ANTITRUST DURING NATIONAL EMERGENCIES: II *

Thomas K. Fisher †

The effects of the Depressions of 1893 and 1929, the Panic of 1907, and World War I upon the enforcement and substantive content of the antitrust law were examined in the first part of this article. Because of the change in government policy toward the law as effected in the early months of the Roosevelt administration, the Depression of 1929 was divided into the years under the Hoover administration and the years under the Roosevelt administration. We have noted that during the former period only twenty-five actions were brought to enforce the law. The legislative policy of that administration in respect to the maintenance of competition remained unchanged, however, with no positive action being taken upon the numerous suggestions offered by private groups and individuals for suspension or modification of the law.

E. The N. I. R. A. Period

The purpose of the Congress in enacting the Sherman Act was to free the flow of interstate and foreign commerce from certain existing and future obstructions. These were obstructions resulting from trade agreements among competitors and the monopolization of trade by one or more individuals or corporations. The emergency legislation enacted by the Congress in the first part of the Roosevelt administration was for essentially the same purpose. But the obstructions impeding commerce at this time were of a different character. No private groups were responsible for the substantial cessation of trade and commerce; rather, impersonal forces world-wide in scope had stalled the productive facilities of the nation. Since the impediments in trade were not the result of agreements among competitors or of monopolization, the suggestions which had been advanced, and rejected, during the Hoover administration were accepted as the basis for a new approach to the current problems.

The National Industrial Recovery Act 117 was passed in June of


The background of the act and the story of its drafting are related in Richberg,
1933 as the principal legislation designed for the alleviation of existing economic conditions. In its declaration of policy a change from the theory of national trade supported by competition to one founded on co-operation was apparent. "It is hereby declared to be the policy of the Congress," the act recited, "to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups. . . ." Pursuant to section 3 of the act, codes of fair competition, formulated by trade or industrial associations or groups, became binding upon the applicable trade or industry when approved by the President. One of the conditions to Presidential approval of a code was that its provisions would tend to effectuate the policy of the act. The policy declaration included: "to avoid undue restriction of production (except as may be temporarily required)." As a further condition to his approval, the President was to be satisfied that the code was not designed to promote monopolies or to eliminate or oppress small enterprises and would not discriminate against them. The nonmonopolistic condition was implemented by a positive prohibition against "monopolies or monopolistic practices." Whether the codes violated the positive prohibition was determinable through the judicial process rather than, as in the case of the aforementioned condition, subject merely to the findings of the President from which no appeal was provided. Section 4(b) of the act granted the President power to require the licensing of trades and industries whenever he found that "destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof."\textsuperscript{118}

The President was also authorized to enter into agreements with, and to approve agreements between, persons engaged in a trade, industry or labor organization, and trade or industrial organizations. Prior to executing or approving such agreements he was directed to find that the terms thereof were consistent with the requirements of the condi-

\textsuperscript{118} The licensing power was effective for not more than one year after the date of the enactment of the act. It was never exercised by the President. \textit{I C. C. H., Federal Trade Regulation Service, 7th ed., ¶ 812 (1932-1937).}
tions above mentioned for his approval of a code. No positive prohi-
bition against monopolies or monopolistic practices was set forth in
respect to these agreements. Another section of the act provided
that, where no code had been submitted for a trade or industry, the
President could prescribe a code for such trade or industry when he
found abuses existing therein which were inimical to the public interest
and contrary to the policy of the act. All codes were to contain cer-
tain enumerated provisions guaranteeing to employees the right to
organize and bargain collectively, and to be free from the interference
of employers in respect to their union activities.

Section 5 provided:

"While this title is in effect (or in the case of a license, while
section 4(a) is in effect) and for sixty days thereafter, any code,
agreement, or license approved, prescribed, or issued and in effect
under this title, and any action complying with the provisions
thereof taken during such period, shall be exempt from the pro-
visions of the antitrust laws of the United States."

On its face and as interpreted in the Congressional debates the act
contained several significant departures from the antitrust law. Of
first importance was the spirit which pervaded the new law. Rehabili-
tation of a disorganized economy and its stabilization thereafter were
to be undertaken through co-operation among competitors and be-
tween an industry as a unit and the government. The act represents "a
supreme effort to stabilize for all time the many factors which make

119 48 Stat. L. 197, § 4(a) (1933). The voluntary agreements were binding only
upon those persons who signed them and violation thereof was a matter of contract
right, no statutory penalties being provided. See Lyon, THE NATIONAL RECOVERY
ADMINISTRATION 30, 900 (1935), for reference to the President's Re-employment
Agreement of July, 1933. When a code was approved for an industry, it superseded
the agreement.

120 48 Stat. L. 196, § 3(d) (1933). This power was never exercised by the
President. 1 C. C. H., FEDERAL TRADE REGULATION SERVICE, 7th ed., ¶ 808 (1932-
1937).

121 48 Stat. L. 198, § 7(a) (1933). Section 9 related specifically to the petroleum
industry. The President was empowered to initiate before the Interstate Commerce
Commission proceedings necessary to prescribe regulations to control the operation of
oil pipe lines and to fix reasonable, compensatory rates for the transportation of petro-
leum. He was authorized to prohibit the interstate and foreign transportation of petro-
leum and the products thereof produced or withdrawn from storage in excess of state
quotas; held, unconstitutional in Panama Refining Co. v. Ryan, 293 U. S. 388, 55
S. Ct. 241 (1935). He was also authorized to institute proceedings to divorce from
any holding company any pipe-line company controlled by such holding company
which pipe-line company by unfair practices or by exorbitant rates tended to create a
monopoly. This power was never exercised by the President. 1 C. C. H., FEDERAL
for the prosperity of the nation and the preservation of American standards," the President declared as he signed the law. The provisions incorporated into the codes, examined at a later point herein, will make clear the importance which should be accorded the spirit embodied in the act.

Turning to a consideration of particular sections of the N. I. R. A., we may note that they left unimpaired section 2 of the Sherman Act, which pertains to monopolizing or attempts to monopolize, and that the powers of the Federal Trade Commission under its organic law were not affected. However, the exemption of approved codes and agreements, and action complying therewith, from the provisions of the antitrust law, opened the door to co-operative action previously forbidden by section 1 of the Sherman Act. In order to reach this conclusion it was first necessary to disregard the language of Chief Justice White in Standard Oil Co. v. United States, wherein he suggested that the terms "monopoly" and "restraint of trade" were synonymous. His construction would have rendered null the exempting clause in the N. I. R. A., since monopoly and monopolistic practices were expressly forbidden by another section thereof.

Restriction of production pursuant to action under a code was contemplated by the framers of the act. Overproduction had been a major "evil" of the distressed economy, and one of the policies of the act was "to avoid undue restriction of production (except as may be temporarily required)" thereby strongly implying that there could be a "due restriction" and a "temporary undue restriction" of production. The

122 Quoted in Lyon, THE NATIONAL RECOVERY ADMINISTRATION 3 (1935). The President's judgment of the act was in these words: "History probably will record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress."

123 Section 3(b) of the N. I. R. A., 48 Stat. L. 196 (1933), provided: "but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

124 The term "antitrust laws" is defined in § 1 of the Clayton Act to include the Sherman Act, the antitrust provisions of the Wilson Tariff Act, as amended, and the Clayton Act. Part I, 40 MICH. L. REV. 969 at 970, note 3, supra.

125 221 U. S. 1 at 61, 31 S. Ct. 502 (1911).

126 Although the cases involving control of production are few in number they lead to the conclusion that such action, resulting from agreement among competitors, would be unlawful under § 1 of the Sherman Act. See American Column & Lumber Co. v. United States, 257 U. S. 377, 42 S. Ct. 114 (1921); Gibbs v. McNeely, (C. C. A. 9th, 1902) 118 F. 120. In National Assn. of Window Glass Mfrs. v. United States, 263 U. S. 403, 44 S. Ct. 148 (1923), and Appalachian Coals, Inc. v. United States, 288 U. S. 344, 53 S. Ct. 471 (1933), restriction of production was not involved.
framers of the bill believed that "exchange of information, which serves to make competition rational instead of blind and destructive and which thus expands trade and commerce" was unlawful under the antitrust law. The exchange of such information, including establishment of open price systems, was to be permitted under the codes. 127 Section 4(b) gave the President power to require licensing for the continuation of a trade or industry in which he found destructive price cutting being practiced. This section implied that the codes might contain provisions preventing such price cutting. Yet if to effect this end members of an industry gave their code authority the power to fix a specific price or a minimum price, would this not be violative of the prohibition against monopolistic practices? 128 Support for a negative answer to this ques-

127 77 Cong. Rec. 5836, 5840 (1933). The legality of plans for the collection and dissemination of trade statistics has been passed upon in the following cases: American Column & Lumber Co. v. United States, 257 U. S. 377, 42 S. Ct. 114 (1921); United States v. American Linseed Oil Co., 262 U. S. 371, 43 S. Ct. 607 (1923); Maple Flooring Mfrs. Assn. v. United States, 268 U. S. 563, 45 S. Ct. 578, 592 (1925); Cement Mfrs. Protective Assn. v. United States, 268 U. S. 588, 45 S. Ct. 586, 592 (1925); and, after the enactment of the N. I. R. A., Sugar Institute v. United States, 297 U. S. 553, 56 S. Ct. 629 (1936). The decisions have not considered particular phases of the plans but have considered each plan as a whole in order to determine whether its purpose or effect was to fix prices or limit production or otherwise unduly restrain trade. In the Maple Flooring case, the Court stated (268 U. S. at 586): "We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce." The scope of lawful activities as thus enumerated would suggest that the framers of the bill had misconstrued the effect of decisions by the Supreme Court. The framers may, however, have had in mind the following practices, the doubtful legality of which is implied in certain decisions: agreements to adhere to filed prices until new price filings become effective, Linseed Oil and Sugar Institute cases; agreements providing for a lapse of time between the filing of prices and the time when these prices become effective, comparable in legal effect to agreements to adhere to filed prices; agreements providing for disclosure of individual cost, price and production data, Linseed Oil and Maple Flooring cases; nonavailability of the collected information to purchasers, American Column & Lumber, Linseed Oil and Maple Flooring cases; persuasion in respect to price or production policies, American Column & Lumber case; agreements providing for filing of current and future prices, Linseed Oil case, but cf. Sugar Institute case.

tion could be found in light of the changes made in an amendment to the bill offered by Senator Borah. His amendment read:

“Provided, that such code or codes shall not permit combinations in restraint of trade, price fixing, or other monopolistic practices.” 129

The conference committee changed the amendment to the form in which it was ultimately passed:

“Provided, that such codes or codes shall not permit monopolies or monopolistic practices.”

Senator Borah interpreted the action of the conference committee to mean that the codes might lawfully contain provisions restraining trade and fixing prices. 130

The possibilities promised by the N. I. R. A. for concerted action of doubtful validity under the antitrust law were realized in the provisions incorporated into hundreds of codes which were approved by the President. Of particular interest for our purposes were the trade practice regulations concerning price control, production control, distribution control, and open price systems.

Direct control of prices was accomplished by the establishment of minimum prices and the prohibition of sales below cost. There were ninety-three codes in which a floor for prices was in effect. 131 The establishment of minimum prices took two forms: first, the power was granted to code authorities to fix minimum prices; secondly, emergency minimum price fixing was permitted when the administrator determined that an emergency existed. 132 One hundred and ten basic and one hundred and eleven supplementary codes contained provisions permitting the establishment of emergency minimum prices, but in only eleven

129 77 Cong. Rec. 5246 (1933). This amendment was agreed to by the Senate, id. 5247.
132 See BACKMAN, Government Price-Fixing 46-51 (1938). The conditions specified by the National Recovery Administration which might indicate the existence of an emergency were: “(a) impairment of employment or wage scales; (b) particularly high mortality of enterprises, especially small enterprises; or (c) panic in an industry or other special conditions.” Quoted in id. 49.
cases was an emergency declared by the administrator. Provisions prohibiting sales below cost were more frequent than those establishing minimum prices. The “cost” basis employed was usually that of the individual producer.

Production control provisions, present in ninety-one codes, extended not only to current supply but also to limitations on potential productive facilities. Current supply was regulated by limitations on machine and plant hours, and the assignment of production quotas to an industry and to the individual members thereof. Approximately fifty codes contained provisions stipulating that persons desiring to build new plant capacity must first satisfy the administrator that public necessity and convenience required such additional facilities. Although these provisions carried the power to exclude new enterprise, a record of the disposition of applications for permission to build new plant capacity shows that in most cases the applications were granted.

Provisions relating to control over the distribution of goods and services were numerous. Among the more important were the establishment of defined classes of customers, regulation of discounts according to quantity or customer class, restriction of sales to certain classes of enterprises, and resale price maintenance contracts. Open price systems were set up in four hundred and twenty-two codes. Through the revelation of current prices it was believed that order would emerge from the chaos of blind competition. In pursuing this ideal some of the systems provided for identification of individual price lists, a lapse of time between the filing of prices and the time when these prices could

138 Id. 49.
134 Id. 51.

Agreements among competitors which defined classes of customers and to whom sales might be made have been held illegal under the antitrust law. See Eastern States Retail Lumber Dealers’ Assn. v. United States, 234 U. S. 600, 34 S. Ct. 951 (1914). Agreements regulating the amount of discounts are comparable in legal effect to agreements fixing prices, since “price” is established only after consideration is given to all the terms and conditions of sale determining what is ultimately paid by the customer. Cf. United States v. Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377 (1927), and Sugar Institute v. United States, 297 U. S. 553, 56 S. Ct. 629 (1936). Resale price maintenance agreements have been held unlawful under the antitrust law. See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911).

become effective for sales, commonly called the "waiting period," and adherence to filed prices until new price filings became effective. Approximately one hundred and fifty codes containing open price systems made no provision for dissemination of the price information to buyers. 139

Numerous suits were brought to enjoin violations of the code provisions. The unconstitutionality of the act and actions pursuant thereto was most frequently urged as a defense to such complaints. 140 Seldom did the defendants contend merely that the code provisions alleged to have been violated by them were unauthorized under the act or were monopolistic practices and hence prohibited. Where these defenses were set forth, defendants usually prevailed. In United States v. Rogers, 141 the government sued to enjoin defendants from selling coal below the minimum retail price established by the code authority. Defendants' argument that the fixing of a minimum price constituted a monopolistic practice was accepted by the court. The court held:

"... This act does grant authority to establish codes of fair competition for trade and industry. But the statute expressly prohibits the approval of any code or codes which 'permit monopolies or monopolistic practices.' Price fixing is such a practice, and is condemned, rather than authorized by the act. Underselling is not 'unfair competition' as that term has always been understood." 142

In Mississippi Valley Hardwood Co. v. McClanahan 143 complainant asked for an injunction against the United States attorney to prevent arrest, indictment and prosecution for violating the minimum prices


See the following for analyses of the administration and code provisions of the N. I. R. A.: "The National Recovery Administration," supra and Lyon, supra; for analysis of price and production controls: Backman, Government Price-Fixing 38-70 (1938); for the part played by trade associations under the act: Whitney, Trade Associations and Industrial Control (1934); for Congressional hearings on the operation of the act: Hearings Before Senate Committee on Finance, Pursuant to S. Res. 79, 74th Cong., 1st sess., Mar. 7-April 18, 1935.

140 A compilation of the cases may be found in 1 C. C. H., Federal Trade Regulation Service, 7th ed., §§ 801-853 (1932-1937).


142 Id. at 858. The same reasoning was applied in State ex rel. Schneider v. Riesenber, (Ohio Com. Pless Ct. 1934) 33 Ohio N. P. (N. S.) 21, 3 C. C. H., Federal Trade Regulation Service, 7th ed., §§ 7252.

143 (D. C. Tenn. 1934) 8 F. Supp. 388.
fixed under the Hardwood Lumber Code. The court granted the relief prayed for, holding that there was nothing in the act which granted authority for the fixing of prices. "Price regulation is the antithesis of competition, fair or otherwise," the court stated. But in *United States v. Lee Wilson & Co.* the court held that the "policy and intent of the Act was to confer power to fix prices." In arriving at this conclusion the court noted that section 4(b), which authorized the President to license one who destructively cut prices, implied that at the time of such price cutting there had been a fixed price which was cut.

The effect of the N. I. R. A. upon acts which allegedly were illegal under a state antitrust statute was passed upon in *State v. Standard Oil Co.* Defendants were charged with having violated the Texas antitrust law by reason of an agreement among them in 1929 to accept and observe the Federal Trade Commission Code of Ethics applicable to the marketing of petroleum products. The court compared the provisions of the Code of Ethics with sections of the N. I. R. A. Petroleum Code and, finding both to be substantially alike, applied the common-law rule that to support a recovery of penalties the acts complained of must be illegal at the time the punishment is inflicted unless the repealing statute carries a saving clause. Inasmuch as the N. I. R. A. contained no saving clause, the court held that the acts of defendants, though they may have been illegal in the past, were now lawful by reason of provisions in an approved code.

---

144 Id. 388. Cf. United States v. Sutherland, (D. C. Mo. 1934) 9 F. Supp. 204 at 205.
146 The court also commented upon the economic necessity for price fixing in the following words: "I think another step has taken place in the public mind, fixing it as public policy, and that is, that with mass production competition cannot fix the price of commodities. Such competition means the destruction of smaller industries and power must be exercised by the legislature in order to prevent the destruction of these industries and prevent unemployment."
148 The common-law rule was well established that on the repeal of a statute without any reservation of its penalties, all criminal proceedings taken under it were abated. Yeaton v. United States, 5 Cranch (9 U. S.) 281 (1809); United States v. Tynen, 11 Wall. (78 U. S.) 88 (1870). But this rule of construction was changed in so far as the federal law is concerned by the Act of Congress of Feb. 25, 1871, which provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing statute shall so expressly provide. 16 Stat. L. 432 (1871), 1 U. S. C. (1940), § 29. Although the N. I. R. A. only suspended the operation of the antitrust law, it is
In view of the fact that a large portion of American business was operating under codes of fair competition, it is not surprising to find that during the twenty-three months prior to the Schechter\textsuperscript{149} decision the Antitrust Division brought only eight petitions, and but ten indictments were returned alleging violations of the antitrust law. In at least five of the eighteen cases defendants maintained that the enactment of the N. I. R. A. had legalized the restraint of trade allegedly resulting from their acts. But in the absence of a showing that the acts complained of were embraced within the protective bounds of an approved code, the courts uniformly found against defendants on this point.\textsuperscript{150}

At the time of the enactment of the N. I. R. A. there were one hundred and twelve consent decrees which had been entered in antitrust proceedings.\textsuperscript{151} Under these decrees defendants were enjoined from doing, individually or in concert with others, many practices embraced within the provisions of codes of fair competition. For these defendants a problem arose in connection with the preparation of and performance under codes. To have agreed with competitors in the preparation of a code upon the establishment of minimum prices or production quotas would have violated the injunctive sections in many of their

clear that the provisions of the Act of 1871 would be applicable thereto, since suspension and repeal differ only as to the period of time the affected statute is inoperative. Maresca v. United States, (C. C. A. 2d, 1921) 277 F. 727 at 737. Furthermore, the provisions of the Act of 1871 "are to be treated as if incorporated in and as a part of subsequent enactments." Great Northern Ry. v. United States, 208 U. S. 452 at 465, 28 S. Ct. 313 (1908). In examining the scope of the conflict between the N. I. R. A. code provisions and the Texas antitrust law, the state court, it is submitted, should have considered and followed the rule of construction set forth in the Act of 1871. Cf. Ex parte Lamar, (C. C. A. 2d, 1921) 274 F. 160, affd. Lamar v. United States, 260 U. S. 711, 43 S. Ct. 251 (1923).

\textsuperscript{149} A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935), holding unconstitutional the delegation of power to the President to approve and prescribe codes of fair competition pursuant to § 3 of the N. I. R. A.


\textsuperscript{151} Donovan and McAllister, "Consent Decrees in the Enforcement of the Federal Anti-Trust Laws," 46 HARV. L. REV. 885 (1933). No additional consent decrees were entered between the end of 1932, when the Donovan and McAllister study was completed, and June 1933, when the N. I. R. A. was passed. See THE FEDERAL ANTI-TRUST LAWS (1938).
consent decrees. To have refused to join with competitors in the preparation of codes would not have resolved the problem for all of these defendants, inasmuch as under certain codes they were required, in order to continue to sell to, or purchase as, wholesalers, to enter into minimum resale price maintenance contracts. The answer to the problem, of course, was for defendants to petition for a modification of their decrees so as expressly to permit them to carry out the purposes of the N.I.R.A. In only ten instances was this procedure followed. The remaining defendants apparently were content to rely upon the belief that contempt proceedings would not be instituted for such a technical—and public spirited—violation.

The legality of joint action taken by certain oil companies during the N.I.R.A. period was passed upon by the Supreme Court in United States v. Socony-Vacuum Oil Co., familiarly known as the Madison Oil case. This decision is of major importance for several reasons. It indicates the strict approach the Court, as presently "reconstructed," will take toward co-operative action among competitors although their endeavors during a national emergency may be directed toward the elimination of competitive "evils." It limits the application of the doc-

---

152 Suspension of the antitrust law upon Presidential approval of a code did not nullify the continued binding effect of decrees previously entered in antitrust cases. See note 149, supra. After a decree is entered, the lawfulness of defendants' acts, in so far as they are within the scope of the decree, are adjudged by its terms.

153 In United States v. Tanners Products Co., (D. C. Ill. 1933) 3 C. C. H., Federal Trade Regulation Service, 7th ed., ¶ 7061, not officially reported, defendants were unsuccessful in their application for modification, the petition having been filed prior to approval of a code for their industry. The petition was dismissed without prejudice to their right to apply for modification after a code had been approved. But the court did expressly permit defendants to associate "amongst themselves and with others to formulate a proposed code of fair competition for the purpose of submitting the same for approval to the President. . . ." Modification of consent decrees was granted in United States v. Standard Oil Co. of California, (D. C. Cal. 1933) id., ¶ 7063, not officially reported; United States v. Southern Hardware Jobbers Assn., (D. C. Va. 1933) id., ¶ 7083, not officially reported; and in the following unreported cases: United States v. American Thread Co.; United States v. Interlaken Mills; United States v. American Assn. of Wholesale Opticians; United States v. Barbers' Supply Dealers Assn.; United States v. National Peanut Cleaners & Shellers Assn.; United States v. American Amusement Ticket Mfrs. Assn.; United States v. Wool Institute. See Temporary National Economic Committee Monograph No. 16, "Antitrust in Action," Appendix D, pp. 126-128 (1941); The Federal Antitrust Laws (1938).

154 310 U. S. 150, 60 S. Ct. 811 (1940), petition for rehearing denied 310 U. S. 658, 60 S. Ct. 1091 (1940). Venue was laid in the District Court for the Western District of Wisconsin, the trial taking place at Madison in the fall of 1937.
trine as announced in the *United States Steel*\(^{155}\) and *Fosburgh*\(^{156}\) cases, namely, that joint action by competitors undertaken with the approval or at the request of public officials who lack authority for their action does, nevertheless, thereby have some "assurance" of being a reasonable restraint of trade. It contains language which would appear to overrule the decision in the *Appalachian Coals*\(^{157}\) case. Finally, the decision stands as a caveat for all business managers who undertake joint action in times of a national emergency and who may stand trial for their conduct after the emergency has passed.

Defendant oil companies were charged with having conspired for the purpose of raising and fixing the tank car price of gasoline in the East Texas and Mid-Continent spot markets.\(^{158}\) The manner in which such conspiracy was effectuated was alleged to have been by means of two concerted gasoline buying programs for the purchase from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields at "uniform, high, and at times progressively increased prices."\(^{159}\)

The evidence showed that in January, 1935, a meeting was held which was attended by representatives of defendant companies and independent oil refiners. A committee was formed "to consider ways and means of establishing and maintaining an active and strong tank car market on gasoline."\(^{160}\) The government contended that the evidence respecting the activities of this committee proved the existence of an agreement to fix the spot market prices.\(^{161}\) The com-

\(^{155}\) *United States v. United States Steel Corp.*, 251 U. S. 417, 40 S. Ct. 293 (1920), discussed in Part I, 40 Mich. L. Rev. 969 at 985.


\(^{158}\) Spot market sales are between refiners and jobbers or consumers, with shipment usually within ten or fifteen days thereafter; contrasted with this type of sale is the long-term supply contract, effective for a year or more, and covering all the purchaser's gasoline requirements during the contract period.

\(^{159}\) 310 U. S. at 167. The indictment also charged defendants with having arbitrarily exacted—by reason of the provisions of the jobber contracts which made the price to the jobber dependent on the average spot market price—large sums of money from jobbers with whom they had such contracts, and with having intentionally raised the general level of retail prices in the Mid-Western market. But the indictment failed to charge that defendants had agreed upon uniform jobber contracts and uniform retail prices, and during the trial, government counsel disclaimed any charge upon either of these matters.

\(^{160}\) 310 U. S. 150 at 178.

\(^{161}\) Brief for the United States 15-34, 39-48, submitted to the Supreme Court.
mittee had proposed a plan, the government argued, whereby the defendant companies were to purchase on the spot market all gasoline which could not be sold by the independent refiners at the price fixed by the committee. Allocations for the purchase from particular independent refiners of their "surplus" gasoline, i.e., gasoline not bringing the fixed price, were made by the committee. Defendants then proceeded to buy this gasoline pursuant to the agreed upon allocation at prices established by the committee.

Defendants presented evidence and made offers of proof which they believed showed an entirely different picture than that for which the government contended. Since 1926 the excessive production of crude oil had driven the price down to a point where it was unprofitable for many wells to continue in operation. Conservation, on the other hand, required that such wells continue operating, for once abandoned, subsurface changes made it extremely difficult and very expensive to operate again. Proration laws were passed by several states but were of little effect. "Hot oil" (oil unlawfully produced under the proration restrictions) and "hot gasoline" (gasoline refined from the unlawfully produced crude oil) continued to flow into the market, with hot oil selling substantially below the price for legal crude oil and hot gasoline, therefore, costing less and sometimes selling for less than the cost of legal gasoline. Deprived of its ordinary outlets, legal gasoline was sold at below-normal prices.

Adding to the depressed condition of the petroleum industry was what defendants described as a competitive evil, namely, "distress" gasoline. The conditions purportedly responsible for this competitive evil were substantially as follows. The independent refiners were under contractual obligation to take all the legal crude oil produced by their respective sellers. Because of the necessity of fulfilling their own contracts with long-standing customers, and the high percentage of overhead costs, these refiners were unable to curtail their refining operations. Lacking storage facilities, the refiners had to dump on the market at forced-sale prices all gasoline which could not be disposed of through sales either under long-term supply contracts or to jobbers and brokers who shopped around on the spot market. The subnormal price brought by the distress gasoline had its depressing effect on the general spot market price level.\(^{162}\)

During the life of the N. I. R. A., repeated efforts were made by the Administrator of the Oil Code to "stabilize the oil industry upon

\(^{162}\) Brief for the Respondents 103-112; Appendix A to Brief for the Respondents 192-215, submitted to the Supreme Court.
a profitable basis." Some success was attained. In September, 1933, crude oil was selling at a dollar a barrel, a rise of about seventy-five cents from the previous June low. But the restoration of the price of gasoline to parity with crude oil failed, partly because of the continued flow of hot oil and hot gasoline after the decision of the Supreme Court had invalidated section 9(c) of the N. I. R. A. and partly because the problem of distress gasoline still remained acute. Independent refiners, caught between the high crude oil price and the extremely low wholesale gasoline price, suffered losses in spite of efficiency in operation.

At the January, 1935, meeting the independent refiners had complained of the failure of refined gasoline to reach a parity with crude oil, and of the harmful effect of hot and distress gasoline. It was their view that "if we were going to have general stabilization in retail markets, we must have some sort of a firm market in the tank car market." Defendants argued that the plan then proposed by the committee above referred to was merely to buy distress gasoline at the fair market price, i.e., the price established through sales of gasoline by independent refiners to jobbers. Whereas the government contended a price was agreed upon by the committee and purchases were then made to maintain the price, defendants contended the function of the committee was merely to determine, with the help of the independent refiners, the amount of distress gasoline on hand, and to notify the defendants of the same. Defendants argued that price was not fixed arbitrarily by the committee, its only function in the price line being the recommendation that defendants should not chisel on the fair market prices in their purchases of distress gasoline. With the removal of hot oil and gasoline from the market by virtue of the Connally Act, and with the elimination of distress gasoline, defendants, of course, expected the spot market price level to rise, but they disclaimed any fixing of price. To meet the inference of noncompetition in prices drawn

163 310 U. S. 150 at 172.
165 Adding further chaos to the industry were the extensive price wars in the retail markets during 1934. The Petroleum Administrative Board, appointed in an advisory capacity to the Secretary of Interior, who was designated by the President as Administrator of the Petroleum Code, worked closely with one of the individual defendants who had been asked by the board to lead a co-operative movement to deal with the price wars. Attempts were made to eliminate this destructive price cutting by persuading suppliers to see to it that their purchasers resold at a fair price.
166 310 U. S. 150 at 178.
by the government from the fairly constant level at which prices re-
ained for seven months, defendants called attention to other factors
which they believed were largely responsible for this stabilization: the
control of crude oil production under the N. I. R. A. and by interstate
compact, the Connally Act which later stopped the flow of hot oil, the
crude oil price of a dollar per barrel, an increase in consumptive demand
and the general improvement of business conditions.¹⁶⁸

Other offers of proof were made by defendants to show knowledge
of and acquiescence in the buying programs by federal officials.¹⁶⁹ The
purpose of these offers was not to establish immunity from prosecution
under the antitrust law—defendants admitted the authorization under
the N. I. R. A. necessary for such immunity had not been obtained—
but to show "the facts of the circumstances of the situations, which
must be taken into consideration" in order to judge the purpose, effect
and reasonableness of their activities."¹⁷⁰ Defendants maintained that
their activities were in line with "the keen desire of the Administration
... to stabilize the oil industry upon a profitable basis."¹⁷¹

The jury was instructed that it was a violation of the Sherman Act
for a group of individuals to act together for the purpose of raising the
prices to be charged for a commodity where they control a substantial
part of the interstate trade and commerce in that commodity.¹⁷² It was
further charged that every person is presumed to intend the natural
and probable results of his acts knowingly done, and that an unlawful
act implies an unlawful intent.¹⁷³ These two instructions meant the jury
should find defendants guilty if it believed that they controlled a sub-
stantial part of the trade in a commodity, and that the natural and
probable consequence of their buying programs was to raise prices.
The trial court refused defendants' request to grant instructions to the

¹⁶⁸ Defendant oil companies sold gasoline in the Mid-Western area through their
own retail outlets and to jobbers. Both marketing channels were affected by the Mid-
Continent spot market price. Retailers in this area followed the posted retail price of
Standard Oil Company of Indiana, and Standard's retail price was obtained by adding
freight charges, taxes, jobber and dealer margins to the prevailing Mid-Continent spot
market price. Sales to jobbers were by long-term contracts, the great majority of which
provided that the price should be the Mid-Continent spot market price on the date of
shipment. Fluctuations in the spot market price were reflected in the movement of the
price charged jobbers. But as pointed out previously, the indictment did not charge
defendants with concerted activity in either of these two marketing channels.

¹⁶⁹ Brief for the Respondents 82-103, 179-197.
¹⁷⁰ Id. 181-182.
¹⁷¹ Statement by Secretary Ickes, September, 1933, quoted in id. 24.
¹⁷² Record, 2404-2405, 2407-2409, 2411.
¹⁷³ Id. 2416.
effect that the purpose of the Sherman Act was not to make impossible the normal conduct of interstate commerce through the adoption of reasonable measures to protect such commerce from injurious and destructive practices, and that if the jury believed defendants’ activities were reasonable measures to protect interstate commerce from injurious and destructive practices and thus to promote competition on a sound basis, it must find defendants not guilty, even though an incidental result therefrom was to contribute to the rise of the spot market and retail prices for gasoline. The jury brought in a verdict of guilty against defendants. The trial court’s charge was held by the circuit court of appeals to be reversible error because it was premised on the theory that the buying program was illegal per se.

Justice Douglas, on behalf of a majority of the seven justices participating in the decision, set aside the circuit court of appeals’ judgment and affirmed that of the trial court. From the language of the decision there are at least three rules of law which may be drawn in respect to the legality of co-operative action among competitors in so far as such action is concerned with prices. In the first place, the decision may mean that the charge of the trial court is a correct statement of the law. Whether or not the trial court was correct in its charge to the jury was the principal question presented for decision to the high court. If this is the interpretation to be placed upon the Court’s decision, the rule as announced by the trial court may be stated as follows: Where competitors controlling a substantial part of the interstate or foreign commerce in a given commodity agree upon a course of action which has the natural and probable effect of raising the price of the commodity, the Sherman Act is thereby violated without any further showing of unreasonableness. In other words, such course of conduct is per se illegal.

Another rule of law may be found in the portion of the Court’s decision which distinguishes the facts in cases cited by defendants from those in the instant case. The principal decision relied upon by defendants for sustaining the validity of their buying program was that in the Appalachian Coals case. Justice Douglas recognized the existence of “so-called demoralizing or injurious practices” in both that case

174 Id. 2381.
176 Justice Roberts, with whom Justice McReynolds concurred, dissented. The Chief Justice and Justice Murphy did not participate in the decision of the case.
177 310 U. S. 150 at 214-217.
and the instant one. But the methods of dealing with them, he stated, were divergent.

"... In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area ... Unlike the plan in the instant case, the plan in the Appalachian Coals case was not designed to operate vis-à-vis the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural. For the plan had not then been put into operation."\(^{179}\)

In *Chicago Board of Trade v. United States*,\(^{180}\) the Court upheld as a reasonable restraint of trade a regulation by the defendant-appellant board which prohibited its members from purchasing grain "to arrive" during the period between the close of trading and the opening of the session the following day at a price other than the closing bid. In discussing this case Justice Douglas said that since the regulation of the board "was not aimed at price manipulation or the control of the market prices and since it had 'no appreciable effect on general market prices,' the rule survived as a reasonable restraint of trade."\(^{181}\) And when referring to the rule of reason announced in *Standard Oil Co. v. United States*,\(^{182}\) he remarked that it had no application "to combinations operating directly on prices or price structures."\(^{183}\)

In these comments we find a repetition by the Court in the use of the words "direct" and "market prices." The use of the word "direct" is particularly significant, since in several of the cases cited by defendants, the Court had acknowledged that an incidental effect of the joint action in question would be the raising and stabilization of prices. This part of the decision, therefore, may be said to stand for the following proposition: *An agreement among competitors which has the direct purpose of raising the market price of a given commodity in interstate or foreign commerce is per se an unreasonable restraint of trade.*

The third rule of law may be gleaned from the following quotations which are taken from a later part of the decision:

"... So far as cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened."\(^{184}\)

\(^{179}\) *310 U. S. at 216.* \(^{180}\) *246 U. S. 231, 38 S. Ct. 242 (1918).* \(^{181}\) *310 U. S. 150 at 217.* \(^{182}\) *221 U. S. 1, 31 S. Ct. 502 (1911).* \(^{183}\) *310 U. S. 150 at 214.* \(^{184}\) *Id. at 219.*
... Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. 185

Summarizing its "holding," the Court stated:

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." 186

Inasmuch as the Court stresses, in a lengthy footnote, that the establishment of a conspiracy under section 1 of the Sherman Act requires only proof of a purpose, and not also proof of power, to fix prices, 187 we may delete from the last quoted paragraph the phrase, "and with the effect." As thus revised, the third rule of law would read: A combination formed for the purpose of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is per se an unreasonable restraint of trade.

All three rules of law deducible from the decision preclude consideration of the reasonableness of co-operative action among competitors. But the standard defining the relationship between the cooperative action and prices is different in each of the rules. The first rule is cast in terms of "effect" upon prices. A condition to its applicability is that the combining competitors control a substantial part of commerce in a given commodity. This condition would logically mean that the requisite effect must be upon "market" prices, since such prices are affected, from the standpoint of the antitrust law, only through a combination of a substantial part of an industry. The second rule likewise pertains to "market" prices but it is framed in terms of "purpose"—a direct purpose—to raise the same. The third rule also is cast in terms of "purpose" but it requires neither a "direct" purpose, nor an effect upon "market" prices. If the Court eventually adopts the third rule as the correct interpretation of section 1 of the Sherman Act, then it

185 Id. at 221.
186 Id. at 223.
187 Id. at 224, note 59. It was necessary for the government to prove that prices in the Mid-Western area were actually raised as a result of the activities of the combination. Sales at the increased prices in that area had to be shown in order to establish jurisdiction in the Western District of Wisconsin, where the case was tried. The Court treated the case, therefore, as one where exertion of the power to fix prices was an ingredient of the offense.
will in effect have overruled the decision in the Appalachian Coals case. It is not improbable that this will be the result reached by the present Supreme Court.\(^{188}\)

The Court held that the trial court had properly excluded defendants' offers of proof relating to knowledge of and acquiescence in the buying programs by federal officials. Two reasons were given by Justice Douglas for this holding. First, Congress had specified the manner in which immunity from the antitrust law might be secured; none other would suffice. "Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained."\(^{189}\) It was unnecessary for the Court to advance this justification for exclusion of the evidence offered on the point of governmental acquiescence in the buying programs, for, as noted previously, defendants made no claim that such acquiescence granted immunity from the law. Secondly, and in answer to the position taken by defendants, all price-fixing combinations are illegal per se. "... they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. Only in the event that they were, would such considerations have been relevant."\(^{190}\) Thus the doctrine as announced and developed in the United States Steel and Fosburgh cases,\(^{191}\) that an "assurance" of reasonableness is imparted to those joint endeavors undertaken at the request or with the acquiescence of public officials who lack authority for their action, is expressly confined in its applicability to those activities subject to the rule of reason. Only when co-operative action among competitors is outside the range of activities determined by the Court to be per se illegal will defendants be permitted to show the approval or acquiescence of public officials as evidence of the reasonableness of the restraint effected. And as the range of activities adjudged by the Court to fall within the per se illegal class increases, the aforementioned doctrine will accordingly decrease in significance.

---

\(^{188}\) The Court in the instant case displayed little patience with "the age-old cry of ruinous competition and competitive evils ... [as] a defense to price-fixing conspiracies." 310 U. S. at 221. In defining price fixing, the Court said: "Hence, prices are fixed within the meaning of the Trenton Potteries case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon." Id. 222.

\(^{189}\) 310 U. S. 150 at 226.

\(^{190}\) Id at 228.

\(^{191}\) Discussed supra, Part I, 40 Mich. L. Rev. 969 at 985, 991.
The N. I. R. A. period marks the first time in the history of antitrust law when the Congress abandoned the concept of a vigorous competitive system as the foundation for the full development of the productive and distributive facilities of the nation. Prior to this period, there had been legislation which carved from the ban of the law certain limited segments of private enterprise, such as the activities of export trade associations and the processing, handling and marketing of farm and dairy products. But with the enactment of the N. I. R. A. came a shift from competition to co-operation that had its effect throughout the entire economy. The brief examination which has been made of practices under codes of fair competition serves to emphasize the extent of the departure from the competitive ideal. The repercussions of this period have been many, not the least among which is the decision in the Madison Oil case. Although the decision is subject to conflicting interpretations, it is crystal clear in its teaching that joint activities in line with the announced policy of an administration may at a later date, with a change in policy, be found to be illegal.

III

ANTITRUST ENFORCEMENT DURING THE PRESENT EMERGENCY

An understanding of the enforcement policy now currently in effect will be aided by a brief examination of the statements and activities of the Antitrust Division since 1937, which year marked the beginning of the Roosevelt administration's vigorous enforcement of the antitrust law.

A. Antitrust from 1937 to 1941

Approximately two years after the Supreme Court's decision in the Schechter case, the administration turned its efforts toward an enforcement of the antitrust law. The Annual Report for 1937 of the Assistant Attorney General in charge of the Antitrust Division laid down a statement of policy, made necessary, it was said, because "the

195 For accounts of the divergent views held by members of the Administration toward the monopoly problem, see Millis, "Cross Purposes in the New Deal," 14 Va. Q. Rev. 357 (1938); "What Do They Mean: Monopoly?" 17 Fortune, No. 3, p. 75 (March, 1938).
law is so vague that as a practical matter a wide discretion in enforce­ment must be exercised by the division." Statistics were quoted showing the concentration of wealth and income in the hands of a few large corporate enterprises. "Competition has of course declined" as a result of such concentration, the report commented. Further evidence of the disappearance of competition, the Assistant Attorney General asserted, was to be found in the numerous identical bids received by government agencies. The report then attacked the judicial interpre­tation of the antitrust law which looked at the "'intent' or 'state of mind' of a fictitious corporate individual" in adjudging the lawfulness of large aggregations of capital, rather than the "results" achieved thereunder. "The antitrust laws have become theological tracts on cor­porate morality." Although the antitrust law has failed in its broad purpose, the report continued, this does not mean that it has lost all of its usefulness. It may still be employed against unfair methods of competition and restraints of trade, and "there is hope that the courts will return to enforcement of the statute against such acknowledged monopolies as, for example, exists in aluminum." The policy of the Antitrust Division, therefore, and in view of its limited personnel, will be to select for "intensive investigations" the complaints showing flagrant violation of the law and in which the greatest public interest is involved.

In the succeeding years this policy has been broadened as increased appropriations for antitrust enforcement have made possible a larger personnel in the division and the institution of an unequalled number of cases. Concentration upon a few selected cases has been superseded by an effort to investigate all the alleged restraints affecting the dis­tribution of a given product. An example of the application of this practice may be found in the building industry, where the division has investigated and indicted suppliers and distributors of building products, and contractors and labor unions installing the same. Relief from only one of the alleged restraints would not result in any appreciable lessening in the final price of the finished product; but by attacking "on a Nation-wide scale, and simultaneously, all the various combina-

107 Id. 41. It is interesting to note that the court before whom the Aluminum case was tried did not "acknowledge" the existence of a monopoly in that industry. United States v. Aluminum Co. of America, (D. C. N. Y. 1941) unreported as of date of writing. See C. C. H., Trade Regulation Service, 9th ed., ¶ 51,055, 52,715, 52,763.
tions which are creating the log jams" it is believed that the price to the ultimate user would be substantially lowered. 199

The Department of Justice has adopted the policy of publishing "explanatory statements" in connection with the steps taken by the Antitrust Division in its administration of the law. 200 The purposes of the "Public Statements" are fourfold: to furnish a guide to businessmen who seek information on the probable action of the Department of Justice in similar circumstances; to aid the department in formulating a consistent enforcement policy; to warn those engaged in "similar illegal practices"; and to call attention of the Congress to the interpretation and application of the antitrust law by the Attorney General. The statements are to cover the conditions which the department believes to exist that create monopolistic control or restraint of trade in a given industry, the reason why the particular legal procedure was followed by the department, and the economic results which can be expected from the department's action.

Although not designed for the purpose of discussing "the guilt or innocence of particular defendants," the widespread and prominent publication of the statements has undoubtedly had the effect of unfairly prejudicing defendants' position in so far as the public is concerned. In many instances the government press releases accompany the return of an indictment or the filing of a complaint. As summarized in newspaper articles the statements, unfortunately, may leave the impression with lay readers that defendants have been found guilty of violating the antitrust law. That the views of the government as set forth in its press releases are only those of a prosecutor in a pending case is not always fully appreciated by the reader. (The suggestion has also been made that a resulting prejudice may be found in the effect of the statements upon the minds of the petit jurors in a criminal action.) 201) Defendants have attempted in some cases to counteract the impression left with the public by issuing explanatory statements on their own behalf. 202 A final judicial decision concerning the lawfulness

202 Statements by defendants have taken the form either of press releases or special brochures. An example of the latter is The American Tobacco Company and Its Service to the Public (1940), published by the American Tobacco Company. After a consent decree was entered in United States v. Bausch & Lomb Optical Co., (D. C. N. Y. 1940) 3 C. C. H., Trade Regulation Service, 8th ed., ¶ 25,487 (not
of defendants' activities must come to many readers as an anticlimax after numerous statements, denials and explanations have been set forth in the newspapers.

Reference has already been made to the number of antitrust actions brought by the government in the second Roosevelt administration. Of the one hundred and fifty-three equity and criminal proceedings instituted, a substantial proportion have been settled by consent decrees. The use of the consent decree as a means for effectuating the enforcement of the antitrust law is not new, approximately one hundred and fifteen decrees having been entered upon consent of the parties prior to 1937. The special prominence accorded consent decrees during this period is attributable to the large number entered and to the procedure by which they have been employed.

In the second Roosevelt administration a total of thirty-three consent decrees were entered. This sum represents more than one-fourth the number entered during the prior forty-six years. All but three of the decrees were entered in the last thirteen months of the administration.

The concurrent use of civil and criminal remedies by the Antitrust Division has given rise to much comment from private sources—and, in one instance, has evoked the official displeasure of a United States District Court judge. This procedure has occurred in substantially the

officially reported), a booklet entitled Bausch & Lomb and Our National Defense (1940) was published by defendant company to answer the “untruthful and inflammatory attacks on Bausch & Lomb's patriotism.”


A study of consent decrees entered in antitrust cases prior to 1933 may be found in Donovan and McAllister, “Consent Decrees in the Enforcement of Federal Anti-Trust Laws,” 46 Harvard L. Rev. 885 (1933).


After learning that negotiations between the government and defendants in the automobile finance cases [United States v. Ford Motor Co. and United States v. Chrysler Corp., The Federal Antitrust Laws, Supplement, Nos. 430, 431 (1941)] were taking place at the same time that evidence was being presented to a grand jury on an alleged violation of the law by the automobile companies, District Judge Geiger discharged the grand jury with the statement: “I do not think it was proper for these
following manner. While evidence was being presented to a grand jury regarding alleged violations of the antitrust law, or after the return of an indictment, negotiations would be under way between the government and defendants for the purpose of reaching a settlement through the entry of a consent decree. If the provisions of a proposed decree were acceptable to the parties, the government would agree to file a complaint in equity framed in terms of the subject matter covered by the decree, and would further agree to recommend to the court an acceptance of its *nolo prosse*. In recent negotiations the government has insisted that defendants file pleas of *nolo contendere* and pay fines in the criminal case.

The view has been expressed that by such a procedure the club of criminal proceedings is used to coerce defendants into an agreement containing provisions conformable to the economic philosophy of government officials, irrespective of the legal boundaries marked out by the law and the cases decided thereunder. The Antitrust Division has acknowledged that a consent decree will be accepted only if it offers "substantial public benefits connected with the policy of maintaining free competition in an orderly market which could not be obtained by the criminal prosecution." What constitutes "public benefits" is, of course, subject to widely varying interpretations. Although defendants are free at any time to withdraw from the negotiations and defend the criminal case, the time and expense involved in a major antitrust suit are so substantial that capitulation to certain "public benefits" provisions demanded by the government may appear to be the less undesirable course to follow. The claim is made, therefore, that the criminal action fetters defendant's free choice in negotiating for a consent decree.

208 At this point we may note that an attempt by several defendants in United States v. Hartford-Empire Co., (D. C. Ohio, 1940) 1 F. R. D. 424, 3 C. C. H., Trade Regulation Service, 8th ed., ¶ 25,548, to force the government to "agree" to a proposed consent decree was unsuccessful. Defendants presented to the court a decree—which apparently provided for the discontinuance of the specific practices complained of by the government. The court pointed out that the prayer for relief in the petition had the usual clause asking for "such other further general and different relief as the nature of the case may require, and the court may deem proper in the premises." The court said it could not, prior to testimony in the case, determine that the proposed decree would satisfy everything requested in the prayer. The court further stated: "A consent decree . . . is an agreement between the contending parties in
As an answer to this contention⁴¹⁰ the government has announced "the precise limitations which the Department imposes upon itself in using civil and criminal procedure concurrently." These are as follows.

First, the department will in no instance start negotiations on the basis of which prosecution would be dropped. Secondly, it will not compromise criminal cases on the mere promise to reform. Thirdly, it will submit all proposals to a judicial tribunal and be guided by the judgment of the court before it takes final action.⁴¹¹ Fourthly, a public statement will be issued giving the reasons for the government's action.⁴¹²

A determination whether the claim which has been advanced against the concurrent use of civil and criminal remedies in antitrust enforcement is justified or not would require a knowledge of what transpired in the negotiations for the numerous consent decrees. It would require an appraisal of the attitude of the officials conducting the discussions on behalf of the government. It would have to take into account the overzealousness of particular officials in particular instances. It would have to consider the effect of overreaching on the part of the government in past cases upon the judgment by defendants of proposals advanced by

the case, such agreement meeting with the approval of the court. That, of course, cannot be appealed from. Since the Government has not and will not consent to these decrees, they cannot properly be termed consent decrees, and the court cannot force a consent decree upon one of the parties. That, indeed, would be an anomalous situation."

⁴¹⁰ The government has commented upon the contention in these words: "Of course, any criminal prosecution could be used as an instrument of coercion. There is no absolute guarantee against such practices except good faith in the prosecuting officer. On the other hand, it is equally true that charges of coercion are easier to make against those who prosecute violations of the antitrust laws than in most types of prosecution. The evidence taken in a grand jury investigation cannot be disclosed. And even when the evidence is disclosed in a trial, it is usually too complicated to be understood without laborious analysis. There is, therefore, no protection which the Department can have against such public charges of coercion. Commentators are free to give vent to their emotional impulses without fear of successful correction." 1938 REP. ATTY. GEN. 65.

In this connection we may note that three remedies for the enforcement of the Sherman Act are available to the government: the libel action (§ 6), the criminal action (§§ 1, 2 and 3) and the suit in equity (§ 4). 26 Stat. L. 209 (1890), 15 U. S. C. (1940), § 1 et seq. There is no indication from the terms of the act that the three remedies may not be brought concurrently. In Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20 at 52, 33 S. Ct. 9 (1913), the Court stated: "The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government. . . ."

⁴¹¹ Court approval of a proposed decree is usually a perfunctory matter, the decree being signed by the court the same day it is presented by the government. To date no court has refused to sign such a decree.

⁴¹² 1938 REP. ATTY. GEN. 65-66.
other officials in subsequent cases. Obviously, such a determination can never fully be made. It is enough for our purposes to be acquainted with the claim, and to note that it is responsible, whether justly or unjustly asserted, for much of the special prominence accorded to consent decrees during this period.

B. Enforcement Policy During World War II

While the United States approached and finally became involved in the most serious national emergency the country has experienced, the Antitrust Division was functioning at a record pace in the number of proceedings instituted under the law. The belief was held in some quarters that with the nation formally at war, the government's antitrust activities would be halted or at least considerably slowed down. But the division quickly turned its full energy toward ends believed by it to be consonant with the nation's all-out war production program. A complete utilization of existing and potential productive facilities and skills has become impossible, the division asserts, because of private agreements restraining trade. Assistant Attorney General Arnold charges:

"Looking back over 10 months of defense effort we can now see how much it has been hampered by the attitude of powerful private groups dominating basic industries who have feared to expand their production because expansion would endanger their future control of industry. These groups have been afraid to develop new production themselves. They have been afraid to let others come into the field. They have concealed shortages by optimistic predictions of supplies, and talked of production facilities which do not exist.

"Antitrust investigations during the past year have shown that there is not an organized basic industry in the United States which has not been restricting production by some device or other in order to avoid what they call "the ruinous over-production after the war.""

By declaring that "the true function of an antimonopoly policy is to break down the obstacles to production created by dominant groups," the Antitrust Division is able to justify the continuation of its vigorous enforcement policy during the present emergency. Current restraints of trade are visualized by the division as existing in the fol-

213 1941 id. 58.
214 Id. 60.
Following eight categories: concerted attempts on the part of basic industries to hamper expansion which will interfere with their domination after the war; attempts to fix coercively prices on government contracts; attempts to use patents illegally in order to control the production of basic materials; restraints in the distribution of the necessities of life by local groups; erection of trade barriers between one locality and another; the freezing out of independent businessmen by combinations which seek to dominate the market; the refusal of labor monopolies to remove illegal restrictions which now interfere with full production; and the use of price ceilings and other war agency rulings as a cloak for new restraints of trade.\textsuperscript{216}

Thus far during the present emergency two features in the program of the Antitrust Division are of special significance, namely, the efforts to prevent discrimination against small business units in the establishment of priorities and the letting of government contracts, and the entry of consent decrees affecting alleged international cartel arrangements.

In the fall of 1941 a Small Business Section was set up in the Antitrust Division. The functions of the section are to assist small business enterprises on problems arising under the antitrust law and in their dealings with government war agencies.\textsuperscript{217} The section has been active in its representation of small business enterprises before war agencies and it has, among other things, intervened in certain instances prior to the award of contracts to urge a revision of specifications so as to en-

\textsuperscript{215} In an indictment returned Nov. 28, 1941, United States v. Empire Hat & Cap Manufacturing Co., (D. C. Pa.), it is alleged that defendants agreed among themselves to fix arbitrary and noncompetitive prices which defendant manufacturers should bid in response to an Army Request for Informal Bids, and to allocate the quantity of hats included in said request among defendant manufacturers and others so that each would bid upon an arbitrary number of such hats.

A War Frauds Unit was established in the Department of Justice in February, 1942. Among other duties the unit will be in charge of prosecutions of alleged conspiracies to increase the cost of plants and factories built to manufacture war materials. See Department of Justice release, May 16, 1942.

\textsuperscript{216} 1941 REP. ATTY. GEN. 60; HEARINGS BEFORE SUBCOMMITTEE OF HOUSE COMMITTEE ON APPROPRIATIONS ON THE DEPARTMENT OF JUSTICE APPROPRIATION BILL FOR 1943, 77th Cong., 2d sess. (1942), p. 198 et seq. See also ARNOLD, DEMOCRACY AND FREE ENTERPRISE (1942); Arnold and Livingston, "Antitrust War Policy and Full Production," 20 HARV. BUS. REV. 265 (1942).

\textsuperscript{217} HEARINGS BEFORE SELECT HOUSE COMMITTEE TO CONDUCT A STUDY AND SURVEY OF THE NATIONAL DEFENSE PROGRAM IN ITS RELATION TO SMALL BUSINESS OF THE UNITED STATES, PURSUANT TO H. RES. 294, 77th Cong., 2d sess. (1942) p. 173 et seq. (unrevised print). Arnold defined small business "as any business which does not have an office in Washington to represent them before these committees." Id. 176.
able the small business company to receive a share in the award.\textsuperscript{218} The Antitrust Division views its assistance in these matters as in line with its traditional function.

\textquoteleft\textquoteleft... in a very real sense [it] has always been a small business section . . . our forum prior to this war consisted of the courts . . . when the war came on it became apparent that the decisions, the court policy-making decisions on which the small businessman's life depends, are going to be made, to a large extent, by defense agencies. . . . Our function is to represent specific cases of hardship in the application of that policy and to represent them before the boards which make the policy.\textsuperscript{219}\textquoteright

Within recent months the existence of international cartels has been brought to the attention of the public by the entry of several consent decrees and by testimony of government officials before Senate committees concerning their alleged effect upon domestic production.\textsuperscript{220} As a result of the current indiscriminate use of the word "cartel,"\textsuperscript{221} it is not unlikely that one result of the present war enforcement policy will be the substitution in the lay vernacular of "cartel" for "monopoly" as a term connoting a conglomeration of industrial evils.

The consent decree which was entered in \textit{United States v. Bausch & Lomb Optical Co.}\textsuperscript{222} was the earliest of such decrees. The government charged that a combination among defendants to restrain interstate and foreign commerce in military optical instruments was effected

\textsuperscript{218} Id. 174-175.
\textsuperscript{219} Id. 176.
\textsuperscript{221} Arnold has defined a cartel to mean a "combination of a number of companies and individuals to keep business within that particular little ring, and to eliminate all competition which isn't dominated or controlled by them."

"The cartel system is an economic disease which attacks communities when people think they have got a mature economy and they want to make themselves secure and don't want to be bothered by fighting a lot of other people who are producing what they call 'distress' production, or ruinous competition. . . ."

"The disease of cartelization does not stop with industry. It is responsible for most of the practices for which we now condemn labor for forcing on employers." 12 \textit{U. S. News}, No. 16, pp. 16 and 18, April 17, 1942.

A cartel is defined by Seager and Gulick, \textit{Trust and Corporation Problems} 5 (1929), as a "combination which disposes of the agreed aggregate outputs of all the members through a common selling agent or company in which each has a proportionate interest."

\textsuperscript{222} (D. C. N. Y. 1940) 3 C. C. H., \textit{Trade Regulation Service}, 8th ed., \textsection 25,487 (not officially reported).
by agreements which, among other things, prevented Bausch & Lomb from selling outside the United States without the prior consent of the German Carl Zeiss corporation, and prevented the latter from selling in the United States without the like consent of Bausch & Lomb. Inventions resulting from the joint labor of the two companies were to be patented in the United States by Bausch & Lomb for the account of Carl Zeiss. The decree declared that the agreements were unlawful and enjoined Bausch & Lomb from carrying out any of their provisions. It was expressly provided, however, that the rights of Bausch & Lomb under any patents for the manufacture of military optical instruments were not affected by the provisions of the decree. This would mean that the sole ownership of those patents obtained by the American company for the account of Carl Zeiss was thereby vested in the American company. The consent decree in United States v. Allied Chemical & Dye Corp.\(^{223}\) enjoined alleged cartel activities and restrictions by prohibiting the defendants from combining among themselves or with others to control imports or exports from the United States, or the prices, terms, or conditions of sale of fertilizer nitrogen.

Consent decrees in United States v. Standard Oil Company (N. J.),\(^{224}\) and United States v. Aluminum Company of America\(^{225}\) have been directed at alleged restraints in domestic production of synthetic rubber and magnesium, respectively, resulting from agreements between the American companies and the German I. G. Farbenindustrie. These two decrees are especially noteworthy inasmuch as they afford a measure of relief from alleged misuse of patent rights beyond any previously acceded to by defendants.\(^{226}\) In the Bausch & Lomb


\(^{224}\) (D. C. N. J. 1942) id., ¶ 52,768 (not officially reported).

\(^{225}\) (D. C. N. Y. 1942) id., ¶ 52,776 (not officially reported).

\(^{226}\) One exception to this generalization may be found in the consent decree entered in United States v. Kearney & Trecker Corp., (D. C. Ill. 1941) id., ¶ 52,644 (not officially reported). It provides in part: "The defendants . . . are hereby ordered to divest themselves of all right, title and interest in and to said United States Patent 1,794,361, and forthwith to take such steps as may be necessary to dedicate, transfer, and assign said Letters Patent and all rights thereunder to the public (including said defendants), without the payment of royalties or other compensation whatever therefor."

Forfeiture of a patent to the public domain for misuse thereof is beyond any relief the government is now entitled to. (See recommendation of the T. N. E. C. concerning forfeiture of patents, Part I, 40 Mich. L. Rev. 969 at 971, note 6, supra.) The writer has been informed by counsel for one of the defendants that although they
case we noted that all rights of defendant in its patents were expressly reserved by the terms of the decree. By the terms of the **Standard Oil Company** and **Aluminum Company** decrees the defendants agree to grant unrestricted licenses under the allegedly misused patents to any applicant royalty free for the duration of the present emergency and thereafter at a reasonable royalty rate. In the case of patents relating to the fabrication of magnesium, as distinguished from production patents, the license is to be royalty free for the life of the patents. The divergent treatment of defendant's patent rights in the early **Bausch & Lomb** decree and the recent **Standard Oil Company** and **Aluminum Company** decrees is due to two decisions handed down by the Supreme Court in January, 1942. The Court held that where the patent privilege had been unlawfully exercised by the holder thereof (a license granted on condition that the patented invention be used by licensee only with unpatented materials furnished by licensor) a suit for infringement shall be dismissed for want of equity "until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated." The Antitrust Division now argues, and imposes as a condition to its acceptance of consent decrees in settlement of cases involving an alleged misuse of patents, that the consequences of the misuse cannot be fully dissipated unless the patented invention is opened up to all applicants free of any restrictions. By reason of the alleged unlawful patent

---


229 As the law now stands, a patent owner is under no obligation to manufacture the patented article or to grant licenses for the manufacture, use, or sale of the same. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 S. Ct. 748 (1908). He can fix any terms of royalty he chooses, Standard Oil Co. v. United States, 283 U. S. 163, 51 S. Ct. 421 (1931); he can fix the price at which the patented article may be sold by his licensee, United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192 (1926); he can fix the quantity or the percentage of the whole output to be manufactured by the licensee, Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., (C. C. A. 7th, 1907) 154 F. 358; he can grant licenses limited to a particular field or fields of use, General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 58 S. Ct. 849 (1938). But where patentees cross-license each other the
practices in the past, certain business relationships have been established and potential competition has been kept out of the market. These relationships can be broken down and new competition made possible, the division asserts, only by compulsory, unrestricted licensing. The presence or absence of provisions in future decrees relating to payment of reasonable royalties for the grant of unrestricted licenses will probably depend upon the strength of defendant's bargaining position.

C. Postponement of Antitrust Cases

Among recent antitrust investigations and prosecutions have been many that are directed against corporations and officers thereof now devoting a substantial part of their productive facilities and skills to the manufacture of war materials. Such investigations and prosecutions have interfered, to some extent, with the affected individuals' time and concentration of mind on the vital needs of a nation at war. Of serious consequence is the time taken by corporate officials in the legitimate preparation of a defense to the charges made against them. Such consumption of time begins when the grand jury subpoena duces tecum is served on the company and ends only after the jury verdict has been announced. Between these dates are days spent in testifying before a grand jury, in conferences with counsel respecting an explanation of hundreds of letters and contracts, and in testifying as a witness at the trial of the case.

One of the first measures taken by the government to accommodate antitrust enforcement to present emergency conditions was an informal announcement by the head of the Antitrust Division that any prosecution would be stopped upon receipt of a letter from a government agency stating the reasons why it believed a given case interfered with national defense. While this policy was in effect no cases were postponed by reason of a claimed interference with the time of corporate executives.

Court has said: "Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce." Standard Oil Co. v. United States, supra, 283 U. S. at 172.

280 See statement and testimony of Thurman Arnold before Senate Committee on Patents, April 23, 1942, Hearings on S. Bill 2303, 77th Cong., 2d sess.

281 At the Hearings Before the Select House Committee to Conduct a Study and Survey of the National Defense Program in Its Relation to Small Business of the United States, pursuant to H. Res. 294, 77th Cong., 2d sess. (1942), p. 184 (unrevised print), Arnold stated: "I am willing to stop any prosecution if any responsible Government agency will give me reasons in writing why it interferes with national defense, and if they will take that responsibility; I do not care to be the sole judge."
In an exchange of letters between the President, the Attorney General, and the Secretaries of War and the Navy, released on March 28, 1942, a formal procedure was established for determining whether postponement of investigations, suits and prosecutions under the antitrust law would be in the national interest. Each pending and future investigation, prosecution or suit is to be examined by the Attorney General and the Secretary of War or the Secretary of the Navy, respectively. Upon their agreement that the pending or future action will not seriously interfere with the all-out prosecution of the war, the Attorney General will proceed. If they agree that it will interfere ("it must be preponderantly clear that the progress of the war effort is being impeded"), or if after disagreement between them, then upon receipt of a letter from either Secretary stating that in his opinion the investigation, prosecution or suit will seriously interfere with the war effort, the Attorney General will defer his activity in the particular matter. In case of such disagreement, however, the Attorney General reserves the right to lay all the facts before the President, whose determination shall be final.

The procedure thus established would appear to be well adapted to resolving the problem raised. By providing that the Attorney General will accede to a postponement request issued by either of the Secretaries, following a disagreement between the Attorney General and a Secretary, it is recognized that those better qualified to appraise the actual extent of an interference with the war effort occasioned by antitrust investigations or proceedings are to make the final decision in the matter, subject to an ultimate Presidential determination if the Attorney General desires the same. It would further appear that the procedure will prevent misuse of the postponement privilege by defendants since postponement will be granted only after it is "preponderantly clear" that the war effort would be impeded by antitrust investigations or proceedings.


233 The letters also state that the Congress shall be requested to pass an act extending the statute of limitations; and that "under no circumstances will there be any suspension or postponement of prosecution for any actual fraud committed against the Government."

As of date of writing, the Attorney General has agreed to apply for adjournment in one case, pursuant to the formal procedure for postponement. United States v. General Electric Company (tungsten carbide case), Department of Justice Release, April 25, 1942; N. Y. Times, April 26, 1942, § I, p. 25, col. 4.
Suspension by the Department of Justice in 1940 of part of its proposed equity suit against twenty-two major oil companies was due to the probable effect of the relief sought upon the defense program. As originally drafted the bill in equity sought, among other things, to divest the companies of certain types of properties, such as pipe lines and tankers, and to divorce transportation and marketing from the production of oil. The draft complaint was submitted to the National Defense Advisory Commission for its consideration of the effect of such relief upon national defense. Upon receipt from the commission of a report indicating that a number of serious defense problems would be raised by a court decree of divestiture, the Attorney General redrafted the complaint, limiting its scope to charges against price fixing, discrimination, and similar practices which tend to restrain the independent oil companies and jeopardize the interest of consumers. The Attorney General's action in this instance is comparable to that taken during World War I when the government secured a postponement of argument in, and final decision by, the Supreme Court in several of its major equity suits which sought dissolutions of defendant corporations. Postponement of cases because of the relief sought will not be frequent during the present emergency for the reason that few suits are now pending where the granting of the government's prayer would result in a disorganization of corporate structures.

D. Co-operative Action on Behalf of the War Effort

The current apprehension on the part of business managers concerning the legality of co-operative action with government agencies in line with the war effort is traceable to several causes. In the first place, the enforcement policy of the government since 1937, among other things, has made corporate officials wary of any co-operative endeavors. This caution is also attributable to the widespread publicity accompanying the comprehensive investigation of business practices conducted by the Temporary National Economic Committee, a study suggested by the President and participated in fully by the Antitrust

---

285 Id., ¶ 15,101. The commission reported that divestiture of facilities used in marketing petroleum products "may affect the construction of such facilities pursuant to negotiations now under way or in prospect for national defense purposes," and that divestiture of transportation facilities might increase the difficulty of obtaining supplies and intensify the problem of financing additional crude oil pipe line construction.
286 Petition filed Sept. 30, 1940, United States v. American Petroleum Institute, id., ¶ 17,039.
287 See Part I, 40 MICH. L. REV. 969 at 997.
Division and the Federal Trade Commission. 238 A second cause for the present apprehension is found in the strict attitude of the Supreme Court toward joint or uniform action by competitors. We have noted the decision of the Court in the Madison Oil case, and the ruling announced therein on defendants' offers of proof which related to knowledge of and acquiescence in the buying programs by government officials. Further evidence of this attitude is found in the decision of the Court in Interstate Circuit v. United States. 239 There the Court stated:

"... It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. ... Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." 240

Recognizing the reluctance of businessmen to engage in certain necessary co-operative or uniform action under the war program by reason

240 Id., 306 U. S. at 226, 227. In this case an exhibitor of motion picture films had written letters to eight branch managers of distributor companies, each letter naming all of them as addressees, asking compliance with two demands as a condition of his continued exhibition of distributors' films in first-run theatres at top admission prices. By the demands distributors were to agree with him that their "A" product would not be exhibited in subsequent-run theatres at less than a stipulated minimum price and would not be exhibited in such theatres as part of a double-feature program. These restrictions were imposed by distributors upon some of the subsequent-run theatres. The trial court found not only that separate agreements had been entered into between each of the distributors and the exhibitor, which agreements were without the protection afforded by the Copyright Act, but also that the distributors had agreed and conspired among themselves to impose the demanded restrictions upon subsequent-run theatres. The latter finding was based upon an inference drawn by the court from the manner in which the proposals were made, from the substantial unanimity of action taken upon them by distributors, and from the fact that distributors failed to call as witnesses any of their superior officials who negotiated the contracts with the exhibitor and who normally would have had knowledge of whether an agreement among the distributors had existed. On appeal, the Supreme Court affirmed the lower court's judgment. (Justices Roberts, McReynolds and Butler dissented.) Speaking for the majority, Justice Stone held that the evidence supported the inference of an agreement among distributors. But in the circumstances of this case, he continued, such an agreement was not a prerequisite to an unlawful conspiracy. That part of the opinion which is quoted in the text, above, then follows.
of these factors, the administration has taken some steps to obviate the possibility of antitrust proceedings in the future based on such action.

The first of these occurred in the early part of April, 1941, when the general counsel of the Office of Production Management (now the War Production Board) wrote to the Attorney General requesting approval of a proposed procedure for the handling of industry meetings called to discuss problems common to an industry and looking to future action in the interest of national defense. The procedure contemplated the calling of industry meetings only by O. P. M. At such meetings a representative of the office would always be present, and minutes thereof would be kept. Any subject pertinent to the problem of defense might be discussed and suggestions from industry members "as to the practical steps which should be taken to achieve the results for defense which are desired" were to be secured. But no agreement or understanding was to be reached at the meetings. All requests for industry action were to be made by O. P. M. after clearance of the same with the Department of Justice. Approval of this procedure was given by the Attorney General, who stated that the procedure, "if followed, should serve to protect those who participate in the meetings against charges that the meetings violate the antitrust laws."

Several questions were left unanswered by this procedure. In what form would the requested action be stated, i.e., to individual units of an industry or to the industry as a whole? Would the action taken pursuant to an official request be protected as well as the participation of industry members in the meetings? Furthermore, what protection was actually afforded by the words, "should serve to protect those who participate?" The Attorney General's announcement on April 29, 1941, of the policy to be followed by the Department of Justice in applying the antitrust law to activities under the national defense program served as an answer to these questions.

241 John Lord O'Brian to Attorney General Jackson, April 8, 1941. This and other letters hereinafter referred to may be obtained from the appropriate government agency.
242 Jackson to O'Brian, April 9, 1941.
243 The announcement was made in identical letters, dated April 29, 1941, sent to O'Brian and Leon Henderson, Administrator, Office of Price Administration and Civilian Supply (now Office of Price Administration). The Attorney General stated that the allocation of orders, curtailment of some kinds of production, and establishment of priorities and price ceilings, if accomplished by private arrangement within an industry for private advantage would probably constitute violations of the antitrust law, but "it is obvious that in the present emergency acts performed by industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations." The department recognized, however, that
Pursuant to the terms of the announcement, an industry—through its committee—may meet with representatives of the O. P. M. or O. P. A. Industry committees shall confine themselves to collecting and analyzing information and making recommendations to the respective war agencies. They cannot determine policies for the industry nor attempt to compel or coerce anyone to comply with any request or order made by the agency. Before requests for action within a given field shall be made, the general character of the action must be cleared with the Department of Justice. If the general plan is approved, thereafter each request for specific action in carrying out the plan shall be made in writing and approved by the general counsel of the agency. Requests for action on the part of any unit of an industry shall be made to such unit by O. P. M. or O. P. A. and not by the industry committee. The scope of the protection afforded industry under this procedure was defined by the Attorney General as follows:

"Acts done in compliance with the specific requests made by the Office of Production Management or the Office of Price Administration and Civilian Supply and approved by their General Counsel in accordance with the procedure described in this letter will not be viewed by the Department of Justice as constituting a violation of the antitrust laws and no prosecutions will be instituted for acts performed in good faith and within the fair intention of instructions given by the Office of Production Management. businessmen are entitled to the co-operation of government agencies in eliminating uncertainties under the law; accordingly, this policy was formulated.

Industrial committees to work on defense problems with representatives of the government agency may be formed only at the request of the agency. Whether such a committee is needed, and if so, how it shall be chosen and by whom constituted are the sole responsibilities of the agency. Industry, may, however, co-operate in the selection of its representatives for such committees. "...any such committee should be generally representative of the entire industry and satisfactory to the government agency."

The selection of O. P. M. Industry Advisory Committees was originally made either by election participated in by all members of the industry or through nominations made by a large number of representatives of the industry. These methods proved to be cumbersome, and, in many instances, it was necessary for O. P. M. to add to the nominations in order to make the committee properly representative. By O. P. M. Regulation No. 12 and General Administrative Order No. 2-7, dated January 14 and 17, 1942 (approved generally in exchange of letters between O'Brian and Attorney General Biddle, December 22 and 24, 1941) the selection of such committees was placed entirely in the hands of O. P. M. officials.

The Attorney General elaborated upon this point in the following words: "That is to say, the function of determining what steps should be taken in the public interest should in each case be exercised by the public authority which may seek the individual or collective advice of the industry. But the determination shall not be made by the industry itself or by its representatives."


or the Office of Price Administration and Civilian Supply pursuant to this procedure.

"In the case of all plans or procedure, however, the Department reserves complete freedom to institute civil actions to enjoin the continuing of acts or practices found not to be in the public interest and persisted in after notice to desist." 246

It is to be noted that under this procedure a request for action does not take the form of a proposed agreement among industrial units, but rather is in the form of a request from a war agency directly to a particular industrial unit. Co-operation among members of an industry is thereby confined to collecting and analyzing information and making recommendations. Subsequent letters from the Attorney General, however, have given approval to co-operative action among industrial units in the execution of a plan deemed necessary by a war agency. In reply to the assertion by the Director of the Office of Defense Transportation that many of that agency's plans would require joint action among carriers, the Attorney General wrote:

"While it is, of course, impossible to anticipate all plans involving the exercise of discretion by carriers which the Office of Defense Transportation may desire to undertake in the future, you may be assured that the policy stated in this letter [as contained in the April 29, 1941, announcement] does not preclude approval by the Department of such plans in appropriate cases." 247

Plans by local business enterprises for pooling deliveries and curtailing services as a means of conserving delivery equipment can be approved by the Department of Justice. 248 Approval has also been given to conferences which are held pursuant to the request of O. P. M. for the purpose of pooling facilities and experience in the fields of production and distribution in order that small manufacturers may jointly obtain war contracts or subcontracts. 249

Complete protection from future suits based on activities by indus-

246 Jackson to O'Brian and Henderson, April 29, 1941.
247 Eastman to Biddle, February 8, 1942; Biddle to Eastman, February 12, 1942.
248 See Joint Statement by Office of Defense Transportation and Department of Justice Relative to Local Delivery Service by Motor Vehicle, Released Mar. 12, 1942.
249 O'Brian to Biddle, Sept. 30, 1941; Biddle to O'Brian, Oct. 4, 1941. The Attorney General commented: "The legality of these preliminary conferences and discussions depends largely upon the nature of the action which follows. For this reason, the Department of Justice must necessarily reserve freedom of action . . . to institute civil actions to enjoin the continuing of discussions and practices which have been found not to be in the public interest and which have been persisted in after notice to desist."
trial units within the scope of the Attorney General’s letters is not yet assured. In connection with the “approval” by President Theodore Roosevelt of the acquisition by the United States Steel Corporation of the Tennessee Company stock, it was pointed out that the power to adjudge the legality of activities under the antitrust law resides solely in the judicial branch of the government, and that any decision by an Attorney General in respect to such activities relates only to the exercise of his power, as prosecutor, to institute, or to refrain from instituting, the available legal remedies. The present policy of the Department of Justice as set forth in the several letters is not, therefore, binding upon succeeding administrations. Undoubtedly, this policy will be adopted by future administrations if for no other reason than that it would be the honorable and equitable course to follow. The slight possibility that it might not be adopted, and that criminal actions might be brought against industrial units which, in good faith, have followed the procedure outlined does warrant, nevertheless, a measure affording full immunity from any antitrust proceeding. The harassment caused by such proceedings, despite an ultimately successful defense thereto, should be definitely precluded. Furthermore, a decision by the Attorney General not to institute criminal actions pertains only to enforcement of the antitrust law by the government. It is not improbable that private suits may be brought to recover treble damages for injury to plaintiff’s business or property resulting from activities undertaken pursuant to the officially approved procedure.

251 Among the difficulties to a successful defense, the following may be noted in particular. Where joint action among industrial units is permitted by the procedure outlined above, if a court were to hold that the restraint of trade effected was per se illegal defendants would not be able to offer in evidence the approval of their activities by the Attorney General since the question of reasonableness would not be in issue. See decision in the Madison Oil case, supra, p. 1179. Where requests are made to particular industrial units, if a court were to hold that the war agency was unauthorized to make the same, defendants might be found guilty of an unlawful conspiracy on the theory announced in the Interstate Circuit decision. See quotation, p. 1194, supra. Priorities, allocation of material and facilities, and price agreements are now expressly authorized. 54 Stat. L. 676 (1941), as amended by Pub. 89, 77th Cong., 1st sess. (May 31, 1941), and Pub. 507, § 301, 77th Cong., 2d sess. (Mar. 27, 1942; Pub. 421, 77th Cong., 2d sess. (Jan. 30, 1942). But cf. the lack of express statutory authorization for requests for simplification, conservation, substitution and preparation of specifications, all of which may involve the curtailment of production in certain lines.

The executive branch of the government has indicated a willingness to put first things first for a successful prosecution of the war effort by approving the postponement of antitrust investigations and proceedings which would interfere with war production. This represents but one of the measures which are necessary to accommodate the antitrust law to present emergency conditions. The other must come from the Congress. By exempting from the proscriptions of the antitrust law those acts performed within the scope of a request or plan approved by public officials, the Congress will make possible during the present war an unflagging spirit of co-operation on the part of business managers. The President pointed out, in approving the postponement of certain investigations and proceedings, that unless the war effort is successful our antitrust law will become a matter of only academic interest. Enactment by the Congress of the suggested exemption law will also serve to maintain the continued existence of an economy founded upon private competitive enterprise.

Senator Van Nuys has introduced a bill which provides “That whenever the Chairman of the War Production Board shall certify to the Attorney General in writing that the doing of any act or thing, or the omission to do any act or thing, by one or more persons (during the period that this Act is in effect) in compliance with any written regulation, order, request, or approval of the said Chairman in which it is specifically set forth that such act, thing, or omission is requisite to the prosecution of the war, such specific act, thing, or omission shall not be deemed in violation of the antitrust laws of the United States or of the Federal Trade Commission Act, if the Attorney General shall find that the regulation, order, request, or approval is in effect an order or a direction requisite to the prosecution of the war, and is not an unlawful delegation of discretion to a private group.” S. 2431, 77th Cong., 2d sess. (1942). An amendment to the bill placing final authority in one person to exempt given acts from the antitrust law would be preferable, the writer believes, to the divided authority now proposed.