Department of Justice

OPENING REMARKS

BY

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE PUBLIC CITIZEN FORUM

12:00 NOON
DUPONT CIRCLE HOTEL
WASHINGTON, D.C.

AND

ADDRESS

BEFORE

AMERICAN BAR ASSOCIATION
ANTITRUST SECTION
ANNUAL SPRING DINNER

7:30 P.M.
THURSDAY, APRIL 14, 1977
SHOREHAM HOTEL
WASHINGTON, D.C.

During the 79 days I have been Attorney General, I've given a great deal of thought to our antitrust responsibilities. Both you and the public at large deserve to know my views.

We have a broad assignment. The statutes under which we operate are clear and simple in their choice of language, but the mission arising from those statutes is complex. We are charged with the responsibility of keeping the marketplace open and unfettered by collusion or conspiracy. We are asked to insure that the free enterprise system has an opportunity to succeed.

How are we measuring up to our responsibilities?

I believe that the Antitrust Division of the Department of Justice is doing a good job in detecting price fixing. The investigative effort is unremitting -- more than 100 grand juries in the past two years.

The criminal prosecutions, the civil suits, and the force with which the Division argues for serious sentences after conviction should operate as a strong deterrent to price fixers. We are determined to see to it that those who choose to depart from the law and undercut our free market system pay the price.

I believe the Antitrust Division is doing an excellent job in the merger and regulated industry fields. The rate of anticompetitive acquisitions is now far less than was the case in recent years. Obviously the business downturn has accounted

for some of this, but the 1968 Merger Guidelines have been more influential than any other single factor in making private industry police itself. Parenthetically, the Division has just issued a new set of guidelines -- governing international business transactions -- and I expect these guidelines will have the same beneficial effect.

The Division's innovative program of advocating competition in the regulated industry framework continues to be a remarkable success. In industries in which regulation had been thought to provide a blank check for unauthorized anticompetitive behavior, the Division in a few short years has helped to rewrite the regulatory rules so that competition again can, where feasible, play an important role.

I must report that I am less happy with the progress of antitrust enforcement in the monopoly area.

Cases brought under Section 2 of the Sherman Act are, by definition, large cases. Our experience with these cases raises the possibility that they are simply too big for courts to handle.

Our procedural framework inevitably seems to produce long pre-trial delay and extended trials. Further delay is produced by crowded appellate dockets. Court proceedings are described in terms of years, sometimes even decades. In bringing a monopoly case, the Department has to be concerned about fashioning remedies for an industry condition that may no longer exist.

As a former judge, I would be the first to agree that one of the causes of this sad state of affairs is that many judges do not attempt to control large cases before them. We, as practicing lawyers, must bear some of the blame. Our use of complex discovery, often only semi-relevant, prolongs and complicates already complicated litigation.

We have reached the point where, in a lengthy case under Section 2 of the Sherman Act, it is not necessarily justice that prevails -- it may be the party with the largest budget and the greatest stamina that prevails. This trial by ordeal is hardly a process designed to achieve justice in applying a basic law to increasingly complex business situations.

Our motto of equal justice under law rings hollow if our system only permits the trial of small cases like price fixing -- usually against smaller defendants -- while permitting giant corporations a form of virtual immunity from Section 2 if they are only willing to spend the money required to stretch out the litigation for years upon years.

I am concerned about this problem; the Department of Justice intends to take concrete steps to solve it. One approach that has been considered is recommending that very large cases be brought in Congress as legislative matters. Congress could hear the evidence and find the facts as to the existence of monopoly or the need for a remedy in a monopolistic situation.

The process would necessarily be more political, but the questions at hand involve the basic restructuring of American industry and the shape of the American economy. These are questions that are perhaps most appropriately answered by the legislature, and not by the courts.

A variation has been suggested that is modeled on the Public Utility Holding Company Act of 1935. Our experience with that statute proves that Congress can require corporate reorganization in accordance with stated guidelines and leave enforcement of the statute either to an expert administrative agency or to a special court constituted for the purpose.

Another middle ground may be the use of a rule-making procedure by an administrative agency, with an appeal from a rule once it has been set forth and hearings on it have been completed. This procedure has proved successful in other areas. There is no reason why it cannot be adapted to some of the larger antitrust matters.

In the litigation field, we are considering the possibility of expanding our trial capacity in two ways. First, state attorneys general may be asked to take over some of the price fixing cases, expecially those involving schemes that have primarily a local impact. This would free the Antitrust Division's attorneys to concentrate on the larger cases of price fixing and other anticompetitive conduct. The Antitrust Division also would be able to bring more cases attacking industries in which the problem is a fundamentally anticompetitive structure rather

than specific anticompetitive conduct.

The second innovation under serious consideration is a program of bringing a few -- perhaps 25 -- carefully selected Assistant United States Attorneys to Washington for special training in antitrust litigation. I am told that the various offices of United States Attorneys have largely avoided antitrust litigation in the past, believing that special training or knowledge in the antitrust mystique is required. We can provide special training to pierce the mystique surrounding the antitrust laws, and at the same time emphasize that antitrust cases can be effectively, efficiently, and promptly litigated.

We must also be more imaginative and innovative in dealing with what is sometimes called "shared monopoly" -- monopolies collectively held by a small group in a concentrated industry. The Antitrust Division is now determining what kind of shared monopoly cases it could bring.

The logic of the approach would stem from the premise that a concentrated industry can produce "monopoly" prices through consciously interdependent pricing. We believe that Section 2 of the Sherman Act may well reach the "shared monopoly" situation of this type.

Another approach is to use Section 1 against a "shared monopoly" situation which involves something more than a simple parallel pricing. The approach to the "agreement" question adopted in General Electric-Westinghouse is instructive, and the relief there offers a non-structural approach to this problem.

Let me leave you with one very simple message: I believe strongly in the free enterprise system. I believe that vigilant antitrust action serves a vital role in guaranteeing that enterprise is truly free to produce and that consumers are truly free to choose.

This Administration has put vigorous antitrust enforcement high on its agenda. As Attorney General, I hope to impart a sense of mission to antitrust enforcement in this country.

# # #