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## ANTITRUST GOALS AND CURRENT ENFORCEMENT PROGRAMS

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*Recent antitrust convictions have brought public attention to bear on this aspect of the business world. The author, the prime mover behind these convictions, herein discusses some of the goals and present enforcement procedures of the Department of Justice. This analysis emphasizes the prior prevention rather than the subsequent destruction of corporate mergers which threaten to obstruct the flow of competitive enterprise. The author additionally examines the problems involved in the use of antitrust laws in the regulation of labor unions.*

### INTRODUCTION

First, what ends do our antitrust laws seek to achieve? *Second*, just how does current enforcement emphasis aim to promote these goals? Relevant here, of course, are Antitrust Division's recent efforts to curb corporate mergers which threaten competition, as well as its program for working effectively with other branches of the federal, and state governments, to protect the public against rigged bids on government purchases. Additionally, the current, though necessarily limited, activity of the Antitrust Division in applying the antitrust laws to illegal conduct by organized labor is also worthy of mention. And, *finally*, reaching for some broad perspective on antitrust enforcement, what if anything can be said about antitrust's impact on the competitive system we prize?

### I. THE ANTITRUST GOALS

Antitrust seeks to promote free markets by striking down privately imposed clogs on free market operation. Under our enterprise system, resources are allocated, goods produced, and prices set, in response to the ebb and flow of consumer pressures exerted via free markets. Consumers

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buy goods in markets. By so doing, they register consumer preference, mold price as well as production decisions. If privately imposed clogs on free markets insulate prices or production from consumer preferences, free market functioning wanes. Such clogs—price-fixing or absorption of competitors that unduly curb consumer choice—antitrust seeks to strike down.

As the Supreme Court has stated it more broadly:

[The antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [They] rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>1</sup>

The public interest in competition "is closely akin to . . . the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."<sup>2</sup>

So much for a brief, very brief, sketch of antitrust's goals.

## II. THE DIRECTION OF RECENT ANTITRUST ENFORCEMENT EFFORTS

In light of these goals, just what judgments underpin recent enforcement emphasis? Initially, consider the Department's recent efforts to carry out the congressional design for section 7 of the Clayton Act<sup>3</sup>—the statute that outlaws any corporate acquisition that may substantially lessen competition or tend to create a monopoly. Enacting this statute, the Congress intended, as one court recently said:

(1) to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the

1. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

2. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). Comparable is the following view:

Antitrust is a distinctive American means for assuring the competitive economy on which our political and social freedom under representative government in part depend. These laws have helped release energies essential to our leadership in industrial productivity and technological development. They reinforce our ideal of careers open to superior skills and talent, a crucial index of a free society. . . .

*Report of the Attorney General's National Committee To Study the Antitrust Laws*, p. 2.

3. The pertinent provision of § 7 of the Clayton Act reads as follows:

[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipency and before they attain Sherman Act proportions. . . .<sup>4</sup>

Carrying out these goals, section 7 seems most apt. *First*, most broadly, section 7 represents a prime weapon for prophylactic antitrust. Vigorous section 7 enforcement in those sectors with great growth potentials can avoid loss of competitive vigor via undue concentration. In short, judicious application of section 7 in growing industries can avoid Sherman Act section 2<sup>5</sup> problems a decade or two from now. It is this very effort that Congress has obliged federal antitrust enforcers to undertake.

*Second*, in carrying out this congressional design, section 7 is well suited. Although both section 7 of the Clayton Act and section 2 of the Sherman Act involve essentially structural issues, merger cases enable their presentation to courts in more manageable bites. On the one hand, today's typical Sherman Act monopolization case likely involves court appraisal of the firm's market power based on a whole series of acts perhaps long since done; exploration of such diverse and, oftentimes, aged events may be lengthy and arduous. Under section 7, in sharp contrast, inquiry focuses on one transaction—the challenged acquisition. And the judicial task is to gauge that one transaction's reasonably probable market consequences.

*Third*, perhaps for such reasons, section 7 cases can be tried more promptly. In *Youngstown-Bethlehem*,<sup>6</sup> for one perhaps atypical example, the trial was completed some thirteen months or so after issue was joined. In *Brown Shoe*,<sup>7</sup> the trial took about eight weeks of actual court time. And, in both the proposed *Texaco-Superior* merger<sup>8</sup> as well as the recent *Sohio-Leonard* case,<sup>9</sup> defense counsel was informed that the United States would

4. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 583 (S.D.N.Y. 1958).

5. Section 2 of the Sherman Act provides that: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

69 Stat. 282 (1955), 15 U.S.C. § 2 (1958).

Section 4 of the Sherman Act authorizes the Attorney General to seek equitable relief against violations of the Sherman Act.

6. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

7. *United States v. Brown Shoe Co.*, 179 F. Supp. 729 (E.D. Mo. 1959), *prob. juris. noted*, 363 U.S. 825 (1960).

8. This proposed merger between Texaco, Inc., and Superior Oil Co. was abandoned after the Antitrust Division informed counsel for these companies that an action would be filed challenging the merger if consummated. *Wall Street Journal*, Sept. 25, 1959, p. 24.

9. *United States v. Standard Oil Co. (Ohio)*, Civil No. 19696, E.D. Mich., Dec. 31, 1959. The complaint in this case was dismissed without prejudice on January 22, 1960, following a stipulation by defendants that the proposed merger would be abandoned.

be prepared for trial within sixty days after completion of rather limited discovery. These discovery moves in *Sohio-Leonard*<sup>10</sup> were filed within one week or so of the complaint. Finally, most recently, apt handling of discovery moves in the recent *Gamble-Skogmo-Western Auto* merger<sup>11</sup> proceeding enabled satisfactory resolution of that matter within ninety days or so after the complaint was filed.

This possibility for speed in litigation serves the public interest. Initially, real savings in court trial time are one result. Another benefit stems from minimizing burdens of litigation for parties involved.

*Fourth*, in addition to savings of time and money for both the Government and defendants, section 7 litigation offers real promise for securing effective relief. As the Supreme Court asserted in a Sherman Act context:<sup>12</sup>

A public interest served by . . . [antitrust] civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

To remedy what it believed to be inadequacies in Sherman Act relief, Congress specified in sections 11<sup>13</sup> and 15<sup>13a</sup> of the Clayton Act that, on a finding of a section 7 violation, divestiture is to be the general rule. True, courts of equity have been vested with, and traditionally exercised, wide discretion in fashioning appropriate relief. Equally true, however, the fact that Congress has made its choice as to the nature of the relief to be granted—divestiture of stock or assets illegally acquired—still leaves the equity court wide discretion to determine the manner and means for effectuating the congressional mandate.

The effectuation of this congressional design, perhaps more avoidable under section 7 than under the Sherman Act, raises difficult problems of unscrambling assets long since joined together. And when the legality of an acquisition can be raised prior to consummation, relief problems diminish still further.<sup>14</sup>

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10. *Ibid.*

11. *United States v. Gamble-Skogmo Inc.*, Civil No. 12776, W.D. Mo., April 1, 1960.

12. *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947).

13. 72 Stat. 943 (1958), 15 U.S.C. § 21 (1958).

13a. 62 Stat. 909 (1948), 15 U.S.C. § 25 (1958).

14. In this context, the Antitrust Division sought to develop close liaison with the Securities and Exchange Commission. As the Director of the SEC's Division of Corporate Finance explained: "We have worked out over the years a fairly simple procedure of being sure the Antitrust Division and the FTC know about the transaction. Any prospectus or proxy statement involving a proposed merger, consolidation, or other form of acquisition of a business where the transaction is in excess of \$3,000,000 and not subject to specific authorization by another federal agency . . . is brought to the attention of these two agencies." Address by Byron D. Woodside, Director, Division of Corporate Finance, Securities and Exchange Commission, "Particular SEC Merger Considerations," p. 24, Nov. 20, 1957.

Utilizing this and similar procedures, the Division seeks, albeit sometimes unsuccessfully, either to proceed—or at least notify merging companies of our intent to proceed—prior to consummation. This policy is rooted in two considerations: First, courts can more easily halt a transaction yet unconsummated than undo a merger already

Finally, emphasis on section 7 enforcement, let us make crystal clear, does not mean that all mergers are suspect. Some mergers may benefit competition. Some mergers may threaten a market's competitive vigor. This Congress has recognized. In amending section 7 of the Clayton Act, Congress did not proscribe all acquisitions. Outlawed are only those acquisitions that may substantially lessen competition or tend to create a monopoly.<sup>15</sup>

Beyond efforts to curb mergers that threaten competition, our program to curb rigged bids on federal and state purchases has been stepped-up sharply. Identical bidding sometimes marks federal, state, and local government procurement. And such government procurement, in many instances, is carried on via requests for competitive bids.

In this context of public procurement, then, enforcement of federal and state antitrust laws takes on a special significance. Competitive bidding cannot function when competitors agree to rig bids on government purchases. To function effectively as an instrument of government procurement, competitive bidding requires markets free of restraints and monopoly elements. Only if the Federal and State Attorneys General succeed in maintaining a favorably competitive climate through vigorous and effective enforcement of the antitrust laws can all of us as taxpayers hope for the benefits of competitive bidding.

The Congress, recognizing that competition was vital to the proper conduct of federal government procurement, enacted legislation in 1947<sup>16</sup> setting up a continuing program of reporting of identical bids to the Attorney General. Statutes oblige each federal agency to refer to the Attorney General identical bids that point to an antitrust violation.

Reports of identical bidding, prepared in accordance with regulations issued by the Armed Services and the General Services Administration,<sup>17</sup> constitute a stream of intelligence which pinpoints the locus of competitive injury and adapts enforcement to the needs of various sectors of our economy. In some areas, reports of suspected identical bids have triggered federal antitrust proceedings. These proceedings, already brought, have involved

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completed. Tasks of formulating a plan for divestiture are obviated. Second, considerations of basic fairness suggest, where feasible, informing business concerns of intent to sue before business commitments are ultimately finalized. Companies can then proceed, if they will, with the knowledge that a suit, probably seeking a preliminary injunction, will follow. Should concerns decide to proceed, the Division will take all reasonable measures to enable prompt resolution of the legal issues raised.

15. See note 3 *supra*.

16. 10 U.S.C. § 2305(d) (1958).

17. Armed Services Procurement Regulation (1955 ed. Revised), 27 February 1959, Revision Nos. 44 and 41 U.S.C.A. Appendix, Rules and Regulations, Sections 1-1.902 to 1-1.903.

products that range from bread and milk to certain electrical items.<sup>18</sup> And the public's right to competitive bidding, in appropriate areas has been safeguarded.<sup>19</sup>

There are indications that a substantial volume of state and local government procurement has been similarly effected. In this light, we have been working closely with interested state officials to help them protect the people of their areas.

First, we are endeavoring to work with state purchasing agents to set up procedures for sifting out identical bids that raise suspicion of anti-trust violation. These officials are currently exploring the feasibility of establishing procedures for spotting possibly rigged bids comparable to the federal government's. Thus, states may develop some system for at least finding out when state purchases have been affected by collusive bidding.

Second, we seek to help state Attorneys General, when state purchases have been tainted by an antitrust violation, to secure recompense for their states. In some antitrust cases brought by the federal government, the primary parties injured may be states or cities throughout the country.<sup>20</sup> When a state or city has been hurt by an antitrust violation, the law provides that it may sue and recover treble damages.<sup>21</sup> The Supreme Court has held that Congress intended to grant the states a right to recover treble damages on behalf of their citizens.<sup>22</sup>

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18. Several recent examples include *United States v. Beatrice Foods Co.*, Crim. No. 0315, D. Neb., Aug. 28, 1958, charging that three Omaha, Nebraska, dairies engaged in a combination and conspiracy to eliminate and suppress competition in the sale of dairy products to Offutt Air Force Base and the U.S. Veterans Hospital near Omaha; *United States v. Carter Products, Inc.*, 60 Civil No. 375, S.D.N.Y., Jan. 27, 1960, charging the two leading manufacturers of mild tranquilizers with fixing prices on bids and excluding others from the manufacture and sale of tranquilizers made with meprobamate as the sole active ingredient; and three indictments filed Feb. 16, 1960, charging General Electric Co., Westinghouse Electric Corp., Allis-Chalmers Mfg. Co., I-T-E Circuit Breaker Co., Federal Pacific Electric Co. and 18 individuals with conspiracy, collusion, bid rigging and market sharing in various heavy electrical products. *United States v. Westinghouse Elec. Corp.*, Crim. No. 20234, E.D. Pa., Feb. 16, 1960; *United States v. General Elec. Co.*, Crim. No. 20235, E.D. Pa., Feb. 16, 1960; *United States v. I-T-E Circuit Breaker Co.*, Crim. No. 20236, E.D. Pa., Feb. 16, 1960. Since Feb. 16, 1960, a total of 17 additional indictments have been returned in Philadelphia, affecting every major sector of the electrical equipment industry.

19. The Omaha Dairy case (*United States v. Beatrice Foods Co.*, *supra* note 18) illustrates that favorable price results may be obtained in governmental procurement from the initiation of antitrust actions. In this case, it was observed that within a week of the conclusion of our preliminary investigation one of the defendants, whose prices had not deviated in three and one-half years of bidding on Air Force contracts, submitted a bid 8 percent below its previous bid, affording the Government a saving of \$4,000 on one item alone. Substantial savings on other dairy product items were obtained at the same time.

20. See, e.g., *United States v. Lake Asphalt & Petroleum Co.*, Crim. No. 59167-M, D. Mass., Aug. 26, 1959. Defendants in this and two related cases entered pleas of *nolo contendere* to the charges of the indictments, and were fined a total of \$466,000.

21. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

22. *Georgia v. Evans*, 316 U.S. 159 (1942). See also *Chattanooga Foundry Works v. Atlanta*, 203 U.S. 390 (1906) (municipal corporation as plaintiff).

Though Congress intended this remedy, oftentimes it may be less than fully effective. A state or city may know its citizens have been hurt, possibly quite badly. But the resources to investigate and prove the antitrust conspiracy from which its damages stemmed may not be at hand.<sup>23</sup>

In light of this difficulty that the states face, the Antitrust Division has been considering means for handling its antitrust litigation with an eye toward aiding state Attorneys General to protect the interest of injured states or cities. Thus, assume a case in which states or cities have been hurt, and where the courts have, over the Antitrust Division's objections, accepted pleas of *nolo contendere*.<sup>24</sup> In such cases, if a civil case is pending, the Division is now appraising the wisdom of considering as one element of the public interest test which guides acceptance or rejection of a civil decree, the interest of a state or its subdivisions primarily injured by the violations alleged. This means that, in appropriate cases, the Division has offered defendants the alternative of proceeding to trial or accepting a consent decree that protects the state's interests. Such cooperation between federal and state law enforcement officials accords with a basic design for our federalism. As the Supreme Court stated many decades ago:<sup>25</sup>

We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. . . . The situation requires, therefore, . . . a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

And just this year the Court once more underscored these principles "of reciprocal comity and mutual assistance" in the law enforcement area. "Free and open cooperation between state and federal law enforcement officers" the Court stated,<sup>26</sup> "is to be commended and encouraged" and "forthright cooperation . . . will be promoted and fostered."

It is entirely fitting, we suggest, that such federal-state "cooperation" be manifest in the antitrust enforcement area. For, as Professor Kingman Brewster recently expressed so well:

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23. As the Attorney General of California recently stated, referring to a particular case he had brought: "The defendants are all located in the Mississippi Valley or on the Atlantic Seaboard. For the State of California to have undertaken the investigation of this matter would have been prohibitively expensive as well as impracticable for other reasons." Letter of Honorable Stanley Mosk, Attorney General of the State of California, to Robert A. Bicks, August 20, 1960.

In much the same vein, the Attorney General of Maine has flatly stated: "The State of Maine is not equipped to uncover and evaluate information essential to the prosecution of . . . multi-state conspiracies. . . ." Telegram from Honorable Frank S. Hancock, Attorney General of the State of Maine, to Robert A. Bicks, August 22, 1960.

24. Such pleas have been held to be inadmissible against a defendant in a subsequent treble damage action brought by parties claiming to have been injured by the antitrust violation. *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939). See Clayton Act, § 5, 69 Stat. 283 (1955), 15 U.S.C. § 16 (1958), which provides that a judgment or decree to the effect that defendant has violated the antitrust laws shall be prima facie evidence against such defendant in a private action respecting the same matters.

25. *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922).

26. *Elkins v. United States*, 364 U.S. 206, 221, 222 (1960).



'The virtue of leaving considerable economic power' in numerous private hands is not too dissimilar from the virtue of leaving considerable political power in the several states of a federation. In the negative sense both reject centralism. . . . More important, both exponents of states' rights and those who would leave economic power in private hands are affirming that more socially constructive energies will be released in the long run if problems can be attacked by and left to the final decision of those living closest to them. . . . [Both seek] maximum play for diverse solutions to comparative problems.<sup>27</sup>

Finally, what about antitrust and organized labor? Here the task is to accord proper emphasis to two somewhat discordant congressional policies. "The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining."<sup>28</sup>

Labor unions have always been held within the general purview of the Sherman Act.<sup>29</sup> However, under the rationale of the Norris-La Guardia Act<sup>30</sup> any trade union activity within section 20 of the Clayton Act<sup>31</sup> is immunized from the operation of the Sherman Act when the union is acting alone and in its own self-interest.<sup>32</sup> But since trade unions do not enjoy an all inclusive exemption from the Act,<sup>33</sup> any combination with a non-labor group renders the immunity dubious.<sup>34</sup> Thus, a union, although employing means authorized by section 20 of the Clayton Act, has no exemption when it combines with businessmen who have the power and intent to eliminate all competition among themselves and prevent competition from others,<sup>35</sup> or when it combines with non-labor groups to fix prices, and thus effect an unlawful restraint in commerce.<sup>36</sup>

More explicitly, labor's immunity is dependent on a factual determination of whether the union is acting in its own self-interest or conspiratorially with non-labor groups that are intent on violating the antitrust laws.<sup>37</sup> Therefore, if a union combines with business contractors to suppress com-

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27. BREWSTER, *THE CORPORATION AND ECONOMIC FEDERALISM* 75-76, Chap. 4 of MASON, *THE CORPORATION IN MODERN SOCIETY* (1959).

28. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945).

29. *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 414 (1947) (dissenting opinion); see, e.g., *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Loewe v. Lawler*, 208 U.S. 274 (1908).

30. 47 Stat. 70-73 (1932), 29 U.S.C. §§ 101-15 (1958).

31. 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).

32. *United States v. Hutcheson*, 312 U.S. 219 (1941).

33. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. (dictum)), *cert. denied*, 348 U.S. 817 (1954).

34. *United States v. Hutcheson*, 312 U.S. 219 (1941) (dictum); see *United States v. Brims*, 272 U.S. 149 (1926).

35. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

36. *Gulf Coast Shrimpers & Oysterman's Ass'n v. United States*, 236 F.2d 658 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956).

37. *Anderson-Friberg, Inc. v. Justin R. Cleary & Sons, Inc.*, 98 F. Supp. 75 (S.D.N.Y. 1951) (dictum).

petition it is not immune from the provisions of the Sherman Act.<sup>38</sup> Similarly, when an association of businessmen makes an agreement aimed at substantially restricting competition and controlling prices and markets, the inclusion of labor provisions in the agreement does not immunize it from the Act,<sup>39</sup> for benefits to unions cannot be used "as a cat's-paw to pull the employers' chestnuts out of the antitrust fires."<sup>40</sup>

Illustrative of union agreements with a non-labor entity which restrain trade is the factual situation in *United States v. Gasoline Retailers Ass'n*.<sup>41</sup> In this case, a Teamsters local and two of its officials were charged with agreeing, in violation of section 1 of the Sherman Act, that station operators would refrain from giving premiums in connection with retail gasoline sales, and would refrain from advertising the price for the retail sale of gasoline. Dealers who gave premiums or advertised prices were picketed or threatened with picketing, had gasoline deliveries cut off or were threatened with a cut-off of deliveries, and were threatened with property damage. Many retail gasoline station operators and their employees were members of the union local.

*United States v. Meyer Singer*<sup>42</sup> is an example of the organization of a labor union composed of independent businessmen as well as employees. In this case, a group of self-employed peddlers, engaged in buying waste grease from restaurants, hotels and other establishments, and in selling such waste to processors, became members of a Teamsters local. The indictment, returned by a federal grand jury, charged them with agreeing among themselves to fix the price they paid for waste grease and the price at which it was to be sold to processors. It was also charged that the peddlers allocated among themselves the establishments from which they would buy, and the processors to whom they would sell. Processors were allegedly prevented from buying from non-union peddlers and required to make payment into a "health and welfare" fund for peddlers. Strikes and picketing and threats of strikes and picketing were used to compel processors to adhere to the system, and suspension and expulsion from the union were sanctions used to force compliance by peddlers.

38. *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954).

39. *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949).

40. *Id.* at 464.

41. Crim. No. 3010, N.D. Ind., June 22, 1959. A trial by the court resulted in judgments of guilty against the union, the association, and one of the union officials. These convictions are presently on appeal to the Court of Appeals for the Seventh Circuit.

42. Crim. No. 27691, S.D. Cal., May 27, 1959. This case was concluded by the acceptance by the court of pleas of *nolo contendere* from all defendants on March 23, 1960. A companion civil case, seeking injunctive relief against the same violations is currently pending. *United States v. Los Angeles Meat & Provision Drivers Union, Local 626, International Bhd. of Teamsters*, Civil No. 515-59-WB, S.D. Cal., May 27, 1959.

*United States v. Chicago Boiler Mfrs. Ass'n*<sup>43</sup> represents an instance in which corruption of union officials by employers for the purpose of restraining trade led to a Sherman Act indictment. In this case, the association and its members, in the business of repairing and installing steel boilers, agreed to fix their charges for boiler repair and installation work, and to prevent nonmembers from engaging in the business. As a part of their plan, they agreed with, and made sizable cash payments to, two business managers of a local union. These business managers in return were to use their official position to harass nonmember boiler contractors, and to refuse to enter into collective bargaining agreements with them.

Thus, it is the Antitrust Division's duty to carry out this congressional design by instituting cases which demonstrate conduct detrimental to our antitrust policy while at the same time not being protected by the mantle of privilege granted to unions to achieve traditional goals. In this selective process we must be ever vigilant that neither policy is frustrated.<sup>44</sup>

### III. THE PERSPECTIVE OF ANTITRUST

Beyond these details what can we say about antitrust economy and the need for continued vigorous enforcement?

In the context of our twentieth century free enterprise economy, the need for a procompetitive public policy rests on two propositions.

First, there is some minimum level of competition which it is necessary to achieve in the market-controlled sector if that sector is to be allowed to remain a market-regulated rather than a government-controlled one. Second, this level is not self-maintaining: in the absence of antitrust, the level of competition will sink below the minimum. . . . [A] complete absence of positive public policy would lead to a drastic decline in the competitiveness of business.<sup>45</sup>

Both generalizations, of course, are slippery. Support in empirical data is hard to come by. And what little empirical data can be found is even more difficult to evaluate.

Consider the impact of antitrust on our country's economic development. Dean Edward Mason recently stated:

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43. Crim. No. 57 Cr. 412, N.D. Ill., June 25, 1957. The case was concluded on May 1, 1959, by pleas of *nolo contendere* from defendants.

44. In attempting more fully to utilize the potential of existing antitrust law as it applies to labor unions, we must at the same time realize that other labor practices beyond the scope of the antitrust laws have been considered at length by Congress in the context of the Taft-Hartley and Landrum-Griffin Acts. (29 U.S.C.A. §§ 141-97 (1960 Supp.)). It is our feeling that whatever Congress decides it wants to outlaw or not should be done in a labor-management context rather than in an antitrust context. But, we must not sell short what antitrust can do at present in the labor field.

45. TURNER & KAYSEN, ANTITRUST POLICY—AN ECONOMIC AND LEGAL ANALYSIS 4-5 (1959).

American industries are less concentrated than similar industries in many other countries, and general concentration is no higher—it may even be somewhat lower—than in countries showing a comparable degree of industrialization. . . . It is clear now, as it was not clear before, that there is no inevitable historical force at work that must produce, over any extended period of time, an increase in the percent of economic activity accounted for by the largest firms either in American manufacture or in the economy as a whole. I think it has been demonstrated that between 1931 and 1947 there was no substantial increase in concentration in manufacture, and at least serious doubts have been cast on the existence of any such tendency over the last fifty years.<sup>46</sup>

These developments cannot generally be deemed unrelated to the past half-century of antitrust law enforcement. As Dean Mason has recently stated:

The structure of American industry and the behavior of firms are markedly different than they would have been if Sherman, Clayton, and Federal Trade were names unknown to the statute books. . . . Cases against monopolization, it is true, have been few in number and dissolutions have been even fewer. But countless mergers and amalgamations that might well have taken place in the absence of antitrust have been scotched in the office of corporate counsel. It is, in fact, to the advice that lawyers give their clients that the laws against monopoly must look for their chief impact.<sup>47</sup>

Reaching this conclusion, Dean Mason is not alone. As two other thoughtful commentators recently concluded:

It is fairly clear from the cases that the antitrust law sets a standard business conduct in respect to anti-competitive practices that is more stringent than would exist in its absence. The relative freedom from cartelization of American industry can also be attributed to the present policy. And . . . the goals of business conduct have probably been affected by the law.<sup>48</sup>

Also much in point are the recent words of Mr. Cordiner, Chairman of the Board of the General Electric Company:

The success of the American economy is largely due to the creation of a business atmosphere that is founded on free markets and intense competition at the market place. Any arrangement that tends toward a system of cartels or price control or regulations by competitors is recognized by the citizens of this country as a deterrent to the present and future growth of our economy. It is for this basic reason that public opinion has obliged the government, regardless of the party in power, to enforce the antitrust laws very aggressively—in the public interest.<sup>49</sup>

46. *Id.* at 42-43.

47. TURNER & KAYSEN, *ANTITRUST POLICY — AN ECONOMIC AND LEGAL ANALYSIS* (1959). Preface by Edward S. Mason, pp. xi, xii.

48. TURNER & KAYSEN, *op. cit. supra* note 47 at 6.

49. Quoted in Smith, *What Antitrust Means Under Mr. Bicks*, *Fortune*, March 1960, p. 120.

It is this role in promoting our goals for economic endeavor that antitrust must seek to play. Specific contours and content of any enforcement program, of course, raise questions of judgment and policy. The focus today, however, is not on those problems—but rather on the broad purpose antitrust enforcement plays. It is antitrust's role in preserving that economic system which has been, and should continue to be, significant.