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The Antitrust Division of the Justice Department is very different from "a private attorney general" and quite different from the Federal Trade Commission (FTC). These differences are readily apparent in enforcement of section 2 of the Sherman Act as it has emerged over the years.[1] A private plaintiff must be primarily interested in winning the case at bar, regardless of the principles necessary to do so. The government, as civil plaintiff, must be concerned about the impact of its case on the economy as a whole; therefore, it must be concerned about both the legal principles involved in the case and the perception of the case in the bar and business community.

In the monopolization area, the government enforcement agencies tend to be dealing with proven market success. They therefore must be especially concerned that they neither punish success for its own sake[2] nor be perceived as doing so. In addition, a major monopolization case has the special problem of being a front-page news event, and thus, an appropriate subject for random political controversy.

The government's "success" in section 2 enforcement must be measured in terms of (1) the effectiveness of the relief actually obtained, especially in major structural cases; (2) the legal principles that the government has helped to establish; and, ultimately, (3) the government's ability to deter monopolistic activities by dominant firms, without chilling competitive vigor.

Section 2 enforcement in fact has been a "mixed bag" for the government. The Antitrust Division has won some famous cases in which little effective relief was obtained (such as *Alcoa*[3]); lost some

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1 The Federal Trade Commission (FTC) does not enforce § 2 (15 U.S.C. § 2 (1982)) directly, but rather § 2 principles govern the FTC's enforcement efforts against monopolists and would-be monopolists under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45 (1982)). *See* Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). The FTC has been a fairly marginal player (when compared with the Antitrust Division) in developing § 2 jurisprudence. *See In re* E. I. DuPont De Nemours & Co., 96 F.T.C. 653 (1980) (*DuPont-Titanium Dioxide*).

2 *Cf.* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (*Alcoa*). *See also* text accompanying notes 35-49 *infra*; and *DuPont-Titanium Dioxide*, note 1 *supra*.

3 *See Alcoa*, note 2 *supra*.

cases that it should have won (such as *DuPont-Cellophane*[4] and *Empire Gas*[5]); won some cases that it should have lost (such as *Grinnell*[6]); brought some cases it probably would wish to forget (such as *IBM*[7]); and even won some splendid little victories (such as *Lorain Journal*[8] and *Otter Tail*[9]) which moved the law forward.

The two "really big" section 2 wins for the government are separated widely by time and circumstances: the *Standard Oil* victory[10] came in the Supreme Court in 1911 after a long litigation; the *AT&T* "victory"[11] in 1982 came by consent after long litigation but before final judgment by any court.[12] Each case transformed the industrial landscape in a key sector of the economy.

The Antitrust Division has achieved its section 2 record at a great cost. Section 2 cases tend to be staff-consuming, expensive, and seemingly endless.[13] A single, large, section 2 case tends to take on a life of its own—a life of intensive, complex combat of precise details which may only be vaguely understood by the senior "warlords" on either side. In part, this is because a major monopolization case goes on for so long that it tends to span the terms of several administrations in the government and survive even major management changes at the defendant company.[14]

This article is concerned with the legal rules which the Justice

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4 United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377 (1956) (*DuPont-Cellophane*). The product market definition analysis seems seriously flawed because it did not respond to the defendant's pricing strategy. *See* text accompanying notes 47-49 *infra*.

5 United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

6 United States v. Grinnell Corp., 384 U.S. 563 (1966). While the "conduct" or "exclusionary intent" aspect of the decision may be correct, the market definition aspect of the case is not. *See* text accompanying notes 53-64 *infra*.

7 United States v. IBM Corp., Civ. Action No. 169-Civ.-200 (S.D.N.Y. 1969-82) (discussed in text accompanying notes 65-79 *infra*). *See* note 13 *infra*.

8 Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

9 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

10 Standard Oil Co. v. United States, 221 U.S. 1 (1911). This case, brought under both §§ 1 and 2 of the Sherman Act, is a landmark in the development of the rule of reason.

11 United States v. Western Electric Co., 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. 1982) (modification of final judgment). *See* text accompanying notes 80-98 *infra*.

12 The government did win some important victories along the way. *See, e.g.*, United States v. AT&T Co., 524 F. Supp. 1336 (D.D.C. 1981) (rejecting AT&T's motion for dismissal at close of government's case).

13 To take an extreme example, the case of United States v. IBM Corp., which lasted from 1969 until 1982, *see* note 7 *supra*, spanned the terms of five Presidents, nine Attorney Generals, and seven Assistant Attorney Generals in charge of the Antitrust Division. By chance, the Assistant Attorney General who filed the case (Edwin Zimmerman) and the one who disposed of it (William Baxter) were each on leave from the Stanford Law School when they acted. Meanwhile, at IBM only five members of its twenty-four member Board of Directors at the time the case ended had been on the Board at the time it was filed. Professor (now Judge) Robert Bork nicely labeled the *IBM* case as "the Antitrust Division's Vietnam." R. BORK, THE ANTITRUST PARADOX (1978).

14 *See* note 13 *supra*.

Department has established in section 2 cases and with the relief it has actually obtained. Parts I and II deal with the legal rules and question the clarity and deterrent effect of many of the decided cases. Part III analyzes the government's modern structural relief cases (*Grinnell*, *IBM*, and *AT&T*). Part IV focuses on the modern conduct-oriented injunctive cases (*Otter Tail*, *Empire Gas*, and *American Airlines*). In Part V, I attempt at look to the future of section 2 enforcement in the post-Reagan world.

I. Enforcement Efficiency and Legal Deterrence

There are two main aspects of section 2 as a government enforcement weapon. The first is *structural*: Section 2 offers a means of breaking up existing monopoly power whenever that power can be traced to past mergers or anticompetitive conduct but not to the classic economic virtues of skill, foresight, and industry. The second is *regulatory*: Section 2 offers a means of restraining abusive conduct of firms who have or seek monopoly power. The first generally looks to divestiture as the clearest way of dealing with the situation, while the second looks to injunctive orders. Seeing this dichotomy between divestiture and injunction is vital if we are to understand the potential for government section 2 enforcement, particularly at a time when antitrust law enforcement is being conducted with much-reduced government resources.

Law in general, and antitrust law in particular, tend to be most effective when they focus on particular conduct and its effects—for then, individual cases can produce useful rules which give general guidance. This clearly can be seen by examining government equity cases brought under the anti-restraint rules of Sherman Act section 1[15] and the anti-merger rules of Clayton Act section 7.[16]

Often the government's principal reason for bringing such a civil antitrust case, and even more often for appealing one, is to establish a particular rule for use against others. This is hardly surprising. Since the government is generally seeking only equitable relief, it is not driven by the prospect of treble damages and attorneys' fees. The government is thus entirely different from almost any private plaintiff in that it has an institutional interest in particular legal rules.

A rule established in one case can significantly influence the private conduct of nonparties, but only where the analogously situated firm has an effective choice among practical alternatives. Choice is generally present for those involved with distribution practices, proposed mergers, or joint ventures, where antitrust ad-

15 15 U.S.C. § 1 (1982).
16 15 U.S.C. § 19 (1982).

vice is generally given in advance. By contrast, the entrenched monopolist—especially one with a history of mergers—has few practical choices when faced with the risk of a potential divestiture action. Its market power is just as much a fundamental fact of life for it as it is for the government. A successful government section 2 action which breaks up another monopolist will not change this reality. All a potential defendant can do is to wait warily, behave quietly, and pray.

Even if the government actually sues for divestiture, such a defendant generally will treat the case as charging a "capital offense" and feel that it has little choice but to stand its ground and fight. Thus, a section 2 divestiture case is very likely to be a legal Verdun—a large-scale, hard-fought, slow, and expensive combat.[17] Each case has a very low pay-off beyond its own four corners.

Thus, the government agency, if it is behaving rationally,[18] must justify the enforcement costs of a section 2 structure case by improved economic performance in the relevant market alone. The agency can do this in a major, growing national industry, but not in a highly localized, monopoly situation. To illustrate, take Phillipsburg, New Jersey—the scene of a famous little antitrust battle in the late 1960s.[19]

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17 History makes clear that any incentives for expediting government monopolization cases are generally inadequate. The government staff wishes to win and, to that end, to develop every piece of possibly helpful evidence. Meanwhile, the defendant generally wishes to put off the day of reckoning; so long as their client is willing to pay for it, the defendant's counsel have every incentive to make the case big and slow.

History does reveal one arguable exception in the monopolization area. During the mid-1970s, the Antitrust Division tried several hard-fought electric power monopolization cases before the Nuclear Regulatory Commission (NRC) and its predecessor as part of the nuclear licensing process. *See, e.g.*, Consumers Power Co., Midland Units 1 and 2, NRC Docket Nos. 50-329A, 50-330A (1975); Alabama Power Co., Jos. M. Farley Units 1 and 2, NRC Docket Nos. 50-348A, 50-364A (1977); Toledo Edison Co., Davis Besse Units 1, 2, and 3, NRC Docket Nos. 50-364A, 50-500A, 50-501A, Perry Units 1 and 2, NRC Docket Nos. 50-440A, 50-441A (1977). They were tried under a statutory standard which required the NRC to deny a license if the addition of the nuclear plant would "create or maintain a situation inconsistent with the antitrust laws." Each involved an antitrust challenge to complex power pooling and supply arrangements, and was the full equivalent of § 2 monopolization cases tried under the principles established in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *Toledo Edison* yielded a 264-page decision based on an 87-day trial. Even so, these cases went fairly fast by § 2 standards. The utility had a key incentive to expedite matters: Under the statute, it could not operate a nuclear plant until all the antitrust issues had been settled.

18 Rational behavior is not a unitary concept for the government. The staff lawyers handling a particular case or investigation may sometimes be perfectly prepared to undertake a massive effort without making any real cost-benefit analysis, especially when they think they can win against some defendant which they do not like. The whole affair can take on a proprietary quality for the staff who are largely free from the costs (even if not the inconvenience) of prosecuting the particular case. Case selection and general deployment of staff resources obviously concern senior supervisors who are necessarily concerned about the drain which every case places on the agency's finite resources.

19 United States v. Phillipsburg Nat'l Bank & Trust Co., 306 F. Supp. 645 (D.N.J. 1969),

It may make sense for the Antitrust Division to try such a local bank merger case and carry it all the way to the Supreme Court because the *Phillipsburg* rule can be applied to similar mergers in a thousand other Phillipsburgs across the country. This is the only meaningful payoff for all of the government's efforts. But no such payoff would occur from a monopolization case in a Phillipsburg which seeks major divestiture: Any small-town bank monopolist elsewhere could just sit tight and hope that lightning would not strike a second time.

The government can achieve a stronger precedential effect when it successfully uses section 2 to attack dominant firm *conduct* likely to recur elsewhere in the economy. *Otter Tail*[20] offers an excellent example. In this case, a relatively small electric power company in Minnesota, with a regional transmission monopoly, used various tactics to deter various local communities from switching to municipally-owned power systems or to punish them for doing so. The battle raged around various small Minnesota communities of the "Lake Wobegon" variety,[21] places that would make Phillipsburg[22] seem positively metropolitan by contrast. Some of Otter Tail's tactics (including refusals to sell wholesale power or to "wheel" power across its system) were not uncommon in the electric utility industry.

Thus, both the basic substantive principles and the injunctive relief established by the Justice Department in *Otter Tail* came to be widely used in the electric power industry, both by the Department itself[23] and even more by private litigants.[24] *Otter Tail* principles have also applied to monopoly utilities in other fields.[25]

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rev'd, 399 U.S. 350 (1970) (Supreme Court's decision invalidated a merger between the two largest banks in a small three-bank community in northwestern New Jersey, closed by law to de novo entry from outside competitors; the two merging banks together had $25.3 million in deposits).

20 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *See* text accompanying notes 102-11 *infra*.

21 *See generally* G. KEILLOR, LAKE WOBEGON DAYS (1985); *Lonesome Whistle Blowing*, Time, November 4, 1985, at 68 (cover entitled "Let's Hear it for Lake Wobegon"). The principal battlefields included Elbow Lake, Minn. (population 1484 in 1970) and Hankinston, N.D. (population 1125 in 1970).

22 1970 population: 17,849. Phillipsburg was part of the Bethlehem-Allentown-Easton standard metropolitan area. *See Phillipsburg*, 399 U.S. at 354-55.

23 *See* note 17 *supra* (discussing use of *Otter Tail* principles in the nuclear licensing context).

24 *See, e.g.*, City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in part, rev'd in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). *But cf.* Town of Messena v. Niagara Mohawk Power Corp., 1980-2 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y. 1980) (no § 2 violation when monopoly power company refused to "wheel" power at unreasonable terms proposed by town).

25 *See* MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), and cases discussed in Baker & Baker, *Antitrust and Communications Deregulation*, 28 ANTITRUST BULL. 1, 21-27 (1983).

II. The Problem of Vague Rules

The deterence-by-precedents issue cuts much more deeply than just the "structural relief versus conduct relief" dichotomy. It goes to the basic question of whether government section 2 enforcement provides a coherent and economically-rational legal message for a dominant firm to use in planning its conduct. The fairest answer is "sometimes yes, sometimes no."

The confusion is compounded by the fact that antitrust law and policy reflect two broad but distinct themes. One is a *populist* concern about entrepreneurial independence and equality—a concern about the danger of the large and powerful squeezing out the small and worthy. The other is a concern about *economic efficiency*, or, as the Supreme Court said in 1975, "competition based on efficiency."[26] Cost-cutting and innovation are at the heart of this interest.

The populist strain was the stronger one historically—and was particularly strong among the judges who decided key government section 2 cases (including Judges Hand and Wyzanski and Justice Douglas). These jurists tended to assume that a monopoly was per se evil and that, therefore, the crucial question was whether the defendant was an "innocent worthy" which had acquired its place by skill or luck. The "competition based on efficiency" approach has been ascendent since the early 1970s and it is now clearly the dominant view. This analysis encourages vigorous competition by every firm—large and small—and will generally insist on a more rigorous showing that a successful monopolist's actions were anticompetitive in intent or effect.[27] Because contemporary judges and prosecutors are likely to be more tolerant toward aggressive monopolists than the classic government section 2 cases would imply, these famous landmarks do complicate life today. This is not the government's fault; it is just part of the net reckoning of government section 2 enforcement.

The Justice Department's efforts in the *Grinnell* case[28] did at least give rise to the hornbook definition of single firm monopolization. Justice Douglas, writing for the Supreme Court in 1966, stated:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic

26 Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621 (1975).

27 *See* note 49 *infra*.

28 United States v. Grinnell Corp., 384 U.S. 563 (1966).

accident.[29]

Both elements of the test are difficult to apply and courts have applied them unevenly in practice.

The first element in the offense—possession of monopoly power—is "the power to control prices or exclude competition."[30] The existence of such power is usually proved by showing that the defendant possesses the "predominant share" of what is likely to be the narrowest market which the plaintiff can establish.[31] *Calculating* market shares is of course easy; *defining* "the relevant market" has not been, and massive market definition battles have plagued section 2 cases. There has also been much speculation as to what "minimum market share" suffices,[32] but in fact the defendants' market shares have been high in all the main monopolization cases which the government has brought and won since *Alcoa*.[33]

The second element of the offense—willful acquisition or maintenance of monopoly power—is much, much harder to master conceptually and to prove in fact. In 1970, a distinguished commentator suggested that "the offense [of monopolization] lies in conduct which reveals that the firm likes to have and means to keep its power."[34] Yet, this is too narrow a rule in today's terms, since we would not wish to punish the firm that "means to keep its power" by being *more efficient* than anyone else in the market. In any event, drawing the actual line between conduct which is "honestly industrial" on one hand, and that which is "exclusionary" or "willful" on the other, falls somewhere in the spectrum between "hard" and "impossible"—and always runs the risk of penalizing success for its own sake.

The great landmarks established by the Justice Department are not particularly helpful in providing precise guidance as to what is acceptable conduct for the dominant firm. These cases tend to be either ambiguous or obvious in their teaching. In *Alcoa* itself, the defendant was found to have prevented others from entering the market by continually expanding capacity in anticipation of in-

29 *Id.* at 570-71.

30 *DuPont-Cellophane*, 351 U.S. at 391.

31 *Grinnell*, 384 U.S. at 571.

32 In *Alcoa*, Judge Hand held that although over 90% of the relevant market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

33 The share was 87% in *Grinnell*; 75-85% in United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 339 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); and 68-80% in American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946). It may have been 100% (of the regional transmission market) in *Otter Tail*.

34 *See* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 445 (2d ed. 1970).

creased demand.[35] Judge Hand specifically declined to "interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition" because to do so would be to "emasculate the Act."[36] In *Griffith*[37] and *Schine Theatres*,[38] the defendants used the combined purchasing power of a whole theatre circuit, covering both "monopoly" and "open" towns to obtain preferential contract terms not available to their competitors in "open" towns. In *American Tobacco*,[39] the defendants purchased cheaper grades of tobacco not suitable for their own cigarettes and at trial were unable to negate the government's suggested inference that these purchases were made to raise costs for competing manufacturers of cheaper cigarettes. In *United Shoe Machinery*,[40] the defendant refused to make its larger, more complex equipment available except on a lease. In *Grinnell*,[41] the defendant achieved its position by acquiring companies that had previously entered into a series of market and product division agreements. In *Otter Tail*,[42] as mentioned above,[43] the defendant refused to supply bulk wholesale power or transmission service to unintegrated local distribution systems with which the defendant "competed" at retail.

The *Alcoa* case in fact presents a potentially perverse message. Alcoa was found liable because it had aggressively promoted the use of aluminum, a relatively new metal on which it had early patents, by maintaining low profit margins and continuously expanding capacity.[44] What Judge Hand found was that Alcoa was not "the passive beneficiary of a monopoly" (of 90% of the market) and that it therefore did not fall "within the exception established in favor of those who do not seek, but cannot avoid, the control of the market."[45] The distinguished (but populist) jurist recognized that Alcoa had "stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked."[46] For this Alcoa was found liable. Yet, in layman's terms, Alcoa seemed to have done what we ask of a competitor in a com-

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35 148 F.2d at 430.

36 *Id.* at 431.

37 United States v. Griffith, 334 U.S. 100 (1948).

38 Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

39 American Tobacco Co. v. United States, 328 U.S. 781 (1946).

40 United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

41 United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd* (except as to relief), 384 U.S. 563 (1966).

42 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

43 *See* text accompanying notes 20-25 *supra*.

44 148 F.2d at 431-32.

45 *Id.* at 430-31.

46 *Id.* at 430.

petitive market—keep prices and profits down, stimulate demand, and be there ready to meet that demand on reasonable terms.

Alcoa becomes even more troubling intellectually when contrasted with the Justice Department's *DuPont-Cellophane* case[47] against DuPont a decade later. There the government challenged DuPont's alleged monopoly position in cellophane and moisture-proof cellophane—products in which DuPont had obtained important early patent rights and clearly continued to dominate. DuPont priced its product rather high, earning very large returns (especially as compared with Alcoa's); and, by its high prices, DuPont enhanced demand for less perfect substitutes for many cellophane uses.[48]

In the end, DuPont persuaded the Supreme Court that the relevant market was not "cellophane," in which it had such a high market percentage, but "flexible packaging materials," where its market share was less than 25%. The net result was that Alcoa was punished for low prices, low profits, and expansiveness, while DuPont escaped liability though it had monopolisticly priced its premium product.

Taken together, *Alcoa* and *DuPont-Cellophane* seem to counsel a dominant firm to keep its prices up, not to be too vigorous or expansive, and to make room for less desirable substitutes and less efficient competitors. Such a message has to be considered both perverse and wrong.

The net result is that the Justice Department has produced fairly little law which seriously helps leading firms by providing guidance on permissible conduct under section 2. Moreover, the government as litigant freely uses *Alcoa* in briefs and oral arguments (as any vigorous litigant would) and thereby has helped to perpetrate the confusion. Thus, under section 2, we really need to look instead to a modern line of decisions by several courts of appeals in private cases—mostly involving IBM and AT&T—which have sought to refine out the vagueness of the *Alcoa* standard and provide some meaningful guidance to dominant businesses.[49]

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47 United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377 (1956) (*DuPont-Cellophane*).

48 *See* Stocking & Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29 (1955).

49 *See* ANTITRUST LAW DEVELOPMENTS (SECOND) 121-30 (1983). The treatise discusses cases such as MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (10th Cir. 1981); Northeastern Tel. Co. v. AT&T Co., 651 F.2d 76 (2d Cir. 1981); California Computer Prod., Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 430 U.S. 1093 (1980); Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). *See also* Baker, "*Berkey, CalComp Cases Support Innova-*

III. The Justice Department's Modern Structural Relief Cases

During the past quarter century, the Antitrust Division has brought and litigated three significant section 2 cases seeking substantial structural relief. *United States v. Grinnell Corp.*[50] was filed in 1961, won by the government in the district court in 1964, and affirmed by the Supreme Court in 1966. *United States v. IBM Corp.*[51] was filed in 1969, went to trial in 1975, and was abandoned by the government in 1982. *United States v. AT&T Co.*[52] was filed in 1974, went to trial in early 1980, and was settled with AT&T's substantial divestiture in 1982. Each case proved to be very different from the others and each case influenced how the others were handled by the government.

A. United States v. Grinnell Corp. *(1961-1966)*[53]

Grinnell was the last of the "old order." By chance, it was tried by the same energetic district judge (Charles Wyzanski) who had, a decade earlier, tried the government's last major section 2 win, *United States v. United Shoe Machinery Corp.*;[54] and it was affirmed on appeal by Justice Douglas, a solid and consistent champion of populist antitrust rules. For both, it was "an easy case."

Judge Wyzanski started his analysis in *Grinnell* from two related premises: First, section 2 litigation was potentially endless; second, monopoly is presumptively evil. This led Judge Wyzanski, the Justice Department, and, ultimately, the Supreme Court to the same conclusion: it is sufficient for the government to prove that the defendants (1) controlled a very high share of a plausible market, and (2) had engaged in enough "bad acts" to bar any inference that "their proportion of the market is a mere tribute to their perfect performance."[55] Having done this, the government was then presumptively entitled to broad structural relief because monopoly was bad and breaking up anything but a perfectly innocent monopoly was therefore good. This perspective is relevant, not only because it won for the government in *Grinnell*, but also because it fundamentally influenced the Justice Department's subsequent prosecution against IBM.[56]

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tion by Dominant Enterprise," Nat'l L. J., Sept. 9, 1979, at 22 (discussing especially *Berkey Photo, Inc.* and *California Computer Products*).

50 384 U.S. 563 (1966).

51 Civ. Act. No. 69-Civ.-200 (S.D.N.Y. 1969-82).

52 524 F. Supp. 1336 (D.D.C. 1981).

53 236 F. Supp. 244 (D.R.I. 1964), *aff'd* (except as to relief), 384 U.S. 563 (1966).

54 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). *Grinnell* was filed in Rhode Island but the district judges in Rhode Island were all disqualified and Judge Wyzanski was assigned by the First Circuit to handle the case.

55 236 F. Supp. at 255.

56 *See* Part III, Section A *infra*.

In *Grinnell*, the facts were not too complicated and Judge Wyzanski worked hard to make sure that the trial did not become too complicated. Indeed, the case took only three years and seven months from complaint to final judgment in the district court.[57] The defendant, Grinnell, which was a manufacturer of sprinkler systems and other protection equipment, had acquired three major competitors in the fire, burglary, and water flow alarm businesses—companies which provided, among other things, service from central stations in particular cities. For many years prior to their acquisition by Grinnell, the acquired companies had engaged in a series of geographic and product market allocation agreements—clear per se violations of section 1 of the Sherman Act, but violations on which the statute of limitations had long since run. This history, plus a series of mergers (including Grinnell's acquisition of the three competing companies), were clearly enough to establish "intent" or "deliberateness" so far as Judge Wyzanski was concerned.[58]

The definition of the market which Grinnell was supposed to have monopolized was much more hotly contested. The Antitrust Division alleged, and the district court found, that there was a *national* market for a product called "accredited central station pro-

57 The expeditious trial process was described by Judge Wyzanski as follows:

> Complaint, seeking relief under § 4 of the Sherman Act [26 Stat. 209, 15 U.S.C. § 4], was filed April 13, 1961. Extensive pre-trial discovery and frequent pre-trial conferences with the Court, and, above all, the co-operation of informed, industrious, and experienced lawyers, who jointly took 128 depositions (totalling over 8,000 pages), to a large extent disclosed to each other proposed exhibits, entered into 5 stipulations, (totalling 58 pages), and exchanged careful, thorough, pre-trial briefs (in excess of 400 pages), enabled the parties at the outset of the trial to lay before the Court 1181 exhibits comprising approximately 15,000 pages. The preliminary procedural and substantive steps *reduced the taking of testimony in open Court to six days, from June 15, 1964 to June 24, 1964*. The Court, at the conclusion of the testimony, required each party to use the summer recess to limit to 40 pages the principal portion of its brief, with a right to annex appendices of unlimited length. Oral arguments upon those briefs and replies thereto took place on October 9, 1964.

236 F. Supp. at 246-47 (emphasis added). The district court's decision was handed down on November 27, 1964. The oral argument in the Supreme Court was on March 28-29, 1966, and the case was decided on June 13, 1966.

58 Judge Wyzanski in fact went further, suggesting that, once the government had shown the defendant had a monopoly market share, the burden should be placed on the defendant to show this monopoly position had been thrust on him by his own skill, foresight, and industry. 236 F. Supp. at 248 (citing United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)). This was, Judge Wyzanski added, likely to be "the highly exceptional case, a *rara avis* more often found in academic groves than in the thickets of business." *Id.* Even at the height of the Warren Court era, the Supreme Court declined to reach this issue. 384 U.S. at 576 n.7. The Court simply indicated that "the record clearly shows that this monopoly power was consciously acquired" and hence Judge Wyzanski's proposition was not necessary to decide the case. *Id.* Today's Supreme Court would be highly unlikely to support Judge Wyzanski's proposition, even if someone urged it to do so.

tection service"—a market in which Grinnell's subsidiaries conveniently had eighty-seven percent[59] The market (the existence of which was affirmed by a divided Supreme Court) was almost certainly fictitious. First, it was not a national market but a series of fairly small regional or metropolitan markets—many of which must have been natural monopolies.[60] Second, the cross-elasticities between "accredited central station protection service" and other forms of protection service seemed fairly strong, even on the record developed in the case.[61] Justice Fortas' dramatic dissent characterized the whole exercise as "a studied failure to assess the effect of defendants' position and practices in the light of the competition which exists"[62] and lambasted the majority for approving "this strange red-haired, bearded, one-eyed man-with-a-limp classification."[63]

The district court had ordered some divestiture and the Supreme Court ordered more, particularly emphasizing the importance of divestiture in markets which were large enough to support more than one central service protection operation.[64]

B. United States v. IBM Corp. *(1969-1982)*[65]

Two and a half years after its Supreme Court victory in *Grinnell*, the Antitrust Division launched its next major section 2 war. The government's complaint, filed three days before the end of the Johnson Administration in January 1969, charged IBM with monopolizing the market for "general purpose digital computers" by pursuing a variety of aggressive tactics.[66] These included: (1) bundling hardware and software together, (2) introducing so-called "fighting machines," with low prices and profits, aimed at "seg-

59 236 F. Supp. at 254.

60 A natural monopoly is simply a market in which production costs continue to fall over all years of potential demand. Such markets are normally characterized by heavy capital investment and large scale economies.

61 Thus, Judge Wyzanski found:

> Defendant alarm companies do not have unfeddered power to control the price of their services. Even where they have no competition from other CSPS companies, they have not always been able to receive the standard [rates] they have set for themselves . . . or annual service charges. This is due to the fringe competition of other alarm or watchmen services.

236 F. Supp. at 254.

62 384 U.S. at 589 (Fortas, J., dissenting).

63 *Id.* at 591.

64 Judge Wyzanski had entered a variety of other injunctions—including a novel one barring any of the defendants from employing Grinnell's chief executive officer. 236 F. Supp. at 259-60. The Justice Department did not resist the defendants' appeal on the latter point and the Supreme Court dropped it as "unduly harsh and quite unnecessary on this record." 384 U.S. at 579.

65 Civ. Act. No. 69-Civ.-200 (filed January 17, 1969).

66 Complaint ¶¶ 20-21.

ments of the market where competitors had or appeared likely to have unusual competitive success," (3) announcing production schedules on so-called "phantom machines" to delay prospective customers from signing up with competitors, and (4) "granting exceptional discriminating allowances in favor of universities and other educational institutions."[67] Thus, the government charged that IBM "pursued a manufacturing and marketing policy that has prevented competing manufacturers . . . from having an adequate opportunity *effectively* to compete for business in the general purpose digital computer market."[68]

The government's *IBM* case was "better" than *Grinnell* in that the core product market was reasonably plausible (even if not incontestable) *based on the technology of 1969*; and IBM's share of the "market" was clearly over 65%.[69] Unfortunately for the government, its evidence on exclusionary conduct was more ambiguous, or at least more complex, than was the case in *Grinnell*; the market context was dynamic and constantly changing; and district judge David Edelstein was no Charles Wyzanski.

In the end, the *IBM* case proved all too much like World War I.[70] The Antitrust Division had done a very extensive pre-complaint investigation and no doubt expected that it would win this one within a reasonable time period. Just as the Franco-Prussian War proved a poor predictor of what war would be like on the Western Front, so did *Grinnell* prove a poor predictor of what would follow in the United States Courthouse on Foley Square in New York. The *IBM* battle raged on an unprecedented scale—with legions of lawyers, economists, and support staff on each side—and was characterized by a level of acrimony and arrogance which was at least new to my experience. Everything was disputed; virtually nothing was stipulated.

After six years of discovery and skirmishing, the trial actually began in May, 1975. Judge Wyzanski had disposed of *Grinnell* after six days of testimony. *IBM*, by contrast, would still be occupying the courtroom after *six years*.

The delay was fatal to the Antitrust Division. By even the mid-1970s, it was clear that the case was a relic. It was a hard fought battle over the market and marketing practices of the 1960s, viewed against the background of the very different computer industry of the 1970s (with powerful small machines displacing big mainframes

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67 *Id.* at ¶ 20.

68 *Id.* (emphasis added).

69 Transamerica Computer Corp. v. IBM Corp., 1979-2 Trade Cas. (CCH) ¶ 62,989 (1979).

70 *See* B. TUCHMAN, THE GUNS OF AUGUST chapter 3 (1962) (describing both sides' overly optimistic expectations at the outset of the war).

in many applications), and looking to relief in the late 1980s or even 1990s. The only practical relief the Antitrust Division staff could even contemplate in such a changing and unpredictable world was breaking up IBM—and that was their unflinching goal as Nixon gave way to Ford, who lost to Carter, who in turn lost to Reagan. The pages of transcripts and exhibits piled up, but nobody seemed closer to victory. The case simply became unwieldy beyond anyone's worst expectations of antitrust nightmare. Even a philosopher-king would have had immense difficulty in dealing with the massive tangle of evidence that had been assembled before Judge Edelstein for almost seven years.

Ultimately, of course, in 1981-1982, Assistant Attorney General William Baxter devoted the intellect and effort which the government needed to employ in order to come to grips with the case. He then quite rightly disposed of it by dismissal. Cost and delay clearly figured in Professor Baxter's decision, as did serious doubts about both the merits of the government's case and the relief requested. Mr. Baxter clearly had a very different approach to section 2 relief than that which was common when the case was brought in the 1960s. Baxter's view was that injunctive relief (or divestiture) had to be tailored with reasonable precision to the defendant's improper activities. By good luck, he was able to announce his historic settlement of the *AT&T* case on the same day and hence was able to avoid what would otherwise have been a deafening, albeit unwarranted, chorus of political abuse about abandoning *IBM*.

Baxter's memorandum to the Attorney General,[71] explaining the IBM dismissal, rested essentially on five points: (1) *Continued Delay*. "[U]nless the government loses the case at some earlier point, it will be many years before the litigation ends."[72] (2) *Dated and Random Evidence*. "It may well be that IBM is a monopolist and controls some segment of the computer market . . . . The Government's case does not allege that IBM achieved that position illegally. Rather, the complaint alleges that IBM maintained a monopoly position lawfully achieved through a series of illegal actions (bad acts) against its competitors . . . [W]hile several acts of these [bad acts] have occurred in the manner and with the intent alleged, the most persuasive episodes concern computer systems that are not included in the market IBM is alleged to have monopolized."[73] (3) *Appeal Prospects*. "[W]hatever the chances that the Gov-

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71 Memorandum from Abbott B. Lipsky, Jr. "at the direction of Assistant Attorney General Baxter in his absence" to the Attorney General, dated January 6, 1982, and released by the Department with a press release on January 8, 1982. Copy on file with the Notre Dame Law Review.

72 *Id.* at 2.

73 *Id.* at 3.

ernment will prevail at trial, the likelihood of success on appeal is small"[74] given the Second Circuit's recent decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*[75] (4) *Injunctive Relief.* "[T]here is no assurance that appropriate relief could be obtained. . . . The conduct episodes that appear most promising as a potential basis for liability are time-bound and highly specific to the immediate context in which they occurred. It is impossible to fashion injunctions to prevent similar future violations that are neither so specific that they would be meaningless outside those now-extinct circumstances, nor so general that they would simply echo the language of the antitrust laws themselves . . . ."[76] (5) *Structural Relief.* "Structural relief in this case would be totally disproportionate to the nature and scope of the violations that we might be able to prove. Further, despite years of effort, no structural relief proposal has been identified that would inject new competition into the industry while retaining the efficiencies necessary to create viable successor companies."[77]

Mr. Baxter's decision was clearly the right one in 1982.[78] The *IBM* case was forged in the *Alcoa* mold. IBM was a dominant competitor, with a superb sales organization, that had used a variety of aggressive selling tactics to make life more difficult for its competitors in a vital and growing industry. For the Antitrust Division, the *IBM* case might still have made some sense *if* it had been filed a couple of years earlier and decided in the early 1970s—before the computer market and the law had changed so drastically.[79]

By the early 1980s, relief in *IBM* was an insurmountable problem. "Equity does nothing in vain," says the old maxim. Nobody could imagine any relief, short of divestiture, that was in any way connected to whatever IBM had done in the 1960s, and by 1982 this relief was simply too drastic on the proven facts to be acceptable in most political and economic circles.

C. United States v. AT&T Co. *(1974-1982)*[80]

AT&T was a case very different from *IBM* and was tried with a

74 *Id.*

75 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). *See* note 49 *supra* and accompanying text.

76 Memorandum, *supra* note 71, at 4.

77 *Id.* at 6.

78 The fact that Mr. Baxter's Democratic predecessor, Sanford Litvack, apparently reached more or less the same conclusion over a year earlier lends additional support to this conclusion.

79 Even then, the relief questions would have been difficult, but there was a greater willingness to accept divestiture as a more or less automatic remedy for over-aggressive monopolists.

80 Civ. Act. No. 74-1648 (D.D.C.). The government's complaint, filed November 20, 1974, is substantially reprinted in T. MORGAN, ECONOMIC REGULATION OF BUSINESS 818-25 (1976).

very different sense of dispatch. *AT&T* turned much more centrally on the structure of its industry. The ultimate question was whether telecommunications was going to be a vast end-to-end monopoly dominated by a single company—AT&T; or, whether long-distance services and equipment manufacturing and supply could be broken off or at least opened up to competition, while leaving the natural monopoly parts of the business subject to full utility regulation.

The *AT&T* case should be analyzed as an integral part (and perhaps the culmination) of a decade-long campaign by the Federal Communications Commission (FCC) and the Antitrust Division to open key parts of the communications business to competition.[81] By the mid-1960s, the telephone business had long since become a classic monopoly. Virtually all interstate voice communication was provided by AT&T's Long Lines Division, while AT&T's local operating (Bell) companies served more than 80% of the country's telephones. Meanwhile, nearly all of the equipment used by Long Lines and the Bell operating companies came from AT&T's monopoly supplier, Western Electric, which was not subject to direct regulation of its costs. Customers also had to lease all telephone equipment from their local telephone company.

By the late 1960s, everything had begun to change. The FCC began a process of piecemeal deregulation, with the active participation of the Antitrust Division in almost every important case. The first vital break came in 1968, when in its *Carterfone* decision,[82] the FCC struck down the telephone companies' historic "foreign attachment" tariffs and opened the door—at first just a crack—to customers procuring their own communications equipment on a competitive basis. A year later, the Commission opened the door to competition in long-distance communications by allowing a then unknown competitor (Microwave Communications, Inc.) to establish a microwave system between Chicago and St. Louis in direct competition with AT&T.[83] This was followed in the early 1970s with a series of decisions involving applications by microwave and satellite carriers that were authorized to compete across the country with AT&T in providing service between major metropolitan

81 I was deputy assistant attorney general, responsible for supervising the Antitrust Division's activities in the regulated sector at the time the *AT&T* case was filed. I discussed the case and its relationship to other Antitrust Division and FCC activities in a speech entitled "Competition, Antitrust Communications, and Change," given before the Federal Communications Bar Association in Washington on Jan. 17, 1975. Copy on file with the Notre Dame Law Review.

82 *In re* Carterfone Device, 13 F.C.C.2d 420, *recon*, 14 F.C.C.2d 571 (1968). The London Economist recently labeled this decision "the Magna Carta of the information revolution." *The Sound of Breaking Monopoly*, The Economist, August 22, 1981, at 15.

83 *In re* Applications of Microwave Communications, Inc., 18 F.C.C.2d 953 (1969).

centers.[84]

Of course, neither the FCC nor the Antitrust Division could come up with a competitive solution to the monopoly aspect of the telephone system—the local telephone operating company. The heavy investment in wires, poles, and local switches made a local telephone system a classic "natural monopoly"—an enterprise in which the economies of scale are so overwhelming that competition cannot work in a technical sense. The Antitrust Division was profoundly concerned that the FCC's pioneering work would be largely undone, that AT&T would be able to use its control of the local monopoly networks to stifle competition in telephone equipment and long-distance communications.[85] There was also a general concern that a local telephone monopoly had inadequate incentives to "shop around" seriously for alternative equipment sources to Western Electric.

These were the problems with which the Antitrust Division had to deal in its front-page antitrust case in November 1974. The government's complaint alleged that AT&T had monopolized two broad markets—"telecommunications service" and "telecommunications equipment"—by a variety of unfriendly devices.[86] These included (1) refusing to provide interconnection to local networks for long-distance and satellite carriers, (2) obstructing connection of customer-provided terminal equipment, (3) enforcing a lease-only policy on Bell System-provided terminal equipment, and (4) causing the Bell System "to purchase substantially all of its telecommunications equipment requirements from Western Electric."[87]

The government's prayer for relief focused particularly on Western Electric. It sought complete divestiture of Western from AT&T and further break-up of Western itself.[88] The prayer also sought "through divestiture . . . to separate *some or all* of the Long Lines Department of AT&T from *some or all* of the Bell Operating

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84 Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *aff'd sub nom.*, Washington Utils. and Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); Domestic Communications Satellite Facilities, 35 F.C.C.2d 844 (1972). In 1971, the Commission decided that a wide range of computer-communication services could be offered on an unregulated basis. *In re* Computer Use of Communications Facilities, 28 F.C.C.2d 267 (1971), *aff'd in part, rev'd in part sub nom.*, GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). In 1956, the FCC decided that data processing services would not be regulated under Title II of the Communications Act of 1934, and that communications carriers could offer data processing through separate segregated subsidiaries—a course not open to AT&T because of the consent— decree in United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶¶ 68, 246 (D.N.J. 1956).

85 The new microwave and satellite carriers needed to access their customers through the local monopoly network; the post-*Carterfone* equipment suppliers had to have access to the technical specifications of the local monopoly telephone companies.

86 Complaint ¶¶ 27-30.

87 *Id.* at ¶ 28.

88 Complaint, prayer ¶¶ 3, 4.

Companies."[89]

In *AT&T*, the Antitrust Division faced an initial burden of establishing that AT&T's conduct was not exempt from the antitrust laws by virtue of FCC regulation. In fact, the FCC generally supported the Division's assertion of antitrust jurisdiction and, with this help, the government was able to defeat preliminary jurisdictional motions.[90] The case then moved forward with reasonable dispatch, especially after it had been reassigned to Judge Harold Greene upon the death of the initial trial judge. The trial actually began in January of 1981, the government's case in chief was complete by July, and by mid-September the trial judge had ruled comprehensively against AT&T's motion for dismissal at the close of the government's case.[91] This careful opinion (spanning over fifty pages in the Federal Supplement) was obviously an important event and must have contributed to the settlement process. Basically, Judge Greene found that the government had proven its case on its main theories:

> The Court concludes that the evidence sustains the allegation that defendants have used their local exchange monopolies to foreclose competition in the terminal equipment market by refusing unreasonably to interconnect equipment not provided by the Bell System, or by unreasonably impeding such interconnection. . . .[92]
>
> . . . .
>
> The Court finds that, as of now, sufficient evidence has been adduced to dictate the conclusion that AT&T has monopolized the intercity services market by frustrating the efforts of other companies to compete with it in that market on a fair and reasonable basis.[93]
>
> . . . .
>
> The government has shown (and defendants concede) that AT&T and its subsidiaries now discriminate between Long

89 *Id.* at ¶ 5 (emphasis added). The government's assumption in 1974 was that AT&T would go on operating the local telephone companies, but that it would be forced to give up all or most of its Western Electric holdings and at least some of its Long Lines Department.

90 *See* Memorandum of FCC as amicus curiae in United States v. AT&T Co., *reprinted in* 62 F.C.C.2d 1102 (1977); and the district court's decision, 427 F. Supp. 57 (D.D.C. 1976). This decision was broadly consistent with decisions in other cases. *See* Baker & Baker, *supra* note 25, at 10-12.

91 United States v. AT&T Co., 524 F. Supp. 1336 (D.D.C. 1981). As Judge Greene described it in his opinion:

> [F]ollowing a period of intensive pretrial activity, trial was begun on January 15, 1981, and the first witness was called on March 4, 1981. The presentation of evidence on behalf of the government spanned a period of four months, and it included the examination of close to one hundred witnesses and the introduction of thousands of documents and additional thousands of stipulations.

Id. at 1342 (footnotes omitted).

92 *Id.* at 1352.

93 *Id.* at 1357.

> Lines and non-Bell carriers with regard to access to Bell System facilities. It has also shown this discrimination to be anticompetitive in its effect.[94]
>
> . . . .
>
> [T]he Court holds that on this record a showing has been made which, unless it is rebutted, would support the conclusion that defendants have engaged in anticompetitive conduct in their procurement practices, in violation of law.[95]

The government made its prima facie case by establishing that fundamental business patterns (not random evidentiary fragments) related to the structure of the defendant and had persisted over a long period of time. The government was no doubt helped by the massive, virtually public record that was available to it in connection with many FCC proceedings and by the fact that there was broad sympathy between the two agencies.[96]

The settlement which Assistant Attorney General Baxter and AT&T Chairman Charles Brown announced on January 8, 1982 was very responsive to both the Antitrust Division's original goals and what the government proved in its case in chief. The celebrated decree separated the natural monopoly local telephone companies from the newly competitive parts of the business—including equipment supply and long-distance transmission. The Justice Department and AT&T agreed that the Bell operating companies would be confined essentially to local monopoly service regulated by state utility commissions. This suited the Justice Department's goals because it eliminated the Bell companies' incentive to favor one long-distance or equipment supplier over competitors. It suited AT&T because it did not want future offspring (the Bell operating companies) to compete with AT&T in providing long-distance service or terminal equipment to customers. What is so interesting, and so contrary to the original assumptions of the Antitrust Division, is that AT&T opted for the "competitive" side of the business and was prepared to divest itself of the much larger local telephone operations.

The decree was ultimately entered in the so-called Modification of Final Judgment (MFJ), and its entry was summarily affirmed by the Supreme Court.[97] The MFJ created a process of ongoing and continuing surveillance over AT&T and the Bell operating

94 *Id.* at 1361.

95 *Id.* at 1372.

96 The Chief of the FCC's Common Carrier Bureau during the years 1979-1981 was the same lawyer, Philip L. Verveer, who had initially been the chief trial lawyer for the Antitrust Division in the AT&T investigation (1974-1977).

97 Modification of Final Judgment, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. 1982), *entry aff'd without opinion*, Illinois v. United States, 460 U.S. 1001 (1983). Chief Justice Burger, Justice Rehnquist, and Justice White dissented from the decision to affirm without a hearing. *See* text accompanying note 11 *supra*.

companies in the district court. Thus, Judge Greene has had to make important decisions on exactly what lines of business will be permitted to be Bell operating companies and whether they will be authorized to make certain acquisitions and carry on other activities. The net result places the court in a sort of dual regulatory jurisdiction with the FCC over the companies.[98]

The resolution of the *AT&T* case was a major triumph for the Antitrust Division staff who had tried it energetically over its six year life; and, perhaps even more, it was a personal triumph for Assistant Attorney General William Baxter who had fought hard to avoid an internal administration effort to have the case dismissed in mid-summer 1981. His cool analytic approach helped fashion a decree which was, unlike so many other government decrees, clear and analytic. It accomplished precisely what the government had set out to accomplish, and indeed accomplished it to an even greater degree than we who filed the case in 1974 could have reasonably hoped.

Whether the Antitrust Division's success in *AT&T* turns out to be a political success is now very much in the hands of the state and federal regulators who are being forced—painfully—to squeeze out most of the traditional cross subsidies in the telephone business in order to protect (1) the local operating companies from bypass of their system, and (2) AT&T from having to bear disproportionately heavy burdens in the new competitive world. This process is making certain long-hidden costs much more explicit, particularly those costs associated with local telephone service, and this in turn is producing a substantial political backlash from the public at large. Whether that backlash will settle down is still a very open question in late 1986.

IV. The Justice Department's Modern "Bad Conduct" Cases Under Section 2

Section 2 "bad conduct" cases tend to be substantially smaller and less notorious than government structural monopolization cases. Moreover, a "bad conduct" case can have a more positive effect if it results in a workable rule regulating the conduct of domi-

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98 Senator Dole, apparently at the behest of the Reagan Administration, introduced legislation (S. 2565) in mid-1986 to change this situation. The Dole bill would have transferred responsibility for administering the MFJ from the district court to the FCC. It was supported by not only the Administration but the Bell operating companies, which believe that Judge Greene has been too restrictive in authorizing them to go into "competitive" services. It was opposed by AT&T, MCI, and others who fear that they will be disadvantaged if the Bell operating companies are permitted to mix "monopoly" and "competitive" services. I anticipate that some version of the Dole bill will be reintroduced in early 1987. Its chances of passage are far from certain in the new Congress.

nant, or near dominant, enterprises in a particular industry (or the economy generally). Basically, the "bad conduct" cases fall into two varieties. The first might be called "abuse of dominant position" by a natural (or very efficient) monopolist. The basic relief sought in such a case is an injunction specifically designed to curb the particular conduct. *Otter Tail*[99] (brought by the Justice Department in 1968) illustrates well the principles involved. The second type might be called "attempted cartelization" by a market leader in a competitive market. The Justice Department's *Empire Gas*[100] and *American Airlines*[101] cases (brought in 1972 and 1982, respectively) illustrate this category.

A. *Abuse of Dominate Position by a Natural Monopolist:* Otter Tail Power Co. v. United States[102]

Otter Tail was a regional power company which provided retail electric service to some 465 mostly-small towns in Minnesota, North Dakota, and South Dakota. It had an effective monopoly over transmission electric power in the region and was also by far the largest source of generated electric power in the region. The essence of the government's complaint was that Otter Tail sought to use its transmission monopoly and generation dominance to prevent local communities from switching from Otter Tail service to municipal distribution upon expiration of existing franchises.

In furtherance of this scheme, Otter Tail was found to have refused to sell wholesale power to several towns which had switched from Otter Tail franchises and to have refused to "wheel" power across its transmission system from other sources to such towns.[103] It also, according to the district court, engaged in baseless litigation designed to deter such franchise transfers. Based on a record accumulated during a month-long trial, the district court in Minnesota found that Otter Tail violated the antitrust laws by these activities, and it entered injunctions against Otter Tail's refusals to sell wholesale power and to "wheel" power across its system.[104]

Otter Tail stoutly maintained that it was exempt from the antitrust laws by virtue of a Federal Power Commission regulation (a position that the Commission supported in its amicus curiae brief in

99 410 U.S. 366 (1973).

100 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

101 United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 106 S. Ct. 420 (1985).

102 410 U.S. 366 (1973).

103 331 F. Supp. 54 (D. Minn. 1971).

104 *Id.* at 61, 65.

the Supreme Court[105]), but a closely divided Supreme Court held that there was no such implied immunity.[106] The Supreme Court sustained the findings on liability, except that it remanded the "sham litigation" finding for further consideration in light of the then recent *California Motor Transport Co. v. Trucking Unlimited*[107] decision. The government ultimately prevailed on the "sham litigation" point on remand.

An interesting aspect of the *Otter Tail* litigation was that the courts tried to make the relief dovetail with the jurisdiction of the Federal Power Commission. In other words, while *Otter Tail* established that a dominant integrated utility could not refuse to deal or to "wheel" with a local municipal system, the courts tried to avoid having to decide the exact terms on which power could be sold or wheeling services offered. Rather, the courts left this issue to the Federal Power Commission, perhaps on a theory which is fairly close to "primary jurisdiction." In other words, the court administering the *Otter Tail* decree might have the ultimate right to set these terms, but it would not do so except in the most extreme situations. In fact, it appears that such an extreme situation never came to pass. Instead, *Otter Tail* has become an important part of the antitrust jurisprudence governing the electric power industry and, more broadly, other regulated natural monopolies or near monopolies.[108]

Otter Tail directed everyone's attention to specific practices in the electric power industry. It was followed by a good deal of private litigation against particular industry practices[109] as well as antitrust proceedings before the Nuclear Regulatory Commission for nuclear generating licenses. More broadly, *Otter Tail* reinforced the existing law that a legitimate monopolist cannot refuse to deal with an actual or potential competitor in order to maintain its position.[110] Nor can a firm which controls access to an essential facility unreasonably deny others access to it.[111] These two rules seem to be but two sides of the same coin.

105 Amicus curiae brief of the Federal Power Commission, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

106 410 U.S. at 375. The vote was 4 to 3. Justices Blackmun and Powell took no part in the consideration or decision of the case.

107 404 U.S. 508 (1972).

108 *See* notes 17, 23-25 *supra* and accompanying text.

109 *See* ANTITRUST DEVELOPMENTS (Second) 132 n.145 (1983) (collecting cases).

110 *See, e.g.*, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

111 *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

B. *Attempted Cartelization by a Leading Firm*: United States v. Empire Gas Corp.[112] *and* United States v. American Airlines, Inc.[113]

Each of these cases involved an attempt by a leading firm in a market to coerce or persuade a significant competitor to raise its prices. In each instance, there was no explicit agreement between the defendant and any other competitor. Therefore, the government proceeded on an "attempted monopolization" theory. In each case, the district court threw out the government's complaint.[114] In *American Airlines*, the government succeeded in getting its complaint reinstated.[115] In *Empire Gas*, the government persuaded the court of appeals to accept its theory, but failed for lack of proof of relevant market;[116] moreover, the government's attempt to obtain certiorari was denied.[117]

The *Empire Gas* record has a real "bucaneering" quality. It concerns competition for liquified petroleum (LP) gas sold in cylinders to customers in small Missouri towns and villages. The business was fairly localized and the sellers were mostly small enterprises which purchased LP gas at a local plant and then distributed it on a local basis. The defendant, Empire Gas, competed in a fairly broad range of towns and in fact had bulk LP gas plants in some twenty-four states. Its history was apparently one of rapid growth by acquisition and aggressive tactics.[118]

The government's case concerned the defendant's efforts to prevent small local competitors from reducing prices or soliciting Empire Gas customers. Thus, witnesses described Empire Gas as having said it was "too large to compete with" and that it "could put [a particular competitor] out of business."[119] In one instance, Empire's president called a competitor and told him that he should raise his prices. When the latter refused, the Empire president said he was going to put the competitor out of business. In another instance, an Empire Gas district manager and plant manager called on a local competitor and said the price for LP gas in the area was going to be "either 9.5 or 15.9" cents per unit.[120] Since the competitor could not survive at 9.5 cents (which was a little below what it had been charging), he eventually raised his price to 15.9 cents.

112 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).
113 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 106 S. Ct. 420 (1985).
114 *Empire Gas*, 393 F. Supp. 903, 915 (W.D. Mo. 1975); *American Airlines*, 570 F. Supp. 654, 663 (N.D. Tex. 1983).
115 743 F.2d at 1122.
116 537 F.2d at 308.
117 429 U.S. 1122 (1977).
118 *See* 393 F. Supp. at 905-08.
119 537 F.2d at 299-300.
120 *Id.* at 300.

Still another Empire manager "demanded that [a local competitor] come up two cents or Empire was going to play 'burnout' with him."[121] When the latter declined to do so, Empire established a new subsidiary in the small competitor's town and solicited customers at half the prevailing price level.[122]

Surprisingly, the district court found that the government had "failed to prove that 'Empire entered into and attempted to enter into price fixing agreements with LP gas distributors to increase LP gas prices,' as alleged in . . . plaintiff's amended complaint."[123] The Court of Appeals for the Eighth Circuit reversed:

> In the majority of these instances Empire's drastic price cuts followed express threats by its officers and employees that such price cuts would result unless there was cooperation with defendant's plans [on price increases and non-solicitation of customers]. In the face of these express declarations of intent, related by so many of the government's witnesses, we cannot accept the district court's conclusion that Empire's price cutting was done for innocent competitive reasons.[124]

Unfortunately for the government, it then proceeded to lose the case on the ground that it had not established "dangerous probability of success" in the context of a relevant geographical market.[125] Apparently the government was just not prepared to prove particular local geographic markets in the conventional way used in merger cases. It relied very heavily on an internal Empire Gas report which mentioned thirteen different geographic areas, some of which were contiguous to each other and some of which were not. The Antitrust Division finally suggested two areas (Lebanon and Wheaton) which the court of appeals found "considerably smaller in area than a circle with a 20-mile radius"[126]—the distance which testimony had established it was efficient to distribute LP gas.[127] It conducted an informal survey which showed that Empire Gas had almost half the market shares in these two communities, but the court of appeals described its "reliability" as extremely doubtful.[128]

When it sought certiorari in the Supreme Court, the Justice Department argued that section 2 did not require this kind of precise market definition for the clearly reprehensible conduct shown

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121 *Id.*

122 *Id.* at 301.

123 393 F. Supp. at 907.

124 537 F.2d at 301.

125 *Id.* at 306-07.

126 *Id.* at 304.

127 *Id.*

128 *Id.* at 304-05.

in *Empire Gas*.[129] The Solicitor General's petition distinguished between unequivocally anticompetitive acts and ambiguous acts which may be anticompetitive. It argued that when a defendant's conduct is not obviously anticompetitive—that is, when it might promote efficiency and competition under some circumstances, restrain competition under others, or be competitively neutral in others—it is necessary to carefully examine the effect on the market conditions in which it takes place.[130] On the other hand, where the defendant's conduct has no redeeming competitive virtue—that is, when the conduct never serves any purpose other than to control a competitor's prices or exclude competition—the government argued that the conduct itself creates a danger of monopolization and demonstrates the actor's intent to violate the law.[131] In such cases, the government continued, there was no need for courts to engage in refined analysis to determine how close the defendant actually was to obtaining the power to control prices or exclude competition.[132] Suffice it to say, the Supreme Court either did not buy the theory or did not accept it as a serious question. The Court's unwillingness to speak on the issue in 1977 (when it was probably more pro-antitrust than today) may prove to be one of the more significant moments in the history of section 2.

United States v. American Airlines, Inc.[133] is also a picturesque case, but a more narrowly-focused one. The Justice Department sought to establish the principle that, where a leading competitor in a market proposes a price fix (or other cartel activity) to another leading competitor in the market, the proposer should be held liable under section 2 on an attempt to monopolize theory. The whole case turned on a single telephone conversation between the presidents of American Airlines and Braniff Airways concerning pricing and competition on flights from Dallas-Forth Worth International Airport (DFW). American and Braniff each had its major hub at DFW. Together, their flights accounted for over 90% of the passengers on nonstop flights between DFW and eight major cities. Overall, "American and Braniff accounted for seventy-six percent of monthly emplanements at DFW."[134]

The celebrated telephone call of February 1982 was between Robert Crandall, president of American, and Howard Putnam, his counterpart at Braniff. Putnam recorded the telephone call and af-

129 Petition for certiorari in United States v. Empire Gas Corp., No. 76-726 (1976), at 6.

130 *Id.* at 12.

131 *Id.* at 13.

132 *Id.*

133 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 106 S. Ct. 420 (1985).

134 743 F.2d at 1116.

terwards gave the tape to the Justice Department. The telephone call, as excerpted by the court of appeals, went as follows:

> Crandall: I think it's dumb as hell for . . . sake, all right, to sit here and pound the * * * * out of each other and neither one of us making a * * dime.
> Putnam: Well—
> Crandall: I mean, you know . . . what the * * * * is the point of it?
> Putnam: Nobody asked American to serve Harlingen. Nobody asked American to serve Kansas City, and there were low fares in there, you know, before. So—
> Crandall: You better believe it, Howard. But, you, you, you know, the complex is here—ain't gonna change a . . . thing, all right. We can, we can both live here and there ain't no room for Delta. But there's, ah, no reason that I can see, all right, to put both companies out of business.
> Putnam: But if you're going to overlay every route of American's on top of over, on top of every route that Braniff has—I can't just sit here and allow you to bury us without giving our best effort.
> Crandall: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.
> Putnam: Do you have a suggestion for me?
> Crandall: Yes. I have a suggestion for you. Raise your . . . fares twenty percent. I'll raise mine the next morning.
> Putnam: Robert, we—
> Crandall: You'll make more money and I will too.
> Putnam: We can't talk about pricing.
> Crandall: Oh bull * * * *, Howard. We can talk about any . . . thing we want to talk about.[135]

Braniff never accepted Crandall's offer. The government's civil complaint sought injunctive relief, including an injunction which would bar American from employing Crandall for a period of twenty-four months.[136] The district judge dismissed the complaint.[137] The question posed was a narrow one: "[C]an an attempted joint monopolization claim be maintained without an allegation of an agreement or conspiracy between the potential monopolists?"[138] Judge Hill answered the question emphatically "no," based primarily on language in the *American Tobacco* decision.[139] Instead, the judge found that Crandall's language constituted "only a solicitation to raise prices," and that this was not sufficient to constitute an attempt.[140] The opinion also reviewed at

135 *Id.*
136 This echoes the relief that District Judge Wyzanski imposed in *Grinnell*, but which the Justice Department did not support in the Supreme Court. *See* note 64 *supra*.
137 United States v. American Airlines, Inc., 570 F. Supp. 654, 656 (1983).
138 *Id.* at 657.
139 *Id.*
140 *Id.* at 659.

great length a variety of ancient common law cases on the issue of whether solicitation and attempt could be charged to the same conduct.[141]

The court of appeals reversed. It said that the offense of attempted monopolization has two elements: (1) specific intent to accomplish the illegal result, and (2) a dangerous probability that the attempt to monopolize will be successful. When evaluating the element of dangerous probability of success, the court did not rely on hindsight but examined the probability of success at the time the acts occurred.[142] It stressed that "[w]e see Crandall's alleged conduct as uniquely unequivocal in its potential, given the alleged market conditions as being uniquely consequential."[143] It then reviewed the old common law cases on whether "an attempt required more than a mere solicitation" and concluded that "there was no clear consensus among the pre-1890 cases on the issue."[144]

The court stated that in enacting the Sherman Act, "Congress could not have supposed that a solicitation could never be an attempt."[145] The court was driven to this conclusion by its concern that under appellees' construction of the Act, an individual is given a strong incentive to propose the formation of cartels. "If the proposal is accepted, monopoly power is achieved; if the proposal is declined, no antitrust liability attaches. If section 2 liability attaches to conduct such as that alleged against Crandall, naked proposals for the formation of cartels are discouraged and competition is promoted."[146]

After the reversal, the parties settled the case in a consent decree which exhibited price information exchanges and required Crandall to keep detailed logs of conversations and telephone calls.[147] This was an important triumph for the government; with particularly attractive evidence, it was able to establish the proposition that solicitation of cartel activity by a dominant or near dominant firm violated section 2. This was a civil case, but a future prosecution of this type need not be. Given the reprehensible character of the conduct, the government would be entitled to proceed criminally in a future case with equally strong evidence.[148]

American Airlines established a large part of what the Justice Department sought unsuccessfully to establish in *Empire Gas*. The dif-

141 *See id.* at 660-63.
142 743 F.2d at 1118 (citations omitted).
143 *Id.* at 1119.
144 *Id.* at 1120.
145 *Id.* at 1121.
146 *Id.* at 1122 (footnote omitted).
147 1985-2 Trade Cas. (CCH) ¶ 66,866.
148 *See* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978).

ference between what the Fifth Circuit held in *American Airlines* and what the government sought in its *Empire Gas* certiorari petition concerns market power. Had the government prevailed in its *Empire Gas* argument that market power need not be established when the conduct was clearly reprehensible, the only issue in *American Airlines* would have been as to what had occurred. As it was, the government did have to show American's market dominance in service from the DFW airport. That apparently did not prove difficult.

I have always thought that proof of market power unnecessarily complicates an *Empire Gas-American Airlines* type of case. If the defendant solicits and/or pressures a reluctant competitor to raise prices or allocate customers and the competitor ultimately gave in, the defendant is guilty of a section 1 felony without any showing at all of market power or market effect. It hence seems odd to require market power when the solicitation and pressure is unambiguous but unsuccessful. I have always thought that the government's position in the *Empire Gas* petition was sound, provided that the "no proof of market power required" rule was limited to plainly reprehensible conduct. Obviously, it would have much potential for mischief. In any event, the issue is today a largely moot one, as *American Airlines* may give the government all it needs in the most serious attempted cartel cases.

V. The Future of Government Section 2 Enforcement

How much government section 2 enforcement can we expect in the future? The answer is uncertain. Two key factors cut in opposite directions. On one hand, the antitrust agencies are inevitably mired in the politics of a long-run budget impasse; they cannot reasonably anticipate having the level of resources which they enjoyed in the late 1970s. Section 2 structural cases tend to consume agency resources on a massive scale, and hence are less likely to be brought in a Gramm-Rudman world. Indeed, it is very hard even to imagine that the Antitrust Division would simultaneously pursue two cases on the IBM or AT&T scale in the late 1980s or the early 1990s.

On the other hand, the post-Reagan Administration *may* face some significant political pressures for section 2 structural cases. A basic purpose of section 2 is to undue a pattern of mergers and acquisitions, as can be seen in cases stretching from *Standard Oil* in 1911 to *Grinnell* in 1966. During the period from the *Brown Shoe*[149] decision in 1962 until the advent of the Reagan Administration in early 1981, the government agencies pursued a vigorous—some-

149 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

times too vigorous—antimerger policy, and significant horizontal mergers among direct competitors virtually disappeared.

Since 1981, we have seen a good many horizontal mergers—including large mergers of the type that not even the most bullish antitrust counsel of the 1970s would have dared to dream. These mergers have been justified—often quite correctly—on the ground that supply-side flexibility, foreign competition, and production efficiency should be given more weight. They should. Nevertheless, it is also virtually certain that, in at least a few industries, the current Administration's more permissive merger policy will prove to have been a visible blunder. For example, a merger approval premised on strong foreign competition may not have been a wise decision if the foreign competition is "snuffed out" later by political action (quotas, embargoes, etc.) or by very dramatic changes in exchange rates.

This is not to say that the present Administration is making persistent errors in merger enforcement (as some of its political critics have charged), but rather, that it is taking many more chances on horizontal mergers than its predecessors did. Taking *some* of those chances will likely prove to be clearly wrong, with distasteful monopoly consequences being paraded across the media in at least a few cases. Such a situation could, and probably should, put pressure on the post-Reagan Administration to bring at least a few *Grinnell*-type cases, to break up some highly visible, but not necessarily very large, "monopolies" created by merger during the Reagan presidency.

Another variable in the section 2 equation will be the public's longer-run perception of the Bell System break-up. This is obviously a major event in American industrial history and it has "antitrust" written all over it. If the public (however wrongly) comes away feeling that the whole thing was a major disaster, the resulting political reaction may exact practical barriers to future section 2 cases requesting divestiture remedies.

What seems clear is that monopoly and monopolization cases tend to be long-run phenomena. Politics, by contrast, tends to be short-run in perspective, with the accepted wisdom on any point ebbing and flowing. The chief antitrust enforcers have comparatively short terms, and the decision to bring a large or novel case may be heavily influenced by short-run factors. This is simply to say that a holder of visible monopoly power in a significant market must face the practical reality of being challenged under section 2 when particular political and enforcement circumstances happen to coincide. The resulting uncertainty cannot be very comforting.

The central purpose of the antitrust laws is to promote business efficiency and consumer welfare. Lurking in the antitrust mission is the recurring risk that antitrust weapons will be used—perhaps inadvertently, perhaps intentionally—to curb efficiency in the name of "competitive equality." When this happens, less efficient competitors may be better off, but costs and consumer welfare suffer. We depend on the wisdom of the courts, and the discretion of the public prosecutors, to assure that it does not happen too often. Nowhere is this risk greater than in the monopoly area—for here, by definition, government enforcers and judges are dealing with proven market success.