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The Antitrust Expediting Act- A Critical Reappraisal

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The Antitrust Expediting Act—A Critical Reappraisal

"I venture to predict that a critical reappraisal of the problem would lead to the conclusion that 'expedition' and also, over-all, more satisfactory appellate review would be achieved in these [antitrust] cases were primary appellate jurisdiction returned to the Court of Appeals . . . ."[1]

The Expediting Act[2] has been subject to some rather severe criticism from the bench and bar. At the extreme, it has been suggested that the act be repealed and the procedure for appealing government civil antitrust cases be completely overhauled.[3] Even proponents of the act have acknowledged its need of revision,[4] but there is little agreement among them on the extent and nature of desirable change. This comment will explore the origins, development, and current role of the Expediting Act in order to help determine what course revision, if it is needed, should follow.

Section 1 of the act[5] provides that in any civil antitrust suit brought under the Sherman Act[6] or any later-enacted statute having a like purpose in which the United States is plaintiff, the Attorney General may, if he considers the case to be of "general public importance," require the suit to be heard before a district court constituted of three judges. The three judges so designated assume the duty "to assign the case for hearing at the earliest practicable date . . . and to cause the case to be in every way expedited." Regardless of whether the section 1 procedure for convening a three-judge court is employed, section 2[7] of the Expediting Act provides that, in every government civil antitrust suit, an appeal from the final judgment of the district court will lie only to the Supreme Court. The act not only precludes an appeal to the court of appeals, but also, since appeal lies only from the final judgment of the district court, it effectively precludes the possibility of an interlocutory appeal to either the court of appeals or the Supreme Court.[8]

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1. Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962) (separate opinion).

2. Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823, as amended, 15 U.S.C. §§ 28, 29 (1958) [referred to herein as the "act"].

3. See, *e.g.*, Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 N.Y. S.B.A. ANTITRUST L. SYMPOSIUM 98.

4. See, *e.g.*, Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 N.Y. S.B.A. ANTITRUST L. SYMPOSIUM 94.

5. Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823, as amended, 15 U.S.C. § 28 (1958). The act also provides identical treatment for government civil cases arising under the Interstate Commerce Act. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, as amended, 49 U.S.C. §§ 1, 8, 12, 13, 19 (1958). However, this latter aspect of the Expediting Act is beyond the scope of this comment. Discussion will be limited to the procedural expedition of antitrust suits.

6. Act of July 2, 1890, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-7 (1958).

7. Act of Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823, as amended, 15 U.S.C. § 29 (1958). This section also applies to government civil cases arising under the Interstate Commerce Act. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, as amended, 49 U.S.C. §§ 1, 8, 12, 13, 19 (1958). See note 5 *supra*.

8. See United States v. California Co-op. Canneries, 279 U.S. 553, 558 (1929).

I. Birth of the Expediting Act

When the Expediting Act was adopted in 1903, it introduced the seventh class of cases in which appeal would lie directly to the Supreme Court from the decision of a single district court judge.[9] Its *raison d'etre*, of course, was to speed up litigation of certain government suits. Why it was thought necessary to expedite government antitrust suits, and to do so by circumventing completely the circuit courts of appeals, can be partially explained by an examination of the legislative history and the historical setting in which the statute was framed.

At the turn of the century the ten-year-old Sherman Act[10] was considered by many to be a dead letter.[11] It was not being actively enforced, and mammoth trusts were abounding as a result of an apparent immunity created by the Supreme Court's decision in *United States v. E. C. Knight Co.*[12] However, the *Northern Securities* case,[13] brought in 1902 by the Roosevelt Administration, signalled the beginning of a government crusade to challenge growing economic power concentrated in a few hands. It became apparent that the Sherman Act was to be given meaning and that the suits to be brought under it, such as *Northern Securities*,[14] would

9. Under the Circuit Court of Appeals Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826, appeals could be taken directly to the Supreme Court from the district court in the following situations:

> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
> "From the final sentences and decrees in prize causes.
> "In cases of conviction of a capital or otherwise infamous crime.
> "In any case that involves the construction or application of the Constitution of the United States.
> "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.
> "In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

10. Act of July 2, 1890, ch. 647, §§ 1-6, 8, 26 Stat. 209-10, as amended, 15 U.S.C. §§ 1-7 (1958).

11. See 2 Sullivan, Our Times 412-19 (1927).

12. 156 U.S. 1 (1895). The *Knight* case held in effect that the Sherman Act did not extend to restraints of trade affecting merely the manufacture of commodities.

13. United States v. Northern Sec. Co., 120 Fed. 721 (D. Minn. 1903), *aff'd*, 193 U.S. 197 (1904). For a discussion of the history behind this litigation, see 2 Sullivan, *op. cit. supra* note 11, at 412-19.

14. The Northern Securities Company was a holding company which had been formed to acquire the controlling interest in two competing railroads, the Great Northern and Northern Pacific Railway companies. The issue in the *Northern Securities* case was whether the Supreme Court would bring the numerous trusts which had been created as holding companies under the prohibitions of the Sherman Act. The question, however, was not simply the method by which the government would control the trusts, but more fundamentally whether the government had the power to control them at all. This issue was recognized as one that would vitally affect the economic structure of the nation. The uncertainty created by the government's challenge of the holding company device in *Northern Securities* caused the market for American securities to become demoralized throughout the world. Consequently,

raise novel and important issues of governmental regulation of business. Thus, it was deemed necessary to provide a procedure by which government antitrust cases could be expeditiously appealed to the highest court for a final determination. It was hoped that the act, in addition to assuring early consideration of vital economic issues,[15] would contribute to a uniform development of the Sherman Act.[16]

In 1903 the circuit courts of appeals had been in existence only twelve years.[17] Prior to 1891, the Supreme Court had been vested with exclusive jurisdiction over all federal appellate claims.[18] Since the courts of appeals were relatively new, they were not readily trusted to handle appeals of cases which previously would have gone straight to the Supreme Court.[19] These new intermediate courts of appeals would have to overcome "a deep professional feeling against taking away from litigants the right to resort to the Supreme Court for vindication of their federal claims."[20] In spite of the creation of the courts of appeals, it was thought necessary to preserve litigants' rights to seek review in the Supreme Court directly from the district courts in a substantial number of cases,[21] particularly those of extreme national importance.[22] Government antitrust cases of the period were considered by many to be of such importance.[23]

Moreover, in 1903 the opportunity for appellate delay was great. Before the Expediting Act, cases arising under the Sherman Act were appealed to the circuit court of appeals.[24] Six months were allowed for taking the appeal, and one year was allowed for taking an appeal from the court of appeals to the Supreme Court.[25] There was

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the early resolution of this issue was of paramount importance. See 2 SULLIVAN, *op. cit. supra* note 11, at 412-19, 462-67; 1 SWAIN, THE CRAVATH FIRM 707-15 (1946).

15. Senator Fairbanks, then chairman of the Senate Committee on the Judiciary, stated in presenting the bill on the Senate floor: "[I]t is the purpose of the bill to expedite litigation of *great* and *general* importance." 36 CONG. REC. 1679 (1903). (Emphasis added.)

16. See Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962) (separate opinion); FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 263 (1928); 109 CONG. REC. 11911 (1963) (remarks of Senator Johnston).

17. Act of March 3, 1891, ch. 517, 26 Stat. 826. See FRANKFURTER & LANDIS, *op. cit. supra* note 16, at 257.

18. *Id.* at 258.

19. *Ibid.*

20. *Ibid.*

21. See note 9 *supra.*

22. See 36 CONG. REC. 1679 (1903) (remarks of Senator Fairbanks).

23. The attorney general stated in a letter to the House Committee on the Judiciary that he considered the type of case which would be directly reviewable under the Expediting Act to be of as great an importance as any of the then existing classes of cases directly reviewable. H.R. REP. No. 3020, 57th Cong., 2d Sess. 2 (1903). See note 9 *supra.*

24. Act of March 3, 1891, ch. 517, §§ 6, 11, 26 Stat. 826, 828, 829.

25. *Ibid.* Interestingly enough, however, the first case tried under the Sherman Act, United States v. E. C. Knight Co., 156 U.S. 1 (1895), was decided in the Supreme Court within one year of the district court's decision.

the further possibility of a party's taking an interlocutory appeal to the court of appeals from a decision of a district court granting or denying an interlocutory injunction.[26] These combined factors raised the fear that trusts and large business organizations would utilize the existing appellate procedure to tie up complex antitrust cases in the courts for indefinite periods.[27] Consequently, the Expediting Act limited the taking of appeals to final judgments of the district court and required the appeal to be taken directly to the Supreme Court within sixty days of the district court's decision.[28] In addition to cutting out one step in the normal appellate procedure, the act thus sought to facilitate the ultimate disposition of antitrust cases by reducing the possibility for delaying tactics on the part of the litigants.[29]

Unlike the direct appeals procedure, the provision in section 1 of the Expediting Act, providing for the invocation of a three-judge district court by the Attorney General, had no legislative precedent.[30] Apparently Congress felt that occasionally antitrust cases would involve matters too complex and important to be considered by a single judge, and that the Attorney General was in the best position to recognize such a case.[31] Three judges would insure that the case would receive "as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals."[32] Section 1 of the Expediting Act was first utilized in the crucial *Northern Securities* case,[33] which followed enactment of the Expediting Act by slightly less than two months.[34] If the juxtaposi-

26. Act of June 6, 1900, ch. 803, 31 Stat. 660. See United States v. California Co-op. Canneries, 279 U.S. 553, 558 (1929).

27. See Solomon, *supra* note 4, at 96.

28. Act of Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823. The time within which to take an appeal under the Expediting Act, which is still sixty days, is now governed by 28 U.S.C. § 2101(b) (1958).

29. Why the act was limited in its antitrust aspects to civil government suits is not entirely clear. A reasonable hypothesis is that private and criminal actions were not envisaged as the vehicles by which the more important antitrust issues were likely to be raised. Indeed, as subsequent litigation has borne out, not nearly as many private treble damage actions or criminal prosecutions have caused an impact on antitrust law as have government civil suits. Criminal suits are usually brought in areas where antitrust law is more settled because of the higher burden of proof required; and many private actions are instituted in the wake of successful government suits which have already settled the major issues.

30. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47-48 (1953).

31. *Ibid.* Actually, the original Expediting Act did not limit the hearing to three judges. It provided that the case must be heard by "not less than three" judges. Act of Feb. 11, 1903, ch. 544, 32 Stat. 823.

32. H.R. REP. No. 3020, 57th Cong., 2d Sess. 2 (1903). This view is interesting in light of the attitude of some toward the role of the court of appeals at that time. See note 19 *supra* and accompanying text.

33. United States v. Northern Sec. Co., 120 Fed. 721 (D. Minn. 1903), *aff'd*, 193 U.S. 197 (1904). See note 14 *supra*.

34. The Expediting Act was enacted on February 11, 1903, and the decision of the

tion of these two events was not accidental, then it would seem that *Northern Securities* exemplifies the type of case Congress meant section 1 to cover.

II. The Current Role of the Act

A. *The Provision for Direct Appeals*

In contrast to the situation in 1903, appeals may now be taken directly to the Supreme Court from the decision of a single district court judge in only three classes of cases: from a decision holding an act of Congress unconstitutional;[35] from certain decisions adverse to the United States in criminal cases;[36] and from decisions falling within the Expediting Act. In all other direct appeals statutes, review is restricted to decisions by district courts constituted of three judges.[37] Antitrust cases falling within the Expediting Act now provide the major source of direct appeals to the Supreme Court.

In a recent ten-year period, about thirty-seven civil antitrust cases were instituted on the average by the government each year,[38] compared to one case in 1903.[39] It is doubtful whether each of the thirty-seven cases today raises issues of equal importance to that raised by the one case of 1903. Indeed, it has been argued that there is currently relatively little development of substantive antitrust

district court (then called the circuit court) in *Northern Securities* was rendered on April 9, 1903.

35. 28 U.S.C. § 1252 (1958).

36. 18 U.S.C. § 3731 (1958).

37. 28 U.S.C. § 1253 (1958). See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 167 (2d ed. Wolfson & Kurland 1951). The three-judge court is little used under the Expediting Act today. See notes 66-76 *infra* and accompanying text.

38. Antitrust cases commenced during fiscal years 1954-1963:

		Government Cases		Private Cases	
Fiscal Year	Total	Civil	Criminal	Electrical equipment industry	Other
1954	194	21	10	—	163
1955	258	33	16	—	209
1956	281	30	24	—	227
1957	244	38	18	—	188
1958	325	33	22	—	270
1959	315	23	42	—	250
1960	315	60	27	—	228
1961	441	42	21	37	341
1962	2,079	41	33	1,739	266
1963	457	52	25	97	283
	4,909	373	238	1,873	2,425

Director of the Administrative Office of the U.S. Courts, Annual Report 139 (1963); Director of the Administrative Office of the U.S. Courts, Annual Report 118 (1960).

39. 109 Cong. Rec. 11912 (1963).

law; rather, the issue raised on appeal is usually whether the district court's decision is supported by the facts in the record.[40] In addition, many appeals merely involve procedural matters. For example, in the relatively recent case of *United States v. Procter & Gamble Co.*,[41] the question on appeal under the act was whether the defendant could compel the government to produce minutes in a grand jury transcript which government attorneys were using to prepare for trial in the civil action. More generally, when a district court denies a motion to intervene in a government civil antitrust case, an appeal lies only to the Supreme Court after the final judgment of the district court,[42] even if the appellant's sole ground of appeal is that he was wrongfully denied permission to intervene.[43] Such issues hardly seem to involve matters of general public importance within the spirit of the Expediting Act.

It is clear that the courts of appeals have established themselves as fully competent to handle most appeals.[44] And, for the most part, the opportunity for appellate delay which existed in 1903 has been abolished. Today only two months is allowed for taking an appeal to the court of appeals (one month for private cases),[45] and only three months is allowed for taking an appeal from the court of appeals to the Supreme Court.[46] Although an interlocutory appeal may easily be taken from a decision granting or denying an interlocutory injunction,[47] in all other cases a litigant must satisfy both the district judge and the court of appeals that an interlocutory appeal "may materially advance the ultimate termination of litigation."[48]

It has been suggested that the heavy work-load of the Supreme Court, combined with the voluminous record compiled in most antitrust cases, tends to slow down consideration of antitrust cases ap-

40. See, *e.g.*, United States v. Singer Mfg. Co., 374 U.S. 174 (1963); United States v. Borden Co., 370 U.S. 460 (1962); United States v. Diebold, Inc., 369 U.S. 654 (1962).

41. 356 U.S. 677 (1958).

42. ROBERTSON & KIRKHAM, *op cit. supra* note 37, § 171.

43. *Ibid.*

44. See FRANKFURTER & LANDIS, *op. cit. supra* note 16, at 258. In fact some Supreme Court Justices have lamented that the act deprives them of the valuable assistance of an intermediate appellate review. See United States v. Singer Mfg. Co., 374 U.S. 174, 175 n.1, 202 (1963) (Clark and Harlan, JJ.); Brown Shoe Co. v. United States, 370 U.S. 294, 355 (1962) (concurring opinion of Clark, J.).

45. 28 U.S.C. § 2107 (1958).

46. 28 U.S.C. § 2101(c) (1958). There is the possibility of obtaining an extension of another two months. *Ibid.*

47. 28 U.S.C. § 1292(a) (1958).

48. 28 U.S.C. § 1292(b) (1958). Interestingly, the Senate Report on § 1292(b) cited an antitrust action as one in which an interlocutory appeal might well speed up the ultimate determination of the case. S. REP. No. 2434, 85th Cong., 2d Sess. 3 (1958). For example, a motion that the statute of limitations had run might be denied in the district court. On appeal from the district court's final judgment, the court of appeals might decide that the statute had run and that the district court did not, consequently, have jurisdiction over the action.

pealed under the act to the extent that the cases are not really expedited.[49] However, a comparison of government civil cases taken directly to the Supreme Court under the Expediting Act with private treble damage cases which were processed through the court of appeals to the Supreme Court, as well as Federal Trade Commission antitrust cases similarly processed, shows that the act does in fact expedite.[50] On the average, it takes an antitrust case approximately an extra year to go through the court of appeals. Moreover, it takes the court of appeals approximately the same length of time to decide a private appeal as it does the Supreme Court to decide a direct government civil appeal,[51] even though many courts of appeals allegedly enjoy a lighter work-load than that of the Supreme Court and government cases are usually more complex than the typical private case.[52] Thus, the litigants, if they are required to take their cases initially to the court of appeals, will wait as long to secure that one appellate review as if the case were taken directly before the Supreme Court, and the court of appeals order may then be appealed, bringing further delay and expense. The cost of a single appeal in either case will, presumably, be substantially the same.

An important consideration in evaluating the merit of the direct appeals provision is the extent to which it imposes a work burden on the Supreme Court. As previously stated, appeals may be taken directly to the Supreme Court from the decision of a single district court judge in only three classes of cases. The class involving appeals from decisions holding an act of Congress unconstitutional[53] has not proved to be a fertile source of direct Supreme Court appeals,[54] nor has the second class, involving certain types of district court decisions adverse to the United States in criminal cases.[55] However, under the Expediting Act, the Supreme Court heard thirty-one antitrust cases during a ten-year period ending in 1963.[56] This was slightly more than one-half of all the antitrust cases heard during that period.[57] In addition, this was at a time when the number of cases filed in the Supreme Court each year appeared to be increas-

49. Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962) (separate opinion).
50. See Appendix.
51. *Ibid.*
52. During fiscal year 1949 five government civil antitrust cases consumed 19, 22, 38, 42, and 65 trial days respectively; while four private antitrust cases consumed 12, 13, 13 and 24 days respectively. These days exclude time spent in informal conferences and other preliminary matters. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES 4-5 (1951).
53. See Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 610-19 (1938).
54. During the twelve years following its enactment, only about ten appeals were taken under its provisions. See ROBERTSON & KIRKHAM, *op. cit. supra* note 37, § 115 n.3.
55. *Id.* § 176.
56. See Appendix.
57. *Ibid.*

ing;[58] several Justices have complained that direct appeals were imposing a "great burden" on the Court.[59] Since the Court generally believes that a party is entitled to at least one appellate review, it seems to be more inclined to note probable jurisdiction in cases arising directly under the Expediting Act.[60] In addition, appeals from decrees or orders made in the district court after the final judgment run directly to the Supreme Court,[61] and, consequently, there is the possibility of dual appeals: once from the final judgment, and once from any decree modifying that judgment.

It would be conjectural to estimate how many fewer government antitrust cases the Supreme Court might have to consider if there were no direct appeal provision. But if an intermediate appeal were required, grant of review in the Court would more likely depend on a conflict in the circuits or other traditional grounds, rather than on the basis that a party is entitled to at least one review. The number of cases heard by the Court under the act in the past ten years is small, averaging only three per year.[62] Whether a review by the court of appeals in that small number of cases which now come directly before the Supreme Court would significantly lessen the Court's overall work-load is open to question.[63] The court of appeals cannot institute a trial de novo, and it is equally bound by rule 52(a) of the Federal Rules of Civil Procedure.[64] It has been suggested, however, that after one appeal, attention in the Supreme

58. The following table shows the number of cases filed, disposed of, and remaining on the dockets in the Supreme Court of the United States during the October terms, 1953-1962.

	1953	*1954*	*1955*	*1956*	*1957*	*1958*	*1959*	*1960*	*1961*	*1962*
Cases remaining on the dockets from the previous term	151	160	205	219	351	225	281	356	385	428
Cases filed	1,302	1,397	1,644	1,802	1,639	1,819	1,862	1,940	2,185	2,373
Cases disposed of	1,293	1,352	1,630	1,670	1,765	1,763	1,787	1,911	2,142	2,327
Cases remaining on the dockets at the end of the term	160	205	219	351	225	281	356	385	428	474

DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 178 (1963).

59. See United States v. Singer Mfg. Co., 374 U.S. 174, 175 n.1 (1963) (Clark, J.); Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962) (separate opinion).

60. See United States v. Singer Mfg. Co., *supra* note 59, at 175; Brown Shoe Co. v. United States, *supra* note 59, at 355.

61. ROBERTSON & KIRKHAM, *op. cit. supra* note 37, § 171; see Brown Shoe Co. v. United States, *supra* note 59, at 357-65 (separate opinion).

62. See Appendix.

63. See Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 N.Y. S.B.A. ANTITRUST L. SYMPOSIUM 94, 96. *But see* Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 N.Y. S.B.A. ANTITRUST L. SYMPOSIUM 98, 100.

64. See Solomon, *supra* note 63; FED. R. CIV. P. 52(a).

Court could be directed to narrow questions of law rather than to untangling the facts and errors from the typically lengthy record of an antitrust case.[65] Certainly a carefully written opinion after a thorough review by the court of appeals could aid the Supreme Court in determining whether it should even hear the case, especially if the case relates to antitrust matters of marginal public importance.

In summary, several of the reasons proffered for adopting the direct appeals provision of the Expediting Act no longer have any basis. Likewise, not all government civil antitrust cases raise issues which are of such vital importance that they must be quickly decided by the Supreme Court. But because of the automatic bypass of the court of appeals, the Supreme Court must decide whether to hear such cases without the benefit of intermediate appeal and with the knowledge that the appealing party will be entirely denied review if the high court refuses. On the other hand, the act can unquestionably speed up the ultimate determination of important government cases through the direct appeals provision; also, section 2 offers a valuable tool for avoiding delay in the final adjudication of cases of general public importance.

B. *The Provision for a Discretionary Three-Judge District Court*

After 1903, the idea of providing a three-judge district court to hear cases of general importance enjoyed increasing favor. In 1906 this procedure was extended to suits to restrain, set aside, or annul an order of the Interstate Commerce Commission.[66] In 1913 jurisdiction over suits to enjoin orders of the Interstate Commerce Commission was placed in a mandatory three-judge district court under the Urgent Deficiencies Act.[67] Subsequently, the provision for a mandatory three-judge district court was made applicable to suits to enjoin orders of other federal administrative agencies.[68] In 1950, however, the jurisdiction over suits to enjoin orders of federal administrative agencies other than the Interstate Commerce Commission was vested in the court of appeals.[69] Although other statutes not dealing with judicial review of orders of federal administrative agencies do still provide for mandatory three-judge district courts,[70] the Expediting Act is the only one which presently calls for the invoca-

65. See Brown Shoe Co. v. United States, 370 U.S. 294, 364 (separate opinion).

66. Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 584, 590, 592. See ROBERTSON & KIRKHAM, *op. cit. supra* note 37, § 213.

67. *Ibid.*

68. *Id.* § 214.

69. Act of Dec. 29, 1950, ch. 1189, §§ 1-12, 64 Stat. 1129-30, as amended, 5 U.S.C. §§ 1031-42 (1958). See HART & WECHSLER, *op. cit. supra* note 30, at 47-48. Jurisdiction over suits to enjoin orders of the Interstate Commerce Commission is vested in a three-judge district court under 28 U.S.C. § 2325 (1958).

70. See 28 U.S.C. §§ 2281, 2282 (1958).

tion of a three-judge district court solely at the discretion of the Attorney General.

It has been suggested that the gradual demise of the three-judge district courts demonstrates that they were an unsuccessful experiment.[71] Moreover, since a three-judge trial court cuts into the time of three federal judges, there is understandably some antagonism by the federal judiciary toward its use. Perhaps because of this, section 1 of the Expediting Act has been little used, and its critics claim that it has been permitted to die a natural death and should be repealed.[72] However, it should be noted that when suits to enjoin orders of the federal administrative agencies were taken out of the hands of three-judge district courts they were not placed in the hands of a single district court judge; rather, initial jurisdiction was vested in the court of appeals. In addition, the fact that the Attorney General has seldom exercised his discretion to invoke a three-judge district court does not necessarily lead to the conclusion that the provision should be repealed. The Justice Department apparently feels there are occasional antitrust cases which merit a trial before three judges. For example, in 1952 the Department admitted that in the prior fifteen years it had invoked the special three-judge district court only six times.[73] However, in each of those six cases, the Department considered it *essential* to have a three-judge court established to hear the case,[74] although the Department generally recognizes the necessity of not unduly hampering the judiciary with repeated calls upon three judges to hear a case.[75]

It would seem that the limited use of the three-judge provision by the Attorney General reflects a proper use of his discretion.[76] On the other hand, during the recent ten-year period of 1954 through 1963 no cases were appealed to the Supreme Court from a three-judge district court invoked under section 1 of the act. Moreover, the Department of Justice did not reveal in which six cases the three-judge provision had been invoked, but only that it considered a three-judge court essential to hear each case. Therefore, although perhaps the factors which originally justified the enactment of the three-

71. See Gesell, *supra* note 63, at 100.

72. See 109 CONG. REC. 11911 (1963) (remarks of Senator Johnston).

73. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT 31 (1952).

74. *Ibid.*

75. *Ibid.* For another explanation for the Attorney General's hesitation to invoke the three-judge court, see Gesell, *supra* note 63, at 100.

76. There is the opportunity, of course, for abuse of discretion. For example, a three-judge court could be invoked to coerce a single district judge into setting aside other matters in order to proceed with an antitrust case. See Solomon, *supra* note 63, at 94. One recent case utilizing a three-judge district court has come to the author's attention. United States v. Crocker-Anglo Nat'l Bank, 223 F. Supp. 849 (D. Cal. 1963). Arguably this case was of general public importance considering the rising national trend toward bank mergers. However, the case, which was decided against the Government, was not appealed to the Supreme Court.

judge provision may still be relevant today, unfortunately there is no definitive disclosed proof of that fact.

III. Recent Attempts To Amend or Repeal the Expediting Act

Since 1949, several attempts have been made to modify, amend, or repeal various provisions of the Expediting Act. The first bill,[77] introduced in the House by Representative Celler, would have modified section 1 of the act. It provided that if, after a three-judge district court had been convened at the discretion of the Attorney General, the chief judge of the circuit decided that a hearing by a three-judge court "would unduly prejudice the dispatch of other judicial business in the circuit" he could reassign the case to a single district judge. Although this bill would have given the judiciary the power to deny the Attorney General's request, the Attorney General expressed his approval of the proposed measure.[78] The Judicial Conference of the United States also recommended that the bill be enacted,[79] but it never emerged from Committee. An identical bill was introduced two years later by Representative Celler;[80] it too was never reported out of Committee.

Another attempt at amendment occurred in 1961.[81] A bill introduced by Representative Toll proposed that a national panel of antitrust judges be appointed from among the district judges by the Chief Justice of the United States, acting with the advice of the chief judge of each circuit. When proceedings were brought in the usual course within any district, either the Attorney General or the judge before whom the case was pending could certify to the chief judge of the circuit that the case was of national public importance and that the proceedings were likely to be protracted. If the chief judge of the circuit concurred, he would designate a single judge from the panel to hear the case. This bill was likewise never reported out of Committee, and it is not clear what the position of the Department of Justice was on this amendment. However, the Judicial Conference disapproved the bill on the ground that it would be "inappropriate for the Chief Justice of the United States to make such an assignment and designation of district judges."[82] Nor did the Conference accept the provision for only one judge to try the case upon the filing of the certificate by the Attorney General.[83]

In 1963, a third assault was made on the Expediting Act. This

77. H.R. 6451, 81st Cong., 1st Sess. (1949).
78. Judicial Conference of the United States, Report 13 (1950).
79. *Ibid.*
80. H.R. 3516, 82d Cong., 1st Sess. (1951).
81. H.R. 6766, 87th Cong., 1st Sess. (1961).
82. Judicial Conference of the United States, Report 68 (1961).
83. Judicial Conference of the United States, Report 12 (1962).

one was an attempt to repeal it entirely for antitrust cases.[84] Under the provisions of S. 1811, government civil antitrust cases were to be appealed on the same basis as other litigation brought before the district court. That is, appeals, as well as interlocutory appeals, would be taken to the court of appeals, with the right to seek review in the Supreme Court by petition for a writ of certiorari.[85] One of the sponsors of the bill, Senator Johnston, stated while introducing it on the Senate floor that the bill also provided for direct review by the Supreme Court of decisions in the district court in "the rare and important case when such review would be in the public interest."[86] Apparently what Senator Johnston meant by "rare and important" was such litigation as the *Steel Seizure Case*,[87] which was appealed to the Supreme Court. The procedure followed in that case was to have the circuit court of appeals stay the injunction granted against the government by the district court, whereupon the Supreme Court immediately granted certiorari. While the Supreme Court heard that suit without the benefit of a court of appeals review, the case was technically not appealed directly to the Supreme Court. Moreover, since cases of such importance occur most infrequently, it would indeed be rare when the Supreme Court would permit an appeal to be taken in that manner. The practical effect of that bill then would have been to eliminate direct review in the Supreme Court of many cases which are economically significant and have need of expediting, but are not of such a nature as to threaten the nation with an economic catastrophe. While it seems improvident to dump all government civil antitrust appeals in the Supreme Court's lap directly from the district courts, some antitrust cases do warrant expedition,[88] and to the extent that the proposal would have eliminated them from consideration, it would seem too harsh.

The fourth bill,[89] which was endorsed by the Department of Justice,[90] proposed to amend section 2 of the Expediting Act and followed closely on the heels of S. 1811. It would leave the three-judge provision of section 1 intact; consequently, if the Attorney General certified that the case was of general public importance before the entry of final judgment, then a three-judge court would be convened to hear the case. Under section 2, if the Attorney General or the district court, either on its own motion or on the application of a party, filed an expediting certificate at any time within thirty days

84. S. 1811, 88th Cong., 1st Sess. (1963).

85. 109 CONG. REC. 11911-12 (1963) (remarks of Senator Johnston).

86. *Ibid.*

87. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

88. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT 131 (1952); Solomon, *supra* note 63. This also seems to have been implied by Mr. Justice Harlan himself in his *Brown Shoe* opinion. 370 U.S. at 364 (1962) (separate opinion).

89. S. 1892, 88th Cong., 1st Sess. (1963).

90. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT 76 (1963).

after final judgment, an appeal from the final decision of the single district court judge would lie directly to the Supreme Court. But so long as neither the Attorney General nor the district court filed an expediting certificate, final and interlocutory appeals would lie to the court of appeals. This bill was not reported out of Committee and has not as yet been reintroduced in the 89th Congress. The Judicial Conference approved it, but suggested that it be amended to require the Attorney General to obtain leave of court in order to certify the case as one of general public importance,[91] thereby subjecting any right of direct appeal from the final decision of a single district judge to the discretion of the judiciary. As the bill last stood, however, the district judge had no such discretion.

IV. Conclusion

It seems clear that a number of antitrust cases are appealed directly to the Supreme Court which are not within the intended purview of the Expediting Act. Some issues which come before the Court involve disputes over procedural matters, while others merely raise questions of the correctness of findings of fact. These cases could be adequately reviewed by the court of appeals. On the other hand, some government civil antitrust cases will continue to raise questions of importance within the original spirit of the act; and for these cases a benefit to the public and considerable saving in both time and money to the parties can be realized by allowing expedition to a final determination. Considering the sparing use that is made of the three-judge district court provision, it seems reasonable to conclude that there is no abuse of discretion in its use.

These conclusions do not support an argument for repeal of the act; however, they do indicate that certain modifications might be beneficial. The necessary modifications seem adequately expressed in the last mentioned bill, S. 1892. Under this bill, because there is no automatic direct appeal to the Supreme Court, many government civil antitrust cases would be appealed through the courts of appeals, with full benefit of interlocutory appellate procedures. In those cases which are considered out of the ordinary and deserving of direct review in the Supreme Court because vital issues which may affect the nation's economy are involved, expedition procedure will be available.

The advisability of incorporating the amendment to S. 1892 suggested by the Judicial Conference is questionable. That amendment would vest absolute discretion for expedition in the hands of a single district judge, some of whom have seen few antitrust cases. Presumably the Attorney General's selection of cases to be brought is in the public interest, and he is arguably in a better position to evaluate

91. *Ibid.*

which will raise novel issues as opposed to merely routine enforcement matters. However, for reasons not completely altruistic, the Justice Department on some occasions may feel it desirable to slow down the ultimate determination of a case. The provision in S. 1892 permitting the district court either on its own motion or on the application of a party likewise to file an expediting certificate should counter-balance this potential advantage of the Justice Department.

Robert C. Bonges

APPENDIX

The following table shows the time intervals from the decision of the district court to the decision on appeal in the antitrust cases heard[1] and decided in the Supreme Court during the calendar years 1954-1963.

Case	Citation	Type of case				Length in months		
		Government Civil	Private	F. T. C.	Criminal	District Court[2] to Court of Appeals	Court of Appeals to Supreme Court	District Court to Supreme Court
	1963							
United States v. Philadelphia Nat'l Bank	374 U.S. 321	X						17
United States v. Singer Mfg. Co.	374 U.S. 174	X						13
Silver v. New York Stock Exch.	373 U.S. 341		X			10	13	23
White Motor Co. v. United States	372 U.S. 253	X						23
United States v. National Dairy Prod. Corp.	372 U.S. 29				X[3]			23
FTC v. Sun Oil Co.	371 U.S. 505			X		30	18	48
Pan Am. World Airways v. United States	371 U.S. 296	X						22
	1962							
Los Angeles Meat & Provision Drivers Union v. United States	371 U.S. 94	X						17
United States v. Loew's, Inc.	371 U.S. 38	X						23
Continental Ore Co. v. Union Carbide & Carbon Corp.	370 U.S. 690		X					N.A.[4]
United States v. Borden Co.	370 U.S. 460	X						16
United States v. Wise	370 U.S. 405				X[3]			12
Brown Shoe Co. v. United States	370 U.S. 294	X						31
Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.	370 U.S. 19		X					N.A.
United States v. Diebold, Inc.	369 U.S. 654	X						14
Poller v. Columbia Broadcasting Sys., Inc.	368 U.S. 464		X			17	15	32
FTC v. Henry Broch & Co.	368 U.S. 360			X				N.A.

APPENDIX (Continued)

Case	Citation	Type of case				Length in months		
		Government Civil	Private	F. T. C.	Criminal	District Court[2] to Court of Appeals	Court of Appeals to Supreme Court	District Court to Supreme Court
	1961							
United States v. E. I. DuPont DeNemours & Co.	366 U.S. 316	X						18
Tampa Elec. Co. v. Nashville Coal Co.	365 U.S. 320		X			17	10	27
Turpentine & Rosin Factors, Inc. v. United States	365 U.S. 298	X						6
Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.	365 U.S. 127		X			26	14	40
United States v. Parke, Davis & Co.	365 U.S. 125	X						6
Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.	364 U.S. 656		X			10	12	22
	1960							
FTC v. Anheuser-Busch, Inc.	363 U.S. 536			X		19	14	33
FTC v. Henry Broch & Co.	363 U.S. 166			X		12	18	30
Maryland & Va. Milk Prod. Ass'n v. United States	362 U.S. 458	X						16
United States v. Parke, Davis & Co.	362 U.S. 29	X						19
	1959							
Pittsburgh Plate Glass Co. v. United States	360 U.S. 395				X	10	8	18
FTC v. Simplicity Pattern Co., Inc.	360 U.S. 55			X		14	13	27
Melrose Distillers, Inc. v. United States	359 U.S. 271				X	7	8	15
Klor's, Inc. v. Broadway-Hale Stores, Inc.	359 U.S. 207		X					N.A.
United States v. Radio Corp. of America	358 U.S. 334	X						13
International Boxing Club v. United States	358 U.S. 242	X						18

APPENDIX (Continued)

Case	Citation	Type of case				Length in months		
		Government Civil	Private	F. T. C.	Criminal	District Court[2] to Court of Appeals	Court of Appeals to Supreme Court	District Court to Supreme Court
	1958							
Guerlain, Inc. v. United States	358 U.S. 915	X						17
United States v. National Malleable & Steel Casting Co.	358 U.S. 38	X						9
Northern Pac. Ry. v. United States	356 U.S. 1	X						21
Moog Indus., Inc. v. FTC	355 U.S. 411			X		19	14	33
FTC v. Standard Oil Co.	355 U.S. 396			X		16	20	36
Safeway Stores, Inc. v. Vance	355 U.S. 389		X			11	13	24
Nashville Milk Co. v. Carnation Co.	355 U.S. 373		X					N.A.
	1957							
Nationwide Trailer Rental Sys., Inc. v. United States	355 U.S. 10	X						27
New Orleans Ins. Exch. v. United States	355 U.S. 22	X						8
United States v. E.I. DuPont DeNemours & Co.	353 U.S. 586	X						30
Lawlor v. National Screen Serv. Corp.	352 U.S. 992		X			63	4	67
Radovich v. National Football League	352 U.S. 445		X					N.A.
FTC v. National Lead Co.	352 U.S. 419			X		35	14	49
FTC v. American Crayon Co.	352 U.S. 806			X				N.A.
United Liquors Corp. v. United States	352 U.S. 991	X						8
	1956							
Holophane Co., Inc. v. United States	352 U.S. 903	X						33
United States v. E. I. DuPont DeNemours & Co.	351 U.S. 377	X						30
United States v. McKesson & Robbins, Inc.	351 U.S. 305	X						35
	1955							
United States v. International Boxing Club	348 U.S. 236	X						12
United States v. Shubert	348 U.S. 222	X						13

APPENDIX (Continued)

Case	Citation	Type of case				Length in months			
		Government Civil	Private	F. T. C.	Criminal	District Court[2] to Court of Appeals	Court of Appeals to Supreme Court	District Court to Supreme Court	
	1954								
Moore v. Mead's Fine Bread Co.	348 U.S. 115		X					N.A.	
United Shoe Mach. Corp. v. United States	347 U.S. 521	X						15	
United States v. Borden Co.	347 U.S. 514	X						14	
United States v. Employing Lathers Ass'n[5]	347 U.S. 198	X						8	
Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.	346 U.S. 537		X					N.A.	
	TOTALS	31						17	Median Interval
			14			17	13	27	Median Interval
				9		19	14	33	Median Interval
					4				

1. This table includes within the antitrust cases which were appealed under the Expediting Act those cases in which the Supreme Court's decision merely consisted of sustaining a motion to affirm the trial court's decision. However, cases appealed under the Expediting Act which raised only questions of federal procedure were not included. *E.g.*, Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961) (time interval from district court to Supreme Court was 18 months); United States v. Procter & Gamble Co., 356 U.S. 677 (1958) (time interval from district court to Supreme Court was 21 months). With regard to non-Expediting Act cases, the table does not include those in which the Supreme Court merely denied an application for a writ of certiorari, nor does it include cases raising only questions of federal procedure. *E.g.*, Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

2. Or the Federal Trade Commission where appropriate.

3. This case was appealed directly to the Supreme Court under the Criminal Appeals Act, 18 U.S.C. § 3731 (1958).

4. The date of the district court's decision was not available. Consequently, it was impossible to determine the length of time required to appeal the case.

5. This case was tried and appealed together with United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954). For purposes of tabulation they are treated as one case.