ADDRESS OF
HON. ROBERT E. FREER, CHAIRMAN, FEDERAL TRADE COMMISSION
BEFORE THE
NATIONAL PETROLEUM ASSOCIATION
HOTEL CLEVELAND, CLEVELAND, OHIO
2 P. M. APRIL 13, 1939

THE PROVINCE OF THE FEDERAL TRADE COMMISSION IN THE FIELD OF BUSINESS PRACTICES

The Federal Trade Commission Act is one of the antitrust acts and its underlying legislative purpose is to preserve as nearly as possible the forces of competition, while at the same time so regulating their pressure that business practices may not be forced below certain minimum standards of honesty and fairness.

I don't suppose that any industry has more first hand acquaintance with the antitrust laws than yours, or that there is a subject for discussion which would hold more interest for you.

The principal obstacle in the path of sound discussion of the antitrust laws is the shabbiness of the antitrust vocabulary. The catch words have become so baggy at the knees from decades of hard wear that they can be used to fit any figure, of speech or otherwise. In fact, a great deal of the confusion and the heat, as distinguished from light, which often accompanies discussions of relations between business and the government, springs from the difficulty of clearly expressing definite and precise ideas by means of words and phrases which lack precision or have emotional or political coloring.

To illustrate: two men use the expressions "fair trade", "unfair competition" and "monopoly". By "fair trade" one man may refer to rivalry for business conducted in an honest manner, free from fraud, deception or oppression, while the other man may mean the maintenance of resale prices. By "unfair competition" one man may refer to the common law concept of passing off, or, in a broader sense to deceptive business tactics generally, and the other man to quoting of prices lower than his own by a more efficient producer.

And "monopoly" — well, even that one is perhaps becoming badly used. The word has been applied to as diverse situations as that on the one hand of a small manufacturer whose prices in his own territory are regularly so low that competitors at other locations cannot profitably meet them, and that on the other hand of the Aluminum Company of America, which is a whole industry in itself.

I made a solemn resolution to try to avoid using any of the time-honored and familiar terms which are susceptible of emotional interpretation and which do not refer to exact situations. Complete success in this regard is beyond my ability, but I hope that you will give me credit for an effort in that direction.

Functions of the Commission

To get on to the subject, the Federal Trade Commission Act embodies a number of different approaches to the problems of industry relationships, and, as a consequence, the Commission exercises several different functions. I shall first mention many of them briefly, but plan to reach finally and to dwell chiefly upon those which deal with so-called restraints of trade.

The Bureau of Corporations, the Commission's immediate predecessor, was created for the purpose of inquiring into corporate relationships and the making of reports thereon. It was felt that if questionable practices could only be aired, direct government intervention would in many cases be unnecessary, because public opinion would require the voluntary elimination of bad practices. The investigative functions of the Bureau of Corporations were incorporated in Section 6 of the Federal Trade Commission Act. Under this section the Commission is authorized to gather and compile information concerning corporations engaged in interstate commerce, excepting banks and common carriers, publish such of this information as it deems expedient in the public interest and to submit recommendations for additional legislation in annual and special reports to the Congress.

It will probably be interesting to you to recall that the Federal Trade Commission Act and the Clayton Act both followed President Wilson's message to Congress, which was preceded by an inquiry on the part of the Senate Committee on Interstate Commerce extending from 1911 to 1913 and in many respects similar to that now being conducted by the Temporary National Economic Committee. In a brief but masterly report submitted in 1913 the Committee recommended among other things that the Bureau of Corporations be converted into an independent commission with power to inquire into business practices and to participate in the unscrambling of combinations found to be unlawful under the Sherman Act.

As finally enacted in September, 1914, the Federal Trade Commission Act included in Sections 6 and 7 much of what had been recommended by the Committee, with the addition of a number of other important functions.

At that time Congress considered carefully whether the law should list and specifically proscribe all the business practices then considered to embody a tendency toward the restraint upon competition prohibited in the Sherman Act; or whether a quasi-judicial commission should be empowered to deal with business practices under a wide standard of legality.

The final outcome was a compromise between the two points of view--in the Clayton Act, so-called tying or exclusive dealing contracts were specifically prohibited, along with certain price discriminations, the acquisition of capital stock of competing corporations, and certain types of interlocking directorates.

The committees considering the bills were of the opinion, however, that it would be an impossible task to write into a statute prohibitions against all the trade practices which were then, or might in the future, be considered harmful to the public or to competitors. Hence, in Section 5 of the Federal Trade Commission Act, the Commission was empowered broadly to prevent the use of "unfair methods of competition in commerce".

In March 1938 the President approved the first direct amendment to the Federal Trade Commission Act. This legislation is known as the Wheeler-Lea Act, and adds to Section 5 by making "unfair or deceptive acts or practices" unlawful in addition to "unfair methods of competition". The principal effect of this amendment is to remove any doubt that may have existed theretofore regarding the Commission's right to proceed against an unfair practice solely on the basis of injury to the general public and without necessity of showing injury also to competitors.

The Wheeler-Lea Act also provides that the Commission's orders to cease and desist shall become final at the expiration of 60 days, if not appealed to the United States Circuit Court of Appeals by the respondent. Violation of a cease and desist order which has become final either through the expiration of time without appeal, or through affirmance on appeal, subjects respondents to suit for civil penalties up to $5,000 for each violation.

Several entirely new sections setting up a special and supplementary type of procedure for handling advertising of food, drugs, curative devices and cosmetics were also added, but I shall pass these over as of little interest to your group.

An administrative procedure is set up in the organic act to make it possible for a Commission of experts, with a highly trained staff, to evaluate the facts pertaining to particular trade practices and to pass upon their unfairness under a broad standard of legality, subject to the review of the courts. The courts, of course, have always considered ultimate determination of whether a practice is unfair in the light of the facts to be a legal question and, therefore, peculiarly a function of the judiciary. Consequently, the process of working out the application of Section 5 of the Federal Trade Commission Act to particular practices has been aptly described as "the gradual process of judicial inclusion and exclusion".*

Practices Unlawful under Section 5

Over the past twenty-five years a host of business practices have been examined and considered by the Commission. Many of these have been held by it to be unfair methods of competition and in only a few cases have these decisions been reversed by the courts.

Practices which have been held to violate Section 5 include, in addition to those which were known to Congress at the time of passage of the act, a number of schemes which were not and could not have been foreseen, as well as some modern refinements of the old ones. In importance the practices range from those involving dream-books for guiding lottery players, to price-fixing devices employed by entire industries which affect the whole country. In ingenuity they range from barefaced frauds to such novel devices as one worked out by merchants in a small town to minimize mail order competition. These merchants hit upon the idea of having the local movie theatre admit children upon presentation of a mail order catalogue. Needless to say this scheme which involved also destruction of the catalogues, almost depleted the supply of such catalogues in the hands of prospective customers.

---

* F. T. C. v. Raladam, 283 U. S. 643.

While it is rather difficult to fit into pigeon holes all the practices which had been held to violate Section 5 of the Federal Trade Commission Act and to catalogue them on a sound basis of distinction, I will attempt to list briefly some of the categories. They are:

1. False and misleading advertising or misbranding of products as to composition, quality, purity, origin, source, properties or nature of manufacture.

2. Sale of rebuilt, second-hand, renovated or old products, or finished articles made from used materials, as and for new.

3. Use of containers or packages customarily associated in the minds of purchasers with standard weights or quantities when such weights or quantities are not therein contained.

4. Various schemes to create the impression in the mind of a customer that the terms of an offer of sale are unusually advantageous when such is not the fact. This classification includes misrepresentation of the regular price, or use of trade names or advertisements misrepresenting the business status of the seller. I suppose many of you are familiar with the recent action of the Commission directing the Columbia Refining Company to cease and desist from representing or implying that it operates a refinery or other place of manufacture of lubricants when such is not the fact.

5. Passing off articles as those of a competitor through appropriation or simulation of trade names, labels, dress of goods, etc.

6. Disparagement of the goods, services, financial condition or reputation of competitors, sometimes accomplished under the guise of tests or reports of supposedly disinterested agencies.

7. Threats of patent infringement suits or other court actions not made in good faith.

8. Use of concealed subsidiaries, ostensibly independent, to obtain competitive business otherwise unavailable.

9. Bribery of buyers or other employees of customers without the customers' knowledge or consent.

10. Procuring the trade secrets of competitors or inducing employees of competitors to violate employment contracts.

11. Use of schemes involving chance or lottery distribution of goods.

12. Boycotts or combinations of traders to prevent competitors from procuring goods on the same terms accorded them, or for the purpose of coercing competitors or manufacturers from whom they buy into adopting a policy considered desirable.

13. Cooperative schemes and practices for compelling wholesalers or retailers to maintain resale prices.

14. Combinations or agreements of competitors to enhance prices, maintain prices, bring about substantial uniformity in prices or to divide sales territories or cut off competitors' sources of supply.

15. Contracts or agreements among competitors to restrict exports or imports.

16. Payment of excessive prices for raw materials for the purpose and with the effect of eliminating weaker competitors dependent upon the same sources of supply.

Restraint of Trade Cases

As you can see, many of the practices listed above are usually employed by a single concern, and involve elements of fraud and deception. Other practices are condemned, however, because of their tendency to interfere with the movement of prices and to obstruct trade.

One prevalent practice of the latter type involves associations or groups of traders engaged primarily in distribution, as distinguished from production, adopting concerted programs for forcing producers to sell their goods only through the members of the group or association and to coerce other traders likewise engaged into adopting similar policies.

An important cease and desist order of this type was recently issued by the Commission against the National Federation of Builders' Supply Associations and its affiliated units. The order was served on approximately 1,700 respondents, and enjoined them from boycotting or threatening to boycott or otherwise induce manufacturers to refrain from selling to competing dealers and others whose methods were considered undesirable; from publishing white lists of manufacturers who accepted the policies of the respondents; from engaging in espionage to determine the sources of competitors' building material supplies for the purpose of interfering with these sources; and from concertedly forcing manufacturers to refrain from selling directly to the United States Government, state governments and other political subdivisions; and from fixing and maintaining uniform prices in particular trade communities.

Within the past few weeks the Commission issued a complaint charging the Wholesale Dry Goods Institute with classifying manufacturers in its trade publications on the basis of whether such manufacturers sold only through wholesalers or sold also directly to retailers, mail-order houses and chain stores, for the purpose of forcing such manufacturers to sell only through wholesalers.

An order to cease and desist was recently entered against a sheet metal roofing and air conditioning contractors association, enjoining them from concerted activities to prevent manufacturers from selling to mail-order houses, effectuated by means of white lists, blacklists, and other devices.

The theory underlying the Commission's proceedings against this type of concerted action is plain. Individual manufacturers certainly should be at liberty to select their customers in the absence of restraint of trade. No private organization should have the power to "freeze" the channels of distribution in an arbitrary manner.

In addition to the cases involving groups and associations of dealers, the Commission has also proceeded recently against a number of groups of producers and manufacturers to stop a variety of concerted activities leading to fixed or rigid prices.

The Metal Window Institute was ordered to cease and desist from concertedly establishing and maintaining minimum prices, discounts and uniform terms and conditions of sale, such as time for delivery and allowances for freight charges; and from agreeing to notify competitors before making any departure from published prices and discounts.

The United States Circuit Court of Appeals for the Ninth Circuit, less than a month ago affirmed the principal parts of an order issued in March 1938 against an association of rice millers in California, requiring them to cease and desist from combining to fix or maintain prices; or compiling, publishing and distributing any joint or uniform list or compilation of prices; or discussing through meetings uniform prices, terms or discounts, or employing any similar device which is designed to equalize or make uniform selling prices, terms, discounts or policies.

Evidence is now being taken before a Trial Examiner of the Commission pursuant to a complaint charging the Cement Institute and its members with engaging in a combination and agreement to fix prices and terms of sale by means of a variety of devices, including use of the basing point system of delivered prices.

Competition and Public Policy

The cases mentioned are only a few of a large number of proceedings instituted by the Commission in the past few years for the purpose of clearing the channels of commerce of artificial restraints. As you know, a detailed analysis of Commission cases of this type was recently presented to the Temporary National Economic Committee.

In the light of the interest in this field, I should like to deal in some general observations on the subject of the preservation of competition as a governmental policy.

There has been much written recently about "imperfect" competition. The classic concept of competition contemplates more or less sensitive prices, affected by the so-called laws of supply and demand. This concept contemplates no artificial controls either by government or by private individuals or groups of individuals. Price always has a tendency, in the theory of competition, to approach the costs of the most efficient producer. Thus, unless there is a total under-capacity, the least efficient, badly located, or obsolete plant is forced automatically from business and the tendency is to reflect savings in the manufacturing and distributing processes in the form of lower prices to the public.

In many industries, prices have become "sticky" and tend to remain uniform and rigid in the face of changing demand and of improvements in the processes of manufacture and distribution. In those industries which for one reason or another are characterized by this so-called "imperfect competition", differences in price and quality often become so minimized as factors in selling, that advertising ability and sales personality are practically the only factors which remain to influence a customer in placing his orders.

The alarming sign in this so-called "imperfect competition" is the absence of the constant pressure of competition, which works the automatic elimination of obsolete facilities and inefficient management. As a result, "sticky" prices tend to reach and remain at a level which requires the public to subsidize even the least efficient in the field.

In recent years there has been a veritable flood of attempts to secure enactment of state and federal legislation aimed at making such competition as resists private control "imperfect" by legislative fiat. Organized groups, irritated by the play of competition, have been able to force legislation to minimize the natural consequences of competition. I doubt, however, that the real temper of the people can be judged by the facility with which some of these laws have been enacted. It is almost a truism that if the present trend away from price competition continues, so that more and more there falls into private hands the power to arbitrarily maintain rigid price levels or to exercise arbitrary judgment as to who may enter or remain in business, there will surely be a demand on the part of the public for some form of control by the government in the interest of the people as a whole.

In this connection, a statement by the Supreme Court on the policy of the laws requiring competition might be of interest. The court said:

> "If there is evil in this, it should be accepted as less than that which may result from the unification of interests and the power such unification gives."*

The public policy of this country has been to insist upon the maintenance of competition in all except the so-called public utility industries in which fair treatment of the public is sought through government regulation. And it seems reasonable to expect that if we reach the point where there appears to be nothing which can be done to maintain or restore price competition in any non-public utility industries, governmental regulation and control somewhat similar to that exercised over railroads and other utilities will be inevitable.**

Do you consider that the experience had in the regulation of our so-called public utilities renders the same kind of approach advisable for the larger group of industries now considered private?

---

* Nat'l. Cotton Oil Co. v. Texas, 197 U. S. 115.

** Senate Report No. 1326, 62nd Congress, 3rd Session, Feb. 26, 1913, pursuant to S. Res. 98, P. 3.

CONCLUSION

As I recall it, an oil company executive made a speech in 1936 on the subject, "Government is in Business Because Invited in by Business Men." Many businessmen advocate a lesser degree of participation by government in the management of business and at the same time urge relaxation of the laws aimed to preserve competition. To my mind these two positions are wholly imcompatible. If specific restraints continue to be exempted from the anti-trust laws or if the trend away from competition is long continued it appears inevitable that government will be required to participate more and more directly in the managerial functions of business. The removal of competition as a factor in our economic machine constitutes such an irresistible invitation to the government to participate in managerial discretion that I for one hope the invitation will not be extended.

Government protection of competition works from the outside; its examination of business practices is aimed to enforce only such rules of conduct as are required to protect the freedom of the market. Government control on the other hand generally penetrates the interior of business and tends to impair the exercise of private initiative. The U. S. Circuit Court of Appeals* last month quoted with approval the following characterization by the Supreme Court** of the purpose of the Federal Trade Commission and Clayton Acts:

> "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs".
> (Italics supplied by U. S. Circuit Court of Appeals)

Business statesmanship is the need of the hour. Unless business statesmen in good faith endeavor to preserve the competitive system it seems doubtful that political statesmen can do so. Political democracy as we have known it can survive only in the indigenous soil of that competitive system of economic democracy in which it was evolved and nurtured.

Since you in business will have a hand in helping to shape future legislative policy of what should be done about both public and private controls of industry, I want to conclude by leaving you this proposition: Assuming that only two courses are open, either the maintenance of fair competition or, in the absence of competition, government regulation of industry to insure fair treatment of the general public, which course is most compatible with democratic institutions and least likely to result in paternalistic or authoritarian government?

---

* California Rice Industry v. F. T. C., U. S. C. C. A., 9th Circuit, decided March 17, 1939.

** F. T. C. v. Sinclair Co., 261 U. S. 463, 476. Int. Shoe Co. v. F. T. C., 280 U. S. 291, 298. F. T. C. v. Raladam Co., 283 U. S. 643, 647.

—oOo—