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H. Laurance Fuller

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COMMENTS

THE CASE FOR ELIMINATING DIRECT APPEAL TO THE SUPREME COURT IN CIVIL ANTITRUST CASES

Sections 28 and 29 of title 15 of the United States Code¹ provide, in substance, for direct appeal from a United States district court to the Supreme Court in all civil antitrust cases wherein the United States is plaintiff. The purpose of the Expediting Act, as indicated by the popular title it carries, is to ensure speedy disposition of cases arising under the antitrust laws. While there was practical justification for this type of appellate procedure when the Expediting Act was passed, the present state of antitrust law renders this special treatment obsolete. Except in rare instances, the important issues which arise in antitrust cases today are factual rather than legal. The great burden placed on the Supreme Court by the Expediting Act, in terms of the necessity for review of the voluminous records presented in most antitrust cases, not only takes up a disproportionate amount of the valuable time of the Court, but may actually present the danger of injustice to the litigants. This comment will consider the effects that changing times have had on the Expediting Act and will examine pending legislation which seeks to alleviate or eliminate its undesirable aspects. Discussion of direct appeals from final and interlocutory decrees in civil antitrust cases will be dealt with in separate sections.

DIRECT APPEAL FROM FINAL DECREES

Under present procedure, a direct appeal from a district court to the Supreme Court lies in only four situations.² These are: (1) appeals from suits, heard by three-judge trial courts, to enjoin enforcement of federal or state laws on the ground of repugnance to the federal constitution;³ (2) appeals from civil actions in which the United States is a party and the decision declares an act of Congress unconstitutional;⁴ (3) appeals from criminal actions in which a decision adverse to the government is

¹ Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. §§ 28-29 (hereinafter referred to as the Expediting Act).

² See generally, HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); ROBERTSON & KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* §§ 167-219 (1951).

³ 28 U.S.C. §§ 2281-84. The three-judge trial court device was borrowed from the Expediting Act, which was the first provision for such a trial court. Appeals from decisions rendered by the three-judge court are governed by section 1253 of title 28.

⁴ 28 U.S.C. § 1252.

based on the invalidity or construction of a United States statute, or in which a motion in bar has been sustained and the defendant has not been put in jeopardy;⁵ and (4) appeals taken pursuant to the Expediting Act.

The Expediting Act itself contemplates two situations. Section 1⁶ provides that the Attorney General may, at his discretion, ask for and receive a three-judge court to hear civil antitrust actions.⁷ Appeal from the three-judge court is direct to the Supreme Court. A request for a three-judge court, however, is rarely made.⁸ As a result, section 1 of the Act is essentially inoperative. Section 2 provides that, "In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."⁹ Section 2, applying as it does to *all* such cases, gives rise to the undesirable aspects of the act. The remainder of this comment will largely consider the effect of this section, and the desirability of repealing or amending it.

The Expediting Act was passed thirteen years after the Sherman Act,¹⁰ at a time when the Courts of Appeal had been in existence only twelve years and had not yet attained their present status as the major avenue of appeal from decisions of the district courts.¹¹ Moreover, litigation under the Sherman Act was only beginning to attain importance,¹² and each decision dealt with novel rules of *law*, rather than new factual situations. In this atmosphere, direct appeal provided an excellent method to quickly

⁵ 28 U.S.C. § 3731.

⁶ 15 U.S.C. § 28.

⁷ "In any civil [antitrust] action brought in any district court . . . wherein the United States is plaintiff, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance. [I]t shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited." 15 U.S.C. § 28.

⁸ See REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31 (1952). During the years 1937-1952, only six cases were heard by a three-judge court under section 1 of the act.

⁹ 15 U.S.C. § 29.

¹⁰ 15 U.S.C. §§ 1-2.

¹¹ The Evarts Act, Act of March 3, 1891, 26 Stat. 826, interposed the circuit courts of appeal between the Supreme Court and the circuit and district courts. Until this time, all appeals to the Supreme Court from lower federal courts were direct, since there were no intermediate courts. Direct review by the Supreme Court was provided by the Evarts Act in the following situations: (a) where the jurisdiction of the lower court was in issue; (b) from final decisions in prize cases; (c) from convictions of capital or infamous crimes; (d) in any case involving construction of the federal constitution; (e) in any case in which the federal constitutionality of any law of the United States, treaty, or constitution or law of a state was at issue.

¹² See, HOFSTADTER, MILLER & AARON, *THE AMERICAN REPUBLIC* 153-55 (1959).

define the nebulous provisions of the Sherman Act. This climate has changed radically. Direct appeal to the Supreme Court has become the exception, rather than the rule, and the Courts of Appeal provide a valuable screening function to lighten the case load of an overtaxed Supreme Court. Antitrust cases today present factual issues of vast complexity involving voluminous records which must be fully evaluated by the reviewing court in order that justice be done.¹³ In addition, the volume of cases in the antitrust area has increased from about four cases per year during the time of President Theodore Roosevelt to about ninety cases per year in 1960.¹⁴ This change in circumstances indicates that a careful re-evaluation of the Expediting Act is needed to assure that the present procedure provides the full review sought to be guaranteed by our court system.

The Supreme Court itself has recently commented on the present limited value of the Expediting Act. In *Brown Shoe Company v. United States*, Mr. Justice Clark in his concurring opinion stated that:

The Expediting Act . . . deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a Court of Appeals. Under our system a party should be entitled to at least one appellate review; and since the sole opportunity in cases under the Expediting Act is in this court, we usually note jurisdiction. A fair consideration of the issues requires us to carry out the function of a Court of Appeals by examining the whole record and resolving all questions, whether or not they are substantial. This is a great burden on the court and seldom results in much expedition, as in this case where 2½ years have passed since the District Court's decision.¹⁵

Mr. Justice Harlan, concurring in part and dissenting in part to the majority opinion in *Brown*, pointed out that novel questions of law are so rarely presented in civil antitrust cases that:

[U]nder modern conditions it may well be doubted whether direct review of such [civil antitrust] cases by this court truly serves the purpose of expedition which underlay the original passage of the Expediting Act. I venture to predict that a critical re-appraisal of the problem would lead to the conclusion that 'expedition' and also, over-all, more satisfactory appellate review would be achieved in these cases were primary appellate jurisdiction returned to the Court of Appeals. . . .¹⁶

¹³ For instance, in *United States v. Singer Manufacturing Company*, 374 U.S. 174 (1963) the record contained 1,723 pages.

¹⁴ See Gesell, *Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 ANTITRUST L. SYM. 98, 99.

¹⁵ 370 U.S. 294, 355 (1962). Mr. Justice Clark again voiced this objection in *United States v. Singer Manufacturing Company*, 374 U.S. 174, 175 (1963) in a footnote to his majority opinion. Mr. Justice White, in his concurring opinion at page 197, indicated that he could not agree with this position. The Court is not, therefore, in complete unanimity on the issue.

¹⁶ 370 U.S. 294, 364-65 (1962).

These statements by two Justices with a combined experience of twenty-two years on the Supreme Court bench should not go unheeded by the profession or Congress. While the great burden placed on the Court might not, in itself, be sufficient to warrant repeal of the Act, the danger of injustice and the lack of actual expedition should swing the balance toward amendment or repeal.

APPEALS FROM INTERLOCUTORY DECREES—AN AREA OF CONFUSION

The Expediting Act does not in terms deal with interlocutory appeals, but speaks only of appeals from final judgments. However, in *United States v. California Cooperative Canneries*,¹⁷ the Supreme Court held that interlocutory decrees entered in civil antitrust cases were not subject to review at all, either by the Courts of Appeal or by the Supreme Court. In that opinion, rendered by Mr. Justice Brandeis, the Court said that by the Expediting Act "Congress limited the right of review to an appeal from the decree which disposed of all matters, and it precluded the possibility of an appeal to either court [the Court of Appeals or the Supreme Court] from an interlocutory decree."¹⁸ While this decision was consistent with the state of the law on interlocutory decrees at the time of the enactment of the Expediting Act, subsequent laws on the subject have clouded the issue.¹⁹

The Judicial Code of 1948 contained a section allowing appeals to the Courts of Appeal from interlocutory decrees "except where a direct review may be had in the Supreme Court."²⁰ Since it is clear that no direct appeal may be had to the Supreme Court on an interlocutory decree entered in a civil antitrust case, a possible conclusion is that Congress meant to declare that such interlocutory decrees should be reviewed by the Courts of Appeal. A recent case dealt with the issue in precisely this manner. In *United States v. Ingersoll-Rand Company*,²¹ the government

¹⁷ 279 U.S. 553 (1929) (hereinafter referred to as *Canneries*).

¹⁸ *Id.* at 558.

¹⁹ The Evarts Act, 26 Stat. 826, was in force in 1903 when the Expediting Act was passed. Section 7 of the Evarts Act provided for appeal of interlocutory decrees to the circuit courts of appeal only when final decrees were reviewable there. Since appeals from final judgments in civil antitrust cases lay only to the Supreme Court, appeal of interlocutory decrees to the circuit courts of appeal was precluded. Subsequent legislation, however, amended this aspect of the Evarts Act, and it has been argued that at the time *Canneries* was decided, a proper consideration of the existing law would have led to the conclusion that interlocutory decrees should have been held to be appealable at that time. See *United States v. Ingersoll-Rand Company*, 320 F.2d 509 (3rd Cir. 1963) for a full discussion of the relevant legislative history.

²⁰ 28 U.S.C. § 1292(a)(1).

²¹ 320 F.2d 509 (3rd Cir. 1963).

filed suit against Ingersoll and others under section 7 of the Clayton Act,²² and the District Court granted an interlocutory injunction against a proposed merger.²³ Ingersoll appealed under subsection 1292 (a) (1) of title 18 of the United States Code,²⁴ the successor to the interlocutory appeals provision in the 1948 Judicial Code. The court held, by the above reasoning, and by reading sections 1291 and 1292 together, that Congress must have intended to permit appeals from both final and interlocutory decrees to the Courts of Appeal, unless such decrees can be appealed directly to the Supreme Court. Further, since interlocutory decrees are not appealable to the Supreme Court under the Expediting Act, such decrees must be appealable to the Courts of Appeal. While this perhaps attributes more erudition to Congress than is deserved, the conclusion is plausible from the standpoint of logic. The Third Circuit evidently stands alone in holding that such interlocutory decrees are appealable.

The case of *United States v. American Society of Composers, Authors and Publishers*²⁵ illustrates the opposite position. In this case, the District Court for the Southern District of New York was asked for a ruling under a previous consent decree entered in a civil antitrust action, and the application was dismissed. The applicant appealed to the Supreme Court under the Expediting Act, but the Supreme Court refused to note probable jurisdiction, without stating a reason.²⁶ Appeal was then taken to the Court of Appeals for the Second Circuit. This tribunal denied the appeal holding that, if the decree of the District Court were final, then the appeal had to be to the Supreme Court under the Expediting Act. If, on the other hand, the decree were interlocutory, then no appeal whatsoever would be available by reason of the *Canneries* doctrine. It seems that the line of argument presented in the *Ingersoll* case was not before the court.²⁷

Although the full Supreme Court has not been directly faced with this problem, the Court evidently intends to follow the *Canneries* case. In a footnote to the *Brown Shoe* case, Mr. Justice Warren indicated that by

²² 15 U.S.C. § 18.

²³ *United States v. Ingersoll-Rand Company*, 218 F. Supp. 530 (W.D. Pa. 1963).

²⁴ Section 1291 of title 18 of the United States Code provides, in substance, that the Courts of Appeal shall have jurisdiction over appeals from final judgments of the district courts except where a direct appeal may be had to the Supreme Court. Subsection 1292 (a) (1) is an identical provision applying to interlocutory decrees.

²⁵ 317 F.2d 90 (2d Cir. 1963).

²⁶ 371 U.S. 540 (1963).

²⁷ The decision of the Second Circuit was recently reversed by the Supreme Court *sub. nom.* *Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors and Publishers*, 375 U.S. 39 (1963). Here it was held that all of the previous argument was for naught, since in truth the United States was *not* a party; and, therefore, the Expediting Act did not apply. This reveals the reason for the Court's refusal to hear an appeal directly from the District Court.

the Expediting Act "Congress . . . precluded the possibility of an appeal either to this Court or the Court of Appeals from an interlocutory decree."²⁸ In *United States v. FMC Corporation*, the trial court denied a government motion for an interlocutory injunction against a proposed merger,²⁹ and an appeal to the Court of Appeals for the Ninth Circuit was denied.³⁰ The government applied to Mr. Justice Goldberg for an order enjoining the merger pending the Supreme Court's consideration of an application for certiorari.³¹ In denying the application for an injunction, the Justice stated that the reasoning of the *Ingersoll* case was "plausible but not persuading,"³² and that "if antitrust procedures are to be changed, the changes should derive not from a plausible construction of codified provisions but from deliberate, explicit congressional action."³³

There is one very limited method for appealing interlocutory decrees in civil antitrust cases. This involves petitioning for a common law writ of certiorari under the so-called "all-writs" section of the Judicial Code.³⁴ However, the Supreme Court has stated that where "the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible. . . ."³⁵ This type of writ is rarely issued and cannot be said to solve the type of problems which have been discussed above.

The most practical resolution of this dilemma is to repeal or amend the Expediting Act. If this were done, both final and interlocutory judgments of the district courts would be appealable to the Courts of Appeal, since sections 1291 and 1292 (a) (1) would come into effect in this type of case. The most common objection to this solution is that many opportunities for delay would become available to the unscrupulous defendant.³⁶

²⁸ *Brown Shoe Co. v. United States*, 270 U.S. 294, 305. This statement is a mere *dictum*, however, since the Court found the lower court decree to be final and appealable under section 1291 of title 18 of the United States Code.

²⁹ *United States v. FMC Corp.*, 218 F. Supp. 817 (N.D. Cal. 1963).

³⁰ *United States v. FMC Corp.*, 321 F.2d 534 (9th Cir. 1963).

³¹ *United States v. FMC Corp.*, — U.S. —, 84 S. Ct. 4 (1963).

³² *Id.* at 6.

³³ *Id.* at 7.

³⁴ 28 U.S.C. § 1651 (a). This section allows the Supreme Court to issue "all writs necessary or appropriate in aid of their . . . jurisdiction. . . ."

³⁵ *United States Alkali Export Association, Inc. v. United States*, 325 U.S. 196, 202 (1945). In this case the writ was allowed to issue since the issue was the jurisdiction of the district court. Thus, where the district court enters an order without jurisdiction, even though the order is interlocutory in nature, the Supreme Court may take jurisdiction. See also *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945).

³⁶ See, e.g., Soloman, *Repeal of the Expediting Act—A Negative View*, 1961 ANTI-TRUST L. SYM. 94, 96.

This same argument, however, can be made against allowing such appeals in any type of case. Since it has been concluded that the interests of justice are best served by allowing appeals from interlocutory decrees in the vast majority of cases, little reason appears for not providing a similar procedure in civil antitrust cases.

PROPOSED LEGISLATION

At this writing, two bills have been introduced in Congress to change and clarify the procedure dealing with direct appeals from final judgments and appeals from interlocutory decrees in civil antitrust cases. These are Senate Bill No. 1811, drafted by the American Bar Association's antitrust section and introduced by Senator Olin Johnston,³⁷ and Senate Bill No. 1892, drafted by the Department of Justice and introduced by Senator James Eastland.³⁸ These bills differ in two important respects: First, the Johnston Bill provides that section 1 of the Expediting Act,³⁹ allowing the Attorney General to call for a three-judge District Court in cases of general public importance, shall not apply to antitrust cases;⁴⁰ the Eastland Bill, however, would leave this section unchanged. Second, the Johnston Bill would completely eliminate direct appeals from antitrust cases heard by a single district court judge, while the Eastland Bill would allow either the Attorney General or the district court to certify that the case is of general public importance, in which case appeal from a final judgment would be only to the Supreme Court.

As a practical matter, it would seem to make little difference whether or not the first section of the Expediting Act relating to three-judge courts is applied to antitrust cases. As Senator Johnston indicated when introducing his bill to the Senate,

Section 1 [of the Expediting Act] has long since fallen into disuse. With dockets crowded as they are today, the Federal judiciary has made clear its antagonism to three-judge trial courts, and it has been many years since the Attorney General has invoked such a court.⁴¹

Senator Johnston's bill proceeds on the theory that antitrust litigation should be put on the same footing as other similar actions brought by the Government. It is difficult to see why appeals in criminal antitrust actions⁴²

³⁷ Senator Johnston is Chairman of the Senate Subcommittee on Improvements in Judiciary Machinery. Senate Bill No. 1811 is hereinafter referred to as the Johnston Bill.

³⁸ Senator Eastland is Chairman of the Senate Committee on the Judiciary. Senate Bill No. 1892 is hereinafter referred to as the Eastland Bill.

³⁹ 15 U.S.C. § 28.

⁴⁰ This Bill, however, would retain this procedure as it applies to actions brought under the Interstate Commerce Commission Act.

⁴¹ 109 CONG. REC. 11261 (1963) (remarks of Senator Johnson).

⁴² FED. R. CRIM. P. 37.

and from the Federal Trade Commission⁴³ should go to the Courts of Appeal while an option exists to appeal to the Supreme Court from civil antitrust actions. It appears to the writer that the provision allowing a three-judge trial court in civil antitrust actions has no more present validity than the other provisions of the Expediting Act, and should be eliminated.

The relevant portions of the Johnston Bill dealing with appeals from single-judge courts read as follows:

SEC. 2 This Act shall not be construed as limiting or narrowing in any respect the right of any party to any civil action brought in any district court of the United States under [the Sherman Act] or any other Acts having a like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff, from seeking direct review by the Supreme Court of a final judgment of a district court of the United States by appealing to a court of appeals and petitioning the Supreme Court for a writ of certiorari, under section 1254 (1) of title 28, United States Code, before rendition of judgment.

SEC. 3 The provisions of section 1292 (a) (1) and (b) of title 28, United States Code shall be applicable in any civil action brought in any district court of the United States under [the Sherman Act] or any other Acts having a like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff.⁴⁴

Strictly speaking, these two sections merely make explicit what should be the natural effect of repealing section 2 of the Expediting Act. Once direct appeal is eliminated, civil antitrust cases would automatically come within the purview of section 1291, which allows appeal from a final judgment to the Court of Appeals when the case is not appealable directly to the Supreme Court. Once appeal to the Court of Appeals is established, the certiorari procedure should come into play. The purpose of section 2 is to make it clear that the intent was *not* to eliminate the Supreme Court's jurisdiction over antitrust matters, a possible conclusion if the section were not included. Similarly, section 3 of this Bill makes explicit that subsections 1292 (a) (1) and 1292 (b), which permit appeals from interlocutory decrees, shall apply to civil antitrust cases. This expression of Congressional intent appears to be of value in view of the confusion as to the present status of the appealability of such decrees.

For comparison, the relevant sections of the Eastland Bill read as follows:

In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant and

⁴³ 15 U.S.C. § 45 (c).

⁴⁴ Section 1 of the Johnston Bill is the present 15 U.S.C. § 28, but it eliminates its application to antitrust cases as discussed *supra*. Section 4 provides that S. 1811 shall not apply to cases wherein a notice of appeal to the Supreme Court has been filed prior to its enactment.

wherein the Attorney General, or the district court either on application of a party or upon its own motion, has certified that the case is of general public importance, an appeal from the final judgment of the district court will lie only to the Supreme Court.

No such certification may be made by the Attorney General or the district court on its own motion, nor shall an application for a certificate be made to the district court by any party, more than thirty days after final judgment. In any case in which a party applies to the district court for a certificate, unless such application is granted within forty days after final judgment, it shall be deemed denied.

If the certificate of the Attorney General is filed after the entry of a final judgment of the district court, section 1 of this Act shall not apply.⁴⁵

In any action in which a certificate has not been filed, appeal may be taken to the court of appeals from any final judgment entered therein, as provided in section 1291 of title 28 of the United States Code, and from interlocutory orders, as provided in section 1292 (a) (1) of title 28 of the United States Code but not otherwise; and any judgment entered by the court of appeals in such case shall be subject to review by the Supreme Court of the United States upon a writ of certiorari as provided in section 1254 (1) of title 28 of the United States Code.⁴⁶

Under this bill the status of the route of appeal would apparently be as follows: First, if the Attorney General files a certificate of general public importance *before* trial, a three-judge court will be required and appeals will lie only to the Supreme Court; interlocutory decrees will *not* then be appealable. Second, if the Attorney General files such a certificate *after* final judgment, or the district court, upon its own motion or upon application of a party certifies that the case is of general public importance, then appeal will again lie only to the Supreme Court. Third, where no such certificate has yet been filed in the cause, final and interlocutory decrees will be appealable to the Courts of Appeal. The Supreme Court may review on a writ of certiorari. It thus appears quite possible that in a given case, interlocutory appeals would lie to the Court of Appeals, while appeal from a final judgment would lie only to the Supreme Court if a certificate were filed.

There is no question that the enactment of either of these bills would improve upon the present procedure. Direct appeals to the Supreme Court would be eliminated in at least the majority of cases, and in both bills the appealability of interlocutory decrees would be established. The only noteworthy difference between the bills is found in the certification procedure provided by the Eastland Bill. The Department of Justice

⁴⁵ The purpose of the provision is to make clear that a three-judge court need not be convened when a case in which a certificate of the Attorney General was filed *after* final judgment is remanded after appeal. Letter from Attorney General Robert Kennedy to (then) Vice-President Johnson, April 25, 1963.

⁴⁶ Section 2 of S. 1892 provides that the act shall not apply to cases wherein a notice of appeal to the Supreme Court has been filed prior to its enactment.