THE STRUGGLE AGAINST MONOPOLY

Address by

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Few items of unfinished business present a challenge to this country so insistent as the settlement of an attitude toward the increasing concentration of business control. After 47 years of experience with the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the National Recovery Act and the Robinson-Patman Act, Senator Wagner commented that this experience has produced no coherent system of industrial control, and said: "Half of the laws enacted by Congress represent one school of thought, the other half the other. No one can state authoritatively what our national policy is." (New York Times, May 9, 1937.)

If American business were wise, it would agree that fair enforcement of a policy against monopoly is all to the good. American people will not permanently tolerate monopoly. Every business man knows that, for he is himself against every monopoly except his own. Antitrust complaints originate almost entirely with business men against business men. Yet business as a whole has been plunging headlong down the road that leads to government control. Merger, consolidation, concentration and crushing of small competitors goes on apace. Complaining bitterly of government interference and of "regimentation" they drive in a direction that leaves no alternative.

Our national policy toward monopoly, and toward regulation of the form and size of business is not to be settled solely or even predominantly by lawyers. It is a challenge to statesmanship, which affects all groups and classes of

citizens. I, therefore, will not discuss the economic considerations that must enter into the formulation of a policy, nor the economic factors which have helped to neutralize antitrust laws in the past.

The lawyers are—or should be—more deeply interested and better informed than other citizens, in the methods and effectiveness of enforcement of whatever policy the nation adopts. The lawyers were originally entrusted with the entire enforcement of the antitrust policy of the United States. For about 20 years court proceedings were relied upon to carry out the policy and, when they proved inadequate, administrative proceedings before the Federal Trade Commission were added. Few policies strike root more deeply into the economic and social life of our people than the laws against monopoly. An almost unanimous verdict upon the 47 years of lawyer efforts would be that the enforcement has been more spectacular than successful, that legal prosecutions have not suppressed monopoly so much as they have educated business to avoid the cruder and more easily proven contracts and combinations in restraint of trade. A half century of litigation and judicial interpretation has not made the law either understandable or respected.

Moreover, a half century of experience has been so inconclusive and uninstructive that business today does not know what policy it wants the government to pursue. A part of the business world vigorously demands laws to protect, preserve, and extend competition. Another part complains of the effects of too vigorous competition which it is the purpose of our laws to maintain. Most men who come to the Department of Justice, complaining of someone's else price-fixing, implore us to tell them how to "stabilize" their own industry, which is a polite term for restraining of competition that they find it difficult to meet. Business men disagree violently whether it is too much competition, or too little competition, that causes most evils in business.

Results show, however, that the policy to restrain concentration of wealth through combinations or conspiracies to restrict competition have not achieved their purpose. Concentration of ownership and control of American industry was never greater than today. We cannot deny that it fell to lawyers at the bar, on the bench and in administrative posts to execute the policy which has thus resulted in disappointment.

We hear on all hands the defeatist philosophy that this disappointment is inevitable, that no antitrust law can be enforced. I do not accept that gloomy view of our people's power over its own economy. Monopoly can be broken, and prevented in most industries, it can be controlled in all, if the people are ready to pay the necessary price. But it can not be done on a half-hearted basis. Two things are necessary.

First a national policy, in which all governmental controls are dedicated to stopping monopoly instead of part trying to suppress and part trying to foster monopoly as the situation has been for years past.

Second. A judiciary that will not sabotage that policy, which it has done in the past and is doing today.

Now as to the first. The settlement of a coherent policy is for the lawmakers and I will only point out some of the most obvious conflicts in our policy.

While the Nation has forbidden monopoly by one set of laws it has been creating them by another. Patent laws, valuable as they may be in some respects, often father monopoly. Unless we are prepared to reconsider the conditions upon which we will extend patent protection we can have no consistent anti-monopoly policy.

While the country has forbidden monopoly it has also been subsidizing it. Monopoly has had tax advantages that have aided its rise. While the sale of a small business to another who wished to continue it as such would be subject to a capital gains tax, if it were absorbed by a big business the matter could be arranged in the form of

a tax free "reorganization". The tax free reorganization privilege has been a powerful incentive for the concentrating of business. The advantage in single transactions, at the cost of the Treasury, has often exceeded the whole annual appropriation for antitrust enforcement. Enforcement has been and is inadequately financed.

Moreover the privilege of paying dividend profits free of tax from one corporation to another, operated as a subsidy for the holding companies, one of the most favored forms of creating and operating monopoly. The recent repeal of this privilege and the substitution of an intercorporate dividend tax has already proved highly effective in dissolving holding companies, and undoubtedly an increase in that tax would prove an automatic discouragement of that particular type of antitrust violations.

Only when the patent laws, the tax laws, the Securities Act and all other laws of the United States are brought to exert their pressures toward the encouragement of small business rather than toward its destruction, can we say that we have a national policy against monopoly.

The second necessity, if any part of the anti-monopoly policy is to be made effective through litigation, is that it be administered with tolerance, if not with sympathy, by the Courts. Let us look briefly and generally at a few outstanding antitrust decisions to learn the general judicial attitude.

In 1890 the Sherman Antitrust Law was enacted. It condemned every contract, combination or conspiracy in restraint of trade, and declared every attempt to monopolize any part of the trade or commerce among the several States to be illegal. The first case reached the Supreme Court in 1895 in *United States* v. *E. C. Knight Company* (156 U. S. 1). This combination controlled 98 percent of the sugar refining business of the whole United States but the Court held that its activities "bore no direct relation to commerce between the States or with foreign nations." The holding that it could not be attacked under

the Sherman Antitrust Law served to protect not only the monopoly in sugar refining but all other manufacturing monopolies for many years. No one doubts that the sugar monopoly was a combination of the character Congress tried to prohibit. So conservative an observer as William H. Taft has said, "The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts. * * * So strong was the impression made by the Knight case that both Mr. Olney and Mr. Cleveland concluded that the evil must be controlled through State legislation and not through a national statute, and they said so in their communications to Congress."

The effect of that decision is well stated by Professor Corwin to be that it "did to all intents and purposes nullify the Sherman Act and kept it nullified during the most critical period in our entire history when most of the great trusts were formed, and it did this in consequence of the Court's constitutional theories." Thus, the Court erected a shelter for industrial monopolies during the period of their formation. The legal reasoning of the Knight case may be read beside the reasoning of Chief Justice Hughes in the case of Jones & Laughlin, recently decided, by those who enjoy studies in contrast.

Taking the law as now established to be sound we are forced to admit that the early struggle against monopoly was paralyzed by the Court, and that its decision was not even good law.

In 1904 in the Northern Securities case (193 U. S. 197) the Theodore Roosevelt administration attempted a revival of the Antitrust Law. The Supreme Court, however, refused to apply the provisions for criminal penalties, in spite of the protest of Mr. Justice Holmes, who insisted, "So, I say, we must read the words before us as if the question were whether two small exporting grocers should go to jail." Such a reading was never made.

Professor Ernest Sutherland Bates concludes:

> "The precedent established in the Northern Securities case of merely enjoining corporations found guilty of criminal conspiracy from continuing their crimes in the future was consistently followed by the Court. It is therefore unnecessary to follow in detail the prolonged and tedious farce of the government's attempt to enforce the Sherman Act. Many "trusts" were nominally dissolved but fear of the law as emasculated by the Supreme Court was so slight that all the time many more trusts of precisely the same nature were being formed."

We are all familiar with the establishment of the so-called "Rule of Reason" whereby the Supreme Court read into the Antitrust Laws a limitation that they should apply only to restraints of trade which the Court should view as unreasonable, and held that Congress did not mean what it said when it condemned *every* restraint of trade.

No one better knows than the lawyers how quickly lower courts and Judges, and the lawyers themselves, catch the cue from the Supreme Court and govern themselves according to the philosophy it announces. The cue to whittle down the Antitrust Acts and reduce them to impotency given by the Supreme Court in these cases was caught by district courts throughout the land, and the offense of attempting to restrain trade came to be treated as frivolously as the offense of parking overtime.

In an effort to strengthen the Antitrust policy, the commodities clause was enacted as a part of the Interstate Commerce Act to divorce transportation from production and in order to put an end to discriminations which grew up where a railroad company occupied the inconsistent positions of both carrier and shipper. The Government made an effort to prevent use of the holding company as a device for evasion and the Court in 1935 rendered an opinion, Mr. Justice McReynolds writing, with reference

to the United States Steel Corporation's ownership of the Elgin, Joliet & Eastern Railroad (298 U. S. 492). The decision turned on whether the United States Steel Corporation dominated and controlled both the railroad and certain shippers over its lines. The government's proof of control was by such facts as these: The Steel Corporation owned all of the railroad capital stock and furnished 60% of its tonnage. It maintained close and constant supervision through conferences and correspondence. The railroad had not less than 4 officers and directors of the Steel Corporation selected from its most important officials on the railroad's board of directors. The board of directors was selected and elected by the proxy for the Steel Corporation. The president then selected the officers who were elected by the board at his suggestion. The president had a settled practice of entering into contracts without any previous approval by the board of directors, which were later ratified and affirmed. Dividends were declared and the amount fixed only after approval by the Steel Corporation. Surplus funds were deposited with the Steel Corporation at a rate of interest which it fixed. The Steel Corporation approved the expenditures for capital account and improvements when in excess of $10,000, which included about 70% of its total capital expenditures. Other evidences of control need not be recited if this imposing list does not convince. Nevertheless, a majority of the Supreme Court held that the proof was not sufficient to establish control of the subsidiary by the parent Steel Corporation. There was dissent by Mr. Justice Stone, Brandeis and Cardozo which will repay reading by those interested in the way laws are not enforced.

If this decision is a standing measure of the degree of proof required in anti-monopoly cases, Congress and the Executive are under a heavy handicap in any effort to enforce any anti-monopoly laws.

A failure to enforce the Antitrust Laws would have been bad enough but they were not merely ignored, they

were perverted. In 1908 the Court discovered (*Loewe* v. *Lawlor,* 208 U. S. 274), that labor unions were monopolies in restraint of trade if they attempted to boycott the goods of any firm that was engaged in interstate commerce. Those who enjoy comparative studies of the judicial process will find it interesting to note the elasticity of the interstate commerce conception in the cases where it was utilized against labor as compared with the narrow interpretation when the sugar trust was under consideration.

After experimenting for many years with efforts to enforce the Antitrust Laws through the Court, the Congress enacted the Federal Trade Commission Act, which was designed to add to the existing remedies against monopoly proceedings before an administrative body. It was thought, apparently, that if the Courts would not enforce the laws themselves, they would let someone else do so. This hope was in the main disappointed.

The Federal Trade Commission has had its powers whittled away and has been cramped by court interpretations and judicial constructions. It was directed to prevent unfair methods of competition. Of course it was impossible to define by statute the multitude of unfair practices. The Commission was expected, after investigation, to determine what practices were unfair methods of competition. But the Supreme Court promptly decided. "It is for the Courts not the Commission ultimately to determine as a matter of law what they include," and it went back to its old precedents for the definition (*Federal Trade Commission* v. *Warren,* 253 U. S. 420). The Court next decided that it would not only define the terms but that it would also examine the whole record in any case and ascertain the issues presented and whether there were material facts in evidence not given sufficient weight by the Commission (*Federal Trade Commission* v. *Curtis Publishing Company,* 260 U. S. 568). Chief Justice Taft filed an opinion, the substance of which is that he was un-

able to decide just what it was that the majority was deciding. It was apparent, however, from the outcome, as the Chairman of the Commission stated, that the Court had claimed the power to frame an issue its own, and to support it by its own findings of fact.

Another blow to the Commission was dealt in *Federal Trade Commission* v. *Klessner* (280 U. S. 219) and *Federal Trade Commission* v. *Raladam* (283 U. S. 643). Professor Bates describes the effect of these two decisions to be that when the Commission "attempted to check monopoly it found that public deception was the essential and when it attempted to check public deception it found that monopoly was the essential," of its power.

The National Recovery Act has been the source of great controversy, and whether its method of approach to the problem was economically wise or unwise I shall not discuss. The fact that is frequently overlooked is that N. R. A. would never have been attempted, nor would any necessity for it have become apparent if the milder and more moderate remedies against business abuses had been allowed by the Courts to function. Its dramatic decapitation by the Supreme Court was not a new chapter in the history of trade regulation. It was a repetition of what had happened, in substance, to the Sherman Act, the Clayton Act and the Federal Trade Commission Act, only they were smothered with restrictive interpretations, while the N. R. A. was given a more merciful and immediate death.

At the end of this long road we read like an epitaph Senator Wagner's statement that "no one can state authoritatively what our national policy is." The Senator spoke with characteristic restraint. He might well have added that no one can state authoritatively what our national policy *can be* under the attitude of the Court.

I am bound to say that this is a record in which I, as a lawyer, can find little satisfaction. No group in the United States is louder in its demands for democratic government

than the Bar. It is always issuing pronouncements in which it fears dictatorship, and always professing fear lest fundamental institutions be impaired or undermined. At the same time, no group in the United States has so consistently thwarted the efforts of the democratic government to establish and enforce a policy concededly within its constitutional power as have the lawyers, on the bench and off. They have systematically denatured and sterilized every statutory policy designed to repress monopoly.

It has seemed to me that the legal profession might as a group perform great service to a democracy. It could establish orderly procedure for the expression of the popular will and guide the forces of government into legally effective channels. Popular opinion today is that litigation is a blind alley down which the government starts with great noise and fury and usually ends up against a blank wall. No realist believes that any public policy touching big business can be entrusted to the legal profession to enforce.

We lawyers have become, in fact as well as by repute, a cult of obstruction. The legal profession today is the center of reaction in the United States. The leaders of the Bar are today more reactionary, less aware of pressing problems and less sympathetic with present trends than the leaders of big business.

Private industry as well as labor, consumers and public interests have grounds to doubt lawyer wisdom. Industries have embarked upon controversies with government under the advice of lawyers whose knowledge of precedents was better than their knowledge of trends. Business received and placed widespread and mistaken trust in the unsolicited opinion of 58 leading lawyers who, under Liberty League auspices, unequivocally branded the Wagner Act unconstitutional. Leaders of the American Bar Association have declared unconstitutional one after another of the laws of recent Congresses which the Courts have sustained. The attack on the constitutionality of the So-

cial Security Act was not based on the opposition of business but upon the theoretical criticisms of lawyers. The Consolidated Edison Company of New York joined the government in defending the attack on old age benefits. Business men generally (except during the campaign) recognized the menacing nature of the problem of old age destitution and of uncompensated unemployment. While there was difference of opinion as to the adequacies and policies of the present legislation, business generally regarded the legislation as an attempt to solve important problems of life while the lawyers saw in it only a technical cross-word puzzle.

Those who have counseled business to carry to Court on technical grounds the battle against needed reforms have performed poor service to business and none for the Courts. The Courts have lately decided that such counselors did not even give sound legal advice, and the fruitless legal controversies have been costly to business in good will.

Government competition, "yardstick" enterprizes, government ownership or operation and drastic types of regulation and "death sentences" are the products of disappointment over the non-enforcement of the laws governing rates, commercial practices and restraints of trade. It behooves the lawyers, from motives of self-defense, to coldly examine the practices of our Courts and our Bar in the enforcement of the Antitrust and other laws to see how far we are provoking automatic remedies instead of remedies through court proceedings, by which craft we have our wealth. In the revision of the Antitrust Laws which Attorney General Cummings has suggested and which must certainly occur within the next few years, one of the important questions for the lawmakers is the extent to which they will replace court proceedings with more effective remedies.

The legal profession is by theory an arm of the Court and the Court an arm of the Government. It has never

been intended that the lawyer should be more powerful than the law. Yet, if our Bar engaged our Courts in solution of mere technical legal conundrums while great public policies are defeated or miscarry, can we blame the public for not holding us in high esteem? No service to itself or society and, in the long run, to its clients would be more distinguished or surprising than genuine co-operation from the Bar to make our Antitrust Laws understandable and co-operation from our Courts to make them respected. Such a duty fulfilled would be a contribution to maintaining our system of free enterprize, free alike from regimentation by Government and from strangulation by monopoly.