

ROBERT H. JACKSON AT THE ANTITRUST DIVISION

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Robert H. Jackson served as the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice from January 1937 until March 1938. Although Jackson was head of the Division for only fourteen months, he held that position during an important period for the development of antitrust law and industrial policy in the United States. This brief chapter in his legal career reveals many facets of Jackson's character, both as a person and a lawyer. It also provides an insight into the development of the Antitrust Division and of the antitrust laws more generally.

JACKSON'S ANTITRUST EXPERIENCE

Jackson began his extraordinary career as a "country lawyer" in upstate New York. Although he had only one antitrust case in private practice, that experience informed his views about the antitrust laws years later when he was Assistant Attorney General.¹ In his draft autobiography, Jackson explains that he represented a number of furniture manufacturers from upstate New York and Pennsylvania who had been indicted in Chicago for conspiring to maintain furniture prices:

It was pretty clear to me that they had so conspired, in spite of the fact that the conspiracy had not succeeded, so far as I was able to determine, in maintaining or visibly affecting prices. It had been seriously suggested by one of the counsel for some of the interests that the furniture men depend upon the ground that while they had agreed to maintain prices they had not kept their agreements. This did not seem to me

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¹ Robert H. Jackson, *Oral History* 426 (Box 190, 1952-53) (on file in the Robert H. Jackson Papers, Library of Congress, Manuscript Division) (noting that Jackson had only one antitrust case when in private practice).

a very credible or creditable performance, and I had advised my clients to buy their peace by pleading their corporations guilty and paying the fines, which in no case amounted to more than \$4,000. Other counsel advised some other defendants differently and after a long mass trial and a very expensive one the jury disagreed and they later pleaded guilty and paid their fines. I was impressed then, as I have been ever since, that the antitrust laws are so vaguely expressed that the average business man has no idea when he is and when he is not violating them.²

This concern that businesses need clear antitrust standards to guide their conduct later figured prominently in Jackson's work as Assistant Attorney General.

While Jackson built his successful private practice, he developed a relationship with Franklin Delano Roosevelt that would forever change the course of his career. Jackson described his nearly twenty-year relationship with FDR in this way: "For almost a score of years before Franklin Delano Roosevelt came to the Presidency, I had some acquaintance, but not intimacy, with him. It grew out of dealings with him on affairs of politics."³ Although Jackson "had no thought of asking or being offered a position in the government after [FDR] was elected," Jackson went on a political speaking tour with FDR's Postmaster General and Democratic Party Chair James Farley in the New York state election in 1933. This led Farley to ask Jackson to come to Washington. In February, 1934, Jackson succumbed to Treasury Secretary Henry T. Morgenthau Jr.'s offer to be the General Counsel at the Bureau of Internal Revenue. Jackson then became "one of the most famous lawyers in the country" after his widely-noted work on the Andrew Mellon tax fraud prosecution.⁴ FDR subsequently moved Jackson from Treasury to a brief assignment at the Securities and Exchange Commission, then to the Tax Division at the Department of Justice, and then to the Antitrust Division.

² Robert H. Jackson, *Draft Autobiography* 87–88 (Box 190, June-July 1944) (on file in the Robert H. Jackson Papers, Library of Congress, Manuscript Division) [hereinafter Jackson *Draft Autobiography*].

³ ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 2 (John Q. Barrett ed. 2003) [hereinafter JACKSON, *THAT MAN*].

⁴ John Q. Barrett, *Introduction* to JACKSON, *THAT MAN*, *supra* note 3, at xv. Jackson first met FDR in Albany in 1911, during FDR's freshman term as state senator.

JACKSON COMES TO THE ANTITRUST DIVISION

Jackson took charge of the Antitrust Division on January 18, 1937. He was not interested in the position at first because he had planned to return to the private practice of law after completing his service as the Assistant Attorney General of the Tax Division. Attorney General Homer Cummings nonetheless persuaded him to accept the job because “the Antitrust Division had many matters of policy to consider” and the Attorney General assured him that the experience would be valuable.

Although Jackson found the Division in a “somewhat moribund” condition, he did not attribute this to a lack of intelligence or hard work on the part of his predecessors. Rather, Jackson believed it was a consequence of the Roosevelt Administration’s industrial policy as exemplified in the National Recovery Administration (“NRA”). In Jackson’s view, the NRA “was based on the philosophy almost exactly opposite to that of the antitrust laws” and, as a result, “during the N.R.A experiment, there had been a pretty general suspension of antitrust law activity. Businessmen were encouraged to meet and cooperate and particularly in the oil industry they were encouraged to enter into agreements which might have been considered as violative of the antitrust laws.”⁵

The NRA thus signified a return to an industrial policy that Jackson associated with Theodore Roosevelt—a policy under which “business should be allowed to become big and...business men should be allowed to get together and agree as to industrial policies, but...the Government should have [a] regulatory hand over all business.”⁶ Jackson contrasted that with the antitrust policy he attributed to Woodrow Wilson—and was much closer to his own—which was “based generally on the belief that business would be self-regulating and would not need extensive Government regulation if the processes of competition could be maintained.”⁷ In his draft autobiography, Jackson explained that, under his predecessors, the Antitrust Division “itself was confused as to what the policy was to be It was not until I came into the Department that the N.R.A philosophy was definitely abandoned and we reverted to the Woodrow Wilson doctrine that free

⁵ Jackson Draft Autobiography, *supra* note 2, at 85–86.

⁶ *Id.* at 85. For a discussion of Theodore Roosevelt’s views about competition and business regulation, see JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT AND DEBS—THE ELECTION THAT CHANGED THE COUNTRY 191–97 (2004).

⁷ *Id.*; see also JACKSON, THAT MAN, *supra* note 3, at 120.

competition is the wisest and most liberal measure of business regulation.”⁸

Jackson found that the lack of a clear policy on antitrust enforcement was not the only challenge confronting the Division in 1937. He also found that there were certain “inherent limitations of antitrust prosecution” under the law as it then stood, which made it “impossible to prosecute or even to investigate all of the alleged violations of the antitrust laws.”⁹ Among these limitations, Jackson was especially critical of judicial interpretations of the antitrust laws that resulted in vague standards of liability that failed to focus on economic effects:

[T]he courts have . . . refused to determine the validity of price policies in terms of the only possible standard which can be practically enforced, i.e., results. Instead of that they have made “intention” to restrain trade the test and qualified monopoly by the term “reasonable.” Such a standard is not only vague but it does not permit consideration of the real factors involved. It does not face the issue whether a combination is in fact one which will tend to produce economies of scale or whether it will in actual operation tend to give an opportunity for monopoly profits. The important factor is taken to be the “intent” or “state of mind” of a fictitious corporate individual. Practical results of combinations, which are the only real criteria for effective, as distinguished from sentimental, administration of a policy to encourage competition, are brushed aside.¹⁰

Jackson also believed that these vague standards had negatively impacted enforcement efforts at the Division by making prosecutions so burdensome that only a few were possible.

Jackson’s response to this crisis was to adopt a plan to “select for intensive investigation those complaints which show the most

⁸ Jackson Draft Autobiography, *supra* note 2, at 86–87.

⁹ Report of Assistant Attorney General Robert H. Jackson in Charge of the Antitrust Division, in Annual Report of the Attorney General of the United States for the Fiscal Year 1937, at 35 (1938) [hereinafter Report of Assistant Attorney General]. Jackson explained that:

Because of the confusion of changing precedents and changing economic conditions, the law itself does not provide adequate standards (1) for the selection of cases for prosecution, (2) for the determination in advance of the validity of the numerous combinations which to not involve the violation of some specific precedent, (3) for the differentiation of industrial efficiency from industrial empire building for effective monopoly control.

Id.

¹⁰ *Id.* at 38–39.

flagrant cases of antitrust violation and in which the greatest public interest is involved.”¹¹ His first step was to create a “Complaints Section” within the Division to which would be referred all new complaints and all old complaints that had previously been assigned indiscriminately to various lawyers in the Division. Jackson incorporated into the new Complaints Section the Division’s fledgling Economics Unit, which was led by an Economics Advisor.¹² Jackson specifically directed the Economics Advisor to cooperate with the section in performing its responsibilities, which included conducting and supervising all investigations, collecting all available evidence, and making recommendations as to whether specific cases should be brought.¹³

ANTITRUST ENFORCEMENT UNDER JACKSON

During Jackson’s tenure, three cases in particular were identified as involving the “most flagrant” antitrust violations and were therefore selected for immediate action, including the landmark cases against Socony-Vacuum Oil Company and the Aluminum Company of America.¹⁴

In *United States v. Socony-Vacuum Oil Company*, twenty-four oil companies and forty-six of their officers and employees had been charged with a series of agreements to fix and maintain gross margins allowed to gasoline jobbers in violation of Section 1 of the Sherman Act.¹⁵ According to Jackson, the indictment caused “considerable disagreement between Attorney General Cummings and Secretary [of the Interior] Ickes, who felt the oil men were being unjustly prosecuted,” but Jackson examined the facts himself,

¹¹ *Id.* at 41. According to Jackson, this new section was “able to weigh one complaint against another and to concentrate its efforts on those which show[ed] the most serious injury to the public.” *Id.* at 42.

¹² The Economics Unit was created in 1936 by Jackson’s predecessor, John Dickinson. See John Dickinson, *The Enforcement of the Antitrust Laws*, Address Before the Council for Industrial Progress, at 13 (Dec. 10, 1936), available in the Homer S. Cummings Papers at the U. of Virginia Library, Manuscript Department, Box 181 (“Within the past six months I have made the innovation of establishing the nucleus of a small economic unit within the limits of a restricted budget and it has already more than justified itself in keeping investigations out of blind alleys and in interpreting the information which they have elicited.”).

¹³ Antitrust Division Office Order No. 7(a) (Feb. 19, 1937) (on file with the Library of Congress, Manuscript Division, Box 79); see also Report of Assistant Attorney General, *supra* note 9, at 42.

¹⁴ Report of Assistant Attorney General, *supra* note 9, at 42. The third of these was a case against automobile financing companies. *Id.*

¹⁵ *Id.* at 48. Section 1 of the Sherman Act declares that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal.” 15 U.S.C. §1 (2000).

concluded that the oil companies “had clearly violated the law and proceeded to prosecute them vigorously.”¹⁶

Drawing on his background as a trial lawyer in upstate New York, Jackson insisted on hiring local counsel for the trial, which would be before a jury in the U.S. District Court in Madison, Wisconsin. Jackson was concerned that the two lead lawyers for the Division had never tried cases before “country” juries, so he hired “a country lawyer from Wisconsin” to assist them. Jackson told the lawyer he “did not want him ever to bother to learn the law or the facts of the case, but [that Jackson] wanted him to keep the case on a level such that the jury would understand it.”¹⁷

The *Socony-Vacuum Oil* case ultimately had a lasting impact on antitrust law. The Supreme Court’s decision affirming the jury’s guilty verdict as to a number of the defendants established unequivocally that “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*.”¹⁸ The Court also flatly rejected arguments by the defendants that their combination could be justified as consistent with the objectives of the National Industrial Recovery Act, to which Jackson was so strongly opposed.¹⁹

Another case that occupied much of Jackson’s attention was *United States v. Aluminum Company of America*.²⁰ Although the Division began investigating ALCOA again in 1933, it did not file a case until April 1937.²¹ In a memorandum to the Attorney General seeking authorization to file the case, Jackson outlined the principal theories of liability in the complaint. First, the Government alleged that ALCOA’s 100 percent monopoly of virgin aluminum gave it the

¹⁶ Jackson Draft Autobiography, *supra* note 2, at 88.

¹⁷ *Id.* at 88–89. According to Jackson, this country lawyer “succeeded so well that considerable complaint was made that several of his remarks to the jury were prejudicial, but at least he gave the case a touch that it needed as a practical matter.” *Id.* at 89.

¹⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

¹⁹ *See id.* at 227–28.

²⁰ Jackson Draft Autobiography, *supra* note 2, at 91.

²¹ Ten days after his initial March 16, 1937, ALCOA case recommendation memorandum to Attorney General Cummings, Jackson sent a supplemental memo attaching a staff memo detailing the history of prior “DOJ relations” with ALCOA. That memorandum noted, *inter alia*, the existence of a 1912 consent decree that resolved a prior antitrust case the United States brought against ALCOA in the Western District of Pennsylvania, the modification of that consent decree in 1922, and a 1926 Department of Justice report that concluded no action should be taken against ALCOA for “lack of evidence” to support an action for contempt of that decree. *See* Memorandum for the Attorney General from Robert H. Jackson, Assistant Attorney General (Mar. 26, 1937) (on file with the Library of Congress, Manuscript Division, Box 77).

power to exclude potential competitors in fabricated aluminum products because those potential competitors would be dependent upon ALCOA for raw material. Jackson explained that the purpose of these allegations was to invite a holding on an issue that had “never been squarely presented to the courts”: whether “a 100 per cent monopoly with the absolute power to exclude others constitutes an illegal monopoly *per se* under Section 2 of the Sherman Act.”²² The Government also alleged that ALCOA took “a series of illegal steps in the development of [its] domestic monopoly.”²³ As relief, the Government sought to have ALCOA dissolved and its properties “rearranged under several separate and independent corporations.”²⁴

Before the case was filed, ALCOA requested a meeting with Attorney General Cummings. Jackson described the meeting as follows:

Arthur V. Davis, head of the Company, and Roy Hunt, and several others appeared in Attorney General Cummings’ office They asked if they were going to be sued. . . I told them candidly that we intended to bring suit, . . . that we felt there was . . . evidence of violation of the antitrust law in the method of obtaining the monopoly and that the monopoly itself was a clear violation of the law. They protested against being used as a guinea pig to test out the law and asked when we intended to file our complaint. I saw no reason for evading the question and told them what my plan was. We filed our complaint as planned²⁵

Shortly after the complaint was filed in the Southern District of New York, ALCOA sought an injunction to prevent the suit from going forward, arguing that the case was related to an earlier case against ALCOA in the Western District of Pennsylvania and that the district court there had exclusive jurisdiction.²⁶ Jackson went to Pittsburgh himself to argue against the injunction, but the district judge entered the injunction nonetheless. Jackson subsequently argued against the injunction in the Supreme Court, which held

²² Memorandum for the Attorney General from Robert H. Jackson, Assistant Attorney General 2 (Mar. 16, 1937) (on file in the Library of Congress, Manuscript Division, Box 77) [hereinafter Memorandum for the Attorney General].

²³ *Id.* at 3; see also Report of Assistant Attorney General, *supra* note 9, at 46 (describing ALCOA case).

²⁴ Memorandum for the Attorney General, *supra* note 22, at 4.

²⁵ Jackson Draft Autobiography, *supra* note 2, at 92–93.

²⁶ See *supra* note 21 and accompanying text (describing the earlier case).

that the injunction was improper.²⁷

The trial of the ALCOA case commenced in June 1938, several months after Jackson left the Antitrust Division, and it concluded in August 1940. The district court entered a final judgment dismissing the complaint in 1942, and the United States appealed. By the time the case reached the Supreme Court, Jackson had been appointed to the Court. Because he and three other Justices disqualified themselves, the Court found itself lacking a quorum of six. The Court then referred the case to the United States Court of Appeals for the Second Circuit. A distinguished panel of the Second Circuit, consisting of Judges Learned Hand, Thomas Swan, and Augustus Noble Hand, decided the appeal on March 12, 1945.

On the question whether the mere possession of monopoly is illegal *per se* under Section 2 of the Sherman Act, Jackson's view did not prevail. Instead, the court of appeals reached the opposite result. Starting with the premise that "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry," the court concluded that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."²⁸ This has since become a basic principle of Section 2 jurisprudence.²⁹ Jackson's view did, however, prevail on the question whether ALCOA had engaged in unlawful exclusionary practices that effectively forestalled competition and protected ALCOA's monopoly. The court of appeals ultimately reversed the district court's judgment and held that the Government had proved a violation of Section 2.

JACKSON, ROOSEVELT AND THE PHILOSOPHY OF COMPETITION

On October 21, 1937, Jackson went to the White House, chiefly to tell President Roosevelt that he wanted to resign. Jackson wanted

²⁷ Jackson Draft Autobiography, *supra* note 2, at 95–96; *see also* Aluminum Co. of America v. United States, 302 U.S. 230 (1937) (affirming decree of a three-judge panel, sitting pursuant to the Expediting Act, which vacated the injunction entered by the district judge).

²⁸ United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

²⁹ *See, e.g.*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

Id. at 407.

2005]

Robert H. Jackson at the Antitrust Division

795

to return to his law practice and felt that he was “becoming more deeply involved in politics and in legislative matters and in matters of policy and was getting away from strictly legal work, for which [Jackson] felt better qualified.”³⁰ Jackson described the visit as follows:

The President was in bed and was just having his breakfast. I sat by the bedside and after a few pleasantries told him that I felt I must get back to my law practice; that it was rapidly disintegrating, that it represented a lifetime of effort and constituted my social security and that I could not let it go longer. He broke in to say, “You can’t do that, Bob, even if it would be best from a money-making point of view.” He then launched into a discussion of the problems of the New York Governorship.³¹

When the conversation finally returned to Jackson’s proposal to leave the Antitrust Division, the President “suggested that there might be changes in the Department of Justice and that at least [Jackson] should withhold any action for the time being,”³² which Jackson agreed to do.

The discussion then turned to antitrust. Jackson proposed to prepare a message to Congress suggesting the revision of the antitrust laws:

I told [President Roosevelt] that [the antitrust laws] were as general as the ten commandments and about as well obeyed, but that a good many lawyers and most businessmen and a fair number of the Government’s own staff did not know what they meant, and that I thought a vigorous campaign to enforce such generalities would have elements of injustice for no one would know what the law was until the courts had decided. It seemed to me that the antitrust laws should be brought up to date by enacting specific prohibitions of at least certain practices.³³

Jackson proposed to prepare a report identifying defects in the current law and recommending proposed revisions, and then to

³⁰ Jackson Draft Autobiography, *supra* note 2, at 125.

³¹ *Id.* at 125–26. Jackson later described FDR’s work habits as follows:

The President always impressed me by his intense application to the work of his office. But it was not labor; it seemed to be his delight. He often worked at his breakfast in bed, frequently seeing Cabinet members or other aides at that time. He was immersed in work nights, holidays, on weekend cruises, and on vacations.

JACKSON, *THAT MAN*, *supra* note 3, at 13.

³² Jackson Draft Autobiography, *supra* note 2, at 128.

³³ *Id.* at 129.

draft a message to Congress based on those recommendations. Roosevelt approved Jackson's proposal and Jackson started working on the report at once with members of the Antitrust Division staff and other agencies.³⁴

In late November 1937, Jackson accompanied Roosevelt on a fishing trip in the Gulf of Mexico. Jackson took with him the materials that had been prepared for the report and, while on the trip, they discussed the problems of monopoly and possible antitrust legislation at length. Among other things, they discussed "the regulation of trade associations among small business men in the interest of enabling them to have a clearer definition of what was permissible and what was not" as well as the possibility of "affording price protection for the public against those industries where monopoly was an accomplished fact."³⁵

After returning to Washington, Jackson and others at the Antitrust Division continued working on the draft monopoly message.³⁶ When a draft monopoly message was sent to Roosevelt, it came back with a new paragraph "that proposed to allow industries to agree on volume of production for a given year."³⁷ This was completely antithetical to Jackson's view of proper antitrust policy. Jackson described what happened next:

What [Roosevelt] had in mind, as he explained to me, was to even out the peaks and valleys of employment through a fixed production schedule. He used the example of the automobile companies. He said, "I don't see any harm in Ford, Chrysler, and General Motors getting together and agreeing on a production schedule that will maintain employment on an even basis over a given period of time."

I said, "Mr. President, the difficulty with that is that the quantity to be produced is related to price. . . . Therefore, the moment that you say that these men may sit down and plan production, they have to plan price. They have to allocate territory. In other words, every evil that we fight under the

³⁴ Roosevelt wrote Jackson a letter formally requesting the report and authorizing Jackson to call upon other officials in government "for data and suggestions to make [the] report complete." JACKSON, THAT MAN, *supra* note 3, at 121 (reproducing an October 22, 1937, letter from Roosevelt to Jackson asking for a report identifying "[t]he important facts bearing upon the success or failure of our present anti-monopoly laws, their economic and social results, and the necessity for revision or amendment.").

³⁵ Robert H. Jackson, *Memorandum of a Fishing Trip with President Roosevelt Leaving Washington, D.C. on Saturday, November 27, 1937 and Returning on Monday, December 6, 1937*, at 13-14 (on file at the Library of Congress, Manuscript Division).

³⁶ Jackson Draft Autobiography, *supra* note 2, at 131.

³⁷ JACKSON, THAT MAN, *supra* note 3, at 122.

antitrust laws will come in under scheduled, agreed production.”

“Yes, I guess that’s right. I guess we can’t do it,” he would conclude.³⁸

Jackson later explained that FDR “always was torn between the Theodore Roosevelt theory of regulated bigness and the Wilsonian-Brandeis theory of free competition and retention of the smaller units.”³⁹

This tension persisted throughout the preparation of Roosevelt’s monopoly message. Jackson felt that he was in a contest with Donald Richberg, a trusted adviser of Roosevelt, who was an advocate of the kind of industrial self-regulation envisioned by the National Recovery Administration. When the NRA was held unconstitutional,⁴⁰ Richberg, who was a former NRA administrator, “urged strongly upon [President Roosevelt] that a system be set up by which businessmen could be allowed to make certain agreements that would be in restraint of trade with the approval and under the supervision of an administrative body.”⁴¹

Jackson was opposed to this course and in the fall of 1937 he began a series of speeches that publicized his view of the proper role of antitrust law.⁴² Jackson emphasized three major themes. *First*, the goal of the antitrust laws was to protect competition, and the alternative—self-regulation by industry with government oversight—was wholly inconsistent with that goal. *Second*, the antitrust laws as written and as interpreted by the courts were unacceptably vague, provided business enterprises no clear guidance as to the standards of liability, and made government enforcement extremely difficult. Instead, “[t]he modern approach toward liability under the anti-trust laws must be an objective one,

³⁸ *Id.* For a similar description of this conversation, see Jackson Draft Autobiography, *supra* note 2, at 134.

³⁹ JACKSON, THAT MAN, *supra* note 3, at 122.

⁴⁰ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act on the ground that it impermissibly delegated a legislative function to the President).

⁴¹ JACKSON, THAT MAN, *supra* note 3, at 123.

⁴² See, e.g., Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. REV. 575 (1937) (Address Before the Trade and Commerce Bar Association and Trade Association Executives, Sept. 17, 1937) [hereinafter *Should the Antitrust Laws Be Revised?*]; Robert H. Jackson, *The Present Monopoly Problem in the United States*, Address Before the Cooperative Committee (Nov. 15, 1937) (manuscript available in the Library of Congress, Manuscript Division); Robert H. Jackson, *Farmers and the Antitrust Laws*, Address Before the American Farm Bureau Federation (Dec. 13, 1937) (manuscript available in the U. of Virginia Library, Manuscript Department, Box 181) [hereinafter *Farmers and the Antitrust Laws*].

not a subjective one; and must be in terms of economic effects, rather than individual states of mind.”⁴³ *Third*, Jackson argued that the level of economic concentration in industry was far too great, and the only viable solution to the “monopoly problem” would be to revise the antitrust laws to control monopolies and protect small businesses against destruction by overgrown competitors.

The importance of the last of these themes to Jackson should not be under-emphasized. Jackson was an ardent supporter of the New Deal, and he wholeheartedly embraced the belief that “the business of government [is] to solve problems of depressions and unemployment by breaking up the powers of the monopolies, rendering flexible and reducing to reasonable levels the costs of raw materials and commodities.”⁴⁴ His speeches in the fall of 1937 were laced with attacks on “big business” and powerful rhetoric about the need to reform the antitrust laws and establish a “consistent national policy of monopoly control.”⁴⁵

What is extraordinary is that Jackson coupled this belief with an equally strong faith in the forces of competition. He could have easily concluded with Richberg and others that the only way to smooth out the peaks and valleys of industrial production and employment was to allow—or even encourage—businesses to coordinate and rationalize their levels of output.⁴⁶ But he did not. Instead, he preached the fundamental philosophy of the antitrust laws:

The philosophy of the antitrust laws was simple American philosophy. It was their doctrine that competition, left free of restraint, would be a sufficient regulator to assure fair prices and good service to the public. They were based on the theory that the government owed the duty of policing the economic system to see that no one interfered with its functioning as a system of free enterprise [sic]. They were intended to prevent the necessity ever arising for government control of prices or for government regulation of business life. They were not designed to get the government into business but they were designed to keep the government

⁴³ Robert H. Jackson, *The Sherman Act and the Anti-Trust Laws*, at 10 (Sept. 22, 1937) (draft manuscript of speech available in the U. of Virginia Library, Manuscript Department, Box 181).

⁴⁴ *Id.*

⁴⁵ *Should the Antitrust Laws Be Revised?*, *supra* note 42, at 576.

⁴⁶ See Felix Belair Jr., *Richberg Vs. Jackson: Business Policy Issue*, N.Y. TIMES, Feb. 20, 1938, at 54.

out of business.⁴⁷

That philosophy still guides antitrust enforcement at the Department of Justice today. So do Jackson's views that sound antitrust enforcement must be based upon economic effects, not vague notions of intent, and that antitrust law needs more objective standards of conduct. Jackson's view about the need to police monopolies aggressively, however, has been replaced in mainstream antitrust thought by a much more cautious approach.⁴⁸

Jackson left the Division in March 1938, when Roosevelt appointed him Solicitor General. Roosevelt's monopoly message was completed one month later,⁴⁹ and Jackson played a central role until the end.⁵⁰ Ultimately, however, Jackson's approach prevailed over Richberg's, and the President's message rejected "big business collectivism" and embraced competition as the organizing principle of the national economy.⁵¹

CONCLUSION

Robert Jackson led the Antitrust Division through an important turning point in its history. He focused and reinvigorated antitrust enforcement, championed the need for standards to provide businesses with clear guidance, and emphasized analyzing conduct on the basis of economic effects, not intent. Antitrust law is no longer animated by a "big is bad" philosophy. But Jackson's belief in competition rather than continual government regulation as the best promoter of a vibrant economy is the fundamental tenet of antitrust enforcement today.

⁴⁷ Farmers and the Antitrust Laws, *supra* note 42, at 1.

⁴⁸ See, e.g., R. Hewitt Pate, The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct, Address Before the Fordham Corporate Law Institute Thirtieth Annual Conference on International Antitrust Law and Policy (Oct. 23, 2003), available at <http://www.usdoj.gov/atr/public/speeches/202724.htm>, explaining:

[T]he most careful analysis is needed. It is with respect to this type of conduct that it may be most difficult to differentiate between healthy competition on the merits and harmful exclusionary conduct. It is here where enforcers and courts run a significant risk of deterring hard yet legitimate competition. It is also an area in which, even if we are able to conclude that certain conduct is anticompetitive, it may be more difficult to effect workable remedies that will restore any lost competition.

Id. at 5.

⁴⁹ See Franklin D. Roosevelt, President's Message to Congress on the Concentration of Economic Power (Apr. 29, 1938), at <http://publicpolicy.pepperdine.edu/academics/faculty/Lloyd/projects/newdeal/fr042938.htm> [hereinafter President's Message to Congress].

⁵⁰ See JACKSON, THAT MAN, *supra* note 3, at 124.

⁵¹ See President's Message to Congress, *supra* note 49.