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Address by

THE HONORABLE EDWARD F. HOWREY

Chairman, Federal Trade Commission

before the

1954 TRADE ASSOCIATION CONFERENCE

sponsored by the

Trade Association Executives Forum of Chicago

and the

Chamber of Commerce of the United States

February 4, 1954

Chicago, Illinois

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Mr. Murphy, ladies and gentlemen: I am glad that this very kind introduction was made before, rather than after, my little talk because I am in the unhappy position of having no prepared talk and I am told that this is an extremely critical audience. Therefore, you can understand my unhappiness.

I was complaining about this situation to my wife last night. She suggested I give the speech that I gave to the New York Bar Association in New York City last week. I told her I could not do that for that speech was published and no doubt everyone had read it. She replied, "Darling, I hate to be the first to tell you, but nobody reads your speeches."

I thought possibly I might follow her suggestion. It was very legalistic, but still it was all written down and ready for another rendition. Then I looked around and I saw Mr. Johnson and some of my other lawyer friends in the audience, who had heard the New York speech, and so I thought that I had better not give that.

Then, Chuck Mortensen, who is an old friend of mine, suggested I talk about trade associations.

Well, I told him that was a difficult subject. He replied, "Why? You have been going around the country as Chairman of the FTC, saying that the new Commission had an open-door policy, that you wanted to extend the consultative activities of the Commission, and that all businessmen had to do was to come in and sit down in your office and you would go over their problems."

I replied, "Well, that may be so -- but you have to be specific. You have to come into us with a specific problem."

He replied, "I'll be specific. I suggest you tell this critical audience precisely what trade associations can do and cannot do on the following subjects." He then listed research on production or product innovations; research on distribution; marketing and merchandising surveys; cooperative advertising; cooperative promotion; production and quality standards.

"Well", I said, "You might as well go on and list publication of trade journals, government labor relations, consumer relations and dissemination of statistics."

Of course, Mr. Mortensen also mentioned cost statistics and credit statistics and, believe it or not, he even whispered price statistics.

I assured him he was getting way over my head. I explained that with the exception of a few well-known fields, like promotion and research and government relations, the legality of trade association activities depended upon a multiplicity of factors -- upon how it is done and how good your lawyer is who is advising you, the purpose and effect of your activities and size of the association. That is what I call the "rule of reason". It involves the membership structure and geographic area involved and the extent of control of the product, market impact and all of those things.

Now, of course, this alleged conversation with Mr. Mortensen never took place. I use it merely by way of illustrating why I am not going to talk about trade associations. Instead, I am going to talk about the F.T.C., which is my favorite subject these days.

Mr. Booth, on my right, said to me a few minutes ago "You are almost a year old in your new job." I replied that I had been a bureaucrat for nine months. This is a well known span of time and, perhaps, I am not even born yet.

The first thing I would like to bring to your attention today is that we have an immense jurisdiction; that was indicated by the introductory remarks of your chairman.

We have the job of preserving the private enterprise system.

The philosophy of our system is that we regulate business activities by competition and we have to see that this competition is maintained and maintained fairly.

As you all know, there are three basic acts in the antitrust field -- the Sherman Act, the Clayton Act and the F.T.C. Act. Now, I say that those acts should be read and administered together -- that they should be considered as inter-related expressions of our national antitrust policy.

Some of my lawyer friends in the audience will reply, "That is all very well, but they never have been interpreted or administered that way." Of course, I agree that there are not only inconsistencies in their wording but there have been inconsistencies in their administration. However, I think that those inconsistencies have been magnified out of all reason and out of all proportion by what I like to call "unrealistic legalisms".

We have this "hard" competition versus "soft" competition concept that grew up before last January. I, of course, mean by that a year ago last January.

In other words, the "hard" competition theory is our Sherman Act and F.T.C. Act, which compel competition and prohibit people from getting together to fix prices, or restrain trade by agreeing not to compete in a certain field.

We then have the Robinson-Patman Act, which has been construed by some to be "soft" competition because it says that you must not discriminate in price and therefore you must not compete too vigorously.

I don't take that view. I think that if the three acts are administered properly by the F.T.C. and the Department of Justice, who are now in close liaison and in harmony with each other, that they need not be inconsistent. As I like to put it, the gearing of the privilege to compete with the obligation to compete fairly need not necessarily be inconsistent.

That leads, of course, to the difference between the Department of Justice and the F.T.C. Some people say that we are both administering the same laws and that we flip a coin to see who takes the cases. I don't agree with that theory either and that was the subject matter of the speech I gave last week. I said then that the Department of Justice is primarily the prosecutor, whereas the F.T.C. is an administrative agency. It was designed by Congress to be a body of experts and to consist of lawyers, economists, statisticians and accountants and other business experts, who were to practice preventive or regulatory law.

"There again that is all very well," our critics say, "but the courts have suggested that you have failed in your expert capacity." Well, we are trying to remedy that, but still the legislative intent is there and the failure, I think, if there has been a failure, has been in administration and implementation and not in the purpose for which the commission was set up.

Certainly we should not extend the per se philosophy. I cannot get away from my legal terms. Most of you know what that means. That means the philosophy which has grown up in recent years, where certain activities, even some activities of trade associations, have been held to be illegal as such. You do not have to prove any cpmpetitive effect. You presume competition is injured by the very fact that the practice is engaged in.

The courts have, I think, been extending that doctrine and, of course, certain agencies of government have asked the courts to extend it.

The F.T.C., being an administrative agency and not a prosecutor, will from now on, as far as I am able to determine F.T.C. policy, examine all marketing and economic factors to try to ascertain whether a certain practice is unfair or injurious and that, I think, is one of the purposes for which it was established.

A few weeks ago I appeared before the House Appropriations Committee and started giving my talk as to how our economists were going to examine all relevant economic factors and one of the gentlemen said, "Young man, when you use the word 'economist' down here that just cuts your appropriation in half."

Well, I told him that I was using the word in its true meaning and that I realized that it had acquired a secondary meaning in Washington and elsewhere. I told him that I was talking about a middle-of-the-road economist. Well, that didn't please him either. He just did not like the word "economist".

That is, perhaps, one of the troubles we run into because the Commission was set up to resolve economic problems and economic questions and, in my judgment, we merely use our legal processes to resolve those questions.

Some people will disagree with that statement. However, I think marketing is primarily an economic problem. I tried to explain that to the Congressional Committee -- how I wanted to build up our Bureau of Business Economics and have our economists in the case from the beginning to the end. I said they should take part in the initiation of the case and in establishing the theory of the case because you have to know what your theory is before you know what the remedy should be. However, I could not sell that to that committee. I hope that I can do better with this audience and also with other audiences. They just would not go for the word "economist" and so I don't know how my appropriation is going to come out.

I would like to say just a word about small business. I have recommended to the Commission that we establish within the Commission a small business section -- a Small Business Division -- to show that the present Commission gives special recognition to the problems of small business.

One of the things that division will do will be to help applicants who complain about competitive practices. Some of them say they file their complaints with the Commission, that they are thrown into the hopper, and that is the last they ever hear of them.

If we can establish this Division it will help the small business people when they come to Washington and want to know what has happened to their case.

The place that small business has in our economy is startling when you examine the figures. Nine out of every ten manufacturers are small manufacturers. Half of the people employed in the manufacturing industry are employed by small business. One-third of the total output of this country is by small business. The head of the National Retail Drug Association said not long ago that of the hundred and fifty million dollars that went through the retail stores in 1952, eighty per cent of it went through small retailers.

Then, of course, in the distribution field, small business dominates. The small wholesalers and retailers are the wagons that carry the manufacturer's goods to market and for that reason I have always said that small business and big business are interdependent. One could not survive without the other.

I think that in Washington today there is a greater awareness of the problems of small business than ever before.

Now, I would like to say something about fair trade. The F.T.C. does not have any role in administering the fair trade laws. However, I take the position that neither do we have the role of scuttling fair trade. Congress has now spoken on this subject twice and the last time very emphatically. Regardless of individual beliefs, I think that it is the job of every governmental agency to try to carry out the intent of Congress. As long as I am Chairman of the F.T.C. I am going to do what I can not to interfere with what I believe to be the intent of Congress. If they want to repeal fair trade then that is their job. I don't think we should repeal it by administrative interpretation.

I would like to close with the thought that business itself is on trial in Washington. You perhaps think the Republican party is on trial but I think that business is also on trial. Businessmen are closely associated with some branches of this administration. They have been brought in to administer various departments and bureaus, and believe me, they are working hard and, in my opinion, doing a swell job. Some of them, however, are running into difficulty from special pleaders -- a small minority who want some special advantage.

I think that all business must place public interest ahead of private advantage. The vast majority are doing that. However, I do think there is a small minority of special pleaders. I plead with them to reform.

Thank you.

MR. MORTENSEN: I would like to thank you very much, Chairman Howrey, for that very interesting and enlightening speech.

I think it is very nice for Chairman Howrey to answer questions for us.

Are there any questions?

QUESTION: How do you define small business?

CHAIRMAN HOWREY: Well, I don't have a definition with me. These figures I gave, I am sure, were based upon a definition. However, I would like to fall back behind the cloak of ignorance and say that in the F.T.C. we don't have to define small manufacturing, which, I presume, is your question, because our small business people are largely in the distribution field. Most retailers and wholesalers, with a few major exceptions, are in the field of small business and I will let that be my definition. I will not try to set a dollar amount.

QUESTION: You spoke as though there were no violations per se of the antitrust laws and, of course, the Supreme Court has said that price fixing is, per se, a violation. Would you talk about that?

CHAIRMAN HOWREY: I did not mean to leave that impression. My words were, I believe, that we should not extend the per se doctrine. Not only has the Supreme Court held that price fixing is illegal but Congress has also asserted that certain practices are illegal as such. I think right away of the Robinson-Patman Act, Sections 2(d) and 2(e), which outlaw, as such, the granting of certain allowances unless they are granted to all customers on proportionally equal terms.

MR. MURPHY: Chairman Howrey, we are indeed indebted to you for your splendid exposition made here today. Thank you very much.