U.S. ANTITRUST CRIMINAL PROSECUTIONS ARE UNCONSTITUTIONAL

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Roxann Henry argues that the current criminal enforcement initiatives of the US Department of Justice Antitrust Division are taking it into territory that will likely trigger constitutional scrutiny of the criminal use of the Sherman Act. Review by the Supreme Court would likely eliminate criminal antitrust enforcement powers given the void-for-vagueness doctrine and the constitutional guarantees of due process, separation of powers and the right to a jury trial, and, even if some aspect of criminal enforcement power was retained, the constitutional scrutiny would lead to the abandonment of the per se standard in the context of criminal trials. Moreover, the loss of criminal enforcement of the antitrust laws would have no meaningful effect on antitrust compliance.

Current initiatives of the U.S. Department of Justice Antitrust Division ("Antitrust Division" or "Division") invite scrutiny of the constitutionality of criminal prosecutions under Sections One and Two of the Sherman Act.[2] Constitutional challenges are becoming routine, and should they reach the Supreme Court, it is highly likely that such challenges will be successful. The result would be to deprive the Antitrust Division of any criminal enforcement powers under the antitrust laws with little other effect.

Below I note key points of the Antitrust Division's new enforcement initiatives then briefly explain the fundamental constitutional principles at stake: the due process void-for-vagueness doctrine, the separation of powers, and the right to trial by jury. These principles apply directly to show how antitrust prosecutions are constitutionally infirm, and particularly in the context of the current Court's textualist approach to reading statutes. The void-for-vagueness doctrine renders invalid prosecutions under both Section One and to Section Two of the Sherman Act. Separately, even were the use of some criminal prosecutorial power to withstand scrutiny, the current use of the per se concept fails constitutional requirements. Lastly, as the difficulty of predicting what could constitute a violation is increasing and the Division seeks presumptions with more attenuated reach, it is important to recognize that the loss of criminal antitrust enforcement powers would have little effect as other forces provide similar or greater ability to deter and punish injurious anticompetitive behavior.

I. THE ANTITRUST DIVISION'S NEW AGENDA

While in the past, the Antitrust Division applied prosecutorial discretion to limit criminal prosecutions to hard-core cartel behavior, the Division has now discarded that policy. Instead, the Division is pushing the envelope into new realms. No longer does the Division claim that it only prosecutes individuals who know they have violated the law. No longer does the Division claim that the conduct they prosecute constitutes hard-core fraudulent conduct. The most dramatic illustrations of the new criminal prosecution agenda are non-compete agreements[3] and Section Two criminal enforcement for monopolization offenses,[4] and especially the Division's statements regarding these issues.[5]

More dramatic departures from past practice that foretell even further extension of criminal prosecutions into unknown territory appear on the horizon. The Division has announced new initiatives to focus on information exchanges that the Supreme Court has placed squarely outside the category of those restraints traditionally understood to be inherently anticompetitive,[6] and further has stated the intention to disclaim earlier guidances that were drafted to allow businesspeople to understand how the Division sees the law.[7]

II. CONSTITUTIONAL PRINCIPLES

The void-for-vagueness doctrine invalidates criminal prosecutions where the statute does not make the boundary clear on what is illegal. Most recently, the Supreme Court in *Ruan v. United States*,[8] reinforced "that consciousness of wrongdoing is a principle "as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[9] The first step in that process is the ability to understand what is proscribed. As stated in *Connally v. Gen. Constr. Co.*:[10]
[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

2 15 U.S.C. §§1 & 2.

3 Much has been written about the Antitrust Division's leap into criminal prosecution of non-compete agreements. There were no prosecutions prior to October 2016 when the Division released guidance that it would criminally investigate naked no poach agreements. Today, however, the limitation of "naked" has become seriously ambiguous or simply disregarded as the Division has indicted defendants engaged in complicated vertical outsourcing arrangements involving non-compete agreements with the court refusing to dismiss finding the allegations meet per se standards. See *United States v. Patel* et al., Case No. 3-21-220 (VAB) (D. Conn. Filed Dec. 15, 2021).

4 The Antitrust Division has proudly proclaimed pursuing criminal enforcement for monopolization offenses and, as with non-compete agreements, has already garnered pleas but no successful jury verdicts. History, however, does not support the stretch to extend modern penalties for monopolization offenses. See Daniel A. Crane, Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment, 84 ANTITRUST L.J. 753 (2022) (collecting cases). Moreover, the reach for criminal charges under § Two seems somewhat contrived as the conduct could easily have been charged under other criminal statutes.

5 The Antitrust Division unabashedly has proclaimed that it is not bound by prior practices and will apply the laws as now, and differently, interpreted.

6 *United States v. US Gypsum Co.*, 438 U.S. 422, 441, n.16 (1978).

7 Press Release, Antitrust Div., U.S. Dep't of Just., Press Release, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023) https//www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statement.

8 597 U.S. __ (2022).

9 *Id.* slip op. at 5 (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

10 296 U.S. 385, 391 (1926).

meaning and differ as to its application violates the first essential of due process of law."[11] Justice Gorsuch recently explained "that the void-for-vagueness doctrine guards against arbitrary or discriminatory law enforcement….[and] is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[12]

Also implicated in the constitutional scrutiny of the antitrust laws are the Sixth Amendment mandate protecting the defense right to trial by jury.[13] If jurors cannot understand what is legal and what is illegal, they cannot make the fact-finding required to provide a fair trial. Moreover, presumptions of illegality, even those couched as judicial interpretation, deprive the defense of the right to a jury trial.[14]

III. THE LANGUAGE OF THE SHERMAN ACT IS UNCONSTITUTIONALLY VAGUE

Given the text of the statute, the Supreme Court repeatedly has acknowledged that the language cannot mean what it says on its face.[15] Even Senator Sherman observed:

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law.[16]

Thus, the implementation of antitrust law has proceeded as the development of a common law regulating competition in a process similar to constitutional law interpretation, with antitrust law evolving with dramatic changes and reversals and strong arguments on both sides of attempting to determine what might constitute a violation.[17] Moreover, the Court, Congress and the Antitrust Division have recognized that overenforcement would chill beneficial conduct. As the Court noted in *United States v. U.S. Gypsum Co.*,[18] "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." [19]

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11 *Id.* at 391 (first citing *Int'l Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914); and then Collins v. Kentucky, 234 U.S. 634, 638 (1914)); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (citing *Champlin Refin. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 242–43 (1932)).

12 *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-24 (2018).

13 U.S. Const. amend. VI.

14 See *Morrisette*, 342 U.S. at 275; *Apprendi v. New Jersey*, 530 U.S. 466, 494-95 (2000); *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004); *United States v. Booker*, 543 U.S. 220,243-44 (2005); *Alleyne v. United States*, 570 U.S. 99, 117-18 (2013).

15 *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63 (1911) (without the standard of reason to limit the language, "the statute would be destructive of all right to contract or agree or combine in any respect whatever"); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *U.S. Gypsum*, 438 U.S. at 438 ("The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits[.]" (footnote omitted)).

16 21 Cong. Rec. 2456, 2460 (1890).

17 Congress intended the term "restraint of trade" to have "changing content" and authorized courts to oversee the term's "dynamic potential." See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731–32 (1988), abrogated on other grounds by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). The Sherman Act's broad prohibitions "turn over exceptional law-shaping authority to the courts," for which reason the Court has "felt relatively free to revise [its] legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 461–62 (2015); see also *Leegin*, 551 U.S. at 899 ("*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act." (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("[T]he [Sherman Act] has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

18 438 U.S.422 (1978).

19 *Id.* at 441 (first citing 2 Phillip E. Areeda & Donald F. Turner, Antitrust Law 29 (Little, Brown 1978)); then citing Robert H. Bork, The Antitrust Paradox 78 (Basic Books 1978); and then citing Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423, 441–442 (1963)). See also Fed. Trade Comm'n & U.S. Dep't of Just., Antitrust Guidelines for Collaborations Among Competitors 1 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; https://perma.cc/PX3F-HCXY ("In order to compete in modern markets, competitors sometimes need to collaborate. . . . Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations."). Congress felt so acutely the need to avoid chilling certain beneficial competitor collaborations from full antitrust liability that it passed the National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified as amended at 15 U.S.C. §§ 4301–05), and the National Cooperative Research and Production Act of 1993, Pub. L. No. 103-42, 107 Stat. 117 (codified as amended at 15 U.S.C. §§ 4301–06) (amending the National Cooperative Research Act of 1984).

While this lack of clarity may function in a civil context which requires proof of anticompetitive injury, it cannot withstand constitutional scrutiny as a criminal statute. As the Court stated in *Bouie v. City of Columbia*,[20] "[i]n order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of protection beyond the constitutional periphery, where the statute does not make the boundary clear." [21]

IV. CURRENT CRIMINAL APPLICATION OF THE PER SE CONCEPT IS UNCONSTITUTIONAL

The *per se* concept not only entails a changing and complex legal standard that lacks the required definitional clarity to withstand scrutiny under the constitutional void-for-vagueness doctrine, as currently applied by the Antitrust Division *per se* illegality substitutes a judicial presumption for jury fact-finding in violation of due process, the right to trial by jury, and the separation of powers. Used as a screen for prosecutorial discretion the *per se* concept has no constitutional infirmity, but the Antitrust Division weaponizes *per se* illegality to deny jury consideration of the key criminal elements of intent and whether the conduct constitutes an unreasonable restraint of trade. Supreme Court precedent demonstrates that this substitution of judicial fact-finding or presumption deprives the defense of its constitutional rights.[22]

The Division claims that by alleging a per se violation of the Sherman Act, the only issue for the jury is whether the defendant knowingly agreed to engage in the alleged conduct and that it is solely for the judge to determine whether the conduct constitutes a *per se* offense. This effectively removes from the jury elements of intent and unreasonable restraint of trade. In *US Gypsum Co*. the Supreme Court unequivocally established that when applied criminally the antitrust laws require the element of intent, distinguishing the elements of a criminal offense from those of a civil violation.[23] The Supreme Court has long and recently recognized that Section One requires some level of fact-finding to determine whether conduct constitutes an unreasonable restraint of trade.[24] That the fact-finding for every element that is an ingredient of an offense must be submitted to the jury has lengthy and strong Supreme Court precedent.[25] Likewise, Supreme Court precedent explicitly requires that the Government bear the burden of proof beyond a reasonable doubt on each element, including intent.[26] Thus, jury instructions that take away from the jury the question whether the defendant understood that the alleged conduct was a unreasonable restraint of trade defeats the defendant's rights to trial by jury and violates the separation of powers as well as fundamental due process.

V. THE ANTITRUST DIVISION'S OVERREACHING PROVIDES A TRIGGER FOR CHANGE

Until recently, constitutional attacks in criminal antitrust prosecutions surfaced relatively rarely, likely largely because the hard-core cartel conduct alleged may have suggested little sympathy and other factual defenses were of greater importance. But in the last year constitutional arguments have become almost routine. To date lower courts have not accepted the unconstitutionality of the statute or of per se instructions, generally on the basis of past practice and long ago and questionable precedent.[27] But as the Division pushes into ever more complex and novel areas of prosecution it is likely that constitutional issues may finally find the way to the Supreme Court.[28] The Court has not addressed the constitutionality

20 378 U.S. 347 (1964).

21 *Id.* at 362n.9 (internal quotation marks omitted) (quoting Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 540 (1951)).

22 For a more detailed discussion, see Roxann E. Henry, *Per Se Antitrust in Criminal Cases*, 2021 COLUM. BUS.L.REV. 114; see also Robert Connolly, Per Se Rules Notches Another Labor Market Pretrial Win, But…," Cartel Capers (Dec. 14, 2022) http://cartelcapers.com/blog/per-se-rules-notches-another-labor-market-pretrial-win-but/.

23 438 U.S. at 437.

24 *National Collegiate Athletic Assoc. v. Alston*, 594 U.S. __ (2021) (noting spectrum of trade restraints from reasonable to unreasonable and requiring factual evaluation to determine whether price fixing in civil action was unreasonable restraint); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (*per se* analysis demands fact-finding even in price-fixing cases).

25 See *supra* note14.

26 *Ruan*, 597 U.S. at __(also rejected the government's argument that the mens rea for the non-antitrust criminal statute in question should turn "on the mental state of a hypothetical "reasonable" [person], not on the mental state of the defendant himself or herself.").

27 E.g. *United States v. Patel et al.*, No.3-21-cr-220 (D. Conn. Dec. 2, 2022).

28 A Ninth Circuit panel member noted regarding the *per se* rule that "if it's going to get straightened out it's going to have to require an en banc panel of the court or more likely the Supreme Court itself." Joshua Sisco, In Foreclosure Auction Appeal, Court Questions Applicability of Per Se Standard, MLex (Jan. 16, 2019).

issues under the current felony statute,[29] but the Division is paving the way for an attractive and sympathetic case and the precedent for finding unconstitutionality is compelling . There have already been petitions for certiorari on constitutional grounds, and we should expect to see more consistent and routine constitutional challenges.[30]

VI. THE LOSS OF CRIMINAL ANTITRUST PROSECUTORIAL POWER WILL HAVE NO EFFECT

Ultimately, the loss of U.S. criminal antitrust power would have little effect because of the availability of civil enforcement and other criminal statutes, although it might detract from the enthusiasm of other countries to criminalize antitrust conduct.[31] Considering the basic justifications for criminal enforcement, restitution, retribution, rehabilitation, and deterrence, only deterrence has significant meaning for antitrust prosecutions.

Restitution is today routinely handled through civil process. Victims are amply provided with the means for retribution and restitution through civil treble damage actions. With no real history of recidivism, there appears to be little need for rehabilitation.[32] Moreover, civil consent decrees requiring compliance and monitoring can be imposed without any criminal action. Thus, the principal issue for consideration is deterrence and whether other criminal statutes, combined with civil enforcement, would provide the same deterrent effect without criminal antitrust enforcement.

There can be no doubt that criminal sanctions provide a strong measure of deterrence, particularly when individuals face the prospect of jail. Deterrence has two parts: the level of the penalty and the likelihood of discovery by enforcers. With regard to jail, other statutes that could serve as the basis for prosecuting antitrust conduct provide for even greater prison time.[33] For example, the maximum penalties for wire and mail fraud can reach 20-30 years in jail,[34] whereas for the Sherman Act statutory maximum is only 10.[35] With regard to the monetary penalty, the statute that permits penalties to rise to double-the-loss or double-the-gain, which has been the basis for all of the largest antitrust fines, is not an antitrust law and can apply to other criminal conduct.[36]

With regard to the likelihood of discovery, for years after the 1993 change to the Division's leniency policy, that policy proved exceptionally effective to increase the likelihood of discovery of antitrust violations. That policy was unique to the Antitrust Division. But the luster of that policy has diminished, and, perhaps more importantly, the basics of that policy no longer appear unique to the Antitrust Division in light of the recent adoption of criminal policies applicable at all types of criminal enforcement by the U.S. Department of Justice.[37]

Moreover, the new criminal policies that apply to all federal criminal enforcement also directly address the issues of corporate deterrence.[38] From the standpoint of a corporation, as an artificial entity, deterrence is about compliance training, monitoring, and reporting. The new policy gives clearer guidance to promote corporate compliance conduct to bolster not just direct deterrence but also the reporting disclosure of illicit conduct.[39] Civil treble damage claims also provide ample incentive to create compliance programs and routinely cost more than fines for Sherman Act violations.

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29 In Nash v. United States, 229 U.S. 373 (1913), the Court rejected the "proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable,'" finding "no constitutional difficulty in the way of enforcing the criminal part of the act." Id. at 377–78 (citing *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 109 (1909)). But *Nash* should not be considered controlling precedent as it involved a misdemeanor not the current felony statute with its extraordinarily severe penalties; the analysis at the time was questionable; and the evolution and history of both constitutional and antitrust laws in the last 110 years would dramatically affect the evaluation.

30 E.g. *United States v. Lischewski*, No. 21-852 (May 2, 2022), *cert. denied*, __U.S.__, case no. 20-10211 (Dec. 8, 2022).

31 Invalidating the use of *per se* presumptions would also have no meaningful effect if, indeed, juries would view the charged conduct as inherently unreasonable, which is purportedly required to deem conduct *per se* illegal.

32 Repeated instances of corporate guilt have either not involved the same individuals or concerned conduct that was ongoing at the same time.

33 E.g. Press Release, Antitrust Div., U.S. Dep't of Just., Municipal Employee Pleads Guilty to Wirefraud Conspiracy (Feb. 3, 2023) (alleged conspiracy to thwart competitive bidding process) https//www.justice.gov/opa/pr/municipal-employee-pleads-guilty-wirefraud-conspiracy.

34 18 U.S.C. § 1341 (setting maximum penalty for mail fraud at 20 years or, under certain circumstances, 30 years); *id.* §1343 (providing similar terms for wire fraud).

35 15 U.S.C. §§ 1 & 2.

36 18 U.S.C. §.3571(d).

37 See Stewart Bishop, DOJ Adds New Incentives to Corporate Enforcement Policy, Law360 (Jan. 17, 2023); Lisa O. Monaco, Deputy Attorney General US Department of Justice Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022) https//www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delievers-remarks-corporate-criminal-enforcement/.

38 *Id.*

39 *Id.*

VII. CONCLUSION

Current enforcement initiatives of the Antitrust Division are focusing attention on the constitutionality of criminal antitrust enforcement. The antitrust laws do not meet fundamental constitutional requirements for the imposition of criminal sanctions. The face of the statutes does not inform ordinary people of the conduct for which they can be prosecuted. Neither the changing tides of prosecutorial discretion or judicial interpretation can substitute for congressional clear description of conduct deemed criminal; instead, the fact of these executive and judicial changes, and even full reversals, regarding the conduct considered illegal pointedly illustrate the unconstitutionality. Today, justifications for criminal antitrust prosecutorial power do not currently exist other than to duplicate governmental resources and target conduct that has no effect on competition, and the Division's new agenda is likely to lead to the elimination of its criminal powers.

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