No. 342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

THE PROCTER & GAMBLE COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Question Presented

The question presented is whether the Sixth Circuit was correct in holding that there was no substantial evidence to support the conclusions of the Federal Trade Commission that the acquisition here in question would probably result in a substantial lessening of competition in the liquid bleach industry.

The Government's framing of the Question (Gov't Br. p. 2) is designed to bypass and disregard the appellate review which has been had. It is the validity of the ruling of the Sixth Circuit, rather than a *de novo* evaluation of the decision of the Federal Trade Commission, which is the controlling issue on this appeal.

Statutes Involved

In addition to the "Statutes Involved" as set forth in the Government's brief, there is also involved Sections 5, 7 and 10 of the Administrative Procedure Act (60 Stat. 239, 5 U. S. C. A. § 1004; 60 Stat. 241, 5 U. S. C. A. § 1006; 60 Stat. 243, 5 U. S. C. A. § 1009), which provide in pertinent part:

> *Section 5,* "(a) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted."
>
> *Section 7,* "(c) . . . [T]he proponent of a rule or order shall have the burden of proof. . . . [N]o sanction shall be imposed or rule or order be issued except upon consideration of the whole record . . . and as supported by and in accordance with the reliable, probative, and substantial evidence."
>
> *Section 10,* "(e) . . . the reviewing court shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be . . . (5) unsupported by substantial evidence. . . ."

Preliminary Statement

The basic issue posed on this appeal is whether there is substantial evidence to support the Government's theories and conclusions respecting the illegality of this challenged acquisition. As to this issue, it matters little as to how the Government's "underlying theories" are framed. Determinative here is whether, in this record, there is substantial evidence to warrant the application of those "theories."

The court of appeals has held that such evidence is not contained in the record. We maintain that, in the context

of this case, that decision should be controlling. And even were this Court to proceed to a *de novo* review of the record, the same conclusion is required. For in every real sense, to accept the Government's position is simply to relieve it of the Congressional stricture that violations of Section 7 must be established by substantial evidence. It would permit speculation to take the place of proof, and theory and assumption to be substitutes for evidence.

We say this runs counter to every decision of this Court involving Section 7. And arguments of expediency to facilitate governmental attacks upon conglomerate mergers cannot justify standards which would endow enforcement agencies with arbitrary power and make judicial review perfunctory.

In taking this appeal for the avowed purpose of securing some express recognition of its "theories," the Government, we maintain, has picked the wrong case and the wrong record. All of the decisions and the teachings of this Court require the conclusion that, as to this particular acquisition and on the facts contained in this record, no illegality has been established.

Statement of the Case

The first half of the Government's brief is devoted to "The Facts" (Gov't Br. pp. 4-22). This consists of an extensive statement of those "facts" which the Government wishes to emphasize, interwoven in which are argumentation, speculation and assumption.

We here supplement the Government's statement by setting forth certain significant facts unnoted by it.* We also advert to various matters in the Government's state-

*In the main, however, we will deal with the Government's treatment of the record in our response to the "Argument" section of its brief.

ment which are fallacious or unwarranted by anything in the record.

1. History and Description of Clorox Chemical Co.—the Acquired Company

Clorox Chemical Co. was organized in 1928 (R. 650a).* From the time of its origin until its acquisition by Procter, it had been engaged solely in the manufacture and distribution of liquid bleach (R. 520a-521a). Its owners, who were its operating executives, delevoped this single product company into an important and successful business entity (R. 517a, 623a, 1216a; CX 28, R. 107X, 685a).

The success of Clorox Chemical was achieved entirely on its own (Complaint and Answer, Par. 8, R. 20a, 32a). Its market share, gauged on a national basis, was greatly in excess of any of its competitors, although in certain sections of the country there were long established competitors with larger shares (R. 314a, 849a, 1075a, 1406a-1407a).

Clorox Chemical at the time of the acquisition was entirely self-sufficient. It had the "know-how" and more than adequate resources—to say nothing of credit—to support any merchandising or expansion program which could reasonably be contemplated within the bounds of responsible business judgment (R. 523a, 642a, 1349a-1350a, 1384a; CX 12, R. 15X-16X, 500a). It is uncontradicted that the acquired company needed nothing from Procter or anyone else to maintain and improve its position.

2. The Product

The basic *chemical* formula of most so-called "quality" liquid bleaches is the same (R. 727a, 875a; but see 881a,

*For the convenience of the Court, citations to the record are in the form used by the Government and as described in footnote 1 at page 1 of its brief. Where exhibits are cited, the page number at which the exhibit was admitted in evidence follows the page number at which the exhibit appears.

986a-987a). The product, however, has potentially dangerous attributes (R. 1173a-1177a, 1188a-1189a). This dictates that strict controls over quality must be exercised to insure uniformity of performance and safety in its use (R. 1188a-1189a, 1192a). Such controls were a significant factor in Clorox's success* (R. 1174a-1176a; CX 372D, R. 163X, 612a; CX 423,** R. 173X, 711a; CX 424,** R. 174X, 711a).

The Government attributes the success of Clorox solely to "shelf space" and "advertising and promotions" (Gov't Br. p. 8). While such merchandising tools may encourage the consumer to make an initial purchase, they furnish no guaranty of repurchases or continued patronage of any brand. That is dependent upon quality and confidence on the part of the housewife. The court below recognized this and, in rejecting the same contentions now advanced by the Government, stated (R. 1561-1562):

> ". . . Clorox attributed its success to its maintaining a high degree of quality control in its production process. The fact that prior to the merger its sales accounted for nearly fifty per cent of the market, would seem to indicate its product's wide

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*Indeed, the uncontradicted evidence showed (R. 643a, 1173a-1176a, 1188a-1189a, 1192a):

(1) Independent laboratory tests of Clorox, as compared with other bleaches, demonstrated its superiority;

(2) Clorox's claim of antiseptic properties higher than any other bleach had been advertised for a number of years, and there was no proof that such claim was ever successfully questioned or contradicted; and

(3) Clorox at all times maintained a high degree of care in the manufacture, control and inspection of its product in order to make certain that it was uniform and stable.

**The exclusive patented formula held by Clorox Chemical Co., referred to in CX 423 and CX 424, has now expired, although the product continues to be manufactured under the same process (R. 1192a).

> acceptance and preference by housewives . . . . But even though the advertising [of Clorox] was extensive, the product had to be good in order for it to obtain repeat-purchases by the housewife. This is demonstrated by the fact that large chains like A&P and Safeway Stores carry Clorox on their shelves even though they market their own private brands of bleach."

3. The Acquisition

The negotiations leading up to the acquisition were initiated by the stockholders of Clorox (R. 650a-653a). The principal owners were advanced in years, failing in health and interested in placing their investment in more readily marketable form (R. 599a, 623a, 654a, 1216a; CX 28, R. 107X, 685a). As noted by the court of appeals (R. 1568):

> "Clorox desired to sell its assets. Its owners were reaching the age of retirement and wanted to transform their stock into a marketable security of a successful company. A small company could not qualify. Clorox either had to sell to a larger company or not sell at all."

The negotiations commenced in 1955; were discontinued by reason of the failure to agree upon price; were resumed in 1957 and the Clorox assets were acquired by Procter in exchange for Procter's stock (R. 650a-652a).

There is not a jot of evidence indicating that, prior to these overtures to it, Procter had ever been interested in entry into the liquid bleach business. As we shall later show, the Government's unqualified assertions that Procter had "pondered" entry on its own, or had made a "two-year study" of the industry (Gov't Br. pp. 17, 49), or had

evinced any interest in, or likelihood of, independent entry represent an inexcusable distortion of the record.*

4. Description of Procter

The facts pertaining to Procter, as set forth in the Government's Statement, are all directed to emphasizing Procter's size and success as premises for inferences and innuendoes unwarranted by the facts. Thus, for example, the Government's emphasis on Procter's *overall* advertising and promotional expenditures is designed to embellish the concept of Procter's size, without regard to the number of products which these total expenditures actually support. Based simply on the Government's listing of some of Procter's important brands,** it is apparent that the advertising and promotional expenditures per brand average considerably less than the more than five million dollars spent by Clorox Chemical in promoting the Clorox brand in the last year prior to the acquisition (RX 83, R. 453X, 1306a, *in camera*).

Another instance of the Government's propensity for exaggeration is the treatment accorded to Procter's introduction of its product Comet in 1956-57. The Government suggests that it was solely because of a "massive" promotional campaign that Comet had achieved a substantial share of market (Gov't Br. p. 16). The record tells quite a different story. Comet was a new product with improved cleansing properties. Consumer research had revealed that, with its distinctive characteristics, it was likely to be favor-

*Indeed, the one piece of evidence to which the Government can point, as referring in any way to the matter of Procter's independent entry, contains a recommendation *against* any such entry (CX 324, R. 150X, 582a, 1160a-1161a).

**The Government's brief lists some 27 familiar household brands and notes that these represent only a partial list of Procter's many products (Gov't Br. p. 10, n. 10).

ably received in the market (R. 563a). The type of introductory campaign with which it was introduced is customary for any new product in the grocery field (R. 541a, 556a). The Government points to a 22-month expenditure of $7.2 million dollars for such purposes.* It refers to this as though it had some sinister significance. But even though Comet was not an established product and did require introductory expenses, these total expenditures were less than Clorox Chemical spent during the same period to advertise and promote its product which had already achieved consumer acceptance on a national basis (RX 83, R. 453X, 1306a, *in camera;* CX 573E, R. 446X, 1151a, *in camera*). The Government's implications that the successful introduction of this new and improved product is illustrative of some overriding "market power" is contrived.

Likewise, despite the repeated references to Procter's overall financial resources, the evidence warrants no assumption that any of these resources would be put to use in the merchandising of Clorox, or that the resources of Clorox needed any supplementation from Procter. Nor is there anything to suggest that any such "available funds" would be used to engage in improper business practices. For, as the court of appeals observed (R. 1565):

> "There was no evidence that Procter at any time in the past engaged in predatory practices, or that it intended to do so in the future."

Certainly Procter is a large, successful and well-managed company. But this, standing alone, cannot be a predicate for the condemnation of its acquisition of Clorox. Yet, as we will establish, this is exactly what the Government is

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*Almost half of these expenditures was for consumer sampling, a customary procedure, where practical, in the introduction of new and improved products (R. 563a-565a; CX 573E, R. 446X, 1151a, *in camera*).

urging here, notwithstanding its protestations to the contrary.

5. The Liquid Bleach Industry

The Government's statement points up the relative ease of entry into the liquid bleach business (Gov't Br. pp. 5-6). It stresses the absence of any production barriers. From these facts, it assumes that if the industry was doctrinarily "competitive," it would include a number of producers, all of which would have approximately the same share of market (Gov't Br. p. 6). Noting, however, that here a limited number of firms account for the major share of total industry sales, the Government assumes that this fact provides some arbitrary rule of thumb by which the industry, regardless of any unique characteristics, can be deemed to be so "concentrated" as to be non-competitive (Gov't Br. pp. 6, 31).

This is an industry in which (1) there is an excess of productive capacity (R. 637a, 777a, 840a, 870a, 911a, 924a, 945a, 971a, 1015a, 1032a, 1070a); (2) freight charges limit the marketing area to a radius of approximately 300 miles from production facilities, and the merchandising of the product, including advertising and promotion, is regionally or locally oriented (R. 724a, 824a, 841a, 875a, 938a, 971a, 1004a, 1028a, 1054a, 1269a); (3) there are some 200 bleach producers, some large and others small, scattered throughout the United States (R. 1561); (4) the profit margins are unattractive because incremental production costs are low and capacity is excessive relative to demand (R. 739a); (5) intense price rivalry exists within the industry (R. 632a, 674a-675a, 807a, 811a-812a, 816a-817a, 851a-852a, 896a-897a, 905a, 1028a-1029a, 1068a, 1109a, 1241a-1242a, 1358a); (6) the increasing patronage of private brands sold through supermarkets has made bleach available to the consumer at decreasing prices (R. 669a, 732a, 905a, 921a-922a, 1248a-1249a, 1270a, 1343a, 1426a,

1472a; RX 69 A-Z, R. 320X-345X, 1225a; RX 78, R. 362X, 1289a). These are economic considerations ignored by the Government. They run counter to any assumption that price competition is, or is likely to be, lacking in the liquid bleach industry.*

Every inference to be drawn from these considerations is that the industry was effectively self-policing price-wise, and that any likelihood of new entrants had no part in controlling prices.

The foregoing was established by substantial evidence in the record before the court below. Undoubtedly these facts prompted, in part, the court's comment to the effect that the evidence did not establish that there was "anything unhealthy about the market conditions" (R. 1562). In no way can it be inferred, as the Government asserts, that this observation was a determinative factor in the court's decision (Gov't Br. p. 24). The issue before the court of appeals was not whether, in terms of economic theory, the industry was "good" or "bad," or whether it measured up to some analytical "model" of competition. The issue was whether this acquisition would bring about a lessening of existing, or prospective competition, in this particular industry.

Hence, the Government's case is not advanced by labeling this industry as a "concentrated" or "oligopolistic" one. Realities must outweigh the significance of "labels." Certainly Procter's acquisition resulted in no additional "concentration" within the industry. The number of competitors was not lessened, nor was there any change in their market position.

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*Typical of the Government's technique, it does not and could not claim that there is any evidence that in the liquid bleach industry, the competitors have adhered to the "easy life" or have adopted any "live and let live" policy (Gov't Br. p. 31). Rather it points to generalizations as to these attitudes with the unwarranted innuendo that such conditions exist in the liquid bleach industry.

6. Post-Acquisition Developments

In the post-acquisition period, there is no proof that the acquisition brought about any lessening of competition, or that there was any probability that it would. The market share of Clorox did slightly increase in the years following the acquisition. But its rate of growth was approximately the same, although slightly less than in the years preceding the acquisition (RX 134A, R. 399X, 1544a).* There is no showing that the acquisition had played any part in this.

As to the competitors of Clorox, the undisputed evidence is that in the years following the acquisition, they sold *more bleach* for *more money* than ever before (RX 137, R. 421X, 1547a). Not a single competitor testified that in the post-acquisition years his business had in any way been adversely affected. As the record so clearly shows, the continued competition of these competitors has been vigorous and successful.

7. The Nature and Import of the Two Decisions of the Commission

The Government's brief contains a passing reference to the circumstance that this proceeding has been the subject of two decisions by the Federal Trade Commission (Gov't Br. p. 3). In the interim between these decisions, the personnel of the Commission radically changed, so that only one Commissioner participated in both (R. 248a-249a, 388a-389a).

The Government notes that on the first appeal, the Commission reversed the findings and conclusions of the trial

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*In the last of the post-acquisition years, the Clorox share of market declined for the first time in the history of the company (RX 134A, R. 399X, 1544a).

examiner and remanded the case for additional evidence, "holding that the record as then constituted was inadequate" (Gov't Br. p. 3). This conceals the real significance of this first decision. For the "inadequacy" to which the Government refers, was actually a direct determination by a unanimous Commission that the examiner's conclusions respecting a violation of Section 7 were not supported by the evidence. As stated by the court of appeals (R. 1559), the Commission held that:

> "[T]he evidence was insufficient to support a finding of illegality."

Thereafter, and in the course of a second appeal, the findings and conclusions of the first Commission were rejected by a new body of Commissioners (R. 1567-1568). The primary importance of this is that the decision of this second Commission was based on the *same record* as had been passed upon by the first Commission. As the court of appeals said (R. 1559):

> "The second Commission's decision was based entirely on the record submitted to the first Commission, which that body had ruled to be insufficient to support a finding of illegality."

This gives rise to the unique circumstance, completely ignored in the Government's brief, that the two Commissions are in irreconcilable conflict. They are in complete disagreement respecting the conclusions to be drawn from the same record. Thus, it cannot be said that here there is any decision by the Commission which reflects any consensus of Commission "expertise" or "informed" Commission judgment.

Summary of Argument

1. The decision of the court of appeals that the Commission's conclusions were not supported by substantial evidence was compelled on the record here.

The lower court adhered strictly to the teachings of this Court in passing upon the controlling issue of the probability of a substantial lessening of competition,* and in its application of the substantial evidence standard. After a thorough factual review, the court below found the record as a whole insufficient to support the Government's theories of illegality. The primary authority to review agency findings has been entrusted to the courts of appeals by Congress and no circumstances are present here which warrant disturbing the decision below.

2. Procter was not a potential competitor in the liquid bleach industry. Initially the Government contends that Procter, itself, was a likely entrant whose competition has now been foreclosed. Not only is there no evidence to support this claim, but, indeed, the only evidence bearing on the subject is to the contrary. Tested by this Court's standards for the determination of likelihood of independent entry, the Government's claim is shown to be an untenable afterthought.

Attempting to discount the infirmities of its claim that Procter was a probable independent entrant, the Govern-

*The initial inquiry in every Section 7 case is whether an acquisition may have the probable effect of lessening competition. In the typical horizontal and vertical merger settings a lessening of such competition is automatic. It remains only to evaluate its substantiality. In conglomerate mergers, such as the one here in issue, these automatic effects are absent. There has been only the substitution of one competitor for another. So, in challenging any such acquisition, the enforcement agencies have the dual burden of establishing (1) the probability that competition will be lessened by reason of the acquisition, and (2) that such lessening will be substantial.

ment asserts, alternatively, that regardless of any such probability (or the absence of such) Clorox Chemical must have regarded Procter as a potential entrant. It speculates that marketing activities of Clorox Chemical, particularly in the area of pricing, were influenced by a concern that Procter might become a competitor.

At no time during the trial proceedings did the Government attempt to elicit any evidence from anyone to support this theory. In place of evidence, the Government substitutes economic generalities respecting the structure of the industry. Notwithstanding the Government's theoretical criticisms, there is nothing in this record which indicates that pricing policies in the pre-acquisition industry were dictated by any consideration other than competition within the industry.

3. The acquisition did not result in the enhancement of Clorox's market position so as to result in any probable lessening of actual or potential competition.

Throughout the entire trial stage of these proceedings the thrust of the Government's claim was that *actual* competition would be substantially affected by the acquisition. This claim has gradually faded into the background. In this Court the Government has elected to proceed primarily, if not entirely, upon the equally fallacious claim that, as a result of the acquisition, potential competition has or will be lessened.

The Government's claims of anti-competitive effects are based upon so-called "competitive advantages." These claims have now been narrowed almost exclusively to the area of advertising and promotion. In this area, it is asserted that the financial resources of Procter would enhance Clorox's "power" and, in addition, would result in economies realized by volume discounts.

But the record shows that Clorox needed no assistance, financial or otherwise, from Procter in its advertising or

promotion or elsewhere. And the evidence shows that these alleged "competitive advantages" are either non-existent, theoretical, or without competitive significance.

Further, the post-acquisition evidence introduced on the remand of the proceeding by the order of the first Commission—and ignored by the second Commission—is wholly incompatible with the Government's theories. It shows that the acquisition has resulted in no adverse effects upon existing competition. To the contrary, the competitors of Clorox are prospering as never before.

4. There is nothing before this Court to lend credence to the assumption that Procter's mere presence in the industry will deter entry by others. The claim is predicated upon possible deterrent effects stemming from Procter's size. Again, there is not the slightest support for it in the record.

Likewise, the Government's assumptions as to the existence of a "class" of prospective entrants, and as to why, or in what respect, any of them would be interested in entry, or deterred from entering, are premised solely upon surmise and conjecture.

In respect of all these claims as to the deterrence of "potential competitors," the Government concedes that its basic theories have never been explicitly recognized by this Court in any of the decisions involving Section 7.

We maintain that, in essence, the Government is asking this Court to sanction the invocation of Section 7 on the basis of assumption and speculation. It seeks a standard which would relieve the enforcement agencies of the requirement that violations must be established by substantial evidence. This is nothing other than an attempt to have these agencies endowed with the power to make arbitrary and non-reviewable determinations of transgressions of the statute.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY DISCHARGED ITS REVIEWING FUNCTION—ITS DECISION SHOULD BE AFFIRMED

The decision of the court of appeals, predicated upon a comprehensive consideration of the whole record in this case, turned upon one ultimate finding (R. 1569):

> "Considering the record as a whole, we are of the opinion that the decision of the second Commission is not supported by substantial evidence. *Universal Camera* v. *N. L. R. B., supra.*"

All that has been written by this Court over the years, respecting the function and responsibility of the appellate court in the review of decisions of administrative agencies, compels that the utmost significance must attach to the decision below.

Understandably, the Government prefers to brush aside this decision. It adopts a disdainful, patronizing attitude towards the court's opinion. It seeks to discount it with broad generalizations that the court below "misapprehended" the controlling issues here (Gov't Br. pp. 25, 30).

This will not do. This Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, which the Government does not even deign to acknowledge, cannot be so cavalierly and summarily disregarded.*

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*The essence of that holding (concurred in by a unanimous Court) is contained in the following passages from the opinion (*Id.* at 490-91):

> "Congress has imposed on [reviewing courts] . . . responsibility for assuring that the Board keeps within reasonable

And in pointing to the applicability of the doctrine enunciated in that case, we are not suggesting that it represents any inexorable, unyielding limitation upon the reviewing power of this Court. We do strongly urge, however, that some clear showing is required that the court below made either an inadequate review of the record, or flagrantly misapprehended the issues involved, before its rulings respecting the substantiality of evidence should be disregarded.

As is apparent from its opinion, the court below made a thorough and conscientious review of the very extensive factual record in this proceeding. We do not understand that the Government questions the adequacy of this review.

The legal standards which the court applied followed the teachings of this Court and were stated as follows (R. 1566):

> "In a Section 7 case it is necessary to determine whether there is a reasonable probability that the merger may result in a substantial lessening of competition.
>
> "Amended Section 7 was intended to arrest anti-competitive tendencies in their incipiency. *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964); *United States* v. *Philadelphia Nat'l Bank, supra;*

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grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals . . . .

* * *

"Our power to review the correctness of application of the present standard ought seldom to be called into action. *Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.*" (Emphasis added.)

> *Brown Shoe Co.* v. *United States, supra.* A mere possibility is not enough, *United States* v. *E. I. DuPont deNemours & Co.,* 353 U. S. 586 (1957); nor is certainty required, *United States* v. *Penn-Olin Chem. Co.,* 378 U. S. 158 (1964)."

Again the Government does not and cannot take issue with these standards. And the court also recognized that they were as applicable to conglomerate mergers as to all others. Then the court evaluated the record in terms of whether there was substantial evidence to support the Commission's conclusions in respect of the controlling standards. This was exactly what the Government urged that it should do.*

Having lost, the Government now seeks to escape the impact of the decision below by saying that it really did not turn on an evaluation of the evidence. It says that "the court of appeals . . . quarreled not so much with the substantiality of the supporting evidence as with the Commission's underlying theory" (Gov't Br. p. 30). This is pure sophistry. The court below neither misconceived nor rejected these so-called "theories." Rather, it reviewed the record in the light of these theories of illegality and found that there was no substantial evidence to warrant their application here.**

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*In its brief in the court below the Government framed the controlling issue as:

> "Was the Commission's holding that Procter's acquisition of Clorox Chemical violated Section 7 supported by substantial evidence and in accordance with law?" Brief for Respondent, No. 15, 769, p. (1).

**No elaboration is required of the principle that decisions of administrative agencies can not be upheld unless based upon "reliable, probative and substantial evidence." 5 U. S. C. § 1006(c). Any decision "unsupported by substantial evidence" on the record as a whole must be set aside as unlawful by the reviewing court. 5 U. S. C. A. § 1009(e); Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, n. 484, 488.

Thus, in setting aside the Commission's conclusions as to the probability of Procter's independent entry, the court below predicated its decision entirely upon its review of the evidence. Likewise, its holding that the Commission had failed to sustain its contentions as to any actual or probable anti-competitive effects upon existing competitors, was based upon its examination of the facts bearing upon these claims. Its decision that no lessening of competition was probable because of any alleged "competitive advantages" turned upon its findings of the inadequacy of the pertinent evidence of record.

Further, we think it plain that the court below regarded these rulings as to the insufficiency of the evidence to be equally applicable to the Government's claims respecting effects upon imaginary "potential competitors." These claims were raised and argued in the court of appeals, and were necessarily encompassed within its decision. The utter lack of any evidentiary support for these speculative possibilities made any specific comment by the Court unnecessary and superfluous.

For there was nothing in the record to support any assumptions as to the existence of any prospective entrants, or as to any conditions which would attract new entry, or as to any valid reasons why Procter's acquisition would deter any new competitor whose entry might be deemed likely. Thus, as to this aspect of the case as well, the decision below, setting aside the Commission's conclusions, was based upon the lack of evidentiary support for them, rather than any rejection of the "theories" advanced by the Government.

What is attempted here is to secure, by treating the decision below as a meaningless formality, a *de novo* review of the record by this Court. Linked to that is the effort to have this Court sanction standards respecting the application of

Section 7 which go beyond the announced and accepted reach of the legislation. They are standards which would endow the Federal Trade Commission with the power to arrive at arbitrary determinations of illegality, regardless of any substantial evidentiary support therefor. They should be rejected here as they were in the court below.

II

PROCTER WAS NOT A "POTENTIAL COMPETITOR" IN THE LIQUID BLEACH INDUSTRY

The Government's contention that Section 7 was violated because the challenged acquisition removed Procter as a "potential competitor" in the liquid bleach market (Gov't Br. pp. 27, 39, 49) cannot be sustained or supported on the record here. The conclusion of the court of appeals that (R. 1568),

> "There was *no* reasonable *probability* that Procter would have entered the household liquid bleach market but for the merger,"

was compelled by the record and by the decisions of this Court which have dealt with this issue. Certainly, in the context in which the Government's claim is advanced, this issue of "reasonable probability" is decisive. And this Court has recently noted that such "probabilities" respecting "potential competition" and the probable effect of its elimination must be established "by evidence in the record." *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 175-176.

What the Government seeks here is a ruling which would relieve the enforcement agencies from the requirement of establishing, by *substantial evidence*, that a possible competitor *probably* would have entered the market on its own.

A. Procter Was Not "Interested" In Entering the Liquid Bleach Market On Its Own.

In an effort to support its assumptions as to Procter's likely entry, the Government has sought to create the illusion that there is evidence in this record to support such a probability. The Government's brief contains numerous statements to the effect that Procter had "studied" and "carefully considered" entering the liquid bleach business on its own (Gov't Br. pp. 17, 24); that it had "pondered" such entry and had the "incentive" to engage in the business (Gov't Br. pp. 27, 39, 49). After a repetition of such phrases the final assumption is uttered that "Procter was clearly interested in entering the bleach industry" (Gov't Br. p. 51).

All of this is an irresponsible distortion and misrepresentation of the record. For neither rhetoric nor repetition can conceal the fact that on this record there is not one iota of evidence that Procter had ever evinced any interest in independent entry. Nor is there, we emphasize, any evidence as to why it might go into the industry.

(1) As to Procter's alleged "study" or "pondering" of entry or any "incentive" to do so.

As we have earlier noted, the Clorox stockholders first initiated negotiations with Procter for the sale of their business in 1955 (Statement, *supra*, p. 6). Although the liquid bleach industry had been in existence for a half a century, there is no evidence of any kind that, prior to this time, Procter had any interest in getting into that business. During the course of these 1955 negotiations, an employee in Procter's promotion department wrote a memorandum analyzing the economics of a purchase by Procter of the Clorox business, concentrating particularly on what would be a reasonable price (CX 324A-D, R. 150X-153X, 582a).

In evaluating its worth, he made an estimate, solely for comparative purposes, of the likely cost of independent entry into the business. This estimate patently was not prompted by any such intent to enter on the part of Procter.

The negotiations which had occasioned this memorandum proved fruitless and no agreement was reached. Two years later, in 1957, the Clorox stockholders reopened negotiations with Procter. There is not even a suggestion of any evidence that Procter had, in the interim, any interest in entering the business. Nor is there any suggestion that anything had occurred which would have stimulated any such interest. Again, an employee in Procter's promotion department wrote a memorandum respecting his estimate of a fair price for the Clorox business. This writing contains no mention of anything pertaining to independent entry by Procter. It concludes that the asking price would be "acceptable" (CX 323A-C, R. 147X-149X, 582a).

Here, then, are the only two pieces of evidence to which the Government can point as even having any remote bearing on the question of Procter's entry. It is this material which the Government has tortured into claimed support for the assertion that Procter had made a two-year study of entry (Gov't Br. p. 17).

Compounding its distorted characterizations of these memoranda, the Government makes only passing reference to the fact that in the single instance where mention was made of the cost of independent entry, there was the recommendation *against* entry by Procter on its own. Commission's Exhibit 324 states (R. 150X-153X, 582a):

> "We would *not* recommend that the Company consider trying to enter this market by introducing a new brand or by trying to expand a sectional brand." (Emphasis added.)

It is, indeed, something of a paradox that, as proof of the likelihood of Procter's entry, the Government has been forced to rely upon a report which flatly recommends that it not go into the field.

That the record contains no direct proof bearing upon this claim as to Procter's entry stems partly, at least, from the fact that this contention was first advanced by the Government as a labored after-thought—long after the record in this proceeding was closed. The Commission's complaint contained no claim that Procter itself was a potential entrant (R. 15a-27a). At no time during the course of the protracted trial proceedings was any such contention advanced. No claim was ever made that the two exhibits, now relied upon by the Government, were ever introduced to show some likelihood of Procter's entry. Not until the case was before the Commission in the course of a second appeal, did it inject this contention *sua sponte*.

Hence, no evidence was adduced respecting any likelihood of Procter's independent entry, and in no way has the Government sustained its burden of establishing such a likelihood by substantial evidence. But even more repugnant to Procter's rights is the circumstance that it had no opportunity to introduce evidence respecting this unasserted claim; no opportunity to demonstrate why the nature of the business and the economics involved made independent entry unattractive and altogether unlikely.*

Thus the Government's contention in respect of this point comes down to assuming that because it says that

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*The failure of the Commission to inform Procter prior to the close of the record that any such claim would be asserted, and the weight the Commission attached to it (See dissenting opinion of Commissioner Elman in General Foods Corp., FTC Dkt. 8600, 3 CCH 1966 TRADE REG. REP. ¶ 17,465 at 22,746), were, we submit, a violation of Section 5 of the Administrative Procedure Act (5 U. S. C. A. § 1004(a)(3)).

Procter was a "large multi-product firm" with adequate resources to enter the business on its own, and because liquid bleach was used in washing machines and was marketed through self-service grocery stores, it can pontificate that Procter was, in fact, a probable entrant. This sort of baseless speculation will not do as a substitute for substantial evidence.* As we will later show, this Court has said that it will not do. The court of appeals noted (R. 1568):

> "Household liquid bleach is an old product; Procter is an old company. If Procter were on the brink it is suprising that it never lost its balance and fell in during the many years in which such bleach was on the market. It had never threatened to enter the market. *Cf. United States* v. *Penn-Olin Chem. Co., supra,* at 173."

In addition, the glaring inadequacy of the record is emphasized by the following:

a) There is no showing that there had been any developments in the industry which would make Procter's entry more likely than it had been in the past.

b) There is no evidence that there had been any expanding uses or new markets for the product.

c) Far from there being any evidence that existing facilities were not adequate to supply existing and prospective demands for the product, such evidence as bears upon this is to the contrary (Statement, *supra,* pp. 9-10).

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*Nothing is added to this speculation by the fact that before the acquisition, Procter had diversified its operations through the acquisition of product lines in which it had never previously engaged (Complaint and Answer, Par. 7. R. 19a-20a, 31a-32a) and by its own introduction of improved products which it had previously marketed (R. 555a, 560a, 563a; Answer, Par. 13, R. 35a).

d) There is no showing or suggestion of any technological break-throughs or developments which would make entry more attractive.

e) There is no proof that Procter's facilities could or would be used in the manufacture or distribution of liquid bleach.

f) There is no evidence that the profit levels for this low-price product would warrant the commitment of Procter's resources to independent entry, rather than to the utilization of them in more profitable fields.

Yet these are the considerations which, in any realistic approach, would control the judgment of business men respecting entry into any new business. We say that it is inconceivable that, on a record which is barren as to these factors, this Court would confirm the validity of the Govment's assumptions. And certainly any such determination would run counter to standards heretofore established by this Court.

(2) The Government's contentions run counter to applicable decisions of this Court.

The Government acknowledges that the Section 7 significance of a merger involving a "prospective entrant" into a market "has received explicit recognition in the decisions of this Court" (Gov't Br. p. 34). We agree. But we maintain that that "explicit recognition" demonstrates that no Section 7 violation on this score has been shown here.

Indeed, the Government, while paying lip service to these prior decisions, is cavalierly disregarding their teachings. It is seeking to thrust upon this Court a new standard of illegality. In scope, it would enable the enforcement agencies

arbitrarily to invalidate all conglomerate mergers involving a company with large resources—particularly if it could be said that the company might have "some interest" in entering a particular field, however unlikely or improbable such entry might, in fact, be.

We first point to this Court's most recent decision involving the claim that a "potential competitor" had been eliminated from the market. *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158. The plain effect of that decision represents a rejection of the Government's position here. In reality, its position is tantamount to asking this Court to overrule its decision in that case.

For the evidence deemed insufficient in *Penn-Olin* respecting the probable entry of the joint venturers into the market was manifestly more direct and specific than anything in the record here. This Court there noted that each of the joint venturers "had compelling reasons for entering" the relevant market; that "the industry was rapidly expanding;" that each company "had evidenced a long-sustained and strong interest in entering the relevant market area;" and that each company "had the know-how and the capacity to enter that market and could have done so individually at a reasonable profit" (378 U. S. at 174-175). Even so, said this Court, these circumstances were not conclusive in establishing that a potential competitor had been eliminated in the Section 7 sense. But here, there is no showing that even these ingredients, which the Court held inadequate in *Penn-Olin,* were present.

Moreover, if the Government's theory here reflects the ambit of Section 7, there would have been, in *Penn-Olin,* no reason or purpose for this Court to remand the case for further findings as to the probability that one or the other of the joint venturers would have entered the market.

Again, we say, that the Government's objective here is to have this Court set aside and disregard its *Penn-Olin* decision.*

This Court also directly dealt with this issue in *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651. The rationale of that decision also requires the rejection of the Government's claims. For this Court there extensively noted the points which were decisive: The acquired company was in the same business as the acquiring company (376 U. S. at 653). Not only was it interested in entering the market of the acquiring company but it had taken every possible step to make its entry into that market possible (376 U. S. at 654-655, 660-661). What is more, the record there showed that the overt activities of the acquired company, in attempting to enter the market, had demonstrably affected competition (376 U. S. at 658-659). Among other things, they had actually forced the acquiring company to reduce its price in California (376 U. S. at 654-655, 658-659). None of these factors are to be found in the record in this case.

Yet if the philosophy voiced here by the Government reflects the law, there was certainly no reason for this Court to consider and stress the significance of these factual considerations.**

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*If the Government is not asking that this decision be overruled, then—in all candor—it should ask that it be followed. This, of course, would require it to acknowledge that this proceeding should be remanded for evidence in respect of this issue.

**The Government's effort to twist this Court's decision in *Continental Can* into a holding that the mere "possibility" of entry is enough to warrant the attribution of the status of a "potential competitor" to an acquiring company, is to no avail. United States v. Continental Can Co., 378 U. S. 441. There, this Court noted that in certain segments of the container business the acquired and acquiring companies were definitely competitors in respect of promoting the end use of their products (378 U. S. at 453-455). The word "possibility," to which the Government refers, was used by this Court with reference to the possible extension of the existing interchangeability of the

Thus, we maintain that this Court has authoritatively delineated the standards which are controlling on the issue of whether an acquiring company is a potential competitor so as to render an acquisition by it invalid under Section 7. And those standards are as applicable and appropriate to a conglomerate merger as to one which bears any other label. They are plainly not satisfied here.

Moreover, the standard which the Government here sponsors would make a mockery of the requirement of substantial evidence. It would substitute the Commission's guesswork, in lieu of evidence, as to those factors which control business management in any decision to enter or not to enter a new product field. No such "theory of illegality" is warranted by the legislation, or is consonant with the decisions of this Court.

B. The Claim That the Policies of Clorox and Other Competitors in the Liquid Bleach Industry Were Influenced or Controlled by the Possibility of Procter's Independent Entry Is Without Any Evidentiary Support.

The Government's second charge as to the effect of the acquisition upon competition is also a product of abstract theory unrelated to any evidence in this record. It proceeds from the assumption that the pricing policies of Clorox must have been influenced by some "fear" of Procter's entry (Gov't Br. pp. 50-51).

In pressing this point the Government "plays down" the significance of its own effort to demonstrate that Procter was a "likely" entrant. It now says that this is of relatively little importance. It says that what really matters is what Clorox *thought* Procter's intentions were (Gov't Br. pp. 28-29). In analyzing these "thought processes,"

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products of the competing companies (378 U. S. at 465). In no sense did this Court indicate that the "mere possibility" of entry can stamp a company as a potential competitor in the Section 7 sense.

the Government deduces that the possibility of Procter's entry "must surely have figured as a palpable restraint on Clorox's conduct" (Gov't Br. p. 27).

At the outset we ask: What is there in this record which supports any such deduction? The Government's brief contains not a single citation to it. And, indeed, none could be culled from it. Instead, this Court is being importuned to predicate a judgment respecting this contention upon generalizations contained in economic literature, upon references made in other cases as to the impact of "potential competition," and upon colorful characterizations which derive from sheer speculation and hypothesis.*

The Government asserts, for example, that Clorox "surely" regarded Procter as a probable entrant (Gov't Br. p. 51). But disregarding the absence of any evidence to establish this, there was no reasonable ground for even the most "skittish" manufacturer of bleach to work up any anxiety as to Procter's intentions. As we have said, for over fifty years Procter had given no indication of any interest in the industry, let alone of any intention to enter. In the light of this background, any imagined "concern" on the part of Clorox would be wholly without foundation or reason. Indeed, the only permissible inference is that it was non-existent.

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*Thus, throughout its brief we are treated to a series of observations which, on their face, show that they are nothing more than reflections of surmise and guesswork on the part of the Government. For example, it is said that "Clorox *apparently* refrained from making conditions in the industry attractive enough to induce Procter" to enter (Gov't Br. p. 51); that the *possibility* of Procter's entry *"could not have failed"* (Gov't Br. p. 39) to induce Clorox and its competitors to "exercise self-restraint in pricing their brands" (Gov't Br. p. 39); that *"evidently*, Clorox's price was low enough to discourage entry by a firm, like Procter, which *undoubtedly* has a high target rate of return" (Gov't Br. p. 51); that "Clorox had an *incentive* not to engage in the kind of conduct that would have made entry attractive to Procter" (Gov't Br. pp. 28-29). (Emphasis added.)

All of these *ipse dixits* may reflect interesting intellectual exercises, but not a single one of them is supported by a word of evidence.

It is only reasonable that if there were any factual support for the Government's assumptions, it should have been reflected in some way during the long course of the trial proceedings. The Commission had access to all of the Clorox records. It offered no documentation of even the remotest "concern" of the Clorox management about, or any interest in, how, or in what manner, Procter would react to its merchandising policies. The Clorox officials testified and were interrogated at great length. There was nothing in any of that testimony that indicated that their activities had in any way been dictated or affected by any "thoughts" that Procter might independently enter the industry. There is likewise no such indication in the testimony adduced from competing bleach manufacturers. And, here again, the failure of the Commission to raise any such issue until after the record was closed effectively precluded Procter from responding to it. It effectively denied Procter the opportunity to expose this contention for the improvisation that it is.

Finally, all of the Government's theorizing about price levels in the industry and the reasons for these levels is pure speculation. It stems from the Government's professed dislike of competitive conditions in the liquid bleach business. Despite these theoretical criticisms, there is nothing in the record to indicate that existing competition was not sufficiently effective to keep prices at competitive levels.* Thus, we say, that the claim that Procter "in absentia" exerted some psychological restraint upon existing competition, dissolves in a vacuum of evidentiary support.

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*The efficacy of existing competition in policing price levels in the industry is well documented in this record. For example, in 1958, in connection with testing a new container in the Buffalo and Atlanta markets, Clorox increased the per case price by 10 cents. The substantial sales loss to its competitors compelled it, some six months later, to reduce the price to its former level (R. 1109a, 1241a-1242a; RX 129, R. 397X, 1519a).

III

THERE IS NO PROBABILITY THAT ACTUAL OR POTENTIAL COMPETITION MAY BE LESSENED OR ADVERSELY AFFECTED BY ANY ENHANCEMENT OF THE "MARKET POWER" OF CLOROX

The Government also claims that this acquisition violates Section 7 because the substitution of Procter for Clorox may deter "prospective" competitors from entering the bleach industry. It argues that the "salutary" effect of potential new entrants (as a curb upon possible anti-competitive practices in the industry) may be diminished, and the prospect of possible new entries into the business may be lessened (Gov't Br. p. 52).

The Government's position is premised upon its claim that alleged "competitive advantages" stemming from the acquisition will so enhance the "market power" of Clorox as to increase substantially the barriers to new entry (Gov't Br. p. 38). As a corollary to this, it also urges that such "advantages" may have some imagined "chilling" effect upon the future competitive activities of actual competitors (Gov't Br. p. 52).

We first consider the nature and significance of these so-called "advantages." For whatever may be their import in a Section 7 proceeding, if they are non-existent or of no competitive significance, as we now demonstrate, the Government's position is fatally undermined.

A. The Alleged "Competitive Advantages" Upon Which the Government Relies Are Demonstrably Without Competitive Significance.

The thrust of the Commission's complaint and the shaping of its proof throughout this proceeding was directed to its claims respecting the effects of these so-

called "competitive advantages." To this end, the Commission inquired into all phases of the operations of both Procter and Clorox. The futility of its inquiry is reflected by the successive abandonment of most of its claims in this respect.

Thus, no claim is now made that the acquisition conferred upon Clorox any so-called "advantages" in the manufacture or production of liquid bleach. Also abandoned by the Government is the assertion that the distribution of Clorox through independent brokers would be discontinued and Procter's sales force utilized in its stead.* Even though passing reference is made by the Government to the importance of shelf space in the merchandising of consumer products (Gov't Br. pp. 15-16), no claim is made that Clorox would now be "advantaged" in this respect.** Lastly, there is no suggestion that Procter's merchandising ability and experience will "advantage" Clorox in any way.***

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*There is nothing in this record upon which to base any judgment as to which method of distribution is more economical or more effective. As to any likelihood that Procter would make any change in the distributional method for Clorox, Procter's President testified that distribution through brokers was effective, that it had been successful for the Clorox brand and that there were no plans to abandon it (R. 608a).

**The only objective evidence bearing upon this subject shows that "pre-merger Clorox" had a larger percentage of shelf space in relation to product movement than did Comet—Procter's most successful and only product in the scouring cleanser field (R. 1330a-1331a). The court of appeals observed that Clorox on its own had achieved "very adequate shelf space" prior to the acquisition (R. 1564).

As to any suggestion that because Procter is a multi-product company, more favorable shelf space could be secured by it for the products which it sponsored, this was emphatically denied by the retailers who testified (R. 1195a, 1296a).

***The President of Procter testified that even though Procter may be competent in its own field to build up a brand, it had not shown anything like the competence of Clorox Chemical Co. (R.

Thus, as is now apparent in the Government's brief, the so-called "competitive advantages," which it claims proscribe this acquisition, come down to two: (1) that Clorox will have available greater financial resources which, among other things, it is said will enable it to engage in more extensive advertising and promotional activities; and (2) that Clorox will be advantaged by an alleged ability to achieve cost advantages by reason of advertising discounts and economies in promotional costs.

We submit that the record demonstrates that these claimed "competitive advantages" are either entirely imaginary or improbable or without competitive significance.* Any analysis of them merely emphasizes that underlying the Government's claim is its assumption that illegality can be predicated upon the "size" of Procter.

(1) As to the availability of additional financial resources.

In its brief, the Government has considerably tempered its previously asserted claims that the "availability" of Procter's overall financial resources "advantaged" Clorox in such a way that anti-competitive consequences were probable. The emphasis now is that access to such resources relieved Clorox of alleged budgetary limitations which had restricted the company, pre-merger, in its advertising and promotional activities (Gov't Br. pp. 26, 39, 40).

567a-568a). In support of this conclusion, he pointed out that Clorox, at the time of the acquisition, had a higher share of the market than any product that Procter then had (R. 1104a-1105a). As noted by the court of appeals, it was Clorox, and not Procter, which had the "know-how" in the household liquid bleach business (R. 1562-1563).

*There is no suggestion that such "advantages" made possible any of the congeries of recognized anti-competitive practices. Cf. Federal Trade Commission v. Consolidated Foods Corp., 380 U. S. 592, 594. There was no evidence that Procter or Clorox at any time in the past engaged in predatory practices. Nor is there any suggestion that Procter would be likely to do so in the future (R. 1565).

Absent such limitations, the Government urges that now Clorox would be able to meet any challenge from new entrants (Gov't Br. p. 39). This is simply a further embellishment of the theme that anti-competitive effects may be presumed from the "size" of Procter. No premise for such speculation may be garnered from this record. Apart from the lack of any evidence to support the Government's hypothesis, the record is clear that Clorox Chemical Co. had more than ample financial resources to meet any realistic competitive requirements (R. 523a, 1565; Gov't Br. p. 4). Its financial self-sufficiency in the bleach industry was noted by the court below (R. 1563):

> "The finances of Clorox, although not comparable with Procter's, were entirely adequate for its purpose and enabled it to continue its growth and to maintain and increase its share in the market."

Nor is there a scintilla of evidence in this record that the merchandising policies of Clorox Chemical were restricted in any respect by budgetary limitations. The Government's assertions to the contrary erroneously assume that expenditures for such activities are subject to no limitations except the availability of funds. Such an assumption reflects the Government's total disregard and misconception of the manner in which American business operates. Expenditures made by management for advertising and promotions, like any other investment, must result in a reasonable profit return or management will not long survive.

In every real sense, the only limitations imposed on pre-acquisition expenditures for advertising and promoting Clorox were the policy determinations of its management. At the time of the acquisition, the optimum per case rate expenditure for advertising and promotion had been established through years of operating experience. It effectively

served the advertising and promotional needs of the brand (R. 1379a-1384a). That rate was regarded by management to be the most economical utilization of funds in terms of profit return (R. 1381a-1382a).* The rate remained the same in the year following the acquisition and there is nothing in the evidence to indicate any likelihood of change (R. 1305a-1308a, 1310a-1312a; RX 83, R. 453X, 1306a, *in camera*). In fact, the testimony was to the effect that there would be none (R. 1382a; see also R. 546a-547a). The evidence permits of no inference that additional advertising would be purchased simply because additional funds could be said to be "available." The conclusion is directly to the contrary.

It was to this very point that the court of appeals directed itself when it stated that "doubtless Procter could advertise more extensively than Clorox, but there is such a thing as saturating the market" (R. 1563).

(2) As to so-called promotional and advertising economies.

Possible cost savings in advertising and promotional activities, as a result of the acquisition have been, on the basis of this record, magnified and distorted beyond any permissible limits. And it is these "advantages" which represent the primary reliance of the Government in support of its claims of anti-competitive effects.

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*The Commission, in assuming that expenditures for advertising and promotional activities might be increased, did pay passing reference to the reality that there is a point of diminishing return in such expenditures. In its opinion, it stated "moreover, the effectiveness of advertising and sales promotions would appear to increase, *at least up to a certain point,* in direct proportion to their volume" (R. 420a). (Emphasis added.) The significant language in the quotation are the words "up to a certain point." While carefully hedging the breadth of its basic assumption by these words, the Commission wholly ignored the testimony to the effect that such a point had been reached in the marketing of the Clorox brand.

(a) *As to multi-product promotions.* The Government's brief asserts that joint promotions reduce "the mailing, printing and other costs of the promotion for each product" (Gov't Br. p. 14). We know of no evidence in the record to support such an assertion and no clue to the existence of any such evidence is provided in the Government's brief.*

Moreover, the Government's presentation contains a misstatement of the evidence. For in its brief it states, without qualification, that "since the merger the Clorox brand has been featured in sales promotions in combination with other Procter products" (Gov't Br. p. 43). Again there is no reference to any record support for this assertion. So far as any multi-product merchandising of Clorox is concerned, the only evidence bearing on the subject was that Clorox would have little to gain—and might have something to lose—through the diffusion of its advertising impact and image if it were promoted in conjunction with other national brands (R. 1389a-1390a; see also R. 746a).

(b) *As to advertising discounts.* The gist of the Government's claim respecting "substantial new competitive advantages" is that the acquisition will enable Clorox to obtain large volume discounts in network television program advertising (Gov't Br. pp. 12, 26, 41). Reference is made to discount schedules allegedly permitting discounts of 25 to 30% on the sponsorship of network television *programs* (as distinguished from the purchase of television

*If the Government's argument is that two coupons can be mailed in one envelope and thus result in the sharing of the cost of a postage stamp, it is probably correct. Any cost savings in this regard, however, certainly cannot be deemed of sufficient significance to warrant consideration as a basis for invalidating an acquisition.

Nor could any such savings be deemed a "competitive advantage," because the competitors of Clorox are able to do the same thing in a joint promotion of their product with the products of other companies. In that way, they too can "split the postage" (R. 1020a).

spots).* The Government argues that before the merger Clorox was unable to qualify for such discounts (Gov't Br. p. 40). Hence it implies that Clorox advertising policies will now be dictated and shaped by their availability.

In this "discount-minded" society, the Government's argument might have surface appeal to the uninformed layman. But the argument ignores practical, commercial considerations. To a knowledgeable advertiser, the choice of appropriate advertising media for a product is not controlled by the availability of advertising discounts, but rather by the requirements of the product and the desirability of obtaining the proper media structure (R. 552a).**

Here the facts are that Clorox Chemical Co. did not use, nor does Procter use, nor is there any evidence indicating that Procter intends to or might use, network television in advertising liquid bleach (R. 550a, 699a, 1396a-1397a,

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*The discounts to which the Government refers apply only to *time* charges in connection with the sponsorship of a TV program (R. 551a). There are no discounts on "talent" charges which are approximately equal to time charges (R. 551a, 779a-780a). Hence, the discounts available for any given program would be, at most, approximately one half the amount referred to in the Government's brief (R. 551a, 779a-780a). Moreover, discounts varied from network to network and there is a wide difference in the discount schedule for nighttime and daytime network television (R. 778a).

**The Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 89th Cong., 2nd Sess., recently conducted hearings on *"Possible Discriminations in TV Advertising."* Reference is made in the Government brief to hearings before this Subcommittee (p. 30 n. 26). One of the witnesses was Don Durgin, the President of the NBC Television Network. He testified that the great majority of his largest advertisers spent considerably more money for "non-discount" than for "discount" time. (December 14, 1966, pp. 685-686). With reference to the Government's assertion in footnote 12 at page 12 of its brief that smaller advertisers paid "40 to 60 percent more" than the largest advertisers for "identical coverage," Mr. Durgin testified that as between the ten largest and the ten smallest advertisers, the smallest advertisers' average costs were less per thousand households (December 14, 1966, p. 689).

1432a-1433a). The reason for this had nothing to do with advertising discounts or financial resources. Very simply, Clorox Chemical Co. and Procter—as a matter of business judgment on the part of management and the Clorox advertising agency—believe that spot television is the preferable media for advertising Clorox liquid bleach. This is because of its flexibility, which permits adjustment of the advertising weight to be given to Clorox in particular areas (R. 1396a-1397a, 1432a-1433a).

Plainly, the Government's characterization of prime time sponsored network television programs as the "principal media" (Gov't Br. p. 41) for advertising liquid bleach is at odds with the evidence.* Not only is the record clear that Clorox did not use any such media, but there is no evidence from which it might be concluded that it was reasonably probable that it would.

Finally, and perhaps most importantly, in the light of the Government's harping upon the matter of these network discounts, is the fact that they have been, or are being, discontinued.** In hearings before this same Senate Subcommittee on Antitrust and Monopoly, 89th Congress, Second Session, which is cited in the Government's brief (p. 30), Mr. Durgin, President of NBC, testified that NBC was eliminating all volume discounts (December 14, 1966, page 683). In other Congressional hearings, representatives of CBS and ABC testified that such discounts had been or were being eliminated (Hearings, Select Committee on Small Business, House of Representatives, 89th Cong., 2nd Sess., Part 2, pursuant to H. Res. 13, pp. 534, 568 (1966)). In later testimony before the Senate Subcommittee

*As is evident from the record there are many ways to advertise and promote liquid bleach. Even among the Government's own witnesses there was no unanimity of opinion as to which method was more effective (R. 775a, 826a, 876a, 903a, 983a).

**Of course, neither Procter, nor any other advertiser, had any control over rate schedules, and such discounts as were accorded were within the sole control and discretion of the networks.

(referred to *supra*), these representatives confirmed that the discounts had, in fact, been eliminated (December 13, 1966, page 547; December 14, 1966, page 638). Only a minor "continuity" discount is being retained by the networks in their rate structure.*

We submit that it would, indeed, be anomalous for any significance of any sort to be attached to this claimed "competitive advantage" when it so clearly appears that (a) there never was any probability that it would be of any importance in the advertising of Clorox and (b) even the possibility of any such "advantage" disappears with the discontinuance of the discounts. In other words, the pertinency of these advertising discounts, which represent the sole objective "competitive advantage" factor which the Government was able to stress, has now evaporated.

Regardless of all else, we emphasize that this record is wholly deficient to permit of any acceptance of the Government's claims. Despite the Government's accent on these "discounts" in the appellate stages of this proceeding, the subject received little attention during the trial proceedings. No impartial experts were called to testify on this subject.** Nor is there any evidence in this record to permit any assessment of their real significance or import. And, remarkably, the Department of Justice has directly conceded that it really does not know what competitive

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*The "continuity discount" is a modest discount available to all advertisers, large or small, who are willing to make a binding commitment to participate in a network program at least once every two weeks for the period of a year. It is not a quantity or volume purchase discount.

**In lieu thereof, the Commission relied upon economic theory to bridge the gap between claimed advertising "advantages" and their probable effect on competition in the liquid bleach industry. The Commission's opinion is replete with references to extra-record writings. It draws upon theories (many of them disputatious) extracted from among 85 citations to 43 of such writings. None of these writings was based upon studies of the liquid bleach industry. The fallacy of any attempt to generalize or analogize from industry to industry was noted by a recognized authority in the field of the economics of adver-

significance these discounts ever had in any event.* There is nothing here upon which any informed judgment could be predicated to the end of treating these discounts as a basis for invalidating a conglomerate acquisition under Section 7.

The foregoing demonstrates that the Government has failed to sustain the burden of its argument that there are any discernible "advantages" resulting from the substitution of Procter for Clorox which have wrought, or are likely to bring about, any significant change in competitive

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tising. Directing comments to this very point, he notes that in the cigarette industry (referred to at page 40, n. 39 of the Government's brief) his own studies disclosed that advertising advantages were there a barrier to entry. Nevertheless, and with particular reference to the bleach industry, he observed that general principles resulting from empirical studies in some industries cannot indiscriminately be applied to another. Tennant, *"An Economist's View,"* Symposium: "Advertising, Competition and the Antitrust Laws," August 10-13, 1964, 26 A. B. A., Section of Antitrust Law 168, 174.

Procter maintained below and repeats here that the Commission's critical reliance upon extra-record evidence was violative of due process and Section 7(c) of the Administrative Procedure Act (5 U. S. C. A. § 1006(c)). The court below held, however, that the extra-record writings were general in nature and not directed to the facts of this case (R. 1558). We believe that its holding was in error. We contend that the Commission's utilization of, and reliance upon, these materials, as a substitute for evidence, constitutes a further basis for affirmance of the decision below.

*Mr. Edwin M. Zimmerman, Acting Assistant Attorney General, Department of Justice, recently appeared as a witness during the hearings referred to in the footnote at page 37, *supra*. Speaking on behalf of the Antitrust Division, he stated, "I wish to repeat that we do not know to what extent, if at all, these forms of discrimination [in the television advertising rate structure] exist. Nor do we know how serious an impact they may have. . . . [W]e have no view one way or the other on whether we have an octopus or a pussycat here." (pp. 724-729).

Also, in the light of this statement we cannot reconcile the Government's unrestrained characterizations of these discounts as "price discriminations" which might run afoul of certain sections of the antitrust laws (Gov't Br. p. 47). Certainly we are not aware of any proceeding, instituted by any agency of the Government, in which any such charge has been pressed.

conditions in the liquid bleach industry. These conclusions are applicable to existing as well as supposititious potential competitors. The Government's failure to sustain its claims respecting anti-competitive effects from competitive "advantages" is further reflected in the post-acquisition evidence which we next discuss.

B. The Claim That Actual Competition in the Bleach Industry May Be "Chilled" As a Result of the Acquisition Finds No Support in the Record.

The effect of the acquisition upon actual competition in the bleach industry has received little attention in the Government's brief. There is no direct claim that the business of competitors has been adversely affected. Perhaps the Government's strongest statement of its position respecting existing competition is included in the caption of the last section of its brief. There it states that the merger "tended to chill such competition . . . as remained in the bleach industry" (Gov't Br. p. 52; see also p. 23). Even this statement is related to some imagined "chilling effect" upon possible "expansion" activities of actual competitors.

Neither the "competitive advantages," which we have just discussed, nor the post-acquisition events support the Government's claim.

(1) The post-acquisition events now emphasized by the Government lend no support to its position, and the first decision of the Commission so held.

The Government's brief generally seeks to obscure the evidence of record concerning the years following the acquisition. It does refer to certain events which took place in the first of the post-acquisition years as indicative of Clorox's enhanced "competitive capabilities" (Gov't Br. p. 46). Even as to these events, there is no forthright claim that they were a result of the acquisition. Nor is there any evi-

dence that these occurrences are related to any such "enhanced" capabilities. And the claims, if made, would have no support in this record. Yet, the Government's discussion of these events has certainly been shaped so as to imply that had it not been for the acquisition, they would never have transpired.

Thus, at page 20 and in the footnote at page 46 of its brief, the Government refers to the fact that after the merger, Clorox began using sales promotions. But it does not openly contend that the use of such promotions was prompted by, or came about as a result of, the acquisition. Instead, by a *post hoc propter hoc* approach, it implies a causal relation. None is shown.*

At three different places in its brief, the Government refers to an incident occurring in Erie County, Pennsylvania (Gov't Br. pp. 20-21, 46, 52).** This was a competitive situation in which the major competitor of Clorox commenced the distribution of its bleach in that area some two months after the acquisition. The initial sales campaign featured the new Purex container, heralded by Purex as the "first major improvement in the packaging of liquid bleach in the industry's history" (RX 114, R. 392X, 1486a). The introductory campaign was implemented by an intensive advertising and promotional campaign, offering price re-

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*All of such sales stimuli were well known to, and had been used in the household liquid bleach industry prior to, and following, the acquisition (R. 744a, 745a, 759a, 836a-837a, 842a, 846a-847a, 877a-878a, 904a, 950a, 1007a, 1042a-1043a, 1046a-1048a, 1056a, 1059a-1060a, 1089a). These techniques were well known to Clorox Chemical Co. management and its advertising agency (R. 676a-677a, 1384a-1385a). None were used which had not previously been conceived or considered by Clorox Chemical Co. prior to the acquisition (R. 685a-687a, 1415a-1416a). Their use was in no way attributable to the acquisition (R. 1384a-1385a).

**The Commission at one point in its opinion had referred to the same incident as an example of the "often intense price rivalry" prior to the acquisition (R. 451a).

ductions on all bottle sizes (R. 1564-1565; see also CX 454A-C, R. 191X-193X, 754a). Within the short space of less than *two* months after its entry into Erie, Purex had captured 32.5% of the entire market (CX 450, R. 189X, 796a). As the Government's own account of the facts shows, more than half of the share of the new market which Purex achieved was obtained at the expense of Clorox (Gov't Br. p. 20).

Clorox countered this new promotional effort with a defensive advertising and promotional campaign of its own (R. 715a-718a, 1565). In the ensuing months the Purex brand share of market declined and Clorox was able to regain its lost market share (CX 450, R. 189X, 796a). Purex retained and held a minimum of 7% of the market (R. 1493a).

The observations of the court below respecting this competitive encounter appropriately summarize its insignificance (R. 1565):

> "without the merger Clorox could, and in all probability would have resorted to the same measures and in all likelihood it would have obtained the same results. It had the know-how and the necessary finances to do so."

Nothing involved in this incident supports the Government's claim that the acquisition enhanced the ability of Clorox "to repel competitive forays by existing bleach producers" (Gov't Br. p. 52).

Reference is also made to the acquisition by Purex of the Fleecy-White brand of liquid bleach. It is wholly unrealistic to attribute that acquisition, even in part, to any "concern" by Purex that it could not compete with Clorox under Procter ownership (see Gov't Br. pp. 21-22 and 46). Purex has certainly evidenced no timidity over the years in

competing with Procter in its other product lines. For example, in its extensive expansion program through acquisition, it has acquired at least two soap companies (RX 77B, R. 361X, 1260a). These were obviously directly competitive with Procter's basic product line. It is also engaged in competing with Procter in the detergent field (CX 438, R. 128X-183X, 747a).

Moreover, long after the "Erie incident" (and before the purchase of Fleecy-White), the President of Purex, when he first testified in this proceeding, stated that Purex had "considered" expanding its territorial market in liquid bleach but that it had not done so "because of the narrow margin in—or the small margin of profit" in liquid bleaches (R. 738a-739a). He testified that Purex had "allocated its use of what capital funds [it had] . . . available in other areas" (R. 739a). He made no mention of the "Erie incident" nor was any mention made of any concern as to Clorox's competitive strength in connection with the decision of Purex to limit its territorial expansion.

It was not until almost one year later when he was recalled to testify by Commission counsel that he purported to relate the acquisition of Fleecy-White to the Purex entry into Erie (R. 1492a-1493a).* Thus, every objective circumstance concerning the Fleecy-White acquisition supports the inference that Purex bought that brand, more than a year after Procter acquired Clorox, because it had no concern about competing successfully with Clorox.**

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*The objectivity of this testimony must be evaluated in the light of the fact that Purex was the principal protagonist of the Commission in the prosecution of this proceeding. The Commission counsel who elicited this testimony is now the President of Purex.

**Reference is made to the "discontinuance" of the Vano brand of liquid bleach (Gov't Br. p. 46). Any fair appraisal of the evidence must lead to the conclusion that this occurrence had nothing to do with Procter's acquisition of Clorox. In August 1956 Babbitt, Inc. (Babbitt) acquired Chemicals, Inc. which, among its other products,

The facts as to these post-acquisition events now emphasized by the Government were before the Commission when it first considered the lawfulness of this acquisition. It held that the record as then constituted "did not provide an adequate basis for determining the [acquisition's] legality" (R. 254a). It clearly and unequivocally held that the evidence in the record which was before it was insufficient to establish any violation of Section 7. On the basis of that record, it noted "we might dismiss the complaint" (R. 254a). Instead, it remanded the proceeding to the hearing examiner for the reception of additional evidence (R. 254a).

(2) The post-acquisition evidence refutes the contention that the acquisition lessened competition or that there was any probability that it would. Such evidence was erroneously ignored in the second decision of the Commission.

When this matter came before the Commission for the second time, it held that the additional evidence adduced on the remand, covering four post-acquisition years, was entitled to no weight (R. 463a-464a).

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manufactured and distributed a liquid bleach called Vano (R. 1085a; CX 535, R. 211X, 1088a). The distribution of this brand had never extended beyond a limited area in the vicinity of San Francisco (R. 1086a). At the time of Babbitt's purchase, the sales of this brand had been steadily declining and were relatively insignificant (CX 530, R. 444X, 1087a, *in camera*). The annual Babbitt report for 1956 listed the various brands which it had purchased from Chemicals, Inc. But the Babbitt management considered the Vano liquid bleach brand so unimportant that it did not even mention its existence (CX 535, R. 211X, 213X, 1088a). At or about the time of this acquisition of Chemicals, Inc. (and before the acquisition of Clorox by Procter), Babbitt decided not to promote or advertise Vano liquid bleach (R. 1094a). Thus, for all practical purposes, Babbitt's decision to discontinue the manufacture and sale of Vano liquid bleach antedated Procter's acquisition of Clorox by some months. This insignificant and obscure event is proof of nothing.

Plainly, the Commission was in error.* The Government's efforts to rationalize the Commission's treatment of this evidence (Gov't Br. p. 45) in the light of this Court's subsequent decision in *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U. S. 592, is contrived. This Court there held that post-acquisition evidence, like any other evidence, should be considered in a Section 7 proceeding. *Id.* at p. 598.

Here, that undisputed evidence showed:

> *First:* There was no significant difference between the post- and pre-acquisition growth trend of Clorox (RX 134A, R. 399X, 1537a).
>
> *Second:* The competitors of Clorox, in the four years subsequent to the acquisition, have sold more bleach for more money than they did in the four years prior to the acquisition. Specifically, they sold almost 200,000,000 more 32-ounce equivalent units of liquid bleach than they had sold in the four years immediately preceding the acquisition—representing added sales of more than $45,000,000 (RX 137, R. 421X, 1547a).
>
> *Third:* In the last year for which share data are available, the competitors of Clorox sold more bleach for more money than they had sold at any time previously in the history of the liquid bleach industry (RX 137, R. 421X, 1547a).**

In no sense do we urge that these statistics are conclusive in determining the validity of this acquistion. They

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*With reference to the failure of the Commission to consider this evidence, the court of appeals noted (R. 1566):

> "We think the Commission was in error in ruling that post-merger evidence was admissible only in unusual cases and that it crept into the record needlessly in the present case, and in giving it *no* weight." (Emphasis added.)

**In the same period the Clorox share of market declined from its share in the previous year for the first time in its history (RX 134A, R. 399X, 1537a).

do, however, reflect the actual competitive situation in the liquid bleach industry in the four years following the acquisition. This evidence of the improvement in the business of the competitors of Clorox is a direct refutation of the Government's assumptions that their competition would be "chilled." For it indicates that in the years since the acquisition their competition has been vigorous and successful. It is plainly significant in rebutting any probability that competition may be substantially lessened in the future.

There is another significant fact emerging from the post-acquisition evidence. The Government in its brief has referred to the testimony, in the original record, of competing bleach producers (Gov't Br. p. 21 n. 21). Shortly after the acquisition, they had expressed their concern respecting Procter's competitive capabilities. When the Commission remanded this proceeding for further evidence, its order of remand encouraged, if it did not literally invite, the recall of competing bleach producers to testify as to any *actual* effects of the acquisition upon them (R. 252a, 254a). These prior witnesses could, of course, have been made available on the remand had counsel chosen to call them. And at the time of the remand hearings, they would have had four years of actual post-acquisition experience.

Yet, no testimony was adduced from these competitors as to whether any of their "concerns" had been well founded or borne out. Certainly, counsel for the Commission would have recalled them if their business had in any way been adversely affected by the acquisition, or their competitive efforts "chilled." The failure to do so, coupled with the prosperity of these competitors in the post-acquisition years, compels the conclusion that they continue to be a viable factor in this industry, and that there is no reasonable probability that their competition may be diminished in any respect.

IV.

NO DETERMINATION OF ILLEGALITY CAN BE PREDICATED UPON THE POSSIBILITY THAT THE SIZE OF PROCTER MAY HAVE DETERRENT EFFECTS UPON POSSIBLE POTENTIAL ENTRANTS

Finally, this brings us to the consideration of a claim which runs throughout the Government's brief. Implicit in its argumentation is that it matters not whether there is any substantial evidence to support its claims as to the nature or probable effects of the claimed "competitive advantages" which it has stressed. Also, that it matters not whether there is any showing that these have had, or probably will have, any effect upon existing competition. It is urging that the bare possibility of anti-competitive effects—stemming solely from the size of Procter—is enough. It says that these possibilities may have such deterrent effects upon some class of suppositious potential entrants as to constitute a violation of the statute.

A. Assumptions Based on Possibilities Stemming Solely From the Size of Procter Are Unsustainable.

We have shown that there is no substance to the contention that any of the specific cost savings or other "advantages" emphasized by the Government would result in any discernible or significant anti-competitive effects (pp. 33-41, *supra*). And even the Government does not suggest that Procter's size would be utilized to engage in predatory or any other recognized anti-competitive practices.

So, in the final analysis, the Government's claim comes down to the proposition that possibilities, stemming from the size and "availability" of additional resources (the necessary concomitant of any merger), represent some automatic increase in the barriers to entry which is violative of Section 7. It is supported by nothing more than the

"visceral" assumption that: "Of course, anybody who ever proposed to enter the business would be deterred by Procter's size." But here there is nothing to support either the "of course" or the assumption that, in this setting, Procter's size or resources would have any such effect.

Yet it is this pre-occupation with "size" which underlies the Commission's decision. The court of appeals recognized that it was this, rather than any likelihood that this particular acquisition would contravene Section 7, which underlay the Commission's decision. In the concluding part of its opinion it said (R. 1568-1569):

> "The Supreme Court has not ruled that bigness is unlawful, or that a large company may not merge with a smaller one in a different market field. Yet the size of Procter and its legitimate, successful operations in related fields pervades the entire opinion of the Commission, and seems to be the motivating factor which influenced the Commission to rule that the acquisition was illegal."

This is an apt summary of the Commission's decision. The "possibilities" which it attributed to "size" are not cognizable under the statute.

B. There Is Nothing To Support the Government's Assumptions As To the Existence of Any Class of Prospective Entrants, Or As To Any Reasons Why Entry Might Be Deterred.

The Government's claims respecting deterrent effects upon potential competitors are also undermined by another set of assumptions which it has had to make. These pertain to the existence of a class of likely entrants, as well as to "why" or in what respect they would be deterred by the so-called "barriers to entry" accented by the Government.

While Section 7 explicitly speaks in terms of a substantial lessening of "competition," the concept of "competition" embraces certain restraints upon potential—as well as actual—competitors. But to be within the reach of the statute there must be some showing that the potential competition, allegedly affected, has some substance. There must be some showing of the likelihood that it both exists and would be deterred. Here the Government has nothing but assumptions to support either factor.

As to the existence of any prospective entrants, the Government simply calls upon its imagination that they "might" be companies which it calls the "large multi-product manufacturers of related products" (Gov't Br. pp. 39, 49, 51). In this category it lists Lever Brothers, Colgate-Palmolive and General Foods. The vacuousness of the Government's assumptions in respect of such "prospective entrants" is evident from the following:

> (1) There is not an iota of evidence in this record indicating any interest on the part of these or any similar firms in entering the business at any time.
>
> (2) The suggestion that profit potentials might, in the future, make independent entry attractive is simply a reflection of the ultimate in speculation.
>
> (3) The obvious realities negative the Government's assumptions. The companies identified by it as "likely" entrants are in constant day-to-day competition with Procter in many product lines. Why should it be supposed that Procter's presence in the bleach industry would be a deterrent to these firms? Why is it not equally reasonable to assume that the very fact that Procter now is in the business might well induce these very firms to enter on their own?*

*See United States v. Penn-Olin Chemical Co., 378 U. S. 158, 174.

(4) Further, as to the Government's list of "likely" entrants, what is there to warrant any assumption that the supermarket chains, for example, would be deterred from engaging in this business because of the presence of Procter? These large, financially sufficient institutions vigorously merchandise their private label brands of bleach in competition with Clorox. They are also in daily competition with Procter in the merchandising of their own brands of many other products sold through their stores. If entry ever became attractive on their own, it is captious to suggest that Procter's competition would deter them.

Emphasizing the fact that the Government's claims are based on sheer abstractions is the circumstance that all of the matters, to which we have alluded above, were susceptible of proof if any substance attached to them. The substantiality of any effect of Procter's entry upon other possible entrants (if such exist) is not a matter to be gleaned from treatises, or to be based on surmise and conjecture. It is a matter of evidence. Witnesses from the companies which the Government says might be likely entrants could have been called to testify. Other proof could have been offered. Speculation would be unnecessary. None of this occurred and the record here contains nothing supporting the validity of the Government's assumptions. And this defect in proof infects all of the Government's deductions respecting restraints upon the entry of potential competitors.

Thus, what is here being urged is that a violation of Section 7 can be predicated upon the *possibility* that *assumed* anti-competitive effects *might* deter the *possible* entry of *assumed* prospective competitors—as to none of which is there any evidence that they ever had, or were

likely to have, any interest in entering the business. This is the antithesis of the requirement of the statute that violations can only be based upon "probabilities"—and only such probabilities as are established by substantial evidence.* The Government is relying upon the very type of ephemeral possibility which is not cognizable under Section 7. To predicate illegality upon such illusory restraints transcends all recognized concepts of the scope of the statute.

The Government acknowledges that no such extension of the reach of Section 7 has ever been "explicitly" recognized in the decisions of this Court (Gov't Br. p. 34). Indeed, it has not. And neither should it be. Nor is anything added

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*However unnecessary, we set out passages from opinions of this Court enunciating this essential principle.

In Brown Shoe Co. v. United States, 370 U. S. 294, this Court said (at p. 323):

> ". . . Congress used the words '*may be* substantially to lessen competition' . . . [emphasis supplied by the Court], to indicate that its concern was with *probabilities*, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with *ephemeral possibilities*. Mergers with a *probable anticompetitive effect* were to be proscribed by this Act." (Emphasis added except where otherwise noted.)

And in a footnote on the same page of its opinion, it quoted from the final Senate Report:

> "The use of these words ("may be") means that the bill, if enacted, would not apply to the mere *possibility* but only to the reasonable probability of the prescribed [sic] effect. . . ." (Emphasis added.)

In Federal Trade Commission v. Consolidated Foods Corp., 380 U. S. 592, 598, it was noted:

> "The 'mere *possibility*' of the prohibited restraint is not enough. (*United States* v. *du Pont & Co., supra,* p. 598). Probability of the proscribed evil is required, as we have noted. . . . [T]*he force of § 7 is still in probabilities.* . . ."

In the concurring opinion in the same case, it is stated at page 605:

> "The touchstone of § 7 is the probability that competition will be lessened. But before a court takes the drastic step of ordering divestiture, the evidence must be clear that such a probability exists."

by the Government's assertion that it is "reasonable" to apply its theory to conglomerate mergers (Gov't Br. p. 34). For whether "reasonable" or not in the eyes of the enforcement agencies, the Congress has sanctioned no such principle.

Congress knew about conglomerate mergers. Had it intended that they should be banned or that the size of merging companies should be the standard of illegality, or that speculation by enforcement agencies could be the substitute for substantial evidence, it would have so legislated. This it did not do.

Yet, under the theory here espoused, every diversification by acquisition on the part of a large business entity would represent a "lessening" of the potential competition of potential entrants. For in every such acquisition there would be "substituted" the "size" of the acquiring company. The reach of the Government's theory would endow it with the power to proscribe all such mergers where, in the arbitrary judgment of the enforcement agencies, "size" would give rise to possibilities that some lessening of competition might result. Any such standard would make judicial review an empty gesture, and would frustrate the intendment of the legislation.

In its petition for *certiorari* the Government represented that this case posed the problem of evolving "proper legal standards" for judging conglomerate mergers (p. 11). It urged that the rejection of the Commission's "standards" would impair the Government's ability to proceed against mergers of this type. Its position is untenable. The vitality of Section 7 is not sapped or diminished by the determination that in this case the Government has not sustained its burden. The effectiveness of the statute, in the proscription of mergers which contravene it, is not curtailed by the recognition that the Government has failed to support its conclusions by substantial evidence. The affirmance of the decision below, so clearly required by the record here, simply means that the standards established by the statute and enunciated by this Court have not been satisfied.

CONCLUSION

For all of the foregoing reasons this protracted litigation, which is now in its tenth year, should come to a close. We respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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