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OUR ANTITRUST POLICY

An Address

By

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It is particularly pleasing to be able to attend the Judicial Conference of the Court of Appeals for the Fourth Circuit. Such meetings are always pleasant and intellectually stimulating. However, this occasion brings added pleasure because Judge Parker is our host. I share the high esteem in which he is held by you and the entire American Bar. He is recognized not only because of his judicial attainments but because of his wide leadership in judicial administration. He is especially noted for his pioneering work in creating, and in stimulating confidence in, judicial conferences.

One cannot participate in a national presidential campaign as I did this past year without having had intimate contact with people and obtaining a fairly accurate concept of the thinking going on in the minds of a great many American citizens about a great many matters. Patterns of thought and conviction gradually become evident, and ultimately comparatively clear. This has been particularly helpful in preparing to administer the affairs of the Department of Justice. It has convinced me of the imperative need of a thoughtful and comprehensive study of our Anti-trust laws.

I believe that it is not difficult to decipher a pattern of thought existing among the people of America, relating to their anti-trust laws. Many of these people would not express their thought in technical language (perhaps not even mention the "free

enterprise system"), but would refer to "competition" (or more readily "unfair competition"), to "monopolies", to "fair trade", and to the impact of antitrust law on their daily struggle for existence.

This existing interest among average American citizens is intensified among certain businessmen, among many of those holding political office, and by a great many lawyers. I have even found certain phases of it a subject not without considerable interest to gentlemen wearing robes and struggling against congested calendars.

At meetings of the bar, the first questions that our antitrust attorneys usually hear are these: What is the new Administration's attitude to be toward antitrust prosecutions? Will there be a slackening of antitrust litigation? Should not there be a reappraisal of antitrust policy? Should not the Republicans dismiss most of the pending suits? What about all those suits which were filed in the closing days of the previous Administration? Are you going to clean house?

I would remind you that the 1952 Platform Pledge of the Republican party states this:

> We will follow principles of equal enforcement of the anti-monopoly and unfair-competition statutes and simplify their administration to assist the businessman who, in good faith, seeks to remain in compliance. At the same time, we shall relentlessly protect our free enterprise system against monopolistic and unfair trade practices.

This plank emphasizes certain fundamental aspects of antitrust law enforcement policy in which this Administration, from the President on down, thoroughly believes: -- the equality of its enforcement, the simplification of its administration, assistance to the businessman acting in good faith in his attempts to follow the law, but with all, an uncompromising determination that there shall be no slackening of effort to protect free enterprise against monopoly and unfair competition; and most certainly -- no winking at violations of the law and no wholesale dismissal of pending suits.

The mere stating of such objectives is easy -- the accomplishment of them is another matter. Everyone agrees, with different degrees of vehemence, that there are inconsistencies in our statutory enactments; and there there have been inconsistencies in our administrative policies. One of our respected national magazines, in characterizing the controversies on antitrust, said:

> The public debate shows signs of being disorderly. It needs an agenda, a common language, and a common ground.[1]

Various groups and agencies have made suggestions or proposed procedures. Some speak primarily from the standpoint of the bench and the bar. I refer particularly to the report adopted by the Judicial Conference of the United States on September 26, 1951, entitled "Procedure in Antitrust and Other Protracted Cases", and to the recent "Report on Possible Work by the American Law Institute"

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1 41 Fortune Magazine 114, January 1950.

dated April 30, 1953.

Some speak from the layman's viewpoint, such as the publications of the following: (1) The American Institute of Management; (2) Report to the Secretary of Commerce by his Business Advisory Committee; (3) The Brookings Institute Preliminary Reports; (4) Current Business Studies of The Society of Business Advisory Professions, Inc.[2]

The very titles of Law Review and Economic Quarterly articles published in recent years are extremely revealing: "An Appraisal of the Antitrust Laws";[3] "Antitrust Laws; Some Recent Trends and Developments";[4] "A New Phase of the Antitrust Law";[5] "The New Sherman Act";[6] "Toward Coherent Antitrust";[7] "The Effectiveness of Antitrust Laws, A Symposium";[8] "The Orientation of Antitrust Policy";[9] "A New Look at Antitrust Enforcement Trends";[10] "Antitrust - New Frontiers and New Complexities".[11]

Bills to establish a "Commission on Revision of the Antitrust Laws of the United States" were introduced in both Houses of the 82nd Congress (1st Session), [12] as was a Senate Resolution.[13]

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2 Graduate School of Business Administration, N.Y. University, March 1953
3 Edwards, 36 Amer. Econ. Rev. 172 (1946)
4 Cahill, 1 The Record 201 (1946)
5 Harbeson, 45 Mich. L. R. 977 (1947)
6 Rostow, 14 Univ. of Chicago L. R. 567 (1947)
7 Wright, 35 Va. L. R. 665 (1949)
8 39 Amer. Econ. Rev. 689 (1949)
9 Clark, 40 Amer. Econ. Rev. 93 (1950)
10 Oppenheim, CCH Law Symposium 69 (1950)
11 Handler, 6 The Record 59 (1951)
12 H. R. 5015; S. 1944.
13 #86

And thus far, at the present 1st Session of the 83d Congress, our Antitrust Division has considered 99 proposed bills having antitrust implication and significance, and 18 additional bills proposing to modify some existing provisions of antitrust law,[14] a total of 117 bills.

Not only do the specialized magazines of business, such as Fortune[15] and Business Week,[16] consider the problem, but those with general appeal find it profitable to turn their attention to antitrust.[17]

There is, then, almost universal recognition of the fact that antitrust laws are, as has been said by a prominent lawyer:[18] "a part of the warp and woof of our economic life. Unlike the late unlamented National Prohibition Act, the Sherman Antitrust Act is no longer a noble experiment * * * With all the discontent and confusion which exists, there are few who advocate its abolition."

Or, as the President of the American Institute of Management said:[19] "It will not be denied that the business attitudes of the 1890's exist almost nowhere today. We are not entering, we have already entered a new era." And, as one well-known professor concludes:[20] "It is academic to debate repeal of the major components of the federal antitrust laws." For, it is his conclusion that "American business generally joins the public in support of a federal antitrust policy."

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14 Senate Bills 540, 766, 1357, 1377, 1396, 1523, 1912, 1913; House Bills 467, 533, 635, 2237, 3501, 3984, 4170, 4597, 4680, 5141.
15 Fortune Magazine 104 (Jan. 1950; Feb. 1953)
16 April 11, 1953
17 Collier's, May 31, 1952; Sat. Evening Post, January 24, 1953
18 McCracken: The Federal Antitrust Laws from the Viewpoint of a Business Lawyer. CCH Symposium 1953
19 Jackson Martindell, President, Amer. Institute of Management, Feb. 27, 1951; College of Business Administration, University of Florida
20 Oppenheim, 50 Mich. L. R. 1146

Once we accept the desire of the public to confirm private competitive enterprise under the theory of limitations placed on freedom of commercial action, which is what we call American Capitalism, the problem is the extent to which such enactments should control business.

I am one of those who is proud of that American Capitalism, despite the seeming conspiracy existing to avoid use of such words. But I am old-fashioned enough to believe just as thoroughly that this control should be in keeping with a middle-of-the-road political philosophy, and aimed primarily at the elimination of predatory practices.

Such control may be and has been established in one of two ways -- either by express legislative enactment, which, though general in terms, is constant and known, or by judicial, legislative, and administrative enlargement, extension or restriction, which is specific but variable in its application.

It would be difficult to overdraw the importance of proper antitrust enforcement in the business community. Business, says Professor Oppenheim, and particularly big business, of recent years, "throughout the land has made no important managerial policy or decision without conscious consideration of the prohibitions of the antitrust laws."[21] And it is the continual cry of little business that, being unable to pay large retainers to insure proper advice, it is the recipient of by far an undue proportion of criminal prosecutions, because of the average small businessman's inability to determine without such advice, whether his conduct is within or without the law. It is essential, then, that a decision be made between the two methods

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21 Oppenheim, 50 Mich. L. R. 1147

of establishing control, and that there be established adequate enactments or interpretations to give clarity, to produce uniformity, and to ensure a common-sense approach to enforcement.

To that end, I propose to set up the "Attorney General's National Committee to study the Antitrust Laws." The work of this Committee will be logically divided into two principal divisions, that having to do with substantive law and that relating to procedural law. The National Committee may be made up of lawyers and economists who will be guided by the broadest viewpoint of what is best for American economy rather than what benefits may accrue to any particular industry, any specific business, or any individual's reputation. A small working committee will be designed to receive, classify, and pass upon the recommendations made by the larger advisory committee. The working committee will attempt to clarify, possibly for congressional approval, an agreeable statement of national antitrust policy that will confirm the principles of private competitive enterprise, and in so far as possible combine certainty with flexibility. This statement can well be couched in general antitrust standards rather than in an enumeration of specific prohibitions.

The areas of research are endless, but to name a few examples which readily come to mind, the advisory committee should consider (1) the nature and extent of monopolies, their measurements, the tools by which they are tested, their economic boundaries, and the market areas they cover; (2) the rule of reason and the per se rule, with their respective possible limitations, extensions or alternatives; (3) the Robinson-Patman Act; whether it should be affirmed, eliminated or revised, and whether "hard competition" is completely incompatible with "soft competition", or whether it is a

workable corollary; (4) duplication of jurisdiction of enforcement agencies, as well as substantive conflict in the antitrust laws; (5) the broad and technical field of patents and trademarks, and their relationship to and effect upon antitrust law; (6) the exemptions existing, or which should exist, under the antitrust laws, with particular reference to labor unions, cooperative associations, trade associations, production pools and voluntary agreements under Section 708 of the Defense Production Act, and a re-examination of the Webb-Pomerene Act relating to foreign commerce; (7) the problems relating to mergers under Section 7 of the Clayton Act, the impact of recent decisions on interlocking directorates, the validity of the theory of conspiracy by implication, and of decisions resting on "conscious parallelism of action", and, finally, strengthening of the sanctions and penalty provisions of the antitrust laws, as applied to those who are guilty of deliberate wrong-doing, in order that they may not enjoy the fruits of their illegal acts.

Any one of these subjects merits careful and exhaustive study. For example, high on the priority list of problems demanding prompt solution is the entire problem of the extraterritorial application of the antitrust laws. This is a provocative subject, particularly in view of the oil case (United States v. Standard Oil Company (New Jersey), et al), which, according to the Committee on Foreign Commerce of the New York State Bar Association, "boldly presented the issue as to whether the United States antitrust laws apply to business operations abroad on the basis simply that they affect the United States". As has been well pointed out, "if the rule be that American courts have jurisdiction over every action in the world that affects us (why does not) every other nation * * * have jurisdiction over our actions which affect them."[22] And what about the I.C.I. case

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22 CCH Antitrust Law Symposium, 1953, pp 125-6

(United States v. Imperial Chemical Industries, Ltd. and du Pont de Nemours and Company) wherein the rights of a third party in England (British Nylon Spinner, Ltd.) were affected and where the English high court enjoined performance of the United States court's order, and such injunction was confirmed by the English Court of Appeal. Grave and basic questions of international comity and of foreign relations, and of national security arise.[23]

In considering antitrust law from a procedural viewpoint there are equally as many facets of thought crying to be heard, analyzed, explored and determined. One of the common criticisms heard of the Antitrust Division is the open-handed use of criminal procedures against businessmen. The Antitrust Division desperately needs aid in its present effort to find civil procedures whereby the Government can make adequate discovery preliminary to civil suit without the use of companion criminal process. Unlike the S.E.C., the F.C.C., the F.T.C., and other governmental regulatory bodies, the Department of Justice has no method prior to the institution of an action, and merely for investigatory purposes, of subpoenaing documents or of requiring testimony under oath, with the resultant possibility of prosecutions for perjury if that oath be violated. Pre-trial procedures have been suggested, but are untimely and inadequate. F.B.I. investigations are presently used, but they can be only as productive of results as is the extent of the cooperation voluntarily granted by defendants. Discovery proceedings under Rules of Federal Procedure must be limited to relevant and material matters

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23 See American Banana Company v. American Fruit Company, 213 U.S. 347, at 356-7

relating to specific allegations. Proceedings in advance of trial to perpetuate testimony are subject to similar restrictive rules. The Government cannot put the cart before the horse, and is frequently unable to spell out its legitimate demands until it has had the benefit of subpoena power, the right to punishment for contempt, and the power to charge perjury.

The Antitrust Division realized twelve years ago that -

> The grand jury is a rather blunt device. It is employed by the Division only for lack of an instrument that is better. It was never shaped for industrial research, and like every agency upon which the law imposes an alien function, it responds clumsily, expensively, uncertainly to the demands upon it. Its mechanics are not geared to antitrust work.[24]

Again, procedurally, a complete study could well be made of the possibilities of the larger use of advance rulings, similar to those now called "railroad releases", to the possibilities of provision for exemption from third-party treble damage actions, or from criminal action, by the voluntary obtaining of advance rulings from the Division. The broad phase of preventive conference procedures looking toward consent decrees has considerable possibilities and some dangers. The general subject of proper limitations on consent decrees which private industry sometimes characterizes as the product of an overreaching government, should be carefully considered.

These subjects are mentioned merely illustratively. We do not desire to shackle the committees, or limit their possibilities of constructive action. We are hopeful that all of these topics, and others, can be carefully and conscientiously analyzed by the leaders of the American Bar and of American economic thought, and it is planned that the preliminary organization of such

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24 TNEC Report Monograph 16 and 38, p. 51

committees, both working and advisory, can be announced by the time of the meeting of the Antitrust Section of the American Bar Association at Boston in August. The importance of the work of the new Committee is emphasized by the statement made by President Eisenhower, who stated this week:

> I believe that the Attorney General's National Committee to study the Anti-trust Laws will provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition. It is requested that all departments and agencies of the Federal Government give full cooperation to insure its success.

Obviously, the committees will desire to be kept closely in contact with the work of other private groups. It is intended, too, that they will include in their membership representatives of the judiciary and of the Federal Trade Commission. There should be close liaison with bi-partisan representatives from both Houses of Congress. The time is over-ripe, and we hope to move as quickly and as intelligently and as carefully as the complicated nature of the problem permits. We bespeak your cooperation in making known to me and to my staff those leaders at the Bar from your own communities who are of the stature and caliber, and of the necessary professional experience, to insure the success of the project herein outlined. It will only be by complete cooperation of this type that a result can be achieved worthy of the importance this problem bears to the welfare of our country.