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THE ENFORCEMENT OF THE ANTITRUST LAWS

AN ADDRESS

by

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In appearing this morning before the Council for Industrial Progress in response to your invitation, I feel that I am discharging a public duty. The President, in creating the office of Coordinator for Industrial Cooperation and in appointing our good friend, Major Berry, to hold it, instructed him to supervise conferences of representatives of industry, labor and consumers to consider problems connected with accelerating recovery and maintaining business and labor standards. This Council was set up under the authority so conferred, and the sessions we are attending are obviously conferences of the character referred to in the Executive Order.

It has been brought to my attention that one of the subjects to which the Council has already devoted attention at a previous meeting and through one of its committees is the so-called Antitrust Laws and their bearing on problems of national industrial policy. Since July, 1935, I have been the law-officer of the Government charged with the administration under the Attorney General of this group of statutes, along with twenty-three other important Federal enactments, such as the Interstate Commerce Act, the Federal Communications Act, the Railway Labor Act, the Packers and Stockyards Act, the Commodity Exchange Act, and other Federal laws lying in the general field of economic regulation. Since this Council, under authority emanating from the President, apparently contemplates reporting with respect to the Antitrust Laws, it seems to me a public obligation to respond to your invitation and place at your disposal the results of my experience in

the enforcement of those laws for the Department of Justice as my period of 18 months' service in connection with their administration now draws to a termination.

I.

There is one point of agreement from which I believe all discussion of the Antitrust Laws must properly start. It is the elementary proposition that when laws stand on the statute books they should and must be enforced until repealed or amended by appropriate legislative action embodying the will of the community expressed through its representatives. To have a law on the statute books and make no serious or successful effort to enforce it is to reduce law itself to impotence, bring it into disrepute, and thereby weaken the only orderly agency which the community has available to effectuate the ends which it desires to see accomplished through public action. A few years ago during the so-called prohibition experiment we witnessed the spectacle of laws remaining on the statute books without effective enforcement, and whatever the reasons or the justification, if any, that may have existed, the results were by common consent not such as we can afford to see repeated in the case of national legislation of major importance.

When I say that laws should and must be enforced until repealed or amended, no matter who or what interests may be affected by such enforcement, there is another implication of the statement which must always be understood,--namely that a law must be enforced, and can

only be enforced, according to the tenor and construction given to it by the courts. In the last analysis the enforcement of law is in the hands of the courts and any attempt at enforcement which runs counter to the construction placed upon the law by the courts is bound to fail. Under our system of Government, it is the province of the courts to construe the law, and their construction, so long as they adhere to it, is as much the law as is the statute itself, unless and until such construction is definitely changed or modified by legislative act. The administrative officers of the Government must follow the construction applied by the courts unless they wish to see their efforts at law enforcement defeated and set at naught when they resort to the courts as they must of necessity do in order to have the remedies of the law applied and its penalties exacted.

So far as relates to the enforcement of the so-called Antitrust Laws, a real and ever-present difficulty exists which arises from the fact that these laws are the subject of widespread popular interest among individuals and groups who are not familiar with the details of court decisions or with the technicalities of legal construction. In the popular mind the Antitrust Laws have come to be regarded as the symbol and embodiment of certain broad attitudes and points of view about economic matters without definite reference to the specific statutory provisions or to the construction which has been placed on those provisions in the process of court decision. In consequence much is frequently demanded of the Antitrust Laws by certain sectors of public opinion which the laws themselves as written by the Congress

and construed by the courts do not supply, and on the other hand there is widespread belief that other things are exempted from the operation of the laws which in fact are not exempted as the laws now stand and as they have been authoritatively construed. In the one instance the officials of the Government are popularly charged with failure to enforce what in fact cannot legally be enforced and in the other they are censured for enforcing what they are lawfully compelled to enforce. A proper public attitude toward the enforcement of the Antitrust Laws and a proper public attitude toward the question of whether those laws need revision or amendment depends first of all upon a much better understanding than exists at present on the part of the public generally as to what the Antitrust Laws, as construed and applied by the courts, do prohibit and what they do not prohibit, and I accordingly wish to devote the first part of what I have to say to you this morning to a contribution towards such better understanding from the standpoint of my experience in the Antitrust work of the Department of Justice.

In the first place, there is apparently a widespread belief that the Antitrust Laws direct their legal prohibitions against bigness in business as such, against competitive practices in general whenever exerted by large-scale business organizations or great aggregations of capital to the disadvantage of smaller rivals, and against all price policies, particularly when pursued by large concerns, which may operate to minimize price-wars or to mitigate declines in the price of the product. Many people apparently believe that all these things are

illegal. It is a popular conception that every great concern is a trust and exists only through the failure of the Federal Government to enforce the Antitrust Acts. I am repeatedly asked why the Department of Justice does not proceed under the Antitrust Laws against this or that well known large corporation, the size of which has come to be a matter of public knowledge, and which the public accordingly tends to regard on general principles as a trust and as therefore subject to prosecution.

At the outset, therefore, it is essential to understand that, as the Antitrust Laws have been construed by the courts, the mere size of a concern and the proportion of the market which it supplies do not of themselves constitute a violation of law. Nor, as a general proposition, is it unlawful for large concerns in the ordinary course of business, and as participants in the competitive struggle, to engage in competitive practices on the same terms as their smaller rivals so long as their conduct is simply directed toward the pursuit of their legitimate business advantage and not directly aimed at the suppression or destruction of competition in an illigetimate manner. In other words, as the Antitrust Laws stand, they do not make mere bigness unlawful, nor do they in general place upon the large business concern, because it is large, any special limitations in the competitive struggle which are not placed upon the smaller concerns also. to this statement there are of course certain possible exceptions which readily come to mind, as, for example, in connection with contemplated mergers. But in the main it is true to say that if there are those

who believe as a matter of policy that bigness in business should be shackled and subjected to special disadvantages, they cannot hope to see their objective in many of its aspects accomplished merely by the enforcement of the Antitrust laws, but must seek for new legislation at the hands of Congress by convincing that body that sound legislative policy requires the adoption of their views.

In the same way it must also be understood that the Antitrust Laws do not outlaw business practices and price policies merely because such policies may operate to make prices relatively rigid or to discourage price wars and market breaks. We have had much discussion in recent years of the problem of so-called rigid prices. One of the most valuable by-products of the great depression has been the stimulus it has given to a better and more thorough understanding of the workings of our present economic system, and as we have achieved that understanding students and analysts have pointed out that in many of our industries prices have a tendency to remain relatively stable over long periods of time while in other lines of business they fluctuate more or less violently. From certain standpoints, it has seemed to many observers that so-called rigid prices constitute an evil, and attention has been called to the fact that such rigidity often results from the existence in an industry of certain types of pricing policies, such as adherence to published price lists, the practice known as "following a leader," the practice of selling only on delivered prices, and the like. Because of the effect of these and other practices in promoting price rigidity they are often referred to as in an economic sense "monopolistic," and the inference is therefore drawn that they must constitute a violation of the Antitrust Laws.

It is, of course, entirely true that practices of this character in many instances may result from conduct which does violate the Antitrust Laws, but that is obviously an altogether different thing from saying that such practices violate the Antitrust Laws in and of themselves. As a matter of fact, in the Antitrust Laws, as they now stand, there is nothing which makes price rigidity unlawful or which outlaws practices that result in price rigidity, unless such practices happen to be the consequence of definite concert or agreement which is unlawful because it violates the prohibitions of the Antitrust Laws against concert and agreement of certain kinds. Where, on the other hand, price policies and business practices which may happen to promote price rigidity are not the result of such unlawful concert or agreement, but have merely grown up in an industry as a by-product of the adaptation of the various members of the industry to the conditions of the competitive struggle existing in that field, there is no prospect of a successful prosecution, because the courts do not construe the Antitrust Laws to outlaw such practices. Once again, therefore, if there are those who believe that price rigidity and the practices which promote it are contrary to public policy, they must appeal to Congress for legislative action rather than to the Department of Justice for Antitrust proceedings.

With this picture in mind of what the Antitrust Laws do not prohibit and therefore of what cannot properly be expected from even the most vigorous and successful enforcement, we are in a position to look at what they do prohibit and to consider what is necessary in the way of enforcement if those prohibitions are to be made truly effective.

Broadly speaking, the Antitrust Laws prohibit the deliberate and intentional suppression of competition, whether by the separate action of an individual concern or by the combined action of two or more competitors. Separate action designed to suppress competition may consist of coercing a competitor to sell out or of destroying the market of a competitor or of wrongfully excluding a competitor from access to a market. Combined action may take the form of a merger between concerns having an important share of the market or of agreements or concert between such concerns relating to and in some way regulating their competitive methods and practices.

Obviously, the question of whether or not the business conduct of a concern engaged in competition with other concerns amounts ot an effort to suppress or destroy competition in such sense as to be unlawful presents a difficult and complicated problem. In a certain sense the essense of competitive conduct, the very type of conduct which it is the purpose of the Antitrust Laws to protect and foster, is to take business away from rivals and to that extent to weaken, in the long run, the ability of those rivals to compete. On the other hand, it is settled by the adjudications of the courts that where one rival sets out to take business away or keep business away from his competitors so as deliberately to destroy them or to paralyze their competitive ability, then the law is violated. Obviously, the test is essentially a test of degree, depending in part upon motive, as evidenced by spoken or written expressions of intention, in part upon effect, as evidenced by statistical and financial results, and in part

upon the employment of certain definite competitive devices which have come to be regarded as in and of themselves unfair and improper, such as fighting brands, tying clauses, local price cutting, price discriminations between customers, and the like. Some of these specifically illicit competitive devices have been isolated and expressly outlawed by statutory provisions, like those of Section 2 and Section 3 of the Clayton Act, and more recently of the Robinson-Patman Act, while on the other hand, a broad general condemnation of all unfair methods of competition is contained in Section 5 of the Federal Trade Commission Act. The law thus recognizes the paradox that competition in the broad sense can only be safeguarded by the outlawry of practices which are in and of themselves forms and methods of competition, and part of the competitive process.

Combined, as distinguished from individual, action which is amenable to the Antitrust Laws may take the form either of a merger or of an agreement relating to some method or methods of competitive conduct. In the case of a merger the question of whether or not the prohibition of the law applies depends, in part at least, upon the reasonableness of the combination and almost wholly upon its economic results as disclosed by a study of the industry and an estimate of the effect of the proposed action upon the competitive situation. In the case of agreements between competitors, on the other hand, it now seems to be well settled by the courts that the legality of such an agreement between competitors with reference to their competitive conduct or their relations to their customers is not necessarily saved by the validity

of the economic considerations which it is designed to serve. Here, assuming that the agreement is a broad as the market, the test seems to be almost entirely the directness with which it operates to cause interstate business to be carried on in a manner different from that which would prevail in the absence of the agreement; in other words, upon whether the agreement operates to regulate a significant relationship in commerce. Thus, if an agreement operating over practically an entire market prevents buyers from enjoying a privilege which they previously enjoyed, or affects price, or prescribes a term in a contract, it may be said with some degree of assurance that the agreement irrespective of the possible soundness of its economic results is an unlawful restraint of trade.

The prohibition of the Antitrust Laws with which we are now dealing, since its essence is prohibition of agreement and concerted action having a direct effect on commerce, applies to the action of employees seeking to better their condition no less than to the action of business concerns, and since possible economic justification creates no exemption from the operation of the law as construed by the courts in this field, it frequently results that clear violations of the Antitrust Laws arise in the field of labor disputes where our economic and social sympathies are strongly enlisted on the side of those charged with the violation.

In view of the definiteness of the legal prohibition against agreements affecting competition, business men appear to have learned their lessons well, and few such agreements are today made candidly and

openly. In so far as they do exist, they have been driven largely underground and operate through the medium of secret concert and consultation. However, where concert and agreement operate in this underground fashion so that the only reason for suspecting their existence is supplied by their visible results in the business practices and more especially the price policies prevailing in the industry, the difficulty of ferreting them out is greatly enhanced by the fact that usually these practices may equally well result from natural and spontaneous growth in the course of the adaptation of the industry to its competitive conditions in the manner to which I have already referred. It will be recollected that when speaking of such matters as price rigidities, we saw that these furnished no ground for illegality if not the result of deliberate concert. The same thing is true of price uniformities. Accordingly, if the concert which underlies price rigidities and price uniformities is secret and concealed with care, it is often extremely difficult to distinguish the resulting situation from one which may be perfectly legal. Only by the most elaborate and painstaking kind of investigating work, going constantly hand in hand with economic analysis of the practices of the industry and the history of those practices, can the distinction ultimately be drawn and the illegal element of concealed concert brought definitely to light.

II.

In view of the limited and technical nature of the prohibitions of the Antitrust Laws as I have outlined them, it must be obvious how difficult it is to prepare and present a case which will successfully

establish a violation of those laws where the parties are adroit enough not to enter into an overt agreement and where they are not, like labor unions, under the practical necessity of taking action in the open. It can, of course, be done and is being done in case after case, but the amount of investigation and preparation which is required on the part of the Government is simply enormous and correspondingly costly. For example, a case of an attempt to suppress competition can hardly be established without, on the one hand, the discovery of definitely incriminating expressions of intention through painstaking detective work and the inspection and sifting of a great volume of documents and without, on the other hand, an exhaustive economic analysis of the competitive situation of the parties. The same sort of analysis of competitive conditions is also essential in all cases of mergers suspected of illegality.

Most difficult of all, as well as most important, are the cases of covert concert because here, as I said a moment ago, it is necessary through a combined process of factual investigation and economic interpretation to distinguish between practices of spontaneous growth and therefore lawful on the one hand, and substantially identical practices resulting from secret agreement and therefore unlawful on the other hand. It is not unusual in a situation of this character that several hundred interviews have to be conducted by agents of the Bureau of Investigation with persons who might conceivably have some knowledge of pertinent facts, without in the end producing any legally sufficient evidence. Investigation after investigation of this char-

acter is conducted by the Antitrust Division, which terminates in a dead end and so never comes to public attention.

I have several times referred to the need for economic analysis. More often than not the question of whether a given business result points on the one hand to a covert agreement or, on the other, is merely a manifestation of a lawful business practice, can only be answered by an economic analysis of the industry and its history. Such analysis must go hand in hand with the investigation of the facts, in order that the investigation may be directed toward facts which are truly indicative rather than spend its energy in the mere accumulation of irrelevant details, and in order also that the information produced by the investigation may be properly interpreted, as it can hardly be by lawyers without the training of economic specialists. It is therefore perhaps surprising that provision has never in the past been made for economic consultants in the Department of Justice and that none have ever been regularly attached to its staff until the past year. Within the past six months I have made the innovation of establishing the nucleus of a small economic unit within the limits of a restricted budget and it has already more than justified itself in keeping investigations out of blind alleys and in interpreting the information which they have elicited.

Ordinarily an antitrust investigation of any importance, when inaugurated by the Department of Justice, requires from the outset the services of several attorneys and of an increased number if a voluminous mass of documentary evidence becomes subsequently available. Almost always such an investigation requires several months to determine

whether it is likely to produce fruitful results. Some investigations require an even longer time and an ever larger staff before a decision can finally be made as to whether there is sufficient evidence upon which to base a suit. In the meantime the Antitrust Division is receiving a constant stream of complaints of a minor nature, all of which must necessarily be given honest and careful attention in the ordinary course of routine, and in consequence the services of a considerable staff are required for this type of work alone. Obviously, if the Antitrust Division were willing to file suits on mere popular rumor and suspicion, without proper preparation and in disregard of whether such suits could ultimately be prosecuted to a successful conclusion, a vastly longer record of antitrust proceedings could be established, with a correspondingly larger list of failures in the courts. Under present conditions, it is practically impossible properly to prepare more than two or possibly three important antitrust cases in the course of a year, depending largely upon the good or bad fortune encountered in the discovery of pertinent and persuasive evidence. Many prolonged and exhaustive investigations prove fruitless in the end because of failure to discover such evidence.

It is perhaps not commonly realized that practically always the question of whether an antitrust proceeding is instituted in one industry rather than another is determined by whether a private complaint from a supposedly aggrieved individual happens to be filed with the Department in respect to this industry rather than that. Antitrust proceedings almost without exception are the results of such private

complaints rather than of the Department's own motive and initiative, and necessarily so. Obviously, if a complaint charging a violation of law is filed it must be investigated, and if supporting facts are discovered the investigation must be pursued until it is definitely established whether evidence enough is avilable upon which to take the case into court. The number of such complaints flowing into the Antitrust Division is more than sufficient to occupy the staff, without leaving any surplus force available for the investigation of industrial fields as to which no complaints are received.

This practically exclusive dependence on private complaints for the initiation of antitrust proceedings has a tendency to make the enforcement of the Antitrust Laws sporadic and haphazard. For example, substantially the same business practices may exist in a number of industries, but it may happen that in only one will a complaint be filed which brings the situation to the attention of the Division. If, as a result of such a complaint, an investigation is then instituted which ultimately leads to a decree enjoining the practices in question as unlawful in the particular industry investigated, it may well result that the same practices will nevertheless continue to be followed in other industries because no complaint is filed with the Antitrust Division and the Government is accordingly not aware of their existence.

Another result is that the Division often finds itself called on because of persistent complaints by interested persons to give a great deal of attention to practices of comparatively trivial importance from

a public or national standpoint, while in the meantime other practices of far larger public consequence may escape scrutiny. There is the added difficulty that private complainants, having set the wheels of the Department in motion, are thereby occasionally enabled to make satisfactory terms with those against whom they have complained so that thereafter they become cold and unwilling witnesses for the Government. Indeed they sometimes even go so far as to make strenuous efforts to induce the Government to abandon the proceeding for the initiation of which they were themselves responsible.

If these disadvantages which result from dependence on private complaints for the initiation of antitrust proceedings are to be removed, and if the Antitrust Laws are to be evenhandedly enforced over the whole business field, with proper emphasis on public importance rather than mere private complaint as the moving force in the initiation of proceedings, two things are necessary. First, the Department of Justice must be equipped with a proper staff of economic analysts to study and surface indications of possible restraints of trade and to guide and direct the work of the Bureau of Investigation into those fields where the surface indicators suggest the existence of violations of law even though no private complaint happens to be filed. In the second place, the Antitrust staff as a whole must be very greatly increased. It is obviously unreasonable to suppose that observance of the Antitrust Laws can be insured when the maximum of really important proceedings that can be instituted is limited to two or three a year.

Under such circumstances the chances of successful evasion and escape from discovery are relatively so great that the deterrent effects of the law can be ignored with a large degree of impunity.

In contrast with the Department of Justice, the Federal Trade Commission is equipped with the economic staff which is requisite if public policy is to be the moving force in the initiation of proceedings to enforce the Antitrust Laws. The Trade Commission, no less than the Department of Justice, is vested with power to initiate proceedings and there is no clear and clean-cut line separating the proper sphere of activity of the two agencies. To be sure the Department of Justice alone is authorized to institute proceedings under the Sherman Act, but conduct which violetes the Sherman Act is in many instances, although not in all, also a violation of the Federal Trade Commission Act which the Trade Commission is empowered to enforce. The relation between the two agencies is happily of the most cordial and cooperative character, but inevitably the overlapping of authority and the equal competence of two entirely separate agencies to initiate proceedings covering the same subject matter prevents the formulation and application of a coordinated policy under unified direction. It is also true that a great part of the time of the investigating staff of the Trade Commission is devoted to the conduct of special investigations made upon congressional request.

To recur to what I said at the outset, while laws stand on the statute books they should be enforced, efficiently enforced, and, until amended, enforced according to the tenor and construction given them by the courts. I have attempted to outline the nature of the prohibitions imposed by the Anti-trust Laws and to point out that those prohibitions are to a certain extent technical in character, and narrower in some respects and broader in others than is popularly supposed. As the Anti-trust Laws now stand as they have been construed, they require for their enforcement in most instances of supposed violations an exhaustive and expensive type of investigation and preparation for trial which I have sought to explain.

Speaking from the standpoint of my own experience, I venture the opinion that there are not available in the Government today adequate facilities for conducting such investigations and making such preparations over a wide enough field to warrant the belief that the Anti-trust Laws can be enforced in anything like all instances of actual violation or even in a sufficient number of instances to give them a fully effective deterrent force. To give them such force on a truly national scale and over the whole field of business would, I am confident, require an expenditure of several million dollars annually by the Department of Justice alone and even that amount might prove insufficient.

It is, of course, open to question whether, in view of the somewhat special and limited character of their actual prohibitions,

their enforcement would be worth the expenditure of the sums needed to make them truly effective. That is a question of policy to be considered by those like yourselves who are charged with the study of policy and the recommendation of legislative proposals. What is not open to doubt is that a law which stands upon the statute books can be fairly assessed only in the light of its application, and that the effect of applying a law cannot be adequately judged unless and until the means are supplied which make the effective enforcement of the law possible. If we are not willing to recommend the creation of the facilities which are indispensable to the enforcement of the Anti-trust Laws, there is no alternative but to suggest an alteration. That is substantially the alternative with which we are confronted at the present time. Either the machinery for the enforcement of the Anti-trust Laws must be expanded, or some other and different machinery for the accomplishment of the purposes of those laws must be devised.

I have deliberately discussed the Anti-trust Laws this morning from the standpoint of technical details. I have said nothing about the large and inspiring purpose which underlies them, the prevention of arbitrary monopolistic power, the oppression of the weak by the strong, the protection of the interests of the consumer, and the protection of the right of labor. As to those larger purposes there is no room for disagreement. The problem with which statesmanship is today confronted is to translate those purposes into practical effectiveness, either through the enforcement of existing legislation or through the formulation of appropriate amendments. We cannot constructively take refuge, as there is sometimes a tendency to do, in mere generalities. There

is a widespread and somewhat surprising tendency on the part of many businessmen today to express complete satisfaction with the Anti-trust Laws as they are. The question suggests itself whether such satisfaction is born of the conviction that under present conditions the Anti-trust Laws as they stand are incapable of adequate enforcement and at the same time bar the way to possibly more effective methods of accomplishing their objectives. The test of the sincerity of those who advocate leaving the Anti-trust Laws unchanged is whether they are willing at the same time to advocate a large increase in the appropriations for the enforcement of those laws. If they are not, they may be justly challenged to join with those who propose revision.