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I am privileged to be asked before this distinguished group of jurists to discuss parts of the recent Report of the Attorney General's Committee to Study the Antitrust Laws. Quite frankly, though, this Report can never hope to rival Perry Mason as a summer chiller, I shall do my best to highlight enforcement problems the chapters assigned to me raise.

At the outset, a bit about the Committee. But four of its 61 members were from Government - 57 were practicing lawyers, law professors, and economists - articulate spokesmen for major points of view on antitrust policy. Once members were selected, the co-chairmen divided antitrust problems into areas for antitrust purposes. These eventually included (1) Sections 1 and 2 of the Sherman Act Generally, (2) Foreign Commerce, (3) Distribution, (4) Mergers, (5) Patents, (6) Exemptions from Antitrust Coverage, (7) Economic Indicia of Competition and Monopoly, and (8) Antitrust Administration and Enforcement.

Then, work groups roughly corresponding to these areas were organized and Committee members assigned to each. In this work group process most all Committee members participated. Moreover, some workers were aided by Conferees chosen by the Co-Chairmen for their special qualifications in a particular area. Finally, Antitrust Division and Federal Trade Commission legal and economic staff members worked as liaison with

relevant Committee work groups. In such manner we sought to insure that practical problems of antitrust administration and enforcement were at all times before the Committee.

With this brief sketch of the Committee operations in mind, I turn to the substance of the Report.

I

According to the Chapter on Sections 1 and 2 of the Sherman Act generally, for example, what is the relation of business size to the offense of monopolization outlawed by Sherman Act Section 2? Further does the Sherman Act, as many contend, penalize rather than encourage business efficiency?

My beginning point, in the words of the late Chief Justice Hughes, is that the Sherman Act, "as a charter of freedom * * * has a generality and adaptibility comparable to that found to be desirable in constitutional provisions * * *. The restrictions the Act imposes are not mechanical or artificial. Its general phrases interpreted to attain its fundamental objects set up the essential standards of reasonableness." 1/ Applying these broad guides, the offense of monopolization consists of monopoly in the economic sense -- that is the power to fix prices or exclude competition -- plus a carefully defined but broad ingredient of <u>purpose to use or preserve</u> such power.

A. <u>That monopoly power required for a Section 2 offense</u>.

The first essential is the concept of monopoly required by Section 2. This begins with the easy case, a single seller of a commodity or service

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1/ Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360 (1933).

for which no close substitutes exist. Beyond this basic notion courts class, as "monopolies" under Section 2, situations where a single seller, or a group of sellers acting in concert, control market price or possess power to exclude competition.

It must be kept always in mind that monopoly power may be found, even absent a showing that prices have in fact been raised or competitors actually excluded. As the Supreme Court put it in the American Tobacco case "the material consideration in determining whether a monopoly exists is not that prices are raised, and that competition actually is excluded, but that power exists to raise prices, or to exclude competition, when it is desired to do so." 2/

This identification of monopoly with power rather than practice Judge Learned Hand explains in the Alcoa decision. There he compares offenses prohibited by Section 2 to those outlawed in Section 1. All contracts fixing prices, he points out, are prohibited by Sherman Act Section 1. No real difference exists, he feels, between such contracts and monopoly. For monopoly necessarily involves an equal, or even larger power to fix prices. Therefore, in his language, "it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control that monopoly confers: they are really partial monopolies." 3/

2/ American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

3/ United States v. Aluminum Co. of America, 148 F. 2d 416, 428 (2d Cir. 1945).

B. Definition of the market.

Monopoly power cannot exist in a vacuum, nor in theory alone. Testing for monopoly power requires first delineating that market within which power must be gauged. The relevant market, in the words of Standard Stations is the "area of effective competition" 4/ within which the defendant operates. And the "problem of defining a market", the recent United Shoe decision explains, "turns on discovering patterns of trade which are followed in practice." 5/ "Market" is normally identified both in terms of trade and products or services as well as the geographical area in which such trade may be limited. For the Sherman Act, the Supreme Court has held, has "both a geographical and distributive significance and it applies to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce." 6/

Increasingly, in recent years, definition of "market" may involve consideration of substitute products. Even in rare situations of complete monopoly, the single seller's power is generally limited by a customer's possible shift, over a period of time, to substitute products.

4/ Standard Oil Co. of California v. United States, 337 U.S. 293, 299, n. 5 (1949).

5/ United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 303 (D. Mass. 1953), aff'd per curiam 347 U.S. 521 (1954).

6/ Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293, U.S. 268, 279 (1934).

In Times-Picayune, the Supreme Court cautions that "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small." 7/ Thus, the court here refused to include newspaper, radio and television advertising in the same market for Sherman Act purposes, despite the fact that there obviously is some competition among them.

C. How much market power constitutes monopoly?

Once we have "Market" defined, relevant next is the question of how much power within that market constitutes monopoly. "Monopoly power", one district court recently explained "can be distinguished from the normal freedom of business only in degree." 8/ The most direct evidence, of course, that defendants possess monopoly power over market price, or over competitors' entry, is its actual use.

Frequently however, evidence of the actual course of prices or the competitive opportunities of rivals is equivocal at best. So courts must rely on other tests for monopoly power, and measure its degree in other ways. All judicial searches for monopoly power start with the primary fact of relative size -- the percentage of

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7/ Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n. 31 (1953).

8/ United States v. duPont de Nemours & Co., 118 F. Supp. 41, 796 (D. Del. 1953).

supply controlled. For in the language of the Supreme Court, "size is, of course an earmark of monopoly power." 9/ However, let me caution, as the Columbia Steel Court put it, that it is impossible "to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." 10/

However significant relevant size may be, absolute size is absolutely irrelevant under Section 2. Only relevant is relative size in the context of a particular market setting.

More generally, testing for monopoly power, courts scan market structure and behavior bearing on control over price and competitive opportunity. Regarding market structure, factors sometimes relevant include the relative size and strength of competitors, particularly whether defendant's market share has been increasing or decreasing. Also significant may be freedom of entry including reference to such factors as capital requirements, locational advantages, and the importance of advertising. Appraising conduct affecting prices, courts may consider the course of prices, their flexibility and relation to price trends in other industries, price competition among firms and

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9/ United States v. Griffith, 334 U.S. 100, 107, n. 10 (1948).

10/ United States v. Columbia Steel Co., 334 U.S. 495, 527-528 (1948).

the presence or absence of trade customs tending to reduce price competition.

Defining monopoly, an issue is the presence of power to fix market price -- not the reasonableness of prices actually charged. Therefore, whether profits or prices are high or low need not, strictly speaking, be relevant to the proof of the offense of monopolization. Nonetheless, such evidence may sometimes throw light on other problems, like the possibility of entry, or indeed, the existence of monopoly power over price. In the American Tobacco case, 11/ for example, the fact that defendants raised prices in a price leadership pattern, during a depression period, and even managed to increase their profits, was held to evidence their monopoly power as well as proof barriers had been erected to entry of new competitors.

In sum, then, as the Report of the Attorney General's Committee put it, "Measuring monopoly power depends upon a full evaluation of the market and its functioning, to determine whether on balance the defendants' power over the interrelated elements of supply, price and entry are sufficiently great to be classed as monopoly power. While the decisions illuminate the economic theory of the courts in evaluating these facts, they provide no magic formula for simplifying the inquiry." 12/

D. The Additional element of "deliberateness" required to make monopoly "monopolization."

More than monopoly power, however, is needed to violate Section 2. For evidence of monopoly power does not by itself prove the offense

11/ American Tobacco Co. v. United States, 328 U.S. 781 (1946).

12/ Report, p. 54.

of monopolization. Needed also, in the language of the court in the Griffith case, is "the purpose or intent to exercise that power." 13/ Here, requisite intent is not a "specific" intent to monopolize, but rather a conclusion based on how monopoly power was acquired, maintained or used. Clearly, "deliberateness" is proved if monopoly has been achieved or protected by restraints of trade illegal under Section 1. In addition, courts may infer a monopoly has been "deliberately" maintained from certain business practices themselves not violative of any antitrust law. To hold otherwise under Section 2, Judge Hand explained in Alcoa, would "make nonsense" of that provision; "for no monopolist monopolizes unconscious of what he is doing." 14/ In such cases, therefore, Alcoa suggests that no showing of intent is required beyond the "mere intent to do the act." 15/

Certain other language in Alcoa, however, inspired the fear that Section 2 might penalize aggressive business management. Particularly, the Alcoa court observed "* * * It was not inevitable that * * * (Alcoa) should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. * * * (Alcoa) insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity

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13/ United States v. Griffith, 334 U.S. 100, 107 (1948).

14/ United States v. Aluminum Co. of America, 148 F. 2d 416, 432 (2d Cir. 1945).

15/ Ibid.

as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary'. So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent." 16/

These statements approved by the Supreme Court in the American Tobacco case, 17/ were misconstrued by some to suggest that monopoly might become monopolization merely by being active, enterprising and dynamic. From this construction, it would follow that the safest course for business leaders is passive stagnation with a gradual loss of market share -- a business policy directly at war with antitrust aims

With any such conclusion, the Attorney General's Committee Report sharply differs. It concludes: "Such is not the teaching of Alcoa. Defendants' conduct was there held to constitute 'monopolization' not because Alcoa was progressive, but rather because it acted, with calculation, to head off every attempted entry in the field. That history of frustrating potential entrants and the vital fact that no company suceeded in breaking into a basic manufacturing industry, whose

16/ United States v. Aluminum Co. of America, 148 F. 2d 416, 430, 431 (2d Cir. 1945).

17/ 328 U.S. 781, 814 (1946).

technology was widely known, over a period of more than 25 years, while Alcoa's output increased 800 percent, convinced the Court, as a practical matter, that Alcoa's monopoly position rested on a good deal more than its technical and business skill. The Alcoa case is not to be interpreted as penalizing enterprise; instead it declares illegal monopoly maintained by policies intended to discourage, impede or even prevent the rise of new competitors." 18/

The defense of monopoly "thrust upon" the defendant.

Supporting the Committee's construction of Alcoa, is Judge Hand's language from Alcoa, quoted with approval by the Supreme Court in the Tobacco case (328 U.S. 781, 814 [1946]): "* * * It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market; it may not have achieved monopoly; monopoly may have been thrust upon it."

Illustrating this principle, the court in the recent United Shoe Machinery case said: "* * * [T]he defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law. * * *" 19/

18/ Report 60.

19/ United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass., 1953) aff'd per curiam 347 U.S. 521 (1954).

II.

Clearly related to this issue of production concentration is the problem of mergers--treated in Report chapter III. Here, applying the criteria for Section 7 that chapter formulates, you may be interested in why the Department of Justice turned down the proposed Youngstown-Bethlehem merger while, at almost the same time, it approved certain mergers by small auto makers. Consider, if you will, the pattern of auto production in early 1954, the time the Division considered the proposed mergers of Hudson-Nash, Packard-Studebaker. There were then three major, and several smaller concerns. The majors in 1949 produced more than 85% of new cars -- leaving the smaller firms with a meager 14 1/2% market share. By the first four months of 1954, moreover, the majors had jumped to almost 95 1/2% -- while smaller producers' share had shrunk to a bit over 4%. In 1954 some of the smaller firms actually operated at a loss. The picture confronting us, then, revealed the smaller companies falling fast behind and the larger producers surging rapidly ahead.

Against this background, our feeling was the proposed mergers might revitalize these lagging smaller concerns. They would then have broader asset basis, might economize by eliminating duplicating facilities, secure better dealer representation and sell more complete lines of cars. It should be emphasized that these companies merging were the smallest in the business. Thus their consolidation spelled no competitive disadvantage over the other smaller concerns.

Vital to our determination of legality, was I emphasize, this consideration as to the merger's probable effect, not only on the merging companies' ability to compete with their giant rivals, but also on any remaining smaller companies. In this case, not only were there no smaller concerns to be disadvantaged, but the merger, by increasing the smallest firms' strength, created far more competition than it eliminated.

Absent competitive disadvantage to smaller reivals, Congress beyond doubt intended us to consider mergers' effect on small companies ability to compete with dominant firms. Thus The Report of the House Committee considering Section 7 asks, for example: "Would the Bill prohibit small corporations from merging in order to afford greater competition to larger companies." 20/ The Report then refers to the "objection that the suggested amendment would prohibit small companies from merging." Rejecting this possibility the Report concludes "there is no real basis for this objection." 21/ For, "obviously those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition, but rather, intensify it." 22/ Applying this legislative guide, I concluded the auto mergers submitted constituted no substantial lessening of competition nor tended toward monopoly.

20/ H. Rep. 1191 (81st Cong., 1st Sess.) 6.

21/ _Id_. at 7.

22/ 95 Congressional Record 11724 (Mr. Boggs).

A contrary conclusion we reached regarding the proposed Bethlehem-Youngstown merger. Since litigation may well be in the offing, my comments are perforce cursory. In steel, the three majors have 30%, 15% and 8% of the basic capacity. The remaining 7 of the first ten producers range from 5% to 1.7% of capacity. Of the proposed merging companies Bethlehem is the second of the big three and Youngstown the sixth of the first ten. Moreover, much of both Youngstown's and Bethlehem's capacity stems from past mergers and acquisitions.

Unlike the auto mergers, however, there were, of course, many companies -- integrated and non-integrated -- much smaller than Youngstown. Further, there was no need for Bethlehem and Youngstown to combine in order to compete with the 80 smaller steel companies most of which are not even integrated. Thus, not only would this proposed merger eliminate competition between Bethlehem and Youngstown (in itself I believe substantial enough to violate the law) but equally important, it would increase concentration in the hands of two companies already industry leaders, and thus widen the competitive spread between the merged companies and their smaller rivals.

Arguing to the contrary, Bethlehem and Youngstown urge that by combining they may better compete with the largest steel giant -- U. S. Steel. Suffice it to say, in the language of the Federal Trade Commission in the Pillsbury Case,23/

23/ F. T. C. Dkt. 6000

the result of the proposed merger would be a market "dominated by a few large * * * companies * * *. This, of course, has been the trend in other industries. In some of them, under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the new Clayton Act antimerger provisions." [24]

The facts of steel concentration underscore the necessity of applying that reasoning to halt the Youngstown-Bethlehem merger.

Were we not to take a position against the proposed Bethlehem-Youngstown merger, I pose the question, where would we begin to stop mergers in the steel industry? If the Bethlehem-Youngstown merger was approved, could we fail to approve any other proposed merger that resulted in less than U. S. Steel's 34%. Could we permit Republic, National, and all 23 of the fully integrated companies smaller than the first ten to unite? Or should we permit the smaller 23 to merge with Kaiser and Colorado Fuel & Iron and Interlake and Armco and Inland and Jones & Laughlin? Neither of such mergers would create a company larger than U. S. Steel. Yet could such mergers conceivable be outside the Congressional intended ban? In short, stopping steel mergers now seems the only chance to avoid the troublesome problem - some years from now - which automobile concentration today poses.

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[24] Id. at 16.

III

Finally, I turn to the Report's treatment of organized labor. Here I focus on practical difficulties in applying the Committee's labor recommendations to the collective bargaining institution.

That Report first analyzed the extent to which certain unions are subject to antitrust. It

> suggests that commercial restraints by unions may be vulnerable to antitrust proceedings:
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> (1) Where the union engages in fraud or violence and intends or achieves some direct commercial restraint; 25/
>
> (2) Where the union activity is not in the course of a labor dispute as defined in the Norris-LaGuardia Act. 26/ Construing this statute, the Supreme Court has recognized "its responsibility to try to reconcile" two "declared 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 an agency of collective bargaining." Accordingly, its task is in each case to determine "how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." 27/ Accomplishing this task may require giving content to the Norris-LaGuardia Act's general definition of "labor dispute." We have noted that recent decisions suggest that courts may infer Congressional intent to apply antitrust to those labor activities, not sanctioned by the Taft-Hartley Act, which aim at direct commercial restraint. 28/
>
> (3) Where a union combines with some nonlabor group to effect some direct commercial restraint. 29/

25/ Cf. Apex Hosiery Co. v. Leader, 310 U.S. 469, 501-504 (1940); 29 U.S.C. § 104 (i) (1952); Coronado Coal Co. v. United Mines Workers of America, 268 U.S. 295 (1925).

26/ See 29 U.S.C. § 113 (c) (1952).

27/ Allen-Bradley Co. v. Local No. 3, 325 U.S. 798, 806 (1945).

28/ See e. g., Hawaiian Tuna Packers v. International Longshoremen & Warehousemen Union, 72 F. Supp. 562 (D. Hawaii 1947); see also Columbia River Packers Assoc. v. Hinton, 315 U.S. 143 (1942); cf. Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

29/ See e.g., Allen-Bradley Co. v. Local No. 3, 325 U.S. 797 (1945).

Against this background of possible avenues for antitrust suit, the Report notes

> Congress in 1947 considered amendments to the National Labor Relations Act. The bill passed by the House, the Conference Committee Report notes, "contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organization engaged in combination or conspiracy in restraint of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity." 30/ Explaining omission of such provisions from the enacted Bill, the Conference Report continued: "Since the matters dealt with in this Section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." 31/

Analyzing cases under Taft-Hartley secondary boycott provisions, the Report concludes

> certain means for curbing union activities aimed directly at suppressing commercial competition may be proscribed by the boycott provisions of the Labor-Management Relations Act. However, only those activities "' specifically provided for' in the Act"32/ are restricted. The result, in the language of the Court in the Joliet Contractors 33/ case may be "numerous apparent incongruities."

30/ 93 Cong. Rec. 6380 (1947).

31/ National Labor Relations Board v. International Rice Milling Co., Inc., 341 U.S. 665 (1951).

32/ 202 F. 2d 606, 611 (7th Cir. 1953); cert. denied 346 U.S. 824 (1953).

On the basis of this analysis, the Committee concludes:

As the limitations of our inquiry require, no one of our conclusions or recommendations implies any change of labor's freedom under the antitrust laws to act in concert in order to promote union organization or bargain collectively over wages, hours, or other employment conditions. Reported cases indicate, however, that some unions have engaged in some practices aimed directly at commercial market restraints by fixing the kind or amount of products which may be sold in any area 34/ or their market price 35/ Such activities run counter to our national antitrust policy. Accordingly, to the extent that such commercial restraints not effectively curbed by either antitrust or Labor-Management Relations Act exist, then we recommend appropriate legislation to prohibit these union efforts at outright market control.

34/ See e.g., Allen-Bradley Co. v. Local No. 3, 325 U.S. 797 (1945); Joliet Contractors Association v. National Labor Relations Board, 202 F. 2d 606-611 (7th Cir. 1953), cert. denied 346 U.S. 824 (1953); United Brotherhood of Carpenters and Joiners of America v. Sperry, 170 F. 2d. 863 (10th Cir. 1948); cf. United States v. American Federation of Musicians, 47 F. Supp. 304 (N. D. Ill. 1942), aff'd 318 U. S. 741 (1943); United States v. Carrozzo, 37 F. Supp. 191 (N. D. Ill. 1941); aff'd sub. nom. 313 U. S. 539 (1941).

35/ See e.g. Columbia River Packers Association v. Hinton, 315 U. S. 143 (1942); Hawaiian Tuna Packers v. International Longshoremen and Warehousemen Union, 72 F. Supp. 562 (D. Hawaii, 1947).

Regarding such legislation, this Committee recommends:

a. It should cover only specific union activities which have as their direct object direct control of the market, such as fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be sold, or the number of firms which may engage in their production or distribution. By "object" this Committee means only the immediate concession demanded from an employer as a condition precedent to halting coercive action against him. In drafting such legislation, greatest care should be given to protecting labor's "full freedom of association [and] self-organization * * * for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" as now provided in 29 U.S.C. § 151 (1952).

b. Unlike the present Labor-Management Relations Act, 36/ the Government should have power to proceed, on its own initiative, without formal complaints from others. A coerced employer, for example, might find it advantageous to acquiesce rather than complain. Thus, were the Government dependent upon formal complaints

36/ 29 U.S.C. § 160 (b) (1952) provides that the Board may issue complaints and hold hearings apparently only "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice."

of others to initiate actions, some wrong to the public interest might go uncorrected.

c. Unlike the Sherman Act, such legislation should not contain provisions for private injunction. In the labor-management area, private injunctive remedies under the Sherman Act have in the past been subject to abuse. In any legislation, therefore, primary reliance should be on Government-initiated enforcement.

Permit me for a moment to detail but a few of the practical problems this recommendation raises. First, does it threaten to make an antitrust question of every wage demand. For a wage increase well may, as the Report condemns, fix "the kind or amount of production which * * * may be produced or sold." Further, it, of course, may affect "their market price" and as a result "the geographical area in which they may be sold."

Obviously to attempt to avoid this anomaly the Committee defined "object" to mean only the immediate concessions demanded from an employer as a condition precedent to halting coercive action against him. Were "object" so construed, however, a union could easily circumvent the prohibition the Report urges. For example, a union might, instead of refusing to work on non-union goods or more efficient machines, merely insist its members be paid three or four times as much for working on such goods or machines. The result, it seems clear, would be to bar such products from the market while at the same time the union effort would be cloaked in the guise of a wage demand.

For further example, how would this recommendation affect the traditional labor-management practice of fixing the speed of an assembly line? Would not such an agreement have as its "object" the "fixing the kind or amount of products which may be * * * produced"? These few examples, I feel sure, highlight the practical difficulties of formulating legislation along the lines the Committee suggests.

With that I throw myself on the mercy of your distinguished panelists.