



DEPARTMENT OF JUSTICE

A Tribute to Judge Douglas H. Ginsburg: An Antitrust Professor on the Bench

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Good evening, and thank you for inviting me to participate in this very special event to celebrate Judge Ginsburg’s contributions to antitrust law.

As someone who shares Judge Ginsburg’s admiration for economics, I understand the idea that almost everything under the sun can be assigned a monetary value. But it is fair to say that Judge Ginsburg’s contributions are truly invaluable. To the extent it is possible in fifteen minutes, I’d like to highlight some of the important and lasting contributions Judge Ginsburg has made to the Antitrust Division, to antitrust jurisprudence, and to the global competition law community more broadly.

A common thread throughout the Judge’s antitrust work—from his early years at the Antitrust Division through today—is the recognition that antitrust law receives purpose and focus from the discipline of economics. A quick look at the Judge’s early, pre-antitrust years suggests how Judge Ginsburg started down this path. He attended the University of Chicago Law School, where he was initiated into the economic analysis of law. Having attended Chicago myself some years later, I understand how that environment would have ignited his passion for economic rigor in legal analysis.

When the Judge was young professor at Harvard, he applied his Chicago School insights to economic regulation, writing about the economic costs and anticompetitive effects of the prevailing “command-and-control” approach to safety and environmental regulation, and emphasizing the benefits of incorporating competitive decision-making into regulatory frameworks.¹ I hope it is not too presumptuous to infer that these early experiences led Judge Ginsburg to focus on the fundamental role that competition plays—or could play—in the U.S. economy, and that those experiences helped shape the approach he would take to antitrust.

¹ See Douglas H. Ginsburg, *Making Automobile Regulation Work: Policy Options and A Proposal*, 2 HARV. J.L. & PUB. POL’Y 73, 78 (1979).

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From 1983 to 1984, Judge Ginsburg served as Deputy Assistant Attorney General at the Antitrust Division under William Baxter. Then, after a year as Director of the Office of Information and Regulatory Affairs, where he oversaw White House review of Executive Branch regulations, he returned to the Department of Justice serve as Assistant Attorney General in charge of the Antitrust Division.

One of his most important tasks at the Division was to help lead merger law out of the 1960s.² As he explained his enforcement philosophy while AAG, he understood that mergers often “perform beneficial functions in the economy” by combining complementary assets or realizing economies of scale, and he argued they ordinarily should not be prohibited unless economic analysis showed they would likely harm competition.³

Amicus briefs filed in the Supreme Court that bore his name unsurprisingly exhibited the clarity that economics brought to antitrust. In *Cargill Inc. v. Monfort of Colorado, Inc.*,⁴ for example, the United States argued that injury from a merged firm’s non-predatory *low* prices should not give a competitor standing to challenge a merger because that is an injury flowing from “vigorous competition”—just what the antitrust laws were designed to protect.⁵ The Supreme Court agreed, holding that “the logic of *Brunswick*” compelled the conclusion that the threat of lost profits due to price competition did not constitute a threat of antitrust injury.⁶

² See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 275 (1966) (explaining that the “basic purpose” of merger law was “to prevent economic concentration in the American economy by keeping a large number of small competitors in business”).

³ *60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division*, 55 ANTITRUST L.J. 255, 255-57 (1986).

⁴ 479 U.S. 104 (1986).

⁵ 1986 WL 727374, at *16.

⁶ 479 U.S. at 116-17.

AAG Ginsburg oversaw other notable happenings at the Antitrust Division, too.

Although it was AAG Baxter who negotiated the government's historic settlement with AT&T, Baxter returned to Stanford Law shortly after that agreement was reached. Baxter left it to his successors, including AAG Ginsburg, to oversee the implementation of the consent decree that broke up AT&T into seven "Baby Bells" and several other independent companies.

Now, I have some reliable sources who tell me that Judge Ginsburg, as young man, left college to co-found the first computerized match-making service. I find it pretty ironic, then, that he presided over one of the largest breakups in history.

Judge Ginsburg's belief in the fundamental importance of economic efficiency characterized his leadership of the Antitrust Division. Although the Antitrust Division promoted efficiency in the economy through antitrust enforcement, the Division itself was in some ways inefficient and disorganized when Judge Ginsburg became AAG. Staff attorney attrition since the early 1980s had left the ranks of attorneys very top-heavy. There were too many managers in too many sections, with too few staff attorneys to do the work.

The answer to this problem, of course, was consolidation—intended “to increase [the Division's] efficiency”⁷ and “better to accomplish its central law enforcement mission.”⁸ AAG Ginsburg put forward and carried out a plan to reorganize the sections—merging nine litigating sections in the Washington office into five new ones, allowing each to obtain what he described as the “minimum efficient scale”⁹ of at least 20 attorneys.

⁷ Memo to All Division Employees, AAG Douglas H. Ginsburg, U.S. Department of Justice, Antitrust Division, at 1 (Sept. 6, 1985).

⁸ Proposed Organizational Change, Attachment to Memo to DAG D. Lowell Jensen, AAG Douglas H. Ginsburg, U.S. Department of Justice, Antitrust Division, at 1 (Sept. 5, 1985).

⁹ Memo to All Division Employees, *supra* note 7, at 1.

One of the most important aspects of AAG Ginsburg’s reorganization project—and the one that perhaps best illustrates his economic vision for antitrust enforcement—was the elevation of the role of economists at the Division. Before he became AAG, the chief economist at the Division was the Director of the Economic Policy Office. AAG Ginsburg’s reorganization plan elevated the stature of that position. He converted the Director job into the position of Deputy Assistant Attorney General (or “DAAG”) for Economic Analysis. This made the Economics DAAG the same rank as the other DAAGs who oversaw the attorney sections. He also turned the Economic Policy Office into the Economic Analysis Group (or what many of us know affectionately as “EAG”).

The goal of elevating the status and visibility of economists within the Division was obvious—and it is a structure that still exists to this day. These structural changes ensured that enforcement recommendations would be measured against their perceived economic impact. The Economics DAAG, a position currently held in an acting capacity by Jeff Wilder, one of EAG’s own outstanding economists, continues to be a direct line of sound economics advice to the AAG.

Before I move on, I would like to underscore the significance of these structural changes at the Division, and read a passage from the September 1985 memorandum to all Division employees from AAG Ginsburg. It sheds light on just how strongly he felt about the need for these changes and their ultimate goal. He wrote:

Proposing this reorganization at the outset of my tenure as your Assistant Attorney general has been the most difficult decision of my professional career. I have done it only because I am utterly convinced that it will improve our ability to do our jobs—to enforce the antitrust laws, develop competition policy in a rapidly changing international environment, and effectively advocate competitive solutions to domestic market problems.¹⁰

¹⁰ *Id.* at 3.

Those last 23 words succinctly capture exactly what the Antitrust Division’s mission continues to be to this day.

AAG Ginsburg’s emphasis on economics also had a profound—and highly beneficial—effect on the Division’s criminal enforcement program. Under a classic Chicago School model of criminal law, deterrence will work only if the expected cost of a punishment—in light of the probability of detection and conviction—exceeds the expected gain from a crime.¹¹ With the help of the Division’s economists in the newly created EAG, AAG Ginsburg realized that courts had been imposing exceedingly low sentences for antitrust crimes. He was especially concerned about the sentences in comparison with the profitability of those crimes. The sentences were too low in many instances to serve the key goal of deterrence.¹²

So AAG Ginsburg prepared a recommendation to the recently created Sentencing Commission: Fines to corporations and individuals ideally should be calculated to outweigh the expected gains of cartel activity (taking into account the likelihood of detection). But because there are some legal constraints on how high fines can be set for individual defendants, AAG Ginsburg observed that “[f]ines alone simply cannot do the job”—prison sentences were also needed.¹³ Through the work of the Sentencing Commission,¹⁴ and the continued vigilance of Division prosecutors in spreading this message to U.S. courts, these insights gradually took hold

¹¹ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

¹² Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, U.S. Sentencing Commission Hearings Concerning Alternatives to Incarceration (July 15, 1986).

¹³ *Id.* at 10.

¹⁴ Following the recommendations of AAG Ginsburg and others, the United States Sentencing Commission promulgated the first antitrust sentencing guideline in 1987. See U.S.S.G. § 2R1.1 (1987). That guideline recommended prison sentences based on the volume of commerce affected by the violation in price-fixing, bid-rigging, and other criminal antitrust offenses.

in U.S. criminal antitrust enforcement. We have AAG Ginsburg, the first DAAG for Economic Analysis (Rick Warren-Boulton), and their economics team, to thank for that.

More recently, Judge Ginsburg has also given our criminal program at the Antitrust Division something to think about by writing with Josh Wright on the topic of “Antitrust Sanctions.” Judge Ginsburg and Josh point out the wisdom of considering a company’s compliance programs in designing sanctions that optimally deter price-fixing and other criminal conduct by employees.¹⁵ They have also questioned whether the Sentencing Guidelines give enough credit to companies with effective compliance programs. We are taking this suggestion seriously as it applies to our criminal program and are considering how best to recognize corporate compliance efforts. That includes carefully examining whether and how pre-existing compliance programs might merit our consideration, whether at the charging stage or at sentencing.

As this example shows, Judge Ginsburg’s influence on the field of antitrust did not wane after his time at the Division was over and he began his tenure on the bench; rather, his influence has only continued to grow. He’s never far from the cutting edge of the difficult questions in antitrust law.

His scholarship on standard-essential patents, and the role of antitrust law in policing the use of intellectual property, is just one example. Since at least 2013, Judge Ginsburg has been warning that the use of antitrust law in this area can have an unnecessary, stifling effect on innovation.¹⁶ He has written that courts assessing a contractual commitment to charge FRAND rates, or weighing the public interest in an injunction against products infringing on standard-

¹⁵ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMP. POL’Y INT’L 3, 19 (2010).

¹⁶ See, e.g., Douglas H. Ginsburg & Joshua D. Wright, *Whither Symmetry?*, 9 COMP. POL’Y INT’L, No. 2, at 41 (2013).

essential patents, have all the legal tools they need. They do not need the Sherman Act and the threat of treble damages.¹⁷ These conclusions that have been echoed by our Assistant Attorney General, Makan Delrahim.

Judge Ginsburg's scholarship is only one of the factors that ensures that his legacy in antitrust will be lasting. Another is the number of his former clerks and students who have gone on to become successful practitioners of antitrust themselves. For instance, focusing close to home, my colleagues Taylor Owings, Counsel in our Front Office at the Antitrust Division, and Daniel Haar, Assistant Chief in the Division's Competition Policy and Advocacy Section, both clerked for the Judge earlier this decade. (And now is as good a time as any to thank them both for their assistance with these remarks). I should also mention one of Judge Ginsburg's more famous former clerks—Deputy AG Rod Rosenstein. He's not an antitrust lawyer by training, but as second-in-command at the Justice Department he oversees the work of the Antitrust Division.

Not only is Judge Ginsburg helping to cultivate the next generation of antitrust thinkers at home, but he is also working to do it abroad. He is a leader of George Mason's Global Antitrust Institute, which provides education and comments to competition authorities around the globe. Judge Ginsburg thus continues directly to promote the idea that competition law enforcement decisions should be based on sound economic principles.

The Institute has provided comments on the detrimental effects of antitrust exemptions, on how antitrust has been misapplied to FRAND licensing disputes, and on how enforcement agencies should not use settlement procedures to advance non-competition goals, among other worthy topics. No less important, Judge Ginsburg and others in the Institute have worked to

¹⁷ See, e.g., Douglas H. Ginsburg, Taylor M. Owings, & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunction*, ANTITRUST SOURCE, Oct. 2014, at 1.

train judges around the world in the economics necessary to reach sound decisions in competition law cases.

We at the Antitrust Division share in Judge Ginsburg's goal of driving toward international consensus on the economic principles that underpin antitrust law. We also share a deep commitment to ensuring due process for companies facing competition law proceedings around the world. Judge Ginsburg has written and spoken to international antitrust audiences on the merits of certain due process protections like transparency and the right to confront evidence.¹⁸ These are goals the Antitrust Division embraces, and we are doing our best to encourage competition agencies around the world to commit to these and other basic principles.

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Today's conference, and the volume that celebrates his antitrust legacy, demonstrates that Judge Ginsburg does not need the official title of a U.S. antitrust enforcer in order to wield influence over the future of the global economy. His leadership as a luminary is a permanent position. Our field of law is better off for it, as are the interests of consumers worldwide. We live in a more efficient, innovative, just, and principled world as a result of Judge Ginsburg's efforts. Thank you, Judge Ginsburg, and congratulations.

¹⁸ See Douglas H. Ginsburg & Taylor M. Owings, *Due Process in Competition Proceedings*, 11 COMP. POL'Y INT'L 39 (2015).