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The Organized Bar and Antitrust: Change, Continuity, and Influence

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I. Introduction

Go back in time to the world of antitrust in the late 1940's:

1945: *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945); *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945) .

1946: *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

1947: *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

1948: *United States v. Griffith*, 334 U.S. 100 (1948); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

1950: Celler-Kefauver Act of 1950 expanding Section 7 beyond mergers of direct competitors, and expanded to cover assets.

1951: *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

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* Professor of Law, Wayne State University Law School. This article is an interim report on research that is being done at the invitation and with the cooperation of the American Bar Association Section of Antitrust Law, whose assistance is gratefully acknowledged. The project is expected to result in a more substantial article to be published in the ANTITRUST LAW JOURNAL. Scores of people shared observations and/or helped collect information, including especially Roxane Busey, Mark Crane, Christopher Meyer, Amy Peebles, Sabine Schwark, Robert Weinbaum, and Michael Weiner. Their assistance is appreciatively acknowledged but all blame must lie with the author.

It was at that point, in 1951, that a major effort was made to promote a committee of the American Bar Association's ("ABA's") business law section to full section status. The effort, frustrated at first when the ABA's Board of Governors rejected the application, succeeded the following year, and the ABA's Section of Antitrust Law (hereinafter "Section") held its first meeting September 17-18, 1952, in San Francisco, California.[1]

From the beginning, the purposes of the Section included "the development of antitrust law."[2] The first substantive comments heralded an interest in influencing law development. After introductory remarks, the Section's first chair, Edward Johnston, spoke as follows:

> I am. . .tremendously interested in the subject of antitrust law. I am tremendously interested in the steps that can be properly taken to improve that law, to bring it in line so far as we can bring it in line with sound economic principles, to try and correct some of the judge-made law which today seems at least to some of us, to be out of step with sound economic business principles, and to conduct, through this body, a real survey of the antitrust field.[3]

Johnston began by setting out the "plans of the Section." It would have "at least two meetings a year" with "interesting and informative" programs featuring "academic discussions of antitrust questions by the outstanding experts in the field." It would also take

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[1] Summary of Proceedings of the Section of Antitrust Law, Sept. 17-18, 1952, *reprinted in* 1 ANTITRUST L.J. 9 (1952).

[2] By-Laws, Section of Antitrust Law, American Bar Association, *reprinted in* 1 ANTITRUST L.J. 141 (1952). Article 1, Section 2 of the By-Laws states:

> Section 2. The purpose of this Section shall be: to promote the objects and purposes of the American Bar Association within the field of Federal Antitrust Law, and including the Federal Trade Commission Act; to further the development of antitrust law, within all of its phases, so as to best promote the public interest; to formulate and extend the study of antitrust law in the interest of making available to the bar information permitting a better understanding of the antitrust laws; to cooperate with all appropriately interested groups in attaining uniformity with respect to both the legislation and the administration in all matters within the field of antitrust law; and to endeavor to improve the application and administration of justice in the field of antitrust law.

[3] Summary of Proceedings of the Section of Antitrust Law, *supra* note 1, at 12.

steps of a more "constructive nature." The Section would analyze and comment on proposed amendments to the antitrust laws, and then go beyond: "We plan to make a survey. . .of the whole antitrust field. There is a need for such a survey to determine whether or not these radically inconsistent laws which we have can be brought into a comprehensive measurement."[4]

With that ambitious and purposeful launching, the Section commenced functioning. Fifty years later, it is time to look back over its existence and consider the role that it has played. Such an enterprise is a major effort, for which this article can serve only as an introduction. It will look briefly at change, continuity, and influence.

II. Change

Fifty years is a long time. Inevitably the Section has seen substantial change.

A. Size

In part, the change is simply one of size:

- The original 1,287 members[5] have grown to 11,749, a number somewhat inflated by 3,132 law students.[6]

- Whereas two officers (chair and vice-chair) were sufficient to lead the Section in 1952,[7] today a dozen are required: chair, chair-elect, vice-chair, immediate past chair, secretary, finance officer, publications officer, program officer, committee officer, international officer, and section delegates (two).[8] (In 1952, the single section delegate was a member of the Council but apparently not formally an officer.)

- The first Council had nine members, plus the section delegate and, ex officio, the officers and the last retiring chairman.[9]

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[4] *Id.* at 15-16.

[5] *Id.* at 10 (Remarks of Fred E. Fuller).

[6] American Bar Association: Section of Antitrust Law.

[7] *See* 1 ANTITRUST L.J. 5 (1952).

[8] The Modern Section lists its officers on its web page at http://www.abanet.org/antitrust/officers.html (last visited Mar. 20, 2002).

[9] *See* 1 ANTITRUST L.J. 5 (1952).

Today the Council has fifteen members,[10] not counting officers, plus ex officio members from the judiciary, the Justice Department Antitrust Division, the Federal Trade Commission ("FTC"), and the National Association of Attorneys General, and the liaison from the ABA's Young Lawyers Division.[11]

- The annual Spring Meeting, currently the Section's major meeting, has lengthened from a single day to three days.

- Seven committees[12] became thirty-four.[13] The initial list was plain vanilla: Antitrust Problems in International Trade, Clayton Act, Federal Trade Commission, Information and Education, Membership, Sherman Act, and Trade Associations. Today the Section has a half dozen administrative committees alone: Amicus, Ethics and Professionalism, Legislation, Membership & Equal Opportunity, Programs, and Publications.

B. Subject Matter

The story about the Section's subject matter interests is both one of expansion and one of retreat. The original seven committees continue to exist either unchanged or as expanded or subdivided.[14] Today's thirty-four committees reflect attention to subject matters not originally contemplated by the Section's founders: Civil Rico, Business Torts and Unfair Competition, and Consumer Protection. The Section now includes a half dozen "practice skills/litigation committees" none of which existed in 1952: Civil Practice and Procedure, Civil Rico, Corporate Counseling, Criminal Practice and Procedure, Private Antitrust Litigation, and State Antitrust

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[10] *See* http://www.abanet.org/antitrust/committees/home.html (last visited Mar. 21, 2002).

[11] *See* http://www.abanet.org/antitrust/council.html (last visited Mar. 21, 2002).

[12] *See* 1 ANTITRUST L.J. 5 (1952).

[13] http://www.abanet.org/antitrust/committees/home.html (last visited Mar. 21, 2002).

[14] Federal Trade Commission and Trade Associations are unchanged. The Clayton Act is unchanged in title, although it has spun off the Robinson-Patman Act. Antitrust Problems in International Trade is now an expanded International Antitrust and Foreign Competition Law. Membership is now Membership & Equal Opportunity. Sherman Act is now divided into Sections 1 and 2. Information and Education is now reflected in separate committees for Amicus, Legislation, Programs, and Publications.

Enforcement. The Section has eleven "industry committees" that reflect both businesses important in 1952 (e.g., fuel and energy industry, transportation industry) and businesses that either did not then exist or were less prominent antitrust venues: Communications Industry, Computer Industry, Health Care Industries, Internet, and Sports, Labor, and Entertainment Industry.

Antitrust is a great subject in part because it serves as a window into discrete parts of the entire economy. This role of antitrust is illustrated by the changing foci of antitrust concern. Consider some of the comings and goings of Section committees:

1953: Practice and Procedure in the Trial of Antitrust Cases

1954: International Restrictive Practices

1956: Antitrust Aspects of the Atomic Energy Program (in 1964 "Antitrust Aspect of Nuclear, Space and Defense Matters;" in 1967 demoted to a subcommittee of the Exemptions committee)

1959: State Antitrust Laws

1961: Criminal Prosecutions (a Practice and Procedure subcommittee)

1963: Legal Control of Advertising

1970: Consumer Protection

1970: Multidistrict Litigation (subcommittee to Civil Practice and Procedure)

1972: Antitrust Aspects of Environmental Law

1979: Health Care Services

1989: Business Torts

1994: Computer Industry

1996: Internet

Changing emphases in antitrust enforcement are also reflected closely in the programs the Section sponsored over the years. First, it is striking how much attention once was devoted to proposed and enacted legislation. "Developments" was initially an annual address by Thomas E. Sunderland in which he reviewed the year's activity, always including legislation.[15] In 1959, "Developments" became a

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[15] *E.g.*, Thomas E. Sunderland, *Developments in Antitrust During the Year*

program. It included a session on the Section itself (a report by the chair and the election of new leaders) and then a massive review of the courts and the FTC by Professor S. Chesterfield Oppenheim[16] and two addresses on legislation.[17] The pattern was set,[18] and legislation remained a mainstay of the "Developments" program for many years.[19] Only in 1988 did the Section abandon the tradition,[20] presumably because genuine legislative developments had become too scarce.

Specific program topics also provide a window onto the changing interests of antitrust. Consider the following:

1957: C. Brien Dillon, *Criminal Penalties, Section 3 of the Robinson-Patman Act - "Dead Horse" or "Sleeper"?*, 8 ANTITRUST L.J. 112, 123 (1957) ("This statute is not dead. It is a sleeper. And it is a dangerous sleeper.").

1960: *Small Business and the Antitrust Laws*, 16 ANTITRUST L.J. 3 (1960) (full day program).

Ending July 1955, 7 ANTITRUST L.J. 170, 186-87 (1955); Thomas E. Sunderland, *Developments in Antitrust Law During the Year Ending July 1956*, 9 ANTITRUST L.J. 138, 163-66 (1956); Thomas E. Sunderland, *Developments in Antitrust During the Past Year*, 11 ANTITRUST L.J. 33, 62-64 (1957); Thomas E. Sunderland, *Developments in Antitrust During the Past Year*, 13 ANTITRUST L.J. 117, 154-57 (1958).

[16] S. Chesterfield Oppenheim, *Selected Antitrust Developments in the Courts and Federal Trade Commission During Past Year*, 15 ANTITRUST L.J. 37 (1959).

[17] Marcus A. Hollabaugh, *Developments in Congress (The Latest Washington Thinking on New Antitrust Legislation)*, 15 ANTITRUST L.J. 178 (1959); FTC Chairman Earl W. Kintner, *Developments in Congress of Special Interest to the Federal Trade Commission*, 15 ANTITRUST L.J. 198 (1959).

[18] *See, e.g.*, Marcus A. Hollabaugh, *What is New On Capitol Hill*, 17 ANTITRUST L.J. 260 (1960); Marcus A. Hollabaugh, *What is New On Capitol Hill*, 19 ANTITRUST L.J. 234 (1961); Edwin H. Pewett, *What is New On Capitol Hill*, 21 ANTITRUST L.J. 224 (1962); Edwin H. Pewett, *What's Going To Be New? - A Report on Legislative Developments*, 29 ANTITRUST L.J. 163 (1965); Edwin S. Rockefeller, *Developments in Federal Antitrust Legislation*, 31 ANTITRUST L.J. 209 (1966).

[19] One exception was in 1964, when the annual meeting "Developments" program focused exclusively on important new Supreme Court merger cases. *See Merger Developments in the Supreme Court*, 26 ANTITRUST L.J. 233 (1964).

[20] *Compare* Thomas W. Queen, *Recent Developments in Federal Antitrust Legislation*, 55 ANTITRUST L.J. 529 (1986) *and* Ky P. Ewing, Jr., *Legislative Developments*, 56 ANTITRUST L.J. 371 (1987) *with Antitrust Developments 1987-88*, 57 ANTITRUST L.J., at iii (1988) (no legislative update) *and Antitrust Developments 1988-89*, 58 ANTITRUST L.J., at iii (1989) (no legislative update).

1965: Assistant Attorney General William H. Orrick, Jr., *Antitrust in the Great Society*, 27 ANTITRUST L.J. 26, 31 (1965) ("Finally, since vigorous enforcement of the antitrust laws permits the free competitive enterprise system to utilize this country's resources most effectively, prevents undue economic concentration, and reduces the pressure for direct government regulation of industry, it is indispensible [sic] to a complete fulfillment of the goals of the Great Society.").

1971: *The Quality of Life and the Antitrust Laws*, 40 ANTITRUST L.J. 282 (1971) (spring meeting program).

1978: Paul R. Dew, *Views from a Sentenced Executive*, 47 ANTITRUST L.J. 729 (1978) (executive required to donate to and work at a food bank).

1994: *Post Chicago-Economics: New Theories-New Cases?* (Program co-sponsored by the Section, the Antitrust Division, the FTC, and Georgetown University Law Center, May 26-27, 1994).

1999: *Antitrust Issues in High-Tech Industries* (Section program, Feb. 25-26, 1999).

C. Diversity

In many, but not all, respects the Section is notably more diverse today than it once was. Diversity is a widely-recognized virtue.[21] Consider the following:

• *Gender.* It is with respect to women that the Section has changed the most. The initial officers and Council were entirely male, and this pattern continued for a long time. Only in 1977 did a woman join the Council (Carla Hills)[22] and not until 1982 did a woman (again Carla Hills) become chair.[23] Currently, four of the Section's ten officers (including the chair) are women, as are many Council

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[21] *See* Letter from Section Chair Ky P. Ewing, Jr., *reprinted in* 15 ANTITRUST No. 3, at 2 (2001) ("Diversity, change, and participation are the themes of this report on Section activities.").

[22] *Cf.* 46 ANTITRUST L.J., at xi (1977) (minutes of business meeting).

[23] *Cf.* 50 ANTITRUST L.J., at xiii (1981) (minutes of meeting at which Hills was elected "chairman-elect").

members and committee chairs.

- *Ethnicity.* The Section has made far fewer strides with respect to minorities. Pamela Jones Harbour blazed the leadership trail for minorities by becoming the first minority Council member (1998-2001) and officer (Section delegate, 2001-04), but thus far no other minority has followed. In 1997, the membership committee was reconstituted as the "membership and equal opportunity committee," to demonstrate a commitment to outreach. In 1999, the Section formed a Special Committee on Minority Clerkships, which recommended that the Section adopt a program of sponsoring minority externships linking minority law students and judges interested in summer externs, and providing stipends.[24] (The program led to the Section's winning the Meritorious Serve Award of the ABA Section Officers Conference.[25])

- *Constituencies.* The Section has gradually engaged in the formal recognition of various constituencies. Government enforcers have been involved in Section activities from the beginning. Starting in 1970, this took the pattern of inviting the Assistant Attorney General ("AAG") and the Chairman of the FTC to serve ex officio on the Council.[26] In 1996, the Section added an ex officio Council position for a representative of the National Association of Attorneys General, which had come to play an active role in antitrust enforcement. Diversity in professional training and employment was recognized in 1975 when the Section authorized economists to become associate members.[27] Eventually, in 2000, the first non-lawyer economist joined the Council (Margaret E. Guerin-Calvert).

Diversity in geography is a mixed story. In recent years, the Section has consciously reached out internationally, most recently by creating an "international officer" position. On the other hand, the Section exhibits strikingly less diversity in U.S. geography. At one time, the by-laws specified that no more than two Council members

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[24] The author is a member of this committee.

[25] Letter from Section Chair Ky P. Ewing, Jr., Fall 2000, *reprinted in* 15 ANTITRUST No. 1, at 4 (describing program).

[26] *Compare* 39 ANTITRUST L.J. 978 (1971) (ex officio for 1970-1971 Council) *with* 38 ANTITRUST L.J. 806 (1970) (FTC Chairman Dixon and AAG McLaren voting members of Council).

[27] Minutes of Council Meeting, Section of Antitrust Law, Aug. 10, 1975, *reprinted in* 44 ANTITRUST L.J. 451 (1975).

could practice in the same state.[28] In 1979, this was increased to three.[29] Today, of the twenty-seven officers and Council members, nine are from the District of Columbia and five are from New York.

III. Continuity

For all of the change in the Section, it is striking how much has not changed. The participation of government officials, the Section's interests in international issues, and the Section's interest in publishing, all mirror similarities present from the very beginning.

A. Government Participation

Government participation has always been a hallmark of the Section. The first Council included George B. Haddock of the Antitrust Division, who delivered an address to the first session of the Section.[30] When his term expired a year later, he was succeeded by Stanley N. Barnes, the new AAG, who also addressed the Section.[31] In 1953, the Section formally adopted a policy "that the Council should contain at least one member connected with the antitrust enforcement agencies of the Federal Government."[32] That policy has been religiously followed, with the Council always including one and sometimes two government Council members, until the decision was made to have the AAG and the FTC Chair, and, later, a representative of NAAG, serve ex officio.

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[28] Executive Session of the Council of the Section of Antitrust Laws, Apr. 4, 1963, *reprinted in* 22 ANTITRUST L.J. 8, 9-10 (1963) (expanding Council by increasing length of terms while leaving unchanged the two-member-per-state limitation). The Section's first by-laws permitted three members per state. By-Laws, Section of Antitrust Law, American Bar Association, Art. III, § 5, *reprinted in* 1 ANTITRUST L.J. 141, 142 (1952).

[29] Minutes of Section Meeting, Section of Antitrust Law, Apr. 5, 1979, *reprinted in* 48 ANTITRUST L.J., at xvii, xviii (1979).

[30] George B. Haddock, *The Sherman Act and Big Business*, 1 ANTITRUST L.J. 17 (1952).

[31] Stanley N. Barnes, *The Judge Looks at Antitrust*, 3 ANTITRUST L.J. 13 (1953).

[32] Minutes of the Second Annual Meeting of the Section of Antitrust Law, Aug. 26, 1953, *reprinted in* 3 ANTITRUST L.J. 9 (1953).

B. International Issues

With its new International Officer, the Section is touting its interest in international issues. The importance of foreign antitrust was symbolized by the presence of Alexander Schaub, Director of Enforcement in the Competition Directorate of the European Commission, as part of the traditional session in which government antitrust enforcers report to the Section.[33] Foreign and international antitrust are important current interests.

The interest is not new, however. The first Spring Meeting included a presentation by Sigmund Timberg, *Problems of International Business.*[34] The original seven committees included a "Committee on Antitrust Problems in International Trade."[35] An early report of a member of one of its subcommittees addressed "*The 'Antitrust' Provisions of the European Common Market Treaty.*"[36] By 1954, the Section had added a committee on "International Restrictive Business Practices."[37] In 1960, the Section's annual "Developments" program included a presentation on British antitrust.[38] As early as 1963, the Section sponsored a free-standing program overseas, in Brussels, on Common Market antitrust.[39] In short, the Section has long looked beyond U.S. borders.

C. Publishing

The Antitrust Section has been in the publishing business from the beginning. It's first chairman, Edward Johnson, included in the initial Section plans an intention to conduct "a survey. . .of the whole antitrust field."[40] In what was later to become known as the

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[33] *Enforcers Discuss Agency Triumphs, Areas for Improvement at ABA Roundtable*, 80 ANTITRUST & TRADE REG. REP. (BNA) 196 (Apr. 6, 2001).

[34] 2 ANTITRUST L.J. 106 (1953).

[35] By-Laws, Section of Antitrust Law, American Bar Association, Art. VIII, § 1, *reprinted in* 1 ANTITRUST L.J. 141, 145 (1952).

[36] 16 ANTITRUST L.J. 118 (1960).

[37] 5 ANTITRUST L.J. 7 (1954) (list of committees).

[38] R.L. Sich, *Developments Under the Restrictive Trade Practices Act, 1956, of the United Kingdom*, 17 ANTITRUST L.J. 285 (1960).

[39] Minutes of Meeting of Council and Committee Chairmen of the Section of Antitrust Law, Apr. 4, 1963, *reprinted in* 22 ANTITRUST L.J. 13 (1963).

[40] Summary of Proceedings of the Section of Antitrust Law, *supra* note 1, at 16.

ANTITRUST LAW JOURNAL, the Section published those initial speeches, minutes, and papers presented at programs, in volumes known simply as Section of Antitrust Law Proceedings.[41] (Commencing in 1957, Proceedings were offered to non-members for $2.50 an issue.[42]) The first four programs were successive, complementary symposia on problems, terms, procedures, and defenses and remedies.[43] When, in 1957, the Section discovered that these early "proceedings" were out of print yet still in demand, it authorized reprinting the symposia in a single volume called an "ANTITRUST HANDBOOK," at a price ($4.25) at least twenty-five cents over cost.[44] Sales "exceeded all expectations," with the initial press run of 2,000 selling out and the second printing of 2,000 selling briskly.[45] The Handbook stimulated 600 persons to become new members of the Section.[46] The Section was in the publishing business for good.

In its 50 years, the Section has become a leading (if not *the* leading) publisher of antitrust materials in the world. It offers monographs and primers and handbooks and multi-volume books on state antitrust and on foreign antitrust.[47] The Section's Proceedings were renamed the "ANTITRUST LAW JOURNAL" in 1966,[48] which added a note of gravitas further enhanced when, in 1968, the Section updated the format of the Journal and began assigning one volume number per fiscal year, rather than one per issue.[49] The red letter date in the Journal's history, however, was November 5, 1982, when the Section Council, troubled by a relentless history of delays and

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[41] These volumes are cited herein as part of the Antitrust Law Journal.

[42] Meeting of the Council of the Section of Antitrust Law, Apr. 4 1957, *reprinted in* 10 ANTITRUST L.J. 5 (1957).

[43] *See* Second Annual Meeting of the Section of Antitrust Law, Apr. 1-2, 1954, *reprinted in* 4 ANTITRUST L.J. 5 (1954).

[44] Meeting of the Council of the Section of Antitrust Law, July 13 & 25, 1957, *reprinted in* 11 ANTITRUST L.J. 5, 6 (1957).

[45] Meeting of the Council of the Section of Antitrust Law, Aug. 25, 1958, *reprinted in* 13 ANTITRUST L.J. 16, 16 (1958).

[46] *Id.*

[47] *See* http://www.abanet.org/antitrust/publications.html (last visited Mar. 21, 2002).

[48] Executive Session of the Council of the Section of Antitrust Law, Aug. 7, 1966, *reprinted in* 32 ANTITRUST L.J., at xiv (1966).

[49] *See Forward*, 37 ANTITRUST L.J. Issue 1 (1968).

production problems, voted to hire Tina Miller, Esq., as an experimental issue editor.[50] The experiment was a grand success and Ms. Miller has played an essential role in Section periodicals ever since, serving as executive editor not only for the ANTITRUST LAW JOURNAL but also for ANTITRUST, the Section's magazine (launched in 1986), and THE ANTITRUST SOURCE,[51] the Section's on-line bi-monthly antitrust publication (launched in 2001). The Section's periodicals have become the principal periodical fora for the written exchange of competition learning and analysis.

The Section's hallmark publication, however, is ANTITRUST LAW DEVELOPMENTS, currently a two-volume explication of antitrust law. Currently in its fourth edition, with a fifth edition in preparation, ANTITRUST LAW DEVELOPMENTS is widely regarded as the Section's singular contribution to the competition community, and, simultaneously, serves as a major source of Section revenues.[52] As with so much in the Section, DEVELOPMENTS's heritage stretches back almost 50 years.

The Antitrust Section has been in the "developments" business since 1954. At that Spring Meeting, the Committee on Antitrust Problems in International Trade submitted a report consisting of a digest of legal developments, a summary of recent studies and reports, and an annotated bibliography.[53] The 1954 Annual Meeting featured a program on "Current Developments in Trade Regulation," with presentations by the AAG, the chairman of the FTC, and the co-chairman of the Attorney General's National Committee to Study the Antitrust Laws.[54] Then, in a performance that foreshadowed much key future Section history, for the 1955 Annual Meeting, Thomas E. Sunderland prepared (and what were then known as Section Proceedings published) *Developments in Antitrust During the Year Ending July 1955*.[55] The presentation and publication of such a paper, by Sunderland and successors,

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[50] Minutes of Council Meeting, Nov. 5, 1982, *reprinted in* 51 ANTITRUST L.J., at xxxvii (1982).

[51] THE ANTITRUST SOURCE, *at* http://www.antitrustsource.com (2002).

[52] Possible bias stems from my service on the editorial board of the second edition (1984).

[53] *Report of the Committee on Antitrust Problems in International Trade*, 4 ANTITRUST L.J. 206, 206-24 (1954).

[54] Symposium, *Current Developments in Trade Regulation*, 5 ANTITRUST L.J. 12 et seq. (1954).

[55] 7 ANTITRUST L.J. 170 (1955).

immediately became an institution.

In 1966, John Koch, then chairman of the Sections Information and Education committee, suggested that the Section take upon itself the updating of the revered 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws.[56] Section Vice Chairman, Edgar E. Barton, promoted the idea; the Council adopted it;[57] and it became the principal project for the Section's committees and leadership during the ensuing years.[58] The book was "designed to report in as objective a manner as possible the developments in legislation and in case law in the antitrust field" since the publication of the 1955 report.[59] The book was a great success, and the Section quickly decided to supplement it periodically as needed.

In early 1972, Section Chairman Richard K. Decker suggested that a committee look into "the publication of a new principle volume of Antitrust Developments in 1973."[60] This "Updating Committee" originally recommended publication of a new Developments book to cover 1955-1973.[61] By the time the book emerged in 1975, however, it had become a free-standing volume intended "to state as objectively as possible the current state of the law and developments in the antitrust field."[62] The Section Council debated whether the volume's name should explicitly reflect its heritage ("Antitrust Developments Second" or "Antitrust Developments (Second Edition)"), but decided that the reference should be only implicit, through use of the term "developments" for a book not really about developments at all.[63] By August 1977, the Section had sold more

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[56] Richard W. McLaren, *Forward*, ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS 1955-1968, at vii (1968).

[57] 32 ANTITRUST L.J., at xivi (1966).

[58] *See* Edgar E. Barton, *Forward*, 32 ANTITRUST L.J., at v (1966).

[59] *Forward*, ANTITRUST DEVELOPMENTS 1955-1968, at vii.

[60] Meeting of Council, Section of Antitrust Law, Feb. 3, 1972, *reprinted in* 41 ANTITRUST L.J., at x (1972).

[61] Meeting of Council, Section of Antitrust Law, Apr. 12, 1972, *reprinted in* 41 ANTITRUST L.J., at xv-xvi (1972).

[62] *See Forward*, ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS, at v (1975).

[63] Minutes of the Council and Editorial Board Meeting, Section of Antitrust Law, June 30, 1973, *reprinted in* 42 ANTITRUST L.J. 499, 501-02 (1973). A motion to switch to "Antitrust Developments Second" was unsuccessfully made the following year. Minutes of Meeting, American Bar Association Section of Antitrust

than 9,200 copies of DEVELOPMENTS; the Section's Council concluded that the book and its expected pocket parts made the expensive publication of an annual "developments" issue of the Antitrust Law Journal unnecessary;[64] the book began to be regularly consulted and cited, and the entire enterprise was an immense success. Supplements were published in 1977, 1979, and 1981, until a new edition (called the second) was brought forth in 1984. The third edition, expanded to two volumes, was published in 1992; the fourth in 1997;[65] and the fifth is to be published in 2002.

It is hard to overestimate the importance of DEVELOPMENTS to the ABA Antitrust Section. Government officials, academics, and practicing lawyers regularly point to it as the Section's signal contribution. It's approach, which combines heavy footnotes with objective text, makes it a valuable research tool for novices and experts alike. By its nature, DEVELOPMENTS cannot be the last word on what the law is, let alone what it should be; but for many of us, DEVELOPMENTS is the first. DEVELOPMENTS also played a critical role in Section finances and in other Section activities and publications; to a significant extent, it made the Section what it is today.

IV. Influence

In his dinner speech honoring the Twentieth Anniversary of the Section, Former Chairman Edward Johnston lamented that "in promoting changes, modifications or improvements in the antitrust laws, I must say that we haven't made very much progress."[66] Congress regards the antitrust laws as almost sacred, "[s]o we must admit that in that field we have not accomplished all that we thought we might accomplish."[67]

Were Mr. Johnston to return this year, his comments likely would be quite similar. Any grand plan to rationalize antitrust through legislation was idyllic dreaming. Antitrust has changed dramatically, to be sure, but the change has been in the courts and the

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Law Council and Committee Chairmen, Feb. 25, 1974, *reprinted in* 43 ANTITRUST L.J. 249, 251 (1974).

[64] Minutes of Council Meeting, Section of Antitrust Law, American Bar Association, Apr. 7, 1976, *reprinted in* 45 ANTITRUST L.J. 6, 9 (1976).

[65] *Forward*, ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (FOURTH), at iii (1997).

[66] 41 ANTITRUST L.J. at 354 (1971).

[67] *Id.*

enforcement agencies, not through legislation. Ironically, the most striking legislative-related substantive changes have stemmed from procedural changes: premerger notification, amendment of the expediting act, and empowerment of the FTC to seek preliminary injunctions. The Section has played a role in these. In principal part, however, the story of antitrust legislation is one of successful resistance to change. Although the Section has sought changes without success, and, conversely, succeeded in resisting change, it is hard to characterize the status quo as evidence of influence.

A. The Section as a Forum

Antitrust has changed because our understanding of proper competition policy has changed. The Section has played an important role in effecting those changes. Its pages and podiums have provided the opportunity for views to be disseminated, disagreements aired, and consensuses reached. Today, for instance, economics and antitrust are closely linked. The Section helped link those two by including economists among its speakers from the very beginning[68] and by regularly highlighting the insights that economics could offer antitrust. As early as 1962, one can see whole days of programs devoted to "Economics in Antitrust Policy and Practice."[69]

One striking way the Section has provided a forum is through its offering of a vehicle for government officials to share remarks and, sometimes, field questions. George Haddock from the Antitrust Division spoke at the inaugural Section meeting.[70] The third annual meeting featured remarks by the FTC chairman and the AAG (as well as the co-chair of the important Attorney General's National Committee to Study the Antitrust Laws).[71] The two antitrust heads returned to speak at the following Spring Meeting,[72] and a pattern of frequent appearances emerged.

The pattern became more formal in 1966, when the Section presented its first Spring Meeting program entitled "Antitrust Report

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[68] *See, e.g.*, M.A. Adelman, *Acquire the Whole or any Part of the Stock or Assets of Another Corporation*, 3 ANTITRUST L.J. 111 (1953).

[69] 20 ANTITRUST L.J. 3 (1962).

[70] George B. Haddock, *The Sherman Act and Big Business*, 1 ANTITRUST L.J. 17 (1952).

[71] 3 ANTITRUST L.J. 3 (1954).

[72] 6 ANTITRUST L.J. 3 (1955).

from Official Washington."[73] The 1966 program included speeches by Senator Philip A. Hart and FTC Chairman Paul Rand Dixon, and, for the first time, a self-described "meet the press" style interview with AAG Donald F. Turner – complete with a panel of interrogators that included New York Times reporter Eileen Shanahan.[74] The Section presented similar reports from official Washington in 1967 and 1968, and a tradition was born. The mix has varied, with speeches replacing interviews and vice versa, with Congress playing a varying role, and with an agency occasionally taking a sabbatical, but the essence of a report has remained.[75]

B. The Section as a Source of Familiarity

The same exchanges that communicate information two ways also nurture familiarity between Section members, especially the leadership, and the enforcement agencies. Indeed, from the very beginning, the Section and the agencies have worked closely together. Government officials regularly speak at Section meetings; they serve ex officio on the Section Council; and they exchange views with the Section, presenting ideas to the Section and receiving comments from it.

The pattern of close working relationships is not new, but rather is rooted in the early years of the Section. The Attorney General's National Committee to Study the Antitrust Laws (1955) included a host of Section members, and one of its co-chairman (S. Chesterfield Oppenheim) went on to chair the Section. The Committee reported to the Section about its work;[76] the Section celebrated publication of the Report by holding a major symposium on the work;[77] and the Section endorsed the substance of the report:

> RESOLVED, That the American Bar Association commends the Report of the Attorney General's Committee

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[73] 30 ANTITRUST L.J., at iii (1966).

[74] *An Interview with the Honorable Donald F. Turner, Assistant Attorney General in Charge of the Antitrust Division*, 30 ANTITRUST L.J. 100 (1966). The program was introduced by the chairman of the Committee on Information and Education, John S. Koch.

[75] *Cf.* http://www.abanet.org/antitrust/glance.pdf (last visited Mar. 21, 2002) ("Roundtable with Enforcement Officials").

[76] S. Chesterfield Oppenheim, *Remarks*, 5 ANTITRUST L.J. 28 (1954).

[77] 7 ANTITRUST L.J. 3 (1955).

> to Study the Antitrust laws for its highly objective, thoroughly able, and exceedingly comprehensive analysis of the antitrust laws, interpretation, decision and policy, and evaluation of their over-all operation and endorses the substance, although not necessarily in all instances the precise form of expression, of the views, conclusions, and recommendations of the Committee as set forth in that Report.[78]

That singularly warm endorsement is not altogether surprising given the closeness with which Section members worked on and with the Committee.

Ever since that experience, the Section has been a vehicle for facilitating private lawyers (and others) working with governmental officials and bodies. The high water mark occurred in 1969. President Richard Nixon elevated Richard McLaren, chairman of the Section during 1967-68, to become AAG. Nixon then asked 1969-70 Section chairman Miles Kirkpatrick to prepare a report on the FTC. That report helped reform the FTC, giving it new life and a new direction, including under the leadership of Miles Kirkpatrick himself, who assumed the chairmanship of the FTC in 1970.[79]

Nineteen years later, Miles Kirkpatrick presided over another Section report on the FTC.[80] That Report provided important guidance for the FTC under new President George Bush. More noteworthy, however, was that the committee that authored the report included, among others, Robert Pitofsky and Timothy Muris, who, of course, would go on to serve as FTC Chairs from 1995-2001, and 2001 to date. (Also included on the Committee was James F. Rill, another Section chair who was to go on to serve as AAG.) As FTC Chairman Muris has explained, that Section report crafted "what might modestly be called a Pitofsky/Muris view of the FTC."[81] It is by making possible relationships such as this that the Section likely has had its greatest influence.

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[78] Meeting of the Council of the Section of Antitrust Law, Aug. 22, 1955, *reprinted in* 7 ANTITRUST L.J. 10, 10-11 (1955).

[79] The influence of the Kirkpatrick Report is nicely described in Timothy J. Muris, *Robert Pitofsky: Public Servant and Scholar*, 52 CASE W. RES. L. REV. 25 (2001).

[80] Miles W. Kirkpatrick, *Letter of Transmittal*, Apr. 7, 1989, *reprinted in* 58 ANTITRUST L.J. 45 (1989). The author served as counsel to this committee.

[81] *Muris, supra* note 79, at 31-32.

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