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"THE ANTITRUST LAWS, THEIR PAST AND FUTURE"

An Address

by

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THE ANTITRUST LAWS, THEIR PAST AND FUTURE

The Antitrust laws have been on the books for over forty years. At the same time, concentration of economic power, handicaps on small business, exploitation of consumers and piling up of huge inventories which cannot be distributed have become our major economic problem. During this period, we have always been just about ready to enforce the antitrust laws. We have written books; we have passed supplemental legislation; we have preached; we have defined; we have built a great system of legal metaphysics; and we have denounced. Indeed, we have done everything except to get an organization together and do an actual practical job of policing. Thus, we have kept alive the ideal of competition and permitted unrestricted building of industrial empires at the same time. The answer is far simpler than most people think. It is simply this. You can't police a country as large as America with a corporal's guard.

Let me illustrate this by the era of Theodore Roosevelt when trust-busting was supposed to be at its height. To read the history of that time is to get the impression that antitrust enforcement was one of the principal activities of government. How many employees were engaged in it? You will be surprised when I answer that the personnel of the Antitrust Division during that famous crusade consisted of only five lawyers and four stenographers. Follow the enforcement organization of the antitrust laws during the intervening years, years of the greatest industrial growth and economic power which

any government has ever known. From 1914 to 1923 there averaged only 18 attorneys in the Antitrust Division. When this administration came into office, there were only 15. Today, it has been increased to about 90. This small group is supposed to police the enforcement of a law covering the industrial activity of 130,000,000 people. At the same time it must handle all legal proceedings connected with 31 other major acts of Congress. The wages and hours bill has recently been added. Compare this to other government activities of narrower scope. The Maritime Commission has a personnel of 1,200; the new Civil Aeronautics Authority has 2,800 though the function of neither of these approaches in extent that of the enforcement of the antitrust laws. A closer illustration is that of the Securities and Exchange Commission. It has eight regional offices and a personnel of over 1,200. If you were to leave all existing securities statutes on the books and take away all of the personnel of that Commission except 90, the enforcement program which is so widely applauded today would be completely wrecked.

I have referred to the enforcement of the antitrust laws in the past as a series of crusades. This is an accurate description. A crusade is concerned more with the dramatization of an ideal than with continuous practical control. So long as the personnel of the Department is so small that violations of the antitrust laws must be ignored, because there is no one to investigate or try them, we have no practical control of the situation. With such an enforcement organization, antitrust cases must be selected

on the basis of their relative importance while the vast mine-run of offenders are permitted to go their way unmolested.

If we are going to change our policy from a series of crusades to every day enforcement and actual control, we must have a policing force adequate to accomplish economic results. We will get neither of these things without public understanding of the problem because without public understanding and support, no law can be enforced. The antitrust problem must be brought to the public and not reserved for the abstract consideration of the lawyer, or the economist.

The questions before the public are these. Shall we continue the policy of easy acquiescence in the enforcement of our anti-monopoly policy? Can we content ourselves with the dramatization of the ideal of competition by an occasional case while thousands of offenses are ignored? This has been the policy in the past. Of course, it is better than nothing. While it has not stopped the concentration of power, nevertheless it has saved us from the European cartel system. It has had an important effect upon the ethics of American business by preserving our competitive ideals. All this has been unquestionably worth while. The question which confronts us today is not whether we should abandon the enforcement which we already have, but whether that enforcement is enough.

It is my conviction that we are being forced to abandon our former policy of easy acquiescence and industrial empire

building by the failure of great industrial empires to adapt their price policies so that they can distribute the goods which they are capable of making and so they can employ labor and run their plants at capacity. The recent depression brought home to us the absurdity of people going without goods because inventories of these very goods had become too large. This meant that prices had been fixed without any reference to long range distribution and with an eye solely for short-run profit. The small independent business man and consumer who needed these goods could not get them.

In the depression of 1933, it was a problem of financial organizations in the marketing of securities which appeared to be our most outstanding weakness. Men could not purchase because their bank accounts had disappeared and their securities had become worthless. That lesson led us to the passage of the Securities and Exchange Act and a better control of our financial organizations. In the recent depression, it was not the collapse of financial organizations which confronted us. That problem was already on the way to solution. Instead, we were choked with the inventories which could not be distributed. Production therefore had to stop and men were discharged at a scale new in our history. This was followed by a demand for an investigation of the monopoly practices and price policies which stopped the flow of goods by destroying the purchasing power of consumers and small business men. We are

being forced to take control of inflexible price structures and coercions in restraint of trade today just as in 1933 we were forced to take control of the financing and marketing of securities.

I have elsewhere referred to our economic structure as consisting of two separate worlds. The first is a world of organized industry and the second is a world of small unorganized business, farmers, laborers and consumers. In the first world, there is the power to maintain high prices no matter how much the demand for the product falls off. The result is that production drops, men are laid off and this in turn lowers the purchasing power and makes the demand drop still further. In the second world, unlimited competition still exists and cannot be controlled. In this world live the farmers, retailers, and the small business men who supply the consumers with both goods and labor. Here, when the supply increases or the demand falls off, prices drop to the bottom, but the people go right on producing as much as the conditions of the market will permit. In the first world, we have concentrated control, which makes possible high and rigid prices, which in turn lead to restriction of production and wholesale discharge of labor. In the second world, we find competition, low flexible prices, large production and labor standards often at starvation levels.

The trouble with the system is that the first of these worlds works at cross purposes with the second. In the first world, great organizations keep up prices and lay off labor. The labor so laid off has no power to purchase the consumer goods furnished by the second world.

Now, everyone knows by this time that in the United States we are capable of producing an abundance for everyone. We have the materials, the factories, the men and the money. The problem is how to unleash the productive forces without taking the short and easy road to industrial autocracy.

The antitrust laws do not themselves fill the whole picture. The government is stepping into the breach today to provide the second or competitive world with more purchasing power. It is spending money on relief, and to aid home owners, in new construction. It attempts to raise wages from starvation levels and to help farmers maintain crop prices which will give them enough purchasing power to buy the goods of the first world of organized industry. But this can never succeed if the world of organized industry maintains and raises prices faster during the period of adjustment than the government supplies temporary purchasing power. That process drains away the money from those who receive it from the government and then stops the circulation of the money by failing to distribute goods and by laying off men who should be consuming what the industry produces.

The objectives of the government are sometimes misrepresented as if they were an attempt to raise all prices or lower all prices. One is called inflation and the other deflation. The real purpose is to lower the prices which are too high and which interfere with production without lowering prices and wages that are too low. In fact, we must raise all the starvation wages and the starvation prices.

In solving the difficulties created by these two worlds, the antitrust laws alone are not sufficient. However, they can help by preventing business men from adopting inflexible price policies which have nothing to do with production capacity and which do not aid in the distribution of the goods which they make. They can help by preventing the coercion which destroys small business. The best way to make people aware of the danger inherent in the power to fix prices is to make them realize that prices which are arbitrarily fixed are in reality taxes and that this taxing power is subject to no public responsibility whatever.

This power to tax operates in various ways. The ordinary example is where sellers in control of the market raise prices the moment times get better. They do this because they are interested in getting more than their fair share of the business expansion. If they were interested in distributing goods, they would lower prices when business expanded in order to run their plant at capacity and to employ more labor. These high prices make inventories pile up and we shortly find ourselves in another depression. They could not be maintained if competition existed.

Another taxing power of small groups who dominate the market is their ability to take away the property and income of small businesses. My favorite example was presented to me some weeks ago when representatives of the waste paper industry in a large city called on me. They said that about 6,000 people in their area made a living by collecting waste paper. They went on to say that there was only one buyer in all that area to whom they could sell their products. He stood between the business men and the market. The reason for this power was that he had perfected arrangements by some means or other so that consumers of waste paper would buy from no one else. He had reduced the price to the collectors until they actually were paying for the privilege of collecting paper for him. They were exhausting their savings and resources in order to stay in business. I asked the question of these men, "Why don't you stop collecting paper if it costs money to do it?" "We can't stop," they replied. "We have built up our little industry and this is the only thing we know how to do. We go on and on until our savings are gone. If we give up our routes and lose our organizations, we can never get them back and they are all we have.

So, we exhaust our credit and spend our savings because we know no other business and then hope against hope for something to happen.

This example is the reverse of the ordinary situation where there is only one seller but it produces the same results. It is a tragic situation because it is so typical. Automobile dealers, independent moving picture theaters, independent oil companies, in fact, unorganized business of all kinds to a greater or lesser degree feels the arbitrary industrial control by those who have erected toll bridges over which consumers and small business men must pass in order to buy or sell.

Such stories ordinarily do not get into the press. However, no one can be connected with the Antitrust Division and not feel the pressure of the complaints which come from all parts of the country. As an illustration of this, I quote from Senator Borah's address before the Senate on May 26.

> "I have in my files over a thousand letters the writers of some of which, in great detail, tell me how they have been crushed and destroyed by the large combines. They have been really deprived of a livelihood along lines they had chosen to follow for life. They simply could not contend with these great combinations, any more than a small army could contend with an army of a million."

This problem is not solved by preaching. Suppose you were the president of a corrugated box company. Your stockholders and directors would expect you to get your waste paper at the cheapest possible prices. If the government acquiesced in monopoly practices, you would be helpless against the pressure to make a temporary profit.

The competitive struggle without effective antitrust enforcement is like a fight without a referee. In such a contest, the man who puts on brass knuckles will win. This situation will not be solved by hanging mottoes of fair play on the four posts of the ring. The trouble has been

that due to inadequate policing, the referee has been absent in most sections of American industry. We should not blame great industrial organizers. In a hard played game, an aggressive team will go as far as the imposition of penalties permits or else it will lose to the team which does. If a single industry turns buccaneer, all decent industries in the group must follow, in the absence of a referee. As early as 1921, Mr. Adolph Zukor made a speech in which he predicted the misfortunes which would come from the monopoly control of theaters. He then became one of the leaders in acquiring control of theaters. It is not fair to criticize Mr. Zukor. With the acquiescent policy of the government in 1920 to 1930, he had to acquire control or someone else would have beat him. We cannot refuse to penalize rough play in the competitive game and then complain because the more gentle team is not successful.

What has happened in this country is that a number of groups have gotten into control of what I have called economic toll bridges which enables them to impose charges on others who have to pass over them to buy or sell their goods. These toll bridges are of many different kinds. Not all of them are illegal, but each of them gives the owner of the toll bridge the power to coerce and to tax others.

Let me give you some examples of these toll bridges. There is the patent toll bridge. A patent is, of course, a legal monopoly given to encourage invention. How far should it be allowed to operate as a source of arbitrary power in the hands of those who never invented anything? Another type of toll bridge consists in the sole access to the market being in the hands of a few producers. Take the sale of gasoline. The very existence of the independent oil companies of America is threatened because

the major oil companies stand between them and access to the market. This has happened in a way which is partly legal under our present laws and partly illegal. The major oil companies, by an aggressive sales policy, have acquired so many filling stations that it is very difficult for an independent to obtain a foothold. Then, by nationwide advertising they have created a situation where the public will not buy gasoline made by independents unless it is sold under the trade name of a larger oil company. One cannot criticize advertising. Yet no one can deny that the marketing system for gasoline has put the major oil companies in command of an economic toll bridge and a most wasteful one, shot through with unnecessary duplication of filling stations, advertising costs and service costs. The temptation to use this toll bridge to coerce others and to fix prices to turn that waste into a profit is often irresistable. We are now prosecuting major oil companies because we have evidence that they have so used it. Such situations raise this question for Congress to consider. If a monopoly power is obtained by legal means, to what extent should the unregulated exercise of that power be allowed to private individuals? If independents could sell gasoline direct to the public, I am convinced that they would have no difficulty in competing. Congress might well consider that the marketing of gasoline has become a public utility. This goes beyond the antitrust laws. Yet, I conceive that part of the duty of an enforcing officer is to call the attention of Congress to cases where the laws are inadequate. It should prosecute the abuse of power and at the same time indicate situations which create irresistible temptations which will lead to further abuses in the future unless they are changed. This is one of the purposes of the public statements issued by the

Department in each case it prosecutes.

A third type of toll bridge consists of pressure put on others, not in the selling of goods, but in the rendering of services. An example already referred to is the service of collecting waste paper. There are many others found in all walks of life. For example, the Antitrust Division is prosecuting a labor union in New York because the evidence which we have collected indicates coercive practices which are similar to another prosecution which has caused widespread public comment. The American Medical Association, by use of various types of pressure, declines to allow a patient to be admitted to a hospital unless he is attended by a member of that association. The Department, of course, would regard as reasonable attempts of the Medical Association to require the highest standards. What they are doing, however, is to prevent qualified physicians from practicing their profession in hospitals because they disagree with their social views as to the best method of furnishing medical care to the poor. They have expelled a physician who was associated with Group Health and reinstated him when he dropped that association. The Department is not interested in Group Health or in any particular form of labor organization or in the encouragement of any particular industry. It is only interested in insuring equal opportunity for all qualified persons to compete in either rendering services or selling goods excepting in those cases where Congress decides otherwise by special exception to the antitrust laws. Economic toll bridges in private hands should either be abolished or regulated.

Of course, application of the various antitrust acts today is not as clear as it should be. The reason is that they have never been enforced on

a scale sufficient to clarify them by the process of judicial decisions covering a wide range of industries. A law like the Sherman Act obtains concrete meaning only when applied to concrete situations. The Sherman Act is interpreted according to a rule of reason. This means that it is not a question of breaking up large businesses into small ones regardless of their efficiency. This is neither the ideal of the policy of the Sherman Act, nor should it be the ideal of further anti-monopoly legislation. No government group that I know of desires to break up efficient mass production. We only desire to condemn combinations going beyond efficient mass production which have become instruments arbitrarily affixing inflexible prices or exercising coercive power.

The line between efficient mass production and industrial empire building cannot be drawn in the abstract. It can only be clarified with respect to particular industries. Both the application of the Sherman Act and the decisions as to what legislation is required to supplement the Act require the exercise of judgment on two questions. The first is this: Does the particular combination go beyond the necessity of efficient mass production and become an instrument of arbitrary price control? The second question is: Does any particular arrangement affecting marketing practices tend merely to create orderly marketing conditions in which competitors can exist, or is it an instrument to maintain rigid prices? Obviously, the answer to these questions can only be a question of controlled judgment made after factual investigation of the particular industry.

Therefore, the clarification of the law is inextricably bound up with the efficient prosecution of all cases, not a selected few. The thousands

of price fixing agreements and instances of coercion of small businesses which are now unprosecuted are gradually changing this country into an industrial autocracy. Attempts to clarify the law in the abstract while violations go uncurbed are useless.

The question before the American people is whether they want to save their competitive system. If so, it will not be done by attacking the morals of the business men who have been thrown into a "free for all" fight without enough referees present at the battles. It will be done only if an enforcement organization is built up, with regional offices and a personnel sufficient to investigate and prosecute all violations instead of some of them.