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under the antitrust laws "based in whole or in part" on any matter complained of in the government proceeding. Every plaintiff who comes within the terms of this provision should be forced to bring suit within a short period—two years, perhaps—after entry of a final judgment or decree in the government action. The effect of such a modification on plaintiffs would vary: where the government suit began during the last two years of a plaintiff's statutory period, his time would be extended; in all other instances, it would be shortened. Where the limitations period is lengthened, two years would provide ample time to bring an action. Where shortened, claimants whose actions would otherwise have been preserved for three, four, or five years after the end of the government suit, would be forced to litigate promptly. Plaintiffs thus restricted would have sufficient time to appraise their chances and to prepare their cases, given the advantage of prima facie evidence in the event of a government victory, and what is usually an exhaustive record. Moreover, with such a record plaintiffs should be better able to utilize the discovery provisions of the Federal Rules.

But here, as in other instances, the exact period chosen is not the important thing. What is important is the pressing need for uniformity. Congress should move to meet it.

THE COMMON LAW POWER OF STATE ATTORNEYS-GENERAL TO SUPERSEDE LOCAL PROSECUTORS

Enforcement of state penal law is traditionally the responsibility of local prosecutors. But in recent years there has been a demand for more centralized control of state prosecution policy. Centralization, it is urged, will

17. 38 Stat. 731 (1914), 15 U.S.C. 16 (1946). For a discussion of § 5, the reasons leading to its passage, and the problems faced by plaintiffs desiring to avail themselves of its prima facie provision, see Dix, Decrees and Judgments under Section 5 of the Clayton Antitrust Law, 30 Geo. L.J. 331 (1942).

18. No provision has been made for this problem in any of the bills introduced in Congress. See note 13 supra.

19. I.e., his time would be shortened provided the period during which the government action is pending is excluded. The running of limitations is already suspended during this latter period. See note 17 supra.


assure uniform enforcement of state laws, reduce the influence of local politicians on district attorneys, and raise the caliber of prosecution personnel.

Few legislatures, however, have established a centralized enforcement system. Instead, they have adopted a variety of half-way measures expanding the role of the state attorney-general in criminal enforcement. Thus most states have granted the attorney-general power to consult with and advise local prosecutors. Some states have conferred on him constitutional or statutory authority to institute criminal proceedings. A few have also empowered him to supersede district attorneys in the conduct of investigations or prosecutions.

Even in the absence of statute, a number of courts have upheld the right of the attorney-general to investigate criminal acts, sign indictments, and institute or intervene in prosecutions. These rights, they have felt, are inherent in the office under the common law. But the question remains whether the common law prerogative to conduct criminal prosecutions includes the right to supersede local prosecutors. In Appeal of Margiotti, the Supreme Court of Pennsylvania held that it does.

In response to persistent public demand, the district attorney of Allegheny County obtained a court order summoning a grand jury to investigate charges that employees of the City of Pittsburgh were converting city materials and labor to their own use. Before the grand jury convened, a new


3. See Willoughby, op. cit. supra note 2, at 119; Warren, supra note 2, at 499.

4. See Proceedings of the Governor's Conference on Crime 632 (N.Y. 1935); Medalie, supra note 2, at 506.

5. See State Dept. of Justice Needed, 16 J. AM. JUD. SOC'y 70, 72 (1932); How to Make Prosecuting Effective, id. at 74-75.

6. E.g., ILL. ANN. STAT. c. 14, § 4 (Smith-Hurd, 1951); 2 MICH. STAT. ANN. C. 10, § 3.183 (1936); VT. STAT. tit. 6, c. 26, § 455 (1947).

7. E.g., 8 ALA. CODE tit. 55, §§ 234, 235 (1940) ("may appear before grand jury in same manner as solicitor" and "direct prosecution in criminal cases"); 5 REV. STAT. NEB. c. 83, § 84-204 (1930) ("shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties"). Some states give the attorney-general statutory power to intervene. E.g., NEW MEX. STAT. ANN. c. 3, § 3-302(i) (1941) (shall "attend and assist in the trial of any indictment in any county on direction of the governor").


9. E.g., Commonwealth v. Koslowsky, 238 Mass. 379, 131 N.E. 207 (1921) (right of attorney-general to attend grand jury proceedings); State v. Robinson, 101 Minn. 277, 112 N.W. 269 (1907) (right of attorney-general to prosecute mayor for failure to reveal known violations of liquor law); State v. Thompson, 10 N.C. (3 Hawks) 613 (1825) (right of attorney-general to intervene in order to enter a nolle prosequi). It should be noted that the power to "intervene" is simply the power to act in conjunction with the district attorney; power to "supersede," on the other hand, is the power to dismiss the district attorney from the proceedings entirely.

state attorney-general was appointed to office. Two days later he served an order on the district attorney superseding him in all matters relating to the investigation. He also petitioned the local court to revoke its order summoning the grand jury. In justification of his action, the attorney-general charged the district attorney with negligent delay in initiating the investigation. And he argued that the district attorney had limited the scope of his petition to "public employees" in order to protect certain public officials. Nevertheless, the court vacated the attorney-general's supersede and directed the district attorney to proceed with the investigation. On appeal, the Pennsylvania Supreme Court held that the attorney-general had a common law power of supersede and that its exercise in this case was not an abuse of discretion.

The court offered no reasons of its own to support its conclusion. Instead it cited as binding precedent a case decided fourteen years earlier. There, the Pennsylvania Supreme Court reasoned as follows: Pennsylvania and other colonies adopted the office of attorney-general as it existed in England; in the eighteenth century the English Attorney-General had power to supersede prosecuting attorneys; therefore the Pennsylvania attorney-general has a similar power.

This argument overlooks the fact that in this country today the relationship between the attorney-general and local prosecutors is quite different from that existing in eighteenth century England. In England public prosecutors were appointed by the attorney-general. In most American

11. Id. at 467–468.
12. Brief for Appellant, pp. 35–38, Appeal of Margiotti, Att'y-Gen., 75 A.2d 465 (1950). According to the attorney-general, the "higher-ups," such as the President of the City Council and the City Controller, are not included in the category of "public employees." Id. at 36.

In 1938 the Pennsylvania legislature passed an act granting the attorney-general discretionary power to supersede district attorneys at any stage of an investigation or criminal proceeding. This act, however, was repealed in the following year. Pa. Laws 1938, P.L. 17; Pa. Laws 1939, P.L. 8.
16. 6 HOLDSWORTH, HISTORY OF ENGLISH LAW 457, 460–461 (1931); Appeal of Margiotti, Att'y-Gen., 75 A.2d 465, 470 (1950) (dissenting opinion). This is also true of Delaware and Rhode Island today. DEL. CODE c. 17, § 446 (1935); R.I. GEN. LAWS c. 10, § 5 (1938).

In modern England, however, the Attorney-General no longer appoints prosecutors. In 1879 Parliament provided for the appointment of a Director of Public Prosecutions. It is the Director's duty to institute criminal actions "under the superintendence of the Attorney-General." But the Director and his assistants are appointed by a secretary of state with the sanction of the Treasury, not by the Attorney-General. Prosecution of Offenses Act, 1879, 42 & 43 Vic., c. 22.

At common law public prosecution by government officials was supplemented by a system of private prosecution. Under that system, any private individual could institute a
states, including Pennsylvania, on the other hand, the district attorney is an elected official. Where the attorney-general appoints local prosecutors, he is the person primarily responsible for criminal law enforcement. If there is negligent delay in investigation or unwarranted failure to prosecute, the public blames the attorney-general. Therefore he quite properly has the power to remove or supersede his appointees. But where the local prosecutor is an elected official, the public regards him as the person primarily responsible for enforcement policy. Yet if supersedure is permitted in such a situation, the attorney-general may be the man in actual control. In the hands of an aggressive attorney-general the mere threat of supersedure can be a powerful weapon: through it he can compel the initiation of an investigation or prosecution, or the entry of a nolle prosequi. The net result is to have accountability lodged in one place and control in another.

As it operates in most states today, supersedure is a haphazard and time-consuming process. Perfunctory reports submitted annually or biennially by district attorneys do not give the attorney-general enough information for deciding when he should exercise his supersedure power. Whenever he does exercise it, litigation between him and the district attorney almost inevitably follows. If the district attorney refuses to bow out of the case, the attorney-general must prove to the court's satisfaction that the district

criminal proceeding. And, if he wished, he could choose a private solicitor to represent him. This system remains in effect in England today. HOWARD, CRIMINAL JUSTICE IN ENGLAND 11 (1931). For a full description of the process of criminal prosecution in England, see ALEXANDER, THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS 91-135 (1911); HOWARD, CRIMINAL JUSTICE IN ENGLAND 1-228 (1931).

17. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 130 (1929). See, e.g., PA. CONST. ART. XIV, §§ 1, 2; W. VA. CONST. ART. IX, § 1.

18. The attorney-general has such power in Rhode Island. R.I. GEN. LAWS c. 10, § 6 (1938). In Delaware the attorney-general is authorized to fix the term of office of his appointees. DEL. REV. CODE c. 17, § 446 (1935).

19. Under such a system, the attorney-general is appointed or elected for the primary purpose of advising and representing the state in civil actions. See WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 116 (1929); De Long, Powers and Duties of the State Attorney-General in Criminal Prosecution, 25 J. CRIM. L. & CRIMINOLOGY 358, 360 (1935).

20. See, e.g., State v. Finch, 128 Kan. 665, 280 Pac. 910 (1929) (attorney-general, after superseding district attorney, dismissed a criminal prosecution over district attorney's opposition); State v. Ardoin, 197 La. 878, 2 So. 2d 633 (1941) (district attorney superseded as legal adviser to grand jury); Commonwealth v. Ryan, 126 Pa. Super. 306, 188 Atl. 764 (1936) (attorney-general employed special attorney to supersede district attorney).

21. In the Margiotti case, the court observed that the district attorney did not file his petition for a grand jury investigation until he was subjected to the threat of supersedure. Appeal of Margiotti, Att'y Gen., 75 A.2d 465, 469 (Pa. 1950). See also Brief for Appellant, pp. 3, 13, 35, 41, Appeal of Margiotti, Att'y Gen., 75 A.2d 465 (Pa. 1950).

22. In at least 17 states the attorney-general is empowered to require annual or biennial reports from prosecutors. For a compilation of these laws and a discussion of the inadequacy of the reports, see WARNER, SURVEY OF CRIMINAL STATISTICS IN THE U.S. FOR THE NATIONAL COMMISSION ON LAW OBSERVANCE & ENFORCEMENT 40-48, 152-159 (1929). See also De Long, Powers & Duties of the State Attorney-General in Criminal Prosecution, 25 J. CRIM. L. & CRIMINOLOGY 358, 384 (1935).
attorney has failed in his duty.\textsuperscript{23} The court's determination is often followed by an appeal. This sparring delays enforcement of the law and decreases public respect for the enforcement authorities. And it is likely to result in permanent animosity between officials who should be cooperating fully.

Furthermore, supersedure does not eliminate politics from law enforcement. There is no reason to assume that attorneys-general play politics less than local prosecutors. An attorney-general can use supersedure to quash an investigation which may prove embarrassing to his own party. Similarly, he can use it to start an investigation of his political opponents. Indeed, it seems that today supersedure is used mainly for just these purposes.\textsuperscript{24}

Finally, supersedure is not necessary to curb incompetent or dishonest prosecutors. There is statutory provision in almost every state for removal by the court of a prosecutor found to be habitually negligent, corrupt, partial, or oppressive.\textsuperscript{25} And the courts in most jurisdictions have power to...

\textsuperscript{23} Even where there is a statute declaring that the attorney-general has the absolute power to supersede, courts have held that his exercise of the power is subject to judicial review. Kemp v. Stanley, 204 La. 110, 15 So.2d 1 (1943); In re Shelley, 332 Pa. 358, 2 A.2d 809 (1938).

\textsuperscript{24} A good example of the use of the supersedure power by an attorney-general to forestall an investigation which might have affected adversely his political interests is cited in De Long, \textit{supra} note 22, at 386. See also In re Shelley, 332 Pa. 358, 2 A.2d 809 (1938). There the attorney-general attempted to supersede a district attorney, who, on the eve of a primary election, proposed to investigate the administration of the Governor. The Governor had appointed the attorney-general and could remove him at will. In recognition of the attorney-general's conflicting loyalties, the court stated that he would be disqualified from handling the investigation personally even if he should succeed, on remand, in having the district attorney set aside. \textit{Id.} at 366, 2 A.2d at 814. The court did not decide the latter question, but simply upheld the constitutionality of a statute conferring on the attorney-general supersedure power. See note 13 \textit{supra}. The dissenting justice felt that the same factors which disqualified the attorney-general from conducting the investigation personally should disqualify him from superseding at all. \textit{Id.} at 377–380, 2 A.2d at 318–320.

An example of an attorney-general's use of supersedure to start an investigation of his political opponents is the \textit{Margiotti} case. There the city officials under investigation had the same political affiliations as the district attorney. The attorney-general, however, was a member of a different political party. This situation gave rise to the attorney-general's charge, rejected by the court, that the district attorney could not conduct an impartial investigation. Appeal of Margiotti, Att'y-Gen., 75 A.2d 465, 469 (Pa. 1950). It also prompted the dissenting judge to remark that "the only party to this record, under the evidence in the case, whose motives are under any stigma from possible partiality and bias for political purposes is the attorney-general himself by virtue of the very office he now occupies and the character of the proceeding here involved." \textit{Id.} at 474.

See also the New York Times' account of the recent supersedure of a county prosecutor by the New Jersey attorney-general, in which the prosecutor charged that the attorney-general's action was "entirely political." N.Y. Times, Dec. 2, 1950, p. 1, col. 2, cont. p. 28, col. 8.

appoint a substitute for a district attorney disqualified in a particular case because of personal interest. Where a prosecutor exceeds his authority in maliciously instituting suit without probable cause, he may be held personally liable. Or, if he fails to prosecute in disregard of a statutory duty, mandamus may lie.

But the shortcomings of supersedure, which is only a stop-gap measure, should not discourage the drive toward centralized law enforcement. Although not every argument for centralization withstands analysis, the need for it is clear in at least two areas: uniform enforcement of state economic legislation, such as antitrust and blue sky laws, and coordinated attack on state-wide crime syndicates. To meet these needs without the disadvantages of supersedure—fomenting litigation and divorcing power from responsibility—a state department of justice should be established. Under such a system the attorney-general would appoint local prosecutors and in turn have the power to remove them at will. Provisions in some

26. Many courts have held that the trial court has inherent power, independent of statute, to appoint a special prosecutor when the prosecuting attorney is disqualified. E.g., King v. State, 43 Fla. 211, 31 So. 254 (1901); State v. Jones, 306 Mo. 437, 268 S.W. 83 (1924). And a number of states have passed statutes declaratory of the court’s common law power. E.g., 2 ILL. ANN. STAT. c. 14, § 6 (Smith-Hurd, 1951); 24 Mo. Rev. Stat. Ann. c. 85, § 12948 (1943); W. Va. Code Ann. c. 7, § 404 (1949). See Baker & De Long, The Prosecuting Attorney, Provisions of Law Organizing the Office, 23 J. CRIM. L. & CRIMINOLOGY 926, 940 (1933); 29 id. 741 (1939); 10 VA. L. REV. 239 (1924).

27. Although prosecutors are usually accorded immunity with respect to the initiation of proceedings, there are decisions holding that a district attorney may be held liable for malicious prosecution or false imprisonment. Carpenter v. Sibley, 153 Cal. 215, 94 Pac. 879 (1908) (malicious prosecution); Leong Yau v. Carden, 23 Haw. 362 (1916) (same); Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182 (1916) (false imprisonment). Contra: Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917).


28. E.g., Thomas v. Fuller, 166 La. 847, 118 So. 42 (1928); State v. Warnock, 12 Wash. 2d 478, 122 P.2d 472 (1942).

29. For example, it is often contended that a centralized system will reduce the influence of local politicians on local prosecutors and will raise the caliber of prosecution personnel. See notes 4 and 5 supra. But state politicians will take over where local politicians leave off. And the local electorate, without centralization, can raise personnel standards by nominating and electing better prosecutors, increasing the pay of all persons in the prosecutor’s office, and even by instituting a merit system for selecting the prosecutor’s assistants.

30. Other typical regulatory statutes which call for uniform enforcement are those prohibiting child labor, false or misleading advertisements, and adulteration of food, drugs, or cosmetics. E.g., FLA. STAT. ANN. c. 500, §§ 500.01–500.32 (1943) (pure food law); 20 Mo. Rev. Stat. ANN. c. 56, art. 3, §§ 9619–9629 (1942) (child labor); 2 NEB. REV. STAT. c. 28, §§ 28–1235, 28–1236 (1943) (misleading advertisements).

31. For proposals to this effect, see note 2 supra.
state constitutions requiring that the district attorney be an elected official may prevent the adoption of so sweeping a scheme. In those states, absent constitutional amendment, at least uniform enforcement of state economic legislation can be achieved. As each regulatory statute is passed, the legislature can write into it a provision giving the attorney general the exclusive power to prosecute violators.

32. See note 17 supra.

33. There are regulatory statutes in many states today which provide specifically for enforcement by the attorney-general, either alone or in conjunction with local prosecutors. E.g., 3 Colo. Stat. Ann. c. 69, § 45 (1943) (pure food law; attorney-general has concurrent power to prosecute); Ind. Stat. Ann. tit. 23, §§ 23-120 (Burns 1950) (antitrust law; concurrent power); Md. Ann. Code art. 32A, §§ 11-17 (1939) (blue-sky law; attorney-general has exclusive power to prosecute). See, generally, De Long, Powers and Duties of the State Attorney-General in Criminal Prosecution, 25 J. Crim. L. & Criminology 358, 377-378 (1935).