JRB IN

Department of Justice

FEDERAL ANTITRUST POLICY: A PERSONAL PERSPECTIVE

Remarks by

JOE SIMS
Deputy Assistant Attorney General
Antitrust Division

Before the

45th Annual
State Bar of Arizona
Convention

Doubletree Inn
Tucson, Arizona

May 4, 1978

I've been asked to talk about federal antitrust enforcement policy. Before I get done, I am actually going to talk about that, but first, if you will bear with me, I want to reminisce a little bit.

I came to the Antitrust Division fresh out of law school in 1970, and after eight years, I will shortly be leaving. During that eight years, there have been some significant changes in federal enforcement policy. Of course, the coincidence of my tenure and these changes is just that -- a coincidence. Nevertheless, to understand antitrust enforcement policy today, I think you have to understand how it has changed in recent years, and how it will likely continue to change in response to different perceptions of need and differing economic and political environments.

In fact, one of the major changes in recent years has been the resurgence of state enforcement. When I was in law school, not that long ago, there was no state enforcement to speak of. California and New York did a little and nobody else did much of anything. Now, with new political attitudes, and new tools (such as parens patriae -- assuming Illinois Brick is only a temporary impediment), and some financial pump-priming in the form

of federal seed-money grants, state enforcement is booming. Minnesota, Ohio, Colorado, New Jersey -- these and many other states have discovered that antitrust enforcement is both popular and productive -- and there aren't very many government activities that can be so described. Of course, Arizona has one of the most vigorous state enforcement agencies and is certainly one of the leaders today. Given my roots, I'm particularly pleased with Arizona's reputation, for which great credit must go to Governor Babbitt and Ken Reed, among others.

Of course, when you go back to talk about the past, it helps to have a framework for discussion. I had some statistics gathered for just this purpose, and they came back in fiscal year format. Now, most people in the real world do not talk in terms of fiscal years. When you ask them what happened in 1975, they think of January through December, not July through June or, as we do in the federal government, from October through September. And it can get rather confusing, when you start working on the Fiscal 1980 budget in January of 1978. I've never been quite sure how to predict two years in advance how many investigations that we have not yet begun will produce cases that will then be litigated, and how many of these will be pending, not to mention how much they will cost.

Budgeting problems are not, obviously, unique to the federal government, although a litigating law enforcement agency does have some unique problems anticipating expenses. One wholly unique government albatross is the civil service system, which is apparently designed to make sure that you have as much trouble as possible in hiring and keeping a high quality work force. You all know that the President has set out on the long road toward trying to correct that situation, and we ought to all wish him luck -- he will need it.

Of course, there are policy issues over which reasonable men can differ, which is one of the reasons why we have political parties, but on this point there can be no disagreement -- the civil service system we have today simply doesn't work. Today, if I want to hire a lawyer -- which is, parenthetically, significantly easier than hiring a secretary or a file clerk, or a paralegal -- I must first try to fit his or her economic circumstances into a salary schedule fixed with absolutely no reference to what alternative employers -- mainly private law firms -- are paying, and which has relatively arbitrary experience requirements attached to its various levels; then there must be a background check by the FBI which, considering that it does have a few other things to do, takes more time. This is designed to make sure there are no relevant skeletons in the applicant's closet, although

there always seems to be some confusion over which skeletons are relevant; and then we must go through the ordinary amount of internal procedural hurdles, all of which require enormous amounts of paper. If you get somebody on board within six months of the time you decided to hire them, you have accomplished quite a bit. You don't make sudden staff changes in the government.

The civil service system -- and its implementor, the Civil Service Commission -- were established with the best of intentions -- to safeguard employee rights. Unfortunately, many regulatory agencies set up to meet laudable goals soon decide that the only way they can accomplish their goal is to tell the people they regulate how to run their business. There is, apparently, no such thing as discreet regulation -- almost by definition regulatory systems are clumsy and burdensome, and have much more interest in the life of their regulation than the viability of your business. And that very real problem, in a convoluted sort of way, leads me to the first recent change in antitrust enforcement policy.

In Fiscal 1977, the Department participated in over 400 regulatory proceedings, before nearly every federal agency worthy of an acronym (and some that are not): CAB, ICC, FMC, FAA, FCC, NRC, FERC, FRB, CC, FDIC, SEC, CFTC. We file

comments, appear at hearings, and prepare reports. Our basic goal is to try to keep the agencies firmly focused on the least anticompetitive ways to accomplish their statutory mandate. Regulatory agencies don't care for that kind of "help," by and large, and we have developed what might be described as an "arm's-length" relationship with some of the agencies before whom we participate. Nevertheless, we do view our activity as helping the agency do what it presumably ought to be doing in any event: carrying out its regulatory mandate in the least costly way possible.

For example, our most active regulatory program today is our work before the ICC involving trucking. There are over 15,000 regulated trucking companies in this country; you would think that would be plenty of competition to produce the benefits of a free market. Unfortunately, each of those firms must perform with handcuffs and ankle chains, all installed by the ICC under the aegis of the Interstate Commerce Act. You cannot sell an interstate trucking service without first getting the permission of the ICC, and that permission can be obtained only by running a gauntlet of regulatory procedures and competitor opposition that can take up to two years to complete. Even then, your ICC "ticket" will only allow you to carry certain goods -- for

instance, beer but not wine -- and then only on specifically named routes -- from Phoenix to Albuquerque but not to Santa Fe. Of course, even with this very limited ticket, you still must get ICC approval of your rates -- the price you charge for your services. And to get that permission, unless you want to charge the "going rate" -- the one set by a price fixing organization called a rate bureau, at which all your competitors get together under the umbrella of an ICC-granted antitrust immunity and fix the prices they will charge to their customers -- you have to again run the ICC gauntlet of litigation.

This regulatory system costs billions of dollars a year, and its public benefits are hard to find, much less quantify. It keeps trucking prices stable, perhaps, and trucking firms think that's good. In fact, so do some shippers, those who are worried about competing instead of wanting to. But is that in the public's interest? It requires more fuel than would be necessary in an unregulated system, and other inefficiencies mandated by the regulatory system are added on to the price of most goods sold in this country. It's hard to see how that's in the public interest.

Our efforts have been aimed in two directions. First, we have been appearing before the ICC at every opportunity, arguing for more entry flexibility, more rate flexibility,

less regulation and more freedom (and incentive) to compete. Second, we have worked steadily to convince the rest of the government that legislative change is both necessary and desirable. The Ford Administration agreed, and introduced legislation; this Administration is still studying the issue, but I am confident the decision will be the same. The ICC is in fact responding favorably to many of our initiatives, and has taken others on its own motion. But the only way to insure real change is through permanent legislative action. ICC commissioners, even those both wise and well intentioned, have limited tenure and there is no guarantee that their successors will have either of those qualities.

This is, incidentally, the same course followed in the airline industry, where we are close to seeing real results. We banged away at the CAB for several years. Finally, Senator Kennedy held some investigative hearings and publicized the problem, Senator Cannon got involved, and the two of them (with lots of help) have just seen the Senate pass an airline deregulation bill 83-9. The House is now considering similar legislation, and with a little luck, it will follow the Senate. In the meantime, we have continued to appear before the CAB, which now has the avowed free market disciple (and distinguished economist) Alfred Kahn as its chairman. Under his leadership, the

CAB is already doing many of the things the new legislation would require. Nevertheless, Chairman Kahn has joined us in arguing for legislation as the only way to assure permanent change. We're a few years behind airlines in the trucking area, but trucking is clearly the next step.

Just to complete the circle of transportation regulators, we have also stepped up our activities before the FMC. Last year, we made more appearances before the FMC than in the previous ten years combined. We have been enormously successful, both before the agency (which is becoming much more sensitive to competition issues) and generally in raising to a visible level competition policy issues in our current system of ocean shipping regulation. In fact, there is some hope that the Administration will authorize an inter-agency effort to come up with a coherent, comprehensive policy approach to these and related problems in the ocean shipping industry. Shipping is just a little behind trucking, but it's coming along.

As time passes, of course, the focus of these efforts will change. Today, trucking and other transportation areas are a primary focus. Tomorrow, I suspect that we will be spending more and more time on energy regulation. We already have a significant foot in that door. We appear before DOE

and its constituent arms -- ERA and FERC -- to raise competition policy considerations in such areas as the domestic crude oil allocation program, removal of gasoline price and allocation regulations, and pipeline rate reform. We are now involved in two massive administrative proceedings involving pipeline rates and ratemaking methodology. One of these is a general rulemaking designed to consider broad reforms in methodology. The other is a proceeding challenging the rates filed by the eight major oil companies that own TAPS -- Trans Alaska Pipeline System. We believe that pipeline rate regulation has been ineffective at best, and the result has been the same kinds of costs to consumers that would have resulted from massive antitrust violations. Thus, we are spending considerable time and resources to try to get that problem fixed.

We also review federal petroleum leases and lease policies, monitor coal leasing and, for the last eight years have advised the NRC (and its predecessor, the AEC) on the competitive effects of the issuance of licenses for construction or operation of nuclear generating plants. Under this latter program, we have to date conducted antitrust reviews of electric power systems producing over 75 percent of all electric power delivered in the U.S. Thus, our energy regulatory responsibilities have grown steadily, and they

will probably continue to expand. Energy issues are likely to be important issues for some time to come.

This focus on the regulated industries is, in my view, the single most significant change in the Division in the last decade. When I first arrived in 1970, there was only one section of the Division, with about 20 lawyers, responsible for regulated industry matters, including intervention before the agencies. Some few other resources were scattered about the Division here and there, but in total there could not have been more than 25 to 30 lawyers responsible for both antitrust enforcement and intervention efforts in the regulated industries. In addition, that same group of people was responsible for all the Division's legislative activities, so their attention was even further diluted. Today, one of the three primary elements of the Division, consisting of 4 sections with about 100 lawyers, is devoted to regulated industry and foreign commerce problems, many of which involve similar policy trade-offs and opportunities. These sections do both antitrust enforcement and regulatory intervention, and they also are deeply involved in relevant legislative initiatives. In the neighborhood of 25 percent of the Division's time, effort and talent is focused on this area, and that percentage may well expand even more in the future.

We believe that these are resources well spent. The "bang for the buck" in terms of competition benefits and competitive policy gains can be significant in the regulated industries, where you can, with a win before an agency, affect the entire industry simultaneously. One major company recently estimated that it incurred costs of over $186 million in 1976 alone, solely to comply with government regulation; over $51 million of that amount was due, it estimated, to transportation regulation. All of that additional cost was no doubt reflected in the prices for this company's products. Thus, regulatory costs are clearly important targets.

Obviously, progress in this area is difficult to precisely measure, with the exception of concrete events, like an airline deregulation bill. But occasionally, we do get an indication of what our work is worth. For example, one of our earliest efforts, beginning back in 1968, was a challenge to fixed commission rates on the New York Stock Exchange. We argued before the SEC, campaigned before the Congress and the public, and initiated litigation -- all aimed at eliminating the 200-year-old practice of fixed commission rates. Finally, in 1975, we won. According to the SEC, the resulting savings -- in the form of lower commissions

than would have prevailed under a system of fixed rates -- in only the first two years of competitive commissions was almost $700 million.

You may remember Willie Sutton's famous quote, when asked why he robbed banks: "That's where the money is." Numbers like $700 million explain better than any words why we spend more and more of our time and energy on the regulated sector of our economy, and why this trend will probably continue.

The second major change in the Division in recent years, and another good indicator of future antitrust enforcement efforts, is best revealed in the following statistics. For comparison purposes, let me divide my tenure in half. In the first four years I was with the Division, FY 1970 through FY 1973, the Division brought 64 merger cases and 52 criminal cases. In the next four years, FY 1974 through FY 1977, the Division brought 29 merger cases (half as many) and 128 criminal cases (twice as many). Of those 29 merger cases, 13 of them were in FY 1974 -- the last three years have seen just 15.

From FY 1970 through FY 1973, 114 individuals were indicted for antitrust violations; from FY 1974 through FY 1977, 359 individuals were indicted (3 times as many). Through the first half of the current fiscal year, of the 29 cases filed, 2 of them have been merger cases; 15 of them have been criminal cases. Fifty-nine individuals have been indicted so far this fiscal year alone, fully half as many as the total of the first four years of this decade. The Division has, as is obvious from these statistics, dramatically expanded its efforts in criminal enforcement. That effort is continuing.

There is no doubt that price fixing is a common, everyday occurrence in the United States, and it cannot be doubted that the result is significant additions to the costs of goods and services in our economy. The true costs of price fixing and similar violations, of course, can never be measured. The cost in terms of inflationary impact, of loss of innovation -- these are all unquantifiable and largely unknown. These costs not only exist, however, but they are substantial. In the last few years, we have put more and more resources into uncovering and prosecuting price-fixing violations. We are <u>in fact</u> uncovering and prosecuting more price-fixing violations. We have an outstanding record of

success; very few of our prosecutions are litigated and lost -- and yet we have seen no indication of diminishing returns for our efforts. In fact, we see only increased signs of more and more price-fixing activity.

It is clear that the Division has so far failed to eliminate price fixing. In fact, there is no reason to believe that we have done anything but scratch the surface. But I don't think that failure (or more correctly lack of present success) rests entirely or even primarily on the shoulders of the Antitrust Division. In the past, the federal courts have been unwilling to hand down the kinds of sentences required to make our meager prosecutorial efforts have anything more than de minimis impact.

For example, let's look at the period between the time the felony statute was passed (December 21, 1974) and the time that individual sentences were handed down in the Folding Cartons case (November of 1976). This is a good period to examine for comparative purposes, since it was a time when the Division was not really publicly campaigning for stiffer sentences, and there was a typical mixture of cases.

During this period, ninety-eight individual defendants were sentenced. Of those, seven, or just over seven percent (7%) received actual jail sentences. The total sentences

meted out to those seven individuals were 285 days, an average of just under 41 days each. Total jail sentences, divided by total defendants sentenced, averaged just under three (3) days per defendant.

Typical sentences included one year unsupervised probation (following a trial and guilty verdict), and six months suspended sentence (following a guilty plea). When the likelihood of being discovered and prosecuted is small to begin with, and the likelihood of receiving a jail sentence if discovered and successfully prosecuted is only seven out of one hundred, is it at all surprising that there is no evidence of any significant deterrent effect from this level of sentences?

I picked the Folding Cartons sentences as the bench mark for a number of reasons. The Folding Cartons case was the beginning of a significant effort by the Division to raise the visibility of the problem -- to do our best to try to encourage more appropriate sentences. As you may recall, Don Baker, then the Assistant Attorney General in charge of the Division, appeared before the court to personally (albeit unsuccessfully) argue for the appropriateness of significant jail sentences in that case.

That marked the beginning of an effort that, although slow starting, has since been very successful. As an interesting comparison, in misdemeanor cases from the Folding Cartons sentences through the first half of the current fiscal year, there were seventy-six individual defendants sentenced, of which seventeen were sentenced to serve actual jail sentences. Thus, the percentage of those sentenced in misdemeanor cases actually going to jail rose to twenty-two percent (22%), a three-fold increase over the period immediately prior to Folding Cartons. The total time sentenced to be served by those seventeen individuals was 1,215 days, an average of just over 71 days each. This compares favorably to the average of about 41 days each in the period immediately preceding the Folding Cartons case. Even more impressively, the average jail time for all individual defendants sentenced was right at 16 days -- five times greater than the comparable figure in the period prior to Folding Cartons.

Still, even this improvement was not sufficient to keep up with our hopes, or even our rhetoric. For some time, we recalled the old Chinese proverb: "Much noise on stairs; nothing coming down." Fortunately, although we have much less experience with felony cases, what experience we do have shows a truly dramatic change. For example,

294 corporate defendants have been sentenced in misdemeanor cases since the passage of the felony statute. */ The total fines imposed against those 294 entities amounted to $6,812,500 -- an average of $23,171.77. By comparison, 41 corporate defendants have been sentenced in felony cases, with total fines of $5,516,000 -- an average of $134,536.59. So, on these numbers, the price of a corporate criminal conviction has gone up about six times. **/

On the individual side, the numbers are even more dramatic. Twenty-one individual defendants have been sentenced in felony cases, and fifteen -- almost seventy-five percent (75%) -- have been sentenced to jail. You will recall that, pre-Folding Cartons, only seven percent (7%) of all individual defendants sentenced went to jail. Total jail sentences imposed in felony cases have been 96 months -- 2,880 days -- an average of 192 days each. The average sentence imposed, calculated on the basis of all individual defendants sentenced, is 137 days, 45 times greater than the average pre-Folding Cartons.

For an even more stark comparison, let me point out that from 1890 to 1970, only nineteen individuals actually went to

---

*/ Data as of 3-31-78. Since that time, the numbers are even higher, including one corporate fine of $650,000.

**/ More recently, we obtained corporate fines of $625,000 and $375,000.

jail for pure antitrust violations for a total of 28 months. In the last year alone, and only counting the felony cases, we have obtained 3-1/2 times the total amount of jail time obtained in the first 80 years of the Sherman Act.

We are not losing more cases today than we did under the misdemeanor statute, and there is no reason to believe that the Antitrust Division will suddenly become significantly less competent than it has been in the past. Thus, today it is safe to draw the following general conclusions, on the basis of the statistics I have just given you: if you are discovered in a price-fixing violation, and successfully prosecuted, (1) your corporation will pay a substantial fine, and (2) most of the individual defendants prosecuted and convicted will go to jail. That latter statement alone illustrates how far we have come just since November of 1976.

As you probably know, the Division has promulgated internal guidelines for its attorneys to follow when they try to calculate sentencing recommendations under the new felony provisions of the Sherman Act. The guidelines are just that -- they do not purport to establish precise mathematical formulae. They are intended, instead, to do two things: (1) focus the internal analytical process, so that the Division's recommendations are, to the extent possible,

reasoned and consistent; and (2), not incidentally, to clarify the potential consequences of a criminal antitrust conviction.

The Division is in fact following these guidelines and recommending substantial sentences. We have recommended the maximum corporate fine of $1 million at least four times -- we haven't yet seen a $1 million fine, but we have received one fine of $625,000, one of $600,000 and several of $500,000. We have recommended 18-month or longer jail sentences on at least nine occasions -- we have seen two sentences of two years or more, one of 18 months, and several of three months. I believe the guidelines and the recommendations that have resulted have played a major role in obtaining stiffer sentences -- and if that's right, we have accomplished one of our primary objectives.

These two efforts -- regulatory reform and criminal enforcement -- are the two most dramatic new initiatives of the past decade in federal antitrust enforcement. They will, in my view, continue to be the two basic thrusts of our efforts. Of course, the Division does many other things, and there will be other new initiatives in the future. If merger activity increases, as it appears to be doing, the Division's merger enforcement efforts will increase. Merger

enforcement, of course, is totally reactive -- there can be no merger case until there is a proposed merger. The pre-merger notification program -- Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 -- will go into effect within a very few weeks, and that program may make merger enforcement more effective.

There is also the shared monopoly effort, an effort that I can assure you is getting priority treatment by the Division. John Shenefield has committed the Division to action on this front, and it may well be that this will prove to be another important continuing effort in the nature of regulatory reform and criminal enforcement.

Still, there is a great deal of Division work that is steady and constant, and that really doesn't get the attention it deserves. What I have tried to outline today are particular activities that are likely to have significant impacts in the future. In that light, there is one more development of recent years that holds much potential for the future, and that is the Division's role as a participant (in a variety of ways) in other governmental decisions.

In 1970, the Antitrust Division was not exactly a common player in the various economic games in town. The dramatic change here, I think, came with the Ford Administration, and

no doubt was due in part to that Administration's decision to adopt as a significant element of its domestic economic policy the concept of regulatory reform. In any event, since that time, the Antitrust Division has played an ever-growing role as a competitive advocate, both within the Executive Branch and before the Congress.

Today, it is a rare matter of competitive significance where the Antitrust Division is not a participant in the decision-making process. It still happens, from time to time, that our participation comes at a somewhat later date than we would like or that our counsel does not carry the weight that we think it should, but these are in most cases matters of degree. The Division has found that when its counsel is analytically sound and persuasively presented, it is more often than not seriously considered. We have also found that we are asked for our advice more often, and we like to think that is because our advice is considered useful. In any event, where we used to spend time trying to figure out how to get into meetings and discussions, our biggest problem now is staying out of those where we really have nothing particular to offer or to gain. From the institution's perspective, the latter problem is much more desirable than the former.

In addition to this increasing opportunity to influence Executive Branch policy, the Division has become more of a force on the legislative side. We are now regularly asked for our views on legislative matters that have competitive significance -- almost 1000 times in Fiscal 1977 -- and more and more often those views appear to be influential. We give formal testimony on the average of about two times a month. We are treated -- and properly so -- as a resource, a reservoir of competition policy expertise.

In fact, there is a growing propensity in the Congress to give the Division a statutory role in government decision making. Whether it is in the form of advice on surplus property disposal, or coal leases, or deepwater ports, the Division is now in over 20 different situations required to participate as a matter of law in both Executive Branch and regulatory agency decision making. Consistent with this trend, Senator Kennedy has reintroduced legislation (S. 2625) that would give the Division a statutory right of participation in proceedings before independent regulatory agencies, and require those agencies to specifically consider the competitive impact and any less anticompetitive alternatives, of agency actions.

Of course, you can have too much of a good thing. There surely is a point of diminishing returns from Antitrust Division participation in the other affairs of government, and the Division is sensitive to that. For example, we recently were given a statutory right to comment on all federal loan guarantees (whatever the size) for, among other things, "biomass" fuel conversion projects, a right that I think we probably could have done without. Too many responsibilities to comment on or participate in competitively insignificant activities can divert attention from more important issues. Still it is nice to feel wanted.

Thus, as I look back, these three changes in the Division's work stand out -- regulatory reform, criminal enforcement, and interagency and legislative advocacy. With these efforts, taken in the context of the Division's historical work, the Division has slowly but surely become a true competition advocacy agency -- and although some would probably disagree, in my view perhaps the first true consumer protection agency. We don't deal directly with the full range of what have become popularly known as "consumer" issues, but we do deal directly with perhaps the primary consumer issue in a market economy -- competition. We have no clients except the ideal of competition policy, no constituency to

work for or answer to except ultimate consumers. All of our efforts are directed at obtaining benefits for consumers, either directly by preventing price fixing or other collusive conduct or indirectly by protecting market opportunities for American business. Over the last decade, we have become both comfortable and familiar in a variety of forums acting as a competition advocate, and that is as good a short description of federal antitrust policy, today and tomorrow, that I can give.

The English actress, Mrs. Patrick Campbell, once commented that she didn't really care what people did as long as they didn't do it in the streets and frighten the horses. Our newly broadened range of activities has drawn slightly more interest, although not all of it positive. There have been more than occasional complaints that we are intruding into areas beyond our expertise. Since reading a recent George Will column on his first love, baseball, I respond with the title of a Robert Frost poem: "Happiness Makes Up in Height for What it Lacks in Length." Competition has the same virtues, and federal antitrust policy today is designed to spread that message to all who will hear. Thank you for listening.

END