
THE RESPECTIVE ROLES OF GOVERNMENT AND PRIVATE BUSINESS
IN THE POST-WAR ECONOMY

by

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General Subject

All admit that some of the pre-war legislation expanding the field of federal regulation must remain and no one urges its wholesale repeal. In the opinion of the average citizen the respective roles of government and business in the post-war world should be one of cooperation in which the government should exercise the minimum regulatory control compatible with protecting the public interest and at the same time exert a maximum effort in respect to encouraging the general conditions which promote the best interests of agriculture, labor, investors and management.

The fundamental concepts in my opinion upon which a conclusion should be premised are (1) the continuation of a free competitive system under the Congressional policy embodied in the antitrust laws; (2) greater use of the Federal Trade Commission's cooperative trade practice conference procedure to aid industry's voluntary efforts to eliminate wholesale competitive practices such as "hit below the belt" and to encourage those elements in particular industries which seek to elevate the plane of competition therein; and (3) the adoption of governmental policies concerning reconversion designed to promote general prosperity -- policies providing appropriate incentives for private investment to insure jobs for our population.

1. The Continuation of Competitive System

The principle of a free competitive system is a part of the American tradition. When the tendency toward monopoly, in the form of trusts and mergers, assumed such proportions in this country as to threaten to destroy the competitive system, Congress in 1890 enacted the Sherman law with only one dissenting vote in either house of Congress.

A vivid description of the national background and need for such legislation is given by Mr. Justice Harlan in the case of Standard Oil Co. v. U. S. He said:

"All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery, - fortunately, as all now feel, - but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life." 1/

Concerted activity meets with like condemnation by the Supreme Court, when, as in the Linseed Oil case, -

" * * * the necessary tendency is to destroy the kind of competition to which the public has long looked for protection." 2/

The Sherman Law, however, proved to be an inadequate safeguard against monopolistic practices and tendencies of the early 1900's. All major political parties in 1912, as was done again in 1936, adopted anti-monopoly planks, and Congress in 1914 reinforced the original antitrust law with the Federal Trade Commission and Clayton Acts.

Roughly speaking, there were two schools of opinion which met in collision on the subject. The one was that the government should regulate the trusts, leaving them intact in order to preserve the claimed efficiency of their integrated structures and to protect the interests of the thousands of minor stockholders, bondholders and persons whose immediate livelihood appeared to depend upon the continued functioning of these coordinated instruments of production and distribution. They had not grown up overnight but were the result of gradual development, which had, more or less, fixed the interests and the future prospects of that segment of our population.

The other philosophy which had many champions, recognized the fact that the trusts had gained their position of power and dominance by the use of unfair practices which destroyed or emasculated their weaker competitors. It was therefore contended that unfair competitive practices should be condemned in an all-embracing definition and machinery set up whereby such practices could be detected, defined and quelled in their incipiency, thus stopping the growth of monopolistic structures in their formative period. In its essence this philosophy called for prevention instead of punishment.

"In undertaking to regulate competition through the Trade Commission, Congress departed in two important respects from the methods and measures heretofore applied in dealing with trusts

1/ Standard Oil Co. vs. U. S., 221 U. S. 1, (Separate Opinion of Mr. Justice Harlan).

2/ U. S. vs. American Linseed Oil Co., 262 U. S. 371.

and restraints of trade. Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the continuance of prohibited combinations and compelling disintegration of those formed in violation of law, it undertook to preserve competition through supervisory action of the Commission. The potency of the accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from further inroads by monopoly. If it discovered that any business concern had used any practice which would be likely to result in public injury--because in its nature it would tend to aid or develop into a restraint of trade--the Commission was directed to intervene before any act should be done or condition arise violative of the Antitrust Act. And it should do this by filing a complaint with a view to a thorough investigation and if need be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure." ^{3/}

The essential nature of the Federal Trade Commission Act is dynamic, as I hope my remarks have made clear. Its administration has been a continual mapping whereby shore lines are taking definite shape. Dangerous reefs and shoals are continuously being charted and the navigator has a trustworthy compass ready to his hand. He will find it in the many factual and legal precedents which have been established by the Commission's processes, including both orders unchallenged and orders passed upon by the Courts. Because of the facility of the Commission's procedure in all its aspects, this body of precedent is constantly expanding and keeping pace with business practices as they change and develop along new lines.

And let me point out this important fact; the final order of the Commission, while requiring a cessation of illegal practices, looks primarily to future conduct and thus is a firm and safe foundation upon which to build towards a true and therefore a lasting prosperity, whereby our traditional policy of free enterprise and its handmaiden, private profit, may be preserved.

2. The Federal Trade Commission's Role of Cooperation

The Federal Trade Commission Act and the Clayton Act were enacted primarily to prevent the employment of such artificial restraints by traders as tend to harden the arteries of trade and shut off or diminish the flow of the benefits of free and fair competition to the consumer and to the competitor.

Trade Practice Conference Rules - It must not be overlooked that there now exists in the Commission machinery that is being used to the end that government and business may cooperatively evaluate and discuss commercial practices. More than 150 important industries, in

^{3/} Mr. Justice Brandeis' dissenting opinion in F.T.C. vs. Gratz, et al, 253 U. S. 421.

which there existed practices prejudicial to the best interests of the industry as a whole and inimicable to the public, have held trade practice conferences under the Commission's auspices. The trade practice rules for these industries resulted in the voluntary and simultaneous abandonment of major evils besetting these industries.

Trade Statistics - A most important problem confronting the American people today is that of providing adequate employment in the post-war period to insure our returning soldiers a chance to make a good living. The maximum business activity can only be obtained by encouraging private investment in new ventures. All of our periods of high business activity have coincided with the development of important new industries. However, the new ventures should be carefully chosen. While under the free enterprise system an individual or a group of individuals is free to engage in any new venture, even if it be foredoomed to failure, only successful ventures are a permanent benefit to the country, and the Federal Government could aid the making of wise investments by currently furnishing the facts with respect to the aggregate profitableness of business enterprises constituting each of several industries in the standard classifications of industry.

While I am not as cynical as Adam Smith who in 1776 - more than 165 years ago - observed that,

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices,"

I must say that experience with association activities reveals a tendency on the part of some to go too far and to thus come in conflict with the law of the land.

Business men constantly want information with respect to production, prices, consumption, etc., and for many years industrial trade associations have gathered such information for the use of their members. Many of these associations have been unfortunate in that their officers and members have been charged with misusing such information in violation of the antitrust laws, such including those in such important industries as lumber, cement, drugs, etc.

The Federal Trade Commission has consistently taken the position that what is needed is not less but more comprehensive trade statistics, available to producers and investors alike; and that the Government is best equipped to furnish such comprehensive statistics.

In 1939, the Commission launched a project, the purpose of which was to establish an adequate system of facts concerning business operations. The Commission's project was unanimously endorsed by the Temporary National Economic Committee which recommended that it be expanded, and stated:

"One of the striking facts of experience in national economic policy formulation during the past decade, amply demonstrated by the experience of this committee, and more recently emphasized by the pressing problems of industrial mobilization confronting the national defense authorities, is the inadequacy of factual information concerning the structure and functioning of our industrial economy."

"Looking to the post-war period we all know that business and Government will be confronted with a new, complex and difficult situation. We shall be able to make the necessary adjustments and keep the economy functioning at a high level only if we anticipate and provide the factual requirements which are essential for intelligent appraisal and proper action. Fact gathering must be continuous so that essential economic information will be available to businessmen, to Government, and to the public."

3. Venture Capital

Our business leaders indicate today a laudable desire to take the lead and the major responsibility for functioning of the general post-war economy after reconversion is complete. The degree of their success in my opinion depends upon the boldness with which they attack the problem of expanding production and distribution of consumers' durable goods.

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