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Antitrust Administration and Enforcement

John T. Chadwell
Member, Illinois Bar

ANTITRUST ADMINISTRATION AND ENFORCEMENT

*John T. Chadwell**

THE importance of the nation's antitrust policy requires that administration and enforcement powers and techniques be equal to the huge task of effectively safeguarding competition. The recommendations of the Attorney General's Committee represent a statesmanlike effort to balance the need for effective enforcement with the need for the preservation of fairness and the conservation of time and resources in antitrust litigation. Some of the recommendations will undoubtedly engender heated controversy; others seem relatively uncontroversial.

Many individual topics are dealt with in the *Report* of the committee and space does not permit comment upon all of them. The following discussion is confined to what would seem to be the most important aspects of the committee's work on administration and enforcement. The section of the *Report* is divided into four parts, and the comments made here follow the same organization: (1) The Department of Justice; (2) The Federal Trade Commission; (3) Related Jurisdiction of the Department of Justice and the Federal Trade Commission; and (4) Private Antitrust Suits.

A. *The Department of Justice*

Of the three sources of antitrust enforcement (Department of Justice, Federal Trade Commission and private litigants), Department of Justice proceedings command the most attention in the *Report.* Armed with the right to invoke the grand jury in Sherman Act cases and to call forth the full equity powers of the court in both Sherman and Clayton Act cases, the department possesses enormous powers of investigation and prosecution. The procedures under which it initiates investigations and prosecutes litigation necessarily merit the most careful scrutiny. The *Report* deals with the functioning of these procedures at their successive stages.

1. *Antitrust Investigations*

If there is to be antitrust enforcement, both the prosecutor and the prosecuted have a stake in adequate investigative techniques. Insuf-

* Member, Illinois Bar.—Ed.

ficient investigative powers for the prosecutor may frustrate enforcement. But equally great is the danger, as the committee notes, that poor investigation may result in the ill-considered filing of suits which would not be brought at all if the prosecutor possessed the facts. Thus a "futile trial" may occur, "exhausting the resources of the litigants and increasing court congestion."[1] Although such abortive use of law suits is a hazard in all kinds of litigation, it is a peculiarly dangerous one in the antitrust field with its notoriously protracted and expensive trials. Consequently both government and industry have a common interest in the investigative powers and procedures of the Department of Justice.

The question is whether the department's investigative powers are presently sufficient, or whether changes are needed. The committee points out that the availability of the grand jury for criminal proceedings under the Sherman Act now gives the department ample powers for a full investigation.[2] As a civil investigator, however, the department theoretically has no greater pre-complaint investigative powers than any private litigant. It possesses none of the civil pre-complaint powers enjoyed by its sister enforcement agency, the Federal Trade Commission.[3] It must rely upon the voluntary cooperation of those under investigation, upon information obtained from third persons, and upon its own investigative ingenuity, without benefit of compulsory process. Cooperation is most often forthcoming.[4] This

[1] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, March 31, 1955, p. 344 (hereinafter referred to as REPORT, followed by the page number).

[2] "A federal grand jury is perhaps the most powerful inquisitorial body in a free country." Nitschke, "Procedure in Antitrust Investigations," 1950 UNIV. ILL. L. FORUM 593 at 604. On grand jury proceedings in antitrust cases, see Wadmond, "Investigation," A.B.A. Antitrust Section Proceedings, Aug. 18-19, 1954, 32 at 42; Hollabaugh, "Development of an Antitrust Case," A.B.A. Antitrust Section Proceedings, April 1-2, 1954, p. 14 at 18.

[3] The Federal Trade Commission Act states that the commission may require reports under oath (§6), may have access to and the right to copy corporate documents (§9) and may compel the testimony of witnesses and the production of documents "relating to any matter under investigation" (§9), 15 U.S.C. (1952) §41 et seq. These powers have been characterized by the United States Supreme Court as comparable to those of a grand jury, United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357 (1950). See Babcock, "Legal Investigation," A.B.A. Antitrust Section Proceedings, April 1-2, 1954, p. 157 at 158: "This combination of fact finding power represents the broadest power available to any agency of the government."

[4] A dissenting member states that not more than 10% of those who are asked for data refuse to cooperate, REPORT 348. See TIMBERG, THE ANTITRUST LAWS FROM THE POINT OF VIEW OF A GOVERNMENT ATTORNEY 32 (1949): ". . . . defense counsel, in the majority of cases, pursue the path of voluntary cooperation." See also Nitschke, "Procedure in Antitrust Investigations," 1950 UNIV. ILL. L. FORUM 593 at 595. On voluntary cooperation generally see Wadmond, "Investigation," A.B.A. Antitrust Section Proceedings, August 18-19, 1954, p. 32 at 37.

is not always so, however, and at times without first trying other avenues, the department has taken the lawful though objectionable expedient of using the criminal grand jury process to investigate its prospective civil case.[5]

The committee strongly disapproves of use of the grand jury where criminal proceedings are not contemplated on the ground that this is a perversion of the grand jury system and "'debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality."[6] On the other hand, it states that this type of resort to the grand jury has been forced upon the department by lack of any adequate pre-complaint civil discovery alternative.

To meet these problems, the committee proposes legislation authorizing the attorney general to issue a "Civil Investigative Demand" upon corporations, partnerships or associations compelling the production of documents. The documents demanded (correspondence and other business records), would have to be "relevant to particular antitrust offenses stated to be under investigation," and the demand would have to "describe the records and data sought with reasonable specificity."[7] A Justice Department custodian would be established to preserve the documents and they would be available for use only for the pending investigation, for submission to a grand jury or for ensuing Antitrust Division or Federal Trade Commission proceedings. The district courts would be vested with jurisdiction to order compliance with the demand, or to modify or set it aside upon a showing that the demand is unreasonable in scope, irrelevant with respect to the specific offenses under investigation, or inadequate in its description of the material required. The demand could apparently be served on any corporation, partnership or association, whether itself suspect or not, but it apparently could not be served on an individual.

The proposed "demand" would be limited to documents and would not be available to compel the attendance and testimony of persons. The committee registers its disapproval of any subpoena powers that would permit the summoning of witnesses by the attorney general for interrogation under oath or generally require production of

[5] It seems improbable that any of the following huge recent civil cases, all of which began with grand jury investigations, were ever seriously intended as criminal prosecutions: United States v. E. I. du Pont de Nemours and Co., (D.C. Ill. 1954) 126 F. Supp. 235; United States v. Morgan, (D.C. N.Y. 1953) 118 F. Supp. 621; United States v. Armour & Co., complaint filed Sept. 15, 1948, dismissed without prejudice (D.C. Ill. 1954) CCH TRADE REG. REP., 10th ed., ¶66,117.

[6] REPORT 345.

[7] REPORT 346.

documents except within the limits defined in the proposal. Such power, the committee says, would be comparable to the "administrative subpoena" used by the Federal Trade Commission and other regulatory agencies and would be "alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary."[8]

It is not readily apparent to the present writer how the Civil Investigative Demand proposal of the committee differs, other than in degree, from the "administrative subpoena" which the committee so strongly dislikes. Of course, the exclusion of the right to call witnesses is a substantial difference. But in most government antitrust cases, documentary evidence is the backbone of the complainant's case and testimony, especially of the defendant's own officers and employees, plays a distinctly secondary role.[9] Given the documentary power, it would seem that the Department of Justice, for most purposes, would as a practical matter be put in a position approximating that of the Federal Trade Commission. Nor does the requirement of "relevance" in the proposed demand seem more than a minor limitation. It would be an unimaginative prosecutor indeed who could not state the "specific antitrust offenses under investigation" with sufficient breadth to insure production of all of the documents he could hope to use.

The proposed demand lodges what would amount to an important subpoena power in an executive officer. Whatever the safeguards intended by the proponents of such a grant of executive inquisitorial power, there would seem to be little to prevent the evolution of this investigative weapon into a virtual civil counterpart of the grand jury or of the Federal Trade Commission, without the special safeguards attached to those institutions. In the hands of an unrestrained prosecutor, this amount of personal power could readily fall into abuse and become an instrument of harassment.[10]

The committee's goal of taking the grand jury out of the civil antitrust arena is highly laudable. But there is no guarantee that this would result from the proposal.[11] Even if the Civil Investigative

[8] REPORT 345-346.

[9] See Nitschke, "Procedure in Antitrust Investigations," 1950 UNIV. ILL. L. FORUM 593 at 596; HAMILTON AND TILL, ANTITRUST IN ACTION, T.N.E.C. Monograph No. 16, 49-50 (1941). In its case in chief in United States v. E. I. du Pont de Nemours and Co., (D.C. Ill. 1954) 126 F. Supp. 235, the government called only two witnesses, but introduced over 1,300 documents, A.B.A. Antitrust Section, REPORT OF COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES 105 (1954).

[10] "Several members" dissented from the committee recommendation for reasons similar to those advanced in this article. REPORT 348.

[11] Cf. the views of one committee member who objected to the proposal because he saw it as a step to curtail the use of the grand jury. REPORT 348-349.

Demand were not in itself an objectionable extension of power, there is little assurance that its existence would "end the necessity for utilizing the grand jury process in civil antitrust investigations."[12] Although the attorney general might perhaps feel under some moral obligation to avoid the use of the grand jury in a clear case, he may reasonably be uncertain at the beginning of the investigation as to whether the ultimate proceeding should be civil or criminal or both.[13] And in any case, it would not appear to be sound technique to let the execution of legislative intent depend upon a moral obligation not written into the law at all. The proposal does not insure correction of the evil which it seeks to correct. Instead it launches a new and unduly extensive addition to the already great investigative powers of the department.

The grand jury has undoubtedly been misused in the past. But it would be better to correct such misuse by legislation directly dealing with the problem. This proposal does not do that. Nor is it, on the other hand, vitally needed by the department. On balance, therefore, it would seem preferable to defer the creation of this extraordinary subpoena power in an executive officer at least until less drastic possibilities have been exhausted.

2. *The Decision to Proceed*

The *Report* observes that "the burdens of antitrust proceedings on all parties are generally so severe that litigation should be contemplated only after investigation discloses a probable offense and in a civil case, only if the Department, after evaluation of all probable defenses, is convinced that effective relief is obtainable."[14]

[12] REPORT 347.

[13] See, e.g., the statement of government counsel in the "soap" case, United States v. Procter & Gamble Co., 14 F.R.D. 230 at 233 (1953). According to the court, counsel stated that the grand jury was employed to secure "determination as to what action should be taken to enforce those laws through criminal proceedings, civil proceedings, or both." For discussion from the point of view of a government attorney, see Hollabaugh, "Development of an Antitrust Case," A.B.A. Antitrust Section Proceedings, April 1-2, 1954, p. 14 at 19-22.

[14] REPORT 349. The record of government victories in antitrust cases in the past has been sufficiently spotty to suggest that the "probable offense" standard suggested by the committee has not always been observed. For figures, see HAMILTON AND TILL, ANTITRUST IN ACTION, T.N.E.C. Monograph No. 16, Appx. A-F (1941). Cf. the recent report of Assistant Attorney General Barnes: In the fiscal year 1954, the Antitrust Division brought to a close 48 civil and 18 criminal actions. 32 of the civil cases were disposed of by consent decree. Of the 12 which were litigated, the government won six and lost six. Four civil complaints were apparently dismissed by the government during the year. Of the 18 criminal cases closed, 17 were disposed of by *nolo contendere* or guilty pleas. Barnes, Address, A.B.A. Antitrust Section Proceedings, Aug. 18-19, 1954, 22.

The *Report* then discusses standards that should be applied by the department in determining whether to institute criminal or civil proceedings or both.

Criminal Proceedings. The Sherman Act is basically cast in the form of a criminal statute. Whether or not this was in keeping with the kinds of violation in the contemplation of the draftsmen of 1890, the steadily increasing economic emphasis of the act has rendered the criminal prosecution less and less appropriate. Yet despite a steady trend away from business conduct of the kind which could reasonably be dubbed "criminal" in any realistic sense, the popularity of the criminal antitrust prosecution has continued unabated. From 1890 to date roughly half of all antitrust actions instituted by the Department of Justice have been criminal prosecutions.[15]

The committee might well have recommended the outright abolition of the criminal prosecution as an outmoded device for modern business regulation.[16] But the *Report* avoids any direct discussion of this problem, and only urges restraint in the use of the criminal prosecution. The great difficulty often confronting a businessman who attempts to determine in advance whether his projected actions will run afoul of the Sherman Act is properly stressed. And the recommendation is made that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade."[17]

The committee's appeal to enforcement authorities to exercise a reasoned discretion in the use of the power of criminal prosecution is certainly sound. This sort of executive restraint has not always been in evidence. Far too many indictments have been returned in areas where the law was unsettled or where the economic complexities of the

[15] See Cahill, "Must We Brand American Business by Indictment as Criminal?" A.B.A. Antitrust Section Proceedings, Sept. 17-18, 1952, 26 at 58. Slightly more than half of the cases instituted under the present administration since March 1953 have been criminal cases. See summaries in CCH TRADE REG. REP., 10th ed., ¶66,070 et seq.

[16] See Cahill, supra, note 15. Cf. HAMILTON AND TILL, ANTITRUST IN ACTION, T.N.E.C. Monograph No. 16 (1941) p. 81: "Yet, as the matter stands today, the criminal action is the law's most effective sanction." See also Berge, "Remedies Available to the Government under the Sherman Act," 7 LAW AND CONTEM. PROB. 104 (1940). On the trial of criminal antitrust cases, see Duncan, "The 'Big Case'—When Tried Criminally," 4 WEST. RES. L. REV. 99 (1953).

[17] REPORT 349. Two members recommended that the law be amended "so as to make criminal only acts of clear, certain and predatory violations of the law, and that the balance be left to civil relief, governmental and private." REPORT 353. The committee rejected this proposal as "impracticable." REPORT 351.

case were such that trial in the atmosphere of a criminal indictment was highly improper.[18] The *Report* specifies several such examples of abuse of the criminal process.[19]

The *Report* quotes and generally endorses a statement of policy made to the committee by the present assistant attorney general in charge of the Antitrust Division stating that criminal prosecutions are now limited to (1) price fixing, (2) cases of specific intent to restrain trade or monopolize, (3) boycotts or other predatory practices, and (4) cases involving a second offense. The statement adds, however, that "the Division feels free to seek an indictment in any case where a prospective defendant has knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons."[20]

Apart from the rather ambiguous significance of the last-quoted sentence and the committee's caveat that "a second offense need not warrant indictment," this statement of policy, if adhered to, should lay the groundwork for a substantial administrative limitation upon future criminal proceedings.

One additional word of caution not made by the committee seems warranted. Even where the law and the facts are such as to justify indictment of a corporation, the criminal process should be used most sparingly against its executives and employees. The harm that indictment brings to the individual may be irremediable even by subsequent dismissal or acquittal.[21] Good conscience should place the prosecutor under the strongest moral sanction to avoid planting the stigma of indictment upon the individual unless his participation in the violation has been clear, substantial and intentional.[22]

In past years, the department has sometimes seemed more interested in the indictment of large numbers of individual defendants than in

[18] From 1890 to 1951, the government won only a little more than half of the criminal antitrust cases which actually went to trial. Duncan, "The 'Big Case'—When Tried Criminally," 4 WEST. RES. L. REV. 99 at 100 (1953). This record strongly suggests that the use of criminal process in many of these cases was improper. It is true that a high percentage of the criminal cases never go to trial but end in *nolo contendere* pleas; but a good many of the latter pleas have doubtless been made by defendants who might well have won on trial but could not stand the enormous expense of a contest, Duncan, supra, at 108.

[19] REPORT 351.

[20] REPORT 350.

[21] See Cahill, "Must We Brand American Business By Indictment As Criminal?" A.B.A. Antitrust Section Proceedings, Sept. 17-18, 1952, p. 26.

[22] Section 14 of the Clayton Act states that a criminal violation by a corporation "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation. . . ." 38 Stat. L. 736 (1914) 15 U.S.C. (1952) §24.

their conviction. Sweeping criminal charges have been leveled at many more individuals than the department could possibly have hoped to convict under even the most favorable circumstances. In the *Madison Oil* case,[23] for example, a total of fifty-six individuals were indicted. Only five were ultimately held properly convicted, with ten others pleading *nolo contendere*. In another case, the indictment alleged violations in connection with the activities of a commodity exchange in upstate New York.[24] Some of the indicted individuals had not been members of the Exchange, were not employees of any corporation that was a member, and as it subsequently developed, had been indicted merely because their names had been entered in an Exchange minute book as social visitors! These individuals were ultimately noll prossed, but not until they had incurred the expense of employing counsel and had suffered the embarrassment of newspaper publicity.

In other cases, important nationally known executives have been indicted and later acquitted or dismissed because there was little or no evidence of their personal knowledge of or responsibility for the violative corporate conduct.[25] Experience indicates that it is very rare that more than a relatively few executives of a large corporation are ever sufficiently closely identified with offending corporate acts to warrant their individual indictment, and it should be the policy of the Antitrust Division to be even more careful in selecting individuals for indictment than in determining in the first instance whether the facts warrant indictment at all.[26]

Criminal and Civil Remedies. For criminal proceedings, the committee majority recommend an increase of the present maximum fine under the Sherman Act from $5,000 to $10,000.[27] A minority rec-

[23] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940).

[24] United States v. Kraft Cheese Co., (D.C. N.Y. 1942) Case No. 641, CCH, FEDERAL ANTITRUST LAWS: 55 individuals, 3 corporations and 1 trade associaton were indicted. The indictment was noll prossed as to all but 4 defendants, who pleaded *nolo contendere*.

[25] See, for example, United States v. General Motors Corp., (7th Cir. 1941) 121 F. (2d) 376: 4 corporations and 19 individuals were indicted; the corporations were held, but all of the individuals were acquitted or dismissed. In United States v. St. Louis Dairy Co., (D.C. Mo. 1948) 79 F. Supp. 12; Case 918, CCH, THE FEDERAL ANTITRUST LAWS, two companies and six individuals were indicted; the companies were found guilty, but the individuals were all acquitted. See also summary of criminal cases in Duncan, "The 'Big Case'—When Tried Criminally," 4 WEST. RES. L. REV. 99 at 116-121 (1953).

[26] In the past few years, the policy of the Antitrust Division has apparently become more careful in this respect. For example, in the recent case of United States v. Kansas City Star Co., (D.C. Mo. 1955) CCH TRADE REG. REP., 10th ed., ¶66,062, ¶66,162, one corporation and only two individuals were indicted; even so, one of the individuals was later dismissed.

[27] REPORT 352.

ommend an increase to $50,000, the amount proposed by Attorney General Brownell and embodied in a bill now pending in Congress.[28]

While a fine of $5,000 may be of no moment to a large corporation, it may be a heavy penalty for an individual executive or employee, particularly since it is not a deductible expense for federal income tax purposes.[29] Any dollar ceiling in excess of the present maximum could work a grave injustice in the latter case while it would not constitute a significant difference in the former. Therefore, it is somewhat doubtful whether any increase in the criminal fine is really called for. Also it is the fact of indictment and conviction that frequently constitutes the real penalty.[30] Further, the evidence of recent judicial attitudes suggests that there is no need for an increase. The *Report* points out that the average fine actually imposed by judges in all cases in the past eight years has been only $2,600, there being numerous fines of only $500 or less. As stated earlier in this article, the criminal prosecution as a means of business regulation should be de-emphasized; a radical increase in the criminal penalty might have the opposite effect. Under the circumstances, the committee's recommendation is entirely adequate.[31]

The only civil remedies discussed are the most drastic ones—divorcement, dissolution and divestiture.[32] The committee points out that in only twenty-four litigated cases throughout the 65-year history of the Sherman Act have the courts entered decrees for these forms of relief, and as might be expected, twenty of those cases were merger or

[28] H. R. 3659, 84th Cong., 1st sess. (1955), increasing the penalty to $50,000, has passed the House at this writing and has been referred to the Senate Judiciary Committee, CCH TRADE REG. REP., No. 19, April 7, 1955, p. 3. President Eisenhower's Economic Report to the 84th Congress recommended that the maximum fine be raised "substantially." Attorney General Brownell in letters to the Senate and House asked for an increase to $50,000, stating that the deterrent effect of the present maximum $5,000 fine against a large corporation is "almost negligible except for the stigma of conviction." CCH TRADE REG. REP., No. 13, Jan. 27, 1955, p. 2.

[29] Burroughs Bldg. Material Co. v. Commissioner of Internal Revenue, (2d Cir. 1931) 47 F. (2d) 178; Great Northern Ry. Co. v. Commissioner of Internal Revenue, (8th Cir. 1930) 40 F. (2d) 372.

[30] The majority observed that ". . . . the deterrent effect on a respected businessman of any criminal indictment cannot be ignored." REPORT 352. At another point, two members pointed out: "The stigma of indictment tends to be the real punishment." REPORT 353, quoting Former Assistant Attorney General Wendell Berge.

[31] It should be noted that $5,000 is not always the maximum penalty assessable against a given defendant. In American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946), the Court upheld fines of $15,000 imposed on each defendant under separate counts of conspiracy in restraint of trade, monopolizing, and conspiracy to monopolize; the three counts all rested on the same facts; total fines in the case were $255,000.

[32] See also the discussion of remedies in the Patent section of the REPORT, pp. 255-259.

close-knit combination cases.[33] The *Report* quotes from the recent *Timken* case that since "divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available."[34]

This "judicial restraint" is firmly approved by the committee, and with good reason. Surgery, whether medical or antitrust, is inherently a remedy of last resort. The risks attending it, the difficulty of its execution and the shock which it inevitably brings all require that it be used with the utmost caution. All other less drastic methods of competitive restoration must be first considered. The committee urges the Antitrust Division to seek these remedies only if the tests of clear necessity, practicability and basic fairness are met. And the division is advised to consider the effects of a possible resultant disruption upon the industry involved, its markets and the public needs in time of peace and war. It is emphasized that such an appraisal "seems a prime responsibility of any antitrust enforcement agency."

A few members attack the Supreme Court's *Timken* opinion for its "solicitude" for the "right of amalgamation"[35] and label the majority as "even hostile to the breaking up of monopolies when they have been proved illegal."[36] There would seem to be no basis whatever for this characterization of the *Report*. In the very few cases in which an outright illegal monopoly has been found to exist, the courts have taken the necessary steps, and the *Report* does not suggest that anything different should have been done.[37]

[33] REPORT 354. On these remedies generally, see Oppenheim, "Divestiture as a Remedy Under the Federal Antitrust Laws—Economic Background," 19 GEO. WASH. L. REV. 119 (1950); Timberg, "Justifications for Divestitute," id. at 132; Van Cise, "Limitations on Divestiture," id. at 147. Brown, "Injunctions and Divestiture," A.B.A. Antitrust Section Proceedings, Aug. 18-19, 1954, 129 at 138. Cf. Adams, "Dissolution, Divorcement, Divestiture: the Pyrrhic Victories of Antitrust," 27 IND. L. J. 1 (1951).

[34] Timken Roller Bearing Co. v. United States, 341 U.S. 593 at 603, 71 S.Ct. 971 (1951).

[35] The implication of the dissent seems to be that the committee approved the refusal of the Court to order divestiture in the Timken case. The committee approved the general language quoted above in the text, but at another place in the *Report* the committee states that the "obvious remedy should have been dissolution" in the Timken case. REPORT 36. See Adelman, "General Comment on the Schwartz Dissent," 1 ANTITRUST BULLETIN 71 at 77 (1955).

[36] REPORT 357.

[37] See REPORT 354. And see the discussion of §2 of the Sherman Act in the REPORT, p. 43 et seq.

3. *Consent Settlement Procedures*

Settlement is a much-desired goal in any kind of litigation. In antitrust it is of unusual importance. To the government it means greater economy and broader enforcement, and to the defendants it may mean an opportunity to avoid a protracted expensive trial attended by unfavorable publicity and potentially to be followed by treble damage litigation.[38] The *Report* notes that from 1935 to date 72 percent of the civil actions brought by the government were terminated by consent, emphasizes the need for workable procedures, and recommends several methods for their improvement.

The *Report* endorses the use of negotiations in advance of filing of a complaint. The Antitrust Division has recently experimented with this approach and the present head of the division has stated that by this method he hopes to "promote flexibility and ease compromise in the process of decree negotiation."[39] A complaint may harden the controversy and deter settlement. And time and money may be consumed in trial preparation and preliminary court proceedings before settlement is reached. The new procedure is a good one and deserves support.

The committee criticizes the established practice of the department in requiring defendants to submit the initial draft of a consent decree in settlement negotiations and recommends that the department revise this practice in the future by submitting an initial draft "in response to a good faith request by defendants." The reason for the present policy apparently stems from the fear of the department that it will be accused of threatening or starting litigation to force a settlement. Perhaps it has accordingly been thought that the initial step in formalizing negotiations by submitting a draft decree must be taken by the defendants.[40] But as long as criminal proceedings are not used to coerce civil settlements, the department would be above criticism in submitting the initial draft as recommended by the committee. The committee's

The dissenting members recommend the creation of a new agency to be called the "Federal Free Enterprise Commission" to be granted some very great powers and to take some powers from the Federal Trade Commission and the attorney general. This suggestion would merely further complicate the already somewhat anomalous situation of two existing enforcement agencies and was rightly not approved by a majority of the committee.

[38] See Barnes, "Settlement by Consent Judgment," A.B.A. Antitrust Section Proceedings, April 1-2, 1954, p. 8; Horsky, "Settlement," id. Aug. 18-19, 1954, p. 102.

[39] Barnes, supra note 38, at 12.

[40] See Berge, "Remedies Available to the Government Under the Sherman Act," 7 LAW AND CONTEM. PROB. 104 at 108 (1940).

proposal if adopted would avoid guesswork by the defendants as to what the department is really interested in, and would shorten negotiations and decrease expense. It should be adopted.

4. *Trial*

The *Report* deals only briefly with four general issues concerning the conduct of trials. It recommends (1) that one judge should be assigned throughout a given case for all purposes; (2) that the issues to be tried be defined with as great particularity as possible before trial with the use of pre-trial conferences, motions for more definite statement, interrogatories calling for statement of the issues and pre-trial statement of the issues as a prelude to extensive use of discovery; (3) that the *Oregon State Medical Society* opinion[41] be the guide in limiting the proof of events long since past; and (4) that certain types of issues be segregated and tried separately in the interest of efficiency.

These and many other trial problems are more fully treated in the Judicial Conference *Report on Procedure in Anti-Trust and Other Protracted Cases*[42] and in the report of the American Bar Association Anti-Trust Section Committee on *Practice and Procedure in the Trial of Anti-Trust Cases*.[43] The suggested assignment of one judge to a given case for all purposes would seem to be elementary good sense in these complex cases and it is standard practice in many districts. The full use of devices in advance of trial to particularize the issues, if fairly done, may help considerably in reducing time and expense and in facilitating a wise decision. And the segregation of certain issues for separate trial is sound procedure.[44]

The treatment which the *Report* gives to the problem of limiting the period of time prior to the filing of the complaint as to which proof may be made, however, would seem to deserve special comment here. The committee recommends that in all civil proceedings, including treble damage suits, the *Oregon State Medical Society* opinion "should be the guide where the proof offered by either party reaches back more than a reasonable number of years."[45] There follows the statement

[41] United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690 (1952).

[42] 13 F.R.D. 62 (1951).

[43] REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION (1954). See generally the bibliography at pp. 58-60 of that report.

[44] On pre-trial problems, see Chadwell, "Pre-Trial," A.B.A. Antitrust Section Proceedings, Aug. 18-19, 1954, p. 52. On trial problems, see Day, "Trial," A.B.A. Antitrust Section Proceedings, Aug. 18-19, 1954, p. 65.

[45] REPORT 364. The *Report* recommends that its guides be used also in criminal proceedings, where appropriate.

that "if that case's teaching is not followed by trial counsel, the court should by pretrial order limit the proof" in accordance with certain guides set forth in the *Report*, and that "in appropriate cases, a pretrial order should fix a cut-off date for proof."

The Oregon State Medical Society decision is certainly authority that "archeology" and "ancient history" should be cut to the bone.[46] But the opinion itself offers little or no "guide" for procedure in future cases. The proof of past misdeeds of the defendants from 1936 to 1941 was in the record in that case and the proofs were closed before the court rejected this old evidence as irrelevant to the claim for present injunctive relief. Thus the expense and time involved in defending against stale evidence had been incurred, and the potentiality of confusion of the legitimate issues to the prejudice of the defense was already serious. It will be impossible to know in advance of trial whether counsel will follow the "teaching" of this case. But if a meaningful limitation of proof is to be accomplished, as it certainly should be in many cases, procedures must be followed which will establish the principles of the limitation, and possibly an actual cut-off date, in advance of trial so that preparation may be made accordingly and the possibility of prejudice at the trial, particularly before a jury, may be avoided.

In this respect the *Report* is a weakened version of the recommendations of the Committee on Practice and Procedure of the American Bar Association,[47] both in its lack of clarity with respect to general procedure to be followed and in its failure forthrightly to call for establishment of a cut-off date wherever possible. It is to be hoped that the courts will bolster the *Report* of the Attorney General's Committee with the recommendations of the American Bar Association Committee. Pursuant to these latter recommendations, the period of inquiry should be defined and limited by the trial judge in conference *prior to trial*. The plaintiff should be required to present evidence tending to show a case of *present* violations of law, at least within a period of five or six years prior to the filing of the complaint before being permitted to introduce evidence of an earlier period as to origins or background of the conspiracy. And when the circumstances permit, the court should establish a strict cut-off date, forbidding introduction

[46] United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690 (1952), noted in 38 A.B.A.J. 764 (1952), 66 HARV. L. REV. 89 at 139 (1952). The government introduced evidence of conspiratorial activity from 1936 to 1941; abandonment of the activity after 1941 was shown; the lower court refused to attach significance to the earlier misconduct in light of the abandonment, and the Supreme Court upheld this ruling.

[47] See note 43 supra.

of any evidence of activities of defendants prior to that date.[48] Anything less than these procedures will provide little insurance against the continuation of the wasteful prejudicial practice of seeking future relief upon the basis of ancient and long-since abandoned corporate mistakes.[49]

5. *Compliance With and Modification of Antitrust Judgments*

The committee urges the Department of Justice to conduct regular studies to determine whether its judgments "have been effective to restore competition," and suggests use of the Federal Trade Commission for this purpose.[50] The committee, apparently by unanimous agreement, also recommends that the department "should consent to judgment modification where the defendant can show that a change in circumstances makes its continuation unchanged incompatible with antitrust goals."[51] A decree which outlives its usefulness and impairs legitimate competitive activity may be as harmful to the antitrust policy as the lack of enforcement of a needed decree. But it is pointed out that in the past the department has refused to agree to substantial modification of even the broadest decree provisions under any circumstances.[52]

The committee recommendation on modification is important. Injustice has existed in past procedures, and the department's reluctance to consent to modifications constitutes a deterrent to consent decree settlements. Lawyers negotiating consent decrees must contend with the justifiable fear that a decree once entered may rapidly acquire immortality irrespective of later changes in competitive conditions. This fear is frequently so substantial as to prevent settlement, whereas if fair consideration of future requests for modification could be assured, the settlement might be agreed to. The department need sacrifice none of its powers in carrying out the committee's recommendation. All that is required is a demonstration of a willingness to negotiate changes where antitrust goals will be promoted.

[48] See Chadwell, "Pre-Trial," A.B.A. Antitrust Section Proceedings, Aug. 18-19, 1954, p. 52 at 58.

[49] Cf. Kramer, "Some Procedural Problems in Protracted Antitrust Trials," U. of Mich. Law School Summer Institute, FEDERAL ANTITRUST LAWS 302 at 307-308 (1953).

[50] REPORT 366. Section 6(c) of the Federal Trade Commission Act authorizes the commission, upon application of the attorney general, to investigate and report upon how antitrust decrees are being carried out.

[51] REPORT 366.

[52] See, generally, Kilgore, "Antitrust Judgments and Their Enforcement," A.B.A. Antitrust Section Proceedings, April 1-2, 1954, p. 102 at 124-127.

In this connection, the committee commends a provision recently devised by the department for future decrees under which defendants may, after a stated period of time, show that conditions have changed so that the relief specified in the decree is no longer necessary. Also commended is another recently designed provision expressly providing for expiration of certain terms of the decree after a stated period of time. These provisions are for use in decrees which ban otherwise lawful conduct in order to dissipate the effects of unlawful practices, and are not of general application for all decrees. They evidence, however, a trend toward a general modification practice which would more nearly comport with the over-all recommendation of the committee.

B. *The Federal Trade Commission*

The *Report* is unaccountably brief with respect to Federal Trade Commission activities. "Committee attention . . . has focused only on (1) The Trade Practice Conference, (2) informal settlement procedures, and (3) problems of enforcement of Commission orders and penalties for violation."[53] The administration and enforcement section thus parallels the substantive sections of the *Report,* which devote little attention to Federal Trade Commission rulings, especially under the "unfair methods of competition" proscriptions of section 5 of the Federal Trade Commission Act. It is not made clear whether this silence indicates general approval of the commission side of the antitrust picture, or whether the committee simply was unable in the allotted time to make an adequate study of commission practice. In point of fact, it is probable that at least as many antitrust proceedings take place before the commission as before the courts. Although many of the problems in commission hearings are the same as in judicial proceedings, substantial differences exist, arising from the fact that the commission is a law-making as well as law-enforcing agency and conducts its hearings under the administrative rather than the judicial process.

The committee may readily be forgiven for not launching into a detailed study of the maze of inner workings of the administrative process as applied to antitrust cases. It is interesting to note, however, that shortly after release of the committee report, another agency, the Hoover Commission, issued a report calling for a complete separation

[53] REPORT 369.

of the prosecuting and adjudication functions of the Federal Trade Commission.[54] The Hoover Commission *Report* states:

> "Where the proceeding before the administrative agency is strictly judical in nature, and the remedy afforded by the agency is one characteristically granted by courts, there can be no effective protection of private rights unless there is a complete separation of the prosecuting functions from the functions of decision."[55]

The Hoover *Report* proposes the creation of a new "Administrative Court of the United States" to be composed of a Tax Section, a Trade Section and a Labor Section, to take over the decisional functions now exercised by federal agencies operating within the indicated fields. Apparently, if this proposal were adopted, the commission would continue to issue complaints and prosecute them under the Federal Trade Commission and Clayton Acts. Hearings, however, would be before the new court and the court would issue or deny the requested cease and desist or other orders.

The adoption of the Administrative Procedure Act of 1946[56] resulted in long strides toward correction of evils inherent in combination of prosecuting and judicial functions in a single agency. Under this law, Hearing Examiners in Federal Trade Commission cases have acquired an independence which they did not previously enjoy, and have exhibited a commendable objectivity and judiciousness in consideration of contested matters. These improvements have been further enhanced by the work of Chairman Howrey and the other members of the present commission, which has greatly increased the stature of that agency in recent years. Adoption of the Hoover Commission proposal could carry even further the improvements already made. However, there are a number of conflicting considerations inherent in this important proposal which cannot be discussed in this article and it is unfortunate that the distinguished group of antitrust lawyers comprising the Attorney General's Committee did not address themselves to this difficult and vital question.

The proposals which the committee makes as to Federal Trade Commission practice and procedure are all quite reasonable. Improvements in Trade Practice Conference procedures are suggested. The new commission settlement procedure is approved. Legislative

[54] REPORT OF COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, "Legal Services and Procedure," 84-88 (1955).

[55] Id. at 85.

[56] 5 U.S.C. (1952) §1001 et seq.

change is proposed to eliminate the outlandish $5,000 per day penalty for violation of final Federal Trade Commission Act orders. And it is also proposed to remove the present inconsistency between the Clayton and Federal Trade Commission Acts by making Clayton Act cease and desist orders become final after a lapse of time as do Commission Act orders. These changes should all be adopted.[57]

C. *Related Jurisdiction of the Department of Justice and the Federal Trade Commission*

The committee endorses the present system of dual agency enforcement of the antitrust laws. It seems likely that were a completely fresh start being made, the somewhat anomalous dual enforcement procedure would be replaced by a single integrated system. Within the framework of existing law, however, the committee finds acceptable procedures for coordination of the two agencies and for elimination of inconsistent or overlapping action. The two agencies today maintain fairly effective liaison, and the committee urges further improvements in cooperation and consultation.

The committee's final word on this matter should be faithfully observed: "It is basic to all relations between the two agencies that both should never for any reason, including differences in views as to the law or the facts, proceed against the same parties for the same offense growing out of the same factual situation."[58]

D. *Private Antitrust Suits*

Private suits are unquestionably an important adjunct of antitrust enforcement and are the principal means whereby persons injured by antitrust violations may be recompensed. As the *Report* notes, until the past ten years, treble damage suits were most often unsuccessful.[59] In recent years, however, there has been a "burgeoning" of these suits, with numerous huge treble damage recoveries and awards of attorney's

[57] REPORT 369-374.

[58] REPORT 377. The committee doubtless had in mind the proceedings instituted by both agencies against the cement industry for use of the basing point system. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793 (1948).

[59] REPORT 378.

fees.[60] Were the substantial law settled and all violations of it willful in character, few would quarrel with the present requirement of mandatory trebling of the plaintiff's damages.

It is manifest, however, that the numerous ambiguities and vagaries of the law expose the totally unwitting violator to the continued peril of huge damage penalties for what to him reasonably seem normal and honest business practices. This peril is especially great with respect to liability under the Robinson-Patman Act, but it lurks as well in many other areas of antitrust law. In private law, punitive damages for tortious conduct are awarded only where malice, or at least willfulness is present; actual damages are the law's only exaction from the merely negligent wrongdoer.[61] Similarly, under other federal statutes which allow more than actual damages, the imposition of amounts in excess of actual damages is made discretionary with the court.[62] The inflexible penalizing of antitrust defendants in private suits is unwarranted by the nature of the substantive law and often leads to unconscionable results.

To rectify the situation while retaining the treble penalty for the knowing violator, the committee recommends enactment of legislation making the doubling or trebling of damages discretionary with the court.[63] The *Report* states:

> "On balance, we favor vesting in the trial judge discretion to impose double or treble damages. In all instances, this would recompense injured parties. Beyond compensation, the trial court could then penalize the purposeful violator without imposing the harsh penalty of multiple damages on innocent actors."[64]

The committee acknowledges the difficulty of laying down any precise standard for the judge's determination and recommends that the matter be left to his discretion, as it is under other statutes with similar provisions.

[60] REPORT 378. For exhaustive discussion and statistics, see comment, 61 YALE L. J. 1010 (1952).

[61] PROSSER, TORTS 11-13 (1941).

[62] Housing and Rent Act, 61 Stat. L. 199 (1947), as amended, 50 U.S.C. App. (1952) §1895. Defense Production Act, 64 Stat. L. 811 (1950), as amended, 50 U.S.C. App. (1952) §2109(c); Copyright Act, 17 U.S.C. (1952) §§1, 101(e); Patent Act, 35 U.S.C.A. (1952) §284; Trademark Act, 60 Stat. L. 439 (1946), 15 U.S.C. (1952) §1117.

[63] A bill now in Congress would effect this change: H.R. 4958, 84th Cong., 1st sess. (1955), introduced on March 15, 1955, by Congressman Walter, and referred to the House Committee on the Judiciary.

[64] REPORT 379.

This recommendation, though dissented to by several members, seems entirely reasonable and contains no serious threat to the continued effectiveness of the private suit. Ability of the plaintiff to prove violation and recover both actual damages and attorney's fees is not affected, and modern liberalized rules of damages supply ample lure to provide incentive to sue without the added windfall of punitive recoveries. Nor, as the committee notes, will the recommended change affect the conduct of potential defendants. The unwitting violator is not affected by the threat of damages, for he does not know his peril. The willful violator, on the other hand, may be held for treble damages as in the past. It is to be hoped that Congress will act promptly on this recommendation.

The *Report* contains three other important proposals for change in the private suit aspects of the law. A federal four-year statute of limitations is recommended to bring much-needed order out of the existing confusion resulting from the lack of a federal statute and the consequent application of state law.[65] Modifications in section 5 of the Clayton Act, providing for use of evidence of government judgments in related private actions and tolling of the statute of limitations during the pendency of government actions, are recommended.[66] And legislation is urged authorizing the United States itself to recover actual damages for violations directly affecting the government.[67] These recommendations constitute perfecting amendments to existing law to resolve present inconsistencies in the availability of the private action. They are sensible and should be adopted.

Conclusion

The gigantic character of antitrust litigation assures that vexatious problems of administration and procedure will always persist. But the *Report* of the committee demonstrates that many rational reforms are possible. The committee properly rejects the idea that the American judicial system is incapable of absorbing and successfully managing

[65] H.R. 4954, 84th Cong., 1st sess. (1955), providing for a uniform four-year statute of limitations, has been passed by the House and sent to the Senate Committee on the Judiciary at this writing.

[66] REPORT 380 et seq.

[67] H.R. 4954 in the present Congress would give this right to the government by overruling United States v. Cooper Corp., 312 U.S. 600, 61 S.Ct. 742 (1941).

the "big case."[68] While some of its recommendations are controversial, in the main the *Report* offers a blueprint for substantial increase in the effectiveness and fairness of antitrust administration.

[68] REPORT 366.