American Landmark Legislation

PRIMARY MATERIALS

Compiled and Edited by
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Volume 7

1978 OCEANA PUBLICATIONS, INC. / DOBBS FERRY, NEW YORK

The editor wishes to acknowledge the helpful services of Mr. Philip Oxley, Reference Librarian at the Columbia University Law School.

ISBN 0-379-10125-4 (series)
0-379-10132-7 (vol. 7)

Library of Congress Catalog Card Number: 75-42876

Manufactured in the United States of America

To my Harvard Law School 1950 classmates:
Herbert Glaser, Richard K. Fink, Gerald Halpern,
Robert B. Ross and David Herwitz on the occasion of our
twenty-fifth anniversary, 1975.

INTRODUCTION TO THE SERIES

The legislative background of our country reflects its past, its critical events, conflicts, and problems. More than this, legislation has a central place in America's governmental system. Acts of Congress increasingly control every citizen's political, social, and economic life. In selecting the laws for this series of *Landmark Legislation,* the editor used two criteria. The first of these was the important national significance they had at the time Congress passed them. Secondly, these laws carry principles that continue to be of great import to one dimension or another of American life. Even when particular laws are no longer in effect, either because they accomplished their purpose (*viz.,* the Homestead Act of 1862) or were declared unconstitutional at a later point by the judiciary (*viz.,* the Civil Rights Act of 1875), their legislative history helps us deal with contemporary issues. Thus public land use and civil rights have something of their genesis in the Homestead and Civil Rights Acts of the nineteenth century.

This series will provide general readers and students, as well as professional workers, with primary legislative materials not now readily available except in the largest library systems. And even there, the task of sifting out and distilling the specific and relevant materials takes skills, time, and energy a very limited number of people have. Hopefully, the *Landmark Legislation* series will make a study or investigation of these important pieces of legislation a pleasurable as well as a viable pursuit.

Reproducing as we have the actual legislative and judicially-related materials will give readers a sense of authenticity as well as "flavor" that cannot be conveyed with ordinary narrative texts.

The full, unabridged, and unedited primary sources are offered for each of the statutes covered. Editing or abridging would have resulted in selection, which in turn reflects an editor's point of view. While unedited accounts require the reader to wade through more than he may be looking for or wants to know, they have the advantage to alerting him to information he did not know existed and should have! In any case, the full reproduction of the congressional debates during the session of the Congress that passed the law is a feature of this series that distinguishes it from anything presently available.

Each "landmark" statute is preceded by a detailed narrative legislative history prepared either by the editor or adapted from an authoritative source. Following the statute are a variety of pertinent documentary sources.. In addition to the complete congressional debates already mentioned, there are committee reports, presidential messages, contemporary news or editorial accounts, and finally, judicial decisions that either interpret the legislation or some part of it or deal with its constitutionality. Together, such a set of materials relating to America's leading legislative enactments will fulfill a great variety of needs and purposes among our citizenry.

Irving J. Sloan
Scarsdale, New York

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The Legislative History of the Clayton Act*

The Political Environment in Which the Clayton Act Was Enacted

During the decade and a half preceding the enactment of the 1914 legislation, the important political leaders of the nation had expressed opinions on the "trust problem," official proposals had been made for changing the antitrust law policy, and the question was a major issue in the presidential campaign of 1912.

*Chapter 2, *Mergers and the Clayton Act* by David Dale Martin, University of California Press (Berkeley: 1950), with permission.

The Recommendations of the Bureau of Corporations—The creation of the Bureau of Corporations constituted a new conception of the "trust problem," since it was a recognition of the inevitability of industrial combinations, in spite of the prohibitions of the Sherman Act. Congress expected the bureau to provide indirect regulation of combinations. Public opinion, exerted in response to information made available by a permanent administrative agency, was expected to prevent the abuse of corporate power. The work of the bureau during its twelve years of existence was narrow in scope, but its investigations of the oil, tobacco, and harvester industries led to the antitrust cases in those fields.[1]

Until the change of personnel in 1913, occurring with the advent of the Wilson Administration, the Commissioner of Corporations held the opinion that most problems of social control of business could be solved by adequate publicity of corporate practices. In this period the commissioner made no recommendations to change the law to prohibit mergers in any form. Requests were made, however, for new legislation to create an agency with sufficient powers to extend the investigative and publication activities of the bureau to all interstate corporations. For example, in 1907 Herbert Knox Smith, the Commissioner of Corporations, said:

> As has been stated in previous reports, the primary object of the Bureau is to set before the President, Congress, and the public reliable information as to the operation of the great interstate corporations in such clear and concise form as to show the important permanent conditions of such corporate operations. With such information as a basis, it is believed that the great corrective force of public opinion can be intelligently and efficiently directed at those industrial evils that constitute the most important of our present problems. . . .
>
> Corporate combination, as such, appears to be not only an economic necessity, but largely an accomplished fact. The mere prohibition of commercial power, simply because such power is the result of corporate combination, by no means meets the real evils. It is not the existence of industrial power, but rather its misuse, that is the real problem. . . .
>
> Thus, the experience of the Bureau seems to point logically to the need

[1] W. Stull Holt, *The Federal Trade Commission, Its History, Activities and Organization*, Institute for Government Research, Service Monographs of the U.S. Government, no. 7 (New York: D. Appleton & Co., 1922), pp. 4–5.

for an extension of such results by the creation of a general administrative system of supervision of interstate corporations which shall give, in substantially the same form as is furnished now for a few corporations, the essential facts relating to all the great interstate corporations. . . . Whether the system take the form of a Federal licence plan or a simple requirement that interstate corporations shall make reports and submit their books to a Federal bureau is of little consequence so long as the information necessary for publicity is obtained.[2]

The following year Oscar S. Straus, Secretary of Commerce and Labor, reiterated this same general approach to the problem of social control of industrial corporations:

It is becoming more and more obvious that the work of the Government in regulating corporations should not be directed at the mere existence of combination itself, as such, but should deal rather with the way in which the combination powers are used, so as to prevent as far as possible the misuse of these great industrial forces. . . . It is useless to ignore the operations of the economic law that has brought about the present concentration in business. It is useless to ignore the fact, further, that this concentration is already largely accomplished.[3]

The first reports on antitrust law policy of the Secretary of Commerce and the Commissioner of Corporations in the administration of President Wilson show a marked change of attitude from the reports of the secretary and commissioner in earlier administrations. In his 1913 report, Secretary of Commerce William C. Redfield renewed the requests of his predecessors that information from corporations engaged in interstate commerce should be submitted to some government agency, but his report spelled out in detail what information he thought should be required and included, among other things,

. . . the names of other corporations in which it holds stock, and names of other corporations which hold its stock, and the respective amounts held; other companies in which its officers or directors are either officers or directors, and their stockholdings in such other companies; . . .[4]

[2] *Reports of the Department of Commerce and Labor, 1907* (Washington: 1909), p. 33.
[3] *Ibid., 1908*, p. 33.
[4] *Ibid., 1913*, p. 70.

As contrasted with previous recommendations, the purpose of such information would be to obtain a basis for legislation rather than relying on public opinion. Secretary Redfield, however, went beyond this and proposed some immediate changes in the anti-trust laws:

> That there are immediate and well-known conditions that should and can be remedied by law is apparent. Some of these remedies are, for instance . . . that corporations shall not hold stock in other competing companies, and that neither a person nor a corporation shall at the same time own a controlling interest in two or more competing corporations, or that the officers of corporations shall not be affiliated directly or indirectly by holding office in other corporations.[5]

Joseph E. Davies, Commissioner of Corporations, expressed essentially the same views in his report.[6]

Other Proposals for Restricting Combinations—In the years immediately preceding the enactment of the Clayton Act, several proposals dealt specifically with the question of prohibiting combinations in one form or another. Consideration of some of these proposals may place in better perspective the proposals that were in fact adopted.

In a message to Congress in 1911, President William Howard Taft renewed a previous request for legislation providing for voluntary incorporation under federal charter of corporations engaged in interstate and foreign commerce. He recommended that the law prohibit corporations organized under the act from either acquiring or holding stock in any other corporations (whether competing or not) except upon approval of a federal agency for special reasons. There was no suggestion of the prohibition of mergers or asset acquisitions since he thought the Sherman Act was sufficient to prevent monopoly.[7]

In the previous session of Congress, Senator Robert W. La Follette had introduced a bill to amend the Sherman Act by adding several sections to it. This bill proposed that in Sherman Act cases

[5] *Ibid.*, p. 71.
[6] *Report of the Commissioner of Corporations* (Washington: 1914).
[7] *Congressional Record*, 62d Cong., 2d sess., 48:1 (1911), 25–26.

several actions on the part of the defendants would be considered conclusive evidence of unreasonable restraint of trade. Among these actions, the bill included doing business under any name other than a corporation's own corporate name, and concealing or misrepresenting the ownership or control of a business or the identity of a manufacturer. This was apparently aimed at what was considered to be evils of the holding company.[8]

In 1912, Senator John Sharp Williams introduced a bill that would have specified certain charter provisions as prerequisites to the privilege of doing business in interstate commerce. Senator Williams included prohibitions against owning stock in any other corporation or having its stock owned by any other corporation. He made no attempt in this bill to prohibit mergers or asset acquisitions.[9]

In the same session of Congress, Senator Albert B. Cummins introduced a bill that would have prohibited a corporation from engaging in interstate commerce if its officers and directors included men who were officers or directors or under the control of officers or directors in another corporation engaged in business "of the same general character." This bill would have prohibited intercorporate stockholding irrespective of the similarity of the businesses. It would have attempted to prevent a community of interest between competitive corporations by prohibiting a person from owning more than 10 per cent of the stock of each of two competing interstate companies. Section 3 of the bill would have restricted mergers and asset acquisitions as well as internal growth of firms. It would have prohibited a corporation from engaging in interstate commerce if it employed capital to the extent that it would "destroy or prevent substantially competitive conditions" in the industry.[10]

One proposal made during the second session of the Sixty-second Congress specifically dealt with the question of the acquisition by one corporation of the property of another. Judge

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[8] U.S. 62d Cong., 1st sess., S. 3276. Reprinted in William S. Stevens, *Industrial Combinations and Trusts* (New York: Macmillan Co., 1913), pp. 530–537.

[9] U.S. 62d Cong., 2d sess., S. 4747. Reprinted in Stevens, *op. cit.*, pp. 537–540.

[10] U.S. 62d Cong., 2d sess., S. 5451. Reprinted in Stevens, *op. cit.*, pp. 540–547.

Elbert H. Gary was requested by the Senate Committee on Interstate Commerce to submit a draft of a bill.[11] The proposal of Judge Gary would have set up a corporation commission to license interstate corporations as a prerequisite to engaging in interstate commerce. No corporation so licensed and whose business constituted more than 50 per cent of the business "of the same character" in the national market would have been allowed to acquire the property or business of another corporation whose business was similar without the approval of the corporation commission. The commission would give its approval only if it concluded that the acquisition would not result in a monopoly or restraint of trade in violation of the Sherman Act. This proposal would have made no change in the criterion of illegality under the Sherman Act, but would have required a judgment prior to the achievement of a degree of market control sufficient to constitute a Sherman Act violation.[12]

All the proposals discussed above were reactions to the enunciation of the rule of reason by the Supreme Court in 1911.[13] With the exception of Judge Gary's suggestions, all were designed to be an enunciation by Congress of a policy toward combinations more stringent than the Sherman Act, as it was interpreted at the time. They aimed, however, at specific practices that apparently accompanied the development of the combinations that had been given wide publicity by the major antitrust cases. The holding company was considered an obvious evil with which the Sherman Act was not capable of dealing effectively. The holding company was an easily understood, well-defined device, used by the "trusts" and unpopular with the voters. Only Judge Gary dealt with the more difficult question of establishing a criterion by which to judge the degree of integration consistent with public policy, and he proposed the retention of the Sherman Act test of illegality, that is, whether the combination unreasonably restrains trade to the injury of the public.

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[11] See *Hearings on the Control of Corporations, Persons, and Firms Engaged in Interstate Commerce,* U.S. 62d Cong., 2d sess., pp. 2407–2412.

[12] Stevens, *op. cit.,* p. 552.

[13] See pp. 16–17.

The Election Campaign of 1912—In the presidential election campaign of 1912, all three parties recognized the necessity of advocating strengthening the antitrust laws. There was general agreement that some new agency should be set up to regulate industrial corporations engaged in interstate commerce. The differences in approach to the problem, indicated by the recommendations of the commissioners of Corporations and the secretaries of Commerce in the Republican and Democratic administrations, were also manifested in the campaign pronouncements of those two parties. Some pronouncements of the group of Republicans who broke away to form the Progressive party were stronger than those of either of the other two parties. All these groups, however, pledged to give the voters some type of positive legislation to supplement the Sherman Act.

The platform of the Republican party included the following statement:

> The Republican Party favors the enactment of legislation supplementary to the existing anti-trust act which will define as criminal offences those specific acts that uniformly mark attempts to restrain and to monopolize trade. . . .[14]

The platform did not state the acts to be prohibited. On the question of the creation of a new administrative agency, the platform was also couched in very general terms:

> In the enforcement and administration of Federal Laws governing interstate commerce and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts.[15]

In his speech in acceptance of renomination, President Taft discussed antitrust policy at length. He renewed his suggestion for a federal incorporation law, but made no specific reference to the question of changing the law to prohibit combinations effected by either stock or asset acquisitions. He expressed his general satisfaction with the Sherman Act and opposed any "drastic amendments," saying:

[14] *Official Report of the Proceedings of the Fifteenth Republican National Convention* (New York: Tenny Press, 1912), p. 345.

[15] *Ibid.*

The measure has been on the statute book since 1890, and many times under construction by the courts, but not until the litigation against the Standard Oil Company and against the American Tobacco Company reached the Supreme Court did the statute receive an authoritative construction which is workable and intelligible.[16]

Taft called for new legislation to prohibit specific unfair trade practices, but he gave no indication of which practices should be prohibited. He went on to call for a competent agency to supervise business transactions and thus preclude violation of the antitrust laws:

[T]here is great need for . . . constructive legislation of a helpful kind. Combination of capital in great enterprises should be encouraged, if within the law, for everyone must recognize that progress in modern business is by effective combination of the means of production to the point of greatest economy.[17]

Some Republicans differed on the degree to which the antitrust laws should be strengthened. A minority report of the platform committee at the Republican convention strongly denounced the Standard Oil and American Tobacco decisions and declared that the "present law is impotent to destroy monopoly." It called for supplementary legislation placing the burden of proof on the defendants in restraint of trade cases, prohibiting community of interest between corporations set up by dissolution decrees, and giving the proposed commission authority to administer all the antitrust laws. The report made no proposal, however, on specific prohibition of stock or asset acquisitions.[18]

The Progressive party, formed in 1912 by dissident Republicans under the leadership of Theodore Roosevelt, also advocated strengthening the antitrust laws, but its proposals would have changed the basic policy embodied in the Sherman Act to allow large combinations under government regulation. The Progressive party platform stated:

To that end we urge the establishment of a strong Federal administrative commission of high standing, which shall maintain permanent active super-

[16] *Ibid.*, p. 429.
[17] *Ibid.*, pp. 429–430.
[18] *Ibid.*, pp. 354–356.

vision over industrial corporations engaged in interstate commerce, or such of them as are of public importance, doing for them what the Government now does for the national banks, and what is now done for the railroads by the Interstate Commerce Commission.[19]

In the campaign of 1912, the Democratic party also offered general promises with respect to strengthening the antitrust policy, but it made specific statements concerning holding companies. The platform said:

We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directorates, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.[20]

The record of the 1912 campaign thus reveals that the political leaders of the nation believed that the public was interested in new legislation to supplement the Sherman Act as interpreted by the Supreme Court. Most discussions of the problem were couched in highly general terms. Everyone recognized the need for some new form of administrative agency to deal with industrial corporations, but the nature and duties of such a body were in dispute. The public discussions definitely placed on the defensive those who were satisfied with the substance of the Sherman Act as interpreted. With the Democratic party winning the election and Taft running third, it was evident that positive action had to be taken by the new administration, but the campaign had not crystallized public opinion on the basic question. The discussions resulted in no substitute for the rule of reason as the basis of deciding the extent to which the government should allow control of markets for industrial products to be concentrated in the hands of single firms. Nor did the legislative process answer this question. The new provisions of law accomplished primarily

[19] Quoted in: *Interstate Trade Commission, To Accompany H.R. 15613*, U.S. House Interstate and Foreign Commerce Committee, 63d Cong., 2 sess., H. Rept. 533 (1914), part 3, p. 2.

[20] *Ibid.*, p. 3.