Department of Justice

SETTING THE RECORD STRAIGHT:
THE PRESENT IS PROLOGUE

REMARKS

OF

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PRESSURES FOR NEW PERSPECTIVES"

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Once again this year the planners of the New England Antitrust Conference have chosen a theme guaranteed to spark lively debate: antitrust in the next Administration. They have also once again assembled an impressive array of speakers. I have no doubt that some of the speakers over the next two days will predict that great and momentous changes are in store for antitrust enforcement policy. Some of these predictions no doubt will be based on the now familiar but still unsubstantiated generalization that this Administration's enforcement has been "lax" or perhaps even "lawless." Well, don't believe them: they are wrong about our record and they are wrong about the future course of antitrust.

Today I want to try something that will no doubt strike many of this Administration's critics as novel, certainly something that they have yet to try. That is, I want to discuss the facts. Those facts show that the Reagan Administration's overall enforcement record has been as vigorous as any in the past, and in the area of criminal enforcement -- the heart and soul of effective enforcement -- no other Administration was able to put together a record that even comes close to ours. The facts do show some decline in the number of civil cases, but the decline merely reflects profound changes in the economy and in the courts' interpretation of the antitrust laws. Because the next Administration will not turn back the clock on the economy and the law, antitrust policy, for the near future at any rate, is not likely to change very much.

Criminal Enforcement

Without question, the single most important responsibility of the Antitrust Division is the criminal prosecution of antitrust felons -- price fixers, bid riggers and their "white collar" ilk. It may not be the most glamorous task, it may not be the most intellectually stimulating, and it may not be the most path-breaking. No, that responsibility is just the most rewarding because it's the most beneficial to society and the economy. The people and firms we prosecute lie, cheat and steal. They frustrate society's right to prices set by market forces, and they pose a very serious threat to this country's competitiveness.

Because conduct like price fixing and bid rigging is inherently inefficient and pernicious, it should be -- and is -- condemned whenever it is found. Of course, the ingenuity of antitrust crooks that try to hide their crimes from prosecutor and consumer alike is boundless. But when we do catch them, the law correctly condemns them swiftly and automatically. All we must prove is that the conduct occurred, because the law recognizes such conduct can only hurt consumers and the economy.

And because we can impose very stiff criminal penalties, our prosecutions earn us multiple rewards. The penalties work to inhibit others from trying to get away with a little price fixing.

The simple truth is it has never -- I repeat never -- been riskier and more dangerous to commit an antitrust crime.

Whether big business or small, the chances that an antitrust crime will be detected and punished with jail and large fines have never been greater.

The Department can't expect those who violate the antitrust laws to turn themselves in. To be successful, we must constantly scour the economy for violations. Today the Antitrust Division is doing just that, conducting a record number of grand jury investigations, 163, and the number is climbing. That number may not seem very large until you realize that there were only 50 grand jury investigations when the Reagan Administration took over the reins of the Division. In last fiscal year alone, we opened 63 grand jury investigations, a record number. Currently, we have 46 grand jury investigations looking into alleged antitrust felonies committed in connection with federal government procurement; 13 investigating price fixing by soft-drink bottlers; 12 investigating price fixing and customer allocations by garbage haulers; and 11 investigating allegations of criminal pooling among bidders at auctions. In addition, we have a major grand jury investigation into the dairy products industry in Florida; another in Texas looking at price fixing and bid rigging by various parts of the steel and alloy pipe and tube industry; another investigating price fixing on aluminum cans; and three grand juries investigating price fixing on chain-link fencing.

And on average each year this Administration has filed twice as many criminal antitrust cases as any other

Administration. In fact, if the number of criminal cases filed each year since the antitrust laws came into being were ranked in descending order, the top five years on the list -- the years in which the greatest number of criminal cases were filed -- would belong to this Administration. In less than eight years, this Administration has brought more criminal cases than were brought in the 24 years prior to 1981; more, in fact, than were brought in the first 64 years of the Sherman Act's existence! Because we have the finest, most dedicated antitrust lawyers in the country, we have set all these records even as our resources have declined by about 40 percent.

Moreover, this Administration has emphasized the prosecution of individuals. In fiscal year 1987, we set the record for the number of individuals prosecuted in a single year. While corporations must pay for the antitrust transgressions of their officials, people, not corporations, make the decisions to violate the law. The responsible individuals must be held personally accountable and sent to jail if society is to protect itself from antitrust crime.

In this Administration we have been much more successful than our predecessors in getting courts to send convicted antitrust felons to jail. And the jail sentences have been longer. Similarly, the size of fines imposed on corporations has climbed each year as a result of the efforts of this Administration. Not long ago we obtained the record for the largest fine -- $1.25 million -- ever assessed against a

corporation for a single violation of the antitrust laws. We have taken a hard line, and it has paid off as several of America's largest companies have entered into multi-million-dollar plea agreements.

We are not satisfied, however, so we are still working to increase the punishment handed out to antitrust felons. We worked with the Sentencing Commission to develop sentencing guidelines that require courts to impose mandatory minimum sentences that exceed the average sentences meted out in the past.

We also have worked for several years to get judges to appreciate the seriousness of antitrust felonies. Just a few years back, judges were handing out sentences that were little more than a slap on the wrist, making a mockery of the law. I am happy to report that today the courts are making clear that society will not tolerate price fixing and bid rigging. Whereas judges used to look for ways to impose unconscionably low penalties, we now see judges who are frustrated with current law that limits their ability to punish antitrust felons severely enough.

Today we are investigating, prosecuting, and punishing businesses of every size and description as well as their officials. In fact, the Division's investigations and prosecutions have never involved a more diverse group of industries and companies, including some very large corporations involved in significant regional or national

conspiracies. No one who commits an antitrust felony -- from the CEO of a Fortune 500 giant to the sole proprietor of an auction house -- can feel safe from the prospect of fines and jail.

We have worked hard to build this record. In contrast to what the Division was doing just fifteen years ago, today we are pursuing white collar criminals with more than just the Sherman Act. Increasingly we are also charging the perpetrators under the other federal statutes -- for example, mail and wire fraud statutes -- that their conduct violates. When targets and other witnesses impede our investigations, they are indicted for perjury or obstruction of justice -- a practice that only ten years ago was uncommon. Not surprisingly, our investigations today meet fewer stone walls.

We have also begun several initiatives, targeting specific types of criminal activity. About three years ago we began a coordinated effort to root out bid rigging and price fixing directed against federal procurement. That effort has been very successful -- as I mentioned we currently have 46 grand juries in this area alone. We have already brought 49 cases involving bid rigging on federal purchases, ranging from the procurement of dredging of the nation's waterways to the procurement of medical supplies for our armed forces.

Another more recent initiative begun about a year ago targets antitrust felonies committed by those with connections to organized crime. It is clear the "tax" imposed on

legitimate commercial activity by organized crime and its favored businesses is costing U.S. consumers millions of dollars each year. And those profits are being plowed back into illicit activities like drug dealing that are destroying our social fabric.

Lost in the din of criticism, then, is the real story of this Administration -- we are beginning to win the war against price fixers. Sadly, the so-called "friends of antitrust" have actually impeded that effort by misleading the business community into believing that the Department has adopted a policy of laissez-faire. If they would join us in delivering the true message, "caveat nefastus" -- or "criminal beware" -- we could be even more successful.

Civil Enforcement

I suppose it is understandable that when the facts totally contradict one's position -- as the facts about this Administration's criminal enforcement contradict the myth of lax enforcement -- it is best to ignore the facts and misdirect the audience's attention. In the case of the Administration's critics, their misdirection has taken the form of demagoguery about civil enforcement, particularly mergers. Here, the critics don't so much ignore the facts as misrepresent them. Listening to our critics would lead one to believe we never challenge mergers. As I will explain shortly, it is true that the economy and the law have changed over the last ten to

fifteen years, making it futile to bring many of the cases that the Department once brought. Nevertheless, the Department is as resolute as ever in its commitment to challenge mergers that threaten to raise prices to consumers.

I doubt there is anyone in the audience who knows how many mergers the Department and the FTC challenged last year. Well, the two agencies challenged twenty-five transactions and several others were abandoned because the parties saw the writing on the wall before a formal decision was made. To find out about these developments, one would have had to look somewhere other than the New York Times, the Wall Street Journal or the Washington Post. They were too busy "reporting" on lax antitrust enforcement to cover the story.

For example, the Division blocked the proposed acquisition of Bumble Bee, the tuna company, by Heinz, the maker of Star-Kist tuna, and the proposed merger of BTU and Thermco, manufacturers of machinery -- diffusion furnaces -- used in the production of semiconductors. The FTC, for its part, challenged the acquisition of a subsidiary of Barlow Rand Ltd. by James River Co., and Schering-Plough's acquisition of Coopervision, Inc., among others. While the number of merger challenges was up over recent years -- perhaps because some firms have been misled by the myth of nonenforcement -- our opposition to mergers that threaten higher prices to consumers is nothing new. In past years, the Division has challenged the acquisition of Conoco by Dupont, Hughes Tool by Baker

Industries, American Hospital Supply Corp. by Baxter Travenol, and Signal Corp by Allied.

The fact is the Administration more than any of its recent predecessors has made very clear what mergers it will challenge -- those that threaten higher prices. With this clear guidance, firms, their managers and their lawyers can structure mergers and acquisitions in ways that avoid any threat to competition and so avoid the specter of a government challenge. Since most mergers and acquisitions are driven by objectives other than raising price -- for example, ridding a company of inept or inattentive management, achieving efficiencies, meeting changes in market demand, responding to foreign competition, or taking advantage of tax laws -- the parties can achieve those objectives without transgressing the antitrust laws. When, however, corporate America proposes a merger that threatens higher prices, we -- the Division or the FTC -- step in and block the merger or at least force it to be restructured in a way that eliminates the threat.

To hear our critics, one would have to conclude that we are asleep at the switch -- that we have failed to stop all sorts of anticompetitive mergers. That conclusion would be wrong. It has been more than a year and one-half since I first publicly challenged the critics to point to one merger that we failed to challenge but that nevertheless led to higher prices. Still, not even one candidate has been suggested. For the critics, it seems that talk is cheap, specifics are rare, and facts are often nonexistent.

The Changes

While no one has been able to identify a single anticompetitive merger that the Antitrust Division should have challenged but did not, it is true that this Administration has challenged a smaller percentage of the mergers it has reviewed. It is also true that in general the number and variety of civil antitrust cases filed by this Administration has declined. Those facts, however, are the result of changes occurring in the economy and the law; they are not the product of the idiosyncratic intransigence of a particular Administration. Thus, the change in the Division's civil case load that has occurred over the last eight years represents a trend that will continue for the foreseeable future, regardless of who is elected next month.

The changes in the economy over the last twenty years have been profound. In the 1960s, "made in Japan" was synonymous with low-tech and cheap. The only foreign-made car with anything approaching mass appeal was the Volkswagen Beetle. And American industry was consistently running trade surpluses. We had no reason to worry about foreign competition and American competitiveness. The price society had to pay for misguided, at times silly, antitrust policy was hidden.

The phobia of antitrust in those days was bigness. If a competitive practice was novel, it was viewed with suspicion; if it was successful, it was challenged. In the eyes of too many antitrust authorities, profits were irrefutable evidence

that competition had failed. Some questionable economic studies purported to show that the higher the level of concentration in an industry, the larger its profits were likely to be. Almost wholly on the basis of those flawed studies, it was concluded that antitrust enforcers should block any increase in market concentration. There were even calls to deconcentrate or break up American industries. And all sorts of imaginative theories were borne out of a desire to stop the formation of big conglomerates even when they did not increase market concentration.

It did not take long to realize that such a myopic and hostile policy was a prescription for economic disaster. Foreign competition arrived, and the U.S. was forced to wake up to economic realities. Economists and businessmen pointed out the tremendous economic cost of the "know-nothing, attack-everything" antitrust policy then prevalent. Moreover, the presence of foreign competition in our markets meant that domestic concentration numbers were a meaningless guide to whether a merger of American firms would raise prices.

The concensus developed that the risk to competition from mergers had been exaggerated. With the emergence of strong foreign competitors, there was less cause to be concerned about domestic firms' power to raise price. Rather, the concern was for U.S. industry's ability to restructure in order to meet the competitive challenge of its efficient foreign rivals. Virtually everyone came to the conclusion that antitrust had to

be reformed. The laws had to be refocused on the eradication of private cartels; the nonsensical rules that impeded U.S. competitiveness had to be altered or eliminated entirely.

The Administration did its part by publishing Merger Guidelines. And, along with the evolution and regulatory reform of capital markets, the number of corporate control transactions increased dramatically. Most of the resulting mergers are designed to respond to changes in the U.S. and world economy. Sometimes those mergers result in the closing of plants to reduce costs; sometimes hometown management is replaced; and sometimes corporate lifestyles are radically altered. Whether or not you find such changes unsettling, they are not the target of antitrust law.

Blaming the level of antitrust enforcement for the current wave of mergers is like blaming the highway patrol's enforcement of the 55-mile speed limit for the daily rush hour traffic jam. The fact is, regardless of the level of enforcement of traffic laws, the traffic jams will exist. And it is likely that all but a tiny fraction of the drivers are content with reaching their destination while observing the law. Thus, traffic may increase -- because of the growth of suburbs, among other things -- and the number of traffic violations remain steady or decline, particularly if the traffic rules become clearer. And if society wants to alleviate problems it perceives from increased traffic like greater pollution and more delay -- problems that have nothing

to do with speeding -- it should consider enacting laws to deal with those problems, not blame the traffic cop doing his job and certainly not ban traffic altogether.

As compared with ten or fifteen years ago, a much greater percentage of the largest transactions labeled "mergers" today are actually leveraged buyouts (LBOs), like the RJR-Nabisco transaction, or involve the conglomeration of noncompeting assets. Nobody -- not even Ralph Nader in his wildest fantasy -- can come up with an antitrust theory that passes the laugh test for challenging LBOs, and the courts have consistently rejected challenges to pure conglomerate mergers. As for that decreasing percentage that involve direct overlaps between the firms that threaten to increase prices, the Department or the FTC investigates and challenges them where a thorough review of all the facts indicates there is a real threat of higher prices.

The Law Has Changed

This greater precision in merger policy was warranted by economic developments; however, by far the most significant change during the last fifteen years came where it counted the most -- in the law. I am often amazed that our critics can with a straight face call our enforcement policy "lawless," as if we are ignoring statutes and court decisions that mandate more merger enforcement specifically and more civil cases generally. As any informed and objective observer of antitrust knows, however, what would truly be lawless -- not to mention

irresponsible in the extreme -- would be an attempt in today's legal environment to bring the misguided cases that passed for civil antitrust fifteen years ago.

° In the merger area, the Supreme Court beginning in 1974 made it clear that concentration was not everything in antitrust analysis. 1/ And lower court decisions presaged the Department's Merger Guidelines. In fact, one can argue that our policy is still more restrictive than the courts' interpretation of the law. When this Administration has had to go to court to stop mergers that we concluded would increase prices, more often than not the courts have refused to block the deals. For example, twice the courts have rejected our challenge to mergers that would have significantly increased concentration in highly concentrated markets on the ground that firms outside the market could easily enter and drive down any price increase. 2/

° In the area of predatory pricing and monopolization generally, the story is much the same. Since the government filed its civil suit in IBM in 1969, the courts have

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1/ See United States v. General Dynamics Corp., 415 U.S. 486 (1974).

2/ See United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984); United States v. Calmar Inc., 612 F. Supp. 1298, 1305-07 (D.N.J. 1985).

consistently rejected claims of predation leveled by competitors against successful firms such as IBM. The courts -- correctly in my opinion -- have been careful to avoid the sins of the past; they no longer mistakenly condemn vigorous, successful competition as an antitrust violation. And just a few years ago, the Supreme Court itself cautioned that "predatory pricing schemes are rarely tried, and even more rarely successful." 3/ As for the government's suit against IBM, it dragged on for twelve years before it was finally dropped, long after the marketplace and technological advances had cut IBM's market share. Unless the next Administration is looking for a WPA project for antitrust lawyers and economists -- I personally would prefer job retraining -- you won't see similar boondoggles anytime soon.

° In the area of vertical (or distribution) restraints, the change in the law has been most dramatic. It was the 1977 GTE/Sylvania case, which involved a location restriction in a distribution agreement, that most clearly marks the Supreme Court's successful effort to refocus antitrust on purely economic concerns. 4/ The Supreme Court has twice since reiterated its view that vertical restrictions -- at least

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3/ Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

4/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

those that do not fix the price or price levels at which distributors may resell products -- must not be condemned in the absence of proof that competition will actually be harmed. 5/ As the courts have found, that proof is almost invariably absent.

Some lawyers and aggrieved businesspeople have been sufficiently upset by the courts' interpretation of the antitrust law in the area of vertical restraints that they tried to change it legislatively this Congress. 6/ They failed, and their prospects for success in the future are not bright. Under the courts' current approach, consumers have been the winners as both discount and full-service stores have flourished in a much more richly varied retailing environment.

° There have been changes in other areas as well. For example, the Supreme Court has required the lower courts to treat joint ventures with more economic sensitivity. 7/ And in 1984 Congress guaranteed that antitrust would not interfere

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5/ See Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988); Monsanto v. Spray-Rite Service Co., 465 U.S. 752 (1984).

6/ See H.R.585, 100th Cong., 1st Sess. (1987); S.430, 100th Cong., 1st Sess. (1987).

7/ See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1978).

with legitimate cooperative research. 8/ Whereas ten years ago high-tech joint ventures, such as the one started by Bobby Inman in Texas, might never have gotten off the ground because of antitrust risk, today those ventures represent one of this country's best hopes for maintaining its competitive edge.

The change in the law, not the ideological quirks of this Administration, is responsible for the current antitrust environment. Again, the facts speak volumes. Using data from the Administrative Office of the U.S. Courts, we can compare the number of antitrust cases -- the total of both criminal and civil -- filed by the Department and the FTC in 1978 with the number of cases filed in 1987. In 1978 the government filed 72 cases and in 1987 we filed 100 cases -- an increase of 39 percent. 9/ These numbers tend to understate the increase because they exclude the criminal cases filed by the Division that were not strictly antitrust cases -- for example, perjury

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8/ National Cooperative Research Act of 1984, 15 U.S.C §§ 4301-4305.

9/ This increase is not a function merely of the year chosen for comparison. A similar increase is shown by comparing, for example, the average total number of cases filed per year during the four full years prior to the Reagan Administration -- 1977 to 1980 -- with the number filed in 1987. That increase, from an average of 76.5 cases to 100 cases, is 31 percent. The data are from the 1977 to 1987 editions of the Annual Report of the Director, Administrative Office of the U.S. Courts, Tables C-3 (U.S. District Court Civil Cases Commenced) and D-2 (U.S. District Court Criminal Cases Commenced).

cases -- of which there are many more today. The numbers also exclude merger challenges where the parties abandoned the transaction before we had to go to court -- also more prevalent today than in the late '70s. Finally, the statistics tend to exaggerate the number of cases filed in 1978 because they include companion civil suits that were routinely filed along with criminal cases at that time (but are no longer necessary under current law). Still, a 39-percent increase in total cases with far fewer resources (about 40-percent fewer professionals) is impressive, and a credit to the professionalism and dedication of the staff.

That the law is largely responsible for the lesser number of civil cases, however, becomes apparent when one examines what has happened to private antitrust suits filed over the same period. From 1978 to 1987, the number of private suits declined 47 percent -- from 1435 to 758. In fact, that decline was more precipitous than the 36-percent decline over that period in the number of civil cases filed by the government. 10/

10/ Comparing the average number of cases brought per year during the period 1977 to 1980 with the number brought in 1987 reveals a similar relationship. While the number of private cases declined 47 percent (from an average of 1434.3 to 758), the number of government civil cases declined by only 39 percent (from an average of 44.5 to 27). The peak year for private cases was 1977, with 1611 antitrust cases filed.

While the most important changes in antitrust have been produced by the courts, it is true we did not resist those changes; in fact, we encouraged them. The Administration does deserve credit for persuading the courts and Congress that a refocusing of antitrust on competition, economically defined, was appropriate. The change in the antitrust law and the concomitant reordering of the Division's enforcement priorities was one part of this Administration's economic program that has led to growth in manufacturing productivity in the 1980s at a 4-percent annual rate as opposed to the 2.3-percent increase in productivity during the period 1950 to 1980.

Don't Expect Things to Change

The good news is that no matter who is elected, things cannot change dramatically, although the next Administration does have a choice between improving on the record of the last eight years or attempting a futile retreat to the bad old days of the late '60s and early '70s. Because the most significant changes in antitrust policy in general and enforcement policy in particular have been wrought -- or at least blessed -- by the courts, those changes will endure. Remember, the watershed year in the courts was 1977 -- the year President Carter took office -- and the judicial appointees of President Reagan, like Dick Posner, Ralph Winter and Doug Ginsburg, have not bucked the trend. In addition, unlike the Supreme Court split on constitutional issues, the current antitrust trend appears to

maintain the support of Justices ranging from Scalia and Rehnquist on the right to Brennan and Marshall on the left.

Moreover, any Administration that undertook the quixotic chore of looking for and bringing the old-fashioned cases that the courts today deplore would have great difficulty convincing Congress to provide the substantial resources required. Gramm-Rudman has left Congress appropriately "tight-fisted." This year, for example, the Administration asked for a small increase of about 25 positions and $1 1/2 million for the Antitrust Division, only to have a Democratic Congress effectively cut our budget by $2 million. This is nothing new. Of the almost $25-million cut that the Division has had to absorb over the last eight years -- from a $70-million base in 1981 (as measured by 1989 dollars) to our current $45-million budget -- Congress was responsible for more than $15 million. That is, more than 60 percent of the cuts in the Division's enforcement budget was imposed by Congress over and beyond the requests of the Administration. Congress would likely be even less generous with an Administration that tilts at windmills.

The Future Is Bright

Any effort, then, to turn the clock back on antitrust enforcement policy is doomed to fail. But that does not mean antitrust enforcement has reached a state of perfection. Before closing, let me offer five personal recommendations for my successor.

First and foremost, continue the momentum in the criminal area. The next Assistant Attorney General will have an abundance of good investigations that, if vigorously pursued, will make him or her the consumers' hero. In particular, the federal procurement and organized crime initiatives should not be allowed to languish. In addition to directly benefiting the economy, those initiatives should continue to improve the Division's relationships with federal investigators and U.S. attorneys.

Second, look for new weapons to use against antitrust felons. Today, we use more informants and consensual monitoring of conversations than ever before. We have significantly enhanced our investigatory prowess by making use of perjury and obstruction of justice statutes and by charging criminal defendants under more than just the antitrust laws. I still believe we could use the RICO statute more than we currently do. Moreover, I think we can prosecute attempted bid rigging, which currently rarely violates the Sherman Act, as attempted wire or mail fraud.

Third, there are some needed legislative reforms. Some involve further rationalization of the law relating to private suits -- for example, treble damage reform. Let me focus today, however, on three legislative changes I would recommend to enhance our criminal enforcement:

(1) The next Administration should move promptly to enact legislation allowing the U.S. government to recover treble

damages. If ever there were a victim more deserving of adequate recovery than the American taxpayer bilked out of a fair price, I am unaware of it. There is bipartisan support for the change, first proposed by this Administration over two years ago. Pass it!

(2) The next Administration should seek to raise the maximum fine for corporations under the Sherman Act from the current $1 million to at least $10 million. When large corporations can earn millions by fixing prices, a $1-million fine is simply not adequate. 11/ We now have a $2.5-million maximum for insider trading. The Canadians have a $10-million maximum for price fixing and no maximum for bid rigging. It is time the U.S. had statutory corporate fines that provide effective deterrence against antitrust crime.

(3) The next Administration should seek legislation enabling courts to authorize wire taps to assist in antitrust investigations. Currently we can obtain wire taps where the alleged conduct being investigated would violate mail or wire fraud statutes. In my opinion that is most, if not all, our

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11/ Of course, to the extent the Department can prove that the gain to the defendant or the loss to consumers exceeded $500,000, the double the gain or loss provision of the Criminal Fine Improvements Act, amending 18 U.S.C. § 3571, will allow a fine in excess of $1 million. Often, however, the precise amount of gain or loss is very difficult to prove. Moreover, as the Sentencing Guidelines implicitly recognize, a fine of only double the gain to conspirators is often inadequate to achieve general deterrence of illegal conduct.

investigations. Nevertheless, changing the law would eliminate any uncertainty. Antitrust investigations would as a result be more effective. In addition, I think every price fixer and bid rigger ought to have some question when they are planning their crime that maybe the FBI is listening in.

Fourth, continue our efforts to transfer responsibility over the AT&T decree to the FCC. I have spoken regularly about the perverse policy effects that can be expected from the AT&T decree's continued regulation of telecommunications. But, in terms of carrying out the Division's main enforcement mission, that decree is draining away scarce resources in order to enable our lawyers to investigate what are all too often petty complaints and to process waivers and recommend decree interpretations that have no realistic effect on competition.

Finally, increase the Division's competition advocacy efforts. Our efforts over the last eight years in persuading other agencies to meet their regulatory objectives by working with the market rather than against it have probably saved the economy billions. Over the last few years, however, our competition advocacy program has been a victim of budget cuts. The Division needs additional resources in order to be able to gear its competition advocacy back up as the agencies begin to implement the agenda of the next Administration.

Conclusion

Yes, there is progress to be made in the next Administration. But it won't be made by mischaracterizing the current Administration's record and by misleading wayward businesspeople into a false sense of security. Progress also won't be made by pining for an antitrust agenda that the courts have long since rejected. And it won't be made by filing economically nonsensical cases at the expense of vigorous criminal enforcement. Rather, it will only be made by recognizing the remarkable progress in sound enforcement made over the last eight years and by doggedly seeking to enhance and extend it.