NOTE TO USERS

THE CHANGING ATTITUDE OF THE FEDERAL GOVERNMENT TOWARD COMPETITION AND MONOPOLY, 1911-1933

by

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PREFACE

There is probably no period in the history of antitrust administration that is more important than that of 1911 to 1933. This period was one of a formative nature, where the policy of the Federal Government toward competition and monopoly became fully established. Decisions in the critical antitrust cases of the Standard Oil Co. and the United States Steel Corporation were handed down within this period. The most important legislation since the enactment of the Sherman Act was passed in this period, namely, the Clayton Act and the Federal Trade Commission Act.

Part I of the thesis discusses what the antitrust policy was in this period and how it has been changed since 1911. Part II discusses the significance of the policy expressed between 1911 and 1933. Basically, Part II is an attempt to analyze the effect of governmental policy on industrial concentration and its market policies.

It is felt that this thesis differs from other investigations in confining the study to this period. A further difference is that the policy of all branches of government is included in the study. The emphasis on conduct as a standard for determining competitive or monopolistic condition has been covered by other writers; however, this thesis does differ from other papers in analyzing the change from the standard of conduct and the effect of such a change.

I am indebted to several members of the faculty at the University

of Nebraska for their help with this thesis. In particular, I am indebted to Dr. Clarence E. McNeill for his guidance and patience in directing the study. I am also grateful to Dr. G. O. Virtue, who originally suggested the study. For the encouragement and counsel of Dr. Curtis M. Elliott, I should like to express my appreciation.

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CHAPTER I

INTRODUCTION

The Scope of the Study

The period from the introduction of the "rule of reason" in 1911[1] to the National Industrial Recovery Act[2] in 1933 was a period that established the basic pattern of antitrust regulation. This period began with a new interpretation of the Sherman Antitrust Act[3] by the Supreme Court and ended with a changed attitude by Congress toward this law.

The new interpretation in 1911 was characterized by the "rule of reason" and the emphasis on illegal conduct as a standard for judging monopoly. Prior to this time, neither Congress nor the courts had been too clear on what the law meant. Congress had not defined the concepts of restraint of trade and monopoly in the Sherman Act, leaving the responsibility for the definition of these terms up to the courts. The courts were quite clear in cases of the loose-knit or trade associations,[4] the decisions in these cases being definitely against market agreements

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[1] Standard Oil Co. of New Jersey v. United States, 221 U. S. 1(1911); United States v. American Tobacco Co., 221 U. S. 106(1911).

[2] 48 Stat. L. 195.

[3] 26 Stat. L. 209.

[4] United States v. Trans-Missouri Freight Association, 166 U. S. 290(1897).

among the various members within the association. However, in cases where an integrated company was concerned the courts were hesitant in accepting the responsibility for the interpretation of the two terms of restraint of trade and monopoly, and in the decisions from 1890 to 1911 there was no apparent trend. It was in the decisions of 1911, the Standard Oil Co. and the American Tobacco Co. cases, that the Supreme Court introduced a standard for judging restraint of trade and monopoly, and it was this standard that the Court consistently followed thereafter.

The changed congressional attitude of 1933 was characterized by the exemption of market agreement from prosecution under the Sherman Act. Such exemption was authorized by a provision of the National Industrial Recovery Act. Under this provision, trade associations were permitted to control production and prices, which was contrary to the policy of competition prior to 1933.

The Nature of the Changing Attitude of the Federal Government

In the Standard Oil Co. of New Jersey and American Tobacco Co. cases, the Supreme Court stressed conduct as the standard for judging monopoly. It is this standard that we take as a basis for the analysis of the changing attitude of the Federal Government toward competition and monopoly from 1911 to 1933.[5]

There is no intention to discuss in this thesis what the "rule of reason" means. It is too difficult and controversial in nature to analyze. What one can, however, state about the "rule of reason" is that it implies a more lenient attitude by the Court toward concentration

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[5]This is the emphasis of Mason, Edward S., "Monopoly in Law and Economics," The Yale Law Journal, Vol. XLVII, 1937, pp. 34-49.

in industry. The change from an absolute wording of the Sherman Act, "Every restraint," to one where only unreasonable restraint is unlawful suggests this. Neither is there an attempt to discuss the legal concept of intent[6] in this thesis. The purpose here is not to eliminate intent, but the point to be made is that intent is based upon conduct. As the Supreme Court stated in 1911, intent ". . . is made conclusive by considering (1) the conduct. . ."[7]

Taking conduct as a basis of our analysis of the changing attitude of the Federal Government, there appears to be two ways in which change from a standard of conduct could take place within this period of study. First, the introduction of another interpretation of monopoly than that of illegal conduct would indicate change. The use of such interpretation as control of the market in place of illegal conduct would be an example. A second type of change would be where the Federal Government accepted monopoly in place of competition. Such acceptance of monopoly would result from a changed attitude toward illegal conduct by the fact that the government no longer defined it as illegal. A case in point would be the sanctioning of price agreements, exempting these agreements from prosecution under the Sherman Act.

Basically, the period from 1911 to 1933 expressed an attitude of furthering competition, according to the standards of judgment that we have established in this introduction. There were few changes in interpretation, either by the judiciary or Congress, and these were only of

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[6]For a discussion of intent in relationship to the antitrust laws, see Annual Report of the Attorney General, 1937, pp. 38-41.

[7]Standard Oil Co. of New Jersey v. United States, 221 U. S. 75 (1911).

temporary significance. The qualifications of the Sherman Act, wherein agreements among competitors as to supply and price policy were permitted, were minor.

As to the effect of this policy of the Federal Government on industry, there is an indication that the government qualified competition. This point of view is discussed in the analysis of six industries in Part II. Within this group of industries, the following are included: Petroleum refining, steel, automobile, meat packing, anthracite coal mining, and grocery chain stores. These studies reveal that the government permitted a greater structure of concentration under the Sherman Act, and that it has also sanctioned certain types of conduct, for example, price leadership and market sharing. The acceptance of such concentration and conduct indicates that competition has been altered to some degree.

A question may be asked as to the nature of the changing attitude of the Federal Government toward competition and monopoly as expressed in areas that were not directly related to antitrust policy. For example, the question may be asked as to the influence of the tariff on market conditions since the tariff is probably the outstanding example of government policy that has had an indirect bearing on the problem.

In answer to this question, there appears to be little change in attitude on the part of the Federal Government as far as the tariff or any other indirect policy was concerned. The Underwood Act of 1913[8] was change in the direction of lower tariff, but it was only a temporary change.

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[8] 38 Stat. L. 114.

The Fordney-McCumber Act of 1922[9] and the Hawley-Smoot Act of 1930[10] characterize the period as one of high tariff and protection. Even under the Underwood Act, where there was a change in policy, the effect of this change is difficult to analyze. The conclusion of most authorities on the influence of the tariff is that such policy does tend to exclude foreign competition if the tariff is high enough, but they are very cautious as to whether or not the tariff is responsible for monopolistic conditions.[11] To go beyond the general conclusions of these writers would seem to be speculation.

Definition of Terms

Several terms have been used in this thesis that should be explained. They are standard of conduct, market control, structure of industry, concentration, and size.

Standard of conduct--As used here the term conduct embraces competitive and monopolistic practices. Competitive conduct expresses complete freedom of action by buyers and sellers, where no one attempts to influence the market. When considering monopolistic conduct, the implication is that it is restrictive conduct. Such conduct indicates a limitation on the freedom to compete. The nature of the limitation is twofold: Monopoly may arise where there is either agreement among

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[9] 42 Stat. L. 858.

[10] 46 Stat. L. 590.

[11] See Taussig, F. W. and H. D. White, Some Aspects of the Tariff Question, Harvard University Press, Cambridge, 1931, pp. 3-17; T.N.E.C., Monograph No. 10, Industrial Concentration and Tariffs, 76th Cong., 3d Sess., pp. 7-17; Stocking, George W., and Myron W. Watkins, Monopoly and Free Enterprise, The Twentieth Century Fund, New York, pp. 411-412.

competitors or where there is an attempt to eliminate competition through predatory conduct.

Market control--The potential power of one company or a group of companies to exert influence on total supply or price. Such control is indicated by the percentage of total production that is sold or purchased by one or more companies. It is assumed that market control does not exist in a market of numerous buyers and sellers.

Structure of industry--The nature of the industry as characterized by the number of buyers or sellers in a given market. One seller or buyer would indicate a structure of monopoly. Numerous buyers and sellers in a market would indicate a structure of competition. A few sellers or buyers in a market, agreement being absent, would indicate a structure that was somewhere between competition and monopoly.

Concentration--The tendency within an industry toward fewer and fewer firms. Concentration may be brought about by monopolistic conduct or be a result of the greater efficiency of large productive units.

Size--As used here size is relative to the market. The size of a company is measured by the percentage of total production that the company buys or sells. There are no exact limits as to the percentage a company should buy or sell before it is placed in the category of "small" or "big" business.

PART I

CHAPTER II

GOVERNMENT POLICY PRIOR TO 1911

Introduction

The following analysis includes the period from 1890 to 1911. Here there is an attempt to trace the trend of public policy, as revealed by the attitude of the three branches of the Federal Government.

The point of departure is the Sherman Act of 1890,[1] which is expressive of a standard of competition. Walton Hamilton and Irene Till, describing the attitude of this period, state, "In 1890 free competition as the way of order for industry was not seriously questioned. Conformity to this standard was an obvious expression of public policy."[2] And Milton Handler states that ". . . the statute accepts competition as the summum bonum of our society."[3]

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[1] 26 Stat. L. 209.

[2] T.N.E.C., Monograph No. 16, Antitrust in Action, 76th Cong., 3d Sess., 1940, p. 26. Walton Hamilton, professor of law, Yale University, is the better known of these two authorities. In addition to several articles in this field, he is the editor of Prices and Price Policies," McGraw-Hill Book Co., New York, 1938.

[3] T.N.E.C., Monograph No. 38, A Study of the Construction and Enforcement of the Federal Antitrust Laws," 76th Cong., 3d Sess., 1940, p. 8. Milton Handler is the author of such articles as "Industrial Mergers and the Antitrust Laws," Columbia Law Review, Vol. 32, 1932, and "Unfair Competition," Iowa Law Review, Vol. 21, No. 2, 1936.

Although writers have emphasized the term competition as that which was expressed in the Sherman Act, competition is probably not the best term. A better description of the attitude of this period is that the people desired to eliminate monopolistic abuses. McLaughlin describes the attitude in this way, "The Sherman Act, as its popular designation indicates, was ostensibly an 'anti-trust' act, that is, a law directed against great aggregations of capital exercising power dangerous to the public interest.[4] The people were against monopoly by private interest, and the statute embodied this view; their demand was that the government should regulate. Having limited experience with a policy of control, Congress resorted to suppression.

In tracing this trend of public policy after 1890, the important question is not what Congress did, but what was the attitude of the judiciary? It was the judiciary that determined public policy. In view of the fact that the Sherman Act was so vague as to standards of competition the Supreme Court was called upon to interpret the law. Therefore, it is of greater value to trace the attitude of the courts.

In discussing this judicial attitude, the cases begin with those of the Trans-Missouri Freight Association and the Joint Traffic Association,[5] and are concluded with the two cases in 1911, involving the Standard Oil Co. of New Jersey and the American Tobacco Co.[6] The change from 1897 to 1911 reflects a more favorable attitude by the courts for one thing.

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[4]James A. McLaughlin, "Legal Control of Competitive Methods," Iowa Law Review, Vol. 21, 1936, p. 274.

[5]United States v. Trans-Missouri Freight Association, 166 U. S. 290(1897); United States v. Joint Traffic Association, 171 U. S. 505(1898).

[6]Standard Oil Co. of New Jersey v. United States, 221 U. S. 1(1911); United States v. American Tobacco Co., 221 U. S. 106(1911).

This is expressed in the substitution of the "rule of reason"[7] in interpreting restraint of trade or monopoly for that of the absolute doctrine in the Sherman Act of "Every contract. . .in restraint of trade. . ."[8] Another element in these cases of 1911 is the stress upon the importance of good conduct. The earlier case of the Northern Securities Co.[9] does not reveal this emphasis. In this case the Court is more concerned with the form of organization.

It is this change in the judiciary to a reasonable approach and its acceptance of the standard of conduct that is to be emphasized.

Attitude of the Government Prior to 1911

There was considerable difference of opinion as between the proponents of the Sherman Act and the Supreme Court in its decisions of 1911. The Sherman Act was passed, as was the railroad legislation of 1887,[10] because of the reaction to the abuses of the industrial and railroad corporation. Most of this reaction came from the agricultural sections. Unfamiliar with an industrial system, the objectors questioned that which was new, and that which was changing their way of life from a self-sufficient one to that of a society wherein they were dependent upon the market. Another reason for concern by the agricultural sections was the declining trend of farm prices from 1873 to 1893. Not only were the

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[7]See p. 15 for discussion of "rule of reason."

[8]26 Stat. L. 209.

[9]Northern Securities Co. v. United States, 194 U. S. 197(1904).

[10]24 Stat. L. 379.

farmers affected by the downward trend in prices, but industry was too.[11] However, industry could attempt to correct it, whereas agriculture with the competitive nature of its activities could not.

Looking for a solution to their problem, one of the obvious answers appeared to be to curtail the activities of big business. This reaction was expressed during the seventies and eighties in such movements as the Greenback Party, the silver movement, and later by the People's Party.

Congress became conscious of this problem of regulating monopoly by the latter part of the eighties, several bills being introduced at this time. In the debate on these bills, Congress revealed quite clearly that the institution to be regulated was the industrial trust. The sugar, petroleum, and meatpacking trusts were mentioned specifically, their unified policy of market control being condemned. Senator Sherman made this point in his discussion on trusts: "But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts. . ."[12] The House report on conference stated, "Its only object was the control of trusts, so called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation."[13] In this same report, the House included transportation along

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[11]". . .In 1891, it was observed that there had never been a time in the history of the country when manufactured goods could be purchased so cheaply as that year. . ." Quotation from Victor S. Clark, History of Manufactures in the United States, Vol. II, McGraw-Hill Book Co., Inc., New York, 1929, p. 169.

[12]Cong. Record, 51st Cong. 1st Sess., p. 2451.

[13]Ibid., p. 5950.

with manufacturing, which is an important qualification of the term industrial trust.[14]

There was some discussion as to whether or not farm associations and labor unions were included within the act. Senators Teller,[15] George,[16] Sherman,[17] and Hoar[18] made reference to it. However, in the debate in Congress the discussion of the inclusion of these two organizations was insignificant when compared to that of the industrial trust.

Although Congress was quite definite as to the institution to be regulated, it was vague as to the regulatory standards to be included in the legislation. A brief discussion of the passage of the act reveals this.

The first bill introduced was sponsored by Senator Sherman. This bill stated,

> That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such articles are hereby declared to be against public policy, unlawful, and void.[19]

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[14] Loc. cit.

[15] Ibid., p. 2561.

[16] Ibid., p. 2606.

[17] Ibid., p. 2612.

[18] Ibid., p. 2728.

[19] Ibid., p. 1765.