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THE "BIG ANTITRUST CASE": THOUGHTS ON PROCEDURAL REFORM

JOHN S. KINGDON*

Despite the adoption of case management techniques such as the pretrial conference, computerized litigation support systems and consolidated multiparty/multidistrict litigation, the "big antitrust case" continues to overwhelm the federal courts. Case management techniques have helped parties gain better control over their own cases and have reduced much of the trial time once devoted to complex litigation; but they have not addressed—and to a certain extent they have exacerbated the length and complexity of the pretrial stage of complex litigation. As a result, even when a complex case is settled or judicially disposed of prior to trial, massive amounts of the parties' and court's time and financial resources

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continue to be absorbed in the pretrial processes of partial issue resolution, discovery and fact-marshalling.²

A "worst case" example of exhaustive pretrial complexity is *Waldron v. British Petroleum Co.*,³ an action alleging an antitrust boycott and conspiracy among oil companies during the early part of the 1950's. The complaint was filed in 1956. During the first twelve years of pretrial motions litigation, there were two substitutions of plaintiffs because of the deaths of the original and intervening plaintiffs. Summary judgment for one defendant was achieved in 1968, but by 1971, fifteen years after the complaint was filed and twenty years after the first activities complained of occurred, plaintiff still had not begun general discovery. Another example of the exhaustive demands of complex antitrust litigation is the government's ongoing prosecution of IBM for monopolization of the computer industry.⁴ After several years of pre-complaint investigation, the Justice Department filed the suit on January 17, 1969, over ten years ago. Little happened for three years. Most of the following three years was consumed in pretrial battles over the alleged destruction of work-product materials.⁵ In July 1973, IBM moved for an early separate trial to settle the issues of relevant markets. The court, however, believed such a procedure would not completely resolve any of the issues of the complaint and denied the motion.⁶ By January 1975, computer technology had advanced far beyond the scope of the litigation. The equipment whose market was embraced by the original complaint was antiquated in comparison with newer IBM products. As a result, the government found it necessary to modernize its complaint to embrace allegations involving the new "plug compatible peripherals" equipment. Updating the complaint imposed additional discovery demands and burdens as a prelude to trial.⁷

² Statistics compiled by the Administrative Office of the United States Courts demonstrate that on the average less than ten percent of antitrust actions reach trial. About forty percent are settled and approximately fifty percent are disposed of judicially each year. However, other Administrative Office statistics show that even pretrial dispositions can still be exhausting. During Fiscal Year 1973, the median duration of private actions judicially terminated prior to trial was 10 months; ten percent took 45 or more months for resolution. During Fiscal Year 1974, the median duration of judicially terminated antitrust actions increased to 16 months, and ten percent of them took 60 or more months for resolution. See Judicial Conference of the United States, *Reports of the Proceedings: Annual Report of the Director of the Administrative Office of the United States Courts: 1973 Report*, Tables C-4 at 358-59, c-5a at 368-69; *1974 Report*, Tables C-4 at 415-16; C-5a at 428-31.


Somewhat overlooked in the literature are the even grander complexities of the antitrust cases brought by the Federal Trade Commission (FTC) before its own administrative law judges. Not only are these cases prosecuted under courtroom and procedural rules more relaxed than the Federal Rules of Civil Procedure, and thus subjected to fewer procedural mechanisms of control, but they are also far more ambitious in scope. For example, the FTC’s two largest cases, the Exxon case, seeking to restructure the oil industry, and the Kellogg case, charging the new structural theory of “shared monopoly” in the cereals industry, virtually defy manageability because of the scope of their claims for structural relief in complex industries.

The Exxon complaint, filed in 1973 after almost eight years of purported investigation, alleged that the eight major oil companies maintained a “non-competitive market structure.” To substantiate that charge, the FTC issued an 1800-page subpoena duces tecum. The requested documents dated back to the early part of the century and the demand was world-wide in scope. After six years of litigation over the massive scope of that request, the companies were given 18 months to search millions of documents in response to a revised staff subpoena. That discovery is presently continuing. The government estimated at one point that it would be prepared to go to trial as early as 1983, ten years after filing the complaint and eighteen years after initiating its investigation of the industry. This estimate was based solely upon the uninterrupted time the agency estimated it would need to sift through this document production and to prepare its case for trial. The FTC maintains that the industry should delay any of its discovery until after the FTC has presented its case before the administrative law judge, which might not occur until the late 1980’s. Respondents’ discovery and the presentation of the defense will take several more years. Present estimates are that the trial will extend into the 1990’s—more than seventeen years after the filing of the complaint. Once the administrative law judge reaches his decision, the Commission itself will review the massive record. Even at this “early” date, the government already has expended over $13 million on the Exxon proceeding.

The Kellogg case has consumed comparable government and private
resources. After a brief two-year investigation and pretrial preparation, the FTC began to present its case before the administrative law judge assigned to the matter in 1972. Four years later, the staff rested, and the industry began its presentation. By 1977, the administrative law judge hearing the case had reached the civil service mandatory retirement age. By special employment contract with the FTC, however, he agreed to remain on the case as an employee of the agency in order to avoid the assignment of a new judge to the case who would have to rehear five years of trial testimony. The special employment arrangement presented an obvious conflict of interest by virtue of the employment of the judge by the prosecution, and a new administrative law judge was appointed in late 1978. During the following year, the new judge read more than 40,000 pages of trial manuscripts in an attempt to avoid repetition of most of the six-year-old trial.

Recently, the problem of managing the big antitrust case was addressed by the Presidentially-appointed National Commission for the Review of Antitrust Laws and Procedures (NCRALP, Commission or National Commission). The fact that problems posed by complex litigation have risen to Presidential notice prompts a hope that they will be tackled more determinedly in the future, even in view of the natural cynicism which greets the work of most Presidential Commissions. After six months of intensive study, the Commission issued its report in January 1979. The report urged the increased use of several pretrial procedural mechanisms to bring big cases under control. They include: immediate discovery conferences after a complaint is filed; time limits on discovery; the use of masters to rule on discovery motions; increased use of partial summary judgment; interlocutory appeals; and sanctions for dilatory behavior. The report also highlighted the need for more effective judicial control over discovery, narrow discovery, and an early identification of the litigable issues.

Most of the recommendations in the final report, and many other ideas discarded by the Commission, had been aired in the past by various commentators. Nevertheless, the report focused upon some of the better suggestions made over the years and there is a strong likelihood that many of its recommendations will be implemented. However, it must be recog-
nized at the outset that the Commission severely restricted the scope of its mandate in order to complete its tasks within a six-month time limitation. Its recommendations suffer accordingly.

A serious handicap to the overall credibility and effectiveness of the Commission Report was the decision to exclude from scrutiny the Federal Trade Commission Act and the FTC antitrust cases brought under that Act. That decision conveniently eliminated consideration of the FTC's mammoth structural cases, *Exxon* and *Kellogg*. That threshold decision also precluded any consideration of whether FTC antitrust cases instead should be brought by the Justice Department and/or litigated in the federal courts, which are clearly better equipped to manage and adjudicate big antitrust cases than the administrative law judge system used by the FTC.

The Separate Views of Commissioner Orrin G. Hatch, U.S. Senator from Utah, deserve careful attention if meaningful progress is to be made toward resolving some of the inherent institutional defects of the antitrust enforcement responsibilities of the FTC. Several antitrust litigators unanimously testified before NCRALP that the trial of complex antitrust cases would be materially expedited if the adjudicative functions of the FTC were transferred to the federal courts. These litigators presented a number of policy reasons which argue compellingly for transferring the FTC's antitrust adjudicative functions to the federal district courts. One witness pointed out that the principal advantage of combining these functions and eliminating the FTC's authority to initiate administrative adjudicative proceedings in antitrust matters was to expedite these complex proceedings. According to Mr. William Simon's testimony before the National Commission:

> [T]he record is that even though the federal judges have a case load of from three to nine times the case load of the administrative law judges of the Federal Trade Commission . . . the antitrust cases in the federal courts get tried in roughly one-third the time that it takes to try them at the Federal Trade Commission.19

The Commission Report expressly declined to take a position on the critically important issue of duplicative antitrust enforcement and the constructive suggestions of many witnesses that antitrust adjudicative authority be transferred from the FTC to the federal courts. It is rather ironic that the report pleads “time constraints” as the reason it was unable to fully address this suggestion of how to effectively save time in litigating antitrust matters.20

Soon after the Commission Report was issued, the Antitrust Litigation
Committee of the ABA Section of Litigation criticized the Commission for
dodging this issue and strongly endorsed the minority views of the five
members of the Commission who recommended the transfer of the antitrust
adjudicative function from the FTC administrative law judge system
to the federal courts. The Report of the ABA Committee, adopted by the
full ABA Section of Litigation, noted that such a transfer would have the
twofold effect of expediting FTC antitrust proceedings and eliminating the
appearance of impropriety which results from the combination in one
agency of the investigatory, prosecutorial and adjudicatory functions.
Unshackling the FTC from the unwieldy adjudicatory procedures of the
administrative law judge system, the ABA Committee concluded, would
result in an invigoration of FTC antitrust prosecutorial efforts.21

Most recently, on November 6, 1979, Senator Hatch introduced legisla-
tion which would implement the recommendation included in his Separate
Views to the Report of the National Commission. Entitled the “Antitrust
Enforcement Improvements Act of 1979”, the bill seeks to accomplish a
transfer of the FTC’s antitrust adjudicative function to the federal courts.22
S.1980 would amend section 5 of the FTC Act to draw a distinction be-
tween the FTC’s “antitrust mission,” i.e., protection against unfair meth-
ods of competition, and the FTC’s “consumer protection mission,” i.e.
protection against unfair or deceptive acts or practices. Under the terms
of the bill, actions with respect to unfair methods of competition would be
instituted and prosecuted by the FTC in federal district court.23 The bill
further provides that actions with respect to unfair or deceptive acts or
practices would continue to be conducted by the FTC in administrative
proceedings.24 As introduced, S.1980 would be applied only prospectively.

21 ABA Antitrust Litigation Committee, Report of the Special Committee for the Study
of the Procedural Recommendations of the National Commission for the Review of Antitrust
Laws and Procedures 8-11 (July 1979) [hereinafter cited as REPORT OF THE ABA LITIGATION
COMMITTEE].

initial co-sponsors of S.1980 include Senators Cochran, Helms, Laxalt and Thurmond.

23 Sec. 201 of S.1980 provide in relevant part:

Whenever the Commission has reason to believe that any such person, partner-
ship, or corporation has been or is using any unfair method of competition in or
affecting commerce, and if it appears to the Commission that a proceeding by it in
respect thereof would be to the interest of the public, the Commission may institute
in its name, through any of its attorneys designated by it for that purpose, a civil
action in a district court of the United States to prevent or restrain such alleged
violation or a threatened violation and pray that the court enter an order requiring
that such person, partnership, or corporation cease and desist from using such
method of competition.

Id.

24 Id. Sec. 202. It perhaps could be argued that the scope of S.1980 is too narrow in that
it would not transfer the FTC’s adjudicative function in consumer protection cases. Some
justification for the approach taken in S.1980, however, exists in the fact that empirically it
has been FTC antitrust proceedings that have been notoriously protracted. In addition, the
focus of antitrust on actual competitive effect, as opposed to the generalized approach used
in determining unfairness and deception, requires greater judicial efficiency and control.
Thus, the legislation would not alter proceedings in which a complaint had been issued and served prior to the effective date of the bill.

In analyzing S.1980, it should be noted initially that the bill is limited in scope. It does not seek to eliminate the FTC as an antitrust enforcement agency. Instead, the result of the bill simply would be that federal judges would perform the adjudicative function which is currently performed at the FTC by the Commissioners and the administrative law judges. As indicated in the Separate Views of Senator Hatch and the Report of the ABA Litigation Section, S.1980 surely would expedite complex FTC antitrust proceedings. The enhanced efficiency and effectiveness which would result from such an adjudicative transfer has been explained by the former chief complaint counsel in the FTC's Exxon case who noted that by eliminating the Commissioners' dual role of prosecutor and judge, the FTC would be free to "make the midlitigation policy decisions and-resource allocations it should now be making under its mandate from Congress."

An additional explanation of the expediting advantage which would result from S.1980 is forcefully explained by Senator Hatch.

Experience has shown that administrative law judges at the Federal Trade Commission cannot maintain the necessary strength and independence to force FTC complaint counsel to adequately structure and focus their cases. As a result, unless the adjudicative function is transferred, Federal Trade Commission antitrust proceedings necessarily will continue to be protracted, unfocused, and therefore, unduly expensive.

The Federal Trade Commission was originally created as a result of dissatisfaction with perceived delay and inefficiency in court proceedings.

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26 Several commentators have in fact suggested that the dual enforcement authority of the Department of Justice and the FTC should be centralized in the Department of Justice. COMMISSION REPORT, supra note 14, at 385-73, 897 ANTITRUST & TRADE REg. REP. (BNA) (Special Supp.) at 104-07. Upon leaving the Office of Attorney General, Griffin B. Bell indicated that based on his experience he would consolidate the antitrust enforcement functions of the FTC and the Department of Justice in one agency. Wall St. J., Aug. 15, 1979, at 3, col. 2.

27 White, FTC: Wrong Agency for the Job of Adjudication, 61 ABA JOURNAL 1242, 1245 (1975).


A case which could be expected to take three to five weeks to try in a federal court could be expected to take as many months before an Administrative Law Judge. There are many reasons for this. FTC law judges have few responsibilities over and above the one or two cases they handle at any given moment. As a consequence, FTC staff lawyers are not motivated to develop streamlined procedures. Meaningful stipulations are seldom entered into, and the bulk of a case is often consumed by arguments regarding the admissibility of documents. Federal judges have heavy dockets; hence, they are forced by necessity to adopt comparatively superior case management techniques and are careful to avoid such time-consuming procedures.

Id. at 9-10.
For instance, it was argued in 1914 that “[i]f we rely on the judiciary, our progress must necessarily be slow. We prefer to place our hopes and aspirations in an administrative board, a board that would not be hampered by appeals, delays and technicalities.” Congress believed that an administrative commission composed of members with expertise concerning the problems of business competition “could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violations occurred.”

Ironically, the delay and inefficiency which today surrounds FTC adjudicative proceedings is the exact opposite of that which was originally intended for the FTC. The federal courts, contrary to the myth of administrative expertise, have been able to develop more flexible procedures for antitrust cases. Accordingly, the expediting advantage of S.1980 would be consistent not only with current notions of judicial efficiency, but also with the legislative intent in creating the FTC.

The inherent unfairness of combining investigatory, prosecutory, and adjudicatory functions in the FTC has long been a serious concern. As stated in a report of the ABA Antitrust Section:

[For] the FTC Commissioners to retain both the prosecutory and adjudicatory functions creates the appearance and possibility of unfairness, even with the best of intentions. It is conceptually wrong for one tribunal to decide what cases are to be brought, to prosecute these cases, and then to sit in judgment of these cases.

Former FTC Commissioner Philip Elman has reached the same conclusion, stating that “on the basis of my experience and observations, the strongest argument I would make against agency adjudication of alleged violations of law is that the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness.”

Of course, the FTC is not alone among federal agencies in its combination of prosecutorial and adjudicatory functions. Empirically, however, the appearance of prejudgment which results from a combination of prosecutorial and adjudicatory functions has been exponentially multiplied at the FTC. With its perceived broad jurisdiction, the FTC may pick and choose almost any point on the horizon of American industry to insert itself. Understandably, most parties proceeded against are likely to regard the FTC as a hostile intruder. When the FTC’s structural appearance of im-

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propriety is added to this already suspicious atmosphere, the result almost always is a sense of outrage. By seeking to eliminate the FTC's ill-advised combination of functions, S.1980 goes a long way toward reducing the perception of unfairness that has engulfed the FTC.

A second fundamental shortcoming of the NCRALP Report was its government and prosecutorial bias. The concept of a "National" Commission was conceived by the Department of Justice; the Commission's Chairman was the Assistant Attorney General responsible for the Antitrust Division of the Department of Justice; the staff was supplied by the Department of Justice; and the options papers, white papers and final report were written by attorneys at the Department of Justice. This was not a Commission with a mission to critically evaluate the big antitrust cases brought by the Justice Department and the Federal Trade Commission. Indeed, although the Commission spent a great deal of time lamenting "dilatory" pretrial tactics by defense counsel, there was no effort whatever to dissect the root causes of problems within pending government cases—some of which represent the most complex antitrust cases ever undertaken.33

Nevertheless, the National Commission's efforts in evaluating the big antitrust case were by no means a useless or academic endeavor. The report contains many concrete proposals which, if adopted, would go far toward mastering the complexities of this type of litigation. This article does not intend to comprehensively critique the Commission Report but rather identifies two critical aspects of procedural reform—the *sine qua non* of manageability—and applies them in ways avoided by the Commission.34

All commentators agree that the most critical factor differentiating complex but expeditiously resolved antitrust cases from those that bog down in pretrial or trial complexity is the early identification of the litigable issues.35 The crucial nature of this process to the proper management of a big case prevades the Commission Report.36 The best illustration of the value of this process is the case of *Telex Corp. v. IBM Corp.*,37 which
lasted three years from complaint to decision. The parties in the Telex case were eager to reach a decision on the merits and, consequently, focused the dispute on relatively narrow substantive issues. The lack of peripheral issues in the pleadings was echoed by the lack of diversionary discovery issues, since Telex was consolidated with two older cases in which the discovery process was nearly completed. As a result, the case proceeded quickly to trial and final decision.

The Telex case demonstrates a critical aspect of early issue delineation passed over by the National Commission and other commentators. This process begins not with the pretrial conference but with the preparation of a properly framed complaint. The Telex complaint was narrowly and precisely drawn and, unlike the vague complaint in the Federal Trade Commission’s Exxon case, no pretrial litigation was needed to sharpen the case theory or to identify the facts or behavior about which the plaintiff complained.

There are several causes of vague pleadings in complex antitrust litigation, some of which may be unavoidable but others which are readily addressed. Uncertainty about all the facts, for example, may cause a plaintiff to allege a broad or vague violation of the antitrust laws in order to encompass all potentially applicable theories of liability. For example, in Wall Products Co. v. National Gypsum Co., the plaintiff-retailer filed its complaint on the sole basis of the defendant-supplier’s sudden cessation of discount pricing in favor of uniform prices for all its customers. The plaintiff anticipated that post-complaint investigation would uncover the information it needed to frame its allegations of price-fixing more specifically.

The lack of clear legal standards in the antitrust field is a second factor in the problem of vague pleading, especially in Sherman Act section 2 attempt and monopolization claims. The Clayton Act section 7 prohibition on the “lessening of competition” is another source of unclear standards. Rule of reason analysis of particular conduct under section 1 of the Sherman Act is a third example.

Counsel may also deliberately write broad or vague allegations as a part of a litigation strategy of postponing the commitment to particular theories of liability. For these antitrust lawyers, narrowly drawn pleadings hamper their pretrial litigation maneuvering and provide the bases for successful objections to their discovery request. Broad or nebulous pleadings, in contrast, provide maximum pretrial flexibility and allow counsel to change their theories of the case in response to emerging fact patterns or the progress of the case through pretrial motions.

423 U.S. 802 (1975). The reversal by the Tenth Circuit was on a point of substantive antitrust law, not procedural deficiencies. The case was settled in late 1975. See also Withrow & Larin, supra note 1, at 37.

An effort to require that plaintiffs plead claims with particularity was firmly rejected in the antitrust field during the 1950's. Courts and commentators believed that antitrust cases were too complex and relied too heavily on circumstantial evidence to justify an early dismissal on the basis of the lack of specificity at the initial stage of the pleadings. Their preference was to give the parties time to develop their factual cases more fully before allowing judicial pronouncements on the allegations. Such a policy was directed to the difficulties associated with the facts of a case, however, and it was not intended to give plaintiffs more time to develop their theory of liability or to identify the general practices upon which the complaint is based. Yet this policy sometimes has resulted in the filing of complaints which consist merely of conclusory statements of "anti-competitive behavior." Occasionally, such complaints not only fail to mention the specific acts or practices which give rise to the alleged violations of law, but also, as in the Exxon case, they frequently fail to articulate a theory of antitrust liability.

The National Commission's conclusion that the case for specialized pleadings in the antitrust field is "very weak" is misleading and subject to severe criticism. Parties who are capable of articulating claims may resign themselves to broad allegations of monopolization or other antitrust violations when facts are not sufficiently available to specifically categorize the alleged violation. But parties who deliberately adopt the practice of vague complaint construction as a litigation strategy should be required to abandon that strategy and to plead more precisely. Even parties who confront a vague or poorly defined legal standard can still name that stan-

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We recognize that the confused and obscure quality of many of the allegations of the complaint may understandably have influenced the district court's decision [to dismiss], particularly since it had granted leave to file an amended complaint. But the subject matter of the lawsuit is too important to allow such prejudicial consequences to flow from imprecision in the pleadings.

395 F.2d at 426.

42 COMMISSION REPORT, supra note 14, at 76 n. 14, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 19 n. 14.
standard in the complaint and partially point to the practices which they rely upon in their allegations.

Although antitrust defense attorneys are confronted with litigation which will cost their clients thousands of dollars in attorneys' fees and may result in enormous treble damage awards, they are presently restrained from resorting to procedural mechanisms routinely available to practitioners in other proceedings to clarify the nature of a plaintiff's complaint. Rule 12 motions for a more definite statement, and motions to strike or to dismiss for failure to state a claim, generally are disfavored in antitrust cases. These motions fail because of the belief that specialized pleadings are unnecessary or unfair in the antitrust field. That belief stemmed from the desire to give antitrust plaintiffs time to develop their factual proofs. This practice perpetuates the delays inherent in refusing to focus on issues at the earliest practicable time in complex cases.

It is not unreasonable to require a plaintiff to articulate particular aspects of a defendant's conduct which suggest antitrust liability, or to require plaintiff's counsel to consider the dimensions of his case before filing a complaint. Antitrust cases do involve imprecise legal standards, but plaintiff's counsel should have an idea of what types of acts or practices of the defendant he believes comprise that behavior. Certainly, counsel should be able to discern whether the acts or practices complained of are conspiratorial or exclusionary in nature, and to so state in the complaint.

If a plaintiff files a nebulous claim, the court should sustain a motion for a more definite statement to give the defendants notice of the character of a plaintiff's allegations. Such a motion simply requires a plaintiff to articulate his case and in no way jeopardizes the policy choice to give the parties time to amass the factual proofs of those allegations before submitting them to judicial scrutiny. At the same time, it enables defendants to begin developing their cases and launches the issue identification process at the earliest possible time.

The federal government has been the chief culprit in initiating massive antitrust cases on the basis of vague allegations. Structural cases initiated by the FTC particularly have been infected with a lack of specificity at the complaint stage. The Commission's massive Exxon case graphically demonstrates the consequences of the broad or vague complaint. That complaint charges the companies with maintaining a "non-competitive market structure," an unprecedented charge undefined in antitrust law or litera-

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PROCEDURAL REFORM

Furthermore, the complaint contains no statement of contemplated relief. As a result, the Exxon case is a paradigm of the horrors visited by the big antitrust case which is initiated without thorough prior investigation on the basis of vague theories. From the outset, the FTC’s prosecuting staff has been unable to limit or define the legal or factual issues in dispute or even to state the types of acts and practices in the oil industry which gave rise to the alleged violation. The vagueness of the complaint and the absence of any requested relief have resulted in six years of non-productive litigation, during which respondents have attempted to ascertain not just the basis, but the nature of the FTC’s complaint.

The lack of a discernible articulated theory behind the Exxon complaint is, in major part, the result of a cursory and prematurely terminated investigation of the industry by the FTC staff. Indeed, Commissioner Paul Rand Dixon, the only present Commissioner sitting when the Exxon complaint was issued, has testified before Congress that the Exxon complaint was filed before the staff was ready. The lack of adequate pre-complaint preparation is a root cause of unmanageable government antitrust cases. There is no reason for this problem to exist, because unlike private plaintiffs, government agencies have extensive pre-complaint investigative authority. Under the Hart-Scott-Rodino Antitrust Improvements Act, the Justice Department has significantly broadened powers respecting the issuance of pre-complaint civil investigative demands. Likewise, the Federal Trade Commission retains wide-ranging authority under section 6 of the FTC Act to order production of materials pertinent to ongoing investigations. In light of these pre-complaint investigative powers, there is no excuse for unfocused, ill-conceived antitrust actions initiated by the FTC and the Department of Justice.

The vague pleading in government cases such as the Exxon, Kellogg,
IBM and AT&T cases may also be the result of the institutional needs of these agencies to test new legal theories or to prove the inadequacy of existing laws, whether or not the agency expects to win the cases. These same institutional requirements may prompt an agency to file a complaint in response to public pressures for government action on current political issues. The result is that such cases are often premised upon popular but ill-founded suspicions, instead of upon thorough investigation. The mammoth government cases seeking to establish the "potential competition" doctrine as a means of challenging bank mergers under section 7 of the Clayton Act are excellent examples of this process.

Finally, the problems generated by vague government complaints are not confined to those prosecutions. Private antitrust actions under section 4 of the Clayton Act often follow on the heels of a government complaint. Where the government complaint is inadequate and vague, so too is the private complaint. The result is that a corporate defendant's litigation predicament is compounded by having to face both government and private cases, all of which fail to develop theories and issues for shaping later discovery requests.

As a first step toward expediting complex antitrust cases, sound professional judgment must be exercised in evaluating which antitrust cases should be brought. Following the decision to initiate a case, a properly focused and well-founded complaint must be prepared. Even if the case seeks to expand antitrust doctrine into uncharted areas, so that the legal theories around which the complaint is framed cannot be fully announced at an early stage, it is not too much to require that the government or a private plaintiff present those theories in understandable form. At a minimum, a plaintiff should be required to point to some facts or behavior underlying his complaint.

The consensus of the National Commission and perhaps the antitrust bar is that early issue identification is a prerequisite to big case manageability. There is no practical reason why issue identification cannot begin with the complaint rather than at some later date. In addition, Rule 12 motions for a more definite statement should be utilized in antitrust litigation to insure that a complaint which is vague or nebulous may be amended to give clearer notice of its allegations and their basis.

Without the minimal procedural reforms described above, no other procedural mechanisms will succeed in making complex antitrust cases more manageable. Indeed, until a defendant comprehends what substantive charges it must defend itself against, the wisest defense available is to resist the complaint and the discovery requests on the broadest basis possible. As a result, the vague complaint itself provides the strongest incentive for the defensive strategies so often denounced by plaintiffs.

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The mechanism of a pretrial conference between opposing counsel and the judge to define the issues for trial and to plan the trial itself was an early procedural device for big case management. \footnote{See 3 Moore's, Federal Practice ¶ 16.02 (2d ed. 1974). An interesting discussion on the role of the pretrial conference may be found in Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561, 566-74 (D. Del. 1952).} Rule 16 of the Federal Rules of Civil Procedure provides for a pretrial conference to simplify the issues and obtain stipulations and admissions of fact when the court, in its discretion, believes such a procedure helpful. Generally, these conferences occur after discovery is well on its way to completion and the parties are actively preparing for trial. However, in at least ten federal judicial districts, a "preliminary" or "initial" pretrial conference is scheduled immediately after the complaint is filed. \footnote{E.D. Ill. R. 9(b); S.D. Ind. R. 19(d); N.D. Iowa R. 18(a)(1) (60 days); D. Mont. R. 11(b); D.N.C. R. 22(a)-(d); D.N.H. R. 10(a) (60 days); N.D. Ohio R. 17; E.D. Pa. R. 7(b) (45 days); E.D. Va. R. 12(3). The practice is observed informally in Maryland. \footnote{Commission Report, supra note 14, at 71-72, 897 Antitrust & Trade Reg. Rep. (BNA) (Special Supp.) at 23.}

A fundamental recommendation of the National Commission involved amending Rule 16 to provide for an earlier discovery conference of counsel to discuss the simplification of issues. \footnote{Proposed Amended Rule 16 (Italics indicate an addition to the current Rule; brackets denote deleted material.)} Important proposed changes to the

\begin{quote}
Proposed Amended Rule 16

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) The filing of nonbinding statements and counter-statements of facts and theories of claims or defenses, which shall be used to narrow issues, guide discovery and prevent surprise, but shall not be admissible at trial;

(7) The imposition of the sanctions stated in Rule 37(b)(2) against any party for failure to follow orders entered pursuant to Rule 16;

(8) The submission of a plan and schedule of discovery;

(9) The setting of pretrial time limits, cutoff dates, and a trial date;

(10) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, the time limits and cutoff dates set, and the agreements made by the parties as to any of the matters considered, and which defines the legal and factual issues and limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial
present Rule 16 include the scheduling of a conference or series of conferences at the request of a party as well as the judge and requiring the parties to file non-binding statements of facts and their theories of the case before the conference. These statements would then form the basis of decisions at the conference concerning the central issues, peripheral issues and non-litigable issues. The statements would guide the parties into the most relevant areas of discovery and away from frivolous or nonproductive matters. The purpose of the proposed amendment is to strengthen the district judge's authority to define issues unilaterally in a pretrial order if the litigants cannot agree.\[4\] Due process safeguards against premature or erroneous judicial decisions include the provision for reconsideration of such orders. Under amended Rule 16, an early issue conference would be mandatory in complex cases within 45 days after filing the complaint.

This particular National Commission recommendation soon may be incorporated into the Federal Rules of Civil Procedure. In February 1979, the Judicial Conference of the United States published a Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure.\[5\] The changes would amend the provisions of Rule 26 governing the scope of discovery to add subsection (f). This subsection would provide for a discovery conference to generate an order tentatively identifying the discovery issues and describing a plan and schedule for discovery. The proposed Rule 26(f) specifically provides that this discovery conference can be combined with a Rule 16 pretrial conference to achieve both simplification of issues and a narrowing of discovery.

These proposals for pretrial conferences to narrow the issues and impose a plan upon discovery in complex litigation re-emphasize the value of an early focus upon issues through a properly framed complaint. If a plaintiff cannot describe his case in the complaint, it is unlikely that he will be prepared to discuss the narrowing of the issues 45 days after filing that complaint. He will certainly be ill-prepared to submit a statement of the theory of his case if he has not already identified one at the complaint stage. On the contrary, he will probably resist any attempt to describe as peripheral or to admit any issue which he has not yet evaluated (or perhaps even considered). Thus, the value of any pretrial conference in simplifying the issues in complex litigation may be illusory.

Unless counsel for the plaintiff are prepared meaningfully to discuss and narrow the issues, the burden of articulating theories for the plaintiff

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calendar on which actions may be placed for reconsideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

\[Id.\]

\[4\] Id. at 59-64, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 17-19 (Mandatory scheduling of conference); Id. at 63-64, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 19 (Judicial statement of the litigation issues).

\[5\] Committee on Rules and Practice and Procedure, Judicial Conference of the United States, February, 1979, at 3-5.
and of identifying the litigable issues devolves upon defense counsel and the court, the two participants least likely to propound plaintiff's case for him. The ordinary judicial reluctance to prematurely cut off a party should certainly operate at its strongest at this early stage of litigation. Should a court nevertheless assume the initiative and issue a pretrial order defining the scope of the litigation and/or scheduling discovery, in all likelihood it will more willingly amend the order and alter the course of the litigation at a later date in response to a then routine request for reconsideration. Should this scenario become a common one, the pretrial conference will serve no useful purpose in expediting the pretrial stages of complex litigation.

At best, the newly proposed pretrial conference will assist the plaintiff in identifying issues. At issue here is the preparation of counsel to discuss the legal, not the factual issues. By assuring that the plaintiff's preparation occurs before the complaint is drafted rather than before an early pretrial planning conference, the reform effort assures that parties will approach the pretrial conference prepared to discuss the proper parameters of the case and to plan the discovery stage of the litigation. If that occurs, the conference will play a vital pretrial role. Moreover, this schedule demands no more of a plaintiff than an early issue conference, particularly one which would occur 45 days after the complaint is filed.

The management and, tacitly, confinement of discovery were central goals of the National Commission, and indeed have been addressed repeatedly by courts and commentators.\textsuperscript{44} Certainly, the adoption of better issue delineation mechanisms automatically will reduce the dimensions of these problems. The discovery conference recommended by the Judicial Conference and the early issue conference proposed by the National Commission are designed to bypass many of these exhaustive disputes by organizing the litigation and planning discovery at an early stage, thereby avoiding needless discovery on peripheral and uncontested issues. The pre-discovery conference is also designed to avoid protracted discovery disputes by forcing the parties to prepare their discovery schedules and to resolve their disagreements over each other's plans before launching and committing their litigation resources. Any later disputes should be resolved more quickly by reference to the agreements reached at the pre-discovery conference and contained in the pretrial order.

The National Commission also considered and suggested (without specifically endorsing) the use of firm time limits for discovery. A two-year limit on discovery particularly was favored by the Commission. Several local court rules already impose shorter time limits on discovery,\textsuperscript{45} but judges are frequently lax in enforcing these deadlines. The idea behind timed discovery is that lawyers will eliminate their search for redundant or marginally useful evidence and other wasteful practices as they are

\textsuperscript{44} See note 1 \textit{supra}.

\textsuperscript{45} E.D. N.C. Civ. R. 7(e) (eight months from filing of answer); E.D. Pa. R. 7(b)(2); E.D. Va. R. 12(3)(a); N.D. Ind. R. 12(d) (eight months); S.D. Tex. Local R. 15(e) (six months).
forced to "budget" their available discovery time. The National Commission refrained from the final endorsement of timed discovery because of the inherent arbitrariness of such limits as well as the suspicion that longer discovery periods may be unavoidable in many large antitrust cases.

While these mechanisms may successfully organize and manage the discovery of complex litigation, the adoption of one or both will not automatically simplify and expedite present problems of protracted antitrust litigation. These are mechanisms which cooperative counsel eager to litigate the merits of a dispute will willingly embrace. But parties unwilling or unprepared for various reasons to adapt to these procedures will not. As pointed out above, the plaintiff who cannot articulate his theory of the case at the complaint stage will not have clarified the issues in the 45 days leading to the discovery conference. Likewise, a defendant may be unwilling to clarify the present confusion over legal or factual issues. In the absence of agreeable counsel, the success of the pretrial conference depends upon the trial judge. In any event, counsel who agreed upon the issues at the conference are not bound by their pre-conference submissions to the judge, and they may later request reconsideration of the issues.

Even under the present rules governing discovery and other pretrial proceedings, an activist judge willing to interject himself into the pretrial process can readily expedite these processes. His considerable powers under Rule 16 are purely discretionary in nature. Many judges already conduct pretrial conferences prior to discovery in order to direct the parties' efforts toward the most fruitful channels. In the final analysis, the trial judge's attitude toward discovery and his view of his own role in complex litigation becomes critical to the reform process.

The process of reform is confronted by a forty year tradition of broad and liberal discovery. This tradition was established by the 1937 Federal Rules of Civil Procedure in reaction to the surprise courtroom warfare which then characterized litigation. To guarantee all litigants a fair trial, the reformers developed broad discovery in order to insure all relevant facts were illuminated before the parties go to trial. This bias in favor of wide-ranging, no-holds-barred discovery continues today. As one court stated: "[d]iscovery under the Federal Rules, particularly in antitrust cases, is extremely broad, and not limited to the allegations of the pleadings.... In antitrust litigation discovery is broadly permitted, and the burden or cost of providing the information sought is less weighty a consideration than in other cases." The approach was also adopted by the Manual for

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58 The Rules are designed to minimize surprise by allowing the parties "to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495, 501 (1947).

59 Maritime Cinema Service Corp. v. Movies En Route Inc., 60 F.R.D. 537, 589, 592 (S.D.N.Y. 1973); accord, Goldinger v. Boron Oil Co., 60 F.R.D. 562 (W.D. Pa. 1973). Numerous cases exist in which judges have stated that "discovery rules should normally be liberally construed to permit discovery in antitrust cases" and that "the burden or cost of providing the information sought is less weighty a consideration." See, e.g., Federal Trade Comm'n v. Lukens Steel Co., 444 F. Supp. 803, 805 (D.D.C. 1977); United States v. IBM Corp., 66 F.R.D.
Complex Litigation. At the same time, however, the Rules envision some reasonable limits upon discovery, particularly Rule 16\(^{40}\) and to a certain extent Rule 83.\(^{41}\)

Pressures for the imposition of some issue-restricted controls on discovery have intensified over time. As early as 1951, The Prettyman Report, adopted by the Judicial Conference, advocated that the early framing of issues was critical to the management of complex antitrust litigation and that such a delineation should serve as “the basis for the bounds of permissible discovery.”\(^{42}\) The 1960 Judicial Conference Handbook of Recommended Procedures for the Trial of Protracted Cases suggested the scheduling of a pretrial conference soon after the pleading stage in order to identify the litigation issues. It recommended that discovery “be confined to the genuine issues necessary to a decision of the case.”\(^{43}\) While many courts continue to honor the liberal discovery tradition, others have begun to limit as well as to organize and guide discovery. These limits have included those on the subject matter or quantity of inquiries\(^{44}\) and those on the time permitted to the discovery stage.\(^{45}\)

Fortunately, some federal district judges are beginning to impose innovative procedures designed to narrow issues and limit discovery, even in complex antitrust cases. A recent example of such judicial activism is Judge Harold H. Greene’s Pretrial Order No. 12 in AT&T.\(^{46}\) That order required each party to file four successive Statements of Contentions and Proof over an eighteen month period, each more specific than the last. The statements would contain each party’s factual and legal contentions and list witnesses and documentary evidence supporting their contentions. The government was required to file its statement first, with defendant’s responsive statement due shortly thereafter. After each set of statements, a pretrial conference would be held in accordance with Rule 16 “for the


\(^{40}\) Rule 16 has been used in several cases to limit discovery, notably in Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., 373 F. Supp. 1225 (S.D.N.Y. 1974) and United States v. AT&T, No. 74-1698 (D.D.C. Apr. 27, 1978), 862 ANTITRUST & TRADE REG. REP. (BNA) A-4 (17 month discovery schedule established).


\(^{43}\) Judicial Conference, Handbook of Recommended Procedures for the Trial of Protracted Cases 29, 25 F.R.D. 351, 386 (1960). See also, Report of the Special Committee for the Study of Discovery Abuse (1977) (the scope of discovery should be narrowed to that “relevant to the issues raised by the claims or defenses of any party”).

\(^{44}\) See, e.g., Isi Corp. v. United States, 503 F.2d 558 (9th Cir. 1974); Marshall v. Ford Motor Co., 446 F.2d 712 (10th Cir. 1971); Montecatini Edison S.P.A. v. E.I. duPont de Nemours & Co., 434 F.2d 70 (3d Cir. 1970).

\(^{45}\) Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 145 (8th Cir. 1968); Freehill v. Lewis, 355 F.2d 46 (4th Cir. 1968).

principal purposes of narrowing and simplifying the issues, arriving at stipulations of uncontroverted facts, and reducing further unnecessary discovery."

The AT&T order balances two competing concerns in the development of pretrial proceedings. On the one hand, issue delineation is facilitated by the completion of substantial discovery. On the other, discovery is better focused and more manageable after meaningful issue delineation has occurred. Judge Greene's concept of judicial control was to proceed concurrently with both issue delineation and discovery. He stipulated that discovery would be limited by the issues identified in each statement, and that issues could not be enlarged in subsequent statements without a strong showing of good cause, such showing to become progressively more difficult with each succeeding statement. This procedure is a reasonable compromise between the competing interests of expediting litigation and fairness to the parties; it is workable only if accompanied by judicial firmness.

Another excellent example of the new, organized approach to big cases is that of the trial judge in In re Coordinated Pretrial Proceedings in Petroleum Products, Antitrust Litigation, MDL-150, the consolidated cases brought by several states against the major oil companies subsequent to the filing of the FTC Exxon complaint. The MDL-150 complaints were patterned after the government case. Thus, they too consisted of vague allegations of antitrust liability and were unsupported by recitations of what specific behavior or practices of the oil companies gave rise to that liability. Unlike the attitude towards early issue delineation adopted initially in Exxon, the MDL-150 trial judge insisted that the parties identify the legal issues before being permitted discovery, stating: "I am appalled at what might happen if no-holds-barred free ranging discovery were to be embarked upon." The judge ordered a stay of substantive discovery while the litigants addressed themselves to the specific issues raised by the various complaints.

The approach toward pre-discovery issue delineation adopted by the MDL-150 judge recognized the need to keep the discovery within manageable bounds, while assuring the parties adequate pretrial preparation. The court first sanctioned the defendants' interrogatories seeking clarification of the issues contended by each plaintiff and required each plaintiff to respond to these "contention interrogatories" with detailed statements of the bases for each of the issues asserted in the plaintiffs' respective complaints. In this fashion, the relatively unfocused allegations were crystallized. Next, the court addressed whether the general stay of discovery

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7 Id. at 1345.
8 Id. at 1346.
9 A similar procedure is presently under consideration in the FTC's ongoing adjudication of the Exxon case. See Order re Pretrial Schedule, In re Exxon Corp., FTC Docket No. 8934 (issued Dec. 28, 1979).
should be lifted, and if so, to what extent. The judge's bench remarks describe precisely the difficult decision of the court in making a complex case manageable:

Gentlemen, I see another dilemma here. If the plaintiffs have information that would justify the conclusion that they are on the trail of a mammoth multilateral conspiracy to violate Section 1 and 2 of the Sherman Act, they are entitled to pursue discovery in aid of such proof. That is one horn of the dilemma that the court has to be mindful of. It is inherently costly, and I would try to control it as best I could, but I would have to allow it to all appropriate extent. That is one horn of the dilemma.

The other horn is if the plaintiffs have no more than unconfirmed suspicions or hunches and hope to have discovery so that they can find something upon which to base a claim, or at least be able to make it so expensive to the defendants that they will pay to settle, there is no justification in permitting extensive discovery. That is the other horn of the dilemma.

And the court has a right — an obligation not to allow discovery to be abused in the latter respect.71

In an effort to resolve this dilemma, the judge required each plaintiff to submit a detailed statement setting forth: (a) the specific legal theories upon which the plaintiff based each of its claims; (b) the precise information known to support each such legal theory; and (c) what further discovery would be required by each plaintiff to prove each of its legal theories.72

Thus, the trial court refused to enter into the discovery phase of the complex litigation until the parties were able to articulate their legal theories, to found those theories upon some specific fact or information rather than on mere suspicions, and to describe why they needed the types of information encompassed by their interrogatories and document production requests.

Clearly, judges in antitrust cases have developed two polar philosophies of discovery. One philosophy envisions a wide-ranging and liberal discovery period wherein each party to a lawsuit may discover facts which suggest potential theories of antitrust liability and defense. After sifting those facts, the parties articulate their strongest legal arguments and proceed rapidly to trial. Such an inductive process "sweeps the grounds for all possible facts and only then considers the legal categories into which they should be grouped."73 At its worst, this philosophy allows the filing of complaints such as the FTC Exxon complaint, and necessarily results in years of pretrial document production, analysis, supplemental documentary discovery and re-analysis. Only after massive outlays by all parties of

73 Withrow & Larrn, supra note 1, at 42-43.
time, money and staff resources will the effort to synthesize these facts into legal arguments begin. In contrast, the discovery process advocated in this article “takes pre-defined legal principles and attempts to shape the pertinent facts to those principles.” This “deductive” approach elevates the goal of a fair but efficient resolution of the case above the insulation of a plaintiff from early pressures to define its case.

Samuel Taylor Coleridge once observed that every reform “will be carried to an excess; that itself will need reforming.” The free-form discovery tradition itself began as a reform. The early issue delineation, controlled discovery approach to big cases carries its own germs of abuse in the form of due process limitations. That potential for abuse is most apparent in the use of time limits on the discovery process. Several local federal court rules already provide for a six or eight month discovery period. Nevertheless, the element of arbitrariness associated with the establishment, at the beginning of a complex case, of a finite period of time during which all discovery must be accomplished discourages their routine use. While a court should be interested in progressing the case to a prompt resolution, every plaintiff is entitled to the airing of his well-grounded grievances. Difficulties in uncovering specific facts to demonstrate the propriety of relief can unavoidably prolong a discovery case through no fault of the plaintiff. In such circumstances, to force a plaintiff to go to trial with what evidence he can uncover in an arbitrarily determined period may precipitate a claim of violation of due process of law if a court inflexibly adheres to that period.

The issue delineation first, discovery second, pretrial process depends upon the emergence at a very early stage of relatively precise and definable legal issues. Some big cases are big because of the size, number or complexity of the parties; for example, class action suits or disputes involving several major corporations. Others, though, are complex because of the expansive legal concepts of massive factual proofs at issue. Conspiracy cases which rely principally upon circumstantial evidence and the reasonableness of inferences drawn from that evidence are examples of the latter. And, as discussed above, occasionally a plaintiff cannot avoid imprecise complaint allegations. The full facts may simply not be available to him until discovery begins and, as a consequence, all available causes of action may not be known at the complaint stage.

Courts hearing a motion for a more definite statement or preparing for an early issue conference must be cognizant of the inherent complexity of antitrust cases and guard against forcing the litigants to choose and then limit their cases to legal theories which later become too narrow or broad in light of the full facts. At the same time, they must insist that a party not come to court until it can articulate at least the events which prompt the filing of the complaint and a legal theory to support such claims. If a court concludes after a thorough review of the pleadings and the submis-

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74 Id.
75 Quoted in Liman, The Quantum of Discovery vs. the Quality of Justice: More is Less, 4 Litigation 8 (Fall 1977).
sions of stated theories and supporting facts that a party may have a meritorious case despite an imprecise formulation of the issues, the judge should order very limited discovery to determine whether a basis for the complaint does exist. Should a party then articulate a case and marshal some evidence in support of it, a subsequent discovery conference may develop the appropriate parameters of fuller discovery.

Other due process problems are suggested by the narrowed scope of discovery being considered in complex litigation. These problems will not occur if careful attention is paid to the purpose and role of discovery in litigation. To a considerable extent, the reordering of the pretrial stages of issue delineation and discovery entails a rewriting of present Rule 26(b)(1)'s scope of permissible discovery. Rather than permitting discovery regarding any non-privileged matter "relevant to the subject matter involved in the pending action," the revised process would require an identification of the issues and then a careful restriction of discovery to matters "relevant to the legal issues" of the case. No due process violations should occur as long as time period restrictions, subject matter parameters and geographic limits of discovery are reasonably constrained to the scope of allegations in the pleadings and, in most cases, to time periods and geographic areas relevant to the plaintiff's business.

As a practical matter, interrogatories and document requests carefully limited to the issues of the lawsuit will probably be more effective than the no-holds-barred discovery presently plaguing some antitrust litigation. As a legal matter, though, limited discovery ensures that due process—the fair and orderly administration of the laws—is available to all parties in a lawsuit, not just the plaintiff on a fishing expedition for facts to suggest a legal theory. The concept of due process grew out of the same American suspicion of an interfering government as did the fourth amendment guarantees against unreasonable searches and seizures. Unreasonable searches and seizures, of course, are those unsupported by probable cause or, at the minimum, articulable suspicions. The same legal caution which guards fourth amendment protections should apply to the fair and speedy administration of litigation. Unwarranted and unreasonably broad discovery should be eliminated from that process.

The management of the "big antitrust case" requires first the acknowledgment of a number of realities:

1. The nature of the case may be so inherently complex that even early issue delineation will not perform a narrowing or expediting function;
2. The stakes are high in complex litigation and frequently nei-

76 Striking this same note, Simon Rifkind ironically stated at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice that, "A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the Fourth Amendment." See Rifkind, Are We Asking Too Much of Our Courts? 70 F.R.D. 796, 107 (1976).
ther party is willing to voluntarily adopt a posture to expedite the case;
(3) Federal district judges are not enamoured, as a rule, with antitrust cases and frequently permit them to languish on their dockets while the judges direct their efforts to more readily adjudicated matters; and
(4) Government cases that are "political" in origin will probably never be precise or easily managed.

Second, it requires the firm rejection of the discovery first, issue delineation last approach to pretrial preparation. The parties must file pleadings which, within the constraints of the legal standards at issue, articulate clear theories of liability and point to at least some specific acts or practices of the parties which give rise to that liability. Under judicial direction, the parties must meet at an early date to discuss and identify the litigation issues and guide their discovery efforts.

Procedural mechanisms such as those proposed by the National Commission on the Reform of the Antitrust Laws will expedite this process. However, changes in the procedural rules will not automatically bring about the expedition of big cases. These mechanisms merely codify procedures already in frequent use by trial judges unwilling to preside over mammoth litigation which wallows in its own complexity. If there is a solution to the "big case" problem, it will come from the caliber, competence, commitment, and judicial philosophy of federal district and appellate judges. The trial court must be willing to take prompt control of the complex case and to effectively manage its progress. Firm judicial guidance and continual involvement by the judge in pretrial preparation, and approval for this involvement by the appellate courts, are essential if these cases are to become manageable.

Over 100 new federal district judges are being appointed to the trial bench under the Omnibus Judgeship Bill. If those judges are willing to assume the heavy responsibility of controlling the parties in complex antitrust litigation, there will be progress toward making the complex antitrust case manageable.