ADVANCE SHEET – January 3, 2025

President's Letter

Recent years have seen a renewed emphasis on the non-economic purposes of the Sherman Antitrust law. We append here an address delivered by Attorney General Edward Levi, sometimes wrongly identified as an exponent of the economic purism of the Chicago school of antitrust, delivered in 1975. Readers interested in this subject should also consult a recent article by Professor Ariel Katz of the University of Toronto, **"The Chicago School and the Forgotten Political Dimension of Antitrust " by Ariel Katz**.

George W. Liebmann

ADDRESS
BY
THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES
BEFORE
THE 85TH ANNIVERSARY OF THE SHERMAN ACT
1:00 P.M.
THURSDAY, JUNE 19, 1975
NATIONAL PRESS CLUB

WASHINGTON, D.C.

I need hardly say it is an enormous pleasure for me to take part in this 85th anniversary celebration of the Sherman Act. It is a homecoming, a reunion, and a pledge to help maintain the values which each of us sees in our own way in that historic charter of freedom. As alumni, conscious as we are that many of us had our experiences with the antitrust division at different times, we are prepared to welcome outsiders to our group. And we know that outsiders are here. I would like to say this conforms with the modern temper witness the Freedom of Information Act. But the fact is that those of us who were involved with the antitrust laws realize that these laws have always moved with bursts of publicity and occasionally with high drama. The antitrust laws are the public's business, and so we welcome the outsiders. But we hope ~hey have the faith, shared by plaintiff's and defense counsel alike. In some sense I choose to believe this is a gathering of true believers. It is because we are true believers that in the past at least there have been so many sects among us, so many contrary positions strongly held.

The most important thing, of course, is that the antitrust laws have survived. I believe they have survived in strength. They have been of inestimable value to our country. They are an expression of the importance of a recognition that liberty is to be found not only in the First Amendment but in the ability to make choices free of overwhelming government directions and intervention. The antitrust laws, in their basic theory, are built upon a view of enterprise and of choice, which property and access to the market give, and I would claim them as among the most important civil liberties. This is an older view, often in disrepute. Although often violated, this view has been sufficiently strongly held to give our country unusual diversity and creativity. This view and its manifestations in the Sherman Act have shaped and protected our democracy.

The survival of the Sherman Act has not always been a sure thing. Throughout its existence the Act has been under periodic attack. There have been frequent revivals. Revivals fit our faith. Some of us came to the antitrust division only a few years after the demise of the Sherman Act was firmly' predicted. The revival of the forties was chiefly the vision of Thurman Arnold. I don't think it is unfair to put it that way, although Thurman was surrounded by persons of exceptional ability. Some of them are here. They will forgive me for this statement, because I think they will agree with it. But the opportunity for Thurman's entrance was given by Robert Jackson, who began the revival in 1937 with more than a note of skepticism -- a thought that this was the last try, a lurking belief, which many thinking people shared, that a different form of government control might be necessary.

"The policy to restrain concentration of wealth through combination or conspiracies to restrict competition," Assistant Attorney General Robert Jackson wrote, "had not achieved its purpose." "Concentration of ownership and control of wealth were never greater than today," he said. Looking over the forty-seven year history of the Sherman

Act, he observed that the "almost unanimous verdict••• would be that the enforcement has been more spectacular than successful, that legal prosecutions have not suppressed monopoly • • • a half century of litigation has not made the law either understandable or respected." The antitrust laws were "full of loopholes, failed to "break up price controlling organizations, or to check the continuing concentration of wealth and of industrial control." He noted the antitrust laws represented "an effort to avoid detailed government regulation of business by keeping competition in control of prices." It was hoped to save government from the conflicts and accumulations of grievances which continuous price control would produce, but perhaps if the antitrust laws failed in this one last effort government regulation of a different type would be necessary. The regulation he had in mind was regulation by governmental commission. Perhaps in some instances it might have gone further to government ownership.

The Jackson doubts were natural. His last chance remarks were written in the aftermath of the National Recovery Administration -- an attempt to replace the Sherman Act with the collusion of. industrial self government. The first director of the NRA, after he departed from his post, wrote a book explaining what he had been up to. Here are his 1935 remarks:

"You can't have recovery without amending the Antitrust Acts because you must prevent a repetition of 1922-29. You c'an't do that without control and can't have that control under Antitrust legislation. Those Acts have failed in every crisis. They had to be forgotten during the war to enable the country to defend itself. When they came back to memory in 1919, they set the stage for what happened up to 1929. They contributed to the boom and they were helpless in -the crash. Without amendment, following the principles of NIPA, they will go on (as they did) to create the very conditions of monopoly and erasure of the individualism which they were conceived to prevent and in the future, as in the past, they will have to be abandoned in any crisis, economic or military. Unless so amended, they have no place in the mechanized, highly organized, and integrated civilization in which we live. There is no more vital and fundamental issue before the country than whether we are going to control modern scientific and industrial development to our use or suffer it to our destruction.

"The only forces that can control it are industrial self government under Federal supervision ••• "

In the background 'of these remarks by Hugh Johnson were the frequent complaints from: some economists and businessmen that the American antitrust laws had made it impossible for American firms to compete with giant foreign companies or cartels in world markets. Those complaints appeared before World War I, were repeated in the 'period between the two world wars, and, not surprisingly, seem to be reappearing today in a somewhat different version. The Johnson remarks also carried forward an extreme version of some aspects of the trade association movement of the Twenties, and of course he was stating much of the language of the technocrats.

The Jackson skeptical last chance did turn into the most creative periods of the Sherman Act, rivaling in doctrinal development the Taft period, exceeding all prior times in the reach of the Act, providing the platform for what has come since. Many, perhaps most, of you here today made and shared in the subsequent experience. And some of you indeed are providing the current leadership or response to the leadership of the present antitrust division. This experience is the more surprising and the more important because in the forest of regulatory commissions created since Jackson's last chance, the antitrust division is almost an oasis. So there is a bond among us; we share something quite unique.

In response to this bond and the affection which goes with it, I thought it might be appropriate to use this occasion to attempt to state some of the things I believe I have learned about antitrust enforcement. I would rather have a discussion on these points, because I am rather sure we do not all agree. We probably never did agree in all

respects, anyway, and subsequent experiences have caused us to change our minds, or at least given us time to rethink the bases for our opinions. Yet I thought it might be a worthwhile exercise for me to attempt to set down some conclusions. I hasten to add I don't think my views will surprise anyone, nor do I think they should be given any particular weight. Indeed perhaps they should be discounted because of the government position I presently hold.

I believe my knowledge of the general direction of the present Antitrust Division is fairly complete. I admire Tom Kauper and his deputies and staff. I did have a conversation with Tom Kauper about what I thought I might say on this occasion. I was afraid someone might think I was setting forth a program for the Antitrust Division, and of course if I did that, I would really want it to come from him although through my mouth. But Tom Kauper is away and I have had to write this speech myself. My humility on this matter is not put on. I don't feel humble. I have just been well trained.

I cannot get out of my mind two incidents among many which occurred when I was in the Antitrust Division. One was in the very early days when Thurman Arnold took me up with him in the private elevator to show the Attorney General, who was Robert Jackson -- two floors above -- a document which Thurman thought was quite exciting and "hot." The document seemed in any event to implicate a large company in a cartel arrangement. Before anyone asks me under the Freedom· of Information Act to supply a copy of that document, let me say at once I have forgotten what the document was. But I do recall that Thurman flashed the page in front of Jackson without further explanation, and I didn't see how anyone could possibly understand from that glimpse what the significance of the disclosure would be. After getting some appropriate expression from Jackson to the effect that it seemed to be quite a document, Thurman whisked out of the room -- I trailing after him -- and down the elevator we went. "Why didn't you tell the Attorney General what the case was about?" I .asked as we descended. "You should never tell the Attorney General anything," Thurman said. That was my first lesson on Attorney Generalship.

I remember as a second occasion Francis Biddle saying quite seriously and plaintively that he always opened the morning paper with apprehension because it would probably report something the Antitrust Division was doing which he didn't know about. And he had reason to be apprehensive. So the second lesson.

I would not have thought I needed a third lesson, but as a useful reminder not to take too seriously the twelve-hour a-day minimum I put in on my present job, I was given a lesson by the Washington Star a few days ago. The Star asked a friend of mine, not in the Antitrust Division, to be sure -- but nevertheless I think it has some relevance whether the turmoil in the Justice Department, the rapid turnover of Attorneys General, hadn't left the Department suffering badly. With the graciousness which all of us cherish as a part of Washington life, my friend responded brightly that he thought things ,had settled down, but anyway the Justice Department consisted of dedicated professionals, so it didn't make too much difference what the political leadership at the top looked like.

So now that I have been given the freedom which comes from being ineffectual, let me seriously try to state what my views or observations are.

As a starter, I think that experience shows one should not expect the defense trial bar to attempt to campaign seriously for a quiet Antitrust Division. I certainly don't mean that the defense antitrust bar wants the division 'to win all its cases, or even to bring them all'. But quietude does not seem to be the aim, and perhaps that is a good thing.

I have another observation which perhaps derives from too little experience. When I was in the Antitrust Division and for some time thereafter, I remained amazed not only at what people put into writing but the collusive arrangements they sometimes sought to achieve. It is of course true that documents written in the heat of a transaction or at the end of a tiring day often appear in a false light when they appear years later.

My thought was, however, that due to the great increase in antitrust prosecutions and the plethora of lawyers surrounding most large companies, there never would be again the kind of conspiratorial price fixing cases which appeared in the early antitrust cases. Indeed I was rather sorry for my successors, which include many in this audience, because I thought they never would have the thrill of that kind of macabre discovery. Indeed when I was teaching the antitrust laws, I used to tell my classes that such simple but overly conspiratorial cases were a thing of the past. It was on such a day in February, 1961, when I was giving forth with this profound wisdom that a student showed me a newspaper item describing an indictment, fines and prison terms and an arrangement among major electrical firms couched in terms of phases of the moon, meetings described as choir practices, and a variety of other codes used for price fixing. My conclusion undoubtedly over-reaches this jolting experience, but it tends to confirm a view that Adam Smith was probably right, 'and vigilance both within and outside such companies always will be needed. If this is true, it says something important about the everlasting necessity for vigorous antitrust enforcement against price-fixing or collusive production controlling or division of territory arrangements. In our excitement about problems of concentration, I think we often tend to forget this. Indeed as some of the experts have pointed out, the nub of the problem of concentration is likely to be the greater ease with which collusive arrangements may be arrived at.

The present Antitrust Division has greatly increased its attack on collusive arrangements. While the statistics, as one might expect, are quite imperfect, my rough estimate is that the enforcement level last year was about three times higher than the average for the period from 1965 through 1969. During an inflationary period, when productivity has particular importance, I think this is a desirable direction. But I think it is desirable anyway.

The antitrust laws have great symbolic value. This is true with the enforcement of most laws, and is one reason, although of course there are other reasons as well, that laws ought not to be enforced in secrecy. But there is a special reason why this is true of antitrust. Antitrust is supported as a viable alternative to more severe, more interfering, more bureaucratic forms of government regulation. It is in that sense that antitrust is regarded as nonregulatory. But this viability must be believed. It must be demonstrated. It must be shown that cases can and will be brought. I do not think this aspect of antitrust enforcement is in any sense illicit. And if this is so, it does suggest, although there are other reasons for this suggestion as well, that antitrust enforcement ought', to be programmatic. I mean two things by this. First, I do not think a successful antitrust program can be launched merely by waiting for complaints to arrive. Collusive arrangements do often break. down; there is bickering and some disclosure. But successful enforcement in this and other fields of 'non-violent crime must be based on a much more affirmative scrutiny of what is going on. Second, I think the effectiveness of antitrust action, as well as the ability to uncover other violations, is greatly enhanced if one proceeds industry by industry. I don't think this is the only way to proceed. Violations, as we know, sometimes follow the pattern of the assumed loopholes of new devices. I would want to be reassured, for example, that the Supreme Court's Kewanee Oil Co. case, which gave patent-like monopoly to non-patented secrets, was not to be used as the basis for cartel-like exchange agreements. As we know, this was the history of many cartel arrangements in the past. In any event I think an enforcement program requires an articulate explanation of its focus, both to help the enforcement, program itself and to give reassurance to the public of the viability of the law.

As an aside let me mention that the new revision of the Federal Criminal Code in S. 1 would make it a criminal offense to steal another's ideas, a proposal that surely will drive scholars wild. This entertaining outcome, however, undoubtedly results from a too broad reading of the provision.

A central question concerning antitrust enforcement is whether it must be based solely on correct economic theory. I find the answer to this rather simple. The answer is "no." I do think it is proper to criticize antitrust cases and doctrines when they justify results on economic grounds which don't stand up. But antitrust laws in a proper sense have always had political overtones. The over-riding purpose of the law, particularly the law against monopolies, was to give assurance that private firms would not be exercising what was taken as the equivalent of governmental power. When Senator Hoar explained his bill, which became the Sherman Act, he emphasized the menace which monopolies, as they were perceived, would have on republican institutions. When Robert Jackson gave his last chance speech, he spoke of the ideal of political and economic democracy. I am prepared to accept therefore, as one indeed must, the judgment of the courts or Congress as to banned conduct even though from an economic standpoint in many cases the ban may make very little sense, or be fairly trivial in its economic impact. This is not an appeal in favor of or in defense of nonsense. I think it is a realistic interpretation of the way the law has developed, and is more consistent with its common law background and process. I would not myself otherwise know how to explain the outcome of the DuPont-General Motors case, although I believe the result was to be expected. This is to say there are some limits as to what size can do -- because that is in fact what the law is, quite apart from what it says it is, and there are also some practices which may be banned, such as tie-in arrangements attached to patents, even though economic theory mayor may not, depending on the facts, find an actual enlargement of the patent monopoly.

I realize this statement, since it seems to leave the often illusory security of economic doctrine, might suggest I advocate no sensible limits to the extension of the antitrust laws in many directions and that I do not see the necessity for the development of consistent judicial or legislative activities for antitrust. But I have not said either of these things, and I should at once affirm that an antitrust doctrine which can be .shown to be seriously harmful in its economic impact is of course subject to the greatest questioning. My guess is that the antitrust laws have suffered more from the development of assumed economic doctrine to justify continually the further extension and reach of the laws. The basic problem of the antitrust laws is not only that they have to be vigorously enforced, but also that they have to be saved from their friends.

The basic guidelines for present problems I think have to be faced up to are these: (1) collusive behavior to restrict production must be vigorously pursued. I believe this should be done in an articulated industry to industry basis; (2) in the field of concentration or structure of industry, short of the problem of monopolization or monopolizing to foreclose entry, there still must be some concern for that kind of felt or believed domination, or for that lack of inventiveness or creativity in industry which gives rise to an overwhelming doubt as to whether the antitrust laws can perform their function. This may be a restatement of traditional doctrines which emphasize the way monopoly power was acquired or the way it has been maintained. But I go back to the symbolic nature of the antitrust laws, and their paramount purpose to be seen as a viable alternative to more stringent forms of government managerial forms of regulation. I cannot emphasize too strongly that I am not advocating the bringing of cases where violation is doubtful; on the contrary, I am saying that in fixing the priority for cases one must consider not only the effect within an industry but on the more general impact in law enforcement. In this sense, and perhaps this is paradoxical but I believe it is true, catching monopoly in what is called its incipiency by preventing acquisitions when the market control is very small, under section seven as it has been interpreted, may be a great disservice to the administration of the antitrust laws, which, from time to time, need splendid demonstrations of the power to deal with the real thing. To talk this way -- opens one to a double charge I realize. I am sure the notion, which I think a necessary one, of symbolic concentration cases is very troublesome. Conversely, the way I have stated the matter may be regarded as being too

unsympathetic to the assumed need 1:0 stop the trend of concentration or to increase the number of industries now dominated, as the saying always goes, by four or five firms. As to the assumed concentration increase over the years, I think there is very little to support this picture, although it may be true. To adopt a change in the law which creates a rebutable presumption that monopoly power exists if it is shown that four or fewer firms account for 50% or more of the aggregate market share, or which automatically goes after any firm having a market share of at least 70% seems to be destined to create a different form of government control over industry. But as to this perhaps one might consider a suggestion. The issues can be enormously complicated in concentration cases; at least not many can be prepared and tried at once. It might be a valuable step to have legislation through which the President every five years would appoint a short-term independent commission, composed of attorneys, economists and other experts from outside the government, which would report on the concentration and structure of American industry from the standpoint of apparent anticompetitive or monopoly behavior. Such a commission if formed should not have a prosecutorial purpose and should not have the power of compulsory process. But its report would focus attention on apparent problem areas. A good report would enlighten public discussion. It also would enlighten the direction of the enforcement of the antitrust laws. Needless to say, this suggestion has not been cleared with anyone.

I am of course aware and I applaud the efforts the Antitrust Division has made to spur the deregulation of industry. While I have some doubts whether as an economic matter it will make all the difference, I also applaud its efforts to do away with resale price maintenance laws. I personally would be particularly pleased if it could do away with the Robinson Patman Act. But this pleasure would derive from a position I took years ago and not from any new look. In the meantime, a new consent decree law has been passed with the best intention in the world, but with the dubious result, I am sorry to conclude, of making it more difficult for the Antitrust Division to accomplish its work. And Congress now has before it a proposal to establish an Agency for Consumer Advocacy, which would allow the Consumer Advocate to intervene at virtually any stage in an administrative process, so defined that it is possible - although I hope this is not the case - the Advocate could demand the right to participate in any investigation, meeting or negotiation conducted by the Antitrust Division, including conferences with any private, party and to intervene at any level in any court proceeding. I can hardly imagine a greater road block to a successful enforcement program.

If the antitrust laws have played their role, as more or less they have, of insuring creativity and diversity, of upholding the ideals of freedom of entry into the market place and into the channels of manufacture and trade, and have contributed to the reality of our democracy, I hope the Antitrust Division itself will not fall victim to over regulation. It might be poetic justice if it did. For the antitrust laws at birth and thereafter were never quite as pure as on the side of competition as we have tried to make them. They were after all in origin at least in some respects part of the Populist tradition, with a strong dose of unfair competition theory and desire to regulate mixed in. Moreover, the Antitrust Division is some ways was the original consumer's advocate, as it still is. But as Thurman Arnold wrote in another connection: the answer to the poetic justice argument is that I don't like poetic justice. I guess no one does. But I hope the Sherman Act and the Antitrust Division will be here with you, loud and clear, at least at every five-year interval.

Not To Be Taken For Granted

This past Sunday we commemorated the Feast of the Holy Family at Mass. For those celebrating Christmas, Hanukkah, Kwanza, or any combination thereof, the central role of family in our lives is clear. At Mass, the celebrant reminded us that Holy Family does not mean "perfect family," so, no matter how much dysfunction accompanied our holiday(s), we should not lose hope.

Now the reason for this article is not really to discuss family, but a member of the Holy Family, Joseph. Do you know that in the Bible he is mentioned just fourteen times? Talk about being taken for granted. Now, here is a guy who had such an effect on Jesus that the young man follows in his footsteps as a carpenter. Can you imagine the time they must have spent together and the impact Joseph must have had on His life, not just as a carpenter, but as a man?

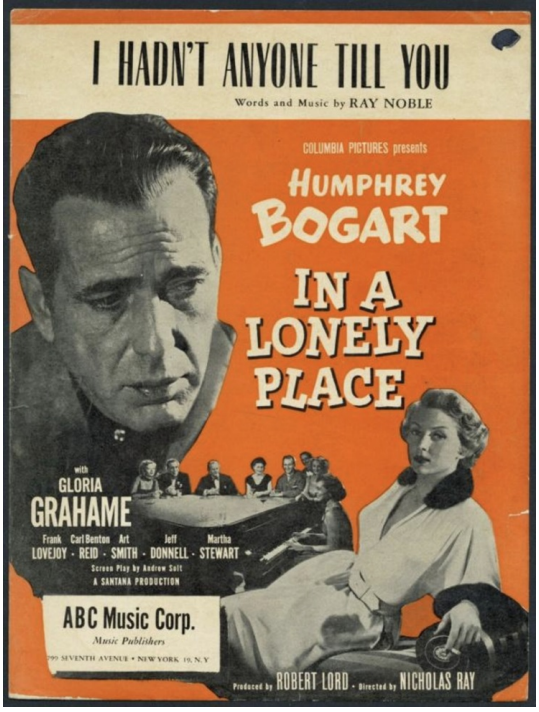
We take people for granted, just as we do almost everything in our lives. We don't appreciate our health until it starts to wane, which in large measure is tied in to a lack of appreciation for our youth, which, yes, truly is wasted on the young. No, I am not bitter about being an old man: not much anyway.

The New Year is the time for making those silly resolutions that take less time to break than they do to make. One that we should all make (and keep) is to stop taking so much for granted, especially people. If they have a special place in your life or have done something for you, let them know how much you appreciate them. Lastly, if they have played a pivotal role in your life, and one day you write a biography, make sure to mention them more than fourteen times.

Now, speaking of places that should not be taken for granted, how about the Bar Library? The Library provides the collections, databases and space that you need in order to bring your case or legal matter to where it needs to be. The fact that it allows you to get there for pennies on the dollar as to what you would otherwise have to pay, should not be taken for granted. Once your legal matter is complete, come back to the Library for a lecture or a film.

A Happy & Healthy New Year to everyone and I look forward to seeing you soon.

Joe Bennett



IN A LONELY PLACE

Screenwriter Dixon Steele (Humphrey Bogart), faced with the odious task of scripting a trashy bestseller, has hat-check girl Mildred Atkinson tell him the story in her own words. Later that night, Mildred is murdered and Steele is a prime suspect; his record of belligerence when angry and his macabre sense of humor tell against him. Fortunately, neighbor Laurel Gray (Gloria Grahame) gives him an alibi. Laurel proves to be just what Steele needed, and their friendship ripens into love. Will suspicion, doubt, and Steele's inner demons come between them?

In her essay "Humphrey and Bogey", Louise Brooks wrote that more than any other role that Humphrey Bogart played, it was the role of Dixon Steele in this movie that came closest to the real Bogart she knew.

WHEN: Friday, January 17, 2025 - 5:30 P.M

WHERE: The Clarence M. Mitchell, Jr. Courthouse (100 North Calvert Street) Main Reading Room of the Baltimore Bar Library (Room 618)

COST: Free – Soft Drinks & Snacks will be served.

RESERVATIONS: May be made at the Library, by telephone or e-mail. In order to keep track of attendance, **reservations are required**. For more information telephone 410-727-0280 or e-mail us at jwbennett@barlib.org.

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