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A National Policy for the Oil Industry, by Eugene V. Rostow

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A NATIONAL POLICY FOR THE OIL INDUSTRY. By Eugene V. Rostow.¹ New Haven: Yale University Press. 1948. Pp. xvi, 173. \$2.50.

One of the large modern buildings in Washington, D. C. is the Standard Oil Building, located part way between the Capitol and the White House. If it does not house a formal branch of the Government, from it has nevertheless emanated a powerful influence on our national affairs, foreign and domestic.² Professor Rostow's book, however, is not so broad as its title would indicate. "A National Policy for the Oil Industry" is concerned with the organization of the industry, the economic effects of that organization, and the cure for the economic ills resulting therefrom. Basically, it is an amply documented indictment for violation of the antitrust laws of the major oil companies, the oil-producing states, and the Department of the Interior.

Professor Rostow's Brandeisian premise is that it is "easier to achieve the values of democracy in a society where economic power and social prestige are more widely distributed, and less concentrated, than in the United States today."³ It follows that if the oil industry could be made to fit a more competitive pattern of organization, without loss of the economic and social values that its present structure affords, action should be taken to adapt the in-

* Professor of Law, Indiana University School of Law. Member of U.S. Attorney General's Committee on Administrative Procedure, 1938-41.

1. Professor of Law, Member of the Graduate Faculty of Economics, Yale University.
2. See, e.g., Tarbell, "History of the Standard Oil Company" (1904); Nevins, "John D. Rockefeller: The Heroic Age of American Enterprise" (1940); Feis, "Petroleum and American Foreign Policy" (1944); Feis, "Seen From E.A." 93-192 (1947); Schuman, "International Politics" 280-81 (2d ed. 1937); New York Post, Feb. 27, 1948, p. 6; Hearings before H. R. Committee on Judiciary on Charges against the Attorney-General, 67th Cong., 2d Sess. (1922); Hearings before Senate Committee Investigating the Attorney-General, 68th Cong., 1st Sess. (1923).
3. Rostow, "A National Policy for the Oil Industry" xiii (1948).

dustry to the new pattern. He concludes "that the oil industry is monopolistic in its organization to an important extent; that a more competitive form of organization would be economically and socially desirable, and should be available as a practical matter under the construction of the Sherman Act which has recently been developed by the courts; and that a reorganization of the industry in the interest of competition would not involve giving up the economies of the large scale of production, or other technological advantages, but should on the contrary result in the elimination of important wastes associated with the excessive size and monopoly."⁴

The indictment is drawn against some twenty-one of the major companies in the oil industry, vertically integrated and operating in all four phases of the business. The largest of these remains the Standard Oil Company (New Jersey), with over two billion dollars in assets.⁵ These companies own about 30% of the producing wells and produce about 62% of the crude oil,⁶ they own over 70% of the proved reserves of oil in this country,⁷ 82% of the refining capacity,⁸ about 90% of the oil tankers and 97% of the pipe lines,⁹ 73% of the oil storage facilities,¹⁰ 40% of the service stations,¹¹ and have binding contracts with 80% of the wholesale jobbers of oil.¹² In addition, these same interests control 75% of the proved reserves in South America, 40% of the proved reserves in the Middle East, and 30% of the proved reserves in the Far East.¹³ It is this group that has imposed on the American economy a policy of planned scarcity for the purpose of maintaining an artificially high price.

Many years before the oil industry became a significant one in the American economy, the policy of conservation of natural resources was a popular political plank.

4. *Ibid.*

5. *Id.* at 7.

6. *Id.* at 10.

7. *Id.* at 10-11.

8. *Id.* at 11.

9. *Ibid.*

10. *Id.* at 12.

11. *Ibid.*

12. *Ibid.*

13. Mather, "Oil Troubles the International Waters" *New York Times Magazine*, Feb. 22, 1948, p. 38.

The very words have a warning connotation. It is that policy that has been perverted to the use of the oil industry. Professor Rostow contends that there is no real threat of exhausting American oil reserves in the immediate future. There are many who disagree with him. Professor Mather of Harvard, for example, states: "If present trends continue, the obvious deduction is that the United States in ten to twenty years will be a 'have not' nation so far as petroleum is concerned."¹⁴ Whichever view be the correct one, however, it is clear that the oil companies have used the slogan of conservation to cover up the fact of monopolistic price-fixing. The oil companies are able to maintain their planned scarcity only with the aid of outmoded law and the cooperation of the legislatures of the oil states and the Bureau of Mines of the Department of the Interior.

The outmoded law is the "law of capture," long rejected in the country of its origin,¹⁵ that the person on whose land oil is brought to the surface is the owner of the oil. It has resulted in an inordinate number of wells being sunk, at great cost in equipment and oil, since the greater the number of wells, the greater the loss in gas pressure, causing a large part of the oil to be left underground for lack of pressure to pump oil through the rock formations. The states have enacted laws restricting the number of wells in any given area. But such laws have been honored more in their breach than in their enforcement.¹⁶

Nominally for purposes of conservation, oil states have enacted prorationing laws, limiting the amount of oil to be brought to the surface in each state. It is important to note that these prorationing laws did not receive their stimulus until the depression caused a sharp decline in the demand for gasoline. The prorationing statutes soon came under the protecting wing of the "Blue Eagle" of the N.I.R.A. Today, the prorationing system operates in this fashion: The Bureau of Mines of the Department of the Interior, assuming a demand,¹⁷ sets a figure for the entire industry's production, at

14. *Ibid.*

15. Ely, "The Conservation of Oil" 51 *Harv. L. Rev.* 1209, 1244 (1938).

16. Rostow, "A National Policy for the Oil Industry" 36, n.68 (1948).

17. "The Bureau of Mines forecasts of demand depend on the concealed premise of price stability. Their effect is to state how much or how little crude oil need be produced to permit prices to remain fixed." *Id.* at 27. "The Bureau of Mines estimates, the

the same time allocating to each state its share of the quota. States by way of compact—where more open monopoly practices are not adopted as in California—in turn ration each of the wells in the state in order to approximate the quota assigned by the Bureau of Mines. The Federal Government cooperates by banning from interstate commerce all oil produced in violation of the state prorationing statutes.¹⁸ Thus, “by and large, the laws governing oil production are drawn and sustained as conservation measures, however much the stabilization of markets may have been the dominating factor in causing their enactment. It will be noted that the industry has not sought—indeed has intensely opposed—a public utility status as the basis for these statutes.”¹⁹

As a matter of fact, any real effort toward conservation would necessitate laws: (1) preventing flush flows; (2) limiting the number of wells per field; (3) regulating the rate of flow at each well to equalize the rate of pressure in the field; (4) requiring a minimum ratio of gas to oil. None but the first is accomplished by prorationing.²⁰

“ . . . If we were really serious about conserving our oil supply, we would eliminate our oil tariff, we would use foreign oil in peacetime, and perhaps have a holiday in one or more areas of production, keeping the American extraction industry as a model plant, and a standby for defense purposes; we would mix gasoline with alcohol made from grain; and we would discourage consumption by a horsepower tax, and perhaps by a prohibition against using oil where coal or water would do. But we are not really serious about oil conservation, and there isn't much objective ground for urging that we should be. However, our public policy is loyal indeed to the slogan of conservation. It is the supposed object of our productive control system, as it is the moving idea which has persuaded the Supreme Court and the public to condone our present monopoly methods of determining supply.”²¹

The prorationing system has successfully withstood attacks on its constitutionality by individuals subjected to it.²²

keystone of the entire plan, are without support in substantive legislation.” *Id.* at 29.

18. 49 Stat. 30 (1935), 15 U.S.C. §715 (1941).

19. Ely, “The Conservation of Oil” 51 *Harv. L. Rev.* 1209, 1224 (1938).

20. Rostow, “A National Policy for the Oil Industry” 34 (1948).

21. *Id.* at 33.

22. *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), 311 U.S. 570, 614 (1941); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932).

Professor Rostow vividly condemns the Court's swallowing the bitter pill of price-fixing because it was covered by a sweet coating of conservation. He regards prorationing, in the words of Mr. Justice Brandeis, as a "glaring instance of the taking of one man's property and giving it to another."²³ But just how far beyond the reasons set forth by a state legislature a court may go is a question far beyond the scope of this review or this book. Mr. Justice Holmes has said: "While the courts may exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, *unsuited to its ostensible end*, or based upon a conception of morality with which they disagree."²⁴

The attack upon the prorationing system is the most complicated and difficult point made in this book. On the other hand, proof of the domination and control by the major companies of transportation, refining, and distribution is easily shown by Professor Rostow.

Professor Rostow's solution is two-fold. First, he would eliminate the "rule of capture" and replace it with a legislative requirement for unitary operation of the oil fields as "the only course of action which as a practical matter could permit high standards of conservation practice to be seriously followed."²⁵ Second, he would bring about competition in the oil industry by means of an antitrust action resulting in an appropriate decree.

Professor Rostow's faith in the Sherman Law rests upon two recent decisions: *United States v. Aluminum Company of America*²⁶ and *American Tobacco Company v. United States*.²⁷ From these he draws his tests of monopoly: "Freedom of entry of new firms into a field is the key to the economists' distinction between competitive and monopolistic markets. . . . the crucial element of their monopolistic power is a degree of control over the prices they charge."²⁸ Whether, in fact, Professor Rostow has correctly interpreted these opinions remains to be demonstrated.

23. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937).

24. *Otis v. Parker*, 187 U.S. 606, 608 (1903) (*Italics Added*).

25. Rostow, "A National Policy for the Oil Industry" 40 (1948).

26. 148 F.2d 416 (C.C.A. 2d 1945).

27. 328 U.S. 781 (1946).

28. Rostow, "A National Policy for the Oil Industry" 125 (1948).

Armed with these two cases, and with the facts he has presented, he is willing to do battle under the Sherman Law against the oil companies. The hurdle of the large numbers of defendants, he quickly surmounts with the aid of *United States v. Reading Co.*²⁹ and *United States v. Patten.*³⁰ "Devising a suitable dissolution decree in the light of these principles presents no insuperable technical obstacles. The courts can employ expert assistants as Special Masters in drafting the decree, and as Receivers in carrying it out."³¹ The fact that one of the vital links in the indictment—the prorationing system—is not only lawful, but in part state and federally sponsored, is a hurdle he prefers to ignore.

These elements are legal ones, which may be overcome. Professor Rostow recognizes one important psychological factor that is set against him, but which does not deter him from choosing the course of litigation rather than legislation: "Although the dissolution of monopolistic organizations is a familiar remedy in antitrust history, each new application of it comes with a shock, and meets the natural unwillingness of judges to do anything drastic except to words."³²

The trial courts have not been too kind to the Government in the antitrust suits brought before them. The *Aluminum* case was decided in favor of the defendants in the District Court.³³ It took what was one of the greatest courts in the country to overturn that decision. Similarly, a three-judge court ruled in favor of the *United States Gypsum Company.*³⁴ The Supreme Court, however, rectified that error on March 8, 1948. *United States v. Paramount Pictures,*³⁵ now on appeal before the Supreme Court, though resulting in a finding of monopoly, ended in a decree denying dissolution. Should the Supreme Court remove the scope of the decree from the discretion of the District Court, and say that it will order divorcement where in its judgment it believes it to be appropriate, a vital link will be forged in Professor Rostow's chain. At this writing, the Court has not yet so acted.

I agree with all that Professor Rostow sponsors in this

29. 253 U.S. 26 (1920).

30. 187 Fed. 664 (S.D.N.Y. 1911).

31. Rostow, "A National Policy for the Oil Industry" 140 (1948).

32. *Id.* at 140-141.

33. 44 F.Supp. 97 (S.D.N.Y. 1941).

34. 67 F.Supp. 397 (D. D.C. 1946).

35. 66 F.Supp. 323 (S.D.N.Y. 1946).

book except his choice of remedy. Much is to be said for the practicality of his choice. A reform by way of Administration sponsorship or legislative action would call for bold, courageous action and there is no assurance that such will be forthcoming. On the other hand, the Antitrust Division, for the most part, is competently staffed and under able leadership. An action against these oil companies has already been started, and the course of that suit will probably be guided by the Division rather than the Attorney General's office. Thus, though a victory may not be assured in the District Court, the possibility of success on appeal is good.

I submit, however, that the knife would be more effectively wielded by Congress, first by amendment to the anti-trust laws to make divorcement, in this case as in others, a legislatively sponsored remedy; second to provide for the supervision of oil production in accordance with conservation measures already covered. A tendency exists, of which this book may be reflection among "liberal" groups today, to turn for aid to the courts, and more specifically to the Supreme Court. This same group suffered untold agonies when the "Old Court," by construction of statutes or Constitution, or other forms of "judicial legislation," destroyed New Deal legislation. Today they seek the assistance of the courts to effect results, opposite to those the "Old Court" would effect, but by the same means. It is a program that ignores the democratic flavor of the legislative and executive branches of government in favor of the non-democratic courts. (Non-democratic in method of appointment, not in their philosophy.) I think that the appropriate answer has already been suggested: education of the public. "The consuming public has never become exercised to the point of transferring the issues to an arena which it might dominate—Congress."³⁶ It is probably a more naive answer, however, than that offered by Professor Rostow.

Notwithstanding this difference of opinion with Professor Rostow, this, the first of the studies in National Policy to be promulgated by the Departments of Economics, Political Science, and Law at Yale University, has set a standard of excellence that the future texts will find difficult to achieve. (Its importance is enhanced for its demonstration of the necessity of fusing law with economics and political

36. Ely, "The Conservation of Oil" 51 Harv. L. Rev. 1209, 1241 (1938).

science for realistic consideration of legal problems.) It certainly should be sent to those in high places who might put it to good use.

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SOME REFLECTIONS ON THE READING OF STATUTES. By Felix Frankfurter. New York: The Association of the Bar of the City of New York. 1947. Pp. 29. \$1.50.

It is not surprising that Mr. Justice Frankfurter chose as his topic for the sixth annual Benjamin N. Cardozo Lecture the reading of statutes. Federal judging today is almost exclusively concerned with statutory material,¹ and on this subject the federal judge has become increasingly articulate, not only because the Bar is in need of instruction on how to treat problems of legislation, but also because the judge's artistic urge, now that his creative common law function has largely atrophied, is directed toward the interpretative.² Thus, Mr. Justice Frankfurter has "gone to great masters to get a sense of their practice of the art of interpretation"³: Holmes, Brandeis, Cardozo.

Together with these three masters, Mr. Justice Frankfurter himself has been an exponent of the new art. He has done as much as any one else—in his opinions as well as in this volume—to enunciate the modern doctrine of statutory construction.

This doctrine—though it is doctrinaire to call it such—is that a statute must be examined, in order to "accord the words the sense in which Congress used them,"⁴ in its total context. The search for meaning in the words of a statute does not differ from the same search in "a wider non-legal context. Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation The troublesome

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1. Frankfurter, "Some Reflections on the Reading of Statutes" 5 (1947).
2. See Frank, "Words and Music: Some Reflections on Statutory Interpretation" 47 Col. L. Rev. 1259 (1947).
3. Frankfurter, "Some Reflections on the Reading of Statutes" 9 (1947).
4. *Id.* at 16.