

Prof. Peter C. Carstensen, Remarks at the American Antitrust Institute's Annual Policy Conference Upon Accepting the Alfred E. Kahn Award for Antitrust Achievement (May 22, 2024)

I am greatly honored to join the list of distinguished recipients of the Alfred E. Kahn Award. It is a great capstone for my career. I started at the Antitrust Division almost 56 years ago, six months before Nixon became president. On the tapes that led to Watergate, Nixon at one point lamented that Richard McLaren, his first AAG for antitrust, had been a good Republican before his appointment, but, in Nixon's words, as I recall them, he was twisted around by those "smart little bastards" at the Antitrust Division. I was honored by the reference. But the fact was that Dick McLaren believed in antitrust law and its vigorous enforcement. Indeed, what I see now is a return to that kind of vigorous enforcement and commitment to finding solutions to continuing competitive problems. It has taken half a century, but I really think antitrust is back.

So, now let me take a few minutes to review my career because it tracks the cycle of antitrust enforcement. As I mentioned, 56 years ago this month, I started studying for the bar exam here in D.C., in July, I married Carol who has accompanied me all these years and heard more about antitrust than perhaps she really wanted. In August, I started at the Antitrust Division where I was assigned to the Evaluation Section which both reviewed proposed cases for their economic rationality and worked to develop and apply new theories to deal with anticompetitive conduct and structure. I landed there, I suspect, because I had a master's degree in economics along with a law degree at a time when knowledge of economics was much less common at the Division.

My five years at the Division involved work on the emerging effort at deregulation and promotion of competition as a regulatory tool, work inspired by Alfred Kahn. I also worked on developing legal-economic theories to address what even then were manifest competitive problems that did not fit traditional categories. We worked on identifying ways to challenge shared monopoly and conglomerate mergers. I did a great deal of bank merger review including participating in developing several major cases on potential competition in banking that did not turn out well. Parenthetically, I agreed to file a lawsuit against a small bank merger in Wisconsin when I was slated to go to Madison for my interview, that way Carol could come too on the UW's tab. Having filed the case, I called the bank to let it know we had sued and offered to provide an immediate copy if someone could come in. No one could, but I was asked to deliver a copy to the UW board or regents meeting where the president of the bank was also president of the board of regents. I remained a little evasive at the law school about what government work I had been doing the day before my interview. When we traveled, Carol got very tired of my telling her what banking market we were driving through.

Overall, this was a period in which the Division strove to ensure that its cases were rational in both economic and policy terms and the law was enforced as Congress had commanded. No wonder Nixon was unhappy. Unfortunately, we often lacked the economic empirics and theories to explain well what we were seeing on the ground.

After about 4 years, I realized that I found developing theories for cases and evaluating actual and potential cases to be more enjoyable than litigation. I did have two and half days of litigation experience in the first financial conglomerate case, Wachovia. What I learned was that the intellectual demands of litigation were very significant but that the kind of attention to detail that was essential was not my cup of tea. So, I looked into teaching. This broke one of my three youthful commitments (my father was a professor of history and so I wanted to avoid being an academic). The others were to stay out of Wisconsin where I had grown up and get out of politics. But Carol went into politics and served 18 years on the Madison school board, winning 6 elections. So, I failed to live up to any of those commitments, and I don't regret it.

At Wisconsin, following the advice of Tom Kauper, the AAG who succeeded McLaren, I picked up a first-year course, torts, and enjoyed that class as much as teaching antitrust. In both classes, I encountered bright and interested students. A few of them are here today. I learned so much from them. I also had a seminar every other year jointly taught with Fritz Mueller and Len Weiss, two of the nation's leading industrial organization economists. That seminar also produced some great student papers that provided me with a deeper understanding of a variety of competitive issues and cases.

Wisconsin was the right place for me. There was respect and encouragement for scholarship that focused on history and economics as much as legal doctrine. I found that there is much to be learned from detailed reviews of major cases. I found evidence that Bork had totally misunderstood the Chicago Board of Trade case where I had access to the records of the Board and the DOJ. The chapter I did with Harry First on the Topco case where again we had the DOJ records showed that the doctrinal shorthand did not explain the case or its less than per se outcome.

The other dimension of my work focused on legal economic analysis of the competitive issues that were too often ignored by courts and the Chicago school scholars. Here I made common cause with a number of other scholars as we sought to keep the flame of vigorous antitrust burning. My work used economic analysis to critique a variety of aspects of antitrust including banking, vertical restraints, mergers of all kinds, and monopoly. I also continued my interest in the regulatory and deregulatory process. In addition, I was an early and active participant in the efforts of AAI to support and advocate for vigorous antitrust enforcement.

In the late 1990s, two of my former students, Dan Smith and Nancy Danielson, asked me to meet with some congressional and Department of Agriculture staff to talk about the potential role of antitrust in agriculture. As I recall, I started by saying that I was a city boy who knew something about antitrust, and what I wanted to know was what problems they were seeing. It turned out there were anticompetitive mergers, exploitive and exclusionary practices, as well as monopsony problems. So, well into my career this meeting opened up a new and interesting line of scholarship and advocacy.

As I studied the problems of agriculture, I found that monopsony and oligopsony were significant. Indeed, these competitive issues were significant not only in agriculture but also in the economy generally, but they were largely unrecognized. This opened a door for me to give a number of talks, testify at hearings, write articles, and ultimately produce a book on buyer power. I was not alone in



recognizing the importance of this dimension of market competition, especially when labor economists discovered that labor markets were often subject to such forces. Buyer power emerged in the 2010 Merger Guidelines as a distinct source of concern and received further elaboration in 2023 Guidelines except that the 2023 focus is perhaps too narrowly linked to employment. I would like to think I played a modest role in making these issues more salient.

I believe that we are circling back to the more active and engaged antitrust of 50 years ago. The kind Dick McLaren believed in. We have better theories and better empirical support for those concerns. Regrettably, I have largely aged out of the kind of active involvement I would like to have in this new era of active enforcement. I will, however, continue to shout encouragement from the sidelines.

Let me conclude by saying again how honored I am to be given this award. It is a wonderful capstone and a great bookend to Nixon's endorsement.