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REMARKS
BY
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ON

EXCHANGE OF VIEWS - GOVERNMENT AND BUSINESS

It is a pleasure to visit and talk with you this evening. Your very capable and genial President, Mr. Brooke Lee, Jr., is persuasive as well as efficient in his work in arranging meetings such as this for you. He and your leaders insure the success of a meeting of this kind.

It is my belief that much is to be gained through exchange of views by those in Government with those in industry. Communication is necessary to understanding between and among us. Without a common understanding of our mutual problems we are handicapped in our efforts to find solutions. Your Association is evidence of the fact that you believe in the exchange of views and ideas for your mutual benefit. It is my belief that you, the Government, and the public will benefit from full and wholesome exchange of views.

First, I would like to discuss with you some thoughts about our public policy for maintaining a system of private competitive enterprise. As you know, that policy is deeply ingrained in our Government's relationship with industry

and business generally.

Frequently, inquiries and investigations attract public attention to our public policy for maintaining competition and the question whether the policy is effective. Occasionally some argue during the course of these inquiries and investigations that we are suffering because of the lack of competition. Others argue that we are better than any other country in the world because we have plenty of competition. All of us stand on common ground and accept the common premise that competition is the essential element in our economic welfare. On that we all agree.

Throughout the decades and generations since the Sherman Antitrust Act became law in 1890, leaders in Government and in business have proclaimed that capstone of our public policy for a free and competitive enterprise system as a great American heritage. Many times it has been repeated that the underlying public policy is responsible in large part for our progress in this country on all fronts. In that connection it has been pointed out numerous times that we have approximately ~~Six~~ per cent of the world's population, and that we have our share of land area and the world's water power, but less than our share of certain natural resources, such as, nickel, tin, manganese, mercury, etc. Nevertheless, we enjoy more than the peoples of other lands such things as automobiles, telephones, and other

luxuries of life. In other words, these things are pointed to as evidence of high standards of living which are the outgrowth of competition. These observations by leaders in Government and in industry are well founded.

Incidentally, it is well to note what has been happening in Western Europe, particularly West Germany, since World War II. There we encouraged the development of private competitive enterprise. Statistics present to us a dramatic story of how the output of manufactured items has skyrocketed in Western Europe in recent years. It is left for the political scientists and economists to reason out the relationship of the upsurge of free and competitive enterprise with this sharp rise in output of manufactured items in that part of the world.

Government officials know that any effort to keep pace with the industrial growth and its attendant new problems requires a better common understanding in this country between Government and business of not only the benefits to be derived from but also the requirements of our national policy for maintaining a free and competitive enterprise system in this country. Serious minded persons in Government understand this, and a number of them are trying to do something about it. It is known that businessmen

and others of the public seek but do not find an unqualified answer to the question."What trade restraints and monopolistic acts are unlawful?" It requires no great amount of legal research to find out why that is true.

Our Federal Antitrust laws and the Federal Trade Commission Act are couched in general terms outlawing acts, practices, and methods of competition. These general terms are not defined by a statute, and in many instances their exact meaning is in dispute.

Woodrow Wilson appreciated the need for businessmen to be more precisely informed about the meaning of these general terms of the law. For that reason, in 1914 he asked two things:

(1) He asked that some additional legislation be enacted, stating that -

> "The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is.
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> "Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item-by-item forbidden by statute in such terms as will

practically eliminate uncertainty, the law itself and the penalty being made equally plain.

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"I think it will be easily agreed that we should let the Sherman antitrust law stand, unaltered, as it is, with its debatable ground about it, but that we should as much as possible reduce the area of that debatable ground by further and more explicit legislation; and should also supplement that great act by legislation which will not only clarify it but also facilitate its administration and make it fairer to all concerned."

Congress responded to these suggestions by taking under consideration proposals contained in a bill introduced by Congressman Clayton of Alabama. Out of that grew the Clayton Antitrust Act, among the provisions of which are those condemning price discriminations, tying and exclusive dealing arrangements, certain mergers and acquisitions, and interlocking directorates.

(2) Wilson also asked that a Federal Trade Commission be created. He wanted such an agency, among other things, to assist businessmen in securing a better understanding of their responsibility under the law. In that connection, he stated:

"It is of capital importance that the businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety. It is as important that they should be relieved of embarrassment and set free to prosper as that private monopoly should be destroyed. The ways of action should be thrown wide open."

On September 2, 1916, in his speech of acceptance on renomination to the presidency, Wilson restated his view of the function of the Commission in the following terms:

> ". . . a Trade Commission has been created with powers of guidance and accommodation which have relieved businessmen of unfounded fears and set them upon the road of hopeful and confident enterprise.
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> ". . . We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to co-ordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law . . . The Trade Commission substitutes counsel and accommodation for the harsher processes of legal restraint . . ."

It is clear that it was intended by Wilson that with the establishment of the Federal Trade Commission we would have an agency which would apply the law against unfair trade practices on a broad basis in an effort to eradicate harmful practices in their incipiency. It was thought this would be done by specifying harmful trade practices item by item. In this way, it was thought, businessmen would be assisted in avoiding the continuation of practices which could make them liable as criminals under the Sherman Antitrust Act.

Businessmen and the public are unlikely to enjoy flexibility, breadth and certainty under our antimonopoly laws unless there is action from day to day by an administrative law agency such as the Federal Trade Commission devoted to spelling out and specifying what trade restraints and conditions are unlawful, and aiding in the establishment of guide lines for avoidance of pitfalls leading to violations.

The Federal Trade Commission has devoted its resources, time, and effort to spelling out and specifying what trade restraints and conditions are unlawful and in aiding in the establishment of guide lines for businessmen that they may avoid the pitfalls of law violations.

One method of advising businessmen about the possible illegality of certain trade practices is through the use of the Commission's Trade Practice Conference procedures. Trade Practice Conferences and Trade Practice Rules are not new at the Federal Trade Commission. The Commission's work in this area dates back to 1918.

Since that early beginning there has gradually evolved the Commission's present Trade Practice Conference Program. In the intervening years, in excess of 250 United States industries have, at one time or another, operated under

various forms of trade practice rules. Today, rules are in effect for 163 industries.

Trade Practice Conferences have been initiated at all stages in the progress of unfair practices within an industry. They have run the gamut of fairly standard rules where the law has been well settled in case decisions and the practices fairly permit the detailed working out of express standards for guidance of industries early in the history of the emerging industry and in the initial stages of unfair practices within the industry.

In more recent years, the trade practice rules have been more often utilized to afford detailed and specific guidance to industry on specific problems of compliance which were peculiar to the industries affected and in the early stages of the use of unfair methods.

The purpose and significance of the Commission's Trade Practice Rules is the interpretation of the law. In that respect they are advisory. Thus, their purpose has been and is to help businessmen understand the practices in specified industries. Thus, the Trade Practice Conferences and Trade Practice Rules really perform an advisory service to businessmen and their industries. The legislative history of the Federal Trade Commission Act clearly indicates

that this function was intended to promote voluntary compliance with the law. As this activity of the Commission has progressed, it has become a program designed to obtain and maintain, to the greatest extent possible, observance of requirements of law administered by the Commission on an industry-wide and voluntary basis.

The Commission's files are replete with information to the effect that in many instances the wide publicity given to the Commission's Trade Practice Rules and its statements of Guides have had a wholesome effect in improving compliance with law.

Problems arising from the use of industry-wide unfair trade practices remain unsolved when the Trade Practice Conference procedure fails to achieve voluntary compliance with the law. Where scores, or perhaps hundreds of members of an industry are engaged in a practice violative of the law and refuse to heed the advice given to them through the Commission's Trade Practice Conference procedure to voluntarily comply with the law, a serious law enforcement problem is presented. In these instances it would appear that what is needed is some mechanism to enforce, on an industry-wide basis, a compliance with the law against unwholesome and destructive trade practices.

This is particularly true in those instances where the use of the unfair trade practice involves large numbers, perhaps hundreds, in a given industry. Obviously, it is impractical and, perhaps, unfair, to proceed against one or two in such a situation through litigation and leave the others free to continue the questionable practices.

The problem faced has prompted the suggestion that the Commission consider the use of its broad statutory powers in setting up another promising rule-making procedure. That would include the establishment of procedures for promulgating substantive rules with the force and effect of law.

It is my view that an industry-wide use of an unfair trade practice which cannot be stopped except through the use of enforcement measures, could be handled best through the use of substantive rule-making procedure. It is clear that the use of such procedure would put particular members of an industry at less disadvantage than would the adversary proceeding, which is limited to prosecution of one individual company at the time.

Selective and prudent use of rule-making proceedings and their foundation upon clearly established standards after investigation may be vastly beneficial, both to the public interest and to concerned businessmen. We can envision

a type of proceeding which would probe in depth such broad industry problems and which, after full observance of the procedural requirements of the Administrative Procedure Act, would terminate with a general rule prohibiting the practice. Specifically, these could be likely advantages:

1. The problem of equitable treatment among competitors would be simplified. At the conclusion of the whole rule-making proceeding, in which all would have had an opportunity to participate, all members of the industry would be equally informed of the Commission's ruling as to the practice in question.

2. The existence of an authoritative, prohibitory statement by the Commission carrying with it formal, enforceable sanctions with respect to a given practice would have an extremely strong deterrent effect upon the members of the industry.

3. Subsequent quasi-judicial proceedings against recalcitrant members of the industry would be immensely simplified because these proceedings would involve only the factual issue of whether the rule had been violated. The effect of the act producing the violation would not be an issue in subsequent proceedings.

Rule-making procedures would be limited to a narrow range of practices which the Commission had reason to

believe were in violation of law. In contrast to Trade Practice Conference Rules, the results - after full hearing, and subject to appropriate judicial review - would be conclusive so far as the issue of lawfulness was concerned.

This suggested approach for assisting businessmen in eradicating industry-wide unfair trade practices has the merit of providing for an analysis of all relevant aspects of a problem rather than dealing only with symptoms. This suggested rule-making process would avoid condemning a single firm for the ills of an industry. In fact, the procedure I am suggesting would involve proceedings directed against no person and against no firm. Instead, the proceedings would be directed against a practice. In that respect it would direct attention to an entire industry rather than focusing attention solely on particular firms.

The statesmen in the industries represented by you will be quick to see these and the other meritorious aspects of the method I am suggesting for Government and business to get together, exchange views, and eliminate troublesome problems. If businessmen cooperate willingly in such an undertaking, the opportunity will be theirs to become partners rather than antagonists in the development of sound policies in relationships between Government and business.

In this way they can have a voice in the development of sound antitrust policies. This should avoid many of the pitfalls of becoming enmeshed in the interminable legal processes inherent in the case approach. The adversary approach to antitrust problems too often emphasizes conflicts and differences, when what we should strive for is a harmonizing of interests.

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