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Decision to Prosecute: Organization and Public Policy in the Antitrust Division

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BOOK REVIEW

DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION. By Suzanne Weaver. Cambridge, Mass. and London, England: The Massachusetts Institute of Technology Press, 1977, Pp. viii, 196. $14.95.

*Reviewed by C. Paul Rogers III**

Professor Suzanne Weaver's first book, *Decision To Prosecute: Organization and Public Policy in the Antitrust Division,* is a study of the Antitrust Division of the Department of Justice, its institutional behavior and its mechanisms for public policy formation. Although Professor Weaver's audience is not limited to the legal community, *Decision To Prosecute* will stimulate in two ways the interest of antitrust students, scholars, and practitioners. On one level, the reader will learn something about the internal operations of the Antitrust Division, and may reconsider his preformed judgments about that influential, trenchant branch of the Justice Department. The reader's expectations of the book may well, however, rise to a second level, because in studying the shaping of public policy in the Antitrust Division Professor Weaver confronts some of the broader, more important issues of antitrust enforcement as well. For example, what real impact does the division have in maintaining competition in the American economy and in regulating the conduct of big business? How effective is the division in forming and carrying out policy decisions which eliminate anticompetitive conduct?

Professor Weaver analyzes the operations and behavior of the Antitrust Division by focusing on the manner in which it exercises its considerable discretion in prosecuting antitrust violations.[1] Al-

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1. The specific question she seeks to answer is: why does the division choose to bring a particular case? S. WEAVER, DECISION TO PROSECUTE 6 (1977). *See also* Arnold, *Antitrust Law Enforcement, Past and Future,* 7 LAW & CONTEMP. PROB. 5 (1940); Comegys, *Quo Vadis: Case Selection By the Antitrust Division of the Department of Justice,* 46 ANTITRUST L.J. 563 (1977); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J.L. & ECON. 365 (1970). For attempts to explain the antitrust selection process in economic terms, see Asch, *The Determinants and Effects of Antitrust Activity,* 18 J.L. & ECON. 575 (1975); Long, Schramm & Tollison, *The Economic Determinants of Antitrust Activity,* 16 J.L. & ECON. 351 (1973); Siegfried, *The Determinants of Antitrust Activity,* 18 J.L. & ECON. 559 (1975). *See generally* T. CALVANI & J. SIEGFRIED, ECONOMIC ANALYSIS AND ANTITRUST LAW (1979). Two interesting studies of resource allocation in antitrust enforcement are Weiss, *An Analysis of the Allocation of Antitrust Division Resources,* and Mann & Meehan, *Policy Planning for Antitrust*

though recognizing that the division employs many other types of discretion in its day to day operation,[2] the author justifies limiting her inquiry to prosecutorial discretion because the division views itself as an essentially prosecutorial unit, and this self-image "pervasively affects the way it performs its other functions."[3]

The author's observations and conclusions were based on some one hundred interviews of division attorneys (both staff and front office), private antitrust lawyers, Office of Management and Budget officials, congressional staff members, and journalists knowledgeable about the division, which she conducted from 1971 to 1974.[4] The study was limited by two division-imposed restrictions. The division prohibited discussion of cases by name, and the author was not allowed to see written internal communications.[5] Neither limitation, however, appears to have hindered greatly the author's ability to gather data upon which meaningful analysis could proceed.

Of initial importance is the finding, repeated throughout the book, that the division operates by what is termed the "prosecutorial ethos." That is, the whole office, from the staff attorneys through the decision-making hierarchy of division prosecutors to the Assistant Attorney General, is almost wholly motivated by the desire to prosecute antitrust cases. This is not surprising, since one would expect an office of lawyers entrusted with the duty to enforce the antitrust laws to be so inclined. More surprising is the author's finding that individual staff attorneys have little conception of the overall beneficial economic policy they should seek to attain in a particular prosecution. Their view of antitrust goals, Professor Weaver concludes, is incomplete and imprecise.[6]

The so-called prosecutorial ethos explains largely the division's lack of concern for the policy implications of each decision to prosecute. Its staff considers itself a team of professional prosecutors who bring cases based on information and investigation. They, and to a large extent the division as a whole, are preoccupied with winning cases in an adversarial setting. Accordingly, they believe that sound legal arguments and evidence, not statements of economic or social

Activities: Present Status and Future Prospects, both in THE ANTITRUST DILEMMA (J. Dalton & S. Levin eds. 1974) (Federal Trade Commission study).

2. For a description of division discretion in deciding whether to bring a civil action or seek a criminal indictment, see Baker, *To Indict or Not To Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978), and THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CRIME AND ITS IMPACT, AN ASSESSMENT 110 (1967).

3. S. WEAVER, *supra* note 1, at 7.

4. *Id.*

5. *Id.*

6. *Id.* at 45-46.

policy, are needed for a successful prosecution, and that arguments based on competitive policy will not sway judges concerned with concrete proof of wrongdoing.

Professor Weaver's conclusions about the almost imperceptible impact of the reigning Assistant Attorney General's policy declarations on his prosecutorial staff may answer various critics who believe that the division should be more policy conscious.[7] Obviously each Assistant Attorney General (AAG) has in mind the directions in which he wants antitrust enforcement to advance. Practically, however, an AAG cannot effect his prosecutorial policy when his prosecutors are concerned almost solely with the legal merit of a given case and the concomitant probability of success in a courtroom.[8]

Professor Weaver finds that AAG policy pronouncements providing substantive ammunition for prosecuting cases are well received and are implemented by the AAG's staff. Because many such guidelines for prosecution, such as structuring cases around the issue of injury to potential competition or of unhealthy aggregate concentration in an industry, present practical problems of proof and are likely to be greeted with reluctance by the staff,[9] however, the author concludes that the prosecutors' attitudes toward policy formulations by their superiors must be viewed in the prosecutorial context, tempered by the necessity to win in court.[10]

Other factors illustrate the division's lack of general policy direction. Professor Weaver brings out one important point that is generally overlooked by the division's critics—the informational constraints working upon the office. The division receives or gathers little information that is useful in a prosecution.[11] Consequently, the

7. *See, e.g.*, Kramer, *Criminal Prosecution for Violations of the Sherman Act: In Search of a Policy*, 48 GEO. L.J. 530 (1960); Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971). *Cf.* Buxbaum, *Public Participation in the Enforcement of the Antitrust Laws*, 59 CALIF. L. REV. 1113 (1971).

8. S. WEAVER, *supra* note 1, at 112.

9. *Id.* at 127. Perhaps a more current example of these pragmatic concerns is the shared monopoly case that Assistant Attorney General John Shenefield has promised to bring. The suit has yet to be filed largely because of concerns of constructing viable legal theories which will be successful in an adversary setting. *See* Wall St. Journal, Aug. 22, 1978, at 16, col. 4.

10. S. WEAVER, *supra* note 1, at 129.

11. *Id.* at 57-58. The informational resources of the division have traditionally been quite irregular. An antitrust official has admitted elsewhere that the agency essentially operates "out of the mailbox." THE CLOSED ENTERPRISE SYSTEM 119 (M. Green ed. 1972). The division's information gathering resources have become more sophisticated, in that the division's Economic Policy Office has been compiling significant industry performance information and storing it in computer data banks. The division still, however, relies heavily on external sources, including idle cocktail party conversation. Comegys, *supra* note 1, at 564-65.

rigors of the adversarial system in which the division must operate mandate a case-by-case approach. This may explain why fifty-eight of the sixty-nine cases filed by the division in 1977 were price-fixing cases while only one asserted a Section Two violation.[12] Furthermore, the lack of usable information may inherently circumscribe the actual prosecutorial discretion of the division.

Similarly, the division's prosecutorial self-concept may limit the reach of policy and its exercise of discretion. The staff views itself as professional, not political, and strives to maintain its image as the "cream" of the profession.[13] As prosecutors, the staff believes they should take their cases as given, based upon the evidence of illegality at hand.[14] They do not want to bring cases which might embarrass them in court and harm their reputations. The eagerness to prosecute is thus tempered by the reality of litigation. The institution of policy or "theory" cases faces the same constraints since the criteria upon which the decision to prosecute rests remains legalistic.

According to Professor Weaver, however, these limitations do not intimate that the division is unprogressive. The prosecutors indeed attempt to expand the scope of antitrust law to new situations which are deemed anticompetitive, but such expansion is undertaken in practice only if the chain of command is convinced that the legal argument is sound and is supported by sufficient evidence for ultimate success.[15]

Perhaps one of the most telling parts of *Decision To Prosecute* chronicles the division's response to an AAG who attempted systematic policy direction. As an example, Professor Weaver considers the regime of former Assistant Attorney General Donald Turner. Apparently, Turner sought to insure that the division was more cognizant of the economic importance of its decisions.[16] He established new decisionmaking structures and promulgated written guides "to constrain the lawyers' decisions and to limit the effects of those decisions."[17] Furthermore, he intervened personally and extensively in

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One critic of the division's performance in detecting antitrust violations has suggested that the paucity of field offices is a major drawback to effective enforcement. R. BORK, THE ANTITRUST PARADOX 406 (1978). Professor Bork suggests creating more field offices by dispersing personnel now in Washington. *Id.* About two-thirds of the division's attorneys are normally based in Washington. S. WEAVER, *supra* note 1, at 4.

12. [Current Binder] ANTITRUST & TRADE REG. REP. (BNA) No. 858, at A-12 to A-13 (Apr. 6, 1978).

13. S. WEAVER, *supra* note 1, at 168.

14. *Id.* at 167.

15. *Id.* at 68.

16. *Id.* at 131.

17. *Id.*

the review process.[18]

Professor Weaver points to some staff resentment because of the additional bureaucratic red tape Turner's actions caused. She concludes, however, that resentment came about primarily because solid cases were turned down by the division hierarchy on economic rather than legal grounds. As the prosecutors viewed it, the range of cases available for prosecution was limited, as was their ability to win any given case, since the Turner policy was to establish good legal precedent rather than to win cases.[19] The result was a decline in staff morale which was reversed only when the next AAG took office.[20]

Professor Weaver states that an AAG has relatively substantial power to direct the division's course of action, at least for the length of his tenure, but intimates that the implementation of new policy by the regular prosecutors may encounter obstacles. Professor Weaver, however, leaves unanswered the more important question—whether the implementation of a systematic policy of antitrust enforcement based upon an established criterion, such as economic impact, promotes better enforcement of the law than the traditional case-by-case approach.

Even assuming that a particular antitrust policy can be considered beneficial, the likelihood of its successful implementation is doubtful, both because of pragmatic prosecutorial considerations and because of the uncertain judicial reception awaiting any new dogma. Moreover, if the prosecutorial staff is indeed nothing more than a team of prosecutors, systematic policy direction would undermine the staff's valued autonomy and, given the evidentiary concerns of prosecutors, create frustration and diminish incentive. The benefits of the policy and the likelihood of success must, therefore, be measured against the possible reduction of prosecutorial efficiency.

The foregoing discussion raises an even broader question. While reading Professor Weaver's book one cannot help but consider whether the Antitrust Division is effective in enforcing the antitrust laws.[21] The author never really gives us her opinion. Yet it is an

18. *Id.* at 132.

19. For a view supportive of the Turner regime and critical of the prosecutors' reaction to the introduction of systematic policy direction, see R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 229-31 (1976).

20. S. WEAVER, *supra* note 1, at 133.

21. The question of division enforcement effectiveness should not, of course, be divorced from questions of remedy and penalty for antitrust violations. *See* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS (1976); Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590 (1977).

important question because if one concludes that systematic policy direction is not the answer, one questions next whether the case-by-case approach is any better. To answer the question conceptually one must formulate value judgments about the amount of influence the division should have on the business economy. That issue, while engaging, is beyond the scope of Professor Weaver's book. The question should be answered, however, in terms of whether the piecemeal approach provides the best use of the division's resources.[22]

Professor Weaver's findings provide substantial cause for reflecting about the division's performance. For example, annual budgetary proposals of the division are relatively modest. Former AAGs have admitted that the division could not productively absorb more than a ten to fifteen percent annual budget increase.[23]

Self-induced budgetary restraint could indicate a lack of division initiative, aggressiveness, or even policy direction. Professor Weaver finds that prosecution decisions are based on the legal merit of each case rather than on the efficient use of antitrust resources to maintain a competitive economy.[24] Upon further reflection, however, the division's emphasis on winning in an adversary system, coupled with the informational constraints imposed upon it, explain why the division's budget seems to parallel closely its operating needs. Arguably policy-directed division behavior would not be as efficient, because ultimately the prosecutorial ethos would still control. Substantial expenditure of time and money on policy-oriented directives may bear no fruit in court and may not ultimately result in a more efficient use of the division's resources than the traditional case-by-case approach.

Professor Weaver finds that division prosecutors are as eager to expand their enforcement of the antitrust laws into uncharted areas as are division administrators who make policy pronouncements. Their enthusiasm is tempered by the practicalities of litigation, but their lack of policy orientation beyond a general belief that competition must be preserved does not stifle their imagination.[25] The division's emphasis on prosecution, however, may inhibit use of division resources to confront the most economically significant matters, particularly if the case is doubtful legally.[26] For example, the preponderance of price-fixing cases recently brought by the division is not the optimal use of its resources; it rather reflects a prosecutorial

22. It is assumed that the greater the division's influence, the better.
23. S. WEAVER, *supra* note 1, at 140.
24. *Id.* at 61, 170.
25. *Id.* at 175.
26. *Id.* at 177.

disposition to enforce the law.

Can the emphasis on prosecutorial values, which leads to piecemeal enforcement, be justified if one believes greater emphasis on antitrust policy is needed to utilize maximally the division's resources? Here Professor Weaver makes a telling point by reminding us that the legislative mandate for the Antitrust Division is directed equally to enforcement of the antitrust laws and to the realization of the principal antitrust policy objective—the protection of a competitive economy.[27] Certainly then a balance should be struck, and formulations of policy must be prepared to give way to some extent to pragmatic enforcement considerations. The key to maximizing the division's resources and influence in the competitive marketplace will depend largely on how the balance is struck.[28] Too much policy orientation may stagnate the division prosecutors and may ultimately be counterproductive. Specific policy objectives, however, are necessary to the division's assertion of influence over troublesome economic and industry practices that do not fall within traditional antitrust doctrine. Policy innovations are an obvious way for the division to influence the application of antitrust principles to objectionable business behavior in an economically beneficial manner.

Professor Weaver's book gives the antitrust reader plenty of grist for his mill. The factual data for analysis are vast, and the author's analysis is sound, but it does not go far enough. Undoubtedly this is largely because the work is a public policy behavioral study, not a qualitative inquiry into antitrust enforcement by the Antitrust Division. This reviewer, however, believes that the author's findings support more sweeping conclusions than those made.[29] The antitrust lawyer, student, or scholar will still thirst for answers to the "big" issues, but the book is nonetheless valuable to antitrust scholarship because it provides empirical foundations upon which the answers to these issues may be formulated. In sum,

27. *Id.*

28. Thus it would seem that division resources should not be diverted from prosecuting garden variety price-fixing cases, because the prosecution mandate in such cases is paramount. Policy directives, however, such as the division's current plan to bring a shared monopoly case, should be given significant priority at the expense of conducting other investigations or instituting other difficult cases.

29. Professor Weaver contrasts usefully the unique features of the Antitrust Division with those of regulatory agencies generally, and suggests that the performance and unique characteristics of the division should be emulated. *See generally* Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979). This reviewer's interest in the book lies in other directions but does not serve to diminish the value of the work.

this is an important, well-conceived book which should not be ignored by those concerned with the enforcement of the antitrust laws.[30]

30. Professor Weaver's work is not directed primarily to the legal community but to all involved in the process of regulating business. The irritating, nonlegal manner of placing footnotes at the end of the book rather than at the bottom of each page documents this.