ADDRESS BY

THE HONORABLE CHARLES H. MARCH,
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Mr. President, Members of the Judiciary, Ladies and Gentlemen of the Bar:

I am home. You can well appreciate my feelings at this moment — to be back again midst familiar and dear scenes and associations; to mingle with my brothers of the bar of my home State; to see again my closest friends.

You will, I am sure, realize the feeling of privilege that is mine in being invited to address this important body of the legal profession that has had and will continue to have an increasing effect in shaping the laws of this State and the entire country. I am proud of my early association with this organization as one of its charter members. The sound and elevating principles inculcated in those early days, indigenous to the soil from which I sprang, has ever remained with me as a guiding light in dealing with the many problems confronting me as a Federal official in Washington. Herein lies one of the many reasons why I am proud to be a son of the State of Minnesota.

My friends, we are living in an age of change. We are living at a time when it is, perhaps, more important than ever to re-examine and rededicate ourselves to the fundamentals upon which this nation is founded and under which it has risen to greatness. The history of thousands of years records the long struggle of mankind upward toward the light of liberty and self-government. It shall be my purpose to draw your attention to this idea of freedom and democracy, which is fundamental and of deep significance; and in the discussion of this subject it shall also be my purpose to allude to some of the things we must be alert to guard against, lest our heritage of self-government, individual liberty and opportunity be curtailed, if not entirely lost.

Self-government has ever been the goal of mankind. Its struggle began with the dawn of civilization. All peoples of the world have striven for self-government. It is democracy's objective and purpose. In 1776 our ancestors had the fortitude, the courage and the conviction of purpose to establish the first great democratic nation of the world. The principles of democracy, of self-government, of liberty, are basic to us, to our institutions and our whole life. We justly cherish these principles and rightfully we are quick to defend them from alien ideologies.

When our forefathers came to this continent they fled from oppression, exploitation and dictatorships. They turned their faces west to this land to found a civilization and government wherein true self-government, freedom and individual initiative were to have opportunity to come to fruition. And that fundamental idea of self-government, liberty, individual effort, produced a Constitution and a government of law that have made ours the greatest nation on earth.

Today we see springing up in various parts of the world a departure from the idea of self-government and freedom for the masses. We see peoples in

other parts of the world apparently clamoring for dictatorships. Little do they realize the price they are paying. I say to you they are running after false gods, the gods of tyranny and regimentation. Liberty and the right of self-government are being trampled upon, the peace of the world menaced. This trend in certain other countries is sufficient to give us pause and to remind ourselves of the gratitude we owe for our democratic institutions and principles. We want none of their dictatorships, their oppression, their ruthlessness. Our course to follow is that of democracy, for therein lies the greatest measure of freedom and human happiness. Democratic principles are the bulwarks of freedom, prosperity and security.

Not only do we see the departure from these true principles of liberty in foreign countries, but there are tendencies in our own land which, if allowed to continue, would fetter and strangle our economic and political well-being. It behooves us all to be alert to these tendencies and to stand guard. And the legal profession is second to none in its responsibility to take the lead against such enemies within our gates.

Among the questions posed by these tendencies is that of monopoly. This question has ever been the concern of liberty-loving people; and at no time in our recent history has it been more acute and more pressing for solution than at present. The entire situation is now up for thorough examination by a select committee of the Government known as the Temporary National Economic Committee, created by Joint Resolution of Congress.

The problem of monopoly seems to be ever with us. It has been of pressing concern to the people since ancient times. The fight against it has gone on through the ages and to each new age it is newly vital. When brought under control as to one form it is not uncommon to find it break out in another form. In its broadest aspects, the problem, which is one of concentration of wealth, is a world problem. It underlies the civil war in Spain, the communist revolution in Russia, the death of democracy in other countries. It has toppled kings from their thrones. It will drive to disaster dictators, whether economic or political, who thwart the masses in their effort to achieve a better standard of living and greater economic security. The whole world is in revolt against that philosophy of unnecessary scarcity which has been the philosophy of private monopoly. Any general monopolization of the means of production and distribution carries with it limitation of purchasing power. The inability of millions to produce, to purchase, and to consume is but the reflection of such monopolization.

For the past half century or more the control of monopoly in this country has been a pressing national issue. The progressive elements in both major political parties have never lost interest in it, and the platforms of both now pledge a renewed attempt to enforce and strengthen the laws designed to protect the public against monopoly.

The passage of the Sherman Antitrust Act of 1890, which is still on the books, was the culmination of prodigious efforts to prevent monopoly from overwhelming our people. In 1914 the need for supplementing the Sherman Act was sufficiently crystallized that steps were taken to deal with certain of its phases through creation of the Federal Trade Commission. In the experience under the Sherman Act up to that time it was found that it was largely through the use of unfair competitive practices and the employment of certain

specific devices that monopoly was able to gain a foothold. To deal with these specific methods the Federal Trade Commission Act was passed, also the Clayton Act, supplementing the Federal antitrust laws.

Functions of the Federal Trade Commission

The Commission was set up on the one hand as a quasi-judicial body, and, on the other, as an agency of inquiry and study in the field of business. Mr. Justice Stone, speaking for the Supreme Court in the Keppel case (291 U.S. 304), stated that the Commission

> "was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected', and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'"

Congress provided in the Trade Commission Act that unfair methods of competition in interstate commerce shall be unlawful, and conferred upon the Commission the power and authority to prevent their use. Subject to right of court appeal, the Commission was authorized to determine what is unfair in the competitive struggle. Authority of such great importance to business had never theretofore been conferred upon an administrative agency. Commission proceedings in these matters are judicial in nature and character. It operates like a court. It hears cases of unfair methods of competition between business competitors, enters findings of facts on the pleadings, testimony and evidence, and issues cease and desist orders where justified by the facts and the public interest. The issues in these cases are drawn upon formal complaint entered by the Commission and answer filed by the respondent. Trials are conducted by trial examiners of the Commission, before whom counsel for the parties appear, examine witnesses and produce the evidence. At the conclusion of the trial the presiding examiner makes his report and the case then goes before the entire Commission. Briefs are filed by counsel on both sides and oral argument heard by the Commission. Thereafter the Commission renders its decision. And, if it is of the opinion that the practice in question constitutes an unfair method of competition, the findings of fact of the Commission as well as its cease and desist order based thereon are entered. The case may be carried to the United States Circuit Court of Appeals and, upon certiorari, to the Supreme Court of the United States.

The cease and desist orders are, of course, in the nature of injunctions, to protect competitors and the public. Any businessman or other interested party has a right to complain to the Commission and if upon investigation it appears to the Commission that the matters complained of are unfair and that action to correct the same would be to the interest of the public, formal proceedings may be undertaken. Such cases of unfair competitive conduct in commerce are brought to the Commission at the rate of over 2,000 annually and the decisions of the Commission cover a wide range of competitive practices.

They constitute a large body of semi-judicial rulings on the important subject of fair practices in business and go far toward checking the growth of the seeds of monopoly.

Trade Practice Rules

The cease and desist order proceeding is what might be termed the compulsory method of eradicating harmful practices in business. The Commission has also provided a voluntary cooperative method in what is known as the trade practice conference procedure. Voluntary correction of unfair competitive methods is most desirable, and the Commission is always glad to assist in bringing it about, rather than be compelled to use the compulsory processes of the law. The elimination of unfair competitive practices is essential to sound business prosperity and a valuable deterrent to monopolistic encroachment. Businessmen generally are recognizing this. Members of trade and industry therefore are finding it more and more to their own benefit to cooperate in setting up fair trade rules by availing themselves of the facilities of the trade practice conference procedure of the Commission. Experience has proved the value of this cooperative effort within the law between legitimate business and the Commission. To date the Commission has conducted such conference proceedings for close to 200 industries and by this joint and friendly action many bad competitive problems have been solved.

General Investigation of the Commission

It was also in its organic act of 1914 that the Commission was given broad powers of inquiry and study of corporate practices and business problems. This was intended as another dike against the monopolistic flood. For example, Section 6 (a) empowers the Commission

> "To gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices, and management of any corporation engaged in commerce, * * * and its relation to other corporations and to individuals, associations, and partnerships."

It is also empowered to obtain reports from business; to investigate the manner in which antitrust decrees are carried out; upon direction of the President or of Congress, to investigate and report facts relating to any alleged violation of the antitrust acts by any corporation; upon application of the Attorney General, to investigate and make recommendations for the adjustment of the business of any corporation alleged to be violating the antitrust acts; to publish reports of its investigation and to classify corporations.

In these provisions the Congress sought to give effect to the view that corporate practices and intercorporate relations in industry require impartial investigation and study by a body of experts; that disclosure of the facts will permit of the operation of an enlightened public opinion which in turn

may be relied upon to bring about correction of abuses. The history of the Federal Trade Commission Act has indeed proved the theory to a very substantial degree that once the real facts in a given situation are clearly made available to the people, public opinion will effectuate the needed reformation.

Much legislation of outstanding importance has sprung from investigations and studies made by the Federal Trade Commission under its general powers of inquiry to which I have referred. Let me illustrate by citing a few examples:

Packers & Stockyards Act, 1921

Beginning in 1918, the Commission conducted an investigation of the meat packing industry as part of a general food inquiry. This led to correction, by consent decree, of certain monopolistic abuses and, in addition, it resulted in the enactment by Congress of a general regulatory statute known as the Packers and Stockyards Act of 1921.

Grain Futures Act, 1921

Following a Commission investigation of the grain trade the Grain Futures Act of 1921 was passed by Congress.

Radio Industry

Under resolution of the House of Representatives, the Commission conducted an exhaustive investigation of the radio industry and made a comprehensive report thereon to Congress in 1924. Upon this record the Department of Justice took action under the Sherman Act against certain corporations and this culminated in a consent decree. The Commission's investigation and report also contributed materially toward the enactment of the Radio Act of 1927, and was directly responsible for most of the provisions therein. Similarly provisions of the Communications Act of 1934 were predicated in a large measure upon matters developed in this investigation.

Securities and Holding Companies Acts

The Securities Act of 1933 and the Public Utility Holding Company Act of 1935 followed the Commission's reports in its exhaustive electric and gas utility investigation. This inquiry was made pursuant to Senate Resolution No. 83, 70th Congress (1928), which directed a searching examination of the corporate relations, financial development, practices and public advantages and disadvantages of holding companies, together with certain political and propaganda activities. The Commission's reports to Congress are embraced in nearly 100 printed volumes, and the Public Utility Holding Company Act of 1935 was a direct consequence of the abuses revealed in this study by the Commission.

The inception of various other Federal statutes may largely be found in Trade Commission inquiries and studies. Some of these are:

The Export Trade Act of 1918, commonly referred to as the Webb-Pomerene Act.

The Perishable Agricultural Commodities Act of 1930 and the amendatory act of 1937.

The Federal Power Act of 1935.

The Robinson-Patman Anti Discrimination Act of 1936.

Robinson-Patman Act

The Robinson-Patman Anti Discrimination Act, administered by the Commission, was designed by Congress to eliminate certain discriminatory practices of monopolistic character which the Commission's report on chain store inquiry reveals. That act prohibits the use of price discrimination, direct or indirect, to injure competitors or to destroy competition. It also prohibits certain specific practices such as brokerage, commissions, allowances, under certain situations which are deemed to be destructive of fair competition. While this statute was only passed in June, 1936, quite a number of cases have arisen thereunder and decisions by the Commission touch the entire field of commodity distribution.

Wheeler-Lea Act

In March of this year the President signed what is generally referred to as the Wheeler-Lea Act, constituting the first revision of consequence of the Federal Trade Commission Act of 1914. The Wheeler-Lea Act greatly strengthens the hand of the Commission in dealing with unfair methods of competition. While the original act of 1914 prohibited, and empowered the Commission to prevent, unfair methods of competition, the Wheeler-Lea Act broadens this power to include unfair or deceptive acts or practices in interstate commerce. A major effect of this amendment is to make it plain that the Commission in its corrective quasi-judicial powers may act not only when the alleged unfair business practice is harmful to competitors, but also when it is harmful or injurious in its tendency to the public regardless of whether a competitor has been injured.

Another outstanding feature of the Wheeler-Lea Act is the incorporation into the law of provisions whereby certain specific additional powers are conferred over false or deceptive advertising of foods, drugs, devices and cosmetics, as those terms are defined in the statute. Such practices are made subject to various forms of corrective action, namely, (1) temporary injunction where such appears in the interest of the public; (2) criminal prosecution where the advertisement is issued with intent to deceive or where the product in question is injurious to health irrespective of the intent; (3) cease and desist order of the Commission enforceable by the United States Circuit Court of Appeals, or when the same has become final after the lapse

of 60 days without appeal, to civil penalties collectible in a suit by the United States. All in all, the various provisions as to foods, drugs, devices and cosmetics found in this Wheeler-Lea Act make it plain that no stone shall be left unturned in completely eradicating such indefensible and harmful trade practices.

The Clayton Act

The various statutes I have mentioned are in effect scattering outposts against the encroachments of monopolistic tendencies. Moreover, as far back as 1914 there was erected still another fort. It was the Clayton Act, to which I have already alluded. One of the principal phases of the evil against which this statute was arrayed is the merger of competing corporations. The Act, under parts of which the Federal Trade Commission operates, prohibits the acquisition by one corporation of the capital stock of a competing corporation, or the consolidation of two or more competing corporations by acquisition of stock, where the effect may be to substantially lessen competition, tend to create a monopoly or restrain trade. At the time this legislation was placed on the books it gave to the people great hope of its usefulness in stemming the tide of monopoly; but, as has been repeated in other occasions in this field of legislation, loopholes or avenues of escape in the legislatively erected armor were developed, largely as a result of judicial interpretation. It was found that monopolistic mergers could easily escape the Clayton Act by the acquisition of assets instead of the acquisition of stock. This technicality soon became crystallized in the decisions of the courts and by it the Clayton Act provisions against monopolistic mergers were rendered nugatory and virtually ineffectual.

So-Called Rule of Reason

Let us look for a moment at another thing that has arisen to break the legislative dykes erected against monopoly. It is one thing to inveigh an evil in general and quite another thing to apply specific remedies. Our laws in this field appear to be one thing on the statute books but quite another under the judicial interpretations. Out of the many interpretations of these laws found in the decisions there have grown confusion, looseness and uncertainty that have encouraged the development of monopolistic practices; and the keystone to much of this encouragement of monopoly is the notorious "Rule of Reason". When this rule was read into the antitrust act by the Supreme Court the gate was opened and left swinging in such uncertain fashion as to let into the sheepfold the economic wolves of special interests and monopolistic greed. No greater condemnation of this miscalled rule of reason, or what is essentially the same thing, namely, the doctrine of good and bad trusts, can be found than has come from the lips of high official authority itself. President Taft, referring to the matter, stated in a message to Congress:

> "I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to best

judgment. It is to thrust upon the courts a burden they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."

In a dissenting opinion Mr. Justice Harlan used the following vigorous condemnation of this rule-of-reason interpolation in the Sherman Antitrust Act;

"The Court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the Act but has usurped the constitutional functions of the legislative branch of the government. With all due respect for the opinions of others, I feel bound to say that what the Court has said may well cause some alarm for the integrity of our institutions."

In an earlier report on behalf of the Senate Judiciary Committee by Senator Nelson on a bill to amend the Sherman Act, it was stated:

"To inject into the Act the question of whether an agreement or combination is reasonable or unreasonable would render the Act as a criminal or penal statute indefinite and uncertain, and hence to that extent utterly nugatory and void, and would practically amount to a repeal of that part of the Act."

The report also states that

"The injection of a rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law."

Is it any wonder that under these circumstances the monopoly question again comes to the fore as of vital importance? The immense aggregations of corporate wealth and control, the development of new and subtle devices, the fact that our protective wall against monopoly has developed weaknesses, make it necessary that action be taken to more effectively guard against this strangling octopus, if we are to save our economic and political freedom.

If the effort to destroy monopoly is directed only against such as can be shown to have abused their power, it may be questioned how far reaching the relief will be, for the effect of monopoly on the concentration of wealth and the consequent limitation of purchasing power of consumers are not conditioned wholly on behavior. In its report to the President in November, 1934, concerning the basing point system of the steel industry, the Federal Trade Commission used these words:

"If the capitalistic system does not function as a competitive economy, there will be increasing question whether it can or should endure. The real friends of capitalism are those who insist on preserving its competitive character."

Recently the Federal Trade Commission completed an investigation of agricultural income. This study revealed for the first time the startling progress of monopoly in the manufacturing of agricultural products. It was found that three tobacco manufacturers in 1934 bought approximately 70 percent of all tobacco consumed domestically.

In livestock three packing companies bought 40.8 percent of the cattle and veal calves, and 25.3 percent of the hogs. Agriculture is the means of livelihood of nearly a third of our population and the basic industry for all others. It has made little progress in the direction of organized control of its own prices or production. Without such control, it has had to bear the full impact of monopoly both in buying and selling. For years before the crash in 1929, agriculture was not prosperous, although other industries were enjoying a sort of wild prosperity, achieved largely at the expense of agriculture. Perhaps what then passed for national prosperity was only the prosperity of monopoly. It should be plain to all that with agriculture prostrate, even the pseudo prosperity of monopoly could not continue.

Mere receipt of greater income by our agricultural population, whether from prices driven upward by natural or artificial causes, or from subsidies paid by the Government, is in itself no permanent remedy. So long as there exists the power of monopoly to control the prices of what the farmer buys, increases in the farmer's income are but the occasion for equivalent increases in the prices he must pay. His relative position is not improved. Indeed, it is possible for his relative position to grow worse notwithstanding an increased income. The same is true also of other unorganized groups and classes of our population.

Almost two years ago I made this prediction:

> "A most disturbing and puzzling feature of the present business improvement is that with industrial production back nearly to pre-depression levels, we still have substantial unemployment. It should be clear that unless these unemployed have their buying power restored, we shall sooner or later suffer another depression."

And so we did, as attested by this so-called recession.

Today monopoly, the ancient oppressor, is knocking at our door. We must conquer this foe, or I assure you that no matter how efficient we may be we will never really extricate ourselves from our present anomoly of apparent over-production on the one hand, with millions going hungry and in want amidst this plenty.

In its final report to the Senate on its chain-store investigation, the Federal Trade Commission said:

> "Should the trend of the past 20 years, and particularly of the last decade, continue for a like period, we shall have a condition in some lines of chain merchandising that few will dispute is monopolistic."

The Brookings Institution has reported that even during our fabled prosperity of 1929 nearly six million American families, representing more than 21 percent of the total population, each had an annual income of less than $1,000, while about 12,000,000 families, representing more than 42 percent of the population, each had an income of less than $1,500 a year.

Monopolistic ownership or control of the means of production connotes dictatorial power over the things produced. It determines the amount to be produced, restricts the freedom to engage in productive pursuits, and consequently the amount of labor that may be employed. By fixing prices, it limits or restricts the quantity of goods which may be consumed.

Price fixing and other monopolistic schemes have been familiar to men of all ages, from ancient China and Egypt, through the days of European mercantilism, to the present. And men of all ages have observed that the common people, caught between the jaws of their own need and the power of monopoly, have had their lives crushed and their children's children sold into economic slavery.

It is my belief that the late severe economic depression can be traced in large degree to reprehensible practices of selfish interests, many of which were unsoundly and excessively capitalized. These practices were not properly controlled, because the country had become so blinded by temporary prosperity as to accept the theory that monopolies were beneficial rather than dangerous.

What happened? In their greed for profit, monopolistic enterprises charged more than the traffic could bear. They have little or no regard for ultimate consequences. By eliminating competition, they thought they were on their way to greater success and greater riches. Actually, however, as it turned out, fewer people were able to buy the products of the big business enterprises which had concentrated output in their own hands, for that very concentration deprived many of their means of livelihood and thus destroyed their purchasing power. The result, so often called over-production, would probably better be termed under-consumption.

It is my conviction that to allow great interests a free hand and to permit them to destroy competition would be to make war against the very principle on which our Government was established, namely, equal opportunity for all who may be fitted to improve their position by reason of their own energy and initiative. By this I do not mean that it was ever intended to protect the lazy or incompetent. I do mean that the right of every man to use his brain and energy and gain a fair reward therefor should be preserved and protected.

Society is an organism through which flows the lifeblood of commerce. When any part of society monopolizes more of that lifeblood than it can use, the other parts suffer. Even in the part which has the excess supply, congestion and disease appear. And just as infection in the less prominent parts of our bodies may produce decay and death, so infection in the humbler parts of our social and economic organism may destroy it.

Monopoly and the impoverishment of the common people until it was a choice between the bread of charity or the blood of revolution has ever been

the herald of moral decay and national death. So passed the glory of republican Greece and the grandeur of democratic Rome and, if we may judge the future by the past, so may perish the greatest republic that "ever gleamed like a priceless jewel on the skeleton hand of time". Self interest, humanity, patriotism, religion itself, all admonish us to weigh well the problem of the hour — a problem born of human progress, forced upon us by the mighty revolution wrought in the industrial world by steam and electricity and that problem is: "Shall the average American citizen be a slave or a sovereign?"

The illustrious Abraham Lincoln said, "I believe this Government cannot endure permanently half slave and half free." And by the same token neither this nor any other government can endure half monopolized and half free, because monopoly is slavery.

We must not fail to protect our heritage, so well expressed in the verse of John Boyle O'Reilly:

"Here. . . . . on this soil
Began the kingdom, not of kings, but men!
Began the making of the world again;
Where equal rights and equal bonds were set;
Where all the people equal-franchised met;
Where doom was writ of privilege and crown;
Where human breath blew all the idols down;
Where crests were nought, where vulture flags were furled,
And common men began to own the world."