



DEPARTMENT OF JUSTICE

Antitrust Enforcement and the Fight Against Corruption

ROGER ALFORD
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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I. Rule of Law in Economic and Political Affairs

Good morning, and thank you so much for having me here today. I especially want to thank the University of Sao Paulo for hosting us.

As some of you may know, I am a professor and associate dean for international and graduate programs at Notre Dame Law School, and it is great to see so many of my Notre Dame colleagues here today. Recently, I have assumed a new role, as Deputy Assistant Attorney General for International Affairs at the United States Department of Justice Antitrust Division. This is a job that I find exciting for a variety of reasons, but foremost among them is the fact that as a competition enforcer, I am directly involved in matters at the intersection of the rule of law and economic prosperity. I welcome the opportunity to be with you today to share some observations about how promoting the rule of law promotes economic prosperity.

There is an undeniable link between good governance and human flourishing. Let me pause here to describe what I mean when I use the terms “good governance” and “rule of law.” As I discussed last month in Shanghai before a very different audience,¹ there are four key components. First, the rule of law requires a system of government in which all persons are accountable under the law. Second, the government must be based on fair, published and stable laws. Third, there must be fair, robust and accessible legal process pursuant to which rights and responsibilities based in law are evenly enforced. Finally, the rule of law requires competent and independent lawyers and judges. Although not exhaustive, the hallmarks of the rule of law include accountability, stability, fairness, even-handedness and independence. Such factors

¹ Remarks of Deputy Assistant Attorney General Roger Alford at the China Competition Policy Forum (August 30, 2017), *available at* <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-china-competition-policy>.

provide the nurturing environment necessary for countries and their citizens to blossom to their full potential.

I want to talk today about one of the most important aspects of the rule of law: the fight against corruption. Corruption is a problem as old as man. No country or generation is immune from this cancer upon the body politic. It has been a topic of intense economic analysis and prolific literary wisdom.² Before I provide you with evidence from the former let me share a few examples of the latter. King Solomon declared that “by justice a king gives a country stability, but those who are greedy for bribes tear it down.”³ In *Don Quixote*, Cervantes presented a tragic story of a man who dreamed of a Golden Age of justice and virtue, willing to take up his sword to slay imagined dragons.⁴ But in the end, the mad conquistador lost all faith in humanity, overcome by the utter corruption and injustice of the world. Jonathan Swift – one of the most celebrated satirists of government venality – lamented in *Gulliver’s Travels* the “many innocent and excellent persons [who] have been condemned to death by the practicing of Ministers upon the corruption of judges.”⁵ And in Shakespeare’s *Hamlet*, Marcellus famously declared that “something is rotten in the state of Denmark.”⁶ He was referring, of course, to the corrupting influence that Claudius had through mismanagement of the affairs of state, thrusting the kingdom into moral bankruptcy and political decay. It is a refrain that echoes across the ages. At one time or another almost every nation has been subject to the same complaint: “something is rotten here.”

² On the value of both the quantitative rigor of economics and the wisdom and judgment of the humanities, see Gary Saul Morson and Morton Schapiro, *Cents and Sensibility: What Economics Can Learn from the Humanities* (2017).

³ Proverbs 29:4, English Standard Version.

⁴ Miguel de Cervantes, *The Ingenious Nobleman Don Quixote de la Mancha* (1605 & 1615).

⁵ Jonathan Swift, *Gulliver’s Travels* (1726).

⁶ William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* (1599-1602).

Corruption is the opposite of the rule of law, both in meaning and effect. A corrupt system is one in which the powerful are abusive, the government is debauched, the laws are debased, and the judges are biased. These conditions are devastating to a nation's economy and its citizens' prosperity. As one of my colleagues at the Justice Department said when he visited Brazil this past May, "corruption impedes free and fair competition and creates a high risk that prices will be distorted and products and services will be substandard. Importantly, corruption disadvantages honest businesses that do not pay bribes. And bribes impede economic growth, undermine democratic values and public accountability, and weaken the rule of law."⁷

These conclusions are supported by strong empirical data.⁸ According to the Global Competitiveness Index (GCI), a country's competitiveness determines its future potential for growth and sustainable prosperity. There is a tight positive linear correlation between competitiveness and perceived corruption; the less corrupt a country is perceived to be, the more competitive and productive it is. As one study concluded: "[T]here is a very strong correlation between corruption and competition where less corrupt countries have more competitive industrial markets."⁹ Corrupt countries are less competitive globally and less attractive to foreign investment. Corruption increases prices and lowers government output.¹⁰ It reduces government revenue and investment in human capital. It stunts growth, imposes hidden taxes,

⁷ Remarks of Acting Principal Deputy Assistant Attorney General Trevor N. McFadden before the American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), available at <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

⁸ Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L. J. 1253 (2012) available at http://scholarship.law.nd.edu_faculty_scholarship/572; Shang-Jin Wei, *How Taxing is Corruption on International Investors*, 82 Rev. Econ. & Stat. 1, 10 (2000); Johann Graf Lambsdorff, *How Corruption Affects Persistent Capital Flows*, 4 ECON. GOVERNANCE 229, 230 (2003); Sanjeev Gupta et al., *Corruption and the Provision of Health Care and Education Services*, in THE POLITICAL ECONOMY OF CORRUPTION, 111, 115-119 (Arvind K. Jain ed. 2001); Rafael Di Tella & William D. Savedoff, *Shining Light in Dark Corners*, in DIAGNOSIS CORRUPTION: FRAUD IN LATIN AMERICA'S PUBLIC HOSPITAL'S 1, 15 (2001).

⁹ Patrick M. Emerson, *Corruption, Competition and Democracy*, 81 J. Dev. Econ. 193, 208, 211 (2006).

¹⁰ Gupta et al., *supra*, at 115-119.

limits spending on education and health care, and diminishes human development.¹¹ The bitter fruit of corruption is poverty, ignorance and death. If a government desires to improve its economy, combating corruption must be high on the agenda.

When corruption is widespread, the community bonds necessary to maintain social order are strained.¹² If the government cannot be trusted to pursue public welfare over private gain, it cannot be trusted to pursue many policies that promote the ingredients necessary for a productive, healthy, educated and stable society. Moreover, by observing corruption among government officials, it alters perceptions of society as a whole. Corruption rots the entire fabric of social trust in society, leading people to conclude that “[i]f I cannot trust the local policemen, judges, teachers, and doctors, then whom in this society can I trust?”¹³

With these principles in mind, let me turn from the general to the specific. General principles find their application in concrete cases, and I would like to spend the remainder of my time talking briefly about how the Antitrust Division seeks to deter corruption and promote the rule of law by vigorously protecting competition and consumers. There are many ways to combat corruption, and the examples I give serve only to illustrate some of the efforts by my country to address the problem. Of course we are not alone; many countries are engaged in this good fight.

Here I should note that we have had very productive cooperation with Brazil’s competition authority, CADE, over many years, and I was grateful to have an opportunity to visit CADE before this conference began. As I said at the outset, we as competition enforcers are in a

¹¹ Alford, *supra*, at 1261-1272.

¹² Bo Rothstein & Eric M. Uslaner, *All for All: Equality, Corruption, and Social Trust*, 58 *WORLD POLITICS* 41 (2005).

¹³ Bo Rothstein, *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective* 173-174 (2011).

unique position to observe the connection between the rule of law and economic prosperity; for this reason, our counterparts are important to us not only as partners in specific cases, but also as allies in promoting rule of law principles for the benefit of the economy and consumers everywhere.

I will focus now on two aspects of our approach: transparency and accountability. Transparency is key to the rule of law, because rules that are fixed and publicly known create a stable framework for individual and collective decision-making. Transparency also enhances trust in the government, ensuring that the public has confidence in government policies and processes. At the Antitrust Division, we strive to be as transparent as possible, by, for example, offering the public access to our manuals and guidelines outlining our enforcement practices and procedures.¹⁴ Our cartel leniency program is another example. This program sets forth a number of objective criteria, and provides leniency – no criminal fine and no jail time for directors, officers and employees – to the first company that approaches us voluntarily to report violations of our criminal antitrust laws, such as price fixing, bid rigging or customer allocation.¹⁵ The program is enormously successful, in no small part because companies and individuals trust that we will evaluate their applications fairly according to published criteria. Thanks to the leniency program, companies have strong incentives to review their activities, root out illegal anti-competitive conduct, and report criminal conspiracies. Their trust in the fair enforcement of our leniency program is a key factor in our ability to detect and deter criminal activity. As a result of that trust, consumers benefit from greater competition through lower prices, and higher quality goods and services.

¹⁴ Antitrust Division Manual (Updated August 25, 2017), available at <https://www.justice.gov/atr/division-manual>.

¹⁵ Antitrust Division Corporate Leniency Policy, available at <https://www.justice.gov/atr/corporate-leniency-policy>.

Another key component of our criminal program, and of rule of law generally, is individual accountability. In the United States, it is not just corporations that are criminally liable for antitrust crimes; individuals are, too – as they have been in Brazil for years. As my colleagues at the Antitrust Division have explained before, “[h]olding companies accountable and assessing large fines, alone, are not the only means, or even the most effective way, to accomplish our goal of deterring and ending cartels. Individuals commit the crimes for which corporate offenders pay. Every corporate crime involves individual wrongdoing.”¹⁶ For that reason, we at the Antitrust Division have a long history of holding individuals accountable for antitrust crimes, and we have consistently touted prison time for individuals as the single most effective deterrent to criminal collusion.¹⁷

Let me give just one recent case example that touches on many of these themes – competition, corruption, rule of law, individual accountability and transparency. In June of this year, Yuval Marshak was sentenced to 30 months in prison for participating in a scheme to defraud the U.S. Department of Defense. The United States spends billions of dollars per year to provide foreign governments with money to be used to purchase American-made military goods and services. The program encourages the use of competitive bidding in all foreign government contracts. In this case, Marshak and others falsified bid documents to make it appear that certain contracts had been competitively bid. Marshak also falsified certifications to the Department of Defense, stating that no commissions were being paid, when in reality he had arranged to receive substantial commissions on the contracts. He even arranged for the undisclosed commission

¹⁶ Remarks of Deputy Assistant Attorney General Brent Snyder at the Yale Global Antitrust Enforcement Conference (February 19, 2016), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.

¹⁷ *Id.*

payments to be made to a U.S.-based company that was owned by a close relative.¹⁸ Anyone considering such criminal conduct would be wise to review his indictment as a cautionary tale.¹⁹

In a world where business transcends geographic boundaries, many of our cases involve cooperation with our foreign counterparts, and we rely on these relationships to amplify our efforts to promote competition and the rule of law. In the case of Yuval Marshak, we benefited from Israel's cooperation in investigating the crime and Bulgaria's cooperation in ultimately extraditing the perpetrator from that jurisdiction.

II. The Challenges of Corruption

I began my remarks today by discussing the importance of the rule of law to economic prosperity. Now I'd like to take an opportunity to talk in more detail about the efforts of the Antitrust Division to fight corruption in the United States.

The most common intersection of corruption and anticompetitive conduct occurs in government procurement, when bid rigging can be combined with or facilitated by other illegal activity such as bribery of public officials, unlawful kickbacks, or fraud. As we explained in a paper prepared for an OECD roundtable on fighting corruption and promoting competition²⁰, in the United States, it is not uncommon for the Antitrust Division to uncover evidence of both bid rigging and other corruption in the course of an investigation. In such cases, the Antitrust Division must determine how to focus the investigation and prosecution. The crimes of bid

¹⁸ "Israeli Executive Sentenced to Prison for Defrauding the Foreign Military Financing Program." Antitrust Division Press Release (June 12, 2017), available at <https://www.justice.gov/opa/pr/israeli-executive-sentenced-prison-defrauding-foreign-military-financing-program>.

¹⁹ U.S. v. Marshak, available at <https://www.justice.gov/atr/case/us-v-yuval-marshak>.

²⁰ "Fighting Corruption and Promoting Competition." Contribution of the United States to the OECD Global Forum on Competition (January 16, 2014), available at [http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/GF/WD\(2014\)19&docLanguage=En](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/GF/WD(2014)19&docLanguage=En).

rigging and those related to kickbacks, for example, have different elements of proof, and investigatory procedures may also differ. For example, the Antitrust Division's leniency program applies only to antitrust crimes, not fraud or bribery. The Antitrust Division may also work with other components of the Department of Justice – such as the Criminal Division or the U.S. Attorneys located throughout the United States – when there is evidence of antitrust and non-antitrust crimes.

Although bid rigging and offenses involving bribery, kickbacks or fraud are different crimes in the United States, the evidence may be similar. For example, the records of communications and the trail of unlawful payments may surface in the same file. In assisting the Antitrust Division, the Federal Bureau of Investigation (FBI) has found analytical synergies in grouping these kinds of conduct together, because investigations in any one of these areas may lead to operational intelligence in the other.

With that background on our investigation methods, let me provide some recent case examples, and describe the lessons we have learned about detecting illegal conduct in this area. As I mentioned earlier, corruption reduces the value of social services, essentially creating an involuntary hidden tax on government services. These cases illustrate our efforts to combat the social costs of corruption on environmental protection and education.

In 2016, we tried and obtained the conviction of John Bennett for fraud against the United States as a result of a kickback scheme in the procurement of environmental clean-up services.²¹ Bennett's company served as a subcontractor that specialized in transporting, treating and disposing contaminated soil. To obtain business from the Environmental Protection Agency,

²¹ "Division Wins Conviction of Former CEO Extradited for Role in Kickback and Fraud Conspiracy." Antitrust Division Update (Spring 2016), available at <https://www.justice.gov/atr/division-wins-conviction-former-ceo-extradited-role-kickback-and-fraud-conspiracy>.

Bennett paid the general contractor more than \$1 million in kickbacks in the form of luxurious trips and other extravagant gifts. Bennett's company then submitted inflated or falsified invoices to the general contractor – and ultimately to the U.S. government – in order to be reimbursed for the illegal kickbacks. This scheme ultimately corrupted approximately \$43 million worth of subcontracts. With cooperation from the Canadian government, we secured his extradition, and a jury of his peers held him accountable for his crimes. He was ultimately sentenced to over five years in prison.

In January 2017, we secured convictions against four individuals for participating in bid rigging and fraud at an auction for public school bus transportation services in Caguas, Puerto Rico.²² These defendants – Gavino Rivera Herrera, Luciano Vega Martínez, Alfonso Gonzalez Nevarez and René Garay Rodríguez – conspired to rig bids for the transportation of Puerto Rico schoolchildren, enriching themselves at the expense of students and taxpayers. To effectuate their scheme, the defendants and other co-conspirators allocated contracts among themselves, predetermining the winning bidder for each contract, and then submitting inflated complementary bids to create the appearance of competition. Along with their bids, they submitted fraudulent certifications of non-collusion. Essentially school bus companies colluded to raise the cost of children going to school. Today it is easy to mourn the devastation of hurricanes on the people of Puerto Rico, but for years their children have quietly weathered the crimes of collusion. These stories are just two examples of numerous efforts to combat corruption.

²² “Four School Bus Company Owners Convicted for Bid Rigging and Mail Fraud Conspiracies Involving Puerto Rico Public School Bus Services.” Antitrust Division Press Release (January 26, 2017), *available at* <https://www.justice.gov/opa/pr/four-school-bus-company-owners-convicted-bid-rigging-and-mail-fraud-conspiracies-involving>.

While it may sound easy, it is incredibly difficult to identify, investigate and prosecute this conduct. And with respect to our investigation and prosecution work, I want to pause here to make an important point – one that relates to the theme of transparency that I discussed earlier. As I said when I discussed the benefits of transparency, in the course of conducting our investigations and prosecutions, it is critical to engender public trust in our processes. For that reason, we take very seriously our obligation to afford parties under investigation certain procedural rights, including the right to counsel, the right to attorney-client privilege, and the opportunity to review and rebut the evidence used against them at trial. We prosecute parties in court, before neutral judges, and parties have a right of appeal. These protections foster public faith in the Antitrust Division, and ultimately, enhance the efficacy of our enforcement.

Our enforcement experience has taught us to see red flags that may signal collusive and corrupt conduct. Conditions are favorable to collusion when there are few sellers or buyers of a particular good or service, when there are no readily available substitutes, when the same vendors repeatedly sell to the same buyers, and when competitors have frequent contact with each other. We grow suspicious when bids appear to be much higher than one would expect from prevailing market prices, previous bid prices, or independent cost estimates. And we perceive collusion to be more likely when we observe the same company winning a particular procurement again and again, or a group of bidders winning a series of contracts in a pattern of suspicious rotation. Antitrust enforcers are adept at combating collusive conduct, and attuned to the tell-tale signs of anticompetitive and corrupt activity.

As experts in fighting corruption, we frequently reach out to U.S. government colleagues who are on the front lines in combating government procurement fraud. We work closely with public procurement officials who are in the best position to detect and prevent bid rigging on

public procurement contracts. We publish materials²³ and offer training on how to recognize bidding behavior that may suggest collusive conduct, and promote procurement procedures that decrease the likelihood of bid rigging. In turn, there is a virtuous circle with such training, because procurement officials often provide the key evidence necessary for a successful bid-rigging prosecution.

Finally, in addition to outreach to public procurement officials, we also conduct outreach to the general public, particularly when there are special circumstances that make collusion or corruption more likely. For example, in times of natural disaster, there may be increased need by state and local governments to solicit competitive bids for cleanup and rebuilding contracts. Bidders may be tempted to engage in conduct that subverts the competitive process, visiting harm on particularly vulnerable localities or populations. In 2005, for example, Hurricane Katrina devastated the Gulf Coast of the U.S., necessitating reconstruction to the levee system in New Orleans, Louisiana.²⁴ The Antitrust Division, as part of the National Center for Disaster Fraud, uncovered a conspiracy and bribery scheme involving two subcontractors who were charged and convicted of bid rigging. Just last month, the Antitrust Division issued public guidance in the wake of three devastating hurricanes, and will remain vigilant to ensure that any anticompetitive conduct related to rebuilding efforts is detected and prosecuted.²⁵

As I mentioned at the outset of my remarks, corruption undermines the competitive process, robs consumers of valuable government services, and ultimately impedes economic

²³ See, e.g., "Price Fixing, Bid Rigging and Market Allocation: What They Are and What to Look For," available at <https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>.

²⁴ See, e.g., "Disaster Recovery," available at <https://www.justice.gov/atr/disaster-recovery>.

²⁵ "Justice Department and Federal Trade Commission Announce Guidance for Post-Hurricane Relief Efforts." Antitrust Division Press Release (September 12, 2017), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-guidance-post-hurricane-relief>.

growth. We take this conduct as a serious threat to competition and to the rule of law more generally, and we will remain vigilant in our efforts to detect and prosecute it, and to assist our foreign counterparts in their efforts to do the same. We may be only one division of one department of one government. But I am confident that the Antitrust Division is a critical weapon in the battle against corruption and collusion.

In conclusion, let me emphasize again the essential point about corruption. The abuse of public power for private gain distorts the essential functions of government. Where there is bribery and collusion of government services, the government is efficient for the corrupt few and inefficient for everyone else. Rampant corruption severs the bonds of community trust necessary for an effective partnership between private and public sectors so critical for a nation to thrive. Corruption begets distrust, which begets disorder, which begets a host of other evils. In contrast, good government promotes best principles of accountability, stability, fairness, even-handedness and independence. The corruption of the best ideals of government is one of the worst possible results. Thank you.