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CASE IN SUPPORT OF APPLICATION OF THE EXPEDITING ACT TO ANTITRUST SUITS

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THE Spring-Summer issue of the *De Paul Law Review* presents "The Case for Eliminating Direct Appeal to the Supreme Court in Civil Antitrust Cases."¹ That comment, like most other published articles² on the question of amending the Expediting Act,³ presents a one-sided picture. One reading them would suppose that the only bar to the changes proposed is the impediment to all progress—inertia.

It is the thesis of this article that, on the contrary, there are substantial reasons for rejecting this attack upon the Expediting Act.

That act contains two major provisions: first, it provides that in civil actions, brought under the federal antitrust laws or under the Interstate Commerce Act, in which the Government is the plaintiff, a three-judge court may be convened upon the filing, by the Attorney General, of a certificate that the case is one of public importance.⁴

Secondly, it provides for a direct appeal to the Supreme Court from a district court's final decision in civil antitrust suits brought by the Government.⁵

I. PROPOSED REVISIONS OF THE EXPEDITING ACT

Two bills have been introduced in the Congress to modify these provisions of the Expediting Act. One,⁶ sponsored by the American

¹ 13 DE PAUL L. REV. 261 (1964).

² See Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 ANTITRUST L. SYM. 98; Wiener, *Federal Regional Courts: A Solution for the Certiorari Dilemma*, 49 A.B.A.J. 1169, 1172 (1964). But Mr. Wiener suggests that the appeal in Government civil antitrust cases might go to special regional appellate courts rather than to the ordinary federal courts of appeals. See also Comment, *Proposed Amendment to Expediting Act Would Eliminate Direct Appeal to Supreme Court*, 39 N.Y.U.L. REV. 319 (1964).

³ Act of February 11, 1903, 32 Stat. 823, as amended; 15 U.S.C. § 28-29 (1958) (hereinafter referred to as the Expediting Act).

⁴ 15 U.S.C. § 28 (1958).

⁵ 15 U.S.C. § 29 (1958).

⁶ S. 1811, 88th Cong., 1st sess. (1963).

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Bar Association, would retain the provisions of that act for cases arising out of the Interstate Commerce Act but would exclude antitrust cases.⁷ It would also make applicable to antitrust cases the interlocutory appeal provisions of the general federal statute on that subject.

The other bill,⁸ sponsored by the Department of Justice, would amend section 2 of the Expediting Act in several ways. It would limit direct appeals to the Supreme Court from final judgments by a district court in both antitrust and Interstate Commerce Act cases to occasions where either the Attorney General, or the district court at its own instance or on request of a party, certified that the case was one of general importance. Also, the case would have to be one in which the Government was the plaintiff.⁹ In addition, the bill also provides that if the Attorney General files a certificate after final judgment of the district court, section 1 of the Expediting Act would not apply.

Unlike the ABA bill, the Attorney General's bill makes applicable only the interlocutory appeals provisions of the Judicial Code pertaining to injunctive orders,¹⁰ and not the broader interlocutory appeal provisions¹¹ of the Code.¹²

The Judicial Conference of the United States has disapproved the ABA-sponsored bill. It has approved S. 1892, with an amendment eliminating the right of the Attorney General to file a certificate without first obtaining leave of court.¹³

II. RETENTION OF SECTION 1 OF THE EXPEDITING ACT

The argument for repealing section 1 of the Expediting Act as to antitrust cases is that it has fallen into disuse. There are several rejoinders to make to this contention. In the first place, it is clear that it has not been used so often as to impose any material burden upon the

⁷ The bill makes clear that a party to an antitrust civil suit brought by the Government could apply to the Supreme Court for certiorari under 28 U.S.C. § 1254(1) (1958), before judgment was rendered by a court of appeals. This provision may create some internal ambiguities, not the least of which is that section 2 of the Expediting Act which refers to "Acts," is not proposed to be amended.

⁸ S. 1892, 88th Cong., 1st sess. (1963).

⁹ The proposed bill is silent as to its effect on the time provisions for appeals to the Supreme Court.

¹⁰ 28 U.S.C. § 1292(a)(1) (1958).

¹¹ 28 U.S.C. § 1292(b) (1958).

¹² The reason for this difference has not been explained.

¹³ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1963, at 76-77.

courts, which might result from three judges frequently having to sit as a district court.¹⁴

Secondly, although its use in interstate commerce cases is almost unknown, the American Bar Association bill would permit section 1 to apply to cases under the Interstate Commerce Act.¹⁵

Thirdly, there are times when its use is desirable.¹⁶ It was used with good effect in the *Paramount* case,¹⁷ and a three-judge court was requested in a major bank merger case in 1963.¹⁸

III. ANALYSIS OF ARGUMENTS FOR REPEAL OF SECTION 2 OF THE EXPEDITING ACT

The real controversy focuses on section 2 of the Expediting Act—direct appeal to the Supreme Court. In 1962, in *Brown Shoe Co. v. United States*,¹⁹ Justice Harlan, in the course of arguing that the judgment before the court was not a final one, also questioned the advisability of direct appeals to the Supreme Court from final judgments in government civil antitrust cases.²⁰ A similar view was espoused by Justice Clark.²¹ In 1963, in the *Singer* case,²² all the members of the

¹⁴ See *infra*, note 16.

¹⁵ It has been said that, as long ago as 1950, the Department of Justice questioned the right of direct appeal in I.C.C. cases, and suggested that the Judicial Review Act be made applicable to the Commission. See Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 ANTITRUST L. SYM. 94. Three-judge courts are provided for under certain provisions of the Interstate Commerce Act. Last year, sixty-seven such courts were called into being. See DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, ANN. REPT. 1963, at 143. One might think that such a situation would invite the attention of the bar and the bench.

¹⁶ In a communication to the Judicial Conference in 1952, the Department of Justice made the following statement:

“The awareness of the Department of Justice of the burden which the appointment of a three-judge court imposes on the discharge of other judicial business is shown by the fact that expediting certificates have been filed in only six cases in the last 15 years. In cases such as those six, however, the establishment of a three-judge court seems to the Department of Justice to be essential.” REPT. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1952, p. 31. And see Solomon, *op. cit. supra* note 15, at 94.

¹⁷ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹⁸ *United States v. Crocker-Anglo Nat. Bank.*, 223 F.Supp. 849 (N.D. Cal., 1963). Compare this fact with the statement of Mr. Gesell, in 1961, that “The Attorney General . . . and their associates in the Antitrust Division do not dare ask for a three judge court. . . .” *Supra*, note 2 at 100.

¹⁹ 370 U.S. 294 (1962).

²⁰ *Id.* at 363–64 (dissenting in part and concurrent in part).

²¹ *Id.* at 355.

²² *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 175 (1963), note 1. The Justices referred to an article by Gerhard A. Gesell. See *supra*, note 2.

Supreme Court, except Justice White, expressed the opinion that time has proven that direct appeals in antitrust cases are unsatisfactory, Justice White expressly disagreed with that statement.²³

One year prior to the *Brown Shoe* case opinion, an attorney, well known for his able representation of defendants in antitrust cases, had described the Expediting Act as "archaic, anachronistic and nonsensical"²⁴—he had just lost an antitrust case in the Supreme Court which he had won in the district court.

a) *The sun has not set on antitrust issues.*—The primary apology for repeal of the Expediting Act is that at the time of the enactment of that act, antitrust law was novel and had had little interpretation. Now, some seventy years after the enactment of the Sherman Act, it is asserted that antitrust cases generally are barren of legal issues and present merely issues of fact for determination by appellate courts.²⁵

It is submitted that this argument has little validity. If the rationale for direct appeal to the Supreme Court were limited only to the question of the importance and novelty of the legal issues in government civil antitrust cases reaching the Supreme Court during the last decade or two, the rationale would be amply supported.²⁶ The contrary position of "nothing new under the sun" finds little support in the history of antitrust litigation.

The Expediting Act was enacted in 1903. Almost thirty years later Professor Milton Handler, a leading antitrust authority, asserted that Supreme Court cases had not "covered the entire range of problems, much remains unexplored and undecided, much that has been passed upon is still enshrouded in uncertainty and doubt."²⁷

²³ *Id.* at 197.

²⁴ Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 ANTITRUST L. SYM. 98. Since it was cited in the *Singer* case, Mr. Gesell's article cannot be overlooked although it may be challenged.

²⁵ "The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law." Harlan, J, dissenting and concurring in part, in the *Brown Shoe Co.* case, 370 U.S. 294, 364 (1962).

"Except in rare instances, the important issues which arise in antitrust cases today are factual rather than legal." Comment, *The Case for Eliminating Direct Appeal to the Supreme Court in Civil Antitrust Cases*, 13 DE PAUL L. REV. 261 (1964).

"We go to the Supreme Court, I submit, primarily on fact cases these days. There isn't any law to be decided in most antitrust cases." Gesell, *op. cit. supra* note 24, at 100.

²⁶ Few who have kept in touch with the writings and statements of antitrust critics in recent years have not found the most repeated complaint one of uncertainty as to the meaning and scope of the antitrust laws.

²⁷ Handler, *Industrial Mergers and the Antitrust Laws*, 32 COLUM. L. REV. 179, 183 (1932).

In the late 1930's and early 1940's, Thurman Arnold, head of the Antitrust Division, was announcing his intention to bring antitrust cases involving patents in order to obtain a judicial determination of the application of the antitrust laws to patent agreements.

In 1962, Professor Handler commented that,

Antitrust since its inception has been in a state of ferment. . . .

There is no prospect that the time will ever come when antitrust will come to rest. We shall always be confronted with many unresolved problems of administration, enforcement, substantive doctrine, and procedural method. I thus see an ever-challenging future for the student of antitrust.²⁸

In August 1964, a widely publicized comment by the Morgan Guaranty Trust Company had this to say:

In one momentous year—from June 17, 1963 to June 22, 1964—the Supreme Court of the United States rewrote the rule book governing mergers and acquisitions in American business. . . . The Court reached back to the trust-busting era of the first President Roosevelt to reinstate a legal doctrine, long in disuse, barring any business combination which eliminates “significant competition.” It also reached forward to assert new authority to ban mergers judged to preclude the possible future development of competition.²⁹

This, we submit, is strong testimony in support of a view of the kinetic nature of the antitrust field of law and a strong refutation of the unsupported thesis that antitrust law has reached the age of stagnation.

Antitrust statutory law did not become frozen in 1903.³⁰ In 1914 the Clayton Act³¹ was enacted. In 1950 the Celler-Kefauver Amend-

²⁸ Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 957, 958 (1962). In an introduction to a 1963 article by Professor Handler, the editors of the *Virginia Law Review* had this to say: “Antitrust, perhaps to a greater extent than most areas of the law, is subject to changing fashions. It is an area where the full potentiality of traditional issues and approaches is not exhausted before new centers of legal attention appear. This result is probably dictated by the constantly changing character of our economy.” Introduction to, Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433 (1963).

²⁹ THE MORGAN GUARANTY SURVEY, A YEAR OF DECISION IN ANTITRUST 4 (1964).

³⁰ There is some evidence that, in passing the Expediting Act, Congress did not have in mind that only cases arising under the Sherman Act would be of importance, but rather that cases arising under future antitrust statutes would also be of importance. See 36 CONG. REC. 1679 (1903).

³¹ Act of October 25, 1914, ch. 323, 38 Stat. 730 (codified in scattered sections of 15 U.S.C.).

ment³² to section 7 of that act was adopted. Over the years, moreover, numerous regulatory statutes containing antitrust provisions have become part of our law, and statutory exceptions to the reach of our antitrust laws dot the legal landscape.

During the last twenty years many new and important interpretations of the antitrust laws and of their relationship to statutes of a regulatory nature have been made by the Supreme Court. To name just a few cases in which this occurred: *Hartford-Empire*,³³ *Paramount Pictures*,³⁴ *Line Material*,³⁵ *Standard Stations*,³⁶ *International Salt*,³⁷ *Embassy Dairy*,³⁸ *Parke Davis*,³⁹ the two *duPont* cases,⁴⁰ and *Brown Shoe*.⁴¹

There are many antitrust matters of importance not yet resolved by the Supreme Court. These would include questions pertaining to joint ventures, reciprocity, conglomerate mergers, product extension mergers, market extension mergers, consignment dealers, cooperative price advertising, and oligopoly.

Despite the remarks of members of the Supreme Court in the *Brown Shoe* and *Singer* cases,⁴² that Court remains a strong witness in support of the point made here. Thus, in 1948, the Supreme Court noted that it had before it an antitrust case of "first impression."⁴³ In 1962,⁴⁴ it again made a similar comment in another antitrust case. And in 1963, that Court stated in one case that, "This is the first case involving a territorial restriction in a *vertical* arrangement."⁴⁵ That same year, in another antitrust suit, the Court noted that "this is the first case which has required this Court to consider the application of the antitrust laws

³² 64 Stat. 1125; 15 U.S.C. § 18 (1952).

³³ *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

³⁴ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

³⁵ *United States v. Line Material Co.*, 333 U.S. 287 (1948).

³⁶ *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

³⁷ *International Salt Co. v. United States*, 332 U.S. 392 (1947).

³⁸ *Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

³⁹ *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

⁴⁰ *United States v. duPont & Co.*, 351 U.S. 377 (1956); 353 U.S. 586 (1957).

⁴¹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁴² See earlier discussion under Topic III in this article.

⁴³ *United States v. Nat'l City Lines*, 334 U.S. 573 (1948).

⁴⁴ *United States v. Wise*, 370 U.S. 405 (1962).

⁴⁵ *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963).

to the commercial banking industry.”⁴⁶ And in 1964, once again, in an antitrust case, it acknowledged that it was “ploughing new ground.”⁴⁷

It appears clear that in view of the generality of the antitrust laws, the changing methods of doing business, the ingenuity of those who would rather try to avoid or evade the antitrust laws than submit tamely to them, and the variance in the enforcement vigor and imagination of short tenure antitrust enforcers, the courts will continue to be called upon to “plough new ground” in the field of antitrust.

b) *The burden and scope of review.*—We turn to other arguments advanced to justify repeal of the Expediting Act. It is said that antitrust cases come to the Supreme Court with long, complex records which impose a great burden upon the Supreme Court,⁴⁸ and that the number of antitrust cases filed by the Government has been increasing.⁴⁹ These contentions have not gone unchallenged.⁵⁰ Moreover, the proposed bills are not confined to cases with long records, although a substantial number of antitrust cases which come to the Supreme Court do not have extensive records. Again, more often than not, antitrust cases with extensive records raise important issues of law, and the Supreme Court’s decisions in such cases have made them landmark cases.⁵¹

⁴⁶ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 324 (1963) and see *id.* at 337.

⁴⁷ *United States v. Penn-Olin*, 378 U.S. 158, 169 (1964).

⁴⁸ See Comment, *The Case for Eliminating Direct Appeal to the Supreme Court in Civil Antitrust Cases*, 13 DE PAUL L. REV. 261, 263 (1964).

⁴⁹ *Ibid.* The comment refers to some ninety cases filed in 1960. Most of such cases were electrical equipment cases, a very rare situation. Normally, the number of cases filed is considerably less. Many are criminal cases, and most of the civil cases are settled before trial. The Supreme Court, during the last decade has had on the average only a small number of government civil antitrust cases on its docket. It did have more than usual during its 1963 term, but that number did not compare with the thirteen cases, involving antitrust questions, in which it wrote opinions during its 1947 term. See Barnard & Zlinkoff, *Patents, Procedure and the Sherman Act—The Supreme Court and a Competitive Economy, 1947 Term*, 17 GEO. WASH. L. REV. 1, 2 (1948).

⁵⁰ See Marcus, *The Big Antitrust Case in the Appellate Courts*, 56 NW. U.L. REV. 756 (1962), in 1 HOFFMANN, *ANTITRUST LAW AND TECHNIQUES* 427 (1963). See also Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949, 952 (1964). Summary docket procedures and motions to affirm, as well as full scale hearings, have been used to dispose of antitrust cases in the Supreme Court; and cases have been disposed of by that Court on records made on motions for summary judgment in the district courts. It is worth noting that many district courts with the highest-weighted caseload have not been courts in which government civil antitrust cases are usually brought. See DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, ANN. REPT. 1963, at 138, 140. Generally as to the work load of the Supreme Court, see Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742 (1964).

⁵¹ Some of the early landmark antitrust cases had monumental factual records. In one of such cases, counsel made helpful suggestions to the Supreme Court as to how lengthy records might be handled. See Marcus, *supra* note 50, at 772.

Frequently, by the time an antitrust case reaches the Supreme Court, it is the inferences from the facts which are in dispute rather than the facts themselves.

One commentator has contended that parties to an antitrust suit would get a more thorough review by a court of appeals than by the Supreme Court.⁵² Another commentator has questioned this assumption on the basis of the Government's experience in criminal antitrust appeals.⁵³ It is believed that a comparison of the review given by court of appeals in private antitrust cases, as appears from their opinions, with that given by the Supreme Court in antitrust appeals, would not demonstrate any greater thoroughness of review on the part of the former. As far as the Supreme Court is concerned, its review of the facts in an antitrust case, while sometimes considerably less than comprehensive, in other instances is quite extensive. It is believed that it is as hazardous to say that the factual review by the Supreme Court of antitrust cases is not likely to be comprehensive as it is to say that it will give a thorough factual review in every antitrust case.⁵⁴ The remarks of some of the members of the Supreme Court in the *Brown Shoe* and *Singer* cases⁵⁵ may be compared with the comment of that Court in an antitrust case with a long record. In the second *duPont* case, the Court said:

'... Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken to make certain that justice has been done. . . .' The proper disposition of antitrust cases is obviously of great public importance and their remedial phase, more often than not, is crucial. . . .⁵⁶

If one assumes that most, or even many, government civil cases are cases of public importance, there would appear to be a number of drawbacks to review by federal courts of appeals, one of which we shall advert to at this point.

Appellate practitioners and commentators are well, and oftentimes unhappily, aware that the common use of panels of much less than the full complement of judges of the particular court of appeals creates

⁵² Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 ANTITRUST L. SYM. 98, 100.

⁵³ Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 ANTITRUST L. SYM. 94, 95.

⁵⁴ See Marcus, *supra* note 50 at 760 *et seq.*

⁵⁵ See discussion of these cases in Topic III of this article.

⁵⁶ *United States v. duPont & Co.*, 366 U.S. 316, 323 (1961).

an element of chance—a roulette factor in the appellate process. Within the same appellate court a decision may go one way or another, depending upon which three judges⁵⁷ one draws on appeal.⁵⁸

One commentator does not see why, if criminal antitrust appeals and appeals from Federal Trade Commission decisions go to the courts of appeals, there should be a right or option to appeal directly to the Supreme Court in government civil antitrust suits.⁵⁹ There is a very logical reason for making a distinction. Criminal antitrust cases rarely involve other than “hard core” antitrust violations, where the law is clear.⁶⁰ Except in rare technical situations appeals in such cases are the prerogative of the defendant and not of the Government, and a convicted defendant thus has a chance of getting more than one review of his conviction.

Federal Trade Commission cases more often than not do not deal with antitrust issues; misrepresentation and Robinson-Patman Act issues comprise a major part of their caseload. It is only within recent years that the Commission has tackled some important merger cases. An argument might indeed be made for direct review to the Supreme Court of such cases.⁶¹ At any rate, the department store character of

⁵⁷ The possibility of *en banc* action is no answer. *En banc* rulings are very much the exception, and if they were common there might be serious complaints about congested calendars. Thus, in the important *American Tobacco* case, see *infra*, note 91, although the Sixth Circuit Court of Appeals considered several motions *en banc*, the twelve-hour argument on the merits was heard by a panel of three judges. See also Wright, *supra* note 50, at 972.

⁵⁸ An eye-opener situation occurred in the case of *Eagle Lion Studios, Inc. v. Loew's Inc.*, 248 F.2d 438 (C.A. 2, 1957), *aff'd*, 358 U.S. 100 (1958). In that private antitrust case the District Court ruled in favor of the defendants. An appeal was taken to the Court of Appeals for the Second Circuit, where it was heard by a panel of three judges. One of the three was Judge Jerome Frank. Shortly before that Court's opinion, Judge Frank died. The decision in which two of the original panel and a third member of the Court participated, affirmed the Court below by a two to one vote. The dissenting judge noted that if Judge Frank had lived, the vote would have been two to one the other way. An appeal to the Supreme Court resulted in a four to four vote, which, under its rules, amounted to an affirmance of the Court of Appeals ruling. See Wright, *supra* note 50, at 970–71.

⁵⁹ Comment, *The Case for Eliminating Direct Appeal to the Supreme Court in Civil Antitrust Cases*, 13 DE PAUL L. REV. 261, 268 (1964).

⁶⁰ Two outstanding exceptions are *United States v. A.M.A.* 110 F.2d 703 (C.A. D.C. 1940); and 130 F.2d 233 (C.A. D.C. 1942); and *American Tobacco* case, see *infra* note 91.

⁶¹ It may be observed that among the large numbers of private antitrust cases will be found a generous sprinkling of those of little general importance or of little substance. This would seem to warrant appeals going to the court of appeals in private antitrust cases. One should point out, however, that some Supreme Court rulings in private antitrust cases have been of major significance.

the operations of the Federal Trade Commission strongly militates against direct review by the Supreme Court of such miscellany.

In regard to this issue, there seems to be an expressed or implicit assumption by proponents of removal or curtailment of direct appeal to the Supreme Court, that the Supreme Court is overburdened, while in contrast the federal courts of appeals are well able to handle additional types of appeals because their burden is much less.⁶² This assumption is open to question unless we are ready to welcome the advent of large numbers of new court of appeals judges divided into many panels.

In recent years the business of the United States Court of Appeals has increased markedly. From fiscal year 1960 to 1961 the increase was eight percent. This was true for the following fiscal year. And for 1963, the increase was thirteen percent. Since World War II the number of cases has approximately doubled.⁶³ In 1964,⁶⁴ 5,437 appeals were commenced. Although since 1949, nineteen judges have been added to the United States Court of Appeals, at the end of fiscal year 1963 there was a 14.1 per cent increase in pending cases over the preceding year, the total number being 3,457.⁶⁵ The overburden has been thought to be acute in some circuits.⁶⁶ This is hardly a picture of appellate courts being able to give a comprehensive review to government civil anti-trust cases because of meager appellate business.^{66a}

It is sometimes said, also, that the Supreme Court would be aided by a prior review by a federal court of appeals.⁶⁷ This argument would seem to assume that most antitrust cases which would be reviewed by a Court of Appeals would also be reviewed by the Supreme Court.⁶⁸ Elsewhere in this article we point out how unlikely this is to be true. And when a commentator suggests that the concurrent court finding rule would be applicable,⁶⁹ one suspects that, at least on the part of

⁶² Compare Justice Harlan's remarks in *Brown Shoe Co. v. United States*, 370 U.S. 290, 365 (1962) (dissenting and concurring in part).

⁶³ DIRECTOR OF ADMIN. OFFICE OF THE U.S. COURTS, ANN. REPT. 1963 at 111.

⁶⁴ *Id.* at 118.

⁶⁵ *Id.* at 111, 119.

⁶⁶ *Id.* at 111-12.

^{66a} The overburden of the federal courts of appeal is made clear in *Wright*, *supra* note 50.

⁶⁷ See comments of Justice Clark in *Brown Shoe Co. v. United States*, 370 U.S. 294, 355 (1962) and *United States v. Singer Co.*, 374 U.S. 174, 175 (1963).

⁶⁸ See *Brown Shoe Co.*, *supra*, note 67, where one judge suggested the Expediting Act deprives litigants of an intermediate appeal.

⁶⁹ Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 ANTITRUST L. SYM. 98, 102.

some proponents, there is a greater desire to insure limited review by the Supreme Court than to have the latter's review obtain the benefit of another court's consideration.

While it is likely that in some instances review by a court of appeals might be helpful to the Supreme Court in the latter's review, it is also likely that there would be instances where such intermediate review might be less than helpful.⁷⁰ If the district court has done a proper job of analyzing the facts and making findings of fact in an antitrust case, the Supreme Court has the wherewithal to facilitate its review. Granted that district judges are uneven in their performance of such tasks, such unevenness is as likely to prevail among the divers court of appeals and their panels.⁷¹ The very fact that district courts know there is likely to be a review by the Supreme Court is a persuasive goad for a responsible performance on their part. It is likely to be less of a persuasive goad to courts of appeals since review by the Supreme Court would be less likely under the bills proposed.

IV. THE ARGUMENTS FOR DIRECT APPEAL

a) *The nature and importance of the antitrust laws.*—The grant by the Expediting Act of direct appeal in government antitrust cases has a firm foundation in the exceptional nature of our antitrust laws.^{71a} They are one of the most universally well known facets of our economy. They have been the focus of study and attention on a large scale here and abroad.⁷² They have been admired or criticized as few other bodies of law. They represent a most important cornerstone of our entire system of free enterprise.

Their very generality has enhanced their importance and made all the more desirable expeditious and authoritative determination of their scope and meaning. Of the Sherman Act it has been said that "As a charter of freedom, the Act has a generality and adaptability com-

⁷⁰ Cf. *Continental Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962); *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683 (1948).

⁷¹ It may be noted that a three-judge court of appeals panel may have a district court judge on it.

^{71a} In advocating special discovery rules in criminal antitrust cases, the argument has been made that, "The wide impact of the decision in an antitrust case makes it especially important that it be correct." Comment, *Discovery in Criminal Antitrust Cases*, 64 *COLUM. L. REV.* 735, 763-64 (1964).

⁷² In recent years study groups or individuals from Australia, England, West Germany and Sweden have come to compare our antitrust systems with their own.

parable to that found to be desirable in constitutional provisions."⁷³ As Justice Frankfurter has noted, "The sweeping generality of the antitrust laws differentiates them from ordinary statutes."⁷⁴

To amend the Expediting Act by eliminating antitrust cases from its ambit would be to downgrade those laws. We live in a period where, unfortunately, the concept and the application of the antitrust laws have been the target for a heavy attack.⁷⁵ One might well urge that now is the time for a reiteration of our faith in the value and importance of those laws and not a time to relegate them to the level of a negligence action.

V. THE PLACE OF THE SUPREME COURT IN ANTITRUST ENFORCEMENT

The Supreme Court has not been without its antitrust aberrations, and the record of some members of that Court in antitrust cases has not been that of a friend to antitrust.⁷⁶ But over the years, and particularly in recent years, probably no government body has been more clearly and effectively an exponent of antitrust enforcement than the Supreme Court. Most students of antitrust would agree, I believe, that while both the executive and the legislative branches of the Government have had their moments of high contributions to the development and enforcement of the antitrust laws, those moments have been much less numerous and less consistent than that of the Supreme Court. This has been in sharp contrast to the attitude taken by a number of district court judges and courts of appeals. While no overall generalization may be fairly made, it is well known that some of such latter judges and courts have shown a marked hostility toward the application of the antitrust laws and to their philosophy.⁷⁷ It is believed that some part of the Expediting Act repeal movement rests upon the realization by many that this is so.

⁷³ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). This thesis has often been stressed by the Supreme Court.

⁷⁴ *United States v. duPont & Co.*, 366 U.S. 316, 363 (1961).

⁷⁵ See, e.g., *Wall Street Journal*, March 19, 1964, p. 18; Bork & Bowman, *The Crisis in Antitrust*, 68 *FORTUNE* 138 (Dec. 1963); Handler, *What is Wrong with the Antitrust Laws*, *ANTITRUST BULL.* 557 (1963).

⁷⁶ See Kramer, *The Antitrust Division and the Supreme Court: 1890-1953*, 40 *VA. L.J.* 433 (1954).

⁷⁷ See Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 *GEO. L.J.* 44, 68 (1960); also, *BUSINESS WEEK*, Sept. 12, 1964 at 106. In *United States v. Singer Mfg. Co.*, 374 U.S. 174, 202 (1963), Justice Harlan, dissenting, observed that "The final outcome of this case might indeed have been different had this Court had 'the valuable

The *Brown Shoe* case,⁷⁸ would seem to be a strange vehicle for the carriage of the remarks of Justices Clark and Harlan to which we have referred.⁷⁹ Although the Celler-Kefauver Amendment to section 7 of the Clayton Act was enacted in 1950, the *Brown Shoe* case, decided by the Supreme Court in 1962, was the first case in which that Court was called upon to interpret that important amendment. By that time there was a vast amount of confusion as to the scope and meaning of the antimerger statute. That confusion was shared by the lower courts, by the enforcement agencies, and by the commentators, all operating in the vacuum created by the absence of Supreme Court construction. The Supreme Court, in the *Brown Shoe* case, made many important rulings which have served to guide the government enforcement agencies and the lower courts in subsequent cases.⁸⁰ If this case had been decided by a court of appeals, such interpretations might still be absent or never made, and this leads to a very important consideration on this issue of direct appeal.

The Supreme Court, because of the pinnacle of its position and its appreciation of the desirability of laying down antitrust principles, has shown boldness in the breadth of its approach to the disposition of an antitrust case⁸¹ that one does not find nor can one expect to find on the part of the intermediate federal courts of appeals.⁸² Thus it has been said, "The latitude the Court assumes in interpreting and applying the antitrust laws is immense."^{82a}

In the landmark *duPont-General Motors* case,⁸³ the Supreme Court

assistance of the Court of Appeals.' This observation, it is submitted, suggests the desirability of the direct appeal rule, if two wrongs become a right when a case reaches the Supreme Court after an intermediate appeal.

⁷⁸ See *supra* note 62.

⁷⁹ See earlier discussion in Topic III of this article.

⁸⁰ "The blueprint for the superstructure was drawn in Chief Justice Warren's decision in the 1962 *Brown Shoe* case. In his discussion of the standards to be applied, the Chief Justice set forth the interpretation of Congressional philosophy that has permeated subsequent applications of the law." THE MORGAN GUARANTY SURVEY, A YEAR OF DECISION IN ANTITRUST 8 (1964).

⁸¹ This attitude is not a belated one of the Supreme Court. See Barnard & Zlinkoff, *Patents, Procedure and the Sherman Act—The Supreme Court and a Competitive Economy*, 17 GEO. WASH. L. REV. 1, 54-58 (1948).

⁸² See Gesell, *supra* note 2, at 102.

^{82a} THE MORGAN GUARANTY SURVEY, *supra* note 80, at 6; and see BUSINESS WEEK, Sept. 12, 1964, at 106-107.

⁸³ United States v. duPont, 353 U.S. 586 (1957).

decided the suit on a ground barely mentioned by the Government, namely, the application of section 7 of the Clayton Act. It is doubtful that the average intermediate court of appeals, in the face of the Government's treatment of this issue, would have had the courage and the feel for antitrust enforcement to have done likewise. In the *duPont* case, also, the Supreme Court, to the great surprise of the legal profession, held that the antimerger statute could be applied retroactively to an acquisition made two decades ago, by considering the post-acquisition effect of the merger. It is hardly likely that any of the court of appeals operating under the shadow of contemplated overseership, let alone any considerable number of them, would have taken such an uncharted course.

In the *Philadelphia National Bank* case, the appellees had contended below that the Bank Merger Act had immunized mergers approved by the banking authorities, from challenge under the federal antitrust laws. Noting that this contention had been abandoned on appeal, the Court said, "We consider it, nevertheless, because it touches the proper relations of the judicial and administrative spheres."⁸⁴ The trail-making ruling of the Court on this point has had far-reaching effect. One might well doubt that a federal court of appeals would have broken such ground under such circumstances.⁸⁵ This was another instance where although the Government had placed major reliance upon the Sherman Act, the Court decided the case under section 7 of the Clayton Act.

Antitrust decrees have often received special attention on the part of the Supreme Court, and there have been instances where that Court has added provisions to a decree.⁸⁶

At least twice in the last fifteen years the Supreme Court has led the way in freeing antitrust cases from a strait jacket of unduly massive requirements of proof which posed a real threat to antitrust enforcement.⁸⁷ And it has been the Supreme Court, of course, which

⁸⁴ *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350 (1963).

⁸⁵ Thus in *Continental Co. v. Union Carbide*, 370 U.S. 690, 695 (1962), the Supreme Court noted that, "The Court of Appeals for the Ninth Circuit announced that its task was to review the correctness of the judgment below, not the reasons therefor, and on that basis affirmed the judgment." That approach is hardly one of clarification of antitrust principles. And see, *Penfield Co. v. Securities and Exch. Comm'n*, 143 F.2d 746, 749 (1944).

⁸⁶ *E.g.*, *United States v. duPont & Co.*, 366 U.S. 316 (1961).

⁸⁷ *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 50 (1948); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963). This is to be contrasted with the

has pioneered in laying down per se rules in price-fixing⁸⁸ and in other types of antitrust cases. Under a system of antitrust appeals to the intermediate federal courts of appeals, one might envisage, with some dismay, the likelihood of per se rules in some circuits and not in others, at least for some period of time.

The direct appeal to the Supreme Court has resulted in providing a uniform policy in antitrust matters for the federal courts.

In an antitrust appeal, what the court may say in its opinion may be as important or more important than the fact of affirmance or reversal of the lower court. And what the Supreme Court says is likely to be far more important than what is said by a court of appeals.

The case before the court may well—and often does—represent the first time the industry involved has been subjected to a comprehensive, factual survey, a survey in which the public has a very real interest. In many instances the opinion of the court is the first opportunity the public has had to know fact from propaganda. A Supreme Court decision normally would receive far greater attention than a lower court's decision; and there are certain factors which favor opinions of the Supreme Court over those of court of appeals. Generally, it can be expected that the give-and-take between nine men of the caliber of Supreme Court Justices is likely to lead to a greater exchange of ideas and information, a better reasoned majority opinion and an important dissenting opinion than in the case of three-judge deliberations.⁸⁹

timidity or caution of the antitrust enforcement agencies in this respect. See Pillsbury Mills, Inc., 50 F.T.C. 555, 564 (1953); Brownell, *The Antitrust Aspects of Mergers*, Mimeographed address before the New York Chapter of the Public Relations Society of America, Sept. 30, 1954, pp. 8-9. A former chief economist of the Federal Trade Commission, in a speech, in 1962, before the Antitrust Section of the American Bar Association, had this to say:

“Unhappily the effective enforcement of the Celler-Kefauver Amendment to section 7 was unduly delayed as a result of the initial approach taken by the Federal Trade Commission's counsel in the first case brought under the new law, the Pillsbury case. . . .”

⁸⁸ See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

⁸⁹ It is common in argument before the Supreme Court to find more than three judges asking questions of counsel designed to facilitate a proper disposition of the appeal. In the long run a three-judge court is more likely to suffer from dearth of such questions than a nine-judge court. Out of nine judges, it may be surmised that there is a likelihood that at least one of them will be interested enough to make the necessary extensive examination of a record or to have his law clerk do so. Out of three judges, there may be less such likelihood. Admittedly, the factor of case load would have to be considered in making any such comparison. On the factor of case load, see *DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, ANN. REP. 1963, Tables A-1, B-1.*

VI. THE PROBLEM OF DELAY AND EXPENSE

For the purpose of discussion of the subject matter under this heading, we assume that there would be two appeals under the proposed bills. Later on in this article we propose to expose the fallacy of such assumption.

The Supreme Court has noted the opportunities for delay in anti-trust cases prior to the enactment of the Expediting Act, when there were two such possible appeals.⁹⁰ This is true today.⁹¹ This may be because of the condition of a court's calendar, the premium on dilatory tactics, either because of the profit in continuing certain types of antitrust violations until finally prevented by court order from doing so or the difficulty in unscrambling particular situations after long lapses of time, and mechanical and manpower problems involved in two sets of appeals.

Denial of the right of direct appeal to the Supreme Court may result in long delays before important principles of law in antitrust cases are established, and before important antitrust cases are decided. In antitrust cases, it is often important for an industry to have an early definitive decision, whichever way the decision goes. Likewise, it is often important for the public interest to have an early termination of anticompetitive practices or of a monopoly situation.⁹²

⁹⁰ *United States v. California Canneries*, 279 U.S. 533, 558 (1929).

⁹¹ Justice Clark, in *Brown Shoe Co. v. United States*, 370 U.S. 294, 354 (1962), to illustrate a contention that direct appeals seldom result in much expedition pointed out that two and a half years had passed since the District Court's decision. That delay occurred because of very unusual circumstances. The chief counsel for the appellants during the pendency of the appeal was chief negotiator for the United States with the Russians at disarmament conferences which took place at Geneva, Switzerland. This was a major reason for delays in presenting the appeal. The Government, also, at one point, found it necessary to ask for a delay because the person assigned to draft its brief left to join another agency. It is this writer's belief that if an appeal had had to be taken to the court of appeals there would have been at least an additional year, perhaps two, before final disposition of this important case by the Supreme Court. The above example may be compared with the time table in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). That was a criminal monopoly case. The verdict was handed down on October 27, 1941. An appeal was filed with the Sixth Circuit Court of Appeals in December 1941, but not until April 1944 was it argued before that Court. The Court's opinion was rendered in December 1944. The Supreme Court's opinion in the case was handed down in June 1946. Thus, the appellate process in that case took almost five years. I suspect that the lapse of such long period of time had much to do with the failure of the Department of Justice to follow up the criminal case with a civil suit.

⁹² The Kiplinger Washington Letter of May 31, 1963 advised that then was a propitious time for mergers. One of the reasons advanced for this advice was that the Government had recently lost a number of merger suits in the district court. The

Some important government civil antitrust cases have been dismissed before trial or after the plaintiff had put in its case. When such cases have been reversed on appeal, four or more years have elapsed from the date of the filing of the complaint to the date of a final judgment.⁹³ There have been government antitrust cases, also, where two successive appeals to the Supreme Court have been made. If, in addition, intermediate appeals had been required, the time for disposition of such cases might be infinitely longer.

An antitrust case which has been around for a long time may lose the attention it deserves or be subject to such pressure for disposition as to jeopardize the purpose for which it was brought. As Professor Handler has noted,⁹⁴ it is not uncommon to have two or three complete turnovers of Government trial attorneys between the beginning and end of an antitrust case. Under such circumstance, it is hardly the path of wisdom to add to the delay in final disposition of such cases. Last year the median time from filing of the complete record to final disposition in the courts of appeals was 7.3 months.⁹⁵

The expense to the litigants of two separate appeals, moreover, is no small matter.⁹⁶

Prolongation of the judicial process, moreover, might seriously prejudice the use by private antitrust plaintiffs of section 5⁹⁷ of the Clayton Act.⁹⁸

Letter states: "Cases will be appealed to the Supreme Court, but this will take a couple of years or so. Meanwhile, Justice is inclined to go easy on challenging any mergers that are not fairly clear cases of monopoly or curtailment of competition." It may be doubted that such advice should be encouraged by providing for the prolongation of the judicial process through intermediate appeals.

⁹³ Thus, in an antitrust case against the theatrical interests of the Shubert Brothers when a trial, long delayed because of a change in government personnel, was in the offing, the presiding judge dismissed the case on the ground that theatrical enterprise did not fall within the reach of the antitrust laws. An appeal to the Supreme Court brought about a reversal, but meanwhile the case had lost its high place on the court's calendar. The case was finally settled in February 1956, six years after the complaint was filed.

⁹⁴ Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 956 (1962).

⁹⁵ DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, ANN. REP. 1963, Table B-4.

⁹⁶ This factor has aroused some opposition to the proposed elimination of a direct appeal to the Supreme Court. BUSINESS WEEK, May 4, 1963, at 90.

⁹⁷ 15 U.S.C. § 16 (1952).

⁹⁸ See *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449 (C.A. 1, 1963), *cert. denied*, 375 U.S. 820 (1963).

VII. THE CERTIORARI ILLUSION

Proponents of the two bills are quick to assert that appeals to the Supreme Court in antitrust cases are preserved through the route of certiorari. It is submitted that this is illusory both as to protection of the public interest and as to the appellate review afforded the litigants.⁹⁹

The grant of certiorari by the Supreme Court is certainly less common than a beautiful day in June. Grant of certiorari by the Supreme Court is very much the exception.¹⁰⁰ There have been a number of suits involving the Federal Trade Commission where the matter was not settled by a Supreme Court decision until long after an initial court of appeals decision and a considerable time after an inter-circuit conflict had developed.

Thus during the ten-year period 1953 through 1962, fourteen decisions of the courts of appeals in Federal Trade Commission cases were appealed to the Supreme Court on the ground that there existed a conflict of decision between various circuit courts of appeals. Of these petitions for certiorari, only five were granted; in nine cases certiorari was denied.

The Supreme Court has often denied certiorari in private antitrust cases; in some instances the issues raised would lead many to feel that they warranted a review by the Supreme Court.¹⁰¹

⁹⁹ It is interesting to note that the President of the U.S. Chamber of Commerce, speaking before the Democratic Convention's Committee on Resolutions and Platform, favored the higher courts accepting more antitrust cases for review in order to keep antitrust decisions in harmony with one another. BNA, *Antitrust & Trade Regulations Rept.*, August 25, 1964, at A-4; and see Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 ANTITRUST L. SYM. 94, 96.

¹⁰⁰ See DIRECTOR OF ADMIN. OFFICE OF THE U.S. COURTS, ANN. REP. 1963, Table A-1. Compare a recent comment by an official of the Federal Trade Commission: "We received a serious setback in our enforcement activities when we lost the *American Oil Company* case in the Seventh Circuit and the Supreme Court denied our petition for review. . . ." CONG. REC., App. 4572 (daily ed. Sept. 2, 1964)..

¹⁰¹ An expert Supreme Court practitioner has said, "No one is really happy about the certiorari jurisdiction of the Supreme Court, least of all the justices themselves. Every reasonably well informed observer of the process can point to questions deemed unworthy of review at one time that obtained review thereafter." Wiener, *Federal Regional Courts: A Solution for the Certiorari Dilemma*, 49 A.B.A.J. 1169 (1963). Among government antitrust cases which might well have been sidetracked by the certiorari barrier are the first *duPont* case, *United States duPont*, 351 U.S. 377 (1956), and the second *duPont* case, *United States v. duPont*, 353 U.S. 586 (1957)—one decided by a 3 to 2 vote and the other by 4 to 3. If the second *duPont* case had gone up to the Seventh Circuit Court of Appeals and had been affirmed on the ground of no

In 1944, a court of appeals decided that the dissolution of a corporation was cause to dismiss an antitrust indictment against it.¹⁰² Not until fifteen years later was the Supreme Court willing to review that question. When it did so, there was unanimous rejection of the rule which had been generally used by the lower courts for a decade.¹⁰³

The Supreme Court's failure to take certiorari in an antitrust case may impose great burdens on courts of appeals and on litigants. Thus, as a result of the Government's electrical equipment company cases, numerous private antitrust cases were filed all over the country. The defendants in many of these cases interposed the defense of the statute of limitations and the plaintiffs contended the statute was tolled by the doctrine of fraudulent concealment. The district courts divided on this issue. Certiorari was requested from the first ruling by a court of appeals on this issue. Denial thereof resulted in a number of other appeals to different Courts of Appeals having to be prosecuted although thus far they have all ruled the same way.

There is another illusory aspect to certiorari as an appellate path for antitrust cases to the Supreme Court. An appeal to the Supreme Court by the United States needs first to be approved by the Solicitor General. That office has always been concerned over its certiorari record, that is, how many of its petitions are granted, and such approval is not given as a matter of course.^{103a}

The Solicitor General's office has on occasion refused to approve recommendations from the Federal Trade Commission for appeal to the Supreme Court; and there have been occasions when the Commission has been allowed to appeal without approval of its position by the Solicitor General and the Commission has won in the Supreme

violation of the Sherman Act, it is not at all certain that application for certiorari would have been granted by the Supreme Court. It is even problematical whether the Solicitor General's office would have authorized the filing of a petition for certiorari in such event.

¹⁰² United States v. Safeway Stores, 140 F.2d 834 (C.A. 10, 1944).

¹⁰³ Melrose Distillers v. United States, 359 U.S. 271 (1959). The chronology of this issue was that in 1944 the Solicitor General's office was unwilling to permit an application for certiorari to the Supreme Court. Some ten years later it approved the filing of such a petition but certiorari was denied by the Supreme Court. Not until a court of appeals in a non-antitrust case departed from the rule obtaining in other federal circuits, did the Supreme Court accept certiorari.

^{103a} See Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 764 note 56, at 764 (1964).

Court.¹⁰⁴ It was only a few years ago that one of the Federal Trade Commissioners strongly criticized the Solicitor General's office for its attitude on appeals recommended by the Federal Trade Commission.¹⁰⁵ The Solicitor General, or a member of his staff, may well differ with the Antitrust Division as to both the possibility of success in the Supreme Court and as to what is a matter of general public interest. Occasionally, the Solicitor General's office has refused to allow the Antitrust Division to take an appeal in an antitrust case.^{105a} Nevertheless the Solicitor General's office finds it difficult to turn down a request for an appeal to the Supreme Court because, if it does, there will be no appeal at all.¹⁰⁶

Without this factor, it is not improbable that in a number of instances, if an appeal were taken to a court of appeals, the Antitrust Division would not be permitted to petition for certiorari to the Supreme Court, especially in cases with long records.

Last year, in merger case after merger case, the district courts held against the Government. Most of them were appealed, with success, to the Supreme Court. It is certainly very doubtful that if they had been lost in courts of appeals, the Solicitor General would have permitted the filing of certiorari in all such cases,¹⁰⁷ or that if petitions had been filed, all would have been granted by the Supreme Court.

If a government antitrust case were appealed to the court of appeals without a certificate of public importance having been requested or granted, it would seem difficult in a petition to the Supreme Court for certiorari from a decision by the court of appeals to argue that the case was one of general public importance. And if a certificate had been requested by a party and denied by a district court, a court of

¹⁰⁴ *E.g.*, *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961). In that case the Solicitor General took a position before the Supreme Court contrary to that of the Federal Trade Commission.

¹⁰⁵ Remarks by Commissioner William C. Kern before the Mechanical Contractors Associations of Texas, Inc., January 14, 1961.

^{105a} *Cf.* *BUSINESS WEEK*, Sept. 13, 1964 at 106.

¹⁰⁶ Occasionally, the Solicitor General's office has permitted an appeal against its better judgment and its judgment has been proven wrong.

¹⁰⁷ It may be noted that in quite a number of recent merger cases lost in the federal courts, the Solicitor General asked for additional time in order to determine whether to perfect an appeal.

appeals might start its review of the case with something less than major interest.

The type of review that the Supreme Court might give upon certiorari from a court of appeals' decision might be quite different and much less comprehensive than in cases reviewed upon direct appeal from a district court.¹⁰⁸

Another dubious aspect of the use of certiorari is that it is almost certain that if direct appeals to the Supreme Court were abolished, antitrust law would differ for long periods of time in different parts of the country. And it should be noted that even if an appeal is taken to the Supreme Court by certiorari, many important issues may remain undecided if, as it has done, it limits the questions it will take on certiorari.¹⁰⁹

It has already been pointed out that one troublesome factor in giving the Attorney General discretion as to what is a case of general importance is the difficulty of determining which ones are of general importance.¹¹⁰ And that extraneous factors may go into such determination is apparent from the infrequency of such determinations being made for invocation of section 1 of the Act.¹¹¹ Furthermore, to give such discretion to one litigant is to raise grave questions of fairness. Moreover, to leave the question of jurisdiction of the Supreme Court to the determination of a single individual, also raises troublesome questions.

¹⁰⁸ For a narrow view of the reviewing function of the Supreme Court where a review has been had by a court of appeals, see *Federal Trade Comm'n v. Standard Oil Co.*, 355 U.S. 396 (1958).

¹⁰⁹ See *American Tobacco Co. v. United States*, 324 U.S. 836, 328 U.S. 824.

¹¹⁰ The Attorney General's legislative proposal to amend the Expediting Act might be regarded by some as a predetermination that most government civil antitrust cases are not of general public importance. On questions of this sort the record of the Department of Justice is somewhat puzzling. Motions to affirm, supposedly, are used when a case or the issues are regarded as of little importance or clear-cut. Yet the landmark decision of the Supreme Court in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), was preceded by a motion to affirm by the Government (denied). In *Hughes v. United States*, 342 U.S. 353 (1952), the Department of Justice filed a motion to affirm (denied). The case was reversed by the Supreme Court by an 8 to 0 vote. In the *Brown Shoe* case, *supra*, despite its importance, the Department of Justice filed a motion to affirm. Later it had to eat some of the *de minimis* arguments it had made in support of that motion.

¹¹¹ One wonders whether there would be appeals to the Supreme Court on the question of whether a case was one of "general public importance."

VIII. INTERLOCUTORY APPEALS

Proposals to afford antitrust litigants appeals from interlocutory orders, in certain situations, seem called for.¹¹² But the desirability of such relief does not warrant the undesirable effects of the far-reaching provisions of S. 1811 and S. 1862.

IX. CONCLUSION

Folklore tells of how a battle was lost for want of a nail. We should be most chary of creating a situation where, for want of a direct appeal to the Supreme Court, antitrust falters or founders.

The Expediting Act has served us well in providing a uniform interpretation of the antitrust laws and the promotion of their policy and enforcement. Its benefits should continue to be available to antitrust.

¹¹² See Comment, *The Case for Eliminating Direct Appeal to the Supreme Court in Civil Antitrust Cases*, 13 DE PAUL L. REV. 261, 264-67 (1964).