Can Criminal Enforcement of Section 2 Be Held Void for Vagueness?

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LAST FALL, THE DEPARTMENT OF JUSTICE scored its first Section 2 criminal conviction in decades. On October 31, 2022, in *United States v. Zito* an individual defendant in Montana admitted to attempting to conspire with a competitor to divide a market and pled guilty to criminal attempted monopolization in violation of Section 2 of the Sherman Act,[1] which provides that it is unlawful for any person to "attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states…."[2] In addition, the Department announced in December the unsealing of an 11-count indictment in *United States v. Martinez* filed the previous month that alleged that defendants conspired to monopolize a market by use of force, threats, acts of violence, and extortion.[3] Here, the Department also brought criminal Section 1 price-fixing charges.

Section 2 has always allowed for criminal enforcement, but until these cases the Department had not criminally prosecuted anyone under Section 2 in almost fifty years. The Department first announced its intention to reinvigorate this dormant aspect of antitrust law and resume criminal Section 2 prosecutions in a series of public remarks by former Deputy Assistant Attorney General Richard Powers beginning in spring 2022.[4] Despite the substantial gap in precedent, the Department rejected calls for guidance in a panel discussion in June: DAAG Powers stated that there is "ample case law out there to help inform those who have concerns or questions."[5] But 20th century Section 2 cases may not provide adequate guidance for 21st century firms given the substantial developments in antitrust law, economic understanding, and in the economy itself that have taken place since the Department's last criminal conviction. Moreover, Section 2 jurisprudence has not delineated "obviously anticompetitive" conduct that might form the basis for a *per se* violation in the way that Section 1 cases have for conduct such as price-fixing agreements. The Department's abrupt shift in policy necessarily raises the question, "what sort of conduct does the Government intend to criminally prosecute?"

The *Zito* case concerned an attempted conspiracy to monopolize through a market-allocation agreement—conduct that would violate Section 1 *per se* if completed. The *Martinez* case included associated criminal Section 1 charges as well as allegations of substantial ancillary conduct that is otherwise criminal. These are reasonable first steps under the Department's new policy. But it remains unclear whether and how the Government might reach beyond these kinds of low-hanging fruit and approach criminal charges for purely unilateral conduct, which would be analyzed under the rule of reason in the civil context. Courts hold statutes with criminal penalties to a higher standard under the vagueness test when it pertains to enforcer clarity,[6] and firms remain without clear rules as to what constitutes a criminal violation of Section 2. This predicament may lead to colorable challenges that the Department's approach to criminal enforcement under Section 2 should be held unconstitutionally vague.

Prior Criminal Section 2 Precedent Primarily Concerned Conspiracies That Would Also Violate Section 1.

The Sherman Act has permitted criminal enforcement for both concerted action (under Section 1) and unilateral conduct (under Section 2) since its enactment in 1890.[7] But criminal enforcement of Section 2 has historically been rare, with one recent study identifying a total of 175 cases between 1903 and 1977, the last time the Department had brought a criminal Section 2 case until last year.[8] The scope of Section 2 criminal charges has also typically been relatively narrow: the substantial majority of cases involve agreements that would also give rise to criminal violations of Section 1.[9]

The landmark 1940 *American Tobacco* case is typical of 20th Century criminal Section 2 enforcement. In that case, the Department alleged that the "Big Three" cigarette companies formed an agreement to fix prices and exclude competitors by coordinating tobacco purchases and retail

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price levels.[10] A jury convicted defendants of conspiracy in restraint of trade under Section 1 and attempt to monopolize, conspiracy to monopolize, and monopolization of the tobacco industry under Section 2.[11] On appeal, the Supreme Court affirmed the judgment and provided a modest touchpoint for criminal Section 2 analysis, holding that "actual exclusion" was not necessary for the crime of monopolization under Section 2.[12] The Supreme Court also noted that the jury could have inferred a conspiracy to monopolize under Section 2 (in addition to a conspiracy to restrain trade under Section 1) due to the significant market shares of the participants.[13]

Similarly in *Wayne Pump*, decided in 1942, the Department brought Section 2 criminal charges together with Section 1 charges covering the same conduct.[14] The Government charged defendants with combining and conspiring to control prices for the sale of computer pumps in violation of Section 1, as well as with conspiring to monopolize the manufacture and sale of computing mechanisms in violation of Section 2.[15] The District Court for the Northern District of Illinois dismissed the indictments for a failure to plead sufficient facts to support the allegations,[16] but the Supreme Court reversed.[17] Notably, the Supreme Court observed that the conspiracy charges under Section 1 and Section 2 were so similar that "it is not necessary to make further differentiations between the counts."[18]

Likewise, in *Chas. Pfizer*, the Department prosecuted defendants for violations of both Sections 1 and 2.[19] In 1961, the Department charged defendant drug companies with conspiracy to restrain trade, conspiracy to monopolize trade, and monopolization of antibiotic products.[20] The Government argued that the drug companies effectuated a price-fixing scheme through licensing agreements.[21] The jury convicted all defendants of all charges, but in 1973 the trial court overturned the convictions.[22] The court explained that the Department had not met its burden of proof because it failed to present evidence of an illicit price-fixing agreement.[23] Notably, the failure to establish a Section 1 conspiracy resulted in acquittal on all charges, including the Section 2 offenses.[24]

Criminal Section 2 Precedent for Single-Firm Conduct is Sparse and Unilluminating.

Criminal Section 2 charges involving unilateral conduct have been quite rare. According to a recent comprehensive study, the Department brought only twenty such indictments before 1977,[25] and the substantial majority of those included criminal Section 1 charges for associated coordinated conduct as well.[26] These unilateral conduct cases provide virtually no insight into what sort of conduct could be targeted as a criminal monopolization violation of the 21st Century for two major reasons. First, a substantial number of them were resolved with *nolle prosequi* filings, *nolo contendere* pleas, or guilty pleas. These cases say little about the substantive contours of criminal Section 2 liability. Second, many of these cases—whether tried or resolved with pleas—involve conduct about which our economic understanding has evolved considerably in the past several decades to recognize potential procompetitive rationales and effects.

Of the twenty criminal Section 2 cases involving unilateral conduct identified above, four were subject to *nolle prosequi* filings and a further eight were resolved with *nolo contendere* pleas. Firms cannot draw any solid inferences from these cases because charging decisions and no contest pleas may suggest more about individual prosecutor and defendant assessments of risk than about the true bounds of Section 2 criminal liability. For instance, the Department at one time had a public policy of filing *nolle prosequi* in criminal cases when settlement was made in the associated civil matter, making it impossible to determine whether and how the underlying conduct truly crossed the line into the criminal realm.[27] There has also been some suggestion that *nolle prosequi* filings in criminal antitrust cases may reflect overzealous initial charging decisions.[28] Similarly, *nolo contendere* pleas, which do not permit adverse inferences in related civil actions in the way that a guilty plea does, may reflect defendant incentives to fight claims in the civil rather than the criminal context.[29] No clear lines between criminal and civil conduct can be inferred from judicial acceptance of these pleas.

Of the remaining eight cases, four resulted in full acquittals or were dismissed, one was resolved with guilty pleas, and three resulted in a conviction on at least one count for at least one defendant.[30] Although acquittals and dismissals may involve some analysis of substantive law absent in the *nolle prosequi* and *nolo contendere* cases described above, they principally provide notice of what conduct is *not* considered criminal and do nothing to define the boundaries of what conduct the Department may now choose to begin charging criminally.[31] Moreover, many of these eight "decided" cases involved conduct that has been the subject of evolving economic understanding recognizing that these practices often have substantial procompetitive rationales, such as tying and predatory pricing. It is also worth briefly noting that some involved ancillary non-economic conduct that is independently criminal: In *United States v. Union-Pacific Produce Co.*, allegations included threats, intimidation, and violence against rival artichoke dealers in New York,[32] and in *United States v. Empire Gas Corp.*, defendants were acquitted of an attempt to dynamite a rival's tank truck.[33]

Two of the Department's trial convictions for criminal Section 2 cases with unilateral conduct allegations involved similar facts. The 1940 *Chattanooga News-Free Press Co.* case included one count for "preventing the operation of competing newspapers" in the area and another for imposing contracts that required advertisers to use defendant's paper exclusively through a mechanism not specified in available sources.[34] The jury convicted defendants as to the first count but acquitted as to the second.[35] The later 1955 *Kansas City Star* case involved (i) a tying claim that the defendant

unlawfully required advertisers to purchase ads in two different papers as a unit, and (ii) an apparent refusal to deal claim related to the conditions on which defendants would offer radio advertising.[36] A jury convicted the defendant, and the 8th Circuit upheld the conviction.[37]

In analyzing the tying claim, the appellate court in *Kansas City Star* drew on two contemporaneous Supreme Court cases concerning advertising restrictions in newspapers. Defendants put great weight on *Times-Picayune Pub. Co.*, which also involved allegations of unlawful tying through unit advertising but which arose in the civil context.[38] In that case, the Supreme Court found the record insufficient to support allegations that ad sales for one newspaper could be coerced by the threat to withhold sales in another because the two papers were indistinguishable in that they served the same purpose in the same market.[39] The *Kansas City Star* court rejected the comparison, despite the close similarity in the conduct alleged, and instead likened the case to *Lorain Journal*, a civil refusal-to-deal case that found refusal to sell newspaper advertising to those who advertised on a newly established radio station amounted to unlawful monopolization under Section 2.[40] The court considered that the factual record would support a conclusion that the two newspapers at issue had distinct uses for advertisers and that each was dominant in its own space—i.e., each occupied a position similar to the eponymous journal.[41]

Both the treatment of tying cases in general and the determination of whether there properly exist two separate products for purposes of tying analysis have undergone substantial changes since *Times-Picayune* and *Lorain Journal* were decided. The Court in *Times-Picayune* observed that "tying agreements fare harshly under the laws forbidding restraints of trade."[42] This view has softened, with the Court observing in the 2006 *Illinois Tool Works* decision that "[o]ver the years, this Court's strong disapproval of tying arrangements has substantially diminished."[43] Although tying may still be a *per se* violation under modern antitrust law, the contours of what constitutes *per se* tying have evolved and remain less than entirely clear today.[44] With respect to the separate products test, the modern analytical framework was set forth in *Jefferson Parish* 30 years after the cases discussed above. That case rejected functional relationships between products, which had often driven earlier cases, and focused on an economic assessment of the "character of demand for the two items."[45] This framework has been further refined in technology markets in a way that intersects with the more evolved understanding of tying arrangements in general: the D.C. Circuit in *Microsoft* refused to apply *per se* treatment under *Jefferson Parish* because that test would ignore beneficial efficiencies realized by technological integration.[46] Moreover, technological integrations may implicate questions of a firm's freedom to design its products, activity that lies at the heart of competition on the merits.[47]

In addition, at least two 20th Century criminal Section 2 cases involved claims of predatory pricing. For example, in 1957 in *Safeway Stores*, which was resolved with a *nolo contendere* plea, the government charged defendant grocery stores with conspiracy to monopolize and attempted monopolization in violation of Section 2 for engaging in conduct designed to drive out competitors with below-cost pricing.[48] In *H.P. Hood & Sons, Inc.,* the Department alleged that the defendant illegally cut prices in certain areas and offered secret rebates to a retailer to destroy competition from rival milk distributors.[49] Modern courts are properly skeptical of predatory pricing cases,[50] and so it is far from clear that these precedents would form a proper basis for similar criminal charges today.

In sum, the sparsity, age, and posture of the 20th Century cases involving criminal charges for unilateral conduct under Section 2 mean that the precedential record provides little meaningful guidance for what unilateral conduct, if any, the Department may charge criminally today.

Neither DAAG Powers's Remarks nor the *Zito* or *Martinez* Cases Clarify the Bounds of Potential Criminal Section 2 Liability.

DAAG Powers has responded to calls for guidance on the Department's plans regarding criminal Section 2 prosecution by simply pointing to a "long history of Section 2 prosecutions and accompanying case law" as the Department's guiding light.[51] That history—as Powers acknowledged—has predominantly concerned "flagrant offenses" that also gave rise to Section 1 claims.[52] However, it is doubtful that Powers intended to imply that DOJ will employ Section 2 to simply bolster existing Section 1 indictments. The Criminal Fine Act of 1987 allowed the Department to pursue a fine amount double any defendant's ill-gotten gains, which eliminated the need to use Section 2 charges to increase penalties for restraints that violated Section 1.[53] Presumably, Powers intended to apply Section 2 in contexts where Section 1 charges are unavailable, but as discussed above, past precedent provides little meaningful guidance for modern firms on what unilateral conduct could potentially be deemed criminal.

As the first criminal Section 2 indictment under the Department's new policy, the *Zito* case is necessarily an important signal as to the kind of conduct that might draw criminal charges going forward. At first glance, the case seems like a modest first-step extension of the Department's criminal prosecution practice under Section 1. The case concerns an attempted conspiracy to enter into a territorial allocation agreement that would violate Section 1 *per se* if consummated.[54] Conspiracy is well understood in the criminal context, and a case based on attempt sidesteps difficult questions of what kind of proof of effects may be required for criminal charges based on actual monopolization. Unsurprisingly, the newest Antitrust Primer for federal law enforcement officials, which to our knowledge is the only formally published guidance on this topic, closely aligns with *Zito*. The Primer concerns only conspiracy cases and advises that *per se* anticompetitive conduct in violation

of Section 1 may also be evidence of a conspiracy to monopolize in violation of Section 2.[55]

In addition, the allegations of *Zito* appear to have some support in the case law. The claims in *Zito* closely parallel those in *United States v. American Airlines*, a 1984 decision in which the 5th Circuit held that the government could state a *civil* claim for attempted joint monopolization based on one company's unsuccessful attempt to solicit another to raise prices.[56] But developments in the law cast doubt on continuing viability of the 5th Circuit's reasoning and therefore the viability of using Section 2 to condemn failed solicitations of agreements unlawful under Section 1. In order to sidestep arguments that attempted monopolization liability based on the unsuccessful solicitation to fix prices would effectively impute an attempt provision into Section 1, the court distinguished between the actual fixing of prices and the acquisition of power to control price. The latter, the court reasoned, could accrue even if the parties did not ultimately fix prices. At the time, joint or shared monopolization claims were accepted by some courts, but more modern decisions have by and large rejected that theory and held that a Section 2 violation requires that a single firm obtain market power.[57] It is therefore unclear whether Section 2 claims based on failed solicitations among competitors can state a claim outside of the relatively rare case where the completed agreement would give one firm market power in a relevant antitrust market.[58]

The *Martinez* case, on the other hand, does little to shed light on whether criminal liability may attach to unilateral conduct because it fits so squarely into the body of prior criminal Section 2 case law.[59] As in the majority of pre-1977 cases, the Department in *Martinez* brought Section 2 conspiracy to monopolize charges in conjunction with Section 1 charges for a completed *per se* conspiracy to fix prices and did not allege any standalone Section 2 unilateral conduct violations.[60] Moreover, the case involved flagrant ancillary criminal conduct like that in *Union-Pacific Produce Co.* or *Empire Gas Corp*.[61]

Defendants May Have Colorable Challenges to Section 2 Indictments as Unenforceable Under the Void for Vagueness Doctrine.

When a criminal statute fails to adequately define its prohibitions, it violates a "basic principle of due process," and that statute is void for vagueness.[62] The "void for vagueness" doctrine requires all criminal statutes to provide "a reasonable opportunity to know what is prohibited, so that [a person] may act accordingly."[63] Early Supreme Court precedent explained the vagueness test as requiring that every person "be able to know with certainty when he is committing a crime."[64] A statute is unconstitutionally vague if (1) "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "it authorizes or even encourages arbitrary and discriminatory enforcement."[65]

Early 20th Century Sherman Act criminal indictments asserted void for vagueness arguments to no avail. In *Nash*, brought in the early 1910s, defendants were convicted of conspiracy in restraint of trade and conspiracy to monopolize under Sections 1 and 2 of the Sherman Act.[66] However, defendants maintained that the Sherman Act itself lacked specificity as to the criminal conduct it prohibited and was therefore vague and unenforceable.[67] The Supreme Court rejected this argument and explained that these conspiracies inherently required an intent to unduly restrict competition.[68] The intent to "unduly restrict competition" inherent in the challenged conduct mitigated the vagueness concern.[69] The Court held that the Sherman Act could define guilt and innocence in terms of "undue" restrictions without failing for vagueness.[70]

Early prosecutions under the Department's recent policy shift to begin criminally enforcing certain no-poach and wage-fixing agreements under Section 1 also drew void for vagueness challenges. In *Jindal*, the first case to reach trial following the adoption of the Department's new policy,[71] the defendant argued not that the Sherman Act itself was unconstitutionally vague, but that the new application to no-poach and wage-fixing agreements violated the fair notice requirement.[72] The Eastern District of Texas rejected the argument, explaining that the defendant had "more than sufficient notice" that his conduct was *per se* illegal pursuant to Section 1 of the Sherman Act.[73] The *Jindal* court made it clear that "it is immaterial that there is no litigated fact pattern precisely on point" [74] as long as prior decisions gave "reasonable warning" that the conduct was criminal.[75] The court pointed to "numerous district court decisions holding that agreements to fix the compensation of employees are *per se* unlawful," an analytic framework that had for decades supported criminal Section 1 violations. Accordingly, the new application of that *per se* framework to labor-side wage fixing, as opposed to consumer-side price fixing, was not unconstitutionally vague.[76]

A few months after *Jindal*, a defendant in *Manahe* raised a similar argument following a federal grand jury indictment that Manahe and his co-conspirators were engaging in a wage-fixing and no-poach conspiracy.[77] One defendant moved to dismiss the indictment on grounds that Section 1 of the Sherman Act is void for vagueness and therefore violated his due process rights.[78] The District of Maine cited the *Jindal* opinion to deny the defendant's motion.[79] The court explained that Section 1 clearly forbids agreements that limit independent decision making on price, regardless of whether expressed in prices to consumers or wages for employees.[80]

Significantly, the Department also gave prior notice of the kind of conduct it would prosecute criminally in the "Antitrust Guidance for Human Resource Professionals."[81] Notwithstanding a substantial body of modern precedent on the treatment of horizontal agreements among competitors to fix prices or allocate a market, the Department crafted context-specific guidance for HR professionals concerning potentially unlawful "agreements regarding the terms of employment with firms that compete to hire employees."[82]

The "Antitrust Guidance" document provides clear guardrails, stating that:

An individual is likely breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or
- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements).[83]

The Department's guidance provides further clarity by defining "naked wage-fixing" and "no-poaching."[84]

With Section 2 charges back on the menu, courts may soon have an opportunity to revisit void for vagueness arguments in criminal antitrust enforcement. In the absence of any further guidance, the Department runs a meaningful risk that charges could be held unconstitutionally vague under either prong of the test outlined above. As to the first prong, for the reasons described above, neither precedent nor Department publications provide meaningful guidelines for distinguishing ordinary Section 2 unilateral conduct violations from criminal ones. And both precedent and the Department's recent remarks could be construed to indicate the potential for arbitrary or discriminatory enforcement. Powers's description of prior Section 2 cases as involving "flagrant" conduct—although certainly an apt characterization given Section 2 precedent involving actual or attempted violence against competitors—reveals a degree of subjectivity that stands in contrast to the relatively bright line between ordinary Section 1 violations and *per se* violations that might support criminal charges. The absence of clear prospective guidance to define what constitutes "flagrant" conduct may run afoul of the constitutional requirement to provide guardrails to govern law enforcement and avoid arbitrary enforcement.[85]

Conclusion.

The Department's announcement that it will once again criminally prosecute Section 2 offenses has justifiably provoked questions from the defense bar. The Department's assertion that there is sufficient criminal Section 2 precedent to guide firms does little to answer those questions. While there is indeed some precedent for tagalong Section 2 charges for the kind of conduct that has continued to be charged criminally under Section 1, precedent concerning single-firm conduct in the absence of related coordinated conduct is sparse at best. The Department's first case—a standalone guilty plea for an unsuccessful attempt to reach the kind of agreement that could have been prosecuted under Section 1 if actually reached—appears to modestly extend the reach of criminal liability beyond Section 1, but developments in Section 2 case law over the past several decades make the scope of that extension unclear. The Department should reconsider its reluctance to offer formal guidance if it intends to prosecute such cases criminally under Section 2, as it is uncertain whether the existing body of precedent would be enough to withstand a challenge that criminal Section 2 charges are void for vagueness. ■

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[1] Dept. of Justice, *Executive Pleads Guilty to Criminal Attempted Monopolization*, (Oct. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

[2] 15 U.S.C. § 2.

[3] Dept. of Justice, *Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border*, (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0.

[4] See Remarks of Dep. Assistant Att'y Gen. Richard Powers at American Bar Association White Collar Conference (Mar. 2, 2022).

[5] Remarks of Dep. Assistant Att'y Gen. Richard Powers at Panel Discussion on Jun. 7, 2022, *available at* United States: Cartel Corner (Sept. 9, 2022).

[6] *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) ("The degree of vagueness tolerated in a statute varies with its type: economic regulations are subject to a relaxed vagueness test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all.").

[7] See 15 U.S.C. §§ 1, 2.

[8] Joseph Matelis & Daniel Richardson, *Cover Story: Criminal Enforcement of Section 2 of the Sherman Act*, 36 Antitrust ABA 61, 65 (2022); U.S. Dep't of Justice, Antitrust Div., An Antitrust Primer for Federal Law Enforcement Officials 2 (April 2005), *available at* https://appliedantitrust.com/03_criminal/doj_materials/antitrust_primer.pdf. [hereinafter, 2005 Primer]. ("Violations of Section 2 are generally not prosecuted criminally. Criminal prosecution is warranted, however, in circumstances where violence is used or threatened as a means of discouraging or eliminating competition, such as cases involving organized crime.").

[9] *Id*.

[10] *American Tobacco v. United States*, 328 U.S. 781, 791 (1946).

[11] *Id*. at 783.

[12] *Id*. at 784.

[13] *Id*. at 797.

[14] *United States v. Wayne Pump Co*., 44 F. Supp. 949, 954 (N.D. Ill. 1942).

[15] *Id*.

[16] *Id*. at 959.

[17] *United States v. Wayne Pump Co.*, 317 U.S. 200, 202 (1942).

[18] *Id*.

[19] *United States v. Chas. Pfizer & Co.*, 367 F. Supp. 91, 94 (S.D.N.Y. 1973).

[20] *Id*. at 98.

[21] *Id*. at 101.

[22] *Id*. at 96.

[23] *Id*. at 101.

[24] *Id*.

[25] Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment*, 84 Antitrust ABA 754, 756 (2022).

[26] *Id*. at 765.

[27] See *United States v. Container Corp. of Am.*, 273 F. Supp. 18, 29 (M.D.N.C. 1967). In the unilateral conduct context, criminal charges in *United States v. Barrett Co.* (S.D.N.Y. 1939) were subject to a *nolle prosequi* filing following civil settlement. Crane, *supra* note 25 at 767.

[28] *United States v. General Motors Corp.*, 216 F. Supp. 362 (S.D. Calif. 1963)). *See also* John J. Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 Tex. L. Rev. 1301, 1314, n.77 (1966-670, *available at* https://collections.lib.utah.edu/dl_files/24/be/24be2fa19740260e1c669b726cc0e00d31675003.pdf. ("Nonetheless, there is some evidence of an abuse of discretion by the Antitrust Division. For example, it has been

rumored that special sections have been set up from time to time within the Antitrust Division to watch one particular business entity. If this be true, it may result in over-zealous application of criminal sanctions and what can only be called a prostitution of the criminal sanction." (citing United *States v. General Motors Corp.*, 5 Trade Reg. Rep. 45,061 (1965) (nolle prosequi)));

[29] *See, e.g.*, *United States v. Safeway Stores, Inc.*, 20 F.R.D. 451, 453 (N.D. Tex. 1957) (government opposing *nolo contendere* plea in order to force a guilty plea for the benefit of later private litigants in civil actions).

[30] *See* Crane, *supra* note 25 at 767-75.

[31] *See, e.g.*, *United States v. Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227, 228 (N.D. Tex. 1959). In *Harte-Hanks*, the Department based attempted monopolization charges in substantial part on the allegation that defendant unlawfully acquired its failing competitor—and only local competitor. The Northern District of Teas found that procompetitive benefits outweighed the anticompetitive behavior, explaining that "even though there is a consolidation…a violation of the antitrust law does not necessarily follow." *Id.* at 228.

[32] Crane, *supra* note 25 at 767.

[33] *Id.* at 774.

[34] *Id.* at 768.

[35] *Id*. The description from this case in Crane apparently comes from a 1967 hearing related to failing newspapers (U.S. DEPARTMENT OF JUSTICE, SUMMARY OF ACTIONS BROUGHT BY THE UNITED STATES CHARGING NEWSPAPERS OR BROADCASTERS WITH VIOLATIONS OF THE ANTITRUST LAWS 1854 (Apr. 6, 1967), *available at* https://books.google.com/books?id=LGNFAQAAMAAJ&pg=PA1854&lpg=PA1854&dq=%22united+states+v.+Chattanooga+News-Free+Press%22&source=bl&ots=NytU1sFdD9&sig=ACfU3U2oYvXTMxUsjqfyDK2zyGmGoDqCdw&hl=en&sa=X&ved=2ahUKEwiq_ten2f77AhUxElkFHQeNABgQ6AF6BAgGEAI#v=onepage&q=%22united%20states%20v.%20Chattanooga%20News-Free%20Press%22&f=false.). The obscurity of this source underscores the difficulty of relying on these cases to guide modern enforcement.

[36] *United States v. Kansas City Star Co.*, No. 18-444, U.S. Dist. LEXIS 3688 (W.D. Mo. Jan. 28, 1954).

[37] *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957).

[38] *Id.* at 657.

[39] *Times-Picayune v. United States*, 345 U.S. 594, 614 (1953).

[40] *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

[41] *Kansas City Star Co.,* 240 F.2d at 658.

[42] *Times-Picayune*, 345 U.S. at 606.

[43] *See Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006) (describing an evolution of the Supreme Court's view of tying arrangements away from "strong disapproval" to a view that "tying arrangements may well be procompetitive").

[44] The Supreme Court most recently spoke to the standard for *per se* tying violations in *Jefferson Parish Hosp. Dis. No. 2 v. Hyde*, which held that *per se* treatment requires a showing that the seller has market power. 466 U.S. 2, 28-29 (1984). Even after *Jefferson Parish*, some circuit courts have further required a showing of anticompetitive effects to sustain a *per se* tying claim. *See, e.g.*, *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1338 (Fed. Cir. 2010).

[45] *Jefferson Parish*, 466 U.S. at 19.

[46] *See United States v. Microsoft Corp.*, 253 F.3d 34, 84-97 (D.C. Cir. 2001).

[47] *See, e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 999-1000 (9th Cir. 2010) ("[P]roduct improvement by itself does not violate Section 2, even if it is performed by a monopolist and harms competitors as a result.").

[48] *United States v. Safeway Stores, Inc.*, 20 F.R.D. 451, 453 (N.D. Tex. 1957).

[49] Crane, *supra* note 25, at 772-73.

[50] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). ("[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

[51] Remarks of Dep. Assistant Att'y Gen. Richard Powers at Panel Discussion on Jun. 7, 2022, *available at* United States: Cartel Corner (Sept. 9, 2022).

[52] *Id*.

[53] Pub. L. 100-185, § 6, 101 Stat. 1279 (1987) (codified at 18 U.S.C. § 3571).

[54] U.S. Dept. of Justice, *Executive Pleads Guilty to Criminal Attempted Monopolization*, (Oct. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

[55] U.S. Dep't of Justice, Antitrust Div., An Antitrust Primer for Federal Law Enforcement PERSONNEL (aPRIL 2022), *available at* https://www.justice.gov/atr/page/file/1091651/download. [hereinafter, 2022 Primer].

[56] *United States v. Am. Airlines*, 743 F.2d 1114 (5th Cir. 1984).

[57] *See, e.g.*, *Midwest Gas Servs. v. Ind. Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003).

[58] The charge sheet in *Zito* does allege that the defendant's company would have gained monopoly power in markets for highway crack sealing services in Montana and Wyoming but does not contain detailed allegations to support the existence of such narrow geographic markets. Indeed, the fact that an agreement was necessary to divide territories would appear to suggest that the relevant geographic market might be broader.

[59] U.S. Dept. of Justice, *Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border*, (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0.

[60] *Id*.

[61] *Id*.

[62] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[63] *Id*.

[64] *United States v. Reese*, 92 U.S. 214, 217 (1875).

[65] *Johnson v. United States*, 576 U.S. 591, 629 (2015).

[66] *Nash v. United States*, 229 U.S. 373, 376 (1913).

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*. at 377.

[71] *United States v. Jindal*, No. 4:20-CR-00358, 2021 U.S. Dist. LEXIS 227474, at *28 (E.D. Tex. Nov. 29, 2021).

[72] *Id*. at *30. Although the court rejected defendant's argument, the jury later acquitted him of all Sherman Act violations. *United States v. Jindal*, No.4:20-CR-00358-ALM, 2022 U.S. Dist. LEXIS 143717, at *2 (E.D. Tex. Aug. 11, 2022).

[73] *Id*. at *30.

[74] *Id.* at *31 (quoting *United States v. Kinzler,* 55 F.3d 70, 74 (2d Cir. 1995)).

[75] *Id*.

[76] *Id*. at *30.

[77] *United States v. Manahe*, No. 2:22-cr-00013-JAW, 2022 U.S. Dist. LEXIS 140154, at *22 (D. Me. Aug. 8, 2022).

[78] *Id*. at *28.

[79] *Id*. at *29.

[80] *Id*. at *30.

[81] U.S. Dep't of Justice, Antitrust Div., ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (OCT. 2022), *available at* https://www.justice.gov/atr/file/903511/download.

[82] *Id*. at 2.

[83] *Id*. at 3.

[84] *Id*.

[85] *Smith v. Goguen*, 415 U.S. 566, 574 (1974) ("In some cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.").