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168 PROSPECT AVENUE
PRINCETON, NEW JERSEY

April 25, 1938

Senator William E. Borah
Senate Bldg.
Washington, D. C.

Dear Senator Borah:

The published report of your interview with the President and of the prospect that some action may be taken soon on the subject of monopoly, prompts me to make a few comments on your Senate bill 3072. These are to be understood as made in full agreement with your view (again expressed in the report this morning) that monopoly could have been suppressed and controlled under existing laws if they had been and were now vigorously enforced. The purpose of any additional legislation is, therefore, to facilitate the attainment of policies long professed but for various reasons pretty largely frustrated up to the present time. I do not attempt to criticize the bill in detail, but merely to indicate certain general features in the copy as I have it here which seem to me to be open to some question--having in mind your own comment to me that the bill would, of course, be considerably amended and revised during its further progress.

I question whether the bill is not more elaborate and complicated than is necessary, and whether it would not be improved if shortened and simplified. For example:

(1) Section one goes afield in the statement of fact and declaration of policy, and raises issues of economic theory which if not erroneous are surely unessential to the main problem. The crux of the preamble is contained in the lines 18-25 on page 2, and lines 1-2 on page 3; and in lines 15-23 on page 3.

(2) I would urge that the subjects of wages and labor policy should be left severely alone. The attempt to include them in this bill complicates a problem difficult and debatable enough already and involves contradictions which I need not elaborate. Moreover, it could well nigh wreck the Federal Trade Commission to impose this task upon it in addition to its other heavy duties.

(3) After omitting the labor problem entirely, the bill still leaves a job much too large for effective performance by any single governmental agency. It would apply to business enterprises variously estimated at from 200,000 to 500,000 in number. It was said by Senator O'Mahoney in his interesting address which I heard, that already the bill had been limited in its application to corporations with a capital of $100,000 or more. Would not a more logical and also more practical classification be one turning on the degree of combination and control extending across state lines, rather than on the amount of capital (often both an elusive and unessential criterion of monopoly). The following criteria are suggested.

That the Act should apply:

(a) to every corporation owning physical plants, equipment and places of business located in more than one state (except railroads and other agencies of transportation or communication that are under the jurisdiction of other federal commissions not including the S.E.C.--exception virtually as covered in Section 11);

(b) to every corporation that is incorporated under the laws of a State other than that in which is located its principal physical plant;

(c) to every business enterprise that de facto controls by any legal device whatsoever the sales and price policies of any other business enterprise located in another State;

(d) to any incorporated or unincorporated business enterprise which the Commission finds to be attempting in any manner to employ monopolistic methods of sale and to fix prices of goods sold in interstate commerce; or to be engaged in monopolistic practices, either alone or in cooperation with others.

It is probable that within these limits the bill would be found to apply at the outset to not more than 5,000 (possibly to a much smaller number) though capable of extension indefinitely where there is a real interstate problem of monopoly.

May I express a final doubt regarding the appearance which the bill gives of centralization and bureaucratic control in the issuance, withholding and canceling of licenses, seeming to give the power of life and death over enterprises engaged in any measure in interstate commerce. On careful reading of the bill it is pretty evident that "its bark is worse than its bite" for under Title I, section 8c (lines 22 ff.) there is preserved to the aggrieved party the same right of appeal to the Courts from any order of the Federal Trade Commission which now exists: but the whole manner of statement gives to the bill as now worded an unduly alarming and revolutionary character.

Further, in this connection Title I, section 4d is stated as if the finding of a condition "in violation of the anti-trust laws" under this Act would be a simple matter, somehow simpler than the process of prosecuting and convicting a combination in restraint of trade under procedure heretofore followed by the Department of Justice. But is this really so, seeing that this subsection is later fully qualified by section 8c, as quoted above? The big monopolies will resist just as they have, by long and expensive litigation, and the Commission would be bogged down at once and be in that condition for years--it is to be feared. If I may be pardoned a flippant analogy, does giving this power (in sec. 4d) to the Commission do any more to help it bring

about the conviction of a monopoly than sprinkling salt on a bird's tail helps to catch the bird, as we boys were kidded into believing? The one obvious benefit of this provision is that it seems explicitly to impose upon some governmental agency (other than the Department of Justice) the duty of investigating with respect to monopolistic practices, every corporation engaged in interstate commerce, whereas this has been (or has been practically treated) as no one's business, except sporadically. But this bill does not materially simplify and facilitate the process of convicting for forming a combination or creating a monopoly. The Commission is really being presented with a nearly empty basket.

To put the matter less negatively and more constructively, it appears that if the judicial and administrative processes for determining what constitutes a violation of the anti-trust laws are to be improved it must be by making the prohibitions more specific and explicit than they have been in the statutes or have been left by judicial construction. This means primarily the formulation and enactment of a model Federal law for corporations engaged in interstate commerce. Sec. 3d of your bill makes it the duty of the Commission to submit its recommendation with respect to such a law, and Title II makes a real beginning in the direction in which lies the greatest hope of progress. But the source of much of the difficulty in past attempts to enforce the antitrust laws lies in the anarchical state of the laws of industrial corporations. Adoption of the criteria above suggested to fix the limits for the application of this bill, should help pretty materially toward this needed reform by separating the small,

5. (Senator Borah)

Independent, competitive sheep, from the big, combined, monopolistic goats in the industrial field.

With best wishes for the cause, I am,

Very sincerely yours,

Frank A. Fetter

PS. I shall be in Washington stopping at the Cosmos Club from Thursday to Saturday of this week. I expect to be in the Senate Building Friday morning at the office of the Senate Committee on Manufactures to confer, at his request, with the Secretary in regard to the pending project for a National Economic Council.