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Antitrust at the Water's Edge: National Security and Antitrust Enforcement

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NOTE

ANTITRUST AT THE WATER'S EDGE: NATIONAL SECURITY AND ANTITRUST ENFORCEMENT

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Politics stops at the water's edge.[1]

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1 This old adage is generally attributed to Sen. Arthur H. Vandenberg, Republican senator from Michigan, who rose above partisanship in the mid-1940s to support President Truman's early Cold War policies. *See generally* C. DAVID TOMPKINS, SENATOR ARTHUR H. VANDENBERG: THE EVOLUTION OF A MODERN REPUBLICAN, 1884–1945, at 191–241 (1970) (describing Vandenberg's singular contribution to the formation of wartime and postwar bipartisan foreign policy). Many others have since echoed his sentiments, and it is not difficult to find the expression quoted in the *Congressional Record* and other official sources in the fifty-odd years since Vandenberg's first utterance. It was used in 1996 as a turn of phrase to justify American entry into the Law of the Sea Convention. 142 CONG. REC. S9474 (daily ed. Aug. 2, 1996) (statement of Sen. Pell). It was used in 1998 to call upon President Bill Clinton and Congress to act together against the regime in Iraq. 144 CONG. REC. S474 (daily ed. Feb. 9, 1998) (statement of Sen. McCain). Finally, President Clinton himself invoked Vandenberg's memory in a plea for more cooperative foreign policymaking. William J. Clinton, Remarks to the Nixon Center for Peace and Freedom Policy Conference, 1995-I PUB. PAPERS 285–86 (Mar. 1, 1995) (calling for bipartisan foreign policy in the spirit of "Senator Arthur Vandenberg's call to unite our official voice at the water's edge").

INTRODUCTION

Writing in the 1960s, the historian Richard Hofstadter observed that whereas "once the United States had an antitrust movement without antitrust prosecutions," by the 1950s, it had "antitrust prosecutions without an antitrust movement."[2] This would seem a strange observation for a scholar as astute as Hofstadter to make during the 1960s, surely as active an antitrust decade as any.[3] But activity alone does not a movement make, and Hofstadter was specifically referring to the decline of antitrust as an ideological and political force in American life. In his view, by the 1950s and 1960s antitrust law may have assumed a life of its own, but it no longer had any detectible ideological coherence or claim on popular politics.

Whether or not Hofstadter was correct that the postwar era foretold an end to the "antitrust movement," by the 1970s it certainly seemed as though the political nature of antitrust had given way to economics. Beginning in the early 1970s, antitrust enforcement and theorization became dominated by scholars, jurists, and lawyers who treated economic analysis as the first (and often the last) place of departure regarding antitrust law.[4] Weighty scholars and jurists, such as Robert Bork and Richard Posner, laid the foundations for an essentially apolitical antitrust law based upon economic efficiency and the enhancement of consumer choice.[5] The impact that such scholarship ultimately made on antitrust law cannot be doubted, for in 1977 the U.S. Supreme Court endorsed its basic sentiments, albeit in a footnote.[6] The following year, the Court became more explicit, stating that the determinative focus of antitrust law was to assess a "challenged restraint's impact on competitive conditions."[7]

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2 Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 189 (Richard Hofstadter ed., 1965).

3 MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS iii (4th ed. 1997).

4 *See generally* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) (discussing the pervasive influence of the Chicago School economic model on contemporary antitrust law).

5 *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 211–39 (2d ed. 1977); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

6 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21 (1977) (declaring that antitrust enforcement without an economic basis would lack "any objective benchmark").

7 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

To be sure, the modern emphasis on apolitical, economics-oriented antitrust law has had its critics.[8] One of them, Herbert Hovenkamp, has assailed the apolitical, efficiency-oriented approach as ahistorical, writing that "in 1890 Congress had no real concept of efficiency."[9] Another critic, Robert Pitofsky, is even more emphatic, stating that "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[10] More recently, in an article positing a political dimension to antitrust law, Fred McChesney agrees that "'factors other than a search for efficiency must be driving antitrust policy.'"[11] The general thrust of such arguments is that politics mattered in antitrust decisions in 1890 and that it continues to matter today.

This Note accepts the arguments of Hovenkamp, Pitofsky, and McChesney at their most generalized level, i.e., that antitrust law, both in its original conception and in its ultimate enforcement, is not fundamentally apolitical or exclusively efficiency-oriented. To a certain degree, this Note also challenges Hofstadter's claims about the depoliticization of postwar antitrust law. Whereas Hofstadter might well be right that the original ideological underpinnings of antitrust law have withered, insofar as his argument indicates a general depoliticization of antitrust law, it, too, is in error. The purpose of this Note is not actually to take issue with Bork, Posner, or Hofstadter. Neither is its purpose to assert that politics is the fundamental basis for antitrust law or that economics does not—or even *should* not—play a significant role in antitrust enforcement. Rather, the purpose of this Note is to provide a descriptive and historical narrative to underscore just how political antitrust law in fact *is*.

A comprehensive historical analysis of the origins and development of antitrust law is clearly beyond the scope of the present work.

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8 *See, e.g.*, Richard S. Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41 (1984); Oliver E. Williamson, *Antitrust Enforcement: Where It's Been, Where It's Going*, 27 ST. LOUIS U. L.J. 289 (1983).

9 Hovenkamp, *supra* note 4, at 250.

10 Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

11 Fred S. McChesney, *Economics Versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133, 142 (1999) (quoting Paul H. Rubin, *What Do Economists Think About Antitrust: A Random Walk Down Pennsylvania Avenue*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 61 (Fred S. McChesney & William F. Shughart II eds., 1995) [hereinafter CAUSES AND CONSEQUENCES]; *see also* Fred S. McChesney, *Be True to Your School: Chicago's Contradictory Views of Antitrust and Regulation*, *in* CAUSES AND CONSEQUENCES, *supra*, at 323.

Besides, other scholars have already written quite excellent ones.[12] Instead, this Note will address a specific and often under-appreciated element of antitrust politics: the intersection between antitrust law and national security. Underscoring the narrative that follows is the conviction that national security issues exert a powerful—indeed, in a great many cases, inexorable—influence on the enforcement of antitrust laws, often forcing aside domestic political considerations and efficiency goals alike. In the years since World War II, national security issues have become extremely pervasive and far-reaching, permeating many aspects of American politics and culture.[13] The immediate concerns of national security include foreign relations, defense policy, and internal security, and this Note will limit itself to a consideration of these issues. It will demonstrate that the national security ethos acts as a political check of the highest level on antitrust law—and, in so doing, it will make plain that, like it or not, politics does indeed play a role in antitrust enforcement.

Part I of this Note briefly lays out the history and development of antitrust, placing particular emphasis on the political nature of the law. Part II considers the historical impact of foreign policy and national security concerns on antitrust law. Such an impact necessarily includes a brief assessment of the development of foreign antitrust traditions, as well as the obstacles to enforcement stemming from comity or the involvement of multinational enterprise. The narrative and descriptive heart of this Note lies in Part III. This Part contains a case study of the dynamics of national security upon antitrust law, focusing on litigation against the United Fruit Company during the 1950s. Finally, Part IV serves as an epilogue of sorts, providing an unfinished contemporary outline of the possible political effect of national security on the Microsoft litigation.

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12 *See, e.g.*, TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880–1990 (1992); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW (1996); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS 86–332 (1988); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955).

13 *See* MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945–1954 (1998); MELVYN P. LEFFLER, A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR (1992); DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE (rev. ed. 1990); H.W. Brands, *The Age of Vulnerability: Eisenhower and the National Insecurity State*, 94 AM. HIST. REV. 963 (1989); Aaron L. Friedberg, *Why Didn't the United States Become a Garrison State?*, 16 INT'L SECURITY 109 (1992).

I. ANTITRUST LAW: HISTORY AND DEVELOPMENT

A good starting point for examining the origins of antitrust law might fruitfully be found in the etymology of the word "antitrust" itself. The study of etymology is not history per se, of course, but it *is* the history of words. And such a history—even an amateurish history, like that which follows—may be useful if one is to consider how the concept of antitrust developed as a legal and political concept. Postmodernist concerns aside, one can still assume that what a group of people *call* a thing can provide insight into the *nature* of that thing. Proceeding on this assumption, it is instructive to dissect the word "antitrust" and attempt to place the word into the context of the late nineteenth century.

Thankfully, one does not have to be a practiced etymologist to pull content out of the word "antitrust," for it breaks down quite neatly into two distinct parts. The meaning of the first part, "anti," is obvious enough, and the *Oxford English Dictionary* (*OED*) describes it as a Greek derivative, meaning "opposed, in opposition, opponent, rival."[14] The second half of the word "antitrust" is clearly the more significant of the two.

In the 1840s, the word "trust" was a "duty or office . . . entrusted to one" that was commonly thought to be "created for the benefit of the whole people, and not for the benefit of those who may fill them."[15] Rudolph Peritz claims that by the 1880s and 1890s, in the minds of Americans, the word "trust" lost this former meaning and acquired a radically different one: "trust as a fearsome concentration of economic power that unjustly enriched a select few at the expense of the commonwealth."[16] The *OED* affirms this claim, and cites a passage from late nineteenth century writer James Bryce as exemplary of the transformation of the meaning of "trust."[17] Because of its descriptive nature, Bryce's passage is worth quoting in full:

> Those anomalous giants called Trusts—groups of individuals and corporations concerned in one branch of trade or manufacture, which are placed under the irresponsible management of a small knot of persons, who, through their command of all the main producing or distributing agencies, intend and expect to dominate the market.[18]

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14 1 OXFORD ENGLISH DICTIONARY 514 (2d ed. 1989).

15 18 *id.* at 624.

16 PERITZ, *supra* note 12, at 11.

17 18 OXFORD ENGLISH DICTIONARY, *supra* note 14, at 624.

18 3 JAMES BRYCE, THE AMERICAN COMMONWEALTH 415 (1888).

Peritz's claims and Bryce's diction suggest that the public discourse regarding the so-called "trust" in the late nineteenth century went far beyond concern for mere economic efficiency. Judging from the tone and insistence of Bryce's writing alone, it seems clear that the motivating sense of fear, anguish over unjust enrichment, and concern for the well-being of democratic society did not emanate from a desire for economic efficiency or consumer choice.[19] The object of such language was concentrated power, not efficiency. Hofstadter makes this same connection, seeing fear of concentrated power as the logical thread running from "pre-Revolutionary tracts through the Declaration of Independence and *The Federalist* to the writings of the states' rights advocates, and beyond the Civil War into the era of the antimonopoly writers and the Populists."[20]

This observation removes us from etymology and brings us back to history itself. As a matter of history, nineteenth century public discourse over concentrated power and the transformation of the word "trust" was rooted specifically in the rise of big business. It is difficult to date the beginnings of big business in the United States, but a general historical consensus holds that large-scale enterprise began to rise in the aftermath of the Civil War and grew almost exponentially in the following decades.[21] Facilitated by the advent and spread of the telegraph and railroad,[22] big business germinated in the United States and gradually acquired the following traits or characteristics: capital-intensiveness, economy of scale, separation of ownership from management, enhanced geographic scope, vertical integration, complex managerial organization, and impersonal labor relations.[23] Technical words such as these may provide a fairly accurate description of what big business was, but they utterly fail to capture the enormous social, political, and economic impact that such business had on Americans.

The establishment of big business "constituted a massive social change" and provided a "seedbed of a new social and economic or-

19 It becomes even more difficult to imagine if one accepts Peritz's assertion that trusts were generally personified in the minds of average Americans. In Peritz's words, trusts "were associated with names, faces, and industries . . . . It was easy to think of large corporate organizations as 'persons.'" PERITZ, *supra* note 12, at 55.

20 Hofstadter, *supra* note 2, at 205.

21 *See, e.g.*, ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); DAVID A. HOUNSHELL, FROM THE AMERICAN SYSTEM TO MASS PRODUCTION, 1800–1932: THE DEVELOPMENT OF MANUFACTURING TECHNOLOGY IN THE UNITED STATES (1984); GLENN PORTER, THE RISE OF BIG BUSINESS, 1860–1920 (2d ed. 1992); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1967).

22 CHANDLER, *supra* note 21, at 79–121.

23 PORTER, *supra* note 21, at 8–23.

der."[24] Richard Hofstadter notes that the "American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors."[25] The very nature of big business explicitly challenged time-honored traditions, for it accelerated urbanization,[26] encouraged mass immigration from Southern and Eastern Europe,[27] established new classes of industrial laborers[28] and middle-class managers,[29] and ultimately jarred the nation's sensibilities by creating a mass society built around mass consumption.[30] Though not all of these transformations happened at once, most all of them were underway by the late nineteenth century and were deeply felt by Americans at all levels of society. The most important political and social movements of the late nineteenth and early twentieth century—namely, the labor movement, agrarian Populism, and Progressivism—all originated in the dislocations brought by the rise of big business.[31] By the 1880s and 1890s, Americans were therefore struggling to place their lives back in order and reestablish control over their nation's economic institutions, particularly the new and fearsome "trusts."

Exactly what blame, one might ask, did Americans affix to the "trusts"? Or more fruitfully, what social, political, or economic ill did Americans *not* blame on them? William Letwin sums up nicely the broad range of anger that Americans harbored for big business:

> [t]rusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by

24 *Id.* at 91.

25 RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 7 (1959).

26 *See* STUART M. BLUMIN, THE URBAN THRESHOLD: GROWTH AND CHANGE IN A NINETEENTH-CENTURY AMERICAN COMMUNITY (1976).

27 *See* JOHN BODNAR, THE TRANSPLANTED: A HISTORY OF IMMIGRANTS IN URBAN AMERICA (1985); ALAN M. KRAUT, THE HUDDLED MASSES: THE IMMIGRANT IN AMERICAN SOCIETY, 1880–1920 (1982).

28 *See* MELVYN DUBOFSKY, INDUSTRIALISM AND THE AMERICAN WORKER, 1865–1920 (2d ed. 1985); HERBERT G. GUTMAN, WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA: ESSAYS IN AMERICAN WORKING-CLASS AND SOCIAL HISTORY (1976).

29 *See* SUSAN PORTER BENSON, COUNTER CULTURES: SALESWOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890–1940 (1986); OLIVIER ZUNZ, MAKING AMERICA CORPORATE, 1870–1920 (1990).

30 *See* BENSON, *supra* note 29; DANIEL HOROWITZ, THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875–1940 (1985); DAVID M. POTTER, PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER (1954); *see also* ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920–1940 (1985).

31 HOFSTADTER, *supra* note 25, at 7–11.

> watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.[32]

Fair or not, a significant number of Americans blamed big business for the totality of woes stemming from modern society. And just as their accusations were loud and clear, so too was their preferred remedy: "a law to destroy the power of the trusts."[33]

It was in such an environment that modern-day American antitrust law was born. It is necessary to add such qualifiers as "modern-day" and "American" because competition law developed long before the 1890s as an element of English common law.[34] In its incipiency, competition law sought "to encourage competitive forces by its traditional emphasis on individual liberty and economic independence."[35] As early as the 1500s, English common law attempted to fulfill this charge by curtailing practices such as "forestalling, engrossing, and regrating," which sought to manipulate prices at the wholesale stage of the distributive process.[36] This doctrine evolved such that its eventual usage in American common law treated "combination" or "restraint of trade" as a tort, and suits based on this kind of tort theory were brought almost exclusively by private litigants, not by municipalities or states.[37] As Hans Thorelli notes, neither in England nor the

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32 William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 235 (1956).

33 *Id.* *But see* LOUIS GALAMBOS, THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880–1940: A QUANTITATIVE STUDY IN SOCIAL CHANGE 47–78 (1975) (claiming that Americans were in an "unequal equilibrium" with big business until circa 1892).

34 THORELLI, *supra* note 12, at 9–12. For a classic example of English antimonopoly common law at work, see *Case of Monopolies*, 77 Eng. Rep. 1260 (K.B. 1603) (holding that a grant for the sole production of playing cards violated the common law). *See also* Jacob I. Corré, *The Argument, Decision, and Reports of* Darcy v. Allen, 45 EMORY L.J. 1261 (1996) (analyzing the *Case of Monopolies*).

35 THORELLI, *supra* note 12, at 12.

36 *Id.* at 14–15. "Forestallers" intercepted goods on their way to market and bought them up to control prices, "engrossers" purchased goods wholesale and then resold them wholesale, and "regraters" bought and sold the same good or commodity within the same local market (i.e., within a radius of four miles). *Id.* at 16; *see also* MICHAEL J. TREBILCOCK, THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS 3–8 (1986) (discussing the historical context of 16th and 17th century English antimonopoly law).

37 THORELLI, *supra* note 12, at 59. Good examples of American common-law responses to anticompetitive behavior prior to passage of the Sherman Act can be found in *Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co.*, 13 N.E. 169 (Ill. 1887) (holding that geographical market division of the city of Chicago violated public policy); *Craft v. McConoughy*, 79 Ill. 346 (1875) (striking down profit-sharing and price maintenance agreements between grain dealers in a small town); and *Richardson v. Buhl*, 43 N.W. 1102, 1110 (Mich. 1889) (labeling efforts at monopolization by the Diamond Match Co. as "odious to our form of government").

United States did common law competition policy accomplish very much.[38] Enforcement was scattershot, penalties were inadequate, litigation was driven only by private parties, and results fluctuated considerably.[39] The rise of big business and the "trusts" made all too clear the inadequacy of the common law, even if the values of liberty and economic independence that animated the common law remained as strong as ever.

The first seeds of modern antitrust law grew at the state level. Before 1890, and particularly from 1888 through 1890, a total of twenty-one states and territories adopted provisions against restraints of trade.[40] These sorts of laws attempted to deal with the trust problem by undercutting means of collusion, holding agreements and contracts in restraint of trade to be void and unenforceable.[41] Thorelli attributes this rush of state legislative action to strongly felt "public agitation" and adds that the state-level effort "was not enough to satisfy popular opposition to 'trusts.'"[42] Such dissatisfaction and continued anxiety about big business surely set the stage for the passage of the Sherman Act in 1890. The specific machinations that led Sen. John Sherman to introduce his antitrust resolution on July 10, 1888, and that culminated in its enactment as law two years later is a long story, interesting in its own right, yet not the province of this Note.[43] It suffices to note that deeply felt public sentiment—drawing upon a venerable history of antimonopoly tradition steeped in a desire for liberty and a sense of commonweal—animated Congress and the President to ensure that a federal antitrust statute became law on July 2, 1890.[44]

In the decades following passage of the Sherman Act, the development of antitrust was pulled thither and yon by various, explicitly

38 THORELLI, *supra* note 12, at 50–53.

39 *Id.* at 53.

40 SKLAR, *supra* note 12, at 93.

41 *Id.*

42 THORELLI, *supra* note 12, at 156, 162.

43 *See id.* at 164–210; SKLAR, *supra* note 12, at 105–17; Letwin, *supra* note 32, at 247–55. An in-depth treatment of the legislative history can be found in 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (Earl W. Kintner ed., 1978).

44 THORELLI, *supra* note 12, at 210. Passage of the Sherman Act fulfilled President Benjamin Harrison's declaration in 1889 that monopolies were "'dangerous conspiracies against the public good, and should be made the subject of prohibitory and even penal legislation.'" *Id.* at 159 (quoting 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 43 (James D. Richardson ed., 1899)). For the text of the original act, see Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)).

political currents. The "trusts" did not, of course, immediately recede into the darkness following passage of the Sherman Act, and neither did public agitation—ostensibly the "antitrust movement" of which Hofstadter writes—dissipate. Antitrust remained one of the highest priorities in the United States well into the Progressive Era, eclipsing other social welfare issues.[45] Early on, the battle took the form of literalists (who sought enforcement of the Sherman Act without regard to the "reasonableness" of restraints) against restorationists (who wanted the common law distinction between reasonable and unreasonable restraints restored to the Sherman Act).[46] In essence, literalists wanted the jurisprudence of *United States v. Trans-Missouri Freight Ass'n*[47] to prevail, whereas the restorationists championed the Sixth Circuit's jurisprudence in *United States v. Addyston Pipe & Steel Co.*[48] This debate, it must be emphasized, was by no means strictly—or even principally—judicial; rather, it was carried on with great vigor by political figures, businessmen, farmers, labor leaders, and scholars, in addition to jurists and lawyers.[49] The restorationists ultimately won this battle in 1911, with the establishment of the "standard of reason" in *Standard Oil Co. v. United States*[50] and the contemporaneous case, *United States v. American Tobacco Co.*[51]

By the time antitrust law passed its third decade and entered the 1920s, the mood of the nation had changed. The "trust" issue had been thrust aside by the First World War, and an "ethic of cooperative competition," championed by Herbert Hoover and the Republican Party more generally, prevailed.[52] Under Hoover's secretariat, the newly invigorated Department of Commerce took the lead in creating a closer and more cooperative relationship between big business and government, and the importance of the Sherman Act waned and became principally a means to rein in those businesses whose bigness was obtained with few benefits to society at large.[53] Hooverian politics and "cooperative competition" managed to survive the early dark days

45 FREYER, *supra* note 12, at 120.

46 SKLAR, *supra* note 12, at 127–54.

47 166 U.S. 290, 328, 342 (1897) (holding that the Sherman Act rendered both reasonable and unreasonable restraints of trade unlawful).

48 85 F. 271, 278–79 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (holding that the common-law distinction between reasonable and unreasonable restraints of trade applied to the Sherman Act).

49 SKLAR, *supra* note 12, at 146, 203–28.

50 221 U.S. 1, 60–61 (1911).

51 221 U.S. 106, 178–80 (1911).

52 PERITZ, *supra* note 12, at 78; *see also* FREYER, *supra* note 12, at 159.

53 Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921–1933: An Early Phase of a Continuing Issue*, 74 IOWA L. REV. 1067, 1069, 1101 (1989); *see also* Robert F. Him-

of the Great Depression and to a considerable degree manifested themselves in the codes of competition of the National Industrial Recovery Act of 1933 (NIRA).[54]

In the years after the U.S. Supreme Court scuttled NIRA,[55] however, the administration of Franklin Roosevelt began to take a very different approach to antitrust law. In April 1938, Roosevelt informed Congress that his administration was concerned that the persistence of depression was abetted by monopolistic practices, and he recommended suitable action.[56] Congress responded by creating the Temporary National Economic Committee (TNEC), and for three years the TNEC worked hand-in-hand with the Assistant Attorney General for Antitrust, Thurman Arnold, to launch a "barrage of antimonopoly action."[57] As with most New Deal policies, this "barrage" was calculated to win political support, and, in this respect it did not fail.[58] But this born-again antitrust zeal would not survive the coming of yet another global war.[59]

If the preceding paragraphs have indicated anything, they have hopefully indicated that antitrust law was born in political fervor and, in the fifty years subsequent to passage of the Sherman Act, the law rose and peaked, focused and shifted according to domestic political vicissitudes. As Part II of this Note will now explain, national security, particularly in the form of foreign relations, also exerted significant—and at times, decisive—influence over the enforcement of antitrust law.

II. NATIONAL SECURITY AND ANTITRUST LAW

There is perhaps no more obvious and arguably important element of U.S. national security than America's relations with the other nations of the world. Whether at peace or in war, foreign relations form the necessary backdrop—though today admittedly not the *exclu-*

melberg, *Business, Antitrust Policy, and the Industrial Board of the Department of Commerce, 1919*, 42 BUS. HIST. REV. 1 (1968).

54 ROBERT S. MCELVAINE, THE GREAT DEPRESSION: AMERICA, 1929–1941, at 158–59 (1984); *see also* ROBERT F. HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION: BUSINESS, GOVERNMENT, AND THE TRADE ASSOCIATION ISSUE, 1921–1933 (1976).

55 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding the NIRA unconstitutional).

56 MCELVAINE, *supra* note 54, at 299.

57 *Id.* at 300; *see also* HAWLEY, *supra* note 12, at 421–55.

58 MCELVAINE, *supra* note 54, at 300.

59 HAWLEY, *supra* note 12, at 442; *see also infra* notes 84–86 and accompanying text.

sive backdrop[60]—for any consideration of a nation's security. In recognition of the primacy of state-to-state relations and American security, George Washington's first cabinet specifically included departments of State and War,[61] and many—if not most—Americans of the 1790s felt that without the Franco-American alliance, the United States would not have been born at all.[62] It is also no exaggeration to say that the inability of the Articles of Confederation to provide the American republic with security led to its demise and to the rise of the more muscular and capable Constitution.[63] And it seems safe to say that foreign relations will remain among the greatest concerns for American national security far into the new millennium.

In antitrust law, recognition of the primary importance of foreign relations manifests itself principally in the doctrine of comity. Comity represents judicial recognition of the sovereignty of other states in the international system. Antitrust law—and American law more generally—has limited ability to reach beyond the borders of the United States and its territories. Implicit in the doctrine of comity is the acknowledgement that overreaching by American courts can complicate American foreign policy (and, thus, national security) and also expose the impotence of the courts themselves, neither being a desirable result. But just as some general U.S. law can flow beyond American borders, so too can antitrust law. Indeed, the Sherman Act itself anticipated as much, as its text indicates: "Every contract, combination

60 Consider, for example, such transnational scourges as global terrorism, environmental decay, and the AIDS crisis. Certainly, the events of September 11, 2001 come readily to mind. For a sampling of the relevant literature on these points, see JON BARNETT, THE MEANING OF ENVIRONMENTAL SECURITY: ECOLOGICAL POLITICS AND POLICY IN THE NEW SECURITY ERA (2001); CRISTIANA BASTOS, GLOBAL RESPONSES TO AIDS: SCIENCE IN EMERGENCY (1999); STEPHEN BOWMAN, WHEN THE EAGLE SCREAMS: AMERICA'S VULNERABILITY TO TERRORISM (1994); ENVIRONMENT AND SECURITY: DISCOURSES AND PRACTICES (Miriam R. Lowi & Brian R. Shaw eds., 2000); INTERNATIONAL COOPERATION IN RESPONSE TO AIDS (Leon Gordenker et al. eds., 1995); and JEFFREY D. SIMON, THE TERRORIST TRAP: AMERICA'S EXPERIENCE WITH TERRORISM (1994).

61 *See* JOHN E. FERLING, THE FIRST OF MEN: A LIFE OF GEORGE WASHINGTON 381 (1988); JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 222–23 (1974); RICHARD NORTON SMITH, PATRIARCH: GEORGE WASHINGTON AND THE NEW AMERICAN NATION 44–60 (1993).

62 *See* ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER GEORGE WASHINGTON 4–5 (1958).

63 *See id.* at 31–32; BRADFORD PERKINS, THE CREATION OF A REPUBLICAN EMPIRE, 1776–1865, at 53–59 (1993). *The Federalist Papers* also provide excellent insight into the national security aspect of the crisis of government in the 1780s. *See* THE FEDERALIST NOS. 2, 3, 4, 5 (John Jay). For specific diplomatic and security concerns brought on by the inadequacies of the Articles of Confederation, see DECONDE, *supra* note 62, at 11–30.

in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, *or with foreign nations*, is declared to be illegal."[64]

Despite the apparent textual authorization of the Sherman Act, it is not difficult to understand why the doctrine of comity emerged early on in antitrust jurisprudence. From the moment of its conception, statutory antitrust law was essentially an American creation. Virtually no other nation developed an antimonopoly tradition and codified it in law.[65] While Great Britain had an antimonopoly tradition,[66] it did not codify it in written law. The British never experienced corporate consolidation on the level of the United States, and they therefore favored business self-regulation and common law to curb restraint of trade over written laws.[67] The Germans and Japanese followed an even more divergent path, actually encouraging cartel activity, often in conjunction with the official policies of their central governments.[68] Only in the postwar period did certain Western Euro-

64 Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)) (emphasis added).

65 For comparative approaches to antimonopoly traditions, see FREYER, *supra* note 12; *see also* RECHT UND ENTWICKLUNG DER GROSSUNTERNEHMEN IM 19. UND FRÜHEN 20. JAHRUNDERT [LAW AND THE FORMATION OF THE BIG ENTERPRISES IN THE 19TH AND EARLY 20TH CENTURIES] (Norbert Horn & Jürgen Kocka eds., 1979) (illustrating comparative legal responses to the rise of big business); Morton Keller, *Regulation of the Large Enterprise: The United States Experience in Comparative Perspective, in* MANAGERIAL HIERARCHIES: COMPARATIVE PERSPECTIVES ON THE RISE OF THE MODERN INDUSTRIAL ENTERPRISE 161–81 (Alfred D. Chandler, Jr. & Herman Daems eds., 1980) (comparing the U.S. experience with that of Germany, France, and Britain).

One possible exception to this general rule is Canada. In 1889, a year prior to passage of the Sherman Act, the Canadian parliament passed the Combines Investigation Act to maintain competition and ward off excessive concentrations of economic power. *See* Act for the Prevention and Suppression of Combinations Formed in the Restraint of Trade, ch. 41, 1889 S.C. (Can.) [hereinafter Combines Act]. Even so, despite their similarities, the Sherman Act became far more potent than the Combines Act. The power of the Combines Act lay in publicizing illegal behavior, not circumscribing it, and its administrative processes were far more cumbersome than those of the Sherman Act. *See* KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 39–40 (1958). For more on Canada's antimonopoly tradition, see JOHN A. BALL, JR., CANADIAN ANTI-TRUST LEGISLATION (1934); and R. JACK ROBERTS, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES 3–36 (2d ed. 1992).

66 *See supra* notes 35–37 and accompanying text.

67 *See* LESLIE HANNAH, THE RISE OF THE CORPORATE ECONOMY 22–26 (2d ed. 1983) (observing that British companies lacked the dynamic for corporate growth found in the United States).

68 *See* ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 393–427 (1990) (describing "cooperative managerial capitalism" in Ger-

pean nations even begin to adopt antitrust laws, and few have developed antitrust laws anywhere near as effective or comprehensive as those of the United States.[69] Lacking a history of competition policy, foreigners often found American antitrust law perplexing and downright annoying,[70] especially when enforcement pitted the U.S. government against foreign companies or when it was used against the overseas subsidiaries of American multinational enterprises.[71]

In response to international irritation, federal courts laid out the doctrine of comity and reined in the overseas applicability of the Sherman Act. In *American Banana Co. v. United Fruit Co.*,[72] the U.S. Supreme Court held in 1909 that overseas anticompetitive actions did not fall within the scope of U.S. law.[73] But by the late 1920s the Court backtracked somewhat, ruling that overseas activities designed to restrain imports into the United States were actionable.[74] Further, with

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many); DANIEL I. OKIMOTO, BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY 12–14 (1989) (describing contemporary Japanese antitrust policy as "lax," yet more than a "meaningless charade"); *see also* EUGENE J. KAPLAN, JAPAN: THE GOVERNMENT-BUSINESS RELATIONSHIP (1972) (expounding upon the tight and permissive relationship between business and government in Japan).

69 *See* MICHELLE CINI & LEE MCGOWAN, COMPETITION POLICY IN THE EUROPEAN UNION 15–37 (1998) (outlining the postwar historical development of antitrust policy in the E.U.); Simon J. Evenett et al., *Antitrust Policy in an Evolving Global Marketplace*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 1, 1 (Simon J. Evenett et al. eds., 2000) (observing that competition policy has acquired international prominence "in large part due to the growing interdependence among national economies during the closing decades of the twentieth century").

70 *See, e.g.*, *infra* notes 130–47 and accompanying text.

71 For considerations of antitrust, multinational enterprises, and problems of extraterritoriality, see BREWSTER, *supra* note 65. *See also* J.-G. CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND UNITED STATES OF AMERICA PRACTICES COMPARED (1988); THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS (Dieter Lange & Gary Born eds., 1987); A. H. HERMANN, CONFLICTS OF NATIONAL LAWS WITH INTERNATIONAL BUSINESS ACTIVITY: ISSUES OF EXTRATERRITORIALITY (1982); NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY (Douglas E. Rosenthal & William M. Knighton eds., 1982); A. D. NEAL & M. L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION (1988).

72 213 U.S. 347 (1909).

73 *Id.* at 359. In the Court's words,

> [I]t is a contradiction in terms to say that within its jurisdiction, it is unlawful to persuade a sovereign power [i.e., Costa Rica] to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.

Id. at 358.

74 United States v. Sisal Sales Corp., 274 U.S. 268, 275–76 (1927). In a 1929 decision, a federal district court decisively rejected French claims that government-admin-

anti-cartel sentiment on the rise during the 1930s and 1940s,[75] federal courts began to look more dubiously on international conspiracies that had an effect on the American economy. In a series of early postwar cases, precedents for acting against overseas collusion began to stack up.[76] Yet, foreign governments still maintained that American law could not transcend American boundaries, and they naturally rejected the notion that companies operating within their own borders were actually subject to the jurisdiction of another sovereign power.

Despite postwar momentum for acting against collusion abroad, comity remains an important potential brake on antitrust. In 1976, the Ninth Circuit noted that "respect for the role of the executive and for international notions of comity and fairness" continued to play a role in the application of antitrust law.[77] Three years later, the Third Circuit observed that "foreign policy, reciprocity, comity and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction,"[78] and in 1981 the Tenth Circuit rejected federal courts' jurisdiction over a case involving American and Canadian potash producers, reasoning that "[c]omity concerns outweigh any effect on United States commerce."[79] Although within the last decade the Court affirmed the ex-

istered potash mines in Alsace were beyond the jurisdiction of U.S. law. *See* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 203 (D.C.N.Y. 1929). Note that in the same year as *Sisal*, the Permanent Court of International Justice also refused to limit nation-states' ability to regulate conduct abroad. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7), *reprinted in* 2 WORLD COURT REPORTS: A COLLECTION OF THE JUDGMENTS, ORDERS AND OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 35 (Manley O. Hudson ed., 1969).

75 *See supra* notes 56–59 and accompanying text.

76 *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 113 n.8 (1969) (holding that Hazeltine's agreements with a Canadian patent pool were reachable through the antitrust laws); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 592 (S.D.N.Y. 1951) (upholding the application of antitrust laws overseas when it involved a conspiracy "which affects American commerce"); United States v. Minn. Mining & Mfg. Co., 92 F. Supp. 947, 961 (D. Mass. 1950) (holding that conspiracy to establish joint factories overseas and to refrain from exporting from U.S. factories was an actionable combination in restraint of trade).

77 Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 612 (9th Cir. 1976). The court added that "acuity is especially required in private suits . . . for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact." *Id.* at 613.

78 Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296 (3d Cir. 1979).

79 Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 871 (10th Cir. 1981). Another 1980s antitrust case decided in part upon comity is *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (citing comity as the basis for authorizing a preliminary injunction free from British interference).

traterritorial reach of U.S. antitrust law in *Hartford Fire Insurance Co. v. California*,[80] Justice Scalia's dissent underscored the continuing relevance of comity to antitrust adjudication.[81] It is probably safe to say that the more apparent it is to federal courts that substantial American foreign policy or national security goals are placed in jeopardy by antitrust action, the more likely it is that such courts will use the doctrine of comity as a basis of action—or restraint of action.

The doctrine of comity represents an important approach of the federal courts when deciding antitrust cases with extraterritorial implications. But more direct and fundamental to the nexus between antitrust and national security is the executive branch's determination to bring suit or not.[82] The decision to prosecute a foreign or multinational company for activity undertaken abroad requires consideration of national security factors at the most basic level. The experience of World War II serves as a prime example. The antitrust revival of the late-1930s, spearheaded by the TNEC and Thurman Arnold's Antitrust Division,[83] was as sure a casualty of Pearl Harbor as were the American sailors who perished there. Indeed, many of the suits brought by the Antitrust Division upon the urging of the TNEC foundered or were dismissed outright when war erupted in Europe in September 1939.[84] At this point, "the center of influence shifted from the antimonopolists to the business-oriented directors of the new defense agencies."[85] Given the nature of total war and the demands that the Second World War placed on the United States, this result should surprise no one. National security trumped all else after December 7, 1941, and it remained supreme until the Japanese surrender in 1945. Yet even after the close of World War II, American policymakers felt enormous national security pressures, and these pressures continued to exert force over antitrust law. In fact, it is arguable that national

80 509 U.S. 764, 798 (1993) (asserting that "international comity would not counsel against exercising jurisdiction in the circumstances alleged here").

81 *Id.* at 820 (Scalia, J., dissenting) (noting that the majority's decision "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners").

82 Obviously, as noted in *Timberlane*, civil suits of private parties could have foreign policy implications beyond the direct control of American policymakers. *Timberlane*, 549 F.2d at 613.

83 *See supra* notes 56–59 and accompanying text.

84 HAWLEY, *supra* note 12, at 442; *see also* MCELVAINE, *supra* note 54, at 300.

85 HAWLEY, *supra* note 12, at 442.

security concerns were felt just as acutely during the Cold War,[86] and that they exerted similar force over the ebb and flow of antitrust law.[87]

The Eisenhower administration presents a useful point of departure for examining the pressures of the Cold War upon antitrust. On the one hand—and in contrast with critics' claims—the administration actually resuscitated antitrust enforcement during the 1950s.[88] On the other hand, when national security interests became involved, the administration invariably set aside, modified, or manipulated antitrust law as the situation required. In 1949, Dwight D. Eisenhower spoke before the American Bar Association and declared that "freedom to compete" was one of the keys to liberty itself,[89] and three years later, when campaigning for the presidency, he promised that his administration would "fearlessly, impartially and energetically" enforce the antitrust laws.[90]

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86 *See infra* notes 102–16 and accompanying text.

87 The impact of the Cold War on domestic politics and law cannot be exaggerated, however much of it lies beyond the scope of this Note. Certainly, its impact was hardly (or even primarily) limited to antitrust law. A good case has been made, for instance, that the impact of the Cold War fell squarely on the civil rights movement (and vice versa), forcing the U.S. government to consider how ugly segregationist practices in the American South complicated diplomats' efforts to convince wary, non-white developing countries that the United States had their interests at heart. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 11 (2000) (analyzing the "strategic value of civil rights reform" for the Cold War struggle and its impact on the civil rights movement); Thomas Borstelmann, *"Hedging Our Bets and Buying Time": John Kennedy and Racial Revolutions in the American South and Southern Africa*, 24 DIPL. HIST. 435 (2000) (describing the political balancing act undertaken by the Kennedy administration to push for desegregation at home and overseas while not alienating white allies in the American South and abroad); Harold R. Isaacs, *World Affairs and U.S. Race Relations: A Note on Little Rock*, 22 PUB. OPINION Q. 364 (1958) (describing the impact of foreign affairs on the Little Rock crisis from a contemporary perspective); Michael L. Krenn, *"Unfinished Business": Segregation and U.S. Diplomacy at the 1958 World's Fair*, 20 DIPL. HIST. 591 (1996) (analyzing the politics behind a controversial American exhibit on race at the 1958 World's Fair).

88 On this point, see THEODORE PHILIP KOVALEFF, BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT (1980) (arguing for a positive appraisal of the Eisenhower administration's antitrust enforcement). Kovaleff's study of antitrust under Eisenhower remains the most thorough, if openly sympathetic, treatment available.

89 Dwight D. Eisenhower, *The Middle of the Road: A Statement of Faith in America*, 35 A.B.A. J. 810–11 (Oct. 1949).

90 KOVALEFF, *supra* note 88, at 12 (quoting Letter from Dwight D. Eisenhower, Republican candidate for President, to National Association of Retail Druggists (Oct. 16, 1952)).

This might seem to be an unusual declaration for a Republican campaigning at a time when only 23% of the American people could identify the phrase "antitrust suit" and when a mere 10% had even rough knowledge of the Sherman Act.[91] Was not this, after all, the time when, in Hofstadter's phrase, the antitrust movement had already ceased to exist? Perhaps. But in Eisenhower's mind, antitrust fit into his larger conception of American tradition and political economy, a formulation that the President called the "middle way."[92] The middle way posited continuous and vigorous economic growth as an alternative to creeping government regimentation. Eisenhower realized that big business could not always produce this growth, however, especially if it actually reduced the freedom and dynamism of the marketplace through merger, market division, or other monopolistic practices.[93] Under Eisenhower, antitrust was not meant to harass business but to rescue productive free enterprise from the clutches of monopoly. It was a pro-business measure, in his view, to encourage innovation and dynamism and demonstrate the redeemable and reformable nature of free market capitalism.[94] In the context of the

91 BURTON R. FISHER & STEPHEN B. WITHEY, BIG BUSINESS AS THE PEOPLE SEE IT: A STUDY OF A SOCIO-ECONOMIC INSTITUTION 54 (1951).

92 *See* DWIGHT D. EISENHOWER, MANDATE FOR CHANGE, 1953–1956: THE WHITE HOUSE YEARS 51 (1963); Robert Griffith, *Dwight D. Eisenhower and the Corporate Commonwealth*, 87 AM. HIST. REV. 87, 91 (1982).

93 KOVALEFF, *supra* note 88, at 11–13; Raymond J. Saulnier, *The Philosophy Underlying Eisenhower's Economic Policies*, *in* DWIGHT D. EISENHOWER: SOLDIER, PRESIDENT, STATESMAN 100–01 (Joann P. Krieg ed., 1987); *see also* THE EISENHOWER DIARIES 138 (Robert H. Ferrell ed., 1981).

94 Gabriel Hauge, a top economic advisor to Eisenhower, stressed the pro-business nature of antitrust when he addressed the Business Advisory Council (BAC) in May 1955. *See* Remarks by Gabriel Hauge, Assistant to the President for Economic Affairs, to the Business Advisory Council (May 6, 1955), *in* Business Advisory Council 1954–55 Folder, Box 25, Sinclair Weeks Papers, Baker Memorial Library, Dartmouth College, Hanover, NH [hereinafter Sinclair Weeks Papers, with appropriate document title, folder, and box].

This Note makes extensive use of historical documents obtained from archives scattered throughout the United States. The Sinclair Weeks Papers mentioned above are an example of such archival materials. The archives consulted for the documentation in this Note include the National Archives in College Park, MD, the Dwight D. Eisenhower Library in Abilene, KS, the Baker Memorial Library at Dartmouth College, and the Seeley G. Mudd Library at Princeton University. It also makes use of documents obtained from the Department of Justice through Freedom of Information Act (FOIA) requests acted upon in 1997–1998. A writer's ability to identify the precise location of such documents varies with the orderliness of a given archive. To the extent possible, this Note will provide the most complete and intelligible citation for such materials, and it will also employ descriptive short forms wherever feasible.

Cold War and the global challenge of Communism, this was a lesson that the President hoped would be learned far and wide.

With the middle way in mind, Eisenhower selected Herbert Brownell as attorney general and Stanley N. Barnes to serve as assistant attorney general for antitrust. Early on, Brownell echoed the President, announcing in June 1953 that the administration would neither wink at "violations of the law" nor dismiss pending suits wholesale.[95] Barnes was wholly in tune with this thinking. A former chief judge of the Los Angeles Superior Court and private practice attorney for over twenty years, Barnes quickly established himself as one of the "finest legal minds" in the administration.[96] Both Brownell and Barnes assured businessmen that the Antitrust Division would end the Truman administration's harassment of big business.[97] This did not mean the end of antitrust, however. On the contrary, by the time he left the Justice Department, Barnes had retired 107 of the 144 cases left over from the Truman years and had initiated 104 cases of his own.[98] Of the inherited cases, the Antitrust Division won thirty-one of them in the courts, settled fifty-seven others in pretrial negotiations, and dismissed only eleven.[99] Under Barnes, the hallmark of antitrust became the consent decree, whereby the Antitrust Division and alleged wrongdoers worked out arrangements to ameliorate monopolis-

95 "Our Antitrust Policy", Statement by Herbert Brownell, Attorney General of the United States (June 26, 1953), *in* Anti-Trust Miscellaneous Material Folder, Box 1, General Subject File 1953–1958, Office of the General Counsel, Record Group (RG) 40, National Archives, College Park, MD; *see also* HERBERT BROWNELL, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 154 (1993).

96 President's News Conference, 1955 PUB. PAPERS 342 (Mar. 16, 1955). For initial assessments of Barnes, see *Joining the White House Team*, U.S. NEWS & WORLD REP., Apr. 17, 1953, at 64; *The New Trustbuster*, TIME, Sept. 7, 1953, at 86; and *Which Way Will Antitrust Policy Head Now?*, BUS. WK., Apr. 11, 1953, at 32. Note finally that Barnes's work in the Antitrust Division was so impressive that in March 1956 President Eisenhower appointed him to the U.S. Ninth Circuit Court of Appeals. *Reward for a Trustbuster*, TIME, Mar. 19, 1956, at 27.

97 *Brownell's Big Battles: Graft, Communism, Monopoly*, U.S. NEWS & WORLD REP., Feb. 6, 1953, at 16–17; *see also Antitrust: Age of Consent*, NEWSWEEK, Feb. 20, 1956, at 79 ("'We have been able,' says Barnes, 'to create confidence among businessmen that we would be fair, not arbitrary, that we wouldn't file cases just for the fun of filing them, and that when we go to the negotiation table, we have a pretty good case.'"); *The U.S. and Business: Era of Good Feeling?*, U.S. NEWS & WORLD REP., July 24, 1953, at 69.

98 *Reward for a Trustbuster*, *supra* note 96, at 27.

99 *Id.* Even acclaimed F.D.R.-era trustbuster Thurman Arnold once said of Barnes, "He is better than any assistant attorney general we've ever had—and that includes Thurman Arnold." *Antitrust: More Clamor To Come*, NEWSWEEK, June 13, 1955, at 77.

tic effects before a case went to trial.[100] Convinced that concrete prohibitions were better than long, drawn-out showdowns, Barnes and his immediate successors "quietly and effectively institutionalized" the consent decree as a weapon against monopoly.[101]

Yet for all the positive achievements in antitrust on behalf of Eisenhower's middle way, enforcement during the 1950s was also strongly influenced by national security, often in ways inimical to both antitrust and the middle way. When one steps back and considers the larger historical context, this sort of pressure—and concession to pressure—is hardly surprising. To a large degree, the early years of the Cold War were characterized by one war-threatening crisis after another: Soviet intimidation of Turkey in 1946 and 1947,[102] the Berlin Blockade of 1948,[103] Soviet acquisition of the atomic bomb in 1949 (and the hydrogen bomb in 1953),[104] the fall of China to Communism in 1949,[105] the eruption of the Korean War in 1950,[106] the Chi-

100 Stanley N. Barnes, *Settlement by Consent Judgment*, 4 A.B.A. SEC. OF ANTITRUST LAW 8, 8–13 (1954); *Antitrust: Age of Consent*, *supra* note 97, at 79–80; *New Style in "Trust Busting": Agreement without Trial*, U.S. NEWS & WORLD REP., Feb. 24, 1956, at 92, 94–95.

101 Hofstadter, *supra* note 2, at 236; *see also* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955); Herbert Brownell, Jr., *Antitrust Today*, 6 CATH. U. L. REV. 129 (1957).

102 *See* BRUCE ROBELLET KUNIHOLM, THE ORIGINS OF THE COLD WAR IN THE NEAR EAST: GREAT POWER CONFLICT AND DIPLOMACY IN IRAN, TURKEY, AND GREECE (1980); Lawrence S. Wittner, *The Truman Doctrine and the Defense of Freedom*, 4 DIPL. HIST. 161 (1980).

103 *See* THOMAS PARRISH, BERLIN IN THE BALANCE, 1945–1949: THE BLOCKADE, THE AIRLIFT, THE FIRST MAJOR BATTLE OF THE COLD WAR (1998); AVI SHLAIM, THE UNITED STATES AND THE BERLIN BLOCKADE, 1948–1949: A STUDY IN CRISIS DECISION-MAKING (1983); Daniel F. Harrington, *The Berlin Blockage Revisited*, 6 INT'L HIST. REV. 88 (1984).

104 *See* MCGEORGE BUNDY, DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS (1988); COLD WAR STATESMEN CONFRONT THE BOMB: NUCLEAR DIPLOMACY SINCE 1945 (John Lewis Gaddis et al. eds., 1999); GREGG HERKEN, THE WINNING WEAPON: THE ATOMIC BOMB IN THE COLD WAR, 1945–1950 (1980); DAVID HOLLOWAY, STALIN AND THE BOMB: THE SOVIET UNION AND ATOMIC ENERGY, 1939–1956 (1994); RONALD F. POWASKI, MARCH TO ARMAGEDDON: THE UNITED STATES AND THE NUCLEAR ARMS RACE, 1939 TO THE PRESENT (1987).

105 *See* WILLIAM WHITNEY STUECK, JR., THE ROAD TO CONFRONTATION: AMERICAN POLICY TOWARD CHINA AND KOREA, 1947–1950 (1981); Warren I. Cohen, *The United States and China Since 1945*, *in* NEW FRONTIERS IN AMERICAN-EAST ASIAN RELATIONS: ESSAYS PRESENTED TO DOROTHY BORG 129 (Warren I. Cohen ed., 1983).

106 *See* ROSEMARY FOOT, THE WRONG WAR: AMERICAN POLICY AND THE DIMENSIONS OF THE KOREAN CONFLICT, 1950–1953 (1985); BURTON I. KAUFMAN, THE KOREAN WAR: CHALLENGES IN CRISIS, CREDIBILITY, AND COMMAND (1986); WILLIAM STUECK, THE KOREAN WAR: AN INTERNATIONAL HISTORY (1995).

nese offshore islands crises of the 1950s,[107] the emergence of Communism and nationalism in the Third World during the 1950s,[108] the fall of Dien Bien Phu in 1954,[109] the Suez and Hungarian crises of 1956,[110] the Sputnik scare of 1957,[111] the U-2 incident of 1959,[112] the rise of Castroism in 1959 and 1960,[113] the ill-fated Bay of Pigs invasion of 1961,[114] the Berlin Wall crisis of 1961,[115] and the most terrifying of them all, the Cuban Missile Crisis of 1962.[116] It is truly difficult for

107 *See* GORDON H. CHANG, FRIENDS AND ENEMIES: THE UNITED STATES, CHINA, AND THE SOVIET UNION, 1948–1972, at 116–42 (1990); Robert Accinelli, *Eisenhower, Congress, and the 1954–55 Offshore Island Crisis*, 20 PRESIDENTIAL STUD. Q. 329 (1990); H.W. Brands, Jr., *Testing Massive Retaliation: Credibility and Crisis Management in the Taiwan Strait*, 12 INT'L SECURITY 124 (1988); Bennett C. Rushkoff, *Eisenhower, Dulles and the Quemoy-Matsu Crisis, 1954–1955*, 96 POL. SCI. Q. 465 (1981).

108 *See* H.W. BRANDS, THE SPECTER OF NEUTRALISM: THE UNITED STATES AND THE EMERGENCE OF THE THIRD WORLD, 1947–1960 (1989); STEPHEN G. RABE, EISENHOWER AND LATIN AMERICA: THE FOREIGN POLICY OF ANTICOMMUNISM (1988); Robert J. McMahon, *Eisenhower and Third World Nationalism: A Critique of the Revisionists*, 101 POL. SCI. Q. 453 (1986).

109 *See* MELANIE BILLINGS-YUN, DECISION AGAINST WAR: EISENHOWER AND DIEN BIEN PHU, 1954 (1988); DIEN BIEN PHU AND THE CRISIS OF FRANCO-AMERICAN RELATIONS, 1954–1955 (Lawrence S. Kaplan et al. eds., 1990); George C. Herring & Richard H. Immerman, *Eisenhower, Dulles, and Dienbienphu: "The Day We Didn't Go to War" Revisited*, 71 J. AM. HIST. 343 (1984).

110 *See* CHARLES GATI, HUNGARY AND THE SOVIET BLOC (1986); KEITH KYLE, SUEZ (1991); DONALD NEFF, WARRIORS AT SUEZ: EISENHOWER TAKES AMERICA INTO THE MIDDLE EAST (1981); SUEZ 1956: THE CRISIS AND ITS CONSEQUENCES (William Roger Louis & Roger Owen eds., 1989).

111 *See* ROBERT A. DIVINE, THE *SPUTNIK* CHALLENGE (1993); JAMES R. KILLIAN, JR., *SPUTNIK*, SCIENTISTS, AND EISENHOWER: A MEMOIR OF THE FIRST SPECIAL ASSISTANT TO THE PRESIDENT FOR SCIENCE AND TECHNOLOGY (1977).

112 *See* MICHAEL R. BESCHLOSS, MAYDAY: EISENHOWER, KHRUSHCHEV AND THE U-2 AFFAIR (1986); DAVID WISE & THOMAS B. ROSS, THE U-2 AFFAIR (1962).

113 *See* THOMAS G. PATERSON, CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION (1994); RICHARD E. WELCH, JR., RESPONSE TO REVOLUTION: THE UNITED STATES AND THE CUBAN REVOLUTION, 1959–1961 (1985).

114 *See* TRUMBULL HIGGINS, THE PERFECT FAILURE: KENNEDY, EISENHOWER, AND THE CIA AT THE BAY OF PIGS (1987); Thomas G. Paterson, *Fixation with Cuba: The Bay of Pigs, Missile Crisis, and Covert War against Castro*, *in* KENNEDY'S QUEST FOR VICTORY: AMERICAN FOREIGN POLICY, 1961–1963, at 123 (Thomas G. Paterson ed., 1989); Joshua H. Sandman, *Analyzing Foreign Policy Crisis Situations: The Bay of Pigs*, 16 PRESIDENTIAL STUD. Q. 310 (1986).

115 *See* BUNDY, *supra* note 104, at 358–85; NORMAN GELB, THE BERLIN WALL: KENNEDY, KHRUSHCHEV, AND A SHOWDOWN IN THE HEART OF EUROPE (1986); ROBERT M. SLUSSER, THE BERLIN CRISIS OF 1961: SOVIET-AMERICAN RELATIONS AND THE STRUGGLE FOR POWER IN THE KREMLIN, JUNE–NOVEMBER 1961 (1973).

116 *See* GRAHAM T. ALLISON & PHILIP D. ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1999); ALEKSANDR FURSENKO & TIMOTHY J. NAFTALI, ONE HELL OF A GAMBLE: KHRUSHCHEV, CASTRO, AND KENNEDY, 1958–1964 (1997); THE KEN-

twenty-first century Americans, even in the awful shadow of September 11, 2001, to imagine just how tense and electrifying international relations were from 1945 to 1962.[117]

Within the general atmosphere of crisis and looming war, the Eisenhower administration was forced to respond to specific pressure on antitrust enforcement resulting from individual crises or diplomatic turmoil. The most famous (or infamous) such case dealt with the international oil cartel, which, in turn, involved Standard Oil of New Jersey (now Exxon-Mobil), Standard Oil of New York (now Exxon-Mobil), Standard Oil of California (now Chevron), Gulf Oil, Texaco, British Petroleum, and Royal Dutch Shell.[118] In the late 1940s, the Federal Trade Commission (FTC) issued a study that strongly implicated the above American, British, and Dutch companies in a concerted international cartel arrangement.[119] Worried about its national security implications, the Truman administration initially sat on the FTC study.[120] Later, for domestic political reasons, it grudgingly released the report and allowed the Antitrust Division to begin sharpening its knives and preparing for criminal prosecution.[121] But the situation in the Middle East worsened appreciably by 1952, and the administration came to fear what it perceived as pro-communist tendencies in Mohammed Mossadeq's nationalist government in Iran.[122] Mossadeq's precipitous decision to nationalize Anglo-Iranian Oil in the spring of 1951 confirmed Washington's suspicions, and so on January 12, 1953, with scarcely two weeks left in his administration, Truman downgraded the antitrust suit from a criminal to a civil suit.[123]

NEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS (Ernest R. May & Philip D. Zelikow eds., 1997); MARK J. WHITE, THE CUBAN MISSILE CRISIS (1996).

117 Brands, *supra* note 13, at 964 (stating that by the early 1950s, "Americans, inhabitants of the mightiest nation on earth, found themselves alarmingly vulnerable").

118 *See* BURTON I. KAUFMAN, THE OIL CARTEL CASE: A DOCUMENTARY STUDY OF ANTITRUST ACTIVITY IN THE COLD WAR ERA (1978); DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER 472–75 (1991). For a brief, generalized examination of Eisenhower's oil policy, see GERALD D. NASH, UNITED STATES OIL POLICY, 1890–1964, at 180–208 (1968). *See also* DAVID S. PAINTER, OIL AND THE AMERICAN CENTURY: THE POLITICAL ECONOMY OF U.S. FOREIGN OIL POLICY, 1941–1954 (1986).

119 YERGIN, *supra* note 118, at 472–73.

120 *Id.* at 473.

121 *Id.*

122 *Id.* at 456–58.

123 Memorandum of NSC Meeting (Jan. 1, 1953), *in* 1 FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, PART 2: GENERAL ECONOMIC AND POLITICAL MATTERS 1338–44 (David M. Baehler et al. eds., William Z. Slany gen. ed., 1983); *see also* YERGIN, *supra* note 118, at 455, 475; Letter from Harry S. Truman, President of the United

For his part, Eisenhower permitted the civil suit to commence, but, lest there be any question about business arrangements in Iran as a result of the coup against Mossadeq (masterminded, of course, by the Eisenhower administration itself), the resulting Iranian oil consortium was given a blanket exemption from antitrust prosecution.[124] Then, in a telling postscript, the Eisenhower administration reaffirmed its commitment to secure Middle Eastern oil, no matter what its antitrust implications. The Suez crisis of autumn 1956 was the necessary backdrop for this reaffirmation.[125]

In short, the crisis was precipitated when nationalist Egyptian leader Gamal Abdul Nasser nationalized the Suez Canal, igniting a chain of events that led to a joint Israeli-Anglo-French invasion in late October 1956.[126] Nasser responded by, inter alia, scuttling several large vessels in the canal, immediately reducing Western Europe to oil rationing.[127] The Eisenhower administration sought to normalize the European oil supply and wanted the main players of the oil cartel to pitch in and get things moving.[128] To win their support, the administration decided to exempt the companies from antitrust prosecution, and Eisenhower informed the members of his National Security Council (NSC) that if company officials were convicted for helping the administration, he would simply have to pardon them:

> [w]ith a smile, the President added that despite his stiff-necked Attorney General, he could give the [oil] industry members a certification that what they were planning and doing was in the interests of the national security. This might assist them with respect to any involvement with the antitrust laws . . . . The President said with a smile that if the heads of these oil companies landed up in jail or had to pay a big fine, he would pardon them (laughter).[129]

Today's current affairs underscore the continuing importance of foreign oil to the United States, so Eisenhower's decision probably

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States, to James P. McGranery, Attorney General of the United States, 1952–53 PUB. PAPERS 1168 (Jan. 12, 1953).

124 Memorandum of Discussion of the 139th Meeting of the NSC (Apr. 8, 1953), *in* 139th Meeting of NSC April 8, 1953 Folder, Box 4, NSC Series, Whitman File, Dwight D. Eisenhower Library, Abilene, KS [hereinafter Eisenhower NSC Papers, with appropriate document title, folder, and box]; *see also* YERGIN, *supra* note 118, at 475.

125 *See* KYLE, *supra* note 110; NEFF, *supra* note 110; *see also* DIANE B. KUNZ, THE ECONOMIC DIPLOMACY OF THE SUEZ CRISIS (1991); W. SCOTT LUCAS, DIVIDED WE STAND: BRITAIN, THE US, AND THE SUEZ CRISIS (1991).

126 KYLE, *supra* note 110, at 133–38, 370–90; NEFF, *supra* note 110, at 266–93.

127 NEFF, *supra* note 110, at 393–94, 420, 424.

128 Minutes of the 303d Meeting of the NSC (Nov. 8, 1956), *in* 8 November 1956 Folder, Box 8, Eisenhower NSC Papers, *supra* note 124.

129 *Id.*

comes as no surprise. But the administration also took decisive steps when far less strategically important commodities were involved. In 1953, for instance, when the Antitrust Division considered action against silver mining companies, the issue quickly assumed diplomatic proportions. Although trustbusters wanted to prosecute Chase National Bank, American Smelting and Refining, and others for conspiring to restrain American silver imports, their zeal had to take a backseat to diplomatic niceties.[130] Undersecretary of State Walter Bedell Smith soon informed Attorney General Brownell that the intended antitrust action would seriously damage Mexican-American relations.[131] For some time, the two governments had been wrangling over tariffs on lead, zinc, and other important Mexican mineral exports, placing larger issues, such as the development of strategic raw materials and cooperation in civil defense, in doubt.[132] Smith instructed Brownell that silver production was particularly important for the Mexican economy, providing employment for over 35,000 workers and adding to the country's American dollar reserves.[133] Moreover, by importing Mexican silver, Chase National Bank acted as an agent of the government-owned Bank of Mexico.[134] A suit against the alleged silver conspirators would naturally involve Chase, incense the Mexican government, and place American diplomacy at risk.[135] From the viewpoint of the State Department, with issues such as civil defense and strategic stockpiling hanging in the balance, Mexican-American relations had significant national security ramifications.[136]

Consequently, Brownell backed down, and chief trustbuster Barnes wrote Smith to assure him that the Justice Department was willing to postpone antitrust action, "perhaps indefinitely," in the interest

130 Letter from Herbert Brownell, Attorney General of the United States, to John Foster Dulles, Secretary of State (May 22, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Record Group (RG) 59, National Archives, College Park, MD [hereinafter Department of State Papers, with appropriate document title, box, and various identifying information].

131 Letter from Walter Bedell Smith, Undersecretary of State, to Herbert Brownell, Attorney General of the United States (June 8, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

132 *Id.*

133 *Id.*

134 Letter from John Moors Cabot, Assistant Secretary of State, to John Foster Dulles, Secretary of State (June 3, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

135 *Id.*

136 *Id.*

of American diplomacy.[137] To the best of this author's knowledge, the lawsuit was never filed.

Similar national security considerations affected an antitrust suit against General Electric (GE) in the late 1950s. In November 1958, the Antitrust Division initiated prosecution of GE, Westinghouse, and N.V. Philips (a Dutch corporation) for conspiring to restrain the importation of American radios and televisions into Canada in an effort to protect their Canadian subsidiaries from competition.[138] A Canadian-owned patent pool, Canadian Radio Patents Limited (CRPL) was also named as co-conspirator. Unfortunately, the case against GE was initiated during a particularly troubling period of relations between the United States and its ally to the north.[139] Underlying these tense relations were deeply held feelings among many Canadians that American economic hegemony was damaging to Canadian interests.[140] Canadian political leaders had already declared that Canada refused to become a "mere economic or political extension" of the United States, and they were equally emphatic that Canadians would not be "hewers of wood, drawers of water, and diggers of holes for any

137 Letter from Stanley N. Barnes, Assistant Attorney General, to Walter Bedell Smith, Undersecretary of State (June 22, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

138 KINGMAN BREWSTER, JR., LAW AND UNITED STATES BUSINESS IN CANADA 17 (1960). From 1940 to 1960, General Electric was the subject of a number of antitrust suits initiated by the U.S. government. *See* RICHARD AUSTIN SMITH, CORPORATIONS IN CRISIS 101, 109–10 (1963).

139 *See* JOHN HERD THOMPSON & STEPHEN J. RANDALL, CANADA AND THE UNITED STATES: AMBIVALENT ALLIES 3 (1994). For other scholarly examinations of the unequal and occasionally troubled relationship between the United States and Canada, see ROBERT BOTHWELL, CANADA AND THE UNITED STATES: THE POLITICS OF PARTNERSHIP (1992); PARTNERS NEVERTHELESS: CANADIAN-AMERICAN RELATIONS IN THE TWENTIETH CENTURY (Norman Hillmer ed., 1989); and Gordon T. Stewart, *"A Special Contiguous Country Economic Regime": An Overview of America's Canadian Policy*, 6 DIPL. HIST. 339 (1982).

140 *See* KARI LEVITT, SILENT SURRENDER: THE MULTINATIONAL CORPORATION IN CANADA (1970). American investment was indeed significant in Canada during the 1950s, amounting to 75% of all foreign investment in Canada and exerting direct control over 50% of Canadian manufacturing and just under 50% of Canadian mining and petroleum. *See* MIRA WILKINS, THE EMERGENCE OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM THE COLONIAL ERA TO 1914, at 135–48 (1970); MIRA WILKINS, THE MATURING OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM 1914 TO 1970, at 17, 76, 132, 189, 330, 402 (1974); *see also* HUGH G.J. AITKEN, AMERICAN CAPITAL AND CANADIAN RESOURCES (1961); CANADIAN DOMINION BUREAU OF STATISTICS, CANADA'S INTERNATIONAL INVESTMENT POSITION, 1926–1954, at 30–41 (1956); A.E. SAFARIAN, FOREIGN OWNERSHIP OF CANADIAN INDUSTRY (1966); C.D. Blythe & E.B. Carty, *Non-Resident Ownership of Canadian Industry*, 22 CANADIAN J. ECON. & POL. SCI. 449 (1956).

other country."[141] Only months before, Eisenhower attempted to prop up sagging U.S.-Canadian relations and allay Canadian fears by visiting Canada and emphasizing, both in private and while addressing the Canadian Houses of Parliament, that the two nations were genuine partners in a "global struggle" of "transcendent importance."[142] The timing of the antitrust suit immediately dissipated whatever goodwill Eisenhower's visit may have garnered.

Sensitive to the extraterritorial application of American law, Canadians blasted the lawsuit and grumbled that the antitrust case complicated an ongoing Canadian investigation of CRPL.[143] Eisenhower was distressed by the bitter complaints coming from America's northern neighbor, and when State Department officials arrived in Ottawa in January 1959 for negotiations, their counterparts in the Canadian ministries of External Affairs, Trade, and Justice bluntly requested that the U.S. government dismiss the antitrust action.[144] The administration refused to terminate the case altogether, but it agreed to a meeting between the nations' top law enforcement officials to

141 *U.S. Money Rolls Up a Storm*, BUS. WK., May 5, 1956, at 50, 54, 57–58; *see also* BOTHWELL, *supra* note 139, at 70–75; 2 JOHN G. DIEFENBAKER, ONE CANADA: THE YEARS OF ACHIEVEMENT, 1957–1962 (1976); H. BASIL ROBINSON, DIEFENBAKER'S WORLD: A POPULIST IN FOREIGN AFFAIRS 312 (1989); Don Page & Don Munton, *Canadian Images of the Cold War, 1946–7*, 32 INT'L J. 577 (1977); *Interview with the Canadian Prime Minister John Diefenbaker: A Frank Talk About U.S. and Canada*, U.S. NEWS & WORLD REP., Apr. 18, 1958, at 72, 74.

142 Dwight D. Eisenhower, Address to the Members of the Canadian Houses of Parliament, 1958 PUB. PAPERS 529, 531 (July 9, 1958); *see also* Memorandum from John Foster Dulles, Secretary of State, to Dwight D. Eisenhower, President of the United States (July 3, 1958), *in* 7 FOREIGN RELATIONS OF THE UNITED STATES, 1958–1960, PART 1: WESTERN EUROPEAN INTEGRATION AND SECURITY; CANADA 687 (Ronald D. Landa et al. eds., Glenn W. LaFantasie gen. ed., 1993) [hereinafter 7 FRUS, 1958–1960, PART 1]. *See generally* 7 FRUS, 1958–1960, PART 1, at 692–721 (containing documents relevant to U.S.-Canadian relations vis-à-vis the GE antitrust suit).

143 *See* Canadian Aide-Memoire to the U.S. Government (Dec. 19, 1958), *in* United States v. General Electric Co. (Civil No. 140-157) Records, Department of Justice, Washington, D.C. [hereinafter GE Records]; BREWSTER, *supra* note 138, at 17–18, 22.

144 Opening Statement of U.S. Delegation (Jan. 5–6, 1959), *in* Joint U.S.-Canadian Committee on Trade and Economic Affairs (1959 and Earlier) Folder, Box 1, Records Relating to the Joint US-Canada Committee on Trade and Economic Affairs 1954–1962, Bureau of European Affairs, Office of British Commonwealth and Northern European Affairs, Record Group (RG) 59, National Archives, College Park, MD [hereinafter Joint Committee Records, with appropriate document title and folder]; U.S. Record of Ottawa Talks (Jan. 21, 1959), *in* 1959 Meeting Folder, Joint Committee Records, *supra*.

hash out a suitable arrangement on antitrust coordination.[145] After spirited discussions in the NSC and the cabinet, Attorney General William P. Rogers met with Minister of Justice E. Davie Fulton in late January 1959 and hammered out a mechanism for substantial consultation over antitrust matters between the United States and Canada.[146] In this particular case, then, national security did not totally derail antitrust enforcement, but it did lead to a general accommodation that could have potential impact on future suits.[147]

145 U.S. Record of Ottawa Talks (Jan. 21, 1959), *in* 1959 Meeting Folder, Joint Committee Records, *supra* note 144.

146 HOUSE OF COMMONS DEBATES 617–19 (Feb. 3, 1959) (Canada) (statement of Minister Fulton); Foreign Service Dispatch (Canada) to Department of State (Feb. 4, 1959), *in* 1-258 Folder, Box 4113, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Memorandum from Baddia J. Rashid, Chief of Trial Section, Department of Justice, to File (Feb. 10, 1959), *in* GE Records, *supra* note 143; Memorandum from Victor R. Hansen, Assistant Attorney General, to William P. Rogers, Attorney General of the United States (Jan. 5, 1959), *in* GE Records, *supra* note 143; Memorandum of Discussion of the 393d Meeting of NSC (Jan. 15, 1959), *in* 15 January 1959 Folder, Box 11, Eisenhower NSC Papers, *supra* note 124; Minutes of Cabinet Meeting (Jan. 16, 1959), *in* Staff Notes—Jan. 1959 (2) Folder, Box 38, DDE Diary Series, Whitman File, Dwight D. Eisenhower Library, Abilene, KS [hereinafter Eisenhower Papers, with appropriate box, folder, and various identifying information]; *see also* Loftus E. Becker, *The Antitrust Law and Relations with Foreign Nations*, 40 DEP'T ST. BULL. 273, 275–77 (1959) (presenting the State Department's willingness to find a consultative mechanism between the U.S. and foreign governments).

147 For a general assessment of the consultation arrangement between the United States and Canada, see B.R. Campbell, *The Canada-United States Antitrust Notification and Consultation Procedure: A Study in Bilateral Conflict Resolution*, 56 CANADIAN BAR REV. 482, 485 (1978). The arrangement did produce some fruit, at least in terms of preventing excessive friction between the two nations. In June 1960, for instance, the Department of Justice used the mechanism to signal its antitrust-based opposition to the acquisition of U.S.-owned Apex Smelting by Aluminum Limited, a Canadian firm. This consultation headed off another potential clash. *See* Memorandum of I. Jack Martin, Administrative Assistant to the President, to Foy D. Kohler, Assistant Secretary of State (June 3, 1960), *in* 2-560 Folder, Box 2280, Class 811.054, 1960–63 Central Decimal File, Department of State Papers, *supra* note 130; Staff Notes (Oct. 27, 1959), *in* Toner Notes—October 1959 Folder, Box 45, DDE Diary Series, Whitman File, Eisenhower Papers, *supra* note 146. For the development of correspondence between Attorney General Rogers and Minister Fulton, see Letter from E. Davie Fulton, Canadian Minister of Justice, to William P. Rogers, Attorney General of the United States (Feb. 12, 1959), *in* GE Records, *supra* note 143; Letter from E. Davie Fulton, Canadian Minister of Justice, to William P. Rogers, Attorney General of the United States (Apr. 17, 1959), *in* GE Records, *supra* note 143; Letter from William P. Rogers, Attorney General of the United States, to E. Davie Fulton, Canadian Minister of Justice (May 29, 1959), *in* GE Records, *supra* note 143; and Letter from E. Davie Fulton, Canadian Minister of Justice, to William P. Rogers, Attorney General of the United States (Dec. 19, 1960), *in* GE Records, *supra* note 143.

As the tortuous paths of the litigation against Chase National Bank and GE demonstrate, national security had power in the 1950s to affect antitrust suits that had, at best, a tangential relationship with larger foreign policy goals of the U.S. government. Furthermore, it should be remembered that national security played no greater role in the Eisenhower administration than it had in the Truman years that preceded it or the Kennedy era that followed it. Indeed, during the entire Cold War, national security was an all-pervasive, bipartisan ethos, and even such things as antitrust law could be drawn inexorably into it.

III. CASE STUDY: *UNITED STATES V. UNITED FRUIT*

This Part will provide an in-depth historical case study of the impact of national security on antitrust during the Cold War. As indicated in Part II, national security concerns placed considerable pressure on antitrust suits during Eisenhower's presidency, and invariably the President sided with perceived security needs, whether the suit concerned oil, silver, or consumer electronics. The importance of petroleum to the postwar order cannot be exaggerated, yet bananas, not oil, were at issue in an especially telling case against the United Fruit Company. One would hardly expect an antitrust suit over such a relatively benign and mundane product to become entangled in Cold War politics, but it did. What follows is the tale of such entanglement.

Attempting to sum up the problems facing United Fruit after a season of flooding and pestilence had laid waste to much of its banana crop in Guatemala, *Business Week* commented that the company had its hands full in 1954 and 1955: "[i]f it isn't fungus, it's floods; if it isn't Communism, it's the Justice Dep[artmen]t."[148] This observation had a ring of truth to it. Since November 1950, United Fruit had been struggling in Guatemala against labor unrest and the expropriations of Jacobo Arbenz's left-wing, nationalist government.[149] It had collaborated with the Eisenhower administration to overthrow that regime, only then to be set upon by Barnes and his determined trustbusters.[150] Although United Fruit had long been a target of the Antitrust Division, the Eisenhower administration did not sink its teeth into the ba-

148 *Report from Bananaland*, BUS. WK., Apr. 30, 1955, at 142.

149 RICHARD H. IMMERMAN, THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION 76–82 (1982); *see also* Memorandum from Victor R. Hansen, Assistant Attorney General, to J. Edgar Hoover, FBI Director (Dec. 11, 1957), *in* United States v. United Fruit Co. (Civil No. 4560) Records, Department of Justice, Washington, D.C. (containing an English translation of an official Guatemalan document justifying the expropriation of United Fruit's land) [hereinafter UFCO Records].

150 *See infra* notes 182–85 and accompanying text.

nana giant until after the Arbenz matter had been settled to its satisfaction.[151] National security remained the driving force behind antitrust, even when the administration finally decided to act against the company.

By the mid-1950s, United Fruit had captured nearly 65% of the U.S. banana market.[152] It had an annual income of nearly $400 million and a long list of foreign assets, especially in Latin America, where it was the largest landholder and largest employer in several countries.[153] This enormous power made the company an attractive target, especially to Arbenz, whose government seized nearly 400,000 acres of the company's land and redistributed it to tens of thousands of landless Guatemalan peasants.[154] The U.S. government had long been wary of massive expropriations by foreign governments, and it registered several formal complaints to the Guatemalan government and ultimately identified the source of its expropriations as none other than "international communism."[155] Given these circumstances, United Fruit turned to the Eisenhower administration for protection against Arbenz, hoping at the same time to use the Guatemalan threat as leverage against antitrust action by the Justice Department.[156]

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151 *Id.*

152 Memorandum from John L. Kilcullen, Officer of Latin American Bureau, Department of State, to Stephen F. Dunn, Officer of Latin American Bureau, Department of State (July 8, 1954), *in* Box 57, Sinclair Weeks Papers, *supra* note 94; *see also* IMMERMAN, *supra* note 149, at 73.

153 STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA 75 (1982). Arbenz's government ultimately expropriated over 1.4 million acres of land in Guatemala by 1954, about 25% of all arable land in the country. PIERO GLEIJESES, SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944–1954, at 155 (1991).

154 IMMERMAN, *supra* note 149, at 80–81.

155 *See Communist Influence in Guatemala*, 30 DEP'T ST. BULL. 874 (1954); John Foster Dulles, *International Communism in Guatemala*, 30 DEP'T ST. BULL. 43 (1954); *Expropriation of United Fruit Company Property by Government of Guatemala*, 29 DEP'T ST. BULL. 357 (1953); *Formal Claim Filed Against Guatemalan Government*, 30 DEP'T ST. BULL. 678 (1954); *see also Guatemala's Warning to U.S. Business*, FORTUNE, July 1953, at 73.

156 GLEIJESES, *supra* note 153, at 156. An exhaustive treatment of the United Fruit Company (now Chiquita Brands International) has not yet been written. For the best available accounts, see AVIVA CHOMSKY, WEST INDIAN WORKERS AND THE UNITED FRUIT COMPANY IN COSTA RICA, 1870–1940 (1996); PAUL J. DOSAL, DOING BUSINESS WITH THE DICTATORS: A POLITICAL HISTORY OF UNITED FRUIT IN GUATEMALA, 1899–1944 (1993); LESTER D. LANGLEY & THOMAS SCHOONOVER, THE BANANA MEN: AMERICAN MERCENARIES AND ENTREPRENEURS IN CENTRAL AMERICA, 1880–1930 (1995); and DIANE K. STANLEY, FOR THE RECORD: THE UNITED FRUIT COMPANY'S SIXTY-SIX YEARS IN GUATEMALA (1994). Although they suffer from subjective analysis, also useful are CHARLES DAVID KEPNER, JR. & JAY HENRY SOOTHILL, THE BANANA EMPIRE: A CASE STUDY OF ECO-

Such action was very much on the mind of Stanley Barnes. Shortly after becoming assistant attorney general, Barnes surveyed the antitrust cases bequeathed by the Truman administration and made it clear that the case against United Fruit would continue.[157] Indeed, trustbusters felt confident that they could successfully prosecute United Fruit for violating sections one and two of the Sherman Act.[158] Although the company dominated U.S. banana sales, its size and market share were less important than its repeated illegal behavior regarding banana production, transportation arrangements, and price-fixing.[159] This behavior had made the company a target of trustbusters in the Justice Department, and their efforts had begun to peak just as United Fruit was coming under attack in Guatemala.

Hoping to turn the administration's attention away from antitrust, company officials began to focus upon the greater danger of a communist beachhead in the Western Hemisphere. They gambled that national security needs were stronger than Eisenhower's commitment to antitrust—and in the short run they were right.[160] When the Guatemalan government decided in February 1953 to nationalize more property, dozens of U.S. congressmen bombarded the State Department with telegrams, urging a strong line in support of United Fruit and in defense of American overseas investment.[161] Company officials echoed this sentiment in a meeting with Assistant Secretary of State John Moors Cabot on May 6, 1953. For his part, Cabot was already convinced that Communism was an "international conspiracy

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NOMIC IMPERIALISM (2d ed. 1967); STACY MAY & GALO PLAZA LASSO, THE UNITED FRUIT COMPANY IN LATIN AMERICA (1958); and THOMAS MCCANN, ON THE INSIDE: A STORY OF INTRIGUE AND ADVENTURE, ON WALL STREET, IN WASHINGTON, AND IN THE JUNGLES OF CENTRAL AMERICA (1987).

157 Letter from Stanley N. Barnes, Assistant Attorney General, to John Moors Cabot, Assistant Secretary of State (May 8, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130 (stating that a Justice Department investigation confirmed that United Fruit was guilty of antitrust violations).

158 Memorandum from John L. Kilcullen, Officer of Latin American Bureau, Department of State, to Stephen F. Dunn, Officer of Latin American Bureau, Department of State (July 8, 1954), *in* Box 57, Sinclair Weeks Papers, *supra* note 94 (writing that the case against United Fruit was not simply a matter of "bigness" but, rather, that it concerned serious antitrust violations).

159 *Id.* For more on United Fruit's transgressions, see DOSAL, *supra* note 156, at 205–23.

160 IMMERMAN, *supra* note 149, at 82.

161 Office Memorandum of the Department of State (Apr. 23, 1953), *in* Box 4389, Class 811.05114, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

and ipso facto a menace to everybody in the world."[162] Capitalizing on this conviction, company officials soon turned the discussion away from United Fruit's great unpopularity in Latin America to a discussion of the antitrust suit.[163] Samuel G. Baggett, vice president of United Fruit, brought up the subject, claiming that a suit would prove "very damaging" to the company at a time when its entire Latin American operations were in jeopardy.[164] "No one," he emphasized, "would believe there was not something seriously wrong with an American company being sued by its own government."[165]

In fact, the Justice Department had just finished its preliminary investigation of United Fruit. The investigation had found ample cause to pursue antitrust action against the company's monopoly of the Central American banana industry,[166] but Barnes knew that he could not proceed with the suit on his own authority, at least not at a time when the President and the State Department were preoccupied with Guatemala. Indeed, United Fruit had repeatedly warned about the diplomatic ramifications of an antitrust suit against the company.[167] Citing an "aggressive and vicious campaign" waged by the

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162 JOHN MOORS CABOT, FIRST LINE OF DEFENSE: FORTY YEARS' EXPERIENCES OF A CAREER DIPLOMAT 86, 89–90 (1979); JOHN M. CABOT, TOWARD OUR COMMON AMERICAN DESTINY: SPEECHES AND INTERVIEWS ON LATIN AMERICAN PROBLEMS 44, 56–59, 118 (1955).

163 Department of State Memorandum of Conversation (May 6, 1953), *in* Box 4389, Class 811.05113, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

164 *Id.*

165 *Id.*

166 *See* Memorandum from Milton A. Kallis, Trial Attorney, Department of Justice, to W. Perry Epes, Assistant Chief of General Litigation Section, Department of Justice, and Victor H. Kramer, Chief of General Litigation Section, Department of Justice, (Dec. 20, 1952), *in* UFCO Records, *supra* note 149 (providing a history of United Fruit and the banana industry); Memorandum from Milton A. Kallis, Trial Attorney, Department of Justice, to Victor H. Kramer, Chief of General Litigation Section, Department of Justice (Feb. 26, 1953), *in* UFCO Records, *supra* note 149 (laying out the Justice Department case against United Fruit).

167 *See, e.g.*, Letter from Samuel G. Baggett, Vice President, United Fruit, to W. Perry Epes, Assistant Chief of General Litigation Section, Department of Justice (Nov. 28, 1952), *in* UFCO Records, *supra* note 149 (warning that an antitrust suit against United Fruit would be "exploited immediately" by communists); Memorandum from W. Perry Epes, Assistant Chief of General Litigation Section, Department of Justice, to File (Dec. 22, 1952), *in* UFCO Records, *supra* note 149 (urging Justice Department officials to consider the larger circumstances of Communism in Latin America before filing an antitrust suit against the company); Memorandum of United Fruit Co. (Feb. 16, 1953), *in* UFCO Records, *supra* note 149 (stating in a company attachment that United Fruit was "fighting for its life in Latin America").

Guatemalan communists "against all American business,"[168] Baggett informed the trustbusters that an antitrust suit would "fan the flames of Communism"[169] and cause "great damage" to "our country's foreign relations generally."[170] Under these circumstances, Barnes decided to refer the matter to the State Department. On May 8, 1953, he informed Cabot of his intention to file suit against the company.[171] Barnes wanted the State Department's opinion as to whether such an action would seriously undermine U.S. interests in Guatemala.[172]

Cabot did not wait long to act. He told Raymond Leddy, the main liaison between the State Department and the Central Intelligence Agency (CIA), that a suit against United Fruit at this point "would upset the applecart for us politically in Central America."[173] Whatever the legal merits of the case, it ought to be settled privately and discreetly, and company officials ought to be told that "complex national interests" dictated a basic reconsideration of the case.[174] Cabot's colleagues agreed. The State Department, Cabot wrote Barnes on May 19, felt strongly that legal action "would have very serious repercussions on our national interests in half a dozen countries of the Caribbean area."[175] It would hearten Latin American radicals, do "irreparable injury" to United Fruit, and undermine the position of "other American interests in the area."[176] For these reasons, the State Department wanted to arrange a conference with Barnes and

168 Letter from Samuel G. Baggett, Vice President, United Fruit, to W. Perry Epes, Assistant Chief of General Litigation Section, Department of Justice (Nov. 13, 1952), *in* UFCO Records, *supra* note 149.

169 Memorandum from Victor H. Kramer, Chief of General Litigation Section, Department of Justice, to File (Feb. 16, 1953), *in* UFCO Records, *supra* note 149.

170 Letter from Samuel G. Baggett, Vice President, United Fruit, to W. Perry Epes, Assistant Chief of General Litigation Section, Department of Justice (Nov. 13, 1952), *in* UFCO Records, *supra* note 149.

171 Letter from Stanley N. Barnes, Assistant Attorney General, to John Moors Cabot, Assistant Secretary of State (May 8, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

172 *Id.*

173 Letter from John Moors Cabot, Assistant Secretary of State, to Raymond Leddy, CIA Liaison, Department of State (May 9, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

174 Memorandum from John Moors Cabot, Assistant Secretary of State, to the Acting Secretary of State (May 14, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

175 Letter from John Moors Cabot, Assistant Secretary of State, to Stanley N. Barnes, Assistant Attorney General (May 19, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

176 *Id.*

other Justice officials to see how best to satisfy all the parties involved.[177]

Just as the company's executives had hoped, the State Department had begun to connect the fate of United Fruit to the needs of American foreign policy. Antitrust, its logic went, would only encourage Guatemalan efforts at expropriation, which in turn would establish a dangerous precedent for further nationalizations in the region and thus result in a major "setback for [U.S.] economic and strategic interests."[178] By the end of May 1953, the State Department had fallen completely in line with Cabot's initial convictions and was considering "every available means" to get United Fruit and the Justice Department to settle their differences without a public trial.[179] By June 4, when the NSC took up the matter, this policy had begun to bear fruit. Brownell opened the discussion by recommending that the Antitrust Division continue its case against United Fruit. However, Secretary of State John Foster Dulles insisted that such a course would have "terrible repercussions . . . on [U.S.] foreign policy objectives," and Eisenhower basically agreed.[180] Convinced that antitrust action would hamper efforts to isolate Arbenz, President Eisenhower ordered Brownell to postpone the trial for one year and, "as a matter of urgency," enter into concerted negotiations with United Fruit to draft a satisfactory consent decree.[181] In effect, the lawsuit was placed on hiatus.

Although company officials must have been pleased with this development, their joy was shattered the following year. For in July 1954, the Justice Department filed a civil suit against United Fruit, charging it with violation of the nation's antitrust laws. How had this happened?

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177 *Id.*

178 Memorandum from John Moors Cabot, Assistant Secretary of State, to Herman Phleger, Legal Advisor, Department of State (May 27, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

179 Memorandum from Raymond Leddy, CIA Liaison, Department of State, to John Moors Cabot, Assistant Secretary of State (June 1, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

180 Memorandum of Discussion of the 148th Meeting of the NSC (June 4, 1953), *in* 4 June 1953 Folder, Box 4, Eisenhower NSC Papers, *supra* note 124.

181 *Id.*; *see also* NSC Planning Board Report on "Effect on National Security Interests in Latin America of Possible Anti-Trust Proceedings" (June 4, 1953), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130; Policy Paper NSC-152/3 (June 4, 1953), *in* NSC 152/3 (2) Folder, Policy Papers Subseries, NSC Series, White House Office of the Special Assistant for National Security Affairs, Eisenhower Papers, *supra* note 146.

Once again, larger security considerations formed the context of such a reversal. The Justice Department acted only days after the CIA, in collaboration with Colonel Carlos Castillo Armas, had successfully toppled the Arbenz regime.[182] With Arbenz out of the way and a pro-American government in place, national security needs no longer required the administration to delay action on the antitrust front. Hence, Brownell pressed the NSC to resuscitate the antitrust suit, arguing that United Fruit had repeatedly violated the nation's laws by price-setting and initiating mergers specifically designed to thwart competition.[183] This time, Dulles had no objections.[184] Indeed, he and others apparently realized that, in the aftermath of Armas's coup, they now had more to gain by putting distance between the United States and United Fruit.[185] One way to gain this distance was to renew the government's case against the company.

Dusting off their briefs, government attorneys appeared in New Orleans before District Judge Seybourne H. Lynne on July 2, 1954 to file suit against the banana giant.[186] Dulles dutifully provided a public assurance that the suit posed no threat to U.S. foreign policy,[187] but company officials promptly disagreed. In a circular to stockholders, President Kenneth H. Redmond insisted that United Fruit "has always rigidly lived up to statutes here and abroad," adding that the lawsuit contradicted the administration's standing policy of encouraging American corporations to invest in the Third World.[188] Company

182 The Guatemalan coup has been detailed admirably in IMMERMAN, *supra* note 149, at 161–86; GLEIJESES, *supra* note 153, at 319–60; and SCHLESINGER & KINZER, *supra* note 153, at 159–225. *But see* Frederick W. Marks III, *The CIA and Castillo Armas in Guatemala, 1954: New Clues to an Old Puzzle*, 14 DIPL. HIST. 67 (1990) (disputing the assumption that the Eisenhower administration was principally responsible for the overthrow of Arbenz).

183 Memorandum of Discussion of the 202d Meeting of the NSC (June 17, 1954), *in* 17 June 1954 Folder, Box 5, Eisenhower NSC Papers, *supra* note 124.

184 *Id.*

185 *Id.*; *see also* RABE, *supra* note 108, at 58. Not everyone saw it that way. Indeed, Rep. Edgar Hiestand of California found the timing of the antitrust suit inexplicable, writing that "the anti-communists in my District are screaming that this is just another demonstration of the heavy pro-communist influence in our Administration." Letter from Edgar W. Hiestand, U.S. Congressman, to Stanley N. Barnes, Assistant Attorney General (July 28, 1954), *in* UFCO Records, *supra* note 149.

186 *United Fruit Sued by U.S. as a Trust; Break-Up Is Asked*, N.Y. TIMES, July 3, 1954, at 1; *see also* Sydney Gruson, *United Fruit Company Is a Vast Enterprise*, N.Y. TIMES, July 4, 1954, at IV.4.

187 Press and Radio News Conference (July 8, 1954), *in* Box 81, John Foster Dulles Papers, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ.

188 Letter of Kenneth H. Redmond, President, United Fruit, to United Fruit stockholders (July 6, 1954), *in* UFCO Records, *supra* note 149. Expressing a similar sense

chairman Thomas Jefferson Coolidge echoed Redmond's sentiments in a July 20, 1954 letter to Assistant Secretary Henry Holland.[189] Coolidge called the suit "unfortunate," averring that it would only encourage further meddling with American overseas businesses.[190] Even worse, as Baggett informed the State Department, the antitrust suit hampered United Fruit's efforts to conclude contractual negotiations with the Armas regime and impeded plans to invest substantial sums in both Guatemala and Honduras.[191] United Fruit, Coolidge said, wanted to help the U.S. government do something of a "constructive nature" in Central America, but it could not act "as long as the antitrust suit is pending" and might have to announce as much to the American press.[192] Deputy Undersecretary of State Robert Murphy expressed his sympathy but warned that nothing would be gained if the company aired its complaints in public.[193]

Murphy had not been cowed by the company's threats, but he could not ignore the prospect of further investment in Latin America. The Eisenhower administration preferred to see the Third World developed by direct investment from American firms, not by grants of U.S. aid.[194] And in terms of such investment, United Fruit's money

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of pique, Samuel Baggett informed Stanley Barnes that he was "amazed and deeply disappointed" at the filing of the suit. Telegram of Samuel G. Baggett, Vice President, United Fruit, to Stanley N. Barnes, Assistant Attorney General (July 2, 1954), *in* UFCO Records, *supra* note 149.

189 Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Henry Holland, Assistant Secretary of State (July 20, 1954), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

190 *Id.*

191 Department of State Memorandum of Telephone Conversation (July 21, 1954), *in* Box 4389, Class 811.05114, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130. For a similar earlier overture by Coolidge, see Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Henry Holland, Assistant Secretary of State (July 20, 1954), *in* Box 57, Sinclair Weeks Papers, *supra* note 94.

192 Department of State Memorandum of Conversation (Nov. 18, 1954), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

193 *Id.* For another threat by Coolidge, see Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Henry Holland, Assistant Secretary of State (Nov. 15, 1954), *in* Box 4401, Class 811.054, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130 (stating that United Fruit "must have a showdown" with the Department of Justice).

194 *See* BURTON I. KAUFMAN, TRADE AND AID: EISENHOWER'S FOREIGN ECONOMIC POLICY, 1953–1961 (1982) (exploring the Eisenhower administration's efforts to use private aid in lieu of or—when necessary—in addition to public aid); *see also* Thomas V. DiBacco, *American Business and Foreign Aid: The Eisenhower Years*, 41 BUS. HIST. REV. 21 (1967); Raymond J. Saulnier, *The Philosophy Underlying Eisenhower's Economic Policies*,

was as good as anyone's. This was especially true in Guatemala, where American officials wanted to ensure the survival of the Armas regime and demonstrate that anticommunism could indeed translate into domestic prosperity. This required the infusion of private foreign investment, especially after the new government reversed course on the land reform inaugurated by Arbenz and foreclosed this potential route to economic development.[195]

With these concerns in mind, Murphy must have brought Coolidge's quid pro quo to the attention of John Foster Dulles, who subsequently adopted a more cautious approach to the suit against United Fruit. At a meeting in early December 1954, Dulles told Brownell, Barnes, and various State Department officials that the administration must do what it could to encourage United Fruit's proposed $60 million investment in Central America.[196] To the extent that the ongoing antitrust suit deterred this investment, it was contrary to American foreign policy, the Secretary argued, and the Justice Department must therefore seek a swift settlement through a consent decree that only addressed United Fruit's most egregious behavior.[197] When Barnes insisted upon the need to dismember the company, Dulles told Brownell in frustration that antitrust simply had to take a backseat to national security.[198] The Secretary, in other words, had revised his position taken just a few months earlier. Given the administration's need for United Fruit's help in Latin America, Dulles again wanted to subordinate antitrust to foreign policy.

What Dulles did not know, however, was that United Fruit had no intention of investing vast sums of money in Guatemala. The situation there was too rocky, and future profits and stability remained questionable. On the contrary, following Armas's victory, the company actually embarked on a concerted effort at divestiture, not investment.[199] In 1956 and 1957, it attempted to purchase goodwill in Guatemala by donating nearly 100,000 acres to the Guatemalan government, ostensibly for resettlement and land reform, and by 1958 it

in DWIGHT D. EISENHOWER, SOLDIER, PRESIDENT, STATESMAN 99 (Joann P. Krieg ed., 1987); Harold E. Stassen, *The Case for Private Investment Abroad*, 32 FOREIGN AFF. 402 (1954).

195 For a treatment of the socio-economic results of the Armas coup d'etat for Guatemala, see GLEIJESES, *supra* note 153, at 381–83, 386 n.86. *See also* SCHLESINGER & KINZER, *supra* note 153, at 234–36, 253–54.

196 Department of State Memorandum of Conversation (Dec. 8, 1954), *in* Box 4389, Class 811.05114, 1950–54 Central Decimal File, Department of State Papers, *supra* note 130.

197 *Id.*

198 *Id.*

199 MAY & PLAZA LASSO, *supra* note 156, at 162–65.

had divested itself of much of its property in the tiny Central American state.[200] Nevertheless, with hopes of future investment in mind, from early 1955 through the resolution of the antitrust suit in February 1958, the Department of State continued to press the Justice Department to arrive at a quick, quiet consent decree with the banana company.

For its part, however, the Justice Department refused to play United Fruit's game. As they did with the State Department, company officials spoke to the trustbusters about the possibilities of further investment in Central America, but they could not find a sympathetic ear.[201] Within three weeks of the initial filing of the suit, the company had proposed a consent decree, but Justice officials brushed it off as "totally inadequate."[202] United Fruit then assumed an increasingly uncooperative stance, bickering over trivial details and seeking to avoid any arrangement that would affect its monopoly position in Latin America.[203] Even worse, Coolidge threatened Barnes in November 1954 that unless the U.S. government came around to the company's position, United Fruit would appeal to the public and cast the Department of Justice in a negative light.[204] Not surprisingly, the trustbusters regarded Coolidge's threat as a "challenge to action," and they refused to budge in future meetings, insisting all the while that they would settle for nothing less than dismemberment of the company.[205] Attorney General Brownell informed Coolidge personally that he felt that things had progressed to the point where there was

200 *Id.*

201 Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Herbert Brownell, Attorney General of the United States (Sept. 17, 1954), *in* UFCO Records, *supra* note 149.

202 Memorandum from Victor H. Kramer, Chief of General Litigation Section, Department of Justice, to Stanley N. Barnes, Assistant Attorney General (Sept. 20, 1954), *in* UFCO Records, *supra* note 149.

203 Memorandum from Stanley N. Barnes, Assistant Attorney General, to Herbert Brownell, Attorney General of the United States (Oct. 18, 1954), *in* UFCO Records, *supra* note 149.

204 Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Stanley N. Barnes, Assistant Attorney General (Nov. 15, 1954), *in* UFCO Records, *supra* note 149.

205 Letter from Samuel G. Baggett, Vice President, United Fruit, to Stanley N. Barnes, Assistant Attorney General (Jan. 14, 1955), *in* UFCO Records, *supra* note 149; Memorandum from Milton A. Kallis, Trial Attorney, Department of Justice, to File (Jan. 11, 1955), *in* UFCO Records, *supra* note 149; Memorandum from Victor H. Kramer, Chief of General Litigation Section, Department of Justice, to Stanley N. Barnes, Assistant Attorney General (Nov. 19, 1954), *in* UFCO Records, *supra* note 149.

little choice but to follow the "traditional policy of letting the courts decide the matter."[206]

Unimpressed by United Fruit's case and angered by the company's cavalier and uncooperative attitude, the Justice Department pressed its own case vigorously, even expanding its scope in 1956 to include violations stemming from the company's 1929 absorption of the Cuyamel Fruit Company.[207] This action alarmed policymakers in the State Department as well as officials in the Guatemalan and Ecuadorian governments, all of whom warned that the new actions would wreck the chance of additional investment by United Fruit and hamper Latin American economic development.[208] Company officials also continued to use this argument. United Fruit's Assistant Vice President, John McClintock, informed American officials that the company had committed itself to a $20 million investment project in Guatemala, and other officials hinted at similar investments in Ecuador, provided that the company could favorably resolve the antitrust suit.[209] At every turn, the company tried to get the State Department to "enter the case" on its behalf, to use its "good offices," and thus to clear a path to further investment and to the "vast improvements in the living and working conditions" that the company promised would result in Latin America.[210]

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206 Memorandum from Edward A. Foote, First Assistant in Antitrust Division, Department of Justice, to File (Nov. 2, 1955), *in* UFCO Records, *supra* note 149.

207 Amended Justice Department Brief Against United Fruit (Jan. 12, 1956), at 12–13, *in* UFCO Records, *supra* note 149; *United Fruit Grows Goodwill by Loan to Panama; Gets New Slap from U.S.*, BUS. WK., Feb. 25, 1956, at 158; *United Fruit Suit Amended by U.S.*, N.Y. TIMES, Jan. 17, 1956, at 47.

208 *See* Department of State Memorandum of Conversation (Apr. 1, 1955), *in* 1-755 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Department of State Memorandum of Conversation (Feb. 15, 1955), *in* 1-755 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Sinclair Weeks, Secretary of Commerce (Dec. 18, 1957), *in* Box 57, Sinclair Weeks Papers, *supra* note 94; Memorandum from Henry Holland, Assistant Secretary of State, to the Acting Secretary of State (Jan. 31, 1955), *in* 1-755 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130.

209 Department of State Memorandum of Conversation (Sept. 7, 1955), *in* Box 4088, Class 811.05114, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130.

210 *See* Department of State Memorandum of Conversation (June 21, 1957), *in* 1-3057 Folder, Box 4089, Class 811.05120, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Department of State Memorandum of Conversation (Oct. 1, 1957), *in* 1-356 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Department of State Memorandum of Conversation (Oct. 1, 1957), *in* 1-356 Folder, Box 4112, Class 811.054, 1955–59

These appeals were enough to make some policymakers wonder if they should continue their "strictly hands-off course" with regard to the lawsuit, but not enough to persuade the Justice Department to postpone the case.[211] The U.S. Ambassador to Guatemala, Norman Armour, for instance, disparaged the ongoing litigation.[212] Armour could not understand a "policy of publicly and officially attacking the same companies on which we must rely to supply a large part of the new capital needed" in Latin America.[213] A public trial may have once been proper, Armour added, but it was "no longer appropriate to the requirements of our foreign policies."[214]

Neither Armour's concerns nor United Fruit's voluntary divestitures in Guatemala altered trustbusters' belief that a breakup of the banana giant was necessary, and the Justice Department readied itself for a potentially nasty battle with the company. Appearing before the House Committee on Small Business, Barnes announced that he would accept "nothing less" than a sizable divestiture of United Fruit's holdings in Central America.[215] In addition, trustbusters sought out

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Central Decimal File, Department of State Papers, *supra* note 130; Letter from Christian Herter, Undersecretary of State, to Thomas Jefferson Coolidge, Chairman, United Fruit (Jan. 6, 1958), *in* 1-356 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Christian Herter, Undersecretary of State (Dec. 17, 1957), *in* Box 57, Sinclair Weeks Papers, *supra* note 94.

211 *See* Letter from Roy R. Rubottom, Assistant Secretary of State, to C.P. Cabell, Deputy Director, Central Intelligence Agency (Nov. 18, 1958), *in* 1957—United Fruit Company Folder, Box 4, Subject Files 1957–59, Records of Assistant Secretary of State for Inter-American Affairs Roy R. Rubottom, Department of State Papers, *supra* note 130; Memorandum from Roy R. Rubottom, Assistant Secretary of State, to William A. Wieland, Director, Office of Middle American Affairs, Department of State (Aug. 3, 1957), *in* 1-356 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130; Memorandum from William A. Wieland, Director, Office of Middle American Affairs, Department of State, to William P. Snow, Deputy Assistant Secretary of State for Inter-American Affairs (Aug. 12, 1957), *in* 1-356 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130.

212 Letter from Norman Armour, U.S. Ambassador to Guatemala, to Ezra Taft Benson, Secretary of Agriculture (Mar. 8, 1955), *in* UFCO Records, *supra* note 149.

213 *Id.*

214 *Id.*; *see also* Letter from Stanley N. Barnes, Assistant Attorney General, to Norman Armour, U.S. Ambassador to Guatemala (Apr. 14, 1955), *in* UFCO Records, *supra* note 149.

215 *Distribution Problems: Hearing Before the House Select Comm. On Small Business*, 84th Cong. IV 110–78 (1956); *see also On with the Trial*, TIME, Apr. 9, 1956, at 48. In fairness, Barnes's intention to dismember United Fruit had long been known to company executives, for Barnes himself informed them of the same three years earlier. *See* Letter from Stanley N. Barnes, Assistant Attorney General, to Samuel G. Baggett, Vice

Latin Americans to testify publicly in regard to United Fruit's existing investments in Central America that "everything does not consist of . . . sweetness and light."[216] Hoping to destroy the company's effort to undercut the lawsuit once and for all, Justice officials explained to their counterparts in Foggy Bottom that too often corporations attempted to escape antitrust action by pitting the government's diplomats against its own lawyers.[217] Conceding the point, Loftus Becker, the State Department's legal counsel, replied that his department would no longer muscle in on the case.[218] The last minute diplomacy of company executives and State Department officials had failed to stop the case, and by early 1958, the suit moved toward resolution.

Despite the preparations of the Antitrust Division and United Fruit, the lawsuit ended not with a high stakes showdown but, rather, by consent decree. Given Barnes's admitted preference for consent decree, this was a predictable end.[219] On February 4, 1958, United Fruit's lawyers agreed to the Justice Department's insistence that the company undergo a "banana split," as journalists wryly put it.[220] Under Judge Lynne's imprimatur, the decree required the company to use its own sizable resources to set up a competitor in the banana trade, a rival whose size and scope had to be greater than the Standard Fruit & Steamship Company, United Fruit's largest current competitor.[221] The new company had to be able to import nine million stems a year, just over a third of United Fruit's current import level.[222] The requirements of the consent decree were unprecedented, but the settlement gave the company wiggle room.

United Fruit had until June 1966 to select one of three plans for dismemberment, and the actual breakup did not have to occur until

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President, United Fruit (Sept. 14, 1953), *in* UFCO Records, *supra* note 149 (declaring that the Justice Department would seek "dissolution of the Company into at least three competing, vertically-integrated business enterprises").

216 Memorandum from Harold S. Glendening, Trial Attorney, Department of Justice, to Victor H. Kramer, Chief of General Litigation Section, Department of Justice (July 24, 1957), *in* UFCO Records, *supra* note 149.

217 Department of State Memorandum of Conversation (Aug. 28, 1957), *in* 1-356 Folder, Box 4112, Class 811.054, 1955–59 Central Decimal File, Department of State Papers, *supra* note 130.

218 *Id.*

219 *See supra* notes 100–101 and accompanying text.

220 *Banana Split*, NEWSWEEK, Feb. 17, 1958, at 78; *Banana Split*, TIME, Feb. 17, 1958, at 90.

221 United States v. United Fruit Co., 1958 Trade Cas. (CCH) ¶ 68,941, 73,799 (E.D. La. 1958); *see also Banana Giant That Has To Shrink*, BUS. WK., Feb. 15, 1958, at 109.

222 *United Fruit*, 1958 Trade Cas. (CCH) ¶ 73,799.

1970.[223] The company could keep good faith with the consent decree by creating an independent banana rival, by selling sufficient land and assets to an existing competitor, or by creating a new enterprise through the sale of part of its production and transportation facilities.[224] Furthermore, the consent decree required the company to divest itself entirely of the International Railways of Central America (IRCA).[225] The New York Stock Exchange reacted positively to the decree, and journalists and business experts quickly agreed that, over the long term, the decree was not likely to weaken United Fruit's position in the banana industry.[226] Ever since 1955, when the Justice Department first proposed the voluntary dissolution as a consent formula, company officials had opposed the deal as "unrealistic," especially the notion that they ought to create their own competitor.[227] But by February 1958, these officials had adopted a pragmatic attitude toward the dismemberment. Company President Redmond welcomed the decree as an acceptable alternative to an "extremely costly and burdensome" trial and insisted that the agreement would not hurt the company's growth.[228] Indeed, as Almyr L. Bump, the company's Vice President, observed the following year, when United Fruit faced adversity, it would knuckle under and simply "[g]row more bananas."[229]

Conforming to the strictures of the consent decree proved not to be an easy or painless process. By January 1962, United Fruit had divested itself of IRCA stock but found compliance with the other demands more difficult.[230] While company officials contemplated their options, United Fruit itself was absorbed into a voracious conglomer-

223 *Id.* ¶ 73,800.

224 *Id.* ¶ 73,799.

225 *Id.* ¶ 73,798–99; *see also* MAY & PLAZA LASSO, *supra* note 156, at 253.

226 *Banana Giant That Has To Shrink*, *supra* note 221, at 109–13; *United Fruit Antitrust Suit Ends; Decree Divides Its Banana Business*, WALL ST. J., Feb. 5, 1958, at 6; *United Fruit Yields in Suit; To End Banana Monopoly*, N.Y. TIMES, Feb. 5, 1958, at 1.

227 Letter from Thomas Jefferson Coolidge, Chairman, United Fruit, to Herbert Brownell, Attorney General of the United States (Dec. 17, 1957), *in* Box 57, Sinclair Weeks Papers, *supra* note 94.

228 *Banana Split*, NEWSWEEK, *supra* note 220, at 78.

229 *The Ripe Problems of United Fruit*, FORTUNE, Mar. 1959, at 99.

230 DOSAL, *supra* note 156, at 230; MCCANN, *supra* note 156, at 174–76. United Fruit's difficulties were compounded by legal maneuvering on the part of its competitors. *See* United States v. United Fruit Co., 410 F.2d 553, 557 (5th Cir. 1969) (affirming Judge Lynne's decision in *United States v. United Fruit Co.*, 1968 Trade Cas. (CCH) ¶ 72,630 (E.D. La. 1968)); *United Fruit Co.*, 1968 Trade Cas. (CCH) ¶ 86,251 (denying the Standard Fruit & Steamship Company the right to inspect United Fruit's plans for divestiture in compliance with the consent decree).

ate, United Brands.[231] Ultimately, in 1972, United Brands spun-off some 58,000 acres of land from Guatemala's Atlantic coast to Del Monte at a cost of over $20 million, complying with the consent decree and thereby ending a particularly nasty chapter of the company's history.[232] In truth, the consent decree had not done much damage to United Fruit's position in the U.S. banana market; by 1967, the company's profit margins hovered around 5.7%, and its sales volume reached a record level of $440 million.[233] By the 1990s, the vestiges of United Fruit were rescued from the moribund United Brands and reborn into Chiquita Brands International, accounting for approximately 40% of the $3.1 billion global banana market.[234]

After forty-three months of legal jousting, the U.S. government and United Fruit ultimately agreed upon a consent decree that jeopardized neither national security nor the profitability of United Fruit. Despite its concerted efforts, United Fruit failed to alter substantially the course of events surrounding the suit. True, it had been among the first to sound the tocsin against Guatemalan Communism. And, equally true, it had skillfully (and, at times, not so skillfully) played upon fears regarding national security imperatives and U.S. policy objectives. Yet these fears had existed all along, and the company's efforts, at best, simply inflamed them. The proceedings of the antitrust suit acted neither to help United Fruit nor to hurt it. From postponement to prosecution to consent decree, the case had been dictated by the paramount concern of President Eisenhower and his foreign policy elite: the necessities and vagaries of national security.

The case against United Fruit could have been an opportunity for Eisenhower to champion his middle way philosophy, but it was not. Instead, the President had done in this case what had previously been done in the oil, silver, and consumer electronics cases. If the Eisenhower administration did not sacrifice the middle way and the purposes of antitrust law on the altar of the national security state, it at

231 *See Bold Start for AMK and United Fruit*, BUS. WK., July 4, 1970, at 22; *How United Fruit Was Plucked*, BUS. WK., Feb. 22, 1969, at 122; *United Fruit's Shotgun Marriage*, FORTUNE, Aug. 1969, at 132.

232 United States v. United Fruit Co., 1978-1 Trade Cas. (CCH) ¶ 62,001, 74,281 (E.D. La. 1978). For more on the final resolution of United Fruit's consent decree, see ROGER BURBACH & PATRICIA FLYNN, AGRIBUSINESS IN THE AMERICAS 209–10 (1980); MCCANN, *supra* note 156, at 69–217; STANLEY, *supra* note 156, at 232–34; *Great Banana Bribe*, NEWSWEEK, Apr. 21, 1975, at 76; and *Honduran Bribery*, TIME, Apr. 21, 1975, at 74.

233 *Yes, They Sell More Bananas*, BUS. WK., July 8, 1967, at 90.

234 Kerry Hannon, *Ripe Banana*, FORBES, June 13, 1988, at 86; *see also How Lindner Keeps His Troops and Investments in Line*, BUS. WK., Apr. 20, 1987, at 81; Stephen Phillips, *Chiquita May Be a Little Too Ripe*, BUS. WK., Apr. 30, 1990, at 100; *Watch That Banana Peel!*, FORBES, Apr. 12, 1993, at 144.

least delayed antitrust until after the perceived communist threat had been beaten back. Even then, it adopted an ambivalent and wavering course while pursuing the case, in large part because it wanted United Fruit to assist economic development in Central America and was reluctant to rob the company of the means that it needed to succeed in this task.

In short, when the administration had to choose between national security and antitrust law, the choice was easy: national security prevailed time and time again.

IV. EPILOGUE: NATIONAL SECURITY AND *UNITED STATES V. MICROSOFT*

Twelve minutes before 9:00 A.M. on the morning of September 11, 2001, a Boeing 767 hijacked by Islamic terrorists slammed into the north tower of the World Trade Center in New York City.[235] Within an hour of this first devastating act of terror, the south tower of the World Trade Center and the Pentagon suffered identical acts of barbarism.[236] The United States was thrown into a temporary state of fear and panic, and within days President George W. Bush had committed the nation to tracking down the terrorists responsible for the attack and eliminating the scourge of terrorism from the world. In the words of the President, the United States was poised to wage the "first war of the 21st century."[237]

With the nation concentrated on little else, readers of the *New York Times* could perhaps be forgiven if they failed to notice U.S. District Judge Colleen Kollar-Kotelly's order of September 28, 2001.[238] Only a month earlier, the D.C. Circuit had directed Judge Kollar-Kotelly to handle the remand of the ongoing antitrust suit against Microsoft,[239] arguably the most prominent antitrust case in the last

235 Serge Schmemann, *Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1.

236 *Id.*

237 Michael Hirsch & John Barry, *How To Strike Back*, NEWSWEEK, Sept. 24, 2001, at 36.

238 Stephen Labaton, *Judge Orders Talks To Settle Microsoft Case*, N.Y. TIMES, Sept. 29, 2001, at C1. Judge Kollar-Kotelly's order can be found at Pre-trial Conference Order, *United States v. Microsoft Corp.* (D.D.C. Sept. 28, 2001) (No. 98-1232), *at* http://www.dcd.uscourts.gov/microsoft-2001.html (order requiring accelerated settlement efforts on behalf of litigating parties).

239 *See* Ted Bridis & Glenn R. Simpson, *New Microsoft Judge Has Limited Antitrust Record*, WALL ST. J., Aug. 27, 2001, at A3; Stephen Labaton, *Judge Is Assigned To Decide Microsoft Antitrust Penalties*, N.Y. TIMES, Aug. 25, 2001, at A1.

half-century.[240] By summer 2001, the Microsoft suit was heading toward an uncertain resolution. U.S. District Judge Thomas Penfield Jackson's decision to break up the software giant[241] was vacated by the D.C. Circuit,[242] and Jackson himself was subjected to withering criticism by the circuit court for "deliberate, repeated, egregious, and flagrant" partiality in his handling of the case.[243]

On September 28, speaking to lawyers for Microsoft and the Antitrust Division, Judge Kollar-Kotelly stated that "the recent tragic events affecting our Nation" required an end to the ongoing suit, and she instructed the lawyers to work "seven days a week and around the clock" to this end.[244] The American economy was hurtling toward recession, and Microsoft and other high-tech firms might be needed to pull the nation from its economic woes and help gird the U.S. government in its battle against global terrorism.[245] So, lost in the tumultuous events of September 2001, the once-momentous case of *United States v. Microsoft* was ushered closer toward a quiet end.

The terrorist attacks of September 11, 2001 may have indirectly claimed another, unintended victim.

In modern antitrust lore, it is difficult to think of a more politically charged case than *Microsoft.* Early on, critics of the case felt that the Clinton administration sought a confrontation with the sprawling software giant.[246] Whether true or not, antitrust prosecution clearly

240 *See* KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES, at xix, 48 (2001); JOEL BRINKLEY & STEVE LOHR, *U.S. v. MICROSOFT* xiii (2001).

241 United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64–65 (D.D.C. 2000), *vacated,* 253 F.3d 34 (D.C. Cir. 2001).

242 United States v. Microsoft Corp., 253 F.3d 34, 46–47 (D.C. Cir. 2001).

243 *Id.* at 107.

244 Pre-trial Conference Order, United States v. Microsoft Corp. (D.D.C. Sept. 28, 2001) (No. 98-1232), http://www.dcd.uscourts.gov/microsoft-2001.html. To these sentiments, Judge Kollar-Kotelly added, "The Court cannot emphasize too strongly the importance of making these efforts to settle the cases and resolve the parties' differences in this time of rapid national change. The claims by Plaintiffs of anticompetitive conduct by Microsoft arose over six years ago, and these cases have been litigated in the trial and appellate court for over four years. As the Court of Appeals has noted, the relevant time frame for this dispute spans 'an eternity in the computer industry.'" *Id.* (quoting *Microsoft Corp.*, 253 F.3d at 49).

245 *Cf. id.*

246 *Another Microsoft Probe,* NEWSWEEK, Sept. 30, 1996, at 6 ("[A]ntitrust experts say populist pressures made a probe inevitable."); Bob Barr, *Criminalizing Business,* AM. SPECTATOR, Sept. 2000, at 50 ("Bringing opponents down is the only explanation for the administration's reinvention of antitrust law against Microsoft."); Edwin E. Mier, *Stop Persecuting Microsoft: Here Are the Monopolies To Go After,* COMM. WK., Mar. 20, 1995, at 33 ("The antitrust persecution of Microsoft by the Clinton administration is the epitome of what's wrong with big government in this country."); Jared Sandberg, *The*

underwent resurgence during the 1990s, particularly when considered against the backdrop of the Reagan years.[247] From its beginning, the warp and woof of the suit against Microsoft was shrouded in domestic politics. Beyond inferences of an anti-Microsoft crusade mentality in the Clinton Justice Department, the case became caught up by the seemingly larger-than-life figures who occupied its most public stages, particularly Microsoft Chairman Bill Gates and *über*-litigator David Boies.[248] Courtesy of videotape, Boies's confrontational deposition of Gates found its way from the courtroom and onto the nightly news.[249]

Then, during the long months of the 2000 presidential campaign, various pundits speculated that a Bush win would bring an end to the case against Microsoft.[250] Although then-Governor Bush never actually spelled out what his administration's antitrust policy would be, many in the national media perceived him to be at least passively opposed to the ongoing litigation.[251] Underlying this perception was

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Windows Get Dirty, NEWSWEEK, Sept. 21, 1998, at 101 ("The Justice Department has made the Microsoft case the linchpin of the Clinton administration's antitrust strategy."). *But see* AULETTA, *supra* note 240, at 21–22 (noting that Assistant Attorney General Joel Klein initially worried that the Clinton administration was ambivalent about attacking Microsoft).

247 HANDLER ET AL., *supra* note 3, at iii (contrasting the "activist 1960's" with the "minimalist 1980's"); William E. Kovacic, *Comments and Observations*, 59 ANTITRUST L.J. 119, 124 (1990) (noting the "federal government's relaxation of merger standards and its reduced scrutiny of distribution practices" during the 1980s); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 56 (1991) (discussing how President Reagan's federal court appointments will, in aggregate, "retrench antitrust doctrine"); *see also* Richard Lacayo & Andrea Sachs, *The Promises and Perils of an Antitrust Chief*, TIME, Feb. 27, 1995, at 33 ("In the corporate takeovers of the 1980s, the Reagan Administration was a wallflower at the orgy."); *Trustbuster Looks Back*, BUS. WK., Oct. 2, 2000, at 52 (noting the "surge" in antitrust prosecution during the Clinton administration).

248 AULETTA, *supra* note 240, at 46–47, 97–103, 109–14, 134–39; *see also* BRINKLEY & LOHR, *supra* note 240, at 31–36 (describing Boies).

249 AULETTA, *supra* note 240, at 46–47, 99–103; BRINKLEY & LOHR, *supra* note 240, at 13–15, 22–23, 64–67.

250 Joel Brinkley, *Bush Advisor Apologizes for Lobbying Effort*, N.Y. TIMES, Apr. 12, 2000, at C1 (discussing a Bush consultant's effort to lobby Governor Bush on behalf of Microsoft); Michael Lewis, *Buy Microsoft*, WALL ST. J., Apr. 7, 2000, at A18 (speculating on Governor Bush's position on the Microsoft case); Richard Wolffe, *Windows 2001*, NEW REPUBLIC, June 19, 2000, at 18 ("[I]f W. wins in November, there's every sign he would appoint a Justice Department ideologically opposed to pursuing the case against Microsoft."); *see also* AULETTA, *supra* note 240, at 342–43, 387–88.

251 Joel Brinkley, *Clinton Team in Final Plea on Microsoft*, N.Y. TIMES, Jan. 13, 2001, at C1 (expressing concerns of outgoing Justice Department officials that President-elect Bush will undercut the lawsuit); Joel Brinkley, *Microsoft Waits for Bush's Position on Its Antitrust Case*, N.Y. TIMES, Dec. 26, 2000, at C1 (speculating on the position that President-elect Bush and Attorney General-designate John Ashcroft will take regard-

doubtless the general notion that any Republican administration would be less suspicious of concentrated corporate power in the software industry than was President Clinton or presidential-aspirant Al Gore. Once installed, the Bush administration did look coolly upon the Microsoft suit, and within months of the President's inauguration, the Justice Department was urged to scale down its emphasis on the case.[252]

If the public and political nature of *Microsoft* had not been heated enough, Judge Jackson took it upon himself to air his personal views about Gates and Microsoft. Judge Jackson claimed that Gates had a "Napoleonic concept of himself,"[253] and he scoffed at any notion that Microsoft might help shape the ultimate remedy proposed by the court, asking rhetorically if "'the Japanese [were] allowed to propose the terms of their surrender?'"[254] Judge Jackson actually made similar comments to the media as early as September 1999, even before he issued the court's findings of fact,[255] and he compounded his impropriety by attempting to make these disclosures secret.[256] Slapping Judge Jackson down, the D.C. Circuit declared that he had been "posturing for posterity" and thereby created a definite impression of partiality.[257] For this reason, the appellate court set aside Judge Jackson's order to break up Microsoft,[258] and the case was subsequently assigned to Judge Kollar-Kotelly to fashion a more suitable remedy.[259]

As the above narrative demonstrates, the case against Microsoft generated serious domestic political turbulence from the beginning. Therefore, it would indeed be ironic if historians one day learned that

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ing the lawsuit); David Kirkpatrick, *One Editor's Opinion: A Breakup Will Never Happen*, FORTUNE, June 26, 2000, at 44 (noting Bush's "lack of sympathy" for the ongoing Microsoft litigation).

252 Dan Carney & Sheridan Prasso, *Did Microsoft Catch a Break?*, BUS. WK., Mar. 12, 2001, at 14 (discussing President Bush's abrupt dismissal of a key Clinton appointee from the Justice Department); Peter Grier, *Brighter Outlook for Embattled Microsoft*, CHRISTIAN SCI. MONITOR, Feb. 28, 2001, at 1 (discussing ambivalence of the Bush administration toward the case); Stephen Labaton, *U.S. Abandoning Its Effort To Break Apart Microsoft, Saying It Seeks Resolution*, N.Y. TIMES, Sept. 7, 2001, at A1 (outlining the Bush administration's decision to forego dismemberment of Microsoft).

253 Ken Auletta, *Final Offer*, NEW YORKER, Jan. 15, 2001, at 40.

254 Leonard Orland, *Judicial Misconduct and the Microsoft Case*, *in* MICROSOFT, ANTITRUST AND THE NEW ECONOMY: SELECTED ESSAYS 239, 243 (David S. Evans ed., 2002) (quoting Peter Spiegel, *Microsoft Judge Defends Post-Trial Comments*, FIN. TIMES (London), Oct. 7, 2000, at 4).

255 United States v. Microsoft Corp., 253 F.3d 34, 108 (D.C. Cir. 2001).

256 *Id.* at 112.

257 *Id.* at 115.

258 *Id.* at 117.

259 Labaton, *supra* note 239.

an unrelated national security issue delivered a final, crippling body-blow to the litigation.

Or would it?

CONCLUSION

As the story of United Fruit demonstrates, and as recent events in the ongoing *Microsoft* litigation may suggest, national security is a major input to policymaking in the United States, particularly in the years following World War II. In the mythology of American foreign policy, it is a cherished and venerable axiom that "politics stops at the water's edge."[260] But in actuality, foreign policy rarely acts *at all* as a brake upon domestic politics.[261] National security spurs domestic political debate and agitation as surely as does any other issue critical to American society.[262] Like domestic politics, antitrust policy stands at the water's edge when national security considerations come into play. As the preceding Parts of this Note have hopefully illustrated, antitrust law can be easily drawn into the vortex of national security that roils the water's edge.

As indicated in the Introduction, the purpose of the present Note is not to refute the proposition that economic considerations are an important factor—perhaps among the most important factors—in antitrust enforcement. Neither is its purpose to argue that economic considerations should *not* be among the most important such factors. Rather, it is hoped that the contents of this Note will give pause to analysts of antitrust law who focus solely on the role of economic efficiency, to the exclusion of other, non-economic considerations.

It is also hoped that the reader will recognize that, at least in the years since 1945, national security considerations have played a primary role in antitrust enforcement—and, for that matter, also in most every other major policy issue. National security is at the very heart of this nation's policy debates, at every level and extending to each branch of our triune federal government. To put it differently, national security is not merely incidental to contemporary policymak-

260 *See supra* note 1 and accompanying text.

261 For a representative critic's view, see Robert Kagan, *Out To Torpedo Missile Defense*, WASH. POST, May 9, 2001, at A31 ("Anyone who thinks politics stops at the water's edge must have missed the past 225 years of American history. Politics loves water.").

262 It is almost too easy to cite examples for this assertion. The connection between the onset of the Cold War and the development of domestic anticommunist hysteria and its concomitant, McCarthyism, is but one of many examples. *See* DAVID CAUTE, THE GREAT FEAR (1978); RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE (1989); RICHARD H. ROVERE, SENATOR JOE MCCARTHY (1959).

ing—to a considerable degree, national security *is* policymaking. The Cold War may have ended, but the terrible events of September 11, 2001, will likely cast an equally troubling shadow on American policymaking far into the future.

Antitrust policy will not be—and cannot be—an exception to the rule.