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ADDRESS

OF

THE HONORABLE BENJAMIN R. CIVILETTI

ATTORNEY GENERAL OF THE UNIVED STATES

DELIVERED BY

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BEFORE

THE 13TH NEW ENGLAND ANTITRUST CONFERENCE

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The first thing I have to do as Attorney General is to take stock. This means evaluating resources and programs. Antitrust enforcement is one of the programs to which I have given careful thought. I have done this not simply because the Department of Justice is charged with enforcing what the Supreme Court has called our "fundamental economic policy" but also because antitrust enforcement is now lodged firmly at the center of public debate. Newspapers display antitrust in front page stories; the television news carries features on antitrust; politicians make antitrust enforcement part of their campaign platforms; in short, the national consciousness about economic issues has been raised. Of course, that is a healthy development in a maturing nation; it's also healthy to have public understanding and support when the Department proceeds against some of the most formidable economic interests in this country.

But the "greening" of antitrust has risks as well. The same political forces that nurture antitrust can distort it either by detouring our enforcement efforts through confusing routes, or by altering it permanently through misguided and ill-conceived legislation. It is therefore important for the Attorney General to articulate clearly the principles and priorities that should guide antitrust enforcement.

The first principle is that the antitrust laws protect only a system -- competition -- they do not guarantee a particular result of that system. Competition is a harsh process that rewards the efficient and punishes those who are wasteful or slow to adapt. It is a process that works to meet the needs of consumers by leaving choices about price, manner of distribution, and innovation to the competitors themselves.

Now this may seem obvious to antitrust lawyers, but it is not obvious to all who participate in the political debate about the structure and behavior of our markets. We know this because the antitrust laws have been overlaid with exemptions that create and protect special privileges for classes of competitors. There is a strain of protectionism that runs deep in our political process. It has produced special concessions that allow major firms, such as trucking companies, to fix prices and create huge subsidies to prop up the inefficient and non-competitive. The costs of these regulatory alternatives to the competitive process are inflationary prices and misallocated resources.

In a time of double-digit inflation, these effects are reason enough to resist, even reverse, the trend toward protectionism; but there is an additional and even deeper social cost that should be kept in mind. The energy shortage of last spring and summer provides an excellent illustration. Formerly cooperative members of our society began to see themselves in sharp economic conflict over their access to

oil -- an access which was determined by government-administered rules rather than by the market. Truckers thought their allocation of oil was too low in comparison to that of farmers, and independent dealers considered their allocations too low in comparison to those of fully integrated gas and go systems. These groups began to compete with each other not for shares of the market, but rather for favored treatment by the federal government. That competition was not marked by improved performance but by protests, strikes and boycotts. It may be unfeasible to deregulate the petroleum industry overnight. But before we completely abandon what Adam Smith called the "invisible hand of the market" for the heavy hand of government and special protection, we ought to reflect on the experience during the energy crisis.

The second fundamental principle of antitrust policy is reliance on the judiciary rather than on regulatory schemes. The antitrust laws are just that -- laws established by a legislature and enforced by a prosecutor in neutral forums whose function is to interpret, not fashion, the laws. Of course, the antitrust laws "regulate" business behavior only in the sense that they serve to prevent interference with the economic and political goal of competition. Regulatory statutes, by contrast, allow administrative agencies to make quasi-legislative judgments about the public interest, and in the process to risk sacrificing competition to other

regulatory goals. Antitrust laws don't ask the judiciary to make political judgments; those have been made by Congress. In deciding antitrust cases, courts first answer a single straightforward question: Is a challenged practice anti-competitive?

Based on experience, and sound economic theory, courts often are able to answer this question using presumptions; examples are those against price-fixing, group boycotts, or horizontal mergers among firms with significant market shares. Even where resort to the rule of reason is necessary, the question is whether the challenged activity, on balance, restrains competition, and not whether competition is itself unreasonable.

The third fundamental principle is that the antitrust laws establish economic freedom as an approriate partner to our personal and political freedoms. Antitrust policy does not require business to seek permission in advance from the government to undertake any activity; with or without advice of counsel, business may engage in any activity it chooses. Of course, the antitrust laws, like other post-hoc sanctions, present a risk to those whose conduct goes over the edge. Indeed, the possibility of very substantial fines or treble damages can be a strong deterrent to questionable behavior. Such deterrence is a basic strategy of antitrust, and is fully consistent with its policy. But the inhibition of new

ventures or innovative methods of doing business is not. In order to avoid such a result, the Department makes every effort to clarify its enforcement intentions through business reviews and other public communications. This third principle of antitrust policy -- freedom to undertake commercial activities without prior restraint -- should be as free of undue risk as is possible.

Consistent with these principles I am committed to certain priorities in the Department's antitrust program.

Our highest priority is the detection and prosecution of private cartels. Agreements to fix prices, limit output, or stifle competition through territorial or customer allocation violate the first principle of antitrust. Despite the fact that they are now felonies, flagrant violations of the Sherman Act are still committed with dismaying frequency. I am determined to maintain a strong campaign against such behavior using all the enforcement tools and penalties granted to us in recent years.

During the past three years indictments of both corporations and individuals have been at record levels. Moreover, the thirty-two criminal cases concluded in fiscal 1979 all involved a guilty verdict or acceptance of pleas of guilt or nolo contendere. Judges are beginning to recognize the seriousness of antitrust violations. Million dollar fines and jail sentences are becoming the order of the day in these criminal cases.

An effective program directed at such per se offenses is, however, not enough to preserve competition in major sectors of the American economy. Strict enforcement of these antitrust laws has not prevented America's industries from becoming even more concentrated. In oligopoly markets, there may be no need to engaged in explicit, per se arrangements that eliminate competition. We must be alert to the possibility that those committed to shared anticompetitive behavior have become more sophisticated and that traditional warning signals such as victim complaints will not be forthcoming. We need new legal precision and investigative approaches for close study of concentrated industries. This effort involves all the Division's litigating sections and its Economic and Policy Planning Offices. The study is not yet complete but is nearing its end. If our review provides a sound basis for suits, they will be brought. If cases are not warranted, a public report explaining the results of our efforts will be valuable.

We remain committed to the prevention of anticompetitive changes in market structure brought about by merger or acquisition. Enforcement of §7 of the Clayton Act has been one of our most effective efforts. Horizontal mergers among significant competitors and vertical mergers threatening substantial market foreclosure are rarely seen today.

The antitrust laws have nevertheless not been able to stem periodic waves of mergers involving America's larger

enterprises. These transactions, usually of a conglomerate nature, can do significant harm by enhancing the concentration of economic and political power in the hands of fewer and fewer corporations. Where such mergers can be challenged under creative interpretation of antitrust precedent, we will not hesitate to do so. Our suits against Occidental's acquisition of Mead and against United Technology's acquisition of Carrier are cases in point.

It would appear, however, that to limit very large acquisitions that needlessly enhance concentration, additional statutory tools will be necessary. John Shenefield has outlined one responsible and effective legislative approach. This proposal would place restrictions on mergers among this country's largest firms [each with over $100 million in assets or sales and a combined total of over $2 billion] as well as acquisitions by very large enterprises [over $1 billion in sales or assets] of leading firms in sizeable concentrated markets. These mergers would be prohibited unless proponents could demonstrate that their likely effect would be to enhance competition substantially. There would thus be no outright ban on large conglomerate acquisitions, only a requirement that they be justified in terms of benefits to competition. We will pursue these proposals in Congress.

Finally, the Department must step up its advocacy of competitive solutions before regulatory agencies, before Congress, and within the councils of the executive branch.

Such an effort is essential to counter unnecessary and anti-competitive government regulation in critical areas of the economy; transportation, communications, finance and energy are examples. Not very long ago, the Department's efforts to eliminate fixed commission rates in the securities industry were successful. The result has been large savings for investors. More recently the Department and the Administration pressed hard for, and obtained, signficant deregulation of commercial air transportation. Consumers have benefitted greatly from that historic step. We are hard at work now on reform of surface transportation regulation to introduce a substantial element of competition.

In addition to establishing priorities, the Division's resources must also be effectively managed. Throughout the early Fifties and Sixties, as many of you no doubt know, the Antitrust Division suffered from a severe case of budgetary malnutrition. Until three years ago, the Division functioned the way a law firm might have functioned at the turn of the last century. Modern technology used by almost all the major law firms was simply not available; everything was done in the most labor-intensive fashion. The result was that taxpayers were just not getting as much antitrust enforcement as they should have from the Division's budget.

It is my intention to accelerate the programs already begun under the leadership of Judge Bell, with the support of President Carter, to improve the internal management and

efficiency of the Antitrust Division. This year, for example, the Division received 15% of its budget for computer support.

Another approach which involves no expenditure of funds and no modification of time-encrusted procedures is the channeling of resources to particularly crucial areas. No other sector of the economy is more important to our nation's welfare today than energy; and no other sector has a greater potential for anticompetitive conduct by both business and government. Yet, for years, responsibility for energy matters was scattered among three sections and no one individual was in charge of a coherent energy antitrust program. With the establishment of an independent Energy Section, all that changed. Today, we have a coordinated program of investigation, prosecution, and competitive advocacy for each important energy source. All of these internal managerial efforts are crucial and will prove to be important capital investments.

As Attorney General, I intend to confront the issue of the manageability of antitrust cases themselves. So far as much of the public is concerned, antitrust is some sort of gruesome yet traditional ritual, a complicated and obscure joke. The big antitrust case has been compared to the nation's wrenching Viet Nam experience, and to a compurgation exercise -- each team mustering its oath-takers -- or the modern day equivalent of trial by ordeal. One critic has said that antitrust litigation reminds him of Henry Kissinger's description of superpower politics -- two heavily armed, blind men locked in the same room, who are then encouraged to do

tremendous damage to themselves, not to mention the room.

I simply don't agree with this notion. On the contrary, I intend to demonstrate that the Antitrust Division can efficiently and expeditiously handle its regular caseload and the big case. The AT&T case is an example. That action was filed in November, 1974, half a decade ago. Unfortunately, it was needlessly bogged down in the appellate courts while jurisdictional issues were debated. Since it emerged from hibernation, however, the case has been forced onto a fast track. For the first time in recent memory, we have pursued stipulations of fact to cut down on the volume of disputed issues. The trial judge has directed the beginning of trial in September. I have instructed the Division's leadership to use whatever resources are necessary to meet that deadline. Efficient case management in Antitrust must be given maximum priority.

To help meet this problem, President Carter appointed a National Commission for the Review of Antitrust Laws and Procedures. Its major task was to suggest ways to expedite antitrust litigation. The Commission recognized the importance of effective leadership by the judiciary in controlling and expediting cases. Recommendations were also made for statutory changes and changes in the Federal Rules of Civil Procedure. Those statutory changes are presently moving through Congress. I support this legislation and expect it will be enacted. The status of the proposed

rules changes is less clear, but if the Judicial Conference does not implement the Commission's recommendations I would expect to recommend legislation to implement the necessary changes.

But self-reform is also essential. Where the Commission's recommendations can be implemented by the Department, without legislation or rules changes, we will do so. For example, I intend to make certain that the Antitrust Division focuses from the outset on the key issue in many civil cases -- namely, the nature of the relief that can reasonably be achieved.

Antitrust enforcement has contributed significantly to the effective functioning of the American economy. But we should not mislead ourselves: antitrust does not provide solutions to all the behavioral and structural problems that exist in our economy. We live in a complex world; many economic forces and legitimate governmental activities designed to achieve public policy goals affect commerce in ways that are far beyond the reach of antitrust laws and policy. Problems of inflation, unemployment, lagging productivity and the need for greater energy independence will require other solutions which President Carter has addressed in proposals to the Congress and on which it must act. Antitrust principles should be kept in mind in devising these solutions, but antitrust is not the panacea that some would have us believe.

I am enthusiastic about antitrust enforcement and am committed to its underlying principles. The heritage of antitrust imposes heavy responsibilities. We must protect the neutrality and independence of analysis that is the key to rational and fair but also effective enforcement in the antitrust tradition; we must seek new and creative approaches that are relevant to our new problem; we must continually struggle against the skepticism and misunderstanding that so often in the past have led to unnecessary sacrifices of competition; and we must resist the adoption of laws and policies which needlessly limit free competition as the primary instrument for regulating markets.