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ADDRESS

By

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IN CHARGE OF THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

"Proposed Civil Investigative Demand
A More Precise Method for Antitrust Investigation"

Prepared for Delivery

Before the

ANTITRUST COMMITTEE
Of the
MICHIGAN STATE BAR ASSOCIATION

Detroit, Michigan

April 25, 1958

It is a pleasure to be with you today. Four months after taking office as the head of the Antitrust Division, Department of Justice, I was requested to speak before the New York City Bar Association. At that time I explained that having spent approximately six years on the bench of the Superior Court, California, immediately prior to assuming my present duties, required me to do much studying to acquaint myself not only with the procedures of the office, but with the voluminous cases filed and in the process of filing, and which involved every conceivable type business in the United States.

Antitrust, you all realize, covers the entire range of American economic life. Thus, we have brought suits against lead producers, 1/ shipping companies and airlines, 2/ shrimp and oyster fisherman, 3/ trailer operators, 4/ and linen

1/ U. S. v. American Smelting and Refining Co., et al.
Civ. 88-249, filed October 9, 1953.

2/ U. S. v. Pan American World Airways, Inc., et al.
Civ. 90-259, filed January 11, 1954.

3/ U. S. v. Gulf Coast Shrimpers and Oystermans Assoc. et al.
Cr. 7192, filed April 1, 1953.

4/ U. S. v. Nationwide Trailer Rental System, Inc., et al.
Civ. W-655, filed August 28, 1953.

service suppliers. 5/ Treating even more directly those human frailties to which all of us may be subject, antitrust has moved against restraints on the manufacture of eyeglasses,6/ false teeth, 7/ and vitamin pills. 8/

Just to ensure continued need for such pills, we have attacked restrictions on the sale of alcoholic beverages in the states that range from Maryland to Tennessee. And riding even higher on the wave of the future, we have more recently struck at limitations on production of sex hormones.

Antitrust, I might add, is concerned not only with the material things of life. It covers the theatre and arts as well. Thus, we have proceeded against restraints by the New York City Theatre Scenery Haulers, 9/ as well as the International Boxing Club, 10/ The United States Trotting Association, 11/; and blending theatre with sport, as well as with a sense of humor, we have filed a case against wrestling.

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- 5/ U. S. v. National Linen Service Corp., et al,
Cr. 20559, Civ. 5171, both cases filed April 25, 1955.
- 6/ U. S. v. Bausch & Lomb Optical Company
Civ. 46-C-1332, filed July 23, 1946.
- 7/ U. S. v. Luxene, Inc. Civ. 66124, filed April 27, 1951.
- 8/ U. S. v. Merck & Co. Inc. Civ. 3159, filed October 28, 1943.
- 9/ U. S. v. Walton Hauling & Warehouse Corp., et al.
Civ. 86-286, filed July 15, 1953; Cr. 141-349,
filed June 23, 1953.
- 10/ U. S. v. International Boxing Guild, et al,
Cr. 21823, filed January 10, 1956
- 11/ U. S. v. The United States Trotting Association,
Civ. 5233, filed March 4, 1958.

As you can readily see, antitrust is no esoteric endeavor conducted in far-off Washington and eternally removed from the main stream of American living.

After a little less than two years in office, I am convinced that antitrust is a distinct American means for assuring that a competitive economy exists and is the basis of our free enterprise system.

I am satisfied that the policy of vigorous and fair enforcement has resulted in more economical enforcement and more effective enforcement.

I find it exceedingly difficult to know just what is of interest to the practitioner in the field of antitrust law. Occasionally, the audience will consist of highly specialized practitioners in the field of trade restrictions, and in such cases to speak generally about the Sherman Act, Sections 1 and 2, and the Clayton Act, Section 7, or about the Robinson-Patman Act, is of little interest.

On other occasions I met Bar Association audiences where the overwhelming majority are general practitioners, and only occasionally--if at all--they come in contact with the antitrust laws. In such cases their interest is in the broader aspects of the antitrust laws rather than in the refinement of particular points. We all realize today

that the antitrust laws, like the Federal tax laws, cut across major business transactions. The purchase and sale contracts, even employment contracts which you draft for your client, price lists, methods of sale, discounts, and other allowances to customers, his acquisition of other businesses by purchase or merger, the trade associations and other industrial groups in which he participates -- these and numberless other activities all have antitrust implications.

The antitrust laws are general in their terms. Mr. Chief Justice Hughes referred to them as having " * * * a generality and adaptability comparable to that found to be desirable in constitutional provisions." 12/ So much for a very general statement concerning antitrust laws.

This brings me to the subject which I would like to discuss with you today - The Proposed Civil Investigative Demand. I have chosen this subject because I feel that the proposed legislation is of vital importance to the Antitrust Division, and that lawyers throughout the country should be aware of the contents of this bill and of its objectives, as well as to why the Antitrust Division desires such legislation.

12/ 288 U. S. 344, 359, 360.

On August 27, 1953, former Attorney General Herbert Brownell, Jr. appointed a committee of distinguished antitrust lawyers to study the antitrust laws and make recommendations. After nineteen months of study and consultation, this committee made a report to the Attorney General, which has been recognized as a thoughtful and constructive analysis of the problems in this field. One aspect of this report dealt with the procedure for enforcement and proposed that the Department of Justice be authorized to issue a civil investigative demand in aid of its antitrust investigations. 13/

A bill to carry out this recommendation was presented to the Congress in July, 1955. The Economic Report of the President to Congress in 1956, among other antitrust legislation recommended, strongly urged that the Attorney General be empowered to issue a civil investigative demand.

The proposed bill, which has safeguards of the type recommended by the Committee, would provide for issuance by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, of civil investigative demands whenever they have reason to believe that any person may be in possession, custody or control of any documentary material

13/ Report of the Attorney General's National Committee to Study the Anti-Trust Laws, pp. 343-349 (1955).

bearing on any antitrust investigation. Each demand would contain a statement of the statute which allegedly is being violated and a description of the class or classes of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified. It also would prescribe a return date providing a reasonable time within which the evidence demanded may be assembled and produced, and identify the custodian to whom such evidence is to be delivered.

The bill would prohibit any requirement which would be held unreasonable if contained in a court-issued subpoena duces tecum in aid of a grand jury investigation. It also would bar any requirement for production of any documentary evidence which the recipient can show would be privileged from disclosure if demanded by a subpoena duces tecum.

Provision is also made to:

1. Permit the Department to ask a Federal District Court to issue an order to enforce a demand for documents.
2. Permit a person upon whom a demand is served by the Department to petition a Federal District Court within 20 days of such service for an order modifying or setting aside such a demand.

Any disobedience of any final order by a court would be punishable as a contempt.

The bill also provides for criminal penalties not exceeding five thousand dollars fine, five years' imprisonment, or both, for anyone convicted of wilfully removing, concealing, withholding, destroying, mutilating, altering, or by any other means falsifying any material in his possession, custody or control, with the intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand.

The need for such a bill seems clear. Under present law, the Department has no such power. As matters stand now, the Department has only two alternatives: First, it can seek the voluntary cooperation of those firms and persons under investigation; Second, it can resort to the use of a grand jury. The first of these alternatives has sometimes been found satisfactory, for many parties under investigation have voluntarily thrown open their files to government investigators or furnished specifically designated information. Others have not. Under these circumstances we have no alternative except to proceed by way of grand jury. The Department should not be required, in order to enforce the law,

to subject every person suspected of a law violation to a grand jury investigation. And from my experience I can say that many others agree with me, because as soon as subpoenas duces tecum are issued those persons who may have been involved in a purely civil matter come in to open their files or furnish information.

In pre-complaint merger investigations this demand is particularly important, for Section 7 has no criminal sanction. Accordingly, we cannot resort to grand jury to secure documents from companies under investigation for Section 7 violation, even if this procedure could bring us the information in the limited time between knowledge of the merger and its consummation. So it is that enactment of this civil investigative demand is vital to more effective anti-merger work.

While situations have arisen where grand jury proceedings were used to secure evidence upon which a civil case was later based, these have been few in number. The majority of civil cases are based upon the Government's own investigation. It is in these essentially civil cases that the civil investigative demand is needed and in which I believe it would provide an effective enforcement weapon.

The proposed civil investigative demand would permit the Government to examine unprivileged correspondence and business records of the party under investigation before a suit is brought. If it is determined that the proof does not support the alleged violation, the matter would, of course, be dropped. If, on the other hand, it is decided to proceed, the Government would not be required to rely upon secondary sources for its information and would then be in a much better position to frame an adequate complaint.

The proposed civil investigative demand would be subjected to all of the safeguards which now attend a subpoena. A person upon whom a demand is made would be authorized to proceed before the District Court of his own district to modify or vacate any demand believed to be unreasonable in scope, inadequate in description of material demanded, or lacking in specificity. The documents produced under the demand would be held by a custodian in the Department of Justice; they would not be available to any person except the person from whom they were taken, officers of the Antitrust Division or the Federal Trade Commission. They would not be subject to use except in the investigation described in the demand or an ensuing investigation before a grand jury, by the Antitrust Division, or by the

Federal Trade Commission.

At the time this recommendation was made, there was some dissent among the members of the Attorney General's Committee and I am sure other members of the bar also had similar doubts. It was contended that this grant of power to an executive officer disregarded the separation of the executive and judicial power; that an executive officer with no quasi-judicial functions should not be authorized to use a procedure so analogous to a court issued process. It is respectfully pointed out, however, that this would not be the first time such a power was granted. For example, the Attorney General of the State of New York has such power under Executive Law, Section 63. Certain agencies of the Federal Government have actual subpoena power, with the right to apply to the district courts to enforce compliance. The Securities and Exchange Commission, for example, may require the production of any books and papers which the Commission deems relevant or material to its investigation. 14/ Likewise, the Federal Trade Commission may compel the production of documentary evidence and may invoke the aid of any Federal Court in securing the production of such

14/ 15 U. S. C. Sec. 78u.

evidence. 15/

To those persons who feel that the civil investigative demand may be abused by the executive officer, I believe the final answer is that the reviewing power of the court affords a true safeguard which could be utilized by the person under investigation to curb any abuse on the part of the officer and to secure a prompt remedy upon appropriate application to the district court.

Other critics of the proposed civil investigative demand urge that the antitrust laws are essentially criminal and should be enforced as such. This objection overlooks the fact that antitrust enforcement is both criminal and civil, as well as the further fact that the proposed civil investigative demand could only be used for purposes of a civil proceeding.

Antitrust laws are among the most complex and difficult to enforce. Every possible procedural flexibility should be made available in aid of their enforcement. Major cases usually involve voluminous documentary material. The use and expeditious presentation of this material will be more effective if before the filing of a case the material

is made available by means of the proposed civil investigative demand.

In view of the evident need for the early enactment of this bill, it is my hope that Congress will move promptly to act on our recommendations. Fortunately for our form of government, all groups have some voice, and there is almost always struck some sort of balance, so that no one voice is too persuasive. In the antitrust field, however, I am not so sure that this balance is always attained. Support for our efforts, I suggest, can come only with the more widespread realization of the popular stake in effective antitrust enforcement. So it is that meetings like today's increase informed discussion of basic problems and serve a vital public service.

Now I would like to close with a few thoughts on the role antitrust plays in preserving a healthy national economy that is so important to all of us.

In 1776, Adam Smith's "Wealth of Nations," comparing Britain and the United States, noted:

But though North America is not yet so rich as England, it is much more thriving, and advancing with much greater rapidity to the further acquisition of riches.

Since that day hardly a year has passed without some like exclamation of wonder from students of economics.

For example, in 1939, Michael Chevalier, in his "Society, Manners and Politics in the United States," remarked on the difference between his own France and what he sees here:

An American's business, Chevalier says, is always to be on edge lest his neighbor get there before him . . . Industry has become a veritable battlefield . . . Unlimited competition (has) become the sole law of labor, everyone being his own master.

These observations are firmly rooted in the realities of our national income statistics. In 1952 the average income per person in the United States was twice that of the Swiss citizen, three times that of the Englishman or Frenchman, or Belgian, six times that of the Western German. National income of necessity rests upon national production, our productivity.

In America we produce one-third of the total goods in the world and one-half the manufactured goods with one-fifteenth of the land area of the world, one-fifteenth of the people of the world, and one-fifteenth of the national resources of the world.

Perhaps influenced by this striking comparison, a noted Swiss political economist, William E. Rappard, concluded in his study, "The Secret of American Prosperity," published

as recently as May, 1955, "that the United States today enjoys a much greater average income than any other nation. The material standard of living is, therefore, by far the highest in the world." Seeking the reason for this, Mr. Rappard wrote Mr. John S. Crout, Director of the renowned Battelle Institute. Explaining American growth, Mr. Crout reasoned:

Antitrust has compelled corporate managements to reconsider their position. They realized that they were required to compete, but had no hope of ever establishing a monopoly.

Under these circumstances, they accepted the concept of true competition and directed their energies and efforts in ways and means of increasing their profits by expansion of their volume of business.

In essence, this meant that each management set out to do a better job of producing, selling and distributing its products than its competitors. 16/

A like conclusion was reached by a British study team that recently visited this country. As a result of the Marshall Plan, international study centers were organized to study the reasons for the superior productivity of American industry. "The Anglo-American Council on Productivity" was set up. It was responsible for organizing British teams of managers, technicians, and trade unionists, which went to the United States to see what methods used

16/ William E. Rappard, The Secret of American Prosperity, (1955), p. 67.

there could be adapted to the needs of Great Britain. Sixty-six teams had made the trip by late 1952. They presented reports which were practically unanimous.

Lest you think I might be biased in reporting their conclusions, let me read you what an American newspaper reported under a London dateline in late 1954, as a result of the return of one of the latest teams. The New York Times headline read:

Productivity Team Lays U. S. Output Supremacy Largely to Sherman, Clayton Acts.

Hits Own Country's Law

Parliament Urged to Act on Manufacturer Pacts That End Competition

That newspaper's account went on:

The praise for the Sherman and Clayton Antitrust Acts was included in the industrial engineers' report because, according to members of the group, "it was the answer we kept getting when we asked American^s what was the source of the competitiveness in their economy." The group's secretary . . . remarked that ". . . the monopolies issue has become a part of the public morality of the United States; it is enforced by public opinion."

And so we see the importance that antitrust enforcement assumes, in the eyes of others. It has withstood the crucible not only of time, but of study. Today it stands

as one of the prime supports for our prosperous and free competitive economy. In its preservation you -- indeed, all Americans -- have a vital stake.

With this thought uppermost, I thank you for this chance to be with you, and wish the work of this organization well.