately concerned with the impact of behavior upon the vitality of competition—and I here specifically mention Section 5 of the Federal Trade Commission Act, a violation of which does not turn upon any proof of injury to competition—then that regulatory statute is not an antitrust law. And I would submit that on that historical basis the pending conglomerate merger legislation should not be characterized as an antitrust law at all.

MR. KOLB: My impression is that the proponents of the legislation would probably agree with Tom's remarks up to a point. I do not know whether they would accept the notion that the proposed legislation should not be called an antitrust law at all. But it is my impression, as I said a moment ago, that there is a political and social commitment behind the legislation, a factor which we should look at very hard.

With that in mind, I would like to turn to Sandy Pfunder, who is from the FTC. And let me add one further thing which I would like Sandy to speak to. It has been said in a number of the speeches advocating the legislation that the reason the antitrust enforcement agencies have proposed this legislation is that they have begun to recognize that beyond a point they cannot win lawsuits opposing conglomerate mergers. I think that it would be well if Sandy, in addition to possibly commenting on the political and social foundations of this legislation, would also speak to that experience in the antitrust enforcement agencies.

MR. PFUNDER: One of the fascinating things about this subject is that you see in the first twenty or twenty-five minutes here how many people can talk about how many different aspects there are to this thing without ever necessarily crossing swords except with respect to very basic perspectives.

Any debate about the conglomerate merger legislation proposals really does presume that you start by asking very basic questions about perspective. I guess I would agree with Tom Dieterich that whether or not these proposals are an antitrust concept depends at least upon how you define your terms and on whether you treat the problem as

semantic. I think of these as antitrust issues in the sense that they start from a premise of a role of economic units in the economy, but more broadly in the society. Antitrust law has traditionally placed certain kinds of limits upon the activities of those units with reference to the way in which they interact in specific markets and through the specific medium of competition.

I think the hallmark of the conglomerate merger is that it has impacts on many different markets and that it does not necessarily have an *adverse* impact on competition in any of those markets. If you are inclined to a broad definition of the concept of antitrust, the conglomerate merger legislation proposals have in common an effort to define certain kinds of restrictions on the activities of economic units, usually corporations, in the economy and in the society as a whole. The proposals purport to state certain kinds of limits which different parties feel are appropriate.

I think that is a roundabout and maybe overly abstract way of saying that I think the underlying judgment in the debate about the attractiveness of various conglomerate merger proposals is ultimately a political judgment about the appropriate level of government intervention. That intervention is stated in terms of competition and markets, but has traditionally had a larger purpose. Maybe defined slightly differently, at issue is the appropriate role for conglomerate mergers among business units, functioning as they do in their separate markets, and specifically for the appropriateness of growth by merger.

The ability of the antitrust agencies to win lawsuits is, I think, only a small piece of that puzzle. It is a piece which has traditionally aimed, as has conventional antitrust rubric, at impact on competition in specific markets. My own belief is that most conglomerate mergers tested in those terms are undoubtedly legal under the antitrust laws, as they exist today. Whether they should be legal and by what rules that should be tested are essentially what the conglomerate merger legislation proposals are all about.

I think it is fair to emphasize something that David Boies raised. These legislation proposals are, in terms of what they would do and what they would reach, very limited and very conservative. The underlying concepts tend to get away from you very quickly, however, and tend to raise ultimate questions before the more limited questions to which they are addressed are necessarily resolved.

The conglomerate merger legislation proposals of the Judiciary Committee and of the Antitrust Division and of the Federal Trade



Commission all purport to deal primarily with a concept of growth by merger—narrower than that, growth by large firms through conglomerate merger—narrower even than that, growth by such firms through larger mergers, specifically mergers of over \$100 million size. Now, that is the immediate issue. Whether these proposals are the best way to get at the issue is fair game for discussion.

I think you can detect, just from what has been said so far, that one of the fascinating things about this subject is that the underlying factual premises are often perceived very differently. Mr. Large says we have to grow; we have to grow by merger; we have to diversify in this fashion to be strong competitively. The antitrust agencies jump up and down and say, "No, you do not." And the issue may ultimately turn on whichever premise is factually the more accurate.

It is fair to say that the empirical evidence on any of these issues is thin. That is why I think people get nervous about the kinds of political judgments that may or may not be appropriate to make, in the absence of more empirical evidence. I think that is essentially where the debate centers.

MR. KOLB: Sandy, thank you very much.

If we have the debate focused—and I think Sandy focused it very well—I think it might be time to ask some pointed questions. Let me just suggest a little background before I put this question to David Boies.

If, in fact, the government agencies are not able after a point to prove that there is economically an anticompetitive impact from a particular merger, and if the United States government representatives here would consider that the case is one where there is not a great deal of empirical evidence, where it might very well be very thin, is there in fact any economic justification for the legislation, or is the legislation primarily, almost exclusively, based on social and political problems? David?

MR. BOIES: I think the answer to that depends entirely on what you mean by economic considerations. If by economic considerations, you mean traditional antitrust considerations, that is, the state of competition in a particular market, then I think the answer is that certainly the primary justification for the legislation does not relate to antitrust economic considerations of that nature. There are some traditional antitrust justifications for the bill that go to entrenchment of large firms, the creation of barriers to entry, the elimination of potential competition, and encouragement of reciprocal dealing.

On the other hand, I think that those considerations, while significant, do not represent the primary thrust of the legislation. I think one of the

reasons they are relevant is that, while those kinds of proof are available to antitrust enforcement agencies under existing law, the proof of those circumstances, the implementation of those theories, is something that is very time-consuming, very expensive, and very uncertain.

And so even from the standpoint of some of these more traditional antitrust-type justifications for the legislation, there is some desirability in attempting to formulate a more predictable test that will focus on the kinds of situations where those antitrust problems, in the traditional sense, are most likely to occur.

Having said that, I think that is a relatively small part of the foundation for the legislation. And I think that if that were all we were talking about, we probably would not have the legislation, or at least we would not have the legislation with the same kind of support that it has. Unique among major pieces of legislation that I am aware of in Congress, this is legislation that is supported by the National Federation of Independent Businesses, the largest organization of small and medium-sized businesses in the country, representing some 600,000 businesses, and the AFL-CIO, as well as by virtually every organized consumer group.

And I think the reason that you see this kind of support, with almost the sole opposition coming from very large corporations in the United States, is the social, economic, and political value judgments that are the foundation of this legislation. Those economic value judgments are broader than conventional antitrust concerns and relate, for example, to the relationships between a large company and its employees. Now, we are told that the employees of Otis have never been better off, from the viewpoint of United Technologies management, and that may be so. And I certainly would not say that it is impossible for worker relationships sometimes to improve from mergers.

Nevertheless, looking at employment relationships from the standpoint of the employees, what you find is that the employee organizations are universally opposed to these mergers because they feel that they create difficulty for them to deal with management, they lengthen the distance of management from the labor organizations, they make it a more rigid relationship, more difficult for them to establish a decent working relationship.

Now, that may or may not be accurate, and I suspect probably, as is the case in most situations, labor and management's views may differ on it. But where you have that perception on the part of labor organizations, where you have the kind of dissatisfaction that is evident from the AFL-CIO's positions and the positions of its member organizations, you

see a deterioration, at least in a number of cases, in labor-management relations. And that may be an economic problem, or it may be a social problem, or it may be some combination of them. Certainly it is economic in the sense that it relates to economic relationships and can have an effect upon the economic efficiency of the company. Certainly it has social implications as well.

Another kind of partly economic and partly social relationship is the relationship of the large conglomerate with its suppliers. And again we hear that, from the viewpoint of United Technologies, the suppliers of the merged corporation could not be happier. On the other hand, when those suppliers, largely small- and medium-sized businesses, express their own point of view, it is a point of view that says, as the National Federation of Independent Businesses has put it, that large conglomerate mergers severely interfere with what the suppliers view as their economic relationships with the companies they are dealing with.

Is that an economic consideration? Yes. Is it a social consideration? Yes. Is it a traditional narrow antitrust economic issue? Probably not.

Now, there are a lot of those kinds of considerations that are partly social and political in nature and partly economic.

MR. KOLB: I think it would be very appropriate, since we heard so much about United Technologies' viewpoint from a different angle, if we turn next to Ed Large to see if he has any rebuttal.

MR. LARGE: I would like to rebut, if I could, one of the first things that Dave said, back in his first statement, when he seemed to assume that conglomerate mergers never have any economies because, by definition, the merging companies are in different markets. The economies that we are concerned about in our business—and maybe I ought to give a little background of United Technologies. We are about 35 to 40 percent foreign right now. We see well over half of our growth in the future occurring in the foreign market, and we are estimating our foreign business will be 50 percent of our total in the next five to six years.

Our main market, just to be very specific, is jet engines. When we started our diversification program in 1973—and we were aware of this at the time—our major jet engine competitor was some six to seven times bigger than we were. Our number two and three competitors were the British and French governments, respectively. You just plain do not compete against that kind of muscle with a small company.

It may very well be that when I acquire an elevator company, it is not going to make better jet engines for me. But it is going to give me some

more muscle so I can stay in there with my bigger competition. That is exactly what I think it has done for us.

The world is becoming smaller. United Technologies is not atypical. Maybe our market shares are a little higher than some. But we live in a truly international world now. We find Rolls Royce, one of our British competitors owned by the British government, coming in with plans now to manufacture in the United States. The Japanese are coming in and buying companies, such as Motorola's television business. And I suspect you will find they will buy up a lot more in the future.

As I mentioned earlier, one Japanese company, the Mitsubishi Group, has sales of \$44 billion! You just plain cannot compete against \$44 billion in muscle with a "Mom-and-Pop" grocery store. And, if the big foreign companies are going to start throwing their muscle around, you are going to have to be big just to stay with them.

That is the economic reality that I am worried about. That is the economic reality that I think this legislation just totally ignores.

MR. KOLB: I think we really are focusing the issue because we are now quite some distance from the traditional concepts of the Clayton Act, Section 7, and we are talking about different social and economic viewpoints. Let me ask at this point, if I may, for the comment of our two purportedly objective observers, Mr. Dieterich and Professor Bauer, to see what they think about the competing arguments that have already been put forth and any other point they may have on the issue, starting with Professor Bauer.

PROFESSOR BAUER: Let me first say that I agree with Tom that most of the issues are political and social. But I am not prepared to say that there are not some very important possible economic consequences to large mergers, to conglomerate mergers, of even a very traditional Section 7 nature, that is, reasonable probability of a substantial lessening of competition.

The three traditional approaches that have been used under Section 7 for conglomerate mergers, the potential entrant doctrine, entrenchment, and reciprocity, have gotten a very rough ride from the Supreme Court and then lower courts in recent years. But in my view, there is a substantial argument for saying that those kinds of mergers do have some very serious economic consequences, and these doctrines ought not be dismissed.

The one case that I think gives a very good example of the kinds of adverse economic consequences from conglomerate mergers is the

Procter & Gamble (P&G)—Clorox merger,<sup>2</sup> where you had the largest advertiser in the United States acquiring a company, Clorox, which was the largest bleach manufacturer in the United States, with about 50 percent of the market in a highly oligopolistic industry. The two largest companies had almost 65 percent of the market. In my recollection, P&G's advertising budget was more than twice Clorox's total annual sales. And it seems to me those are the kinds of product-extension mergers, conglomerate mergers, which can be attacked under very traditional antitrust theories. And you do not have to rely on political consequences or social consequences as well.

The second point I would make is one that Sandy Pfunder alluded to. Although antitrust clearly must be recognized to have broader functions than simply preservation of small units or simply preservation of competition for itself, in my view that, too, is an extremely important goal.

Historically antitrust has been designed to achieve that goal, because if we did not do it, we would have to do the same thing in another way. And the antitrust laws are designed to preserve the general features of our economy with minimal government regulation. It is a marvelous self-policing system.

Ed Large was saying earlier that United Technologies forbears from making acquisitions which they know are likely to run into government challenge. It seems to me that is one of the valuable features of our antitrust laws, that there is at least some general idea of what is and what is not unlawful, so that the government does not need to interfere.

The alternative to doing that is either to have some socialism, which I think all of us would shy away from, or at least have government agencies deciding what the price of goods will be and who will sell to whom. Antitrust is designed to avoid those alternatives. It seems to me, although one can call that political and social, that this does have extremely important economic components.

The third point I wanted to raise was, I do not know how happy the Otis employees are with United Technologies' acquisition of Otis. I infer that they are singing the company's song. And I have no reason to doubt that. On the other hand, one can point to conglomerate acquisitions which do not have those kinds of happy consequences. I think of one in my hometown of South Bend, Indiana. There was a medium-sized company called Associates Finance, which was one of the largest

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<sup>2</sup>FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

employers in South Bend, certainly the largest white-collar employer, with something on the order of 1,000 employees. It was acquired by a small, little operation called Gulf and Western. And within one year of its acquisition by Gulf and Western, Associates' headquarters in South Bend was closed up and it was moved to Dallas. Well, let me say that people who had made homes in South Bend may not have been that happy about that acquisition. Whether that is good or bad, one has to recognize that those are among the consequences of conglomerate acquisitions.

You do not have to be in favor only of things bucolic, as Justice Douglas was in the *Falstaff* case,<sup>9</sup> where he sang the praises of Golden-dale, Washington. You do not have to go quite that far to recognize that there are some extremely important consequences of conglomerate mergers which are perhaps not of a strictly economic nature, but that are also not trivial.

The last thing I would like to suggest is that maybe what we are asking is on whom should the burden of proof be. It was the last question I raised in my preliminary statement, but I would like to make the point again. Ed Large told us how Otis was helped by being acquired by United Technologies, that Otis was extremely profitable last year. I am not sure whether that was the result of Otis's qualifications, Otis's own good management to begin with, or whether it was something that UT's financial muscle helped with. I am not sure I understand why having Otis Elevator helps one sell jet engines in competition with Rolls Royce. I hear the assertion, but, excuse me, I am not persuaded. It seems to me what we are talking about, then, is the burden of proof.

One can, on the one hand, argue that it does help, and then, on the other hand, argue that it does not. We admit that this is not the kind of thing which is going to be subject to empirical proof. On whom should the burden of proof be? One can make the judgment, as I have, that these kinds of acquisitions are likely to have very serious kinds of consequences. And I do not want to wait until twenty years from now to see that I turned out to be right.

MR. KOLB: Let me just say before passing the microphone to Tom that the proposed legislation would leave in place the existing antitrust legislation. So if there were genuine economic problems, competitive problems, with respect to a particular acquisition—let's say it created a genuine potential competition problem—it could still be barred under

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<sup>9</sup>United States v. Falstaff Brewing Corp., 410 U.S. 526, 543 (1973) (Douglas, J., concurring).

the traditional legislation. So the question we are asking is, do we go further, do we bar mergers in areas and in situations where you could not prove that.

Now, Tom?

MR. DIETERICH: I guess, Joe, I shall have to refer back to your opening statement for just a moment. Not being an economist, I cannot go further than regurgitate what has been told to me by others. But I observe that questions such as whether the average size of a domestic company is increasing or decreasing (after an appropriate adjustment for inflation), whether there is increased concentration in American industry in a 4-firm, 8-firm, or other concentration ratio sense, and whether there is increased concentration in gross in the sense of aggregate sales or assets of a specified number of the largest domestic corporations (100, 200, 500, or 1,000) are questions the answer to which will vary depending on the identity of the person responding. You will get answers indicating everything from significantly decreased concentration to significantly increased concentration. And I just do not think there is any empirical data clearly establishing the immutable truth of any answer to any such question.

The existence or nonexistence of a trend toward concentration in the economy of the United States is, I think, fairly debatable. I think we must assume that there is a case that can be made on either side of that argument.

Also fairly debatable is the existence of any relationship between the degree of concentration existing in any particular industry and the vitality of competition in that industry. If a case can be made for the proposition that concentration is increasing, that does not—at least in my view—establish the need for remedial legislation absent establishment of the further and different proposition that increased concentration is, in and of itself, anticompetitive.

Which leads me to my second point. Under the antitrust laws as they exist today, the courts have developed and applied a number of theories under which a conglomerate merger can be condemned if the facts of the particular case demonstrate a reasonable probability that that merger will have anticompetitive consequences. The actual potential entrant doctrine is such a theory. The perceived potential entrant doctrine is another—and that theory was applied in *Ford/Autolite*.<sup>4</sup> The

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<sup>4</sup> *United States v. Ford Motor Co.*, 1971-1 Trade Cas. ¶ 73,445 (E.D. Mich. 1970), *aff'd* 405 U.S. 562 (1977).

entrenchment theory, applied in cases such as *Reynolds Metals-Arrow*<sup>5</sup> and *P&G-Clorox*,<sup>6</sup> is a third. And the reciprocity theory, applied in *Consolidated Foods*,<sup>7</sup> is another.

It is true, as David has observed, that in many instances—particularly in the last three, four, or five years—antitrust enforcement authorities have lost conglomerate merger cases that they have filed. But I question whether it is proper to conclude from that fact that we need new legislation to prohibit transactions of a kind that have been challenged unsuccessfully by the antitrust enforcement authorities. It seems to me that you can make the argument that those cases have been correctly decided—and that there is no reason to condemn a conglomerate merger unless there is a demonstrable and reasonable probability that that merger will have an anticompetitive effect in light of its particular facts.

I think David conceded that much. As I heard him, he has no desire to procure a new law that would simply give antitrust enforcement authorities another ground on which to win cases that they could already win under existing law. Consequently, the real issue seems to me to be whether we want or need a federal law that, absent special pleading, would preclude a company from making an acquisition if it would thereafter have more than a foreordained total of sales or assets. Anticompetitive effects—or the absence thereof—would be irrelevant.

That is why I said the first time around that I think this is really a political and sociological debate, rather than one involving traditional antitrust considerations.

From my own personal standpoint, I oppose that kind of legislation. I do not think that the government, in exercising the power that it has had to run industries like the railroads, the airlines, and the shipping companies, has demonstrated that it is better able to determine what an industry should look like and how it should be run than private industry. I don't trust government to determine maximum size, and I don't trust government's ability to determine what should be "peeled off" when an acquisition would take a company over some foreordained maximum size.

Ed Large has pointed out—very properly in my view—that domestic industry today is competing in international markets. The AFL-CIO and

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<sup>5</sup> *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D. C. Cir. 1962).

<sup>6</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>7</sup> *United States v. Consolidated Foods Corp.*, 1978-1 Trade Cas. ¶ 62,063 (E.D. Pa. 1978).



the Association of Independent Businessmen, about whose support of the concept of pending legislation we have already heard, may well prefer a return to the kind of industry structure we had in the 1830s. They also support continued existence of the Robinson-Patman Act, in unamended form. If that is the economic structure that comports with one's political and sociological predilections—I respect the predilections. But that is not the economic structure in which domestic industry is today attempting to compete, on an international basis.

MR. KOLB: I think you can all see now that I am the only objective one. During Tom's account, Sandy Pfunder was gnashing his teeth over here and leaned over to me and said, "Are you going to call on me?" And I said I would. Sandy?

MR. PFUNDER: I thought I was going to be with Tom right up to the point at which he said what he thought the real question was. I come out a little differently as to what I think the real question is.

I do not see these legislative proposals as focused primarily on the question of whether an absolute limit to the size of one or all American corporations should be legislated. I think the legislation is aimed at something different and has a different underlying premise. It is essentially that, to the extent that firms have and create additional capital, there is a preference as to how that capital might be employed, or at least a preference as to how it ought not be employed.

Growth by merger is obviously one of the things that corporations can, and frequently do, do with their retained earnings. There are other alternatives. Some of those other alternatives have costs which may explain why they are relatively less popular. But I think the issue here is not an optimal size or a maximum size for corporations, but rather whether acquisition is an appropriate use of corporate resources—and specifically acquisitions by very large companies of very large companies.

Now, having said that, I doubt that I have won many converts. Let me state as simply as I can what I think the basic case is for the legislation. You can draw your own conclusions, and I will not tell you what mine are. I think the underlying premise is that the economics, at least the microeconomics, and the market-by-market, maybe industry-by-industry, economics, are awash. Now, I hear Ed Large saying, it ain't so, and to the extent he is right, he has focused on one very important aspect of the debate. If United Technologies is in fact strengthened in its ability to make and market aircraft engines worldwide by reason of its acquisition of Otis, that fact, and particularly the underlying factual evidence that supports it, is very important to this debate, because the

underlying premise of the legislation is that Otis does not need United Technologies and United Technologies does not need Otis. Or maybe I would be more comfortable leaving it in the abstract, to say that, on balance, the economic evidence supporting the efficiencies or the better performance derived from large conglomerate mergers just is not there. You can still debate whether the evidence ought to be brought forward by the proponents of legislation that would limit growth by conglomerate merger, or whether the proponents of large mergers should bring that evidence forward in order to justify being able to make large acquisitions.

My initial point was that this is a political choice. It is not an antitrust choice; it is not an economic choice. But that is where the debate essentially focuses.

Not even in the broadest macroeconomic sense do we, in my view, get very far in trying to demonstrate the importance of conglomerate merger limitations. I do not think the aggregate concentration figures are very persuasive one way or the other, and they certainly do not support a major change in the way in which the statutes of the United States view the process of conglomerate mergers, at least in my view.

On the other hand, there are three kinds of problems, all of which have the same thing in common. One is the growth of discretionary economic power in the perhaps simplistic sense that says that when two large firms merge, their economic resources are combined. And I hear a bit of Ed Large's descriptions as at least fitting that kind of mold.

Second, in the political arena, to the extent that any two corporations have any kind of political power, large, small, or in-between, the assumption underlying the legislation is that, all things being equal, when two firms merge, they will aggregate whatever political power they separately possessed.

Finally, the social consequences of mergers tend, again all things being equal, to become that much larger when the decisions that have social consequences of any kind are made by fewer and fewer parties.

All of this is simply another way of saying that the conglomerate merger legislation is directed at very large, perhaps grossly oversimplified, notions of long-range trends that result from the growth of aggregate concentration and from the growth of economic and political power through merger. And one can debate forever how soon one takes a position on that kind of issue, what kind of evidence can be mustered pro and con, what kind of demonstration one must make before legislation is appropriate. That all is fair game. And I think the

proposals that are before Congress at this point will at least have the primary benefit of focusing a debate which I think Senator Hart had hoped to begin in a little different way in his original proposals of the Industrial Reorganization Act. They are the same basic underlying issues and many of the same basic theories, but I think directed in a much more conservative way.

MR. KOLB: Sandy, thank you.

Before we move on to another part of this subject, I think it might be well for me to add a perspective which is not my own, but is something that appears in the speeches and the other literature that supports this legislation. It has not come out so far in our discussion, I think, in any prominent way, because it is possible that these spokesmen for the legislation do not avow it. But you should know about it.

There are speeches which indicate that one reason to pass this legislation is that the power of big business in Washington, through its lobbyists, through the Business Roundtable, and so forth, has become so immense that it is particularly important to limit firm size. It is stressed in a sophisticated argument that diversity of business viewpoint is limited if you combine business leaders into one giant corporation, where there used to be four or five.

That is another point of view. It is more truly a political reason for this legislation. I think one could say on the other side that if one is going to pass legislation to limit the political power of a particular group, one could easily do that for labor unions, the Republican Party, the Democratic Party, and so forth. And I think one does have to see this as one of the underpinnings of the legislation, though I note that a good many proponents do not advocate that as the reason. But it is there and you should know about it.

Let me move to the next very important question, and that is if this legislation is to be enacted, what form exactly should it take? You recall I started by reading to you some of the lists of the types of defenses that had been advocated. These are defenses to the basic initial finding that the merger is over the threshold amount, whatever it is. You recall that there were defenses such as showing that the preponderant effect will be beneficial, that there will be efficiencies that would stem from the merger that would be more important than the anticompetitive effects. Another approach is what has been called the cap and spin-off approach.

These are important subjects in the debate. What I would like to do is spend our last bit of time touching upon those. And the way I would like

to do it is to start with the advocates of the two most significant approaches, the preponderant evidence efficiencies approach and the cap and spin-off. I think David Boies could speak to the first and Sandy Pfunder to the second. And then I think the others on the panel could respond.

MR. BOIES: In the legislation that the Judiciary Committee and Senator Kennedy has introduced, as I think you know, we have a combination of those defenses. The cap and spin-off defense is really, I think, largely originated by the Federal Trade Commission in its present form. The pro-efficiencies and pro-competitive defense is largely originated by the Antitrust Division. And in a typical spirit of legislative compromise, we have adopted all three of them.

As this legislation progresses, the nature and extent of what affirmative defenses, if any, may be appropriate will be given much scrutiny. I think there are sound arguments for and against all of those approaches. I think obviously the argument against having these defenses is that if conglomerate mergers and the growth of concentration really are a problem, then perhaps we ought to just prohibit at least very large mergers altogether.

I think the other side, which we have found more persuasive, is that there probably are mergers in which the advantages outweigh the problems associated with them, and you ought to give the proponents of that merger an opportunity to come in and prove that.

The reason for including the cap and spin-off approach is that in a number of cases it may be very difficult to prove that a merger actually will enhance competition or will increase efficiency, but the management of the corporation may believe that very strongly and may believe this is a very desirable merger. And so the cap and spin-off approach, which really says, as incorporated in our bill, if you want to make a merger that you cannot justify externally, but you think is important for you to do, you have to spin off a comparable sized portion of your business, so that at least you have not used this assertion, this unproven assertion, as a means to grow through merger.

That all underlies what I think is the general philosophy of the legislation, which is not directed at size per se and is not even directed at mergers per se, but is directed at very large mergers that, based on the economic and other evidence available, are not justified. That does not mean that there are not problems with size unassociated with conglomerate mergers, but generally that the advantages, social and economic, to permitting firms to continue to grow where that growth is as a result of more efficient operation in the market or will bring about provable

efficiencies or enhancement in competition, outweigh any of those problems.

Let me just reply to a couple of things that Tom said, if I could spend 60 seconds on that.

MR. KOLB: He was gnashing his teeth, too.

MR. BOIES: The question was raised as to whether or not there really was an increase in concentration; I think the statistics show that there has been, particularly in manufacturing, but I am not sure that is the relevant inquiry. In 1975, there were fourteen mergers in excess of \$100 million. In 1977, there were forty such mergers. In 1978, there were eighty mergers over \$100 million. Thus far in 1979, there have already been ninety such mergers.

What is clear is that there is a significant increase in the number of very large mergers, and concentration is higher as a result of those mergers than it would otherwise have been. Whether it is increasing, as most economists believe, or decreasing, as some people believe, or about the same, as a lot of people believe, I do not know and I do not think is critical.

What I think is relevant to the concentration issue is that there is clearly more concentration than there would have been without the very large mergers.

In terms of whether we want to have the government run the shipping industry or the airline industry, I do not think we do. I think that is one of the reasons for this kind of legislation. I also think that is one of the reasons why the same person who introduced this legislation was also the person who introduced in Congress the airline deregulation act. I do not think this society will tolerate government-sized businesses that are not justified in terms of efficiencies. We are either going to regulate them, like we tried to do with the Federal Maritime Commission, the CAB, or maybe with the Robinson-Patman Act, or we are going to have them at a size that is not larger than the size that they can justify.

I think the right way to posit the question is: are we going to keep business at a size at which it can operate independently of the government, or are we going to let it grow to such a size that the forces that brought us to the Federal Maritime Commission, the CAB, and the Robinson-Patman Act are going to say that we have let it get that big and now we are going to regulate it?

MR. KOLB: I would like Sandy to comment on the cap and spin-off approach, which has been the principal suggestion of the Federal Trade Commission as a way to handle this type of legislation.

MR. PFUNDER: I think the primary reason underlying the cap and spin-off proposal is the same basic reasoning that underlies the suggestion that it is appropriate to have defenses in any of the proposed conglomerate merger bills for something roughly equated with efficiency and something separate, roughly equated with a preponderant pro-competitive impact. Nobody, particularly not the Federal Trade Commission, has any interest in reaching out to forbid either the pro-competitive mergers or the efficiency-enhancing mergers under any of these proposals. The issue is: how do you deal with those kinds of issues, and how do you create a workable defense?

We put forward the cap and spin-off proposal in an effort to eliminate these issues from litigation.

The cap and spin-off proposal is designed to permit companies to make large acquisitions, providing they are willing to spin off something equally large, and thereby choose between what they would acquire and what they would spin off, on whatever basis is important to them. Now, that may be a basis that looks primarily to efficiencies. It may look primarily to a pro-competitive impact, keeping in mind that the basic antitrust strictures would remain in place. It can look to anything that corporate management feels is relevant.

The cap and spin-off is designed to say that those features of a larger corporate acquisition are most appropriately left to corporate managers, rather than brought into courtrooms where they are litigated before judges and involve lawyers and evidence and proof. They are horrendous issues.

The possibility of combining a cap and spin-off with separate defenses for efficiency or predominant pro-competitive impact is, I think, a different kind of concept. It leaves the cap and spin-off as a safety valve, as an alternative to litigating some very difficult issues.

I do not have any problem with that, but it is a different approach. It makes fair game the potential trial of issues on which, as an antitrust lawyer, would make me shudder, if you think about the kinds of efficiencies, the kinds of contexts in which efficiency might be relevant, and the ways in which you might measure efficiencies.

I think from a practical standpoint, the person who has the burden of proof on those issues probably loses. And one advantage, in our view, to the cap and spin-off is that not only do you not have to decide how to litigate those issues, you do not necessarily have to decide who wins them or loses them by specifying who has the burden of proof. You make those issues irrelevant to the extent you can. And you simply lay down

broader ground rules which permit acquisition to take place if corporate management feels that, on balance, for those reasons or any other reasons, they are better off making an acquisition and doing a spin-off of something of comparable size.

MR. KOLB: Let me ask Tom Dieterich what he thinks of the various competing types of approach that have been suggested.

MR. DIETERICH: From the standpoint of simplifying antitrust litigation, the cap and spin-off approach is the only one that results in simplifying the trial of an antitrust merger case. Assuming for the moment that there will be some such legislation, one very real problem that I envisage with the cap and spin-off approach is that I cannot see how your cap can be a constant cap. We have an economy that, in real terms, has been inflating at somewhere between 10 and 15 percent a year for the last five years.

I think the fact is that to have any meaningful cap, you are going to have to have an escalating cap. How do you escalate it? The problem boggles my imagination. I do not know how to solve it. I think it is compounded by the fact that real growth in different industries is not going on at the same level. The depreciation of assets of different industries is not going on at the same level. The electronics industry has far more real growth—I am speaking very broadly on the basis of newspaper clippings—but is it really fair to apply the same cap and spin-off rule to a \$2 billion electronics company that you apply to a steel producer?

I agree completely with Sandy that the ultimate result of enacting an efficiencies defense means that the person who has the burden of proof loses. And, again, I think I would revert to the fact that the enactment of such a law would reflect far more by way of a political and sociological determination as to what the structure of American industry should be than it reflects any empirically demonstrated threat to the competitiveness of the structure of the American economy.

MR. KOLB: Professor Bauer?

PROFESSOR BAUER: I will try to keep this brief. My view is that among those two defenses—and I think a defense is important—the efficiencies defense is preferable to the cap and spin-off approach. The two advantages that I see to the cap and spin-off approach are, first of all, it is far more consistent with the noneconomic, that is, the political and social, arguments that we have been making. If conglomerate growth is bad, then conglomerate growth is bad regardless of whether it does or does not have economic efficiencies, and therefore the cap and spin-off

approach, while allowing an efficient acquisition, requires that there be a trade-off for it. The other advantage is one that seems to me fundamental, that is, the judicial management problem. It is a fairly straightforward kind of thing, without involving the courts in enormous and often inponderable problems.

But the disadvantages that I see are two as well, and, in my view, they outweigh the advantages. One is that it allows the company, to be a little pejorative, to sell off its dogs. You acquire a healthy company, and in order to do that, you sell off your weakest link. And even if it does not do that, if our assertion is that the big companies are far better able to survive than the small ones, I think you have very, very real problems of whether a spun-off small independent will be able to survive.

I want just thirty seconds' worth of response to Tom Dieterich's observation that what we are trying to do—or what this legislation is trying to do—is place an absolute size on the growth of companies. I think that is not true, for the reason that it certainly does not prohibit alternative forms of growth, either internal expansion or, as I read the bill, the toehold defense, that is, taking a small company and expanding that small company into a viable competitor. What it does is say that a large acquisitive corporation ought not to grow by acquiring a large ongoing enterprise and making that a part of its umbrella.

MR. KOLB: I will complete the sequence with one more speaker on this issue and then one more general question. I would like to turn to Ed Large first of all for a comment on the cap and spin-off versus efficiencies defense, and then I want to ask one general question about foreign commerce.

MR. LARGE: If I could turn the question a little bit, I would like to talk about the structure of the legislation. I think it ought to be round and no larger than the nearest trash can.

Just one comment on this suggestion that has come up several times that we are talking about very limited legislation. We all seem to agree that we have a political issue here. And I do not see how you make a differentiation, on a political basis, between growth through internal growth or growth through acquisition. If you do not like it politically, you do not like it. And this is just the first step. We might as well call a spade a spade.

MR. KOLB: One remaining issue that is of some considerable importance is the impact this legislation might have on acquisitions by companies overseas. There was, of course, the initial proposal that the company overseas be treated just like the American company in terms of



the threshold test and defense and so forth. That could tend to produce foreign relations problems. Conversely, if you give a foreign corporation an advantage by structuring a test that helps it, there are corporations, possibly even United Technologies, that might suggest that is not fair. This does present a serious policy question if the legislation is to be passed. And I would like to ask all of the speakers to comment on that briefly. I am going to start with Ed Large.

MR. LARGE: Again, I do not mean to avoid the question, but regardless of whether the law literally applies to foreign trade or foreign companies, we cannot as a practical matter export it. We just plain cannot. Mitsubishi is not going to reduce its \$44 billion size no matter what we do. The same thing will happen with the German companies, with the French companies, and with the British companies. They are going to laugh all the way to the bank if we do this sort of thing, if we reduce ourselves to impotence through these artificial size barriers.

MR. KOLB: David Boies?

MR. BOIES: The way the legislation is presently drafted, it would apply to any acquisition where one party to a merger meets the jurisdictional amount requirements in the United States and the other company meets such requirements on a world-wide basis. So if you had an acquisition of, for example, American Motors or United Technologies or the Otis Elevator Company by Mitsubishi or any of the other large foreign companies, that would be covered.

I agree that there are some potential foreign policy considerations. From our standpoint, at least at the present time, we tentatively feel that as long as what we are regulating is the acquisition of American corporations, we have a pretty easily defensible right to regulate that, regardless of the national source of the acquiring company. This is, however, an area that raises very complex issues and needs further thought.

MR. KOLB: Let me just ask you, what would happen if the acquisition of the American corporation were incidental to an acquisition overseas. The body of the acquisition is primarily in Europe, let's say, but a small part of it is in the United States.

MR. BOIES: If the assets or sales in the United States exceeded the jurisdictional amount limits, then that portion of it would be covered. Now, obviously, we cannot preclude an acquisition outside of the United States, or if we can, we are not going to do that. But if the merger or the acquisition is of a company both in and outside the United States and in the United States it is above the jurisdictional amount, that would be

covered. And the only way to solve that would be to spin off the American portion of the acquisition.

MR. KOLB: Let me ask Professor Bauer, do you have any comments on this?

PROFESSOR BAUER: Really, very limited. I appreciate Ed Large's argument. I agree that one of the fundamental problems with this entire legislation is that the United States is no longer insular, if we ever were. It is extremely important, as the dollar gets weaker and we have oil problems, and that entire litany, that American companies not have an additional burden of competing internationally.

However, at least with respect to the particular question that you have raised, there is a fair amount of congruence. It is true that we are not going to be able to control the expansion of Mitsubishi or British or French or Italian companies. However, the statute would also not do anything to internal growth of American companies. What we are saying is that under certain circumstances, foreign companies ought not to be acquiring American companies. That is a simple congruence. If American companies are going to make those large acquisitions abroad, they similarly are not covered by this proposal. I see the political concerns—that foreign countries are not going to like it—but I do not see quite as clearly the alleged economic problems.

MR. KOLB: Let me pass the microphone to Sandy Pfunder. And let me just embellish this a little bit by asking him to comment on whether or not this approach could lead to retaliation by foreign countries who view the legislation as restrictive and, in that way, cut down on free trade.

MR. PFUNDER: Yes. I suppose it could. And I think these kinds of issues are probably the most difficult part of the attempt to construct a piece of proposed legislation that would do what any of the conglomerate merger legislation proposals would do. I think the problem is solvable, because I think the issue is the defensible reach of the jurisdiction of U.S. law with respect to the impact of conglomerate mergers on the economic, political, and social environment within the United States. While the mechanics are potentially very difficult to construct and not without considerable pitfalls, I think the adverse impacts in the foreign environment can probably be minimized. And I think something can probably be put together that will not disrupt the whole scheme of things.

MR. KOLB: Now for an objective wrap-up, Tom Dieterich.

MR. DIETERICH: I am not sure that this is a wrap-up, Dan, because I want to make one further substantive comment on this international trade point. I think all the comments heretofore have been on the U.S. company acquiring abroad. But I think there is a very real—and viewed now in the sociological and political terms which the proponents of this legislation presumably act upon, I think anyone would have to concede that there is a good result from the establishment of onshore manufacturing facilities by a foreign-based multinational corporation. It brings tax revenues into the United States. It makes for domestic employment. All kinds of good things follow from the establishment of onshore manufacturing facilities.

If the foreign-based multinational corporation is considering a conglomerate acquisition in the United States, my guess is that it is not going to be interested in any acquisition that would not trigger a spin-off under the proposed legislation. If you are talking about a company with an operation of \$5 million or \$6 million in sales, you can do that by your own internal development efforts. You do not have to have onshore manufacturing facilities for that kind of an operation. But if you want to come into the United States in a big way, with onshore manufacturing facilities, you almost inevitably will have to acquire a corporation, conglomerate acquisition, that will trigger a spin-off under this kind of legislation.

And I think that we are silly if we think that a Japanese conglomerate or a German steel company or a French aluminum company or an Italian chemical company is going to peel off some of its foreign assets to set up onshore manufacturing operations in the United States. We simply will not have those operations established. They will manufacture abroad and they will sell into the United States through distribution arrangements. We will lose whatever economic and sociological benefit would flow from the establishment of onshore manufacturing activities by these companies.

MR. KOLB: Now, you may wonder how we are going to decide who won the debate. My conclusion is that anybody with his name tag still standing is a winner.



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