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SOME PROBLEMS IN THE ENFORCEMENT OF THE ANTITRUST LAWS*

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THERE has been much discussion through the years about the evils of monopoly, monopolistic practices, and unreasonable restraints of trade. We have always paid lip service to the ideal of free competition. But we have done little in this country to cope with these evils. We have done little to make our competitive ideal effective.

The first important antitrust legislation was the Sherman Act,[1] which became law in 1890. Other antitrust legislation followed, such as the Clayton Act[2] and the Federal Trade Commission Act,[3] both of which were enacted in 1914. Having enacted these laws, we seemed to feel that our economic system was safe and that we could relax in secure contentment. We had celebrated our devotion to the ideal of economic freedom by enactment of the laws. An occasional renewal of our faith might be observed by the institution of an antitrust suit. But this ritualistic indulgence had little effect in preventing the concentration of economic power. Great industrial organizations with power to control prices grew at an accelerated rate. The processes of practical business produced new and attractive techniques to fix prices and restrain the activities of those unmanageable men who still wanted to do business on an independent, competitive basis. Regimentation of our industrial life became the order of the day, and it encountered surprisingly little resistance.

General awareness of what was actually happening in this country while we were paying ceremonial obeisance to the ideal of a free economy is just dawning now. The crisis of recent years has gradually but forcefully brought home the fact that when there is no real competition, production is restricted, prices are inflexibly maintained, the channels of distribution become choked with high priced goods that the

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[1] 26 Stat. L. 209, 15 U. S. C. (1934), §§ 1-7.

[2] 38 Stat. L. 730, 15 U. S. C. (1934), §§ 12-19.

[3] 38 Stat. L. 717, 15 U. S. C. (1934), §§ 41-51.

people cannot buy, and, as a result, production is further restricted and employment further reduced. A vicious downward spiral operates. Only drastic action can check it.

If competition fails to provide the people with an abundant supply of goods at reasonable prices, then, of course, the government sooner or later is compelled to step in. If price competition cannot be made to work, some other means must be found to keep prices within reason. This usually means government price-fixing. Private monopolistic control over prices cannot long be tolerated because there is no protection for the consumer. Hence, where competition has failed and cannot be restored, government price-fixing to protect the consumer almost inevitably follows.

In many industries today we appear to be at the cross-roads. Unless within the next few years competition can be restored, we will probably be in for widespread government price regulation, if, indeed, not something more drastic. If the antitrust laws cannot be enforced so that competition restores the flow of goods to the consumers in large volume at low prices, then inevitably we will be forced to turn to government regulation of prices and industrial policies as a less objectional alternative to private regimentation of our business and industrial life.

Most of us would certainly prefer a free to a regulated economy. I am, of course, not unmindful that there are certain industries where we must concede that competition will no longer work and that regulation on a public utility basis is unavoidable. We must recognize, moreover, that the category of businesses so affected with a public national interest that government regulation is necessary is increasing. But giving due regard to the peculiar problems of special industries which must be solved by regulation of the public utility type, still it is our desire that the vast domain of American business shall, so far as possible, remain free for the cultivation of private enterprise with a minimum of government regulation.

Our job today is to use these antitrust laws to undo the damage which has been done by encroachments of monopolistic practices in the past and to prevent further encroachments. Our job is vigorously to use the antitrust laws to restore real competition. It is to such a job that the efforts of the present administration are dedicated.

I shall try to describe for you the machinery for enforcing the antitrust laws and to state some of the problems which confront us in the task of enforcement.

DESCRIPTION OF COMPLAINTS

You would like to know first how an antitrust suit originates. The first information of an antitrust violation usually comes from a complaint submitted to the department. We are receiving more complaints now than ever before in the history of the Sherman Act. For example, in the fiscal year 1932, there were 356 complaints; in the fiscal year 1937, there were 581 complaints; in the fiscal year 1938, there were 923 complaints; and in the fiscal year 1939, there were 1375 complaints. This year the number will more than double the number received last year.

These complaints generally come from businessmen themselves. Ordinarily the complainant is a small competitor who feels that a particular experience he has had warrants an investigation. Sometimes he can give a very full story and furnish a great deal of evidence. Other times he merely knows what has happened to him but cannot explain how or why it happened. For example, a dealer in farm implements writes in that the manufacturer is forcing him to discontinue all of his profitable lines and take on machines that force him to operate in the red. A small bread manufacturer complains that the big bakeries have been cutting bread prices below cost in his community in order to put him out of business. A small dealer in fertilizer complains that all of the manufacturers charge him uniform prices and he believes that this is the result of collusion and agreement. Another man writes in that his factory cannot compete with others because a patent-holding company controls all the patents on modern machinery and will not grant him a license. These are but a sample of the type of complaints which daily pour into the Antitrust Division.

These complaints are usually in the form of letters to the attorney general. Where a situation is aggravated there will frequently be many complaints about the same matter. If complainants are financially able to employ counsel, their complaints are sometimes presented in person by lawyers who either come to Washington or present them to some of the field offices of the Antitrust Division or to United States attorneys. Sometimes, but not often, counsel have been able to work up a substantial amount of evidence in support of their complaints and occasionally, but not often, we are presented with a fully developed case in which very little additional investigation is required.

At this point I should like to make one observation. The enforcement of the antitrust laws is often represented to be a battle between the government and business. Critics point to alleged persecution of private enterprise by the administration in power, and it is said that the

antitrust laws are being used to harass business. I am sure, however, that from my brief summary of the complaints received by the Antitrust Division you will see that most antitrust suits have their origin not as an attack by government on business, but in a complaint by one group of businessmen against another group. The issue in antitrust suits is between the conflicting practices of those businessmen who want a controlled market and those who want a free market. The government simply steps in because experience has shown that private litigation in itself is not an efficient weapon for protecting free competition, nor does it adequately guard the public interest.

What does the Antitrust Division do with these complaints? We have a complaints section. In this complaints section we are gradually building up very complete files on each major industry, prepared by a group of industrial economists who have made comprehensive studies of the facts in each industry. These files contain a great deal of historical information about most of the major industries, and descriptions of the trade practices and pricing policies of these industries. The information is kept as up-to-date as possible.

When a complaint is referred to a lawyer in the complaints section, normally he will first study the available background information contained in our files on this industry, and then he will consider the complaint with reference to the background. If the complaint seems to be bona fide and reasonable, and if it fits into the facts of the industry as we know them, decision may be made to order an investigation.

INVESTIGATIONS

Of the total number of complaints received, only a small percentage are ever investigated. Many of them on their face do not warrant investigation. Others are merely cumulative with respect to a situation already under investigation. Others, I regret to say, deserve investigation, but because of the limitation of funds and personnel we are unable to proceed.

When an investigation is decided upon, the preliminary work is generally done by the Federal Bureau of Investigation, acting on the instructions of the Antitrust Division. The Antitrust Division furnishes a memorandum to the Director of the Bureau of Investigation, outlining the complaint and specifying what information is wanted. The Director of the Bureau of Investigation then assigns special agents in the field to make the investigation. The bureau does not have a special group of agents assigned to antitrust work, but special agents are used interchangeably upon antitrust and other matters. In due course the

agents of the bureau submit reports on the result of their investigations, which often develop new leads that must be further investigated by special agents from other field offices. Many of these investigations become nation-wide in scope. As the investigation proceeds from the preliminary to the advanced stage, contact between our office and the special agents of the bureau becomes more frequent, and in the latter stages of the investigation the lawyers and agents work hand in hand.

Although the Bureau of Investigation plays an important part in our field work, we do not depend entirely upon it. Very often the facts appear to be of such nature as to require investigation by our lawyers, in which case we send them into the field to conduct interviews independently of the agents of the bureau or jointly with them.

You must bear in mind that the success of field investigations by the Department of Justice depends largely upon the cooperation offered by complainants, prospective witnesses and the prospective parties defendant themselves. We have no subpoena power. We have no power short of a grand jury investigation to compel the production of evidence. The degree of cooperation we get varies in different cases. Where witnesses are obstinate, or prospective defendants choose not to open their books and records to our agents, we are often compelled to resort to grand jury investigations to get the facts. Plainly the powers of the Department of Justice to secure evidence are inadequate, but that subject in itself could offer sufficient material for a separate paper. I shall not dwell on it further now.

SELECTION AND ASSIGNMENT OF CASES FOR PROSECUTION

How do we select cases for prosecution? The selection of cases for comprehensive investigation really amounts to selection of cases for trial. If the investigation process which I have just discussed results in the production of evidence indicating probable violation of the anti-trust laws, we have no alternative in the ordinary situation but to institute legal proceedings. About the only limitation under which we operate in this respect is the limitation of funds and personnel. We are not sufficiently staffed to prosecute every case that comes to our attention. The discretion that is exercised, however, is usually exercised during the investigational stages, at the point where we must decide whether to proceed with an advanced investigation or drop a matter in favor of something else deemed more important. In most cases where the investigation is carried through to the finish and sufficient evidence is revealed, prosecution follows. We rarely, if ever, decide

not to bring a suit after we have collected enough evidence to warrant prosecution.

When it has been decided to institute a suit we assign such number of lawyers as appears to be needed. During the investigational stage the matter has been under the supervision of a very small staff—perhaps only one lawyer. As the investigation proceeds, the matter is transferred by degrees from the complaints section to the trial section as it commences to appear that the investigation is producing sufficient evidence to warrant prosecution. There is no fixed point in the procedure at which the supervision of the matter is transferred from the complaints section to the trial section. It is simply a matter of judgment to be exercised in each individual case. At some point, however, it must be decided that the matter has reached such proportions that it no longer ought to be supervised in the complaints section, but should be put under the wing of a trial lawyer, subject to the supervision of the chief of the trial section.

I should state parenthetically that our legal staff is divided into three sections: complaints, trial and appellate. These divisions are more for convenience of supervision than anything else. The same lawyers may, and often do, follow a case straight through from the complaint stage to the trial, and later through the circuit courts of appeal to the Supreme Court.

When a case is assigned to a trial lawyer, he recommends the assignment of such assistants as he needs. The assignments are made by the chief of the trial section. A major antitrust case may require a staff of a dozen men, although this is rather larger than the average. I should say that in most instances the staff on a single major case will run from six to eight lawyers, with perhaps an economist and accountant, or one or two other technical consultants, also assigned to the case. A single case may require one or two senior assistants and three or four juniors—perhaps men quite recently out of law school. The matter of assignments is, of course, very flexible, and each case must be considered and staffed according to its particular demands.

DECISION WHETHER SUIT SHOULD BE CRIMINAL OR CIVIL

At this point the question may arise as to how we decide whether a case should be instituted as a criminal or equity case. Every violation of the Sherman Act is a criminal violation. In addition, however, the district courts are invested with jurisdiction to entertain equity suits to prevent or restrain violations. But fundamentally the Sherman Act

is a criminal statute and the civil remedies are supplemental for the purpose of furnishing additional redress where the facts call for it.

It is the announced policy of the Department of Justice, unless there are compelling reasons to the contrary, to bring criminal actions rather than suits for injunction where the evidence indicates that illegal acts have been committed. In particular situations, there may be extenuating circumstances which warrant the department in bringing civil suits instead of criminal suits, such as long-continued acquiescence on the part of the government in the commission of the illegal acts. But in general there can be few reasons for failing to present evidence of violation to a grand jury. The department should not take the responsibility of declining to present evidence in a criminal prosecution where it has that evidence in its possession.

What has been said should not be taken to mean that equity suits will not often be filed. There are situations where long acquiescence on the part of the government makes the institution of a criminal proceeding inequitable. There are other cases where effective public relief can only be accomplished through an equity suit. Typical of these latter cases would be a case of a company that had built up a monopoly through the acquisition of many competing units, and where effective public relief might depend upon a systematic decentralization of the economic power of the company by an ordered divestiture of its holdings, under the supervision of a court of equity. The *Standard Oil Company* case[4] of 1911 would be typical of this class of cases. Another instance would be the *Swift & Company* case[5] in which the packing interests were required under the supervision of a court of equity to unload some of the allied businesses which they had acquired. These are situations in which a criminal prosecution, at least standing alone, would not afford a full measure of public relief.

Nor is there any reason why civil and criminal remedies cannot and should not be pursued concurrently. Cases may well arise where effective public relief requires both criminal prosecution and an injunction. The statute expressly authorizes the use of both remedies. The Supreme Court has said in the case of *Standard Sanitary Manufacturing Company v. United States*:[6]

> "The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the

[4] Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502 (1911).

[5] Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905).

[6] 226 U. S. 20 at 52, 33 S. Ct. 9 (1912).

> suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government; the dependence of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power."

Thus it is clear as a matter of law that criminal and civil actions may be brought concurrently or successively and that the order in which they are to be brought is for the determination of the prosecuting arm of the government.

PROCEDURAL INADEQUACIES OF PRESENT LAW

Equity Procedure

Let me point out some of the weaknesses of the present enforcement procedures. Equity proceedings standing alone are seldom effective except in dissolution cases or other cases where affirmative action is required under direction of the court to restore competitive conditions. An injunction operates only *in futuro*. The threat of an injunction does not present any real hazard to unlawful conduct. As long as parties know that the worst that can happen to them for violating the antitrust laws is to be slapped by an injunction, they operate under no real deterrent. They will have to cease their unlawful conduct if and when an injunction is granted. They operate with immunity until then.

Injunction suits, moreover, are subject to many delays. We instituted our suit against the motion picture industry in July, 1938. Only recently it was tentatively set for trial beginning May 1, 1940. This is fairly typical of the time required to get a major equity suit set down for hearing on the merits.

Once decrees are obtained in equity cases the policing of them is highly difficult. There is no machinery for adequate enforcement of decrees and we must rely entirely upon complaints of decree violation. Often proof of violation of a decree is as difficult as proof of a new equity suit. Not infrequently the conduct of defendants is so guided by skilled lawyers that they accomplish substantially the purposes of their original conspiracy without technically violating the decree. In such situations the government is compelled to bring a new equity suit in order to secure the relief originally intended, because the activities of the defendants have been cleverly steered through the technical loopholes of the decree so that contempt proceedings will not lie.

These are but a few of the difficulties that pursue us when we attempt to rely upon the injunction process alone to enforce the antitrust laws.

Treble Damage Suits

Just a word might be said about treble damage suits. The private suit for treble damages provided by the antitrust laws has fallen far short of its purpose. The costs, delays and difficulties of proof are sufficient to deter all but the most hardy litigant. It is generally only after the government has prosecuted successfully a criminal suit or has won an equity decree that private parties can make an effective case against a competitor charged with unlawful practices. Moreover, the public interest is but poorly served by leaving to private litigants the enforcement of a public policy so important to the economic welfare of our country as that contained in the antitrust laws.

Criminal Procedure

The criminal process is likewise inadequate as a remedy against antitrust law violations, although it is the most effective enforcement weapon we now have. A procedure devised for dealing with ordinary criminal cases is scarcely adequate for a judicial attack upon a complicated industrial problem. The rights of the accused, which are of utmost importance when the liberty of an individual is in jeopardy, are irrelevant symbols when the real issue is the arrangement under which the corporations in an industry must compete. The rules of evidence, designed to protect the innocent against rumor and hearsay, are serious hazards in piecing together a picture of business practices and diagnosing the departures of an industry from public policy. It is rare that litigation can be guided over so alien and hazardous a course as criminal procedure requires to a result that is entirely satisfactory. Nor can a victory by the government be easily molded into the exact constructive result sought. In many instances a judgment for the government is not enough. Positive controls are necessary to place the industry in order. A criminal proceeding is powerless to supply them.

Further, the criminal indictment, rather than the fine, constitutes the chief penalty in the minds of defendants. As a practical matter it is impossible to secure jail sentences because of the respectable character of most defendants. The stigma of indictment tends to be the real punishment. Therefore, the real judgment comes at the beginning rather than at the end of the trial. It emerges from a process which is ex parte with no chance for the accused to be heard in defense. Conviction after trial really comes as an anti-climax.

The use of the criminal process to give effect to a public policy borrows troubles which do not inhere in the questions at issue. Delays of many sorts are available to defendants. Needless to say, most defendants take full advantage of them. Even when the defense is not deliberately playing for time, criminal prosecutions under the antitrust laws are notoriously long. Questions of jurisdiction and removal; the defendants' constitutional privileges, appropriate enough in ordinary criminal cases but hardly suited to antitrust prosecutions; strict application of the rules of evidence; the difficulty of acquainting a jury of laymen with the complicated economic picture; the limited rights of the government as against the larger tolerances accorded to the defense —these are obstacles in the way of enforcement of the antitrust laws which are created directly by a criminal suit. Although the real question involves merely the legality of a trade practice, the government, as against the individual defendants, must prove its case beyond a reasonable doubt, rather than by a mere preponderance of evidence. Nor may the government appeal from an adverse decision.

Nevertheless, as the law stands today the criminal remedy is the most effective deterrent to violation, with the present civil remedy as a supplement to be used concurrently in those cases where a decree with specific provisions seems called for to assure future lawful conduct. Under the law as it stands today, effective enforcement means criminal enforcement.

I submit that the difficulties involved in criminal prosecutions suggest the necessity for the creation of effective civil penalties.

SUGGESTED PROCEDURAL REFORM—THE O'MAHONEY BILL

A bill has been introduced in the Senate by Senator O'Mahoney[7] (and a companion bill in the House by Representative Hobbs[8]) to provide additional civil remedies. If this bill becomes law it may be possible to enforce the antitrust laws effectively with much less frequent recourse to the criminal procedure.

The O'Mahoney bill provides among other things that any violation of the antitrust laws by any company shall be a violation by each officer or director who shall have authorized, ordered, or caused the doing in whole or in part of any of the acts constituting the violation. It is provided that if any officer or director shall have had knowledge of any act constituting the violation, he shall be presumed to have authorized, ordered, or caused the act. If evidence in behalf of such

[7] S. 2719, 76th Cong., 1st sess., introduced June 28, 1939.
[8] H. R. 7035, 76th Cong., 1st sess., introduced June 29, 1939.

officer or director shall be introduced to rebut the presumption, the fact of such knowledge shall nevertheless be submitted to the jury, or be taken into account by the court in trials without a jury.

The bill then provides that any officer or director thus violating the antitrust laws shall forfeit to the United States a sum equal to twice his total compensation received from his company on account of his services in respect of each month during which any violation shall have occurred. Such forfeiture shall be payable into the Treasury and shall be recoverable in a civil action brought by the United States. In addition to these forfeitures, an officer or director violating the act may be enjoined from serving the company permanently or for a period not less than ninety days, and from receiving any compensation from the company during such period.

Provision is also made for recovery of civil penalties from the companies themselves in the amount of twice the total company net income during each month in which the violation occurs.

This bill is aimed at establishing the personal responsibility of individuals for the acts of the companies they direct. It is ridiculous to convict corporations of antitrust violations and impose fines which are paid by the stockholders, while at the same time the officials responsible for the illegal acts are not held to account. Yet this is a result which has not infrequently occurred.

The O'Mahoney bill presents some new enforcement procedures which I believe would greatly add to the effectiveness of the Sherman Act. Moreover, if adopted they would put teeth in the civil remedies so that these remedies could be used without necessarily always invoking the criminal process and all of the emotional disturbance which generally attends its use. Those businessmen who dislike the imposition of criminal penalties in antitrust cases should welcome this bill. If the proposed new civil penalties are adopted it may be unnecessary to resort to the criminal process so often. But until we get these civil penalties, or at least some effective civil sanctions, we must vigorously use the only real weapons we now have.

NO NEED FOR AMENDMENT OF SUBSTANTIVE LAW

So far what I have said about amendments relates only to procedure. There are some people who also believe that the substantive antitrust laws should be amended and made more precise; that they ought to list in specific terms those business practices that are forbidden. I personally believe, however, that those businessmen who think that the antitrust laws can be amended so as to specify precisely the prac-

tices forbidden in all interstate industry are entertaining a forlorn hope. The forms of illegal conduct are seldom duplicated in detail even once, and precise specification in the law would only provide the loopholes for escape by those with illicit intent. The broader patterns of unlawful conduct, on the other hand, are stereotyped, and already most intelligent businessmen and their lawyers know these broad patterns of conduct which violate the antitrust laws and how to avoid them.

If we try to amend by making more specific the substantive provisions of the antitrust laws which are applicable to all industry, we get into what I believe is a hopeless difficulty. The particular problems of every industry are different. Legislation designed to deal with the problem of the seasonal surplus in the milk industry and to provide for orderly marketing of that surplus would be a poor solvent for the troubles of the independent oil marketers. Amendments designed to deal with the problem of block-booking in the motion picture industry would obviously not point the way toward the restoration of competition in the aluminum industry. I submit that the particular problems in each industry which need legislative attention cannot be solved by any blanket amendment of the substantive provisions of the antitrust laws. The present substantive provisions, I believe, are adequate, and they permit of application to each industry case by case according to the particular demands and problems of that industry. Substantive amendment would destroy necessary flexibility.

Procedural amendments along the lines of the O'Mahoney bill, I believe are needed, but I think that the substantive law as interpreted by decisions of the courts and the announced prosecution policy of the Department of Justice provides as definite a guide for businessmen as they can ever hope to obtain.

CONSENT DECREES

A word should be said about the consent decree. There is nothing new in this device. Many equity suits have been settled by consent decrees in the past and many will continue to be in the future. There is no necessity for litigating issues if the parties are willing to confess the error of their ways and agree in the future to abide by a judgment against them.

An additional question may arise, however, when criminal proceedings are pending and consent decrees are offered. I have already alluded to the fact that the law permits the simultaneous pursuance of the criminal and civil procedure. Frequently it happens that during the pendency of a criminal case, the department is approached by the

defendants with offers to correct the practices complained of by the department. Those offers usually take the form of proposals to enter into consent decrees enjoining the continuance of the illegal practices. A consent decree proposal is in effect a proposal that the government shall file an equity suit against the parties and that they shall consent to the entry of a decree granting the relief prayed against them.

The question then is whether the department is warranted in dismissing criminal proceedings upon the agreement of the defendants to consent to an injunction which merely requires that they comply with the law. The department takes the position that as a general rule a decree merely enjoining unlawful conduct cannot be recommended as the ground for dismissal of a criminal case. It is not enough merely to promise never to do it again. On the other hand, if a decree is tendered which, in addition to enjoining conduct unlawful anyway, confers substantial public benefits connected with the policy of maintaining free competition, then such a decree might justify either a nolle prosse of the indictment or a suspended sentence after conviction. In other words, if a decree is submitted during a criminal prosecution that contains provisions in addition to those which merely require lawful conduct—conditions which confer affirmative public benefits—then the department may in particular cases be justified in accepting the decree and in submitting all the facts to the court as justification for a nolle prosse or a suspended sentence.

Where this procedure is followed, the department will frankly disclose to the court the complete history of the submission of the decree and the reasons why its adoption is recommended in lieu of further criminal prosecution.

Criminal proceedings should not and will not be used to coerce the submission of consent decrees. When we embark on a criminal prosecution it is with the intention of going through with it. However, the Department of Justice is a public office. Its doors ought always to be open to persons with bona fide proposals which they believe are in the public interest, even though such persons are defendants in a pending criminal action. We reject the suggestion that we cannot properly confer with defendants or their lawyers once a grand jury investigation has commenced.

Proposals for decrees that are in the public interest must be voluntary, *and we mean voluntary*. The department will not seek consent decrees in matters where criminal action has been started. The initiative, if any, must come from the other side.

NECESSITY FOR INCREASED ENFORCEMENT PERSONNEL

Notwithstanding the procedural difficulties in enforcement which I have discussed, the failure to enforce the antitrust laws in the past has not been primarily a failure of the laws. It has been a failure of the organization provided for their enforcement. I submit that what is needed most of all is an adequate enforcement staff. We have never had one. During Theodore Roosevelt's administration when there was much antitrust talk but few practical results, the Antitrust Division consisted of only five lawyers and four stenographers. From 1914 to 1923 there averaged only eighteen lawyers in the Antitrust Division. When the present administration came into office there were only fifteen lawyers charged with enforcing these laws. Today the number has been increased to about two hundred. This small group is supposed to police the enforcement of laws covering the activity of substantially all American business. In addition, this small group of lawyers is required to handle all legal proceedings connected with thirty-one other major acts of Congress.

Incidentally, if anyone thinks that the cost of antitrust enforcement is too high and that it is not worth the cost in dollars and cents, I would direct his attention to the fines assessed in antitrust cases. In the fiscal year which ended June 30, 1938, a year in which the appropriation for enforcement of the antitrust and kindred laws was $475,000, fines in cases handled by the division aggregated $815,750, or $340,000 more than the appropriation. Of course, the true criterion of the effectiveness of the antitrust laws is not to be stated in terms of fines assessed or collected, but I merely throw in these figures to show that there is no net financial loss to the government in antitrust enforcement.

The problem is really the problem of maintaining traffic policemen. If there are sufficient traffic policemen on the job there will be fewer traffic violations. The beneficial effects of maintaining an adequate staff for enforcement of the antitrust laws will not be measured alone in the larger number of antitrust suits instituted. Indeed, it is conceivable that after a time there can be effective enforcement with fewer antitrust suits pending in the courts. But the primary effect of an adequate staff should be preventive—fewer violations will occur if the traffic policemen are on the job.

THE BUILDING INVESTIGATION

I wish that I had time to enter into a discussion of some of the policies of the Antitrust Division and endeavor to indicate where we think they fit into a program of economic recovery. Such a subject, however,

is beyond the scope of my paper. I would, however, like to allude to just one phase of our present program because it has been much publicized of late, and it is a fair laboratory example of how the antitrust laws may be used in effectuating desirable economic ends. I refer to our drive against the illegal restraints with which the building industry is honeycombed.

I think that most economists and businessmen are agreed that one of the major things this country needs is a revival of building activity. Millions of our population are improperly housed. We have a generation of work ahead if we are to do an adequate housing job and yet, notwithstanding this great need, building lags and the construction industry is in the doldrums. One of the principal reasons for this condition is that building costs and prices are artificially maintained quite generally throughout the industry, and this artificial price maintenance is supported by manufacturers and distributors of building materials, contractors and labor organizations. We believe that a vigorous application of the antitrust laws to the building industry will do much to reduce building costs and that it will give enormous stimulus to recovery.

At the present time we have major building investigations under way in twelve principal cities of the country and grand juries are, or shortly will be, probing the building industries in all of these cities. Other investigations in other cities will follow. Already a number of indictments have been returned in different cities against manufacturers, distributors, contractors and labor organizations who have entered into various kinds of restrictive devices to raise prices and shut out honest competition from the field. I wish that I could appropriately describe to you some of the amazing evidence that we are uncovering in some of these cases. The facts will from time to time come publicly to light. All I now can say is that a compilation of the numerous unreasonable and restrictive devices with which the building industry is shot through would certainly furnish the public a chamber of horrors of the first magnitude. Predictions are freely made that the success of this drive will reduce building costs as much as twenty-five per cent in many communities, and in some places much more.

You may have noticed in the newspapers that there has been some flurry over the necessity of applying the antitrust laws in these building suits to labor organizations. This resulted from our announcement that there are at least five types of activities of labor unions which we consider to be violative of the antitrust laws. These are:

1. Unreasonable restraints designed to prevent the use of cheaper

material, improved equipment, or more efficient methods. An example is the effort by labor unions to prevent the installation of factory-glazed windows or factory-painted kitchen cabinets.

2. Unreasonable restraints designed to compel the hiring of useless and unnecessary labor. An example is the requirement that on each truck entering a city there must be a member of the local teamsters' union in addition to the driver who is already on the truck. Such unreasonable restraints must be distinguished from reasonable requirements that an additional amount of labor be hired in the interests of safety and health or avoidance of undue speeding of the work.

3. Unreasonable restraints designed to enforce systems of graft and extortion. When a racketeer, masquerading as a labor leader, interferes with the commerce of those who will not pay him to leave them alone, the practice is obviously unlawful.

4. Unreasonable restraints designed to enforce illegally fixed prices. An example of this activity is found in the Chicago milk case where a labor union is charged with combining with distributors and producers to prevent milk being brought into Chicago by persons who refuse to maintain illegal and fixed prices.

5. Unreasonable restraints designed to destroy an established and legitimate system of collective bargaining. Jurisdictional strikes have been condemned by the American Federation of Labor itself. Their purpose is to make war on another union by attacking employers who deal with that union. There is no way the victim may avoid such an attack except by exposing himself to the same attack by the other union. Restraints of trade for such a purpose are unreasonable whether undertaken by a union or by an employer restraining trade or by a combination of an employer and a union, because they represent an effort to destroy the collective bargaining relationships of a union with an employer.

Labor organizations in criticizing this policy contend that they are entirely exempt from the antitrust laws by section 6 of the Clayton Act. But that section only provides that nothing in the antitrust laws shall be construed to forbid the *existence* and *operation* of labor organizations or to forbid members of such organizations from *lawfully* carrying out the *legitimate* objects of such organizations. We contend that the five types of restraint I have enumerated are not lawful activities in pursuance of legitimate objects of labor unions. These activities, as you will have noted, have nothing to do with the promotion of better wages, fairer hours and working conditions, or with the promotion and protection of collective bargaining as such. These types of restraints

which we think collide with the antitrust laws do not arise out of labor disputes between employers and employees. We do not think that the antitrust laws have any application to strikes that are connected with labor disputes, or with any other stoppages that grow out of bona fide labor disputes. But we believe that when labor unions or their members go beyond their proper activities and enter into collusive agreements among themselves or with manufacturers, distributors, or contractors which restrain interstate trade and commerce, then the antitrust laws apply. We believe that in due time and after proper reflection the forward-looking leaders of labor itself will approve and applaud this policy.

I have been able barely to scratch the surface of some of our problems. I hope, however, that I have challenged your minds to further thought on these questions. With an adequate staff and a clearly conceived and generally understood enforcement policy, I believe that the antitrust laws can do much to achieve the balanced objective of checking private monopolistic price controls and eliminating economic toll bridges that lay so heavy a tribute each year on American business. The attainment of this objective may be linked in an important way with the preservation of democratic political institutions. Private property, free enterprise, individual initiative and competition seem to go hand in hand with democratic government. Private economic regimentation, on the other hand, paves the way under modern conditions for dictatorial political organization. The one seems to call for the other.

Our task both in government and industry is to make democracy work; to gain for our people without sacrifice of democratic principles the economic advantages of modern industrial techniques. It is to this task that the best minds of government and business, of lawyers and laymen, should be dedicated.