



DEPARTMENT OF JUSTICE

Presentation of the Sherman Award to the Honorable Judge Douglas H. Ginsburg

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**Remarks as Prepared for the
Sherman Award Ceremony**

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Welcome to the Conference Center of the historic Robert F. Kennedy Department of Justice Building. It is an honor to present the Sherman award to Judge Douglas H. Ginsburg this afternoon. We're joined today by Judge Ginsburg's wife Deecy and many of Judge Ginsburg's colleagues and admirers. We're particularly honored by the presence of Justice Gorsuch, a champion of liberty, who in his short time on the Supreme Court has reconfirmed his reputation for brilliance, clarity of thought and expression, and for holding the government to its word, whether in the statutes that it enacts or the treaties that it makes. I also welcome the distinguished guests who are with us virtually.

The Sherman award is the Department of Justice's highest antitrust honor. It is named for Senator John Sherman, who authored our nation's first antitrust law—the Sherman Act—in 1890. Today we honor Judge Ginsburg's lifetime contributions to antitrust law and economic liberty. I can think of no more deserving recipient for the Sherman Award than Judge Ginsburg. His career in public service and his scholarship have shaped the way that antitrust law is understood and practiced. The ceremony today recognizes Judge Ginsburg's rightful place among the giants of antitrust law who have previously been given this honor. They include: Judge Diane Wood, AAG James Rill, Chairman Robert Pitofsky, Professor Herbert Hovenkamp, Judge Robert Bork, Judge Richard Posner, and Professor Phillip Areeda.

The Antitrust Division has a personal connection to Judge Ginsburg. Before Judge Ginsburg was appointed to the DC Circuit in 1986, he was the Assistant Attorney General for the Antitrust Division. This was a critical time in the Division's history. At the beginning of 1984, pursuant to a consent decree, the Bell System was broken up into the seven "Baby Bells." Judge Ginsburg had to oversee the enforcement of the consent decree, and by all accounts he discharged his duties admirably.

Judge Ginsburg was central to another of the most significant moments in modern antitrust history. He was part of the en banc D.C. Circuit that issued the *United States v. Microsoft* decision—arguably the most important and influential Section 2 decision of the twenty-first century. The *Microsoft* decision also reflects a hallmark of Judge Ginsburg’s work—his advocacy for intellectual property rights. Judge Ginsburg has advanced the view that strong IP rights ensure incentives to compete dynamically on innovative solutions. In *Microsoft*, the DC Circuit declined to find that Microsoft violated § 2 by refusing to allow computer manufacturers to alter the Windows desktop interface. As the per curiam opinion put it, “a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft’s copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process.”¹

Judge Ginsburg’s antitrust accomplishments, however, extend far beyond his career in the federal government. He is one of the foremost scholars of antitrust law. His scholarly work has shaped my thinking in numerous ways. I’ll give a few examples. Judge Ginsburg co-authored an important study comparing the efficacy of generalist courts with specialist courts when the courts have to decide competition law cases.² Judge Ginsburg’s nuanced study notes that specialist judges have important advantages over generalist judges—after all, antitrust law is complex and judges deciding hard antitrust cases have to understand both economics and antitrust doctrine. But Judge Ginsburg also notes that there are particular disadvantages

¹ *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Circ. 2001) (en banc) (per curiam).

² Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists versus Generalists*, 36 *FORDHAM INT’L L.J.* 788 (2013).

associated with specialist courts, such as the risk of regulatory capture, where a powerful interest group may advocate for judges who serve its interests to be appointed to the court.

I found this article to be convincing and valuable—so much so that I’m now an advocate of the model of specialist antitrust tribunals that Judge Ginsburg suggested. He noted in the article that clever institutional design can ameliorate some of the disadvantages of specialist antitrust courts, and I agree. I support an Article III Court, into which generalist Article III judges with an interest in antitrust law could rotate for a number of years. Industry players wouldn’t play a role in selecting the judges most favorable to them, because the judiciary itself, through the Chief Justice of the Supreme Court, would decide who serves on the court. And judges would bring their generalist experience with them and acquire specialist training while serving on an Article III court of competition law.

Judge Ginsburg has also written perceptively about the emerging field of behavioral economics and its implications for antitrust law.³ In short, he has been skeptical of behavioral economics. Price theory, in Judge Ginsburg’s view, made antitrust doctrine rational and predictable and the accompanying consumer welfare criterion gave courts clear standards according to which to decide cases. Behavioral economics is more open-ended and threatens to destabilize this area of law. Since the Supreme Court is searching for overarching principles to guide lower courts faced with antitrust cases, Judge Ginsburg argues that behavioral economics is unlikely to be useful to the Supreme Court.

It’s hard to disagree with Judge Ginsburg’s contention that price theory’s dominant place in antitrust doctrine is a hard-won victory for doctrinal rationality and that behavioral economics needs to be embraced only cautiously. I am, perhaps, a bit more hopeful that further research in

³ Douglas H. Ginsburg & Derek W. Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, 6 *COMPETITION POLICY INT’L* 89 (2010).

behavioral economics can help identify irrational firm behavior and help antitrust law adjust. Judge Ginsburg's work is an important reminder that behavioral economics cannot displace price theory as the driver of antitrust doctrine, and whatever doctrine is advanced in the future, antitrust laws should continue to be based on rational, neutral principles, just like those Judge Ginsburg has helped usher in over the years.

Judge Ginsburg has also made antitrust law more rational and predictable through his work at the Jevons Institute for Competition Law and Economics at University College London. As a member of the Advisory Board of the Jevons Institute, Judge Ginsburg has fostered dialogue between U.S. and European practitioners of competition law. He gave an address about American antitrust law at the inaugural Jevons Antitrust Forum in 2005. His talk was a characteristically incisive empirical analysis of private antitrust actions showing that the Supreme Court's *Sylvania* decision had caused a decrease in private lawsuits beginning in the late 1970's. By starting the Antitrust Forum off on that strong note, Judge Ginsburg encouraged American and European competition authorities and judges to learn from each other and converge on substantive and procedural principles. He continues to exercise leadership in international competition enforcement, not only through the Jevons institute, but also through his work training international jurists through the Global Antitrust Institute at the Antonin Scalia Law School.

Judge Ginsburg is also a devoted teacher. As many of you know, he has held a great number of distinguished academic positions since beginning his professional career as a professor at Harvard Law School. He is currently teaching at the Antonin Scalia Law School at George Mason University, and before that he was Distinguished Professor at NYU. His former

clerks affectionately describe their time in his chambers as an educational crucible that honed their thinking and writing, preparing them to succeed in their legal careers.

More recently, Judge Ginsburg has taken his teaching role beyond the walls of the academy. He performed a valuable service by creating the fantastic PBS documentary *A More or Less Perfect Union*, which brought Judge Ginsburg's insights about the wisdom of the Framers' constitutional design to a wide audience. I strongly recommend the documentary: it's a fascinating dialogue with judges, historians, and constitutional scholars. It shows how our framers protected liberty by creating a government of limited powers, and how, unfortunately, federal power has expanded over time, in ways that limit personal and economic freedom.

Any one of these accomplishments would make Judge Ginsburg a deserving candidate for the Sherman Award. His untiring work in all these areas has led to several careers' worth of accomplishments. And we all are the beneficiaries of Judge Ginsburg's brilliance, hard work, and dedication to public service. It is with gratitude and profound respect that I present the Sherman Award to Judge Ginsburg.