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DISSOLUTION, DIVORCEMENT, DIVESTITURE: THE PYRRHIC VICTORIES OF ANTITRUST*

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"The hard core of the monopoly problem is the concentration of economic power, specifically, the ownership and control of a large proportion of the industrial economy by a small number of giant corporations. Within the framework of the antitrust laws, the problem can be met in only one way, namely through dissolution—trust-busting in the literal sense."¹ Dissolution can be achieved under present law through vigorous enforcement of Section 2 of the Sherman Act² which makes it unlawful 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."³ Section 4 of the Act authorizes proceedings in equity to eliminate unlawful monopolies and to restore competition.⁴

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1. Address by Dr. John M. Blair before the Economic Workshop at the University of Minnesota, July 12, 1949. As used in the subsequent discussion, "divestiture refers to situations where the defendants are required to divest themselves of property, securities or other assets. Divorcement is . . . used to indicate the effect of a decree where certain types of divestiture are ordered. It is especially applicable to cases where the purpose of the proceeding is to secure relief against anti-trust abuses flowing from [vertically] integrated ownership and control. The term 'dissolution' is generally used to refer to any situation where the dissolving of an allegedly illegal combination or association is involved, including the use of divestiture and divorcement as methods of achieving that end. While the foregoing definitions differentiate three aspects of remedies, the terms are frequently used interchangeably without any technical distinctions in meaning." OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 885 (1948).

2. 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 *et seq.* (1946).

3. 15 U.S.C. § 2 (1946).

4. While the Sherman Act contains no specific provisions for equitable relief to the public on account of violations of the Act, Section 4 does invest the courts with jurisdiction not only to *restrain* violations (by means of injunction), but also to *prevent* violations (by means of injunction "or otherwise"). The courts thus have the

Prior to World War I, no substantial progress was made in breaking up great industrial combinations. The two outstanding dissolution cases during the period—*United States v. Standard Oil Co. of New Jersey*⁵ and *United States v. American Tobacco Co.*⁶—failed to produce momentous results and can hardly be cited as good examples of what a dissolution policy can accomplish. The *Standard Oil* decree had the fatal flaw of leaving economic control over the successor companies with the same interests that had exercised control over the parent company prior to dissolution. The *American Tobacco* decree was even weaker, for here:

The Court adopted the celebrated “three way” principle whereby monopoly was conceived to be eliminated and competition restored by the simple means of dividing a trust into three roughly equal parts. The reason for selecting the magic figure “3” and not 7, 11, 60 (as was proposed) 100, or any other number was based, as might be expected, on legal rather than economic considerations. The Court felt that the firms created by a “three-way” division would be too small to be subject to prosecutions as “monopolies” under the Sherman Act. The possibility that the firms might be so large that they could readily follow uniform price policies and in other ways adopt monopolistic practices—as they have recently been convicted of doing⁷—was given no weight by the Court.⁸

The period between the great wars was marked by two major defeats for the Government. In the *United States Steel* case⁹ of 1920, the Supreme Court announced its famous ruling that “the law does not make mere size an offense, or the existence of unexercited power an

power to dissolve an unlawful combination and can use that power whenever necessary to give complete relief. *United States v. Great Lakes Towing Co.*, 217 Fed. 656 (N.D. Ohio 1914). As Oppenheim points out, it is essential to recognize “that the essence of equity jurisdiction is the power of the court to mould the decree to the necessities of the particular case. Invocation by the United States of the general authority of a court of equity under the Sherman Act enables the court to exercise a wide discretion in framing its decree so as to give effective and adequate relief. Since the public interest is directly involved, the court may go further in giving relief than it does when only private rights are involved. The Sherman Act vests the court with jurisdiction not only to ‘restrain’ but also to ‘prevent’ violations of the Act by injunctions ‘or otherwise.’” OPPENHEIM, *op. cit. supra* note 1, at 885-6.

5. 221 U.S. 1 (1911).

6. 221 U.S. 106 (1911).

7. See 328 U.S. 781 (1946).

8. BLAIR, *op. cit. supra* note 1. For a further discussion of the *Tobacco* case and the dissolution decree of 1911, see JONES, THE TRUST PROBLEM IN THE UNITED STATES 123-63, 452-74 (1929); SEAGER AND GULICK, TRUST AND CORPORATION PROBLEMS 149-95 (1929); STEVENS, INDUSTRIAL COMBINATIONS AND TRUSTS 440-61, 472-516 (1913); COX, COMPETITION IN THE AMERICAN TOBACCO INDUSTRY (1932); Hale, *Trust Dissolution: “Atomizing” Business Units of Monopolistic Size*, 40 COL. L. REV. 617-20, 628-31 (1940).

9. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

offense."¹⁰ This doctrine was given added vitality by the *International Harvester* decision¹¹ of 1927. Needless to say, these two opinions constituted a virtual cease fire order on the dissolution front.¹²

10. *Id.* at 451.

11. *United States v. International Harvester Co.*, 274 U.S. 693 (1927): "[T]he law . . . does not make the mere size of a corporation, however impressive, or the existence of an unexercised power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power." *Id.* at 708.

12. In this connection it is interesting to observe that less than two months after the *Steel* opinion, the Supreme Court decided *United States v. Reading Co.*, 253 U.S. 26 (1920), and decreed that the defendant company be dissolved. The Court held that the company's "dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control. That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act has been frequently held by this court." *Id.* at 57. The Court concluded, therefore, that "for flagrant violation of the first and second sections of the Anti-Trust Act, the relations between the Reading Company, the Reading Railway Company and the Reading Coal Company and between these companies and the Central Railroad of New Jersey must be so dissolved as to give to each of them a position in all respects independent and free from stock or other control of either of the other corporations." *Id.* at 59, 60.

Of special significance in this opinion is the Court's assertion that the existence of a combination and its inherent market power, *regardless of the use made of it*, constitutes a violation of the law. By making monopoly power, rather than its exercise, the crucial test of legality, the Court followed the ruling of *Northern Securities v. United States*, 193 U.S. 197 (1904) and *United States v. Union Pacific R.R.*, 226 U.S. 61 (1912) (as well as the dissent in the *Steel* case), and seemingly rejected the subsequent precedents of *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918) and *United States v. United States Steel Corp.*, 251 U.S. 417 (1920). Of further significance is the fact that in the *Reading* case the Court deemed a 33 per cent control over the market as constituting monopoly, whereas in the *Shoe Machinery* and *Steel* cases the same Court held that a 95 and 65 per cent control over the market, respectively, did not come within the meaning of the statute. How, it may be asked, can such widely divergent opinions be issued by the same court in a period of three years?

The answer seems to be that only seven Justices participated in the *Shoe Machinery* and *Steel* cases, while the full Court heard and decided the *Reading* case. Both the *Shoe Machinery* and *Steel* cases were decided by a 4-3 vote—Justices White, McKenna, Holmes, and Van Devanter voting with the majority; Justices Pitney, Clarke, and Day with the minority; and Justices Brandeis and McReynolds abstaining. Had Brandeis and McReynolds cast their votes (as they did in the *Reading* case), the *Shoe Machinery* and *Steel* decisions would have gone down as 5-4 victories instead of 4-3 defeats for the Government.

One other question warrants explanation, *viz.* why the *Reading* case, since it was decided by a full court, never became the controlling precedent in subsequent litigation. The answer seems to lie in the drastic changes which occurred in the composition of the Court shortly after the *Reading* decision was announced. By 1922, four Justices had retired: White, Pitney, Clarke, and Day. Of these, Pitney, Clarke, and Day had voted with the minority in the *Shoe Machinery* and *Steel* cases, and with the majority in the *Reading* case. Chief Justice White, on the other hand, had voted against the Government in all three cases. Thus, of the retiring Justices, three could be classified as "antitrust minded" while one was not. By contrast, all of their successors had little if any sympathy for a vigorous anti-trust program: Taft (1921), Sutherland (1922), Butler (1922), and Sanford who wrote the majority opinion in the *Harvester* case (1923). By 1923, therefore, only Brandeis and McReynolds remained (to be joined

Then, starting in the late 1930's, the nation became alarmed over the high degree of concentration in the economy. Even greater concern was expressed over the growing centralization of control that occurred during World War II and the post-war merger movement.¹³ As a result, and in an effort to check this trend, the Department of Justice has in recent years attempted to revitalize the long dormant Section 2 of the Sherman Act by filing an increasing number of dissolution, divorcement and divestiture cases.¹⁴

The obvious purpose behind this recent emphasis on dissolution, divorcement and divestiture is to reduce the degree of concentration in highly concentrated industries;¹⁵ to deprive monopolistic firms or groups of firms of their power over price and their ability to exclude competitors; in short, to promote competition by creating a larger number of bona fide independent competitors in certain lines of commerce.¹⁶

by Stone in 1925) to raise their dissenting voice against judicial acquiescence in the combination and merger movement of the Harding-Coolidge-Hoover era.

13. Smaller War Plants Corporation, *Economic Concentration and World War II*, SEN. DOC. NO. 206, Part 1, 79th Cong., 2d Sess. (1946); UNITED STATES FEDERAL TRADE COMM'N, REPORT ON THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS (1947); UNITED STATES FEDERAL TRADE COMM'N, THE CONCENTRATION OF PRODUCTIVE FACILITIES, 1947 (1949); NATIONAL RESOURCES COMMITTEE, THE STRUCTURE OF THE AMERICAN ECONOMY (1947).

14. Among the more important dissolution, divorcement, and divestiture proceedings in this group are those filed against Aluminum Company of America (1937), Paramount Pictures, Inc. (1938), The Pullman Company (1940), General Electric (1941), National Lead Company (1944), Libby-Owens-Ford (1945), American Can Company (1946), Continental Can Company (1946), A. B. Dick Company (1946), American Society of Composers, Authors, and Publishers (1947), United Shoe Machinery Corp. (1947), Armour & Company (1948), Western Electric Company, Inc. (1949), E. I. du Pont de Nemours & Company (1949), The New York Great Atlantic & Pacific Tea Company, Inc. (1949), Celanese Corporation of America (1949), Lee Shubert (1950), Standard Oil Company of California (1950), and General Outdoor Advertising Corp. (1950).

15. Testifying before the Senate Subcommittee on Appropriations in 1946, Attorney General Clark (now Mr. Justice Clark of the Supreme Court) stated the need for restoring competition "by the seldom used processes of dissolution, divorcement, and divestiture." Similarly, in his Annual Report of June 30, 1947, he said: "In regard to monopolies, I have encouraged the application of the remedies of divestiture and divorcement in civil suits brought under Section 2 of the Sherman Act, as the most expeditious means of eradicating this economic evil. The ramifications of monopoly are myriad and, when allowed to develop unchecked, have an effect upon every aspect of the economic scene. Nowhere is this effect more apparent than in the fields of production and pricing and upon no one is the impact of monopolistic policies more severe than upon the small businessman." REP. ATT'Y. GEN. 8 (1947).

16. Needless to say, many of the recent Section 2 cases are not directed against the cruder forms of monopoly (as typified by the pre-1911 Standard Oil and American Tobacco companies). They are concerned, instead, with oligopoly—a type of market structure where a few sellers (the "Big Three" and the "Big Four") are dominant. Under this type of market organization, the entry of newcomers is effectively deterred—not so much by the threat of economic reprisals as by the size and entrenched power of existing firms. Under oligopoly, moreover, a seller no longer can afford to be independent in his choice of a price policy. He must, of necessity, take the reaction of his rivals into account. He must anticipate that price cutting will inevitably cause

Unfortunately, however, the Department's dissolution program has not, on the whole, produced the desired results. In sharp contrast to the many legal triumphs, economic relief has generally been unimpressive. Remedial action approved by the courts has, in most instances, failed to lessen concentration and restore effective competition.¹⁷ As the following case studies indicate, firms found guilty of possessing and exercising monopoly power have—with the notable exception of the motion picture companies¹⁸—escaped dissolution, divorcement, and divestiture.

his large competitors to follow suit with the result that the market is shared as it was before—only at a lower level of prices and profits. It is this certainty that price cuts will eventually be met, it is this fear of retaliation, that leads to conservative and non-aggressive price policies in many of our oligopolistic industries.

The economic result of oligopoly pricing is substantially similar to that which would obtain if but a single firm dominated a given field. The result is collusion—not in the common sense meaning of the word, to be sure—but parallel action, nevertheless, as far as the effects of market behavior are concerned. As Fritz Machlup observed not long ago: "A covenant signed with blood; an agreement signed with ink, an understanding without written words, concerted acts approved with a wink or a nod, a common course of action followed without physical communication—these may be different methods of collusion, but the differences are irrelevant if the effects are the same." Machlup, *What's Best for the Competitive Enterprise System?*, DELIVERED PRICING AND THE FUTURE OF AMERICAN BUSINESS 195 (1948).

17. In discussing the choice of a remedy in civil antitrust cases, Justice Jackson stressed the importance of granting such economic relief as will effectively prevent future violations and be adequate in restoring competition in the industry concerned: "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor. . . . In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *International Salt Co. v. United States*, 332 U.S. 392, 400, 401 (1947).

18. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). The motion picture cases represent what is probably the Government's greatest economic victory in the sixty year history of antitrust enforcement. For more than eleven years the Department of Justice battled through three court decisions, a war, and two intervening consent decrees in order finally to achieve the complete divorcement of the major motion picture producers from their affiliated exhibition outlets. Moreover, the Government obtained, in addition to vertical divorcement, a considerable measure of horizontal dissolution on the exhibition level.

Throughout, the major question in the motion picture cases was not the guilt or innocence of the defendants but rather the finding of a suitable remedy to prevent future violations. And on this question, the district court was adamant; it stated that, while vertical integration is not a *per se* violation of the Sherman Act, vertical integration does become illegal if conceived with a *specific intent* to control the market or if used to create a *power* to control the market. Furthermore, the court held that vertical integration in this industry was a definite means by which unlawful competitive methods were effectuated. Hence, the court concluded that there had been collective

*United States v. Aluminum Co. of America*¹⁹ is a prize example to demonstrate how ready the courts are to denounce iniquity while steadfastly refusing to correct it. It is a case in which the Government, after a battle of thirteen years, won a resounding legal victory only to suffer a crushing economic defeat.

The proceedings were initiated on April 23, 1937 with a complaint against Alcoa, 25 of its subsidiary and affiliated companies, and 37 of its directors, officers and stockholders. The complaint charged Alcoa with monopolizing the manufacture of virgin aluminum and the sale of aluminum sheets, alloys, cables, bars, etc., in the United States. It alleged that this monopoly was preserved and protected by the purchase of plants abroad and by cartel agreements with foreign producers. It claimed that the monopoly was acquired by restrictive contracts and oppressive tactics, including discriminatory prices and the squeezing of price spreads between virgin ingot and aluminum sheet for the purpose of eliminating new competitors. In order to obtain effective relief—in order to re-establish competition in the aluminum industry—the Government requested Alcoa's dissolution.

After a lengthy trial, the district court on June 23, 1942 entered an opinion holding the defendants not guilty and ordering the petition dismissed.²⁰ This decision was reversed, however, by the circuit court of appeals²¹ on March 12, 1945 in one of the most celebrated judicial opinions of our time. Judge Learned Hand ruled that Alcoa was an illegal monopoly at the time of trial; that the company had monopolized the aluminum sheet market and squeezed independents out of the fabricating business; and that Alted (Alcoa's Canadian subsidiary) had entered into agreements with European aluminum producers which affected imports into the United States.

From a legal point of view the Hand decision was a milestone, for it finally interred and reversed the old dictum that mere size is no offense under the Sherman Act. As one writer observed:

Size [to Judge Hand] was not only evidence of violation, or of potential offense . . . it was the essence of the offense. Size,

use of monopoly power and that "divorcement . . . appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the . . . defendants." 85 F.Supp. 881, 896 (S.D. N.Y. 1949).

19. 148 F.2d 416 (2d Cir. 1945). The following discussion of the aluminum litigation is based on Adams, *The Aluminum Case: Legal Victory—Economic Defeat*, 41 AM. ECON. REV. 915 (1951).

20. 44 F.Supp. 97 (S.D. N.Y. 1941).

21. 148 F.2d 416 (2d Cir. 1945). The case was certified to the Circuit Court of Appeals for the Second Circuit on June 12, 1944 (322 U.S. 716 (1944)) because the Supreme Court was unable to obtain a quorum to sit on the appeal (320 U.S. 708 (1942)).

meaning market control, was what competition and monopoly were about. All other aspects of the case were subordinated to the central and decisive fact that the Aluminum Company of America, many years after its patents had expired, made, and then fabricated, or sold, over 90 per cent of the virgin aluminum used in the United States. Its arrangements with foreign companies for dividing world markets were further evidence of monopolizing. That it had engaged in deplorable tactics to prevent other companies from entering the field helped compound the offense. But the case was proved, in Judge Hand's view, by showing the company's market power. It made over 90 per cent of the virgin aluminum, and therefore had monopoly power.²²

In sharp contrast to the court's willingness to pronounce Alcoa a monopoly, stands the court's refusal to alleviate the situation. On the problem of relief the court merely recommended that remedial measures be withheld until such time as the district court could evaluate the effects of the Government's program for the disposal of surplus aluminum plants. Only if this disposal program failed to create substantial competition in the industry was the trial court authorized to consider dissolution. In other words, the task of creating competition in the aluminum industry was shunned by the court and "assigned" to the disposal agency of the Government.

Perhaps, on the face of it, this solution of the relief problem seems plausible, especially since the objectives of the Surplus Property Act of 1944²³ coincided in many respects with those of the antitrust laws. Under that Act preference was to be given to smaller purchasers to an extent consistent with "the usual and customary commercial practice."²⁴ Above all, no disposal agency was even to begin negotiations for selling a plant valued in excess of \$1,000,000 without first being advised by the Attorney General whether the proposed disposition would violate the antitrust laws.²⁵ Impressed with these provisions of the Surplus Property Act, the court thought that the prospects for competition in aluminum were bright and that the disposal of Government plants might make the dissolution of Alcoa unnecessary.

22. ROSTOW, *A NATIONAL POLICY FOR THE OIL INDUSTRY* 127 (1948).

23. 58 STAT. 765 (1944), 50 U.S.C. § 1611 (1946). The express intention of Congress was, among others, to "give maximum aid in the re-establishment of a peacetime economy of free independent enterprise . . . ; discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise; . . . foster the development of new independent enterprise; . . . dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade. . . ." *Ibid.*

24. 50 U.S.C. § 1627(b) (1946).

25. 50 U.S.C. § 1629 (1946).

The court was mistaken—if not naive—however, to think that a disposal of surplus aluminum plants could stimulate competition sufficiently to obviate the necessity of dissolving Alcoa. The court failed to recognize that its refusal to deal with the specifics of relief confined the disposal agency to a limited and narrow course of action. Faced with an Alcoa of colossal dimensions, the disposal agency was forced to adopt a program which would create new producers of substantial enough size and integration to compete effectively with the undiminished monopolist. The disposal agency had no power to reorganize the facilities owned by Alcoa. It could hardly dispose of the Government plants to a large number of independent concerns incapable of coping with Alcoa's position of dominance and entrenchment. The agency chose the only feasible alternative: it brought into being two new integrated producers and created them in the image of Alcoa. It elected a course of action made inevitable by the court's refusal to deal with the problem of Alcoa's size.

Had the circuit court seriously attacked the problem of relief, it would have appreciated the importance of reorganizing Alcoa's structure; it would have recognized that such reorganization was an essential prerequisite to stimulating greater competition in the aluminum industry and placing that industry on a broad base of independent competing producers. As things turned out, the structure of the aluminum industry *was* reshaped after 1945, but this was due almost entirely to the actions of the War Assets Administration rather than to the relief granted by the circuit court.

The 1945 decision was not the end of this case, however, for both Alcoa and the Government were permitted to seek further relief. Accordingly, when the disposal program of the War Assets Administration was completed, Alcoa petitioned the court (March 1947) to declare that it no longer had a monopoly of the ingot market. In September 1948, the Government also filed a petition alleging that competitive conditions had not been re-established in the aluminum industry; that Alcoa had continued to dominate and control the aluminum ingot market; and that, only through divestiture by Alcoa of plants and other properties, could competitive conditions be established. The Government's petition attempted to show that divestiture of Alcoa was practicable; that at least one new domestic integrated producer could be established as part of a program to create competitive conditions; and that following divestiture Alcoa would continue to be a fully integrated producer, under no competitive disadvantage, and with such facilities, production, sales volume, and ability to expand so as to permit and encourage it to grow with the rest of the industry. The petition attempted to demonstrate that

a fourth producer could be established without disintegrating Alcoa; that the structure of Alcoa was not that of an inseparable entity, but of duplicate facilities which fulfill the needs of market control rather than integrated efficiency.²⁶

These issues were tried before Judge Knox in 1949, and the court's opinion was handed down on June 2, 1950.²⁷ The court, in denying both petitions, found that competitive conditions had not been restored in the aluminum industry and that the Government was entitled to further relief. The relief granted by the court included the finding that certain provisions in the patent licenses issued by Alcoa were unenforceable; and that persons who held stock in both Alcoa and Alted (the Canadian subsidiary) be required to divest themselves of the stock in either of the two corporations. Jurisdiction over the case was retained for another five years during which time both parties, if conditions so warrant, can petition the court for further and more complete relief.

The court's opinion is disturbing for a number of reasons. First, the relief granted is inadequate and the prospects for further relief are dim. Judge Knox seemed satisfied with the industry's present structure and expressed little concern over the small number of firms in the field. Disregarding almost entirely the implications of the three-producer oligopoly, the court focused its primary attention on the ability of Reynolds and Kaiser to survive and expand. It is likely, therefore, that no reorganization of the aluminum industry by judicial action will take place in the next five years; that at the end of this period—if Reynolds and Kaiser hold their own—the court will pronounce competitive conditions in aluminum to have been re-established: the court will then terminate its jurisdiction in the case.

26. The Government relief petition was exceedingly mild. It merely requested a partial horizontal disintegration of Alcoa. What the Government should have demanded as a minimum additional requirement was that Alcoa be enjoined from any further *vertical* integration—especially in the fabrication field. Some such requirement—limited perhaps to a period of five years—was essential to deprive Alcoa of its power to squeeze independents in the future as it had done in the past. Moreover, as a House committee investigating the aluminum industry recently pointed out, "it is not price competition of ingot that worries any of the 'Big Three', for that question seems to have been resolved by a price leadership pattern that suits all of them. While the courts may have their eye on the price of pig as an indication of monopoly pricing, it is in reality a vertical organization of each of the 'Big Three' from ingot production to finished products that is the hazard to the survival and growth of new independent producers. It is the same integrated organizational structure which prevents the widest possible use of aluminum for purposes which are not only possible but which would prove a great boon to the public." H.R. REP. No. 255, 82d Cong., 1st Sess. 24 (1951).

27. United States v. Aluminum Company of America, 91 F.Supp. 333 (S.D. N.Y. 1950).

Needless to say, Kaiser and Reynolds *will* survive and the status quo in the industry *will* be maintained during the next five years. This outcome seems certain because Alcoa—in order to forestall any future relief action by the court—will refrain from expanding its share of the market. By exercising self-restraint, Alcoa will demonstrate that Kaiser and Reynolds can maintain their market position, and possibly, improve it. By judiciously avoiding any aggressive or expansive activity, Alcoa can thus effectively bar the Government from showing the need for further relief in the crucial five-year period. By pursuing a “live and let live” policy, which has proved so effective in other industries, Alcoa can then insure the termination of the court’s jurisdiction by 1955. Given the present high level of business activity, such a conservative course of action need by no means be unprofitable.

The second cause for concern is the precedent which the Knox opinion establishes with respect to future antitrust cases involving oligopolistic industries. The Government brief dwelt at considerable length on the fact that failure to grant divestiture relief in this case would be tantamount to judicial approval of a three-producer industry. The court’s refusal to divest Alcoa and, thus, create at least one additional domestic producer might, therefore, be construed as a judicial sanction for the type of structural organization now prevailing in the aluminum industry. Furthermore, the court’s refusal to concede that in an industrial structure of this sort, Alcoa, as the dominant firm, exercises control over its competitors seems ominous. The monopolistic significance of price leadership and the zone system of pricing enforced by Alcoa was ignored. The court failed to appreciate the fear engendered among fabricators that Alcoa, because of its dominant position, could ruin them by a simple refusal to sell (or, as it is euphemistically called, maintaining the right to “select its customers”). Thus, some of the more basic elements of the “parallel action” theory, which is essential in proving an oligopoly case, were disregarded. This opinion may, therefore, become a substantial obstacle in the future prosecution of cases involving companies in highly concentrated industries.

A third cause for concern is the court’s effort to establish a foreign producer as the fourth competitor in a highly concentrated domestic industry. This objective was sought to be accomplished by separating the control of the Canadian company from Alcoa. Realistically viewed, however, such action is unlikely to promote a more competitive market in the United States for a number of reasons: first, despite the change in stock control, the Canadian company will not become an active competitor, either in the domestic ingot or the fabricated aluminum market,

since the largest consumers of ingot in the United States are the three primary producers (Alcoa, Reynolds, and Kaiser) and since Alted does not have the facilities for expanded participation in the American fabricated aluminum market. Furthermore, Alted is Canada's sole producer and therefore enjoys an undisputed monopoly position in its own country. In addition, Alted has long been the motivating force in the cartelization of the world aluminum industry and will probably continue its efforts in that direction in the future. Finally, if the Canadian company should ever initiate an aggressively competitive policy in the United States market, tariff barriers could always be raised sufficiently to "protect" our vital domestic industry. Keeping these facts in mind, it is difficult to conceive how a corporation so traditionally opposed to the competitive philosophy as Alted, can take the place of a fourth producer in the American aluminum industry.²⁸

There is one final aspect of the court's opinion which is disturbing, especially since it relates to national security. As has been noted above, the opinion places great emphasis on the maintenance of the status quo in the industry. This fact is bound to discourage, therefore, any expansion of Alcoa's productive facilities (such as the company had contemplated in Alaska, for example).²⁹ At the same time, the potential threat of Canadian competition may inhibit expansion by Reynolds and Kaiser, at least until such time as the nature of that competition has been determined. The Canadian company, by contrast, is free to expand without restraint and is currently doing so by adding substantially to its facilities in British Columbia.³⁰

The result is anomalous: Canadian facilities during the next five years will tend to expand while our own aluminum capacity may remain

28. After an extensive investigation of the aluminum industry, a House committee appraised the competitive potential of the Canadian company in the United States market as follows: "Thus far, there are only three primary aluminum producers in the United States. Alcan [Alted] does not constitute the fourth competitor in domestic markets as its pricing policy (despite its lower costs) is to follow Alcoa's price Competition would not be fostered if instead of increasing the number of American producers [in the wartime expansion program], this Government aided the further growth of Alcan Alcan lives and operates in a world of trade beyond the United States antitrust laws and often unfriendly to the United States philosophy of competition. Alcan for years was the leader of the European aluminum cartel. Although no longer a member, Alcan is subject to influences in world markets that restrain trade. Alcan and its various competitors in other countries jointly own aluminum companies in a number of countries including Norway, Australia, and China. Although the European cartel has formally ended after Alcoa's prosecution, Alcan's behavior in world markets, including the United States, necessarily departs from United States concepts of competition. Therefore, further expansion of Alcan in United States markets can hardly be regarded as a healthy gain for competition." COMMITTEE REPORT, *op. cit. supra* note 26, at 32.

29. See 91 F.Supp. 333, 399, 400 (S.D. N.Y. 1950).

30. COMMITTEE REPORT, *op. cit. supra* note 26, at 29, 30.

static. Thus, we may well become more dependent on a foreign producer for an increasing part of our national aluminum requirements.³¹

In summarizing the results of thirteen years of litigation in the Alcoa case, one is impressed with the insignificance of the relief obtained by the Government. A company which had monopolized the aluminum industry for fifty years was permitted to remain intact. An economically mild—probably excessively mild—proposal for divestiture was refused. Once again, the court chose the easy solution. Judge Hand passed the task of stimulating competition in this basic industry to the War Assets Administration. Judge Knox attempted to introduce a new competitor in the domestic market by severing the *formal* ties between Alcoa and Alted. Both refused to undertake the kind of physical reorganization of the industry necessary to bring about a competitive structure consistent with the objectives of the Sherman Act.³²

As a result, aluminum today is a three-producer industry; Alcoa, instead of being a single-firm monopoly, now exercises residual monopoly power through price leadership and other means; the concerted action typical of oligopoly has replaced the unilateral action characteristic of monopoly. A ringing judicial denunciation of monopoly has produced

31. That this is not a desirable prospect was pointed out by the Monopoly Subcommittee of the House Judiciary Committee. As the Committee observed, "Canadian aluminum is subject to any regulations placed by the Canadian Government and any agreements entered into with the United Kingdom and other Commonwealth countries. In other words, British Empire countries have a preferential position. In October 1950, Alcan had to reduce its offer to this country of 1951 and 1952 deliveries because of increased obligations to the United Kingdom. In the 1939 and 1940 loan agreement between Alcan and the United Kingdom, Alcan agreed to give the British Government first call annually on 107,500 metric tons. In the 1950 agreement with the British Government, Alcan gave another first call of 200,000 metric tons annually for a long term. Perhaps the United States Government also could obtain a first call on any additional capacity Alcan may build. However, that capacity will always be under the jurisdiction of another country, no matter how friendly, and that is not the same thing as being fully accessible to the United States at all times." COMMITTEE REPORT, *op. cit. supra* note 26, at 32-33.

32. In all fairness to Judge Knox, it is to be remembered that Learned Hand, sitting on a higher court, had refused dissolution and ordered that only if the Government's surplus disposal program failed to create substantial competition in the industry was the trial court authorized to consider dissolution. Judge Knox might have felt that this decision by Hand restricted his choice, since the appearance of Kaiser and Reynolds arguably had created "substantial" competition. Moreover, Judge Knox was probably aware of the possibility that a number of future developments could subvert the effort to end the common control exercised by Alcoa and Alted, when he decided to retain jurisdiction of the case for another five years. Declared Judge Knox: "Together, Limited and Alcoa are in a position at any time, to restrain effectively the growth of Reynolds and Kaiser. Accordingly inasmuch as irreparable harm can result from a delay in remedies, it is unwise for this court to relinquish jurisdiction of this action until it is assured that the aluminum industry has been oriented in a lawful direction." *United States v. Aluminum Company of America*, 91 F.Supp. 333, 418 (S.D. N.Y. 1950).

little in the way of affirmative relief. Vigorous and effective competition has not been re-established in this basic and vital industry.

Another illustration of some of the problems which confront the Antitrust Division in obtaining adequate relief from the courts is the case of *United States v. National Lead Co.*³³ The decision shows that while the Division is extremely successful in establishing liability, *i.e.*, proving a violation of the antitrust laws, it seems ineffective in securing meaningful relief.

The case involved three corporations charged with the creation of a world-wide cartel in titanium compounds and conspiracy with substantially all of the important chemical companies of the world. At the conclusion of the trial, the court upheld the Government's charges. It ruled that the defendants had violated the antitrust laws through participation in an international cartel, and that their agreements creating a world-wide patent pool and dividing the world into exclusive territories, for the purpose and with the effect of suppressing imports into and exports from the United States, had violated the Sherman Act. In spite of this finding, however, the district court refused to grant the Government's requests for royalty-free licensing and divestiture. The Supreme Court, in upholding the decision, rejected the Government's plea that each duopolist be required to divest one of its two principal titanium pigments plants:

There is no showing that four major competing units would be preferable to two, or, including Zirconium and Virginia Chemical, that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown vigorous and effective competition between National Lead and du Pont in this field Such competition suggests that the District Court would do well to remove unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.³⁴

The Court's reluctance to resolve this basic issue in favor of the Government was perhaps due in large part to the Government's failure

33. 63 F.Supp. 513 (S.D. N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

34. 332 U.S. 319, 352, 353 (1947).

to prove the need for, or practicability and feasibility of, divestiture relief. The Government never made an overwhelming case for, or presented preponderant evidence in favor of, the type of relief requested. It did not allay the fears of the Court concerning the effect of a divestiture decree on the efficiency of the successor companies, nor was the probative benefit of divestiture for the re-establishment of competition in the industry shown. It neither demonstrated that the principal titanium plants of the defendants were adapted to separate ownership and independent operation, nor did it establish the compelling need for the particular remedy requested in any scheme to free this growing industry from the fetters of the dominant defendant firms.³⁵ The failure to show that the "tough" competition which allegedly existed in this industry, in fact, merely took the form of sales rivalry between two nominally independent firms was unfortunate. The impression seems inescapable that had the Government devoted as much energy toward establishing the appropriateness of the relief requested as it did to proving a violation of the law, the Court might have granted a more drastic, yet more effective, remedy.³⁶

Had the Government done so, the Court might have appreciated more fully the need for structural reorganization—a mild one, at that—of a highly concentrated industry. The statement by one of du Pont's general managers that competition in titanium pigments was "tough" and "plenty tough"³⁷ might not have been so readily accepted. The Court might not have shuddered at the idea of cutting "living tissue" or of disturbing a delicately adjusted oligopolistic machine. Convinced of the necessity, fairness, practicability and feasibility of divestiture the Court might have been more willing to accept the Government's proposal for an effective remedy.

Even if it is granted, however, that the Government did not present the strongest possible evidence to support its demand for divestiture, it

35. Such proof is, of course, very difficult. But by making use of factual economic and technological data and by drawing from the experience and opinions of experts in the field, the Government could do much to alleviate the judicial reluctance to employ the more drastic but more effective remedies of dissolution, divorcement, and divestiture. See Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L.J. 1019 (1949), for a discussion of the judicial and legal techniques and considerations involved in such proceedings.

36. There has been judicial recognition that the Government cannot establish with certainty the economic effect a given course of action will have in the future. Hence, the rule arose that all doubts regarding remedies should be resolved in favor of the Government and against an adjudged monopolist. See *Hartford Empire Co. v. United States*, 323 U.S. 286, 409 (1945); *United States v. Bausch and Lomb Co.*, 321 U.S. 707, 726 (1944). Unfortunately, despite this rule, the Government has found it difficult to establish the propriety of an effective remedy.

37. 332 U.S. 319, 352 (1947).

is still doubtful whether the Court used valid (and economically meaningful) criteria for choosing an appropriate remedy. As Justice Douglas, in a vigorous dissenting opinion, pointed out:

The task of putting an end to monopolistic practices and restoring competition is one of magnitude and complexity; Congress has authorized use of the broadest powers of equity to cope with it The [court's] powers under the antitrust laws, though not specifically enumerated, are ample to thwart the plans of those who would build illegal empires, no matter how imaginative their undertakings or subtle their techniques. The power of the court is not limited to the restraint of future transgressions. The impairment of property rights is no barrier to the fashioning of a decree which will grant effective relief Divestiture or dissolution may be ordered in spite of hardship, inconvenience, or loss Devices or instrumentalities which may be used for legitimate ends may nevertheless be outlawed entirely where they have been employed to build the monopoly or to create the restraint of trade³⁸

This view was nevertheless rejected, with the result that the decree approved by the Court stopped short of granting effective relief. Divestiture was refused and, while compulsory licensing was ordered, it was put on a "reasonable royalty" instead of a royalty-free basis. Moreover, any company which applied for a license from the defendants had to be prepared reciprocally to license its own patents to the defendants. In both these respects, the Court increased the odds against the restoration of competition in this industry. It forced independents and potential newcomers to pay royalties on misused patents and to surrender one of their few competitive advantages—the exclusive right to use such patents as they might possess. It is hardly surprising, therefore, that the *National Lead* decision did little to stimulate the entry of newcomers into the titanium pigment industry.³⁹

The case of *United States v. Timken Roller Bearing Co.*⁴⁰ which, in many respects, is a "sequel" to the *National Lead* case, is significant because it indicates a growing trend against the liberal granting of divestiture by the Supreme Court. Moreover, the case is important because it demonstrates the rather dubious grounds on which the Court can refuse—and, in the foreseeable future, is likely to refuse—divestiture relief in any manner or form.

38. *Id.* at 366, 367.

39. For a penetrating discussion of this case, see Zlinkoff and Barnard, *The Supreme Court and a Competitive Economy: 1946 Term*, 47 *COL. L. REV.* 914, 933-948 (1947).

40. 83 F.Supp. 284 (N.D. Ohio 1949), *modified and aff'd*, 71 *Sup.Ct.* 971 (1951).

The amended complaint was filed December 15, 1947, and charged Timken and two foreign corporations (which were named co-conspirators but not defendants) with engaging in an unlawful conspiracy and combination to restrain foreign commerce by entering into agreements to eliminate competition in the manufacture and sale of anti-friction bearings in all markets of the world.

On March 3, 1949, the district court filed an opinion,⁴¹ which it thereafter adopted as its findings of facts and conclusions of law, declaring the defendant guilty of having violated Sections 1 and 3 of the Sherman Act. After considering and rejecting all of the various defenses raised by Timken in the course of the trial, Judge Freed held that the defendant, together with British Timken and French Timken (its co-conspirators), had unlawfully combined and conspired to restrain foreign commerce by: (1) dividing the world among themselves into exclusive sales and production territories;⁴² (2) fixing prices on all sales made into territories assigned to another member of the conspiracy;⁴³ (3) cooperating to protect each others' markets and to eliminate competition from outsiders;⁴⁴ and (4) participating in foreign cartels which restricted exports from and imports into, the United States.⁴⁵ Judge Freed concluded that the restraints involved were not only illegal *per se*, but were entered into with the clear intent of controlling "commerce in the tapered bearing industry throughout the entire world."⁴⁶

On the basis of these findings, the district court entered a final judgment⁴⁷ which enjoined, among others, the following practices: (1) exclusive exchange of know-how, patents, material and machinery between Timken and its co-conspirators; (2) agreement between defendant, British Timken, French Timken, or their subsidiaries, agents, sales representatives, or distributors to fix prices for the sale or resale of bearings in the United States; (3) defendant's refusal to sell bearings on the grounds that they are for resale or distribution in the territories allotted by the conspiracy to British Timken or French Timken; and (4) the defendant's entry into agreements with its co-conspirators for the transfer of trade-mark rights upon restrictive conditions, such as allocation of territories and exclusive exchange of know-how and

41. 83 F.Supp. 284 (N.D. Ohio 1949).

42. *Id.* at 306, 307.

43. *Id.* at 306, 308.

44. *Ibid.*

45. *Ibid.*

46. *Id.* at 310.

47. The final judgment, as is so often the case, was not published.

materials.⁴⁸ In addition, the district court ordered that the defendant divest itself of its 30.25 per cent common stock interest in British Timken and its 50 per cent common stock interest in French Timken.⁴⁹

On appeal to the Supreme Court,⁵⁰ four major questions were presented for review,⁵¹ namely: (1) whether defendant had in fact combined with British Timken and French Timken to restrain foreign commerce by allocating world markets, fixing prices, and restricting competition in the sale of anti-friction bearings; (2) whether the restraints were reasonable as ancillary to a "joint venture" or to the "licensing" of the trademark "Timken"; (3) whether the evidence at the trial and the findings of the district court supported the judgment; and (4) whether the divestiture and injunctive relief ordered by the lower court were appropriate and necessary. With the exception of divestiture, the Supreme Court, on June 4, 1951, resolved all of these issues in favor of the Government.⁵² By a vote of 4 to 3, however, the Court refused divestiture and thus added another to the Government's long list of Pyrrhic victories in the enforcement of the antitrust laws.⁵³

The Court's refusal to grant divestiture in this case was apparently motivated by two major considerations. One was a feeling that a more liberal rule of reason should be applied to international trade arrangements under the Sherman Act, even though similar arrangements under similar circumstances in domestic commerce might be deemed unreasonable. The second was that divestiture is a harsh remedy, that it should not be used to punish but to correct, and that it should not be employed if "effective" alternatives are available. How valid are these objections

48. The injunctions are contained in paragraphs V-IX of the district court's final judgment.

49. Paragraph VIII, final judgment.

50. The direct appeal of this case to the Supreme Court was allowed under Section 2 of the Expediting Act of 1903, 32 STAT. 823 (1903), 15 U.S.C. § 29 (1946), as amended by Section 17 of the Act of June 25, 1948, 62 STAT. 869 (1948), 15 U.S.C. § 29 (Supp. 1950).

51. Actually, defendant attacked the district court decision in 206 assignments of error, including 69 alleged errors in the findings of fact, 26 in the conclusions of law, and 62 based on the court's refusal to make new and additional findings. In spite of the fact that the Supreme Court considered these assignments as unduly repetitious and—in part—frivolous, it nevertheless agreed to consider the appeal. *Cf. Local 167 v. United States*, 291 U.S. 293, 296 (1934); *Phillips & Colby Constr. Co. v. Seymour*, 91 U.S. 646, 648 (1876).

52. 71 Sup.Ct. 971 (1951).

53. The court was strangely divided on this case. Justices Black, Douglas and Minton signed the majority opinion, Reed wrote a concurring opinion in which Vinson joined, Jackson and Frankfurter wrote separate dissenting opinions, while Burton and Clark did not participate. On the divestiture issue Black, Douglas and Minton voted to uphold the district court, while Reed, Vinson, Jackson and Frankfurter voted to reverse the lower court judgment.

to divestiture relief when viewed in terms of the facts brought out during the trial and in terms of the precedents developed by the Court in similar cases?

First, as to the application of the rule of reason in international trade cases, defendant had contended—and Justices Jackson and Frankfurter apparently agreed—that the obstacles to foreign commerce created by tariff barriers, quota restrictions, governmental limitations on foreign exchange, etc., were such as to effectively foreclose any major invasion of foreign markets by Timken and of domestic markets by the co-conspirators. The defendant had further urged that, since a reciprocal invasion of market territories was impossible even if divestiture was granted, a divestiture decree by the Court would merely operate as a penalty against defendant rather than as a measure of relief against past and future violations of the law.⁵⁴

Justice Jackson, in his dissenting opinion, accepted this view and concluded that “this decision will restrain more trade than it will make free.”⁵⁵ In a separate dissenting opinion, Justice Frankfurter expressed a similar view. After stating that “even ‘cartel’ is not a talismanic word, so as to displace the rule of reason by which breaches of the Sherman Law are determined,”⁵⁶ he urged that the rule of reason be applied more liberally in the international trade field, and that arrangements which might be deemed unreasonable in domestic commerce be, under certain circumstances, considered reasonable when involving foreign commerce.⁵⁷

While the Jackson and Frankfurter opinions, theoretically at least, seem plausible they are not supported by the facts of this case. As the district court, in an explicit and comprehensive finding, held, “all that the evidence discloses is an intent to form a smoothly operating combination to control commerce in the tapered bearing industry throughout the

54. Brief for Appellants, pp. 22-28, 196-198, *Timken Roller Bearing Co. v. United States*, 71 Sup.Ct. 971 (1951).

55. 71 Sup.Ct. 971, 979 (1951). “. . . not all agreements are conspiracies and not all restraints of trade are unlawful. In a world of tariffs, trade barriers, empire or domestic preferences, and various forms of parochialism from which we are by no means free, I think a rule that it is restraint of trade to enter a foreign market through a separate subsidiary of limited scope is virtually to foreclose foreign commerce of many kinds.” *Ibid.*

56. 71 Sup.Ct. 971, 978 (1951).

57. “Of course, it is not for this Court to formulate economic policy as to foreign commerce. But the conditions controlling foreign commerce may be relevant here. When as a matter of cold fact the legal, financial, and government policies deny opportunities for exportation from this country and importation into it, arrangements that afford such opportunities to American enterprise may not fall under the ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce come within its condemnation.” *Ibid.*

entire world.”⁵⁸ The agreements and conspiracy into which the defendant had entered, in addition to being illegal *per se*, could not even be justified by “good business reasons,” and could hardly be regarded as an attempt to compete under the difficult conditions confronting world trade.

The record reveals that, not only did the conspirators refrain from selling outside their allocated territory, but also prevented their customers from doing so. Sales of bearings for replacement purposes outside of allocated territories, though permitted by the contracts between the conspirators, were discouraged by a penalty or “commission” of 10 per cent (later 5 per cent) imposed on such sales.⁵⁹ Furthermore, even where this penalty was imposed, the prices charged were regularly fixed by agreement among the parties.⁶⁰ The record reveals that, by mutual understanding, each party to the conspiracy, when selling replacement parts for export into the other’s territory, charged substantially higher prices (*i.e.* imposed a “protective” discount) than on similar sales within its own territory.⁶¹ American Timken, although it was not actually a party to any cartel agreements, cooperated and consulted with British Timken and French Timken in organizing them, and approved the agreements before they were executed, all as part of a plan to eliminate outside (including American) competition.⁶² Finally, the record reveals that, as a result of its own restrictive covenants, the defendant could not, in many parts of the world, use the “Timken” trade-mark in competition with its British and French co-conspirators.⁶³

From an examination of the record it would appear, therefore, that Timken was hardly the victim of the difficult circumstances surrounding world trade; that Timken, far from attempting to expand world trade, did everything in its power to contain and restrict it; that instead of being a silent and unwilling partner to a conspiracy imposed on it by external necessity, Timken was a prime mover in the division of the world into non-competitive spheres from which outsiders were excluded and in which the conspirators behaved in accordance with an “orderly” and “rational” mode of conduct characteristic of international cartels.

Perhaps the most telling answer to the Frankfurter-Jackson position was provided by the district court itself when it inquired why, if competition between Timken and its co-conspirators was impossible, did Timken need to enter into restrictive agreements in the first place, and

58. 83 F.Supp. 284, 310 (N.D. Ohio 1949).

59. *Id.* at 293, 294, 298.

60. *Id.* at 298, 301, 306.

61. *Id.* at 301, 306.

62. *Id.* at 304, 307.

63. *Id.* at 314.

why has it since then so vigorously defended its right to continue them.⁶⁴ Why, if divestiture was a vain and futile gesture in any attempt to restore competition, did Timken so vehemently oppose this form of relief?

It is unfortunate indeed that neither the defendant, nor Justices Jackson or Frankfurter, specifically demonstrated how the existence of tariffs and other trade barriers hampered Timken in its efforts to sell tapered bearings abroad. It is unfortunate that neither the defendant, nor the Justices who upheld its position, specifically indicated how the combination and contractual agreements into which Timken entered promoted world trade, in general, and exports from, or imports to, the United States, in particular. It is regrettable that Justice Frankfurter failed to explain the exact manner in which he would have applied his more "liberal" rule of reason to the specific facts of this case. Finally, it seems incongruous that Justice Frankfurter, while recognizing that "it is not for this Court to formulate economic policy as to foreign commerce," nevertheless chose to write an opinion which would make the foreign commerce provisions of the Sherman Act a dead letter and thus, institute a drastic change in the law which only Congress has the power to make.

The second major reason for the Court's refusal of divestiture relief was set forth in the Reed-Vinson concurring opinion which held that "[s]ince divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available."⁶⁵ In urging upon the Court the same judicial restraint that was followed in *United States v. National Lead Co.*,⁶⁶ Justice Reed argued that a divestiture order in this case was excessively severe, and that such an order was unnecessary since injunctive relief would prove adequate in terminating the illegal conspiracy and in restoring competition.⁶⁷ By thus relying on a series of injunctions, backed by

64. "If all the impediments to foreign trade existed ever since 1914, which became more and more pronounced to the present day, why were the contracting parties, defendant, British Timken and French Timken so concerned about airtight agreements to keep each one within its own commercial domain? The repeated and persistent provisions of the successive contracts, for territorial restrictions, contradict any claim of lack of ability to compete." 83 F.Supp. 284, 317 (S.D. Ohio 1949).

65. 71 Sup.Ct. 971, 977 (1951).

66. See pp. 13-15, *supra*.

67. "An injunction was entered by the District Court to prohibit the continuation of the objectionable contracts. Violation of that injunction would threaten the appellant and its officers with civil and criminal contempt The paucity of cases dealing with contempt of Sherman Act injunctions is, I think, an indication of how carefully the decrees are obeyed Prompt and full compliance with [this] decree should be anticipated." 71 Sup.Ct. 971, 978 (1951).

the threat of civil and criminal contempt, Justice Reed thought that the purpose and functions of the Sherman Act would effectively be served.

That this view is rather naive should be self-evident. The paucity of cases dealing with contempt of Sherman Act injunctions is probably evidence, not of how carefully such decrees are obeyed, but rather of the ease with which they are evaded and the niggardly appropriations made available for their surveillance. Moreover, the past record of prison sentences and fines imposed on individual defendants for anti-trust violations makes the threat of contempt against corporate officials an empty threat indeed. Finally, even if we assume that the injunctions in the present case will be observed with punctilious exactitude, it is questionable whether these injunctions—absent divestiture—would add much to what the Sherman Act already prohibits *per se*.

Unfortunately, the Reed-Vinson opinion not only fails to substantiate the adequacy of the injunctive relief, standing by itself, but also does violence to three important precedents developed by the Court in previous divestiture cases. Thus, the Reed-Vinson position seems to ignore a previous ruling by the Court that divestiture may be required not only where a stock acquisition was itself a violation of the antitrust laws, but also where the acquisition, though lawful, was part of a conspiracy to suppress competition. As the Court stated in the *Paramount*⁶⁸ case:

To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the . . . defendants have inflicted on the industry.⁶⁹

The Reed-Vinson opinion also does violence to the ruling of the *Crescent*⁷⁰ case. There the Court held that the inducement to avoid competition, which was afforded by a conspiratorial stock affiliation between potential competitors, warranted effective assurance, through

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

69. *Id.* at 152-153.

70. *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

divestiture, that the opportunity therefor would be unavailable in the future. In explaining the necessity of divestiture in such cases, the Court had recognized that "the government should not be confined to an injunction against further violations," and that:

[T]he relief need not, and under these facts should not, be so restricted. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these [defendants] . . . to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court has abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available.⁷¹

The Reed-Vinson opinion further seems to ignore the previous rulings by the Court that those who violate the Sherman Act may "not avoid an undoing of their unlawful project on the plea of hardship or inconvenience"⁷² and that "the policy of the antitrust laws is not qualified or conditioned by" the disadvantages or inconvenience which the judgment provisions may cause to those whose conduct is regulated.⁷³ On the basis of these precedents Justice Reed and Vinson could easily have rejected defendant's plea that hardship, inconvenience and loss of profit would result from the divestiture order of the lower court. They could have rejected this plea on the simple ground that the alleged hardship was immaterial as a matter of law.

Indeed, Justices Reed and Vinson could have gone beyond precedent and pointed out that the alleged hardship, even if material as a matter of law, was doubtful and speculative as a matter of fact. To be sure, defendant had urged that, under a divestiture judgment, the sale of its stock in British Timken and French Timken would be difficult; that serious financial losses would be involved in the sale; that defendant would be unable to realize in dollars on securities sold in Great Britain; and that it would suffer losses through the payment of taxes on gains from the sales.

71. *Id.* at 189-190.

72. *Id.* at 189.

73. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948).

While these contentions appear plausible, they are more speculative than real. In the first place, there is, as the record shows, a regular market for British Timken shares, since they are listed on the London Stock Exchange and also traded on the "switch-pound" market in New York. In addition, there is a market which can be tapped through privately negotiated sales or syndicate operations. Secondly, the price at which the shares were to have been sold need not have been artificially depressed by offering them all at one time or in large blocks. The district court decree proposed to allow a two-year period for the sale of the stock, thus providing adequate flexibility for advantageous disposition.⁷⁴ Thirdly, there would appear to be little danger that defendant could not realize American dollars from the sale of its British or French holdings. If the securities were sold in the United States, there would, of course, be no problem of currency conversion. But even if the securities were sold abroad, the *National Lead* experience indicates that the conversion problem is not insuperable. As the Government informed the Court, defendants in that case had used the proceeds from an enforced stock sale to purchase British Government bonds (which pay 3 to 4½ per cent interest withdrawable immediately in dollars) the principal of which may be withdrawn in dollars upon maturity and, in some cases, before maturity.⁷⁵ In the light of the record and the testimony by some of defendant's own witnesses, it would appear that the hardship which would allegedly have ensued from divestiture was, to say the least, doubtful and speculative.⁷⁶

We may conclude, therefore, that Justices Reed and Vinson erred in their refusal to grant divestiture. Since they both concurred with the district court finding that defendant's investments in potentially competing companies were carried out as part of an illegal conspiracy to suppress competition; agreed with the finding that these investments served initially, and have continued to serve, as an inducement to defendant not to compete with British Timken and French Timken; must have had cognizance of previous Court rulings authorizing divestiture (a) where the acquisition of stock investments was itself illegal, or (b) where the investments—though lawfully acquired—were utilized as part of an unlawful conspiracy to restrain trade, or (c) where the investments

74. Paragraph VIII(A), final judgment.

75. Brief for the Government, p. 12, *United States v. Timken Roller Bearing Co.*, 83 F.Supp. 284 (N.D. Ohio 1949).

76. "Defendant's argument that it will have heavy taxes to pay upon any gain from the sale of its foreign investments cannot be said to be a hardship argument, for it is flatly inconsistent with the position that defendant will suffer any loss from the sale. Taxes are due, on defendant's own assumption, only in the event of profit or capital gain resulting from the enforced sale." *Ibid.*

served as an inducement to restrain competition; must have recalled that even in the *National Lead* case (which they quoted with approval)—to the extent that it involved an illegal division of world territories—defendant was ordered to divest itself of its foreign stock interests because “the stock acquisitions were part and parcel of the territorial allocation agreements;”⁷⁷ must have realized that the prospective hardship flowing from divestiture rested more upon allegations of defense counsel than upon evidence developed at the trial; should have recognized that the injunctive provisions of the decree did not go much beyond the *per se* prohibitions already existing under the Sherman Act; should have known that the threat of civil and criminal contempt does not by itself assure compliance with an injunctive decree; and finally, should have resolved doubts as to the efficacy of relief in favor of the Government and against the conspirators,⁷⁸—for all these reasons, we believe that divestiture in this case should have been authorized.

In appraising the results of the *Timken* case one cannot help but wonder why the majority refused to allow divestiture; why they rejected the Black-Douglas-Minton view that “obviously the most effective way to suppress further Sherman Act violations is to end the intercorporate relationship which has been the core of the conspiracy.”⁷⁹ Does the Court act unwittingly? Does the Court unconsciously condone what the antitrust laws were designed to prevent? In short, does the Court propose to stand idly by while America’s foreign trade is recreated in the image of the Old World cartels?

The manner in which the dissolution, divorcement and divestiture remedy is implemented is of crucial importance in attaining the anti-monopoly objectives of the Sherman Act. This fact is demonstrated by the case of *United States v. Pullman Co.*⁸⁰

The complaint in that case was filed on July 12, 1940, charging Pullman, Inc., three subsidiaries thereof, and 31 individuals with violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The Government charged that the defendants had secured a monopoly in the *operation* and *servicing* of sleeping cars by buying out competitors and by making contracts with the railroads for exclusive

77. 332 U.S. 319, 363 (1947).

78. See *Local 167 v. United States*, 291 U.S. 293, 299 (1934), where doubts concerning the *scope* of relief were thus resolved.

79. 71 Sup.Ct. 971, 976 (1951).

80. 50 F.Supp. 123 (E.D. Pa. 1943); 53 F.Supp. 908 (E.D. Pa. 1944); 64 F.Supp. 108 (E.D. Pa. 1946).

operating and servicing rights. The Government also charged that the defendants had conspired to monopolize the *manufacture* of sleeping cars.

Pullman, Inc. was a holding company controlling The Pullman Company, Pullman-Standard Car Manufacturing Company, and Pullman Car & Manufacturing Corporation of Alabama. Together, these companies exercised vertically integrated domination of the manufacture and operation of sleeping cars in the United States.

The Pullman Company (the operating subsidiary) was engaged in the business of operating sleeping, parlor, private and miscellaneous cars for railroads. By 1940 it had achieved a complete monopoly in the operating field by systematically acquiring competitors, coercing railroads into signing operating contracts, and forcing railroads to deal exclusively with Pullman.⁸¹ The company thus exercised a stranglehold from which no important railroad could escape. The reason is obvious: a substantial part of all sleeping car travel involves the use of connecting carriers. Even if a railroad could operate its own sleeping car service, it could not send its sleeping cars over the lines of connecting carriers with which The Pullman Company had contracts, or—if these Pullman contracts were abrogated—without then entering into numerous complicated contracts for the exchange of cars.

The Pullman-Standard Car Manufacturing Company and Pullman Car & Manufacturing Corporation of Alabama were the manufacturing subsidiaries of Pullman, Inc. Together these companies exercised a virtual inopoly in the making of sleeping, parlor, dining, and similar cars. The monopoly in the manufacture of these cars was secured by The Pullman Company's refusal to *operate* any cars not *manufactured* by the Pullman organization. This refusal was, in turn, made effective by The Pullman Company's operating monopoly and its agreement to own and use only cars produced by Pullman-Standard. Since the railroads were dependent on Pullman service for carrying first-class passengers, the Pullman organization had the power to restrain these railroads from buying certain types of cars from other manufacturers. Thus, although there were a number of manufacturing companies in 1940 capable of producing sleeping car equipment,⁸² they were not able to do so as long as Pullman exercised its vertically integrated control over the industry.

The economic effects of the integrated monopoly in the operation and manufacture of sleeping cars were clear: since the Pullman operating

81. 50 F.Supp. 123, 127 (E.D. Pa. 1943).

82. *Ibid.*

company had no competitive incentive to lower rates or to improve its equipment, it exacted excessive charges for its services and operated a fleet of obsolete cars.⁸³

The railroads were exploited in many ways. They were required to guarantee Pullman a minimum profit on all cars used and could share only part of the profits earned in excess of such minimum.⁸⁴ (The railroads thus took all risks of loss, but were rewarded with only part of any accrued profits.) They were required to pay in some instances 75 per cent and in others more than 100 per cent of the total cost of air conditioning sleeping cars, in spite of the fact that the air conditioning equipment became a fixture of the Pullman car and the property of The Pullman Company.⁸⁵ Pullman also forced contracting railroads to pay for all improvements on "standard" equipment cars, in spite of the fact that such cars were built on a model more than 20 years old and in spite of the fact that the improvements became the property of The Pullman Company.⁸⁶ The company thus exacted non-competitive and excessive prices and terms for the operation of sleeping car services.

The consumers suffered not only from the arbitrary rates on sleeping car services, but also from the inadequate facilities provided. For two decades, prior to 1940, there was no important change in the type of car operated by Pullman and a substantial number of the sleeping cars owned by the company were more than 20 years old.⁸⁷ Because of Pullman's ability to restrain other car manufacturers from marketing their product, the consumer did not receive the benefit of improved equipment kept up to the standards of speed, comfort, and convenience made possible by advances in rolling stock construction.

The unreasonably high profits earned by Pullman over the years were another effect of monopoly. While the I.C.C. had the same regulatory power over the fares of The Pullman Company as over the fares of other common carriers, the Commission never chose to fix either maximum or minimum fares and charges. The Pullman rates in effect in 1940 were not fixed by the Commission but were initiated by The Pullman Company pursuant to its own monopolistic price policies. Since the manufacturing subsidiary of the Pullman organization was not subject to I.C.C. supervision, any regulation of the operating company's

83. *Id.* at 131, 132.

84. *Id.* at 132.

85. *Id.* at 131, 132.

86. *Id.* at 132.

87. *Ibid.*

rates was incapable of preventing exploitation and the accumulation of excess profits.⁸⁸

Finally, the Pullman monopoly resulted in the limitation and restriction of sleeping, parlor, and dining car production; in the suppression of developments in modern car construction; in discrimination between railroads in the terms for operating sleeping cars; and in the exclusion of companies eager to embark upon the manufacture of sleeping cars and similar equipment.

When the court's decision in the case was announced on April 20, 1943, the Government seemed to have won a complete victory. It was held there had been a violation of the Sherman Act in both manufacture and operation of sleeping cars. The court directed that the final decree provide for divorcement of the operating company from the manufacturing company; that The Pullman Company be required to operate and service sleeping cars of any manufacture tendered to it for operation; that any railroad be allowed to operate its own sleeping car business; that The Pullman Company be required to furnish through-line sleeping car service to any railroad; and that the company eliminate its exclusive dealing contracts with the railroads.⁸⁹

The decision left one vital question unanswered, namely, whether Pullman, Inc. should dispose of its operating or manufacturing subsidiary. On January 22, 1944, this question was resolved by leaving the election between the two alternatives to Pullman, Inc.,⁹⁰ a step which foreshadowed the inadequate relief which the Government was eventually to obtain in this case.

Judge Biggs, in his dissent, recognized the drawbacks inherent in the court decision. He argued that the Pullman organization, rather than being allowed a choice in the matter, should be required to sell the *manufacturing* part of its business. Judge Biggs reasoned as follows: If permitted a choice, Pullman will almost certainly elect to retain the manufacturing subsidiary and sell the operating company. It would be extremely difficult to find a bona fide independent purchaser for the operating company, thus necessitating a sale of its facilities to the railroads.⁹¹ Judge Biggs did not relish this prospect. Moreover, he thought

88. This situation is quite typical of vertically integrated public utilities, where the operating subsidiary is subject to public regulations, but the manufacturing subsidiary is not. Cf. FEDERAL COMMUNICATIONS COMMISSION, REPORT OF THE INVESTIGATION OF THE TELEPHONE INDUSTRY IN THE UNITED STATES, 74th Cong., 1st Sess. (1939).

89. 50 F.Supp. 123, 137 (E.D. Pa. 1943).

90. 53 F.Supp. 908 (E.D. Pa. 1944).

91. Judge Biggs discussed the problems raised by railroad ownership of the Pullman operating company as follows: "Who will police the operations of the pool in order to make sure that those carriers who contribute to the purchase of Pullman Company stock . . . will treat their partners in the joint enterprises or the public

it was a "striking anomaly that the tort-feasor, Pullman-Standard, should be left in a position where it can profit greatly by way of the monopoly from the sale of light-weight sleeping cars in the postwar market."⁹²

However, Judge Biggs did not prevail. As he had predicted and in accordance with the court's judgment, Pullman elected to sell its operating business. After extensive negotiations, it accepted the purchase offer made jointly by railroads doing over 95 per cent of the nation's passenger business. The court approved acceptance of this offer, and on March 31, 1947, the Supreme Court, being equally divided, affirmed without opinion.⁹³ This brought to an end seven years of litigation in the course of which divorcement was granted. Yet, instead of being used as a means to provide an open market, the separation of Pullman's operating and manufacturing subsidiaries came to be regarded as an end in itself.

The sale of Pullman's operating facilities to the railroads was unfortunate. It created the potential danger of: (1) vesting in the railroads monopoly control of a nationwide competing system of transportation; (2) perpetuating the Pullman manufacturing monopoly; and (3) resulting in discrimination against the smaller railroads.

As to the danger of monopoly control over competing transportation systems, the Government had argued that:

[P]urchase of The Pullman Company by the railroads would reduce to common ownership and control an important part of the passenger transportation system of the United States. There is no qualitative difference between common ownership of Pullman cars and common ownership of all rail passenger cars. Common ownership of the sleeping car business would be unlike individual ownership by the railroads of all passenger coaches. In the passenger coach field the railroads compete for coach travel. They own all the coaches but ownership is individual, not common. Incentive to compete among themselves as to sleeping car service . . . as well as to make sleeping car service competitive with coach service will be lacking under common ownership. . . . Competition between coach and sleeping car service will be eliminated. As in all cases involving large investments the inevitable tendency, absent competition, is to use the existing equipment until it is completely worn out.

There is the same objection to railroad ownership of sleeping cars as there would be if the railroads were to purchase all

without discrimination? I know of no power presently vested in the Interstate Commerce Commission or in any other government agency which would enable it to regulate such a pool operation." *Id.* at 910.

92. *Ibid.*

93. 330 U.S. 806 (1947), *rehearing denied*, 331 U.S. 865 (1947).

passenger busses, or all of the air lines or all of the water transportation. In any of these situations such a purchase would permit the railroads to monopolize an important means of public transportation and suppress or develop it as they chose, regardless of public needs. It would vest in the railroads monopoly control of a competing system of transportation. . . .⁹⁴

As to the danger of perpetuating Pullman's manufacturing monopoly, the Government had argued that:

[S]ale of The Pullman Company to the railroads may easily defeat the express order of the Court directing complete separation of the operating company from the manufacturing company. This is occasioned by the existence of interlacing relations among several large banks and insurance companies, Pullman Incorporated and the railroads. The Morgan, Vanderbilt, and Mellon interests have substantial representation on the present directorate of Pullman Incorporated which has elected to retain ownership of Pullman-Standard Car Manufacturing Company. These financial interests likewise dominate a large number of the great railroads of the country, both through ownership, and more importantly, through the financial syndicates which float the securities of such railroads. Equally important in the financial operations of the railroads and Pullman Incorporated are several of the largest insurance companies which invest in railway securities.⁹⁵

From the evidence at hand, the Government had concluded that through the:

. . . banker and insurance nexus the railroads are affiliated with Pullman Incorporated which owns, and will continue to own, Pullman-Standard Car Manufacturing Company. If they purchase the operating company the railroads might still purchase substantially all of their sleeping car requirements from the Pullman-Standard Car Manufacturing Company. If the Court's decree is to become effective and competition restored in the sleeping car operating and the sleeping car manufacturing fields, such affiliations must be avoided.⁹⁶

Pointing to the danger of discrimination against the smaller railroads, the Government had warned that:

[S]ale of the sleeping car business to the railroads might cause a marked deterioration in the service on small roads. Under the

94. Brief for United States, p. 3, *United States v. Pullman Co.*, 64 F.Supp. 108 (E.D. Pa. 1946).

95. *Id.* at 6.

96. *Id.* at 7.

plan submitted by the railroads the stock would be distributed in accordance with the percentage of sleeping cars operated by the several railroads. This means that the twenty railroads making the offer would own 81 per cent of the stock and would effectively control the policies of the new company. The smaller roads would get only such types of equipment and services that the controlling roads did not want, thus lessening the smaller road's ability to compete for traffic. The small roads would become captives of the large roads. The public traveling on small roads would be required to use inferior accommodations or shift their patronage to the larger roads supplying more desirable accommodations.⁹⁷

In spite of these objections, the sale of the Pullman operating subsidiary to the railroads was given judicial sanction. Similar approval was granted by the I.C.C. on May 6, 1947, after a finding that "the proposed pooling will be in the interest of better service to the public and of economy in operation," and that such pooling "will not unduly restrain competition."⁹⁸ With this opinion, litigation in the *Pullman* case came to an end.

What did the seven years of litigation accomplish? What affirmative relief was obtained? How effective was that relief in destroying monopoly power and restoring vigorous competition? To be sure, Pullman's manufacturing and operating business were divorced. The new railroad-owned servicing company was required to purchase new cars on the basis of competitive bidding. The railroads promised that, after an interim three-year period, the jointly owned servicing company would be sold to a purchaser not connected with either the railroads or Pullman, Inc.⁹⁹ Finally, the new operating company was required to provide, upon request, service for cars not owned by it. The suit has thus succeeded in removing some of Pullman's monopolistic restraints which previously prevented the railroads from purchasing and owning sleeping cars operated over their lines. The decree made possible, to some extent, the entry of newcomers into the manufacture of sleeping cars and similar equipment. It put an end to the exploitation of the railroads by the Pullman organization.

On the other side of the ledger, however, must be entered the failure to provide for the *financial* as well as physical divorcement of Pullman's subsidiaries. The number and strength of interlocking directorships between Pullman, Inc. and the railroads (or companies which

97. *Id.* at 8.

98. 268 I.C.C. 473, 492 (1947).

99. This sale has not as yet taken place and an extension of the "interim" period has recently been authorized by the I.C.C. See 276 I.C.C. 5 (1949).

are the source of railroad financing) were left untouched. The Pullman operating company was sold without requiring the would-be purchaser to demonstrate its complete independence of all connections, direct or indirect, with Pullman, Inc. In view of the financial ties between Pullman-Standard and the railroad-owned operating company, and in spite of the "competitive bidding" provision, a potential newcomer in the manufacturing field was thus made to face considerable odds against his successful entry.

Here a great opportunity was muffed. The courts could have created three independent groups in the industry: (1) two or more car manufacturers, (2) an independent operating company, and (3) the railroads. This could have been done preferably by ordering the sale of the Pullman manufacturing subsidiary to a bona fide independent or by forcing the sale of the operating company to a bidder other than the railroads. There would thus have come into being three separate groups whose economic self interest was such as to promote development of better equipment and service, competition between rival modes of transportation, and freedom from monopolistic domination or influence over the manufacture of sleeping cars. Without punishing Pullman for past offenses, provision could have been made for more effective competition in the future.

As it turned out, the concentration of economic power was not substantially lessened. The seat of monopoly power was merely transferred from a giant firm to a highly concentrated industry. Divorcement was obtained, but it was carried out in a manner which largely ignored the economic realities of intercorporate relationships.

CONCLUSIONS AND RECOMMENDATIONS

To the extent that the above case studies are representative—and an examination of the record would seem to indicate that they are¹⁰⁰—we may conclude that the relief obtained by the Government in Section 2 cases under the Sherman Act has generally been inadequate; that the Government, while successful in establishing the defendants' violation, has not been able to secure the kind of remedy which would dissipate the effects of monopoly and encourage the restoration of a more competitive industrial structure; that the Government, therefore, has won many a law suit but lost many a cause.¹⁰¹

100. As stated *supra* note 18, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), is the exception and not the rule.

101. In all fairness, however, it should be noted that the Antitrust Division has attempted to overcome the apparently insuperable obstacles to divestiture by making

There are many factors which explain the Government's failure, except in a handful of cases, to get meaningful dissolution, divorcement and divestiture relief. The most important factor is the attitude of the courts to this problem. The courts have exhibited a disinclination to undertake drastic economic reorganization of a monopolized industry and have, therefore, often failed to establish the structural prerequisites for vigorous competition. They have generally refrained from breaking asunder what man has illegally joined together.

The "shyness" of the courts in this respect stems not only from the temperament of many judges but also from a lack of training in the economic problems involved in monopoly cases. Perhaps it is this lack of comprehension of intricate economic forces rather than an unwillingness to grant drastic relief which is responsible for the *ad hoc*, uncomplicated and readily implemented remedies traditionally embraced by the courts. Perhaps it is a lack of expertness in wielding the knife which

increasing use of the consent decree as a means of obtaining relief "just short" of divestiture. Between 1935 and 1950, for example, 134 of the civil cases filed were settled by the consent procedures whereas only 37 cases were tried. See Timberg, *Equitable Relief under the Sherman Act*, 1950 U. OF ILL. L. FORUM 629, 630. Under the policy now in force, consent decrees are negotiated in cases "where the Government feels that there is an advantage in taking a present settlement that will immediately alleviate the alleged restraints, instead of pursuing a protracted course of litigation that would permit those restraints to continue for an indefinite future [compare the 'time utility' of the economists]; and where there are good, but not assured, possibilities that the restraints will be removed by the operation of the judgment. Frequently, in these situations, the defendants present an economic justification for less far-reaching relief than the Department may have asked for in its complaint—a justification which the Government is willing to test (without acquiescence) in the light of operations under the judgment." *Id.* at 657.

As Timberg aptly points out, the Government, under the consent procedure, has been able to secure certain forms of relief which had not generally been granted in litigated judgments. Thus a number of recent consent decrees have provided for the dedication or royalty-free licensing of patents in fiat glass products, colored motion picture film, plastics, automotive air brakes, magnetos, cast iron pressure pipe, railway spring products, stainless steel, filters, glass bulbs, fiberglas, air conditioning equipment, disconnecting switches, and stencil duplicating machines and supplies. *Id.* at 640, 641. Some of these decrees have provided for the licensing of future patents, typically for a five year period, as well as for the extensive disclosure of know-how to any applicant either without payment or at actual cost. Many have included affirmative injunctive provisions designed to forestall not only the precise violations charged but also all similar violations. Finally, and perhaps most important, recent consent judgments have contained the "Damocles' Sword" provision under which jurisdiction is retained for from three to five years so that the Government may, at the end of the "probationary" period, petition for divestiture relief if competition has not been re-established in the industry. While these decrees have been the vehicle for solving many of the Government's difficult relief problems, their relatively recent origin makes it impossible to appraise and evaluate their economic effectiveness. Unless it can be demonstrated that competition has been successfully restored in industries where these decrees are now operative, the consent procedure can hardly be embraced as an efficacious substitute for dissolution, divorcement and divestiture.

has made the courts so reluctant to sanction the drastic economic surgery necessary to strike at the core of the monopoly cancer.

Another factor influencing the relief obtained in monopoly cases is the method of presenting such cases to the courts. Since relief cannot be obtained until the Government has proved a Section 2 violation, the evidence is presented for the primary purpose of showing the existence of monopoly. Usually the record contains little concerning the specifics of relief, and relief problems are not considered until the conclusion of the trial and the announcement of the court's opinion. In most cases, therefore, the court has no evidence before it as to the nature of the remedy necessary to neutralize the effects of the monopoly. It must frequently proceed on the basis of conjecture as to what the Government's ultimate relief problems will be.

In addition, the preoccupation of the trial staff with developing the kind of record which will substantiate its monopoly charges tends to deemphasize the importance of a well-organized and comprehensive plan for relief. The legal problem of "winning" the case is permitted to take precedence over the economic problem of obtaining adequate remedial action. There arises, therefore, a tendency to improvise relief measures when reality demands that a concrete relief program be spelled out. Often the trial attorneys "estimate" how much by way of relief the judge is likely to grant rather than considering what kind of relief is required to effectuate the purposes of the law. The result is that frequently the battle is won while the war is lost.

The analysis of the above cases demonstrates to the writer that the present system of presenting and deciding antitrust cases fails to achieve the results demanded by the Sherman Act. The inadequacies of present practices are mostly self-imposed by the courts and the Anti-trust Division: the solution to the problem is within their domain. While it is unlikely that the judges can be schooled in the intricacies of economic theory or the complex pattern of economic reality, competent economic counsel can be made available to assist them in the analysis of monopoly cases, and to render assistance in the formulation of adequate relief programs. The courts could either employ full-time economic experts or call upon professional consultants from the ranks of industry, government, or the universities.¹⁰² On the basis of comprehensive industry

102. In a recent discussion of the relief problem in dissolution, divorce and divestiture cases, Professor Oppenheim makes the same recommendation. He points out that "[u]pon the judges fall the final responsibility for interpreting the antitrust laws and determining the appropriateness of the 'D.D.D.' remedies in concentration of economic power cases. It is most important, therefore, that consideration should

studies by experts in the field, the courts might then more readily invoke such "drastic" remedies as dissolution, divorcement and divestiture.¹⁰³

While the Antitrust Division is aware of the difficult problems faced in securing adequate relief,¹⁰⁴ it is recommended that its requests for dissolution, divorcement and divestiture be based on more thorough-going studies of relief alternatives. Such studies should be made by an adequate staff of economists, industry specialists, and engineers (within the Antitrust Division) who possess the technical qualifications essential for the development of a practical, yet economically meaningful and effective relief program. A preponderance of evidence should be presented to demonstrate that the relief proposals are not only necessary but also practical and feasible. The Government should attempt to prove, with more convincing evidence than it has in the past, that dissolution, divorcement and divestiture is, in particular cases, the *only* remedy capable of neutralizing monopoly power and restoring competition in accordance with the mandate of the Sherman Act. To establish the case for its relief proposals, the Government might emphasize and effectively demonstrate that a company's size is not necessarily the guarantor of economic efficiency; that the company's favorable profit record is often the result of its coercive power in the market place rather than its efficiency of operation; that the dissolution of a giant might actually enhance rather than diminish the efficiency of its operating components; that dissolution in particular cases would not impair our ability effectively to mobilize the country's resources in times of national emergency. Most important of all, any remedy proposed must be specific; it must show

be given to appropriate methods of providing judges with assistance in the form of sound and unbiased advice of economists. Such assistance would help the judges in appraising the relative merits of opposing economic facts and views as developed in the record of particular cases and upon which proof of antitrust violation and the applicability and scope of remedies depend." Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws*, 19 GEO. WASH. L. REV. 11, 130-131 (1950).

103. As an alternative to the above suggestion, the courts could make use of Section 7 of the Federal Trade Commission Act, which provides that: "In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require." 38 STAT. 722 (1914), 15 U.S.C. § 47 (1946). The former alternative, however, would be preferable, since the proceeding might lose its desired objective flavor if the investigation was conducted by a governmental body.

104. See Timberg, *supra* note 101.

why plant X has to be divested; how such a plant can operate as a functionally independent unit; why such divestiture is necessary for the dissipation of monopoly power; how such divestiture will in fact be instrumental in promoting greater competition, etc.

In requesting drastic relief, the Government should point to cases where such relief was granted and where as a consequence satisfactory results were achieved. Our experience under the Public Utility Holding Company Act of 1935,¹⁰⁵ for example, might be cited to show how industrial efficiency was increased in many instances through dissolution, divorcement and divestiture.¹⁰⁶ Similarly, innumerable cases could be cited where drastic relief was requested and denied and where, as a result, competition was not restored.

In making its case for a particular relief program, the Government should not rely entirely on the expert testimony of the Antitrust Division economists. Since the courts might consider such testimony as being of an *ex parte* nature, greater reliance should be placed on expert and disinterested witnesses drawn from industry, government, and the universities. In this connection, consideration might also be given to a more frequent use of Section 6(e) of the Federal Trade Commission Act which authorizes the Commission:

Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.¹⁰⁷

The powers here granted should be used very selectively, however, in order to minimize the problems connected with effective inter-agency cooperation; to minimize delay in the settlement of cases; and to conserve the Commission's energies for comprehensive investigations affecting the national economy.

During the trial and in the course of relief hearings the Government should impress upon the courts what effective competition means and what the prerequisites for such competition are. The courts should be shown that one price in one place at one time is not necessarily the manifestation of competition; that such price uniformity is often imposed arbitrarily from *outside* the market rather than being determined by

105. 49 STAT. 803 (1935), 15 U.S.C. § 79 (1946).

106. See *Hearings before the Monopoly Subcommittee of the House Judiciary Committee*, 81st Cong., 1st Sess. 1460-69 (1950).

107. 38 STAT. 721 (1914), 15 U.S.C. § 46(e) (1946).

the forces of supply and demand within the market. The Government should impress upon the courts that, in an oligopolistic market structure, administered prices, price leadership, price uniformity, and price inflexibility are often as valid a proof of monopoly power as the domination of an industry by a single firm. The distinction between active, vigorous competition in the economic sense and psychological competition which consists merely of a gentlemanly sales rivalry between competing producers should be stressed.¹⁰⁸ In short, the Government must emphasize and re-emphasize that competition from the viewpoint of the individual businessman does not necessarily meet the standards of competition from the viewpoint of the economy as a whole.¹⁰⁹

If, after having been advised by the Antitrust Division of all the considerations and relief alternatives, the courts are still reluctant to undertake the kind of reorganization necessary to accomplish the purpose of the Sherman Act, it might be advisable for Congress to consider passage of a new antitrust act. By this suggestion, it is not implied that the relief powers under the Sherman Act are inadequate. We do believe, however, that judging by past performance, these powers have not been used to a sufficiently far reaching extent. The new law should be designed to supplement, not supersede, the Sherman Act. It should be modeled perhaps along the lines of the Public Utility Holding Company Act of 1935, which proved so successful an instrument in the dissolution of vast utility empires. The new law should clearly set forth the evils against which antitrust action is to be directed and specify

108. Cf. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

109. The structural characteristics of workable competition in a particular market may be listed as follows: "1. There must be an appreciable number of sources of supply and an appreciable number of potential customers for substantially the same product or service. Suppliers and customers do not need to be so numerous that each trader is entirely without individual influence, but their number must be great enough that persons on the other side of the market may readily turn away from any particular trader and may find a variety of other alternatives. 2. No trader must be so powerful as to be able to coerce his rivals, nor so large that the remaining traders lack the capacity to take over at least a substantial portion of his trade. 3. Traders must be responsive to incentives of profit and loss; that is, they must not be so large, so diversified, so devoted to political rather than commercial purposes, so subsidized, or otherwise so unconcerned with results in a particular market that their policies are not affected by ordinary commercial incentives arising out of that market. 4. Matters of commercial policy must be decided by each trader separately without agreement with his rivals. 5. New traders must have opportunity to enter the market without handicap other than that which is automatically created by the fact that others are already well established there. 6. Access by traders on one side of the market to those on the other side of the market must be unimpaired except by obstacles not deliberately introduced, such as distance or ignorance of the available alternatives. 7. There must be no substantial preferential status within the market for any important trader or group of traders on the basis of law, politics, or commercial alliances." EDWARDS, *MAINTAINING COMPETITION* 9-10 (1949).

some concrete and detailed, yet comprehensive, standards for the application of the dissolution, divorce and divestiture remedy. It should constitute a clear mandate to the courts that any firm found to possess monopolistic power be dissolved into its component parts, unless such firm can prove its size to be necessary for the maintenance of efficiency.¹¹⁰ By placing a new "charter of freedom" on the statute books, congressional intent to promote competition might be more readily effectuated.

110. For a proposed bill, drafted along these lines, see *Hearings, supra* note 106, at 1600-25.