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ADDRESS

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Yesterday the Attorney General's National Committee to Study the Antitrust Laws submitted its report to me. This Committee was established in the summer of 1953. Under the able co-chairmanship of Judge Stanley N. Barnes and Professor S. Chesterfield Oppenheim, it has studied the complex field of antitrust law. Some sixty men, lawyers and economists of the broadest viewpoint, have been guided in their study only by what is best for the American economy, without regard to what benefits may accrue to any particular industry, any specific business, or any individual's reputation.

In establishing the Committee, I stated that its goal was "a thoughtful and comprehensive study of our antitrust laws." I believe that goal has been achieved. I know the Committee has had in mind the hope expressed by President Eisenhower that it would "provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition." The Committee's contribution to our understanding of problems in this difficult field is outstanding and its recommendations will receive careful consideration and thorough study.

The final report of the Committee is nearly 400 pages long. You will appreciate that I have not had sufficient time to complete my study of it. I would like to make clear, therefore, that the discussion which follows, relating to one aspect of the Committee's study, does not necessarily mean that I adopt the Committee's recommendation or that that recommendation is in accord with the policy of this Administration.

The recommendation to which I refer deals with the controversial subject of price-fixing laws sometimes known as "fair trade" laws. The Committee' report states:

> The Committee acknowledges that "Fair Trade" enactments reflect some legitimate commercial aims. Nationally advertised and branded consumer commodities readily lend themselves to loss-leader and cut-rate merchandising that can impair substantial investments in business goodwill. Such marketing tactics may alienate established distribution channels whose appeal to consumers emphasizes attractions other than price reductions. "Fair Trade" pricing enables manufacturers and other brand or trade-mark owners to invoke prompt legal sanctions to check unwelcome promotional selling, thereby protecting "quality" items from debasement in the consumer's mind. * * *
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> The Committee, however, does not consider "Fair Trade" pricing an appropriate instrumentality for such protection. Since state enactments vest absolute discretion in suppliers for determining the level of a "Fair Trade" price, the legislative price-setting authorization extends far beyond the essential guarantees of "loss-leader" control. An effective "Fair Trade" system, moreover, strikes not only at promotional price cutting, but at all price reductions which pass to the consumer the economies of competitive distribution.

The Committee's report goes on to say "On balance, we regard the Federal statutory exemption of 'Fair Trade' pricing as an unwarranted compromise of the basic tenets of National antitrust policy" and to recommend repeal of the Miller-Tydings amendment to the Sherman Act and the McGuire amendment to the Federal Trade Commission Act.

I know of course that this whole subject of minimum resale price maintenance as evolved in state and federal "fair trade" laws is a matter of considerable interest to this group. It may be worthwhile, therefore, to examine the problem in some detail.

The Sherman Act is the basic antitrust statute. Enacted in 1890, it prohibits contracts, combinations, or conspiracies in restraint of trade. Under that law price-fixing agreements are illegal per se; that is, it is immaterial whether prices have been fixed with a good motive or a bad one. However, "fair trade" legislation provides exemption from the antitrust laws for contracts or agreements prescribing minimum resale prices and permits binding all dealers within the state whether or not they have signed a contract. These laws were passed in the 1930's by 45 states, all within the space of a few years.

In 1937 the Miller-Tydings Amendment to the Sherman Act was enacted. It exempts from the antitrust laws vertical minimum price-fixing contracts for the sale of trademarked or branded commodities which are in competition with other similar commodities, when such contracts are valid under the state law of the place of resale. In 1951 the Supreme Court held that this exemption extends only to contracts and does not legalize the binding of nonsigners, that is, persons not party to a contract. The next year Congress passed the McGuire Act, which specifically permits binding nonsigners. Thus, in many states of the United States a retailer does not have the right to decide at what price he shall offer and sell goods for which he has paid and of which he is the owner. The legal theory on which the manufacturer retains the right to fix prices on goods which he no longer owns is that he is entitled to protect the property right in his goodwill.

One of the principal purposes of "fair trade" legislation allegedly was to help small retailers compete with chain stores and other large outlets. At any rate, the main impetus for both state and federal "fair trade" legislation came from retailer associations. It may be, however, that the anticipated benefits have been somewhat illusory. There is increasing evidence that retailers, as well as manufacturers and consumers, are unhappy with the result.

Let me refer briefly to some of the problems facing the business community in this connection. The argument has been made that when price competition on a given item is eliminated within a state or marketing area, competition among retailers is confined to such secondary elements as service, credit, advertising, and convenient or attractive location. This means not only that the substance of competition is lacking, but that dealers must spend more on advertising and similar incidentals of competition. This in turn not only has the effect of raising prices for consumers, but it handicaps those small retailers who cannot afford extensive advertising, or elaborate establishments or services. Their best hope of attracting customers is in charging lower prices. In fact, one of the few remaining ways a small retailer can compete is by offering lower prices.

Under "fair trade," the right is taken from a businessman to decide whether to compete for a share of the market by operating on low overhead and charging lower prices or by attracting customers with more extensive services and higher prices. How can the small businessman, perhaps starting out with limited capital, hope to compete with a large, well-established store which offers credit, telephone orders, delivery service, and similar conveniences, if he cannot charge lower prices in the hope of winning some customers away from his competitor?

While, as I have said, "fair trade" was intended to help small dealers compete with chain stores and other large outlets, there are indications that, on the whole, it has not handicapped chains and department stores. If they have private brands (as many chain stores do), it is easier to sell these in competition with nationally advertised brands, the price of which is fixed, than it would be if the nationally advertised brands were offered at varying prices. The argument of some manufacturers that "fair trade" is necessary for the protection of the small retailer has a somewhat false ring when they admit that they have engaged in manufacturing for sale under private brand an article identical, except for a different brand name, with the "fair traded" item. I do not mean to imply that a manufacturer does not have the right to place a retailer's brand name on an article he makes if he chooses to do so, but when this is done so that a large retailer can undersell a small retailer who is bound by "fair trade" prices, we may question the sincerity of the manufacturer's interest in protecting the small retailer.

I appreciate the dilemma in which manufacturers find themselves. Probably their primary interest is in selling as much as possible of what they produce. If a low mark-up establishment sells more than a "fair trade" dealer, the manufacturer is reluctant to offend his best customer. On the other hand, if that best customer is selling below "fair trade" prices, the manufacturer is under great pressure from competing retailers to discontinue supplying him. If he does not yield to that pressure, he may find that "fair trading" retailers will refuse to handle his product. If he does yield he not only runs the risk of alienating his best customer, but he finds that active "policing" is expensive. It was reported recently that one company has announced it will spend $750,000 in enforcing "fair trade" in just one of its several departments. This is a substantial item of cost to pass on to consumers. Only large manufacturers can undertake such a program and, even then, enforcement is likely to be discriminatory; a prominent merchant may be sued for lowering his price to keep from losing customers to "discounting" merchants whose price violations the manufacturer has ignored.

Looked at from the consumer's viewpoint, it is hard to understand why he should be required to pay the same for a commodity whether he goes to a store inconveniently located in a low-rental area, pays cash for the article, and takes it with him, or, on the other hand, telephones an order to a store and perhaps has them gift wrap, charge and deliver the identical item to him. He expects to pay for service, but should he pay a price which contemplates service when no service is available?

It seems evident that the absence of competitive pricing under "fair trade" results in higher prices for the consumer. It also means that consumers are deprived of the opportunity of shopping around for the same product priced competitively and advertised freely by different retailers. A comparison of prices for certain commodities obtained last year showed very interesting results with respect to prices available to consumers. Based solely upon newspaper advertisements of drug stores in the District of Columbia, the survey showed that on 736 items of ordinary drug store business the "fair trade" price totalled $2,241.10 and the non "fair trade" price on the same items totalled $1,602.44. The saving of 28.4%

available to a careful shopper is substantial. I might add that the effect of "fair trade" on prices to the consumer is under continuing study in the Department of Justice.

It may be that the growth of national advertising and "fair trade" have contributed to the predicament in which many retailers find themselves today. Advertising has made the consumer brand-conscious and it has also served to place increasing consumer reliance on the manufacturer. When the goods are guaranteed and serviced by the manufacturer, and are pre-sold by intensive advertising, the retailer may increasingly find himself in the position of a mere order-taker. Thus, the reliability and service of an old, established merchant may become less attractive to a consumer than the reduction in price offered by a so-called "discount" house.

A great deal of opprobrium is directed against the discounter today. Perhaps he owes more to "fair trade" than does anyone else. It gives him a fixed ceiling and makes it a simple matter for him to undersell those who are bound by "fair trade" contracts. It also makes it easy for consumers to compare his "discount" prices with prices fixed by "fair trade," while "fair trading" merchants are lacking the flexibility to meet his prices. It may be that the elimination of "fair trade" would hamper the operations of "discounters" to a greater extent than it would hurt those who have so earnestly sought the protection of "fair trade"; the retailer who has found a way to make a profit by underselling his competitors finds high mark-up, price-fixed, nationally-advertised, pre-sold goods particularly susceptible of "discount" selling.

I do not doubt that retailers who are bound by inflexible pricing contracts are finding the competition painful. At any rate, vigorous protests are being registered concerning the "unfair competition" of the "discounters." But similar protests were made in our grandfathers' time when mail-order houses began competing with local merchants, and again, more recently, when chain stores presented another threat to established patterns of distribution.

It may be that what is called "unfair competition" in this context is really just <u>keen</u> competition. This nation is so thoroughly committed to a belief in competition that we sometimes forget that some of its advocates may be thinking solely in terms of competition for the other fellow. So, in the merchandising field, retailers may desire the competitive advantage of having others bound to observe "fair trade" prices while they are free to unload on overstocked goods or offer liberal trade-in allowances or hold warehouse sales. One retailer may consider it "unfair" of a competitor to put on a promotional show at a cost of $10,000 or $15,000. Another may consider it "unfair" for a competitor to sell for 20 or 30 percent less than list price.

There is the danger, however, that cries of "unfair," and insistence that there be more and more laws to "civilize" competition may lead to ever-increasing curtailment of individual initiative and regulation by the Government, until the very essence of free competition will have been dissipated.

That this is no idle fear is evidenced by the fact that a recent survey has been reported as showing that 93.2 percent of the retailers in this country are dissatisfied with the way "fair trade" is working out. To the extent that they believe the answer to be in stronger "fair trade" laws with more effective sanctions, they may in reality be asking to be deprived of more of their economic freedom.

Free competition is the basic American principle which has kept our economy dynamic and vigorous. Without competition in price, the substance of true competition is lacking. While advocates of "fair trade" argue that it places competition on the product, where they say it belongs, it may also be argued that the viability of our free enterprise system depends upon competition at all levels of manufacturing and distribution. Insulation from genuine competition may have a debilitating effect far more harmful than that resulting from the rigors of competition.

While the Miller-Tydings and McGuire Acts in terms prohibit horizontal agreements, i.e., between manufacturers, between distributors, or between retailers, it is naive to believe that "fair trade" contracts are not horizontal in practical result. If a manufacturer has a price-fixing agreement with two competing distributors, the effect is the same as if the two distributors had a pricing agreement with each other. Thus, through the device of "fair trade" contracts, competitors can accomplish a result which would otherwise be illegal under the antitrust laws. This is equally true of course with respect to succeeding stages of the distributive process.

While "fair trade" has now been in existence for nearly twenty years, it has only recently faced the test of a buyer's market. It was depression born, and it was easy enough to enforce during wartime scarcity. Now that production is high, "fair trade" is hard put to resist the law of supply and demand, which is the only law which can dictate retail prices. Not only is "fair trade" in trouble in the market place, but, as you know, there are a number of states in which judicial interpretation has declared the law unconstitutional. Attempts to continue "fair trade" in those states of course may subject participants to the hazards of the Sherman Act.

What the ultimate fate of "fair trade" will be I am not prepared to predict, but it is likely that it will continue to create controversy.

Not long ago, before the Attorney General's National Committee to Study the Antitrust Laws had issued its report, representatives of a manufacturer of a nationally advertised product came to Washington to present arguments to us in support of "fair trade." One of the men indicated that he made his own liquor purchases in Washington, D. C. -- where there is no "fair trade" law, and where, he said, "everybody knows the prices are lower." His attitude as a consumer seemed to us to be inconsistent with his "fair trade" arguments as a manufacturer, but his justification was "Well, I'm human too."

Of course he is. And it is a very human thing to want to buy at the lowest price possible, to try to "get the most for our money." But is the combination of state and federal legislation known as "fair trade" an attempt to deny this fundamental characteristic? Is the more accurate term for "fair trade" "resale price maintenance." Can it be described best as legalized price-fixing, called "fair trade" to make it seem less odious? Such fundamental questions must be soon answered by the people of America.