1924

Book Review: The Federal Trade Commission

Wesley A. Sturges
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
for another. The suggestion is very interesting, but he does not expect to see such a scheme become a reality.

As to the comparative size of the two Chambers in the several states of the Union there has been a pronounced tendency in at least one direction and that is that the proportion between the smaller and the larger Chamber should be, roughly speaking, as one to three. Assuming the same degree of audacity as the author, it is suggested that the relation of one to three in the two Houses of the Federal Congress would be about right. In other words, that with a Senate of almost a hundred members, the most workable size for the other Chamber would be about three hundred.

As to the length of term or frequency of election, the prevailing tendency and the argument of the author are clear, sound and convincing. The reasons that prompted provisions for short terms and frequent elections have largely passed away. Frequent elections were at first directed against the danger of recurrence to absolute monarchy. The danger now is the opposite direction. No one longer fears the danger of government by a few. The need now is for a system by which the many may govern themselves without danger of too frequent change. Terms should be longer even if it be necessary to have a part of the members elected frequently.

Frequency and length of sessions is quite another matter from that of frequency of election and length of term. There is much to be said in favor of frequent or at least of periodic regularity of sessions. Appropriations should be regularly and not infrequently made. It tends to keep before the people the fact that it is their funds that are being allotted and that go to the varied expenses of running the government. Likewise it keeps alive the sense of responsibility on the part of legislators.

There follow interesting and instructive chapters on the place and time of holding legislative sessions; the election and qualifications of members, including exclusions; qualities, capacity and training of members; rotation in office, and lobby. There is also a chapter on "Improprieties or Worse"; a special chapter devoted to bribery, in which it is accurately concluded to be becoming more and more rare so far as monetary considerations are concerned; a chapter on privileges; one on contempt; another on salaries, including expenses; and the volume closes with chapters on customs, habits, and decorum of Legislative Assemblies.

The book is a veritable storehouse of instances and illustrations gathered from a very wide field, with careful and incisive comment of which the author is a master. It is altogether a book well worth reading by anyone who feels even a general interest in the way his country is governed, and should be invaluable to those who are engaged in the work of carrying on the government and legislating for it.

JOHN Q. TILSON

New Haven.


This book is a product of the program of the Commonwealth Fund initiated in 1920 to encourage legal research. It is an "intensive study" of administrative law and practice. Only such activities of the Commission are discussed by the author as "properly fall within the scope of such a study."
An historical background of the Federal Trade Commission is depicted in an introductory chapter on Political and Legislative History. The Sherman Act was such a rush-order-product. Substantial numbers of the electorate were experiencing an economic squeeze not unlike Elizabethans ensnared in the superimposed system of Crown patents of monopolies. The antecedents, however, were obscured by the complexity of the economic process of modern variety. On the other hand, "corporations," "pools," "combinations," "restraints of trade," "monopolies" and "trusts"—all terms of somewhat precise legalistic significance to lawyers—had become popularized and synonymous. Their connotation of undefined greatness and of concentrated resources made them morally reprehensible. Just naturally by process of over-simplification the complex of many intricate problems requiring scientific study and pragmatic adjustment as continuing problems became one popular problem to be solved finally—the problem of trusts and monopolies. Popular hue and cry to trounce all trusts, monopolies and restraints of trade was too dominant to be ignored by those considerate of political favor; hence the Sherman Act which made criminal "every contract, combinations in form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states." Its equipment was standard: the Attorney General's Office, jails, fines, treble damages—equipment adequate for "busting."

As Lord Coke appears to have rationalized the Statute of Monopolies into consistency with pre-existing common law "principles" (and well-enough, perhaps, had the rule of Darcy v. Allen, 11 Coke 84b, been effective) so the Sherman Act was offered to fill a niche in the existing "legal order." But some "contracts in restraint of trade" and some "combinations" had enjoyed the favor of the common law courts while the Act incriminated every such contract and combination. The "rule of reason" was adopted by the Supreme Court restricting the Sherman Act to unreasonable restraint of trade or competition.

The technique of the Supreme Court in applying this rule has had its variations. Introspective consideration of the "real purpose" of a contract or combination—whether to promote economies or to eliminate competition—is evidenced with its difficulties in United States v. U. S. Steel Corporation, 251 U. S. 417. At other times there is (in form at least) the pragmatic approach of measuring the data of the restraint in hand with given consequence deemed desirable as in Chicago Board of Trade v. United States, 246 U. S. 231.

The author finds in these later decisions of the Supreme Court a crystallization of the emotions of the proponents of the legislation of 1914. Should the court be left to determine the application of the Sherman Act according to its notions of economic expediency? There was the fundamental demand that the legislature particularize its dictates of policy and oust judicial usurpation. Business men wanted certainty—the behavior of the Supreme Court was yet unpredictable. They asked for an authoritative advisory governmental agency to which they could submit proposed business programs for approval.

Out of this experience came the Federal Trade Commission Act (1914) a non-criminal statute prohibiting "unfair methods of competition" (section 5) and the Clayton Act (1914) with such specific prohibitions as are contained in relevant sections (sections 2, 3, 7 and 8). But as the author concludes: "The Sherman Law remained intact, nor was any attempt made at a legislative definition or specification of the offences to which it relates . . . . the movement of clarification and definition, at least so far as it rested upon the demand of business men that they be appraised what conduct was and what was not lawful had made but little progress."

As an administrative commission, (now nine years old, comprising a per-
sonnel of three hundred persons and expending nearly one million dollars annually), it is authorized to proceed in cases where it "has reason to believe" that the law has been violated if "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." It is written that its "findings" shall be conclusive "if supported by testimony," but such provision has had little effect in the courts due to incomplete and formalistic "findings" that have come up in the cases. Its orders to "cease and desist" are enforceable by application to the Circuit Court of Appeals.

The Commission's most effective work may be referred, perhaps, to its activities in the field of deceptive and dishonest practices. Appropriation of unearned increments in trade values by deceiving the market appears to be a by-product of the competitive system. With the function of "trade practice submittals," whereby those engaged in a given trade gather in conference with the Commission to discuss and study practices in a given trade and to resolve various recommendations to the Commission concerning that trade, the author finds the Commission particularly fitted with these cases.

In thorough constructive criticism the author points out serious defects in the statutes by which the Commission was created and with which it is concerned as well as with its actual carrying-on. Constituted to be both prosecutor and judge judicial impartiality is jeopardized. Actual practices of the Commission warrant the criticism. True to its "judicial" capacity the Commission is slow, some cases dragging over a period of three or four years or more. Likewise is it in arrears in its docket. Its report of cases, its "findings," are too frequently inadequate to serve as intelligible precedents. The author asks for no more than a "descriptive and narrative report couched in simple and direct language" in substitution for mere formal recitals. Promiscuous publication of the Commission's complaints is unduly injurious to respondents against whom the complaints are later dismissed. As a national commission it is handling too many cases of too little importance.

Mine and other pertinent criticisms are made by the author to "make the Federal Trade Commission more effective . . . . for despite the many matters of detail which can be justly criticized, and despite the meagre results which have been achieved to date . . . . the fundamental policy embodied in the Federal Trade Commission Act is sound and . . . . the Commission itself is in a position to render services of great value to the business community and to the country as a whole."

Wesley A. Sturgis

Yale University School of Law.


Present-day students of international law have noted with more than usual interest the appearance of each new volume dealing with the international legal problems raised during the recent war. The interest of some is inspired by a belief that advances in science and civilization (?) have created problems wholly new and have made the law of centuries an anachronism. Others whose views are less iconoclastic, were nevertheless deeply stirred by the breadth of a struggle which prevented the scholars of almost every land from viewing the problems