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## COMMENTARY

### ANTITRUST CRIMES: TIME FOR LEGISLATIVE DEFINITION

*James P. Mercurio\**

#### I. Introduction

The Sherman Antitrust Act was enacted in 1890 by a populist Congress determined to break the power of industrial "trusts" that threatened to dominate the nation's economic life. Conforming to the writing style of its day, the Act was framed in sweeping, declaratory sentences, with alternative phrases designed to cover all foreseeable contingencies. Section one proclaims the following:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.<sup>1</sup>

The Act provides the ordinary processes of the criminal law as an important means of enforcement. Following the above-quoted proscription, § 1 declares that "[e]very person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor."<sup>2</sup> And § 2 makes it a misdemeanor to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."<sup>3</sup>

From the outset, it was recognized that the misdemeanors created by the Act were not defined with precision; Senator Sherman explained this vagueness during the floor debates on his antitrust proposals:

It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by the bill, and not the lawful and useful combination.

I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law.<sup>4</sup>

In the 85 years since the Sherman Act was passed, the courts, as Senator Sherman foresaw, have determined "in each particular case" whether the "contract, combination or conspiracy" was or was not "lawful and useful."

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1 15 U.S.C. § 1 (1970) (originally enacted as Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209).

2 *Id.*

3 15 U.S.C. § 2 (1970).

4 21 CONG. REC. 2457, 2460 (1890) (remarks of Senator Sherman).

While these judicial determinations have not defined a "precise line between lawful and unlawful combinations," they have produced a workable body of law under the basic principle, first enunciated in *Standard Oil Co. v. United States*,<sup>5</sup> that only contracts, combinations, or conspiracies that restrain trade "unreasonably" are prohibited by the Act.<sup>6</sup>

Although the Act declared every violation of the Sherman Act a criminal offense, it also provided for civil enforcement actions. In § 4, the Government was given the power to obtain injunctive relief against violations of the Act;<sup>7</sup> in § 7, private parties were given the right to recover "threefold the damages" sustained by reason of a violation.<sup>8</sup> Thus, a violation of the Sherman Act might be subject to a criminal prosecution, a government civil injunctive suit, or a private damage action. Experience under the Act has demonstrated that only a few kinds of violations are properly treated as criminal offenses, with their drastic remedies of fine, imprisonment, and the social obloquy of criminal conviction.<sup>9</sup> A great many antitrust violations are appropriately viewed as mere antisocial conduct akin to that misconduct traditionally considered tortious which, like negligent driving, requires a civil remedy in the form of damages and, where appropriate, injunctive relief, but does not deserve condemnation as a crime.

The Act, however, does not distinguish between criminal and civil offenses, and thus the Attorney General has sole discretion as to which type of enforcement action will be brought. His authority to institute a criminal prosecution, a civil action, or to take no action at all in response to evidence of an antitrust violation is not governed by any legal standards. By virtue of the extraordinary vagueness inherent in the "rule of reason," the executive authority entrusted with instituting criminal antitrust proceedings not only has the normal discretion of all prosecutors to decide which violations and which violators should be charged, but in large measure has also the power to define the violation. The only legal check on this authority is that the indictment must charge a restraint which a jury could find "unreasonable." In short, the system for enforcement of the antitrust laws presents the anomalous situation where the Congress has broadly condemned as criminal a vast range of conduct of which only a portion is generally thought to merit criminal punishment, and has left discretion with the Attorney General to determine, without legal standards, which conduct in fact should be punished criminally.

5 221 U.S. 1 (1911).

6 See generally Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 801-06 (1965).

7 15 U.S.C. § 4 (1970).

8 Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 210. This section of the Sherman Act was superseded by § 4 of the Clayton Act, which provides treble damage actions for violations of any of the antitrust laws of the United States. 15 U.S.C. § 15 (1970) (originally enacted as Act of October 15, 1914, ch. 323, § 4, 38 Stat. 731).

9 In congressional testimony, an attorney who formerly served in the Antitrust Division as chief of the General Litigation Section recently has stated his belief that "[t]he antitrust laws depend, for effective enforcement, outside of the local price fixing conspiracy problem, not upon criminal cases but upon civil equitable relief." *Hearings on S.782 and S.1088 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 136-37 (1973) [hereinafter cited as *Antitrust & Monopoly Hearings*].

That this situation has not led to serious injustice results largely from the fact that antitrust violations were classified as misdemeanors and generally have not been punished with severe sentences. In December 1974, however, the Sherman Act was amended; all violations are now felonies punishable by imprisonment of up to three years and fines of up to \$1 million for corporations, or \$100,000 for individuals. Moreover, the Antitrust Division of the Justice Department—the executive agency that proposed the amendment—and the Senators and Representatives who supported it, have expressed hope that the increase in maximum penalties would lead to sentences of greater severity than those imposed in previous antitrust cases. Conviction of an individual for violating the Sherman Act—for being a member of a “combination” that is found to be on the wrong side of “the precise line between lawful and unlawful combinations”—therefore means not only a serious possibility of a substantial prison term and perhaps a devastating fine, but also the certainty of disenfranchisement, disqualification for public office, and all the other consequences that automatically follow from a felony conviction. Since even the author of the statute admitted difficulty in defining this “precise line,” the possibility of injustice resulting from these severe penalties is obvious.

## II. Raising Criminal Offenses Under the Sherman Act to Felonies

Sherman Act violations were raised to the status of felonies by § 3 of the Antitrust Procedures and Penalties Act, which provides as follows:

Sections 1, 2 and 3 of the Act entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” approved July 2, 1890 (15 U.S.C. 1, 2, and 3), are each amended—

- (1) by striking out “misdemeanor” whenever it appears and inserting in lieu thereof in each case “felony”;
- (2) by striking out “fifty thousand dollars” whenever such phrase appears and inserting in lieu thereof in each case the following: “one million dollars if a corporation, or, if any other person, one hundred thousand dollars”; and
- (3) by striking out “one year” whenever such phrase appears and inserting in lieu thereof in each case “three years” . . .<sup>10</sup>

This Act grew out of several proposals, the principal purposes of which were to revise and reform the procedure by which civil antitrust cases brought by the Government could be settled by consent decrees.<sup>11</sup> Prior to these proposals, there had been a number of articles in the national press disclosing that a major antitrust case brought by the Justice Department in 1970 against International Telephone & Telegraph Corporation (ITT) had been settled by consent decree following intensive “lobbying” by ITT officials. Many of these articles charged that the settlement was unduly favorable to ITT and that the Government had been influenced by ITT’s large campaign contributions, as well as by a large

<sup>10</sup> Act of December 21, 1974, Pub. L. No. 93-528, 88 Stat. 1708.

<sup>11</sup> S. 782, 93d Cong., 1st Sess. (1974); S. 1088, 93d Cong., 1st Sess. (1973); H.R. 17063, 93d Cong., 2nd Sess. (1974); H.R. 9203, 93d Cong., 1st Sess. (1973).

contribution made by an ITT subsidiary to the City of San Diego, the city in which the Republican Party planned to hold its 1972 National Convention.<sup>12</sup> The proposed bill which ultimately formed the basis for the Act, S. 782, was introduced by Senators Tunney and Gurney. It provided for publication of all proposed antitrust consent decrees in the Federal Register at least 60 days before entry by the court, along with a "public impact statement" outlining and explaining the terms of the proposed decree and its anticipated effects on competition. The bill further provided that all "materials and documents which the United States considered determinative in formulating" the proposed decree be filed with the court and made available to the public, and that before entering the proposed decree the court must determine that its entry is in the public interest.

As originally introduced, S. 782 contained no provision making antitrust offenses felonies or changing the Sherman Act's prescription of a maximum imprisonment of one year. It did contain a provision that would have raised the maximum fine for Sherman Act offenses from \$50,000 to \$500,000, but had no other provision relating to penalties. The primary intention of the sponsors of the bill was to remedy the abuses that were likely to occur in consent decree negotiations involving powerful, or at least wealthy, defendants. The ITT case was considered a warning of the manner in which such defendants could corrupt an antitrust settlement process left solely in the hands of the Attorney General.

Hearings on S. 782 and similar bills were held by the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee.<sup>13</sup> As might be expected from the principal thrust of these bills, the discussions centered on the consent decree provisions. The increase in the maximum fine was mentioned only in passing.<sup>14</sup> When it was discussed it was invariably supported on the ground that the current maximum fine of \$50,000, in effect since 1955, did not reflect the enormous growth in corporate assets since then and had become a meaningless penalty for large companies. The "consent decree bill," as it was commonly known, passed the Senate in July 1973, and was sent to the House with virtually no opposition to its sole, and uncontroversial, provisions dealing with antitrust penalties. Hearings were thereafter held by the Subcommittee on Antitrust and Monopoly of the House Judiciary Committee; there, as in the Senate, attention was focused on the consent decree provisions.<sup>15</sup> S. 782 was

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12 See, e.g., Wash. Post, Mar. 25, 1972, at A-1, col. 4; Wash. Post, Mar. 6, 1972, at A-1, col. 2; Wash. Post, Mar. 3, 1972, at A-1 col. 3; Wash. Post, Feb. 29, 1972, at B-11, col. 1.

13 *Antitrust & Monopoly Hearings*, supra note 9.

14 See, e.g., *id.* at 58, 95-96, 150.

15 Only one witness in both the Senate and House hearings expressed any opposition to the increase in fines. Professor Milton Handler, in his testimony before the House Committee, questioned the effectiveness of the increase and pointed out the following:

We must bear in mind that, while the Department of Justice has discretion to proceed either criminally or civilly, every violation of the Sherman Act is a criminal offense. In many antitrust litigations the frontiers of antitrust law are extended, and conduct, which was thought to be legal before the litigation, turns out, after the Supreme Court review, to be unlawful. The Court has not hesitated to overturn prior cases; to alter its views of the scope and content of the antitrust laws; and to give our antitrust statutes an expansive reading which vastly extend their reach.

reported out of the committee on October 11, 1974, with an increase in the maximum fine the only provision dealing with antitrust penalties.<sup>16</sup>

Before the bill reached the House floor, however, a series of events occurred that substantially altered its penalty provision. On October 8, 1974, three days before the committee report, the President delivered an economic message to the Congress in which he called for an increase in the fine for Sherman Act violations to \$1 million.<sup>17</sup> This message was accompanied by a letter to the Speaker of the House from the Office of Management and Budget, stating:

At the request of the President, I am transmitting for your consideration and appropriate reference the following draft amendment, in implementation of the Economic Message delivered by the President before a joint session of the Congress today:

To amend H.R. 17063 to increase the fine for Sherman Act violations to \$1 million for corporations and to \$100,000 for individuals.

The President urges swift action on this proposal, which was referred to in the Economic Message, before the close of the 93d Congress.<sup>18</sup>

Three weeks later, the Assistant Attorney General in charge of the Justice Department's Antitrust Division gave a public address in Chicago in which he announced that he intended to propose legislation making antitrust violations punishable as felonies and increasing the maximum imprisonment to five years.<sup>19</sup> On November 1, 1974, the Chairman of the House Judiciary Committee, Representative Rodino, wrote the Assistant Attorney General pledging his support for this legislation and pointing out that "it may be that an amendment making antitrust crimes felonies rather than misdemeanors is possible for the present Congress."<sup>20</sup> One week later, the Justice Department requested the House Judiciary Committee to support an amendment to S. 782 that would make Sherman Act violations felonies, instead of misdemeanors, and would increase the maximum sentence to five years.<sup>21</sup>

On November 19, 1974, the bill was brought to the House floor. Representative Rodino began the debate by announcing that the penalty provisions in the bill reported out of committee had been amended in accordance with the administration's request. Until this amendment, the only provision in the bill dealing with penalties was the increase in maximum fine, which had gone unchanged through the Senate and the House committee hearings. The first

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I personally do not know how increased punishments can deter people from entering into arrangements which were believed in good faith by them and experienced counsel to be lawful at the time they occurred and which subsequently become unlawful.

*Hearings on H.R. 9203 and H.R. 9947 Before the House Subcomm. on Monopolies & Commercial Law of the Comm. on the Judiciary, 93d Cong., 1st Sess. 215 (1973).*

16 H.R. REP. NO. 93-1463, 93d Cong., 2d Sess. (1974).

17 Address by President Gerald R. Ford, Joint Session of the 93d Cong., Oct. 8, 1974, 10 WEEKLY COMP. PRES. DOC. 1239 (1974).

18 See 120 CONG. REC. H 10,760 (daily ed. Nov. 19, 1974).

19 Address by Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice, Mid-Winter Symposium of the Chicago Bar Ass'n Comm. on Antitrust Law and the Illinois State Bar Ass'n Section on Antitrust Law, Oct. 31, 1974.

20 See note 18 *supra*.

21 *Id.*

speaker in the floor debate on the "consent decree bill" following Representative Rodino, however, began his speech by noting that "[p]erhaps the most significant provision [in the bill] is that which would increase criminal penalties."<sup>22</sup>

S. 782, as amended, passed the House after a short debate, was approved by the Senate on December 22,<sup>23</sup> and was signed into law by the President on December 23, 1974. The President's statement upon signing the "consent decree bill" began with the following:

I have signed S. 782, the Antitrust Procedures and Penalties Act, which will strengthen significantly antitrust laws and the ability to enforce them.

This legislation is the first major reform of the Nation's antitrust laws in nearly 20 years. It changes such antitrust violations of the Sherman Act as price fixing from misdemeanors to felonies; increases the maximum sentence from 1 year to 3 years; and raises maximum allowable fines from \$50,000 to \$1 million for corporations and from \$50,000 to \$100,000 for individuals.<sup>24</sup>

Thus, in little more than a month's time, an amendment to the Sherman Act making all violations of the Act felonies was proposed, passed, and enacted into law; and the President was pointing to this amendment, passed by the House and Senate with little discussion and no debate, as a "major reform of the Nation's antitrust laws."

### III. The Need for Legislative Definition

The imposition of serious criminal punishments for business conduct condemned by the Sherman Act poses serious problems to fair and effective enforcement of the antitrust laws, unless a further legislative step is taken. Supporters of the 1974 amendment making Sherman Act offenses felonies shared the assumption that there exist certain well-defined antitrust offenses which are universally considered evil and understood to be criminal. Representative Hutchison stated this assumption in the following terms: "One cannot unknowingly commit a criminal antitrust violation. This increase [in penalty] is designed to deter those who might conspire to fix prices or to monopolize a given market."<sup>25</sup>

Price-fixing was most frequently mentioned as an example of the kind of antitrust offense for which felony treatment was necessary. In fact, the President's statement would lead one to believe that the new statute had carved out price-fixing for special treatment. In explaining the amendment, he stated that "[i]t changes such antitrust violations of the Sherman Act as price fixing from misdemeanors to felonies."<sup>26</sup>

22 *Id.* at 10,761.

23 120 CONG. REC. S 20,861-65 (daily ed. Dec. 9, 1974). Senator Hruska at this point expressed concern about the vagueness of the Sherman Act as a criminal statute, and stated that "[i]f violations of the antitrust laws are to be put in the class of felonies there must, in all justice, be some qualification providing that only deliberate and intentional violations are to be considered criminal." *Id.* at 20,864.

24 10 WEEKLY COMP. PRES. DOC. 1600 (1974).

25 120 CONG. REC. H 10,761 (daily ed. Nov. 19, 1974).

26 See note 24 *supra* (emphasis added).

There is, however, no general understanding among lawyers, much less among businessmen, as to which violations constitute a crime under the antitrust laws and which violations are not suitable for criminal punishment. Even with respect to price-fixing, the most frequently cited example of criminal antitrust conduct, there is considerable question as to whether some concerted activities, such as exchanges of price information among competitors, constitute "price-fixing,"<sup>27</sup> and whether in all industries a system of self-regulated prices is necessarily evil. For example, until the Supreme Court's decision in *Goldfarb v. Virginia State Bar*,<sup>28</sup> many lawyers followed minimum fee schedules promulgated by their local bar association without even considering that they might be committing a felony.

The absence of consensus as to what conduct can be punished as a crime under the antitrust laws raises a serious question whether the Sherman Act can, consistent with constitutional standards of fairness, be enforced as a criminal statute. This question was raised and decided in favor of enforceability in *Nash v. United States*,<sup>29</sup> an early prosecution under the Act. The offenses charged in *Nash* consisted of a conspiracy in restraint of trade and a conspiracy to monopolize. In rejecting the argument that the rule of reason was "so vague as to be inoperative on its criminal side," the Supreme Court stated the famous dictum: "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."<sup>30</sup>

In decisions subsequent to *Nash*, the Court has shown more concern for the problems raised by vaguely worded criminal statutes.<sup>31</sup> Moreover, the more than 60 years of experience under the Sherman Act since *Nash* has demonstrated that the "reasonableness" of many business arrangements cannot be ascertained with any degree of certainty unless lengthy inquiry into the economic circumstances surrounding the arrangement is made. The antitrust rule of reason, therefore, is objectionable not because it requires an estimation of a "matter of degree," but because it requires judgments in many situations in which a businessman is forced to apply it that cannot be made with any assurance of correctness. It thus is doubtful that anyone at present would seriously contend that the Sherman Act itself sets forth a standard of conduct sufficiently clear and precise to impose severe criminal sanctions upon persons who fail to comply with it.

The Government itself, despite the *Nash* holding, recognizes the "potential unfairness" in the criminal enforcement of the Sherman Act without a "firm rule" limiting criminal prosecution to "willful violations of the law." Thus the Justice Department's Antitrust Division long ago adopted a policy for

27 See, e.g., *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

28 95 S. Ct. 2004 (1975).

29 229 U.S. 373 (1913).

30 *Id.* at 377.

31 See, e.g., *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914). See also Bork, *supra* note 6, at 840-47.



deciding in which cases criminal proceedings should be instituted. This policy was restated in 1967 by a Task Force Report submitted to the President's Commission on Law Enforcement and Administration of Justice.

The Supreme Court has held that the Sherman Act is not unconstitutionally vague. But an indictment in a particular case might unfairly attack conduct not known to the defendants to be unlawful. The solution of the Antitrust Division to this problem of potential unfairness has been to lay down the firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law, and that one of two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing *per se* offenses—willfulness will be presumed. The most common criminal violation of the antitrust laws is price fixing; upwards of 80 per cent of the criminal cases filed charge conspiracies to fix prices. The Supreme Court held more than 30 years ago that price fixing was a *per se* violation of the law—one for which no justification or defense could be offered. *United States v. Socony-Vacuum Oil Co.* Second, if the acts of the defendants show intentional violations—if through circumstantial evidence or direct testimony it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct—willfulness will be presumed.<sup>32</sup>

The question remains, however, whether in defining criminal antitrust conduct a prosecutor's policy can ever be an adequate substitute for legislative definition, particularly when the conduct so defined is punishable as a felony. Several considerations suggest that policy is not an adequate substitute: (1) a prosecutor's policy can never achieve a level of public understanding that is comparable to the public understanding of a law enacted by the Congress and openly interpreted by judicial decision; (2) reliance upon such a policy to limit the criminal applicability of the broad prohibitions of the Sherman Act has an inevitable "chilling effect" as businessmen refrain from legitimate group conduct in the fear that the Government might decide to prosecute such conduct as a crime; and (3) vesting such broad discretion in the executive branch is a serious inroad upon the principle of separation of governmental powers and results in an undue concentration of important legislative and executive power in the Attorney General.

#### A. *The Lack of Public Understanding of the Antitrust Division's Definition of Criminal Antitrust Offenses*

The Antitrust Division has made the judgment that only "willful violations of the law" should be subject to criminal sanction. In determining "willfulness," the Antitrust Division relies upon one of two presumptions. The first is that willfulness "will be presumed . . . if the rules of law alleged to have been violated are clear and established—describing *per se* offenses." The second is that, even if the offenses charged are not covered by the various so-called *per se* rules,

<sup>32</sup> PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, CRIME AND ITS IMPACT, AN ASSESSMENT 110 (1967) (Presidential Task Force Report).

"if . . . it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct . . . willfulness will be presumed."<sup>33</sup> The second "presumption" is nothing more than a definition of what is meant by willfulness. In effect, the Government's policy is to prosecute as criminal only those cases in which the defendants appear to have known that their conduct was a violation of the antitrust law and to apply the commonly followed maxim, *ignorantia legis neminem excusat*, only in those cases involving per se offenses.

This policy, however, is sound only if it is presumed that per se offenses have been defined clearly enough to give businessmen fair notice of the condemned conduct. As explained previously,<sup>34</sup> however, even with respect to horizontal price-fixing among competitors (the conduct alleged in "upwards of 80 per cent of the criminal cases filed"), it is doubtful that there is a common understanding of the kind of conduct that might be charged as price-fixing or of the wrongfulness of this conduct in every circumstance. Other per se offenses are generally said to include boycotting, allocation of customers, allocating of territories, and tying agreements.<sup>35</sup> There is considerable difference of opinion on each of these offenses as to the precise nature of the conduct proscribed, as well as to the proper applicability of the per se rule to all instances in which the conduct may occur.<sup>36</sup>

Little basis exists, then, for concluding that the "willfulness" concept embodied in the Antitrust Division's policy on criminal antitrust enforcement is generally known or understood outside the Antitrust Division itself. Since this concept lies at the heart of the Division's definition of antitrust crimes, it is doubtful that many businessmen have any precise understanding of the conduct that is criminally proscribed. The Sherman Act does not incorporate any element of "willfulness."<sup>37</sup> Consequently, once an indictment is obtained by the Justice Department—and it may be obtained without presenting any evidence of willfulness to the grand jury—an individual may be tried, convicted, and imprisoned for three years without any judicial determination of willfulness.

A recent case in the Oregon district court, *United States v. Champion International Corp.*,<sup>38</sup> illustrates this point. A number of timber processing concerns and their responsible executives were indicted for conspiracy to eliminate competition among themselves for the purchase of timber from the United States Forest Service. The evidence showed that prior to each public timber sale held by the Forest Service in Portland during the four years preceding the indictment,

33 *Id.*

34 See text accompanying notes 27-28 *supra*.

35 See generally Special Subcomm. of the Sherman Act Comm., *The Per Se Rule*, 38 ANTITRUST L.J. 731 (1969) [hereinafter cited as *Per Se Rule*]. See also Bork, *supra* note 6. In 1969, the Attorney General requested legislation to increase the maximum fine for Sherman Act violations. In his letter to the Speaker of the House, he described criminal violations of the Sherman Act as "principally price fixing, boycotting, allocation of customers, and allocation of territories." *Antitrust & Monopoly Hearings, supra* note 9, at 471.

36 *Per Se Rule, supra* note 35, at 731.

37 Two states have recently revised their antitrust laws and have limited criminal sanctions to "willful" violations. ILL. ANN. STAT. ch. 38, § 60-6 (Smith-Hurd Supp. 1975). MD. CODE ANN. art. 83, ANN. § 11-204 (1975).

38 See, e.g., *United State v. Champion Int'l Corp.*, Civil No. CR 74-698, at 6-7 (D. Ore., July 16, 1975).

the defendants met and discussed their respective needs for the timber to be offered at the sale. At the following sale, only one of the defendants would submit a bid, while the others withheld theirs.

The case was tried without a jury, and on the facts outlined above, the court found as follows:

Meetings between competitors are not illegal even when coupled with the exchange of information about each participant's interest in upcoming sales. A line must be drawn, however, between the exchange of interest and an implied agreement to act on this information. The defendants crossed that line. . . . I find that the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves. At the conclusion of each of the meetings described above, for example, it was understood that the most interested buyer would purchase the sale. No one really committed himself not to bid but in sale after sale over a four year period, the one who had expressed the highest interest in a sale was the one who took the sale without opposition. Where, as here, an operator's existence depends upon his raw material supply, one would not likely pass up a sale unless he knew that a subsequent sale would go to him.<sup>39</sup>

No finding of willfulness was made, and none was required. The defendants were found guilty of entering into an "implied agreement," a criminal violation under the Sherman Act.

The two individual defendants in *Champion International* were each fined \$5,000 and placed on probation. After the sentencing, one of these defendants expressed complete bewilderment: "The government did not have any spelled out rules for us to go by. There were no rules. . . . I still don't understand [the antitrust laws]. I don't think anyone understands them."<sup>40</sup>

Whatever one might think of the credibility of a convicted defendant's claim that he does not understand the law he has been found guilty of violating, it must be admitted that no businessman would have made such a claim had the charge been bribery, embezzlement, or virtually any felony other than an antitrust offense. And whether this defendant was sincere or not, it cannot be doubted that he believed he was saying something that would get a sympathetic response from the business community. His statement indicates a feeling, which a great many businessmen apparently share, that the antitrust laws are largely inscrutable. Accordingly, the Antitrust Division's policy of prosecuting only "willful violations" may have no meaning to many of the persons whose conduct the Sherman Act is intended to govern.

No policy adopted within an executive department can be expected to reach the level of understanding of a statute enacted by the legislative branch. In the first place, such a policy is adopted without public discussion. The circumstances of its adoption and the meaning of its provisions to those who proposed, supported, and opposed the policy are not disclosed. Second and perhaps more importantly, all authoritative interpretations of its provisions are necessarily

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<sup>39</sup> *Id.*

<sup>40</sup> BNA ANTITRUST AND TRADE REG. REP. No. 727, A-11 (Aug. 19, 1975).

and legitimately made in secrecy. While the indictments issuing from the Anti-trust Division reveal the result of its deliberations, the public is never given a full statement of the specific circumstances which the Division considered, or an explanation of the reasoning used in reaching its conclusion. In virtually every other felony case, the conduct constituting the offense is defined by statute so that any questions concerning the definition of criminality can be judicially resolved. Under the present system of criminal antitrust law, however, only questions regarding the outer limits of the statutory offense, that is, the boundaries of the judicial standard of reasonableness, can be resolved by the courts. Once a criminal prosecution is brought, the defendant has no way to obtain judicial resolution of whether the conduct with which he is charged falls within the narrow range of antitrust misconduct that Congress evidently intended to punish as a felony.

### B. *The Undesirable "Chilling Effect" of Defining Criminal Conduct by Executive Policy*

The Sherman Act was designed to prevent businessmen from engaging in certain kinds of group action. It is important to bear in mind, however, that not all group action is prohibited; in fact, some kinds of group action among business firms are socially beneficial and should be encouraged. Senator Sherman recognized this in his remarks quoted previously,<sup>41</sup> in which he explained that the Sherman Act was not intended to inhibit "lawful and useful combination."<sup>42</sup>

The uncertainty as to the definition of criminal antitrust violations, which stems both from statutory vagueness and lack of public understanding of which violations are regarded as criminal, inevitably leads businessmen to forego useful group activities in fear that a criminal charge might result. The address of the Assistant Attorney General referred to previously in this article alludes to one situation in which such forbearance commonly occurs: "When does exchange of price information constitute proof of a price-fixing agreement?"<sup>43</sup> Although a system of price exchanges was condemned under the circumstances alleged in *United States v. Container Corp. of America*,<sup>44</sup> in many marketing contexts an exchange of prices and price-related information, such as sales, costs, and expenses, could have economically beneficial results. The Bureau of Economics Staff of the Federal Trade Commission recently pointed out some of the benefits flowing from publication of such information. In a statement supporting the Commission's Line of Business program, under which the Commission intends to require each of approximately 1,000 large corporations to submit sales, cost, and expense data each year for each line of business in which they are engaged, the staff explained as follows:

The purpose of the Line of Business program is to collect and publish in aggregated form statistical information on economic performance in more

41 See text accompanying note 4 *supra*.

42 21 CONG. REC. 2460 (1890) (remarks of Senator Sherman).

43 See note 19 & accompanying text *supra*.

44 393 U.S. 333 (1969).

than 200 industry categories for a sizeable sample of large corporations active in the U.S. manufacturing sector. Such information, it is believed, will have many important uses. . . . With it industrial decision-makers will be better able to identify industries in which competitive entry has been insufficient, thereby fostering a more rational allocation of manufacturing industry resources. It will aid company executives in judging their own organization's performance against industrywide averages and stimulate below-average performers to greater effort. And it will provide investment analysts and investors valuable information to consider in selecting investment opportunities.<sup>45</sup>

If, as the Commission maintains, a statistical compilation of price-related information gathered for certain lines of business on a national basis is in the best interest of the public, other compilations of market prices and financial information would also serve a desirable public objective. In fact, there are decisions upholding the lawfulness of competing business firms joining together in order to gather and publish such compilations.<sup>46</sup> There are other decisions, however, in which such group activities have been deemed evidence of unlawful conspiracy to tamper with prices.<sup>47</sup> For example, the holding in *Container Corporation* might be read to suggest that in some circumstances the exchange of prices in itself might be an unlawful combination if it has a price stabilizing effect in the relevant market and serves no other purpose.<sup>48</sup>

For a businessman considering whether his company should join a program of exchanging information with his competitors, the answer to the question posed by the Assistant Attorney General—"When does exchange of price information constitute proof of a price-fixing agreement?"—might thus depend either upon the effect the exchange is subsequently viewed to have upon the market or upon the unknown and unknowable actions and motivations of other companies that participate in the exchange. A businessman considering whether to join such a program is forced, therefore, to rely upon little more than guesswork as to how his counterparts view the program and what effect the program may have upon the market in which he operates. To require the businessman to pay damages—even treble damages—in the event of a wrong guess seems justifiable, for the ultimate question in damage cases is which party should bear a loss that one of the parties must inevitably bear. In resolving this question, the rule of reason provides an acceptable basis for decision. In criminal prosecutions, however, the question is not one of allocating inevitable losses, but whether the accused person should be punished for a failure to comply with important social norms. No one should be forced to consider criminal prosecution as one of the "risks" involved in questionable conduct. Although perfect clarity is impossible, the criminal law should be of sufficient clarity to allow a sound judgment as to the lawfulness of contemplated actions. A standard like the rule of reason, however, which can be applied only after exhaustive investi-

45 BUREAU OF ECON. STAFF, FEDERAL TRADE COMM., PROPOSED REVISION OF FORM LB, SUPPORTING STATEMENT 1 (1975).

46 See note 27 *supra*; G. LAMB & S. KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE 60-70 (1956).

47 See note 27 *supra*.

48 393 U.S. at 337-39 (dissent of Justice Fortas).

gation of circumstances, many of which occur or can be known only after the event, makes sound judgment in many instances impossible. It seems neither fair nor socially desirable to impose a risk of serious criminal punishment upon persons who engage in group activities which, although open to some question, might prove to be in the best interest of the public. Price information exchanges are only one example of such activities, but it illustrates the undeniable "chilling effect" produced by the uncertainty in the law stemming from the failure of Congress to segregate and define those antitrust violations that deserve criminal sanctions.

### *C. Undue Concentration of Legislative and Executive Power in the Attorney General*

The Antitrust Procedures and Penalties Act grew out of a political atmosphere of discomfort, if not outright distrust, concerning the Attorney General's power to settle civil antitrust suits against major corporations. It was generally feared that this power may have been abused in the case against ITT, or at least that the existence of that power had resulted in questionable conduct, including improper campaign contributions on the part of ITT. It is ironic, therefore, that the same legislative act that was intended to curb the Justice Department's unfettered power to deal with civil antitrust defendants should itself vastly increase the power of the Department over criminal antitrust defendants.

This increase constitutes a departure from the basic constitutional principle that legislative and executive powers should be separated. The importance of this separation of powers in criminal law enforcement is manifest. If the executive department, vested with the power to commence criminal proceedings, should also possess unlimited power to define the offense, there is nothing the accused person can plead to the court to show that his conduct did not constitute a crime.

Under the present system for enforcement of the antitrust laws, the Attorney General's power to define the offense, while not unlimited, is exceedingly broad. A businessman could be charged with a felony should he enter into any agreement which the Attorney General determines is an "unreasonable" restraint of trade. This standard of reasonableness takes into account a host of considerations. In *Chicago Board of Trade v. United States*,<sup>49</sup> the Supreme Court listed these considerations as follows:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting

<sup>49</sup> 246 U.S. 231 (1918).

the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>50</sup>

The standard of reasonableness is thus more a balancing test than a workable limit on the Attorney General's power to define antitrust offenses. The immense power of the Attorney General to frame charges under this standard is readily seen. In view of the corrupting effect of such power, as suggested by the ITT settlement, its existence should not go unquestioned.

#### IV. Conclusion

In raising antitrust crimes to the status of felonies, Congress has only begun the legislative work that must be accomplished to achieve an administration of the antitrust laws that is both effective and fair. As the legislative history described earlier demonstrates, the provision that raised the status of antitrust offenses to crimes was inserted as a last-minute amendment to a bill, the primary purpose of which was to regulate settlement of government antitrust civil suits. The issues raised by vigorous criminal enforcement of the antitrust statutes have therefore not been given the careful consideration they deserve. It might even be questioned whether criminal enforcement is necessary in view of the availability of class actions to remedy public injuries caused by antitrust offenses. It is clear, however, that after some 85 years of experience under the antitrust law, the time has come for clear legislative delineation of the conduct which is punished as criminal under these laws.

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50 *Id.* at 238.