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June 12, 1959

TNEC

✓  
see Edwards Jr.  
Memorandum  
on "Captives"  
"politics"

MEMORANDUM FOR MR. LEON HENDERSON:

1. Thank you for sending me a copy of Corwin Edwards' memorandum to you on Possibilities of Agreement on TNEC Recommendations. It contains a number of interesting suggestions, but I don't like the characterization of the break-up of excessively large units as "atomization". I do not know any serious student who has suggested the atomization of any important capital goods industry, but there is quite a difference between imperfect competition among a dozen or more units and a monopoly exercised by one or two units. ]/h

2. I think as soon as Kreps gets acclimated, we ought to try to get a small group informally together some evening to see, on the basis of the work now done, what sort of a concrete program we can begin whipping into shape to implement the President's message.

Ben V. Cohen



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DEPARTMENT OF JUSTICE

Washington, D. C.

April 22, 1939

MEMORANDUM

For: Mr. Leon Henderson

From: Corwin D. Edwards

Subject: Possibilities of Agreement on TNEC Recommendations.

I am heartily in sympathy with Mr. Homan's belief that a common policy is possible in the TNEC in spite of the apparently divergent views there represented. *hm*

There are obvious limits to the possibility of either regulating industry or restoring competition. In so far as regulation is concerned, information, personnel, and political support are lacking to set up in very many cases a control which protects the public interest instead of becoming merely a device by which an interested group obtains what it wants by political means. So far as competition is concerned, the concentration of control has proceeded so far that a break-up of established concerns would be, in some of our most important industries, a prerequisite to effective competition. To plan and enforce such atomization is likewise a hard enough job that the Federal Government would strain its resources if it tried to do it on a very broad scale. Thus both regulation and atomization have to be economized and the danger is that when both policies are applied at the most appropriate points there will be important areas of American industry subject with little check to restrictive control by private interests. *cap tone* *hm*

If the apparently conflicting programs of action are reduced to specific detail, I think the heat will go out of the conflict because their complementary nature will become apparent. If they remain merely broad expressions of principle they will, of course, seem to be irreconcilable. *hm*



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The most promising sequence for TNEC in formulating its recommendations seems to me to be as follows:

- (1) Draft proposals designed to prevent the further development of unregulated private monopoly. All points of view in the TNEC should be able to agree upon the desirability of action along this line. Such proposals would include measures to prevent elimination of competition by merger (such as the Federal Trade Commission recommended as an amendment to Section 7 of the Clayton Act), measures to prevent further abuse of the patent laws by throwing restrictions around the powers conveyed by patent and the duration of the patent privilege, and the like.
- (2) Draft proposals to strengthen the enforcement of the antitrust laws and to shake the effectiveness of private restraints by close-knit industries. Those most devoted to competition will obviously favor such proposals, and those most interested in regulation will recognize the need of them in order to convince industry that it cannot avoid competition without being willing to pay a price for the privilege. Proposals in this field would include detailed amendment of the antitrust laws as to procedure, character of proof and penalties, and also such bills as the draft consumer preference bill designed to prevent the use of basing point systems as collusive devices.
- (3) Consider the cases in which the strongest argument appears for the dissolution of existing aggregates of economic power. Consider whether the objective can be accomplished by equity proceedings under the Sherman Act, and in so far as it cannot, draft appropriate proposals. Determine as tough-mindedly as possible how large a program of this sort is feasible within a reasonable time.
- (4) Consider the remaining cases in which abuse of private power is of greatest concern. In these instances formulate specifically the kind of public regulation which would be most likely to limit or prevent the abuses. Be tough-minded here, too, as to the extent to which it is feasible for Federal or state governments to undertake such regulation.

The Committee is likely to develop disagreements as to whether particular industries where restraints are conspicuous should be treated as part of group 3 or group 4. Nevertheless, since it will be clear that the number of cases to be included in either group is necessarily limited, there should be much more



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disposition to find points of agreement than would appear in a general argument as to which course of action is best for all monopolistic industry or for some single typical case.

- (5) Consider any cases in which the intensity of competition has been such as to disorganize productive processes and degrade the standard of life of producers. Formulate recommendations for such cases. ]

Doubtless there will be disagreement as to how many and what cases belong in this group, particularly since proposals of the NRA type and other proposals to raise prices or profits will center here. At worst, however, such a sequence will isolate the most important disagreements and raise them after the less dangerous issues have been dealt with. Moreover, some of the most obvious cases, particularly among farm products, have already given rise to producers' cooperatives and to Federal control programs. Thus the areas of acute controversy probably will be limited to the quasi-handicraft producing industries and the retail distributive trades. ]

- (6) Summarize as well as possible the size and shape of the problem which remains untouched in spite of all these recommendations and propose means for the further study of this problem.

One unfortunate assumption which I read between the lines in Mr. Homan's letter appears to me worth mentioning because I think it has recently become rather widespread. It is that those involved in the investigation who are most concerned to protect competition have developed an uncritical and dogmatic devotion to laissez-faire as an adequate solution for all problems. I grant that phrases have been used which are capable of this interpretation, just as some phrases on the other side are capable of being interpreted as a desire for self-government in industry of the NRA type. Nevertheless, I do not think that either of these views is really being advocated in the Committee. The Federal Trade Commission is the most out-spoken of the Committee's defenders of competition. Recent reports to Congress by the Commission have recommended Federal regulation of grain deliveries on futures contracts, Federal licensing regulation of warehouses storing grain for delivery on such contracts, regulation of storage charges on such grain, amendment of the Commodities Exchange Act to permit those administering this act to prescribe outside delivery in satisfaction of commodity contracts, Federal ]



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licensing of cotton warehouses, terminal market inspection of fresh fruits and vegetables by the Federal Government, prescription of rules by the ICC for payment by carriers of damage claims on fruits and vegetables, strengthening of the licensing provisions of the Perishable Agricultural Commodities Act, cooperative action by Federal and state governments to formulate local rules for food terminals in principal cities and to formulate plans for additional facilities at such terminals, publication by the Federal Government of reports as to unsatisfactory terminal market conditions, establishment by milk cooperatives of inter-market agencies for the transfer of milk and cream between markets, establishment of a Federal advisory agency to promote interstate compacts and uniform laws for the regulation of milk markets by state governments, and the like. Furthermore, the Commission has repeatedly indicated its strong sympathy for consumers' cooperatives, farm producers' cooperatives, and producers' credit associations. The Commission's devotion to competition as the general rule has not in fact prevented it from recommending specific regulatory measures where it believed that competition had broken down or was not accomplishing satisfactory results.

/s/ CORWIN D. EDWARDS

Corwin D. Edwards,  
Special Assistant to the Attorney General