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FOR RELEASE 2:00 P. M.
WEDNESDAY, SEPTEMBER 13, 1939

"THE ANTITRUST LAWS AS THE FIRST LINE OF DEFENSE AGAINST WAR PROFITEERING"

AN ADDRESS

BY

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BEFORE THE

NATIONAL PETROLEUM ASSOCIATION

2:00 P.M. September 13, 1939

Hotel Traymore

Atlantic City, N. J.

The outbreak of the war presents new responsibilities to the Antitrust Division. The problem is not one of the necessary control when we are in a war. We hope such drastic control never becomes necessary. The problem is one of preventing the other fellow's war from distorting our economy. It makes nationwide policing of combinations in restraint of trade and the control of profiteering more important than ever. The present sudden rise in the prices of necessities in the face of huge surpluses is an advance symptom which tells what may happen if we are not prepared in advance. With the experience of the last war in the memory of every citizen, there is no excuse for unpreparedness.

What was the experience? First there was a drop in prices and general distress. Then came the pre-war inflation of 1914 which robbed productive industry for war boom industry, resulting in complete unbalance of prices. We were confronted with the spectacle of the Southern farmer going hat in hand to the newly created millionaires and asking them for charity's sake to buy a bale of cotton. There were no controls. Real wages went down one-third while thousands of new fortunes were made. Wilfred I. King, whom I quote because he is an anti-New Deal economist, estimated that in the United States alone enough wealth was transferred from the pockets of labor and consumers to the pockets of manufacturers and promoters to make forty thousand new millionaires.

Thus was an economy built up which depended upon the perpetuation of the war to prevent its utter collapse. I do not wish to get into the current and useless dispute as to the cause of our entry into the last war. Nevertheless, the pressure of such an economy to get us

into the war to save industry, to save capital, and to save employment was at least a contributing factor. Our entry into the war merely postponed the collapse, and the dark days of 1920 and 1921 were the payoff for the reckless over-expansion of 1914 to 1918.

The fear that those conditions may be repeated is responsible for the sudden and extraordinary purchases of food stuffs we have just seen. The public determination that some measures of control be taken is evident by a flood of telegrams and letters to the Department of Justice demanding investigation of combinations raising prices.

There are other means of control beside antitrust enforcement. Nevertheless, it is the Sherman Act that stands as the front line defense against unbalanced prices and arbitrary price control. The Department of Justice is the first organization to which the public instinctively turns. Wires from all parts of the country appealing to us for immediate investigation of illegitimate price increases have come in faster than we can answer them even without the investigation. They come from state Attorneys General, from farmer's unions and co-operatives, and from small manufacturers whose raw materials threaten to soar out of sight. They come from labor unions, and associations of housewives, from women's clubs, and from consumers' cooperatives. The number of these appeals coming into my office is a certain indication the American public is not disposed to take it on the chin today as they were in 1914.

To give you an idea of the temper of the people today, I will read a few of these wires, selected at random. Here is one from the

Treasurer of a small manufacturing company:

> "Profiteering seems to have gotten off to a rapid start with sugar refiners accepting no business and local jobbers asking ridiculous prices****** As manufacturers using fair amount of sugar we are being severely penalized*****I believe you in a position to remedy this unfortunate situation."

Here is one from a farmer's union:

> "Request the Department of Justice to make immediate investigation as to the reason for the sharp advance in prices of sugar*****In Michigan local merchants and wholesale grocers complain that they cannot secure sugar from the sugar refineries only in very limited quantities. This being canning season both consumers and producers of vegetables are compelled to suffer. *****We appeal to you for help in the interests of both producers of fruits and vegetables and consumers."

Here is one from a state Attorney General:

> "Information has come to me that wholesalers have substantially raised prices on foodstuffs which will cost consumers of this state millions of dollars. My information shows this increase in price has been made effective on goods now in stock though cost of such goods not affected by war conditions.*****State laws provide very inadequate remedy. Federal Government has power to deal with situation and I urge that investigation be made by you."

Every source of information indicates no justification for these prices on the basis of supply and demand. It is the kind of a situation which demands immediate action, not long time reform. Public hysteria, of course, started the movement. Nevertheless, organizations continued it and took advantage of it. I expect that this condition is only temporary. Nevertheless, it has already taken millions in tribute and has already embarrassed thousands of small business men. It is an advance symptom of what may happen in the future. Such situations

put the Antitrust Division in the front line and give it an immediate task to prepare for.

The Antitrust Division is in the front line not only because it is the first agency to receive complaints from business men and consumers, but because its remedies are in line with our traditional free and independent economy. They must therefore be tried out before the public is ready to believe that more far-reaching measures are necessary. We do not contend that the application of antitrust laws are adequate in all industrial situations. We do contend, however, that antitrust proceedings aimed to determine whether price rises are caused by the use of arbitrary power have the outstanding advantage of focusing attention to concrete problems industry by industry. They compel both business and government to think about each industry in the light of its particular facts. They avoid that tendency to abstract thinking which leads to a general type of regulation which is the course of bureaucracy. The Antitrust Division may be compared to an advance guard which feels out the disposition of the opposition forces and determines, first, whether heavy artillery needs to be brought up from the rear, and second, where it should be concentrated.

These are our responsibilities as we enter a disturbed and uncertain future. How are we prepared to meet them? The last two years have given the Antitrust Division experience with a larger organization. They have taught us the effectiveness of handling restraints in distribution on a nationwide scale, as opposed to the helter skelter prosecution of the past. We are attempting to treat antitrust prosecution as

an economic and not a moral problem. We picture ourselves in the role of a traffic officer freeing the movement of goods in commerce, rather than a crusader devoted to destroying bigness for the sake of trust busting. Indeed, we do not wish to destroy combinations which pass on savings to consumers through economical marketing methods or the efficiency of mass production. It is not size itself, but the creation of bottle necks and toll bridges in the distribution of a product which is unreasonable under the law. To get results we must attack simultaneously all the restraints which affect the distribution of a product from the manufacturer to the ultimate consumer. This method is showing concrete results. For example, simultaneous prosecution of farm organizations, labor organizations, large milk distributors and municipal health agencies in Chicago brought about a startling price drop to the consumer of twenty-five percent. Last week, rubber, an industry not under investigation, rose thirty-six percent in price. In the fertilizer industry, which is today under investigation from top to bottom, no such price raise occurred though large quantities of its basic materials have been cut off by the war. In housing, which today is our most extensive investigation, we are achieving results. Certain labor leaders have abandoned the jurisdictional strike. Certain contractors have stopped the use of bid depositories in advance of the calling of grand juries. We are convinced that there are less unreasonable restraints in the building trade today than there were before we announced that we had put the road of commerce in building

under patrol. We confidently expect similar results in every industrial field which we enter, so long as our prosecutions are well planned and not in the nature of an occasional raid.

We have observed that when business men are compelled to think about complaints which force us into action they begin to work out plans to change the force of those complaints which they would never have contemplated if their attention had not been forcibly called to the situation. We have not been unfriendly to the businesses which we have prosecuted, and we have found that the business men themselves, though they have often thought us unreasonable, have not found us arrogant or hostile. We do not attempt to impose any ideas of our own on any business. We have proceeded in the belief that a fair and vigorous prosecution policy can be not only a warning against doubtful practices but a method of making business men solve their own problems by substituting new practices which promote instead of impede the distribution of goods.

With this experience and an organization, which has been considerably increased, the Antitrust Division faces the new problems raised by the war. There is first the problem of associations of small businesses. The recent price hysteria has shown the nature of those problems. American business is organized as it never was before. Most producers today not connected with some large unit either belong to a trade association or a fair trade practice committee. Such organizations have their legitimate function. At the same time

they offer an unexampled opportunity for covert understandings about prices carefully concealed in the language of pure brotherly love and cooperation. For example, an association of restaurant owners met a couple of days ago in a large city to discuss the necessity of raising their prices. We look at such discussions with suspicion. We believe in the deterring effect of immediate investigation of such meetings. An ounce of prevention in such cases is worth a pound of cure.

The war will inevitably add to the task of the Department of Justice in checking the possible tendency of trade associations and similar organizations to take advantage of the situation without destroying the legitimate utility of those organizations. The line between the legitimate and illegitimate use of such associations depends on the facts in the particular case. We are not opposed to the clarification of the antitrust laws. We believe in it. However, we insist that apart from Congressional action the only effective way for such clarification is by our case by case approach. The anti-trust act comes out of the common law. The common law has tried to frame a flexible instrument, not a specialized machine. A flexible instrument may be defined as one which does not fail us under the unforeseen conditions of an emergency. So much for the new problems of small business. Large business also presents new questions in time of war.

So in the present emergency, positive regulation of some industries may be necessary. However, we think that a vigorous antitrust policy in time of war will make active price control less necessary and more limited in its application if necessity does compel us to resort to it.

Therefore, it is now more necessary than ever before to attack bottle necks which restrain trade through artificial price levels. If we are to maintain a balanced economy under the expanding market of a great war, we must not permit the profits of that expanding economy to become the tools for furthering industrial aggression on the part of a few groups.

A third problem, which will become more acute in an emergency, is the problem raised by laws which appear to give exemptions from the antitrust laws to competitive groups in order to protect them from larger combinations. I refer to such legislation as the Fair Trade Laws and the Agricultural Marketing Acts, which seem on superficial examination to be directly opposed to the Sherman Act itself. It is not our function in the Antitrust Division to pass upon legislative policy in situations where the Congress feels that the unaided application of the antitrust laws do not meet the need. As prosecuting officers we should try to understand rather than attack the laws which we enforce. It is our function to see that there are no unreasonable uses of the exemptions to the Sherman Act which are granted by Congress. You may agree or you may disagree with the Robinson-Patman Act and with the Miller-Tydings Act. In either event you will be compelled to admit that they were passed to aid groups which are peculiarly at the mercy of over competitive conditions. It is the duty of the Antitrust Division to examine the basis for these special privileges and to prosecute if they are used to achieve

results which are beyond the intent of Congress. This is a service to these acts and not an attack upon them. It is a principle of the Sherman Anti-trust Law, illustrated by the Supreme Court of the United States recently in the Interstate Circuit case, that no legal privilege whether it be a corporate franchise, or a patent, or a copyright, or the collective bargaining privilege of a labor union, or the collective bargaining privilege of a fair trade association or agricultural cooperative, may be unreasonably used to block the channels of commerce and give undue or an artificial advantage to any particular group which seeks to create and control an economic toll bridge.

Price policies, in the absence of actual scarcity, are the reaction of mass psychology. That psychology in America today is becoming to an increasing extent focused in our trade associations and fair marketing committees. Therefore, it should be the concern of each industry and is not one which makes intervention by the Government essential.

In attacking restrictions on the free flow of commerce, whether they occur in large units, or in trade associations, or in labor, the center of emphasis should always be on the distribution of the product not on abstract rules defining in a vacuum the duties of such organizations. This is essential because what is reasonable for one industry may or may not be reasonable under different circumstances of an entirely dissimilar industry. Fair trade practices in movies give us no guide to practices in the steel industry or in milk. We cannot exist in a machine age without combinations. In investigating their reasonableness, we should constantly keep in mind their utility in the efficient distribution of the particular products with which they are concerned.

No one should interpret the application of these principles as an attack on business. They are the opposite of an attack. They are a defense of business. Our complaints come from business men. We represent almost exclusively the interests of competitive business. America today needs competitive prices as a balance wheel in a war market. There is less hardship in enforcing the antitrust laws on an upgrade of prices than there is on a downgrade. There is even more necessity for enforcement in such times as a protection for the consumer. Intelligent antitrust enforcement can perform an essential service in steadying the economic machine in the storm of war and in preventing the necessity of drastic action necessary when prices get too far out of balance.

So much for the outline of the principles which we believe make the Antitrust Division the best front line of defense against the unbalanced price structure which is the greatest economic hazard of a neutral nation in time of war. The problem of putting those principles into practice is solely a question of obtaining an adequate organization and using it effectively. This is essential if the traditional conservative methods of the Sherman Act are to be given a fair trial before new and drastic anti-profiteering legislation is passed.

We are laying our plans to obtain that adequate organization. Today our resources of time and personnel are under tremendous pressure. We have been swamped by complaints arising out of the present price crisis. The pressure of espionage work, which Mr. Hoover's efficient staff has been compelled to assume, makes it more difficult to obtain the use of his men for investigation work. Yet the present sudden price rise is conclusive evidence that profiteering is apt to increase even faster than espionage.

It is, therefore, already clear that more personnel will be required if the Antitrust Division is to deal adequately with the problems of a neutral nation in a war market. Last year we received a substantial increase. All of this increase is being devoted to clearing away the tangle of restraints in the building industry. This will require simultaneous grand jury investigations all over the United States. Investigation of the building trades has become more important by the present possibility of a war market instead of less. We need the building industry today more than we have needed it before the outbreak of war as a balance wheel against a war boom economy. When the building industry is forced to compete against expanding war industries for labor and materials there is all the more need for it to be free from artificial restrictions. We cannot add a war shortage of houses to our present shortage without burdening labor, consumers, and even the war industries themselves. Therefore, efforts to clear away the restraints in building must not be diverted into helter skelter forays in other channels.

This leaves the practical problem of how we are going to take care of our present commitments and also the flood of new complaints which are pouring in on us since the outbreak of war. It first becomes our duty to prepare recommendations for the consideration of the Budget Committee. Such plans are for the consideration of Congress. Independently of our proposed increases we must extend the effectiveness of our present personnel by combining wherever possible with other agencies which are working on the same problem from a different angle. Attorney General Murphy has directed me to prepare plans for such cooperation. The following suggestions are being explored:

1. The Antitrust Division must not work in a vacuum. It must maintain a liason with the War and Navy Departments, the Department of Agriculture, the Department of Commerce, the Treasury Department and with the War Resources Board. This liason may avoid duplication of work, it may permit the joint use of personnel, and finally, it should prevent conflicts of policy.

2. Plans are already under way in the various departments to coordinate the agencies with business or statistical information. Out of this may come a War Industries Statistical and Research Committee. Such a service is essential in the determination of what complaints and what industrial situations the Antitrust Division can most effectively attack. It should supply much of the research which the Antitrust Division has had to do in the past in the preparation of its cases.

3. Plans are under way for a closer coordination of the personnel of the Federal Trade Commission with that of the Antitrust Division. These two agencies should supplement each other. A definite policy for more effective cooperation with the Federal Trade Commission is being worked out.

4. Nationwide effort must be made to coordinate the work of the Department of Justice with the work of the State authorities. The Governors of Wyoming, Texas, California, and Missouri have already signified their willingness to tie State laws with Federal laws dealing with restraints of trade. We need to work out a plan by which we may obtain orderly reports from local state-enforcing units if we are to police the economic traffic of America during the difficult times ahead.

5. And finally, we must seek to organize consumers so that reliable complaints may reach us in an orderly way. The Consumers Council now attached to the Department of Agriculture may be made an important organization center and clearing house for consumer reporting in widely scattered localities.

These are the outlines of a big job of organization which needs to be done. Granted an effective organization, enforcement will come. And the kind of enforcement which should be obtained from an effective organization does not mean a rash of indictments breaking out all over the country. It means, rather, effective preventive measures to deter reckless

offenders from getting started and compelling orderly business men to follow in self-protection. The greatest service which well planned prosecution can render is to increase the respect for the law and make potential enforcement a real deterrent. The more publication of the fact that a road is patrolled is sufficient to cut down arrests for speeding.

The oil industry which you gentlemen represent may find its problems changed by the war. It is likely that some of the sources of complaints by independents will disappear. It is also likely that new causes of complain from consumers will arise. I had originally prepared a speech indicating the necessity both for the benefit of the oil industry and of the Antitrust Division to raise all the pertinent issues in coordinated, simultaneous proceedings so that both the Department of Justice and the members of the industry could find out where we stood for the future. Clarification of the Government aims with respect to oil is as essential for your advantage as it is for mine. I am not going to deliver that speech because the conditions which the war will create make further study necessary. I am informed that the Temporary National Economic Committee will preface its study of oil by examination of the behavior of this important war material in the last war. I believe that out of these hearings may come a guide for future policy by the Antitrust Division.

In the meantime we must learn definitely from the Supreme Court of the United States through the medium of the appeal in the Madison Oil Case just what the law is with respect to unreasonable combinations in fixing the price of gasoline. After that decision and after the publication of the work of the Temporary National Economic Committee it will become the duty of the Department of Justice to develop a clearer formula regarding its

prosecution policies in oil than can now be spelled out of the separate pending cases which are before us. In the past we have been considering violations of the antitrust laws in oil as separate cases. According to our present policy we must consider the distribution of this product as a whole.

I recognize that you gentlemen necessarily represent the stockholders and must be faithful to the interests of profits and dividends. I represent a public interest which is not concerned with profits and dividends. Such a difference in interests, however, is as inevitable as the difference in interest between the referee and an aggressive football team playing a game to win. It should not lead to unfriendliness between us even though at times many of you will demand the execution of the umpire. Such demands are an incident of every lively game.

I regret that my instrument of prevention happens to be the criminal indictment. I hope that legislation will be passed which will put the differences between the oil industry and the Antitrust Division on the civil side of the docket by providing adequate civil penalties. Until that happens, I will be forced to continue my announced policy of using the criminal indictment, because in justice to my oath of office I cannot condone past violations of the antitrust laws even though they are in the nature of public torts rather than malicious offenses when Congress has decreed that they should be punished by the criminal process. However, I repeat that in this process of dealing with your industry I hope that however unreasonable you may think the Antitrust Division is, you will have no cause to say that it is unfriendly, or that it is insincere, or that it has not pledged itself to the freedom of independent enterprise through competitive control, rather than its regulation through positive administrative control.

If we are to preserve our political democracy we must not let economic democracy slip out from under us. If we are to preserve peace we must give peace time industry an equal chance to compete with expanding war industry in the troubled times ahead.

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