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"Economic Policy of the United States"

Address by Abram F. Myers
Federal Trade Commissioner

before

The American Institute of Steel Construction, Inc.,

at

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About the time of each national election there springs up an agitation for the repeal or a general overhauling of the antitrust laws. The clamor has been increasing in intensity in recent years, and never was so great as at the present time. The financial and trade journals are thundering editorially for the scalp of the Sherman Law. Their columns are crowded with articles and addresses by experts and pseudo-experts advocating a "modern" or "enlightened" policy towards business. The mails are heavy with monographs, brochures and just plain pamphlets proposing new policies and methods of regulation. And the publishers of news letters and Washington's fifty-seven varieties of tipster and dopester are in a foment to get to their subscribers advance information as to the likelihood of legislation affecting the attitude of the Government towards business.

You may have noted that in my enumeration of propagandists I have omitted business men, and it is a striking fact that in the ranks of the articulate abolitionists and modificationists but few business men are to be found. It is highly desirable, therefore, that the leaders of industry should give this question their most earnest consideration before succumbing to a propaganda of lawyers, economists and experts of varying degrees of expertness. They should weigh carefully the conditions which led to the enactment of the antitrust laws, the present justification for them, and the extent to which they actually interfere with legitimate or desirable activities before arriving at a conclusion as to what, if any, changes are needed. And finally they should solemnly reflect on whether it is not better "to bear the ills we have than fly to others that we know not of".

The reasons for the Sherman Law were not economic merely, but were social and political as well. The prospect of monopoly privileges and the desire for promotion fees had led to the formation of so many huge combinations that there was a well-founded fear that all competition would be suppressed, that independent business men would become the mere servants of the combinations that had absorbed or crushed them, and that the public would be placed at the mercy of a few great kings of industry possessing the uncontrolled power to fix prices of the necessities of life. Strange as this

language may seem it is but a paraphrase of the speeches of statesmen venerated for their balance and vision, and illustrates the extremes to which even the most conservative may be moved in inveighing against any threat to the national ideal of liberty, which has its foundation in the economic independence of the people.

It must be remembered that the trusts which gave rise to the basic anti-trust law were not organized to promote efficiency, effect economy, or achieve integration. They were organized on a scale that was huge and were financed in a manner that was wild. They practiced extortion and oppression and their trails were marked by the bleaching bones of their competitors. Neither was the Sherman Law aimed at trade association activities or at cooperation between the members of an industry to promote healthy stabilization and to proscribe unethical and uneconomic practices, for the reason that such activities were comparatively unknown at the time the act was passed. That the Sherman Act both as an active weapon and as a deterrent has largely achieved its real purpose, no one will deny; that a return to the evils at which it was aimed is unthinkable, all will agree.

The public policy of the United States, as gleaned from the statute books, is summed up in the formula "competition at home, combination abroad". The antitrust laws, while prescribing free and open competition in the domestic market, encourage combination in the export trade. On paper, the formula is ideal. Competition in trade and commerce to the water's edge, as a spur to efficiency and for the protection of our own citizens; combination in the foreign trade to meet the challenge of the state monopoly, the comptoir and the cartel. That it is successful is attested by the ever-increasing volume of our foreign trade, which is not due merely to the fact of combination, a privilege that has been availed of by surprisingly few industries, but to the salutary policy of competition which has kept American industry efficient and alert and has protected it against the mummifying effects of unified operation.

Moreover, there are other policies which distinguish the United States from the nations which allow to their industries an unlimited right of combination, and which seem to me to justify our policy of free and open competition. It has been the policy of this country to develop quickly its natural resources by encouraging its manufactures through a protective tariff. The primary purpose of the tariff is to give to the protected industry the benefit of the home market. The corollary of such a policy is that the industry enjoying such protection should not be permitted arbitrarily to exploit the people, and the safeguard against such exploitation is competition.

Therein lies the difference between the United States and England, which has no antitrust statute, but relies on the limitations of the common law as applied in civil proceedings. England is practically a free trade country, open to competition from all parts of the world, so that domestic producers can not exploit the public for any great length of time. Of the policy of Germany, France, Russia, etc., nothing need be said, because economic and political conditions in those countries are so different, and the degree of interference with what in this country is regarded as private business, is so

much greater than the people of the United States would tolerate. It goes without saying that American industry would not willingly exchange the policy of the antitrust laws for a policy of free trade or of minute governmental supervision.

What are the hardships imposed on American business by the antitrust laws which have given rise to so much clamor for their repeal? Are they real or are they imaginary? Certainly the antitrust laws do not cramp the normal, orderly expansion of business. They do not prevent the consolidation of independent units for the promotion of efficiency of production and economy of distribution. The Supreme Court has twice held that the Sherman Act does not prohibit the merging of competing plants for sound business reasons, regardless of the size of the resulting combination, so long as the power acquired is not used to oppress competitors or to exploit the public. Section 7 of the Clayton Act forbids the acquisition by one corporation engaged in interstate commerce of the whole or a part of the capital stock of another corporation similarly engaged, where the effect may be to substantially lessen competition between them, but does not apply to a case where the physical assets, and not the stock, are acquired. While this provision makes the bringing together of competing corporations a little more difficult, and has been a good thing for the lawyers, it has not proved an insurmountable barrier in any case where there was a will to merge.

Neither have the antitrust laws prevented that degree of cooperation among independent business men which promotes stabilization and yet falls short of price and territorial agreements. The growth of trade associations has been amazing. Their rights have been clearly defined. There is no opposition to them on the part of the Government so long as they do not overstep bounds which all of us will agree are proper and necessary. Later on I will outline some of the present day activities of trade organizations which are being encouraged by the Federal Trade Commission and other branches of the Government. For the present, it is enough to say that in their application to cooperative efforts in industry, there is no need for a change in the antitrust laws, unless it be to legalize price agreements and divisions of territory which would eliminate all competition. That would involve such a fundamental change in the public policy of the United States as would engender doctrines and policies foreign to every conception of American ideals.

A charge frequently hurled at the antitrust laws is that they make competition a fetish; that competition has been exalted over all considerations of economy and efficiency. These flights are, for the most part, purely rhetorical. The competition which the antitrust laws would preserve is not the jungle competition which the critics of those laws imagine. The antitrust laws recognize that not all competition is good, and that unrestrained competition is bad. They have been as often invoked for excesses of competition as for the suppression of competition. The test of the legality of a corporate combination is not the amount of inter-company competition that is suppressed, but whether the competition it affords is fair or oppressive. And the Federal Trade Commission Act has for its main purpose the prevention of unfair methods of competition in interstate trade and commerce.

It is on the proper interpretation of the words "unfair methods of competition" that the ultimate reconciliation of the proper needs and aspirations of business with the law depends. The Commission has, and was intended to have, a wider field of usefulness than the mere prosecution of individuals and concerns for the use of unfair competition. Also it is clear that the language of the statute is not to be limited to common law definitions. It is the formula whereunder the Commission may and does cooperate with industry, through the trade practice conference procedure, in writing codes of ethics which are bringing about that degree of proper and desirable stabilization compatible with American institutions and ideals. In this way the Commission is making good the prediction of the late Senator Cummins in a speech in the Senate on September 7, 1914:

"I predict that in the days to come the Federal Trade Commission and its enforcement of the section with regard to unfair competition will be found an anchor for honest business. I believe it will introduce a stability in business that hitherto has been unknown. I believe it will restore confidence among those who are conducting their affairs honestly and uprightly. I believe it will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce, and that it will rank in future years with the antitrust law; and I was about to say that it would be found still more efficient in the creation of a code of business ethics and the establishment of the proper sentiments with regard to business morals."

A trade practice conference is authorized by the Commission on the application of a substantial part of an industry, usually made through their trade association. The industry is thereby enabled to write its own code of ethical and economic practice, subject to approval or rejection by the Commission in the public interest. Resolutions aimed at practices illegal per se are placed in Group I, and the Commission undertakes to enforce compliance therewith by proceeding against all violators, whether they have subscribed thereto or not, under Section 5 of the Trade Commission Act. Resolutions placed in Group II are aimed at practices which have not heretofore been held unlawful by the Commission or the courts. The secret violation of such a resolution by one who has openly subscribed thereto, and has led his competitors to believe that he will observe the same, will result in a proceeding by the Commission on the ground that such secret violation is in and of itself an unfair method of competition.

Thus these codes for the strengthening and uplifting of American industry are made enforceable in every particular save one. The Commission has not yet undertaken to enforce resolutions of the character included in Group II against a recalcitrant minority who will not subscribe thereto.

The absence of means for the enforcement of Group II resolutions against non-subscribers has proved a serious stumbling block to the efforts of many industries at self-regulation. Thus the manufacturers of knit underwear at a recent conference declined to adopt resolutions fixing standards for the wool content of "part wool" garments because they could not be assured of protection against the competition of the low-content manufacturers. Thus a grave

question is presented as to whether codes of ethics for American business are to be written by a progressive majority, or by a reactionary minority. For it often happens that a recalcitrant 15 or 10 per cent of an industry, seeking and obtaining a competitive advantage by persisting in practices which the majority have proscribed, eventually bring all down to their level, and in this way praiseworthy efforts to elevate the standards of an entire industry may be defeated. In this fashion the minority effectively imposes its will upon the majority.

The remedy for this, if any there be, lies in the gradual expansion of the Commission's powers under existing law, rather than in new legislation. It is doubtful if the building up of a new code of business practice will lend itself to Congressional definition. Certainly any attempt by Congress to decree by law that the minority in an industry shall conform to the wishes of the majority in respect of practices never heretofore regarded as unlawful would meet with determined opposition and would give rise to grave questions of constitutional right. In any such proposal provision would have to be made for an umpire to guard the minority against oppression and the public against extortion.

The courts at a time when the Federal Trade Commission was regarded as a none-too-constructive agency gave to the words "unfair methods of competition" a somewhat narrow interpretation. They held that the words did not apply to practices not characterized by fraud, deceit, bad faith or oppression, or which did not tend to restraint of trade or monopoly. But this definition was given in cases in which the Commission had attempted to apply the law to practices of which it did not approve, without regard to legal precedent and contrary to the customs and usages of trade. The courts put an end to the notion that the Commission could evolve out of its inner consciousness a business code with the binding effect of law, and by way of emphasis went farther than was necessary to achieve their purpose.

What of a code of fair trade practices for each industry, written by the overwhelming majority thereof, with the Federal Trade Commission as arbiter? The language of the statute is not like a crystal, fixed and unchangeable; it is applicable and has been applied to many practices not specifically in the minds of the lawmakers when the act was passed. The question is simply one as to the extent to which the customs and needs of the preponderant part of an industry may be taken into account by the Commission and the courts in deciding what are, and what are not, unfair methods of competition. No case involving a practice formally condemned by a clear majority of the industry involved has been presented to the courts together with the fact of such condemnation.

Approached from this angle the element of coercion is greatly minimized and the grave constitutional questions largely disappear. It is not a case of galvanizing the will of the majority into law. The needs and customs of the majority are merely taken into account in applying the law now on the statute books. The plan contemplates an administrative and (if sought in individual cases) a judicial weighing of the relative merits and advantages of the proposals of all interests concerned. It further contemplates the rejection of any and all measures which would work undue hardship on any member

or branch of the industry in question, or on the public. And it is founded on the conception that the minority has no greater right to impose its will on the majority and on the public, by standing in the way of important reforms in the public interest, than the majority has to impose its will on the minority by insistence on measures which would unduly prejudice the rights of such minority.

On the question whether the experiment is worth making let us consider the possibilities of the procedure as indicated by the more than forty successful trade practice conferences already held. In the beginning the conferences were largely confined to outlawing practices admittedly unlawful. It is not to be inferred, however, that these conferences had no constructive value. They had the effect greatly to elevate the standard of ethics in the industries involved; to protect honest manufacturers and dealers against the unfair competition of their unscrupulous rivals; and to restore and increase public confidence in such industries. Certainly no one can question the benefit to all concerned from the wholesale elimination of such pernicious practices as short weights and measures, false advertising, and misbranding.

Believing that the establishing of standards of quality in commodities was the greatest single reform that could be accomplished for the protection of the public, the Commission widened the scope of its conferences to include content and quality definitions of furs, "Castile" soap, engraving and embossing, gold-filled watch cases, rayon, furniture, woven furniture, rebuilt typewriters, plate glass, and hickory handles. The hickory handle conference is significant in its bearing on the future usefulness of the trade practice conference procedure, in that the standards of quality adopted at the conferences were those which had previously been worked out by representatives of the industry in cooperation with the Division of Simplified Practice of the Department of Commerce. In other words, the subscribers to the conference rules availed themselves of this means of translating the beneficent results of the helpful cooperation of the Department of Commerce into a binding agreement.

In the past year the conferences have been even more constructive from the standpoint of the industries affected. Resolutions have been adopted providing for the publication of prices realized in actual transactions; condemning price discrimination in the language of Section 2 of the Clayton Act; declaring against the payment or allowance to buyers of commissions, bonuses, rebates or allowances of any kind; against the rendering of unusual services or the assumption of unusual charges without charging the customer therefor; against discrimination in price resulting from the allowance of quantity discounts on split shipments; against selling goods below cost; and against the dumping of considerable quantities of goods in territories outside of the subscriber's particular markets and selling such goods at prices below those prevailing in his own territory.

This brief review of recent accomplishments seems also to me to reflect the current trends of thought in Government and in industry. So far as possible the adjustment of the aspirations and needs of business with the law will be accomplished through conference and cooperation. Competition is to be preserved and the undue concentration of economic power avoided by

encouraging and approving that degree of cooperation between independent businesses which will enable them to survive the competitive struggle and remain independent. Waste is to be eliminated and the public protected by the establishment of standards of grade and quality. And the extremes of overproduction and underproduction are to be avoided, and stability of employment promoted, by encouraging the dissemination and intelligent use of the essential facts of industry.

Care in the pricing of products and the avoidance of secret departures from prices openly established will be favored to the end that industry may not be plunged into price wars to their impoverishment and demoralization. As in the past, the use of approved methods of cost accounting will be urged. The adoption and adherence to a firm price policy will be encouraged. Such a policy is in keeping with Section 2 of the Clayton Act and is justified on other grounds as well. The products of one industry are the raw materials of another, and discrimination between competing concerns in the matter of prices on necessary materials, not based on differences in quality or quantity, will in the end give rise to the very evils which it is the purpose of the antitrust laws to prevent.

At this stage we might well inquire what scope would be left to competitive effort under such a policy? What protection is afforded the public, and what becomes of the highly developed professional purchasing agent? I firmly believe that under such a system competition would continue to be the great regulator of our domestic economy. There would be no decrease, but a marked increase, in the steady march of progress. The struggle for greater efficiency, for the elimination of waste, and for fixing standards of quality would continue with renewed vigor. Prices would be fixed not in concert, or by agreement, but by each industrial unit acting singly, and they would reflect the relative efficiency and individual policy of each concern. The striving for improvement in the quality of output would be unhampered by the temptation or need to lower standards in order to realize a profit in a chaotic market.

Under such a system the professional buyer would find ample opportunity for the legitimate employment of his talents. He could still shop for the lowest prices and the best quality. But the lying buyer would be effectively stopped, because the price quoted him in each instance would be the best that the bidder could offer, having due regard to the situation in his company and the prosperity of his industry, and would not be shaved to meet supposedly lower prices by competitors which actually existed only in the imagination of the buyer.

With the prospect of such a policy of rationalization under enlightened leadership in industry and an administration committed to cooperation and engineering efficiency, what is to be gained by trust law tinkering at this time? That peculiar conditions in the coal and oil industries call for special attention, is admitted. As a member of the Committee of Nine of the Oil Conservation Board I joined in a recommendation for a modification of the antitrust laws to meet the peculiar needs of the oil industry, and that recommendation has been endorsed by the American Bar Association. Section 7

of the Clayton Act exists as a nuisance law in that it is wholly ineffective to prevent mergers and only makes them more troublesome and expensive. But a proposal to repeal that provision might encounter as much sentiment in favor of preventing mergers as in allowing them, and no one can predict what the outcome would be. That there should be some rationalization of the law with respect to the maintenance of resale prices on competitive trade-marked goods is attested by the hopeless confusion into which this subject has been plunged by the conflicting and inconclusive decisions of the courts.

With these exceptions I can see no good end that can be served by the repeal or a general modification of the antitrust laws. I do not believe that the country will ever abandon free and open competition as the keystone of its economic policy. An enlightened administrative policy will enable us to retain all the benefits of competition and to eliminate all that is bad. That the realization of these ideals is possible is attested by the accomplishments to date. That American industry will readily adopt and conform to a policy which holds such promise of a continuation of prosperity, of stabilization of employment, and of protection of the public, I entertain no doubt.

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