HD 2500
.F87
no.79

OF HOUSE JUDICIARY COMMITTEE ON MARCH 19, 1947 at 1[illegible]

A few observations of a general and introductory nature are pertinent to the vital issues presented by this bill. The only tenable theory of social action is that the law should follow the facts. That is the genius not alone of the common law but of legislative policy in a democratic society. We have a declared public policy regarding monopoly that is rooted in the principles of the common law and which has been embodied in and implemented by a series of antitrust statutes. But in the dynamic development of industry based on modern technology the facts are constantly tending to outrun the law. It is obvious that unless the law keep pace with the changing facts it will become more and more of an abstraction with less and less force in controlling the course of events.

The Commission believes that all the necessary facts have been made a matter of record on which the action proposed by this bill to amend one of those antitrust acts must be either predicated or rejected. The facts of record demonstrate that our economy has been evolving in a manner that increasingly contradicts the economic foundations of our institutions and the basic assumptions of our antitrust laws. This bill affords an appropriate opportunity to make an effective choice between taking the first step toward changing our law to cope with the changing facts and letting our law against mergers of competing

corporations fall further and further behind while concentration of economic power proceeds further toward its full fruition in some form of monopolistic industry and strongly centralized government. The factual diagnosis showing the relation of mergers to concentration is as complete and as exact as specialists in the field can make it and the choice is one between legislative action and continued frustration of our declared public policy against such mergers.

The most recent addition to the factual record on the subject of concentration is embodied in the special report to Congress which the Commission submitted under date of March 10, 1947. Only in circumstances where the public interest demands it has the Commission exercised its statutory function of sending special reports to the Congress and of making special recommendations for legislation. According to this report the trend toward monopolistic concentration of economic power shown by many previous studies has been continuing at an accelerating pace since 1940. The report shows that more than 1,800 formerly independent manufacturing and mining concerns have been swallowed up through merger and acquisition since 1940 and that their combined asset value was $4.1 billion, or nearly 5 percent of the total asset value of all manufacturing concerns in 1943. Moreover, it was the larger corporations each having assets of over $5 million (in many instances achieved through earlier

acquisitions) that accounted for some three-fourths of these recent 1,800 acquisitions; no less than 242 of these acquisitions were made by 18 large corporations.

The war and the exigencies of national defense contributed powerfully to the trend of concentration by channeling government purchases and government financing of productive facilities predominantly into the hands of corporations which already occupied positions of dominance in their respective industries. Surplus profits created by such channeling have contributed powerfully to the trend by providing funds for additional wartime and postwar expansion through acquisition of former competitors. These conclusions appear in and are supported by the report of the Special Senate Committee on Small Business dated December 31, 1946. Among other things that report showed that out of $175 billion of government contract awards between June 1940 and September 1944, $107 billion or [illegible] percent, went to only 100 of the more than 18,000 corporations receiving such awards (Progress Report on "Future of Independent Business," January 2, 1947, p. 24). This report pointed out also that during the war 68 corporations had received two-thirds of the $1 billion appropriated by the government for research and development purposes in industrial laboratories, and that some two-fifths of the whole amount went to the top ten corporations. Moreover, the 62 largest listed manufacturing corporations increased their net working capital by an estimated total of $8.4 billion between 1939 and 1945.

The staff re[illegible] [illegible]oly Subcommittee of

Committee on Small Business submitted on Decemb[illegible]

that the disposal of government owned war surplus plants had

operated to increase the amount of industrial concentrati[illegible]

represented by the 250 largest manufacturing corpora[illegible]

about 66 percent to about 70 percent [illegible] six large [illegible]

alone, which had less than 10 percent of all manufacturi[illegible]

ties in 1939 had acquired 48 percent of the val[illegible]

sold as of June 30, 1946

The most recent information on the wartime growth [illegible]

centration available from the Bureau of Internal Revenue shows

that the larger manufacturing corporations, those with a[illegible]

$60 million or more each, increased their shar[illegible] total asset[illegible]

from 42 percent in 1939 to 52 percent in 1943 [illegible] over, th[illegible]

enlarge[illegible] their proportion of gross sales (and gross receipts [illegible]

operation) from 32 percent of the total in 1939 to 42 perce[illegible]

1943 It may be noted that in 1943 there were only 234 manufa[illegible]

turing corporations in this group, representing only three

of one percent of the total number of all manufacturing cor[illegible]

tions

An even more precipitous increase in concentration too[illegible]

place in the metal products industries - the field most vit[illegible]

affected by the war In these industries corporations with

$50 million or more in assets increased their sh[illegible]

assets from 49 percent in 1939 to 59 percent in 1943, and their proportion of gross sales from 58 percent [illegible] percent. In 1943 there were only 118 of these large corporations in the metal products field, representing but seven-tenths of one percent of the total number of all metal products corporations.

The effect of war contract awards upon concentration, as shown by the foregoing figures, was forecast in 1941 by the Final Report of the Temporary National Economic Committee. That report had shown that out of some $13 billion awarded by the government for national defense between July 1940 and March 1941, about 45 percent was awarded to six closely related corporate groups and 80 percent was awarded to 62 companies or interrelated groups (Final Report p. 4). In the light of what has come to pass it may not be amiss to recall the warnings of the Temporary National Economic Committee in that connection.

In 1941, that Committee warned that "It is quite conceivable that the democracies might obtain a military victory over the aggressors only to find themselves under the domination [illegible] economic authority far more concentrated and influential than that which existed prior to the war" (Final Report [illegible]

[illegible] another war would do to extend and entrench such domination by a few over the many needs no comment.

The degree of prewar concentration in the economy as a whole and in manufacturing industries in particular was [illegible]ed by the report of the Senate Small Business Committee, submitted in January 1946. It contained the following.

The 4[illegible] largest transpor[illegible]
92 percent of all the trans[illegible]
the country

The 40 largest public utility corporations owned more than 80 percent of the public utility facilities.

The country's 20 largest banks held 27 percent of the total loans and investments of all the banks.

The 17 largest life insurance companies accounted for over 81.5 percent of all the assets of all life insurance companies.

The 200 largest nonfinancial corporations owned about [illegible] of all the assets of all the nonfi[illegible] [illegible]porations in the country.

One-tenth of 1 percent of all the cor[illegible]
owned 52 percent of the total corporate [illegible]

One-tenth of 1 percent of al[illegible]
earned 50 percent of the total c[illegible]

Less than 4 percent of all the manufac[illegible] corporations earned 84 percent of all the [illegible] of all manufacturing corporations.

No less than 33 percent of the total value o[illegible] manufactured products was produced under conditions where the four largest prod[illegible] each indiv[illegible] product accounted for over [illegible]nt of the [illegible] United States output.

More than 57 percent of the total value of manu[illegible]factured products was produced under conditions [illegible] the four largest producers of [illegible] over 50 percent of the total [illegible]

One-tenth of 1 [illegible] of a[illegible] the firms in the country in 1939 em[illegible] 500 or more workers and accounted for 40 percent of all the nonagricultural employment in the country.

In manufacturing 1.1 percent of all the firms employed 500 or more workers and accounted for 48 percent of all the manufacturing employment in the country.

emp...
workers were employed by 14...
remai... third w...
About ... 00 inc...
research laboratories.

Some of these figures were taken from the final report of the Temporary National Economic Committee which was published in 1941 after a most exhaustive stu... movement and the extent to which the concentratio... power had proceeded up to World War II.

In May 1945, hearings were held on H. ... 2357 which was a bill to amend Section 7 of the Clayton Act in a man... somewhat similar to what is proposed ... the present bill. At those hearings, the facts regarding the extent of monopolistic concentration through corporate mergers and acquisitions in a numb... of industries were presented by members of the Commission's staff. For the purpose of supplementing the findings of the Temporary National Econ... Committee, a showing of acquisitions occurring betw... 1939 and 1944 was put into the record. In addition a detailed case study was presented showing how the present concentrated control in a number of particular industries had come to pass through acquisition of competing corporatio...

The following industries were examined:

Agricultural Implements	Chemicals
Bread and Packaged Foods	Processed Building Mater...
Milk and Milk Products	Salt
Rubber Tires	Drugs
Rubber Boots and Shoes	Dry Ice

.atus [illegible]nisLe

The statement of this Commission in its Report to the 80th Congress suggests the answer to the question of the first step necessary to be taken in the light of experience and the objectives of our declared public policy.

Mergers and acquisitions are now sharply [illegible] rise more mergers and acquisitions in the manufacturing and mining industries took place in 1946 than in any [illegible] the previous 15 years. In 1946 the number of mergers was [illegible] percent above the number in 1945, and 225 percent above [illegible] annual average of the years, 1940-1941.

Some rather significant things appear when the number of mergers and acquisitions is considered year by year during the 26-year period covered by the report of the Senate Committee referred to above. In general, it appears that the years of greatest business activity and high price level [illegible] the years in which the greatest number of mergers take [illegible] In 1920, the number of mergers increased more than six [illegible] over the number during [illegible] not be [illegible] note that it was in March 1920 that the Supreme Court handed down its decision upholding the legality of the [illegible] Steel Corporation's numerous corporate acquisitions [illegible] Beginning in 1926, [illegible]umber of mergers substantially surpassed the number for 1920 and increased each year thereafter until 1929 when it reached the record figure of [illegible]

it may not be irrelevant to note that it was in November 1926 that the Supreme Court handed down its decisions curtailin[g] power of the Federal Trade Commission to order the divestit[ure] of stock unlawfully acquired whenever the merger was completed by an acquisition of physical assets, even though such assets were acquired as a result of the use of power obtained through unlawful stock acquisitions. In 1943, however, there began a new wave of mergers, which was continuing at high levels in 1946.

It is certainly more than a coincidence that the stock market crash of 1929 which heralded the onset of the great depression was preceded by a great wave of corporate mergers and a wild speculation in their securities. Today speculation in the future of merged concerns, supported by war-swollen profits, is again operating as one of the important causes of the present upward trend in merger activity. It is indeed ironic that this speculation, which stems from the expectation of greater profits resulting from the elimination of formerly competing concerns, leads inexorably to the elimination of our competitive economy and thus to the elimination of the possibility of legitimate speculation.

Assuming as we must that the government, acting [illegible] the general public interest, can, if Congress so directs, prevent the further growth of monopolistic power through mergers of competing corporations, the question is one of ways and means such as H. R. 515 proposes, of halting all mergers that tend toward monopoly regardless of whether consumated by sale of stock or of assets. However, only by a frank recognition of our f[illegible] concerning which the facts "day unto day uttereth speech" and a clear understanding of the legal futilities in which we so have been enmeshed, can we hope to replace such futilities with effective legal weapons.

The legal futilities referred to may be summarized briefly. The documented details have been so frequently set forth, not only by the Commission but by other students of the problem, that

in 19

dissolved under the Sherman ... pursuant to the S
Court's decrees of dissoluti... the Standard
Tobacco cases decided in 1911. It was assumed
remaining problem was how to prevent the format
how to ... incipient monopoly in the bud ...
the characteristic and prevailing method of cre
a... tions of corporate power up to that time had been t
acquisition of the capital stock of competing corporation
was the method forbidden by Sectio... The expectatio
monopoly would thus be rooted out in ...

However, about the time that the Commission ha...
a number of proceedings for enforcement ... Section ... the
Court interpreted the Sherman Act to mean that huge siz
power acquired through acquisition of competing corporations
not necessarily violate that Act and that it was ...
of such power and not its existence which would make such
acquisitions unlawful. A few years later when the Commiss...
cases under Sec... reached the court, it was held ...
Commission had no power under Section 7 to halt the incipie...
monopolies where the unlawful acquisition of stock was fol
by an acqu...on of the physical properties without which
stock had no value, and where this was done before the ...
could complete the hearings and enter its order requiri...
...of the stock ... acquired.

A typical [illegible] cally current instanc[illegible] he futil[illegible] of any further attempt to enforce Section 7 under such circumstances is the case of the Consolidated Grocers Corporation. Through a number of stock acquisitions in competing corporations, that company became, in 1945, the largest wholesale grocery in the country with assets of $20 million and annual [illegible] $100 million. It occupied an allegedly dominant position in the wholesale grocery trade in numerous important trade areas, including Chicago, Baltimore, and Canton, Ohio. The Commission issued its complaint in 1946, charging a violation of Section 7; but while the case was being tried, the respondent corporation took title to the assets, which it had previously controlled only through stock ownership, and dissolved the subsidiary corporations whose stock it had acquired. There being no effective way by which the stock acquired could be divested, even though it was later held to have been unlawfully acquired, the Commission had no alternative to dismissing the case, which it did in February 1947.

The practical status of Section 7 and of the Commission's present powers relating thereto is that no matter how unlawful an acquisition of stock in a competing corporation may be, the remedy provided by the statute can easily be defeated, leaving the acquiring corporation in possession of the assets which are the fruits of its unlawful acquisition of stock. And if the assets be acquired directly without any intervening acquisition

of stock, as has become the prevailing method, there has never been any legal ground for a contention that this was prohibited under Section 7.

Thus the brave start, under the 1914 statute, toward preventing monopoly in its incipiency has ended in complete frustration. And at the same time, the Sherman Act has been so construed that it seldom has served to unscramble corporate mergers, no matter how great the size and power of the acquiring or of the consolidated corporation. In the International Harvester case, the Supreme Court did not think that such a corporation which constituted from 64 to 85 percent of an industry as an unlawful monopoly. (274 U.S. 693, 701, 708 [1927]. This condition of legal impotence has continued for over twenty years, notwithstanding recurring cycles of corporate mergers and repeated demonstrations of the facts by the Commission and other students of the problem. The contrast between the rapid evolution of economic concentration of power and the feebleness and slowness with which effective legal remedies have been and are being applied is most striking. It is sufficient to call in question the reality of our faith in the validity of the competition presupposed by the free enterprise competitive system.

A paradoxical aspect of this problem is that while corporate mergers and acquisitions proceed unrestrained and unrestrainable by law toward an ultimate maximum in unified ownership and concentrated economic power, we still enforce the law against the

more transient and more vulnerable forms of trade restraint represented by price agreements and conspiracies among competitors. The process of corporate acquisition proceeds side by side with such forms of trade restraint among competitors, and the presence of large scale unified ownership in any industry is a most powerful guarantee of success in the operation of a price-fixing combination among the competitive units of that industry. The anomaly of the situation is that the very success of law enforcement against such combinations highlights the advantage of unified corporate ownership as a legally invulnerable means of accomplishing similar ends. It therefore stimulates the very trend which constitutes the problem to which this bill is addressed. Carried to its logical result, there will probably be less and less opportunity to score victories against price-fixing combinations as corporate mergers immune from legal attack take their place.

The truth of the whole matter is simply that we enter the era of atomic energy with the military, social and scientific facts all indicating the benefits of decentralization, but facing the prospect of a continued economic pressure tending toward more and more centralization.

The responsibility for action on the problem of monopoly is traditionally non-partisan. The Sherman Act was enacted in 1890 with but one dissenting vote in Congress -- truly a non-partisan policy. The legislative strengthening of that policy in 1914 by the Clayton Act, designed to curb monopoly in its

incipiency, likewise was forecast in 191[illegible] planks in the platforms of all the major political parties. No one has summarized the danger of monopoly any better than President William Howard Taft, under whose administration some of the most far-reaching antitrust actions of all time were taken. On December 6, 1911 he stated:

> "When all energies are directed, not toward the reduction of the cost of production for the public benefit by a healthful competition, but toward new ways and means for making permanent in a few hands the absolute control of the conditions and prices prevailing in the whole field of industry, then individual enterprise and effort will be paralyzed and the spirit of commercial freedom will be dead."

The Federal Trade Commission now urges the Congress to act responsively to the facts of the present situation of the increasing threat not only to our traditional antitrust policy but also to the American system of free competitive enterprise which that policy is designed to foster and to protect.