Department of Justice

ANTITRUST IN NEW HANDS:

DIRECTIONS AND TRENDS UNDER PRESIDENT CARTER

Remarks by

JOHN H. SHENEFIELD
Assistant Attorney General
Antitrust Division

Before the

Association of American Law Schools
1977 Annual Meeting Preliminary Program
Atlanta, Georgia

December 27, 1977

I am delighted to share with you today my own perceptions of where the antitrust world is currently headed. Since this is an academic rather than a business or practicing professional group, I will refrain from some of the usual sabre-rattling found in these speeches. I am content to observe only that if there are any price fixers, barrier-erectors, monopolists or regulators amongst you, I devoutly hope you will recant, see the light, and learn to love competition.

That said, let me describe to you both some of the intended antitrust directions of the Administration and some of the phenomena that make being a cop on this particular law enforcement beat at once fascinating and frustrating.

You have all heard by now that the President is pro-competitive. Whatever you have heard is, if anything, understatement. I seriously doubt that there has been any President in recent times more aware, or more supportive, of antitrust enforcement in general. Obviously, the President does not involve himself in decisions on what cases should be brought or how they should be handled, but the White House attitude on competition policy percolates throughout the Washington policy structure. When we walk into an inter-agency working group meeting, we are not quite the voice in wilderness that the Division may have seemed in years past. The Attorney General has emphasized this competition policy, sometimes in the face of politically potent assertions that antitrust goals should be abandoned or bent to accommodate conflicting interests.

A few major antitrust directions have already been widely announced. Substantively, they are energy policy, shared monopoly, and regulatory reform. A procedural topic, but equally high priority, is finding ways to litigate antitrust cases without exhausting court resources, the litigants, and public patience. These four areas together encompass a major portion of our broad policy agenda.

Washington is, of course, full of policy makers. Every bureaucrat worthy of a passing reference by Jack Anderson purports to be charting the Administration's course, navigator if you will to the White House captaincy. If I can push the metaphor a little more, I will note that there is a lot of tugging on the helm of the Ship of State. The FTC and the Division pull together, and pull strongly, for policy formulations that are either pro-competitive, or at least as non-anticompetitive as possible. To stretch our influence, the FTC and the Division have started, really for the first time, to plan some of their activities together. You have already heard Chairman Pertschuk describe the valuable contribution by the FTC. Let me talk for a moment about the Antitrust Division.

I am firmly convinced that there is no more crucial problem facing the nation than formulation of a coherent, sensible energy policy. The Antitrust Division does not purport to be the fount of all wisdom on how this sector of the economy should be structured to maximize domestic energy independence and minimize ultimate cost. What we do provide to the debate is a sensitivity to the manner in which structure can contribute to distortions and inefficiencies in resource distributions.

A lot of the public commentary on energy policy attempts to simplify the issues into a confrontation between energy producers and the rest of our society. Stating the problems in such terms permits a nice Manichaean solution to them: anything that international oil companies do not like must be good for the general public. The problems of this approach may be immediately apparent -- bubonic plague does not become a virtue if condemned by Exxon -- but in subtle ways it pervades a lot of Washington's popular wisdom. The Antitrust Division is expected by many either to attack "big oil" for its cross-ownership of coal and uranium reserves, or at least enthusiastically to embrace the notion of legislative proscription of cross-ownership. We are similarly expected to support various kinds of vertical divestiture in the industry, on the apparent theory that integration of the industry inherently restrains competition and raises prices. Lurking beneath the various specific "remedies" we are asked to endorse is a not insubstantial demon theory that explains why we need an energy policy at all: because, it is postulated, large oil companies are inherently evil.

Demon theories make great rhetoric, but lousy policy. Another thing that leads to lousy policy is intense pressure to make haste. Just as not everything the large oil companies do is evil, so also not everything they support is sound public policy. There is always a tendency in a crisis atmosphere -- and I believe with many others in Washington that we are in an energy crisis -- to oversimplify and to take action uncritically, unaware of its implications in the long run.

Before we will stamp the Antitrust Division's imprimatur on a piece of energy policy, we would like to see facts and figures. Part of <u>our</u> energy program is precisely that: development of a system that can provide comprehensive, intelligible data on what is happening in the energy sector -- who owns what, production and distribution economics, cross-elasticity data, and so on. One of our most intense struggles at the moment is to counter the resistance of the industry, and its allies in government, to giving us access to disaggregated data that are the prerequisite of antitrust judgment. It is, I may say, a struggle we are prepared to carry on until we prevail.

The problem of formulating energy policy is compounded by suspicion of size, a sort of implicit assumption that any economic agglomerations as large as oil companies must be anticompetitive. I recognize and accept the populist roots of antitrust that are uncomfortable with massive capital structures. But sharing the sentiment is not a substitute for economic and logical analysis. We need an energy policy in antitrust enforcement -- an honor never in recent history so conspicuously bestowed on a single industry -- because energy is our paramount national concern in so many other ways, and, in part because, as Willie Sutton used to say about why he robbed banks, "That's where the money is."

Our antitrust policy in energy thus consists of a number of kinds of analysis the Division has had to perform before, with the added recognition that we are not talking just about widgets, but about the cornerstone commodity of a modern industrial society. What policy will maximize production, particularly of non-petroleum sources? In a scarce energy economy, what facilities constitute bottlenecks, control of which might permit extraction of monopoly rents? In what instances do ventures require combinations of capital and expertise that justify joint enterprises between competitors -- and what restrictions should be placed on such ventures? What are the economic risks, and benefits, of cross-ownership and vertical integration?

This list of issues should suggest that antitrust energy policy does not, as some would have us do, consist of declaring war on producers. We have sought to emphasize our concern with these issues through creation of a new section within the Division intended to deal exclusively with energy issues. Do not assume, though, that the Section is languishing if it does not hale the seven sisters into court next week. Instead, look for its intervention in FERC and other administrative proceedings. Note our business reviews of proposed joint ventures and acquisitions. Expect us to testify frequently regarding energy legislation ideas. And be assured that we will vigorously prosecute anti-competitive practices discovered in the energy industry. The "direction" of the Administration energy policy is toward finding a solution to the dislocations of and threats to our economy posed by energy pricing and scarcity. The Antitrust Division contribution to this policy will be reinforced scrutiny, rigorous analysis of the competitive aspects of energy-related activities, and forceful action when we are ready.

A subject of less public clamor, but equally great Antitrust Division attention, is shared monopoly. Scarcely a day goes by without my taking some action within the Division advancing toward a move against those concentrated industries that may not engage in overt collusive activity but nonetheless in concert manifest the symptoms of classical monopoly structure: administered, non-competitive pricing, failure to innovate, erection of barriers to entry, and so on. We are surveying the theory and surveying industries that appear to fit into the theory.

As students of the arcane art of antitrust analysis, you all are aware of the historic development -- or nondevelopment -- of legal theory that effectively addresses itself to oligopoly market structures. I am not convinced that the intent or power of the antitrust laws in this area has been exhausted. I believe our laws do reach this phenomenon and we intend to prevail when we file our cases. We are proceeding carefully, however, taking the time necessary to study the facts and the theory of a shared monopoly case before it is filed, rather than beginning our analysis in response to a motion to dismiss.

A minor discursus on this topic may illuminate my earlier comments on the potential frustrations of running the Antitrust Division, and on the sometimes unanticipated turn events can take in Washington as various parties scuffle for the helm.

Without meaning to suggest that a target industry for shared monopoly had, or has, been chosen, you are probably aware that several months ago I suggested that domestic steel producers appeared to exhibit some of the symptoms -- especially signaling and price uniformity -- one might expect in a shared monopoly. Well, no sooner did my visage grace the cover of Iron Age magazine than that very industry publicly announced it was going to hell on a handcart. Announcements of huge losses, layoffs and plant-closings, dumping charges and demonstrations in Washington bombarded us in rapid-fire, dizzying succession. In the midst of this barrage, proposals for steel industry mergers began to be presented to us. Then a White House level working group was assembled to work out a reference price system to protect the domestic producers from unfair foreign competition. A few newspapers reported that the working group was setting new anti-trust enforcement standards to apply to steel industry joint ventures and mergers. I am pleased to announce that the Sherman and Clayton Acts emerged intact. Still, the difficulty of dealing with a problem like steel industry behavior and performance in purely antitrust, competitive terms is well illustrated by this example. The problems that seem so simple in the abstract or in the classroom are vastly more complicated and compelling in the real world of inflation, bankruptcies and unemployment.

All of this is not intended as a diatribe against big steel. Instead, it is exemplary of the strange byways I am discovering must sometimes be followed in

Washington, even when so evidently clear-cut a matter as law enforcement is involved. We will bring a shared monopoly case, and in the not-too-distant future. It could but will not necessarily involve the steel industry. Keep in mind, though, that competition analysis is not the only game in town.

Nowhere is this latter point more evident than in our regulatory agency proceedings and related legislative work. A lot of this goes on beneath the surface of public attention, but much of our energy is focused on getting regulatory agencies to let a little competitive, light in. We also have been extremely active in the groups formulating Administration policy on such matters as airline and trucking regulatory reform. It was with considerable pride that one of my Section Chiefs announced to a staff meeting last week that "Everyone in the Administration is trying to be a hawk now" on regulatory reform, largely because of the success the Division has had in peddling its wares around town. There are a lot of battles yet to be fought, but to quote the startling conclusion of a currently popular movie, "We are not alone." The problem is, of course, that the forces of regulation have been in town for a while, and are pretty well entrenched.

There are said to be two different theories of how to go about regulatory reform. The first is the wide salient, frontal assault on the whole regulatory structure, in which the Antitrust Division would gallantly carry the standard into battle with the forces of regulation. There is some implication that this strategy might reduce the Antitrust Division to the remnants of a latter-day Balaklava light brigade. The alternative, suggested analogically by one of my most imaginative colleagues in the Division is the "Droste apple" approach, also known as the "magic button" theory of deregulation. This reference is to the marvelous chocolate apples made by Droste, which sit nicely intact until you push a button on the top, whereupon they immediately fall to pieces. By finding the weak spots in regulatory schemes, the critical seams, if you will, opening them, we can then insinuate a little competition that will tear the structure apart. Call it starting a run in the seamless web.

You do see us firing a few broadsides at regulatory schemes: AT&T would certainly contend that we are out to destroy both the "one system" and the "one company" nestled in the protective comfort of FCC regulation. What you see less often, but of cumulatively equal importance, are our myriad of filings with the CAB, the ICC, the FMC, the FCC and other such bodies. In toto, these filings assert that where regulation must be provided, it should be accompanied by the minimal necessary interference with competitive markets and should not become an umbrella for anticompetitive effects neither intended nor needed for the regulatory purpose. Outside of the outraged reactions these filings evoke in the trade press, they may be scarcely visible, but bit by bit they serve to erode regulatory barriers to competition and perhaps even facilitate our search for the Droste "magic button."

My decision is to do both. We shall continue to look for the magic chocolate button, but we shall also think in terms of the all-out assault. The objective of regulatory reform, while it has been adopted in other Administrations, will be a fundamental motivation in this one. As I suggested earlier, the present Administration was elected on a platform that specifically included promises to do something about regulatory questions. During the campaign, President Carter took positions on openness in decision-making, the revolving door, the electric utility industry and the need to protect consumer interests and regulation of the telecommunications business.

Moreover, the ubiquity of federal regulation seems permanent. I have been told that, in the history of the Republic, exactly two federal programs have ever disappeared entirely. We no longer manufacture rum in the Virgin Islands and we don't breed horses anymore for the cavalry. There is some evidence for the proposition that regulation flourished spectacularly in recent years, despite the conservative Republican cast of the political leadership. Don Baker used to say that businessmen regard the introduction of competition with roughly the same skepticism with which his children face eating green vegatables -- something very good no doubt, for others, but themselves -- they prefer dessert. Persuading an industry out of regulation is roughly equivalent to luring Br'er Rabbit out of the briar patch.

But regulatory reform is something that this Administration is firmly committed to. So we will keep pressing magic chocolate buttons and, at the same time, open up entire new fronts through skirmishers' line assaults.

The last item specifically mentioned on our policy menu is procedural reform. As a private attorney, I became intimately familiar with the endless procedural hurdles standing between my client and judgment. As

Assistant Attorney General, I see the truly damaging effects of these hurdles. Beyond the exhaustion of public patience, beyond even the serious problem of draining scarce judicial and law enforcement resources, these procedural hurdles force infinite delay, and ultimate confusion, of significant public issues. Particularly in the areas of discovery and motion practice, the ingenuity of counsel and the flexibility of existing rules of civil procedure have combined to beget a monstrosity: a seeming inability to force major cases to the decision point. The theoretical and sometimes rubbery concepts of antitrust law seem ideally suited to endless searches down barren back alleys for testimony that does not stand witness to anything, for mountains of documents that do not prove anything, and for abstruse briefs in support of legal theories that do not mean anything.

Most antitrust generals, including Assistant Attorneys General, think they know all about how to wage war economically on monopoly. Not very many of us, however, have ever read Clausewitz. His whole theory of warfare was based on the necessity of making it short, sharp, and decisive. Much traditional antitrust litigation in the past -- the big, overblown, seemingly unfocused and interminable cases we are all too familiar with, have pretty much violated about every strategic and tactical rule in Clausewitz's little book.

For our part in the Antitrust Division, this is, I hope, beginning to change. In both of our largest cases, new efforts are being made to focus, telescope, specify and narrow, without sacrificing the essential meaning of our case. We hope the defendants will join us in these efficiency moves.

Still, it is important to realize that there is nothing immoral about "big" cases. Indeed, one of the strategies of defendants in the big case is to persuade the world at large that any litigation that lasts for a long time is the product of inefficiency and inexperience. We in the Department of Justice are very much aware of this public relations strategy and we do not intend to let the effort undermine our institutional tenacity.

Big cases are frequently big because they are important. Important things are not achieved simply by wishing for them intensely. There are alternatives to litigation. We could do nothing, or alternatively, we could subject major firms to some variety of a Cuban trial, in D.C. Stadium, perhaps. But our belief, in the Department of Justice, is that the best hope for responsible government action lies in the courtroom. Our job, then, is to help make the courtroom process efficient and fair and reduce the potential for its being abused.

Both Judge Bell and I are former litigators and he is a former federal judge. We both have a strong intuitive sense that much more can be done by lawyers and judges alike in this country to reform pretrial and trial procedure.

The recently signed Executive Order establishing a Presidential Commission for the Review of Antitrust Laws and Procedures -- on which Mike Pertschuk and I will sit -- will have as a primary order of business recommendations for solutions to the procedural morass into which antitrust cases seem too often to fall. The banner of procedural reform may not seem to bear the ideologic or symbolic significance of energy, shared monopoly, or regulatory reform, but without it many of our substantive efforts may be ambushed or headed off at the pass. A good legal theory is nice to have -- but it is of little use unless we <u>can</u> "tell it to the judge." To fail in this effort, it seems to me, is to acquiesce in the creation by abdication of responsibility of antitrust exemptions for our largest firms. This is why reform is important, and this is why I hope that the Antitrust Division can act as catalyst to such reform.

That is a quick glance at the Antitrust Division's menu in the next few years. There will be some off-menu items, specialties of the day, including efforts to reverse Illinois Brick, excursions into the mysterious world of international diplomacy in order to carry out our law enforcement obligations, continued vigilance to ferret out price fixing and attempts to persuade judges to pass severe sentences when convictions are obtained. And there will undoubtedly be other items, which we cannot yet anticipate.

Kaleidoscopic change is a commonplace at the Antitrust Division. Personnel change, industries change, legal theories change, and most of all, political appointees change.

One constant, and one constant alone, remains -- the value of competition in our country's economy and the Antitrust Division's mission to restore or protect it.