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ANTITRUST, REAL OR FANCIFUL

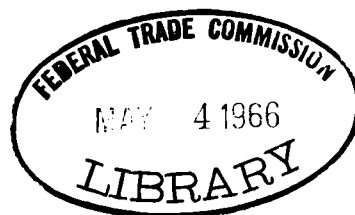
A STATEMENT BY

~~FYRETTIE MACINTYRE~~ COMMISSIONER

FEDERAL TRADE COMMISSION

BEFORE THE

BUSINESS PUBLIC RELATIONS SEMINAR



Hot Springs, Virginia

and others who have had responsibilities in effectuating the purposes of our antitrust laws. As recently as July 18, 1958, when President Eisenhower gave his approval to Public Law No. 85-536, it was declared that:

The essence of the American economic system

of competition in commerce, and unfair or deceptive
acts or practices in commerce, are hereby declared unlawful."

False and Deceptive Acts and Practices

have a dangerous tendency unduly to hinder competition or create a monopoly.

The Commission's general authority to prevent acts and practices with a tendency to hinder competition or create monopolies is derived from the prohibition against unfair methods of competition spelled out in the original Federal Trade Commission Act of 1914. In addition, Section 2 of the Clayton Act of 1914, as amended by the Robinson-Patman Act in 1936, specifically charges the Commission with proceeding against discriminatory pricing practices which may injure competition. Finally, under Section 7 of the Clayton Act, the Commission has the responsibility of proceeding against corporate mergers with the requisite anticompetitive tendencies.

Mergers

Antitrust activity in the merger area has always been an intriguing subject for the commentator. Of late, however, the volume of comment - much of it critical from the academic community, the press and business - has been increasing. The reasons for the current concern with application of antitrust to mergers are fairly obvious.

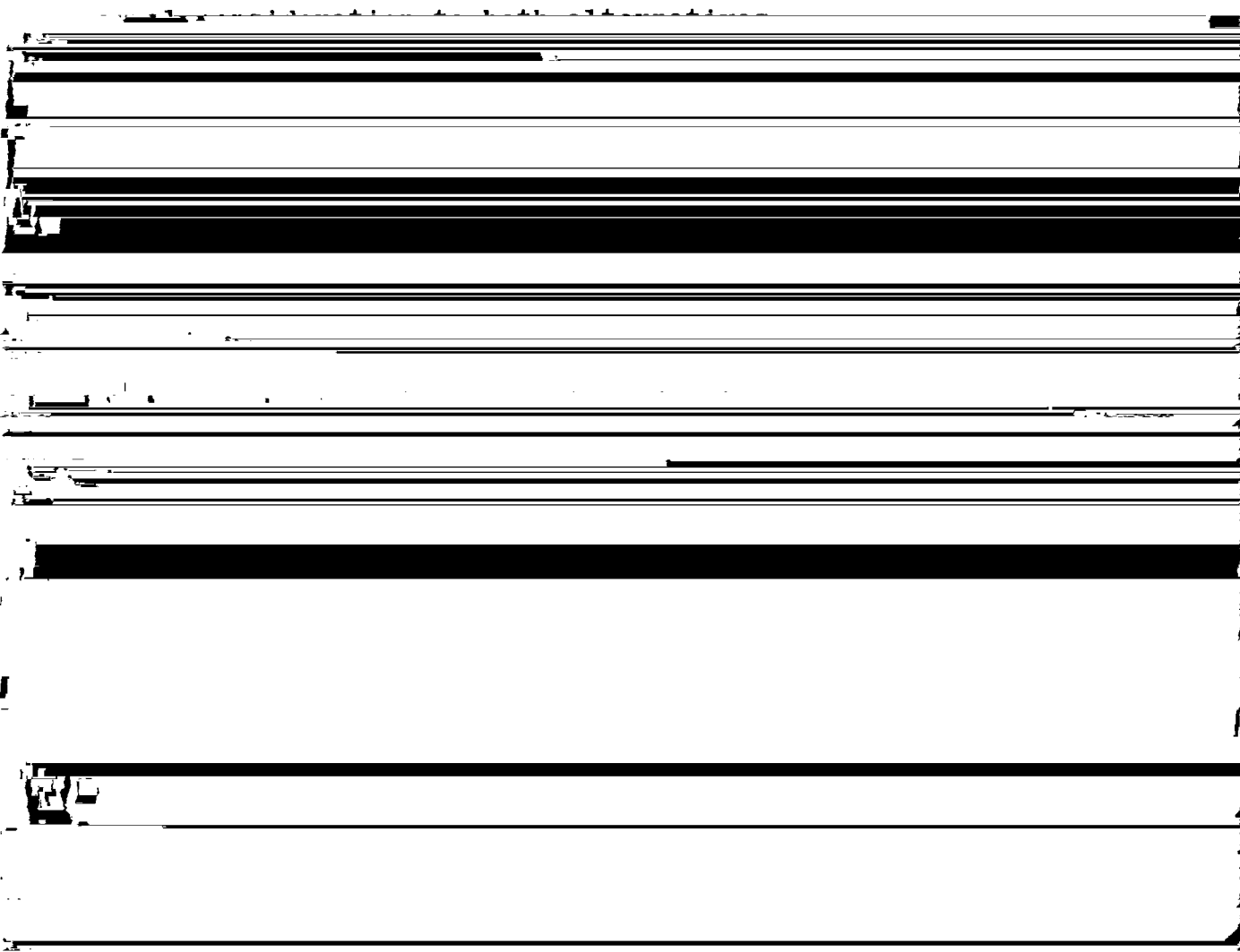
On the one hand, there are those who have become ever more

and the implications of these phenomena for our free

market system. On the other hand, there are those

who view with alarm current developments under the merger law, which it is feared may freeze business into an obsolete pattern. In short, there is increasing concern about the relevance of antitrust to the economy of today. My remarks will be devoted to that topic and the further question of how should antitrust measures be applied to current problems. I do not intend to discuss the minutiae of the more recent decisions or to delve into some of the more arcane subjects of interest to the lawyer or economist in

approach for maintaining a free competitive economy one which focuses on the structure of the economy (e.g., prohibition of mergers) or one which emphasizes the restraint of anticompetitive behavior. Finally, one might also ask whether a rational antitrust approach should not give



articles in the April and March issues of Fortune, devoted to the subject. These articles offer an advantageous springboard for our discussion for the simple reason that I assume that most of you have read them and, secondly,

and that mergers, be they horizontal, vertical or conglomerate, are legal unless they spring from a "manifest attempt to restrain trade."

It is evident that the main preoccupation of the article in common with other critiques of antitrust from the business community is with the impact of current enforcement under Section 7 of the Clayton Act, which was enacted to deal with the question of mergers. In this connection, Fortune charges that in the last 15 years antitrust enforcement has become more and more subject to a reactionary enforcement philosophy, fearful of change, and which frowns on the growth of firms, especially by merger. It is Fortune's basic contention that the attempt to preserve a market structure of many competitors for the purpose of maintaining competition is groundless. The

in competitors better able to withstand the vicissitudes of competition under modern conditions.

~~With this brief and perhaps oversimplified~~

introduction to one approach to the current debate about the role of antitrust, I must preface my further remarks with the advice that I, of course, cannot on any of these issues give you a definite answer. One's point of view on such problems is necessarily personal and to a considerable degree conditioned by one's past associations and experience. Mine has been primarily with the Federal

Trade Commission. In this connection, it is significant that the statute creating the Commission - the Federal Trade Commission Act - as enacted in 1914 declared "unfair methods of competition are hereby declared unlawful." 2/

The phraseology of this prohibition is important; it charges the Commission with proscribing those acts which -

The Supreme Court in 1931 stated that Congress, in enacting the statute, was concerned with preventing "unfair competition [which it recognized as the] practice which destroys competition and establishes monopoly" 3/ The recognition by the Court, which was then of a conservative complexion, of the legislative intent to encourage an economic climate in which a large number of independent competitive firms can flourish is noteworthy. The question remains whether, in an era of growing concentration and technological innovation, it is still a realistic goal.

A consideration of this topic leads us to the burning antitrust issue of the day: What is the structure of the economy like at the present time and

While appropriate, your discussion as to whether

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firms [none of which has sufficient control of a product] to greatly affect the price or terms of exchange that result from a bargaining process in the market. It

is not sufficient that a firm have a competitor or even many competitors." In this connection, concentration has been singled out as a possible indicator of where significantly noncompetitive markets may be found. 5/

significant and that such power is not measured by the size of its market share in particular markets but extends to markets in which a conglomerate's share is too small to constitute a monopoly or participation in oligopoly.

The problem of overall concentration due to conglomerate size is, however, a difficult one. Even Dr. Edwards, despite his suggestion that Section 7 proceedings should be brought whenever possible, does not seem certain that the present laws are applicable to concentration resulting from the growth of conglomerate firms. He concedes that it would be difficult to bring the present antitrust laws to bear upon such amalgamations. 7/

Dr. Edwards is not alone in expressing doubt that the antitrust laws now in force were designed to deal with this problem. In this connection it is interesting that Donald Turner, Assistant Attorney General in Charge of the Antitrust Division, recently suggested the possibility of dealing with overall concentration by legislation specifically designed to curb growth by way of acquisitions

7/ Testimony of Professor Corwin Edwards, Concentration Hearings, p. 44, 45 (1964).

Messrs. Dirlam and Kahn, who state in this connection:



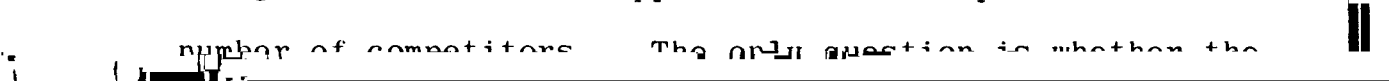
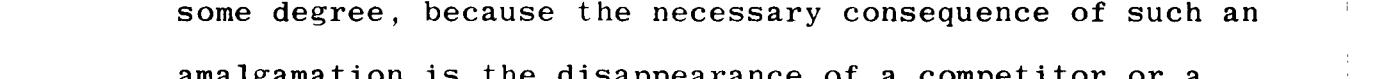
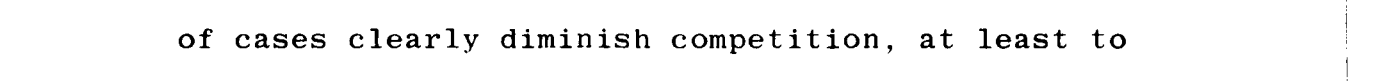
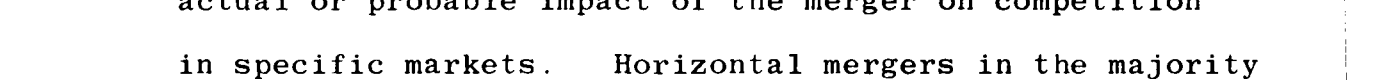
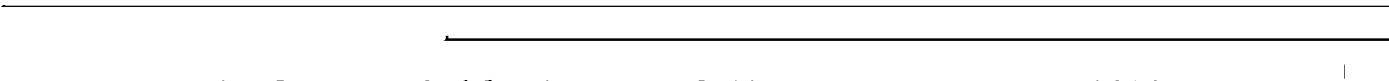
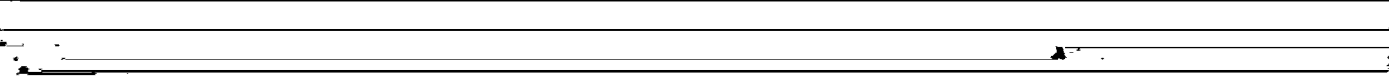




"The antitrust laws cannot be turned into a statute for the structuring of all markets in the direction of purer competition. Apart from the economic objections to such a program, it would be politically impossible. It is questionable if it is worth devoting the bureaucratic resources necessary to achieve the re-ordered structure, and it is questionable too whether the resultant discord and confusion might not impair economic performance more than the final restructuring would improve it. Where giant firms have overstepped the bounds of antitrust, there is no other effective

would in most cases be impaired by dissolving them

reduction of power by these means could be accomplished without much loss. But beyond this remedy, we must resign ourselves to the presence of substantial economic power in our community. General Motors, General Electric, AT & T, duPont, Sears Roebuck, Standard Oil of

merger results in the elimination of potential competition, the likelihood that reciprocity will be used, or the creation of extraordinary competitive advantages for the conglomerate enterprise, then a proceeding under the present antimerger act is justified.

In the case of vertical and horizontal mergers, however, the antitrust agencies, in my view, should take a fairly stringent stand. These acquisitions can readily



actual or probable impact of the merger on competition in specific markets. Horizontal mergers in the majority of cases clearly diminish competition, at least to some degree, because the necessary consequence of such an amalgamation is the disappearance of a competitor or a number of competitors. The only question is whether the

I would agree with Mr. Turner's rebuttal to Fortune's proposals that the best economic evidence indicates that a strong merger policy, at least insofar as horizontal mergers are concerned, is almost certainly

right. 10/ In this connection it is interesting to note that certain studies indicate there is a relationship between price-cost margins in an industry and the degree of concentration in that industry. In the case of an economic study of 1958 data for 32 food manufacturing industries, one of the economists responsible for this inquiry stated:

" . . . we have examined and accepted the hypothesis that average industry price-cost margins are

namely, that competition is more apt to flourish if selling and buying power is dispersed among numerous buyers and sellers. As Mr. Turner stated, an active merger policy intended to limit increases in market

~~concentration is unlikely to result in lower efficiency~~

~~ppm will be antitrust policy conflict with efficiency 12/~~

Accordingly, I believe that in terms of antitrust objectives such as lower prices, better services and more efficient allocation of economic resources, there is a great deal to be gained from application of the antitrust laws to preclude, if possible, further concentration in specific industries and markets as distinguished from in-

what should be my prime concern, namely, the prohibition
by the Federal Trade Commission Act of unfair methods of

antitrust and trade regulation although there are those

than by rigorous enforcement of certain provisions of our antitrust laws which prohibit destructive trade practices. 14/

The suggestion to this effect, although recently

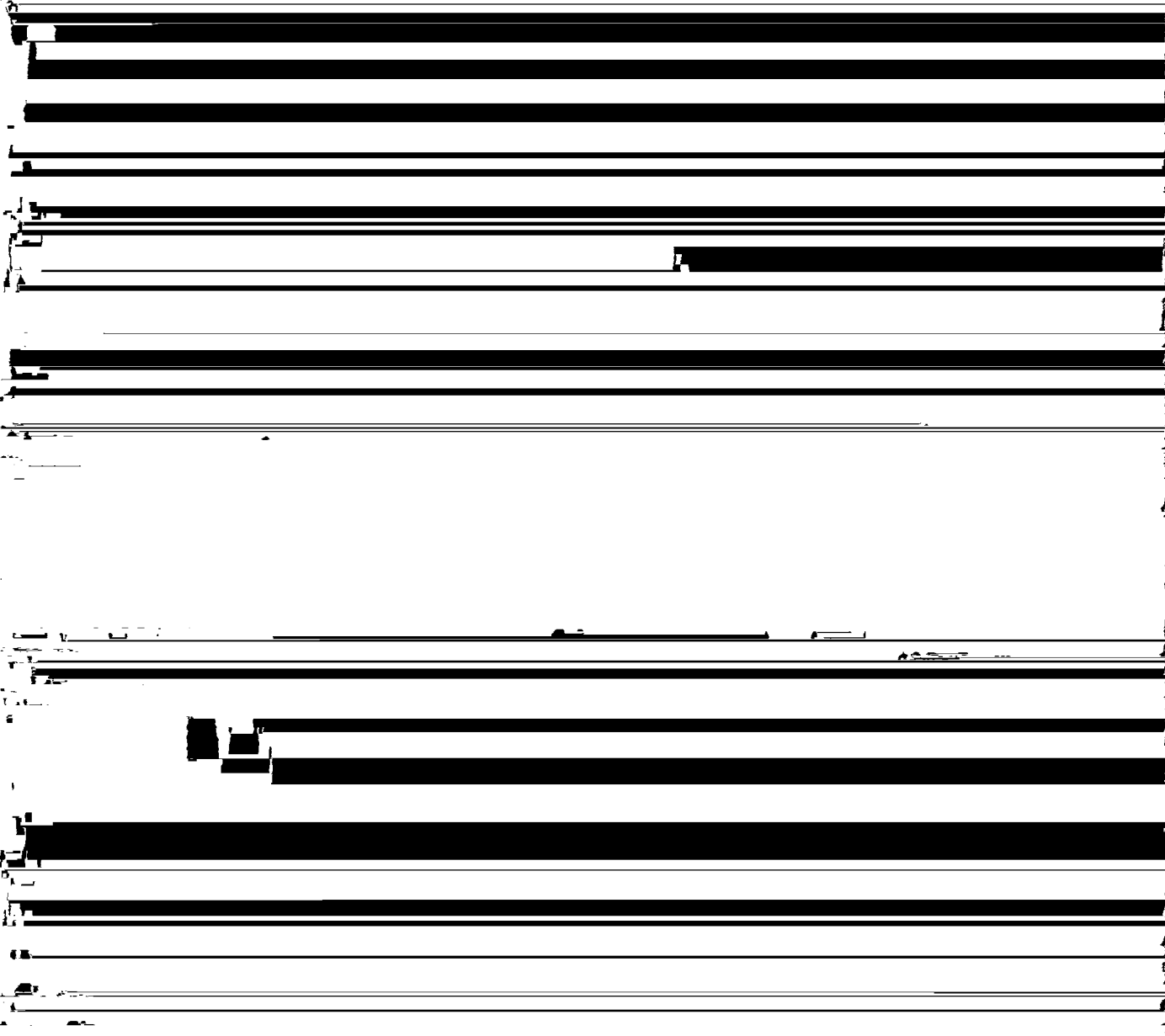
through different periods of antitrust activity. It seems to me that many of these suggestions in effect say "Let the tooth and claw of the jungle prevail." It is argued by some that this would allow for "vigorous competition." Of course some of these advocates claim that they would undertake to dissect "vigorous competition" and try to learn whether the tiger, upon sinking his tooth

antitrust I am not quite so confident as some others about what can and should be done to implement our antitrust public policy in a particular antitrust case.

and study of business problems and firsthand experience as a trial lawyer in antitrust cases. I have seen and experienced the difficulties involved in the objective

marshalling of facts upon the basis of which fair decisions may be made in antitrust cases. Likewise, I have noted the difficulties for business and the government in antitrust actions where decrees and orders have been

In my view, it would be unwise to de-emphasize enforcement of those antitrust statutes specifically designed to prohibit unfair methods of competition by primary or total reliance on a structural approach to antitrust. Enforcement of the antimerger law has an important role in the antitrust statutory scheme, but the structural approach, as I have already noted, has definite



the economy, the law merely fixes the rules of the game but does not involve the government in business risks or management activities nor require detailed review of either basic

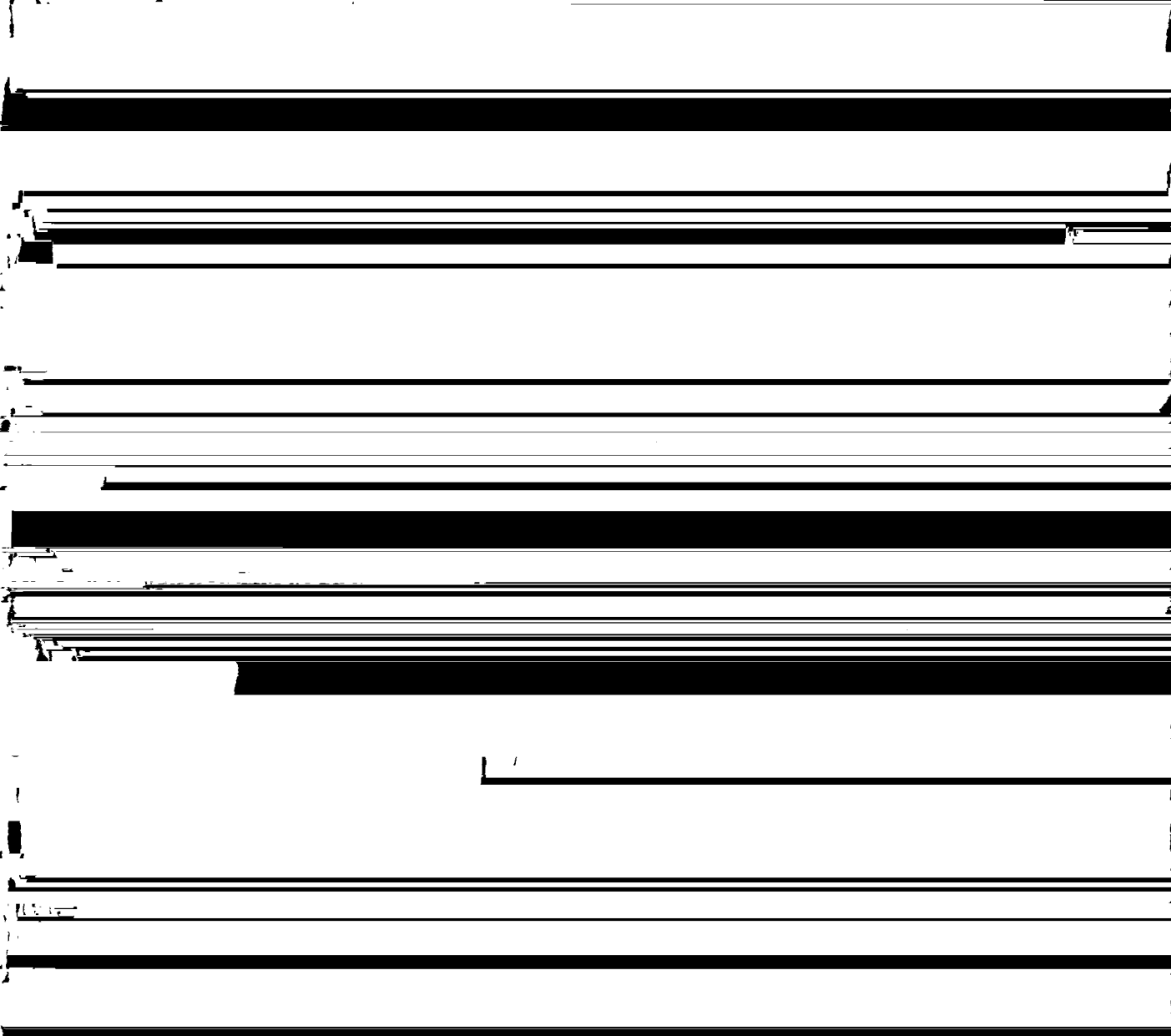
lawyer engaged in private antitrust practice, warned that if our national public policy for an economic system of private enterprise based on free and fair competition is not vigorously maintained, there can be no

imposed to socialize the powers, profits and property of business enterprises. 19/

Earlier on Pages 13 and 14 and in Footnote 9 of this

Attorney General in Charge of Antitrust, Department of Justice, indicated that he believes some antitrust action should be taken against some of the concentrated economic groups. The report said, "Yesterday, he talked of using a court case under the present antitrust laws or of asking Congress for new legislation." He indicated that the Justice Department has not made up its mind

whether it is appropriate to start a new case today out of



This living process should be one that would approach