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MONOPOLY OR COMPETITION THROUGH SURPLUS PLANT DISPOSAL? THE ALUMINUM CASE

HERBERT ROBACK

Surplus Property Act and Plant Disposal

The philosophy of the antitrust laws,¹ refined by specific aids to small business, is expressed in statutes affecting war mobilization and reconversion.² Since the greater part of war production was handled by big business in big plants, the Government now finds itself the awkward possessor of surplus manufacturing facilities adapted to undertakings of tremendous size.³ In disposing of these facilities, the Government must steer a difficult course between the economic demands implied by their dimensions⁴ and the antimonopoly objectives of the Surplus Property Act.⁵

Congress was not content to let the disposal agencies steer this course without guidance. It created a Surplus Property Board to formulate broad disposal policies⁶ and provided an additional measure of Congressional re-

¹"Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Judge L. Hand in *United States v. Aluminum Co. of America et al.*, 148 F. (2d) 416, 429 (C. C. A. 2d, 1945).

²SMALL BUSINESS MOBILIZATION ACT, 56 STAT. 351 (1942), 50 U. S. C. App. § 1101 *et seq.* (Supp. 1945); WAR MOBILIZATION AND RECONVERSION ACT, 58 STAT. 785 (1944), 50 U. S. C. App. §§ 1659, 1660 (Supp. 1945); SURPLUS PROPERTY ACT, 58 STAT. 765 (1944), 50 U. S. C. App. §§ 1611, 1627, 1629 (Supp. 1945).

³The Federal Government authorized \$12,000,000,000 for building of new plants, of which only \$250,000,000, or 2 per cent, went into plants costing less than \$1,000,000 each. More than half the new plants (by dollar volume) cost over \$25,000,000 each. The Government authorized \$2,000,000,000 for expansion of old plant, of which less than 10 per cent went into plants costing less than \$1,000,000 each. More than half the funds for expansion of old plant went into plants costing over \$10,000,000 each. WAR-CREATED MANUFACTURING PLANT FEDERALLY FINANCED 1940-1944, Civilian Production Administration, Industrial Statistics Division, Nov. 15, 1945 (processed), 3, 15.

⁴"The federally financed expansion consists chiefly of tremendous plants which only government or large corporations can operate profitably in peace-time unless some methods of multiple tenancy are developed." *Id.* at 3. "A large portion of war-created plant is of such size as to require very great aggregates of capital." *Id.* at 14.

⁵Among the twenty more or less overlapping objectives set forth in section 2 of the Act for the guidance of disposal activities are these:

"(b) to give maximum aid in the re-establishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment"; "(d) to discourage monopolistic practice and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise"; "(p) to foster the development of new independent enterprise"; "(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade. . . ."

⁶Prior to creation of the Board by the Surplus Property Act, surplus property was

view. Thus Section 19 of the Act directs the Board, in cooperation with the various disposal agencies, to report to Congress within three months upon twelve categories⁷ of surplus property (excluding plants which cost less than \$5,000,000). Each report is to describe the amount, cost, and location of the property; outline the economic problems that may be created by its disposition; and set forth a plan or program for the care and handling, disposition and use of the property consistent with the policies and objectives set forth in the Act. Before disposal may be made (except leasing for terms of not more than five years) of any property in the first eight categories, thirty days must elapse after the Board has submitted its report to Congress.

Congress took a further step to guard against the furtherance of monopoly in property disposal. Section 20 of the Act requires that the disposal agency obtain the Attorney General's approval for specific disposal of any plant or property costing \$1,000,000 or more. Finally, nothing in the Act is to be construed as impairing the antitrust laws or preventing their application to those who acquire surplus property.⁸

supervised by the Surplus War Property Administration, established pursuant to EXEC. ORDER No. 9425, 9 FED. REG. 2071 (1944), and assuming disposal functions previously performed by Treasury Procurement. The disadvantages of the three-man Surplus Property Board caused it to be superseded by a single administrator and the Surplus Property Administration, pursuant to Pub. L. No. 181, 79th Cong., 1st Sess. (Sept. 18, 1945). But even then the administrative difficulties were not removed. The administrator had no means of insuring that his disposal policies would be effectively carried out by the designated disposal agencies. See Senator Mitchell's Memorandum to the President, 91 Cong. Rec., Dec. 7, 1945, at A 5742; also *id.*, Nov. 23, 1945, at 11080. Thereupon, additional administrative changes were made. As of January 15, 1946, the Surplus Property Administrator transferred the disposal functions of the RFC to one of the latter's subsidiaries, the War Assets Corporation. 11 FED. REG. 408 (1946). As of February 1, 1946, the President by Executive Order 9689 merged and consolidated the Surplus Property Administration with the War Assets Corporation and vested in the chairman of the board of directors the functions of the administrator. 11 FED. REG. 1265 (1946). In this way, responsibility for the formulation and execution of disposal policies was centered in a single agency. The executive order also directed that, effective March 25, 1946, the functions of the War Assets Corporation be transferred to a separate agency in the Executive Office of the President, to be known as the War Assets Administration and to be headed by a War Assets Administrator.

⁷(1) Aluminum plants and facilities; (2) magnesium plants and facilities; (3) synthetic rubber plants and facilities; (4) chemical plants and facilities; (5) aviation gasoline plants and facilities; (6) iron and steel plants and facilities; (7) pipe lines and facilities used for transporting oil; (8) patents, processes, techniques, and inventions, except such as are necessary to the operation of the plants listed herein; (9) aircraft plants and facilities and aircraft and aircraft parts; (10) shipyards and facilities; (11) transportation facilities; and (12) radio and electrical equipment.

⁸Section 20 reads:

"Whenever any disposal agency shall begin negotiations for the disposition to private interests of a plant or plants or other property, which cost the Government \$1,000,000 or more, or of patents, processes, techniques or inventions, irrespective of cost, the disposal agency shall promptly notify the Attorney General of the

By placing "aluminum plants and facilities" first on the list of properties requiring a report, Congress straightaway challenged the Surplus Property Board to test the antimonopoly objectives of the Act.⁹ The test was not whether small business would participate in the acquisition of these giant Government plants, built to serve enormous wartime demands.¹⁰ Aluminum

proposed disposition and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed ninety days after receiving such notification, the Attorney General shall advise the Board and the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws. Upon the request of the Attorney General, the Board or other Government agency shall furnish or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition of surplus property violates the antitrust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act. . . ." 58 STAT. 765, 775 (1944), 50 U. S. C. App. § 1629 (Supp. 1945).

⁹"The disposal of Government-owned aluminum plants may well be the pattern for the disposal of all the facilities constructed by the Government for the purposes of war. On what is done with respect to these facilities may depend the success or failure of the clearly announced congressional policy for the preservation of free enterprise. It would be dangerous to minimize the task. It is not too much to say that both the economic and the political future of this country will be deeply affected by what is done with these Government-owned facilities." Senator O'Mahoney at *Joint Hearings on Aluminum Plant Disposal before the Subcommittee on Surplus Property of the Committee on Military Affairs, Special Committee to Study and Survey Problems of Small Business Enterprises, Industrial Reorganization Subcommittee of the Special Committee on Postwar Economic Policy and Planning* (hereinafter cited as *Joint Hearings*; page references are to the revised print of parts 1 to 5, consecutively pagged), U. S. Senate, 79th Cong., 1st Sess., pt. 1, p. 4. See also Senator Mitchell's statement in 91 Cong. Rec., Nov. 23, 1945, at 11081.

¹⁰Whether such large plants were required by war exigencies, or reflected the intent of the Aluminum Co. of America to discourage postwar competitors, has been a subject for debate. Alcoa's preferences in the matter of size and location were generally accepted by the Government. See *Aluminum Plants and Facilities*, REP. SURPLUS PROP'TY BD. TO CONGRESS, September 21, 1945, (hereinafter cited as REP. SURPLUS PROP'TY Bd.) 36, 37; *The Aluminum Industry*, REP. ATT'Y GEN., 79th Cong., 1st Sess., SEN. DOC. No. 94 (1945) (hereinafter cited as REP. ATT'Y GEN.) 35, 36. For Alcoa's justification, see Letter of Reply to Attorney General of the United States by the Aluminum Company of America, December 3, 1945 (hereinafter cited as Alcoa Letter to Att'y Gen.; page references are to the printed letter) 30-32. Before the plants were built, Secretary of the Interior Harold Ickes gave this warning to the Truman Committee:

"We will have lost a great deal of ground if our present plans are so devised that the reduction plants that the Government is now building can be bought by only one big and wealthy company. In such an event it may buy them up at junk prices that will result in heavy losses to the Government. It may even do this for the purpose of closing them down, thus keeping them out of competition. Throughout its existence, the Aluminum Co. of America has bought out or hampered by all means in its power, every formidable competitor that ever threatened it.

"If the aluminum plants, established and approved by the Office of Production Management and the Defense Plant Corporation, are few, and so of gigantic size, it will be impossible for average men or corporations to stay in or go into the aluminum business at the end of the emergency. . . ."

production is a complex, highly integrated enterprise. Only companies with large aggregates of capital would be able to operate the plants.¹¹ But basic production in the aluminum industry, for a half century, had been controlled by a single enterprise, the Aluminum Company of America.

Over the years, this company, popularly known as Alcoa, had been involved in a varied assortment of antitrust actions brought by the Government and by private parties.¹² Even as the Surplus Property Board set about preparing its report to Congress, a circuit court sat in final judgment¹³ on a proceeding instituted by the Government in 1937. The court, no less than Congress, appreciated that disposal of the Government's vast aluminum properties could spell the difference between perpetuation of a monopoly and introduction of competitors to the industry. Therefore, the court was quick to defer a remedy for the illegal monopoly that it found as of 1940. It passed on to the Surplus Property Board the immediate burden of the decision whether the aluminum industry will continue in its old path of monopoly or take a turn to new highways of competition.

Antitrust Litigation

The action leading up to the court decision had roots in a consent decree of 1912.¹⁴ The early suit sought to eliminate, by injunctive relief, certain restrictive practices¹⁵ objectionable under the Sherman Act. Twenty-five years later, the Government decided it was time to curb the ramified and

Hearings on Aluminum before the Special Committee Investigating the National Defense Program (hereinafter cited as *Truman Committee Hearings*), U. S. Senate, 77th Cong., 1st Sess. (1941) pt. 3, p. 882.

¹¹"The mining of the ore, the production of alumina, the smelting of aluminum, and the semifabrication of aluminum are mass-production jobs and can be most economically done by an integrated company that has been made possible through large investments." Testimony of Aluminum Company of America, *Hearings on Future of Light Metals before the Special Committee to Study and Survey Problems of Small Business Enterprises* (hereinafter cited as *Small Business Committee Hearings*), U. S. Senate, 79th Cong., 1st Sess. (1945) pt. 50, p. 6366. See also INTERIM REPORT OF SURPLUS WAR PROPERTY SUBCOMMITTEE OF SMALL BUSINESS COMMITTEE, Senate Subcommittee Print No. 5, Sept. 10, 1945, 3-4.

¹²For a review of these proceedings, see Note, *The Aluminum Industry: An Antitrust Experience* (1937) 37 COL. L. REV. 269; Reuschlein, *Aluminum and Monopoly: A Phase of an Unsolved Problem* (1939) 87 U. OF PA. L. REV. 509, 534 *et seq.*

¹³*United States v. Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2d, 1945). See note 27 *infra*.

¹⁴The provisions of the consent decree are summarized in a Note (1937) 37 COL. L. REV. 269, 272, 273, n. 21. Cf. the following comment: "Litigation was avoided; but beyond that, the decree would seem to have been a meagre accomplishment for the government. . . . Such restraints as were imposed sought to regulate rather than abolish monopoly." *Id.* at 273, 274.

¹⁵The restrictive practices are summarized in Reuschlein, *Aluminum and Monopoly: A Phase of an Unsolved Problem* (1939) 87 U. OF PA. L. REV. 509, 536, 537, n. 127.

far-flung operations by which Alcoa maintained a monopoly hold on the aluminum industry. The suit in 1937 sought not only injunctive relief, but also a dissolution of Alcoa and organization of its properties into separate and competing units.¹⁶ Basing its charges on matters much more extensive and complex than those involved in the old action and citing 62 defendants in addition to Alcoa, the Government brought suit¹⁷ in the Southern District of New York, wherein some of the defendants were located. Alcoa tried to prevent the suit and restrict the issues to those raised by the original consent decree, which had been entered in its home district of Pennsylvania. It filed a petition in that district asking for an injunction to prevent the Government from going ahead with the New York suit. A preliminary injunction was issued,¹⁸ but later vacated by a special Expediting Court¹⁹ which dismissed Alcoa's petition, finding between the two suits ". . . only such similarity as may exist between an infant and a full grown man."²⁰ The Supreme Court affirmed this opinion.²¹

In the proceeding before the court in the Southern District of New York, Judge Francis G. Caffey listened to 155 witnesses appearing over a course of 28 months, conscientiously read 58,000 pages of testimony, including 15,000 pages of exhibits, and took a year to write a book-length decision.²² He took almost another year to write 407 findings of fact.²³ Alcoa could not have expected to fare better in its home district. Judge Caffey was much more impressed with the ability of Alcoa's spokesmen to defend themselves²⁴

¹⁶Cf. Note (1937) 37 COL. L. REV. 269, 278, 279, 281.

¹⁷See Reuschlein, *op. cit. supra* note 15 (1939) 87 U. OF PA. L. REV. 509, 539 *et seq.*; Note (1939) YALE L. J. 677.

¹⁸United States v. Aluminum Co. of America, 19 F. Supp. 374 (W. D. Pa. 1937).

¹⁹Set up after the Attorney General filed an expediting certificate in accordance with 32 STAT. 823 (1903) as amended by 36 STAT. 854 (1910) and 36 STAT. 1167, 15 U. S. C. § 28 (1940).

²⁰United States v. Aluminum Co. of America, 20 F. Supp. 608, 611 (W. D. Pa. 1937). See Note (1938) 38 COL. L. REV. 515.

²¹Aluminum Co. of America v. United States, 302 U. S. 230, 58 Sup. Ct. 178 (1937).

²²United States v. Aluminum Co. of America, 44 F. Supp. 97 (S. D. N. Y. 1941).

²³See United States v. Aluminum Co. of America, *et al.* 148 F. (2d) 416, 421 (C. C. A. 2d, 1945). The findings of fact were filed July 14, 1942, and final judgment dismissing the complaint was entered July 23, 1942.

²⁴The decision contains numerous laudatory references to Alcoa witnesses. The appeal court noted concerning the three chief officers of the company that Judge Caffey "went out of his way to commend their candor and credibility." However, the court dismissed any notion that the judge might be "biased" in Alcoa's favor, as the Government's brief seemed to suggest. The court also pointed out that, with a record of this magnitude, "it is physically impossible for an appellate court to function at all without ascribing some *prima facie* validity to his conclusions." 148 F. (2d) 416, 433, 434 (C. C. A. 2d, 1945).

than with the ability of the Government's witnesses to confute them.²⁵ He completely absolved defendants from any violation of the Sherman Act, uttering a homily about competition in the aluminum industry and a tribute to Alcoa's chief executive²⁶ that sounded like a text from Horatio Alger.

On appeal, the Supreme Court, in the absence of a quorum, certified²⁷ the case to the Circuit Court of Appeals for the Second Circuit. The circuit court did not parallel in its decision Judge Caffey's elaborate dissertation and findings. On the monopoly side, the decision was directed to what the court considered "the most important question of the case": the extent of Alcoa's control in production of primary or ingot aluminum.²⁸ Rejecting Judge Caffey's calculations, the court decided that Alcoa controlled not 33 per cent, but more than 90 per cent, of the market in primary aluminum, constituting an illegal monopoly.²⁹ The case was reversed in part and remanded to the lower court. In so ordering, the circuit court deferred consideration of a remedy by taking judicial notice of events brought to its attention, for opposite reasons, by both parties in the case.³⁰

²⁵Judge Caffey referred to one group of witnesses against Alcoa as "wishful thinkers" and to another as "extremely biased." Of the latter he said: "I do not accuse these men of intending to do wrong. The probability is that they were born that way and they can't help it." 44 F. Supp. 97, 308 (S. D. N. Y. 1941).

²⁶"... anyone possessing the four cardinal tangible elements of intelligence, industry, courage and money or credit is and has been able, with confidence, to go into the production of virgin aluminum." *Id.* at 306. Apparently Mr. Arthur V. Davis, Alcoa's chief executive, started out with only the first three of the four virtues. Of him Judge Caffey said, "At the start he worked as a laborer. He daily wore overalls. He not infrequently was forced to whistle for his pay. When this small company was seeking to raise its initial capital of \$20,000 only, Mr. Arthur V. Davis had no part because he did not have the money. Yet by 1900, practically, he had become the real leader in Alcoa. . . ." *Id.* at 309.

²⁷*United States v. Aluminum Co. of America, et al.*, 322 U. S. 716, 64 Sup. Ct. 1281 (1944). The certification was made pursuant to section 2 of the Act of February 11, 1903, 32 STAT. 823, 15 U. S. C. § 29, as amended by the Act of June 9, 1944, c. 239, 58 STAT. 272, 15 U. S. C. § 29 (Supp. 1945). The Government had filed its petition for appeal on September 14, 1942, and the Supreme Court referred the case on June 12, 1944. See 148 F. (2d) 416, 421 (C. C. A. 2d, 1945). Presumably some or all of the Supreme Court justices who disqualified themselves were previously associated with the Government in litigation.

²⁸148 F. (2d) 416, 422, 423 (C. C. A. 2d, 1945). The circuit court considered under a separate heading the validity of certain practices "ancillary" to the establishment of monopoly, whereas the district court considered certain of these practices as monopoly charges proper. See note 62 *infra*.

²⁹148 F. (2d) 416, 429 (C. C. A. 2d, 1945). Besides finding an illegal monopoly in ingot aluminum, the court ordered injunctions to issue against (1) resumption of an illegal "price squeeze" by which Alcoa had forced out of the market competing manufacturers of aluminum sheet, and (2) entry of Aluminium Limited (the Canadian counterpart of Alcoa) into any cartel or agreement restricting imports into the United States. *Id.* at 447, 448.

³⁰"The plaintiff wishes us to enter a judgment that 'Alcoa' shall be dissolved, and that we shall direct it presently to submit a plan, whose execution, however, is to be

Effect of the War

Five years had passed since the evidence in the case was closed. During that time, as the court noted,³¹ aluminum along with other industries had been revolutionized by the war. Capacity for the production of primary aluminum had in fact increased six-fold over that in 1939,³² and capacity in other phases of the industry was multiplied many more times. The enormous demands of the aircraft program caused aluminum production to rise more rapidly than production in any other major basic industry.³³ Aluminum accounted for three-fourths of the weight of military aircraft.³⁴ More than two-thirds of the aluminum output went into airplanes and practically all of the remainder into other war uses.³⁵

Before the war Alcoa was the sole producer of primary aluminum in the United States. Optimistic claims by Alcoa and the early defense agencies that this producer could take care of all military needs proved to be remarkably shortsighted.³⁶ The Government in its own name financed the building of 52 plants, plus facilities distributed in 37 privately owned plants.³⁷ Public investment in the aluminum industry totalled \$739,000,000, including \$702,000,000 in plants and facilities owned almost entirely by the Reconstruction Finance Corporation, over \$2,000,000 in plants and facilities owned by the Navy Department, and \$34,000,000 in loans to private enterprise by the Reconstruction Finance Corporation.³⁸ A pro rata share of construction costs in public power facilities servicing the industry during the war, brings

deferred until after the war. . . . On the other hand, 'Alcoa' argues that, when we look at the changes that have taken place—particularly the enormous capacity of plaintiff's aluminum plants—it appears that, even though we should conclude that it had 'monopolized' the ingot industry up to 1941, the plaintiff now has in its hands the means to prevent any possible 'monopolization' of the industry after the war, which it may use as it will; and that the occasion has therefore passed forever, which might call for, or justify, a dissolution: the litigation has become moot." *Id.* at 445.

³¹*Ibid.*

³²Wartime capacity amounted to almost 2,500,000,000 pounds annually, as compared with 350,000,000 pounds at the end of 1939. REP. ATT'Y GEN., 11.

³³*Ibid.*

³⁴REP. SURPLUS PROP'TY BD., 13. A single B-29 required 40,000 pounds of aluminum. Alcoa Letter to Att'y Gen., p. 34.

³⁵REP. SURPLUS PROP'TY BD., 13.

³⁶See *Truman Committee Hearings*, pt. 3, p. 877 *et seq.* Secretary Ickes testified that Alcoa "sought to put off the horrible day when the monopoly would have to experience some competition." *Id.* at 879. See also SEN. REP. No. 480, pt. 4, 77th Cong., 1st Sess. (1941) 15 *et seq.*; *Small Business Committee Hearings*, pt. 48, p. 6141 *et seq.*, p. 6174 *et seq.*, pt. 60, p. 7107 *et seq.*; REP. ATT'Y GEN., 20 *et seq.* For Alcoa's view see Alcoa Letter to Att'y Gen., p. 10 *et seq.*

³⁷REP. SURPLUS PROP'TY BD., 9.

³⁸*Ibid.*

the total Government stake in the aluminum industry to one billion dollars.³⁹

In terms of ownership, Government facilities dwarfed private capacity. Alcoa, owning all the aluminum producing facilities in 1940, now held only 44 per cent of the alumina capacity and 35 per cent of the aluminum capacity. The Defense Plant Corporation, by contrast, held 52 per cent and 56 per cent respectively.⁴⁰ But Government ownership of the major portion of aluminum producing capacity did little or nothing to alter Alcoa's *de facto* monopoly control.⁴¹ Alcoa designed, built and operated practically all the DPC alumina and ingot plants, and controlled a preponderant part of the fabricating capacity.⁴² Two other companies did manage to get into the wartime production of primary aluminum. The Aluminum Division of Olin Industries, Inc. operated a small Government plant, and the Reynolds Metals Company, formerly confined to the fabricating field, constructed its own producing facilities with the help of an RFC loan.⁴³ Together, these two producers had about 10 per cent of aluminum capacity as against 90 per cent for Alcoa.⁴⁴ Other potential producers were excluded from participation in the aluminum production program.⁴⁵

The circuit court accepted data in the Truman Committee Report, as of March, 1944, that annual production of aluminum was as follows: Alcoa's plants, about 828 million pounds; plants owned by plaintiff and leased to Alcoa, about 1,293 million pounds; Reynolds and Olin plants together, 202 million pounds; a total of about 2,300 million pounds. Upon taking notice of these facts as relevant, not to the correctness of the findings,⁴⁶ but to the

³⁹REP. ATT'Y. GEN., 12.

⁴⁰*Ibid.*

⁴¹*Id.* at 13, 14.

⁴²"The Government's choice of lessees is the strongest proof that the public plants were not antimonopoly instruments during the war years." REP. ATT'Y GEN., 14.

⁴³*Id.* at 15; REP. SURPLUS PROP'Y Bd., 21. Secretary Ickes testified that Alcoa "did its damndest" to prevent the Government from making a public power contract with Reynolds necessary to operate its aluminum plants. *Truman Committee Hearings*, pt. 3, p. 888. See also *Hearings on Aluminum and Magnesium before the Special Senate Committee Investigating the National Defense Program*, Spokane, Washington, August 21, 1945 (hereinafter cited as *Mead Committee Hearings*; page references are to the stenographic transcript) p. 4106. Reynolds testified that the RFC had been advised by the OPM that "our company's efforts . . . were not necessary for the national defense program." *Mead Committee Hearings*, 4112.

⁴⁴REP. ATT'Y GEN., 15.

⁴⁵Henry J. Kaiser tried unsuccessfully to get into aluminum production in 1940. *Mead Committee Hearings*, 4186. The Union Carbide and Carbon Co. and Bohn Aluminum and Brass Corp. were listed among those recommended by the OPM to the War Department for operation of projected Government plants. Letter of Sidney Hillman to Under Secretary of War Patterson, July 15, 1941.

⁴⁶The court said that to make these facts part of the findings would have required sending the issue back for another trial, "which in the present case we should under no circumstances be willing to do." 148 F. (2d) 416, 446 (C. C. A. 2d, 1945).

remedies, the court said:

"... it is impossible to say what will be 'Alcoa's' position in the industry after the war. The plaintiff has leased to it all its new plants and the leases do not expire until 1947 and 1948, though they may be surrendered earlier. No one can now forecast in the remotest way what will be the form of the industry after the plaintiff has disposed of these plants, upon their surrender. It may be able to transfer all of them to persons who can effectively compete with 'Alcoa'; it may be able to transfer some; conceivably, it may be unable to dispose of any. The measure of its success will be at least one condition upon the propriety of dissolution, and upon the form which it should take, if there is to be any. It is as idle for the plaintiff to assume that dissolution will be proper, as it is for 'Alcoa' to assume that it will not be; and it would be particularly fatuous to prepare a plan now, even if we could be sure that eventually some form of dissolution will be proper. Dissolution is not a penalty but a remedy; if the industry will not need it for its protection, it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency. The need for such a remedy will be for the district court in the first instance, and there is a peculiar propriety in our saying nothing to control its decision, because the appeal from any judgment which it may enter, will perhaps be justiciable only by the Supreme Court, if there are then six justices qualified to sit."⁴⁷

Even more persuasive to the court why it should not then adjudge a dissolution were the declarations of the Surplus Property Act. After outlining them, the court said:

"... In view of these declarations of the purpose of Congress, the 'agency' which the Board 'designates' to dispose of the plaintiff's 'aluminum plants and facilities' may well believe that it cannot do so without some plan or design for the industry as a whole, some comprehensive model which shall, so far as practicable, re-establish 'free independent private enterprise,' 'discourage' monopoly, 'strengthen' small competitors, 'foster' independents and not foster 'monopoly or restraint of trade.' If it should find this method desirable, it would have to learn what purchasers were in the market, how strong they were, what units they could finance and operate, and in what position they would be to compete. In such a model or design the 'agency' would have to assign a place to 'Alcoa' and that place no one of course can now anticipate. Conceivably 'Alcoa' might be left as it was; perhaps it might have to be dissolved; if dissolved, the dissolution would depend upon how the other plants were distributed. If the 'agency' should find it wise to proceed in this way, it may succeed in inducing 'Alcoa' to accept the place assigned to it, particularly if the plan has not been prepared

⁴⁷*Ibid.*

ex parte. If it does not succeed, then, but then only, will it be appropriate for the district court to act. We do not of course mean that in deciding whether to dissolve 'Alcoa,' or how to do it, that court must be governed by any plan which the 'agency' may have devised, if it does devise one. But, plan or no plan, it must wait until it learns what the 'agency' has in fact done. Moreover, if the 'agency' does form a plan, it will have been an attempt to realize the same 'objectives' for which the court itself must strive; and the court may well feel that it should accord to the 'agency's' plan that presumptive validity which courts are properly coming more and more to recognize in the decisions of specialized tribunals. Nothing which we now say ought in any measure to limit the discretion of the 'agency' to proceed in this way. Therefore, we shall merely reverse the judgment, as far as it held that 'Alcoa' was not 'monopolizing' the ingot market, and remand the case to the district court.⁴⁸

Alcoa's View of Plant Disposal

Alcoa and the Surplus Property Board each read the decision in a different light. The company saw in it permission to exclude competitors up to limits of putative judicial acceptance, whereas the Board considered it a mandate to pursue obligations under the Surplus Property Act and establish a measure of effective competition in the industry. The Surplus Property Administrator, comparing Alcoa's attempts to block competition with earlier practices condemned by the circuit court, said: "What the court said of Alcoa's behavior prior to the decision describes the experience of the Surplus Property Board with Alcoa after the decision."⁴⁹

This difference in outlook delayed for months the preparation of a disposal program. Before the disposal agency could proceed to sell or lease plants, the Board was obligated to set forth the program in the form of a report to Congress. According to the law, this report should have been submitted to Congress at the beginning of 1945.⁵⁰ Late in August of that year, Congressional criticism evoked the explanation that the report was being held up by disagreement among Board consultants as to Alcoa's place in a disposal program.⁵¹ One of these consultants had been delegated the specific

⁴⁸*Id.* at 446, 447.

⁴⁹Letter of the Surplus Property Administrator to Senator O'Mahoney, chairman of the Subcommittee on Surplus Property, Senate Military Affairs Committee, January 6, 1946 (hereinafter cited as Surplus Prop'ty Adm'r Letter to O'Mahoney; page references are to the mimeographed release) 24.

⁵⁰The Surplus Property Act was approved October 3, 1944. However, the Board was not organized until January, 1945, the time when the report should have been submitted. See *Mead Committee Hearings*, 4168.

⁵¹*Id.* at 4170, 4171.

task of working with Alcoa officials on this problem.⁵² He undertook to act as an intermediary, transmitting Alcoa's proposals to the Board and interceding in Alcoa's behalf with a view to settlement of the antitrust suit.⁵³

Alcoa offered to buy or lease certain Government plants, claiming that it was a proper candidate for these plants on the basis of the court decision. Judge Caffey for the district court had considered the monopoly charges in a dozen segments of the aluminum industry and had exonerated Alcoa on all counts. The circuit court confined its consideration to the production of primary or ingot aluminum as the central monopoly issue.⁵⁴ That Alcoa had been the sole domestic producer of ingot aluminum before the war was not in dispute. The question was: In evaluating Alcoa's market control, what competitive value should be given to (1) that part of production which Alcoa fabricated itself and therefore did not sell as ingot? (2) imports of primary metal? (3) secondary or scrap metal? Judge Caffey had excluded ingot which went into Alcoa's own fabrication, and balancing the remainder against imported and secondary metal, had concluded that Alcoa's share of the market should be figured at 33 per cent. The circuit court pointed out that inclusion of the fabricated part would raise Alcoa's share to "the neighborhood of sixty-four per cent" and that exclusion of secondary would raise it to "over ninety" for the period under consideration. Before giving its reasons why Alcoa's share should be calculated at the latter figure, the court noted: "That percentage [over ninety] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not."⁵⁵

Accordingly, Alcoa asserted the right to purchase or lease ingot-producing plants, conditioned upon approval of any such acquisition by the district court where the case originated, "and if, thereafter, the company produces or sells not to exceed 60 per cent to 64 per cent of the aluminum ingot produced or sold in the United States, the company will not have a monopoly of the aluminum ingot market in the United States, the determination of the exact percentage between 60 per cent and 90 per cent which would constitute a monopoly to be made in the first instance by the United States District Court for the Southern District of New York."⁵⁶ From the fact that the circuit

⁵²Surplus Prop'ty Adm'r Letter to O'Mahoney, 24.

⁵³*Id.* at 22, 24; *Mead Committee Hearings*, 4141, 4142. According to the Surplus Property Administrator, the position taken by this consultant was: ". . . you have to face the fact that it is a monopoly and it is going to continue to be a monopoly. . . ." *Mead Committee Hearings*, 4171.

⁵⁴148 F. (2d) 416, 422 (C. C. A. 2d, 1945).

⁵⁵*Id.* at 424.

⁵⁶*Mead Committee Hearings*, 4162.

court had focused on ingot production as the decisive monopoly question, Alcoa inferred judicial approval of its control in other branches of the industry, and consequently maintained that no jurisdiction had been reserved to question its right to acquire alumina or fabricating plants.⁵⁷

By proposing that its attempted acquisitions of ingot-producing plants be referred back to the district court for approval, Alcoa maintained that the Government would be protected in the matter of illegal monopoly.⁵⁸ Perhaps it expected that the court which was so generous in its original findings would look kindly upon Alcoa's requests. But this was a peculiar view of the judicial and administrative functions, justified in no way by the language of the circuit court concerning plant disposal. The Board and its disposal agency were obligated to give effect to the purposes of the Surplus Property Act, and the court expressly disclaimed any wish to limit their discretion,⁵⁹ though it recognized that the ultimate end sought was the same. The Board sought to prepare a disposal program required by law and in accordance with its interpretation of that law. Upon the end results of the program hinged the court's judgment as to the necessity of remedial action against Alcoa. But Alcoa demanded, in effect, that the Board, rather than formulate a plan of its own, act as a referral agency between the company and the court on specific plant acquisitions.⁶⁰

The interesting feature of the court's language is that it said Alcoa must necessarily be assigned a place, were the disposal agency to go about achieving the antimonopoly objectives of the Surplus Property Act by establishing some comprehensive plan *for the industry as a whole*; it did not say, as Alcoa assumed, that Alcoa must necessarily be assigned *a portion of the Government plants*.⁶¹ In other words, the court said nothing more than that Alcoa,

⁵⁷*Id.* at 4163.

⁵⁸*Id.* at 4141; *Joint Hearings*, pt. 3, p. 209.

⁵⁹At one point Alcoa admitted that the Surplus Property Board was in no way restrained by the court decision. *Mead Committee Hearings*, 4153.

⁶⁰The Surplus Property Board reported, for example, that in connection with proposed acquisitions, Alcoa wanted the Board "to recommend to the District Court . . . that so long as Alcoa did not produce more than 75 per cent of the domestic aluminum supply, the company should not be regarded as in violation of the Sherman Act." *REP. SURPLUS PROP'TY Bd.*, 48. Alcoa later claimed that this proposal emanated from a Board representative rather than from itself. *Joint Hearings*, pt. 3, p. 209. There seems to have been some confusion as to whether the Board consultant acted for Alcoa or for the Board. See note 53 *supra*.

⁶¹According to Alcoa—"Congress has directed the Surplus Property Board to prepare and submit to it a plan for the disposal of surplus government-owned aluminum plants and facilities which cost the government \$5,000,000 or more. It would seem that the Board must necessarily assign a place in its plan to Aluminum Company of America, the largest privately owned segment of the industry. The United States Circuit Court of Appeals for the Second Circuit has stated that the Board should so proceed." *Mead Committee Hearings*, 4162.

as an important producer, would still be in the aluminum industry and so would necessarily figure in the consideration of any plan devised by the Government for the distribution of its plants. The conceivable alternatives that the court saw for Alcoa were: it might be left as it was, or it might be dissolved. In no case was it to grow bigger by acquisition of Government plants.

Necessarily, the same consideration would apply whether the plants were those producing alumina from bauxite, ingot from alumina, or fabricated forms from ingot. By claiming an unlimited right to acquire Government plants aside from ingot production,⁶² Alcoa was unwilling to pursue the logic of its own demonstrations that aluminum production, throughout its major branches, forms a single integrated enterprise.⁶³ Suppose the court had handed down a dissolution decree instead of deferring the question? Would Alcoa then have claimed that, because the court ruled on ingot production alone, its vast properties, representing a prewar net investment of \$237,000,000,⁶⁴ must remain largely intact, and that dissolution must be restricted to some part of its four ingot-producing plants? A reorganization plan under that limitation would have been patently absurd and impossible. By the same token, the court implied, and the Surplus Property Board understood,⁶⁵ that an effective program of disposal to Alcoa's competitors must include plants in all branches of the industry.

⁶²Cf. the comment of the Assistant Attorney General in a letter dated November 5, 1945, to Senator O'Mahoney: "The circuit court, according to Alcoa's interpretation of its decision, considered each branch of the industry independently but found a monopoly in ingot alone. That was not what the court did at all. . . . The court unquestionably viewed ingot as the heart of the industry and all other branches of the industry as subordinate thereto. It is therefore misleading to imply that the court considered all branches of the industry on a coordinate basis and that it found Alcoa guilty as a monopoly of only one of its subdivisions. What actually happened was that the court found Alcoa guilty of monopoly in the industry's most important branch, ingot." *Joint Hearings*, pt. 3, p. 231.

⁶³See note 11 *supra*; *Small Business Committee Hearings*, pt. 50, pp. 6366, 6367; *Mead Committee Hearings*, 4155; Alcoa Letter to Att'y Gen., 5 *et seq.*

⁶⁴REP. SURPLUS PROP'TY BD., 21.

⁶⁵"It is necessary to reject Alcoa's view that it should be allowed an unrestricted opportunity to acquire government plants in the bauxite, alumina, or fabricated or semifabricated fields of the industry. . . . Alcoa dominates these other fields. It would be contrary to the opinion of the Attorney General and the Surplus Property Act of 1944 if the Board were to approve the disposition to Alcoa of individual plants in such fields in disregard of their effect upon Alcoa's monopoly." Surplus Prop'ty Adm'r Letter to O'Mahoney, 21. See also *Joint Hearings*, pt. 2, p. 62 *et seq.* The Board's policy has not prevented the RFC or its subsidiary, the War Assets Corporation, as the disposal agency, from pursuing before the Attorney General on several occasions the question of Alcoa's right to acquire Government fabricating plants. Senator Mitchell reviewed these efforts in a letter dated February 6, 1946, to the chairman of the board of War Assets Corporation, pointing out that ". . . the obliga-

The Board found nothing in the proposals that Alcoa made or in the conferences that were held, to provide the basis "for working out a plan with Alcoa as suggested by the Circuit Court."⁶⁶ In a later summary, the Board noted:

"... All discussion with Alcoa was fruitless because the only proposals that the company would advance indicated that (1) it wanted to control the key plants necessary for the creation of wholly independent competition, and (2) it wished to acquire itself some of the best reduction plants and would not voluntarily give up its leases."⁶⁷

Lease Complications

The leases to which the Board referred were an added difficulty in the way of preparing a disposal program. Alcoa's leases of Government alumina and aluminum plants extended for fixed periods, unlike those of other contractors who had agreed to permit cancellation on 10 to 30 days notice by the RFC when the plants were no longer needed for war production.⁶⁸ Cancellation by either party to the Alcoa contract was permissible, however, if production in any six-month period fell below 40 per cent of the aggregate productive capacity of all plants covered by the lease.

On several occasions Alcoa had placed before Congressional committees a list of reasons "why, in our judgment, it would be wise to postpone any definitive program for the disposition of these plants."⁶⁹ By interesting

tion of the disposal agency clearly is to give effect to the Surplus Property Act and the policies of the Surplus Property Administration rather than to act as agent for Alcoa in trying to explore the permissible area of Alcoa's operations." The latest written reply of the Attorney General to the chairman of the board of War Assets Corporation, denying Alcoa's right to acquire a fabricating plant, is dated February 7, 1946.

⁶⁶Surplus Prop'ty Adm'r Letter to O'Mahoney, 24. Cf. Alcoa's later statement that the Board prepared a plan *ex parte* in disregard of the court's suggestion. *Joint Hearings*, pt. 3, pp. 210, 222 *et seq.*

⁶⁷Surplus Prop'ty Adm'r Letter to O'Mahoney, 26.

⁶⁸REP. SURPLUS PROP'TY BD., 43. Alcoa charged on the other hand, that the leases were discriminatory against it in that other lessees or operators of Government aluminum plants were given options to purchase or rights of first refusal to purchase at the best price offered to another buyer. *Joint Hearings*, pt. 3, p. 201. Since Alcoa operated practically all of the Government plants, the Government had tried to avoid the more obvious postwar monopoly implications by denying Alcoa this privilege. In the 1941 *Hearings of the Truman Committee* (pt. 3, p. 892), Senator Brewster stated that Alcoa was willing to waive any right of acquisition. The original contract was drafted by Alcoa, and according to the Truman Committee, even after amendment, "contained few, if any, safeguards to the Government and was entirely too favorable to Alcoa." The Committee was instrumental in effecting a few beneficial changes. SEN. REP. No. 480, pt. 4, 77th Cong. 1st Sess. (1941) 16, 17.

⁶⁹*Small Business Committee Hearings*, pt. 50, p. 6382 *et seq.*; *Mead Committee Hearings*, 4161. An Alcoa executive testified before these committees: "Alcoa cannot tell, and no living person can tell, the length of time that will be required to develop post-

coincidence, the proposed time lapse coincided with the expiration dates of Alcoa's leases. The court had casually noted that the leases were to run until 1947 or 1948, but it did not see fit to comment beyond the suggestion that they might be surrendered earlier. The Government, however, was in an embarrassing predicament of its own making.⁷⁰ By retention of the leases, Alcoa could stave off competitors for several years,⁷¹ and possibly forever, or at least maneuver the Government into a position which would make it receptive to Alcoa's offers in the matter of plant disposal. The general counsel of the RFC and an Alcoa official both admitted before the Senate Committee Investigating National Defense (Mead Committee) that Alcoa was using the leases as a bargaining weapon.⁷²

The critical attitude of this Committee spurred the Surplus Property Board to re-examine the lease arrangements with Alcoa.⁷³ While the Government lawyers were busily engaged in debating theories of cancellation,⁷⁴ Alcoa's production figures were examined and the discovery was made that production for the six-month period ending July 31, 1945, actually had fallen a fraction below the 40 per cent of aggregate capacity stipulated in the lease. This circumstance gave the Government its opportunity. Upon

war aluminum markets. A year after peace has been made, Congress and the industry will all be better able to gage the future; 2 years after peace they will be still better able to judge the future." Cf. the Attorney General's comment: "There is a warning in this unequivocal statement—and a challenge to those who want more production and employment in this industry than Alcoa expects." REP. ATT'Y GEN., 44.

⁷⁰Secretary Ickes had stated in 1941: "We think that the Government ought to insist upon terms that won't make it possible for the Aluminum Co. to put on any financial or other screws at the end of the emergency." *Truman Committee Hearings*, pt. 3, p. 891.

⁷¹REP. ATT'Y GEN., 39. The rental terms were such that idle plants would be no financial burden to the company. *Id.* at 39, 40; *Mead Committee Hearings*, 4152.

⁷²*Mead Committee Hearings*, 4154, 4170. According to an RFC memorandum dated July 10, 1945, Alcoa reported its intention to continue under the contract at least until the court had ruled what percentage of ingot production constituted a monopoly. Surplus Prop'ty Adm'r Letter to O'Mahoney, 33, App. 3.

⁷³See Senator Mitchell's statements in 91 Cong. Rec., Nov. 23, 1945, at 11081; *id.*, Dec. 7, 1945, at A5741.

⁷⁴The RFC general counsel stated in August, 1945, that "some very good legal minds are working on the matter." *Mead Committee Hearings*, 4169. Apparently they were discouraged by the proviso in section 34 of the Surplus Property Act that "Nothing in this Act shall be deemed to impair or modify any contract, or any term or provision of any contract, without the consent of the contractor, if the contract or the term or provision thereof is otherwise valid." See *id.* at 4168, 4172. However, section 17 of the Alcoa lease contained a provision which made the agreement subject to any future federal law, or any authority exercised pursuant thereto, and presumably the Surplus Property Board could have issued a regulation simply cancelling the lease. This possibility had once been pointed out to Alcoa by the RFC. Surplus Prop'ty Adm'r Letter to O'Mahoney, 33, App. 3. The suggestion that specific legislation might be required to break the lease was made at the *Mead Committee Hearings* (p. 4172).

recommendation of the Surplus Property Board, the RFC served notice upon Alcoa that the lease agreement with respect to specified aluminum and alumina plants would be terminated, effective October 31, 1945.⁷⁵

In an attempt to maintain continuous operations of the plants, the Surplus Property Board offered Alcoa an alternative arrangement whereby the leases would extend for another year subject to cancellation by either party on 60 days notice.⁷⁶ This and subsequent offers by the Board to extend the period for notice of termination to 90 or 120 days or even a year were rejected.⁷⁷ Public concern over the resulting unemployment⁷⁸ led the Surplus Property Administrator to state:

"Alcoa consistently took the position that unless it could keep the plants tied up until 1948, it would not agree to any temporary arrangement for their continued operation. The responsibility for shutting down the plants and throwing the employees out of work, therefore, rests squarely upon Mr. Davis and the other managers of the company."⁷⁹

Government Reports and Alcoa's Answer

The Board finally submitted its report to Congress on September 21, 1945. Therein it described the proposals made by Alcoa for acquisition of the Government plants and explained why this plan was unacceptable.⁸⁰ Alcoa's monopoly in primary metal would be increased rather than reduced by permitting it to acquire three of the four best ingot-producing plants. Transfer

⁷⁵According to the RFC announcement: "The lease was terminated for the purpose of freeing the plants from the Alcoa agreement so that they could be disposed of in a manner which would create competition in the aluminum industry. The Government agencies concerned have taken this course in an effort to conform to the recent decision of the United States Circuit Court of Appeals for the Second Circuit and to provide additional sources of supply of this material so essential to the national security." REP. SURPLUS PROP'TY Bd., 129, App. 19.

There is no evidence that the RFC itself ever seriously entertained the feasibility of government cancellation. In fact, the general counsel for RFC joined to the notice of termination a letter which contained the following:

"In the event we can arrive at a mutually satisfactory basis for adjusting the matter or should you convince us that we are wrong in our present position, we will withdraw the notice of termination." *Id.* at 130, App. 19.

Senator Mitchell remarked on the floor of the Senate: "Now I submit that this is not proper talk for a Government agency that has such a tremendous responsibility to the people of this country. In effect this agency is asking a private corporation to make decisions for it on matters of grave public importance." 91 Cong. Rec., Nov. 23, 1945, at 11081.

⁷⁶REP. SURPLUS PROP'TY Bd., 44.

⁷⁷Surplus Prop'ty Adm'r Letter to O'Mahoney, 25. Cf. Alcoa's statement that the RFC had cancelled the leases "without warning" and that it was "summarily evicted" from the plants. *Joint Hearings*, pt. 3, p. 210.

⁷⁸See *Joint Hearings*, 45-46, 174 *et seq.*

⁷⁹Surplus Prop'ty Adm'r Letter to O'Mahoney, 3.

⁸⁰REP. SURPLUS PROP'TY Bd., 47 *et seq.*

of the giant alumina plant at Hurricane Creek, Arkansas to Alcoa would render more difficult disposal of the remaining, less desirable ingot plants by making operators dependent on Alcoa for their supply of alumina (the compound from which the metal is derived). The capacity that Alcoa sought to acquire was in excess of its demonstrated needs, and the acquisition would permit Alcoa to take the Government plants off the market without increasing the aggregate amount of employment. Finally, the Alcoa plan assumed that most of the competition necessary to put that company within the judicially-approved range of production would be furnished by Canadian aluminum, which is subject to the same stockholder control.⁸¹

The Board's report stated that aluminum plant disposal would be undertaken according to a priority schedule which gave prospective competitors of Alcoa first choice of plants and equipment.⁸² Alcoa would be given an

⁸¹For the court decision on the relationship between the two companies, see 148 F. (2d) 416, 439 *et seq.* (C. C. A. 2d, 1945). Cf. Senator Mitchell's remarks in 91 Cong. Rec., Dec. 21, 1945, at A6165: "Alcoa keeps pointing to the court decision in the antitrust case that the stockholding relationship between the American and Canadian companies was not a violation of the antitrust laws. But as the Attorney General's report says [p. 38]: 'The prospective independent is interested in a much narrower fact: Are these two companies going to operate independent of each other, or as friends of each other, in competing against him?' To suppose that the same group of majority stockholders in both companies will arrange matters to secure a lesser rather than a greater net return to themselves is again a strain on the credulity of the average citizen. The Surplus Property Board in its report to Congress on aluminum plant disposal described a plan acceptable to Alcoa whereby it was assumed, among other things, 'that imports from Canada and elsewhere would take place in volume that would bring Alcoa's domestic production below the percentage fixed by the court as constituting monopoly' [p. 48]. In other words, Alcoa would use the Canadian company as a faucet, turning on some imports when it produced more than 75 per cent of the domestic aluminum supply, shutting off such imports when its production was below this percentage." See also Surplus Prop'ty Adm'r Letter to O'Mahoney, 26 *et seq.*; REP. ATT'Y GEN., 36 *et seq.*

The account of the fantastic "Shipshaw" deal, whereby the RFC enabled the Canadian company to build up tremendous aluminum facilities by advance payments for war orders, is given in *Small Business Committee Hearings*, pts. 57-60. Alcoa denied participation in this deal, but there is evidence to the contrary. See 91 Cong. Rec., Dec. 21, 1945, at A6165; Surplus Prop'ty Adm'r Letter to O'Mahoney, 37, App. 6.

⁸²REP. SURPLUS PROP'TY Bd., 50. This accorded with instructions of the Attorney General. On May 21, 1945, the Attorney General advised the Surplus Property Board that disposal of any plants or equipment to Alcoa should not be made until a plan had been worked out under Section 19 of the Surplus Property Act. On September 6, 1945, the Attorney General advised the Board further:

"It is my judgment that as a general rule, the disposal of any government-owned aluminum plant to Alcoa would be violative of the antitrust laws, unless such disposal were accompanied by suitable divestiture of properties now owned by Alcoa to the extent necessary to create competition. As you know, it is not the practice of the Department to give general opinions on disposal matters *absent* a particular disposal program of specified plants. The position of Alcoa, however, is unique in that court action as to divestiture has been expressly deferred in order that the Court may determine what effect Government disposals have upon com-

opportunity to acquire certain desired facilities, subject to approval of the Attorney General, but only under terms of sale or lease that conferred no competitive advantage over others. Coupled with the recommendations for disposal priority were several proposed measures of governmental assistance to prospective competitors.⁸³ The report stated in conclusion:

"The Board recognizes that conditions beyond its control may make this program impossible of accomplishment. In that event, unless the courts dissolve or reorganize Alcoa under the Sherman Act, it will be for Congress to consider whether to leave the aluminum industry under the domination of one company or whether to authorize the Government either by subsidized or direct operation of key plants to provide some measure of production that is independent of Alcoa's control."⁸⁴

Alcoa wrote and publicized⁸⁵ a reply denouncing the Board's report as contrary to the ruling of the court and as seeking the ultimate destruction of that company.⁸⁶ As a propaganda document, it served Alcoa's purposes, but the charges in it were hardly well-considered. For example it asserted that the Board was trying alternatively to destroy Alcoa by subsidizing competitors or to effect "its dissolution by government-induced court decree."⁸⁷ The court had plainly stated that the measure of the Board's success in disposing of plants to competitors would be at least one condition upon the propriety of a dissolution decree. The Board's program of disposal, if successful, would reduce the likelihood of dissolution. By attempting to block the program Alcoa was inviting its own break-up. In this case Alcoa was voicing two fears which did not reinforce each other—fear of competition and fear of dissolution.

The divided emphasis in Alcoa's reply evidently was inspired by the am-

petition in this industry. Therefore, any Government disposal which does not increase competitive conditions will make more necessary the ultimate dissolution or rearrangement of Alcoa."

REP. SURPLUS PROP'Y Bd., 27. See also *Joint Hearings*, pt. 2, p. 42 *et seq.*

⁸³(1) Making available the Government stockpile of bauxite at Hurricane Creek; (2) engineering investigations to improve competitive position of plants, and possibly Government financing of necessary changes; (3) control of disposal of secondary metal so as not to discourage primary producers. REP. SURPLUS PROP'Y Bd., 53.

⁸⁴*Ibid.* Cf. Senator Mitchell's caustic comment: "An admission of defeat is registered even before the work of disposal has begun." 91 Cong. Rec., Nov. 23, 1945, at 11081.

⁸⁵Alcoa stated in its brochure: "In view of the fact that the report of the Surplus Property Board was submitted to Congress and widely publicized in the press, facilitated by a press release, we are making copies of this letter available, insofar as possible, to the same parties." The brochure was read in testimony before three Congressional committees. *Joint Hearings*, pt. 3, p. 151 *et seq.*

⁸⁶*Ibid.*, at 153.

⁸⁷*Ibid.*

biguous wording of a report on the aluminum industry submitted to Congress by the Attorney General several days before the appearance of the Board's report.⁸⁸ The Attorney General's report stressed the urgency of prompt action by the Government to promote competition in the industry, asserting at the same time that "The only solution lies in the split-up of Alcoa into a number of competing companies." It recommended that the Surplus Property Board should be guided in aluminum plant disposal by the necessity of creating competition, but fundamentally it argued that disposal without substantial Government aid to competing producers was unlikely, and that therefore dissolution of Alcoa should precede or accompany the disposal program. At one point the report stated:

"If it is not feasible, under present conditions, to undertake concurrently the tasks of reorganizing Alcoa into competing companies and of selling or leasing Government plants, then Government aid of some sort will have to be forthcoming to enable independent operators of the Government plants to compete against Alcoa and survive. And as long as the competition is dependent on substantial Government assistance, industrial consumers may continue to wonder whether or not these independent producers can be relied on as permanent sources of supply. Under such circumstances the Federal court will still be faced with the problem of determining whether or not the Government's disposal program has made the industry competitive and what further action, such as the dissolution of Alcoa, must be taken to bring about that condition. There can be no question about the firmness of the Court's decision to make the aluminum industry competitive. If that objective is not achieved through the disposal of Government plants, then that objective will have to be achieved through the application of the Sherman Act in conformity with the opinion of the Court."⁸⁹

Thus the ambiguity revolves about the proposal for immediate dissolution and the recognition that dissolution is ultimately the problem before the court. How could dissolution be effected without court action? The report was addressed to Congress pursuant to section 205 of the War Mobilization and Reconversion Act, which directs the Attorney General to include recommendations for legislative action.⁹⁰ The report made no specific recommendations on

⁸⁸Alcoa stated in its reply to the Board report: "The fact that the Department of Justice, only 10 days prior to the report, submitted a 139-page document to Congress devoted almost wholly to an argument for the dissolution of Alcoa seems to us more than a coincidence." *Joint Hearings*, pt. 3, p. 153.

⁸⁹REP. ATT'Y GEN., 42, 43.

⁹⁰58 STAT. 785 (1944), 50 U. S. C. App. § 1660 (Supp. 1945). Section 205 provides: "The Attorney General is directed to make surveys for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power

this score. For Congress to legislate the break-up of Alcoa would be unusual, to say the least, and it would raise interesting questions of constitutional power.⁹¹ A long letter of reply by Alcoa to the Attorney General's report challenged the economic rather than the legal aspects of dissolution.⁹² An Alcoa executive later maintained before three Senate committees in joint hearings that the Attorney General's appeal for dissolution was made upon considerations other than those demanded by enforcement of the antitrust laws.⁹³ The Attorney General's representative at the same time denied⁹⁴ any intent as charged by Alcoa to supersede the courts by appealing to Congress.

But the big weapon in Alcoa's arsenal was the subsidy issue. In the light of the declared objectives of the Surplus Property Act, the Board's proposals concerning what the Government would do in opening the way for competitors were moderate indeed. Alcoa's letter of reply described these recommendations as a "six-point subsidy program which applies to every phase of aluminum manufacture and sale—a cradle to the grave program which, once started, can never be terminated."⁹⁵ The subsidy campaign against the Board found a responsive audience among some members of Congress⁹⁶ and served to (1) delay Congressional approval of the Board's report,⁹⁷ (2) ob-

in the course of war mobilization and during the period of transition from war to peace and thereafter. The Attorney General shall submit to the Congress within ninety days after the approval of this Act, and at such times thereafter as he deems desirable, reports setting forth the results of such surveys and including recommendations for such legislation as he may deem necessary or desirable."

⁹¹Cf. the suggestion by the chairman of the Federal Power Commission that the aluminum industry might be regulated as a public utility. *Joint Hearings*, pt. 3, p. 130. See also Note (1937) 37 COL. L. REV. 269, 292.

⁹²Alcoa Letter to Att'y Gen., 3.

⁹³*Joint Hearings*, pt. 3, p. 220.

⁹⁴*Id.* at 228.

⁹⁵*Id.* at 152. Alcoa put out strenuous effort to make its argument. For example, its printed brochure devoted four pages to rebuttal of a diffident suggestion in the Board's report that Congress might want to consider amending public power laws to remove the disadvantages arising from inflexible power contracts to aluminum producers. REP. SURPLUS PROP'Y Bd., 45; *Joint Hearings*, pt. 3, p. 192 *et seq.* At another point Alcoa said that the Board's proposal to offer the Hurricane Creek alumina plant to a competitor who would make alumina available to other producers at a competitive price, "necessarily involves a Government-fixed price for alumina." While Alcoa said that this was "unnecessary and destructive of free enterprise," Alcoa itself offered to operate Hurricane Creek and supply alumina at a price to be "dictated by the Government." *Joint Hearings*, pt. 3, p. 189; pt. 2, p. 55. A proposal by the Board to offer leasing terms to competitors comparable to those offered Alcoa in its original wartime lease was described as "an invitation to reckless, extravagant, and calculated mismanagement" but Alcoa wanted to operate under those terms till the expiration of its lease in 1948. *Id.*, pt. 3, at 155; *Mead Committee Hearings*, 4152.

⁹⁶See *Joint Hearings*, pt. 2, pp. 57, 67 *et seq.*; pt. 3, p. 149 *passim*.

⁹⁷*Id.*, pt. 3, at 208; pt. 4, at 259.

secure the objectives of the Surplus Property Act,⁹⁸ (3) place the Board and the RFC on the defensive in the matter of exercising their authority to carry out these objectives.⁹⁹ Subsequently the Board was impelled to make public a point-by-point refutation of Alcoa's charges. In this connection it noted:

" . . . The company's protest was intemperate, and vituperative and served to obscure the issues and not to clarify them. The obvious purpose of Alcoa's protest was to attempt to distract the members of Congress and the public from the fact that Alcoa was seeking to obtain the more desirable Government plants and thus to increase and solidify its own monopolistic position."¹⁰⁰

Patent Complications

At the present writing, a truce has been declared between Alcoa and the Government, and in place of denunciation, encomiums have been exchanged. The praise that Alcoa extracted from the Government was its reward¹⁰¹ for releasing certain patents necessary to the disposal program, after putting up a resistance which the Board broke by laying the whole matter before Congress.¹⁰²

The RFC had considered a series of alternative offers by the Reynolds Metal Company, finally arranging a tentative lease of the Hurricane Creek alumina plant and the Jones Mill reduction plant, both in Arkansas. The proposed leases for these plants were conditioned, among other things, on the RFC or Reynolds obtaining from Alcoa licenses under certain patents and processes essential to the efficient operation of the plants.¹⁰³ The Sur-

⁹⁸*Id.*, pt. 1, at 14 *passim*. Senator Mitchell stated: "The copious crocodile tears that Alcoa is shedding over Government subsidies must not be permitted to wash out the Surplus Property Act and to confuse the issues that present themselves." 91 Cong. Rec., Dec. 21, 1945, at A6166. See also *id.*, Dec. 21, 1945, at A5742.

⁹⁹*Joint Hearings*, pt. 2, p. 91; pt. 3, p. 141 *passim*. Senator Mitchell remarked on the floor of the Senate: "Had the legal minds in both agencies spent as much time trying to carry out their duties under the law as they have in debating the limits of their respective authorities, this country would be considerably better off today." 91 Cong. Rec., Nov. 23, 1945, at 11081. In a memorandum to the President, Senator Mitchell stated that "On subsidies the RFC is playing the Alcoa game." He referred to the fact that the RFC had abandoned an earlier proposal to offer Government guarantees against losses akin to those provided in the original Alcoa contract. 91 Cong. Rec., Dec. 7, 1945, at A5742. See *Mead Committee Hearings*, 4120, 4121; *Joint Hearings*, pt. 2, p. 92.

¹⁰⁰Surplus Prop'ty Adm'r Letter to O'Mahoney, 3.

¹⁰¹A statement by Alcoa and the laudatory Government letters were printed in a green covered brochure and distributed by Alcoa. In view of Alcoa's past actions and the indefensibility of its position, the praise was gratuitous.

¹⁰²Surplus Prop'ty Adm'r Letter to O'Mahoney.

¹⁰³*Id.* at 1.

plus Property Board had been hampered in formulating a disposal program by inability to get from Alcoa a commitment to turn over the manufacturing "know-how" in the Government-operated plants to prospective competitors.¹⁰⁴ Finally the Attorney General succeeded in extracting a "vague offer" which failed, however, to specify Alcoa's intentions regarding the patents.¹⁰⁵ Apparently Alcoa was withholding its patents in order to bargain with the Attorney General regarding settlement or dismissal of the antitrust suit.¹⁰⁶ When a lease agreement with Reynolds for the Arkansas plants appeared in the offing, the Surplus Property Board addressed a letter to the chairman of the Subcommittee on Surplus Property of the Senate Military Affairs Committee advising him of Alcoa's failure to cooperate. The letter stated at one point:

"Alcoa is using its patents to obstruct the Reynolds transaction despite the fact that it has hitherto publicly assured both your Subcommittee and the Senate Committee on Small Business that its patents would not prevent or hinder the disposal of Government plants to competitors. Although the Government understood that the plants constructed for it by Alcoa were to be capable of independent operation, now for the first time Alcoa suggests that the Hurricane Creek plant can be sold as an effective operating unit to a competitor of Alcoa only if we accept the terms and conditions that Alcoa may dictate."¹⁰⁷

Less than one week after this letter was made public, it was announced that Alcoa had agreed to turn over the patents in question to the RFC for sub-licensing on a nonexclusive royalty-free basis.¹⁰⁸ This agreement which made possible the leasing of the Arkansas plants to Reynolds was hailed on all sides as clearing the road to competition.¹⁰⁹

¹⁰⁴*Mead Committee Hearings*, 4149; REP. SURPLUS PROP'TY BD., 49; *Joint Hearings*, pt. 2, p. 95.

¹⁰⁵Surplus Prop'ty Adm'r Letter to O'Mahoney, 5.

¹⁰⁶The Surplus Property Administrator reported he was "told by RFC that representatives of Alcoa have made statements that suggest that the company may be unwilling to grant a license or to discuss its terms unless the antitrust suit against Alcoa is settled or dismissed." Surplus Prop'ty Adm'r Letter to O'Mahoney, 5.

¹⁰⁷*Id.* at 5, 6. Judge Caffey had said that "Alcoa was founded on patents," but he made much of the fact that these patents had expired, permitting, in his opinion, anyone to enter the aluminum industry without restriction. 44 F. Supp. 97, 111, 306 (S. D. N. Y. 1941). Alcoa has repeated this point. *Mead Committee Hearings*, 4149. The patents at issue in the Hurricane Creek lease covered a method of economically extracting alumina from low-grade bauxite. Before the agreement to release this patent, Alcoa made it appear that the old Bayer process, without combining the new patented process, would suffice for the operation of Hurricane Creek. See *Joint Hearings*, pt. 3, p. 189; pt. 4, p. 243.

¹⁰⁸RELEASE OF SURPLUS PROP'TY ADM'R, dated Jan. 10, 1946.

¹⁰⁹Senator O'Mahoney, Chairman of the Surplus Property Subcommittee, termed it a "splendid beginning," the Surplus Property Administrator praised Alcoa for

Outlook for the Aluminum Industry

There can be no doubt that transference of the Government-owned plants in Arkansas to Reynolds, even on a temporary basis, is an epoch-making event in the history of the industry and a sizeable accomplishment in the Government's aluminum disposal program. For the first time, the war period excepted, there will be two basic producers of aluminum.¹¹⁰ Other prospective producers will not be exclusively dependent on Alcoa for their supply of alumina and industrial consumers will not be exclusively dependent on Alcoa for their supply of aluminum. These factors may facilitate disposal of the remaining plants. An aluminum industry shaken loose from the grip of a single producer and a single regulator of price presents challenging opportunities. The automobile industry alone is capable of consuming more aluminum than can be produced even with present war-expanded capacity.¹¹¹ In the building of aircraft, railroad rolling stock, ships, houses, and in a thousand and one articles of daily use, aluminum can be used to good advantage because of desired technical qualities.¹¹²

Because Alcoa had preëmpted the field in the past, the future market possibilities of aluminum production have not attracted potential new producers to bid for Government plants. Until quite recently, those few who registered interest conditioned their proposals upon some form of governmental assistance up to the time that commercial markets can be established. Mainly such assistance would involve interim Government purchases of aluminum for a national security stockpile of strategic metals,¹¹³ or governmental assumption of financial losses along with the greater part of the profits.¹¹⁴ This latter arrangement characterized Alcoa's operation of Government plants during the war.¹¹⁵ The fact that the Arkansas plants have

its "splendid contribution," and the Attorney General offered "hearty congratulations" to everyone. Alcoa wrote to the Administrator that "public considerations" alone moved it to grant a royalty-free license. Correspondence in *RELEASE OF SURPLUS PROP'TY ADM'R*, dated Jan. 10, 1946.

¹¹⁰Alcoa persuaded an early competitor to refrain from producing aluminum. 44 F. Supp. 97, 113 (S. D. N. Y. 1941).

¹¹¹REP. ATT'Y GEN., 28. Automobile manufacturers used relatively large amounts of aluminum until 1915 when Alcoa raised the price of aluminum per pound from 19 cents to 33 cents. *Id.* at 29. See REP. SURPLUS PROP'TY Bd., App. 17, p. 120 *et seq.*

¹¹²REP. ATT'Y GEN., 28 *et seq.*

¹¹³*Joint Hearings*, pt. 3, p. 143; pt. 4, pp. 253, 275; *passim*. A bill authorizing the RFC to purchase aluminum for stockpile purposes from government-constructed plants recently was introduced in both houses of Congress. See 91 Cong. Rec., Nov. 20, 1945, at 11003; Nov. 23, 1945, at 11081; Nov. 28, 1945, at A5545; Dec. 7, 1945, at A5742.

¹¹⁴*Joint Hearings*, pt. 2, p. 91; pt. 4, p. 242 *passim*. See also 91 Cong. Rec., Dec. 7, 1945, at A5741.

¹¹⁵REP. SURPLUS PROP'TY Bd., 52.

been leased to Reynolds without such obligations on the part of the Government makes it unlikely that guarantees will be offered to bidders of the remaining Government plants. In that case, the plants unfavorably situated with respect to transportation, power, and other economic factors will remain idle, or be scrapped, if it is not feasible to relocate these plants or convert them to different uses.

Comparatively new in the metal-producing phase of the industry, Reynolds will have to overcome the advantages accumulated by Alcoa in 50 years of monopoly endeavor.¹¹⁶ As the long history of this endeavor so amply demonstrates, competition can be offered by Alcoa when the occasion demands it—competition designed not for the ultimate benefit of consumers but for the temporary purpose of driving competitors from the field. Consequently, there is an impelling logic on the part of Reynolds to build up counter-measures of industrial control against its dominant rival. An industry so characterized by duopoly will not necessarily confer the economic and social benefits assumed to flow from competition.¹¹⁷

The law, lacking fine distinctions, does not demand that once the onus of monopoly is removed, the ideal of competition be attained. What disposition, then, will be made of the antitrust suit? In its report the Surplus Property Board noted:

“Even if the Board is successful in selling some of the plants to competitors of Alcoa, this fact by itself may not satisfy the requirements of the Sherman law. It is not the province of the Board to work out a plan for the reorganization of the properties presently owned by Alcoa or to express any views on the question whether, after the completion of the Board’s disposal program, Alcoa’s operations will be lawful under the Sherman Act. This is a question which must be determined for the executive branch of the Government by the Attorney General and a question that will presumably be decided ultimately by the courts.”¹¹⁸

The start made by the Government in aluminum plant disposal will persuade the Attorney General to shelve any demand for a dissolution decree. Whereas four months ago he reported to Congress that the break-up of Alcoa was “the only solution,” his recent letter to the Surplus Property Administrator

¹¹⁶*Id.* at 22, 23. Reynolds shares one advantage with Alcoa as against other would-be competitors. Both companies have amortized their wartime investment, and thus post-war production costs will carry no depreciation charges. *Id.* at 24.

¹¹⁷A recommendation has been made for 4 to 6 basic producers in the aluminum industry. “A duopoly, because of the protection afforded it, by not being a monopoly, may in effect be worse than the monopoly.” Testimony of Arnold Troy, Eastern Metal Products Co., *Joint Hearings*, pt. 4, p. 266.

¹¹⁸REP. SURPLUS PROP’Y BD., 53.

regarding the Reynolds lease and the Alcoa patent suggests otherwise.¹¹⁹ It is reasonable to expect that Alcoa will attempt to work out some arrangement with the Attorney General for dismissal of the suit, or failing that, will petition the court for a judgment to the same effect.

The district judge, who expressed his abhorrence of dissolution¹²⁰ for Alcoa and who delivered 407 unexceptional findings of fact in its favor, can hardly be expected to break up a monopoly with two producers in the field when he failed to find a monopoly with one. The instructions of the circuit court give ample leeway. Transfer to Reynolds of the Jones Mill reduction plant already reduces Alcoa's percentage of ingot-producing capacity from 90 to 78 per cent.¹²¹ This approaches the midway point between the monopoly figure and the one which the circuit court decided would "probably" not constitute a monopoly. If the Government finds it possible to transfer the efficient block of Northwest plants to Reynolds or to other parties,¹²² the legal requirement of competition, for the time being at least, will be satisfied. The question will arise again only if the operators of Government plants, at the termination of their leases, find that they cannot make a go of it and withdraw from the industry.

¹¹⁹"I want to express my gratification at the outcome of these negotiations. The consummation of this lease and the granting of this license on the terms above stated should contribute substantially to the establishment of real competition in the aluminum industry. It is entirely in line with the objective of this Department in the pending antitrust suit." RELEASE OF SURPLUS PROP'TY ADM'R, dated Jan. 10, 1946.

¹²⁰"I am convinced and I wish to put on the record the statement that in my judgment it would be greatly contrary to the public interest either to dissolve or enjoin Alcoa." 44 F. Supp. 97, 309 (S. D. N. Y. 1941).

¹²¹Computed from United States Tariff Commission, *Aluminum*, War Changes in Industry Series Report No. 14 (1946), Table 19, p. 76. The total from which this percentage is derived includes the capacity owned by Alcoa and Reynolds plus the portion of the Jones Mill plant capacity leased by Reynolds as capable of economic operation. Even before the lease with Reynolds was made, Alcoa claimed that it "no longer owns or operates anything approximating 90 per cent of the aluminum-ingot capacity of the United States." Alcoa arrived at a figure somewhat below 50 per cent by including the Government-owned capacity in the total, and thereby claiming "a wide margin within which it may acquire surplus Government ingot facilities without becoming of monopolistic size." *Joint Hearings*, pt. 3, pp. 209, 219. That is to say, Alcoa counted the idle Government-owned capacity as competitive and therefore as justification for its claim to acquire this capacity itself! The same type of reasoning led Alcoa to argue that Government plants acquired by it would have to compete with, among other things, the output of its own existing facilities. *Id.* at 200. Cf. Surplus Prop'ty Adm'r Letter to O'Mahoney, 21.

¹²²In a release dated February 21, 1946 the War Assets Corporation announced that the Mead reduction plant at Spokane, Washington, had been leased to the Kaiser Co. Reynolds has submitted a bid for the Troutdale, Oregon reduction plant. If these two reduction plants are operated at capacity, Alcoa's share of ingot-producing capacity will drop to about 58 per cent.