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SOME ABUSES OF ANTITRUST PROSECUTION:
THE INVESTMENT BANKERS CASE

*Ralph M. Carson**

THE epochal decision of Judge Medina on October 14, 1953, in *United States v. Morgan*¹ has already been the subject of adverse criticism by the losing Government counsel and defense by an opposing lawyer.² Professor Steffen's grief at the ruin of his handiwork has led him into the impropriety of attacking with unwarranted epithet a thoroughly considered decision by one of the most eminent judges now sitting in our federal courts and into the more symptomatic fault of attributing to the new chief of the Antitrust Division political motivation in his decision not to appeal.³ He has the assurance to assert that the appeal which was not taken must necessarily have resulted in victory for the Government. While not able in his articles to devote much time to the merits, he felt it "seems to be true" that the Government actually made out a *prima facie* case;⁴ but on more satisfactory technical points he is sure that "the case must necessarily have been reversed on appeal."⁵

These technical points turn on a charge that the judge misapprehended Professor Steffen's pleading of the conspiracy, that he mistakenly failed to discriminate between "terms" and "means" as pleaded, and that he gave too much emphasis to the need of a unifying element in the conduct of the 17 defendants charged. The nicety of verbal distinction thus attempted by the critic con-

* Member, New York Bar.—Ed.

¹ (D.C. N.Y. 1953) 118 F. Supp. 621.

² Steffen, "The Investment Bankers' Case: Some Observations," 64 YALE L. J. 169 (1954), and Steffen, "The Investment Bankers' Case: Observations in Rejoinder," 64 YALE L. J. 863 (1955); Whitney, "The Investment Bankers' Case—Including a Reply to Professor Steffen," 64 YALE L. J. 319 (1955), and Whitney, "The Investment Bankers' Case: A Surrejoinder," 64 YALE L. J. 873 (1955). Professor Steffen drafted the complaint while at the Yale Law School (Trial Record 1796-1797, citing Bibliography of the Faculty in Dean's report, Sept. 1, 1948, p. 18), superintended the proceedings before the grand jury, and headed the Government staff for the civil case through the three years of pre-trial proceedings and during the trial until June 29, 1951.

The TRIAL RECORD, running to 23,962 printed pages, is cited throughout this article as "Tr." followed by the page numbers of that record.

³ Adverted to by Mr. Whitney in 64 YALE L. J. 319 at 344, n. 70, with the references. Judge Barnes, Assistant Attorney General in charge of the Antitrust Division, explained to Congressman Celler's Subcommittee of the Judiciary Committee on Antitrust and Monopoly Problems, May 13, 1955, that his decision with respect to appeal was a matter of judgment resting on the Supreme Court's respect for the determination of trial judges on issues of fact. Stenographic Minutes, pp. 525-527.

⁴ 64 YALE L. J. 169 at 193.

⁵ Ibid.; repeated in 64 YALE L. J. 863 at 871.

trasts sharply with the inability of the judge and defense counsel to pin down the Government staff to definition during the trial. It is sufficiently dealt with in Mr. Whitney's articles; and one feels confident that the ordinary legal mind in reading the critic will have a sense of horror that the compliance of businessmen with the law is to be measured by these word-exercises of a Byzantine logothete, resembling nothing so much as the single and double procession of the Holy Ghost in Gibbon's 66th chapter.⁶

But it may be doubted whether self-vindication is the prime object of the attack on Judge Medina. The probable end-result sought, consonant with a long endeavor on the part of certain academic circles, is to influence public opinion and particularly opinion in Congress. On May 13, 1955, Senator Douglas of Illinois, in testimony before Congressman Celler's Subcommittee on Antitrust and Monopoly Problems, revealed his susceptibility to Professor Steffen's kind of writing in this way:

"Now, I know that there has been a suit in the New York courts on this question as to whether the investment bankers were in restraint of trade.

"The suit went on for a long time, and I was not able to follow it in very close detail, but I have read a very slashing article by Professor Steffen on the conduct of that trial, and it raised serious doubts in my mind as to whether the decision was based on the weight of the evidence.

"The chairman [Celler]. And it is interesting to note, and I have not yet had an explanation—we may get it today—why an appeal was not taken from that decision.

"Senator Douglas. I would be much interested in that myself. . . .

"As I understand Professor Steffen's point it is that the judge—and he is undoubtedly a very honorable man—tried to break down every bit of evidence produced by the Attorney General, used analytical logic, so to speak, breaking up each part, saying that it by itself did not prove anything, and then said there was no proof, but refused to apply the principle of synthetic logic of seeing how the accumulation of specific

⁶ "The procession of the Holy Ghost from the Father alone, or from the Father and the Son, was an article of faith which had sunk much deeper into the minds of men; and in the sessions of Ferrara and Florence the Latin addition of *filioque* was subdivided into two questions, whether it were legal and whether it were orthodox. . . . It was agreed [in the Council of Florence] (I must entreat the attention of the reader) that the Holy Ghost proceeds from the Father *and* the Son, as from one principle and one substance; that he proceeds by the Son, being of the same nature and substance; and that he proceeds from the Father *and* the Son, by one *spiration* and production." ⁷ GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE*, 114 and 117 (1909).

factors, each one of which, perhaps, would not be determinative in itself, would build up the case as a whole.

"The Chairman. As a matter of fact, the judge in that case in my humble opinion, acted more like an attorney for the defendants than he did as a judge.

"Senator Douglas. Well, that thought occurred to me at times, but I did not quite dare to say it, Congressman Celler."⁷

This colloquy suggests it is time to set out the details in which the *Investment Bankers* case evidences the abuse of governmental power both in the unwarranted election to prosecute and in the oppressive conduct of the prosecution. This is the more opportune as the recent *Report of the Attorney General's National Committee to Study the Antitrust Laws* in its chapter on antitrust administration and enforcement says nothing about this central and basic evil in the law.⁸

1. *Pre-Complaint Proceedings*

In September 1945 the Antitrust Division served grand jury subpoenas for the production of documents relating to their financing on about 2,000 corporate and other business executives, according to news reports,⁹ although Professor Steffen later told the court that only 125 companies were affected (Tr. 9062). The subpoenas were most comprehensive, dealing with all transactions in securities of \$1,000,000 or more since January 1, 1920. The prospective defendants and doubtless other investment bankers opened their files to FBI search without subpoena. By this process from 100,000 to 200,000 separate documents were accumulated in the Government files.¹⁰ In January 1944 the Antitrust Division had summoned to Washington H. L. Stuart of Halsey Stuart & Co., an investment banker who had been in the business since 1895 (Tr. 13027), for questioning about a conspiracy among investment bankers (Tr. 14820). Stuart denied there was any conspiracy, but he or his associates over a period of years held with the Antitrust Division 100 conferences on the subject (Tr. 14823).

Halsey Stuart & Co. were not defendants in the projected case. Counsel for some of the 17 investment bankers who *were* conferred with the Attorney General on the subject of his proposed

⁷ Stenographic Minutes, pp. 486-488.

⁸ Report transmitted to the Attorney General, March 31, 1955, c. VIII. The case illustrates the soundness of the committee's conclusion that Sherman Act cases should be handled by the standard judicial process.

⁹ NEW YORK HERALD TRIBUNE, Sept. 19, 1945.

¹⁰ Hearing of March 9, 1950, p. 26.

charges in March and October 1947. Convinced of the error of the course the Attorney General was following, five law firms submitted to him a memorandum on the general charges proposed and a separate memorandum on the agreement in restraint of trade in securities asserted to have been made in conferences called by the New York State Superintendent of Insurance in 1941-1942. Counsel for the Investment Bankers Association, also charged by the attorney general as a lobbying organization, submitted a separate memorandum. In these memoranda counsel for the various proposed defendants laid out in general terms the facts about the business as ultimately found by the court six years later. It was pointed out, for example, that the 17 underwriters selected as defendants represented no recognizable line of demarcation, that they did not include some of the leading firms, that they did not constitute a ranked list of leaders in the business either for any year or for any average period, that they are completely separate and independent entities without cross-investments or common officers. Counsel for the Investment Bankers Association demonstrated by the statistics of the organization that among the 716 member firms the 17 proposed defendants played an inconsiderable role either on the Board of Governors or on the leading committees.

All this was to no avail. Professor Steffen's complaint was served October 30, 1947.

2. *The Pleadings*

In terms seemingly precise the complaint accused the 17 underwriter defendants of membership in an unlawful conspiracy since about 1915 to restrain and monopolize the securities business (par. 43) by agreeing not to compete among themselves in the merchandizing of security issues and to divide such merchandizing among themselves on a mutually satisfactory basis by five specified means, to eliminate the competition of others by eight specified means, to diminish the use of competitive bidding and other financing by four specified means, to frustrate competitive bidding and circumvent regulatory orders therefor by four specified means, to control the management and financial activities of issuers by three specified means, etc. (par. 44). Among the means embraced in the terms of the conspiracy was recognition of the claims of traditional bankers, allocation of participations under the concept of

historical position, and exchange of participations on the basis of reciprocity. Various designated "predecessors" of the defendants were described with the effect of bringing into the suit vanished underwriting houses such as J. P. Morgan & Co., the original Kidder Peabody & Co., Chase Securities Corporation, Harris Forbes & Co., Harris Trust & Savings Bank, The National City Company of New York, and Guaranty Company of New York. Defendants and their predecessors were charged with having invented the modern syndicate method of distributing securities in 1915 (par. 27), and the insurance agreement, alleged to have arisen at meetings held at the invitation of the New York Superintendent of Insurance in 1941-1942 among representatives of some defendant underwriters and of six insurance companies, was set up as an act in the performance of the conspiracy (par. 45C). Obedient to the source of complaint against the defendants, viz., unsuccessful competitors in Chicago and in Cleveland, the Government pleaders averred it to be a term of the conspiracy that the business of purchasing and distributing securities should be concentrated in a single market (viz., New York; par. 44A).

Defendants interposed separate answers on March 17 and 18, 1948 constituting a general denial.

3. *Pre-Trial Proceedings*

Judge Medina was designated on February 13, 1948 to preside at the trial and conduct all pre-trial procedures by the senior district judge on the application of the Government. He held extensive pre-trial hearings and made four separate pre-trial orders, of which Order No. 3 has particular significance. In the first order, made June 10, 1948 after three days of hearing, the court defined the conspiracy averred:

"(1) That the conspiracy, restraint and monopoly charged in paragraph 43 of the complaint relate exclusively to matters alleged in paragraphs 44, 45 and 46 of the complaint; *that all the terms of the alleged continuing agreement and concert of action complained of are those enumerated specifically in Subdivisions A, B, C, D, E, F, G, and H of paragraph 44; that all the acts and things relied upon to establish the forming and effectuating of the conspiracy are those specifically set forth in Subdivisions A, B, C, and D of paragraph 45; and that no express agreement is relied upon to establish said alleged conspiracy or any part thereof, but only*

a course of conduct from which the conspiracy may be implied or inferred."¹¹

Order No. 1 also provided for a committee representing defendants to deal with plaintiff's demands for admission of the genuineness of documents, for the service of such demands upon defendants at 60-day intervals, and for 51 interrogatories to be answered by plaintiff.

Plaintiff's answers to interrogatories, served September 13, 1948, followed the favorite procedure of swamping defendants with everything plaintiff had, without measure or discrimination. To the interrogatory requiring information about securities issues on which plaintiff would offer evidence at the trial, the Government listed 3,047 different issues extending back to 1899. To the interrogatory requiring the facts relied upon to show relationships giving certain defendants "domination and control" over the merchandizing of securities of certain issuers, the Government furnished 135 printed pages describing 294 alleged instances in addition to numerous cross-references. To the interrogatory demanding occasions relied upon to establish plaintiff's claims regarding the traditional banker concept, plaintiff obligingly furnished 149 printed pages describing 313 instances in addition to numerous cross-references. To the interrogatory requiring the instances when defendants secured the appointment or election of a director, officer or member of protective committee of an issuer to promote the interests of defendants' underwriting business (abandoned in part November 19, 1951, Tr. 10791), plaintiff furnished 150 described instances, with an appendix naming the directors, all of which ran to 132 printed pages, in addition to extensive cross-references. The interrogatory calling for a description of occasions where defendants used allied stockholders of issuers or financial institutions serving the needs of issuers to influence the underwriting business (abandoned in effect November 19, 1951, Tr. 10800-9) brought forth the equivalent of 47 printed pages containing 54 alleged instances. The interrogatory requiring the identifying of occasions on which defendants influenced or controlled the affairs of issuers through relations of a commercial bank (greatly reduced by amendment, April 8, 1952, Tr. 14742) brought a description of 96 instances running to

¹¹ Italics added. Notwithstanding Professor Steffen's recent attempted distinction between "terms" and "means" of the conspiracy, no protest from him against the second clause of this provision is of record in the case.

52 printed pages in addition to cross-references. To the interrogatory requiring description of the occasions on which defendants increased their security merchandizing business by promoting consolidations, mergers or the like (abandoned after the openings, Pre-Trial Order No. 3, April 9, 1951; also November 19, 1951, Tr. 10790), plaintiff responded with the equivalent of 39 printed pages reciting 118 alleged instances, over and above cross-references. The interrogatory demanding occasions when defendants formed buying groups in accordance with the concept of historical position brought forth 155 alleged instances occupying 63 printed pages in addition to three pages of cross-references. The interrogatory requesting the occasions on which defendants formed stand-by accounts to bid at competitive bidding brought a response occupying 126 printed pages and including 182 alleged instances.

In all, the 14 pounds of mimeographed paper which the Government tendered as its answers to the 51 interrogatories directed by Pre-Trial Order No. 1 ran to 1,899 printed pages occupying five ring binders. It was evident that the Government staff had thrown at the defendants everything they could scrape up, without selection or evaluation of any kind. The numerous instances cited were *either* paraphrases from single documents in disregard of the over-all situation involved *or* biased one-sided versions from informers, later proved erroneous wherever tested. Subsequent developments showed that none of the Government staff knew which of their Niagara of documents would be actually relied on at the trial. Much less had any of them measured the probative force of the documents to be selected, either severally or collectively.

By the time of the court's Pre-Trial Order No. 2, dated May 25, 1950, 27 pre-trial hearings had been held on which 15 motions of major import had been argued and decided; 10,640 documents selected by plaintiff from its capacious reservoir had been painstakingly authenticated by the defendants and printed at joint expense; 21 depositions had been taken or provided to be taken by plaintiff; 22 extremely comprehensive demands by plaintiff for admission of the authenticity of documents had been dealt with; and the court was ready to fix the case for trial in October 1950. Realizing the inadequacy of the statistical material on which plaintiff was proceeding, defendants had at their own expense and by a system of questionnaires procured a comprehensive and exact statement as to all important security issues during the

15-year period 1935-1949 at a cost of \$350,000, based on 36 volumes of issue data sheets each of 200 pages and 11 volumes of issue register lists.¹²

The burden imposed on defendants and their attorneys was crushing. For illustration, plaintiff's request for admissions dated January 23, 1950 made a demand on *all* defendants for admission of matters which the committee described as follows:

"The alleged facts appearing in a 17-page narrative statement covering various details during the period 1929 to date concerning the organization and financing of The Lehman Corporation; trading accounts participated in by The Lehman Corporation; relationship between The Lehman Corporation and Lehman Brothers; stockholdings of The Lehman Corporation in a number of corporations; transactions between The Lehman Corporation and other investment trusts; the organization and financing of General American Investors Co., Inc. and transactions between it and The Lehman Corporation; the organization and financing of Selected Industries, Inc.; the directorship personnel of Selected Industries, Inc., trading accounts participated in by Selected Industries, Inc.; the stockholdings of Selected Industries, Inc. in a number of corporations; the formation of American International Corporation; the personnel of the original directorate of American International Corporation."¹³

On the Government's application to force defendants other than that immediately involved to an admission with respect to this kind of demand, the Government's reasoning was disclosed:

"Mr. Bennett: Now, the Securities and Exchange Commission before the passage of the Act regulating investment companies, which was passed I believe in 1940, held a long series of hearings on the subject and came out with a report which I would say is two feet across when you put all the volumes together. Now, we took the investment trusts or investment companies which were controlled, as we understood it, or at least where there were connections with these defendants. We went into this report of the Securities and Exchange Commission and supplemented it by the information which we had marked for identification on the depositions."^{13a}

¹² Memorandum on Pre-Trial Order No. 2, p. 10; *United States v. Morgan*, (D.C. N.Y. 1950) 10 F.R.D. 240.

¹³ Report of Arthur H. Dean as Committee under Pre-Trial Order No. 1, March 1, 1950, Appendix G, pp. 15-16.

^{13a} Hearing of March 9, 1950, pp. 22-43.

"The Court: You see, we cannot argue everything in bulk. I would consider the first thing to persuade the Court about is where there is one defendant who had an investment company that he knew something about, and its investments and so on, how is it reasonable for me to compel or to take steps in the nature of a compulsion against defendants who concededly know nothing about that particular investment company?

"Mr. Bennett: Your Honor, may I, just for the sake of the record, say that we do not concede that they do not know. We feel that they do know in most cases.

. . .

"In other words, I say here we think with regard to a large part of these facts defendants other than Lehman Brothers, *because of their familiarity and their participation in the syndicates*, did have knowledge of the facts which we have alleged."¹⁴

. . .

"The Court: . . . I think right this minute that these are utterly unreasonable demands. They are all discursive and almost argumentative. I do not see why you put them in, and I am not quite sure but that there is something to be said for the contention of the defendants that they are oppressive.

"Mr. Bennett: Your Honor, I thought I had explained to you that what we were trying to do was to boil down this case. These are the contentions we think are facts.

"The Court: I know, but boil down the case by a great big, long—let us see how long this is. It is about ten pages, and it is the sort of thing a man might write as a brief.

. . .

"It is just a long discursive statement. I just cannot see that. Let us get to this other point. Why should these other people admit that? Why should they come in and in effect say, 'Well, it is true we are all conspirators and all did this together, and although we really did not have anything to do with this particular phase, why, we admit it?'

. . .

"This is an argumentative paragraph from beginning to end, and it doesn't seem to me that it is the function of an admissions procedure to get admissions of that character. But what we were talking about a moment ago is why should the other defendants who have had absolutely nothing to do with

¹⁴ Hearing of March 30, 1950, p. 190. Italics added.

Tri-Continental, may never have heard of it at all that I know, why should they be forced to make admissions?

"Mr. Bennett: Well, your Honor, may I ask you to turn the page and look at page 4 and you will see that Tri-Continental and Selected Industries, as has been admitted several times, are the co-owners of Union Securities Corporation, which is a defendant here.

. . .

"I say there isn't any question—I don't think there is any question; *I have heard it said time and time again by defendants*—that Tri-Continental and Selected Industries own Union Securities Corporation, which is a defendant here.

"Now, if you will look at page 4, in the middle of the page, you will see that this Tri-Continental Corporation's co-owner of Union Securities Corporation, Selected Industries, Inc., was organized and underwritten by Charles D. Barney, which we claim is the predecessor of Smith, Barney; Stone & Webster and Blodget, Inc., which is the other name for Stone & Webster Securities Corporation; Lehman Brothers, which is a defendant, Kidder, Peabody & Co., and Brown Brothers & Co., which we claim is a predecessor of Harriman Ripley & Co., Incorporated, the defendant Harriman Ripley & Co., Incorporated.

"So I say, your Honor, that *these other people do have considerable knowledge.*

. . .

"The Court: Well, if you only think of one at a time, I mean you get on one and you get off and onto another one. There is one. Let's concentrate on that. That is simple. That is clear. Now, why should the other defendants be forced to admit or deny? That is what I would like to know.

"Mr. Bennett: Your Honor, it is a public offering. *These gentlemen are in the securities business* and I certainly think they know when there is a public offering and who are involved as underwriters. That is their business, your Honor."¹⁵

This colloquy and many others that occurred in the 27 days of pre-trial hearings made it clear that Professor Steffen's staff were using their one to two hundred thousand documents and their 3,047 security issues as a reservoir from which to distil private conclusions concerning the securities business on the theory that the 17 investment bankers had a community of interest which

¹⁵ Hearing of March 30, 1950, pp. 213-217. Italics added.

must be conspiratorial. Thus one of the staff, in explaining to the court why he could not stop with authenticating 8,000 documents but must have two or three thousand more, said:

"For instance, we have documents that we must submit in regard to the community of interest that exists as a part of this conspiracy between the commercial banks and the investment bankers."¹⁶

To explain why the Government had to print as "evidence" 250 pages of affidavits of Robert R. Young filed in the 1938 injunction action of *Alleghany Corporation v. Guaranty Trust Company*,¹⁷ Government counsel said:

"Based on our investigation we feel that there is an existing monopoly and we have alleged it in the complaint. . . . Now we didn't make the monopoly. But there the monopoly is for us to prove. . . . In proving that monopoly we must create or build a structure that will show and demonstrate to your Honor that there is such a thing as a monopoly and a violation of the antitrust law. Now in building that structure it is going to take many timbers to build it. These documents are the timbers."¹⁸

This conception of the conspiracy as a synthesis by the Government staff from many thousands of disparate documents turned out in the development of the proof to be a correct description of the Government's case.

Defendants' attempt to get discovery of documents. In the belief that the mass of papers procured by the Government at public expense and through the grand jury process should be equally available to the defendants for rebuttal of the claims based on them, the defendants from December 1948 on applied to the court for discovery. This was strenuously resisted. Every ground that the Government staff could think of—sovereign immunity, the privilege of informers, attorney's work-product (consisting in the "arrangement" of documents), Attorney General Murphy's Order No. 3229 of May 2, 1939 giving confidential character to Department of Justice files, etc.—was used to defeat discovery. The application was pressed by defendants in five separate hearings over a period of 18 months, but met with successive denials due to the court's unwillingness to impede investigations. Upon a renewal of the application following the proceedings in *United*

¹⁶ Hearing of March 9, 1950, p. 28.

¹⁷ (D.C. N.Y. 1938) 23 F. Supp. 203, *affd.* (2d Cir. 1938) 97 F. (2d) 367.

¹⁸ Hearing of April 20, 1950, p. 295.

*States v. Cotton Valley Operators Committee*¹⁹ it was granted June 29, 1951, well after the commencement of plaintiff's evidence (Tr. 9073). The inspection which defendants were thus belatedly able to have of files collected by the Government from the Chesapeake & Ohio Railway Company, Halsey Stuart & Co., Otis & Co., and many others yielded numerous exhibits which attorneys for various defendants were able to use on cross-examination, although not felt by the Government staff to be relevant for their purposes.²⁰

In the meantime the authentication and printing of the Government's 10,640 documents continued. Included in the lot were 167 pages of excerpts from testimony given by Dillon Read representatives before the Securities and Exchange Commission in 1942, 150 pages of excerpts from 1939-40 issues of the magazine *Investment Banking*, 119 pages of Securities and Exchange and Federal Trade Commission reports on Gulf States Utilities and other companies, 112 pages of excerpts from a prospectus of Texas Eastern Transmission Corporation, and 112 pages of excerpts from a prospectus of Transcontinental Gas Pipeline Corporation.²¹ The expenses of this printing had run up to \$120,000 by March 1950.²²

Pre-Trial Order No. 3 was not signed by the court until not only these procedures were completed but full openings of the case had been made by numerous counsel on both sides. By the time of the openings the Government staff had sufficiently revised their notions of the case so that, of the 10,640 documents which they insisted upon authenticating, they had elected only 4,000 for tabulation in their outline of proposed proof provided for by Pre-Trial Order No. 2. Ultimately in its entire case plaintiff marked in evidence only 1,522 documents. Thus all the labor and expense upon the 9,118 documents printed, authenticated but not utilized, were wasted. Yet it is not open to a critic to assume that this grievous burden was imposed upon the devoted 17 out of governmental malice pure and simple. The explanation may again be that the Department of Justice presumed to prosecute

¹⁹ (D.C. La. 1950) 9 F.R.D. 719, affd. by a divided Court, 339 U.S. 940, 70 S.Ct. 793 (1950).

²⁰ An example among many is the pencil memorandum of William Wenneman made at the December 1, 1938 Chesapeake & Ohio finance committee meeting (Ex. MS-36, Tr. 11677), which demonstrated that Messrs. Stanley and Walker did not put in a bid for the pending bond issue, contrary to the contention of the Government and its witness, Robert R. Young.

²¹ Hearing of April 20, 1950, pp. 307-308.

²² Hearing of March 23, 1950, p. 156.

without adequate information or knowledge. Professor Steffen's principal assistant said in the pre-trial hearing of March 9, 1950, in opposing defendants' suggestion of a split trial (p. 62): "The main reason is we think it is premature at this point. Nobody knows what our case is."

4. *The Openings*

Judge Medina said in the memorandum of April 9, 1951 accompanying his Pre-Trial Order No. 3:

"Had I permitted the usual brief and formal opening statements, I do not see how I could have exercised any intelligent control over the trial. In any event, I encouraged counsel for both sides to indulge in a very wide latitude in presenting their respective versions of the facts and the law. The first opening statement began on November 28, 1950. The openings in all consumed sixty-six (66) days of the time of the Court; fourteen (14) counsel were heard, three (3) on behalf of the plaintiff and eleven (11) on behalf of various defendants; in all the openings and various colloquies between the Court and counsel and between the various counsel made a record of some five thousand, four hundred fifty-three (5,453) pages."²³

This opportunity to open an equity case to an acute and attentive judicial mind was one that alert counsel would embrace eagerly. At the outset, on November 8, 1950, the court made plain his purpose, viz., to get at once the clearest possible conception of what the conspiracy was claimed to be:

"The Court: I think there are going to be two things that I am going to be doing instinctively right from the beginning. One is . . . to be at all times alert to see whether the particular evidence is applicable only to one defendant or applicable generally to the others. And the other and perhaps more important thing that I am going to be alert to and all the time thinking about, is this idea of conspiracy, if there was a conspiracy. I must be thinking about that all the time, and I shall be. Whatever the outcome of that thinking will be, I am certainly not going to wait until we get through a year of trying the case and then think whether there was a conspiracy. I am going to be thinking about that right from the drop of the hat every minute of the time that we are trying this case."²⁴

²³ (D.C. N.Y. 1951) 11 F.R.D. 445 at 453.

²⁴ Hearing of November 8, 1950, pp. 47-48.

Mr. Stebbins of the Government staff invited the judge to say that he did not want "an exhaustive opening that would re-cover all of this material."

"The Court: I do not care how you do it as long as you get your side of the case into my head. That is what I want you to do from your opening.

"Mr. Stebbins: I take it from what your Honor has said that you would like to have a real living thumbnail sketch of all of our claims and how we intend to prove them so that you will have a sort of a guide or a ruler, as it were, by which to evaluate our evidence as it comes along, without going into a mass of detail —

"The Court: You may have to go into the detail. I can't tell you any more than that except that you have got to try to get me to understand your case, and I do not care if you take a week in your opening or any other time, as long as you get it into my head. That is all I want.

"Naturally, if you just come in and follow along with that brief, in a more or less formal and perfunctory way, that won't be doing me much good, because I can read it myself, although I do not guarantee to have that mass of documents all read before the opening begins, but I think it probably would be helpful to take some slightly different approach that would cut across that. But do it any way you want. . . .

"The forthright way for all of us to proceed is going to be better for everybody concerned, and if somebody thinks that I am just not getting something, I don't mind at all if they get right up and say so. I want that kind of talk.

"Mr. Stebbins: That is very gratifying to know, your Honor."²⁵

An independent reason which made extensive opening statements a matter of elementary fairness to the defendants is that at the commencement of the trial Government counsel handed up to the court four thick and misleading volumes, viz., a Trial Brief Part I (Summary and Analysis of Facts) comprising 458 pages; a Trial Brief Part II (The Applicable Law) comprising 81 pages; an Appendix B, Part I—Traditional Banker Charts of 609 pages; and an Appendix B, Part II—Historical Position Charts comprising 143 pages. As far as the facts of the case were concerned, these

²⁵ Id. at 48-49.

were stuffed with distortion and plain mistake.²⁶ In the openings of defense counsel, the validity of all these bulky books as to their version of the facts was thoroughly riddled; and that is the real reason for Professor Steffen's present criticism of the opening statements.²⁷ He, as well as his associates, Mr. Stebbins and Mr. Baldrige, had made openings to the court. While Mr. Baldrige at one point criticized the speeches of counsel for their length, he at another point praised the practice (Tr. 4427); and Mr. Steffen himself in delivering a rebuttal on April 2, 1951 said:

"Now, as your Honor knows, I came into these proceedings only about the middle of March, and I probably am not qualified to say much about these opening statements to your Honor. I assume they have been useful. While they have been much longer than any the Antitrust Division has had any part in heretofore, I hope they have proved to be valuable to the Court." (Tr. 5435)

It was not until after Judge Medina had signed his Pre-Trial Order No. 3 that Professor Steffen made formal objection to the length of the opening statements (Tr. 5584). The following colloquy then occurred (Tr. 5585):

"The Court: Do you think it is fair to wait until the opening statements are concluded and then object to the fact that they have taken place?

"Mr. Steffen: I think that there were objections in the course of the opening statements.

. . .

"The Court: How long a continuance do you desire in order to obviate this alleged error?

"Mr. Steffen: I do not want any. I am prepared to go right ahead with the evidence. . . .

"The Court: That objection is overruled and you are given an exception."

The real difficulty with the opening statements of counsel from plaintiff's point of view is one which cannot be avowed, viz., that they demonstrated conclusively that the Government lawyers did not know what they were talking about. It was made apparent that the "case" was nothing but a selection of phrases

²⁶ Illustrations: (a) Plaintiff inflated the percentage of negotiated underwritings attributed to the management of defendants by counting in full issues co-managed by non-defendants. (b) In listing the participants in underwriting groups to show "historical position" plaintiff systematically omitted non-defendants, whose presence would have shown the innocence of the practice.

²⁷ 64 YALE L. J. at 193-194 and 871 (1954).

from an enormous medley of documents having no internal relationship and evidencing no concert among the defendants; worse, that Government counsel could not answer questions about these documents. It was made apparent too that the Government counsel could not explain how the 17 defendants and no others were constituted conspirators by means of practices which all other investment bankers followed, that the Government's statistics about underwriting were basically erroneous, that Government counsel did not know the real meaning of the claim of successorship inserted in the complaint. When asked by the court which issuers the Government claimed the defendants controlled and which they did not, Mr. Baldrige could not answer (Tr. 1998):

"Mr. Baldrige: Well, that is something that will be unfolded.

"The Court: We can think about that?

"Mr. Baldrige: That is something that will come out in the evidence."

When asked whether the Government claimed Morgan Stanley & Co. to be the ringleader of the conspiracy, Mr. Baldrige said (Tr. 1977): "No, not up to this time"; and again: "I don't care to answer that just now."

Professor Steffen on the other hand did attempt in his opening statement to go into the evidence on some points and did so with disastrous effect upon his claim about the so-called Pink agreement. In 189 pages of exposition (Tr. 4921-5008, 5017-5117) of the Government's case on this transaction, he specified what an officer of the Northwestern Mutual Life Insurance Company would testify (Tr. 5033) and promised further oral evidence (Tr. 5025): "We have members of the insurance group who took notes and will testify rather clearly. We have a banker who may testify." The fact that, when the time came for proof, Government counsel ran away from this promise and refused to tender any witnesses whatever despite the earnest request of the court (Tr. 18914) makes extended opening statements as objectionable to an irresponsible prosecution as they are helpful for ascertainment of the truth.

5. *Pre-Trial Order No. 3*

Another reason why on April 26, 1951 the chief of the Government trial staff registered for the first time formal objection to the extensiveness of the opening statements is that they had led

the court, on April 9, 1951, to the formulation of his Pre-Trial Order No. 3, establishing a procedure for the receipt of evidence of conspiracy and imposing upon the plaintiff an obligation of disclosure which forever destroyed the possibility of the Government's fastening upon the defendants a synthetic conspiracy from disparate phrases in a miscellany of documents. Pre-Trial Order No. 3 is a procedural device of the first importance to a fair, orderly and responsible presentation of a conspiracy claim. It was protested against by the Government staff as soon as signed.

This order granted the application of the Government, made as a result of examining its proof in the light of the opening statements, to amend the complaint by (a) dropping three items of claim, (b) curtailing the proof on five other items, and (c) amending the description of the conspiracy. It also dealt with the attempted addition of 850 additional documents in the outline of proof. To curb the Government's tendency to beg the question by lumping all 17 investment bankers together in every statement the order required specification as follows:

"C(2) To avoid confusion, delay and unnecessary discussion counsel for plaintiff are hereby directed to refer to the 'defendants', 'they' meaning the defendants, and 'the defendant banking group' only when reference is intended to each and every defendant acting jointly; wherever reference is made to two or more defendants or defendant firms, but not all, the names and identity of such defendants or defendant firms shall be specified."²⁸

The order also made detailed prescriptions about the handling of evidence, recording of objections, etc., and fixed April 30, 1951 to begin the taking of evidence. But the salient clause was the provision putting on the Government the responsibility for connecting the evidence in support of its conspiracy claim, as follows:

"B(1) Proof, documentary and otherwise, which is admissible against some or all of defendants only in the event that a prima facie showing is made of combination, agreement or conspiracy in accordance with the requirements of controlling precedents, will be received subject to connection and motion to strike, upon condition that at the close of plaintiff's case and *prior to the making of motions to dismiss and argument thereon counsel for plaintiff shall state to the Court in detail and with appropriate references to testimony and exhibits: (a) the proofs which it is claimed make*

²⁸ United States v. Morgan, (D.C. N.Y. 1951) 11 F.R.D. 445 at 451.

out a *prima facie* case of such combination, agreement or conspiracy against all or some of defendants 'aliunde', that is to say independently of the items received as above stated subject to connection and motion to strike; and (b) such further discussion of the evidence as a whole as will fully disclose the theory of plaintiff's case and the contentions made relative to what it is claimed has been established *prima facie* against each defendant. Because of the complicated nature of the case this is deemed essential in the interests of justice as a preliminary to the making of motions to dismiss and argument thereon."²⁹

Provision was made for marking of exhibits received against all defendants (thus presumably constituting evidence *aliunde* of the alleged conspiracy) and separate marking of those received against one defendant only and not to be used against others until the *prima facie* showing of conspiracy had been made:

"(f) Exhibits shall be marked as follows:

"(i) Those received generally against all defendant firms, by the symbol 1-A and so on, followed by the printed pre-trial number. For example: Exhibit 1-A (477).

"(ii) Those received subject to connection and motion to strike, by the symbol 2-B and so on, followed by the initials of the defendant firm or firms (if any) against whom the exhibit is received generally and by the printed pre-trial number. For example: Exhibit 2-B (M S & Co.) (1522).

"(iii) Each of the defendants' exhibits shall be marked with the initials of the defendant firm offering the exhibit, followed by a number in sequence. . . . For example: Exhibit KL-1 (5843)"³⁰

After the completion of the Government's proof and before its connecting statement preliminary to defendants' motion to dismiss, Pre-Trial Order No. 3 was on December 9, 1952 amended so as to restate the foregoing provision and add the following:

"(b) . The order of presentation by counsel for plaintiff shall be first to state, with appropriate references to testimony, exhibits and other data which are part of the record, the contentions made relative to what it is claimed has been established *prima facie* against each defendant *seriatim*, completing such statement with respect to one defendant before proceeding to another, in order that the Court may be able, without excessive labor and within reasonable limits of time,

²⁹ Id. at 449. Italics added.

³⁰ Id. at 450.

to assess and evaluate such contentions and claims and the testimony, exhibits and data referred to. After all such statements shall have been completed, counsel for plaintiff shall demonstrate to the extent deemed necessary any similarities or conformities asserted to exist between the proofs with respect to different defendants, and put the parts of the so-called mosaic together, by presenting plaintiff's case as an integral whole."

It was these procedural provisions for the regulation and scrutiny of the Government's proof, based on the fundamentals of the law of conspiracy, which by preventing confusion and compelling clarity of statement brought about a self-demonstration of the emptiness and artificiality of the Government's case. Judge Medina explained Pre-Trial Order No. 3 with a memorandum on April 9, 1951.³¹ The discussion in this memorandum of the court's search for the unifying elements of the alleged conspiracy has attracted criticism from Professor Steffen.³² But a reading will show that the judge was merely emphasizing for the Government's benefit the degree of proof necessary to show a conspiracy:

"It is obviously my duty to keep the defendants in mind as separate entities until the plaintiff sustains the burden of proving the alleged combination and conspiracy.

"Because of the situation which I have just described I have hit upon an expedient, described in the annexed Pre-Trial Order No. 3 which will in no way hamper the plaintiff in the introduction of its evidence, but will serve to clarify the state of the proof before I hear and determine the motions to dismiss.

"Declarations of alleged co-conspirators made in furtherance of the objects of the alleged conspiracy will be received subject to connection and subject to a motion to strike. At the conclusion of the government's case-in-chief, argument on the motion to strike will be heard and at that time the burden will be upon the government to show a *prima facie* case of combination as alleged against each defendant from evidence *'aliunde'*.

"I have adopted this procedure because of the unusually complicated and involved factual issues presented, because of the scope of the charges, because of the number of defendants and because of the absence of any readily apparent

³¹ Id. at 452.

³² 64 YALE L. J. 169 at 175.

or explicable 'unifying element' or elements whereby the alleged co-conspirators may be brought together into a unit. This apparent absence of what I have called a 'unifying element' makes the factual issue of conspiracy or agreement one of the most crucial and complex in the case, and distinguishes this case, insofar as problems of proof are concerned, from every other anti-trust case which has been brought to my attention."³³

6. *The Trial April 30, 1951 to
May 19, 1953*

This enormous period of time was occupied by the plaintiff's leisurely presentation of documents, the examination and cross-examination of four witnesses tendered by plaintiff, and plaintiff's connecting statement pursuant to Pre-Trial Order No. 3. These operations illustrate on a great scale the defects of the Government's antitrust techniques.

(a) *Fragmentation of Proof.* As was recognized by Pre-Trial Order No. 1,³⁴ the Government based its conspiracy charge upon no express agreement but upon inference from a course of conduct. This was sought to be collected from a multitude of syndicate agreements, each embracing one or more defendants (or asserted predecessors of defendants) and a number of non-defendants; from 41 express agreements on various matters, each embracing one or several (but less than all) defendants; and from a multitude of phrases in miscellaneous documents created in a great variety of transactions, with non-defendants and non-conspirators participating. The Government had an elaborate outline of proof, annexed to Pre-Trial Order No. 3, pursuant to which the authenticated documents were classified.

The Government's procedure was to have eight lawyers by rotation present this proof, section by section according to the outline and defendant by defendant in order, by reading in the stipulated captions of the documents and also reading selected scraps from the 21 depositions. Apart from some attempt to trace the security issues of a few companies consecutively, there was no connection or sequence of any kind in the presentation. The alleged restrictive practices of the several defendants were sought to be proved by emphasis on isolated phrases in documents chargeable

³³ United States v. Morgan, (D.C. N.Y. 1951) 11 F.R.D. 445 at 454-455.

³⁴ June 10, 1948, quoted at note 11 above.

to each, *without any attention to whether or not the entire transaction from which the document emanated was competitive in character*. The Government's lawyers, in other words, bent their gaze exclusively on selected verbiage.³⁵ They sought to create the conspiracy by establishing a similarity of phrase between the documents or the deposition testimony of one defendant and the documents or deposition testimony of another, without regard to the nature of the underlying transactions; indeed, frequently in disregard of the competition inherent therein. Worse, the eight Government lawyers were each unacquainted (by and large) with the segments of the proof tendered by the others and could not respond to the court's questions about the relationship among them.

Thus, a nine-page document containing diary entries of Smith, Barney & Co. (Ex. 189-B [SB] [3333]) was introduced by the Government, Mr. Steffen said, "simply to show that E. B. Smith & Co. in their initial approach to the case said they had to go to Morgan Stanley" (Tr. 8364). The document, however, showed that Morgan Stanley did not get the Panhandle Eastern financing involved, but that successive issues went to different groups of investment bankers, including two non-defendants (Tr. 8362). It showed that the new president of Panhandle Eastern in November 1936 felt the financing was still open to the house submitting the best proposition (Tr. 8363). The court asked for information about this president but Mr. Steffen did not know (Tr. 8365). Again, after putting in evidence a letter by First Boston Corporation to Rochester Gas & Electric Corporation dated September 4, 1936 (Ex. 342-B [FB] [315]) stating that First Boston would not bid on capital issues, the Government attorney had to admit that within a few weeks First Boston headed an underwriting syndicate for the company addressed. The court naturally said (Tr. 9482): "So I am puzzled as to what you want me to infer from this."

The Government's explanation was (Tr. 9483):

"Mr. Buttle: Only that that was their point of view. . . . They say they are opposed to bidding for it. . . . I say as a matter of fact in many of these cases where we have documentation if you develop it further *you will find that there is*

³⁵ Production of a file of defendant Blyth & Co. containing 1937 correspondence with National Gypsum Company showed that the FBI investigators had looked only for documents containing selected phrases, omitting all others, with the effect of misrepresenting the nature of the transaction. Tr. 8889-8891, June 30, 1951.

competition. . . . The point is simply this, your Honor, that I am certainly not going to make an issue of this particular document.” (Italics added.)

The comment drawn from the court was of a kind repeated throughout the trial (Tr. 9483):

“Well, it is the sort of thing that various lawyers for one or another of the defendants told me in the very beginning was going to happen—that you would get documents with some little word or phrase in there that seemed helpful, and then barge ahead, utterly forgetful of the fact when you come to understand it as a whole it showed just the opposite. I don’t see why you keep doing it.”

This was fair warning. But the process of shredding the proof by words and phrases continued inevitably because the Government lawyers knew nothing else. In the plaintiff’s final connecting statement the Government attorney, describing the alleged agreement of defendants with the insurance companies as a result of superintendent Pink’s conferences, could not answer the court’s question whether defendant White, Weld & Co. had anything to do with it (Tr. 18914-5):

“Mr. Bennett: I haven’t gone into that proposition.

“The Court: All right.

“Mr. Bennett: Because I haven’t thought it was desirable to do it at this time, but I will be very happy to do it if your Honor requires.

“The Court: That is a tricky way of looking at this. You are supposed now to be showing me the case you have against each of these defendants, and if you just stand there and just touch on one or two little things . . . — you ought not to do that.

. . . .

“I have waited all this time for this mosaic to be built up to see what the Government has, and I don’t like this picking and choosing. . . .”

The record is full of this kind of thing. The Government counsel charged with the case (Professor Steffen left the staff in June 1951) had no course but to keep on as they were doing because the case bequeathed them allowed nothing else. Mr. Baldridge had confessed in the opening that the Government took no account of competition that failed to obtain the business (Tr. 4758).

(b) *Avoidance of Live Witnesses.* For the most part the Government were chary of witnesses. They did produce two minor ones and two of major importance. The latter were Robert R. Young and Harold L. Stuart. Each exploded the Government's claim in a different way, and when Stuart left the stand after a prolonged cross-examination the Government took no more chances with witnesses.

Young was called because of his record of antagonism to J. P. Morgan & Co. and his controversy over public sealed bidding with Morgan Stanley & Co., the former dating from his struggle to get control of Alleghany Corporation in 1938. Much of his testimony revolved about his campaign to impose upon railroad companies a method of financing at public sealed bidding, over the resistance of managements who preferred to negotiate their security issues with underwriters of their own choice. The resistance to *compulsory* sealed bidding by Morgan Stanley & Co., Kuhn, Loeb & Co. and others was made an article of charge by the Government on the puerile ground that, since "competitive bidding" includes competition, those opposed to it (as an undesirable mode of financing) had thereby ranged themselves against *all* competition; and on the Gilbertian thesis that the similarity of attitude in this respect on the part of defendant and nondefendant investment bankers indicated a combination *among defendants*. A great deal of the testimony, not really germane to the conspiracy issue in the case, dealt with the circumstances in which Young procured the sale of the Chesapeake & Ohio \$30,000,000 bond issue of December 1938 to Halsey, Stuart & Co. and Otis & Co., with the misstatements then made as to the defendants Morgan Stanley and Kuhn, Loeb having put in a "bid" for the issue (in reality they had not, and Professor Steffen now says it doesn't matter³⁶) and with a continuing campaign of partisan publicity by Young and others through a series of ten security issues concerning the original Chesapeake & Ohio transaction.³⁷ This campaign resulted in the imposition of compulsory competi-

³⁶ 64 YALE L. J. 169 at 189, n. 97 (1953).

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³⁷ Otis & Co., who as investment bankers had not received the participations they desired in underwritings headed by defendants, carried on this campaign with Young, Cyrus Eaton of that firm maintaining close communication with President Roosevelt (Ex. KL-12, MS-150A) for the purpose of bringing pressure on the administrative agencies. Senator Truman, in a Senate speech Jan. 15, 1940, was induced to espouse the Young-Eaton version of the Chesapeake & Ohio transaction [86 CONG. REC. 328 (1940)], of course without any knowledge of the circumstances.

tive bidding on the railroads by the Interstate Commerce Commission in 1941, and on certain utility companies by the Securities and Exchange Commission in 1944.

But the important thing about Young's testimony despite his obvious bias against certain defendants, was that he, as president of Alleghany Corporation, found no difficulty in getting bids on a proposed issue from various defendants (Tr. 11622, 11933, 12119). The conspiracy alleged by the Government did not seem to be operating during the time of Young's financial negotiations in 1938 and 1944. Moreover, although insistent upon imposing compulsory sealed bidding on others, Young selected for Alleghany Corporation the negotiated method of financing, because advised by Stuart that he could get a better price thereby (Tr. 11911, 11937, 12118).

Stuart's testimony was even more destructive of the Government's theories. Called as a witness because he had adopted the competitive bidding approach as a means of getting business after the Insull collapse had destroyed the large business he theretofore enjoyed on the negotiated basis,³⁸ Stuart in his extensive testimony on cross-examination showed conclusively that every financial method and syndicate device which the Government had charged against defendants as showing a conspiracy among them was widely practiced by Halsey, Stuart & Co. and other admitted non-conspirators. As a result Government counsel abandoned the charge of the complaint that defendants had invented the syndicate method (Tr. 13986).

After these experiences the Government called no more witnesses, preferring to rely on isolated phrases from a scattering of documents selected out of many thousands. None of the defendants was called to the stand, although selections were read from their depositions. The court's repeated requests for a witness to clarify a point (Tr. 10278, 14757, 14761) were disregarded. At Tr. 18914 the court said:

"I don't understand how, when you charge that Pink agreement implicating all the people that you did implicate in that charge, then you start making the proof and when I begin complaining and say I want a witness, I want one of the people who were there, I want to hear about this, you say

³⁸ Acting as investment banker of Samuel Insull, Stuart did not propose public sealed bidding for Insull company securities "because we had the business" (Tr. 13751).

Yes, your Honor, we will give you a witness, and then putting it off day after day, and then all of a sudden somebody comes in and says, Your Honor, we are going to rest; we will let the Pink agreement stand on what is in the record. Now that is stopping just as you get to the point where you were going to have a witness who would tell me what was agreed upon."

The court had signed a subpoena for Donald C. Slichter of Northwestern Mutual Life Insurance Company (Tr. 10929-30). Government counsel often promised to produce him to testify about the alleged Pink agreement (Tr. 12764, 12770, 12993-4), but on his failure to appear Government counsel claimed not to know that his testimony would have been favorable to the defense (Tr. 19236).

(c) *Evasive Presentation of Conspiracy.* Most striking was the changeable and devious presentation of the alleged conspiracy. As pleaded in the complaint it was a definite and tight combination resting on deference to the so-called traditional banker, allotment of participations on the basis of historical position, and the reciprocation of business among the defendants. But the very opening statements showed that the continuity of relationships on which the Government depended did not really exist, and this was conceded by Government counsel (Tr. 4755). Although described in the complaint as a term used by defendants (par. 22), "traditional banker" appears to have been originated by counsel for the Securities and Exchange Commission in the TNEC inquiry (Tr. 8475), not by defendants; and finally, Government counsel claimed that it did not matter whether defendants used the term or not (Tr. 20700). The self-defeating nature of the concept was shown by the concession that, if the traditional banker was in a shaky position, defendants "would go in . . . and compete for the business" (Tr. 8025). Where an issuer came to a defendant, said Mr. Steffen (Tr. 8448), "we have never contended that they would not take the business in such circumstances."

What the Government concession ultimately boiled down to was that defendants would compete for business where they separately judged that another investment banker did not have a "satisfactory relationship" with the issuer (Tr. 7847). It was sought to build a tissue of similar phraseology among defendants by asking a half dozen out of the 17 whether they would go after

business of an issuer whose relationship with another investment banker was "satisfactory." The answers varied, and there were actual instances of defendants competing in disregard of an apparently satisfactory relationship with another investment banker.

The Government staff shamelessly manipulated the word "satisfactory" to create the appearance of conspiratorial action by certain defendants, just because it is a word of elastic meaning and furnishes an automatic escape in respect of any competition which might turn up. Such competition would not under this concept have availed defendants because it would show the prior relationship by defendants not to have been "satisfactory." The semantic device was based on circular reasoning, as one defendant pointed out.³⁹ But in this way Mr. Steffen was enabled to reconcile with his theories the startling competitive fact of Morgan Stanley's taking away the Dominion of Canada financing from First Boston in 1936 (Tr. 8583): "Whether or not there was a satisfactory relation or the Dominion itself felt there was a satisfactory relationship with the First Boston is simply a matter of conjecture at this time."⁴⁰

This flight from the original charge was enough in itself to dispose of the case, since it was conceded that the case must stand or fall on the "traditional banker" claim (Tr. 10433). But Government counsel also asserted that the traditional banker evidence did not in itself prove the conspiracy (Tr. 9345, 9481), and referred to the claims about historical position and reciprocity. Yet on examination of all the Government's evidence on these points, they also disappeared. It was formally conceded that participations in underwriting groups are accorded for purely business reasons (Tr. 1835, 20753) and that claims to underwriting participations on the basis of so-called historical position were also made by non-conspirators (Tr. 10432, 10719) and did not violate the Sherman Act (Tr. 10521). Cyrus Eaton and H. L. Stuart, not charged by the Government as conspirators, asserted rights to underwriting participations on the basis of historical position (Exs. MS-92, MS-76, B1-65; Tr. 10592-3, 16088). The

³⁹ Harold Stanley at Tr. 8418: "That is what I meant to say, because if he is satisfactory how can anybody else get it?"

⁴⁰ This was June 20, 1951. In its connecting statement Jan. 21, 1953, the Government took the same line (Tr. 19269-71).

third element of the alleged conspiracy, reciprocity in the exchange of business, was said by Government counsel in their opening to be general among the defendants (Tr. 135), but in the proof the keeping of any records even remotely reflecting reciprocity was shown as to only nine of the 17 defendants (Tr. 10768). As finally formulated the charge of reciprocity was nothing more than the use of records of past mutual business to get future business, and was admitted to be merely neutral and not illegal (Tr. 10830, 10834, 10957, 11148).

The break-up of the Government's paper case of matched phrases is nowhere better illustrated than in the original description of the conspiracy as starting with the Anglo-French Loan of 1915. This was the position taken in the Government's answers to interrogatories served in 1948, being based in part on a statement of Mr. George Whitney (whose association with J. P. Morgan & Co. ran back to 1916) in the TNEC inquiry in 1939. In pre-trial proceedings the Government expressed an intention to call Mr. Whitney as a witness;⁴¹ but the notice of taking of his deposition, which they gave in April 1949, was withdrawn on the eve of his testimony, doubtless to prevent its being available to defendants in the presentation of plaintiff's case. During the trial, when requested by the defense to call Mr. Whitney as a witness on a point in issue, the Government staff declined to do so (Tr. 12940-2). The Anglo-French Loan of 1915 remained for a time the inception of the supposed conspiracy (Tr. 6581), was then the subject of equivocation by Mr. Steffen (Tr. 6590), was treated by the court as still in the case at the end of plaintiff's proof (Tr. 18916), but was in effect abandoned during its connecting statement (Tr. 19282).

In shaping and re-shaping their diminishing claim of conspiracy, the Government lawyers successively jettisoned timber after timber of the ideal construction originally envisaged.⁴² The justification and propriety of various defendants' fight against the imposition of compulsory competitive bidding by administrative agencies was conceded (Tr. 11817-8, 11887, 15497), and yet their similarity of attitude in that respect was made an article in the accusation of conspiracy even though investors, issuers and other

⁴¹ Hearing of December 7, 1948, p. 76.

⁴² Page 373 *supra*.

investment bankers not conspirators opposed compulsory sealed bidding for the same reason (Tr. 12388, 12376). Sinister allusions to a "gravy train," employed by Government counsel in their opening (Tr. 273), were finally agreed to be out of the case (Tr. 19109). And so was the claim that defendants controlled issuing companies (Tr. 9492, 12126). The charge as to placing representatives of defendants on boards of directors of issuers was conceded not to be a term of the conspiracy (Tr. 10010, 10017, 11538), although claimed to be a means of preserving the conspiracy (Tr. 10017-8), whatever that means. On November 19, 1951 the Government voluntarily dismissed the case as to the Investment Bankers Association (Tr. 10775), thus vindicating the representations made in vain by its counsel to the Attorney General four years before. The symptomatic claim as to concentration of the investment banking business in a single market was quietly abandoned at the same time (Tr. 10790).

Yet in a blind and dogged way the Juggernaut rolled on. At the very end of the case Government counsel came to the decision (after long hesitation⁴³) to name Morgan Stanley as the "master mind" or "leader" of the asserted conspiracy (Tr. 19354-5), although conceding that they had "no specific, direct evidence against Morgan Stanley & Co. in connection with any specific issue" (Tr. 19250). The whole thing, so far as they were concerned, was sheer surmise based on business pre-eminence (Tr. 19251, 19260). Government counsel found not a thing wrong with Morgan Stanley getting a lot of utility financing (Tr. 19297). With respect to the charge of price maintenance in syndicate agreements, the evidence conclusively showed that Morgan Stanley had abandoned all provisions to that effect in 1938, and plaintiff declared their position in this regard to be unique (Tr. 19409). This ultimate decision of the Government strategists to accuse as the head of the conspiracy just that underwriting firm which was conspicuous in conducting its business on the merits, which was among the most successful, and which had been the most determined in defending the liberty of corporate management against compulsory sealed bidding, was the consummate touch that reduced the case to hash.

⁴³ Page 378 *supra*.

(d) *Phraseology and Semantics.* The Government case abounded in misuse of the semantic values of words. Examples are the treatment of "competitive bidding" and "satisfactory," discussed above. And necessarily out of the voluminous documentation available the Government staff were able to draw scattered phrases that suggested some restrictive practice. These they generalized without scruple, against the evidence. An example is the term "proprietary interests," which appeared in a memorandum of September 30, 1920, prepared in the Boston office of the old Kidder Peabody & Co. in relation to percentage participations of New England sub-underwriters in American Telephone and Telegraph financing (Ex. 859-B 466). One of the Government's four witnesses, J. R. Chapin, testified that this phrase was used only in the Boston office of the old Kidder Peabody and referred only to New England participations in American Telephone financing alone (Tr. 12816-7, 12874). Chapin was competent to speak, having been since 1910 an employee and during 1928-31 a partner in the old firm which went into liquidation in 1931. Yet the word "proprietary" is taken up into the complaint (par. 45A[4]) as denoting a general restrictive practice agreed among all defendants.⁴⁴

A second example is the memorandum of July 27, 1935 in which a Kuhn Loeb partner recorded himself as saying that his firm "did not want to poach on their [Edward B. Smith & Co.'s] preserves" (Ex. 117-B [KL] 135). This too is taken up into the complaint as a term of agreement among all defendants (par. 45A[1]) embodying a general "ethic not to compete." Yet the evidence before Judge Medina, adduced by the Government itself, showed in the clearest way that the 1935 financing of Armstrong Cork Company, which this memorandum concerned, attracted competition among four of the defendants, including Kuhn Loeb & Co. The phrase about poaching on preserves was

⁴⁴ In this Professor Steffen may have followed others. Such a use occurred in the Public Utility Division report to the Securities and Exchange Commission Dec. 18, 1940, which influenced the commission to adopt Rule U-50 imposing compulsory sealed bidding for certain utility securities. Another occurred in a student note written on the competitive bidding controversy in 50 YALE L. J. 1071, n. 20 (1941). Both were quite erroneous, as shown by the evidence before Judge Medina. Both were based on the partisan and one-sided proceedings of the Temporary National Economic Committee. The latter and the Public Utility Division Report as well, together with other writing of this kind, have managed to introduce error into a leading text like DEWING, THE FINANCIAL POLICY OF CORPORATIONS, 5th ed., 1953. See volume 2 at pp. 1043, 1044, n. 7.

addressed by the Kuhn Loeb partner to a would-be "finder" in an effort to have this agent bring an Armstrong Cork senior executive into the Kuhn Loeb office, as part of their campaign to get management of the financing.

These and the other verbal tags used by the Government are exhaustively discussed in the court's able opinion in their context which usually shows competition. In an ocean of documents such scattered phrases can always be found. They were not honestly appraised by the prosecution.

(e) *Misleading Presentation.* The Antitrust Division increased the burden on the court because of their handling of the case in the way described, by a method of presentation which in many points was positively misleading. Thus counsel systematically employed the word "caretaker" in the description of 1935 railroad financing of issuers formerly clients of J. P. Morgan & Co., in order to insinuate an understanding that Morgan Stanley would later take over the business, although admittedly⁴⁵ no such word appeared in the evidence. Again, in 31 court days of oral summation and in 526 pages of closing briefs, plaintiff made virtually no mention of examples of competition shown in scores by various defendants in derogation of the Government theory. Another illustration was counsel's garbling of the defendant Stanley's statement, "There is also competition between investment bankers seeking new clients" (Ex. 192-B [MS] 925) by omitting the word "also" in order to argue a concession by Stanley that competition existed *only* at that point (Closing Brief, Part I, p. 43; see Tr. 22286-90). Perhaps worst of all was the statement (Closing Brief, Part I, p. 3) that Part II ". . . will demonstrate that a showing of conspiracy has been made by a *preponderance* of the evidence" (*italics added*) followed by a discussion confined to scraps of evidence that contained the Government's key words or phrases and remaining silent on the great mass of countervailing evidence. This was on the pretext that all evidence in the plaintiff's case that did not support the plaintiff's theories was "evidence relating solely to matters of defense" (Closing Brief, Part II, p. 1)—a shabby device indeed and one which ran flatly contrary to

⁴⁵ Letter of July 16, 1953 from Richard B. O'Donnell, Chief, New York office of the Antitrust Division, to Ralph M. Carson.

the court's ruling on the precise point at the close of plaintiff's case and was conceded by Government counsel themselves to be erroneous (Tr. 18648-50).

Of a piece with this last device was the conduct of the attorneys of the Antitrust Division, throughout their so-called connecting statement of 31 court days, in ignoring sedulously and persistently every scrap of evidence favorable to the defendants. Their connecting statement thus became an anthology of phrases, useless to the court except as a demonstration that the issues would be evaded by the plaintiff to the very end. The opportunity to use Senator Douglas's "synthetic logic" was vigorously rejected by every Government lawyer.

(f) *Alleged Price Maintenance.* The complaint alleged that defendants unlawfully maintained prices through their underwriting agreements. A bundle of 1,143 separate agreements used in 505 separate underwritings was put in evidence by Government counsel as Exhibit 41-A (Tr. 6388). The charge based on this exhibit was leveled as an inseparable part of the general conspiracy which Government counsel said would not be changed (Tr. 1526-7); but at the end of the case an application was made by them to amend the complaint so as to set up price maintenance through syndicate agreements as a separate and independent conspiracy (Tr. 15671-9). This change of heart was due to the fact that the Government's witness, H. L. Stuart, not asserted to be a participant in the general conspiracy, employed price maintenance clauses and thought them indispensable (Tr. 14043, 14312-4, 14432).

The motion to amend, although favored by most of the defendants, was properly denied by the court because of the confusion that it would unavoidably engender, on the enormous record before him.⁴⁶ The court's discussion of the price-fixing charge in the syndicate system,⁴⁷ although labeled as by way of dictum⁴⁸ in view of his findings on the charge of conspiracy, has great value. In concluding that the fixed-price type of public offering of new securities gives no offense to the Sherman Act, the court ranged

⁴⁶ *United States v. Morgan*, (D.C. N.Y. 1953) 118 F. Supp. 621 at 685-686; Tr. 20904-6.

⁴⁷ 118 F. Supp. 621 at 683-699.

⁴⁸ *Id.* at 686.

itself with the administrative agency charged by Congress to oversee the securities market. Ever since 1945 the Securities and Exchange Commission had been in disagreement with the views on the subject of the Antitrust Division, and the complaint in the *Investment Bankers* case was filed with knowledge by its authors of the adverse opinion on the price-fixing charge which the commission recorded in the Public Service Company of Indiana case.⁴⁹

7. *Consent Decree and Politics*

The accumulating enormous expense to which these dilatory and wasteful procedures put the defendants (who were not like the Antitrust Division able to draw from a bottomless purse furnished by the taxpayers including the defendants) rendered consent decree a continually pleasing mirage. It is the habit of the Antitrust Division to keep this possibility before the eyes of prospective defendants. The present assistant attorney general in charge of the division points out the advantage of a consent decree in removing the danger of treble damage suits. He also observes: "Consent settlements may, in addition, cut down the peptic ulcer rate among corporate executives by avoiding the publicity of a protracted public trial. . . . In some instances, this publicity, largely avoidable in a consent settlement, may prove as damaging as the remedy decreed."⁵⁰

In so massive and costly a case as this, the prospective victims necessarily considered whether a negotiated decree was feasible, i.e., one in which the defendants should be bound in the future not to commit unlawful acts which they denied they were committing in the present. But it was quickly made plain that no such alternative was open. The terms of peace included provisions directed to render impossible the manner in which the underwriting business was being currently conducted by the proposed defendants while leaving free all other underwriters who operated in the same manner.

Litigation was inevitable. But in the conduct of the litigation the wasteful and oppressive methods above outlined kept constant pressure on defendants to surrender their economic liberty so

⁴⁹ Exchange Act Release No. 3700, June 13, 1945.

⁵⁰ Hon. Stanley N. Barnes, in *UNDERSTANDING THE ANTITRUST LAWS* (Practicing Law Institute) 135 (1955).

as to arrest the financial drain upon them. These methods approximated the procedural pattern which one finds in Franz Kafka's *The Trial*.

Now that the litigation has ended upon terms which cast such serious doubt (to say the least) upon the justification of the suit originally, the attempted return of the controversy to a congressional committee is worth a moment's attention. As with many ambitious antitrust suits, this one had an origin in partisan politics. The record carries many references to presidents, senators, commissioners with whom unsuccessful competitors of one or another defendant lodged charges as colorful as inaccurate. The complaint, when filed, was employed for partisan purposes. A Democratic presidential contender treated it as "evidence" for purposes of a speech in the Senate.⁵¹ The Attorney General cited it liberally in an address November 15, 1949 to the American Finance Conference in Chicago, to show how the Administration was working to protect small business from the effects of the alleged conspiracy. He told his auditors "The case is set for an early trial." The case not being set for trial at all, the defendants on March 9, 1950 applied to have it set down for April 3, only to meet with the objection that the Government would not be ready until some 3000 more documents were authenticated.⁵²

Now much of the elaborate documentation which so confused the Government staff and befogged the record came from the congressional investigations that have dealt with financial practices at frequent intervals in the past 40 years. Indeed the doctrine embodied in the complaint can be traced to the successful polemic of Louis D. Brandeis, in 1914, entitled *Other People's Money*, which in turn was based on hearings conducted in 1912-13 by the Pujo Subcommittee of the House Committee on Banking and Currency, 62d Congress, 3d Session.⁵³ In this and in the many subsequent investigations by congressional committees alone, witnesses were denied the protection of counsel, and the endeavors

⁵¹ 96 CONG. REC. 8017 (June 1, 1950).

⁵² Hearing of March 9, 1950, p. 34.

⁵³ Telford Taylor points out that counsel to this committee, the late Samuel Untermyer, dominated it completely. TAYLOR, *GRAND INQUEST* 63 (1955). In part 25 of the proceedings (pp. 1831-2) is an interesting example of how this resolute examiner directed H. P. Davison away from his proposition that J. P. Morgan & Co. frequently acted to strengthen its competitors.

of the committee staff to base a thesis on a one-sided presentation were not controlled by any corrective evidence or by cross-examination. Hence much misinformation and misdirected legislation.⁵⁴

Judge Medina's masterful and comprehensive opinion marks the first occasion in the financial history of this country in which conclusions as to the conduct of the securities business as such have been based upon observance of the customary judicial guarantees of fairness and accuracy, viz., cross-examination, confrontation of witnesses, the hearsay rule. It sets a standard which both congressional investigative staffs and the Antitrust Division might well use as a corrective to the long process of systematic misinformation that led up to the filing of the complaint.

8. *Some Conclusions*

A. The *Investment Bankers* case was a bold attempt to put into effect unfounded doctrinaire views as to how the public issue business should be conducted, by subjecting the defendants to punishing labor and expense as the alternative to an acceptance by them of the unjustified restrictions of a negotiated decree which would have brought about permanent regulation of the industry through the Antitrust Division.

B. The abuse of the conspiracy concept which the prosecution employed can be effectively checked by the differential marking of exhibits and the requirement of a final connecting statement by plaintiff, which Judge Medina provided in his Pre-Trial Order No. 3. This procedure is an essential aid to justice in a conspiracy case of any size.

C. The attempted flooding of court and defendants with documentary material is still a favored practice of antitrust staffs⁵⁵ which justifies two remedies. One is the imposition upon plaintiff of

⁵⁴ Former President Truman in his current volume of memoirs points out that his vote in the Senate in favor of the disastrous Neutrality Act of 1937 was due to his being misled by the report of the munitions investigation conducted by Senator Nye. TRUMAN, *YEAR OF DECISIONS* 153, 189-190 (1955). The political value of the Nye-Clark investigation at the time is that it also was an attack upon J. P. Morgan & Co. for their activity as fiscal agents of the Allies in this country in 1915-16.

⁵⁵ In the United Shoe Machinery case, Judge Wyzanski's order of March 10, 1950 complained of 4600 exhibits comprising hundreds of thousands of pages as to which, said the court: "It is plain from the Government's brief, from the fact that no single Government counsel in the more than two years that this case has been pending has read more than a fraction of the exhibits, and from the magnitude of the task that the

the cut-off date suggested by *United States v. Oregon State Medical Society*⁵⁶ and related rules of procedure elaborated in the Judicial Conference Report,⁵⁷ in the American Bar Association Committee's report on practice and procedure in the trial of antitrust cases (1954), and in Chapter VIII, section 5 of the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955). A second reform badly needed is statutory provision for recovery by the successful defendants from the Government of their costs of defense.

D. The *Investment Bankers* case and some others indicate that the greatest need in antitrust prosecution is a higher professional standard of responsibility and decision in both the selection of cases and the presentation of evidence. The only hope of cutting these conspiracy cases down to size, said Judge Medina, "lies in the exercise of a sound discretion by the Department of Justice."⁵⁸ At various points in the trial he called attention to the oppressive effect of the protracted, pointless accumulation of documents in combination with plaintiff's continued unwillingness to take a position, abandon a hopeless contention or clarify its theory of proof (Tr. 9055, 12990, 12994, 18912, 18914). He felt that such procedure, if followed in even a few cases, would lead to a breakdown in the administration of justice in this country.⁵⁹ Those who participated in the case felt that neither the Attorney General nor his assistant in charge of the Antitrust Division (of whom there were three during the pendency of the case) exercised any effective control over it. There was no flow of command from the top to the staff, apart from a few months' appearance in the case of the Chief of Civil Litigation for the Division following the earnest remonstrance of one of the defendants' attorneys to the assistant attorney general in charge.

The effect of the administrative break-down in the Department of Justice evidenced by the *Investment Bankers* case is to put

Government does not expect this or any other Court even to look at— not to say study—all or even a large part of these exhibits." See further Judge Wyzanski's description in the final opinion of the "unforgivably unselective tactics pursued by the Government" in that case. *United States v. United Shoe Machinery Corp.*, (D.C. Mass. 1953) 110 F. Supp. 295 at 314, *affd.* 347 U.S. 521, 74 S.Ct. 699 (1954).

⁵⁶ 343 U. S. 326, 72 S.Ct. 690 (1952).

⁵⁷ 13 F.R.D. 62 (1951).

⁵⁸ 118 F. Supp. 621 at 827.

⁵⁹ Hearing of April 13, 1950, p. 242.

in the hands of the trial staff letters of marque and reprisal against legitimate business, valid for the duration of the voyage, without check or direction from the supposed masters of policy. The entire body of antitrust law suffers in repute from these abuses in the machinery of enforcement.