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SOME COMMENTS ON ENFORCEMENT ACTIVITIES OF THE ANTITRUST DIVISION

AND THE DIVISON'S ROLE IN LEGISLATIVE REFORM

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[Based on an address before the Antitrust Section of the New York State Bar Association at the Association's annual meeting January 22, 1975, New York City]

One of the most famous lines in English literature, famous perhaps only because we confronted it, usually under duress, in high school literature courses, asserts that "It was the best of times, it was the worst of times . . . ." In this line, opening *A Tale of Two Cities*, Charles Dickens stated what I believe has been viewed as a truth by anyone who reads it, whenever and wherever it is read. But I found myself musing about this dichotomy, as I listened to the president frankly advise

us that "The State of the Union is not good," and I wondered whether the Dickens description is accurate today. One's first reaction is no, that is instead only "the worst of times." But is it? I do not believe so, and I hope you do not either. We are in a time of change, and it is because of the hope of that change, and the challenge it presents, that these may also be "the best of times."

. . . [I]t has been quite a year for the [Antitrust] division. The AT&T case was filed in November. Over-all, on the enforcement front, we instituted 38 civil suits and 33 criminal actions in 1974, the highest number of criminal cases since 1962. Forty-seven of the total of 71 cases involved price-fixing in one way or another. One of those cases, *United States v. Oregon State Bar Association*, represents the division's first attack on anticompetitive practices of the organized bar. The decision in the government's favor in its case against the National Society of Professional Engineers, challenging a code of ethics provision against competitive bidding, has provided support for this effort. The statement by the district court that the contention that professional groups are somehow exempt from the antitrust laws represents "a dangerous form of elitism" is surely worth pondering.

But is was also a significant year in a number of other ways. It was a year in which, for the first time in a great many years, the division's resources have been significantly expanded. There was also major new antitrust legislation, increasing Sherman Act penalties, substantially repealing the Expediting Act, and imposing new consent decree procedures. So there is much in the past year one might talk about.

But it has also been quite a year for the nation as a whole. We have, in mid-stream, seen a new man assume the presidency. And while we may congratulate ourselves on our ability to transfer power smoothly, as indeed we did, we must also recognize that the events preceding that transfer contributed in no small measure to the lack of confidence which is so much at the heart of our problems today. Indeed, it was a year of political instability around the world. The energy crisis came upon us and others with a surprising suddenness. We have seen double-digit inflation, and recession with its rising unemployment. On the surface, then, it is easy to conclude that it surely is not "the best of times."

The dramatic nature of all that has occurred is reflected in the topic suggested for this conference, which is focused on inflation and shortages. When it was suggested in October that I discuss the role of the Antitrust Division "in these somewhat critical times," I assumed that inflation was the factor making these times "critical." But now, in addition, we face rising unemployment and recession; if the times were "somewhat critical" in October, they seem more so now, though perhaps for different reasons . . . .

Clearly, the primary remedy for these major problems is in macroeconomic measures of the kind proposed by the president. At the same time, however, and quite apart from the specific measures he proposed, the president has made clear that we need to move in new directions, to re-examine our existing institutions and not rely on old solutions to what are in part new problems. New directions are required, both for consumers, whose life styles must be altered, and for businesses. We must eliminate fat and become lean again. One new direction (at least considering recent history) clearly indicated by the president is a move toward strengthening of, and a return to, the free market as our primary economic regulator. This is not rhetoric, but a deliberate and significant choice, a choice rejecting the extension (urged by some) of government regulation and perhaps even government control of business.

What, then, is the relevance of the current economic conditions to the enforcement activities of the Antitrust Division? I think we must concede that decisions about enforcement matters cannot proceed in a vacuum. Shortages, for example, to the extent they exist, are an economic fact. In some cases . . . the fact of shortage may itself be a reason for filing suit. In others, it may provide justification for the conduct engaged in. There are major energy research needs, which may require some forms of joint effort. We may see increasing numbers of mergers resulting from the failure of business firms, though I would take this occasion to remind you that an otherwise unlawful merger can be justified on failing company grounds only if no less anticompetitive partner can be found, a requirement which we will continue to insist must be met.

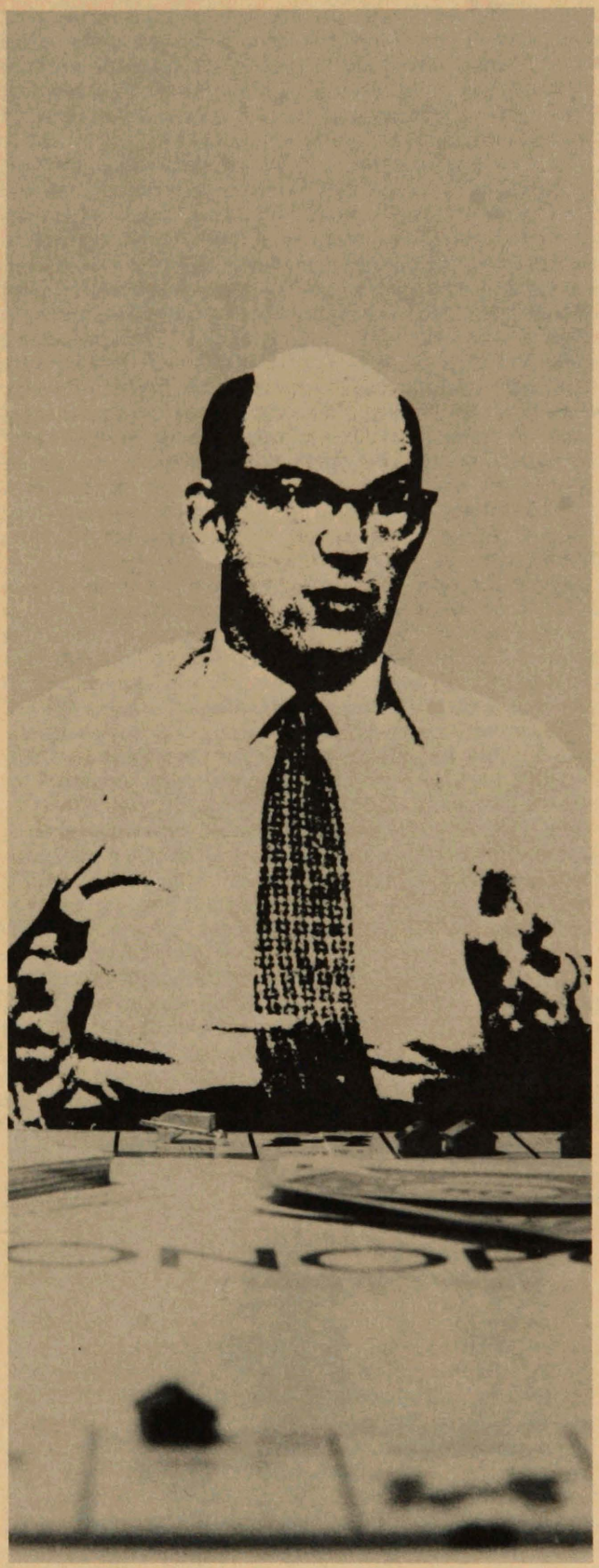
These, however, are in a sense details. On a broader scale, this is no time to slacken up enforcement efforts, or to ease up on or modify antitrust rules, merely because we are in economic difficulty. Some would disagree, and would argue that we should not further burden business with antitrust enforcement, at least until economic recovery is achieved. How far some would go in this direction is not clear; in the past, we have sanctioned some forms of price-fixing in the name of recovery. Most, I think, would agree that these efforts in the 1930s were a failure. But whether or not there is a sentiment to let the Blue Eagle fly again, some undoubtedly believe that antitrust enforcement is a good thing for good times and a bad thing for bad times. I strongly disagree.

Part of our present difficulty is a lack of consumer confidence in our economy and in our institutions. During past periods of recession, particularly during the 1890s, that lack of confidence seems to have arisen in part because of a public belief that the system was not adequately controlling serious abuses of economic power. I do not know how you read the American public, but I find that same concern one of the reasons for lack of confidence today. Thus, to allow such abuses, or even to appear to allow them, in the name of recovery seems self-defeating. To permit increases in economic power for the same reason would be even worse.

I think we also have enough experience to know that the very fact of sharply changing economic conditions, with its uncertainty and dislocation, can itself provide a strong motivation to fix prices, and to attempt to prevent the disruption of longstanding, economic relationships by allocating markets or other varieties of illegal self-help. Thus the incidence of violations may in fact increase during difficult times, and enforcement efforts must keep pace.

Nor is this a time to tolerate conduct which results in economic waste. There has been much discussion in recent months about the relationship between antitrust enforcement and inflation. We have put increasing emphasis, in our resource decisions, on conduct which directly results in price increases and restrictions on output. Thus, we have focused more than ever on the problem of price-fixing, in part in the belief that price-fixing does contribute to inflation. We do not suggest, of course, that an assault on price-fixing will cure inflation. But such an attack can, I believe, make a significant contribution. There has also been a continuing dialogue over whether concentration and pricing practices in concentrated industries have any relevance to inflation. As most of you know, economists disagree on this issue, some asserting that prices rise more slowly in highly concentrated industries than in those less concentrated. Others have asserted that even if this is the case, there is a ratchet effect arising from the fact that such prices also drop more slowly in times of recession, and thus never drop back to competitive levels. In any event, stickiness in prices itself tends to impede adjustment.

What all this suggests is that antitrust enforcement



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must remain active whatever the general economic conditions we confront. If we are to rely on the free market as our fundamental regulator—and that is surely the direction of this administration—artificial restraints which make price levels unresponsive to changes in economic conditions, which encourage economic waste or slow innovation and cost reductions, are a barrier both to economic recovery and to reducing inflation. In large measure, many of the institutional problems we are attempting to deal with today are the result of ill-advised efforts to cure past economic difficulties by departing from free market principles. If we are to learn by experience, we will not repeat those mistakes today.

Put another way, I do not see in current economic conditions any reason for a diminution of our enforcement efforts. If anything, they suggest the need to intensify these efforts, in a way which is able to take into account changes in the competitive effects which may be brought about by the status of the economy as a whole. We are not prepared to tolerate price-fixing any more today than we were six months ago. We are as concerned with abuses of, and growth in, economic power today as we were in the past. In short, antitrust enforcement is as good in bad times as in good, and perhaps even more important.

Our strong emphasis on price-fixing will continue. We have now forwarded to our field offices a number of investigations, based upon comparative price analyses of regional markets by our Economic Policy Office. Based on past performance, a number of prosecutions may result. We will also continue our efforts against anticompetitive arrangements in the service sectors of the economy. I foresee no changes in the applicable merger standards. And we will continue our review and investigations in a number of highly concentrated industries.

On the regulatory front, we will continue to participate in a wide variety of agency proceedings . . . . Many members of the antitrust bar have expressed concern over the complexities arising from the interplay of antitrust rules and regulation, and some have suggested that the Antitrust Division's efforts have added greatly to this confusion. The way to handle these problems, they suggest, is not through particular proceedings but through legislation. We all must concede that there is some uncertainty, and so rather than talk [on this occasion] about our litigation or advocacy role in regulatory proceedings, I would like to address instead the division's role in legislative regulatory reform . . . . It is a time for change, for new directions. It is a time to reexamine, and to ask whether we really are doing things as well as we should.

Following the president's call last October for a study of federal regulatory activities and their possible adverse economic impact, we began the complex task of studying the various federal regulatory agencies and certain regulatory activities of the executive branch.

These studies are designed to be (and I assure you they will be) in-depth looks at the statutory mandates of the agencies, the background and stated historic purpose of the existing regulatory schemes, and the actual operation and economic effect of the current system. We will be looking hard at the relationship (if any) of the existing schemes to their stated or historic purpose, and what specific effects on economic efficiency the current schemes have. Finally, we will attempt to isolate specific desirable regulatory goals, and fashion the necessary legislative changes which must be made to blend the statutory mandate and directions of the regulatory agencies to those specific goals in such a way as to eliminate unnecessary and wasteful economic restraints.

With this general approach in mind, let me touch on the major areas we are working in. First, and probably

most important, is transportation, with major emphasis on surface and air transportation.

Transportation regulation has been a topic of discussion and analysis for some years now, both within and outside the government. Despite all this discussion, and despite the general agreement that reforms are necessary, no real reforms have been made.

This lack of reform has not been for lack of effort. In 1971, the administration submitted the Transportation Regulatory Modernization Act of 1971. In 1974, it proposed the less comprehensive Transportation Reform Act of 1974. Neither of these bills was passed by the Congress. It has become clear that no reform is likely until the public realizes why it is necessary, and one of the goals of our work is to present a reasoned and rational analysis of the current regulatory system, its strengths and its weaknesses.

Those who have listened to me in the past know that I believe quite strongly that surface and air transportation suffer from excessive economic regulation, and that this excess regulation results in substantial economic waste. Prices are high, more fuel is consumed than is really needed, and environmental problems are created that could be avoided. The ultimate effect is higher costs to the consumer and, since transportation costs are part of the price of almost every product, these higher costs have quite general application throughout the economy.

In examining how to improve the performance of our surface transport system we are considering a number of issues. These include entry and exit rules, and licensing restrictions, particularly commodity, circuitous routing, and backhaul requirements. We are studying ratemaking procedures and the possibility (and effect) of the elimination of antitrust immunity for most rate bureau activities as well as for mergers and acquisitions. Clearly, any reforms must be consistent with assuring that common carriers in fact serve all shippers on reasonable terms which can be ascertained in advance.

The basic goal, obviously, is to eliminate economic regulation where it is unnecessary or counterproductive, and to insure that continued regulation is properly directed so as to permit affirmative economic regulatory action only where necessary to meet some clearly defined economic goal. Here again, we are seeking in these bad times to learn from our adverse experiences in dealing with past bad times. The one lesson that is crystal clear is that governmental regulation is not a panacea, and may indeed exacerbate rather than cure the problem.

In air transportation, we are also studying the desirability of easing entry and exit restrictions. The effect of the elimination of CAB control over rates is being carefully considered, along with the idea of phasing out such controls over a period of years. Existing antitrust immunities are also being given careful attention. Based on the experiences of intrastate air transportation in Texas and California, more flexible entry and pricing policies have the potential of providing considerable public benefits. . . .

Another major area of study is the financial field. We worked on and strongly supported the administration's 1973 financial reform proposals, and this past experience has formed a base for our current efforts. Many of the changes contained in the 1973 proposals will undoubtedly find their way into our conclusions. But for this study, we are not limiting our consideration to past legislative efforts. For our review to be complete we must look at and consider the effects of such additional questions as, for example, restrictions on entry, and whether more precise rules are needed to control bank expansion by merger and acquisition. It may well be that significant changes in the existing regulatory and antitrust rules will appear desirable if our financial institutions are to be effectively and efficiently regulated. The development of electronic technology for the delivery of banking services renders this analysis even more essential and the evolving character of that technology must be given significant weight in any rational economic analysis of financial regulation. . . .

Another whole area of economic regulation which may no longer serve any legitimate purpose is agriculture. The treatment of cooperatives, under the Capper-Volstead Act, poses a number of issues of both structure and behavior. There are significant regulatory activities, carried on under the aegis of the Agriculture Department which are being carefully reviewed. For instance, is there a continuing justification for the elaborate system of federal milk marketing orders? What of the price support programs of various and sundry kinds dealing with a wide variety of agricultural assistance programs? Does the basic concept of "parity pricing" continue to make economic sense? Marketing orders and marketing agreements, and the mechanisms and procedures utilized to adopt and implement those arrangements, are also areas of concern, as are such indirect regulatory devices as import quota programs.

About the only conclusion we have yet been able to draw from our work in the agriculture area is that it is enormously complicated. The regulatory schemes appear to be overlapping and complex, and the stated or intended purposes of this maze of regulations have in some cases been obscured by the mists of history. We are not the world's experts in this field, but hopefully we will be able to provide some new perspective on this massive regulatory system, whose very existence is largely unkown to the consuming public.

We are also devoting considerable resources to such areas as communications, where among other questions the regulation of cable television presents important issues; the securities field, where such developments as the consolidated tape, the central market and the forthcoming elimination of fixed commission rates promise great changes; anti-dumping statutes and procedures; natural gas pipelines; electric utilities; ocean shipping; broadcasting and insurance. . . .

As you can see, we have not been bashful, and it may well be that our schedule calling for completion of the complete Regulatory Reform Project by the end of February may be somewhat optimistic. Still, I think you would discover by talking to the division personnel who are involved in this work that we are not simply spinning wheels. A large number of division lawyers and economists are devoting a considerable portion of their time to this project, and they are working hard. I attach high priority to this effort, and we will have a final product in the near future.

Consideration of legislative proposals cannot be limited solely to classic economic regulation, and so we are also examining legislative proposals more directly in the antitrust field. Two areas warranting new attention, I believe, are the Robinson-Patman Act and fair trade.

The Robinson-Patman Act was adopted during the Depression, with little thought given to its effect on long-run economic efficiency. Today, given our general concern with the state of the economy and our specific need to promote economic efficiency, Robinson-Patman clearly deserves re-examination. There are obviously several alternative methods of dealing with the act. It could be left as it is. It could simply be repealed. It could be amended to perserve special remedies against anticompetitive price discrimination but eliminating language which discourages legitimate price competition. We are not at all certain yet what the best course is. What is clear is that we need to be thinking about it and, to the extent necessary, doing something about it.

I have previously indicated my feeling that it is past

time for the federal fair trade enabling statues, the Miller-Tydings Act and McGuire Act, to be repealed. This legislation is a sibling of Robinson-Patman, conceived during the same period. Today, however, there is a consensus among economic observers that the existence of fair trade practices results in higher prices; indeed, that is now recognized as the very reason for the continued existence of fair trade laws. But in addition to these direct economic losses, fair trade laws and the practicies they allow may well have other adverse economic impacts. Fair trade price lists may spill over into non-fair trade states, in the form of "suggested retail" price lists, thus resulting in a higher price level generally for particular products. Fair trade practices also frequently provide a convenient cover for other clearly illegal collective restraints. Finally, fair trade prices when enforced introduce undesirable rigidities into the retail price structure and contribute both to the maintenance of inefficient firms and to excess capacity in the distributional chain. In these days of higher and higher prices, when we are searching for ways to free up economic marketplaces and allow market forces to effectively operate to promote efficiency, the fair trade laws are an anachronism which have no place in our economic system.

Finally, we continue to believe that passage of the proposed amendments to the Antitrust Civil Process Act would significantly aid our efforts to more vigorously and effectively enforce the antitrust laws. Antitrust cases are, as you know, complex and extensive litigation proceedings generally requiring lengthy investigations and frequently resulting in the accumulation of voluminous data. Passage of the Antitrust Civil Process Act in 1962 was extremely helpful, but it has become clear that the act has some important limitations. Thus, even today, the speed with which our investigations can be conducted depends to a significant extent on the level of cooperation of persons having relevant information. The proposed amendments to the act would significantly increase our authority to compel the production of relevant information by providing us the ability to require written interrogatories, to take oral testimony, and to require the production of documents from individuals as well as corporations with relevant information. The net effect of these amendments would be to expedite particular investigations and thus allow us more effective use of our limited resources. We believe these amendments are very important and we would hope that the Congress could affirmatively act on these amendments within a very short time.

Let me now end where I began. That the times are bad no one can deny. But it is not a time for gloom. It is not a time for patchwork solutions. And it is not the time, in haste, to repeat the mistakes of the past and depart from our free market mechanisms. But it is a time of opportunity, a time for ideas, for reform, for self-examination, and a time to make this nation lean and tough. How we respond will ultimately determine whether this truly was the best or worst of times.

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