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STATEMENT BY

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MEMBER FEDERAL TRADE COMMISSION

IN DISCUSSION WITH

LEADING MEMBERS OF THE HOUSE OF REPRESENTATIVES

STATE OF HAWAII

ON

FEDERAL-STATE COOPERATION REGARDING

ANTITRUST AND TRADE REGULATION

HONOLULU, HAWAII

AUGUST,1962

Introduction

It is with considerable humility that I have accepted your kind invitation and now undertake to discuss with you Federal-State cooperation regarding antitrust and trade regulation. That is true because you and other leaders in the Legislature of the State of Hawaii last year showed the way to closer cooperation between the Federal Government and your State of Hawaii in matters of antitrust and trade regulation. You did that through the enactment of an antitrust law which not only parallels in many respects, but exceeds in other respects, Federal legislation dealing with unfair competition, combinations, conspiracies and monopolies in restraint of trade. Thus, you evidenced cooperation in effectuating a national public policy of antitrust to maintain a free and competitive enterprise system. Your bold and clear action in that respect would justify one in concluding that we should be asking you to visit Washington and to discuss with Federal officials ways and means for enhancing Federal-State cooperation on antitrust. In any event, your invitation served as a good excuse for my visiting your beautiful and wonderful State of Hawaii. So I am here, and I shall proceed with

one of the purposes of my visit - my discussion with you.

What are some of the advantages to be gained from closer Federal-State cooperation in antitrust and trade regulation?

1. Further cooperation between the States and the Federal government would aid in presenting a stronger front to the forces of monopoly and unfair competition. There would be less hiding behind State lines by lawless traders taking advantage of their intrastate and interstate competitors.

2. We would have fewer cases where the intrastate businesses are hampered and hindered by unfair acts and practices of large firms carrying on interstate transaction Likewise, we would have fewer cases of large intrastate concerns taking unfair advantage of competitors through practices in some instances denied to interstate business but not prohibited by duly enforced State law.

3. Expensive duplication of investigations and other effort may be avoided through coordination of Federal and State activity in this field. A Federal authority may furnish a State authority with information collected by Federal effort when the Federal government lacks the jurisdiction enjoyed by the State authority, and vice vers

4. Substantial benefits may arise from the very fact that the same or similar language appears in provisions of Federal and State antitrust legislation. Where identical or similar language appears at both the Federal and State levels in antitrust legislation, it permits a coordination of effort. In passing, it is noted that the recent antitrust law enacted by your State employs much of the language found in the Federal legislation, particularly the Sherman Act. This enables the State to avoid the delay incident to efforts to have the courts interpret the meaning of the term "found in the law." That is to say, that by following the language of the Federal statute, your State has inherited the wealth of interpretation handed down by high Federal courts. Likewise, as we move along, Federal officials will benefit from the able opinions of the Supreme Court of your State and other states which interpret law not unlike the provisions appearing in the Federal law. The tendency of all of this will be to bring about a substantial degree of uniformity in procedure at both the Federal and State levels.

5. We who are public servants in the employment of

the Federal government should be forever mindful that the Federal government is unable to alone effectuate the public policy for a free and fair competitive enterprise system. Facilities and effort at not only Federal but State and local levels will be required. Built upon the cooperation of Federal and State officials will be the understanding and effort of local businessmen and their lawyers toward bringing free and fair competitive results out of unfair business practices and conditions at the local level.

6. Heretofore trade regulation too often has been thought of by general practitioners and their clients at the local level as something far away in Washington which only lawyers with specialized training and experience are qualified to practice. Such thinking in the past has circumscribed our program for the improvement of trade practices and conditions, and unless we completely discard such ideas, we will substantially restrict the effect of our efforts. Not only cooperation but recognition and utilization of facilities and abilities at all levels must be had.

I

A Background: The Place of Federal Enforcement

With the growth of industry and the coming of an increasingly complex economy came Federal regulation over trade. Indeed, a century had passed since the creation of these United States before the first Federal antitrust statute, the Sherman Act,[1] became the law of the land. Senator Sherman, author of that Act upon which was placed the gloss of the common law, made it clear that he was introducing no radical experiment. Rather, he was endeavoring merely to supplement and bolster what the states had already done, what already existed. Speaking on the floor of the Senate in 1890 he said:

> "This bill [the Sherman Antitrust Act] ... has for its ... object to invoke the aid of the courts of the United States to deal with combinations ... when they affect injuriously our foreign and interstate commerce ... and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that effect injuriously the industrial liberty of the citizens of those states. It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. ..." [2]

An agrarian economy felt the harsh impact of a multitude of impersonal corporations which were rendered even more insensitive by the stockholding trust. 3/ Against this the man on the land rebelled. He saw the industrial entrepreneurs "as merciless and cruel exploiters, completely selfish, living by no rules and guided by no ethics, and in general as denizens of an economic jungle who preached and believed in the Darwinian concept of the survival of the fittest." 4/

Action was demanded and taken. On March 30, 1889 the State of Kansas enacted the first antitrust statute. Two weeks later, responding to a call from Kansas Governor Lyman Humphrey, nine states met in St. Louis to investigate an alleged beef combine. 5/ Within three months following the conference Texas, Tennessee, and Michigan all had antitrust statutes.

With passage of the Sherman Act, however, defendants subjected to state antimonopoly prosecution argued preemption. The Federal law, they pleaded, was supreme; primary jurisdiction lay in Washington, D. C., not the state capital. To this Mr. Justice Holmes replied: "The mere fact that it [the state antitrust action] may happen to remove an interference with commerce among

the States ... does not invalidate it ... [C]ertainly there is nothing in the present law at least that excludes the states from a familiar exercise of their power." 6/

Conceptually Federal and State policies relating to the free and fair conduct of trade are the same. The flow of commerce in the final analysis has no boundaries. The businessman is concerned with business first; the policies of local, state, and national bodies are not necessarily the measure of where and whether he will do business. Yet, the Federal and State governments do not have the same freedom of action; our form of society will not allow that. Thus, to deal with those practices which burden commerce we must join in an active partnership with the States to correct that which is injurious to all. 7/

II

State Legislation and Enforcement

"The Sherman Antitrust Act of 1890 ... was neither the first nor the last of a series of enactments of the same general character. A dozen States had already established constitutional declarations or statutes to the same end.

Two-thirds of the States had fallen in line by 1898. And today almost every state of the union had such a law." 8/ For many states, as for the Federal Government, this legislation was not sufficient. To preserve the type of society which the people have willed monopoly had to be attacked in its incipiency. To achieve the desired end preventive medicine would be more efficacious than surgery. 9/

This the State of Wisconsin understood when it created a "little" Federal Trade Commission whose task it was to insure that "trade practices and methods of competition shall be fair and that all unfair methods of competition and all unfair trade practices are prohibited." 10/

To carry out its task the legislature empowered the enforcement body, the state Department of Agriculture, to move in either of two directions: (1) A complaint against named respondents challenging specific practices may be issued by the Department, and is prosecuted by the Attorney General who, in essence acts as trial counsel before the agency. If the complaint is proved a cease and desist order is issued; (2) The Department may exercise its quasi-legislative power. It may institute

a general order proceeding which will bind all members of an industry. Service is made by publication, and the order may be reviewed by the courts. 11/

As early as 1922 the Department by general order prohibited price discrimination in the sale of gasoline at wholesale. 12/ And by contrast, as late as today, the Federal Trade Commission and the courts continue to wrestle with the problem under the Amended Clayton Act. 13/ The Wisconsin order, according to its attorney general, "bears considerable similarity to the Robinson-Patman Act. However, its 'meeting competition' defense is specifically limited to the competition of another wholesaler selling to the same retailer. This gives an integrated oil company the choice between abandoning this defense or allowing the operator of a captive station to buy from other suppliers; likewise, it applies only to the competition the wholesaler faces, not to competition between his customers and other retailers." 14/

Indeed, from such a state as Wisconsin the scholars of Federal antitrust jurisprudence might learn a great deal. To the oft-met critique that the Robinson-Patman Act is in basic contradiction to the Sherman Act, Wisconsin's chief antimonopoly enforcement officer replied:

"Critics of federal anti-price discrimination statutes tend to put price fixing and price discrimination in unrelated categories and often treat the Sherman Act and the Robinson-Patman Act as though they were inconsistent in spirit and applied to different situations. In our experience, area price discriminations in particular are used as an instrument of promoting price fixing and monopolization. Many an independent business has been induced to sell out to an expanding integrated competitor by the presence or the mere threat of selective price cutting confined to his area of operation or that of his customers. Likewise, many an independent has been induced to join in a price fixing conspiracy because the alternative was the prospect of an immediate price war initiated by his multi-unit, well capitalized competitor. 15/

From Texas and New York have come additional assistance in terms of achieving total antitrust enforcement. Mergers which may substantially lessen competition have been proscribed. 16/ More significantly, however, the law has been enforced. It is as the Department of Justice declared:

"State antitrust action against mergers is particularly significant to maintenance of the vigor of competition in our economy because of the limited manpower of the federal Antitrust Division [and the Federal Trade Commission]. First, the number of mergers in commerce occurring every year is so great that the Division [and the FTC] cannot fully cope with them, especially when the anticompetitive impact is felt primarily locally rather than in a multi-state market. Second, in some of the most important segments of the economy -- such as banking and insurance -- the states have particular responsibility because of the Congressional scheme in the area. 17/ Third, even outside such reserved areas in commerce which have been committed to state monitoring, there is the large number of mergers involving firms not in commerce, although they may affect commerce. Such mergers may well be more susceptible

to control under state antitrust jurisdiction, because Congress did not exhaust the full scope of the commerce clause in the specific federal antimerger law. 19/ These mergers, however, may create clouds over various markets --- the sum of which clouds may substantially inhibit the vitality of national as well as local competition. State antitrust law, then, has heavy responsibilities in the merger field under our system of concurrent state-federal jurisdiction. 20/

These statutory innovations are excellent. Yet, in themselves they mean little for I need not tell you that declared policy is one matter and effective enforcement of the written word quite another. One commentator has stated, "all avenues of explanation for state antitrust inactivity lead inevitably to lack of desire to have and to enforce an effective state antitrust law." 21/ Specifically:

"The key to the enforcement problem probably is the lack of personnel and money required to do the job. Most states make no provision for a special assistant attorney general, or for any special branch. The creation of such a special enforcement office, however, has played a leading role in the stepped-up activity in New York and Wisconsin, and is being tried elsewhere.

"Candor would seem called for at this point. Effective antitrust enforcement clearly is not a job for amateurs, nor for skilled attorneys who are charged with simultaneous enforcement of numerous other laws. Antitrust enforcement requires knowing what to look for, having the skill, time and money required to find it, and having the ability to establish this special kind of case in court. These qualities are not superhuman, but they do not come automatically packaged with a license to practice, nor are they likely to come with the general kind of experience acquired in a political career." 22/

Evidently, the State of California recognizes the necessity for providing the means to accomplish the statutory end. In 1960 the legislature granted a $90,000 appropriation to a special antitrust division within the office of the State Attorney General. 23/ The division's staff consisted then of seven attorneys, including the former chief of the West Coast Bureau of the Federal Antitrust Division. 24/ For the legislature and the people of California results were forthcoming. Within twelve months the new division brought more cases to court than in the previous 57 years of the antitrust statute's history. 25/

The results in California, however, cannot be itemized entirely by a statistical recitation of formal cases. Much as the sight of a traffic officer prevents a driver from speeding, knowledge on the part of the public and the business world that an effective enforcement group is at work often serves to prevent a wrong from occuring. To an extent the Wall Street Journal in a page one story offered two examples of this:

> "... when her husband died recently, a Los Angeles housewife asked a local mortuary to take charge of the funeral and burial. The undertaker informed her tersely that due to an agreement among morticians he couldn't serve the area where she lived and referred her to a nearby 'competitor'.

'I didn't like the other place at all,' she says, 'but the one I wanted simply refused to take my business.'

The woman complained to a special antitrust squad set up last year in the California attorney general's office to deal with such practices. The state lawyers say that by simply threatening the undertakers with legal action they were able to break up the area-assignment agreement." 26/

. . .

"Consider the case of Ralph D' Adamo, owner of a beauty shop supply business in San Diego, Calif. His competitors ganged up on him, he claims, for selling his wares at a discount. Through alleged pressures on the manufacturer of a hair-tinting cosmetic, they cut off his supplies of this product with the result that his sales dropped from $6,200 a month to $700, he says. When word got around that the state was investigating the situation, Mr. D' Adamo began getting supplies of the tint again, he reports." 27/

Nor is the state confined to local violations which the Federal authorities do not choose to handle, even if jurisdiction should exist. Attorney General Wilson reminded us that in 1907 the State of Texas obtained a verdict against the Waters-Pierce Oil Company that finally totaled $1,800,000 after being appealed through all the courts. 28/ To show the people the concrete meaning of antitrust enforcement "this money was placed in specie in a wheelbarrow and rolled up the main street of [the] capital to the State Treasurer." 29/ More recently the same State of Texas acted to prevent the merger of giant Sinclair Oil Company with sales of more than $1 billion and the Texas Pacific Coal & Oil Company. 30/

State antitrust work fills a most important place in the total scheme of antitrust activity. To the extent that states are lax, Federal enforcement correspondingly is weakened. To the extent that states are vigorous, Federal enforcement correspondingly is strengthened. The Report of the Special Committee to Study the New York Antitrust Laws declared:

> "The State has a substantial and historic interest in preventing and ending restraints in . . . [certain] areas, which generally may be deemed to outweigh that of the national government. The state interest is enhanced by the fact that even though interstate commerce technically may be affected by some of these restrictions ... federal enforcement has been withheld at least in many instances. Therefore, if the State were to proceed against such impediments without discriminating against interstate commerce, there would be no conflict with national policy or its administration. If there were an informal arrangement between state and national governments vesting enforcement of such local restraints in the state -- recognizing, of course, that the federal government may proceed where it deems its interest paramount -- the possibility of collision would be even further diminished ..."

III

Federal-State Cooperation

Like all states, Hawaii has antitrust problems peculiar to itself. This was demonstrated during your first legislative session when the Senate by Concurrent Resolution directed that a study be conducted on "Domestic Dumping

and the Development of New Industry in Hawaii." 32/ Responding to the Senate directive the report submitted in January 1962 more specifically defined the matter of dumping:

> A continuing problem of critical importance to new enterprise in Hawaii, as well as to consumers, is that of 'domestic dumping'. Domestic dumping, in general, may be defined as the sale of Mainland goods in Hawaii below the usual trade prices -- that is, the mainland prices plus freight and handling charges. More precisely, domestic dumping is the practice of geographic discrimination [in] the sale of goods of like grade and quality for use at a distance from the home market at net prices lower than those received at home. 33/
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> ... In the case of many products [ed. where dumping is not practiced], freight charges are substantial, and delivered prices in Hawaii are high. This condition of high local prices invites and induces enterprises in Hawaii to consider producing at home those products whose freight costs are high in relation to product value. 34/

Historically geographic price discrimination is no new device. It frequently is the means by which the monopolist continues to hold his power. Having exploited a market he cannot afford to withdraw, to allow the more efficient to succeed him. Wendell Berge, former chief of the Federal Antitrust Division, developed this theory in his post-war book, Economic Freedom For the West. 35/ Its import may be great for Hawaii, the furthermost extension of our nation's New Frontier. Berge wrote:

"Many of the raw materials of American industry are produced west of the Missouri River, shipped East for processing, and then shipped back again to Western markets. A large part of the financing of Western raw material industries has been done by a comparatively few great bankers of the East. Even the railroads of the West and their communications sytems have been largely managed from Eastern centers. It is not meant to imply that there was at first anything deliberate in the colonial treatment of the West by Eastern financiers and industrial interests. Historically, new lands are always developed in this manner. In the pioneering stage foreign capital is essential, but after nearly a century maturity is expected. When a mature degree of independence is not forthcoming it gradually becomes clear that something is economically wrong."36/

Among the more valuable types of assistance which the Federal government might offer the States endeavoring to shape an antitrust policy is our experience. There is much to be gleaned from our achievements and failures. Consider by way of example the bitter lessons learned from the Standard Oil Trust. By 1874, over 50 per cent of the refining industry was represented by what had become known as the "Standard Alliance", which, in 1882, became the Standard Oil Trust. Its absolute size gave it power both in buying services and goods, and in selling "coal oil" or "Kerosene". And the power was utilized. Favored treatment was demanded and obtained from railways in the transportation of oil and other supplies for the Trust. The advantages gained were then parlayed by Standard to discriminate between

and among its customers located in widely separated markets for the purpose and with the effect of destroying competing oil refinery firms. 37/

Of these facts Congress became aware. It understood that the trail blazed by Standard in the petroleum industry, which included, first, the acquisition of market power and multiple-market control through merger with competitors, and then the use of that market power to discriminate in price to destroy the remaining competition, had shown the way to monopolists and would-be monopolists in other industries, who were quick to imitate. Included among the latter were the tobacco, sugar, biscuit and steel industries. The monopoly power thus acquired and abused by those in the petroleum and tobacco industries was challenged as violative of the Sherman Antitrust Act. The Supreme Court of the United States disposed of those challenges in 1911. It held that the Standard Oil Co. of New Jersey was a monopoly in violation of Section 2 of the Sherman Act and decreed a dissolution of that combination. 38/ The Standard Oil Companies of today resulted from the dissolution. A similar ruling was handed down against the American Tobacco Co. 39/

The Congress and the people, however, were not satisfied. Monopoly had to be stopped in its incipiency. Legislation was demanded. Congress responded by passing the Federal Trade Commission Act and the Clayton Act.

Section 2 of the Clayton Act prohibited discriminations in price where the effect might be substantially to lessen competition. 40/ It was directed in large part against the territorial price cutter. In 1936 the statute was amended to make clear the purpose of Congress. And it is from this point that the states might well profit from a harsh history.

Purpose and effect to injure competition were never part of the statutory language. Rather, it was as a Court of Appeals recently stated:

> "The purpose of this Section [2(a)] as an integral part of the antitrust legislative scheme is to prevent price discriminations in commerce which tend to injure competitive enterprise. To that end, it forbids a seller from charging different customers different prices for the same products with the effect of lessening competition. And we know that market power is a ready means towards competitive injury." 41/

Yet, beginning in as early as 1929 some courts evidence a concern over whether these facts were proved in geographic price discrimination cases. Indeed, it was significant to another Court of Appeals that the challenged practice was invoked by the respondent to punish and eliminate a weak competitor. 42/

More recently the Seventh Circuit has read purpose and effect into the statute. First it was held that §2(a)

refers to effect upon competition generally, rather than upon individual competitors. In response one may ask how over-all competitive effects may be demonstrated other than by showing the adverse competitive effects upon individual competitors? Do they not collectively represent the competition in any named market?

Next, it was held that actual injury designed to destroy competition was wrought by the respondent. Fortunately, however, to counter this position the Supreme Court has said "the statute itself spells out the conditions which make a difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law ..." 44/ And, an appellate court earlier declared, speaking of another subsection of the Act " . . . it does not concern itself with motive or intention. It is only concerned with the consequences which follow from an act. If those consequences eventuate, the act from which they result is forbidden." 45/

I have sketched, not detailed,one of the problems concerning territorial pricing at the Federal level. I would hope that from this narration you might succeed where we have stumbled. Above all, I would hope that

you would study and avail yourselves of the most signal contribution we might make to your program of trade regulation -- our experience, our history.

There are, of course, other areas of Federal-State activity. One is continuous contact, to let each know what the other is doing. By press release dated January 19, 1951, and again on November 24, 1953, the Federal Trade Commission formally noted its determination to cooperate with state enforcement agencies. 46/ Matters upon which the Commission may not act, but are considered of sufficient public importance are forwarded to state authorities.

Recently the President by Executive Order instructed the Justice Department to cooperate with state governments receiving identical bids. 47/ The Order seems to be a ramification of the "Electrical Cases". It is interesting to note in passing that by statutory direction the Wisconsin enforcement authority must cooperate with Federal agencies.

Contact does not end with the appointment of formal liaison officers and directives. This the Federal Trade Commission recognized on December 21, 1959 when it opened a conference on public deception. Consumer groups from the entire breadth of this nation came to hear of our work and voice their own thoughts. And on February 27,1961

under the combined sponsorship of the Tampa, Florida Merchants Association, the Advertising Club, and the Chamber of Commerce spokesmen for the FTC and the Office of the State Attorney General conducted an educational conference relating to deceptive advertising. Businessmen were told what the Federal and state governments required of them in one forum. Government officials united to achieve a common end: protection of the consumer.

Other organizations have followed with their own projects. In 1960 the Consumer Council Division of the Office of the Massachusetts Attorney General held a conference on "The Role of State and Federal Antitrust Activities in the Preservation of Competition". During the same year the Justice Department held a similar meeting for the states' attorneys general.

IV

Conclusion

The goal sought, the unfettered fair conduct of trade, can only be achieved through a united effort. For "we live in the jurisdiction of two sovereigns, each having its own system of courts to decree and enforce its laws in a given territory . . . the situation requires therefore, . . . a spirit of reciprocal unity and mutual assistance to promote due and orderly procedure."49/

And that spirit must flame anew for "history has thrust us to the point where we must seize upon the strategic facts of our economic life and free that life from the clustering usages which limit, rather than nourish and support its growth. The economic philosophy to which this country is committed by its traditions as well as by its desires is a philosophy of freedom and action. The principles of political liberty to which we adhere are paralleled by the belief that the prime mover of economic activity is freedom of the market. The assumptions which underlie our national economic policies are derived from an instinctive feeling that freedom is politically and economically interdependent. It is this conception which defines the ends we seek to serve in combating the growth of monopoly power in our economy." 50/

Your enactment of antitrust legislation in 1961 was a great step toward the ends sought. At the Federal level the Congress of the United States has seen fit to supplement similar basic antitrust legislation with additional enactments, such as, for example, the Federal Trade Commission Act in 1914 and the Clayton Antitrust Act of 191 with its Robinson-Patman Act amendment in 1936. As you know, a number of States have enacted similar legislation to supplement their basic antitrust laws. Thus public

policy to maintain a free and fair competitive enterprise system has been expanded to condemn acts, practices, and conditions, the effect of which may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or which may have a dangerous tendency unduly to hinder competition or tend to create a monopoly. That expanded public policy has been implemented at the Federal level not only through the establishment of enforcement agencies, but also through the creation in the enforcement agencies of facilities for appropriate cooperation with the various states to effectuate the public policy. Heretofore in my remarks I have referred to this cooperative effort, particularly as evidenced by the Federal Trade Commission, the agency of which I am a part.

I have referred to these matters with the thought that perhaps you would want to consider them in furtherance of closer cooperation between the Federal government and your State of Hawaii in matters of antitrust and trade regulation.

Footnotes

1/ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1-2 (1958). Wendell Berge, former Assistant Attorney General in charge of Antitrust, placed the Sherman Act in historical perspective: "If we look back at history in the light of current urgencies, it is apparent that in its economic aspects the American Revolution was a revolt against monopoly. Throughout the Nineteenth Century the separate states fought to keep the market free. From one standpoint the settlement of the West itself often obscured the effects of monopoly and diverted attention from the need to combat it. As long as opportunity could be found in the opening up of new areas, the dangers inherent in trusts and combines were not so evident as they were later to become. It was not until the passing of the geographical frontier, when it continued concentration of economic power threatened to eclipse enterprise, that Government was aroused to the recognition of monopoly as a formidable opponent.

The opposition of the people as expressed in the development of the Populist and Granger movements in the post-Civil War era finally led to the passage of the Sherman Act. Even though account was taken of the long-run implications of monopoly for the American economy, by the enactment of a law designed to eliminate restraints of trade, the enforcement of the law was more nominal than real. Indeed, in the halcyon days of the Twenties, when size became the symbol of efficiency in industry, and industrial mergers became not only the fashion but a frequently eulogized trend, the purposes of the Sherman Act and the validity of its formulation were almost forgotten. This occurred, moreover, in the same period in which the cartelization of world industry reached a peak." Berge, Economic Freedom For The West, at 144 (1946).

2/ 21 Cong. Rec. 2457 (1890)

3/ Wilson, The State Antitrust Laws, 47 A.B.A.J. 160 (1961). Mr. Wilson wrote this brief but excellent article as Attorney General for the State of Texas.

4/ Ibid.

5/ The conference was held on April 12 and 13, 1889. "On the second day of the conference, one of the Minnesota delegates, E. M. Pope, Chairman of the Committee on Needed Legislation, proposed that all nine states represented adopt an 'Act to define trusts, and to provide for penalties and punishments of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of _____.' The proposal carried, and the Texas delegates were able to take home the proud report that the Texas law had been adopted almost in its entirety; one section only, which related to a specific earlier Texas statute, was omitted, and to another section was added a clause against the price-fixing of beef and pork, a point on which the cattlemen and farmers were especially concerned." Quoted by Wilson, id. at 161.

6/ Standard Oil Co. v. Tennessee, 217 U.S. 413, 423 (1910). See also, State v. Allied Chemical & Dye Corp., 9 Wis. 2d 101 N.W. 2d 133 (1960). The State alleged a conspiracy among certain out of state corporations to fix the price of calcium chloride, a chemical product widely used in state highway maintenance. The defendants moved to dismiss on the grounds that Federal government had preempted state law. The Department of Justice on the record declared that Wisconsin's action did not affect Federal enforcement. The Court held there was no preemption, no conflict, no burden on interstate commerce.

Accord, Peoples Savings Bank v. Stoddard, 351 Mich. 342, 88 N.W. 2d 462 (1958). CF. Kosuga v. Kelly, 257 F.2d 48 (7th Cir. 1958) (Illinois law), aff'd on other grounds, 358 U.S. 516 (1959), Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945), discussed by Stern, A Proposed Uniform State Antitrust Law: Text and Commentary On A Draft Statute, 39 Tex. L. Rev. 717, 719 (1961).

7/ For a specific recommendation on how this may be effected see Report of the Special Committee to Study the New York Antitrust Laws of the New York State Bar Association, at 7-8 (1957) [hereinafter cited as N.Y. State Bar Ass'n, Committee Report]: "We find also that antitrust enforcement against local restraints which technically affect interstate commerce is within the concurrent jurisdiction of state and federal governments. We believe that the situation in New York calls for federal-state cooperation so that antitrust

enforcement may avoid overlap of effort, conflict of jurisdiction, and unnecessary litigation as to whether the challenged activity constitutes intrastate or interstate commerce, or whether it so substantially affects interstate commerce as to be beyond state control. Therefore, if New York increases its appropriations for antitrust enforcement, as we strongly urge, we recommend that informal arrangements be made by state officials with the United States Attorney General and the Federal Trade Commission vesting in the State of New York primary responsibility for antitrust enforcement against restraint of trade in retail distribution and manufacture for essentially local consumption, as well as restraints which take place wholly within the State of New York -- the principal areas in which state interest ordinarily outweighs federal. In other words, the federal government should relinquish to this State primary responsibility for restraints which do not affect the citizens of other states to a substantial degree. By this allocation the United States would be able to proceed against restraints which concern more than one state, and New York would be able to move against restrictions within its territorial borders. In this way, there will be complete coverage.

We recommend that the United States refer to New York all information which it possesses as to cases primarily of local concern, and that in turn New York refer to the Department of Justice all information which it may possess as to restraints of a more extensive character. We recognize that at all times, of course, where a restraint affects interstate commerce, the Department of Justice may exercise its paramount right, if it deems it necessary, to supersede state action by instituting suit under the Sherman Act. The federal government might choose to act because it is seeking judicial clarification of the law, or because for any other reason it deems federal interest predominant notwithstanding the general categories set forth above. We make this recommendation for New York alone. While we have obtained some sparse information from other states, we have not considered the situation elsewhere."

8/ See, Address by Robert A. Bicks, Assistant Attorney General, Antitrust Division, Department of Justice, before a meeting of the Massachusetts Consumer Council, Boston, Mass., Oct. 6, 1960, at 2. See also, Statement by Earl W. Kintner, Chairman, Federal Trade Commission, "The Role of State and Federal Antitrust acitivities in the Preservation of Competition," before the same conference.

9/ Thus, it was following the court's promulgation of the "Rule of Reason" in Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911), that the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. §41 et. seq. (1958) became the law of the land. Unfair methods of competition and unfair or deceptive acts or practices in commerce were to be prohibited by a Trade Commission.

Representative Morgan set the background for the creation of a Federal Trade Commission when he said in 1914: "... there are at the present moment two roads open to the nation in meeting the trust problem. One offers the old method of leaving to the overcrowded courts unfitted for the business of administrative adjustments ... the vast task of establishing rules of conduct for the larger businesses of the country... The courts adjudicating particular cases under unflexible statutes, will forbid the form, and the nation will helplessly witness the prohibited form pass away and the substance of the evil continue." 51 Cong. Rec. 8977 (1914).

This is not to say that the Sherman Act is useless legislation. Far from it. The "Electrical Cases" vividly have demonstrated that the predatory practices of old linger on. United States v. Westinghouse Electric Co., et al., Trade Reg. Rep., (1960 Trade Cas.) ¶69,699 (E.D. Pa. March 24, 1960). See also, Smith, The Incredible Electrical Conspiracy, Fortune, April, 1961, p. 132.

10/ Wis. Stat. ch. 100.20 (1957). The statute was discussed by Wisconsin's antitrust officer Mr. Sieker in The Role of the States in Antitrust Law Enforcement -- Some Views and Observations, 39 Tex. L. Rev. 873 (1961). Mr. Sieker said, "It will be noted that this [the language of the state statute] differs from Section 5 of the Federal Trade Commission Act in that the latter merely prohibits that which is unfair but does not require positive acts. In practice the application of the two has turned out to be similar." id. at 879.

11/ Id. at 879-880. "A list of the types of practices covered by such proceedings will serve to illustrate the usefulness of this statute. They have included: secret

advertising allowances granted to some customers and not to others purchasing under like terms and conditions; a secret chain store discount not given to independent competitors; selective price cutting and tie-in sales and services in the linen supply industry; deceptive and misleading statements and advertisements by 'advance fee' real estate promoters; deceptive and misleading advertising in the sale of food freezer plans; bait advertising; the collusive use of scare sales tactics by tobacco buyers in purchasing tobacco leaf from farmers; false representations in the television repair business." id. at 880.

12/ Ch. Ag. 112, Wis. Adm. Code 1922.

13/ Sun Oil Company v. Federal Trade Commission, 294 F. 2d 465 (5th Cir. 1961), cert. granted; see also, Initial Decision In the Matter of American Oil Company, Dkt. 8193 (Nov. 27, 1961).

14/ Sieker, supra note 10 at 882.

15/ Id. at 881.

16/ Wall Street Journal, Aug. 11, 1960, p. 1, col. 1.

17/ Ibid. For an excellent summary of monopoly and antitrust cases enforced by the states see State Antitrust Laws Reference Handbook, Dept. of Justice (1960) [hereinafter cited as State Antitrust Handbook]. See also, Report of Special Comm. to Study the New York Antitrust Laws, Annex I at 65(a) (1957).

18/ Consider the following examples of merger work in New York, recited by that State's Attorney General: "Attorney General is requested by Superintendent of Banks for an opinion relative to possible monopolistic tendencies of proposed bank merger. Conducted full field investigation. Attorney General Rendered opinion.

The Superintendent of Banks had inquired whether the proposed merger, if consummated, would reduce competition among banks in the area affected. The Attorney General's investigation considered the size of the banks involved, other banks in the area, their size and position. Schedules were prepared comparing the then competing banks as to assets, loans, discounts, deposits, capital accounts and deposit to capital ratios; and what the relative positions of banks in the area would be with regard to these factors if a merger

were consummated. The report balanced the danger of concentration which would result from the merger, against the intensification of competition which might also result if the merging institutions were in a stronger position to compete. But it ended with the caveat that if the merger were consummated, the Attorney General's office would be vigilant in observing whether competition actually resulted.
2. Bank merger. Matters considered similar to 1, supra." Report of the Special Comm. to Study the New York Antitrust Laws, Annex I, at 65 (a) (1957).

19/ Clayton Act, §7, 15 U.S.C. §18 (1958), applies only to corporations in commerce. See, Page v. Work, Trade Reg. Rep., (1961 Trade Cas.) ¶69,955 (9th Cir. 1961), cert. denied, Oct. 16, 1961, ¶67,100.

20/ State Antitrust Handbook, 30-31 (1960).

21/ Rahl, Toward a Worthwhile State Antitrust Policy, 39 Tex. L. Rev. 753, 765 (1961).

22/ Id. at 764. "The only way for the state to have an expert enforcement policy is to place the policy in expert hands. Experts are available, in the federal government and in private practice, if the state has an appropriation for the purpose. Most do not, and this obviously is a substantial reason for the uneffectiveness of the state laws. The federal government, with not one, but two expert agencies, and millions of dollars in annual appropriations, stands in obvious contrast." id. at 764-65.

23/ Wall Street Journal, Aug. 11, 1960, p. 1, col. 1.

24/ Ibid.

25/ Ibid. Yet, it must be noted that the number of suits brought totals during the twelve month period four, and the number brought during a period of fifty-seven year totaled three.

26/ Ibid.

27/ Ibid.

28/ Wilson, The State Antitrust Laws, 47 A.B.A.J. 160, 161 (1961).

29/ Ibid. "Again the state in 1909 recovered from seven oil companies a total sum of $216,720, and in 1913 recovered another penalty of $500,000 from another oil company. Most of these cases included injunctions and some the dissolution through receivership of the corporations concerned." Ibid.

30/ Wall Street Journal, Aug. 11, 1960, p. 10. It was then reported, "A hearing on the injunction is still pending but Sinclair withdrew its offer when Texas Pacific directory refused to submit it to their stockholders because of the suit." Ibid.

31/ Report of the Special Comm. to Study the New York Antitrust Laws, at 632 (1957).

32/ The Study was conducted under the auspices of the Economic Research Center, University of Hawaii, by Dr. Vernon A. Mund, Professor of Economics, University of Washington. It was submitted during January, 1962.

33/ Id. at 1. "The sale of mainland or foreign goods locally at prices lower than those currently prevailing is not, in itself, 'dumping'. The test for dumping is whether or not the seller is selling the same product at the same time at a 'higher price' in one market and at a 'lower price' in another market -- net to him." Ibid.

34/ Ibid. "Many examples of such products come readily to mind. They include plastic pipe; hardboard and other kinds of building materials; steel products; fabricated metal products, such as hot-water tanks; dressed beef; and manufactured foodstuffs, such as evaporated milk or macaroni." Ibid.

35/ Berge, Economic Freedom for the West (1946).

36/ Id. at 17. Again and again Berge underscored this point: "The events of recent years have increasingly underscored the fact that there is a direct and profound association between the existence and power of monopoly in our economic system and the failure of Western industry to evolve and to expand as it could and should. The effects of monopoly on the West have in some cases been remote and subtle, and in others immediate and obvious, but they have been everywhere persistent and insidious when judged by the degree to which Western industry has been discouraged

or stifled. Almost continuously since the period of its early exploration the West has been subjected in one way or another to all the artifices of monopoly and to all of its effects.

Both as a producing and a consuming area, the West has felt the consequences of monopoly domination of important industries. The raw materials of the West have been shipped to the East for fabrication and then shipped back to Western markets. As a result a vicious circle has operated to limit opportunities for the improvement of industry and labor in the Western States at the same time that Western consumers have been compelled to pay higher prices for the commodities which they required.

Western enterprise and Western capital could not enter such field as chemicals, aluminum, magnesium, steel or electrical equipment on competitive terms. These industries, like so many others, were governed by national monopolies or subject to the ministrations of international cartels. In numerous instances in the years before the war the efforts of Western businessmen to enter attractive sectors of production encountered an impenetrable wall of monopoly or cartel control.

On frequent occasions it was the decision of cartel groups to prevent the establishment of industries in the West. The power which such groups wielded rendered their verdicts notoriously effective. No matter how much vision or initiative or technological skill or capital were marshaled for the purpose, Western industry found that it could not engage in production unless monopoly was willing. With respect to competition monopoly is habitually unwilling, and independent action in many cases was practically impossible. In effect, this meant that only in special circumstances and at rare intervals could new concerns in the West arise in an industry ruled by cartels. If a new concern were established, its survival was predicated upon the whim of monopoly and contingent upon the calculated restrictions by which cartels attempted to preserve their privileges. It is indeed remarkable, when we consider the degree to which monopoly prevailed before the war over whole spheres of technology and over world markets, that Western industry was able to progress as far as it did." id. at 141-142.

37/ The Commissioner of Corporations in Part I of his Report on the Petroleum Industry, May 20, 1907, in referring to the position of the Standard Oil Co. in the petroleum industry, at pages xviii - xx, in his letter of submittal of the Report, stated: "Scandalous railway discriminations obtained by the Standard in its earlier years as against its competitors did more than all other causes together to establish it in its controlling position . . .

"Another important element in the control over the industry is secured by the Standard through its marketing methods. It uses very generally the bulk system of delivery to retail dealers by tank wagons - a cheaper, safer, and more convenient method of delivery than in barrels. This not only reduces the cost of marketing greatly, but also has eliminated largely the jobber from the business. Dealing thus directly with the retailer, the Standard is enabled to arrange for such local price differences as it may desire for the purpose of destroying local competition, without disturbing its prices over any large section of its trade."

38/ Standard Oil Co. v. United States, 222 U.S. 1 (1911).

39/ United States v. American Tobacco Co., 222, U.S. 106 (1911).

40/ The Clayton Act of 1914 originated with the bill H.R. 15657, introduced by Mr. Clayton on April 14, 1914, 51 Cong. Rec. 6714 (1914). Section 2 of this bill prohibited discrimination in price between different purchasers, with the purpose or intent to destroy or wrongfully injure the business of a competitor of either the purchaser or the seller. Section 2 did not contain any proviso excepting discriminations made in good faith to meet competition.

H. R. 15657 was reported out on May 6, 1914, and the report, H.R. No. 627, 63d Cong., 2d Sess., 8-9, showed that the Sec. 2 prohibition of price discrimination was confined to a well-known, common, particular form of discrimination. Thus, the report stated, in part:

"Section 2 of the bill is intended to prevent unfair discrimination. The necessity for legislation needs little argument to sustain the wisdom of it. In the past it has

been a most common practice of great and powerful combinations engaged in commerce - notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence - to lower prices of their commodities, oftentimes below the cost of prices of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engaged in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practices by those engaged in commerce."

S. Doc. No. 583, 63 Cong., 2d Sess. (1914). Made the same statement for the Senate Judiciary Committee in its report on H.R. 15657.

In its report upon the bill to enact the Clayton Act - S. Rep. No. 693, 63d Cong., 2d Sess., 1 (1914), to accompany H.R. 15657, the Senate Committee on the Judiciary said:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves are not covered by the act of July 2, 1890 (the Sherman Act) or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

41/ Atlas Building Products v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir., 1959); see also, Sen. Rep. 1502, 74th Cong., 2d Sess., 4 (1936); H.R. Rep. 2287, 74th Cong., 2d Sess., 8 (1936).

42/ Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d, 234 (2d Cir., 1929), cert. denied, 279 U.S. 858: "Appellant sent its export manager of its entire business to Porto Rico to wage the price war, and his admissions and business methods, there displayed, all prove the fact that it was intended to punish, and, if possible, eliminate, the appellee as a competitor. He directly proceeded to use strong, unfair competitive methods, and, from his own statements, designedly tried to cause loss to the appellee, a weaker competitor. 'Lucky Strikes' was a much more expensive cigarette than appellee's brand, and, if sold at as low or a lower price, it would be practically impossible for a weaker competitor to continue. Its cost was more than double that of the appellee's, considering the elements of manufacturing cost and the quality of tobacco used. This conduct, together with the guaranty against loss, made to its sales customer there, is sufficient evidence of a design and plan to put the appellee out of business, either because of some real or fancied wrong due to the unfavorable legislation, or it was used as an excuse to proceed against and eliminate a weaker competitor. In either case it was violative of the statute.

The letters written by this agent of the appellant to its officers, explaining the designs and purposes, justify the appellee in its claims. The appellant could stand this competition in this price warfare. Its sole business in Porto Rico was the sale of 'Lucky Strikes', and this was about one-half of 1 per cent of its entire 'Lucky Strike' business throughout the world. A loss there would not impair its financial stability, but the appellee could not so compete. Such price-cutting to capture the market, by eliminating the appellee therefrom, is prohibited by the provisions of the Clayton Act. It was foreign to any legitimate commercial competition. The Gilles & Woodward books showed a monthly loss after June 27th on the sales volume of 3,000,000 per week, $18,200 for August and September alone, and the loss continued. This, added to appellant's loss, shows the willingness to accept an annual loss of $175,000."

43/ Anheuser-Busch, Inc. v. Federal Trade Commission, 289 F.2d 835, 839 (7th Cir. 1961). Cf. Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Maryland Baking Co. v. Federal Trade Commission, 243 F.2d 716 (4th Cir. 1957).

44/ Federal Trade Commission v. Anheuser-Busch, Inc., 336 U.S. 536, 550 (1960).

45/ P. Lorillard Co. v. Federal Trade Commission, 267 F.2d 439, 444 (2d Cir. 1959).

46/ The Commission, in order to promote cooperation with State authorities, adopted the following policy concerning reference of matters to State authorities:

"... Whenever a matter is closed by the Commission for lack of jurisdiction, but it appears that the act or practice involved is not insificant and may possibly involve violation of State law, such matter shall be called to the attention of the proper authority of the State in which the acts or practices have occurred.

47/ Exec. Order No. 10936 (April 24, 1961).

48/ Wis. St. ch. 14, § 14.525 (1957), as amended, (1959).

49/ Ponzi v. Fessender, 258 U.S. 254, 259 (1922).

50/ Berge, Economic Freedom For the West, 140 (1946).