Antitrust Enforcement Under the Secretaries of Agriculture and Commerce

by

Ralph H. Folsom

Originally published in COLUMBIA LAW REVIEW
80 COLUM. W. L. REV. 1623 (1980)

Antitrust Enforcement Under the Secretaries of Agriculture and Commerce

Ralph H. Folsom*

Public enforcement of antitrust law rests principally with the Federal Trade Commission (FTC), the Antitrust Division of the Justice Department (DOJ), and the states. Little known and, unfortunately, in an era of dramatically rising food prices, little utilized antitrust authority over various aspects of the meat, fish, and agriculture industries is vested in the Secretaries of Agriculture and Commerce, to the exclusion of the FTC. Because of unnecessary jurisdictional complexities and departmental laxity, the delegations of antitrust jurisdiction to these executive departments have failed.

This Article critiques these delegations and, revealing the problems that have arisen under them, proposes statutory and administrative remedies. Part I of the Article reviews the jurisdictional regimes established by the Packers and Stockyard Act of 1921 (PSA),[1] the Capper-Volstead Act of 1922 (Capper-Volstead),[2] and the Fishermen's Collective Marketing Act of 1934 (FCMA).[3] It examines enforcement of antitrust and consumer protection pursuant to these statutes, and in this regard also investigates agricultural marketing orders and fishery management plans under the Agricultural Marketing Agreement Act of 1937 (AMAA)[4] and the Fishery Conservation and Management Act of 1976 (Fishery Act).[5] Part II proposes restoring the FTC's antitrust authority through either concurrent or exclusive jurisdiction and also suggests less radical alternatives to reinvigorate public enforcement of antitrust and consumer protection in the industries concerned.

I. Trade Regulation in the Food Industry

A. *Regulation of Meat Packers, Live Poultry Dealers, and Stockyard Owners Under Antitrust and Consumer Protection Law*

The Department of Justice has possessed jurisdiction to enforce the Sherman and Clayton Acts against meat packers, live poultry dealers, and stockyard owners since the enactment of those statutes.[6] Nothing in the Packers and Stock-

---

*Professor of Law, University of San Diego. A.B. 1968, Princeton University; J.D. 1972, Yale Law School; LL.M. 1973, London University; Professor of Law in Residence, U.S. Federal Trade Commission, 1977-79. A portion of Professor Folsom's research was supported by a grant from the University of San Diego, which is gratefully acknowledged. The views contained herein are those of the author only and should not be construed as necessarily reflecting those of the Federal Trade Commission.

1. 7 U.S.C. §§ 181-229 (1976).
2. 7 U.S.C. §§ 291, 292 (1976).
3. 15 U.S.C. §§ 521, 522 (1976).
4. 7 U.S.C. §§ 601, 602, 608a, 608c, 610, 612, 671-74 (1976).
5. 16 U.S.C. §§ 1801-1802, 1811-1813, 1821-1826, 1851-1861, 1881-1882 (1976).
6. 15 U.S.C. §§ 1-7 (1976) (Sherman Act); 15 U.S.C. §§ 12-13, 14-19, 20, 21, 22-27 (Clayton Act); 29 U.S.C. §§ 52, 53 (Clayton Act) (1976); see, e.g., cases cited in note 15 infra.

yards Act alters this basic authority. On the other hand, section 406 of the PSA[7] severely limits the FTC's jurisdiction to enforce antitrust and consumer protection proscriptions against these groups under the Clayton Act and the Federal Trade Commission Act (FTC Act).[8] In theory, the Secretary of Agriculture's enforcement powers under sections 202 and 312 of the PSA counterbalance this limitation.[9] The underlying logic of this distribution of regulatory authority is obscure, but its history is less so.

1. *Allocation of Jurisdiction Between the Federal Trade Commission and the Secretary of Agriculture.* Prior to 1921, the Commission had jurisdiction over the entire meat industry under section 5 of the FTC Act, which then extended only to "unfair methods of competition,"[10] and under sections 2, 3, 7, and 8 of the Clayton Act.[11] Between 1914 and 1921, the Commission instituted a number of enforcement proceedings related to the meat industry[12] and studied the notorious anticompetitive practices of the "Big Five" meat packers,[13] issuing a report on the meat-packing industry.[14] That report described, among other things, market division, price fixing, and mergers to obtain monopoly power.[15]

The Packers and Stockyards Act of 1921 vested in the Secretary of Agriculture broad regulatory power[16] over "packers," "live poultry dealers," and "stockyard owners." This power included, in sections 202 and 312, expansive antitrust and consumer protection jurisdiction.[17] Although the Act was fashioned

---

7. 7 U.S.C. § 227 (1976).

8. 15 U.S.C. §§ 12-13, 14-19, 20, 21, 22-27 (Clayton Act); 29 U.S.C. §§ 52-53 (Clayton Act) (1976); 15 U.S.C. §§ 41-77 (1976) (FTC Act).

9. 7 U.S.C. §§ 192, 213 (1976).

10. 15 U.S.C. § 45 (1976).

11. 15 U.S.C. §§ 13, 14, 18, 19, (1976).

12. See, e.g., FTC v. Armour & Co., 4 F.T.C. 457 (1922) (1917 acquisition held to violate Clayton Act § 7); FTC v. Swift & Co., 5 F.T.C. 143 (1922) (1917 acquisition held to violate Clayton Act § 7 and FTC Act § 5); FTC v. Western Meat Co., 5 F.T.C. 417 (1923) (same, 1916 acquisition).

13. The "Big Five" were Swift & Co., Armour & Co., Cudahy Packing Co., Wilson & Co., and Morris & Co.

14. FTC, Report of the Federal Trade Commission on the Meat-Packing Industry (1919).

15. Id. at 31-74 (summary of findings). In 1920, the Department of Justice negotiated a Sherman Act consent decree with the "Big Five," enjoining them from engaging in a variety of businesses (including holding any interest in stockyard companies) and from selling meat at retail. The decree also incorporated general prohibitions against monopolizing, attempting to monopolize, restraining trade, or using illegal trade practices. The Supreme Court has repeatedly refused to vacate or modify this decree. The unreported consent decree was entered Feb. 27, 1920, in the Supreme Court of the District of Columbia and is described in United States v. Swift & Co., 286 U.S. 106 (1932); Swift & Co. v. United States, 276 U.S. 311 (1928); United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), aff'd per curiam, 367 U.S. 909 (1961) (Supreme Court refusing to vacate or modify the decree). See also United States v. Armour & Co., 402 U.S. 673 (1971) (decree held not to prohibit retail food firm's acquisition of majority interest in packer); U.S. Plans to Lessen Curbs on Businesses Run by Meatpackers, Wall St. J., Oct. 16, 1979, at 20, col. 3.

16. The scope of this jurisdiction goes considerably beyond the regulation of anticompetitive and anticonsumer trade practices, which are the focus of this Article.

17. Section 202 of the Packers and Stockyards Act of 1921 (PSA) makes it unlawful for "packers" or "live poultry dealers or handlers" to:

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

in part after the FTC Act, Congress made clear that the Secretary's regulatory powers were to go beyond eliminating "unfair methods of competition." [18]

To prevent "overlapping of authority and duplication of jurisdiction," [19] the PSA provided, as a correlate to the Secretary's new power, that the FTC would have no power over matters within the authority of the Secretary except when the latter requested the Commission to make investigations and reports in particular cases.[20] The FTC and Clayton Acts, however, were not amended in 1921 to reflect this withdrawal of the Commission's authority. Therefore, insofar as

---

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or any live poultry dealer or handler, or buy or otherwise receive from or for any other packer or any live poultry dealer or handler any article for the purpose or with the effect of apportioning the supply between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other persons to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section. 7 U.S.C. § 192 (1976).

Section 312 makes it unlawful for "any stockyard owner, market agency, or dealer" to: engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock. 7 U.S.C. § 213(a) (1976).

The PSA gives the Secretary the power to issue a complaint against packers, live poultry dealers, or stockyard owners, requiring them to testify at an adversary hearing. If the Secretary determines that a violation of PSA, antitrust, or consumer protection law has occurred, a written report with findings of fact and a cease-and-desist order must be issued to the delinquent party. This order is subject to judicial review and, if sustained or not appealed, may be enforced by the Attorney General through fines or imprisonment or both. In 1976, Congress amended the PSA to give the Secretary power to assess civil penalties of up to $10,000 per violation of §§ 202 and 312. These penalties are also enforceable through the courts. See 7 U.S.C. §§ 193-195, 213-217, 218d, 222, 224 (1976).

18. 61 Cong. Rec. 1805-06, 1920, 2698 (1921).

19. H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921).

20. Packers and Stockyards Act of 1921 (PSA) § 406(b), 7 U.S.C. § 227(b) (1976). Legislative history of the PSA suggests that it was intended to remove from the FTC all Clayton and FTC Act jurisdiction over the trade practices of packers and stockyard owners. See 61 Cong. Rec. 2486, 2680, 2704 (1921) (remarks of Sens. Norris and La Follette, speaking against limiting FTC jurisdiction). See also Plumrose, Inc., 58 F.T.C. 1134 (1961) (dismissing, for lack of jurisdiction, a complaint charging violation of § 2(d) of Clayton Act). The Eighth Circuit recently stated in dicta, however, that investigations of packers under § 6 of the FTC Act are possible even through the FTC may not possess enforcement powers over packers under § 5 of the FTC Act. See Blue Ribbon Quality Meats, Inc. v. FTC, 560 F.2d 874, 876 (8th Cir. 1977).

unfair methods of competition and Clayton Act violations in the meat industry were not brought within the jurisdiction of the Secretary, the possibility of residual FTC sanctions remained.

The FTC prosecuted no packers, live poultry dealers, or stockyard owners between 1921 and 1938. In 1938, amendments to the FTC Act expanded the Commission's power under section 5 to include regulation of "unfair or deceptive acts or practices."[21] To ensure that this grant of "consumer protection" authority not be construed to affect the regulatory jurisdiction of the Secretary, Congress amended section 5 to express this caveat.[22] Congress did not comparably amend the Clayton Act in 1938.[23]

Between 1938 and 1958, no FTC prosecutions of packers, stockyard owners, or live poultry dealers survived the jurisdictional rules established by the PSA and the 1938 amendments to the FTC Act.[24] In one notable price discrimination case, however, the Fourth Circuit upheld the Commission's position that a canner of food products, a few of which contained meat or meat stock, was not a "packer" within the terms of the PSA and was therefore subject to FTC jurisdiction.[25]

Amendments to the PSA in 1958 significantly changed the jurisdictional rules governing regulation of trade practices of packers and live poultry dealers,[26] but left untouched the Secretary's exclusive jurisdiction over the trade practices of stockyard owners and the FTC's residual authority over practices and persons not covered by the Secretary's powers. These amendments established a division of jurisdiction between the Secretary and the FTC that remains in effect today. The present section 406 of the PSA gives the Secretary primary jurisdiction over packers' and live poultry dealers' trade practices involving "livestock, meat, meat food products, livestock products in unmanufactured form, poultry or poultry products."[27] The Act excludes from the Secretary's primary jurisdiction "retail sales of meat, meat food products, livestock products in unmanufactured form, or poultry products";[28] primary jurisdiction over this area is vested in the FTC.[29] Although the PSA does not define "retail sales," the House Report

---

21. Act of March 21, 1938, ch. 49, 52 Stat. 111.

22. With the amendment, section 5 provides as follows:

> The Commission is empowered and directed to prevent . . . persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act of 1921, as amended, *except as provided in Section 406(b) of said Act,* from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Act of March 21, 1938, ch. 49, § 5(a), 52 Stat. 111, as amended (emphasis added) (codified at 15 U.S.C. § 45(a)(2) (1976)). Section 406(b) of the Packers and Stockyards Act of 1921, 7 U.S.C. § 227(b) (1976), is discussed extensively at notes 27-32 and accompanying text infra.

23. But see note 40 infra for discussion of an amendment made in 1950 to Clayton Act § 7.

24. See, e.g., United Corp. v. FTC, 110 F.2d 473 (4th Cir. 1940).

25. Crosse & Blackwell Co. v. FTC, 262 F.2d 600 (4th Cir. 1959). See also J. Weingarten Inc., 57 F.T.C. 1533 (1960); Giant Food Shopping Center, Inc., 55 F.T.C. 2058 (1959).

26. Pub. L. No. 85-909, § 1(2), 72 Stat. 1749 (1958).

27. 7 U.S.C. § 227(c) (1976).

28. 7 U.S.C. § 227(c) (1976).

29. 7 U.S.C. § 227(a)(3) (1976).

accompanying the 1958 amendments suggests that the term denotes "sales by a retailer to an individual consumer—not bulk sales to institutions and bulk users of products such as are normally made by wholesale dealers." [30]

The FTC has secondary jurisdiction under section 406 over the nonretail trade practices of packers and poultry dealers in matters involving meat, meat food products, livestock products in unmanufactured form, or poultry products, but not livestock or poultry. This jurisdiction can be invoked only when (1) the Commission determines that the effective exercise of its primary jurisdiction over retail sales otherwise is or will be impaired, (2) the Commission notifies the Secretary of this determination, and (3) the Secretary does not advise the Commission that there is a pending Department of Agriculture investigation or proceeding involving the same subject matter.[31] A similar, but not identical, provision of section 406 grants the Secretary secondary jurisdiction over "retail sales" when its primary jurisdiction over acts or transactions of packers or poultry dealers otherwise is or will be impaired.[32]

---

30. H.R. Rep. No. 1048, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 5212, 5218. The FTC and the Secretary of Agriculture may, in certain circumstances, share jurisdiction over retail grocery stores that are "packers" within the meaning of the Packers and Stockyards Act of 1921 (PSA), 7 U.S.C. §§ 181-229 (1976). "Packers" is defined by the PSA to include "any person engaged in the business . . . of manufacturing or preparing meats or meat food products for sale or shipment in commerce." 7 U.S.C. § 191 (1976). This statutory definition of "packer" has been construed to include food stores that process carcasses into retail cuts. Safeway Stores, Inc. v. Freeman, 369 F.2d 952 (D.C. Cir. 1966). See also Bruhn's Freezer Meats v. USDA, 438 F.2d 1332 (8th Cir. 1971) (freezer meat company that cut up and otherwise processed meat, and sold it at retail, held to be packer).

31. 7 U.S.C. § 227(a)(2) (1976).

32. 7 U.S.C. § 227(c) (1976). The 1958 amendments, which culminated in the present jurisdictional allocations, have a tangled legislative history. In early 1957, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary held hearings on the operation of the meatpacking industry and its effect on livestock producers and meat consumers. The Subcommittee concluded that large segments of the industry were escaping effective regulation because the Secretary had failed to adequately enforce the unfair trade practices provisions of the PSA. See S. Rep. No. 704, 85th Cong., 1st Sess. 4-12 (1957). This realization prompted Sens. O'Mahoney of Wyoming and Watkins of Utah jointly to introduce S. 1356 to amend the PSA. The O'Mahoney-Watkins bill sought to effect a complete transfer of jurisdiction over unfair trade practices committed by packers and live poultry dealers from the Department of Agriculture to the Federal Trade Commission. The bill was briefly placed before the full Senate, which unanimously referred it to the Committee on Agriculture and Forestry and the Subcommittee on Antitrust and Monopoly for joint hearings. During these hearings, disagreement between the FTC and the Department of Agriculture focused upon which authority should have exclusive jurisdiction over wholesale trade practices. See id. at 3-10. See also 104 Cong. Rec. 8815 (1958). The Committee on Agriculture and Forestry sought to resolve the jurisdictional issue with an amendment that placed concurrent wholesale and retail jurisdiction in the Commission and the Secretary for a trial period of three years. That amendment allowed each agency to assert jurisdiction over matters on which the other had already instituted a proceeding. See S. Rep. No. 704, supra, at 4-5. In May 1958, the O'Mahoney-Watkins bill was so amended and passed by the Senate.

Meanwhile, in 1957, subcommittees of the House Judiciary and Interstate and Foreign Commerce Committees held joint hearings on bills relating to monopolistic and unfair trade practices in the meatpacking industry. See H.R. Rep. No. 1507, 85th Cong., 2d Sess. (1958). Rep. Celler of New York introduced H.R. 11234 before the Interstate and Foreign Commerce Committee. This bill would have divided jurisdiction over trade practices by giving the Secretary jurisdiction over all sales of livestock and, in designated cities, live poultry, and giving the Commission jurisdiction over trade practices in connection with sales of all products other than livestock and live poultry. The Celler bill, however, was soon amended to provide the first appearance of anything resembling the "hot pursuit" provisions of the current law:

2. *Problems Raised by the Present Jurisdictional System.* The current jurisdictional order governing regulation of anticompetitive and anticonsumer practices in the meat industry creates a number of problems. First, the division of jurisdiction makes it difficult for the FTC and, to a lesser degree, the Secretary, to effectively police the meat industry as a whole. Matters involving livestock and poultry, and the practices of stockyard owners, are entirely excluded from FTC jurisdiction. Collusive anticompetitive activities at nonretail levels of the industry come within the Commission's secondary jurisdiction only insofar as the Commission's primary jurisdiction is impaired. By contrast, only trade practices at the retail level fall outside the Secretary's primary jurisdiction. Thus, in the typical chain of meat production and sale, from rancher to consumer, through feedlot, packer, and retailer, the FTC has primary regulatory jurisdiction over only the final link. As a practical matter, therefore, the Commission is rarely able to undertake enforcement that encompasses most elements of the meat industry. For example, there have been suggestions that the industry's "Yellow Sheet" pricing procedure[33] may be manipulated by packers to the detriment of ranchers and supermarket chains.[34] Department of Agriculture investigation of these suggestions and other possible anticompetitive conduct by packers has not been vigorous.[35] Although a nonpublic FTC investigation of beef industry pric-

---

> If the Federal Trade Commission, in the course of any investigation or other proceeding determines that effective exercise of its powers and jurisdiction with respect to retail sales of meats, meat food products, livestock products in unmanufactured form, or poultry products requires that the jurisdictional limitations be removed with respect to any such commodities, the Commission shall so notify the Secretary of Agriculture, setting forth the commodities involved and the reasons for the Commission's determination. If the Secretary of Agriculture concurs in such determination he shall so notify the Federal Trade Commission, and thereafter the jurisdictional limitations shall not apply to such investigation or proceeding.

H.R. Rep. No. 1507, supra, at 5. In addition, the amendments contained a mirror-image provision that provided for situations in which the Secretary made a similar determination of jurisdictional need. During the same period, however, the House Committee on Agriculture was reviewing the jurisdictional issue and reporting a bill (H.R. 9020, 85th Cong., 1st Sess. (1957)) sponsored by Representative Cooley of North Carolina. This bill would have given the Secretary exclusive jurisdiction over the wholesale activities of packers and live poultry dealers, and given the Commission and the Secretary concurrent jurisdiction over retail operations. See H.R. Rep. No. 1048, supra note 30, at 6, [1958] U.S. Code Cong. & Ad. News at 5218. Throughout hearings on the Celler and Cooley bills, the FTC and the Secretary again actively vied for jurisdiction. In May 1958, the House Rules Committee instructed the Committees on Agriculture and the Interstate and Foreign Commerce to meet and offer a compromise version of the Cooley bill when it came to the floor. This meeting ultimately resulted in the House's passing, in August 1958, an amended bill incorporating the present jurisdictional provisions. The Senate, with the qualified endorsements of Sens. O'Mahoney and Watkins, see 104 Cong. Rec. 19,101 (1958), soon passed the compromise Cooley Bill.

33. The "Yellow Sheet" is a daily meat market news report published by the National Provisioner, Inc. Prices reported in the Yellow Sheet become market prices through widespread incorporation by reference into agreements between buyers and sellers regarding future transactions.

34. See Subcommittee on SBA and SBIC Authority and General Small Business Problems, Committee on Small Business, House of Representatives, Small Business Problems in the Marketing of Meat and Other Commodities (Part I: Meat Pricing), H.R. Rep. No. 1787, 95th Cong., 2d Sess. (1978). See also Iowa Beef Aides Traded for Themselves While Helping Set Price, Deposition Says, Wall St. J., Nov. 1, 1979, at 6, col. 1. But see In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), cert. denied, 101 S. Ct. 280 (1980) (allegations that retail food chains fixed prices, injuring ranchers in their sales to packers).

35. See, e.g., Staff Lawyers Criticized Farm Agency's Investigation of Iowa Beef Processors, Inc., Wall St. J., May 5, 1980, at 2, col. 3. See generally text accompanying notes 41-53 infra.

ing is now underway,[36] it is clear that FTC prosecutorial jurisdiction does not extend to alleged manipulation by packers unless effective exercise of the Commission's primary "retail sales" authority otherwise is or will be impaired.

Second, the division of primary jurisdiction provided in section 406 of the PSA imposes on the FTC and the Secretary the burden of proving that the subjects of their actions fall within their jurisdictional authority. In actions brought by both the Secretary and the Commission, defendants have been quick to argue that primary jurisdiction lies with the other authority.[37] Having to deflect such contentions encumbers enforcement by the Secretary and the Commission and inhibits regulation of anticompetitive and anticonsumer activities of packers, poultry dealers, and stockyard owners.

Third, whenever either the Commissioner or the Secretary considers exercising its secondary jurisdiction over the trade practices of packers and poultry dealers, it must determine whether this exercise would impair primary jurisdiction and must institute clearance procedures with the other. Again, additional effort is necessary to establish the PSA's jurisdictional prerequisites. This effort diverts the Secretary and the Commission from substantive policy considerations and provides another defense for packers and poultry dealers.[38]

Fourth, because of the PSA framework, which effectively removes power from the FTC only to the extent that it is implanted in the Secretary, uncertainty surrounding jurisdictional authority in specific areas can tie the hands of both enforcement bodies. For example, in the past few years, mergers involving packers have increased economic concentration within the industry.[39] Yet conflicting views on the Secretary's authority over mergers in the meat industry have made the Commission's power uncertain; this uncertainty has idled both the FTC and the Secretary.[40]

---

36. Antitrust Probe of Beef Industry by FTC Under Way, Focusing on Price Methods, Wall St. J., June 5, 1980, at 10, col. 2.

37. Actions brought by the Secretary pursuant to § 202 of the Packers and Stockyards Act of 1921 (PSA), 7 U.S.C. §§ 181-229 (1976), are often met with one or more of these defenses: that no packers or live poultry dealers are involved; that products not listed in § 406 of the PSA are involved; or that only retail sales are involved. See, e.g., Bruhn's Freezer Meats v. USDA, 438 F.2d 1332 (8th Cir. 1971); Safeway Stores, Inc. v. Freeman, 369 F.2d 952 (D.C. Cir. 1966), Folsom-Third St. Meat Co. v. Freeman, 307 F. Supp. 222 (N.D. Cal. 1969). Similarly, FTC enforcement actions under § 5 of the Clayton Act are often met with arguments that stockyard owners are involved, that livestock or poultry are involved, or that no retail sales are involved. See, e.g., Crosse & Blackwell Co. v. FTC, 262 F.2d 600 (4th Cir. 1959); United Corp. v. FTC, 110 F.2d 473 (4th Cir. 1940); Plumrose, Inc., 58 F.T.C. 1134 (1961); J. Weingarten, Inc., 57 F.T.C. 1533 (1960); In re Renaire Corp., 55 F.T.C. 1169 (1959).

38. See, e.g., Bruhn's Freezer Meats v. USDA, 438 F.2d 1332 (8th Cir. 1971).

39. Swift & Co., for example, acquired a number of turkey processing plants between 1966 and 1974, and Cargill Corp. acquired MBPXL in late 1978. See W. Williams, The Changing Structure of the Beef Packing Industry (1979) (published by Tara, Inc.).

40. Clayton Act § 7, as amended in 1950, states that the FTC and the Department of Justice have no jurisdiction over "transactions duly consummated pursuant to authority given . . . the Secretary of Agriculture under any statutory provision vesting such power." Act of December 29, 1950, ch. 1184, 64 Stat. 1125, 15 U.S.C. § 18 (1976). This provision, however, is meaningless. The Supreme Court has held that "there is no 'statutory provision' that vests power in the Secretary of Agriculture to approve a transaction." Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 469 (1960). The language of § 7 sheds no light on the basic question of whether the

Finally, at least in part because of the PSA's allocation of power, the chief enforcement authority under the PSA, the Secretary of Agriculture, has failed to enforce vigorously the proscriptions of the Act. During congressional hearings held in 1957 and 1958 on amendments to the PSA,[41] the Secretary of Agriculture's enforcement of sections 202 and 312 against unfair or deceptive practices of packers, live poultry dealers, and stockyard owners was discussed in detail. In 36 years, the Secretary had issued only 32 cease-and-desist orders. Eighteen related to refusals to pay for livestock, six to fraud and misrepresentation in weighing or grading of livestock, and only eight to monopolistic or restraint-of-trade practices. Of the latter, two had been revoked after issuance and the most recent order had been imposed in 1938. The Senate Committee on the Judiciary labeled this "a significant and shocking record of neglect and inaction in enforcement."[42] At that time, responsibility within the Department of Agriculture for enforcement of sections 202 and 312 was vested in a section whose staff consisted of two marketing specialists and a stenographer. According to the Committee, however, "even more important than the number of employees is the lack of sympathy in the Department of Agriculture for the antitrust concept of Title II of the Act."[43] After conceding that for 26 years, sections 202 and

---

Secretary, under §§ 203 and 312 of the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 193, 213 (1976), has prosecutorial authority over meat industry mergers. The scope of the Secretary's merger authority, given the jurisdictional rules of § 406 of the PSA, 7 U.S.C. § 227 (1976), affects FTC merger powers over the meat industry. Section 202(d), (e), and (g) appear to give the Secretary the authority to prosecute packers and poultry dealers for merging or acquiring "for the purpose or with the effect of manipulating or controlling prices, . . . creating a monopoly in the acquisition of buying, selling, or dealing in, any article, or . . . restraining commerce." 7 U.S.C. § 192(d), (e), (g) (1976). Section 202(a), 7 U.S.C. § 192(a) (1976), covering "unfair" practices and devices, could be construed to cover mergers and acquisitions of virtually any character. Section 312(a), 7 U.S.C. § 213(a) (1976), however, which is very similar in language to § 202(a), has been interpreted by the Tenth Circuit in private litigation as granting the Secretary no power to adjudicate mergers of stockyards, Denver Union Stockyard Co. v. Denver Livestock Comm'n Co., 404 F.2d 1055 (10th Cir. 1968), cert. denied, 394 U.S. 1014 (1969). It is plausible that Congress intended the Secretary's authority over packer and poultry dealer mergers to amount at least to that which the FTC possessed before 1921. See text accompanying note 20 supra. See generally cases cited at notes 47 and 52 infra. The Secretary, however, has no established premerger clearance procedures and, as a matter of practice, has not actively sought to regulate packer or poultry dealer mergers. The Secretary has ruled on only one packer acquisition, and that was in 1925, under § 202(e) of the PSA, 7 U.S.C. § 192(e) (1976). Armour & Co., Docket No. 19 (Sept. 14, 1925) (Secretary Jardine finds no violation under PSA § 202(e)). In that opinion, the Secretary held that a Sherman Act standard of illegality for mergers, and not a Clayton Act standard, applied. Thus, by implication, the Secretary's *Armour* opinion suggests that the FTC's Clayton Act merger authority over packers and poultry dealers remains intact despite the PSA. An advisory opinion of the Solicitor of the Department of Agriculture, issued in 1939, suggests just the contrary. U.S.D.A. Solicitor's Opinion No. 1384, at 4384 (May 1, 1939). In responding to an inquiry concerning a packer acquisition, the Solicitor replied in language that alludes to the application of a Clayton Act standard of illegality under PSA § 202(a): "[I]f the acquisition . . . were found to have the effect of substantially lessening competition, the transaction might be held to be an unfair practice." To complicate matters even further, an unpublished 1964 opinion of an FTC hearing examiner held that the Commission's Clayton Act jurisdiction over packer mergers was not displaced by the PSA, which was interpreted to reach only mergers constituting Sherman Act violations. Frito-Lay, Inc., 64 F.T.C. 1447 (1964).

41. See, in particular, Regulation of the Meat Industry: Joint Hearing on S. 1356 before the Senate Comm. on Agriculture and Forestry and the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. (April 17, 1958).

42. S. Rep. No. 704, 85th Cong., 1st Sess. 7 (1957).

43. Id. at 10.

312 had not been adequately enforced, Assistant Secretary Earl Butz asked: "don't you think when the sinner confesses and resolves to do better he should be given a chance?"[44] Although the Senate Committee registered its response by voting to remove all such authority from the Secretary in favor of the FTC,[45] in the end the primary and secondary jurisdictional allocations under section 406 gave the Secretary his second chance.

Since 1958, the Secretary's enforcement record under sections 202 and 312 has improved. More resources within the Department have been devoted to antitrust and consumer protection matters, and more enforcement actions have resulted.[46] The comparison, however, is deceiving. Some of the Secretary's enforcement actions have involved price discrimination via refunds and discounts,[47] preferential plans of various sorts,[48] or deceptive practices.[49] Surprisingly many have involved weighing methods[50] or failure to make payments due.[51] It is less than comforting to think of U.S.D.A. attorneys collecting debts or verifying scales. Even though the Ninth Circuit has felicitously held that the department can prosecute incipient antitrust violations under section 202,[52] mainstream anti-

---

44. Id.

45. Id. at 16.

46. The author's review of contested Packers and Stockyards Act cases from 1974 through 1979 revealed a total of 13 prosecutions under § 202, 7 U.S.C. § 192 (1976), and 37 prosecutions under § 312, 7 U.S.C. § 213 (1976). See cases cited at notes 48-53 infra.

47. Swift & Co. v. United States, 317 F.2d 53 (7th Cir. 1963); Wilson & Co. v. Benson, 286 F.2d 891 (7th Cir. 1961).

48. Armour & Co. v. United States, 402 F.2d 712 (7th Cir. 1968); Capital Packing Co. v. United States, 350 F.2d 67 (10th Cir. 1965); Aikins v. United States, 282 F.2d 53 (10th Cir. 1960); Bill Cody, 37 Agric. Dec. 410 (1978); National Beef Packing Co., 36 Agric. Dec. 1722 (1977); Elmer A. Kath, 36 Agric. Dec. 1707 (1977).

49. Harry Vealey, Jr., 39 Agric. Dec. 8 (1979); Jackson Union Stockyards, Inc., 37 Agric. Dec. 1533 (1978); Smithfield Livestock Mkt., 36 Agric. Dec. 1546 (1977); Eric Loretz, 36 Agric. Dec. 1087 (1977); Harry C. Hardy, 33 Agric. Dec. 1383 (1974); Livestock Mktg. Dev. Co., 33 Agric. Dec. 784 (1974); Wood County Livestock Auction, 33 Agric. Dec. 755 (1974).

50. Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973); Burrus v. USDA, 575 F.2d 1258 (8th Cir. 1978); Fairbank v. Hardin, 429 F.2d 264 (9th Cir.), cert. denied, 400 U.S. 943 (1970); Farmville Livestock Mkt., Inc., 38 Agric. Dec. 973 (1979); Sidney D. Collier, 38 Agric. Dec. 957 (1979); Gus Z. Lancaster Stock Yards, Inc., 38 Agric. Dec. 824 (1979); Jake Muelenthaler, 37 Agric. Dec. 313 (1978); W.H. Hodges & Co., 36 Agric. Dec. 1970 (1977); C.D. Burrus, 36 Agric. Dec. 1668 (1977); George Townsend, 35 Agric. Dec. 1604 (1976); Overland Stockyards, Inc., 34 Agric. Dec. 1808 (1975); Braxton McLinden Worsley, 33 Agric. Dec. 1547 (1974); In re Livestock Mktg. Dev. Co., 33 Agric. Dec. 784 (1974); In re Trenton Livestock, Inc., 33 Agric. Dec. 499 (1974); J.A. Speight, 33 Agric. Dec. 280 (1974).

51. Van Wyk v. Bergland, 570 F.2d 701 (8th Cir. 1978); Lewis v. Butz, 512 F.2d 681 (8th Cir. 1975); E. Gursky, 38 Agric. Dec. 1178 (1979) (failure to maintain bond); Raskin Packing Co., 37 Agric. Dec. 1890 (1978) (failure to maintain bond); C.J. Edzards, 37 Agric. Dec. 1880 (1978); Penn Packing Co., 36 Agric. Dec. 1857 (1977); John E. Hoth, 36 Agric. Dec. 1812 (1977) (failure to maintain bond); Sechrist Sales Co., 36 Agric. Dec. 665 (1977); Mid-States Livestock, Inc., 37 Agric. Dec. 547 (1977); Osburn's Packing Co., 37 Agric. Dec. 50 (1977); Milton Bryan, 36 Agric. Dec. 37 (1977); R & D Invs., Inc., 35 Agric. Dec. 668 (1976); Samuel M. Rosenthal, 36 Agric. Dec. 210 (1976); Derwood J. Smelley, 34 Agric. Dec. 1173 (1975); San Jose Valley Veal, Inc., 34 Agric. Dec. 966 (1975); Arthur John Wedel, 34 Agric. Dec. 850 (1975); Major Lewis, 33 Agric. Dec. 1294 (1974); J.D. Monk, Jr., 33 Agric. Dec. 925 (1974); James J. Miller, 33 Agric. Dec. 53 (1974).

52. De Jong Packing Co. v. USDA, 618 F.2d 1329 (9th Cir.) (packer collusion on purchase terms violated PSA § 202(a), 7 U.S.C. § 192(a) (1976)), cert. denied, 101 S. Ct. 783 (1980) Central Coast Meats, Inc. v. USDA, 541 F.2d 1325 (9th Cir. 1976).

trust offenses, such as price fixing, market division, group boycotts, and tying, have received comparatively little attention.[53] Deceptive advertising by packers, poultry dealers, or stockyard owners is uncharted territory.

On balance, the Senate Committee's appraisal in 1957 would today not be far off the mark; certainly room for improvement remains. In this regard, the Department of Agriculture's thousands of field agents could provide a formidable investigatory force to launch greater enforcement efforts. The PSA amendments of 1976,[54] which empower the Secretary to assess civil penalties for violations of sections 202 and 312, reiterate Congress's view of the importance of inaugurating such efforts.

B. *Antitrust Regulation of Agricultural and Fishermen's Cooperative Associations*

1. *Jurisdictional Order and Immunity of Cooperatives from Antitrust Prosecution.* Agricultural and fishermen's marketing cooperatives comprise independent businesspersons aggregated to pool their buying and selling power. Turn-of-the-century attacks on cooperatives, as combinations illegal per se under state and federal antitrust laws, induced many states to pass statutes authorizing the formation and existence of cooperatives.[55] Similarly, the federal government in 1914 enacted section 6 of the Clayton Act to remove federal antitrust constraints against the cooperative form of business organization. Section 6 provides that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help . . . or to . . . restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . . ." The section states that such agricultural organizations may not be declared "illegal combinations or conspiracies in restraint of trade, under the antitrust laws."[56] This provision places marketing cooperatives on an equal footing with corporations under federal antitrust laws. Indeed, the Supreme Court has expressly held that relations between agricultural cooperatives and noncooperatives can be reached under the Sherman and Clayton Acts.[57] Additionally, a federal district

---

53. But see Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968) (refusal to bid competitively for lambs violated § 202(a) of PSA, § 192(a) (1976)); Swift & Co. v. United States, 308 F.2d 849 (7th Cir. 1962) (agreement between packer and dealer to eliminate competitive bidding on hogs violated § 202(a) of PSA, 7 U.S.C. § 192(a) (1976)); De Jong Packing Co. v. USDA, 618 F.2d 1329 (9th Cir.), cert. denied, 49 U.S.L.W. 3439 (1980); Corona Livestock Auction, Inc. v. USDA, 607 F.2d 811 (9th Cir. 1979); Gene Thorp, 34 Agric. Dec. 992 (1975); Walti, Schilling & Co., 37 Agric. Dec. 1010 (1978) (stipulated order based on administrative law judge's unpublished opinion, P. & S. Docket No. 5057).

54. See note 17 supra.

55. See generally Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 464 (1960) ("Some state courts had sustained antitrust charges against agricultural cooperatives, and as a result eventually all the states passed Acts authorizing their existence.")(footnotes omitted). See also Burns v. Wray Farmer's Grain Co., 65 Colo. 425, 176 P. 487 (1918); Ford v. Chicago Milk Shippers' Ass'n. 155 Ill. 166, 39 N.E. 651 (1895); Reeves v. Decorah Farmer's Coop. Soc., 160 Iowa 194, 140 N.W. 844 (1913).

56. 15 U.S.C. § 17 (1976).

57. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 464-65 (1960); United States v. Borden Co., 308 U.S. 188, 203-05 (1939).

court recently refused to enjoin an FTC monopolization proceeding against a large co-op,[58] and this proceeding withstood a concerted attack in Congress aimed at eliminating FTC authority to expend funds prosecuting agricultural cooperatives.[59]

Congress more clearly identified the collective activities exempted from the antitrust laws, and gave meaning to the broad language of section 6, in the Capper-Volstead Act of 1922. That statute was designed to encourage the formation of cooperatives, to promote marketing efficiency and counterbalance the power of the cooperative members' suppliers and buyers.[60] Capper-Volstead authorizes members to act collectively in "processing, preparing for market, handling, and marketing" their products, and also permits cooperatives to maintain "marketing agencies in common."[61] The extent to which the marketing-agencies provision insulates intercooperative mergers and other restraints of trade is unclear.[62] Two cases, however, shed some light on its effect. The Ninth Circuit has held that this provision removes intercooperative price-fixing from prohibition under the Sherman Act,[63] while the Second Circuit has indicated that the provision reduces the potential for nonpredatory monopolization offenses.[64] The scope of the intercooperative antitrust immunity granted by this provision takes on special importance with the passage of the Federal Trade Commission Improvements Act of 1980, which prohibits the use of FTC funds to investigate or prosecute any cooperative "for any conduct which, because of . . . [Capper-Volstead], is not a violation of any Federal antitrust act or the [FTC Act]."[65]

58. Sunkist Growers, Inc. v. FTC, [1979] Antitrust & Trade Reg. Rep. (BNA) No. 902, A-5 (C.D. Cal.). Sunkist and the FTC have reached a tentative settlement. See Sunkist Will Sell Division to Settle Charges by FTC, Wall St. J., Feb. 23, 1981, at 6, col. 2. See also Washington Crab Ass'n, 66 F.T.C. 45 (1964) (FTC Act proceeding against fishermen's cooperative upheld despite § 2 of FCMA, 15 U.S.C. § 522 (1976)); Florida Citrus Mutual, 50 F.T.C. 957 (1954) (order reversing hearing officer's dismissal of price fixing action and directing the taking of evidence). It has been reported that the FTC staff recommended to the Commission the issuance of a monopolization complaint against Ocean Spray Cranberries, Inc. See [1979] Antitrust & Trade Reg. Rep. (BNA) No. 914, A-18.

59. See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 20, 94 Stat. 374 (1980); H.R. Conf. Rep. No. 917, 96th Cong., 2d Sess. 36-37, reprinted in [1980] U.S. Code Cong. & Ad. News 2309, 2319-20. See also Antitrust Charge Leveled Against Dairymen Co-op, Wall St. J., Aug. 5, 1980, at 8, col. 1.

State antitrust authorities also have begun to prosecute cooperatives. See Arizona v. United Dairymen of Arizona, No. 80-245 [1980] Antitrust & Trade Reg. Rep. (BNA) No. 959, D-1 (D. Ariz., complaint filed Mar. 21, 1980); Oregon v. All-Coast Fishermen's Marketing Ass'n, Inc., [1980] Antitrust & Trade Reg. Rep. (BNA) No. 977, D-3 (Or. Cir. Ct., July 8, 1980).

60. See H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921); S. Rep. No. 236, 67th Cong., 1st Sess. (1921).

61. 7 U.S.C. § 291 (1976).

62. See National Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978) (cooperatives' antitrust exemption to be narrowly construed); Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

63. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974). See also K. Ewing (Deputy Ass't Attorney General, Antitrust Division), Antitrust Enforcement: Fighting Inflation in the Necessaries of Life and Business (remarks before the Legal Committee, Grocery Manufacturers of America, Inc.) (May 1, 1979).

64. Fairdale Farms, Inc. v. Yankee Milk Inc., [1980] Antitrust & Trade Reg. Rep. (BNA) No. 994, A-8 (2d Cir. Dec. 9, 1980).

65. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 20, 94 Stat. 374 (1980). See note 59 supra.

With the Fishermen's Collective Marketing Act of 1934,[66] "an act to authorize association of producers of aquatic products," Congress intended fishermen's marketing cooperatives to benefit from the section 6 exemption, despite the absence of any reference to "fishermen organizations" in the Clayton Act.[67] The FCMA expands upon Capper-Volstead's permissive language, authorizing collective "catching, *producing*, preparing for market, processing, handling, and marketing" and permitting fishermen's cooperatives to maintain "marketing agencies in common."[68]

Thus the activities described by Capper-Volstead and the FCMA were to be the "legitimate objects" of cooperative associations, and would enjoy the section 6 exemption. Congress clearly intended, however, that certain behavior not be protected. Section 2 of Capper-Volstead and section 2 of the FCMA direct the Secretaries of Agriculture and Commerce, respectively, to proceed against cooperatives if they have reason to believe that: "any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural [or aquatic] product is unduly enhanced by reason thereof."[69] The Supreme Court has held that the Secretary of Agriculture's authority under section 2 of Capper-Volstead is an "auxiliary" power, which in no way impinges upon or supplants the courts' ordinary antitrust jurisdiction, as limited by section 6 of the Clayton Act, in cases involving agricultural cooperatives.[70] Presumably, the section 2 power of the Secretary of Commerce under the FCMA is auxiliary as well.[71] Thus, the secretaries do not have either exclusive or primary jurisdiction over antitrust offenses of agricultural or fishermen's marketing cooperatives.

2. *Departmental Regulation of Antitrust Violations Resulting in Unduly Enhanced Prices.* Neither the Secretary of Commerce, nor the Secretary of the Interior, who from 1939 to 1970 was solely responsible for enforcing the provision, has ever commenced a proceeding against a fishermen's marketing cooperative under the undue-price-enhancement provision of section 2 of the FCMA. Similarly, the Secretary of Agriculture has never brought an action against an agricultural marketing cooperative pursuant to section 2 of Capper-Volstead. Be-

---

66. 15 U.S.C. §§ 521, 522 (1976).

67. See H.R. Rep. No. 1504, 73d Cong., 2d Sess. (1934).

68. 15 U.S.C. § 521 (1976) (emphasis added).

69. 7 U.S.C. § 292 (1976) (agricultural products); 15 U.S.C. § 522 (1976) (aquatic products). These sections empower the Secretaries to serve a complaint on cooperative associations, hold a hearing, and issue a cease-and-desist order against the restraint of trade or monopolization involved if an association is found to have violated § 2. Such orders are enforceable in the courts. The Secretaries have no power under these statutes directly to affect unduly enhanced prices.

70. See Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); United States v. Borden Co., 308 U.S. 188 (1939). See also Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19 (1962).

71. See Gulf Coast Shrimpers & Oysterman's Ass'n v. United States, 236 F.2d 658 (5th Cir. 1956); Local 36, Int'l Fishermen & Allied Workers v. United States, 177 F.2d 320 (9th Cir. 1949); Hinton v. Columbia River Packers Ass'n, 131 F.2d 88 (9th Cir. 1942); Hawaiian Tuna Packers v. International Longshoremen's and Warehousemen's Union, 72 F. Supp. 562 (D. Hawaii 1947); United States v. Monterey Sardine Indus., [1940-1943 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 56, 169 (N.D. Cal. 1941).

tween 1922 and 1978, there were only seven Department of Agriculture investigations of possible undue price enhancement by agricultural co-ops.[72] These traditions of inaction force the conclusion that departmental enforcement of these antitrust provisions has failed.

Several agricultural marketing cooperatives possess sufficient market power to merit investigation by the Secretary. In 1975, the FTC staff reported that the California and Hawaiian Sugar Refining Corp., a cooperative, marketed virtually all of the cane sugar produced in Hawaii.[73] Potato Growers of Idaho sold 60% of Idaho production bound for processing. The California Almond Growers Exchange handled about 70% of U.S. almond production. Diamond Walnut Growers marketed about one half of the nation's walnuts. The Florida Fresh Produce Association sold about 70% of Florida's celery. The National Grape Cooperative Association, Inc., handled about 50% of domestic concord grape sales. The California Canning Peach Association and the California Canning Pears Association represented about 50% of the production of these fruits. Ocean Spray Cranberries, Inc., produced, processed, and marketed about 80% of U.S. cranberry production. (The FTC staff later recommended the prosecution of Ocean Spray.[74]) Sunland Marketing, Inc., a federated cooperative, is the world's largest seller of dried fruit (raisins, figs, and prunes). Sunkist Growers, Inc., the subject of a pending FTC proceeding,[75] has long dominated the California-Arizona citrus industry, and in 1975 controlled about 77% of its production. United Egg Producers, composed of five regional co-ops, represented about 55% of U.S. egg production. A number of regional milk cooperatives control large percentages of regional raw milk supplies.

Several factors account for the Secretary of Agriculture's administrative delinquency. Foremost among these is the prevalance of "agricultural marketing orders," which are administered by the Secretary under the Agricultural Marketing Agreement Act of 1936 (AMAA),[76] and which normally regulate the price of agricultural products by employing a variety of mechanisms to regulate their supply.[77] These orders are designed to establish "orderly market conditions" and "parity" prices for farmers[78]—depression-era concepts that have supported the issuance of many marketing orders for previously unregulated products. The Secretary generally establishes new AMAA marketing orders after receiving a

---

72. R. Bergland, Secretary of Agriculture, Statement Before the National Commission for the Review of Antitrust Laws and Procedures (July 27, 1978). Responsibility for enforcement of § 2 of Capper-Volstead currently rests with the "Capper-Volstead Committee," consisting of the Department's General Counsel, Assistant Secretary for Marketing Services, and Director of Economics, Policy Analysis, and Budget.

73. FTC, Staff Report on Agricultural Cooperatives 106-18 (1975).

74. See [1979] Antitrust & Trade Reg. Rep. (BNA) No. 914, A-18.

75. See note 58 supra.

76. 7 U.S.C. §§ 601, 602, 608a, 608c, 610, 612, 671-674 (1976). The AMAA amended the Agricultural Adjustments Act of 1933, 7 U.S.C. §§ 601-624 (1976).

77. These mechanisms include establishing quality controls, "surplus" controls, and reserve pools.

78. 7 U.S.C. § 602 (1976). Payments for reduced planting of "basic agricultural commodities" in order to achieve similar objectives preceded and now coexist with the marketing order system under the AMAA. See 7 U.S.C. §§ 608, 611, 1421 (1976).

favorable polling of producers within specified geographic areas. Following the poll, the Secretary and a majority of the handlers[79] of the product usually enter into "marketing agreements" embodying the proposed order.[80] Agricultural cooperatives, which are often composed of either producers or handlers, or both, may vote in block for, and agree on behalf of, their members. Approximately fifty such orders covering fruits, vegetables, and nuts are now in effect.[81] Once the order is operative, all handlers and producers of the product concerned face mandatory reporting requirements, inspections, and possible fines in order to insure compliance.[82] Since without an AMAA order, it is unlikely that "marketing" co-ops may legally limit their members' production,[83] these orders may be a more significant factor in food prices than is the market power of cooperatives.[84]

The existence of marketing orders does not justify the Secretary's complete failure to ensure that cooperatives do not commit antitrust offenses that unduly enhance prices. Likewise, the limited antitrust exemption accorded the "making" of AMAA "marketing agreements"[85] does not impair the Secretary's Capper-Volstead antitrust authority to proceed against cooperatives engaging in antitrust violations not clearly protected by that exemption.[86] In the milk industry, for example, many co-ops have consistently extracted price premiums in excess of AMAA minimum prices, which some consider already to be above competitive levels,[87] yet the Secretary has turned a deaf ear.[88] Even worse, the Secretary may have contributed to undue price enhancement by formulating AMAA

---

79. "Handlers" are "processors, associations of producers, and others engaged in the handling of . . . agricultural commodit[ies]." See 7 U.S.C. § 608c(1).

80. The Secretary can impose an order without such agreements if (1) the polling shows industry producers favor the order, (2) imposing it would effectuate statutory objectives, and (3) the order is the only "practical means of advancing the interests of . . . producers." 7 U.S.C. § 608c(9)(B) (1976).

81. Federal marketing orders may also cover tobacco, hops, honeybees, and naval stores. See U.S.C. § 608c (1976).

82. See 7 U.S.C. § 608c (1976).

83. See L. Sullivan, Handbook of the Law of Antitrust 722 (1977) (question of cooperatives' power to concertedly reduce output "important and unresolved"). See also FTC v. Central Cal. Lettuce Prods. Coop., 90 F.T.C. 18, 62 n.20 (1977). Compare the authority of fishermen's cooperatives to collectively "produce." See text accompanying note 68 supra.

84. See, e.g., United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939) (effect of AMAA and milk marketing order thereunder might be to give cooperative a monopoly; no violation of Sherman Act). Perhaps this explains why § 20 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 20, 94 Stat. 374 (1980), bans any use of FTC funds to study or investigate any agricultural marketing order.

85. 7 U.S.C. § 608b (1976).

86. See Cow Palace Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D.C. Colo. 1975) (limited marketing agreements exemption irrelevant to alleged antitrust violations relating to federal marketing orders); In re Midwest Milk Monopolization Litigation, 380 F. Supp. 880 (D.C. Mo. 1974) (citing United States v. Borden Co., 308 U.S. 188 (1939), as authority for narrow construction of marketing agreement exemption).

87. See U.S. Department of Justice, Report on Milk Marketing 364-94 (1977). See also A. Masson, R. Masson & B. Harris, Cooperatives and Marketing Orders, *in* Agricultural Cooperatives and the Public Interest (Univ. of Wisc. N.C. Project No. 117, 1978).

88. See USDA, The Question of Undue Price Enhancement by Milk Cooperatives (1976) (response to a formal petition from the National Consumers Congress for a hearing under § 2 of Capper-Volstead).

marketing orders in response to cooperatives that have openly sought them in order to maintain or increase their market power.[89] In addition, although the AMAA specifically allows the Secretary to insert into marketing orders terms and conditions prohibiting unfair methods of competition and unfair trade practices in handling agricultural products,[90] the Secretary appears to have ignored this authority.

Other factors may explain the Secretary's delinquency. First, cooperatives may have traditionally been too small to obtain sufficient market power to allow undue enhancement of prices. Second, in addition to its marketing-order duties, the Secretary is statutorily required to encourage and foster the development of cooperatives, a mandate that may sometimes run counter to enforcement of section 2 of Capper-Volstead.[91] Third, permitting cooperatives to form "marketing agencies in common" may insulate intercooperative restraints of trade from the Secretary's antitrust enforcement authority, much as it has been held to insulate intercooperative price-fixing agreements from the Sherman Act.[92] Fourth, as one commentator has noted, it may be that the Secretary can act only *after* the fact of undue price enhancement and not in its incipiency.[93] Finally, the term "undue enhancement" of prices, which lacks statutory definition, has bred confusion. Indeed, in the past three years the Department has suggested three different definitions.[94] Although these factors do not excuse administrative neglect, they do suggest the need for legislative clarification of the law.

Some limited signs of life are visible at the Department of Agriculture. In 1978, Agriculture Secretary Bergland testified that his department was reevaluating enforcement of section 2 with an eye toward reorganizing existing enforcement procedures. He described four principles on which any reorganization would be based: (1) positive departmental monitoring of cooperatives; (2) moni-

---

89. These cooperatives include Ocean Spray Cranberries, Inc., Florida Fresh Produce Exchange, and Sunkist Growers, Inc. See FTC, Staff Report on Agricultural Cooperatives 143-50 (1975).

90. See 7 U.S.C. § 608c(7)(A) (1976). The USDA recently agreed to prepare antitrust guidelines to include in its Agricultural Marketing Service Manual for persons subject to AMAA orders. This agreement was prompted by a Justice Department investigation of marketing practices in the U.S. raisin industry. See Justice Closes Raisin Probe After Agriculture Promises to Tighten Safeguards Against Collusion, [1980] Antitrust & Trade Reg. Rep. (BNA) No. 992, A-6.

91. See, e.g., Cooperative Marketing Act, 7 U.S.C. §§ 451-457 (1976). See also note 78 supra.

92. See text accompanying note 63 supra.

93. Note, Trustbusting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives, 61 Va. L. Rev. 341, 379 (1975) [hereinafter cited as Trustbusting Down on the Farm].

94. See USDA, Response to National Commission for the Review of Antitrust Laws and Procedures § 4a (Oct. 13, 1978) ("undue price enhancement is the existence of prices higher than those which would result from the market structure including a cooperative which did not commit acts of monopolization or restraint of trade"); USDA, The Question of Undue Price Enhancement by Milk Cooperatives (1976) (undue price enhancement identified as the existence of prices higher than warranted by economic conditions); USDA, Undue Price Enhancement By Agricultural Cooperatives—Criteria, Monitoring, Enforcement (June 1980) (final report of the Capper-Volstead Study Committee) (undue price enhancement exists somewhere beyond prices higher than those resulting from equality of bargaining power between co-ops and their buyers; it is to be determined on a case-by-case rule-of-reason basis with initial research focusing on existence of undue price enhancement and subsequent research exploring possible causative antitrust violations).

toring dissociated from conflicts of interest arising out of U.S.D.A. promotional work with cooperatives; (3) allegations capable of being filed by both private citizens and the Department; and (4) allegations to be heard before an Administrative Law Judge pursuant to Administrative Procedure Act rules, with final appeal to the Department's "Judicial Officer."[95] This reevaluation is nearing completion, and rules of practice governing cease-and-desist proceedings under section 2 of Capper-Volstead have been proposed.[96]

Until 1977, there was no comparable federal regulatory system for control of fish supplies and prices. The Secretaries of Commerce and the Interior, therefore, cannot excuse their longstanding failure to pursue antitrust enforcement under section 2 of the FCMA on the basis of competing regulatory considerations. Since 1934, some fishermen's cooperatives have possessed sufficient market power to merit investigation. For example, the Washington Crab Association had a virtual monopoly of fresh crabs caught in the Washington coastal waters prior to a 1964 FTC action against the cooperative.[97] The Gulf Coast Shrimpers and Oystermen's Association dominated Mississippi's shrimp and oyster sales prior to a 1956 Justice Department suit under the Sherman Act.[98]

In 1977, Congress passed the Fishery Conservation and Management Act,[99] which established for fishing a regulatory regime under the Secretary of Commerce like the AMAA system for agricultural products. The Act's principal objective is conservation of national fishing resources, rather than maintenance of "orderly marketing conditions" or "parity" prices. Eight regional fisheries councils, composed of industry and government officials appointed by the Secretary, are scheduled to design approximately 50 "management plans" for various fishery resources. These plans, a few of which are in effect, set fishing quotas with the objectives of replenishing and thereafter managing stocks within 200 miles of U.S. coasts. The fishery management plans must be approved by the Secretary, who has the power to amend them. Once effective, they may be enforced with either civil or criminal penalties. Unlike the creation of AMAA marketing agreements, the process of designing management plans for fishery resources does not enjoy an express statutory exemption from the application of the antitrust laws. Since antitrust immunities are rarely implied,[100] the extent to which participants in this design process remain subject to antitrust laws is an open question.

---

95. R. Bergland, Statement, supra note 72, at 3-4.

96. See USDA, Undue Price Enhancement by Agricultural Cooperatives (June 1979) (interim report of the Capper-Volstead Study Committee); USDA, Undue Price Enhancement by Agricultural Cooperatives—Criteria, Monitoring, Enforcement (June 1980) (final report of the Capper-Volstead Study Committee); 44 Fed. Reg. 39,409 (1979).

97. See Washington Crab Ass'n, 66 F.T.C. 45 (1964).

98. See Gulf Coast Shrimpers & Oystermans Ass'n v. United States, 236 F.2d 658 (5th Cir. 1956).

99. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-02, 1811-13, 1821-26, 1851-61, 1881-82 (1976)).

100. See, e.g., United States v. Borden Co., 301 U.S. 188 (1939).

Because the Fishery Act has reduced foreign fishing in U.S. waters, fishermen's marketing cooperatives are handling more fish than ever before.[101] The significance of section 2 of the FCMA is thus increased, not diminished, by imposition of the new regulatory controls. Viewed in this light, energetic enforcement of the undue price enhancement provision of section 2 is of vast importance.

II. Proposals for Legislative Change and Administrative Action

A. *Packers, Live Poultry Dealers, and Stockyard Owners*

The legislative compromise of 1958, which led to the PSA's split jurisdictional framework and the vesting of primary authority in the Secretary of Agriculture, has resulted in insufficient enforcement of the antitrust and consumer protection provisions of the PSA. This problem can be eradicated by amending sections 312 and 406 of the PSA and section 5(a)(2) of the FTC Act to create one of two jurisdictional regimes: either full concurrent jurisdiction in the Secretary of Agriculture and the FTC or, as the Senate Committee on the Judiciary recommended in 1957,[102] sole authority in the Commission.[103] Although Congress, in 1958, gave the Secretary a second chance to improve enforcement of the PSA provisions on antitrust and consumer protection, the record since then only marginally justifies a further opportunity. Nevertheless, a concurrent, rather than exclusive, jurisdictional regime would maximize potential for such protection. Concurrent authority would not cause jurisdictional confusion; clearance liaison procedures, such as are now used by the Department of Justice and the FTC, are available to minimize the potential for duplicative regulation.[104] If the Secretary is to retain any jurisdiction, however, a dramatic redirection of efforts toward mainstream antitrust and consumer protection offenses is necessary. Given the poor execution of the Secretary's past promise, this refocusing seems unlikely. Hence, *exclusive* FTC authority over meat industry trade practices may be preferable. The Commission is not only better organized and better staffed to undertake this role, but also more sympathetic to the policy goals of antitrust and consumer protection law. There would be no fear that the Commission would expend its energies collecting debts or verifying scales.

---

101. Recent legislation should further expand cooperative fish handling. Act of December 22, 1980, Pub. L. No. 96-561, 94 Stat. 3275. See Bill Is Expected to Benefit Pacific Coast Fishermen, N.Y. Times, Dec. 29, 1980, at A12, col. 1.

102. See note 45 and accompanying text supra.

103. Under either scheme, the Department of Justice would retain its present jurisdictional authority. That power extends solely to antitrust enforcement and does not entail "consumer protection" authority analogous to the power of the FTC and the Secretary to take action against "unfair or deceptive practices."

104. See Handler, Blake, Pitofsky, & Goldschmid, Trade Regulation 159 (1975) (describing present procedures). The notice and clearance procedures established between the FTC and the USDA by § 406 of the Packers and Stockyards Act of 1921, 7 U.S.C. § 227 (1976), could perhaps be retained.

If neither of these alternatives is immediately available, two less radical, but still effective, proposals are worth considering. One would be to eliminate the "impairment" determination required by section 406 of the PSA. This would not remove the statute's primary-secondary division of jurisdiction or its requirements of notice and clearance of proposed actions; it would simply eliminate the burden on the Secretary and the FTC of justifying enforcement actions in terms of impaired primary jurisdiction.

A second possibility focuses on meat industry mergers. Largely because of jurisdictional uncertainty, no significant Department of Agriculture or FTC merger authority has been applied to acquisitions in the meat industry. Since the present jurisdictional scheme renders the powers of the Secretary and the Commission mutually exclusive, this failure to police mergers can be remedied by clarifying the extent to which either of these two authorities has merger enforcement powers. This could be accomplished by amending sections 202 and 312 to provide that the Secretary has no merger authority, or by amending section 406 to provide that whatever the Secretary's current authority, nothing in the PSA is intended to affect FTC merger jurisdiction.

B. *Cooperatives, Agricultural Marketing Orders, and Fishery Management Plans*

The legislative recommendations contained in the 1979 Report of the National Commission for the Review of Antitrust Laws and Procedures to the President and the Attorney General provide a good beginning for reforming the competitive and consumer-interest deficiencies of Capper-Volstead, the FCMA, the AMAA, and the Fishery Act.[105] The Commission recommended: (1) mergers, marketing agencies in common, and similar agreements among agricultural cooperatives should be allowed only if "no substantial lessening of competition" results; (2) section 2 of Capper-Volstead should be amended to clarify the meaning of "undue price enhancement," and responsibility for enforcement of this provision should be separated from Department of Agriculture responsibilities to support cooperatives;[106] and (3) in formulating agricultural marketing orders, the Secretary of Agriculture should be required to choose the least anticompetitive alternative consistent with the goals of the AMAA.

Although written with only the farming industry in mind, these recommendations should be applied to fishermen's cooperatives and the creation of fishery management plans as well. Moreover, as applied to both industries, the recommendations require a variety of modifications to resolve some of the prob-

105. The Report of the National Commission is reproduced at [1979] Antitrust & Trade Reg. Rep. (BNA) No. 897, Special Supp. (January 18, 1979) [hereinafter cited as NCRALP Report]. Lest a false cry of alarm be raised, it should be remembered that nothing in the National Commission's Report suggests that the formation of agricultural co-ops or their lawful right to exist should be altered. No retrenchment of the antitrust exemption of Clayton Act § 6 is anticipated. Indeed, the Report states just the contrary: "Farmers should continue to enjoy the right to form agricultural cooperatives for the joint marketing of their produce. The antitrust treatment of cooperatives once formed, however, should be similar to that of ordinary business corporations," NCRALP Report, supra, at 73.

106. See note 91 and accompanying text supra.

lems noted above. Recommendation (1) should be implemented with statutory provisions vesting nondiscretionary authority, subject to clearance liaison procedures, in the Secretaries, the FTC, and the Department of Justice, to dissolve common marketing agencies the effect of which "may be substantially to lessen competition, or tend to create a monopoly." This language, which is anticipatory and less demanding than the Commission's, has already been interpreted under section 7 of the Clayton Act; therefore, a substantial body of case law is available to assist in development of such a dissolution authority. Under this language, public authorities could check incipient antitrust problems. Additionally, the statutory authorization to form marketing agencies in common, which would be retained under recommendation (1), should be limited by the requirement that agencies be subject to the undue-price-enhancement provisions of Capper-Volstead and the FCMA, the suggested dissolution proceedings, and the antitrust laws generally.[107] This would make *internal* price-fixing by marketing agencies in common, for example, lawful, until (1) the effect of the price-fixing might be substantially to lessen competition or to tend to create a monopoly (triggering the proposed dissolution proceedings), or (2) prices became unduly enhanced (triggering Capper-Volstead or FCMA antitrust proceedings), or (3) the agency monopolized its market (triggering traditional antitrust proceedings). *External* price-fixing by individual co-ops or by common agencies in conjunction with others would be illegal per se. Under this proposal, monopolizing, merging, or trade-restraining co-ops or common marketing agencies would be treated like individual corporations, subject to challenge under familiar statutory standards. Thus, it would eliminate the need for the Commission's new standard of "no substantial lessening of competition" for allowance of common marketing agencies and co-op mergers. However, if a different legal standard is to be fashioned for cooperative antitrust, then Congress should also consider using a provision like that employed in the Bank Merger Act of 1966.[108] That Act uses the familiar Clayton Act language, but adds a condition allowing banking regulatory agencies to approve mergers when "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community."[109]

Recommendation (2) calls for clarification of undue price enhancement. It would be preferable to eliminate that requirement altogether, allowing the Secretaries to pursue antitrust violations, as does the Department of Justice, under Sherman Act language. Apart from the confusion spawned by the vague concept of "undueness,"[110] this standard limits the Secretaries' antitrust enforcement authority to violations affecting prices, although not all offenses have such an

---

107. See United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 (W.D. Mo. 1975) (Sherman Act consent decree against milk marketing agency in common). This Department of Justice action was apparently preceded by an ineffective petition to the Secretary of Agriculture to act under § 2 of Capper-Volstead, 7 U.S.C. § 292 (1976). See Trustbusting Down on the Farm, supra note 93.

108. See 12 U.S.C. § 1828(c) (1976).

109. 12 U.S.C. § 1828(c)(5)(B) (1976). Again, clearance liaison procedures would avoid duplicative public regulation. See text accompanying note 104 supra.

110. See note 94 and accompanying text supra.

effect; and it ignores activities such as limit pricing designed to deter entry.[111] Hence, the price enhancement requirements of Capper-Volstead and the FCMA unwisely restrict the Secretaries' capacities to regulate the market power of cooperatives. Assuming, however, that the existing provisions are to be retained, then the following is proposed for the definition of "unduly enhanced" prices: prices exceeding those that would ordinarily exist under conditions of effective or workable competition in the market for the product concerned. This definition differs markedly from those most recently offered by the Department of Agriculture.[112] The proposed definition does not challenge the rights and benefits flowing from cooperative formation; instead, it allows the Secretaries to consider market structure, conduct, and performance in deriving legal conclusions under section 2 of Capper-Volstead and the FCMA. Furthermore, it employs the concepts of effective and workable competition, which have been extensively discussed in antitrust and regulatory law and economic literature.[113]

Finally, recommendation (3) should be modified to require that the Secretaries consider "consumer interests" when formulating agricultural orders and fishery plans. The law's present bias in favor of producers can no longer be justified by depression-era economics or conservation rationale.

Enforcement of all of these recommendations can be best ensured by permitting all interested parties to be involved in each element of the enforcement scheme. Thus, state authorities and private parties, including consumer groups, should have the right to petition for the initiation of undue-price-enhancement and dissolution proceedings. Also, all groups, including the Department of Justice and the FTC, should have the right to participate in agricultural-marketing-order and fishery-management-plan proceedings and to appeal such proceedings on the grounds that competitive factors or consumer interests have been inadequately considered or that the least anticompetitive alternative has not been selected. Finally, the Secretaries' complete antitrust authority should remain "auxiliary" to suits by private parties, the FTC, and the Department of Justice challenging individual co-ops, intercooperative mergers, and restrictive agreements not undertaken through common marketing agencies.

These proposals expand Department of Justice and FTC antitrust powers over cooperatives, while leaving concurrent cooperative antitrust regulation with the departments, subject to extensive public-interest safeguards. Divesting the Secretaries of their jurisdiction is an inferior alternative, because revitalizing the antitrust authority of the Departments of Agriculture and Commerce should increase the likelihood that consumer and competition interests will be considered in the regulation of agricultural and fishermen's cooperatives. The Department of Agriculture's reevaluation of departmental responsibilities, now nearing completion, suggests that the department is finally taking antitrust regulation seriously

---

111. See generally L. Sullivan, Handbook of the Law of Antitrust, 118-21 (1977).

112. See note 94 supra.

113. See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws, Chapter VII (1955); G. Stocking, Workable Competition and Antitrust Policy (1961); Adams, The "Rule of Reason": Workable Competition or Workable Monopoly?, 63 Yale L.J. 348 (1954).

and, it can be hoped, the Department of Commerce will follow its lead. Lastly, interjecting similar perspectives into, and enforcing them in the process of formulating, agricultural marketing orders and fishery management plans should have an even greater public interest impact.

CONCLUSION

Under the Packers and Stockyards Act, the Secretary of Agriculture possesses extensive authority to enforce antitrust and consumer protection law against "packers," "live poultry dealers," and "stockyard owners." Although the Act does not affect the Department of Justice's concurrent antitrust jurisdiction, it does incorporate significant restraints on the antitrust and consumer protection jurisdiction of the Federal Trade Commission. Under the Capper-Volstead Act, the Secretary of Agriculture possesses antitrust authority over price-enhancing agricultural cooperative associations, which otherwise enjoy a limited statutory immunity from antitrust laws. The Secretary of Commerce enforces a similar antitrust scheme with respect to fishermen's cooperatives under the Fishermen's Collective Marketing Act.

The PSA, Capper-Volstead, and the FCMA clearly anticipate that the Secretaries will help ensure that competition lends its guiding hand in the food industries governed by these statutes. The Secretaries have failed to perform such a role. Despite this lackluster record, enforcement of competition and protection of consumer interests in food industries may be maximized by providing revitalized concurrent jurisdiction, to the Secretaries, the Department of Justice, and the FTC. In addition, the legislature should require the Secretaries of Agriculture and Commerce to accommodate antitrust and consumer perspectives in formulating agricultural marketing orders and fishery management plans under the Agricultural Marketing Agreements and Fishery Conservation and Management Acts.