Report of the Attorney General's Committee to Study the Antitrust Laws. 1955. pp. 343-349.

CHAPTER VIII

Antitrust Administration and Enforcement

Closely related to substantive antitrust issues are problems of administration and enforcement. These involve not only the Department of Justice and the Federal Trade Commission but also treble damage litigants whose suits necessarily figure in any enforcement study.

The Department, on the one hand, must have adequate investigatory authority to determine whether a probable violation exists. If the decision is reached to proceed, then a choice must be made between a civil suit, a criminal action, or both. Important here is not only the selection of appropriate penalties or equitable relief, but also the chance of avoiding trial through consent settlement. Should consent negotiations fail, there must be appropriate means for assuring quick and fair trial of disputed issues. After trial is completed, the Department must consider how best to enforce its judgment. Finally, it faces the continuing problem of the extent to which it should grant advance clearances and releases.

The Commission, on the other hand, faces some of these same problems as well as issues involving voluntary compliance, such as trade practice conferences and informal settlement processes. Together, both the Commission and the Department, of course, must best divide their diverse processes and skills to avoid duplication and maximize effective enforcement.

In addition to these Government enforcement agencies, private damage proceedings are also significant. These may pose problems of their own, such as whether damages should be automatically trebled in all cases or only where violations are willful, whether the United States may recover damages and, finally, whether private antitrust proceedings should be governed by diverse state statutes of limitation or some uniform federal law. This Report considers all these issues.

A. THE DEPARTMENT OF JUSTICE

1. *Antitrust Investigations*

The inevitable generality of most statutory antitrust prohibitions renders facts of paramount importance. Accordingly, effective en-

forcement requires full and comprehensive investigation before formal proceedings, civil or criminal, are commenced. Incomplete investigation may mean proceedings not justified by more careful search and study. Public retreat by the prosecutor may then be difficult, if not impossible, and the result may be a futile trial exhausting the resources of the litigants and increasing court congestion. Thus the adequacy of investigatory processes can make or break any enforcement program.

Present procedures enable the Department of Justice to employ compulsory process to obtain both documentary and testimonial evidence at every stage of criminal and civil antitrust proceedings—except during the investigative stage of a matter in which civil proceedings are, from the outset, contemplated.

Where indictment is contemplated, the federal grand jury is equipped with ample powers to permit the fullest investigation. The grand jury subpoena may be used to compel the discovery of all documentary material reasonably required as well as the testimony of witnesses under oath.

In the investigation of civil matters, on the other hand, the Department must:

(*a*) depend upon the voluntary cooperation of those under investigation;

(*b*) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

(*c*) make use of the grand jury.

These procedures do not satisfy civil enforcement needs.

Voluntary cooperation of parties under investigation has often been sufficient, but compulsory processes are required in some cases. Moreover, a Government agency should not be in a position of sole dependence upon voluntary cooperation for discharge of its responsibilities.

Filing a civil complaint enables resort to the compulsory discovery processes under the Federal Rules of Civil Procedure, such as interrogatories, motions to produce documents, depositions, etc. These methods have been extensively used in antitrust cases and provide discovery powers almost as sweeping as a grand jury.[1] But they come

[1] Interrogatories, according to Rule 33 (Fed. R. Civ. Proc.) "may relate to any matters which can be inquired into under Rule 26 (b)." Rule 26 (b) (Fed. R. Civ. Proc.), in turn, provides for depositions pending trial "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *." It is no ground for objection, 26 (b) continues, "that the testimony will be inadmissible at the trial if * * * [it] appears reasonably calculated to lead to the discovery of admissible evidence." Beyond interrogatories and depositions, discovery and production of documents are available to secure evidence "not privileged" and, under Rule 34 (Fed. R. Civ. Proc.) "relating to any of the matters within the scope of the examination permitted by Rule 26 (b)".

into play only *after* a complaint has been filed. Thus the Department cannot utilize them to determine whether the institution of formal proceedings is warranted. Moreover, the filing of a skeleton complaint in hopes that the Federal Rules' discovery procedures will unearth facts essential to a valid accusation is unwise. For we agree with the Judicial Conference of the United States that no plaintiff, including the Government, may "pretend to bring charges in order to discover whether actual charges should be brought." [2] These Rules "were not intended to make the courts an investigatory adjunct to the Department of Justice." [3]

The last alternative is the grand jury. Its use where civil proceedings are contemplated from the outset cannot be justified on the purely formal ground that the Sherman Act defines a criminal offense appropriate for consideration by a grand jury, even though it may later be determined that equitable relief is more appropriate. In reality, resort to grand jury in essentially civil investigations stems from lack of an adequate civil discovery alternative.

We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.

We recognize that the Department has been handicapped and accept the Judicial Conference conclusion that present civil investigative machinery is inadequate for effective antitrust enforcement.[4] The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails.

We reject the proposal for legislation authorizing the Department of Justice to issue the type of administrative subpoena typically employed by regulatory agencies.[5] Unlike the Federal Trade Commission, for example, the Department of Justice is entrusted only with law enforcement. The grant of subpoena powers suggests broader regulatory powers, structural reorganization, a system of hearing officers and a panoply of administrative procedural protections which the Committee is not prepared to recommend. We would, in addition, disapprove any subpoena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer

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[2] Judicial Conference of the United States, Report on Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, 67 (1951).

[3] *Id.* at 67.

[4] *Id.* at 67.

[5] See e. g., compulsory process granted the Federal Trade Commission, 15 USC (1952) 49.

and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.

To enable fair and effective enforcement by the Department, the Committee recommends legislation, applying only to relevant documents possessed by parties under investigation, which would:

1. Authorize the Attorney General, in a civil antitrust investigation, to issue and have served upon any corporation, partnership or association a Civil Investigative Demand. This would require the production of existing correspondence and other business records and data or copies thereof, not privileged, in the possession of the party served. Such documents must, however, be relevant to particular antitrust offenses stated to be under investigation. In addition, the Demand must describe the records and data sought with reasonable specificity, so as fairly to identify the material demanded, as well as specify a reasonable time for its production.

2. Create the office of custodian in the Department of Justice and require that all documents produced in response to a Demand be delivered to the custodian or his deputy at the recipient's principal place of business or at such other district as the parties may agree. The custodian would be charged with receiving and preserving all such documents. He should make them available only to the Antitrust Division or Federal Trade Commission personnel participating in the pending investigation and, under reasonable conditions, to representatives of the corporation, partnership or association that has delivered them.

3. Restrict the use of documents produced in response to a Demand to (*a*) the pending investigation, (*b*) submission before a grand jury, (*c*) Antitrust Division or Federal Trade Commission proceedings that may ensue; and require that they be promptly restored to their rightful owner thereafter.

4. Vest the United States District Court for the judicial district in which the recipient maintains its principal place of business or in such other district as the parties may agree with power to entertain motions:

a. with respect to the performance by the custodian of his statutory duties; and

b. by the United States for an order directing compliance on pain of contempt; and

c. by a recipient challenging:

(1) the reasonableness of the Demand and the relevance of the documents called for in relation to the specific offenses the Demand states to be under investigation; or

(2) the reasonableness of the scope of the Demand; or

(3) the adequacy and specificity of the description of the material required to be produced.

If the Demand does not conform to the statute the Court would have the power to modify or set it aside entirely.

5. Provide that a Demand may be served and enforced by the courts against any corporation, partnership or association subject to the jurisdiction of the United States.

6. Provide that whether compliance with a Demand is effected in response to a court order or to the Demand itself, all constitutional and statutory safeguards and immunities shall be fully preserved.

The Attorney General should resort to this Demand where requests for voluntary production would probably prove not fully effective. If, as seems likely, the Demand in practice becomes an effective tool to compel production of data adequate for precomplaint investigation, its successful use should end the necessity for utilizing the grand jury process in civil antitrust investigations. Thus, it would complement, not supersede, the grand jury, which retains its proper role in criminal investigations.

True, the proposed Demand does not carry the same sanction as the grand jury subpoena, which, after all, is the process of the court. With the Demand, this would not be the case until it had become the subject of a court order directing compliance. There are sanctions, however, not only in the enforcement procedure proposed but also in the existing criminal statutes making unlawful the concealment of material facts or the obstruction of justice.[6] Complementing grand jury recourse, this proposed Demand should enable the Department

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[6] 18 U. S. C. § 1001 (1952) provides: "* * * Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Complementing that provision is 18 U. S. C. § 1503 (1952) which reads: "Influencing or injuring officer, juror, or witness generally: Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

to gather quickly the wealth of data needed to determine probab violation.

With this position, several members disagree. In the words of on

> "I appreciate the fact that the Department of Justice is some times handicapped by the refusal of some recalcitrants to coop erate when the Department is seeking evidence upon which t decide whether to file a civil or criminal antitrust action o whether or not facts warrant the filing of a civil action. Bu the fact is that not more than ten percent of those who are aske for data refuse to cooperate.
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> "In addition, I oppose its enactment because: (*a*) The Depart ment of Justice is an Executive Department and the Attorney General is an Executive Officer. This recommendation disre gards the basic distinction between the executive power on the one hand and the judicial power on the other.
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> "(*b*) The Sherman Antitrust Act is in essence a criminal statute.
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> "(*c*) When all is said about it the proposed Demand is a form of subpoena duces tecum—and it will originate with the Attorney General. The use by Department agents of such a formal process will be more likely to terrify innocent people than a regular sub poena duces tecum would.
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> "(*d*) One of the plainest lessons taught by the history of gov ernment in any place and at any time is that freedom of the individual disappears with the growth of executive power.
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> "It is true, of course, that some are embarrased by the fact that they may have to appear in a grand jury investigation; but that such appearance carries with it a taint or feeling of crim inality I deny.
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> "(*e*) I submit that there is really no need for a subpoena duces tecum in any form in any of the circumstances presented by the Report. Certainly, the fact that the availability of such an in strument would make easier the work of the Department of Justice is not a strong argument in favor of such an instrument.

Louis B. Schwartz adds,

> "the historic functions of grand juries have extended to civil matters regarded as of especial importance, *e. g.*, the conduct of public office, the state of public institutions. Grand jury was simply the investigating arm of the crown and a device for screen ing out criminal complaints so insubstantial as not to warrant prosecution. Nothing could be more appropriate than the exist ence and exercise of this sovereign jurisdiction to compel great corporations, whose activities affect the public interest, to dis close the facts as to their acquisition and use of economic power.
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> "I would have no objections to the civil investigative demand," he concludes, "if it were proposed as a supplement to existing

enforcement powers. But in the light of the background of the proposal and the Report's animadversions on the grand jury subpoena in 'civil' cases, I can only regard this as a step to curtail the Department's most effective investigative device."

Finally, one member fails to see how a civil investigative demand limited to the production of *documents* can give the Government the information it needs to draft an intelligent complaint or to decide whether to proceed civilly or criminally.

2. *The Decision To Proceed*

Once evidence is secured, then the decision is at hand (1) whether to proceed at all and, (2) if the facts are deemed to warrant action, whether to institute criminal action, civil proceedings, or both. In either event, (3) what relief should be demanded. Finally, (4) involving all these issues, what procedures best insure that each decision is intelligently made.

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. With this overall guide, a balanced enforcement program should include national and local restraints within the reach of Federal antitrust. Industrywide and regional proceedings, of course, play a crucial enforcement role. However, the importance of striking down "local" restraints within the reach of the commerce clause is not to be minimized. Such market clogs may be of great importance to the people and the economy of a particular area. Often these restraints, carried out by small concerns without experienced antitrust counsel, are of a flagrant type which antitrust compliance has largely removed from national markets. Since State antitrust laws, with few exceptions, have not been fully developed or enforced, national antitrust policy must make adequate provision for dealing with all market restraints within its ambit.

Once the decision to proceed is made, then the choice of civil or criminal attack is at hand. The Sherman Act, inevitably perhaps, is couched in language broad and general. Modern business patterns, moreover, are so complex that market effects of proposed conduct are only imprecisely predictable. Thus, it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe 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.