AAI AMERICAN ANTITRUST INSTITUTE

Remarks of Jonathan Sallet
Presentation of the Alfred E. Kahn Award for Antitrust Achievement
To Philip Weiser, Colorado Attorney General
May 23, 2023

I only met Alfred Kahn once in my life. In one conversation that day, Fred said: "I'm going to explain the most important principle of economics." I said, "Great" and he said, "Ignore sunk costs."

Since then, I've been on the look-out for situations where sunk costs could be ignored. Here's one. Suppose there's a person in the room here today who came to see Phil Weiser in-person and now, confronted with a substitute, thinks, well, I've spent the time and effort to be here so I might as well stay. That would <u>not</u> be ignoring sunk costs. But I'd be appreciative anyway.

It's a privilege to work for Phil Weiser. He's a great leader, lawyer and, of course, antitrust expert. But there's more. Phil is a person of values. Not what's convenient, but what is correct. Not what's popular, but what is principled. There's a biblical passage that he likes. It's from the Book of Deuteronomy and it says, "Justice, Justice you shall pursue." (16:20).

The pursuit of justice is all-important; to correct wrongs, to counter prejudice and hate, to hold people accountable. It takes many people, working together, over time, to bend the arc of the moral universe toward justice.

But it's not enough to pursue justice where others have done injustice; it's just as important to practice justice oneself. And that is what Phil does and that is even more unique than, say, understanding the *Microsoft* decision. Phil practices justice in the way he thinks and the way he acts; in the conduct of his office and in course of his own life. Leadership is not the act of just issuing edicts from afar, it's the work of inspiring people up close, treating them fairly and with respect, always understanding what you are doing for them not just what they are doing for you. That's what Phil does and that's an example of practicing justice.

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Diana has asked me to share my own views for a few minutes on the challenges of antitrust and I'm happy to do so.

We live in a time when antitrust must throw off doctrines that protect harm to competition, rather than preserving competition itself. Many voices have been raised in support of this and many very good ideas have been presented about how to do so, in articles, in speeches, in blogs.

From a litigator's perspective, however, that may undersell one critical audience – the judiciary. Standing in front a judge or panel of judges in open court is recognizably different than offering policy prescriptions in a speech or op-ed. Preparing to have every assumption and assertion closely examined—in public and in real time —tends to further concentrate the mind.

In fact, that's the promise of litigation—to parse carefully the metes and bounds of truth. This is not neo-Brandeisian. This is Brandeis himself. The author of the Brandeis brief detailed of fact after fact. The author of *Chicago Board of Trade*, a seminal opinion in the analysis of competitive harm (that I believe has often been unduly criticized). When a judge asks a fact question, philosophical discourse by itself is of little aid to a litigator.

In other words, much has been said about antitrust reform; more should be said about the process of winning antitrust cases. Given some current litigation trends, the present circumstances are coming uncomfortably close to requiring antitrust enforcers to anticipate and bear the burden of addressing any potential defense in order to proceed to full consideration of the merits.

Today governmental enforcers face a series of hurdles that can cumulatively make the job of governmental enforcers unnecessarily harder. Collectively, these trends have made it too hard for antitrust enforcers to succeed, as illustrated by *Brooke Group*, *Trinko*, and *American Express*.

We must confront three present-day threats to enforcement of Section 2. First, the creation of legal doctrine, which is to say unjustified legal requirements placed on antitrust enforcers making it harder for them to win cases. Jonathan Baker explained this in his book the *Antitrust Paradigm*: The notion that false positives inevitably outweigh false negatives "systematically overstate[s] the incidence and significance of false positives and understate[s] the incidence and significance of false negatives."

Second, unfocused inquiries that allow defendants to introduce evidentiary side issues unrelated to competitive harm, which add confusion and complexity to the conduct of litigation. And unnecessary complexity and the potential for confusion is a burden to governmental enforcers.

Third, the potential for defendants to try to construct a *de facto* defense out of the length of time needed to litigate a big case.

This brings us back to Phil's discussion in the video about the Tenth Circuit decision in the *American Airlines* case. In that case, American responded to low-price competition by dropping its fares and adding capacity. The DOJ sued, alleging that the conduct was intended to exclude low-price competition, which happened. Then American restored prices and reduced capacity. The Tenth Circuit affirmed summary judgment for the defendant, refusing to accept any of the price-cost tests offered by DOJ under Section 2.

One could recast that outcome as either doctrine or evidence. Doctrine in the sense that the Tenth Circuit thought the DOJ had not satisfied *Brooke Group's* requirement of price below an appropriate measure of cost. Evidentiary in the sense that the Tenth Circuit concluded that the leading price-cost test offered by DOJ actually measure what should have been measured.

The temptation for monopolies is to try to dress any doctrinal wolf in the clothing of fact-based sheep. Doctrine presented as evidence would both limit appellate review of district courts and, equally troubling, allow appellate courts a free hand to revise the facts as if they were subject to de novo review. Consider just this kind of approach in *American Express*. This is why we must focus on

better legal principles implemented through evidentiary standards that focus tightly on harm to competition.

And these burdens are cumulative because each unnecessary step forces the government to expend scarce resources knocking down one strawman after another. While risking failure if it fails to clear every hurdle.

Of course, the job of antitrust enforcers is to make forcefully and simply demonstrate competitive harm. But we are very fortunate that the American Antitrust Institute adds its unique voice to the work of building a stronger coalition for competition. The leadership of AAI demonstrates that. I could say how refreshing it is that AAI is led by an economist, not a lawyer but I feel honor bound to instead say, as General Weiser would undoubtedly wish, that it's great that Diana comes from Colorado.

And I want to say that I've been personally very impressed by the advocacy work led by Kathleen Bradish. The ability to cut through the fog of law with incisive analysis is just so important to litigation. In amicus brief after amicus brief, AAI is fighting the fight where the fight must be won.

Of course, we need Congress to enact antitrust reform that is not sector-specific (although I think sector-specific regulation of digital issues is important as well). But equally seriously, is there a real prospect that the judiciary will <u>not</u> continue to play a fundamental role in the administration of even new and improved antitrust laws? I don't think so.

A stronger coalition for competition also needs all of the enforcement resources it can muster. That includes State Attorney General and their staffs. Maybe we'll look at the T-Mobile/Sprint trial and see that as a turning point – the moment when states mounted a major antitrust case themselves. The case on which I work is equally unusual – a complaint from the DOJ and a set of states in tandem alongside a case brought by a bi-partisan group of 38 State Attorneys General with a broader, complaint alleging more anticompetitive.

conduct and harm to competition; better revealing the full scope of Google's methods of monopoly maintenance. Fully agreeing with the DOJ complaint but saying more.

Coalitions of states are taking on big issues. The ability of states to join forces has led to a challenge to the entire generic drug industry, important litigation in pharmaceuticals, pesticides, five cases against Google and the challenge by California against Amazon based on is state law. Use of state law is another facet of the importance of state antitrust, demonstrated as well by the case brought by the State of Ohio alleging that pharmaceutical rebate practices violate Ohio law.

Of course, States are working with federal antitrust enforcers in multiple cases. Last week makes the point. In the American/Jet Blue case, the Justice Department was right to challenge horizontal coordination under Section 1. DOJ was joined by Arizona, the District of Columbia, California, Florida, Massachusetts, Pennsylvania and Virginia. State AG lawyers were fully involved. And the governmental plaintiffs prevailed.

We need more of this. We need all of the smart lawyering, effective litigation, careful preparation that can be gained -- through the combined resources of federal and state antitrust enforcers.
There's a difference of course. To walk into the Robert F. Kennedy Building is to visit a temple of justice. The artwork, the architecture, the goddess of Justice in the Great Hall standing more than 12 feet tall. It's awe-inspiring.

It's not quite the same feeling to be on a video call with state AG lawyers scattered around the nation, hashing out what position to take on a discovery dispute or the start-time of a deposition. While dogs (including my own) bark in the background.

But impressive in its own way. Because the inspiration to pursue justice may be divine but the work of procuring justice is human. I'm incredibly proud to be a part of these state efforts and I'm incredibly impressed by the hard work, dedication and expertise I see every day -- from people who aren't earning what they could earn in the private sector; who don't have all the resources that they need; who are taking time from their families to benefit other people they will never know.

We may be out-resourced, but we will not be out-smarted or out-hustled.

For this opportunity, of course, I applaud Phil Weiser, as AAI itself has rightly done in bestowing the Alfred Kahn award upon him.

Thank you.