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NOTES

A LEGISLATIVE HISTORY OF THE 1960 BANK MERGER ACT AND ITS 1966 AMENDMENT: JUDICIAL MISUSE AND A SUGGESTED APPROACH

In February, 1959, a bill "to provide safeguards against mergers and consolidations of banks. . ." was introduced in the Senate,¹ thus commencing a seven year period of legislative investigation, debate and compromise resulting in the Bank Merger Act of 1960² and the 1966 amendment to that Act.³ Many commentators have analyzed the history of this legislation and have arrived at differing conclusions concerning the effect of these Acts on bank mergers.⁴ Moreover, many of these writers have criticized decisions of the Supreme Court, decisions in which the Court used the same legislative history.⁵ The extensive but conflicting use of this history indicates the need for an analysis divorced from any views as to the wisdom of the legislation.

1. 105 CONG. REC. 2283 (1959).

2. Pub.L. 86-463, 74 Stat. 129 (1960).

3. 12 U.S.C. § 1828 (Supp. III 1967).

4. "Although the precise meaning of the competitive factor was not elaborated in the legislation, there is some indication that it was partially to be given content by reference to the monopoly standards applied under the Clayton Act." Comment, *The 1966 Amendment To The Bank Merger Act*, 66 COLUM. L. REV. 764, 769 (1966) (discussing the legislative history of the 1960 Bank Merger Act);

The legislative history of the Bank Merger Act [of 1960] leaves not the slightest doubt that what Congress intended was that the banking agencies should have authority to approve or disapprove bank mergers as a substitute for bringing them within the scope of Section 7 of the Clayton Act. . . .

Seely, *Banks And Antitrust*, 83 BANKING L.J. 1035, 1042 (1966); "Congress has chosen to rely upon vague concepts such as the 'community to be served,' 'competitive factors,' 'convenience and needs,' and 'public interest.' Unfortunately these concepts remain undefined. Agency discretion, in effect, is unlimited." Legislative Section, *The 1966 Amendment To The Bank Merger Act; Economic Perspective And Legal Analysis*, 20 VAND. L. REV. 200, 230 (1966); "The sponsors of the bill adopted made it clear that the competitive standard to be applied under the merger act (amended) is that of the antitrust laws. . . ." Via, *Antitrust And The Amended Merger And Holding Company Acts: The Search For Standards*, 53 VA. L. REV. 1115, 1122 (1967). For a discussion of the cases and the legislation that are the subject of this note see also Klebaner, *Federal Control of Bank Mergers*, 37 IND. L.J. 287 (1962); Lifland, *The Supreme Court, Congress And Bank Mergers*, 32 LAW & CONTEMP. PROB. 15 (1967); Wemple & Cutler, *The Federal Bank Merger Law and the Antitrust Laws*, 16 BUS. LAW. 994 (1961); Comment, *Bank Mergers and the Six Headed Monster*, 16 CATH. U.L. REV. 69 (1967); Note, *Federal Regulation of Bank Mergers; The Opposing Views of the Federal Banking Agencies and the Justice Department*, 75 HARV. L. REV. 756 (1962).

5. See generally *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171 (1968); *United States v. First Nat'l Bank & Trust of Lexington, Ky.*, 376 U.S. 665 (1964); and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

The legislation and attendant controversy focused on three issues: the extent to which bank mergers merit competitive standards different from those used in other industries; the proper authority—the Federal Banking agencies or the Attorney General—to be charged with the primary responsibility for approving a merger; and the checks to be placed on that decision, either in the form of control given to other agencies or in the form of avenues of appeal to the judiciary made available to interested parties or agencies. This note will discuss the positions of the more vocal and influential participants in the Congressional debates and hearings on these issues and will determine which position triumphed or what compromise emerged.

1960—SENATE

Senator Robertson, Chairman of the Senate Committee on Banking and Currency and chief opponent of applying the antitrust laws to bank mergers, introduced on February 16, 1959, S. 1062,⁶ a bill to amend the Federal Deposit Insurance Act to provide safeguards against mergers and consolidations of banks which might lessen competition unduly or tend unduly to create monopoly. The bill required prior approval of the federal banking agencies before an insured bank could merge or consolidate with any other insured bank or directly or indirectly acquire its assets or assume liability to pay its deposits. In granting or withholding this approval the agencies were to consider both the six banking factors enumerated in the F.D.I.C. Act⁷ and the effect the merger might have on competition. The latter was to be measured by a consideration of whether the combination would lessen competition unduly or tend unduly to create a monopoly.

Disagreement focused on competitive standards with the discussion centering around the degree of control to be placed in the Justice Department. The bill gave the banking agencies the option of seeking a nonbinding analysis of the competitive factor by the Justice Department.⁸

6. *Supra* note 1 and S. 1062, 86th Cong., 1st Sess. (1959).

7. The six bank factors the bill refers to are:

- 1) the financial history and condition of each of the banks involved,
- 2) the adequacy of its capital structure,
- 3) its future earnings prospects,
- 4) the general character of its management,
- 5) the convenience and needs of the community to be served,
- 6) and whether or not its corporate powers are consistent with the purposes of this act.

See also 12 U.S.C. § 322 (1964).

8. *Hearings on S. 1062 before the Committee on Banking and Currency of the Senate*, 86th Cong., 1st Sess. 2 (1959) (hereinafter cited as *Senate Hearings on S. 1062*). The federal banking agency having jurisdiction would be the Comptroller of the Currency, if the acquiring, assuming or resulting bank is a national or a district bank; the Board

Robertson's accompanying statement indicated that the purpose of the bill was to authorize regulation on the basis of uniform standards involving both banking and competitive factors.⁹ The statement also alluded to pending bills that met the problem of rising concentration by applying the language of Section 7 of the Clayton Act to bank mergers.¹⁰ Robertson refuted such applications of Clayton Section 7's strict standards:

Unrestricted competition . . . has not been the rule in the banking industry for many years. The approval of a charter . . . and the admission of a state bank to membership . . . are not matters of routine. The financial history of the bank, if already existing, the general character of its management and the convenience and needs of the community to be served must be considered. And once in business, the bank's activities are carefully regulated by many agencies. . . .

All these considerations make it impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns not subject to regulation and not vested with a public interest.¹¹

The bill was then referred to the Senate Committee on Banking and

of Governors of the Federal Reserve System, if the bank is to be a state member bank (except a district bank); and the Federal Deposit Insurance Corporation, if the bank is to be a nonmember insured bank (except a district bank). The bill provided that the agency having jurisdiction over the merger would receive reports on the competitive factor from the other agencies not involved in the decision.

9. 105 CONG. REC. 2294 (1959).

10. 15 U.S.C. § 18 (Supp. 1967):

No Corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another Corporation engaged also in commerce, where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

Before the Supreme Court's decision in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), it was generally assumed that Section 7 of the Clayton Act applied only to bank mergers by stock acquisition. Since asset acquisition was the major device for accomplishing such mergers, the Clayton Act required amendment if it was to be the tool to stop rising concentration in the banking industry.

The pending bills referred to above were: S. 724, which required prior notification of certain corporate mergers to the Attorney General and provided a civil penalty for noncompliance and would have plugged the supposed gap in the Clayton Act; and S. 1004 which prohibited the acquisition of assets of other banks by banks, banking associations or trust companies where the effect might be to substantially lessen competition or tend toward monopoly. Senator Robertson directed a letter to Senators Eastland (Chairman of the Judiciary Committee) and Kefauver (Chairman of the Subcommittee on Antitrust and Monopoly) referring to the above bills and requesting that consideration be given the fact that his bill affected the same area. *See Senate Hearings on S. 1062*, at 1-7.

11. 105 CONG. REC. 2283 (1959).

Currency, chaired by Senator Robertson.

In the Senate Committee hearings, Robertson introduced into the record the opinions of the three banking agencies supporting the bill as introduced,¹² and the opinion of the Justice Department. The Comptroller of the Currency cited the use of the word "unduly" in the competitive standard and noted that the standard provided needed flexibility for the agencies in acting on a bank merger application.¹³ The Justice Department assailed the same competitive standard and favored amending Section 7 of the Clayton Act to include bank mergers.¹⁴ Thus, the extremities of position were established at the outset. Although it appears that these agencies differed in their view of the proper remedy for rising concentration, much of this disagreement was caused by differing views as to the efficacy of the then existing application of Clayton Section 7 in supplying the needed flexibility. This need was discussed in the context of the failing company doctrine.¹⁵

The banking agencies and those committee members who supported S. 1062 as introduced believed that the court applied a failing company doctrine too narrow for the banking industry.¹⁶ Therefore, any legislation that would amend and apply Section 7 of the Clayton Act to banks was an anathema. However, Congressman Celler, Chairman of the House Judiciary Committee and a chief proponent of amending Section 7 of the Clayton Act to apply to all bank mergers, characterized S. 1062 as insufficient to curb rising concentration of the banking industry.¹⁷ He interpreted *International Shoe v. FTC* as saying that the antitrust laws will tolerate *some* lessening of competition; therefore, he believed Section 7 permitted those *few* mergers where lessened competition in the banking industry would be desirable.¹⁸ If agency approval

12. *Senate Hearings on S. 1062*, at 62, 48.

13. *Id.*, at 20.

14. *Id.*, at 12. The Justice Department was alarmed at the rising concentration in the banking industry and considered it to be against the public interest in competition. Thus it felt that any measure short of amending Section 7 of the Clayton Act (the best weapon available since its standards were not as difficult of proof at any early stage as were the standards of the Sherman Act) would not effectively control bank mergers. A good discussion of the Justice Department's position is contained in Note, *Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice*, 75 HARV. L. REV. 756 (1962).

15. *International Shoe v. FTC*, 280 U.S. 291, 302 (1930). This case introduced the failing company doctrine as a defense to an action under Clayton Section 7 where there is no other prospective purchaser and one of the firms faces the possibility of business failure.

16. *Senate Hearings on S. 1062*, at 15.

17. *Id.*, at 86.

18. *Id.*, at 98, 99. Celler stated those instances which were illustrative of situations in which he thought a merger substantially lessening competition could be approved because it was in the public interest:

1) traditional failing company doctrine as enunciated in *International Shoe*;

were to be substituted for the application of Section 7, he favored increased participation by the Attorney General in the approval process along with the holding of public hearings whenever the Attorney General filed an unfavorable report on the competitive factor.¹⁹ Underlying the differences of opinion as to the degree of participation by the Justice Department was the general feeling that the degree of control given the Department or the banking agencies would reflect legislative recognition and approval of the above agencies' tendency to emphasize their particular area of expertise, either antitrust concerns or banking industry factors, in judging a proposed merger.

Outlining the views of committee members is difficult since during the hearings only five of fourteen members were vocal to any large degree: Senators Bennett, Frear, Sparkman, Muskie and Robertson. Senator Bennett favored the Robertson approach and asserted that banking problems should be analyzed in terms of "an organic, whole industry," not, as he believed the Clayton Act required, in terms of a single institution.²⁰ Bennett was joined to a lesser degree by Senator Frear, whose only ascertainable concern was the use of the word "unduly" in the competitive criteria.²¹ He believed that the standard was unclear and asked questions directed toward defining the degree of latitude that would be allowed the banking agencies in assessing competitive effect if "substantially" were to be substituted for unduly. Robertson's only apparent committee opposition during the hearings was Senators Sparkman and Muskie, who were concerned with the level of participation by the Attorney General in the decision making process and also with the use of the word "unduly" in the competitive factor. Sparkman, who initially favored application of Section 7 of the Clayton Act, suggested *requiring* the Attorney General's opinion on the competitive factor.²² Muskie was concerned over the meaning of the competitive standard. Sharing a conviction of Senator Douglas

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- 2) problem bank having inadequate capital or unsound assets;
 - 3) where acquired bank has not made adequate provision for management succession; or,
 - 4) where several banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices which may eventually have an adverse effect upon the condition of the banks.

19. *Senate Hearings on S. 1062*, at 90; see also the text of the O'Mahoney Amendment which Celler endorsed, note 30 *infra*.

20. *Id.*, at 28.

21. *Id.*, at 28, 99. During exchanges between Robertson and O'Mahoney, Robertson was asked to justify the use of the word "unduly." He stated that the term was less rigid than others and further that it reflected a balancing of the comparative effects of the merger. One of these meanings, the former, was to be lost in the House amendments but apparently the other remained in spite of the changes. See 105 CONG. REC. 8135 (1959).

22. *Id.*, at 90.

that the agencies were controlled by the banks, he believed that the banking agencies, who were required to report to the agency having jurisdiction over the merger,²³ would function merely as rubber stamps.²⁴

This divergence of opinion within the Banking and Currency Committee was reflected in the Committee report²⁵ and in a lengthy supplemental report filed by Senators Muskie, Clark, Douglas and Proxmire.²⁶ The committee report recommended amendment of the original bill to require that the Attorney General's opinion on the competitive factor be sought on each bank merger application. The report clearly set out the considerations that led those supporting it away from the language of Clayton Section 7.

The Committee concluded that [some mergers were in the public interest and should be approved even though they might result in a substantial lessening of competition.] The committee concluded that the strict rule of Clayton Section 7, as interpreted in the *Bethlehem Youngstown* case²⁷ [was inappropriate to the field of banking.] S. 1062 provides for full consideration of the public interest in the soundness . . . of the banking system through recognition of the several banking factors of Section 6 of F.D.I.C. Act and equally full consideration of the public interest in promoting competition and preventing monopoly. S. 1062 gives no one of these factors controlling weight but requires that all be considered, that all be duly weighed and that a balanced judgment be reached.²⁸

In the supplemental report the other senators urged just as strongly the need for more restrictions on mergers than the bill provided. They preferred to give the Attorney General more influence by granting him

23. See note 8.

24. *Senate Hearings on S. 1062*, at 59 and 60.

25. S. REP. No. 196, 86th Cong., 1st Sess. (1959).

26. *Id.*, at 25.

27. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

The court held that advantages of size were rejected by Congress in the plan for preservation of a competitive system, and thus no distinction was to be made between good and bad mergers; any benefits to the consumer that might have flowed from the proposed merger were irrelevant. This case would seem to completely negate any "special" consideration for banks because of their "uniqueness."

28. S. REP. No. 196, *supra* note 25, at 19-21. The content of this standard is indicated by the language of the Senate Committee Report to the effect that the word unduly was used to prevent the competitive effect of a merger from being controlling:

The word unduly is used to show that any lessening of competition or tendency to monopoly which may be found by the agency—whether 'appreciable,' 'perceptible,' 'slight,' 'substantial,' 'serious,' or 'great' must be weighed and considered by the banking agency as just one of several factors which will go to form its balanced judgment.

Id., at 23.

the power to stop bank mergers which he believed would "substantially" lessen competition. Granting authority to the three banking agencies to approve or disapprove mergers was deemed insufficient to assure that competitive factors would be given weight; the agencies would be concerned only with the financial health of the banks.²⁹

In the course of the debates on S. 1062 three amendments were offered, one by the Justice Department and two by committee members of the Banking and Currency Committee. The initial and most volatile exchanges took place over the amendment unsuccessfully offered at the behest of the Attorney General's office by Senator O'Mahoney. This amendment adopted substantially the position advocated by Congressman Celler: the agencies would apply the standards of Clayton Section 7, with four narrowly drawn exceptions, and would hold a judicially reviewable public hearing on a merger if the Attorney General opposed it.³⁰

29. *Id.*

30. 105 CONG. REC. 8113 (1959):

[The agencies] . . . shall not grant consent under this section to any merger, consolidation, acquisition of assets, or assumption of liabilities, where in any section of the country the effect thereof may be substantially to lessen competition, or to tend to create a monopoly. This provision shall not, however, be deemed to prohibit a merger, consolidation, acquisition of assets or assumption of liabilities where . . . there is a reasonable probability of the ultimate failure of the bank to be acquired; that because of inadequate or incompetent management the acquired bank's future prospects are unfavorable and can be corrected only by a merger or consolidation with the acquiring bank; that the acquired bank is a problem bank with inadequate capital or unsound assets and its acquisition by another bank would be the only practical means of dealing with the problem; or that several banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices which may eventually have an adverse effect upon the condition of such banks and the merger of the two or more banks would, therefore, be in the public interest. . . . the appropriate agency shall request a report from the Attorney General of the competitive facts involved in the merger.

If either or both of the banking agencies or the Attorney General disapproves the application in writing within thirty days, the Comptroller, the Board of Governors of the Federal Reserve System, or the Corporation, as the case may be, shall notify in writing the applicant and the disapproving agency or agencies, or authority or Attorney General of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Comptroller, the Board of Governors of the Federal Reserve System, or the Corporation, as the case may be, has given written notice to the applicant of the action of the disapproving agency or agencies, authority, or Attorney General. The length of any such hearing shall be determined by the Comptroller, the Board of Governors of the Federal Reserve System, or the Corporation, as the case may be, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Comptroller, the Board of Governors of the Federal Reserve System, or the Corporation, as the case may be, shall by order grant or deny the application on the basis of the record made at such hearing. Such order may be appealed to the Court of Appeals for the District of Columbia by any party adversely affected or by the Attorney General within thirty days after entry of such order.

The Comptroller, the Board, and the Corporation shall submit to the

Senator Douglas supported the O'Mahoney Amendment's use of Clayton Section 7 criteria, thus aligning himself with those who accepted the polar position of the Justice Department.³¹ Senator Kefauver joined Douglas and O'Mahoney in voting for the O'Mahoney Amendment,³² and noted that the Committee bill, plus then current interpretations of Clayton Section 7, posed two conflicting standards: the Clayton Act for stock sale or exchange; and the proposed committee bill for stock sale or exchange as well as asset acquisition.³³

Less extreme than the position taken by O'Mahoney, Kefauver, and Douglas were the positions taken by Senators Javits and Clark, also members of the Banking and Currency Committee. Although he agreed with the position of the O'Mahoney amendment on substitution of "substantially" for "unduly," Javits' principal objection to that amendment was the restrictiveness of the four narrow exceptions for approval of an anticompetitive merger.³⁴ Senator Clark opposed the public hearing and judicial review provisions of the O'Mahoney Amendment, not for the added restriction they would place upon the banking agencies but because he feared addition of this quasi-judicial red tape would discourage desirable mergers and thus offset the gains from increased participation by the Justice Department.³⁵

The four senators concurring in the supplemental committee report again agreed on an amendment proposed by Senator Sparkman, also of the Banking and Currency Committee. The amendment required the banking agencies to report every six months to the Banking and Currency Committee of each house of Congress all information regarding bank mergers which they had before them.³⁶ This amendment was passed by

Congress a report each six months after approval of this Act setting forth the following information with respect to each merger, consolidation, acquisition of assets, or assumption of liabilities approved by the Comptroller, the Board, or the Corporation, as the case may be, the name of the receiving bank; the name of the absorbed bank; the total resources of the receiving bank; the total resources of the absorbed bank; a copy of the report of the other two banking agencies and of the Attorney General on the competitive factors involved in the merger, consolidation, acquisition of assets, or assumption of liabilities.

31. 105 CONG. REC. 8127 (1959).

32. *Id.*, at 8139.

33. *Id.*, at 8131. See note 10 *supra*. The primary focus of the legislative hearings and debates was the impact of Clayton Section 7, which reached the evils of monopoly in its incipency by demanding a scrutiny of the possible anti-competitive effects of a combination. The Sherman Act was not then regarded as imposing such strict prohibition. The Sherman Act (Section 1) is said to have been formed into a tool useful against bank mergers by the decision in *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964). Lifland, *The Supreme Court, Congress, and Bank Mergers*, 32 LAW & CONTEMP. PROB. 15, 27, 28 (1967).

34. 105 CONG. REC. 8129 (1959).

35. *Id.*

36. *Id.*

the Senate along with the committee amendment requiring rather than authorizing the banking agencies to request the opinion of the Attorney General on the competitive factors involved in a proposed merger. With these exceptions the committee bill passed the Senate in the same form as introduced by Senator Robertson. Thus, during the debates and in the reports, all the more vocal participants, with the exceptions of Robertson, Bennett, Frear and Fulbright, were dissatisfied to some extent with the bill. Proxmire, Douglas, Kefauver and O'Mahoney expressed that dissatisfaction by voting for the O'Mahoney Amendment. However, Javits, Clark and Sparkman, while not completely pleased with the bill, were not drawn to the O'Mahoney Amendment. While Javits and Sparkman offered amendments to correct perceived inadequacies in S. 1062, Sparkman's amendment passing and Javits' failing, both Javits and Sparkman voted against the extreme position embodied in the O'Mahoney Amendment. Clark abstained from the vote thus impliedly rejecting that amendment. Therefore, though dissatisfaction presented itself in the Senate, the Robertson approach, endorsed by the three banking agencies, emerged triumphant to be presented to the House. Clearly it was to no great degree compromised by requiring rather than merely authorizing the banking agencies to seek the Attorney General's views since his report would in no way bind the agency.³⁷

1960—HOUSE

While it is quite clear that the position of Senator Robertson emerged from the Senate, it is equally unclear precisely what changes S. 1062 underwent in the House. The bill was reported unanimously out of the House Banking and Currency Committee with little debate.³⁸ Congressman Spense, Chairman of the Committee, had praise for the measure, and the committee's only significant change was substitution of the phrase "the effect of the transaction on competition (including any tendency toward monopoly)" for Senator Robertson's phrase "whether the effect thereof may be to lessen competition unduly or to tend unduly to create a monopoly."³⁹ This change probably resulted from the hearings and executive sessions of Subcommittee No. 2, chaired by Congressman Paul Brown.

The most vocal members of that subcommittee were Congressmen Hiestand, Moorhead, Multer and Vanik. Perhaps the most effective witness at the hearings was Congressman Celler. His testimony, substantially the same as that he had given before the Senate Committee.

37. S. REP. No. 196, 86th Cong., 1st Sess. 24 (1959).

38. 106 CONG. REC. 7257 (1960).

39. *Id.*

criticized the "unduly" standard and espoused⁴⁰ almost completely the views of the O'Mahoney Amendment. Mr. Hiestand seemed unimpressed with these views. He feared that if the word "unduly" was deleted or changed many mergers might be prohibited although they were in the public interest,⁴¹ and he exhibited a concern for the banking agencies' need for flexibility to consider other than competitive factors in approving mergers.⁴² However, Hiestand seemed to stand in a minority position.

Congressmen Multer, Moorhead and Vanik seemed much more impressed with Celler's testimony, which comported with their apparent attitudes on the solution to the bank merger problem. Multer's statements during the hearings seemed to advocate application of Clayton Act standards with well-drawn exceptions.⁴³ Moorhead agreed with Multer on most issues and added only his opinion that the required Attorney General's report on the competitive factor should receive almost conclusive weight.⁴⁴ Vanik used the hearings to express his antimerger feeling and advocate public hearings, as did other members, if only for the deterrent effect of such hearings on mergers.⁴⁵

The committee's report at first glance seems to reflect Hiestand's views on the relevance of the competitive factor :

Your committee is convinced that the Senate's approach is basically sound. . . . We are concerned, however, with some indications that under the Senate bill a merger could be approved even though it "unduly" lessened competition. . . . Most witnesses agreed that a bank merger would serve the public interest, even though it might lessen competition substantially, where there is a reasonable probability of the ultimate failure of the bank to be acquired; or where because of inadequate or incompetent management the acquired bank's future prospects are unfavorable and can be corrected only by a merger with the resulting bank; or where the acquired bank is a problem bank with inadequate capital or unsound assets and the merger is the only practicable means of solving the problem; or where several

40. *House Hearings on S. 1062*, at 123.

41. *House Hearings on S. 1062*, at 155.

42. *Hearings on S. 1062 before the Subcommittee of the House Committee on Banking and Currency*, 86th Cong., 2d Sess. 42 (1960) (hereinafter cited as *House Hearings on S. 1062*).

43. 106 CONG. REC. 7259 (1960). These exceptions were substantially those in the O'Mahoney Amendment.

44. *House Hearings on S. 1062*, at 42, 69, 74, 87, 120 and 150.

45. *Id.* at 42, 69, 54, 74, 108 and 178.

banks in a small town are compelled by an overbanked situation to resort to unsound competitive practices. . . .⁴⁶

This reading is supported by the remarks of Congressmen Brown and Spense, Chairmen respectively of the subcommittee and the House Committee on Banking and Currency, who voiced the opinion during the debates that the bill placed control of bank mergers in the banking agencies, which possessed expert knowledge of the industry's problems.⁴⁷ Thus a conflict between the views of Multer, Moorhead and Vanik and the bill as reported is apparent; this conflict is enigmatic since the bill was reported with a unanimous vote of the committee.

A compromise seems to have been reached. Thus Multer departed from his views during the hearings by issuing the following statement during the debates :

The banking agencies are thus free to approve a bank merger to save a failing bank, or to approve a merger brought about by emergent conditions even though such action necessarily lessens competition or creates a monopoly in the particular community served.⁴⁸

The precise nature of the compromise is difficult to determine, but it is noteworthy that even Congressman Celler urged passage of the bill although he conceded it was not the type of bill he would have authored.⁴⁹ The subcommittee seemed to have accepted Celler's criticisms of the Robertson "unduly" standard, while still allowing approval of mergers that substantially lessened competition or created a monopoly. From the rejection of the "unduly" standard with its potential for decision making flexibility, one could conclude that the banking agencies were now to be more restricted in applying their expertise to override an unfavorable report by the Attorney General. Thus, it appears the committee concurred on a competitive standard that stood somewhere between the words "substantially" and "unduly."

The standard to be applied by banking agencies emerged as follows :
. . . the Comptroller, the Board, or the Corporation, as the case may be, *shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community*

46. H.R. REP. NO. 1416, 86th Cong., 2d Sess. 11 (1960); U.S. CODE CONG. & AD NEWS, 86th Cong., 2d Sess. 2003-2005 (1960).

47. 106 CONG. REC. 7257 (1960).

48. *Id.*

to be served, and whether or not its corporate powers are consistent with the purposes of this Act. The appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. . . . The Comptroller, the Board, or the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report. . . .⁵⁰

The effect of the House changes may be examined in light of the positions taken by members of the Senate as it concurred in the House amendments.

The first comments were made by Senator Fulbright, a co-sponsor of the original version of S. 1062, as he introduced the amended bill to the Senate. The Senator stated that the six banking factors and the competitive factor were to be weighted together and that the competitive factor would not be controlling—points which seem to have been understood by both chambers. He commented upon the rewording of the competitive factor and injection of the phrase “in the public interest,” stating with respect to the former :

This balancing of favorable and unfavorable banking factors along with favorable and unfavorable competitive factors, with no one of them being overlooked and no one of them being controlling, was just what the Senate meant when it used the word ‘unduly’ in referring to the competitive factors. I am satisfied that the House has reached just the same result the Senate reached. . . .⁵¹

and with respect to the latter phrase he minimized its effect :

. . . [it] is not a new standard in itself. It is not an eighth factor. . . . The phrase is only used to indicate that if the merger is to be approved the weighing of the seven specified factors must have resulted in a finding favorable to a merger.⁵²

49. *Id.*, at 7258. Celler added that the Act would be of no use “. . . unless the Banking agencies prohibit those mergers which have an anticompetitive effect as intended by this measure. . . .”

50. *Id.* (emphasis added).

51. *Id.*, at 9712.

52. *Id.* Fulbright seems to have chosen the second meaning placed on “unduly” by Senator Robertson. See note 21 *supra*.

The Senator did not find it necessary to comment on the statutory charge that "the agency shall not approve . . . [a merger] unless it finds the transaction to be in the public interest." In a letter to Senator Javits, Mr. J. Russell Clark, superintendent of the banks of New York, labeled the charge a presumption against bank mergers. He believed that if the phrase operated merely to allocate the burden of proof it was not objectionable; however, if it required a bank to show an affirmative public interest benefit rather than merely an absence of competitive harm to this same public interest it would be clearly undesirable. Robertson answered the inquiry by stating that the phrase merely expressed the net result of the type of merger that should be approved⁵³ and thus did not have the importance Mr. Clark attached to it. Javits made no other remarks after asking that Mr. Clark's question be recorded. Therefore, the only position set forth as the Senate concurred in the House Amendment was that of Senators Fulbright and Robertson. It seems fair to conclude from their remarks that they viewed the passage of S. 1062 as a triumph for the banking agencies.

Thus, while the precise position reflected in the original bill as introduced by Robertson did not enjoy complete success, the views expressed by the O'Mahoney Amendment were largely rejected. The respective federal bank supervisory agencies were to make the decision on insured bank mergers; the report of the Attorney General on competitive aspects was to be advisory and not controlling. Deliberately omitted was any attempt to specify or restrict the circumstances in which the federal bank supervisory agencies might determine that a proposed bank merger is in the public interest and should be approved notwithstanding its effects on competition. The omission of provisions for public hearings or for judicial review of banking agency decisions also seems intentional. However, the reluctance of Congress to clarify its new standards emphasizes the fact that the bill as passed was capable of enough diverse interpretation to satisfy all but Mr. O'Mahoney.

THE SUPREME COURT—1963

Subsequent to the passage of the 1960 Act, the Department of Justice, as a result of disagreement with the Comptroller of the Currency,

53. 106 CONG. REC. 9714 (1960). The issues of burden of proof and presumptions were to become important in the judicial application of the 1966 amendment to the Bank Merger Act of 1960. See *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171 (1968), and the imposition of what one writer believes to be an insurmountable burden of proof on the proponents of a bank merger. Edwards, *Bank Mergers and the Public Interest; A Legal and Economic Analysis of the 1966 Bank Merger Act*, 85 BANKING L.J. 753 (1968). See also *United States v. First City Nat'l Bank of Houston* and *United States v. Provident Nat'l Bank*, 386 U.S. 361 (1967).

filed antitrust suits attacking several mergers which had been approved by the Comptroller.⁵⁴ Two of these cases, *United States v. Philadelphia Nat'l Bank*⁵⁵ and *United States v. First Nat'l Bank & Trust of Lexington*,⁵⁶ reached the Supreme Court in 1963 and 1964.

The *Philadelphia* case held in broad terms that bank mergers, regardless of how they were accomplished, were subject to Section 7 of the Clayton Act. This decision was criticized by dissenting justices and by many commentators as undercutting the purposes of the 1960 Bank Merger Act.⁵⁷ Whether these criticisms are well taken or not, the Court mentioned repeatedly the legislative history of the 1960 Act and this use of the history should be examined in light of the foregoing conclusions.

At the outset it is obvious that the decision itself is at variance with the conclusion of the 1960 Congress that the prohibitions of Clayton Section 7 were not intended to apply to bank mergers. However, the Court was quite correct in asserting that there was no explicit exemption of bank acquisitions have anticompetitive effects. . . ."⁵⁸ These state-Merger Act. In considering whether the Bank Merger Act implicitly repealed Section 7 as it applied to bank mergers, the Court relied quite heavily on legislative history: ". . . the legislative history seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected. . . ."⁵⁸ More explicitly, the Court said that ". . . Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects. . . ."⁵⁹ These statements are an inappropriate use of the legislative history. The history clearly refutes very little; the comments of the various participants could be used to support almost any contention. General purpose possibly could be drawn from the positions Congress rejected, and one position clearly rejected was the application of Clayton Section 7's standards. Moreover, the catalyst which prompted introduction of the Robertson Bill, defeat of the O'Mahoney Amendment and enactment of the undefined compromise bill was the concern of Congress with the applicability of the antitrust

54. See Lifland, *The Supreme Court, Congress and Bank Mergers*, 32 LAW & CONTEMP. PROB. 15, 20 (1967).

55. 374 U.S. 321 (1963).

56. 376 U.S. 665 (1964).

57. Lifland, *supra* note 54, at 20-26; In the *Philadelphia Nat'l Bank* case Justice Harlan in his dissent said that:

I respectfully submit that this holding, which sanctions a remedy regarded by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.

374 U.S. at 373.

58. 374 U.S. at 352.

59. *Id.* at 354.

laws. It seems impossible to say in what way the antitrust laws were affected, but the history surely reveals the purpose of Congress to affect the juxtaposition of bank mergers and the antitrust laws.

Furthermore, as the Court commenced treatment of the legislative history, it noted with respect to the lack of effect of the 1960 Congressional gloss on the intent of an earlier Congress, that: "This holds true even though misunderstanding of the scope of Section 7 may have played some part in the passage of the Bank Merger Act of 1960."⁶⁰ Assuming the accuracy of this statement, the Court needed to proceed no further. Certainly it was neither necessary nor even appropriate for the Court to search for the 1960 Congressional intent when, if found, it would to a large degree be based on a misconception that the Court was in the process of correcting.

1966—SENATE

In April 1965 Senator Robertson introduced S. 1698,⁶¹ a bill designed to place exclusive jurisdiction over bank mergers in the banking agencies and to exempt all bank mergers, past and future, from the antitrust laws.⁶² Robertson included with the bill his reasons for taking such action:

The Supreme Court in the *Philadelphia* and *Lexington* cases has rewritten the antitrust laws and has nullified the intention of Congress in passing the Bank Merger Act.

My bill will reinstate the original purpose and intention of Congress when it passed the Bank Merger Act. Since, in my judgment, the Supreme Court has erroneously interpreted the

60. *Id.* at 349.

61. 111 CONG. REC. 6919 (1965).

62. *Hearings on S. 1698 before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess. 6, 7 (1965) (hereinafter cited as *Senate Hearings on S. 1698*). The text of that bill is as follows:

. . . The authority to approve mergers, consolidations, and acquisitions of stock or assets and assumptions of liabilities, herein conferred on the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Corporation shall be exclusive and plenary, and any banks participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws, including the Sherman Antitrust Act and the Clayton Act, with respect to such transaction, whether accomplished by the acquisition of stock or the acquisition of assets, or in any other way, and whether such transaction has been or is hereafter consummated.

SEC. 2. No proceedings shall hereafter be instituted or prosecuted under the antitrust laws, including the Sherman Antitrust Act and the Clayton Act, against any bank insured under the Federal Deposit Insurance Act by reason of or with respect to any merger, consolidation or acquisition of stock or assets and assumption of liabilities consummated before May 13, 1960, pursuant to approval of the appropriate State or Federal bank supervisory authority.

antitrust laws and the Bank Merger Act, my bill is drafted so as to be applicable not only to future mergers, but to all mergers heretofore consummated pursuant to appropriate regulatory approval, including mergers now under attack by the Department of Justice under the antitrust laws.⁶³

Hearings opened before the Subcommittee on Financial Institutions of Robertson's Committee on Banking and Currency.⁶⁴ Mr. Martin of the Federal Reserve Board and Chairman Randall of the Federal Deposit Insurance Corporation, the only representatives of the federal banking agencies who testified, supported wholeheartedly the position expressed by Robertson and concurred in by Senator Bennett, still a member of the committee.⁶⁵

All my bill does is seek to carry out the declared intention of Congress in 1960, that these mergers should be under the exclusive control of the banking agencies. . . .⁶⁶

However Robertson, Bennett and the representatives of the banking agencies did not set the tone for most of the committee in the same manner as they did during the 1960 Senate hearings. Rather, Senator Proxmire emerged as the most vocal and effective member of the subcommittee. His views prevailed with respect to both issues discussed: application of the antitrust laws and forgiveness of agency approved mergers then under attack by the Department of Justice.

Initially, Proxmire's inquiries sought a safeguard for competition. He found little solace in the Robertson bill and felt that its passage would increase the present degree of concentration in the banking industry.⁶⁷ Moreover he felt big banks served big business and discriminated against small business, thus aggravating the concentration cycle.⁶⁸ Senator Douglas accepted Proxmire's position and carried it further, remarking that the American banking system was in grave danger of becoming a virtual monopoly similar to the systems of England and Canada.⁶⁹ The views of both Douglas and Proxmire are exemplified by the latter's statement that: ". . . because banks are protected against the adverse impact of competition . . . it seems . . . that we can give more weight to competition . . . in banking than in any other industry."⁷⁰ The bill as reported out of

63. 111 CONG. REC. 6920 (1965).

64. *Senate Hearings on S. 1698*, at 12-14.

65. *Id.* Chairman Martin at 14, Chairman Randall at 231, 39.

66. *Senate Hearings on S. 1698*, at 200.

67. *Id.*, at 32, 88, and 137.

68. *Id.* at 83.

69. *Id.*

70. *Id.*, at 138.

committee reflected this position and left unchanged the application of *Philadelphia* and *Lexington* to the banking industry. However, two concessions to the banking industry were agreed upon: the bill gave clearance to all past mergers; and required all future mergers to wait thirty days before consummation in order that the Justice Department might file an antitrust suit while the banks were still separate, while prohibiting antitrust suits attacking the merger unless instituted within the thirty day time period.⁷¹

It seems clear that Proxmire's position continued the application of the antitrust laws to bank mergers. However, this situation was affected, it appears, by agreeing to the forgiveness provisions and the short statute of limitations. Both concessions seem to stem from a common fear of the evils of divestiture. This fear of "unscrambling" was shared by Robertson, Sparkman, Proxmire and most committee members who were vocal during the Senate hearings.⁷²

The statute of limitations was first suggested by Mr. Martin of the

71. *Id.*, at 9 and 10; 111 CONG. REC. 13304 (1965). The text is as follows:

. . . The Comptroller, the Board, or the Corporation, as the case may be, shall immediately notify the Attorney General of the approval of any merger, consolidation, acquisition of assets, or assumption of liabilities pursuant to this subsection, and such transaction shall not be consummated until thirty calendar days after the date of approval: Provided, however, That, if an antitrust suit to enjoin such transaction is instituted within said thirty-day period, the merger shall not be consummated until after the termination of such antitrust suit and then only to the extent consistent with the final judgment in such antitrust suit. Provided, further, That when the agency finds that it must act immediately in order to prevent the probable failure of one of the banks and reports on the competitive factors involved may be dispensed with, the transaction may be consummated immediately upon approval by the agency: Provided further, That, when an emergency exists requiring expeditious action and reports on the competitive factors involved are requested within ten days, the transaction may not be consummated within less than five calendar days after approval by the agency. When a transaction is consummated pursuant to the above procedure, no proceedings under the antitrust laws, including the Sherman Antitrust Act (15 U.S.C. 1-7) and the Clayton Act (15 U.S.C. 12-27), shall thereafter be instituted concerning the transaction. Notwithstanding the above provisions, any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank, which was consummated prior to the enactment of the amendment pursuant to the then appropriate regulatory approval or approvals, State or Federal, and where the resulting bank has not been dissolved or divided or has not effected a sale or distribution of assets or has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this amendment, shall be exempt from the antitrust laws including the Sherman Antitrust (15 U.S.C. 1-7) and the Clayton Act (12 U.S.C. 12-27).

72. *Senate Hearings on S. 1698*, at 76, 202. In connection with this fear Proxmire stated:

What I think is perhaps most important . . . is to provide that those banks that are already merged, that already have been scrambled, should not have to undergo the agony and inequity and the financial loss and the disruption of the economy in the community of being required now to unscramble.

Federal Reserve Board as an acceptable alternative if the subcommittee could not reach agreement on the original Robertson bill. Considering the source of this proposal, Robertson and Bennett probably had no objection to it when agreement could not be reached on other issues. In addition, the concern of the remaining members of the committee with the difficulty of unscrambling a consummated merger might explain the thirty day limitation as a compromise between the positions of Robertson and Proxmire. The committee report did little to simplify the positions discussed above other than to record the predicament that led to the bill: "In view of the importance of prompt action to clarify the present situation, the committee agreed, without dissent, to report a substitute bill proposed by Senator Proxmire embodying the elements on which there was unanimous agreement."⁷³

The compromise bill enjoyed limited debate in the Senate. The only measure discussed was its "forgiveness" of the cases then pending in court, including the *Lexington* case which had already been decided. Senator Hart, of the Senate Judiciary Committee, offered an amendment opposing this measure and remarked that: "The anticompetitive effects of prior mergers—especially when in litigation—can be just as dangerous to our competitive economy as future ones."⁷⁴ Hart also questioned the shortness of the thirty day statute of limitations.⁷⁵ However, the Senate rejected his amendment and by implication his arguments.⁷⁶ Some clarification of the bill emerged from an exchange between Senators Javits and Proxmire. When Javits inquired whether the bill would free banks involved in a merger from an antitrust suit forever, Proxmire replied that the thirty day limitation applied only to the merger itself and any suit attacking its probable anticompetitive effect.⁷⁷ The Senate accepted the compromise bill without further discussion.⁷⁸

1966—HOUSE

The House unlike the Senate indulged in extensive debate and hearings. The usefulness of this debate in defining the bill that emerged is questionable in view of the seemingly hasty compromise that took place. The Senate bill was referred to the House Committee on Banking

73. S. REP. No. 299, 89th Cong., 1st Sess. 3 (1965).

74. 111 CONG. REC. 13307 (1965).

75. *Id.*

76. *Id.*, at 13309.

77. *Id.*, at 13308.

78. Emphasizing the rapidity with which the bill was passed is the fact that no remarks were recorded recognizing what appeared to be a dual standard for judging the validity of mergers: the banking agencies would be using the antitrust laws and the amended Merger Act, while Justice used only the antitrust laws. This lack of uniformity was a major issue as the House effected its changes in the language of the Senate bill.

and Currency, chaired by Wright Patman, on June 14, 1965,⁷⁹ but it was not reported until February 8, 1966.⁸⁰ During the bulk of this time extensive hearings were conducted by the subcommittee on Domestic Finance, also chaired by Patman.

Patman, on the day the Senate hearings opened, was quoted as having said, "If you exempt banks from the antitrust laws you might as well also shoot the policeman on the corner."⁸¹ This statement characterizes the position assumed by Patman during the course of hearings, which were marked by sharp differences of opinion. However, only some of these differences related to bank mergers; others related only to problems caused by rebellious members of the subcommittee.

Patman had not scheduled early hearings for the Senate bill, and it appeared, once those hearings had begun, that they would not end in time for presentation of the bill in that session. A series of motions made by members of the subcommittee, Widnall, Brock, Clawson and Stanton to close the hearings and retire into executive session were ruled out of order by Patman. The parliamentary maneuvers then began.⁸² Congressman Ashley, a member of the full committee participating in the hearings, introduced in the House a substitute bill which provided for the banking agencies to hold formal hearings on merger applications, subject to review by a court of appeals as in the case of other administrative agencies.⁸³ The Attorney General commented adversely on the proposal, particularly on the need for formal hearings and appellate review, although he indicated that he had no objection to a provision that the courts and the banking agencies should apply the same standards in future antitrust proceedings.⁸⁴ Consequently, Congressmen Ashley and Ottinger revised

79. *Id.*, at 13432.

80. 112 CONG. REC. 2438 (1966).

81. N.Y. Herald Tribune, May 19, 1965, at 32, col. 1.

82. *Hearings on S. 1698 before the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. 382, 392, 394, 397 (1965) (hereinafter cited as *House Hearings on S. 1698*). The journey of this bill in Congress was characterized by such compromise, maneuver and counter-maneuver that it was the subject of an article captioned *The Bank Merger Bill's Zany Journey* in the Wall Street Journal on Feb. 8, 1966.

83. H.R. 11011, 89th Cong., 2d Sess. (1966). The bill required public notification and a report from the Attorney General concerning the competitive factors involved before a merger could be approved and provided that institutions having a competitive relationship with a proposed merger be made parties to the approval proceedings. Mergers approved in accordance with it were exempt from all antitrust proceedings.

84. See letter from Attorney General Katzenbach to Chairman Patman, Sept. 24, 1965 quoted in H.R. REP. NO. 1221, 89th Cong., 2d Sess. 8 (1965). The Attorney General seemed to feel that in the vast majority of cases hearings would be unnecessary where no serious antitrust problems were presented. Further he felt that a hearing full enough for appellate review, with attendant disclosure of all pertinent financial data, was not appropriate for bank mergers because of the traditional privacy surrounding such information.

the Ashley bill, deleting the provision for appellate review and providing for original antitrust suits by the Department and the application of the same standards by both courts and agencies. Neither the courts nor agencies would approve a transaction in violation of the antitrust laws, but both would consider the banking factors of the 1960 Act as well as the effect on competition, and both could approve a transaction in which the probable adverse competitive effect was clearly outweighed by the public interest in meeting the convenience and needs of the community to be served. The revised bill encountered difficulty because of Patman's refusal to call a committee meeting as requested by Ashley. A meeting was then convened by Ashley with the assent of a majority of the committee and, in defiance of Patman's wishes, the committee reported out the Ashley-Ottinger bill.⁸⁵ Patman deemed the session illegal and its action

85. See H.R. REP. NO. 1179, 89th Cong., 1st Sess. (1965); Brief for the Comptroller at 12-22, *United States v. First City Nat'l Bank of Houston*, 386 U.S. 351 (1967). Congressman Reuss, another member of the full committee participating in the hearings, who had attempted to disband the rebellious session wrote to the Attorney General and took the position that the Ashley Bill, as reported, was defective, and requested that the Attorney General and the Secretary of the Treasury comment on his alternative proposal. Following is the Ashley-Ottinger proposal and also the Reuss solution:

(1) The Ashley-Ottinger proposal:

The responsible agency shall not approve any merger transaction under this subsection unless it finds that such transaction will not violate the antitrust laws, except that in considering the application of the antitrust laws to merger transactions, the responsible agency, the Attorney General, and any court reviewing the legality of such transaction shall take into account the effect on the public interest and the community to be served of the following banking factors:

- (A) the financial history and condition of each of the banks involved;
- (B) the adequacy of its capital structure;
- (C) its future earnings prospects;
- (D) the general character of its management;
- (E) the convenience and needs of the community to be served; and
- (F) whether or not its corporate powers are consistent with the purposes of this act.

A merger transaction which tends to lessen competition may be approved where the probable adverse effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.

(2) The Reuss proposal (in other section identical with the Ashley-Ottinger proposal)

The responsible agency shall not approve any proposed merger transaction—

(A) unless it finds that such transaction would not involve a violation of section 2 of the Sherman Antitrust Act (15 U.S.C. 12).

(B) which would violate section 1 of the Sherman Antitrust Act (15 U.S.C. 1) or section 7 of the Clayton Act (15 U.S.C. 18) unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions.

invalid,⁸⁶ but in an effort to compromise and retain control of his committee, he reported out and supported a new bill embodying substantially the Ashley-Ottinger proposals with some revisions suggested by the Attorney General.⁸⁷

Although the House hearings were extensive, they are of little help in indicating the positions taken by the men who engineered the bill because the issues and language discussed at that time gave no hint of the changes that were to be written into the Proxmire bill. Patman's position is relevant, but his desire to quell internal discord may have neutralized the force he exerted in the direction indicated by his statement at the opening of House hearings :

. . . [T]o weaken or in any way diminish the role of the Justice Department in bank mergers cannot fail, it seems to me,

86. See *Senate Hearings on S. 1698*, at 16.

87. The recommended revisions of the Attorney General were as follows:

1. Subsection [1] to read as follows: The responsible agency shall not approve a proposed merger transaction unless it finds that such transaction will be in the public interest, taking into consideration the effect of the transaction on competition (including any tendency toward monopoly) and the importance of protecting the public against bank insolvency. In determining the effect on competition and the likelihood of insolvency, the agency shall take into account the following factors, among others:

- (A) The financial history and condition of each of the involved;
- (B) The adequacy of their capital structure;
- (C) Their future earnings prospects;
- (D) The general character of their management; and
- (E) The convenience and needs of the communities to be served.

2. Subsection (7) to read as follows: [information not requested on these Sections by Reuss.]

(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply with paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

to be harmful to the public interest and to banking itself. . . . So we must consider carefully the equities here before passing an ex post facto law legalizing unlawful, monopolistic mergers condemned by the Courts.⁸⁸

But, in the course of the hearings his comments reflected no compromise either in his adamant view on the application of strong antitrust laws to bank mergers, or in his belief that exemption of any mergers then before the courts from these same antitrust laws would be totally inappropriate. Yet he voted for the bill, while Weltner and Todd who agreed with Patman during the hearings but were not subject to the same threat posed by Ashley and his followers, voted against the bill.⁸⁹ However, the views of Patman, one of the most powerful men in the House should not be completely dismissed because of the intrinsic pressures put upon him. Although he adverted to "the convenience and needs of the community" factor as he reported out the bill, he failed to explain its content and chose to devote much of his statement to the point that the bill effected no substantive change in the antitrust laws other than to provide a very limited exception to their prohibitions.⁹⁰

Mr. Widnall, who at the outset of the hearings seemed to endorse a position almost as extreme as that of Robertson's, also voted for this bill.⁹¹ Unfortunately, Widnall said little in the debates on the floor of the House that would give any indication of his reasons for acceptance of this bill. However, he seemed strongly enough in favor of placing control and responsibility in the banking agencies to make his presence felt. Thus, the bill appears to be a compromise lying somewhere between the views of Congressmen Patman and Widnall.

The compromise may be reflected in the remarks of Congressmen Ashley and Reuss, who viewed themselves as chief architects of the language used in the bill. Ashley felt the bill made it quite clear that banking services stand on a different footing from other forms of economic activity. He read the *Philadelphia* case to state that the antitrust laws prevented the social or economic benefits of a bank merger from being considered, and he thus saw the purpose of the bill to be assurance that the Court could never again dismiss the inquiry into the community need

88. *House Hearings on S. 1698*, at 1.

89. 112 CONG. REC. 2467 (1966). Weltner felt that first the antitrust criteria should be considered and then if this hurdle was cleared, reference could be made to "banking factors." *House Hearings on S. 1698*, at 156, 867. Todd introduced six private bills for the relief of the six banks originally exempted by the forgiveness provision of the Proxmire Bill, and also stated that the only proper agencies to render a decision on bank mergers were the Courts. *Id.* at 476, 508.

90. 112 CONG. REC. 2440-42 (1959).

91. See *House Hearings on S. 1698*, at 5; see also 112 CONG. REC. 2467 (1966).

for banking services which a proposed merger could provide.⁹² Reuss, on the other hand, viewed the bill as not overturning the force and effect of the *Philadelphia* case because that decision incorporated a definition of competition in banking which encompassed many "banking factors" and a view of the failing company doctrine with larger contours as it applied to banks.⁹³ Thus, despite their differing opinions as to the effect on *Philadelphia*, both men arrived at substantially identical views as to the bill's purpose vis-à-vis bank merger applications.

Unfortunately, the precise nature of this effect was obscured by the vague language of the bill itself. The only remarks on the meaning of this language that completely agree are those of Congressmen Weltner and Gonzalez, who believed only seventy years of litigation could clarify it.⁹⁴ The bill embodied substantial changes from the language of the Proxmire Compromise. A uniform standard, plus provisions to insure its uniform application by the agencies and the courts, was injected; the degree of forgiveness for the six cases exempted in the Senate bill was modified; and the competitive factor was neither that embodied in the 1960 Act nor a specific assent to the *Philadelphia* and *Lexington* cases. Rather, it was of undefined content and was apparently controlling unless clearly outweighed.

On February 9, 1966 the bill, as amended by the House, was laid before the Senate.⁹⁵ Robertson stated:

92. 112 CONG. REC. 2446 (1966).

93. *Id.*, at 2445. It is important to note that although Reuss saw "the force and effect" of the *Philadelphia Nat'l Bank* case as unchanged, Congressman Multer, who was instrumental in effecting the final language of the 1960 Act, felt that the 1966 amendment worked a great change in the existing situation:

If in the first instance, as is done here now [the Justice Department] had been required to take into account all of the factors, very few, if not most of the cases that were brought would not have been brought, and if the Court then had a right to determine the case in each instance that was before it on the basis of all the banking factors as well as competition, I have no doubt that many, if not all, of the decisions would have been contrary to the result as announced by the court.

112 CONG. REC. 2443 (1966).

94. *Id.* at 2452. Weltner, Todd and Gonzalez filed strong dissenting reports on the bill as it came out of the Committee. With respect to the language of the bill, Congressman Fino agreed with Weltner and Gonzalez that many portions of the standards were unclear, but this lack of clarity did not deter him from voting in favor of the bill. 112 CONG. REC. 2447, 2467 (1966). Congressman Minish, on the other hand, was not so troubled with the language and felt that it clearly left intact the *Philadelphia* decision and the application of the antitrust laws to bank mergers. 112 CONG. REC. 2451 (1959).

95. 112 CONG. REC. 2653 (1966). The operative provisions of that bill are:

(1) Standards.

(a) The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

The bill before us will accomplish substantially what we had in mind when we passed the Bank Merger Act in 1960 . . . to regulate bank mergers under special standards designed to reflect the special considerations applicable to banking as a competitive but regulated industry vested with a public interest.⁹⁶

On this level of generality he was correct. Only two positions had been soundly rejected in the history of this amendment: the position of Senator Robertson in his original proposal for complete exemption of banks from the antitrust laws and the positions of Congressmen Todd and Weltner who proposed the application, without exception, of those laws. Robertson introduced a prepared statement into the record, but it does

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

(b) In any judicial proceeding attacking a merger transaction approved under paragraph (5) [above language] on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the (Sherman Act), the standards applied by the Court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

(c) In any such action, the court shall review de novo the issues presented.

(2) Stay on Consummation

(a) [T]he transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

(b) The commencement of such an action [under the antitrust laws] shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order.

(3) Immunity If Not Attacked.

Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone of itself constituted a violation of any antitrust laws other than section 2 [of the Sherman Act]. . . .

(4) Past Mergers.

(a) Mergers consummated prior to June 17, 1963 [the date of the *Philadelphia National Bank* case], are 'conclusively presumed to have not been in violation of any antitrust laws other than section 2 [of the Sherman Act].'

(b) Mergers consummated after June 16, 1963, and not attacked at enactment may not 'be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2.'

(c) Mergers attacked after June 16, 1963, are subject to 'the substantive rule of law set forth in' the law as amended.

96. *Id.*

not appear to have been read orally. Thus, the more specific points in the statement, although arguable constructions of the bill, were probably not relied on to any great extent by the Senate as it concurred in the House Amendment.

The bill was seriously opposed only by Senators Hart and Proxmire, who felt it should be referred to the Judiciary Committee for study of the meaning of the "new" standards and the effect of other provisions in the bill.⁹⁷ In answer to their opposition Robertson said only that :

. . . [T]he bill is a compromise. If we are not willing to accept a reasonable compromise we do not get anything. I do not know of anyone who has read the entire bill, who has studied it, and who is interested in it, who would endorse it 100 per cent. But it is the best bill we can get.⁹⁸

. . . .

. . . I have been reliably informed that, having voted and finally agreed to a compromise, the House will not make any further changes in our behalf.⁹⁹

With little debate the Senate concurred.

Some conclusions can be drawn from the legislative history and language of the 1966 Amendment. The compromise represented a significant retreat from the position of the 1960 Act. Gone was the concept of administrative finality as well as the advantage for banks that might lay in the opportunity to merge before the Justice Department was ready to file suit. Further, the competitive consideration was now of greater but still undefined weight. Yet, the banking position made some advances over the post-*Philadelphia* situation. Past mergers were protected against the antitrust laws except Section 2 of the Sherman Act, and the thirty day statute of limitations gave the same protection to present mergers if not attacked within that period. Finally, and probably most importantly, the courts could not dismiss the public interest in matters other than competition as irrelevant. Any further conclusions with respect to the content of the standards by which agencies and courts were to judge a merger cannot be made by reference to the legislative history.

Members of the House and Senate, although making specific remarks, seem to have agreed on only the very general purpose of changing the existing situation while they disagreed on the nature of the existing situation and the manner in which it should be modified.

97. *Id.*, at 2658.

98. *Id.*, at 2657.

99. *Id.*, at 2652.

THE SUPREME COURT 1967-1968

*United States v. First City National Bank of Houston*¹⁰⁰ and *United States v. Provident National Bank*,¹⁰¹ the first cases to come to the Supreme Court under the Bank Merger Act of 1966, were decided in a single opinion in which the Court was careful to point out that it expressed no views on the merits of the mergers in question or the justifications urged in their support and confined its decision to the procedural issues.¹⁰² Those issues were three: the burden of proof under the 1966 Amendment; the weight to be accorded the Comptroller's (Federal Banking Agencies) prior decision; and the continuation of a stay of the merger pending appeal to the Supreme Court before trial.

In placing the burden on the proponents of the merger, the Court relied on the general rule on the burden of proving exceptions to prohibitory statutes. In support of the intended application in this situation, the Court cited the House Committee Report and a statement of Patman that the proponent of the merger would have to carry the burden. The Court cited Patman as the sponsor of the bill; however, in view of the circumstances this sponsorship in no way gives his statements conclusory effect. In light of the inconclusive history on this point the Court should have relied on the statutory language which arguably could support their conclusion. In holding that no weight need be accorded the Comptroller's decision, the Court cited the general inconclusiveness of the history¹⁰³ and proceeded to other support for its decision. On the issue of staying consummation, the Court adverted to the legislative agreement concerning the difficulty of unscrambling already consummated mergers and thus, it seems, validly relied on a point which most proponents of the bill advanced.¹⁰⁴ Thus the Supreme Court was generally correct in its initial use of legislative history of the 1966 amendment.

In the most recent decision by the Supreme Court, *United States v. Third National Bank in Nashville*,¹⁰⁵ the problems posed by specific use of precise quotations from legislative history are more obvious. The issue before the Court was substantive—the content of the standard enacted in 1966. The Court decided that the standard was that of the antitrust laws with a limited exception for those mergers which clearly served the

100. 386 U.S. 361 (1967).

101. *Id.*

102. *Id.*, at 369 n.1.

103. *Id.*, at 367. The Court said: "The 1966 Act was the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversy that finally abated in Congress to be finally resolved in the courts.

104. *Id.* at 370. See text at note 30 *supra*.

105. 390 U.S. 171 (1968).

convenience and needs of the community. It chose first to cite Congressman Minish for the proposition that this bill was an exception to the antitrust laws, not an entirely new standard replacing those laws and their judicial gloss in the area of bank mergers. The Court's choice of Mr. Minish in this instance¹⁰⁶ seems dubious when the history yields no definitive agreement on this point and when other Congressmen also made statements which were not as strong, and, in some instances, contradictory to those of Minish.¹⁰⁷

The Court used Ashley's language along with that of Congressman Multer to bolster its conclusion that the ultimate test was that of the "public interest."¹⁰⁸ Following this point the Court concluded from their language that "public interest" reflected the net result of a consideration of both the antitrust laws and the convenience and needs of the community. The Court could as well have quoted remarks of Congressman Celler,¹⁰⁹ other remarks of Multer¹¹⁰ or a number of other statements from those who voted for the bill for varying reasons which would have presented at least three differing views on the meaning of public interest. Thus, the use of these specific remarks adds little, if anything, to the force of their argument. In view of the Court's treatment of the legislative history in the *Houston* and *Provident* cases, its liberal use of specific remarks here is puzzling. The Court should have utilized the history as it generally did in the earlier cases, conceding its inconclusiveness and using it only for those issues on which there was agreement in terms of general purpose.

106. *Id.*, at 184-85.

107. See the remarks of Congressman Stephens at 112 CONG. REC. 2450 (1966) : So we have compromised ideas and said that the antitrust laws do pertain to banks if the criteria for bank mergers are not met as set [sic] in the bill . . .

See also the remarks of Congressman Stanton :

. . . not only does this bill set forth a single set of bank merger standards for the supervisory agencies, the Justice Department, and the courts, it also gives these standards equal weight as between economic and competitive circumstances. . . .

and Congressman Weltner :

. . . I think we catapult ourselves into seventy more years of litigation as to the meaning of this [standard] if we depart from the antitrust laws as they have been delineated over the past seventy years.

108. *Supra* note 106.

109. See 112 CONG. REC. 2449 (1966) :

. . . It is the public interest which must be secondary. It is the anticompetitive effect which must be primary. And only where the public interest outweighs the anticompetitive effects [may a merger be consummated].

110. See 112 CONG. REC. 2449 (1966) for remarks of Multer to the effect that :

. . . If the public interest outweighs the anticompetitive effects the merger will be approved.

and for a third view see the statement of Todd :

[the purpose of inserting the words "public interest"] was to make the anti-trust intent tighter in its application than it would have been if we simply left the phrase 'Convenience and needs of the community' in by itself.

Id.

CONCLUSION

The legislative history of the 1960 and 1966 Bank Merger Acts yields general purpose and policy. In some instances as discussed above it gives more precise positions but these tend to concern procedural and not substantive provisions of the 1966 Act. The history shows compromise, which expands the pages but not the meaning of the debates, hearings and reports and, more importantly, tends to obscure specific Congressional intent. Thus, the Court's and commentators' inquiries should more properly be directed toward discovering this general purpose, which cannot be found in the specific position that certain individuals chose to take on narrow issues posed by the final language but rather in the positions these individuals offered which Congress and the committees rejected. It is the rejection of the positions advanced by O'Mahoney in 1960 and Robertson and Proxmire in 1966 which deserve increased study by the Courts. Into these the Courts can safely delve and by elimination at least narrow the possible positions taken by Congress.

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