

Inaugural Jackson-Nash Address
Remarks of Assistant Attorney General Makan Delrahim
February 26, 2018

Good afternoon everyone, and thank you for joining us. It is a great honor to see so many illustrious attorneys and economists among us, including both alumni of, and current colleagues at, the Department of Justice and the FTC. Today, I'm pleased to announce the creation of the "Jackson-Nash Address," and feel privileged to kick off the series with an inaugural address from our distinguished speaker, Professor Alvin Roth of Stanford University.

I'd like to share a few words about what the new Jackson-Nash Address series means to the Antitrust Division, and what we hope it will signify to the broader competition and law and economics communities. In naming the address after former Supreme Court Justice Robert H. Jackson and Nobel Laureate economist John Nash, our goal is to recognize that antitrust enforcers carry out their mission to protect competition and consumers through equal contributions of legal and economic analysis.

Antitrust law has undergone a transformation over the past 40 years. Academics, law enforcers, and courts have refined their understanding of modern economics and learned how to apply the latest economic tools to the analysis of competition. Though antitrust law relies on a robust body of legal precedent, it is also built on a foundation of constant self-reflection and innovation: we learn from our mistakes and update doctrine to reflect sound, accepted economic wisdom. Indeed, there are few other areas of law in which the Supreme Court so willingly reflects on decades-old precedent—and in some instances, dismisses such precedents as they did in the *State Oil* case,¹ and did so unanimously.

¹ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

In a time where some are calling into question some of the fundamental foundations of modern antitrust law, the goal of this series is to provoke discussion about how the latest developments in economics may shed light on antitrust issues we face every day, and how innovation in economic analysis can serve the ultimate goal of continuing to better protect consumer welfare.

Justice Robert Jackson and Professor John Nash exemplify these values. Both were leaders in their respective fields, and their innovative thinking was far ahead of their time. Today, both Jackson and Nash have a lasting influence on modern legal and economic thinking.

For those of you that have followed some of my recent remarks since becoming Assistant Attorney General, it should be no surprise that Justice Jackson is one of my personal legal heroes. He devoted much of his adult life to public service. Following the election of President Roosevelt in 1932, Jackson joined the Bureau of Internal Revenue, which we now know as the IRS, as an assistant general counsel. He then joined the Department of Justice, where he was Assistant Attorney General for the Tax Division, before moving over to become Assistant Attorney General of the Antitrust Division. Following his time leading the Antitrust Division, Jackson served as Solicitor General of the United States, and Attorney General from 1940 through 1941, when he was nominated and confirmed as a Supreme Court Justice. As a Justice, Robert Jackson authored opinions in many of the seminal cases on the exercise of executive power, including his famous concurrence in the *Youngstown Sheet & Tube* case² and his brave dissent in the infamous *Korematsu* case.³

I'd like to focus on some of Justice Jackson's innovations at the Antitrust Division. He was far ahead of his time. The Sherman Act was over 40 years old, yet courts and enforcers

² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³ *Korematsu v. United States*, 323 U.S. 214 (1944).

were still grappling with its meaning and how to apply it. Jackson understood that the power entrusted to enforcers required some limiting principle. In a speech delivered to the Trade and Commerce Bar Association in September 1937, Jackson lamented that “for forty years administrations have alternated between a policy of being vague and passively vague” in their application of the Sherman Act.⁴ The reason, Jackson noted, was that at the time, the antitrust laws had “no stated or intelligible policy which differentiates pursuit of industrial efficiency from industrial empire building.”⁵ In a conversation with President Roosevelt, Jackson put it bluntly, explaining that the antitrust laws “were as general as the ten commandments and about as well obeyed.”⁶

Not only did then-AAG Jackson diagnose the problem, he also identified the solution, which could be found in economics. As Jackson put it, “[e]very antitrust problem is economic as well as legal.”⁷ We take that basic insight for granted today. But remarkably, Jackson had a visionary understanding of the consequences of applying economics to legal analysis.

For example, Jackson recognized the danger in pursuing enforcement actions untethered to sound economic principles. He explained that he had “no interest in ‘trust busting’ for the sheer joy of ‘trust busting’ or in legal assaults on combinations which have economic necessity on their side.”⁸ That same humility extended to the institutional limits of antitrust enforcers in their ability to regulate the economy. Jackson went on to say that “[w]e should not spend great sums to obtain decrees which are economically unenforceable and, when carried out in form, are

⁴ *Id.*

⁵ Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937), available at <https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised/>.

⁶ R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 795 (2005) (quoting Robert H. Jackson, Draft Autobiography 129 (Box 190, June-July 1944) (on file in the Robert H. Jackson Papers, Library of Congress, Manuscript Division)).

⁷ Jackson, *supra* note 5, at 575.

⁸ *Id.* at 576.

often only lessons in futility.”⁹ Every day, the Antitrust Division faces the same challenges to ensure that our enforcement actions are economically necessary to protect competition, and that our remedies to anticompetitive transactions and conduct will be complete and effective.

Jackson also understood that a commitment to economic principles requires a broad and consistent application of antitrust law. He witnessed firsthand the failed experiment with legislative exemptions from antitrust law under the National Industrial Recovery Act, and didn’t mince words about the alternative to antitrust enforcement. To quote Jackson again, “American business must make up its mind whether it favors the regulation by competition contemplated by our antitrust laws or the only probable alternative – government control. Every step to weaken antitrust laws or to suspend them in any field, or to permit price fixing, is a certain, even if unknowing, step to government control.”¹⁰ That same insight rings true today, as we regularly encounter assertions of antitrust immunity, often based on a misguided assertion that government control has supplanted the need for competition.

Professor John F. Nash, Jr.’s contributions to sound antitrust enforcement are equally significant. He is considered one of the fathers of modern game theory, and in 1994 he was awarded the Nobel Prize for Economics. The Nobel award committee recognized Professor Nash’s seminal innovations that have become essential tools for economists—in particular, economists focusing on the analysis of mergers and their competitive implications.

The first innovation is the idea of an equilibrium—what we call a Nash equilibrium—that formally captures how producers and consumers interact within a market and how those interactions are reflected in observed market facts and data. The development of an appropriate economic model, with a Nash equilibrium calibrated to market facts pre-merger, can yield

⁹ *Id.*

¹⁰ *Id.* at 577.

predictions about how a merger changes incentives and likely affects prices, quality, and other aspects of competition.

Nash's second significant innovation is the concept of a Nash bargaining solution, which is a formal way to characterize the outcome of bargaining between buyers and sellers. Some markets are characterized by "posted prices," where firms simply set prices and consumers respond by either buying or not buying at the posted price. But many markets involve active bargaining between the buyer and seller. In such markets, economists can employ the Nash bargaining solution to model interactions between buyers and sellers, as well as the effects of mergers on bargaining outcomes.

It is unlikely that Justice Jackson or Professor Nash understood at the time how their insights could shape antitrust law and economic analysis for decades to come. I hope that, several decades from now, future legal and economics scholars will look back at some of today's most prominent scholars and make the same observation. To that end, a goal of the Jackson-Nash Address is to highlight innovators in the field of economics whose ideas are still being unpacked, and which yield real-world insights into market behavior.

I can think of no better economist to help inaugurate the Jackson-Nash Address than today's speaker, Professor Alvin Roth. Professor Roth has served as the Craig and Susan McCaw Professor of Economics at Stanford University since 2013. Before joining Stanford, Professor Roth was the George Gund Professor of Economics and Business Administration at Harvard from 1998 to 2012, the A.W. Mellon Professor of Economics at the University of Pittsburgh from 1982 through 1998, and a professor at the University of Illinois from 1974 through 1979. Professor Roth earned a bachelor's degree from Columbia University in 1971 and a Ph.D. from Stanford University three years later, in 1974.

In 2012, the same year he joined Stanford's faculty, Professor Roth was awarded the Nobel Prize for Economics for his theory of stable allocations and the practice of market design. His research spans the fields of game theory, experimental economics, and market design. All familiar topics to most antitrust practitioners. Professor Roth's matching theories in particular have paved the way for significant innovation in a variety of markets that suffered from inefficiency, such as medical residency matching, student/school matching in New York and Boston public school systems, and matching kidney donors with patients. It is rare for an economist's theoretical innovations to have such clear social welfare benefits. Professor Roth's knack for finding practical economic insights is on further display in his popular 2015 book, "Who Gets What – and Why." In his book, which I read and loved, Professor Roth reminds us that many interactions we take for granted resemble markets involving a buyer/seller relationship, from college and job applications to relationships and dating. It's hard to dispute his wisdom. I hope Russell Crowe is paying close attention to Professor Roth's work.

Professor Roth, it is an honor to have you here today.