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THE ANTITRUST LAWS IN THE PRESENT EMERGENCY

An Address

By

HONORABLE THURMAN ARNOLD

ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES

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My subject is the Sherman Act in the present emergency. The Sherman Act does not operate in a vacuum. It is the principal Governmental instrumentality designed to remove restraints on the production and distribution of goods. That instrument must be used today in the interests of the national defense effort. All of us by now should be aware of the necessity for greater and greater production of the goods necessary for military and civilian needs if our defense effort is to succeed. All of us should now be aware of the necessity of using all our productive resources and organizations, including the thousands of small businesses throughout the country, if we are going to turn out the goods we have promised. All of us should now be aware of the crippling effects of restraints on production exercised through the illegitimate use of power by some labor organizations in order to maintain their position. And yet the anti-productive ideas held by some groups in labor and capital alike are still effective to retard our defense production. The full force of the Sherman Act must be thrown into the battle.

There is no denying the fact that for ten months our defense effort has been hampered by the attitude of powerful private groups who fear the expansion of production because it may destroy their domination of industry after the war. These groups have been afraid to develop new production themselves. They have been even more afraid to let others develop it. They have concealed shortages by over-optimistic predictions of supplies. At one time reports went out that it was unpatriotic to suggest that there would be a shortage of aluminum. Only last March an authoriative report on the steel industry gave the impression that there would be a surplus of steel for all civilian and domestic needs this year and next. Today the railroads are claiming there is no shortage in transportation. Shortly after the Defense Commission was appointed, the standard statistical agency of the automobile industry said:

> "A painstaking survey of the present situation indicates that the widespread worry over tooling for volume output of airplane engines may be somewhat overdone; that our ability to produce motorized equipment is available almost in a twinkling, and that the stage for the transition from industrial to armament output has been fairly well developed."

We have waked up to disastrous shortages only when precious time has been lost and we are running out of supplies.

Among the powerful private groups restricting production must be included a few strategically located labor unions. Economists in the Antitrust Division estimate that these labor restrictions on production, which have nothing to do with wages or hours or conditions of labor, are today costing the American consumer over one billion dollars a year. They are increasing. I am not talking about high wages. I am talking about hold-ups and bottlenecks in housing, and in food and in fuel and in transportation, created by powerful labor unions which claim the legal right to institute strikes and boycotts for the following illegitimate objectives: (a) to enforce price fixing agreements and free channels of distribution; (b) to eliminate small competitors and owner operators; (c) to restrict the use of labor saving devices; (d) to keep more efficient materials off the market which might interfere with static jobs; (e) to prevent self-employment; (f) to make arbitrary classifications of jobs which retard the efficient use of labor; (g) to tie up huge industries in the struggle to determine which of two unions will dominate the field.

The truth is that we face the present emergency with an unbalanced economic structure created by a progressive set of consolidations of economic power in private groups since the World War. Just before the present war started, 4% of our corporations received 84% of all corporate income and so dominated the industrial picture. Just before the present war, a few powerful labor dictatorships, controlling transportation and installation of necessities, stood between the producer and the consumer and prevented independent businessmen and farmers from getting the benefits of modern industrial efficiency. Now that the war has started it is these very corporations and organizations to which we must turn. They are not unpatriotic, they have, however, trained themselves to resist the development of new enterprise. They are obsessed with the idea that over-production will interfere with their future domination. While they are willing to expand their own war production, they do not want others to expand, and they reserve the right to dictate to civilian consumers what they can buy and the prices which they can pay.

In dealing with the anti-productive ideas of these groups we are only repeating the experiences of other democracies which prior to this war had gone a long way down the path of static cartelization of industry. England, because of this set of ideas, wasted all the precious months before the fall of France. The London Economist, writing immediately after the fall of France, described this attitude as follows:

"It is a set of ideas that is admirable for obtaining security, 'orderly development' and remunerative profits for those already established in the industry - at the cost of an irreducible body of general unemployment. It is emphatically not a set of ideas that can be expected to yield the maximum of production, or to give the country wealth in peace and strength in war.

"Nevertheless, when the war broke out and it became obvious to all but the purblind that maximum production had become the one subject that superseded all others, this anti-productive system was carried to its highest point. The noble army of controllers was recruited from organized industry; the rings, from being tolerated, became endowed with all the power of the State. The result has been what could have been, and was, predicted - not so much an unfair advantage to certain private pockets as a sluggish tempo of advance and a low limit to what was considered possible. British industry, by and large, has, until recent weeks, been making the maximum effort compatible with no disturbance to its customs now or to its profit-making capacity hereafter. There is no accusation of unpatriotism in this; on the contrary, businessmen, placed in an impossible position of divided loyalties and contradictory intentions, have done their best, but the result has been what we see - a startling inadequacy of production."

Antitrust investigations during the past year have shown that there is not an organized basic industry in the United States which has not been restricting production by some device or other in order to avoid what they called the ruinous overproduction after the war.

We are in an era when we must call on every emergency power of the Federal Government. But these powers will not work against that set of anti-productive practices. Take, for example, the power to impose priorities on basic materials, useful alike for defense and for civilian necessities. During the past year the leaders of our basic industries have been demanding that priorities be used, not to expand production, but as an excuse not to expand it. It has been argued that new war supply should not come from new productive enterprise until civilian supplies were first taken away. The folly of such a policy has been shown in those industries where as a consequence supplies have already run out. We must wake up to the same folly in those industries where supplies are still available.

Take cadmium, for example. It is essential to plating of all kinds. The jobbers who controlled the supply told the government they would furnish all government contracts with cadmium at eighty cents a pound.

(Recently increased to ninety-five cents). This removed the competitive surplus. The price of cadmium for civilian use rose to $1.50 to $2.50 a pound. Independent platers, of whom there are many, who had not yet been called on for defense contracts faced ruin and disorganization. We are going to wake up to find that we need these independent business organizations.

Taking the awarding of huge contracts for defense as another example. During the past year three-fourths of all our vast war contracts have been let to eighty-six concerns. A brief case history will show you what this has meant to small business production. A mid-western firm employing 460 men and using machine tools found its normal business of making refrigerators endangered. The manager lost no time in offering his services to the government. He got no contracts because the contracts were given to the larger and more convenient units. He wrote to the entire list of original contractors for the government to get a sub-contract, stating exactly what his plant was set up to do. He did not even get one serious nibble, let alone a sub-contract. Now the real pinch has come in the supplies of material. He can get no brass, zinc or aluminum. He has machines and men exactly of the type and training desperately needed for defense production, but they are not being used and he is about to suspend business and let his organization go to pieces. His case history is typical of thousands of small manufacturers who may have to disband their organizations. Whether they can ever come to life again is doubtful. The loss to national defense is irreparable.

Therefore, today as never before, the security of the country demands effective and vigilant enforcement of the antitrust laws to supplement the activities of the agencies responsible for policy and planning, and to protect in a special way the interests of the small business man, the farmer, and the consumer from the restraints which will defeat our defense program. Without such vigilance and protection the special emergency powers will be ineffective.

Take the emergency power to impose price ceilings as one example. It is a necessary brake on inflation. Yet it will not work in an industry where costs are raised by artificial restrictions. In spite of the national need for housing, the building industry is still a mass of such restrictions. In the distribution of food in large cities monopoly charges on transportation and distribution are increasing. Private pools to raise prices through marketing arrangements and through the suppression of competitive bidding are taking advantage of their golden opportunity. The necessary price ceilings through which Mr. Henderson is seeking to curb present price spirals are robbed of their effectiveness by such conspiracies.

Take the emergency powers to prevent German control of American industry as another example. They will not work in the absence of antitrust investigations of the activities of international business groups. The recent investigation of our great drug industry showed that the German Dye Trust was restricting American production by contracts in restraint of trade.

These contracts compelled our own drug companies to ship drugs to German dominated distributors in South America, even during the present war. And thus we were building up German commercial influence and German funds for propaganda in this hemisphere with our own goods and our own companies.

There was no way of finding this out without a grand jury. Today, as a result of our successful prosecution, our largest drug company has shaken off its German influence and is prepared to advance American competition in South America.

I quote from an article in the August issue of FORTUNE magazine, as follows:

> "Nazi interest in trade restraint is to hold back production outside Germany. Inside Germany they have optimum production, optimum expansion for the state. Nothing interests them less than maintaining 'orderly markets.' But by cleverly playing upon the profit motive (which is suppressed inside Germany) they have gulled businessmen in the democracies into limiting production of the very articles that the democracies were to need most urgently in their own defense. In this way Germany induced Europe's democracies to 'stabilize' aluminum production - in their own self-interest - while German production shot forward at top speed. The consequences of this have since become all too plain."

It is interesting to note that every single instance of the German influence which was cited in the article, to wit: military optical instruments, tungsten carbide, aluminum, magnesium, beryllium, chemicals and drugs, was uncovered by an antitrust investigation or prosecution.

The great defense agencies have no facilities to investigate coercion and oppression of small business men from Maine to California, nor the hidden uses of power against the interest of the farmer and the consumers. Thus the Antitrust Division, as the only existing independent investigating force skilled in the problems of the small business man, the farmer and the consumer, has the job of being the advocate for the small business man, the farmer and the consumer.

Lawyers know better than anyone else the necessity for independent advocacy where conflicting interests are involved. The antitrust law was laid on the shelf in the last war; it has not been laid on the shelf in this war because we have come to realize the economic necessity of insuring small business men and farmers and consumers a place in a unified defense effort.

I have defined small business as any business which is unable to maintain a staff in Washington to represent its interests before the departments which are now making the great decisions temporarily changing our whole industrial structure. The Antitrust Division is the independent public defender of this group. It has set up a Farm Section and a Small Business Advisory Section.

This job is going on. Let me give an example of the kind of results that we are getting. The McKeesport Bulletin of May 10th contains an announcement by Mr. Philip McKenna, President of the McKenna Metals Company, that at the present time his production is ten times as great as it was a year ago, that he has 182 employees who operate 24 hours a day and 6 days a week, that his rates of pay have advanced. If it had not been for the action taken by the Antitrust Division Mr. McKenna's company would have been unable to survive because of a private NRA Code formulated, dominated and policed by the General Electric Company. Mr. McKenna generously gives us credit in the following statement:

> "The present test of the productive strength of free enterprise under American principles against the productive strength of dictatorship controlled people will prove the effectiveness of private initiative and free workers in the present struggle for the future of the world. It may be remembered that the McKenna Metals Company owes its existence to protection under American law, and that the Department of Justice disclosed the monopolistic practices contrary to American anti-trust laws."

When big industry is investigated the cry is usually raised that we are interfering with their peace of mind so that they cannot grab all the contracts for national defense. Had this cry been listened to in the prosecution of General Electric, this man in McKeesport would be out of business today. As a matter of fact, so far as cooperation in defense is concerned we have found that we get more of it by attacking the men who are raising prices and restricting production, because others with better ideas are lifted to power.

It is a fundamental axiom of industrial democracy that you cannot allow private groups to exercise economic power over others uncurbed by law. If there is no referee at a prize fight the man who puts on brass knuckles will win. And the same is true in the industrial game, particularly in a time of huge government spending.

The best example of the results of the uncurbed use of organized power can be found in our present labor picture. Recently the Supreme Court exempted labor activities from the Sherman Act even where they were illegitimate, even where a labor union was putting an embargo on efficient methods or fixing prices - indeed even where the strike was to compel an employer to violate an order of the National Labor Relations Board itself. This appears to be the law today. How are the unions exercising that new power? In one large city we have convicted a truckers' union for making a charge of $9.00 a day on trucks which entered the city. That conviction is now reversed. At the beginning of last week another local union decided that it would impose a charge of $10.00 a day. In some cities farmers are being charged for the right to unload their own produce from their own trucks. Such charges are being pyramided in the distribution system. I give you a by-law from a union in a large city which represents another sort of restriction which is spreading over this country in this time of dangerous price spirals.

"Article 6, Section 7.

> Whenever in the judgment of the Bakers Local Union 118 any firm or combination of firms are engaged in unfair, or unwarranted competition for trade and in the selling of Bakery products and against the best interests of the Bakery industry, it shall be authorized and it shall be its duty to have such practices stopped even to the extent of withdrawing our members from employment of such concerns as will persist in such detrimental and ruinous practices."

On Labor Day President Green of the American Federation of Labor demanded that the government spend vast sums in the defense housing program. While he was making this speech his unions were demanding the right to keep cheaper housing off the market. We cannot afford these impositions in this time of emergency. A rational antitrust program requires the passage of legislation to correct them.

There are two bills now pending in Congress, one introduced by Congressman Walter of Pennsylvania, the other by Congressman Monroney of Oklahoma, to confine labor unions to their legitimate purpose. There is no valid argument against the principles embodied in these bills. The lawyers of America must use their influence to see that the antitrust laws do not become class legislation.

The answer to the monopoly problem in peace or war is simpler than most people imagine. It does not consist of destroying the efficiency of organized industry wherever that efficiency is passed on to the consumer. It consists in encouraging that efficiency to produce at full capacity. You can't fix prices unless you restrict production. Therefore, the true function of an anti-monopoly policy is to break down the obstacles to production created by dominant groups. Typical of the things we are attacking are:

(1) Concerted attempts on the part of basic industries to hamper expansion which will interfere with their domination of the industry after the war.

(2) Attempts to coercively fix prices on government contracts.

(3) Attempts to illegally use patents in order to control the production of basic materials.

(4) Restraints of trade in the distribution of the necessities of life by local groups.

(5) The erection of trade barriers between one locality and another.

(6) The freezing out of independent business men by combinations which seek to dominate the market.

(7) The refusal of labor monopolies to remove the restrictions which now interfere with full production.

Through offices in various parts of the country we are attacking this problem case by case. We have no general panacea, but we do have the power to get relief in particular situations. The policy of the Antitrust Division in enforcing the Sherman law during the present emergency must be to see to it that private restrictions on production do not cripple the use of the resources of this country. The outcome of the defense program may well depend on the success of that policy.