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REMARKS
BY
EVERETTE MacINTYRE*
COMMISSIONER, FEDERAL TRADE COMMISSION
AT THE WINTER CONFERENCE OF THE AMERICAN MARKETING ASSOCIATION
NEW YORK, N. Y., DECEMBER 27, 1961
ON

"UNCERTAINTIES UNDER OUR ANTIMONOPOLY LAWS"

The statement points out that the breadth, depth and generalities in the provisions of the antimonopoly laws give rise to uncertainties regarding the legal status of certain

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certain about the application of the law. There is little or no basis for hoping that the scope or sweep of these general provisions of the antimonopoly laws will be reduced or made more certain through legislative enactments. Therefore, the suggestion is made that an administrative agency such as the Federal Trade Commission, be looked to for help in solving the problem. Such administrative agency by taking action from day to day could be looked to for spelling out and specifying what trade restraints, which if continued are likely to lead to violations of the antimonopoly laws. It is suggested that this action could take the form of substantive rule-making by the Federal Trade Commission, and, thereby, businessmen would be assisted in avoiding the continuation of practices which would make them liable as criminals under the antimonopoly laws.

* The author was appointed by President Kennedy to be a member of the Federal Trade Commission for a 7-year term commencing September 26, 1961. Mr. MacIntyre is a member

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Statutory law in this country regarding the subject is, with the exception of a few provisions applying to particular acts, almost as general and indefinite as the common law. Of course, when the Sherman Antitrust Act was passed in 1890, it was thought that the language of its provisions made more definite the law for the regulation of interstate and foreign commerce. Particular basis for that thought is found in the words of the first section of that law to the following effect: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal," and the words of Section 2 to the effect that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

proposals were rejected. Then proposals were made to make the application of the Sherman Act more flexible by making it effective only where trade restraints and monopolistic conditions were found to be unreasonable.

At first the Supreme Court rejected proposals [redacted]

reading into it an interpretation which would make it applicable only to unreasonable restraint of trade.[1]

These proposals would have amended the Sherman Act to permit the continuation of a number of combinations in restraint of trade.[2]

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1. U.S. v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897); U.S. v. Joint Traffic Assn., 171 U.S. 505 (1898).

2. In 1909, Sen. 6440, introduced in the 60th Congress, [redacted]

corporations except railroad companies (already subject to the Interstate Commerce Act) immunity from antitrust prosecution upless notified within thirty days by the

Although these proposals were not acted on by the Congress, the law, through the process of judicial interpretation, was made almost as general and broad in its sweep as the common law of England and this country. A part of this development was the decision by the Court in the Standard Oil Case.[3/] In that case the

that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended

determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

interpreted is as Mother Hubbard's dress, covering almost everything but touching nothing in particular. The uncertainties inherent in such a situation were aptly described in the opinion of Justice Harlan, a member of the Supreme Court who participated in the decision in the Standard Oil case. He said:

> "To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act as a criminal or penal statute indefinite and uncertain,

The Federal Trade Commission Act is couched in general terms, making unlawful unfair methods of competition and unfair and deceptive acts and practices. The Supreme Court has ruled that the words "unfair methods

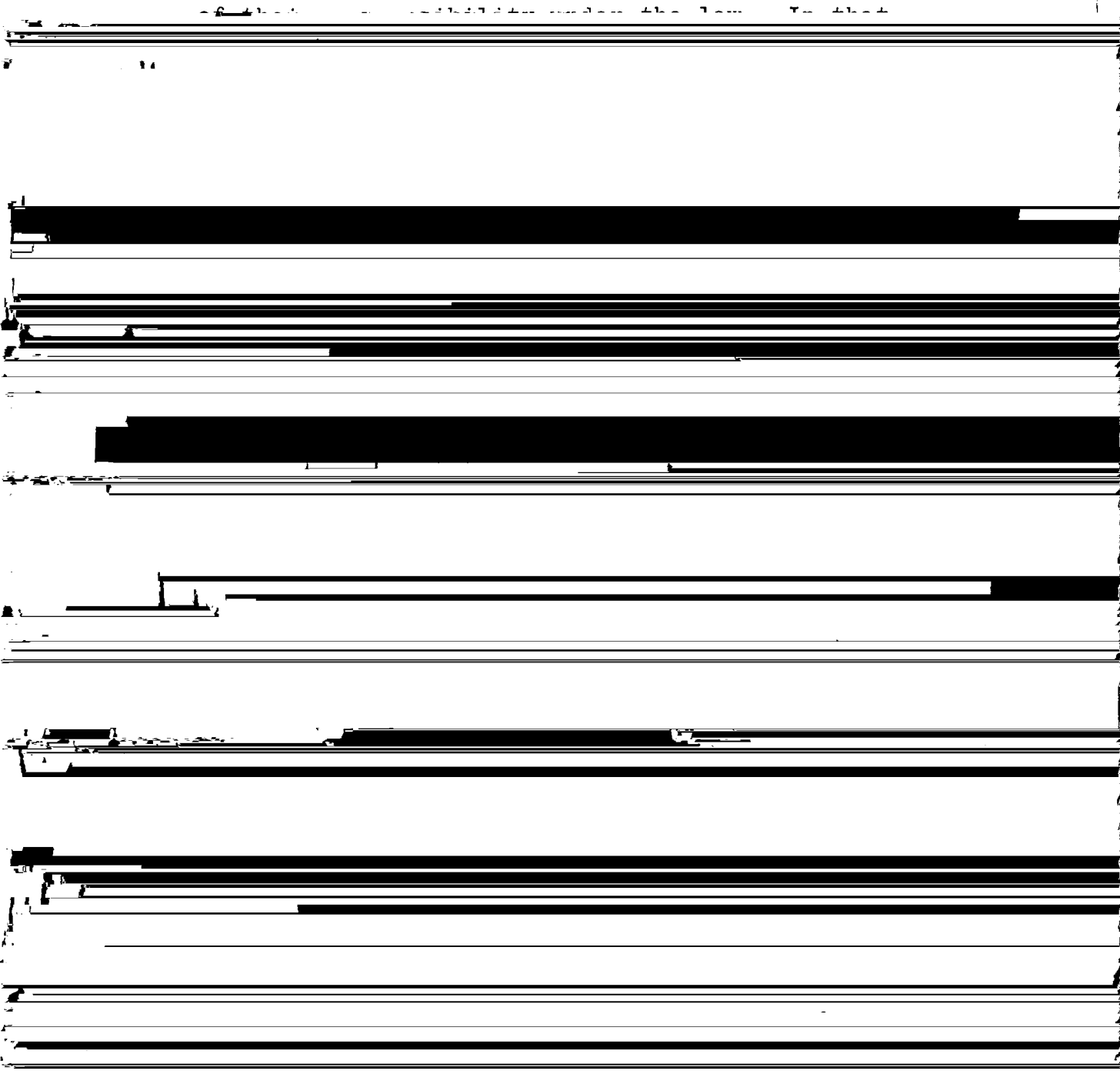
"Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can

statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain. 4/

* * *

should let the Sherman antitrust law stand, unaltered, as it is, with its debatable ground about it, but that we should as much as possible reduce the area of that debatable ground by further and more explicit legislation; and should also supplement that great act by legislation

(2) Wilson also asked that a Federal Trade Commission be created. He wanted such an agency, among other things, to assist businessmen in securing a better understanding



" . . . We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to co-ordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law . . . The Trade Commission substitutes counsel and accommodation for the harsher processes of legal restraint . . ." 9/

It is clear that it was intended by Wilson that with the establishment of the Federal Trade Commission we would have an agency which would apply the law against unfair trade practices on a broad basis in an effort to eradicate harmful practices in their incipiency. It was thought this would be done by specifying harmful trade practices item by item. In this way, it was thought, businessmen would be assisted in avoiding the continuation of practices which would make them liable as criminals under the Sherman Antitrust Act.

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9. Ibid., p. 8158.

Unless the Federal Trade Commission undertakes the specification of harmful trade practices item by item, which probably would lead to trade restraints violative of the Sherman Act, businessmen will be left without guide lines of what is legal and what is illegal under our antimonopoly laws.

It is clear that the national public policy against monopolies and monopolistic practices and conditions precludes any thought of cutting down the scope of the sweep of the Sherman Act and the Federal Trade Commission Act. On that point, the Chief of

From existing circumstances and our experience, it is clear that public policy will continue to dictate that our antimonopoly laws continue with their broad sweep covering a multitude of unspecified trade practices and conditions. It cannot be expected that the Congress will undertake to specify in new legislation each of the trade practices and conditions likely to fall within the broad sweep of the Sherman Act and the Federal Trade Commission Act. Therefore,

businessmen and the public are unlikely to enjoy flexibility, breadth and certainty under our antimonopoly laws unless there is action from day

to day by an administrative law agency such as the

Federal Trade Commission, devoted to spelling out and specifying what trade restraints and conditions are unlawful, and aiding in the establishment of guide lines for avoidance of pitfalls leading to violations. Reference has been made to the responsibility of the Commission to proceed against unfair trade practices on an industry-wide basis. Hope has been expressed that the Federal Trade Commission will give attention to its responsibilities in this regard.

Considerable discussion has centered on the

This idea is not new. For a substantial period of time the Commission has utilized a trade practice conference procedure for the purpose of informing itself about industry-wide practices alleged to be unfair. It has proceeded to utilize that information in formulating statements of what the Commission believed to be applicable as law to the trade practices in question. These statements were designated as Trade Practice Rules and were designed to afford guidance to industries and enable them to voluntarily operate

in compliance with the interpretations of the law by the Commission and the courts. It was hoped that

lieu of proceeding formally against the individual manufacturers involved, the Commission designated a Commissioner to hold conferences with members of the industry and recommend an acceptable disposition of the entire matter, which would end the abuse and eliminate the resultant consumer deception. As a resul of that conference, the members agreed upon proper markings for their products which were acceptable to the Commission, and that agreement became effective on May 1, 1919. The records indicate that the agreement was 100 per cent effective and ended the abuse.

Since that early beginning there has gradually evolved the Commission's present Trade Practice Conference Program. In the intervening years, in excess of 250 United States industries have, at one time or another, operated under various forms of trade practice rules. Today, rules are in effect for 163 industries. Huston Thompson, Chairman of the Commission in 1921, has written that the Trade Practice Conference procedure was developed to meet situations where one member of an industry started an unfair method of competition and others in the industry were forced to adopt it in the interest of self-preservation, with the result that the Commission would be deluged with complaints.[12]

Trade practice conferences have been initiated at all stages in the progess of unfair practices within an industry.

law has been well settled in case decisions and the practices,

fairly uniform to the detailed working out of express standards for guidance of industries early in the history of the emerging industry and in the initial stages of unfair practices within the industry.

In more recent years, the trade practice rules have been more often utilized to afford detailed and specific guidance to industry on specific problems of compliance which were peculiar to the industries affected and in the early stages of the use of unfair methods. Illustrative of this trend was the promulgation of the Rayon Rules.[13/] This new industry, producing a product which closely resembled silk in appearance and texture, was susceptible of deceiving consumers by its

A cursory examination of trade practice rules enacted in the past 10 years shows that the Trade Practice Conference procedure has been used increasingly in industry after industry to afford guidance to members in new industries or where

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o arerthen

3. In increasing numbers of industries, rules involving specific practices have been developed early in their usage,and their service lies not only in ending existing abuses, but it is frequently much greater in the prevention of future abuses.

Students of FTC procedure and the laws it administers have praised the benefits of the Trade Practice Conference procedure.

An article in the George Washington Law Review 16/ concludes that the procedure "has performed for industry and the public a great educational service, the value of which in eliminating unethical practices, and cutting the cost of law enforcement, cannot be overestimated."

The Attorney General's Committee on Administrative Procedure 17/ made this statement:

"... even where formal proceedings are fully

In a number of cases where the courts have had occasion to consider the applicability of trade practice rules in particular cases, they have commented favorably on the rules and upheld the principles enunciated in them. 18/

In addition to these cases, the value of interpretive opinions and rules has been often considered and examined by the Supreme Court. Perhaps the Supreme Court's opinion of such procedures is best summed up in

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

On September 15, 1955, the Commission initiated a new method of interpretive rules in the form of Guides.

The first Guide adopted on the above date covered cigarette advertising. Prior to the adoption of these guides, the Commission had obtained final

cease and desist orders in seven cases and negotiated 17 stipulations involving cigarette advertising.

In 1954 and early 1955, the Cigarette Industry

embarked upon an intensive advertising program of

and are presented to the Commission staff in advance

and then conformed to the informally expressed views

through litigation, and leave the others free to continue the questionable practices.

[redacted]

the administrative process has deepened. More than ever it is believe that these untested but promising rule-making procedures should be explored for use as a supplement to adjudicative work.

Pursuant to specific statutory authority, the Federal Trade Commission and other administrative

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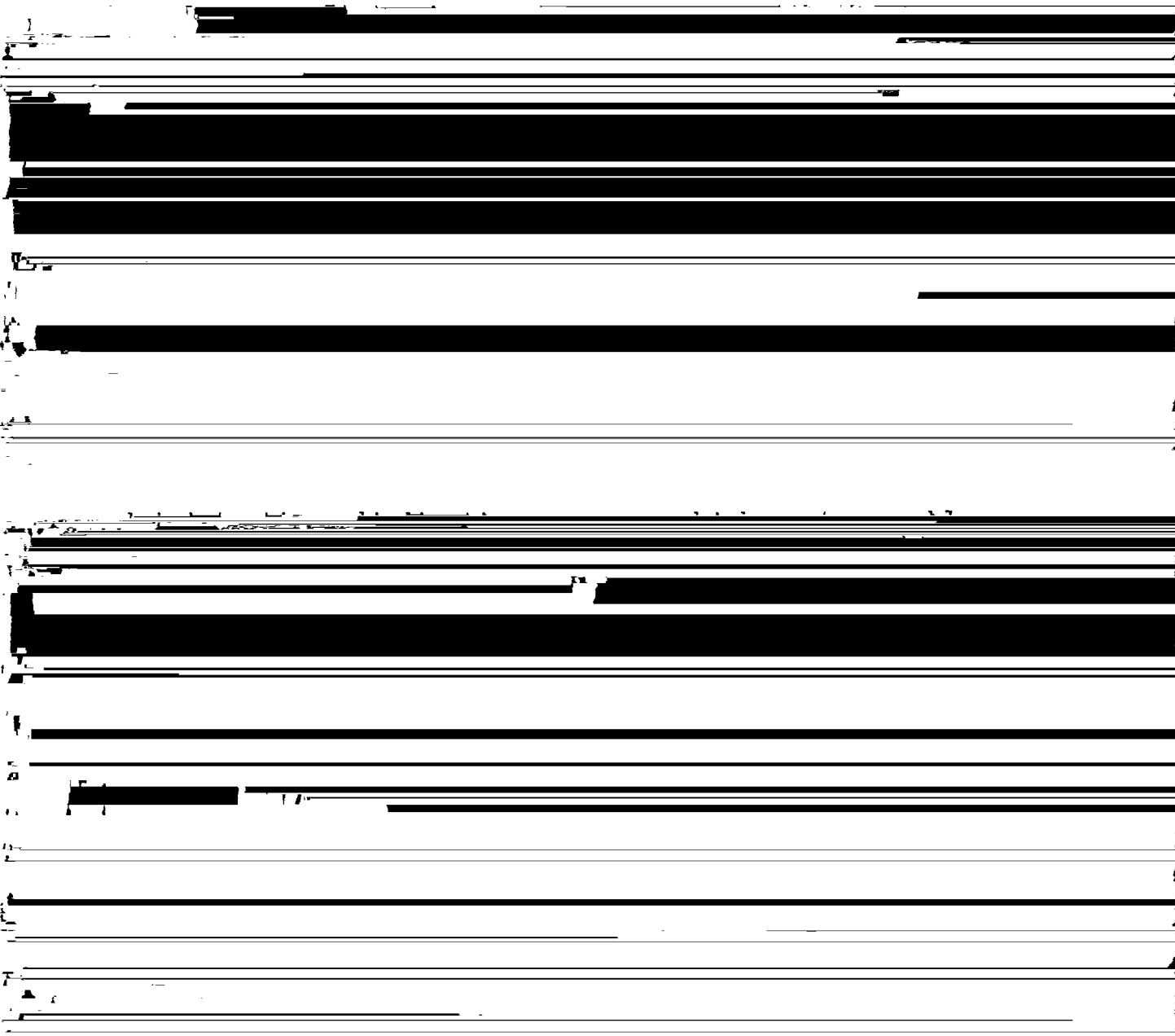
Trade Commission Act. Also, as has been stated, Section 6(g) of the Federal Trade Commission Act empowers the Commission "from time to time to classify corporations

The rule-making process, as has often been pointed out, is that aspect of the administrative process most analogous to the statute-making power of the



the decision-making of the courts. Too often, in stressing adjudicative powers and in analogizing our

while adjudication operates concretely upon individuals in an individual capacity." 22/

Rule-making and adjudication are necessary and complementary weapons in the arsenal of administrative powers. So long as appropriate procedural safeguards are provided, the agency's choice of one mode or the

the Federal Power Commission to set guide lines by which it will be controlled in its regulatory functions is within its authority under the Natural Gas Act. Under that Act the Federal Power Commission was authorized to make determinations regarding rates, charges or classifications observed, charged or controlled by any natural gas company, and in that connection to determine the justness and reasonableness of what the gas company demanded. The Power Commission found that by proceeding against individual companies through the use of the case by case method, it was failing to carry out effectively the Congressional mandate. It chose to meet the problem by a rule-making process by which it would make a determination of what was reasonable and make its determination applicable to the operations of all of the companies operating in a particular area. This the court held it may do under the general terms of the Natural Gas Act.

There are, of course, a number of questions which arise in connection with possible use of rule-making procedures, e.g., whether rules would have retroactive effect; [25/] whether they would be "substantive" or

"interpretative;" [26] the extent to which a reviewing court will be free to substitute its judgment for that of the Commission. [27] To meet the requirements of due process, a substantive rule would necessarily be founded upon clearly defined standards and the rule itself expressed in such definite

simplified because these proceedings would involve only the factual issue of whether the rule had been violated.

Subsequent adjudicative proceedings could then be

violation of the rule, and the rule would carry with it the same sanctions as would the statute itself. Thus, these rule-making proceedings would not be aimed at a generalized restatement of the law as applied to a particular industry or at solving every industry problem in one package, but, rather, would be focused upon critical competitive problems in a particular industry as they arose. In this respect, the results would be more like Internal Revenue Service tax rulings than like our present Trade Practice Rules or Industry Guides.

then under the present procedure with a consequential

judgments as to how competitive processes may be preserved.

As has been mentioned earlier, the case approach to antitrust problems is not adequate for many of our problems. The great danger of relying solely on this approach is that it strikes only at individual firms and often fails to develop the economic facts necessary to develop adequate remedy. It cannot be emphasized too strongly that we must make reliable economic understanding the cornerstone of any legal edifice constructed to ensure the maintenance of a competitive economy.

The case approach is especially effective when two assumptions are fulfilled: (1) a particular firm (or small group of firms) is violating a law, and (2) the