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# ANTITRUST DIVISION -- 1981
# TRANSITIONS IN PROGRESS

Remarks by

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Good evening. I am delighted to be back here tonight at the Antitrust Section's annual dinner and to see so many old friends again. Last year, when I spoke at this occasion, I had just signed on at the Justice Department. Having worked in the Antitrust Division many years ago, and dealt frequently with the Government since that time, I had a pretty good idea of what I would find and what I wanted to do. I also had a lot of questions -- what's it really like inside the Division these days -- what kind of a relationship would I have with the Administration and the Congress -- what could I possibly do to earn the big salary that the Attorney General had offered me? One of the biggest questions I had at the time was how long I wanted to stay at Justice, which only goes to show that if you think about something long enough it usually becomes moot.

Seriously, though, this is the first full day of the new Administration and yesterday's events remind us that there <u>is</u> a transition in progress in Washington, and of course in Justice, and that before too long I will be on my way out as Assistant Attorney General and someone else will be on his or her way in. Of course, the exact names and dates are not out yet, nor are the particular goals that the new Administration will pursue in antitrust, but I want to talk about transitions anyway, important transitions that have taken and are taking place at the Division and in antitrust generally. It may be too soon for a report card, but it is not inappropriate to review the past year in light of what I thought a year ago.

As you may recall, when I spoke to you almost exactly one year ago tonight I outlined my goals and priorities for the Division. While I don't really expect anyone to recall what I said last year -- although that would be nice -- I have gone back and re-read the record so I can refresh your recollections. I told you then that the Division's main focus would continue to be the vigorous enforcement of existing law. And I promised that as Assistant Attorney General I would devote a major portion of the Division's resources to pursuit of flagrant price fixing and other per se violations of the Sherman Act that continue to occur at an alarming rate. A year ago I also told you that I hoped to succeed in these efforts by focusing my attention as Assistant Attorney General on the machinery and processes of the Division. Now, as I prepare to leave the Division for private practice for the second time, I would like to report to you on transitions underway at the Division and on some of the more important insights I have gained as its head during the past twelve months. I want to talk about what I hope will prove to be improvements in Government investigation and litigation management and about the trend toward criminal enforcement and jail terms as increasingly important deterrents. I would also like to leave you with a few general thoughts about the Division, its decision-making process, and its people.

1. Litigation Management

A year ago I spoke of the widely-recognized need for more efficient management of antitrust litigation. I affirmed then

that the responsibility for such efforts, while resting in important part with the private bar, also rested with the Antitrust Division since we, I believe, must set the example. A year ago I felt strongly that complex antitrust cases could and should be tried more quickly and efficiently. After a year's tenure as antitrust chief I believe that even more strongly today.

As you know, delay and inefficiency on the part of both private and Government attorneys have multiple causes. Looming large among these causes is the common inability of attorneys to resist a temptation to pursue every possible trail that may produce something of value to their case development or trial preparation. In addition, because of the absence of some of the pressures facing private attorneys, I think we in the Antitrust Division at times may have been lulled into less expeditious pursuit of our civil or criminal investigations than would have been profitable or appropriate. I take some measure of pride in reporting to you tonight that determined efforts over the past year to combat such sources of delay and inefficiency at the Division have paid off with some encouraging success. Let me explain to you what we have done this year and then relate to you some of the results.

First, let me emphasize that efforts to improve the management of the Division's investigations and litigation have been going on for some time and by no means have I been the first Assistant Attorney General to devote substantial energies to this task. Each of us has had his own special emphasis to

contribute in this area, and our efforts have varied not only because of changing circumstances but because each new Assistant Attorney General has had his own peculiar set of strengths and inclinations. As most of you know, my background is the same as many of yours. Before rejoining the Division a year ago, I had spent the bulk of my professional career managing antitrust litigation, often against the Division, as a member of the private bar. And as lead attorney in such cases, I have always been the kind of person who couldn't help but get personally involved in the details of the case and keep closely informed about the progress of the other attorneys working with me. Thus, it probably won't surprise you to learn that in working for greater focus and expedition in Division cases my emphasis has been to try to tighten control by staying as thoroughly informed and involved in the day-to-day progress of the Division's litigation as possible, and by insisting that section chiefs and the Division' lead attorneys do the same.

To bolster the effectiveness of this approach and to increase the Division's efficiency in some other ways as well, we have institutionalized a number of important management initiatives. By far the most important of these, in my view, has been the establishment of regular monthly meetings between the Assistant Attorney General and each section and field office chief to review in detail the progress and future of each section's investigations and litigation. In these meetings we have taken a tough, hard look at each stage of our investigations and cases, striving to keep

our focus on the really essential questions of law and fact, trying to minimize the duration and the costs of our efforts in light of their potential and actual benefits. In these early morning and late evening meetings, I have asked the chiefs to predict realistically the future progress of the projects in their sections, and I insist that they either stick to these schedules or justify their departures from completion timetables promised previously. This continued emphasis on keeping efforts focused, trim, and on schedule has had a salutory "trickle down" effect within the Division. As the chiefs have thought more and more about meeting these standards, they in turn have demanded that the attorneys working under them do more to meet them as well. Each chief comes into the meeting totally informed as to what is going on in his or her section, including the details of each investigation. They can, and do, at the drop of a hat, tell you in meticulous detail each issue in the inquiry, who counsel is, and what problems we have had. It is, let me tell you, a rather impressive performance when you remember that the Division may have as many as five or six hundred investigations and cases ongoing at any given time.

The Division's section and field office chiefs and its line attorneys have also been given other incentives to manage investigations and litigations more effectively. Responsibility for planning and adhering to budgets for litigation support services has been decentralized, and more careful controls have been imposed to monitor these expenditures. Now, whenever the

specialized services of the Division's recently-established Information Systems Support Group (ISSG) are required, the lead attorney on a matter, his or her chief, and the ISSG must work out a joint litigation support proposal and submit it to the Division's Office of Operations, through which all our investigations and litigation pass. The memorandum must detail the services to be performed, why they are needed, the schedule for their performance, and anticipated costs. If Operations, which reports directly to me, approves the request in whole or in part, it then will specify the portion of the Division's limited available funds that can be spent. Once that limit has been reached, no further services can be provided until a supplemental request has been made and approved. This procedure forces attorneys from the outset of a project to think in hard cost-benefit terms about how they should best proceed and why, and like the Division's monthly meetings helps sustain the incentive to either adhere to announced game plans or justify their modification.

I believe that these and other efforts we have made to tighten our litigating operations have had heartening results. Division attorneys are emphasizing more careful and earlier thinking about how they should proceed with their investigations or litigation, and have focused their attention more sharply on really essential matters, rather than peripheral ones. In general, our attorneys have, I think, become more acutely conscious of costs and benefits and of time and resource limitations in planning their strategy. And in the case of investigations, our attorneys

have increasingly come to accept the idea of closing an investigation and moving on after an initial, intelligently limited inquiry produces no promising results. I think that because of these changes, we in the Division now are using our available support resources more wisely and efficiently.

Our success in these areas also is reflected by more tangible results over the past year. We have succeeded in clearing away a large backlog of old civil investigations and grand jury proceedings, and our open investigations today are much more current than was the case a year ago. For instance, our grand jury inquiries are now typically taking less than a year to complete. Similarly, virtually all our pending CID investigations were authorized since I arrived -- which is another way of saying they too are, on average, taking months rather than years to complete. In short, decisions on opening civil investigations, convening grand juries, issuing civil investigative demands, and closing investigations are now being made significantly faster than previously, and our investigations are, in general, consuming an appreciably shorter period of time.

At the same time, the quantity of litigation conducted by the Division and our success in it has remained high or surpassed prior levels. In fiscal year 1980 the Division filed 83 cases. Fifty-five of these were criminal cases -- more than in any year since World War II. In the 12 months ending on January 14, 1981, we filed 87 criminal and 38 civil cases. This total of 125 cases compares favorably with the total of 58 for each of

the fiscal years 1978 and 1979. Fines and recoveries in fiscal year 1980 remained high as well, totaling more than $12.5 million, the second largest amount in the Division's history. And the number of days of actual jail time imposed also significantly increased in fiscal 1980 over the prior year's total.

Thus, we have made some real gains at the Division this past year in better focusing, managing, and expediting our investigations and litigating efforts. We have built on the accomplishments of the past, as hopefully others will build on our improvements in the future.

2. Enforcement Policy

Much more briefly, let me turn to a second area and share with you some thoughts on the trend to greater emphasis on crimina enforcement at the Division. Last year I told you that I intended to continue, and to step up, criminal enforcement as a major deterrent. As the statistics I just reported to you indicate, we have in fact followed this path. Not only have a great many more criminal cases been brought, but sentences of days to be actually served in jail have increased as well, from a total of 1,085 in fiscal 1979 to 1,381 in fiscal 1980.

After a year as Assistant Attorney General, I continue to disagree with those who argue that huge treble damage recoveries are a far greater deterrent to flagrant violations of the antitrus laws than the possibility of being indicted. I am firmly convince that the harsh reality and isolation of federal prison and the social stigma of a jail sentence actually served can be at least

as big a deterrent as a treble damage recovery. Accordingly, I am sure the Division will continue to monitor price fixing and other per se offenses, and to seek criminal convictions and maximum penalties, including jail sentences, whenever appropriate.

Perhaps the best indication of the Division's current attitude toward jail sentences is its record in the recent spate of road building and airport construction cases. A large proportion of the 60-some criminal cases brought in these areas over the last year involved individual defendants. In plea agreements and in its sentencing recommendations the Division typically has sought actual jail terms of between three and four months, and sometimes as long as a year. Usually, sentences of these magnitudes actually have been imposed.

3. Decisionmaking at the Division

Before concluding, I'd like to add a few thoughts about the decision-making process at the Antitrust Division, about the Division generally, and about its people. These are things that I guess I always knew, but that never really hit home as hard as they have this past year.

The Division's primary, indeed its sole, criterion for deciding whether or when to bring a case or terminate one is whether it's "right" to do so. I think there's a real difference between this process and the one private practitioners are far more used to. In private practice the interests of one's client largely govern decisionmaking. What are the stakes, what are the chances, what sort of tactics or strategy will maximize

return to the client? Of course, this is not to say that there are no limits on the private practitioner's efforts on behalf of the client; we all know the rules and when the Canons step in. And I don't mean to belittle or denigrate this aspect of the practice; under our adversarial system of justice, vigorous offense and defense on behalf of the protagonists is the chosen way of reaching the most equitable result. But the fact remains that in private practice the sides are usually already chosen up for us, and business necessities trigger the gun that starts the game.

The Government doesn't make antitrust enforcement choices in the same way. Sure, something akin to the "stakes" are sometimes relevant: when the Division brings a case it has to consider what enforcement principles might be furthered or set back by a win or a loss. And the probability of winning plays a role too: if it seems too low, the Division must be on uncomfortably shaky factual or legal ground. But these "stakes", and these "odds", are assessed in the context of whether it is just or fair to proceed in the circumstances as opposed to whether a client will come out financially better off in the long run. And sometimes, when you're talking about far less than clear-cut violations, a full appreciation of the stakes or a solid call on the odds is just not possible. Then there's no choice but to make what is admittedly a judgment call, getting the best and most expert input you can. Fortunately, the goal is usually clear -- maximize competition -- but the trick is in figuring out how best to do it.

When I went back to the Division last year, I was not so much surprised as I was impressed with the sincerity with which these hard enforcement choices are made. I am sure those of you who have spent any appreciable time at the Division know what I am talking about. There's a lesson in it, a lesson for anyone in practice who wants to make a presentation to the Division on behalf of a client who seeks Government action or who wants the Government to stay its hand. Lengthy presentations on the Government's chance of winning or on the client's willingness to litigate the matter till the cows come home carry little weight. Similarly, don't bemoan the effects of ruinous competition -- the Division leaves that kind of decisionmaking to others. And don't simply hash, rehash, and debate the facts once a pretty clear factual understanding, including agreements and disagreements, has been established. I know that whenever I have met with counsel as Assistant Attorney General I have already had an in-depth review of the facts and I haven't been interested in hearing the same factual presentation that the staff and the Office of Operations have already passed along to me. Obviously, where there are new facts of which we are not aware or implications we do not appreciate, it is important and useful to call them to our attention. But absent such a situation, it is well to assume that the people you are addressing are equally and perhaps even more impressed by common sense than by sophisticated legalisms. Unless it's an open-and-shut, did-we-or-didn't-we, type of case, remember that the Division is always on the lookout for latent procompetitive

tendencies in allegedly anticompetitive behavior. And, most importantly, believe that the Division wants to do the right thing -- because it does.

Finally, a brief, general comment about the people of the Antitrust Division. I mentioned last year that, for me, professionalism is the hallmark of a successful legal practice -- whether in the Division or elsewhere. I told you then that I was committed to maintaining and elevating, if possible, the quality and sense of professionalism in the Division. During this past year we strived to do that in a variety of ways, including aggressive recruitment of the best new law graduates, placement of more responsibility directly on staff attorneys, informal talks, seminars and lunches, and recognition of accomplishment in every way we could.

I cannot tell you that every lawyer in the Division is or ever will be at the peak of our profession. Nor can I tell you that every lawyer has maximized his or her professional talents. But I could not tell you that about any law firm either. What I can tell you -- of which I am very proud and of which I think you too should be proud -- is that the Division consists of enormously able men and women who are extremely dedicated to their tasks. They show up at seven in the morning to talk about litigation and they stay until late in the evening to do what has to be done. Their financial rewards are, by any fair measure, small but they are in the truest sense professionals. I believe they were professionals when I arrived and they will be professional

when I leave but I like to think that during the past year we have added something to each other's professional and personal lives. I know they have to mine.

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I guess that's about all I have to say this evening, except to thank you again for the chance to renew old acquaintances and make some new ones. I'll be rejoining the ranks of the private bar soon, and together we'll do battle, hopefully civilized, against the Government and one another. See you then.