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RECOMMENDATIONS FROM CONGRESS—A CONGRESSIONAL VIEWPOINT ON CURRENT ANTITRUST PROBLEMS*

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The Sherman Antitrust Law, our basic antitrust statute, has long had the universal support of all informed and farsighted Americans. As has been frequently said, it is the charter of our economic freedom. I believe that that short, concise, and far-reaching statute contained a prescription for the economic health of the nation, when it was enacted in 1890, and that it is still good medicine today. The high productivity, the industrial and scientific research, the technological improvements, the courage and enterprise of business pioneers, and the economic advancement, which combined have made the United States the greatest nation, with the highest standard of living the world has ever known, could have been achieved only under a competitive, free economy. The vigorous and intelligent enforcement of our antitrust laws, according to the objectives established by the Congress, will preserve that competitive economy. However, the maladministration of our antitrust laws can contribute materially to the dissipation of that strong, healthy and competitive economy which has so long stood as a bulwark against the threats of aggressors, and can weaken our military security by undermining the foundation of our industrial arsenal and impairing our high standard of living. The future of this nation requires a vigorous enforcement of the antitrust laws; but equally it requires an intelligent enforcement of those laws.

Today we hear many complaints, from widely varied sources, against the objectives, aims and administration of the antitrust laws. To the extent that these complaints are directed against the statutes, I believe that they are in a large measure injustified. The basic errors on which most of the criticism rests are in fact a result of the manner in which these laws have been, in my opinion, badly administered in recent years.

I am certain that businessmen, both big and little, as well as the consumer, will find a most vigorous, forthright, courageous and enlightened enforcement of the antitrust laws under this Republican administration. They will, I am equally sure, find these laws administered to preserve freedom of opportunity, freedom to compete, freedom to succeed on one's own for his own account, freedom from predatory restraints, and freedom from economic bondage. These are freedoms American businessmen have not enjoyed in recent years.

I. Philosophy and Economic Benefits of Antitrust Laws

With roughly 6 per cent of the world's population and no greater percentage of its land area, approximately one-half of the total production of

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the world is in the United States. Our great productive superiority is the most important single factor standing between the liberty, freedom, and democracy of the free world and its enslavement by Soviet imperialism.

The immense productive capacity of our highly competitive free enterprise system accounts for the high standard of living of our people. Generally speaking, whenever a monopoly exists in any industry there is no reason to expect—and we do not have—great efforts in research to develop new products or to improve the quality and lower the price of old products. The monopolist has no incentive to seek ingenious ways to get his product to the consumer more quickly and in better condition, or to employ the most modern manufacturing techniques. It is through these means, which are the by-products of vigorous competition, that the consumer is offered better goods at lower prices and his standard of living thereby elevated.

The small and medium size businessmen of our country are the backbone of our economy. They must always be protected against the predatory practices of those larger competitors who may seek to take unfair advantage of their greater wealth. Most small businessmen do not ask, and do not expect, crutches for their economic support or protection against competition, which is not unfair. But they are entitled to expect the protection of the laws that insure their right to engage in a fair competitive contest for the patronage of the consumer, that insure their right to grow and to prosper, and that insure their right to expand by their industry and hard work in an economy free of unreasonable restraints.

These are the basic purposes of our antitrust laws. They must, and they will, be vigorously enforced; and I say this not only because I believe in this course but because the people will insist upon their enforcement. The benefits of our competitive system are apparent in any comparison with the economic practices in Europe, particularly in France and England, where cartels are encouraged and vigorous competition is often frowned upon for fear that its technological advances will put people out of work and destroy financial investments in obsolete industrial facilities.

These objectives of the antitrust laws have been rather well achieved during the last fifty years, more because of their overwhelming public support than because of recent ideological crusades in their name.

I was interested in a summary recently published of a forthcoming study by the Brookings Institution entitled "Big Business in a Competitive Society."[1] That study discloses some reassuring facts on the existence of a competitive society in spite of our gigantic growth, including the fact that there are more business concerns now in proportion to the population of the country than there were in 1900. It is also interesting that of the one hundred largest corporations in 1909, only thirty-six remained among the one hundred

[1]Published as a supplement to the Feb. 1953 issue of *Fortune* Magazine.

largest in 1948—and five of those had dropped out along the way to return later. Of the forty-seven corporations which entered the group in 1919 only twenty-four remained in 1948. The Brookings report points out the important part played by big business in our modern complex society, yet it also shows the responsibility of both the government and business itself to see to it that competition is preserved and the continued position of small business is maintained. This must be one of the objectives of an enlightened antitrust policy.

II. Objectives of the Antitrust Laws

Congress has passed the Sherman Act primarily to protect the consuming public against monopolies and conspiracies to fix prices. The underlying theory of the Sherman Act is that price fixing and monopoly tend to maintain artificially high prices, while vigorous competition generally brings better products at lower prices. Congress intended the public interest to be paramount in the Sherman Act. All too often these days I fear that the consumer is the forgotten man, but the Sherman Act was intended primarily to protect him.

The Federal Trade Commission Act extends to the area covered by the Sherman Act. Through empowering the Commission to prohibit "unfair methods of competition," the Congress made provision for stopping predatory practices that constitute an unfair method of competing against another businessman.

The Clayton Act, particularly as amended by the Robinson-Patman Act, was aimed at protecting smaller businessmen against unfair and predatory price discrimination, exclusive dealing arrangements, tying clauses, and similar practices. This act was designed both to give small buyers a measure of freedom from the economic pressures of large sellers and to give them an opportunity to compete equally with other buyers in the resale of the goods they both buy.

In each of these statutes the Congress was trying to preserve a competitive economy. The Supreme Court has so acknowledged, saying:

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "[2]

Nevertheless, it has frequently been urged that the antitrust laws are directed at contrary objectives. The point is made that the Sherman Act requires that continuous, vigorous competitive struggle between businessmen will bring lower prices to the consumer. It is argued, on the other hand, that the purposes of the Clayton Act, of protecting smaller businessmen from

[2]Standard Oil Company v. Federal Trade Commission, 340 U.S. 231, 248, 249, 71 S.Ct. 240, 249, 95 L.Ed. 239, 250, 251 (1951).

destructive competition, requires an absence of that vigorous competition in order to protect the weaker businessmen. This is sometimes called soft competition. It has also been said that the Robinson-Patman Act prohibits what is known under the terms as the hard competition that is required by the Sherman Act.

It is, of course, true that the consumer is interested in buying at the lowest possible price, while the businessman is generally interested in selling at a high enough price to make a profit. To this extent the interests of the consumer and of the small businessman appear to be at least in part inconsistent.

The Supreme Court Justices have touched upon this view. Speaking for the Supreme Court majority, Justice Burton wrote, "We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts."[3] And in a dissent filed earlier this year, Mr. Justice Frankfurter (joined by Mr. Justice Burton) wrote, "I am not unaware that the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act, are difficult to formulate and not altogether harmonious."[4]

To the extent that there is conflict in the competitive requirements of these statutes, however, such conflict results largely from their incompetent administration, in my opinion. The key phrase in the Sherman Act is the prohibition against combinations in "restraint of trade," while the key phrase in the Clayton Act, as well as in the Robinson-Patman Amendment, is the "prohibition" against discrimination in price that may "injure competition." "Restraint of trade" and "injury to competition" are not dissimilar evils. Trade, as we know and require it to be conducted, is competition. What restrains trade thus injures competition. But in the administration of these laws they have been given contrary constructions by those charged with the enforcement of these laws.

While restraint of trade has properly been applied to unreasonable impediments to the competitive contest for trade, in the enforcement of the Sherman Act, the Federal Trade Commission has construed the phrase "injury to competition," in the Robinson-Patman Act, as including that injury inflicted on individual competitors in competition. And the courts have somehow concluded that the Federal Trade Commission is a body of infallible experts whose views are sacrosanct. As we shall presently see, the courts' attributing expertise to this Commission has been a serious source of trouble.

Had the Federal Trade Commission construed the phrase "injury to

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[3] *Id.* at 249, 71 S.Ct. at 249, 95 L.Ed. at 251.

[4] Federal Trade Commission v. Motion Picture Advertising Company, 344 U.S. 392, 73 S.Ct. 361, 369, 97 L.Ed 295, 303 (1953).

competition" to have its normal and usual meaning, the business community would have been spared many of the problems that have plagued it in recent years.

The Robinson-Patman Act was passed for a good purpose. It has a proper objective. Criticism recently directed at it, to the extent that it is at all justifiable, is attributable to the misadministration of the statute by those who should be, and claim to be, its best friends.

From the discussion that follows, it will be apparent that antitrust enforcement in recent years has not had as its objective compelling maximum adherence to that course of conduct intended by the Congress in passing the antitrust laws. The antitrust agencies have been far less concerned with obtaining compliance with the laws as passed by Congress than they have been with carrying on their own ideological crusade to require changes in the economy of the nation according to their views of a proper social and economic society. They thereby sought to extend the prohibitions of the antitrust laws beyond the limits of the statute to cover areas not contemplated by the Congress in passing those laws. Motivated by that effort to change the business habits of the nation and to impose on the nation an economic philosophy never sanctioned by the Congress—and unthought of by Congress, in fact—the antitrust laws were used to promote this economic and philosophical crusade rather than to obtain maximum compliance with the law. Bringing as many violators as possible to justice was secondary to using antitrust litigation to extend the periphery of the law without the sanction of the Congress.

III. The Maladministration of Antitrust Laws

In the twenty-five years following the passage of the Sherman Act substantial progress had been made toward building up a body of judicial precedents interpreting the areas of conduct prohibited by the act; including the decisions in the *Standard Oil*,[5] *International Harvester*,[6] *United States Steel*[7] and *American Tobacco*[8] cases. In the years that followed a lawyer could, with reasonable accuracy, advise his client of the conduct prohibited by the law; and an honest businessman could find out what he must do, and what he must not do.

In spite of the fact that violation of the Sherman Act is a criminal offense, today competent lawyers complain that they are unable to advise their clients of what conduct may be unlawful under the antitrust laws.

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[5]Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1910).

[6]United States v. International Harvester Co., 214 Fed. 987 (D.C. D. Minn. 1914), *dism.* 248 U.S. 587, 39 S.Ct. 5, 63 L.Ed. 434 (1918).

[7]United States v. United States Steel Corp., 251 U.S. 417, 40 S.Ct. 293, 64 L.Ed. 343 (1919).

[8]United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1910).

Businessmen are now subject to indictment and criminal trial for normal business conduct heretofore long regarded as normal and proper, and advice as to the legality of which they cannot obtain from competent counsel.

The necessarily broad language of the Sherman Act was intended to make it applicable to changing economic conditions and to encompass problems not within the contemplation of the Congress in 1890. But the crusaders of recent years have not tried to enforce the law as Congress passed it and as the courts had previously interpreted it. Their objective has not been to give small businessmen and the public the benefits they would achieve from a vigorous prosecution of all possible violators. Instead, they picked the cases, in my opinion, that best served to extend the scope of the law, by judicial decree, to cover the areas dictated by their personal economic views.

Under our form of government, it is the Congress that makes and amends the laws. The citizen is entitled to look at the statutes, and their judicial interpretations, to know what conduct is prohibited. In recent years, however, when the administration wanted to change the law, instead of going to the Congress for legislation, they went to the courts for judicial revision of the law. Let me give you a few examples. For years it was generally considered that insurance companies and railroads were not subject to the antitrust laws. The administration went to the courts, and not to the Congress, to change the rule. The Congress was required to take remedial action to correct these abuses.

The *Federal Baseball* case[9] held in 1922 that professional baseball was not interstate commerce and therefore was not subject to the Sherman Act. The *Colgate* case[10] held in 1919 that resale price maintenance was not wholly prohibited under the Sherman Act. The *Appalachian Coal* case[11] held in 1933 that all price fixing is not unlawful. None of those cases has been expressly reversed, yet I doubt that any of you experts here would advise his clients they would safely rely on any of these cases. Businessmen may be indicted and convicted next year for current conduct which decisions of the Supreme Court, that have never been reversed, say is lawful.

In 1926 the Supreme Court, in the *General Electric* case,[12] held that it was lawful for the licensor of a patent to require his licensee to sell the licensed article at a fixed price. Yet in 1948, in the *Line Material* case,[13] the Supreme Court was persuaded to hold that such conduct was unlawful. Both decisions construed the Sherman Act of 1890; and Congress had not changed the law in the interim. Yet anyone who followed the 1926 decision

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[9]Federal Baseball Club v. National League of Professional Baseball, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922).

[10]United States v. Colgate & Company, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919).

[11]Appalachian Coals v. United States, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933).

[12]United States v. General Electric Company, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926).

[13]United States v. Line Material Company, 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701 (1948).

could be indicted and convicted for conduct undertaken even before the 1948 decision advised him that the Supreme Court had changed its opinion.

Another objective of the crusade was to bring all big business under the condemnation of the act. A strong, healthy and prosperous community of small businessmen is essential to our economy, but there are also areas in which big business has an indispensable role. The antitrust laws must permit both to prosper, each with due deference to the rights of the others.

The mass production economies of the automobile industry in my state, which are possible only by large concerns, has not only made it possible for 45 million Americans to own automobiles, but it has also provided employment for hundreds of thousands of workers. Where else can we obtain the tanks, airplanes, electronic equipment, and other huge and complicated items of war materials required in great numbers for our security?

A formerly active member of the outgoing administration has conceded this objective in a recent book. This former government official says:

> "But in more recent years a second concept of what the anti-trust laws mean has arisen, an interpretation mischevious and injurious and unrealistic. . . . Under the newer doctrine of trust busting, as it exists today, the corporate misdeed of being big need not relate to anything the big business has done, or plans or threatens to do. It is not necessary for the government to show that by reason of its size the defendant company in fact exercises a power in a manner that excludes competitors. It is enough that by reason of its size it possess a power which if exercised could exclude competitors; because of its size it is presumed to be a 'potential' law breaker, even though it be admitted that it has never taken any step, alone or with a combination, to make use of the asserted power, nor committed any acts of competitive violence, coercion, deceit or collusion. The heart of the offense is the potential power to do wrong, not the misdeed itself."[14]

The theory of illegality attaching to a potential violation was not in the act when it was passed in 1890. When and how did it become unlawful? And what would happen to the country if we put every potential criminal in jail?

The author of the above quotation was recently chairman of the Atomic Energy Commission. He writes that in the early development of the atomic bomb it was essential to find a concern with a combination of certain skills considered necessary to develop the bomb. He found such a company and it agreed to undertake the job for the Atomic Energy Commission; and that concern was at that very time being sued by the Antitrust Division because it possessed the very combination of skills required for the atom bomb program.[15]

The methods some businessmen will pursue to fix prices, drive competitors out of markets, use their economic power to suppress the growth of others,

[14] DAVID S. LILIENTHAL, BIG BUSINESS: A NEW ERA 169-71.
[15] *Id.* at 101-103.

stifle small business concerns, and otherwise seek to get around the prohibitions of the antitrust laws is unlimited. The Antitrust Division should be vigilant in seeking out those people, and relentless in their prosecution. It seems to me that we should first bring to justice those who are presently violating the law before we seek to prosecute those, who although fully complying with the law, are considered to be potential violators.

Another cause of concern to business is the "competition" between the Department of Justice and the Federal Trade Commission. Their conflicting objectives have caused businessmen to fear that the pricing practices required by one may result in being sued by the other. Thus, the outgoing Secretary of Commerce told a congressional committee that:

> "In some situations businessmen feel that they are confronted with a choice between violating the Robinson-Patman Act by charging different prices to different customers or violating the antitrust laws by charging uniform delivered prices."[16]

In one recent case the Department of Justice publicly disagreed with the view argued by the Federal Trade Commission before the Supreme Court and refused to sign the Commission's brief.[17] Competition of ideas within the government may be a good thing, but such public disagreement is not conducive to voluntary compliance with the law. The Attorney General, as the chief legal officer of the government, should make the final decision in any case of disagreement within the government concerning interpretations of law.

The Federal Trade Commission has disturbed business. The *Gratz* case[18] held in 1920 that it was the final obligation of the courts to determine what was an unfair method of competition. Earlier this year, however, the Supreme Court held to the contrary in *Federal Trade Commission* v. *Motion Picture Advertising Service* (February 2, 1953). The Court now leaves it up to the Commission to decide as a question of fact whether any given practice is an unfair method of competition. In a dissenting opinion, Justices Frankfurter and Burton urged that it is for the Court to determine whether the Commission has correctly applied the proper standards. I would agree, for to leave the entire question to the Commission, is, in effect, to deprive the respondent of a right of review. It would be unconstitutional, in my opinion, for Congress to deprive him of his right of review. The courts should not shirk that responsibility.

The willingness of the Supreme Court to rely on the Commission as a body of experts is undoubtedly, at least in part, the result of the tremendously long records presented to the Court by the Commission. Quite recently the

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[16] *Printed Hearings on S. 236* (81st Cong.) p. 6.
[17] Standard Oil Company v. Federal Trade Commission, Docket No. 1, Oct. 1950 Term.
[18] Federal Trade Commission v. Gratz, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993 (1920).

Commission refused bills of particulars in two Robinson-Patman Act cases, each involving literally millions of transactions.[19] The majority of the Commission said they could not grant the bills of particulars because to do so would limit the scope of the trial. They said that the public hearings on the complaint should be used to continue their investigation. Two Commissioners dissented. They said that:

> "By consistently refusing to grant motions for bills of particulars as a matter of general policy, the Commission is not only being unfair to the respondents involved, but the Commission is also imposing an undue burden on its hearing officers whom it appoints to hear these cases."

I might add that such long-drawn-out trials are also unfair to the taxpayers who bear the expense of the unnecessary delay and are also a burden on the reviewing courts. It is not uncommon for the record in Commission cases to contain thousands of pages of testimony, and additional thousands of pages of exhibits.

The Commission has frequently opposed the expressed will of the Congress. In 1936 and again in 1937 the Congress rejected the F.T.C. proposal to require uniform f.o.b. mill selling and to prohibit freight absorption.[20] Yet the Commission thereafter spent years and a substantial part of its appropriations to achieve that very objective.

There is reason to believe that there exist many restrictive exclusive dealing agreements oppressive to small business. There appear to be many tying agreements that coerce small businessmen to buy and stock products they cannot profitably resell. There are no doubt many discriminations in price between competing buyers that genuinely injure competition. These are unlawful practices. These violators know they are violating the law, as passed by Congress, and their vigorous prosecution would tend to preserve our free competitive economy.

The evidence certainly indicates that the antitrust laws have not been administered in the public interest. In spite of all the fanfare on cases that accomplish little or nothing, many clear violators have never been pursued. Businessmen have been unable to determine what conduct the law requires of them. The law has been extended beyond that provided for by Congress. The funds appropriated by Congress for antitrust enforcement have not been used to achieve the maximum enforcement of these laws that are so important to the preservation of our free enterprise system.

IV. Recommendations to the Congress

The Senate Committee on the Judiciary has reported favorably S. Res. 14, introduced by Senator McCarran, authorizing a study of the administra-

[19] Matter of Safeway Stores, Inc., Docket 5990; Matter of the Kroger Co., Docket 5991.

[20] S. 4055, 74th Cong., 2d Sess.; Corn Products Mfg. Co. v. Federal Trade Commission, 324 U.S. 726, 737, 65 S.Ct. 961, 967, 89 L.Ed. 1320, 1331 (1945), quoting 80 Cong. Rec. 8102, 8140, 8224.

tion, interpretation and effect of the antitrust laws. This is certainly a constructive thing for the committee to do. It is worthwhile for the Congress periodically to review laws that affect so important a part of our economy and have been on the books for so many years. The committee report is in part that:

> "Questions have been raised as to whether the legislative policies embodied in these laws are intrinsically sound in approach, and whether the separate provisions of these statutes and their relationship to one another are sufficiently consistent and coordinated to effectuate a unified Federal policy of maintaining competition.
>
> "Because of the tremendous technological progress in the past 60 years in American industry, it is necessary that a thorough review be made of the entire antitrust field in order to achieve such realinement of the antitrust laws as may be shown necessary by such review."

I believe that a thorough study will disclose that unsoundness resulting from antitrust policies is more directly attributable to the administration of the laws than to the statutes themselves; and that it is the administrators of those laws who have failed to keep abreast of our tremendous technological progress; more than that the provisions of the statute do not permit doing so.

The hearings that will be held under the resolution, if it is approved by the Senate, will no doubt bring forth many suggestions to rewrite the antitrust laws. A number of suggestions will undoubtedly be intended to cure unpopular actions taken under existing statutes. But, of course, all unpopular action is not necessarily improper. There will also be those who want the statute to specify with great detail everything that is prohibited and that is permitted by the antitrust laws. All witnesses will urge that their amendments will "strengthen" the antitrust laws.

It does not seem possible to rewrite the law to give businessmen complete legislative assurance of the commercial conduct required in our competitive marketplace. To do so would either prejudice the public by making possible many predatory practices, or it would prejudice businessmen by making illegal *per se* many practices that should not be illegal in every instance. The surest way to provide certainty in the law is to make all practices of a certain class illegal *per se*. But that would outlaw many practices which may be both reasonable and proper under many circumstances. In our complex business economy there are many questions that cannot be decided legislatively in advance. A few illustrations will prove this point.

Should it be illegal to sell at prices below the cost of production? Frequently the answer is yes; but a manufacturer bringing out an entirely new product may find it necessary and entirely appropriate to sell his first production units below the costs properly attributable to the "pilot" run of the article.

What percentage of a market is a monopoly? The originator of a new

product may find himself with 100 per cent of the market until others decide to enter the field, even though there are no restraints against potential competitors.

What is the "market" for purposes of measuring competition? Copper now frequently competes with alumnium. Silk, rayon, nylon, and other synthetic materials may compete in some areas and for some purposes but not for others.

These are but a very few examples of the impracticability of Congress trying to specify in minute details the prohibitions of the antitrust laws. I think it can do no more than to set out the general yardstick by which competitive conduct is to be measured.

I would recommend to the committee that it consider these problems in its forthcoming study:

1. Inquiry should be made not only into the statutes but also into their administration by the enforcement agencies charged with bringing about a compliance with the legislative objectives of the Congress. Those agencies should be required to give the people greater and more intelligent enforcement for the appropriations given to them. This can be done by bringing the maximum number of clear violators to justice, and leaving to Congress the task of extending the scope and the area to be covered by the antitrust laws.

2. Closer cooperation should be sought between the Antitrust Division of the Department of Justice and the Federal Trade Commission so that they may devote all their energies to the enforcement of the antitrust laws; and not be diverted by quarrels among themselves, the pursuit of conflicting objectives, or struggle for individual agency power.

3. The rule of reason should be reaffirmed as the basis for construing the antitrust laws. These are situations in which a businessman's conduct should be judged by its reasonableness in the public interest under all the pertinent circumstances. The public interest should be paramount in determining the legality of competitive conduct and it should not be defeated by the application of *per se* rules of illegality.

4. Appropriate action must be taken to require, consistent with due process, shortening the lengthy records in antitrust cases, in order to: (a) facilitate review by the appellate courts; (b) relieve congestion both in the district courts and before the Federal Trade Commission; (c) give the public greater enforcement for their tax dollars; and (d) reduce the useless financial burden of litigation on those who are thus brought to justice.

5. The statute should be amended, if necessary, to require the reviewing courts to accept their responsibility for determining the propriety of the judgments brought before them to safeguard that right of every American to a fair trial according to law. The fact is that the Federal Trade Commission is not a body of experts endowed with infallible judgment; and a respondent is entitled to review of its decisions contemplated by the Administrative Procedure Act.

6. In those cases in which the administrators have acted contrary to the expressed intent of the Congress, such as with respect to freight absorption and good faith meeting of a lower price, the law should be clarified to make clear the will of Congress.

7. Treble damage suits brought under the federal antitrust laws are now subject to the varying state statutes of limitations. Depending on the state in which the action is brought, the period of limitations may be as short as two years or as long as ten years. There should be a uniform federal statute of limitations.

8. Lastly, I urge against any widespread rewriting of the antitrust laws, at least until the new administration has had a fair chance to clean up this mess in the antitrust field. I do not believe it is possible for us to write a suitable set of statutory rules to govern the competitive conduct of businessmen in every foreseeable—or unforeseeable—situation.

V. Recommendations to the Courts

I have this to recommend to the courts on administrative and procedural questions which I believe would improve the administration of justice in antitrust cases. The courts must compel a shortening of the record in the long cases. This can be done through pre-trial conferences and the full use of Rules of Civil Procedure. The Federal Trade Commission should be made to abandon the practice of building up a long record in its antitrust cases. In an appropriate case, its refusal to limit the issues, to define the scope of the trial, or to confine the evidence to the disputed issues might well be grounds for reversal on review. There is no justification for compelling reviewing judges to go through thousands of pages of testimony, or making litigants spend thousands of dollars to print the record in order to seek judicial review. The reviewing courts should discharge fully their high responsibility of insuring a fair trial and a just decision, according to the statute, to every litigant. Shortening the record, as recommended above, should facilitate the achievement of this objective.

VI. Recommendations to the Department of Justice and the Federal Trade Commission.

To the Department of Justice and the Federal Trade Commission, with the hope that the Congress will see to it that they are adopted, I make these recommendations:

1. Encourage the maximum voluntary compliance with the law by making it possible for businessmen and their lawyers to know the conduct required of them by the antitrust laws. The value to the people of the law enforcement agencies depends not so much on the number of suits filed as on the degree to which the laws are being obeyed by all who are subject to their provisions.

2. Stop the ideological crusades to change the business economy of the nation. Give up the efforts to extend the scope of the prohibitions of the antitrust laws beyond the areas intended by the Congress to be thereby included; and give up the practice of bringing suits for the purpose of establishing a new, different and novel rule of law rather than to bring the violators to justice.

3. Give the antitrust laws a more vigorous enforcement than they have heretofore had and thereby wipe out the greatest number of monopolies, unreasonable restraints of trade and other predatory practices at which the laws were directed. Through shortening the length of the trials, and giving up the crusade against business, there will be greater opportunity to prosecute a greater number of the violations of law which Congress intended to prohibit.

4. Use the criminal process only for willful violations of the statutes. Businessmen who violate the antitrust laws because the rules of the game have been changed or because they cannot learn the boundaries of the prohibited conduct are not criminals. Treating them as criminals is not conducive to creating respect for the law or for its enforcement.

5. Put a prompt end to the rivalry between the Commission and the Department of Justice. The Attorney General must assume the helm to chart this government's course in antitrust policy, as is his statutory responsibility.

6. Raise the standard of competence and ability of the lawyers on the staffs enforcing the antitrust laws, so that even the most able members of the bar will consider it a great honor to become a government antitrust lawyer.

7. To the extent that assistance from economists is required, greater use should be made of economists who have had at least some practical experience in the business world; and less guidance, if any at all, should come from those theoretical economists who would run our complex twentieth-century economy on the textbooks written about the theories of sixteenth-century economic practices.

8. I repeat to the administrators what I have suggested to the Congress and the courts: Shorten the record in the long cases. Particularly the Commission should stop giving the courts records of such great length that the court is deterred from giving the litigant that fair review to which he is entitled.

The adoption of these recommendations would, I believe, contribute materially to the preservation of our competitive free enterprise system. I have only one final recommendation to the antitrust lawyers of the American Bar Association. You, too, have an important stake in our economy in the administration of the antitrust laws. I urge you to help in putting at least some of these recommendations into effect or at least the house in order.