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Private Monopolies

EXTENSION OF REMARKS

OF

HON. J. W. ROBINSON

OF UTAH

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 24, 1938

STATEMENT BY COL. CHARLES H MARCH, FORMER CHAIRMAN OF THE FEDERAL TRADE COMMISSION

Mr. ROBINSON of Utah. Mr. Speaker, under the leave to extend my remarks in the RECORD, I include the following statement by Col. Charles H. March, former Chairman of the Federal Trade Commission:

MONOPOLY ON DEFENSE THROUGH AGES—AMERICAN BATTLE INVOKING LEGISLATION APPEARS IN MANY FORMS—"RULE OF REASON" VIEWED AS ONE OF OBSTACLES TO REGULATION

(Editor's note: Charles H. March, Republican Commissioner of the Federal Trade Commission, first appointed by Coolidge and reappointed by President Roosevelt, makes a plea for straight thinking on monopoly, and advances his own views with respect to the present national situation in an interview with and by Lucy Salamanca.)

"Granted," says Charles H. March, Republican Commissioner of the Federal Trade Commission and twice chairman of that body, "that the giant monopoly is abroad in the land; granted that it will destroy the very foundations of our democratic Government if allowed to go uncontrolled; and granted that the whole world is now in revolt—and justly—against the philosophy of unnecessary scarcity which has been the philosophy of private monopoly, I still urge upon the American people the necessity for some good straight thinking at this time on this vital subject.

"Furthermore, I contend that the question is simple, the remedy direct, and the law adequate. In my opinion, the present situation with respect to this grave economic condition has been aggravated, not by lack of adequate legislation but by emasculation of that legislation which we now have. My long experience as a member of one of the United States Government's oldest independent agencies, charged with the quasi judicial functions of preventing unfair methods of competition in commerce and of making investigations into industrial abuses, has convinced me that when the Supreme Court read into the Sherman antitrust law the so-called 'rule of reason,' it gave great impetus to the formation of monopolies; it confirmed them—however unintentionally—in their monopolistic profits and their inflated capital structures and accentuated the holding-company menace."

"Please remember," I suggested, "that this is for the great American public—an effort to clarify some of the confusing and conflicting arguments that are being hurled at its head—and the 'rule of reason' doesn't mean a thing to the layman."

"That's right. It doesn't, and it should. I'll come to that. What the American public does know is that we are now in the midst of a business recession, that unemployment is still an acute problem, that many are in want in the midst of plenty. The public knows, too, that recently President Roosevelt requested that the Federal Trade Commission make an investigation into this situation, to determine the effect of monopoly upon it, and whether or not monopolistic practices can be held responsible for it. I am not at liberty, of course, to comment upon this at this time. But the American public has only to go as far back as the last depression to determine for itself that certain practices of a monopolistic nature were in large measure responsible for that debacle.

"I personally believe that the last depression was traceable in no small degree to monopolistic practices on the part of large businesses, many of them excessively capitalized. These practices were not controlled at the time, because the whole country had been so blinded by prosperity that the growth of monopolies had seemed actually beneficial rather than dangerous. But they charged more than the traffic would bear and exploited their positions without sufficient regard for the consequences.

"In reducing competition they seemed to be on the way to greater success. Actually, however, fewer people were able to buy the products of those who had concentrated output in their own hands, for such concentration had deprived many of their livelihood. The result, though often called overproduction, might equally well be termed underconsumption, for many of those who had been consumers lost their purchasing power when they were no longer able to fight against the methods used by their larger competitors.

"All this is directly contrary to the principle on which our Government was founded—that of equal opportunity for all who are fitted to improve their position by reason of their energy and initiative. If there is still to be anything distinctive about our national character, we must preserve forever the right of every man and woman to use his brains and energies to the full, and to reap a fair reward from this use. I fear we have taken the sturdiness of American individualism too much for granted. It is time we examined this American characteristic again, to see whether or not we are losing it, and to decide whether or not we wish to lose it and to replace it with reliance on the Government or on others."

"Such dependence would lead us, would it not, into the totalitarian state, or socialism?

"The totalitarian state, socialism, fascism, communism, or any other 'ism' that has ever lured man with the hope of redressing his wrongs, down through history. This problem of the concentration of wealth into the hands of a few has always been a world problem. It underlies the civil war in Spain, the Communist revolution in Russia, and the death of democracy in other countries. It has toppled kings from their thrones. It will drive to disaster dictators, economic or political, who thwart the masses in their efforts to achieve a better standard of living and greater economic security. It is an ancient question and, curiously, when it recurs, it has always been novel and acute. This is because self-seeking enterprisers have been adept at conceiving and adopting new monopoly devices soon after society showed itself able to comprehend and control the contemporary problem. Thus the problem has always been a new one, requiring a new concept and a new analysis.

"In the present recurring wave of interest and preoccupation with monopoly I read the natural result of legislation rendered inefficient in interpretation. Back in 1873, Henry Ward Beecher declared that he counted among the dangers of those times 'one which has developed out of the prodigious rapidity of the accumulation of enormous and consolidated wealth.' He cited in particular the railroads of his day. 'I fear that the time will come,' Beecher prophesied 'when the workingman will rise up and say that he has no appeal to the courts no appeal to legislatures; that he is bought and owned by consolidated capital. And when that time comes, unless it brings reformation, it will bring revolution.'

"Well, it brought reformation some years later in the Sherman antitrust law, passed in 1890. And between those nineties and the election of President Wilson in 1912 the American industrial scene underwent a vast change. Great and numerous national industries passed into the hands of powerful corporations.

"With this ever-growing power of monopoly the Federal Government demanded the creation of the Federal Trade Commission to cope with the arising problems. In Wilson's first term the Federal Trade Commission was created for the administration and enforcement of the antitrust laws, and the Clayton Act was passed, revising and strengthening the Sherman Act. For the first time in our national history monopoly was compelled to lay its cards on the table and justify its actions before trained experts in law and business. Office records, letters, contracts, all the practices of monopoly, were subpenaed and brought before the Commission.

"What has happened between that day and this that has caused monopoly to get such a hold upon our business enterprises? I will tell you. First, however, I would like to make two things clear. I believe that most businessmen—big or little—are honest. My second contention is that there is nothing the matter with our present law; that as it stands, if it were executed in its spirit and to the letter, it would eliminate those evils it was designed to wipe out."

Commissioner March broke off to inquire abruptly, "Have you ever read that law, designed to protect you and your neighbors against private monopoly and to preserve individual business enterprise and safeguard the unorganized masses of labor, agriculture, and consumer from the unbalanced economy of organized capital? Everyone who is having anything to say about this present question of monopoly should certainly read it. It states in direct language

just what it means: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign countries, shall be deemed guilty.' That's clear enough. It also states: 'Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.'

"Similarly, the Federal Trade Commission Act states the functions of the Commission with equal clarity, and there can be no question of the simplicity and directness of the language used in section 7 of the Clayton Act of 1914. But, just as it is one thing to inveigh against monopoly in general and quite another to attack it specifically, so have our laws proved to be one thing on the statute books and another in the courts. In now historic instances the Supreme Court has refused to decree dissolution of certain trusts, holding that not mere size and power but behavior is the test of unlawful monopoly. This is the familiar doctrine of good trusts and bad trusts. Under such a doctrine it is possible for a concern to dominate an entire industry, and eliminate competition, yet not be in an unlawful monopoly. This doctrine of good trusts and bad trusts was but a development of the 'rule of reason,' where the Supreme Court held that not 'every' combination in restraint of trade, as the statute distinctly reads, is a violation of law, but only those combinations which 'unreasonably' restrain trade.

"Out of this interpretation of the laws made by Congress has grown all the confusion, the looseness, the uncertainty, that has encouraged the development of monopolistic practices, safe from the law, in this land. Under the administration of Theodore Roosevelt some of the trusts were prosecuted while others were not molested. The Standard Oil Co. combination was proceeded against, but the United States Steel Corporation was not disturbed until during the Taft administration. Theodore Roosevelt was a vigorous advocate of the doctrine of reasonable restraint of trade held by the minority of the Supreme Court in certain cases, and he was so far convinced that the steel corporation was a good trust that he approved its acquisition of the Tennessee Coal & Iron Co. during the panic of 1907.

"President Taft, on the other hand, showed his disagreement with the philosophy of his predecessor when he stated in a message to Congress: 'I venture to think first this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to best judgment. It is to thrust upon the courts a burden they have no precedents to enable them to carry, and to give them a power approaching the arbitrary the abuse of which might involve our whole judicial system in error.' He was referring, of course, to the power the Supreme Court had taken of injecting into the case the question of the 'reasonableness' of the combination under trial.

"We have, as a matter of fact, been operating for some 25 years under an amendment which Congress has sanctioned only by its silence and which it formerly refused to sanction by legislative enactment. Nothing that any outside critic of the Court could say can match in vigor and logic the dissenting opinion of Justice Harlan, who charged: 'The Court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act but has usurped the constitutional functions of the legislative branch of the Government. With all due respect for the opinion of others, I feel bound to say that what the Court has said may well cause some alarm for the integrity of our institutions.'

"Two years before, Senator Nelson, on behalf of the Senate Judiciary Committee, had reported on a bill amending the Sherman antitrust law and said that 'to inject into the act the question of whether an agreement or combination is reasonable or unreasonable would remove the act as a criminal or penal statute indemnite and uncertain rule, hence to that extent utterly nugatory and void, and would practically amount to a repeal of that part of the act. And while the same technical objection does not apply to civil prosecutions,' he went on, 'the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law.' Yet, notwithstanding this attitude of Congress, of the President and the prior decide of the Supreme Court itself, less than 2 years later the Supreme Court reversed itself and held that the Sherman Act did not 'inhibit every combination in restraint of trade, as its terms provide, but only such combinations as are in unreasonable restraint of trade.'

"But are these not direct examples of the invasion by the judiciary of the constitutional domain of Congress?"

"Exactly. And it has practically rendered null and void our laws against monopoly and monopolistic practices. It makes it practically impossible to prosecute such cases, for how can evidence be presented to determine the intent and morality of a corporate body? James M. Beck, who was Assistant Attorney General of the United States at the time of the 'rule of reason' decision and later was Solicitor General, expressed it well when he said that the Supreme Court has 'assumed a crushing burden' and that it would involve determining 'the limits of combination, the lawful and unlawful forms thereof, the economic necessities of a people, the degree to which commercial methods, the invalidity of different forms of competition, the degree to which the telegraph, the railroad, and the steamship may be utilized in consolidating different and competing units into a more efficient and noncompeting unit, the proportion of a given trade or industry that a given individual may enjoy, how far prices may be regulated to prevent loss, and how far production can be restricted to prevent waste.' He might well have stated, as he did, that the Court must now be the arbiters of conflicting schools of philosophy and economic ideals' and have asked, as he did, which was right, 'Jefferson and Adam Smith or Hamilton and Karl Marx, the individualism of Herbert Spencer or the socialism of John Ruskin? I cannot envy them their self-imposed burden.' Nor can anyone, it has been clear in the intervening 25 years."

"How do you account for the fact that public interest in the question of monopoly did not take a spectacular upturn in the face of all this?"

"The World War intervened. During our participation in it few cases were initiated, and the results of the 'rule of reason' decisions in the Standard Oil and American Tobacco Co. cases were not immediately apparent. Within a few months of these decisions, however, the Government under President Taft's administration had filed suit for dissolution of the United States Steel Corporation. The suit was disposed of in the lower Federal court in 1915. It was argued before the Supreme Court in 1917 and reargued in 1919. In 1920 the Supreme Court decided unfavorably to the Government, without mentioning the rule of reason as such, but resting its decision upon the conclusion that whatever restraint of trade or monopoly did exist was not 'unreasonable.' The Court asserted that 'the law does not make mere size an offense or the existence of unexerted power an offense.' Well, what does that mean? That there may actually be 100 percent monopoly of an industry and yet be no violation of the Sherman law. How can any government hope to wipe out monopoly in the face of such decisions?"

He continued: "One instance in particular is interesting as an illustration of barriers erected to the efforts of the Federal Trade Commission to enforce section 7. This is the ruling of the Supreme Court that even though the stock of a corporation be acquired in violation of the law, the Commission has no power to remedy the situation if the stock so acquired were sold to acquire the physical properties before the Commission filed its complaint. Since there is necessarily a lapse of time between any preliminary inquiry and the issuance of a formal complaint, offenders corporations may readily use it to acquire the physical properties of corporations whose stock they have previously acquired in violation of law."

"How can you reconcile such facts as these with the pledges of both political parties to enforce and strengthen the antitrust laws?"

"You can't reconcile them. The pledges are futile so long as the Supreme Court sits in judgment upon whether a given monopoly or restraint of trade is reasonable and in the public interest. Consider the last Republican Party platform. It stated that the party favored 'the vigorous enforcement of the criminal laws, as well as the civil laws, against monopolies and trusts and their officials.' Furthermore, the platform 'demanded the enactment of such additional legislation as is necessary to make it impossible for private monopoly to exist in the United States.' But that is the point. We do not need additional legislation to fight monopoly. We need the exact enforcement of that which we have. The last Democratic platform pledged 'vigorously and fearlessly to enforce the criminal and civil provisions of the existing antitrust laws,' and added 'and to the extent that their effectiveness has been weakened by new corporate devices or judicial construction, we propose by law to restore their efficiency in stamping out monopolistic practices and the concentration of economic power.'

"It is a fight that has gone on through the ages, and to each new age it is newly vital. Away back 640 years before Christ there was one Thales of Miletus who used his knowledge of astronomy to forecast an excellent wine crop. Whereupon he bought up all the wine presses of his neighbors at a low figure in advance of the season. Come harvest time, his neighbors were forced to buy back their wine presses at exorbitant rates. Aristotle makes reference to this earlier bit of business in his Politics and names the practice 'monopoly,' or 'exclusive sale' in the Greek.

"Yet today we still have much to learn in controlling the evil. An English writer prefaced his study of the question in 1622 with the remark that because the name and nature of monopoly 'is more talked of than well understood of many' he had thought it not unreasonable 'to bestow some special pains in the diligent investigation thereof.' The conclusion is one that can be recommended in the confusion of today's discussions of the subject. Conflicting remedies and philosophies are being advanced on every hand. The question is being entangled in unnecessary complexities, shrouded in obscure, sometimes fanciful interpretations, and attacked and denounced from such diverse and unrelated angles that the whole matter has taken on for the public generally the aspect, indeed of 'confusion worse confounded.'

"There is one thing we can all understand. Abraham Lincoln voiced it when he said this Nation could not exist half slave and half free. Neither can this Nation exist half monopolistic and half free for monopoly by its very nature controls the freedom of the people. But we can have a Nation free of monopoly if we enforce the laws against monopoly. There is no other way to realize the American dream or to preserve the American ideal."

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