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Executive Memorandum

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RUSH!

THE DEPARTMENT OF JUSTICE: APRIL FOOLISHNESS ON ANTITRUST

George Bush was correct on January 28 to declare a 90-day moratorium on new federal regulations and to instruct federal agencies to assess the harm done by existing regulations to the American economy. But Attorney General William Barr now has violated the spirit if not the letter of this ban. Last week he changed the Justice Department's enforcement guidelines to extend the reach of United States antitrust laws, which restrict business cooperation, to foreign companies in foreign countries.

Attempting to enforce antitrust laws overseas is a bad policy on its merits. These laws make American firms less competitive. Trying to enforce them beyond America's borders invites retaliation from trading partners. But as bad as that is, worse is the appearance that Bush is not in control of his own cabinet. If he wishes to shed the label of the "reregulatory President" that he so far has earned, he must instruct Barr to reverse this decision and instruct all federal officials to abide rigorously by his moratorium and to review regulations thoroughly as a prelude to a major deregulation effort to make America more competitive.

Antitrust laws allow the federal government to prevent cooperation between businesses that it believes will unduly restrict competition. Justice Department guidelines have allowed enforcement of these laws against foreign companies operating in their own countries only if American consumers are harmed by such collusion. But there are rarely overseas applications of these laws since American consumers usually gain better quality products at low prices from cooperation between foreign firms. Barr now has eliminated this "American consumer" provision, thus opening the door for more extensive Justice Department action against foreign firms.

To begin with, antitrust laws are of questionable economic benefit. The premise behind these laws is that close cooperation between businesses will result in monopolies which restrict competition and force consumers to pay higher prices for goods and services. Even if this is sometimes true, cooperation often allows businesses to turn out better quality products at lower prices. By stifling even beneficial cooperation, America's antitrust laws all too often make American firms less able to compete against foreign competitors that are not subject to such harmful laws by their own governments.

Legally Dubious. An attempt by the U.S. to apply its antitrust laws to foreign companies operating in their own countries in accordance with their countries' laws is legally dubious. As the U.S. Supreme Court emphasized in the 1986 case of *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, the cartelization of a foreign market cannot violate U.S. antitrust laws, "because American antitrust laws do not regulate the competitive conditions of other nations' economies." While a case under the new Justice Department guidelines might raise somewhat different issues, the basic issue would be the same, and the Court might well strike down these guidelines.

An attempt to enforce American antitrust laws overseas also would be impractical. The Justice Department would have to act against an American-based subsidiary of the foreign firm. The subsidiary would be required to defend itself in a U.S. court for the actions of a parent company, franchiser, or partner. In such prosecutions the U.S. government would not be able to provide due process of law for the accused. How exactly, for example, would the Justice Department accumulate evidence, since its agents generally cannot operate legally in foreign countries? How would the Justice Department subpoena evidence from overseas firms, since its jurisdiction does not extend to foreign countries?

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Invitation to Retaliation. An attempt by the Justice Department to enforce American antitrust laws overseas invites retaliation. The European Community (EC), for example, might prosecute America's Ford Motor Company's European subsidiary because workers in a Ford factory in Michigan are not accorded the benefits mandated by EC labor laws. The EC could claim that lower benefit levels for Ford workers in the U.S. are a form of "unfair" competition against European auto manufacturers. The EC would not accept as a defense that Ford's European factory treats its workers according to EC laws. In such a case the American government and people correctly would consider the EC's behavior an unjustified attempt to meddle in U.S. internal economic and political matters.

Although the Justice Department insists that the new policy is not aimed at any one country, Barr's change in antitrust enforcement guidelines seems to be aimed mainly at Japanese companies that often operate in strategic alliances called "keiretsus." But if the Justice Department targets Japanese firms, it is likely to hit American firms as well. American companies now are breaking into the Japanese market by joining in such strategic alliances. Example: Last October the Aluminum Company of America and Japan's Kobe Steel established an alliance to produce tubing for photocopiers. Example: Last December America's International Business Machine Corporation and Japan's Canon Ltd. announced plans for joint production of notebook computers. Example: In January of this year American Telephone and Telegraph and Nippon Electric Company agreed to manufacture jointly dynamic random access memory chips. As American firms use such alliances to become more competitive and to penetrate foreign markets, they could find the U.S. Justice Department frustrating their efforts in an attempt to apply America's antitrust laws overseas.

With his announcement of a 90-day moratorium on new government regulations, Bush acknowledges that federal regulations often do more harm to the economy than good, crippling American firms in their ongoing contest with foreign competitors. A so-called "level playing field" should not consist of applying the same destructive regulations to overseas firms, crippling them as well.

Freeing Business. If the Bush Administration is serious about freeing American enterprise from the burden of regulations, the President must get control of his own officials and demand that they obey his 90-day moratorium. To untie the hands of American business, the Administration should seek to amend U.S. antitrust laws to make it easier for American firms to form joint ventures, both with one another and with foreign firms. And as a first step in this effort, the President should instruct Attorney General Barr to abandon any attempt to apply American antitrust laws to acts taken by foreign firms on foreign soil.

Edward L. Hudgins, Ph.D.
Walker Fellow in Economics
Deputy Director of Economic Policy Studies

Nancy Bord, Ph.D.
Bradley Resident Scholar

For further information:

Bryan Johnson, "Forging Alliances to Bust Into the Japanese Market," Heritage Foundation *Backgrounder* No. 876, January 31, 1992.