

Statement of

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TO A SUB-COMMITTEE OF
THE SENATE COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE

ON S. RES. 241, 80th CONGRESS, 2d SESSION

June 2, 1948

STATEMENT OF ROBERT E. FREER

Mr. Chairman and Members of the Committee:

It is difficult to comment on Senate Resolution 241 for a number of reasons. No one can quarrel with the language of the resolution authorizing an inquiry by the Committee into business practices and the impact upon consumers and business men of the decision of the Supreme Court in the Cement case and of other recent decisions of a similar nature. As a matter of fact, the Commission welcomes an opportunity to report to Congress on this subject. Section 6 of the Federal Trade Commission Act directs the Commission to make investigations into business practices for the Congress and to report recommendations for legislation on similar matters. I do have some hesitation about the provisions of Section 2 of the resolution because it suggests the need of legislation to legalize practices which were found to be illegal by the Commission and the Courts in these cases.

The Commission has made numerous investigations of basing point and similar practices over a period of years, and I have with me copies of several reports to the Congress and to the President, showing the extent of the studies which were made and conclusions which were reached. These reports involve not only basing point practices in the Cement industry but in other industries as well. I would also direct your attention to the proceedings of the Temporary National Economic Committee which required several years of time and the expenditure of several millions of dollars. A great deal of attention was directed to the basing point problem in its various aspects by the Temporary National Economic Committee which had among its members representatives not only of the departments and agencies concerned with industrial problems but also democrats and republicans from the House and Senate. You may recall that the Temporary National Economic Committee recommended legislation to Congress which would declare the basing point system to be unlawful regardless of whether it was supported by combination and conspiracy.

The suggestion inherent in the resolution that legislation may be needed to legalize what was condemned by the Commission in the Cement case is a serious one and it goes to the very roots of the anti-trust laws. I think it should be made plain from the outset that legislation which would approve any practice prohibited by the Commission's order in the Cement case would be legislation to permit combination and conspiracy to fix and maintain prices or systematic price discrimination practiced for the purpose or with the effect of eliminating competition. The Committee should not approach this problem with any idea that the practices prohibited in the Cement order can be made lawful without nullifying the Sherman Act and the anti-monopoly provisions of the Federal Trade Commission and Clayton Acts. Thus, the fundamental issue presented by the resolution is not whether legislation should be considered to protect any particular business group, but whether the anti-trust laws should be retained as a basic principle of our legal and economic structure. I venture to suggest that no inquiry can be made by this Committee or by any other agency of the government into every phase of anti-trust law enforcement and the social and economic value of such laws, with \$15,000 or by March 15, 1949.

The Commission is entirely willing to cooperate with this Committee in examining the theories involved in the Cement case or the applicability of such theories to any other industry, but it should be made plain at the outset that the Cement case does not have the radical and revolutionary effect that has been attributed to it in certain quarters. The decision of the Commission was to the effect that the Cement industry had been engaged in a combination and conspiracy to fix and maintain prices and that systematic use of the basing point method of pricing in that industry had the effect of eliminating competition. This decision was affirmed by the Supreme Court of the United States and I do not feel it appropriate at this point to seek to justify or defend it. I do commend to your careful scrutiny, however, the very detailed findings of fact by the Commission showing the methods by which the basing point system of uniform delivered prices in that industry was maintained. Certainly, it is unwarranted to assume that the effect of this decision is to outlaw all delivered prices or to require only f.o.b. mill prices. The Cement case is simply a reaffirmation of a principle which is a fundamental one in the law and economics of this country that collusion and combination and conspiracy to fix and maintain prices is contrary to the American system of free enterprise. The Federal Trade Commission has always stood for preservation of the competitive system and has been directed by Congress to prevent unfair practices which interfere with the competitive system. The fundamental approach in the anti-trust acts generally, and in the Federal Trade Commission Act particularly, is that competition is not only the life of the trade but also the primary force which will insure equal opportunity of business enterprise and the natural regulation of prices in the arena of the free market. The Commission has no desire to suggest how prices should be quoted in any industry or to advise or participate in any decisions of business management.

The difficulty with suggesting an amendment to the existing law which would permit practices prohibited by the Commission's order in the Cement case is that any such legislation would necessarily be a direct contradiction of the fundamental principles of the anti-trust laws. I say this because there is nothing in the Commission's order in the Cement case which prohibits conduct on the part of any seller of cement which is not a part of a combination or understanding to eliminate competition, or which is not practiced systematically by the industry for the purpose or with the effect of eliminating competition in price between sellers. The Commission does not wish to be in a position of defending its decision in the Cement case but it certainly is interested in advising Congress of its position that the anti-trust laws, ineffective as they may be, are good insurance against disappearance of our system of free enterprise.

I am sympathetic with complaints from individual industries and individual industrialists that competition often is a ruinous process, that often it is harsh and brutal, and that at times it results in inequities. No one can deny that this is so. Members of the Committee have no doubt received communications from individual business men indicating that immediate ruin faces them as a result of the Cement decision. Such arguments were made to the Supreme Court and similar fears have been expressed to the Commission. It is our view that some of these fears are the result of misapprehension of the decision, some of them may forecast temporary dislocations due to shortages or to local inequities that may exist for a time following

use of competitive prices on cement, and some of them may be attempts deliberately to misrepresent the situation. Really honest competition in any industry which has been subject to monopoly control over any extended period of time may actually force some producers out of business by removing the umbrella of monopoly control from the heads of high-cost, obsolete, or badly located plants. There is no question but that competition has this effect.

If you gentlemen are persuaded by evidence of some of the realities of competition that it is undesirable, and that business should be permitted systematically to restrain competition, to keep in operation badly located or inefficient producers, then you must face the issue squarely and provide at the same time some means of protecting the public from selfish excesses that must necessarily attend the right of any group of business men to control an industry and to meet together and act for their personal and private benefit. Even the most ardent foes of competition as a regulatory force admit that if it is systematically restrained and eliminated there must be some responsibility to the public which can only be borne by the government.

If we are to legalize combinations in restraint of trade or systematic price discriminations for the purpose of eliminating competition, the government must be accorded a voice in the regulation of such combinations and collusive arrangements to protect the public interest. Frankly, my thirty years of experience in legal matters involving the government and business, which included representation of railroads, express companies and other corporations as well as more than twenty years in the Interstate Commerce Commission and the Federal Trade Commission, convinces me that it is undesirable to substitute for our present antimonopoly laws, under which government's duty is only to keep competition free and fair, a system of regulation of business under which it becomes the government's duty to see that industrial prices and practices are kept "reasonable" in the public interest.

There is nothing in our history of public utility regulation, either by State or Federal government, which would lead me to suppose that any such regulation would be advisable in such industries as steel, cement, and the like. Some of you gentlemen on the Committee have been in business. You have engaged directly in the struggle to manufacture and sell a product. I feel sure that your experience in business has been such that you recognize the dangers which would flow from permitting trade groups to get together to fix prices and marketing practices. There is always in any industry the marginal fringe of high-cost producers. This may be due to bad management, obsolete plant equipment, bad location to raw materials, or bad location to the market. The temptation in any of the formula pricing systems or price fixing combinations is to hold an umbrella over the marginal producer and to fix prices at a level which will be high enough to enable the marginal high-cost producer to operate at a profit. If Congress so relaxes the anti-trust laws as to permit such conduct, it cannot long escape the establishment of some agency to pass upon such situations. This has become necessary in those fields of commerce which have been removed in part from the anti-trust laws -- railroads, utilities, and the like. The process of determining what is a fair rate for a utility or a fair value on the property of a railroad or a power company for rate-making purposes has been known to require from five to ten years of litigation before administrative

agencies and courts up to and including the Supreme Court of the United States, so that when a final decision is reached it has only historical significance and is wholly inapplicable to contemporary conditions. One classic example of this situation is an order of the Illinois Commerce Commission made on August 16, 1923, setting rates to be charged by the Illinois Bell Telephone Company in the city of Chicago. The matter was in the Supreme Court of the United States at least three times, and a final decision was reached in 1934 when the Supreme Court after 11 years finally rejected the Telephone Company's contentions that the rates established by the Commission were confiscatory (*Lindheimer v. Illinois Bell Telephone Company*, (1934) 292 U.S. 151; 54 S. Ct. 658). This case, like so many others involving the question of whether the prices or rates fixed by a regulated monopoly are fair or reasonable, required the most meticulous, voluminous, and protracted court examination of the properties, practices, accounting factors, and prospects of the company so that in the last analysis the regulatory powers of the public utility commission were practically ineffective.

You are all familiar with the length of time which it took to reach a final decision in the Cement case, involving as it did several scores of producers and practices engaged in over a period of years. I venture to say that if the Commission had been required to examine the books of accounts of the industry to determine whether the prices charged for cement in any one period was "reasonable," the case would have dragged on beyond the normal life expectancy of the youngest of the eminent counsel who participated in its trial.

I have a further reason for a dislike of modification of the anti-trust laws which would require regulation by the government. We are all of us human beings and subject to the fallibilities of the species, including the likelihood of mistaken judgment. This applies equally to business men who would seek to regulate their affairs by agreement and understanding and to government officials who would supervise such agreements. If a monopolist makes a mistake in business judgment or if a regulatory agency having control of an industry makes such a mistake, the consequences might be disastrous to the nation as a whole. On the other hand, a mistake in judgment on the part of a wholesale grocer, a steel fabricator, a paint manufacturer, or any other individual concern in a multiple unit industry under free competition, will usually result only in the failure of the one making the mistake.

Furthermore, vigorous price competition plays a part in our economy which could not be played by any organized group in business or by any government agency. If any federal commission were to find unreasonable a price for cement, for instance, which had been fixed by the industry on the basis of a profit on the marginal producers' cost of doing business and to order that price reduced to a level which reflected the low-cost producer's cost of doing business plus a reasonable profit, with the necessary effect of driving out of business all the high-cost operators, I have no doubt that such an order would be declared by the courts to be confiscatory and, therefore, unconstitutional.

I am sure that this Committee would not wish to see any government agency empowered directly to order a man out of a particular business because of his inefficiency or bad location. Free competition may do this, but I, for one, would not wish to have the responsibility either of saying that a price was reasonable which kept the high-cost cement producers in

business and penalized the public by depriving them of the benefits of lower prices which could profitably be charged by low-cost producers; or of saying to the high-cost producers "You must go out of the cement business."

At the present time the Federal Trade Commission has 562 employees. Messengers, clerks, stenographers and administrative employees engaged in keeping records and other "housekeeping" activities constitute slightly more than half of the total. This leaves somewhere in the neighborhood of 260 attorneys, accountants, investigators, and other persons dealing directly with business practices, including the five Commissioners. The Standard Industrial Classification Manual, prepared by the Technical Committee on Industrial Classification of the Bureau of the Budget in 1941, lists 1530 different industries in the United States and contains 43 pages of fine print listing manufactured products from "abacuses" to "zwickback (machine made)." The Sixth Edition of the Directory of Commodities and Services of the Office of Price Administration (1945) lists 245 pages of commodities and services, a total number of approximately 10,000. If Congress should adopt any modification of the anti-trust laws which requires a test of "reasonableness" of price fixing devices or discriminations in price which cannot be justified by cost differences, it would no doubt empower some agency of the government to inquire into the "reasonableness" of such practices and of the prices so fixed. If Congress were to impose such a duty on the Commission, for example, there would be approximately 40 commodities and services and 6 different industries for every one of the present Federal Trade Commission staff not engaged strictly in administrative and clerical work. Of course, the Commission has at the present time only about 90 professional people engaged wholly or substantially in anti-monopoly matters, so that to divide up the responsibility for industries and commodities between these men would result in an even more ridiculous situation.

I do not think that the task of regulating the "reasonableness" of monopolistic practices and of curbing "unreasonable" excesses through orders to cease and desist or court action would be any less complicated task than confronted the Office of Price Administration during the war, and the Committee is aware of the many thousands who were employed on that work.

The necessary implication of the resolution under consideration is that the Cement decision and other recent Court decisions upholding anti-monopoly orders of the Commission require legislation to modify the anti-trust laws and interpret them. This can only mean that the fundamental principles of the anti-trust laws are being questioned since there is nothing in the Cement decision nor in the other Supreme Court decisions, which is not based squarely on the fundamental principle of the law that price fixing combinations or discriminations which injure competition are unlawful and against the public interest. Congress cannot, in my opinion, frame any legislation which would legalize the practices prohibited in those cases and at the same time preserve the anti-trust laws as insurance of the continuance of our free enterprise system.

It is interesting to note that in all of the totalitarian governments in modern history freedom of economic enterprise has been systematically restrained and business has been run either by a few large aggregations of private capital supported by the government or by the government itself. In any case, freedom of enterprise and the right of the individual to take

his chance in competition and either to go broke or to run a corner shop into a big business simply does not exist. England is the only example I can recall of a free country which has permitted wide latitude in industrial combinations, many of them operating either under loose supervision of the government or in cooperation with the government. I understand from press reports that there is now pending in Parliament a proposal to establish an administrative agency patterned after the Federal Trade Commission with similar powers to prevent price fixing and other restraints of trade and commerce.

In conclusion, I would like to reiterate the position that the Commission does not oppose any inquiry into the operation of the anti-trust laws as manifested in the Cement decision or any of the other recent actions of the Commission or of the Department of Justice, but it must be recognized from the start that in legalizing any of the practices found to be illegal in those cases, the mainspring of the free competitive system must be impaired. I also wish to express my firm conviction that legislation to relax the anti-trust laws must necessarily provide some substitute check on the part of the government to protect the public, and that such regulatory check is likely to prove far more onerous than any localized discomforts which may result from the judicially sanctioned breaking up of price fixing combinations designed to protect inefficient or badly located producers from the rigors of competition.