

For Release after 7 p.m. (CST), June 18, 1953

REVALUATION OF COMMISSION'S RESPONSIBILITIES

Address of

**Hon. Edward F. Howrey, Chairman
Federal Trade Commission**

Before the

1953 INSTITUTE FEDERAL ANTITRUST LAWS

at the

UNIVERSITY OF MICHIGAN LAW SCHOOL

Ann Arbor, Mich.

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MR. CHAIRMAN:

I welcome the honor of appearing before the University of Michigan's 1953 Institute on Federal Antitrust Laws to make my first public statement as Chairman of the Federal Trade Commission.

The Commission is, or at least should be, one of the most important and vital agencies in Washington. It exercises a jurisdiction which staggers the imagination. It supervises the competitive practices of our vast multi-billion dollar economy. It is charged with the basic duty of preserving our private competitive system.

The antitrust laws are deeply embedded in our business philosophy. They were enacted many years ago as the Magna Carta of economic freedom for an America emerging from an agricultural economy.

As Chairman of the Commission I will do my best to see that they are administered vigorously, fairly and intelligently, with due regard for all segments of our economy, including the consumer, the small businessman, the medium size and the large.

The purpose of this statement is to suggest certain lines along which the Commission's efforts may immediately be directed toward realization of this overall objective.

The time that I have been in office is too brief to permit reevaluation of all phases of the Commission's responsibilities. Such a program will be filled out in the months ahead. I hope tonight to provide a substantial beginning.

II

The Sherman Act of 1890 is a broad statute setting up general standards which prohibit unreasonable restraints of trade and attempts to monopolize.

The Federal Trade Commission Act of 1914, as amended, is a general statute which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." This statute supplements the Sherman Act.

The Clayton Act of 1914, as amended, is a special statute which prohibits particularized practices when specified effects upon competition are proved, such as, price and service discriminations, exclusive dealing and tying contracts, acquisitions of competitors and interlocking directorates. This statute also supplements the Sherman Act.

There is no doubt that these statutes were intended to be in pari materia. No presumption or inference is necessary to disclose the Congressional intention of treating them as interrelated expressions of the national antitrust policy.

In recent years, however, enforcement policies have grown up which seem to magnify conflicts and inconsistencies in these basic statutes.

Policy choices have been made, for example, between "hard" and "soft" competition. At other times these antithetical positions have received concurrent and simultaneous advocacy in separate counts of the same complaint.

There may be some inconsistency between legislative policies which enforce price competition (Sherman Act and Federal Trade Commission Act) and those which regulate price discrimination (Robinson-Patman Act), but this inconsistency has been accentuated and magnified out of all proportion by the application of unrealistic legalisms.

As Congress thought of it, the promotion of price competition and the prohibition of unfair and discriminatory pricing practices constituted a complementary dual program of fostering competition in the public interest.

The gearing of the privilege to compete with the obligation to compete fairly, is not necessarily inconsistent except as made so by strained statutory interpretation.

III

In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a "body of experts" competent to deal with complex competitive practices "by reason of information, experience and careful study of business and economic conditions"; and second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages.

The action was to be prophylactic; the purpose was prevention of diseased business conditions, rather than cure.

Critics of the Commission have maintained that it is not the body of experts Congress intended; that it has become a prosecuting agency employing laborious procedures and rigid per se interpretations without regard to the relationship of law, business economics and public policy; that its staff consists of a small coterie of rigid minded men dedicated to the expansion of the Commission's jurisdiction by means of strained interpretations and "test" cases.

Supporters of the Commission, on the other hand, have maintained that a per se philosophy and "test" cases are necessary in order to deal with new, unforeseen and expanding unfair methods of competition created by a growing and dynamic economy; that the Commission would be unable to stop unfair practices, either in their incipiency or in their fruition, if it must employ the rule of reason in all cases or be limited to those unyielding categories of practices which had already been litigated or which were in violation of common law.

It would take a bold and adventuresome spirit to attempt to resolve these differences of opinion in one short evening.

I do suggest, however, that the expertise which the Commission is supposed to exercise plows barren ground if it is bound by absolute or per se rules; that it cannot acquire a special knowledge of competitive conditions and effects unless it examines all relevant economic factors, unless it tests public interest and competitive injury by such comparative facts as business rivalry, economic usefulness, degree of competition, degree of market control, degree of vertical integration, customer freedom of choice of goods and services, opportunities for small competitors to engage in business, costs, prices, and profits.

Mr. Justice Frankfurter in the Standard Oil of California case suggested that standards of proof of this type might be practicable for the Federal Trade Commission but were ill suited for ascertainment by courts which lacked skilled economic assistance.

The inference to be drawn from this comment, and the more recent Motion Picture Advertising case, is that the Federal Trade Commission can and should sift and appraise all relevant economic data. In the Motion Picture case the Supreme Court said: "The precise impact of a particular practice on the trade is for the Commission, not the courts, to decide."

For emphasis and appreciation of the proper concept of Administrative Law and of the true function of the Federal Trade Commission, we are indebted to the dissenting opinion of Mr. Justice Jackson in the case of Federal Trade Commission v. Ruberoid Co. Let us examine his analysis.

Congress was conscious of the "convenient vagueness" of the term "unfair methods of competition" in the F.T.C. Act and similar phrases in the Clayton Act. These acts, like other regulatory measures, sketched a general outline which contemplated clarification and completion by the Federal Trade Commission and other administrative agencies before court review.

The importance that policy and expertise were expected to play in reducing the Clayton Act to "guiding yardsticks," for example, is evidenced by the fact that authority to enforce it was dispersed among several administrative agencies dealing with special types of commerce. The Act vested enforcement in the Interstate Commerce Commission where applicable to railroads and common carriers; in the Federal Communication Commission as to wire and radio communications; Civil Aeronautics Board as to Air carriers; Federal Reserve Board as to banks; and the Federal Trade Commission as to all other types of commerce.

The rise of administrative agencies has been the most significant legal trend of the last century. "They have become a veritable fourth branch of government."

Courts and commentators "have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required ... The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

Where a statute is complete in policy aspects (such as a revenue act) and ready to be executed as law, Congress yields enforcement to a wholly executive agency. Where the law is not clear of policy elements its enforcement is placed in the hands of an independent administrative tribunal. If the tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines the rationale for placing it beyond executive control disappears.

As Mr. Justice Jackson said, "...if the scheme of regulating complicated enterprises through unfinished legislation is to be just and effective, we must insist that the legislative function be performed and exhausted by the administrative body before the case is passed on to the courts."

This is the duality of responsibility imposed by Congress on the Federal Trade Commission and the courts - that is, ascertainment by the Commission of competitive effects and review by the courts.

IV

As an important first step in this direction the Commission should revitalize its Bureau of Industrial Economics in order to provide for greater coalescence of legal and economic concepts of competition and monopoly. Standards of proof for measuring injury to competition should be carefully explored.

Almost every antitrust case presents economic as well as legal questions. In important cases the Commission's economists, guided by legal principles outlined by lawyers in charge of the case, should take part in the field investigation and furnish an economic report to the Commission prior to complaint.

Economics can properly be brought to bear on anti-monopoly cases at four successive levels:

1. Initiation of cases. Economic criteria are relevant as to whether or not particular complaints should be investigated, the relative importance to be attributed to different cases, the amount of business affected, the seriousness of the economic impact of the alleged violation, the likelihood that what can be done about it will be effective.

2. Development of a theory of the case. Complex cases should be made to depend upon an acceptable economic theory as well as upon a valid legal theory. This necessarily raises a question as to the type of remedy that is desired and the economic consequences of such remedy. Questions of this type cannot adequately be covered by legal analysis alone.

3. Investigation. Restraint of trade and Clayton Act cases often require the development of statistical, accounting and marketing information. Such analyses can contribute to the planning of the investigation as well as to its actual conduct.

4. Decision. Economic analysis may be needed to evaluate the facts. Such analysis may be relevant at either or both of two stages - (1) in considering whether or not a complaint should issue, and if so, on what theory; and (2) after trial, in formulating the findings and determining the scope of the order.

The economic work of the Commission has not been adapted to the requirements of the Administrative Procedure Act. After trial is completed, neither the Hearing Examiner nor the Commission can ask for economic help in cases where the Bureau of Industrial Economics has participated in the development of the prosecution - the Administrative Procedure Act bars the furnishing of such advice.

This serious defect should be remedied by attaching economic advisers directly to the Commission, and possibly to the Hearing Examiners, to perform economic functions in the same manner as the General Counsel performs legal functions.

V

There is a particular need to formulate guiding yardsticks in matters arising under the Robinson-Patman Act.

Much discussion has taken place as to the relative merits and demerits of that Act. Small business groups, primarily retailers and wholesalers, strongly support it. Recently they have formed a committee called the "Committee for the Preservation of the Robinson-Patman Act."

On the other hand, at the American Bar Association meeting in San Francisco, several speakers said "no" to the proposition, "The Robinson-Patman Act - Is It in the Public Interest? ."

For my own part I believe in its philosophy and am obligated to enforce it. Enforcement by an administrative agency means, or should mean, making every attempt to obtain compliance, first voluntarily and then by order.

I long have thought that one of the main reasons for failure to obtain general compliance with the Robinson-Patman Act, is the mystery and ignorance (both in industry and government) which surround distribution costs.

While savings in cost constitute the primary justification for price differentials under the Act, there has been little advancement in the field of distribution cost accounting during the seventeen years it has been on the books. Manufacturing cost determination has been reasonably well understood and recognized for many years, but this has not been true in the distribution field.

In Robinson-Patman Act cases it has been very difficult, if not impossible, to determine precisely what cost savings are allowable and how they may be proved. General accounting analyses made for management in the regular course of business seem to be unsuitable for the purpose of supporting price differentials under the act.

The few distribution cost studies that have been developed have been very expensive and have involved detailed functional analyses of the sellers' entire business. Even then the conflicts between respondent's accountants and Commission accountants with reference to theory, allocations, procedures and methods have prevented any reasonable evaluation of the actual savings in serving different customers.

I therefore intend to recommend the establishment of an advisory committee on cost justification consisting of accountants, economists and lawyers representing all viewpoints.

This committee should be instructed to ascertain whether it is feasible for the Commission to develop standards of proof and procedures for costing which can be adopted by the Commission as guides to business enterprises desirous of complying with the statute.

If standard methods and procedures can be developed, then distribution cost accounting could be built into the seller's formal books of account. This would permit business firms to keep their costs in a form which would enable them to compute directly the distribution costs applicable to specific products, to specific classes of transactions, or to specific classes of customers.

At the present time most companies do not undertake any such prior systematic analysis, but develop their analyses only when they face an actual Federal Trade Commission complaint.

VI

Turning to another phase of the Commission's responsibilities, you will recall Woodrow Wilson said that businessmen "desire something more than that the menace of legal process be made explicit and intelligible; they desire the advice, the definite guidance and information which can be supplied by an administrative body."

In an effort to carry out this original intent, I propose to recommend the establishment of a Bureau of Consultation within the Commission.

The primary purpose of such a Bureau would be threefold: (1) to act in a cooperative and consultative capacity to business, particularly small business; (2) to give informal advice on all kinds of matters involving the laws administered by the Commission; and (3) to seek voluntary compliance with such laws by means of conferences, informal hearings and other types of informal procedures.

One of the divisions of this Bureau should be concerned exclusively with the problems of small business.

Small business has an essential economic and human role in American life. All inequitable handicaps should be eliminated so that small firms may grow in a healthy way and compete more effectively with their bigger competitors.

Big business and small business are interdependent, one cannot live without the other. The distribution system of the Nation consists primarily of small wholesalers and retailers who carry manufactured goods to market.

One of the complaints of small business is the mystery and delay which surround their applications for complaint; they say they drop their complaints in the hopper and never hear from them again unless and until a formal complaint issues or the case is dropped.

One of the duties of the Small Business Division would be to advise such applicants for complaint with reference to the precise status and progress of the investigations being made by the Commission.

A Conference Division should be established within the Bureau of Consultation to stimulate voluntary compliance. In the Sugar Institute case Chief Justice Hughes said: "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal process."

Business concerns, large and small, generally favor voluntary compliance with the law.

It is the object of the Commission to stop unfair and deceptive practices. If the practice can be stopped, and surely stopped, by informal procedures, the Commission's object is attained. Under such circumstances no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure cessation of the practice in the future, an order to cease and desist is appropriate. Such orders are entered, not as punishment for past offenses, but for the purpose of regulating present and future practices.

But in cases where everything that can be accomplished by a protracted proceeding, has been or can be accomplished by voluntary cooperative effort, then the time and expense of trial should certainly be avoided.

Before a formal complaint is recommended the Conference Division should give the proposed respondent an opportunity to appear and show cause why a complaint should not issue. In those cases where the complaining party desires

to do so, he should be permitted to appear and take part in an informal hearing. No testimony should be taken but it should be a joint conference between the Commission, the proposed respondent, and the applicant if willing. If this were done the Conference Division should be able to dispose of the majority of the potential cases of the Federal Trade Commission in harmony with the public interest and to the satisfaction of all concerned.

VII

In litigated cases involving legal and economic complexities, the issues should be carefully particularized in the complaint. Discovery procedures, of course, are not available. For this reason the pleadings and issues should be made as definitive as possible.

An adversary hearing of the type required under sections 7 and 8 of the Administrative Procedure Act cannot by its very nature be used as an investigatory process. Such a hearing, like any other trial, is for the determination of issues.

Surprise and tactical advantages should be frankly eliminated in all administrative hearings. Particularization in pleading should be accompanied, in the big cases at least, by pre-trial procedures involving the identification and authentication of exhibits, exchange of exhibits, exchange of written drafts of the proposed testimony of experts, stipulations of fact not subject to dispute, and a detailed plan for the hearing.

VIII

There are many other phases of the Commission's responsibilities which I should like to discuss if time permitted.

Delay in disposition of cases is one of them. It is believed that a management survey by an outside firm of management engineers is an essential first step in dealing with this problem. I have already recommended to the Commission that such a survey be made in order to eliminate excess paper work, simplify the structure of the Commission's staff, redefine the ground rules under which the staff operates, and decrease the work load of the individual Commissioners so that they are not overwhelmed by petty matters.

In closing, I want to stress the fact that the Commission seeks compliance, not punishment.

In order to accomplish this the lawyers, economists and accountants representing the Commission must approach each case in a spirit of fair play; they must be governed by the statute and the facts of the particular case, not by preconceived ideologies or theories.

Representatives of business must approach the problem in the same spirit; they must place public interest ahead of private advantage.

In some instances compliance can be obtained only through formal hearings leading to cease and desist orders. In many cases, however, voluntary compliance can and should be obtained through informal procedures, through investigation and consultation. This is one great advantage the efficient administrative agency has over the courts.

In each instance, whether compliance be voluntary or by order, the goal is the same - the prevention of improper practices and the perpetuation of our free competitive system through practical and effective enforcement of law.