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"THE UNSOLVED PROBLEM OF MONOPOLY"

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AN ADDRESS

by

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Mr. Chairman, Members of the Associated Grocery Manufacturers of America, Ladies and Gentlemen:

You have invited me to discuss a subject that is highly controversial and beset by difficulty. What I shall say represents merely my own viewpoint and grows out of my personal experience. A frank expression of opinion may, perhaps, be of some help in this vexing business. The title of this address, "The Unsolved Problem of Monopoly," is a recognition at the outset that, despite long years of debate and controversy, a satisfactory solution has not been found. And yet the need of a remedy is increasingly insistent.

Whatever else may be said of our anti-trust laws, they represent an honest attempt to preserve democratic processes. With the objectives of these laws, I assume that few responsible persons have any serious quarrel. To forbid monopoly, to preserve free competition, to insure fair trade practices, and to prevent the price range of commodities from getting beyond the reach of the consumer, these and related purposes are at once worthy and of the essence of democracy. Yet, manifestly, our anti-trust laws, admirable in design, and, within certain areas, reasonably successful, have failed of their major objective. They may have checked the growth of monopoly, but they have not prevented it.

The trend toward an undue concentration of wealth and economic control is unmistakable. It is estimated that in 1929, 200 non-financial corporations controlled 49.2% of the assets of all such corporations. In 1933 the percentage had increased to 56. Reports from the Bureau of Internal

Revenue for 1933 indicate that nearly 1/3 of all the property passing by death was found in less than 4% of the estates. The studies made by the Brookings Institution in its 1929 report indicate that 6,000,000 families had incomes of less than $1,000 annually, and that 36,000 families in the high-income brackets received as much of our national income as 11,000,000 families with the lowest incomes. Reliable statistical information discloses that large numbers of industrial units have totally disappeared, and that there has been a progressive elimination of the small business man as a factor in American life.

If this is what democracy comes to, then we must amend our ways or confess judgment in the face of the world. And, let me add, that unless we destroy monopoly, monopoly will find ways to destroy most of our reforms and, in the end, lower the standards of our common life.

Competition, as a restraining influence, is being gradually displaced and, in large areas, remains only as a shadowy reminder of conditions that once existed.

Its illusory nature is well illustrated by the futile attempt upon the part of the Government itself to obtain competitive bids in a wide range of materials. The law requires the submission of sealed offers pursuant to detailed instructions duly advertised, and awards the contract to the lowest responsible bidder. These offers are handled with the utmost care and impartiality. Finally the critical moment arrives and the bids are opened. They are found to be identical. The whole proceeding degenerates into a farce. Not so long ago, the Denver office of the Bureau of Reclamation received 17 bids for reinforcement bars. Of these bids, 14 were identical

to the last cent. When the Navy Department opened 59 bids for steel pipe, each and every one of the 59 companies bid precisely $16,001.83. In one instance, in purchasing cement, 40 companies bid each precisely $17,148.60. Substantially this same experience has recurred in bids for paper, rubber, meat, rope, office supplies, cans, chemicals, medical supplies, plumbing, explosives, and other materials without end.

It would not be appropriate at this time to consider the legal aspects of this situation. I reserve such discussion for another time and place. My purpose is to call attention to <u>the fact</u>; and to ask you, what has become of competition in the sense in which it is generally used? No one can claim, I suppose, that these identical bids were the result of identical costs of production, or the result of calculations based upon independent estimates. Whether they were the result of round-table conferences or more subtle devices which it is claimed defy prosecution, the result is the same. If such a result can be attained within the law then our prohibitions relative to collusion are aimed at methods and not at results; and yet results are the things with which we, as a people, are chiefly concerned. If a result harmful to the public may not lawfully be achieved by one method while the same result may be reached by other means held to be legal, we are confronted by a judicial paradox difficult to resolve. Manifestly, private action which sets in motion a chain of circumstances producing frozen price levels is, from the standpoint of public interest, as offensive as arbitrary price fixing by a private monopoly. No matter what mechanism the government -- federal, state,

or local -- may set up to assure price competition in public buying, it may, with reference to a large range of materials, be completely set at naught by ingenious devices of control which, it is contended, have not yet been brought clearly within the purview of our law.

Moreover, the complexities of modern existence and the pressure of events have undoubtedly had their effect upon the anti-trust laws, their interpretation, and their administration. If you look at the statutes, do you find the law? Not at all. Only the simple expect to find the law in the statute books. The law must be searched out, as if it were a quarry in the tangled underbrush of an almost impenetrable forest. The courts have interpreted and re-interpreted the law and have, from time to time, laid down doctrines of a modifying and even self-contradictory nature. It is a case of "confusion worse confounded."

When the Sherman Anti-Trust Act came before the Supreme Court in 1895 in the famous Knight case, it was held that the sugar refining business of the country "bore no direct relation to commerce between the States or with foreign nations." It is hardly to be doubted that this decision devitalized the Sherman Anti-Trust Act to a marked extent, and for many years thereafter monopolistic practices went forward under judicial sanction. We have come a long way since that time, as you may readily see by comparing the reasoning in the Knight case with the reasoning of Chief Justice Hughes in the Jones & Laughlin case.

Congress, after 24 years of experience with the Sherman Act and its judicial interpretations, passed the Clayton Act and set up the

Federal Trade Commission. Following 20 years of experience with this form of procedure, we came to the period of the National Recovery Administration, the establishment of which was due, in part at least, to the relative inadequacy of the anti-trust laws. Its period of existence was, however, so brief that it is impossible to say what the ultimate effects would have been had it not been declared unconstitutional.

The Robinson-Patman Act, the Miller-Tydings bill, and enactments like the Wagner Labor Relations Law, the Walsh-Healey Act, and the Guffey Coal bill, affect business methods in many essential ways, with resultants we have not yet fully appraised. In the meantime, various decisions have been rendered by our courts which have tended to curb the power of the Federal Trade Commission and limit the scope of its useful activity. All these considerations lead to suggestions to which I shall, later on, refer.

ENFORCEMENT

Despite the difficulties and uncertainties to which I have alluded, there still remains an extensive area within which anti-trust proceedings, even under existing laws and procedure, may be highly fruitful. This we have demonstrated by many successful actions dealing with such matters as unfair methods of competition, harmful restraints of trade, and ruthless suppression of small business by unethical methods. In fact, this administration, during the four and one-half years of its existence, has instituted more anti-trust suits than were commenced in any comparable period theretofore. Necessarily, we in the Department of Justice take the law as we find it and enforce it to the utmost of our ability and resources. This is our plain and inescapable duty. This we have done, and this we will

continue to do.

Nevertheless, it is literally impossible, with the limited personnel of the Anti-Trust Division, to give attention to every complaint or to prosecute all the cases that ought to be brought to the attention of the courts. Roughly speaking, it costs the Government not less than $100,000 per year to prosecute one sharply contested anti-trust suit. Under the conditions that now prevail, it is only by working under extreme pressure that we are able to investigate the most urgent of current complaints and keep three or four large cases moving simultaneously. Moreover, the Department of Justice should be supplied with a staff especially qualified for economic analysis. Practically all of the difficult anti-trust cases involve intricate economic and business problems. Manifestly, no suit against an American enterprise should be instituted without the most careful preliminary investigation. No responsible person would desire the Department to file suits on popular rumor and suspicion, without adequate check or preparation and without an eye to ultimate results.

My proposition is that the Anti-Trust Division of the Department of Justice should be more adequately implemented. Laws do not operate _in vacuo_. They do not achieve their results automatically. There must be behind them the driving force of the Government.

It is idle to pass new laws or to revise old ones without realizing that their administration is fully as important as their formulation; and that to enact ambitious laws and not to provide the means of their enforcement is to "keep the word of promise to our ear and break it to our hope."

CONCLUSION

In what I have said it has been my primary purpose to state a problem, to indicate roughly its outlines, and to stress its importance. Manifestly we have built up a body of law that is at once difficult to understand and well-nigh impossible of practical application in many of the urgent situations of modern times. A thorough over-hauling of these laws is imperatively required.

This is necessary, not only from the standpoint of the Government and the public, but from the standpoint of business as well.

Naturally, I deprecate a slap-dash approach to the subject. In my judgment, there should not only be serious study, but extensive hearings, so that every interested element of our national life may be represented and so that it may not be contended that any legitimate considerations have been ignored. Adequate consideration of the matter must of necessity cover a wide range of inquiry which should touch such subjects as mergers, holding companies, financial control, Federal incorporation or licensing, base-point bidding, price leaders, identical bids, patents and taxation. It should run the whole gamut of our national life.

Competing considerations should be given their appropriate weight so that the resultant may gain general respect, for there is nothing in the world more futile than to enact laws which public opinion and the courts are not prepared to support.

We should determine how far wrongful intent is to be considered as a criterion when actual restraint of trade has been shown, and whether the so-called "rule of reason" requires re-definition. We should consider

whether we are chiefly concerned with the form of competitive practices, or whether the accent is to be placed on the control of the supply and price of the product with the resulting mastery of the market.

A sinister intent is difficult to establish, whereas an economic result stares one in the face. The establishment of rebuttable presumptions, within reasonable limits, would tend to relieve the Government of many almost insupportable burdens in the matter of affirmative proof that now has to be drawn from reluctant or adverse witnesses.

Monopolistic practices could undoubtedly be more clearly defined. This would be helpful in the interest of enforcement, and would be a protection to those who honestly endeavor to comply with the law. Consideration might well be given to an increase in the authority of the Federal Trade Commission as an advisory body.

No doubt, in rewriting the anti-trust laws, thought should be devoted not only to strengthening them and making them more intelligible, but attention should also be given to providing protection and encouragement to legitimate efforts of enlightened business men to increase production and employment, to improve working conditions, to eliminate waste, to provide more effective methods of distribution, and to supply better services to consumers and to the public. Nor should we overlook the fact that recalcitrant minority groups may, by ill-considered methods, impair or destroy the orderly conduct of business, with incidental injury to labor and to the public. The word "chiseller" has in modern times come to have a very definite meaning.

In short, the anti-trust laws need clarification and restatement. They need to be adapted to our modern problems more realistically and

intelligently, and they need behind them the drive of adequately financed enforcement machinery. Do not for a moment imagine that this is solely the Government's business. It is the problem of all of our people, and that includes every element of American life.

It must not be forgotten that we have found it necessary to set up an Interstate Commerce Commission to deal with railroads and other means of transportation. What has occurred in the utility field you are, of course, well aware. These developments were the direct result of indefensible practices that the average man deeply resented. The American people will not permanently tolerate monopoly or its evil fruits. Every business group understands this full well, and, indeed, those who maintain conditions that are tantamount to monopoly are opposed to every monopoly except their own. Complaints under the anti-trust laws usually originate with business men and are directed against other business men. In this welter of things, nothing is more obvious than the fact that big business, if I may use that term, is moving blindly but with accumulating acceleration down the road leading to ultimate government supervision. Indeed, there are those who are persuaded that economic groups that in one way or another have arrived at a position of dominance in any essential line of activity are likely candidates for regulatory treatment -- and that this is especially true with reference to so-called natural monopolies or lines of business dealing with national resources. The problem has been so long with us that unless it is frankly considered and firmly grasped, it will get quite beyond control and lead to remedies of a character that few really desire.

The American people have a deep and abiding faith in democratic processes. They have seen the stop-look-and-listen sign passed all too

often; but while their patience endures every possible effort should be made to solve the problem within the terms of our political and economic ideals. Personally, I adhere to the faith that these difficult matters can be dealt with within the framework of our customary processes.

The very fact that this subject is being seriously considered by such a group as the one I see before me is a source of deep satisfaction and encouragement. Fundamentally, all our people want to do the right thing. With courage and good will, and in a spirit of frank cooperation, that excludes no helpful element of our national life, we may undertake our task with confidence.