Business and Government in The Eisenhower Era

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Until the Treaty of Rome ratifying the Common Market in 1957, no country or group of countries had a corpus of antitrust laws that was as all encompassing as that of the United States. Yet the institution of antitrust is far older than America; it can be traced back at least to the time of the Babylonians. As early as the eighteenth century B. C. the code of Hammurabi treated the problem of price fixing.[1] The rulers of the Roman empire also endeavored to regulate trade. Even though English common law contained numerous examples of efforts to restrain unfair practices of forestalling, regrating and engrossing, it was in the United States that the concept of antitrust made its greatest gains.

While there were many earlier local and state laws that could be classified as belonging in the antitrust corpus, it was not until 1890, after the economy of the United States had assumed national parameters, that the nation as a whole had its first antitrust statute, the Sherman Act. Passed by a nearly unanimous vote, it was strengthened in subsequent years by such measures as the Panama Canal Act and the Clayton Act which sought to buttress obvious weaknesses in the original legislation. All were supported, if not sponsored, by the Republican party. But, in some way, the myth was planted and allowed to flourish that the Democrats were the party of "trust-busting,"

and the Republicans were the party of trusts. At least since the 1950's this has not been valid.

The Depression and then World War II did not strengthen America's allegiance to the antitrust laws. In the reconversion period after World War II and during the Korean war, there were many who questioned and others who attacked the corpus. The growth of interest and doubt concerning the subject was exemplified by the fact that not only law journals and business magazines treated the problem, but also popular mass culture periodicals devoted space to the topic.[2] Perhaps the most influential of all the articles was the seminal contribution of S. Chesterfield Oppenheim entitled "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy."[3]

It was in this context that the Republicans, for the first time in twenty years, entered the White House. One of the first actions of the new attorney general, Herbert Brownell, was to announce the formation of a committee to study the antitrust laws.[4] Modeled along the lines suggested in Oppenheim's article, the Attorney General's National Committee to Study the Antitrust Laws was not formed to advocate repeal of the laws, because "American business generally joins the public in support of a federal antitrust policy."[5]

Led by Oppenheim and co-chaired by the Assistant Attorney General in charge of the Antitrust Division of the Justice Department, Stanley Barnes, the Committee was composed of lawyers,

academicians, economists, and a minimal number of government officials. At no time did the administration suggest the inclusion of any specific person; it only requested that the geographic distribution of the members be more diverse.[6] In like manner, its findings were totally uninfluenced. In light of the climate of opinion, the Report of the Attorney General's National Committee to Study the Antitrust Laws[7] was a smashing victory for the antitrust laws. Careful scrutiny of the Report yields seventy-four suggestions made for the benefit of various enforcement agencies and the courts. The Committee also proposed twelve statutory changes, many of which reinforced the laws. In most cases the Eisenhower administration subsequently recommended that the statutes be so altered.

While the Eisenhower record for gaining legislative approval of the changes was not outstanding, it is important to note that from 1954 onward the Democrats controlled Congress.

One of the most significant suggestions of the Committee was that some type of mechanism be established by which the government could procure important papers from a company being sued in a civil action. A subpeona can only be used in a grand jury proceeding, which presupposes a criminal action. After 1956, the Eisenhower administration backed legislation to provide for Civil Investigative Demand.[8] The need for the device became all the more pressing after the Proctor and Gamble decision[9] and Robert Bicks, the new Assistant Attorney General

in charge of the Antitrust Division, spent much of his time unsuccessfully lobbying for the bill. When John F. Kennedy became president, Lee Loevinger, Bick's successor, was finally able to gain its passage.

The Eisenhower administration brought a new vitality to the Antitrust Division. When Barnes assumed leadership, he found that the average case lasted over five and a half years from filing to final judgment; one case had even been filed back in 1938. Such actions became stale; they were also very expensive for it cost the government in the neighborhood of one quarter million dollars to litigate a medium-sized antitrust suit.[10] Thus one of Barnes; first priorities was reducing delay. One means was recourse to consent decrees. A product of negotiation and a certain amount of compromise between the government and the defendant, the decree, once entered, carried with it the force of a litigated judgment. Not only did it treat a current situation, it also could and often did include clauses which covered possible future situations. The consent decree mechanism was an important tool for the government, for it provided effective enforcement without the cost in time, manpower and money of a protracted trial. The meetings negotiating the consent decrees were informal. Under Barnes, the government's conferees were directed to appear in shirtsleeves; hopefully, such an unstudied atmosphere would lead to more give-and-take than might prevail in a stiff courtroom environment. Barnes

emphasized that thereby "The Division may strike down violations in areas otherwise. . . beyond its reach."[11] All the advantages, however, did not redound to the government. While litigated government antitrust actions were prima facie evidence, consent decrees were not, and consequently any defendant who agreed to a consent decree greatly increased the work and sharply diminished the chances of success for any future treble damage claimant. Furthermore, a consent decree did not garner as many headlines as did an antitrust conviction. Wide use of consent decrees substantially reduced the backlog of cases.

The Division used another time- and money-saving device on the order of the consent decree: the "prefiling conference." After investigating a particular situation and preparing a proposed complaint, the Department would then notify the prospective defendant of the Division's intentions. It then summarized the nature and grounds of the charges to provide the defendants with some frame of reference. If they wished to start negotiations towards a possible consent decree, prior to the filing of the complaint, Barnes' Division was ready to meet with them at the conference table in an effort to work out an acceptable solution. The agreement would dispose of the problems raised on the complaint, while at the same time safeguarding both the public and corporate interest. The benefits accruing to both sides were identical to those gained by the signers of consent decrees.

A related innovation was that of merger pre-clearance. Under this, two merging companies requested a government clearance, and after a thorough study of all the economic and competitive problems peculiar to the industry, the government would clear the merger. All that the clearance guaranteed was that the Division would not institute proceedings at that time. If the competitive situation changed, or if later investigation revealed that the facts were either inaccurate or incomplete, the clearance could be withdrawn.[12]

All of these devices conformed to the Eisenhower administration's program of economy in government. In the Antitrust Division, productivity rose, both in number of cases terminated, and also in number initiated.

The Eastman Kodak case[13] illustrated many different facets of the Brownell-Barnes management of the Department and of the Antitrust Division in particular. The action commenced with the use of the prefiling procedure, and from then on negotiations moved smoothly, illustrating how goodwill and sincerity on both sides of the confernece table could ameliorate many difficult and complex problems. The government achieved a decree providing effective relief--the restoration of competition in the film developing market--and the profitability of Kodak was not adversely affected.

In detail, the Kodak case began with an investigation arising from a number of private complaints regarding the company's

monopoly of the processing of amateur color film. The findings suggested that Kodak had monopoly power on processing and that its practice of controlling the resale price of its color film under fair trade laws was unfair since the price of processing was included in the cost. The Antitrust Division maintained that the pricing practice was not covered by fair trade for the following reasons:

1) The products in question were items on which Kodak had a monopoly, thus they were not products in free and open competition--a requisite in the fair trade statutes;
2) The products were sold only on a basis which included processing, helping to prove that the products were not in free and open competition;
3) The prices which Kodak had fixed included a charge for service (processing) and the fair trade laws apply to commodities and do not provide any antitrust exemption with reference to price fixing agreements relating to services;
4) Kodak retailed the products in question in stores operated by one of its dubsidiaries. They were in direct competition with other independent retail dealers whose prices were fixed by fair trade agreements.

But perhaps the most important factor was that almost all

Kodacolor and Kodachrome film sold in the United States was processed by Kodak after it had been exposed. As the independent photo finisher had no opportunity to process the film, the public was paying the company a tariff for film development which was not determined by the competitive forces of the market place.

In July 1954, the Antitrust Division notified the officials of Kodak of the intended complaint, and upon request, furnished them with a copy. Shortly thereafter, the company advised the Department that it wanted to negotiate a consent decree prior to the filing of the complaint. By mid-August, the parameters of the negotiations had been set. At conferences lasting until early December, the two sides formulated an agreement which was entered in the federal court at Buffalo on December 21, 1954, simultaneously with the filing of the complaint.

Using the technique of prefiling, in less than six months, the government was able to enter a decree, which, saving the costs of time and trial, still afforded satisfactory relief. The judgment required Kodak to cancel its fair trade contracts covering resale price maintenance of its color film and it enjoined the signing of any such contracts in the future. Additionally, and a key factor for Barnes and Brownell, the decree prohibited Kodak from selling its color film with the processing charge included in the sale price. This clause would have been nearly meaningless had there not been an enabling section stating

that independent film processors could obtain, upon written request, licenses at reasonable royalty for the use of the Kodak processing patents. As even the license to use certain techniques was useless without the know-how, the decree directed Kodak to make available scientific manuals which could be used by the new entrants in the processing field. In order that Kodak not overlook any critical aspect, the decree stiuplated that the company permit independent processors to send technical personnel to observe the methods and machines utilized at the Kodak processing plants throughout the United States. Additionally, Kodak was required to sell all materials necessary for the processing of its amateur color film.[14] By the decree the Justice Department intended to create conditions under which the independent processors would be able to complete effectively with Kodak to the benefit of the individual photographer.

Despite the fact that, according to Barnes, "President Eisenhower . . . complained to me . . . about the inconvenience . . . of certain provisions of the Eastman Kodak decree," the president never suggested that it be changed.[15] Subsequent evidence indicated that the decree had definitely accomplished what its authors intended, and Herbert Brownell often used the Kodak decree and the resultant burgeoning of independent processing firms as an example of antitrust activity at its best.

The Antitrust Division also made notable headway in anti-merger cases, but it gained many more headlines from the twenty.

separate criminal actions which comprised what were known as the Electrical cases. Covering many aspects of the industry, all its major companies were included in at least one indictment. While some of the violations were long-lived, one being traceable to the heyday of the NRA,[16] the Justice Department concentrated on the most recent ones to prove its charges. Essentially the conspiracies were of four types: The time and manner of the introduction of new products, price level and amount of discount, terms of sale, and division of markets--both geographical and quantitative. It was very difficult for the Department of Justice to gather the evidence, for the companies went to great lengths to hide collusion. Ihey even had a set of rules:

1) Minimize phone calls.
2) Use plain envelopes if mailing materials.
3) When registering at a hotel, do not include the company's name.
4) Endeavor not to travel together.
5) Do not eat together.
6) Leave no wastepaper behind after a meeting in a hotel room.[17]

For a long time the government had been stymied in its efforts to find some sort of a pattern in the prices bid in the switchgear industry. The bids were so exact and uniform, but even with the aid of cryptographers,[18] the government could not ascertain the formula. When Nye Spencer, the sales manager

for one of the smaller companies, was questioned, he finally agreed to cooperate with the government. Spencer revealed that the firms had worked out an elaborate formula which utilized various phases of the moon to determine which company would be the low bidder. Ihe other bidders were assigned different percentages over the winner and these were varied according to the formula.

The facts of the cases are not as important as the attitude of the government. It was determined to exact a punishment and to make private treble damage suits as easy as possible for other aggrieved parties. In the end, nearly $2 million dollars in fines were levied, and many executives of the leading companies were jailed. But that was not all. Based on the government's cases, over 1700 private damage suits were filed in various federal courts. This produced two significant results: First, the high cost of law breaking was emphasized to the companies; for General Electric alone, and final cost was over $120 million.[19] Second, the burgeoning of interest in the field led to great growth in the number of lawyers practicing antitrust law. In addition, until this time, most had been defense-oriented. The Electrical cases brought about a change in the situation. The number of private treble damage suits, which began to increase with the reawakening of interest in the subject in the Eisenhower era, continued to do so at an even greater rate. Private suits have always been a boon to the nation

at large; they are aimed at a specific problem, and they cost the government nothing. Without private actions, the Antitrust Division would need at least four times its budget to do its job.[20]

For the past two decades, then, the Republican party has been the party of antitrust.

FOOTNOTES

1. William Seagle, Men of Law from Hammurabi to Holmes (New York, N.Y.: 1947), 26.

2. Benjamin Wham, "Ihe Growth of Antitrust Law: A Revision Is Long Overdue," American Bar Association Journal, XXXVIII (November 1952), 934-935; H. Graham Morison, "Is the Sherman Act," Fortune, XLI (January 1950(, 104-114. See also the five part series by David Lilienthal in Collier's Weekly, CXXXIX (May 31-June 28, 1952).

3. Michigan Law Review, L (June 1952), 1139-1244.

4. Herbert Brownell, "Out Antitrust Policy" (June 26, 1953). Mimeographed copies of speeches by Herbert Brownell are available at the Columbia University Law Library, New York, NY.

5. Ibid.

6. S. Chesterfield Oppenheim to author (April 23, 1971).

7. (Washington, D.C., 1955).

8. Economic Report of the President: 1956 (Washington, D.C.: 1956), 79. Alson subsequent years.

9. United States v. Proctor and Gamble and Company, et al., 356 U.S. 677 (1958). See especially 684.

10. Lamar Cecil, "Remedies in Antitrust Proceedings: Fines and Imprisonment," 5 A.B.A Antitrust Section (August 18-19, 1954), 123.

11. Stanley Barnes, "Settlement by Consent Judgment," 4 A.B.A. Antitrust Section (April 1-2, 1954), 10.

12. Herbert Brownell, "Speech" (November 17, 1955).

13. 1954 Trade Cases, par. 67,920.

14. 1954 Trade Cases, par. 57,920.

15. Stanley Barnes to author (May 7, 1971).

16. The Wall Street Journal, January 9, 1961.

17. U. S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 87th Cong., 1st Sess.,

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Administered Prices: Hearings. . . (28 pts., Washington, D.C.: 1961), Pg. 28, 17, 394-17, 396.

18. Baddhia Rashid to author (July 9, 1971).

19. General Electric Company prospectus dated April 25, 1967, "Statement of current and retained earnings," 4.

20. Lee Loevinger to author (July 9, 1971); H. Graham Morison to author (July 15, 1971); Lee Loevinger, "Private Action-- Ihe Strongest Pillar of Antitrust," Ihe Antitrust Bulletin, III (March-April 1958), 167-177.