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Martin J. Adelman
Wayne State University

Ernie L. Brooks
McGlynn, Reising, Milton & Ethington, Troy, MI

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THE INTEGRITY OF THE ADMINISTRATIVE PROCESS, SHERMAN SECTION 2 AND PER SE RULES--LESSONS OF FRAUD ON THE PATENT OFFICE

MARTIN J. ADELMAN†

ERNIE L. BROOKS‡

Although the Supreme Court intimated in *United States v. Singer Manufacturing Co.*[1] that improper conduct before an administrative agency calculated to exclude competitors is an antitrust violation, it was not until the Court decided *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*[2] that the existence of such a violation was assured. *Walker Process* is a patent case, and though courts have considered the new antitrust law of

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†Partner, McGlynn, Reising, Milton & Ethington, Troy, Michigan. Adjunct Professor of Law, Wayne State University. A.B. 1958, M.S. 1959, J.D. 1962, University of Michigan.—ED.

‡Associate, McGlynn, Reising, Milton & Ethington, Troy, Michigan. B.E.E. 1967, General Motors Institute; M.S. 1967, Purdue University; J.D. 1972, Wayne State University.—ED.

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1. 374 U.S. 174 (1963). Justice White observed in his concurring opinion:

> Whatever may be the duty of a single party to draw the prior art to the [Patent] Office's attention, clearly collusion among applicants to prevent the prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibition against conspiracies in restraint of trade—if not bad *per se*, then such agreements are at least presumptively bad. The patent laws do not authorize, and the Sherman Act does not permit, such agreements between business rivals to encroach upon the public domain and usurp it to themselves.

Id. 200 (citations omitted).

2. 382 U.S. 172 (1965).

exclusion by administrative abuse in relation to other agencies,[3] the focus has been on the Patent Office.[4] Recently administrative abuse as the basis for an antitrust claim received Supreme Court impetus in areas other than patents in *California Motor Transport Co. v. Trucking Unlimited*,[5] and such claims are bound to be considered with increased frequency in view of the Court's narrow treatment of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[6] and *United Mine Workers v. Pennington.*[7] As yet,

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3. Israel v. Baxter Laboratories, Inc., ___ F.2d ___ (D.C. Cir. May 17, 1972) (Civil No. 24,622) (abuse by drug sellers of agency to influence it to deny fair consideration for license to market competing drug); Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971) (intimidation of state fair officials to bar competing soft drink concessionaire); Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (deception of state officials to reduce gas production allowance of competitors); Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755 (9th Cir. 1970), *aff'd,* 404 U.S. 508 (1972) (see note 5 *infra);* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970) (subversion of state competitive bidding process by improperly influencing drafters of specifications in order to exclude a competitor). *See generally* Comment, *Antitrust Immunity: Recent Exceptions to the Noerr-Pennington Defense,* 12 B.C. IND. & COM. L. REV. 1133 (1971).

4. *See generally* Smith, *Fraud upon the Patent Office as a Violation of the Sherman Antitrust Law,* 14 IDEA 507 (1971).

5. 404 U.S. 508 (1972). *Trucking Unlimited* concerns a conspiracy to exclude competitors by instituting actions without probable cause in state and federal proceedings to defeat applications concerning operating rights. On reviewing this conspiracy the Supreme Court refused to exempt the conspiracy from antitrust proscription. The case is perceptively analyzed in Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited,* 29 WASH. & LEE L. REV. 209 (1972).

6. 365 U.S. 127 (1961). In *Noerr,* the railroads and the truckers were involved in a dispute. The railroads initiated a publicity campaign intended to influence the legislature to pass antitrucker legislation. It was alleged that the railroads intended to destroy the truckers as competitors in violation of the Sherman Act. The Court stated:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce restraint or monopoly.
>
> . . . .
>
> . . . The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

neither the elements nor the underlying theory of the antitrust law of administrative abuse have been fully articulated by the courts.[8] In this Article we offer a coherent body of doctrine for the antitrust law of administrative abuse drawing on the facts and experiences of the decided cases.

Under settled antitrust principles improper action before an administrative agency designed to exclude competitors is a per se violation of Section 1 of the Sherman Act[9] if undertaken by two or more parties acting in concert.[10] Conversely a party acting alone is not subject to Section 1 if he excludes competitors through administrative abuse. Such abuse, therefore, has been particularly troublesome for the courts. Our conclusion is that administrative abuse by a party acting alone, if it is designed to and does in fact exclude competitors, is monopolization proscribed by Section 2 of

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Id. 136, 139.

7. 381 U.S. 657 (1965). In *Pennington,* there was an alleged effort by large mine operators and union officials to eliminate small companies by persuading the Secretary of Labor to set higher minimum wage standards for companies selling coal to the T.V.A. on long term contracts. The Court stated:

> Joint efforts to influence the public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Id. 670.

The two exemptions set forth in *Noerr* (discussed note 6 *supra)* and *Pennington* are commonly referred to jointly as the *Noerr-Pennington* doctrine.

8. Failing to place the antitrust law of administrative abuse on a solid foundation, courts have confused its application by considering other antitrust doctrines in conjunction with it. For example, when the challenged action concerns a state agency, courts have blurred the question of whether there has been an antitrust violation by administrative abuse with the antitrust exemption for state action. This latter exemption is the so-called *Parker* exemption of Parker v. Brown, 317 U.S. 341 (1943). Clearly whether *proper* conduct involving a state agency should be exempt from the antitrust law pursuant to *Parker* does not control whether *abuse* of the agency should be exempt from the antitrust law pursuant to the *Noerr-Pennington* doctrine. *See generally* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation,* 39 ANTITRUST L.J. 950 (1970); Oppenheim, *supra* note 5.

Cf. Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir.), *cert. denied,* 404 U.S. 1047 (1971). *But see* Handler, *Twenty-Fourth Annual Antitrust Review,* 72 COLUM. L. REV. 1, 4-18 (1972).

9. 15 U.S.C. § 1 (1970) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . . .

10. *Cf.* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

the Sherman Act.[11] Further we conclude that this monopolization via administrative abuse is a per se violation having the following elements:

(1) A unilateral act performed to influence an administrative agency to take exclusionary action toward a competitor, provided that the unilateral act is not exempt from the antitrust law on constitutional grounds or on the grounds that proscribing the act interferes with the agency's proper operations; and
(2) Exclusionary action by the agency toward a competitor of the type the unilateral act was calculated to induce, provided that the agency's exclusionary action is not demonstrably and indubitably correct.

We argue in this Article that the above elements are all that are required for a Section 2 violation in the new antitrust area of administrative abuse. To this end we review the development of Section 2 of the Sherman Act to establish that per se rules are appropriate under this section for the same reasons they exist under Section 1. Second, we provide standards for exempting certain conduct before administrative agencies, notwithstanding exclusionary objectives. Third, we review the patent experience to date to demonstrate that the proposed per se rule is an appropriate vehicle for allaying confusion in the antitrust law of administrative abuse. Finally, using the patent experience to graphically illustrate exempt and non-exempt exclusionary conduct, we demonstrate that the proposed per se rule is applicable to cases claiming abuses of agencies other than the Patent Office.

I. SHERMAN SECTION 2 AND PER SE RULES

Since the Sherman Act was passed the focus has been on Section 1. Rule of reason principles and per se rules have concurrently evolved under Section 1, with some practices initially tested under the rule of reason ultimately becoming per se violations.[12] In

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11. 15 U.S.C. § 2 (1970) provides:
Every person who shall monopolize, or 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, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

12. For example, the rule of reason approach of White Motor Co. v. United States, 372 U.S. 253 (1963), was converted to a per se approach in United States v.

essence the basis for per se rules under Section 1 is simply the recognition that certain conduct is so pernicious that it cannot possibly be justified on rule of reason principles.[13] Accordingly, that conduct is proscribed per se with a resulting benefit to businessmen and the courts. Businessmen benefit by the definitive guidance afforded by per se rules; courts benefit by avoiding perilous and protracted proofs at trial. In contrast Section 2 remains largely obscure. No demarcation exists between per se violations and rule of reason violations, *i.e.*, violations requiring an extensive market analysis. In fact there is lively debate as to whether Section 2 proscribes conduct, performance, or structure.[14] We submit that Section 2 proscribes conduct, as does Section 1.[15]

Arnold Schwinn & Co., 388 U.S. 365 (1967). *Cf.* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

13. *See* United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1 (1957). *See generally Northern, supra,* where the Court stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States." Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.
>
> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id. 4-5 (citations omitted).

14. For an elaborate review of the various theories of Section 2 see G. HALE & R. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT (1958).

15. For an excellent review of the significance of conduct under Section 2 see Turner, *Antitrust Policy and the Cellophane Case,* 70 HARV. L. REV. 281 (1956). Since Professor Turner believed that *Cellophane* (United States v. E.I. du Pont de Nemours

A conduct interpretation was adopted at an early date by the Supreme Court in *Standard Oil Co. v. United States.*[16] This construction of Section 2 was applied in all cases decided in the first great era of antitrust enforcement, an era that closed with *United States v. United States Steel Corp.*[17] The focus of Section 2 shifted perceptibly away from conduct 25 years later in *United States v. Aluminum Co. of America.*[18] In *Aluminum Co. of America (Alcoa),* Judge Hand focused on market considerations with particular concern for the appropriate "relevant market." Since Alcoa's conduct was not per se predatory,[19] the exclusionary effects of the conduct

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& Co., 351 U.S. 377 (1956)) foreclosed a definition of monopolization based on exclusionary predatory conduct, he argued that such conduct is proscribed as an *attempt* to monopolize. Under Professor Turner's view a successful attempt to monopolize, as he defines it, does not of necessity constitute the offense of monopolization. Thus predatory price cutting pursued to exclude a competitor is, in his view, an illegal attempt to monopolize, even though there is no monopolization if the competitor is driven from the market unless the price cutter has monopoly power in a relevant market. In general Professor Turner's view has not received judicial acceptance. *See* Hibner, *Attempts to Monopolize: A Concept in Search of Analysis,* 34 ANTITRUST L.J. 165 (1967).

After a full review of the relevant cases and commentators, Judge Watkins explains his rejection of Professor Turner's view as follows:

> It seems to this court clear, both on authority and logic, that when a charge is made of attempt to monopolize, the first question would be—"to monopolize what?" The answer would seem to be "the relevant market, toward the monopolization of which the attempt was directed." Were this not so, there would be the anomaly that a defendant could be punished for attempting to do what, if accomplished, would be legal. That is, if a defendant in fact acquired a position in a relevant market that did not amount to monopoly, how could it be wrongful for a defendant to attempt, successfully or unsuccessfully to acquire that position—i.e., to try to do that which if accomplished would be valid?

Diamond Int'l Corp. v. Walterhoefer, 289 F. Supp. 550, 576-77 (D. Md. 1968) (footnote omitted).

In contrast, we contend that exclusionary predatory conduct, if successful, is by definition monopolization. Exclusionary predatory conduct not yet successful is an attempt to monopolize if the test of Swift & Co. v. United States, 196 U.S. 375 (1905), is met.

16. 221 U.S. 1 (1911).

17. 251 U.S. 417 (1920).

18. 148 F.2d 416 (2d Cir. 1945).

19. See Judge Wyzanski's discussion of *Alcoa* in United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954):

> In [*Alcoa*] Judge Hand, perhaps because he was cabined by the findings of the District Court, did not rest his judgment on the corporation's coercive or immoral practices. Instead, adopting an economic approach, he defined the appropriate market, found that Alcoa supplied 90% of it, determined that this control constituted a monopoly, and ruled that since Alcoa established

had to be judged in the context of the market. *Alcoa* was approved in *American Tobacco Co. v. United States,*[20] and its focus on "relevant market" dominated an ensuing series of Section 2 cases.

Judge Wyzanski held that conduct which was not per se unlawful had an unlawful exclusionary effect judged in the context of the market and the facts at hand in *United States v. United Shoe Machinery Corp.*[21] Similarly, a detailed market analysis was required in *United States v. E.I. du Pont de Nemours & Co.,*[22] the cellophane case, to determine whether acts, neutral on their face, were exclusionary when judged in the context of the "relevant market." *United States v. Grinnell Corp.*[23] concerned mergers in the central station protective service business. Since the mergers were not necessarily predatory and therefore not per se exclusionary, it was again necessary to launch an extensive inquiry in terms of the "relevant market."

It is imperative to recognize that each of the foregoing cases is a rule of reason case under Section 2[24] and, as such, "relevant market" plays a central role in each. But "relevant market" is not central to all Section 2 offenses. Predatory exclusionary practices are appropriately treated as per se violations of Section 2 without reference to any "relevant market."[25]

> this monopoly by its voluntary actions, such as building new plants, though, it was assumed, not by moral derelictions, it had "monopolized" in violation of § 2. Judge Hand reserved the issue as to whether an enterprise could be said to "monopolize" if its control was purely the result of technological, production, distribution, or like objective factors, not dictated by the enterprise, but thrust upon it by the economic character of the industry; and he also reserved the question as to control achieved solely "by virtue of . . . superior skill, foresight and industry." At the same time, he emphasized that an enterprise had "monopolized" if, regardless of its intent, it had achieved a monopoly by manoeuvres which, though "honestly industrial," were not economically inevitable, but were rather the result of the firm's free choice of business policies.

Id. 341.

20. 328 U.S. 781 (1946).
21. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).
22. 351 U.S. 377 (1956).
23. 384 U.S. 563 (1966).
24. The rule of reason approach to the Sherman Act initially announced in Standard Oil Co. v. United States, 221 U.S. 1 (1911), has been consistently applied to both Section 1 and Section 2. *See* ATT'Y GEN. COMM. TO STUDY THE ANTITRUST LAWS, REPORT 5-12 (1955). Experience under Section 1 has exposed practices considered per se unreasonable without marketing inquiry. See note 13 *supra.* No corresponding development has accompanied Section 2.
25. A review of the decided cases suggests that the extent of the market defining

Domination of Section 2 by rule of reason cases has cast "relevant market" problems and considerations in a role central to all Section 2 offenses.[26] But the Supreme Court defined monopoly

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the "relevant market" contracts as the predatory character of the exclusionary practices increases. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 n.23 (1956). One commentator, Hibner, *supra* note 15, at 168, reports this epigram:

> "The scope of the relevant market contracts and expands in direct proportion to the viciousness of the overt acts alleged."

Carried to the extreme, this approach permits a market definition, or relevant market, co-extensive with the exclusionary practices. For example, in Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), the court defined the relevant market to be co-extensive with the scope of the predatory practice alleged. Clearly the relevant market defined as a matter of law by the court—one gas producing field—bore no relation to the economic definition required by *du Pont*. The Fifth Circuit explained its reluctance to apply an economic market definition by quoting from Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289 (D. Col. 1969):

> "However, in our opinion, such analysis is unnecessary in this case and the 'relevant market' is in that sense irrelevant. We have here a practice illegal in itself, operation of the pipelines as private carriers, a purpose and the obvious natural effect of which was to exclude nonlocal competition from the crude supply which Shell badly needed. When one must 'look' for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further."

438 F.2d at 1306, *quoting* 306 F. Supp. at 304.

We agree with the reasoning of the Fifth Circuit, but we believe that instead of limiting relevant market as a matter of law, it should in the appropriate case be removed from consideration. Our approach has the advantage that the existence of monopoly power is established without distorting the economic concept of relevant market, a concept useful in rule of reason cases under Section 2.

26. "[T]he policy unequivocally laid down by the [Sherman] Act is competition." Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1957). *See, e.g.*, ATT'Y GEN. COMM., *supra* note 24, at 11 (1955):

> While the words "restraint of trade" and "monopolize" used in Sections 1 and 2 take their initial meaning from pre-1890 common and statutory law, they are redefined to effectuate a statutory policy of protecting the public against wrongs which the Congress thought might flow from situations, popularly called "monopoly," where competition—by whatever means—was unduly limited. The Standard Oil opinion defines the object of the Sherman Act, as well as the common law, as the prohibition of all "contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition," and of acts "producing or tending to produce the consequences of monopoly."

power in the *du Pont* cellophane case and again in *Grinnell* as simply "the power to control prices or exclude competition."[27] Monopoly power is the proper focus under Section 2. As noted by the Court in *Grinnell,* "[t]he existence of such power ordinarily may be inferred from the predominant share of the market."[28] Accordingly, if there is doubt concerning the existence of monopoly power, an inquiry into the "relevant market" is essential. However, if the power to raise prices or exclude competitors exists, monopoly power exists by definition. Although it is unnecessary to analyze the "relevant market" to infer monopoly power when the power to exclude competitors exists, the Supreme Court discussed "relevant market" problems in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,*[29] pretermitting the primary test and the fact that it established monopoly power.

In *Walker Process* the patentee had obtained a patent by deliberately making false statements to the Patent Office. The patentee knew that if the Patent Office were given the facts, the patent would not have been granted. The patentee then excluded, or attempted to exclude, competitors by asserting the invalid patent. On these facts the Supreme Court declined to find a per se violation of Section 2.[30] Following the "relevant market" rubric of the rule of reason cases discussed above, the Supreme Court suggested

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The per se violation of Section 2 we propose in this Article is anchored directly to the free market goal of the Sherman Act. If a party undertakes to artificially limit competition by subverting an administrative agency and the agency takes the exclusionary action sought, the offense of monopolization under Section 2 is complete. Although "relevant market" analysis is useful to determine the market impact, *i.e.,* the effect on competition, of practices judged by rule of reason standards, it simply is not necessary when the effect on competition is apparent on the face of the facts. It is possible that "relevant market" thinking is even misleading in the latter case.

27. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (the cellophane case).

28. 384 U.S. at 571.

29. 382 U.S. 172 (1965).

30.

> As respondent points out, Walker has not clearly articulated its claim. It appears to be based on a concept of *per se* illegality under § 2 of the Sherman Act. But in these circumstances, the issue is premature. As the Court summarized in *White Motor Co. v. United States,* 372 U.S. 253 (1963), the area of *per se* illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences.

Id. 178.

in dicta that Section 2 was not violated unless the patent obtained were broad enough to encompass a "relevant market."[31]

At the time *Walker Process* reached the Supreme Court, the Court was so accustomed to inferring monopoly power from the percentage share of the "relevant market" that it failed to apply the primary test of exclusion. On its facts *Walker Process* presents a situation proving monopoly power. Without question the patentee had the power to exclude competitors, *i.e.*, it held a patent which foreclosed competitors from the market defined by that patent. Patent theory preempts argument whether a patent gives its owner the power to exclude competitors. The bare existence of the patent and its assertion satisfies the primary test of monopoly power, thereby avoiding the necessity of secondary tests. In such a case secondary tests are only useful to resolve the question of damages.

In *Walker Process*, the Court refused to find a per se violation on the pleadings. An affirmance of the *Walker Process* dicta on a full record would make the concept of "relevant market" (useful in assessing the legality of acts which may only be exclusionary when employed by one having considerable market power) a vehicle in which one who subverts an administrative proceeding to exclude competitors may escape. *Walker Process* is reminiscent of *White Motor Co. v. United States*,[32] cited in the *Walker Process*

31.

> To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. It may be that the device—knee-action swing diffusers—used in sewage treatment systems does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof, as is the amount of damages suffered by Walker.

Id. 177-78.

Cases since *Walker* have generally required a relevant market analysis. *See, e.g.*, Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); Beckman Instruments, Inc. v. Chemtronics, Inc., 428 F.2d 555 (5th Cir.), *cert. denied*, 400 U.S. 956 (1970); Acme Precision Prod., Inc. v. American Alloys Corp., 422 F.2d 1395 (8th Cir. 1970), *opinion on remand*, SCM Corp. v. Radio Corp. of America, 318 F. Supp. 433 (S.D.N.Y. 1970); Dole Valve Co. v. Perfection Bar Equip., Inc., 311 F. Supp. 459 (N.D. Ill. 1970); Malco Mfg. Co. v. Elco Corp., 307 F. Supp. 1177 (E.D. Pa. 1969); Diamond Int'l Corp. v. Walterhoefer, 289 F. Supp. 550 (D. Md. 1968).

32. 372 U.S. 253 (1963). In *White Motor*, after reviewing vertical territorial restraints, the Court refused to apply a per se rule to them because:

opinion. Both cases make it clear that the Supreme Court prefers a full record when announcing per se rules. In *United States v. Arnold Schwinn & Co.*,[33] where there was a full record directed to the practices attacked in *White Motor*, the Court embraced a per se rule encompassing the *White Motor* facts.[34] Similarly, we believe the Court will rule on a full record that administrative abuse which excludes competition is a per se violation of Section 2. "Relevant market" is superfluous to the inquiry since the primary test of monopoly power—whether there is power to control prices or exclude competitors—provides an answer for the Court.

In summary, recognizing Section 2 as the complement of Section 1 forces the conclusion that certain pernicious conduct should be subject to per se proscription under Section 2.[35] Since one test of monopoly power is the power to exclude competitors, conduct intended to exclude competitors should be proscribed per se if there is no possible justification for that conduct. For example, absent justification, subversion of administrative processes with the intent to exclude competitors should be proscribed per se. Thus, a patent applicant's fraud on the Patent Office should support an action under Section 2 as a per se violation.[36] Further, any conduct specifically designed to exclude competitors should be, if successful, per se monopolization.

> We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" and therefore should be classified as *per se* violations of the Sherman Act.

Id. 263 (citation omitted).

33. 388 U.S. 365 (1967).

34.

> As the District Court held, where a manufacturer sells products to his distributors subject to territorial restrictions upon resale, a per se violation of the Sherman Act results. . . . Such restraints are so obviously destructive of competition that their mere existence is enough.

Id. 379.

35. This proposed per se rule must be distinguished from the suggestion found in Judge Wyzanski's opinion in United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966), where the court suggested that once monopoly power is shown in a rule of reason case, it is presumed that such power resulted from or is maintained by exclusionary conduct. This suggestion is analyzed in Note, *Section 2 of the Sherman Act—Is a Per Se Test Feasible?*, 50 IOWA L. REV. 1196 (1965).

36. *Cf., e.g.,* United States v. Union Camp Corp., Civil No. 5005A (E.D. Va. complaint filed Nov. 4, 1968); United States v. Union Camp Corp., Criminal No. 4558 (E.D. Va. indictment filed Nov. 30, 1967). Similarly, enforcement of a patent known to be invalid is fraud on the courts and should be treated in a like fashion.

Conversely, rule of reason principles should apply to Section 2 conduct which may be justifiable. Various factors should have significance here. For example, the question of "relevant market" should be reviewed in the context of rule of reason cases where it is necessary to measure an alleged monopolist's market power in order to judge whether its conduct was in fact exclusionary. In short, resort to secondary tests is appropriate for rule of reason cases.

II. EXEMPT EXCLUSIONARY CONDUCT

Certain conduct before administrative agencies is wholly exempt from the antitrust law notwithstanding an intention to exclude competitors.[37] The *Noerr-Pennington* doctrine defines one such exception.[38] A further example is afforded by consideration of the patent law. Although patents are effective to exclude competitors from the defined area of endeavor, patent applicants are exempt from attack under the antitrust law with respect to conduct appropriate to securing their patent grants.[39] However, the *Noerr- Pennington* doctrine is not without limitation, as *Trucking Unlimited* makes clear.[40] Nor is the patent exemption absolute, as evidenced by *Walker Process*.

Similar exemptions and limitations can be descried for other administrative agencies. Appropriate conduct before the respective agency is necessarily dependent on the function of the agency. Furthermore the limits of the exempt conduct likewise depend on the agency and its area of action. Administrative action can center on licensing,[41] the existence of exclusive rights,[42] the distribution

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37. Such exemptions are not expressly found in the antitrust laws but, like all implied exemptions, are created in order to permit the execution of other governmental policies. Aside from the constitutional implications, agencies could not properly function if parties could not appear before them to present reasons why the agency should take official action which would have exclusionary effects.

38. See notes 6 & 7 *supra*.

39. The operation of exemptions from antitrust in the field of patents is discussed in depth in Adelman & Jaress, *Patent-Antitrust Law: A New Theory*, 17 WAYNE L. REV. 1 (1971). *See also* Walker Process Equip., Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 179 (1965) (Harlan, J., concurring); Troxel Mfg. Co. v. Schwinn Bicycle Co., ___ F.2d ___ (6th Cir. Aug. 11, 1972) (Civil Nos. 72-1106-07).

40. See note 5 & accompanying text *supra*.

41. *E.g.*, the Food & Drug Administration, Civil Aeronautics Board, and Interstate Commerce Commission.

42. *E.g.*, the Patent Office.

of operating rights,[43] or regulation of price competition.[44] Conduct appropriately directed to administrative agencies is exempt from antitrust action if that conduct is properly limited to the function of the agency. On the other hand, if the conduct seeks to affect competition by subverting the administrative process, the conduct carries with it no antitrust exemption. Courts have found abuses in the deliberate clogging of the administrative process,[45] deliberate submission of false information (fraud),[46] and improper use of former agency personnel.[47] No doubt other abuses will come to be recognized, but as of now the most important abuse is fraud.

III. FRAUD ON THE PATENT OFFICE

The administrative agency charged with issuing patents is the Patent Office of the Department of Commerce.[48] It is responsible for examining patent applications and granting only patents which meet the statutory requirements.[49]

Patents are granted for novel developments only;[50] therefore, the Patent Office must ascertain the state of the relevant art before passing on the question of patentability. To this end the Patent Office strives to find all the pertinent evidence of relevant prior work, *i.e.*, the prior art. In the current age of technological complexity, the Patent Office, in the few hours it can devote to each patent application, cannot cull all the pertinent published prior art. Furthermore, certain types of unpublished prior art are simply unavailable to the Patent Office, *e.g.*, offers to sell or actual sales of devices, or public uses of processes.[51]

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43. *E.g.*, the Civil Aeronautics Board, Federal Communications Commission, and Interstate Commerce Commission.

44. *E.g.*, the Federal Power Administration, Interstate Commerce Commission, and Civil Aeronautics Board.

45. *E.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

46. See section III of this Article, *Fraud on the Patent Office, infra.*

47. *E.g.*, Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

48. 35 U.S.C. § 1 (1970).

49. U.S. CONST. art. I, § 8, cl. 8, enables Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress passed the first patent act pursuant to this provision in 1790. Currently, the patent law is found in Title 35 of the *United States Code,* enacted into positive law in 1952.

50. 35 U.S.C. § 102 (1970).

51. The Patent Office has an extensive collection of published prior art. Other than the rarely used public use proceeding authorized by 37 C.F.R. § 1.292 (Supp.

The difficulties inherent in overseeing the issuance of patents in brief ex parte proceedings are aggravated by the fact that patent applicants are represented by their advocates in Patent Office proceedings. Since the Patent Office has no method for checking the veracity of many technical assertions made by applicants, there is an obvious need for candor if the Patent Office is to perform its function. Accordingly, a duty of candor has been assigned applicants and their solicitors with respect to business transacted in the Patent Office.[52] *Walker Process* anchored this duty of candor to the antitrust law when it approved an action under the antitrust law based on misrepresentations or fraud in the Patent Office.

It can be argued that the administrative problems of the Patent Office, while important for the proper administration of the patent system, are of no concern to the antitrust law. But this is not so, since every invalid patent issued by the Patent Office can be used as a weapon to exclude competitors—a weapon which can be brandished in extremely expensive litigation.[53] There is no question that patents wrongly issued by the Patent Office owing to ignorance of the most pertinent prior art, or misjudgment with respect to the proper standard of invention, or other errors, result in substantial clogs on commerce in the United States.

The brute force method of dealing with the problem of invalid patents would be to simply strip away any immunity under the antitrust law for patents which ultimately prove to be invalid. Under this method any exclusionary action taken by the owner of an invalid patent would be subject to antitrust scrutiny.[54] However, this solution would effectively destroy the patent system because it would render all invalid patents void ab initio.[55] The effect would

1972), knowledge of *acts* such as public uses or sales is not available to the Patent Office.

52. *See* Kingsland v. Dorsey, 338 U.S. 318 (1949); Monsanto Co. v. Rohm & Haas Co., 456 F.2d 592 (3d Cir.), *cert. denied,* 407 U.S. 934 (1972); Norton v. Curtiss, 433 F.2d 779 (C.C.P.A. 1970); Beckman Instruments, Inc. v. Chemtronics, Inc., 428 F.2d 555 (5th Cir.), *cert. denied,* 400 U.S. 956 (1970); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

53. *See generally* Blonder Tongue v. University of Ill. Foundation, 402 U.S. 313 (1971).

54. In essence this would have been the effect of Judge Brown's decision in Troxel Mfg. Co. v. Schwinn Bicycle Co., 334 F. Supp. 1269 (W.D. Tenn.), *rev'd,* ___ F.2d ___ (6th Cir. Aug. 11, 1972) (Civil Nos. 72-1106-07), holding a licensor must return all royalties paid by a licensee if, at any time, the licensed patent is adjudicated invalid.

55. Fortunately the destructive void ab initio doctrine of the district court in *Troxel,* discussed note 54 *supra,* was rejected by the court of appeals. *Id.*

be that the owner of a duly issued patent could only enforce it free from exposure to antitrust liability if it ultimately survived a court challenge on the issue of validity. Every finding of invalidity would result in exposure to antitrust liability since no exemption would be available. Surely patent owners would only infrequently choose to assert and enforce them, and we could readily expect that the patent system would cease to present any major incentive for investment in technological innovation. Thus, for antitrust law and the law of patents to live peacefully, the antitrust exemption for validly issued patents cannot be withdrawn merely because a patent is subsequently declared invalid.[56]

Yet the Patent Office proceedings are ex parte and the opportunities for abuse by applicants are substantial. If an applicant abuses the administrative process and a patent is wrongly issued by the Patent Office, there is no reason to grant an exemption from the antitrust law. Accordingly, if the issuance of a patent is sought through fraudulent conduct and that patent is found on the facts to have been wrongly granted, the applicant should be subject to antitrust liability.

As an example, a clear case of abuse is found in *Walker Process*. In that case Walker Process asserted that Food Machinery (FMC) had obtained, maintained, and enforced a patent obtained by fraud on the Patent Office. The fraud consisted of filing for a patent more than one year after FMC had put the invention on sale or in public use. When the application was filed, the inventor signed an oath affirming that he was not aware of any public use or sale of the claimed invention more than one year before the filing date. If the allegations of Walker Process were true, this oath was necessarily false. If the oath filed were indeed false, it was indisputably material to the issuance of the patent: but for the false oath, no patent would have issued, since the public use more than one year before the filing date was a statutory bar. Furthermore, since the misrepresentation centered on dates within the knowledge of FMC, intent to defraud the Patent Office is properly imputed to it. In this circumstance there can be little question that a rule exempting FMC from the antitrust law is inappropriate. In fact,

56. An implied exemption from the antitrust law is recognized for the patent system, and this exemption provides shelter even though a patent is declared invalid by the courts, provided the patent was regularly and normally issued by the Patent Office. Under this exemption, businessmen are free from antitrust attack if they refrain from abusive practices before the Patent Office, and the Patent Office can effectively provide the incentive to technological innovation intended by Congress.

redress under the antitrust law is particularly appropriate for FMC's exclusionary conduct.

Whether antitrust law is appropriately applied in other instances involving abuse of Patent Office procedures depends on considerations not reached in *Walker Process*. First, assuming an affirmative misrepresentation, is it necessary that the misrepresentation caused the issuance of the patent? Second, is it necessary that the patent be invalid or may the antitrust exemption be withdrawn even though the patent is valid? Third, are there circumstances creating an affirmative duty to inform the Patent Office on relevant matters? If so, is the failure to inform the Patent Office an offense justifying withdrawal of the antitrust exemption?

It may be argued that the antitrust law is violated by acts of fraud that cause a valid patent to issue if the patent would not have issued but for the fraud. The irony of this argument is significant: It posits situations where a patent would not be granted by the Patent Office in the absence of fraud even though the Patent Office, if it were properly doing its job, would have issued the patent. For example, the Examiner wrongly takes a position subsequently overcome by the applicant through fraud. If the position of the Examiner were wrong, it is fair to assume the fraud merely advanced the time the patent issued. A contrary conclusion assumes that the Examiner, though wrong, would have been sustained on appeal in the Patent Office, and ultimately by the courts. Any restraints on competition resulting from the issuance of the patent in this case are a direct result of the underlying policy of the system whereby patents are issued for meritorious inventions.[57]

57. The distinction between the effect of fraud practiced on the Patent Office where the patent which ultimately issued proves to be *valid* rather than *invalid* is discussed in Corning Glass Works v. Anchor Hocking Glass Corp., 253 F. Supp. 461 (D. Del. 1966), *rev'd on other grounds*, 374 F.2d 473 (3d Cir.), *cert. denied*, 389 U.S. 826 (1967). In this case the court held an antitrust claim could not be based on a valid patent. Although fraud perpetrated to secure a valid patent should not attract the antitrust law, neither should the patentee be permitted to benefit from the fraud. Patent policy should be invoked to render the otherwise valid patent unenforceable in view of the fraud. This distinction was overlooked in the Seventh Circuit's decision in Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972), where the court found that abuse of the Patent Office rendered an otherwise valid patent invalid and also found an antitrust claim to be properly based in part on the assertion of admittedly valid patent claims.

Another example of judicial confusion is found in American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), where the court was faced with the issue of whether fraud on the Patent Office resulted in the issuance of a patent that had

Accordingly, fraud committed to secure the issuance of a valid patent should not forfeit the antitrust exemption.

A different situation obtains when fraud is practiced and the Patent Office issues an invalid patent. Of course the mere concurrence of fraud on the Patent Office and the issuance of an invalid patent does not necessarily forfeit the antitrust exemption ipso facto. Since patents which are in fact invalid may have issued independent of any fraud, some courts have held that the antitrust exemption is forfeited and an antitrust offense established only when the invalid patent would not have issued *but for* the fraud.[58] Speculation inheres in this view, we believe, because proof of what

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already been held valid in Chas. Pfizer & Co. v. Barry-Martin Pharmaceuticals, Inc., 241 F. Supp. 191 (S.D. Fla. 1965). The issue was whether fraud on the Patent Office was an unfair method of competition under § 5 of the FTC Act, 15 U.S.C. § 45 (1970), and if so whether the FTC's order requiring licensing at a royalty rate of 2.5% was proper.

In the Patent Office, the Examiner applied an incorrect legal test, and Pfizer, instead of arguing with the Examiner, submitted false information to overcome the erroneous rejection. The court believed it was significant to the § 5 case whether the Examiner would have allowed the patent if Pfizer had not submitted false information. The court therefore remanded, directing the FTC to take the Examiner's deposition to ascertain what would have happened 13 years before, absent the false information. The Examiner's memory was apparently refreshed, and the Sixth Circuit was satisfied by this dubious testimony on the *but for* test. Surely the question of whether, under § 5, Pfizer's fraud constituted unfair competition when the patent received was otherwise valid should not have depended on whether the Examiner believed, 13 years later, that he would have continued to hew to an erroneous rejection *but for* the false information.

58. *See, e.g.*, Nashua Corp. v. Radio Corp. of America, 307 F. Supp. 152 (D.N.H. 1969), *aff'd*, 431 F.2d 220 (1st Cir. 1970); Norton v. Curtiss, 433 F.2d 779 (C.C.P.A. 1970).

A good example of the futility of seeking out any *but for* relation is found in the following opinion of Judge McLean in SCM Corp. v. Radio Corp. of America, 318 F. Supp. 433 (S.D.N.Y. 1970), where a *Walker* counterclaim was denied even though the patent was otherwise invalid because the court was unable to find the requisite *but for* relationship:

> Proving materiality is by no means an easy task. In *Charles Pfizer & Co.* it was established by calling the Examiner himself who testified that he would not have granted the patent had he known the facts which defendants failed to disclose to him. But this is an unusual procedure, and one which is not normally possible in view of the policy of the Patent Office against permitting its Examiners to testify in private litigation. In the absence of such direct testimony, the court must fall back upon the Patent Office record, the "file wrapper" of the patent, for such light as it may cast upon the problem.
>
> In this instance, as is frequently the case, the light that the file wrapper casts is dim. After a painstaking study of the difficult language of the Examiner's "actions," I have found no convincing evidence, one way or the other,

the Examiner, given all the facts, would have done years before the inquest is not possible. After all, even if the Examiner is asked what he would have done had he known all the facts, his response is conjectural. Another difficulty is that there is no way to know whether the Examiner would have been affirmed if he had rejected the patent application. Without question many invalid patents have been issued by the Patent Office through Board of Appeals error. Furthermore, a court cannot confidently conclude what would have happened because the record in the Patent Office may have differed significantly from the record before the court.[59]

A *but for* requirement follows from the wooden application of logic to the exclusion of underlying policy. One who has abused an agency should not be permitted to argue, after the agency mistakenly takes the desired action with the sought after exclusionary effect, that the agency would have taken the same improper action even if there had been no abuse. Indeed, policy considerations foreclose such arguments. Accordingly, the *but for* test is indifferent to

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> as to what the Examiner would have done . . . . In the final analysis, what position the Examiner would have taken had RCA been candid with him remains a matter of speculation.
>
> Under these circumstances, I am compelled to conclude that SCM has failed to carry the burden of proving that RCA's nondisclosure was material in a "but for" sense, i.e., that the patent would not have issued if RCA had revealed all the relevant information.

Id. 448-49.

The court, after denying the counterclaim, went on to hold the patent unenforceable as a matter of patent policy for the following reasons:

> [T]he fact remains that RCA did withhold relevant facts. Which side in this litigation is to suffer from this conduct? It is appropriate that it should be RCA who suffers. Any other rule would fail adequately to discourage conduct of this sort merely because of the circumstance, which must be present in many cases, that it turns out to be impracticable to ascertain what the Examiner, who did not know the true facts, would have done if he had known them. The evidence here justifies the conclusion that this court should not enforce a patent obtained under these circumstances. I so hold.

Id. 449-50.

We find no basis in logic or policy for this distinction between patent and antitrust policy when the patent is otherwise invalid. The court's reasons for ruling the patent unenforceable are equally applicable to antitrust policy.

59. In Graham v. John Deere Co., 383 U.S. 1 (1966), the Supreme Court pointed out that the standard applied in the Patent Office on the issue of obviousness was notoriously below that applied by the courts. Moreover, in infringement litigation thousands of dollars are available to investigate all of the pertinent prior art; consequently the record in infringement litigation normally is substantially different and more extensive than the record before the Patent Office.

the policy which should control the availability of an antitrust exemption.[60]

To conclude, although a patent secured in good faith but subsequently declared invalid is entitled to an exemption from antitrust law, there is no policy reason for granting an exemption where an applicant has deliberately committed fraud on the Patent Office if the associated patent is held to be invalid. The antitrust exemption should be denied whether the fraud controlled the issuance of the invalid patent or not. There is no reason whatsoever to extend the antitrust exemption to a patent owner who charted a course of conduct calculated to induce the Patent Office to issue an invalid patent. He should not be permitted to obscure this wrong by the collateral pursuit of *but for* speculations.

Candor in the Patent Office entails more than abstention from affirmative misrepresentations, *i.e.*, submission of false information. Passive misrepresentations, *i.e.*, deliberately withholding information known to be pertinent, are just as culpable as affirmative misrepresentations if undertaken to secure the issuance of an invalid patent.[61] If information known to be pertinent is deliberately withheld with the intent to favorably influence the Examiner, the applicant who thereby obtains a patent which is subsequently declared invalid should not be permitted the aegis of an antitrust exemption for the same reasons he is denied an exemption when false information is submitted. Courts have little difficulty when the fraud centers on affirmative misrepresentations; however, if the alleged fraud centers on withholding information known to be pertinent, the situation is more difficult. After all, as a general rule the appli-

60. Similarly, we believe that any wrong agency action in the context of an abuse should be presumed to be the result of that abuse. Therefore the courts should not remand to the agency or attempt, by studying the record, to determine whether the agency would have made the mistake even if the abuse had not occurred.

61. The nondisclosure of information believed to be pertinent to the decision of the Patent Office must be intentional to be culpable, Xerox Corp. v. Dennison Mfg. Co., 322 F. Supp. 963 (S.D.N.Y. 1971), or the nondisclosure must arise through gross negligence, Norton v. Curtiss, 433 F.2d 779 (C.C.P.A. 1970). It has been suggested that some courts have gone further and required disclosure of information that the applicant does not believe pertinent, but that someone else might believe pertinent. Such a hindsight view of nondisclosure is completely improper for antitrust and to the extent it was applied in Monsanto Co. v. Rohm & Haas Co., 456 F.2d 592 (3d Cir.), *cert. denied*, 407 U.S. 934 (1972), we think that case was wrongly decided.

Judge Kalodner's persuasive dissent in *Monsanto* is marred by his insistence on a rigid *but for* relationship. This makes it somewhat difficult to be certain whether he was asserting that there was no clear and convincing proof of intent to deceive or maintaining that there was no such proof regarding the *but for* relationship.

cant is not required to tell all he knows. We submit that if the applicant knows certain information would be considered pertinent by the Examiner and knows that if the information were furnished to the Examiner it would prejudice the probability of issuance of the patent, then the applicant has an obligation of candor to inform the Examiner of the pertinent information. Failure to fulfill this obligation forfeits the antitrust exemption and establishes a per se antitrust violation if the patent is invalid.

IV. LESSONS OF FRAUD ON THE PATENT OFFICE

If a patent applicant secures the issuance of an invalid patent by fraudulent conduct before the Patent Office with the intent to exclude competition, he illegally monopolizes the market defined by the patent grant. This monopolization, we have argued, is proscribed per se by Section 2 of the Sherman Act. The elements of this Section 2 violation should be the applicant's fraudulent acts designed to secure an invalid patent with the intent to exclude competitors and the issuance of that invalid patent by the Patent Office.

On this view, not every patent issued by the Patent Office and subsequently held invalid by a court supports an antitrust violation. If this were so, the incentive for technological innovation underlying the patent system would evaporate. In fact, businessmen would in all likelihood scrupulously avoid a system thus circumscribed by the antitrust law. Accordingly, a patent issued by the Patent Office, though determined to be invalid by a court, is beyond the reach of the antitrust law unless fraud or other abusive conduct was committed to secure its issuance. This antitrust exemption for patents regularly and normally issued is essential for the smooth and efficient conduct of the patent system.

However, if fraud is committed to secure an invalid patent it should be irrelevant whether the patent would not have issued *but for* the fraud. If the patent applicant committed fraud to secure an invalid patent, there is no reason why he should be heard to argue that his fraud did not cause the patent to issue. Furthermore, any determination of whether the fraud caused the issuance of the patent is speculative and conjectural. A per se violation of Section 2, therefore, is made out by establishing that fraud was committed and that an invalid patent was issued. Nothing more is required.

Fraud committed to secure a valid patent will not support an antitrust action. When the Patent Office issues a valid patent, it

simply does not create a monopoly proscribed by the antitrust law. That fraud was committed to secure the valid patent does not change this simple truth.

When the experiences with fraud on the Patent Office are extrapolated to other agencies, a conceptually identical per se violation of the antitrust law is seen to exist for conduct designed to influence *any* administrative agency to exclude competitors, if competitors are in fact excluded. Every administrative agency takes action analogous to the erroneous issuance of an invalid patent. If the agency is to achieve its designated function, such action must be exempt from the antitrust law when it is taken in the regular and normal course of events. Accordingly, exclusionary action by an administrative agency supports an antitrust violation only if the party charged committed improper acts to achieve the exclusionary result.

Similarly, if the administrative action is demonstrably and indubitably correct, no antitrust violation has occurred. This exception is typified by the issuance of a valid patent where fraud was committed to secure that valid patent. Certainly the courts should not embark on a protracted and perilous inquiry as to the propriety of administrative action. Even if such an inquiry were practicable, however, no antitrust violation is possible where the action is correct on its face. If the action is questionable, the collateral issue of the propriety of the administrative action should not be pursued; rather, an antitrust violation should be found.

All administrative agencies, like the Patent Office, can be abused to achieve an exclusionary result. If a party subverts the administrative agency (for example, by fraud) to achieve an exclusionary result and the agency takes the desired exclusionary action, we have shown that a per se violation of the antitrust laws is committed. In summary, this per se violation under Section 2 has the following elements:

(1) A unilateral act performed to influence an administrative agency to take exclusionary action toward a competitor, provided that the unilateral act is not exempt from the antitrust law on constitutional grounds or on the grounds that proscribing the act interferes with the agency's proper operations; and
(2) Exclusionary action by the agency toward a competitor of the type the unilateral act was calculated to induce, provided that the agency's exclusionary action is not demonstrably and indubitably correct.