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ADDRESS

BY

HONORABLE HERBERT BROWNELL, JR.

Attorney General of the United States

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I

I welcome today's chance to meet with this distinguished group of antitrust lawyers, men whose clients comprise a real cross section of our country's economic life. Particularly pleasing is the opportunity to be back home again with old friends and to talk over this Administration's plans to preserve that freedom for initiative, opportunity and advance which is at the heart of our antitrust laws.

II

These laws, in a real sense, comprise a charter for economic freedom. Therefore, I suffered mixed feelings of pride and chagrin on reading a recent ad in my home town paper. I refer, of course, to the Wall Street Journal. On its pages, some few days ago, one businessman advertised:

"CAPITAL WANTED

WANTED $150,000

> Fully secured. In amounts of $50,000 or more for sound, established monopoly business. Equal retirement principal and generous interest over 30 month period. Assured capital gains or finder's fee."

My feelings were mixed. I hardly knew whether to take offense that monopolists dare to advertise their status publicly. Or, on the other hand, to feel pride that our law enforcement program has forced them to hunt for new capital.

III.

This bold captain of industry, I feel sure, joined a considerable part of the American public in post-election speculation about the antitrust plans of the new Administration. Commentators and other writers had a field day. One wrote rather amusingly under the title, Trust-busters: They Will Not Wither Away Under the G. O. P.

> "Bystanders, Democrats and Republicans alike," he wrote, "apparently expect Herbert Brownell & Co. to stride briskly into the imposing Justice building in January, chuck into the wastebasket all the cases still pending, the solid as well as the spectacular, and trouble Big Business no more.
>
> "There is considerable evidence that no such thing will happen. Shifts in emphasis, and in the prevailing attitude toward business, are more than likely. The crusade may give way to a more matter-of-fact approach. But any winking at monopoly is just as unlikely as would be the recall of Thurman Arnold to direct antitrust activities."

III. - A

After supporting his thesis with facts, that author ended up:

> "Under the new Administration the Justice Department might again become primarily interested in promoting competition rather than in attacking industry. Such an outlook was clearly foreshadowed in the party's platform. If it can be implemented, the country may gain a better defense against monopoly than the Democrats for all their crusading zeal, were ever able to achieve."

Does our record to date support this prophet's guess?

IV.

In a word, yes. To begin with, January 20, 1953 to January 20 of this year, 11 civil and 18 criminal cases were brought. Of these 29, 25, however, have been brought in the past 9 months, since Judge Barnes became head of the Division. For those who feel that volume of proceedings filed is an index of enforcement vigor, this case volume approaches the pace of like periods in the recent past.

V.

Statistics alone, however, hardly tell the story. To understand our antitrust program, the policies guiding the selections of causes, the bringing of cases, must be bared to public view. Beyond that, you are all concerned, I know, with problems of antitrust uncertainty and delay. And finally, many have questioned our policy regarding criminal antitrust proceedings. These are the issues I shall talk over with you today.

VI.

First, the criteria for selection of cases, the goals our antitrust program seeks to promote. Cases begun by this Administration have aimed, I suggest, not at mere doctrinal perambulation but at making real strides toward either cracking restraints on market entry or controls over price. Thus, the majority have attacked such traditional violations as price fixing, allocation of customers or territories, and boycotts. These activities, so clearly at odds with the fundaments of a competitive economy, obviously cannot be tolerated.

VII.

In addition to merely striking down illegal practices, several Section 2 proceedings, as for example, the American Smelting and Panagra cases, have been brought. Here we aim to remove barriers and monopolistic practices stifling competition. Progress, we all agree, depends in large part on the force of competition. Our creed is that new or improved production uses live or die on the basis of their ability to gain market acceptance. Ever watchful we must be, therefore, to insure that new industries, stemming from improved technology, techniques or discoveries, are free to develop. Newer modes must not be stifled, by those established industries which they threaten to displace or set aside. Competition in the research laboratories is as important as competition in the market place.

VIII.

Our concern for competition, moreover, has not been limited to the production of goods and services; their efficient distribution is also prerequisite to realization of antitrust goals. Connecting the producer with the ultimate consumer, a multitude of distributive services guides

the traffic from plant to market. To the extent that competition in distribution efficiently speeds goods to consumer, the public enjoys the fruits of industries while business explores wider area of effective demand. Sluggish and slothful distribution, in contrast, can dissipate antitrust gains on the research and manufacturers' level, thereby draining off benefits meant for the consumer and drying up potential markets where new business might grow. Accordingly we have been alert to remove all clogs in this lifeline of production.

IX.

In addition to wiping out full-blown restraints on competition, antitrust aims also, in the language of the recent House Report on amended Section 7, "to permit intervention *** when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far reaching as to amount to a combination in the restraint of trade, create a monopoly, or constitute an attempt to monopolize." Here the pattern of our policy has not yet been marked out by specific cases. Complaints have been prepared, but negotiations have temporarily held up filings. Nevertheless, in effectuating congressional intent to cope "with monopolistic tendencies in their incipiency," at least two policy questions have already arisen.

X.

First, at which stage in a market characterized by successive acquisition should action be instituted? Should we wait until the trend is clearly defined, until some market rearrangement has taken place by virtue of the first few acquisitions by more aggressive companies? Should we wait until it is perhaps too late to stop the very concentration Congress sought to prevent? Or, on the other hand, should we attempt

to diagnose the beginning of a trend and act at that point? Our only certain guide is Congressional intent to curb "creeping concentration."

XI.

As for the second problem: How can we learn of proposed mergers soon enough so that, where necessary, premerger injunctive proceedings can replace post-merger divestiture actions? To my view, particularly well suited for testing a transaction while preserving the status quo in this area, is the injunction. For if the Government is to proceed at all against a merger, an early determination of legality seems more desirable for all concerned.

XII.

It is not enough to settle upon a policy determining which cases will be brought in various areas. No matter what cases are brought, there still remain problems of delay and uncertainty, of disposing of actions quickly and of providing guides adequate for lawyers to advise clients intent on staying within the law.

XIII.

Not all blame for delay, we must realize, belongs on the Division's doorstep. Time lapses before disposition may stem, in addition, from crowded court calendars, protracted trials and unduly lengthy negotiations for settlement. All these hurdles are intensified, of course, by the lack of Division manpower.

XIV.

Real strides have been made, however, in speeding up disposition of cases. Thus, from May 1, 1953 to January 20, 1954, 60% more cases were terminated than during the corresponding nine months of the preceding years. This amounted to 42 cases: 12 by court decision, 3 by dismissal and 27 by consent judgments and nolo pleas. Particularly emphasized has been the winding up of cases pending an undue length of time. An old case, in our view, is one pending for more than two and one-half years. From May of 1953 to January of this year, one-third of the Division's old cases (18 out of 56) were terminated. Of these, eight were among the twelve oldest cases in the Division, cases filed between 1941 and 1946.

XV.

In addition, we aim where possible to cut the length of protracted trials. In one case, for example, extensive use of stipulations concerning undisputed facts and authentication of documents shortened the trial period from an estimated three to four weeks to a bit more than one day. In another, wide-spread resort to interrogation and stipulation covering financial and statistical data obviated the necessity of producing, at trial, documentary evidence covering a five year period. In a third proceeding, I understand, the Division is trying to reach an agreement with defense counsel on a statement of facts which would reduce the trial from an estimated two weeks to one hour. Admittedly, these are small and halting steps. But, I believe, they point the road we must travel.

XVI.

Beyond delay is the problem of uncertainty. Remarking on the confused state of our law in another area, Mr. Justice Jackson observed: "If there is one thing that the people are entitled to expect from their law makers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." (Estin v. Estin. 334 U.S. 541-553) Almost, but not quite, as important, are guides in the antitrust field. The same Justice commenting somewhat less euphemistically on antitrust laws, observed that: "One-half century of litigation and judicial interpretation has not made the law either understandable or respected." (Jackson and Dumbauld. "Monopolies and the Courts. 86 U. of Penn. L. Rev. 231-256 /1938/). To remedy the maleffects of uncertainty, we have taken an important step.

XVII

I have appointed a National Committee to Study the Antitrust Laws. The some sixty Committee members include practicing lawyers, law professors and economists. The aim in choosing members was to gather men well-versed in antitrust problems, men who are articulate spokesmen for the divergent views on issues of antitrust policy. In this, I believe, we have succeeded.

XVIII

In the main, this group breaks new ground. True, through the more than sixty years since the Sherman Act's passage, antitrust debate has raged on specific issues in specific areas. Similarly, Congressional hearings have scanned particular economic sectors and particular antitrust problems. This group, in contrast, now considers all sectors as well as all fundamental antitrust issues. And, unlike the TNEC of some fifteen years past, its primary task is to weigh policy rather than gather facts and its recommendations will be addressed to enforcement agencies and courts as well as to the Congress. In sum,then, the Committee aims to evaluate overall antitrust operation and suggest changes where needed to more effectively secure basic antitrust goals.

XIX

This task, as you know, is by now well begun. The Committee's six study groups have been at work for almost four months. And their report will be complete before the fall. This report, I hope, will formulate criteria adequate for both the selection of antitrust cases and for a practical business guide to those who strive to live within the law.

XX

Complete certainty, we all realize, can never be achieved. Indeed if it could, gone would be much of the challenge and high responsibility which enriches practice of the law. The Sherman Act itself, our basic charter, is phrased in universals; it gains content only from case by case interpretation which molds its underlying policy to meet changing business habits.

XXI

But despite the impossibility of certainty, the need for some guides cannot be dismissed with the glib assertion of one commentator that "the peace of mind of monopoly is not yet a recognized reward for economic endeavor." We must try to point the path, to show the way for the bulk of American business that earnestly seeks to live within the law. That we can never fully succeed must not discourage us from that progress which, I believe, is possible.

XXII

Finally, what is our problem regarding criminal antitrust proceedings? Criminal proceedings will be limited to the obvious form of per se illegality. Thus, of ten criminal actions instituted from May to the end of 1953, all but one involved practices which courts had persistently held to be per se violations. With one exception, these criminal cases struck at activities such as price fixing, allocation of territories or customers, and boycotts. Because criminal action will be limited to this area of clear cut violation, only exceptional circumstances will justify acceptance of a nolo plea in such matters.

XXIII

These are the broad policies which thus far have guided our anti-trust administration. I have talked with you frankly about our program, its problems and goals. I welcome very much such a chance to discuss our common problems with you who, until recently, were my colleagues in the practice of law. And, I do believe these are problems we truly share. For I feel sure we all realize our stake in the preservation of a free economy. Only thus can we preserve that chance to enter the calling or business of one's choice which is so much a part of our American creed.

Antitrust enforcement should be a real concern of all our people. It should be remembered that business generally profits more than any other segment of our economy from a proper administration of antitrust law enforcement. Business markets are thereby expanded. Profit possibilities are directly increased. A premium is placed on efficiency and initiative. Under such conditions, the avenues of opportunity for American industry are limitless. When competitive principles operate effectively and efficiently, the industrial capacity of our country has grown more rapidly. Therefore, to preserve those conditions which permit such initiative to advance will always remain as one of our primary objectives.

During the international crises which have existed for a number of years, all of us have acquired a new realization of the values and principles upon which our American society is based. We have come to recognize more and more that our political and social freedom under a representative Government requires the solid foundation of a free economy. In order for democracy to survive and to be strong, we have learned that its economic liberty must be safeguarded and maintained. In the first lectures delivered on the William W. Cook Foundation at the University of Michigan entitled "Freedom and Responsibility in the American Way of Life," Dr. Carl L. Becker adequately expressed this view when he said:

> "I, at least, am one of those who believe that if we cannot preserve a very large measure of individual initiative and private enterprise for private

> profit, it will be exceedingly difficult to preserve that degree of intellectual and political freedom without which democracy cannot exist. I think, therefore, that the primary aim of all Governmental regulation of the economic life of the community should be, not to supplant the system of private economic enterprise, but to make it work."

To the fulfillment of this objective, we should devote our boundless resources. To the maintenance of this American faith in our economic system, we should dedicate our full energies and our best talents.