RALPH NADER VIEWS ON PROPOSED ANTITRUST SUIT CONSENT DECREE

HON. GEORGE E. BROWN, JR.

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Friday, October 3, 1969

Mr. BROWN of California. Mr. Speaker, Author-Attorney Ralph Nader, who has done more for the American consumer in the past few years than any private citizen in history, has submitted his views to the court regarding the Justice Department's proposal that a consent decree be issued in the antitrust suit filed against the major automobile manufacturers and the Automobile Manufacturers Association.

I urge my colleagues to read Mr. Nader's statement, which incisively points out why an open trial related to the conspiracy—involving agreements to restrain the development of smog control devices on automobiles—should be carried out. The statement follows:

RALPH NADER, SUBMISSION OF VIEWS REGARDING PROPOSED CONSENT DECREE, UNITED STATES AGAINST AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., ET AL., CIVIL ACTION NO. 69–75–JWC

What the domestic auto companies conspired over a period of at least 16 years to do—restrain the development and marketing of auto exhaust control systems—is a crime under the Sherman Act. Collusive, anti-competitive agreements which result in seriously jeopardizing the capacity of citizens to breathe air without carcinogenic and other lethal and violent pollutants would, under the most normal of expectations, be prosecuted by the Division as a crime. That course of enforcement was indeed initiated by Mr. McLaren's predecessors in the Antitrust Division, Donald Turner and Edward Zimmerman, in mid-1966. Grand Jury proceedings for 18 months resulted in the Division's trial attorney's request to Mr. Turner for permission to ask the Grand Jury to return an indictment. The Grand Jury was even willing to return an indictment regardless of what instructions were forwarded from Washington—so convinced was it of the criminality of the behavior detailed during these 18 months. Mr. Turner dropped the criminal case, without any public explanation, and had the Grand Jury discharged. One year later, in January 1969, a civil complaint was filed. Nine months after that, the civil complaint was in effect dropped in favor of a porous, proposed consent decree, stripped to the minimum of what the legitimate impact of the law should have been.

Is this where five years of Antitrust Division involvement and expenditure of numerous man-years is to end? I should like to detail some reasons why the answer to this question must be "no."

Over the years, a large proportion of the civil actions brought by the Antitrust Division have been terminated by consent decrees. The criteria employed have rarely been made clear. However, it is known that scarce manpower and judicial delay are important factors. Year after year, those who have led and supervised the Antitrust Division have undermined or weakened antitrust enforcement by simply referring to those two conditions. At the same time, there has been no sustained effort to obtain more funds for the Division or to develop procedures (with the exception of the CID development earlier in this decade) which will accelerate any judicial recourse or at least improve the bargaining power of the government that more expeditious trial reflects.

It seems to be relevant to suggest a number of questions which should be asked in the automobile smog case before a consent judgment is considered or approved:

1. Are there important and unresolved issues of law which merit judicial determination?

2. Are there important rights of public and private institutions and citizens which can be eroded or erased by a consent judgment as proposed?

3. Does the seriousness of the antitrust violation in this case argue for the greater deterrent and public educational purposes achieved by a civil trial or the resumption of the Division's criminal action?

4. Does the proposed consent decree achieve the announced objective of Attorney General John N. Mitchell who described it last week as representing "strong federal action to encourage widespread competitive research and marketing of more effective auto antipollution devices?"

Matters of fact and law point to clearly affirmative responses to questions (1) (2) & (3) and a negative response to question (4).

The present case offers an excellent opportunity for the Antitrust Division to establish judicially two important principles which would have enormous replicative value over the behavior of modern industry striving to restrain the rate of innovation to the detriment of competition and human welfare. The Department's complaint of January 10, 1969 requested that the defendants be restrained from making joint responses to government regulatory agencies concerned with air pollution control. For years the Automobile Manufacturers Association has been the instrument of precise collusion by the auto companies to develop common positions on questions of pollution and safety and to head off or suppress any potential diversity of response. Even after the Department commenced its investigation into this conspiracy, the AMA was developing and using a stock speech on air pollution—a speech which was given, for example, both by Dr. Fred W. Bowditch, Chief Engineer for General Motors and Mr. Donald A. Jensen, Ford's executive engineer in charge of vehicle emissions. (*Detroit News*, December 1, 1968). Collusive trade associations activity continues to be a prime anti-competitive practice in this country. Such activity is long overdue for authoritative judicial resolution and the emergence of judge-made law that would give pause to other trade associations which exert similar, if not greater control, over their members and enforce the dominant firm(s)' policy over smaller industry firms. The proposed consent decree loses this opportunity.

The second principle requiring case law development relates to "product fixing." The automobile industry has restrained competition among manufacturers in the area of product quality. The consumer movement can produce numerous instances of such lowest common denominator quality throughout an industry. The auto companies' activities in the motor vehicle emissions field are in this sense symptomatic of a disease which affects wide areas of the economy. By not moving against this sort of collusion, the Division has relinquished an opportunity to formulate a crucial, new precedent that is rooted in old antitrust doctrine. The instant case is ripe for this determination and the Division has the benefit of five years of investigation as well.

Because the antitrust laws recognize the rights of persons or groups to initiate private antitrust actions, the Division is in a trusteeship position thereto. Any decision made must take into some account how the final resolution will affect the rights of private and public parties under the antitrust laws. In this case, municipal and other public bodies have displayed a strong interest in antitrust enforcement vs. the auto conspiracy as well as recovering in separate actions damages which they have incurred as a result of auto pollution. The possibility that local governmental bodies, business firms and individual citizens may wish to adjudicate their rights is severely limited by the proposed consent decree. Section 5 of the Clayton Act provides that consent judgments, unlike other final judgments in cases brought by the United States, shall not be considered prima facie evidence against the defendant in a treble-damage suit. The practical effect of this provision is that potential treble-damage plaintiffs would have to duplicate the investigative process which took the Department several years and several hundreds of thousands of dollars even with its extraordinary discovery powers. Los Angeles County alread has filed a one hundred million dollar suit against the automobile manufacturers, seeking to recoup some of the loss to the County resulting from this corporate conspiracy to hold back on pollution controls. Further, the California Attorney General, acting on behalf of the State, has been denied access to the Justice Department's information about the auto pollution case. The evidence of the conspiracy exists in the Justice Department's possession and the Department seems determined not to have any of it surface in a public trial. In a critical treatment of the Department's consent decree program ten years ago, the House Antitrust Subcommittee described precisely this effect:

"The almost inevitable consequence of the acceptance of a consent decree by the Department of Justice . . . is to deprive suitors, who have been injured by the unlawful conduct, of their statutory remedies under the antitrust laws."[1]

The Department's complaint charges the auto industry with collusive behavior having devastating consequences for the peoples' health in this country. At least 50% of the nation's air pollution comes from the motor vehicles' internal combustion engines. Medical and other epidemiological studies have linked these pollutants with diseases ranging from cancer to emphysema. Property damage from corrosive pollutants is estimated at $13 billion annually by federal officials. Half of this amount is a very substantial cost inflicted on this nation by the auto industry's intransigent refusal to innovate over the past generation. Can anyone deny the need and benefit for the public to learn about the nature and depth of this colossal corporate crime? The citizens of this country, who are the customers of this industry, have a right to know the extent which the auto companies are deliberately responsible for the enormous health, economic and aesthetic damages caused by the internal combustion engine. One of the purposes of a public trial is deterrence; the Division has chosen to lose a grand opportunity to bring these companies and their harmful practices into the public arena of a courtroom. This aspect of the Division's case alone would have a greater deterrent effect than the tightest of consent judgments. Since it is not any longer the practice of antitrust enforcement to pierce the corporate veil and hold the culpable officials responsible, a public trial would at the least have shown that such corporate officials are holding far greater power over citizens in this country than they can exercise responsibly or even legally.

What of the proposed consent decree? The proposal can hardly be stronger than the complaint which itself is the result of a process of enforcement erosion which began with an intended criminal prosecution and ended with a meek request for injunctive relief. The complaint did not even contain a request for the imposition of civil damages pursuant to the antitrust laws. (Like the drug cases, the federal government has incurred damage to its property and personnel

[1] (House Antitrust Subcommittee, *Department of Justice Consent Decree Program*, 1959).

from this conspiracy). The process of secret, ex parte type negotiations with representatives of corporate defendants discourages confidence in antitrust enforcement and facilitates sloppy or political decision making. When decisions can be made without prior citizen access or without criteria publicly displayed on which such decisions are rendered or without adequate explanation, abuses, distortions and laceration of the public interest can occur with greater frequency than would be the case otherwise.

The following weaknesses can be cited in the proposed consent decree:

1. There is no provision requiring the keeping of records by the defendants. For example, the Department has no assurance that minutes or transcripts will be kept of AMA committee meetings on pollution matters or that there will be records kept of informal discussions between executives and representatives of various auto companies. The section of the proposed decree requires written reports concerning any matters contained in the decree, but only "upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division . . ." If the Department is serious about its surveillance responsibilities over the consent judgment, why doesn't the proposed decree place an affirmative responsibility on the companies to make periodic reports concerning the matters covered by the decree? Why, for instance, are not the companies required to report the terms of all licenses granted and purchased? Why are there no reports on the status of research relating to motor vehicle emissions?

Why is there no ban on the destruction of corporate or AMA documents relating to the conspiracy? The task of surveillance, effective surveillance, is so formidable that it raises a question whether the Division is even less equipped to monitor compliance with the decree than it is to engage in complicated litigation which would permit other parties to have the information on which to base their vigilance against antitrust violations by the auto industry. Certainly the terms of the decree proposed last week do not facilitate surveillance. Neither does the fact that the Divisions Judgment Section is composed of only 12 professional personnel with no more than half that number having the burden of trying to see that the many hundreds of consent decrees are being complied with. Judged on any basis—cost-benefit, importance of the case etc., the resources which the Division can devote to litigation are greater than those devoted to compliance.

2. Section VI(A) (3) of the proposed decree requires defendant AMA to make available for copying or for examination by any person the technical reports in its possession or control prepared or exchanged by defendants pursuant to said cross-license within two years prior to the entry of this Final Judgment. Why only *two years* when the Department alleges the conspiracy to have begun at least in 1953 and when the Department alleges specific conspiracies to delay installations in 1961, 1962–63 and 1964? There is also an onerous additional proviso that any person who requests such information agrees to offer each signatory party to the AMA cross-licensing agreement of July 1, 1955, as amended, and any subsidiary thereof, nonexclusive license rights with respect to any patents or patent applications based upon information obtained from AMA or its members who are defendants in this case. This proviso can vitiate the purpose of the afore-mentioned section VI(A) (3) since it requires firms or individuals to become entangled in a serious risk of harassing litigation where the richest firm wins. What small firm is going to take the risk? Consequently, the purpose of this section to encourage proliferation of information collusively obtained or possessed so as to promote competition fails.

3. Two provisions which the Department emphasized in its September 11, 1969 press release were the restraint against exchanging confidential information (IV A 2 a) and the restraint against filing joint statements (IV A 2 g) to regulatory agencies on matters pertaining to pollution or automotive safety are scheduled to expire quietly in ten years under Section IX of the proposed decree unless the Department applies for a continuation after nine years. Why, if these two practices are considered anticompetitive—and indeed they go to the base of the conspiracy—will they be any less anticompetitive in ten years?

In the case of the proposed restraint on joint statements, the qualifications make the restraint mere paper in impact. These exemptions to the ban on joint statements via the AMA are: statements relating to (i) the authority of the agency involved; (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information. In addition, the proposed decree (IV (A) (1) (g)) permits joint filing on the critical point of ability to comply with a particular standard or regulation if there is a written agency authorization for such a joint statement. What kind of naivete or incompetence does this draftsmanship reveal on the part of the public's representatives in the Division? Defendants have probably already drafted a form request to the various agencies on behalf of the AMA to take advantage of just that blatant loophole, and will approach the agencies at the appropriate time.

4. Equally as disturbing is the effect of the four exceptions noted above on section IV (A) (2) (a)—the section restraining defendants from exchanging restricted information. Under the four exemptions, defendants are permitted to file joint statements relating to the draftsmanship of or the scientific needs for standards or regulations (i) or the test procedures or test data relevant to standards of regulations (iii). The defendants have no doubt already prepared the legal memoranda explaining how these two exceptions permit the exchange of confidential information when that exchange is directed toward the filing of joint statements before regulatory bodies.

Both the process of negotiating this decree without public input and scrutiny as well as the weak provisions of the decree itself indicate that the Department has abnegated its obligation to enhance the deterrent spirit of the treble damage provisions of Section 4 of the Clayton Act. In at least two cases, the Department has itself acknowledged its responsibilities to treble damage litigants. In *United States v. Standard Ultramarine and Color Co.*, 137 F. Supp. 167 (1955) and *United States v. American Radiator and Standard Sanitary Corp.*, 288 F. Supp. 696 (1968), the Department resisted proposed nolo contendre pleas by the defendants on the ground that it had a duty to third party litigants whose task would be made more difficult because of the application of Section 5(a) of the Clayton Act.

In his consideration of this issue in the *Standard Ultramarine* case, Judge Weinfeld discussed the legislative history and purpose of Section 4 of the Clayton Act (137 F. Supp. 167, at 171–72, footnotes omitted, emphasis added):

"Congress, to secure effective enforcement of the antitrust laws, provided both criminal and civil sanctions through governmental agencies. But it was not content to rely solely upon official action. It sought to encourage individuals to aid in the policing. And to help achieve the broad objectives of the Act the treble damage action was authorized in favor of those who had been injured by the condemned conduct. Its purpose was not only the redress of private wrong but also the protection of the public interest. And 'Congress intended to use private self-interest as a means of enforcement * * * when it gave to any injured party a private cause of action * * *.' Another purpose in permitting an injured party to recover threefold his actual damage was that substantial verdicts against the wrongdoer would constitute punitive sanctions—to act as a deterrent against a repetition of the offense and to serve as a warning to potential violators.

But even this auxiliary policing method did not altogether fulfill its purpose. The years that followed the enactment of the treble damage provision revealed that few private litigants had the resources or staying power to conduct a protracted and difficult antitrust case. And those who were able and willing to assume the staggering cost of litigation were frequently worn out by their opponents by sheer attrition. The disparate situation between victim and violator was sharply pointed out by President Wilson when he urged Congress; to enact what ultimately became § 5 of the Clayton Act. A reading of the interesting debates which followed shows that the unmistakable purpose of the Congress in enacting § 5 in response to the Presidential message was "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions.' *The defendants urge that there is no obligation upon the Government to assist or encourage litigants. But a fair reading of the debates and the Committee Reports indicates that such was the very purpose of the clause. It was fashioned as a powerful weapon to aid private litigants in their suits against antitrust violators by reducing the almost prohibitive costs and staggering burdens of such litigation in making available to him the results of the Government's successful action, whether an equity suit or a criminal prosecution.* And the hoped for byproduct of the benefit to a plaintiff was increased law enforcement."

There are basically three ways in which the Justice Department may dispose of the case in a manner consistent with its obligation to protect the rights of third parties. The first and best way is through an open trial. A full public trial of the issues involved would provide the basis for follow up treble-damage suits by establishing a public record containing all the evidence collected by the Justice Department. In addition, it would put one of the most public relations conscious industries in the United States on notice that it could not engage in anti-social conspiracies without running the risk of adverse public reaction stemming from full disclosure. The House Subcommittee report of 1959 recognized the salutory effect of such disclosures: "consent settlement procedures," said the subcommittee, "also diminish the deterrent effect of the antitrust laws because they permit defendants to avoid much of the unfavorable publicity that usually attends antitrust litigation." (See also *Standard Ultramarine, Supra*, at 169).

The Department has justified its agreement to the proposed consent decree on the ground that it has achieved all that was requested in the complaint and that the expenditure involved in litigation has been avoided. But, in view of the major weaknesses of the proposed decree outlined above, in view of the major expenditure already incurred by the Department in its long investigation, and in view of the earlier decision of the Department to initially seek a criminal indictment, the Court's treatment of this argument in *Standard Ultramarine, supra*, at 171, is apposite here (Footnotes omitted):

"We need not tarry long on the issue of the elimination of expense to the Government. It has already been put to great expense in the investigation and preparation of the matter to date. The fact that it was presented to a grand jury suggests the violations charged were deemed by the Attorney General to be of a 'flagrant' nature. The suggestion that the Government forgo its right, and indeed its duty, to uphold the integrity of our laws because the heavy cost of prosecution falls of its own weight. Cost of enforcement in terms of manpower and money is of little consequence when necessary to assure decent respect for, and compliance with, our laws."

After a consideration by the Court of the infirmities of the proposed consent decree and an examination of the process of negotiation which caused the Department to move from an initial stance of presenting the case to a Grand Jury for a criminal indictment to the position of agreeing to a meek consent decree, it is respectfully suggested that the ends of Justice would be best served by requiring the Defendants to answer the charges against them in open court.

A second, although somewhat less desirable alternative is that the Justice Department demand inclusion in the decree of a provision, popularly called the "asphalt clause." Under such a provision, which was included in the consent decrees in the 1960 Asphalt Cases, injured governmental bodies suing to recoup their damages would have the benefit of *prima facie* evidence of the antitrust violation just as they would have following trials won by the United States pursuant to Section 5-A of the Clayton Act. A typical provision taken from one of the consent decrees in those cases reads as follows: (*United States* v. *Allied Chemical Corp.* (D.C. Mass. 1960) 1961 CCH Trade Cas. Pat. 69, 923):

That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in said complaint, this adjudication being for the sole purpose of establishing the *prima facie* effect of this Final Judgement, in the suits specified below and for no other purpose;

Each defendant is enjoined and restrained from denying that this Final Judgement has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it.

The third possibility is that the Department agree to a provision in the consent decree requiring that the evidence collected by it shall be available to private litigants. The Department recently resisted such a provision in the 1967 Library Book Cases. In those cases, publishers had been charged with conspiring to fix the prices of library books. The case was settled by consent decree. The applicants for intervention in the case—municipalities, states, and local school boards—sought preservation and custody of the documents collected by the Department. Although they did not prevail—there was no such order in the final judgment—there was a separate order of the court which provided that the evidence be impounded in the custody of the Chicago office of the Department's antitrust division. The applicants then subsequently applied for access to the documents and were permitted by the court to examine these records. This access facilitated a number of successful treble damage suits on behalf of these public bodies.

BOLIVIAN TRIBUTE TO PEACE CORPS VOLUNTEER, SANDRA SMITH

HON. DANTE B. FASCELL

OF FLORIDA

IN THE HOUSE OF REPRESENTATIVES

Friday, October 3, 1969

Mr. FASCELL. Mr. Speaker, we all know how appreciative those of us in the United States are of the brave work of the Peace Corps volunteer, but, unfortunately, very infrequently do we see evidence that our foreign friends also applaud the efforts of our Peace Corps workers. A truly moving experience to be shared with all Members occurred recently in a Bolivian village on the outskirts of the capital, La Paz. Sandra Smith, a talented and industrious young woman, was 22 years of age when she first arrived in Bolivia. Her efforts for the Indians with whom she worked illustrated well her untiring devotion to the people to whom she would devote her brief life. I commend to the attention of my colleagues the following article that appeared in the September 16 issue of the Miami News:

"ANGEL" SANDRA GAVE PEASANTS HOPE OF ESCAPE

(By Ian Glass)

Sandra Smith, whose most obvious physical attributes were flowing blonde hair and a winning smile, was just one of 200 Peace Corps workers assigned to Bolivia.

For 13 months, she ran a one-room school in the El Alto slum on the outskirts of the mountaintop capital of La Paz. She taught Indians how to read and write.

When Sandra died last month at the age of 23 of a brain hemorrhage, the ragged and normally unemotional Indians with whom she lived wept.

"She was an angel," said Juan Mamani, who sent his child to Sandra's school.

In a letter to Sandra's parents—Mr. and Mrs. Preston L. Taplin, who live at 13725 NW 1st Ave., Miami—a pastor wrote:

"The sight of her flowing hair thrilled and excited the young, dark-haired youngsters with whom she worked."

Robert Hill, pastor of the La Paz Community Church, added, "She was a flame on El Alto. She has touched lives that will never forget her. Because of her, some lives will have been changed for the better."

Even Bolivian newspapermen were touched by the passing of Sandra.

"Dear little gringo," wrote a columnist in La Paz's El Diario, "You had an ideal in your heart, you lived by it, and you died for it."

Sandra grew up in Clarence, N.Y. At the University of Rochester, she met and married Frederick Smith, a graduate in chemistry, who is also 23.

Last year, they were assigned to Bolivia. On the way, they stopped with a couple of dozen other Peace Corps volunteers—to visit her parents in Miami, who had moved here from Clarence the year before. Her father has a radio business.

In La Paz, while Fred taught masonry at a nearby trade school, Sandra coached 27 Indian children in reading and writing in a 12-foot-by-26-foot room. She also gave their mothers advice on cooking and elementary sanitation.

"She scrounged things for them they had never seen before, like crayons and paper," Mrs. Taplin said.

The death rate among Peace Corps workers is comparatively high, mostly because they work in remote, uncivilized areas, far from medical attention.

Sandra died on her second wedding anniversary. Her parents do not yet know what was the cause. "It could have been encephalitis or a brain tumor; we just don't know," Mrs. Taplin said.

When her coffin was flown out of La Paz for burial in Clarence, Indians trudged to the airport with small gifts for her husband, an unsual tribute from people who are generally taciturn and withdrawn.

"She was constantly thinking of the school and how to improve it," said Rosa Pelaez, Sandra's 24-year-old assistant. Barely literate herself, she is now trying to run the school alone while waiting for the Peace Corps to decide whether a new volunteer will be sent into the project.

Meanwhile, the residents of El Alto have petitioned to have the little school, whose furniture consists of lumber and bricks, named after Sandra Smith.

"You were truly working for the liberation of the Indian peasant," one editorial in a La Paz newspaper said, "because you taught him to read, and that is where the true redemption will come from."

CONGRESSMAN JOHN D. DINGELL

HON. MARTHA W. GRIFFITHS

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Friday, October 3, 1969

Mrs. GRIFFITHS. Mr. Speaker, it is a pleasure for me to share with my colleagues two recent articles concerning Michigan Congressman, JOHN D. DINGELL. Congressman DINGELL entered Congress 15 years ago as the then youngest Congressman. It was always a slight shock to show off this "baby" who was more than 6 feet tall. He was a brash, impetuous "infant." As the senior Member from Michigan, I am happy to point out that his ability and enthusiasm have been used for all of the people and to have you note with me his acclaim by the press:

[From the New York Times, Sept. 28, 1969]

NATIONAL HEALTH INSURANCE MOVING INTO SPOTLIGHT

(By Richard D. Lyons)

WASHINGTON, Sept. 27—In every Congress for the last quarter of a century a Michigan Representative named Dingell has introduced a bill calling for sweeping changes in the nation's medical care system.

Initially running to several hundred pages, the bill over the years has shrunk drastically as the programs that were originally labeled "visionary," "socialistic," "utopian" and worse have become law, such as:

Federal support for medical research, grants for hospital construction, support of maternal and child health programs, aid to the disabled, money for rural health plans, and financial help for student doctors and nurses.

H.R. 24, the current Dingell bill, now contains only one proposal: the establishment of a national health insurance program.

Universal health insurance plans such as the Dingell one and others that would extend a Medicare type of program to Americans of all ages have suddenly and unexpectedly gained the serious attention of mem-