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## **An Agricultural Law Research Article**

# **Does the Harkin Family Farm Bill “Square” with the Sherman Antitrust Policy?**

by

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# DOES THE HARKIN FAMILY FARM BILL "SQUARE" WITH THE SHERMAN ANTITRUST POLICY?

## I. INTRODUCTION

The survival of the American family farm is a concern of those involved in the agricultural sector of the U.S. economy, particularly in view of the family farm's diminishing prominence in our society due to current market forces, foreign competition, and high capital investment requirements.<sup>1</sup> Tradition is an important element of this concern, for "[f]amily farms have been revered since the days when Thomas Jefferson argued for national policies of public land distribution that favored small, independent landholders."<sup>2</sup>

In response to this issue, legislators have been and continue to be active in attempting to create an economic atmosphere which is favorable to the financial viability of the family farm to insure its existence as an American business enterprise and social institution.<sup>3</sup> The Family Farm Act of 1987 is one such an attempt, and is the focus of this analysis, with specific regard to its provisions proposing price-enhancement through supply management.

On March 6, 1987, Senator Byrd of West Virginia, Senate Majority Leader, introduced this bill on behalf of its sponsors, Senator Harkin of Iowa, Senator Burdick of North Dakota, Senator Exon of Nebraska, and Senator Daschle of South Dakota, before the Senate of the 100th Congress, First Session, as S.658. The bill provided:<sup>4</sup>

price and income protection to family farmers through the management of the supply of the 1988 through 2000 crops of certain agricultural commodities, to enhance the ability of eligible farm borrowers of qualifying states and the farm creditors of such borrowers to restructure farm loans, to provide grants to states to assist persons leaving farming, and for other purposes.<sup>5</sup>

After its introduction to the Senate, the bill was submitted to committee, and its status as pending legislation continues to the present.<sup>6</sup>

The bill calls for, exclusive of items not relevant to this discussion,<sup>7</sup> the Secretary of Agriculture to conduct referenda among eligible produ-

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1. See Darrow, *The Farm Structure of the Future: Trends and Issues*, 17 USDA-EXTENSION, MICH. STATE UNIV. 1 (1984). See also Meeks, *The State of Agriculture: Some Observations*, National Conference of State Legislatures 48 (1986).

2. Darrow, *supra* note 1, at 1.

3. See *id.* at 8. See also Meeks, *supra* note 1, at 48.

4. S. Rep. No. 658, 100th Cong., 1st Sess. 1 (1987) [hereinafter S. 658].

5. *Id.*

6. Telephone interview with Mark Halverson, Agricultural Assistant to Senator Tom Harkin (Sept. 28, 1988).

7. S.658, *supra* note 4, at §§ 401-21, & 511-84.

cers of certain commodities and milk, respective of their particular crops, to establish producer preference for the programs proposed within the bill itself.<sup>8</sup> If approval from one-half or more of eligible producers were attained, the Secretary would be obliged to implement national marketing quotas for the succeeding production year, using acreage allotments and set-aside land percentages for commodities, and production allotments for milk.<sup>9</sup>

Further, the Secretary of Agriculture would be empowered to issue regulations as necessitated by enactment of this legislation, and would be authorized to carry out the process through the Commodity Credit Corporation.<sup>10</sup> Loan, payment and purchase incentives would be granted participating producers to encourage compliance with the plan.<sup>11</sup> Non-compliance would lead to ineligibility for such incentives.<sup>12</sup> Marketing certificates are to be issued to compliant parties, and unauthorized sales or purchases would be subject to penalties.<sup>13</sup>

The Secretary of Agriculture would also have the ability to monitor imported food articles and report to the President as to the detrimental effects of such imports upon the domestic market. Imported foodstuffs with pesticide levels in excess of that which is permitted under U.S. law would be regulated in turn by the Secretary of the Treasury, presumably to protect U.S. farmers from unfair competition, among other considerations.<sup>14</sup>

Thus, through supply management and market control, the bill seeks to provide income protection to family farmers. Though "family farmer" is a loose description, the bill defines the eligible farmer as follows:

(A) Citizen of the United States or permanent resident alien.—

The person (or, if the person is not an individual, each individual with a beneficial interest in the person) is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act 8 (U.S.C. 1101).

(B) Operator of family farm.—The person's farm operations meet each of the following requirements:

(i) The person (or, if the person is a cooperative, corporation, partnership, or joint operation, the members, stockholders, partners, or joint operators, respectively) devotes a substantial amount of time daily to the management or operation of the farm.

8. *Id.* at § 602.

9. *Id.* at §§ 604-07, & 201-02.

10. *Id.* at § 613-14.

11. *Id.* at § 603 & 615.

12. *Id.* at § 612.

13. *Id.* See also *id.* at § 608.

14. *Id.* at §§ 311-13.

(ii) A majority of the hours of labor required annually for the (farm and nonfarm) enterprise of the farm is provided by the person and the person's family (or, if the person is a cooperative, corporation, partnership, or joint operation, by the members, stockholder's, partners, or joint operators, respectively, and the families of such individuals.

(iii) The value of the gross annual sales of agricultural commodities produced on the farm is at most \$500,000.

(C) Nonfarm related income test.—The annual average nonfarm related income of the person for the 4 calendar years preceding the calendar year in which this subtitle takes effect is at most \$45,000.

(D) Projected gross income test.—The person's gross income for any of the person's 1st 3 fiscal years ending after the date of the enactment of this title is likely to be less than the sum of—

- (i) the farm operating expenses of the person for the fiscal year;
- (ii) the reasonable living expenses of the person for the fiscal year; and
- (iii) the principal and interest payments due from the person in the fiscal year to the person's farm creditors.<sup>15</sup>

Whether the bill will accomplish the preservation of the "family farm" is an open matter for future historical analysis and debate. Nevertheless, the above listed criteria for program eligibility, with their emphasis upon the agricultural producer with limited farm and nonfarm financial resources, at least seems to express such a desire on the part of the framers of the bill.

## II. THE QUESTION

This bill proposes to create a system in which farmers as a group control production and supply. This form of control would improve prices that farmers receive in commodities markets by more closely conforming supply to demand. However, such a policy may be contrary to Sherman antitrust policies. In *Tigner v. Texas*,<sup>16</sup> Justice Frankfurter, commenting on congressional passage of legislation subsequent to the Sherman Act which afforded a certain exempt status to agricultural producers involved in cooperative marketing with respect to antitrust considerations, offered the following:

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by antitrust laws. These various measures are manifestations of the fact

15. *Id.* at subd. 5.

16. 310 U.S. 141, 146 (1940).

that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process.<sup>17</sup>

Therefore, in analyzing the effect of antitrust law on the proposed legislation, it is important to note that, as Justice Frankfurter remarked, a very different price and production policy has developed for agriculture in comparison with industry and commerce, and that such a distinction is significant to a proper understanding of the issue.<sup>18</sup>

The unique character of agriculture in relation to the economy at large is descriptively detailed in the language of the court in *Case-Swayne Co. v. Sunkist Growers*<sup>19</sup> where it was stated that:

Agricultural production is a peculiarly precarious area of the national economy. Because of production's dependency upon acts of God, a farmer cannot predict the amount of crop his land will yield in a given season. He may suffer economically from a very large yield as well as a small one. Obviously, if the land yields a meager crop the farmer has little to sell and therefore earns very little. When there is a bumper crop, the large supply drives prices down, and the farmer's profit is again reduced. Farmers suffer similar adverse consequences when an optimum crop has been produced, if that supply is not wisely distributed but oversupplied to some markets and not supplied to others. Finally, since an individual farmer cannot produce enough of a crop to affect significantly the availability of that crop to the consumer markets, he has no ability to set a minimum price for his product. For the last century, farmers and other agricultural producers have attempted to counteract these disadvantages and achieve some economic stability through the development of cooperative associations.<sup>20</sup>

Here the court seems to imply that the inability of individual farmers to affect market prices necessitates the development of marketing cooperatives to insure the economic survival of the farmer in a potentially volatile market setting. If the same standards of conduct in the marketplace were to be enforced upon agriculture as upon other sectors of industry and commerce, agricultural producers would suffer incomparable risks. Hence, the distinct position of agriculture in the economic process.

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17. *Id.* at 146. See also Manchester, *The Status of Marketing Cooperatives Under Antitrust Law*, U.S. Economic Research Service 2 (1982).

18. Manchester, *supra* note 17, at 2.

19. 355 F. Supp. 408 (C.D. Cal. 1971).

20. *Id.*

### III. BASIC ANTITRUST LAW AND ITS RELATIONSHIP TO AGRICULTURAL COOPERATIVE MARKETING

Restraint of trade and monopolization are the principal acts prohibited by sections 1 and 2 of the Sherman Act, respectively. Section 1 of the Sherman Act makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." <sup>21</sup> Section 2 of the Sherman Act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." <sup>22</sup>

The broad and all-inclusive language of the Sherman Act raised problems concerning the scope of its prohibitions. <sup>23</sup> It was used by parties hostile to agricultural cooperative marketing, for example, to attack their existence, <sup>24</sup> even though there is evidence that such was not the intent of the framers of the Act. <sup>25</sup> Paradoxically, the Supreme Court during that period held, in *Standard Oil of New Jersey v. United States*, <sup>26</sup> that a "standard of reason" was to be applied, and that restraints to trade were to be considered unlawful, (and monopolies as well), only if they were "unduly" unfair and unreasonable, thereby narrowing the parameters of the Act in some respects. <sup>27</sup>

As a result of such variance in interpretation of the applicability of the Sherman Act, Congress, in response to popular concern about this problem and in an effort to ensure the vitality of antitrust policies, passed the Clayton Act in 1914. <sup>28</sup> The Clayton Act attacked the antitrust problem in terms more specific than did the Sherman Act. <sup>29</sup> Subsequent to its passage, Congress added the Federal Trade Commission Act of 1914 as another instrumentality of antitrust enforcement. <sup>30</sup> The F.T.C. was empowered to enforce sections 2, 3, 7, and 8 of the Clayton Act <sup>31</sup> and also authorized to proceed against "unfair methods of competition" in interstate or foreign commerce. <sup>32</sup>

21. 15 U.S.C. § 1 (1982). See also Manchester, *supra* note 16, at 10.

22. 15 U.S.C. § 2 (1982). See also Manchester, *supra* note 16, at 10.

23. G. THOMPSON & G. BRADY, *ANTITRUST FUNDAMENTALS* 12 (2d ed. 1974).

24. Manchester, *supra* note 17, at 5.

25. *Id.* at 5 n.42 (According to Manchester, there is evidence in the congressional record that Senator Sherman was aware of the unique status of agricultural producers, and spoke to the issue, but that his suggestions for a general exemption for agricultural producers were rejected by the Senate Judiciary Committee of that time.)

26. 221 U.S. 1 (1911).

27. *Id.* at 66-7. See also G. THOMPSON & G. BRADY, *supra* note 23, at 12.

28. G. THOMPSON & G. BRADY, *supra* note 23, at 12.

29. *Id.* at 13.

30. *Id.* at 14.

31. *Id.*

32. *Id.*

Section 6 of the Clayton Act, however, contained language somewhat favorable to agricultural cooperatives, affording an exemption for such cooperatives if they held a non-stock status.<sup>33</sup> Section 6 provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for purposes of mutual help, and not having capital stock or conducted for a profit, or to forbid or restrain individual members from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>34</sup>

This exemption to antitrust enforcement given by section 6 to agricultural marketing cooperatives caused consternation among some members of Congress at that time, who felt that measures were needed to prevent the exemption from being manipulated to "exploit the public".<sup>35</sup> In order to allay such fears, and to give greater specificity to the exemption, Congress passed the Capper-Volstead Act of 1922.<sup>36</sup>

Section 1 of the Capper-Volstead Act provides:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* that such associations are operated for the mutual benefit thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum. And in any case the following:

Third. That the association shall not deal in the products of

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33. Manchester, *supra* note 17, at 5.

34. Clayton Act § 6, 15 U.S.C. § 17 (1982).

35. Manchester, *supra* note 17, at 6 n.46.

36. *Id.* at 13.

non-members to an amount greater in value than such as are handled by it for its members.<sup>37</sup>

This section confers upon farmer producers the privilege of organizing into cooperative marketing groups for mutual beneficial purposes with limitations suggesting that such benefits be primarily bestowed upon the farmer-producers themselves.<sup>38</sup>

On the other hand, section 2 of the Capper Volstead Act requires the Secretary of Agriculture to restrain agricultural marketing cooperatives from "unduly" enhancing prices through monopolization and restraint of trade.<sup>39</sup> The section reads in part:

That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect. . . .<sup>40</sup>

The use of the term "unduly" with regard to price enhancement seems to be consistent with the court's opinion in *Standard Oil*, which called for the application of a standard of reason in such decisions.<sup>41</sup>

Thus, the Supreme Court in *Maryland & Virginia Milk Producers v. United States*,<sup>42</sup> looked to a House Report<sup>43</sup> in determining the congressional intent in the passage of the Capper-Volstead Act:

This (the House Report) indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix price at which their cooperative will sell produce, and otherwise carry on like a business corporation without violating anti-trust laws. It does not suggest a congressional desire to vest cooperatives with unrestrained power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their business in their own legitimate way.<sup>44</sup>

Moreover, in a more recent case, *Sunkist Growers v. F.T.C.*,<sup>45</sup> a U.S. Dis-

37. Capper Volstead Act § 1, 7 U.S.C.A. 291 (1980).

38. See Manchester, *supra* note 17, at 13.

39. *Id.* at 8.

40. Capper-Volstead Act § 2, 7 U.S.C.A. 292 (1980).

41. *Standard Oil*, 221 U.S. at 66-7.

42. 362 U.S. 458 (1960).

43. H.R. Rep. No. 24, 67th Cong., 1st sess. 2 (1922). "Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so farmers can take advantage of it." *Id.*

44. *Maryland & Virginia Milk Producers*, 362 U.S. at 466-67.

45. 464 F. Supp. 302 (C.D. Cal. 1979).



trict Court gave this interpretation of the scope of the Capper-Volstead Act:

The purpose of the Capper-Volstead Act is to improve the bargaining position of farmers with respect to corporate middlemen in order to increase farm income and to stop the rise of tenancy and the migration of farm families to the cities. To effectuate these purposes, the Congress authorized farmers to act collectively. Under normal circumstances, the mere formation of collective processing and marketing associations would be found to be a violation of the antitrust laws; Capper-Volstead, in conjunction with section 6 of the Clayton Act, merely removes the formation and existence of cooperative associations from the sweep of the antitrust laws. However, the right under Capper-Volstead to act collectively does not authorize any combination or conspiracy in restraint of trade that agricultural producers may see fit to devise.<sup>46</sup>

Thus it may be gleaned from legislative activity and judicial interpretation that agricultural producers have been given a broad latitude of operation with respect to the Sherman Act, notwithstanding the fact that such behavior in other areas of industry and commerce might not be viewed so favorably. However, it is also apparent that agricultural enterprises are in no way exempt from enforcement of the provisions of the Sherman Act or other antitrust policies.

#### IV. GOVERNMENT ACTION AS OPPOSED TO PRIVATE ACTIVITY

While, as shown in the preceding section, the courts have consistently held that agricultural producers, though generally exempt, do not enjoy complete immunity from antitrust laws;<sup>47</sup> in *Hiatt Grain & Feed, Inc. v. Bergland*,<sup>48</sup> the district court notes that the Supreme Court of the United States has distinguished government action from private activity.<sup>49</sup> For example, the court offers *United States v. Rock Royal Co-op, Inc.*,<sup>50</sup> where the Supreme Court held that if the Secretary of Agriculture issued otherwise valid orders "the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act."<sup>51</sup> In explanation of the holding, the *Bergland* court offers further, from *Eastern R.R. Presidents Conference v. Noerr Motor Freight*,<sup>52</sup> the following:

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46. *Id.* at 309 (citations omitted).

47. *See, e.g.*, *United States v. Borden*, 308 U.S. 188 (1939).

48. 446 F. Supp. 457 (D. Kan. 1978).

49. *Id.*

50. 307 U.S. 533 (1960).

51. *Id.* at 560.

52. 365 U.S. 127 (1961).

[W]here restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the Sherman Act can be made out. These decisions rest upon the fact that under our form of government the question of whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.<sup>53</sup>

Moreover, the *Bergland* court suggested that "this principle has been specifically applied to price support activities of the Secretary of Agriculture."<sup>54</sup>

The question then becomes, does the Secretary of Agriculture have the statutory power to implement a plan of price-enhancement through supply management and cooperative marketing to benefit the producers of agricultural commodities and milk?

#### V. POWERS CONFERRED UPON THE SECRETARY OF AGRICULTURE BY CONGRESS TO EFFECT PRICE SUPPORT PROGRAMS

The federal farm program had its origins in the Agricultural Marketing Act of 1929, where Congress created the Federal Farm Board. The Board was given a revolving fund of \$500 million to make loans to marketing cooperatives for the purpose of purchasing grain from farmers. However, a steep decline in prices exhausted the resources of the board and it failed. In spite of its failure, its brief existence established political acceptance for government involvement in the alleviation of price and income problems for the producers of certain commodities. This principle of government action in such matters was to become consistent with policies of the New Deal.<sup>55</sup>

In the early thirties the Great Depression hit the farm sector severely, and the Agricultural Act of 1933 was enacted in response.<sup>56</sup> The Secretary of Agriculture was thus empowered to seek adjustments in production from producers through voluntary acreage allotments in exchange for parity payments that were to be financed by processing taxes placed on the commodities concerned.<sup>57</sup> Processors were to be licensed, to prevent unfair practices or charges, and the Commodity Credit Corporation was created later that year to make mandatory price support loans.<sup>58</sup> A 1936 Supreme Court decision<sup>59</sup> brought a halt to the program, as the processing

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53. *Id.* at 136 (footnotes omitted).

54. *Hiatt Grain*, 446 F. Supp. at 505.

55. U.S.D.A. ECONOMIC RESEARCH SERVICE, AGRICULTURAL INFORMATION BULLETIN NO. 471, BACKGROUND FOR 1985 FARM LEGISLATION: CORN 23 (1985).

56. *Id.*

57. *Id.*

58. *Id.*

59. *United States v. Butler*, 297 U.S. 1 (1936).

taxes were found to be unconstitutional.<sup>60</sup> However, a prolonged drought in 1936 caused Congress to enact new legislation clarifying the legal status of marketing orders and agreements. The Agricultural Marketing Act of 1937 established the authority of the Secretary of Agriculture to issue milk marketing orders.<sup>61</sup>

The Agricultural Act of 1938 was passed to provide mandatory price support loans for producers of cotton, wheat, corn, tobacco, and rice based on parity prices and parity payments. Farmers could secure loans from the government by pledging the commodity as collateral.<sup>62</sup> The commodities were to be stored in time of excess supply and returned to the marketplace in time of scarcity.<sup>63</sup>

In the 1940's agricultural policy shifted to the encouragement of production to meet wartime and postwar needs.<sup>64</sup> Price supports were increased and continued thus until 1948.<sup>65</sup> The 1948 Agricultural Act began a new approach in agriculture.<sup>66</sup> It provided support for basic commodities, but also contained provisions for lowering support levels should supplies become excessive.<sup>67</sup> The Commodity Credit Corporation Charter Act was passed in 1948 as well, which approved and continued the broad powers and the past methods utilized by the C.C.C. in price support programs.<sup>68</sup>

Dissatisfaction with the price support provisions of the 1948 Act led to the Agricultural Act of 1949.<sup>69</sup> The Secretary of Agriculture was given a grant of authority to "provide the price support authorized herein through the Commodity Credit Corporation and other means available to him."<sup>70</sup> Further, the Secretary was empowered to determine and approve the amount, terms, and conditions of price support operations, and the extent to which such operations are carried out.<sup>71</sup>

Acreage allotments, production goals and marketing practices, including quotas when authorized by law, could be prescribed by the Secretary and required as a condition for the eligibility of producers for price support.<sup>72</sup> The funds of the Commodity Credit Corporation (CCC) were used

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60. *Id.*

61. Harkin, "Roosevelt to Reagan" *Commodity Programs and the Food Act of 1981*, 31 *DRAKE L. REV.* 499, 504 (1982).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 502.

67. U.S.D.A. *ECONOMIC RESEARCH SERVICE*, *supra* note 55, at 24.

68. *Id.*

69. *Id.*

70. 7 U.S.C.A. § 1421(a) (1986). *See also* Harkin, *supra* note 61, at 503.

71. *Id.* at § 1421(b).

72. *Id.* at § 1421(c).

to make loans, purchases, and payments.<sup>73</sup>

During the fifties, production increased dramatically and various measures were taken to reduce stocks. On occasion, marketing quotas were instituted by the Secretary of Agriculture to manage supply.<sup>74</sup> The Agricultural Act of 1958, while providing a continuation of most farm programs, gave rise to the concept of a referendum to be conducted by the Secretary among producers (in this case corn producers), to determine their preference for the programs the Secretary proposed.<sup>75</sup>

In the early 1960's, the problem of surplus stocks continued to grow; support prices elevated, and the U.S. began to lose its competitive edge in world markets.<sup>76</sup> The Agricultural Act of 1961 established the practice of the Secretary of Agriculture providing direct payments to farmers to divert acreage away from the production of certain feed grains, rather than continue price supports for unneeded stocks. Diverted acreage was to be used for conservation purposes, and compliance was voluntary, though the direct payments served as an inducement for farmer participation.<sup>77</sup> Surplus stocks were also disposed of through food programs to the poor and through distribution to public service and military organizations. CCC stocks dropped dramatically as a result, and remained low through the 60's and 70's.<sup>78</sup>

The Secretary of Agriculture brought additional crops under voluntary programs with the enactment of the Food and Agriculture Act of 1965.<sup>79</sup> This legislation marked a return to marketplace reliance, wherein farmers were allowed to substitute one crop for another, depending upon demand, unlike the restrictions of acreage allotment. However, direct payments through voluntary reductions stayed in place to reduce the risk to farmers.<sup>80</sup> By the end of the 60's, at a substantial cost to the government, surplus stocks were brought under control.<sup>81</sup>

The Agricultural Act of 1970 introduced the concept of set-aside acreage.<sup>82</sup> This legislation limited the amount received by farmers in direct payments, and increased production flexibility.<sup>83</sup> The set-aside concept contrasted from the diversion program in that diversion was crop specific, where set-aside was discretionary on the part of the producer, except

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73. *Id.* at § 1421(e)(2)(c).

74. *See* Harkin, *supra* note 61, at 504.

75. *Id.*

76. U.S.D.A. ECONOMIC RESEARCH SERVICE, *supra* note 55, at 26.

77. *Id.*

78. *Id.* *See also* Harkin, *supra* note 61, at 505.

79. *Id.*

80. *Id.*

81. *Id.* at 28.

82. *Id.*

83. *Id.*

where the Secretary within his discretion maintained marketing quotas.<sup>84</sup> This afforded farmers yet more flexibility in production decisions.<sup>85</sup>

In 1973 there was a shift in policy to increasing production to meet export market demand.<sup>86</sup> The Agriculture and Consumer Protection Act replaced support prices with target prices, whereby a deficiency would be made if prices fell below the target price.<sup>87</sup> To protect farmer income, disaster insurance was added to shield the farmer from unforeseen circumstances that might affect yield.<sup>88</sup> However, adverse global weather conditions and production shortfalls led to record prices between 1973-1977. The Secretary set acreage allotments for production, and 90% of allotted acreage had to be planted to receive target price protection, thus encouraging crop production.<sup>89</sup>

With increased production demand eventually caught up with supply and prices suffered.<sup>90</sup> At the same time production costs, due to inflation, were up, and, as a result of these factors, net farm incomes declined.<sup>91</sup> Congress passed the 1977 Food and Agriculture Act to increase farm income, to institute conservation measures as a remedy to the effects of overproduction, and to establish the Farmer Owned Reserve [FOR].<sup>92</sup> The FOR was formed to reduce price instability and to control the cost of holding CCC inventories. The plan called for farmers to hold their stocks in their own facilities until a specified date or when market prices permitted.<sup>93</sup> In this way, a form of price supports was reinstated.

The next few years proved to be a time of instability for the agricultural sector.<sup>94</sup> Encouraged by expectations of a growing export market, and prodded by bankers and the Department of Agriculture in this regard, farmers had continued to expand their operations in anticipation of increased profits, even as land values and the cost of equipment rose.<sup>95</sup> Farm debt quadrupled from 1970 to 1981.<sup>96</sup>

Such policy seems to have been ill-conceived. By the end of 1981, land values were dropping, export conditions failed to materialize, (due in part to world-wide recession but also to increased competition), and prices were insufficient to support operations costs.<sup>97</sup> American farmers, particularly

84. *Id.*

85. *Id.*

86. Harkin, *supra* note 61, at 506.

87. U.S.D.A. ECONOMIC RESEARCH SERVICE, *supra* note 55, at 29.

88. *Id.*

89. *Id.* See also Harkin, *supra* note 61, at 507.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Harkin, *supra* note 61, at 507.

95. Meeks, *supra* note 1, at 9.

96. *Id.*

97. *Id.* at 10.

small family commercial operations, found themselves overburdened with debt.<sup>98</sup> Hence, the current farm "crisis", the conditions of which § 658 attempts to resolve.

It can be seen from the preceding legislative history that the Secretary of Agriculture has, at least at certain points in the past, had the ability to exercise broad discretion in implementing various programs of supply management to protect producer income through the use of such instrumentalities as quotas and acreage allotments. However, it is important to note here that in the late 60's and through the 70's the power of the Secretary of Agriculture, in the opinion of some commentators, became limited with regard to the discretion under which the the office operated. Senator Thomas Harkin, a co-sponsor of S.658, and from whose writings, among others, the legislative history of the powers of the Secretary of Agriculture was gained for use in this article, stated the following:

[D]uring the early years of the 1930's, 1940's, and 1950's, the Secretary of Agriculture was more powerful. Legislatively, Congress gave much authority to the Secretary to use his discretion in both administering programs and setting pricing levels. Also, the Secretary of Agriculture was one of the first Cabinet posts established and was an important and integral part of the Executive Office of the President.

During the 1970's, the House and Senate Agriculture Committees became more involved with the fine-tuning of programs, and circumscribing the Secretary's discretion. To some extent this was revised in the 1981 bill, and it is unclear which direction will be taken in the 1980's.

The power of the Secretary of Agriculture has also been eroded because of overlapping jurisdictions with the Secretary of State, the Secretary of the Interior, and the Secretary of Commerce. During the past twenty years, the Departments of State and Commerce have increased in power and stature and have increasingly become involved in foreign trade issues and the transporting and sale of agricultural products within the United States.<sup>99</sup>

Thus, the question as to whether the Secretary of Agriculture has the authority to invoke his discretion in implementing the provisions of S.658 which deal with supply management and price-enhancement, seems open to legislative action and possibly judicial decision. As shown in preceding discussion, there is evidence that he may have had such powers in the past.

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98. *Id.*

99. Harkin, *supra* note 61, at 516.

## VI. CURRENT POLICY, PROGRAMS, AND TRENDS: THE 1981 AND 1985 FARM BILLS

By the late 70's and 80's, it became apparent that the provisions of the 1977 Act inadequately addressed the growing pressures of high production costs, declining markets and over-production that were affecting the financial health of the family farmer.<sup>100</sup> Using production costs as a measure for target prices had proved to be an unsound practice in view of rising production costs and a declining world market for surplus stocks.<sup>101</sup> Part of the problem was that the qualification for support of all planted acreage had encouraged over-production, and set aside had not served to achieve crop specific acreage reduction, adding instability to market projections.<sup>102</sup> Foreign competition, world-wide recession and increased technological efficiency also added to the circumstances.<sup>103</sup> As a result, prices failed to provide a margin of profit sufficient to satisfy increased farmer debt derived from borrowing for expansion, with collateralization having come from mistakenly inflated land values.<sup>104</sup>

In response to this situation, Congress passed the Agriculture and Food Act of 1981 that set forth specific loan and target price minimums which would override the Secretary of Agriculture's discretion with regard to minimum price and income support levels.<sup>105</sup> Crop-specific acreage reductions were instituted in a return to the allotment concept to divert acreage from production and decrease stocks.<sup>106</sup> Greater use of discretion on the part of the Secretary was authorized, however, in the releasing of stocks from the FORs.<sup>107</sup> It is not clear, therefore, if the power of the Secretary in exercising his discretion in supply management for price support to provide income protection was diminished by this legislation, due to the fact that the signals from Congress were somewhat conflicting.

The 1981 Act, and its Payment-In-Kind (PIK) offspring, proved largely ineffective in restoring financially troubled farmers to fiscal health, though PIK had a measurable effect in increased income in 1983.<sup>108</sup> As a result, legislative debate heightened with regard to the future direction of American agriculture and the role of the family farmer therein.<sup>109</sup> Many, perhaps influenced by a Reagan administration view of economics, favored less government involvement in the marketplace and a transition from government

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100. U.S.D.A. ECONOMIC RESEARCH SERVICE, *supra* note 55, at 30.

101. *Id.*

102. *Id.*

103. Meeks, *supra* note 1, at 10.

104. *Id.* at 9.

105. U.S.D.A. ECONOMIC RESEARCH SERVICE, *supra* note 55, at 30.

106. *Id.*

107. *Id.*

108. See D. JOHNSON, K. HEMMI & P. LARDINOIS, *AGRICULTURAL POLICY AND TRADE: ADJUSTING DOMESTIC PROGRAMS IN AN INTERNATIONAL FRAMEWORK*, 60, 64 (1985).

109. Meeks, *supra* note 1, at 48.

dominated farm economics to a more entrepreneurial agricultural sector.<sup>110</sup>

Thus, Congress handed down the 1985 farm bill in pursuance of these principles. The bill reduced target prices in future years and decreased loan rates. Farmer efficiency was promoted. Deficiency payments were tied to target prices, and an export bonus provision was set forth. Also, a land conservation reserve was established to control production, and subsidy payments were provided for the planting of cover crops on idled land.<sup>111</sup>

Despite the changes included in the Food and Security Act of 1985, the Food and Agricultural Policy Research Institute (FAPRI) concluded in a 1986 report that little room exists for improvement in farm commodity prices, gross farm receipts, and net farm income.<sup>112</sup> Therefore, the prognosis for the future financial health seems not to have improved greatly by its enactment.

Other measures, aside from the Harkin Family Farm Bill, have since been considered by Congress. The bailing out of commercial agricultural banks, the subsidizing or buying down of interest rates incurred upon prior debt, the deferment of loan payments to troubled farmers, and the "warehousing" of foreclosed farm land to protect farm land values have all been discussed as potential remedies to the crisis family farmers face.<sup>113</sup> However, the role of the Secretary of Agriculture and the use of the discretionary powers of the office in providing such remedies, or others yet promoted, is at present unclear with respect to legislative mandate.

## VII. SUMMARY

There is a general consensus among concerned parties that the American family farm is endangered as an economic enterprise and social institution. What, if anything, should be done about preserving the family farm is a matter of continuing debate. Any discussion of policy in regard to the future of the family farm should consider traditional American values and the role of the family farm therein as well as the financial feasibility of continuing the family farm system.

The "Harkin Family Farm Act of 1987," was introduced to the Senate as a measure to aid the survival of family farm operations, proposing the use of supply management techniques to induce price-enhancement of marketed crops for the protection of producer income. The bill calls for the establishment of national marketing quotas, acreage allotments, set aside acreage conservation programs, loan and payment inducements to

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110. *Id.* at 49.

111. *Id.* at 42.

112. *Id.* at 43.

113. *Id.*



participation, marketing certificates to control marketing activity, penalties for non-compliance, and restrictions and regulations to be imposed upon imports and exports. As a result, interested parties have inquired as to whether such action would be violative of antitrust laws.

Legislative history and judicial decision seem to indicate that such would not be the case, particularly where such action is taken by the government with legislative approval. First, the antitrust laws and policies are themselves legislatively mandated. There is no constitutional basis for antitrust law, so Congress may adjust such policies as is necessitated by social conditions. Second, even in view of antitrust policies, Congress has afforded agricultural producers a certain exemption from antitrust enforcement where it can be shown that the questioned economic activity is for the benefit of the producers themselves and that such activity does not "unduly" restrain trade or monopolize. Third, there is long history of government action through legislative mandate towards the regulation of the agricultural economy of the U.S. for the public good. Such action has been upheld by past judicial decision, and seems to have occurred as a matter of policy.

However, one potential bar to the legislation's enactment is the bill's mandatory compliance aspect which arises through the use of disincentives and penalties for non-compliance with the proposed plan. While not necessarily an antitrust concern, mandatory participation in government programs is nonetheless unpopular with American farmers.

Objection in this regard would seem overcome by the application of the proposed referenda process, where the vote of more than one-half of crop-specific eligible producers is required prior to the implementation of the program in a given program year. In a democratic society such as our own, where majoritarian politics are regularly practiced, and where farmers have been involved in mutually beneficial cooperative marketing ventures and have been the recipients of federal farm program benefits for some time, submission by an individual farmer to a farm program designed for and agreed upon by a majority of those similarly situated does not seem overly burdensome.

Therefore, it appears that if the "Harkin Family Farm Act of 1987" is passed, it will likely survive any antitrust challenges that may arise, and satisfy concepts of fundamental fairness as well. Whether its passage can be achieved in view of current economic policy and whether its provisions will accomplish the alleviation of adverse pressures which affect the family farmer are issues yet to be decided.

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