

022125
E

FLEISCHMAN AND WALSH, L. L. P.

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

AARON I. FLEISCHMAN

FLEISCHMAN AND WALSH, P. C.

CHARLES S. WALSH

ARTHUR H. HARDING

STUART F. FELDSTEIN

RICHARD RUBIN

JEFFRY L. HARDIN

STEPHEN A. BOUCHARD

R. BRUCE BECKNER

HOWARD S. SHAPIRO

CHRISTOPHER G. WOOD

SETH A. DAVIDSON

MITCHELL F. BRECHER

JAMES F. MORIARTY

MATTHEW D. EMMER

JILL KLEPPE McCLELLAND

REGINA FAMIGLIETTI PACE

TERRI B. NATOLI*

RHETT D. WORKMAN

CRAIG A. GILLEY

MARK F. VILARDO

PETER J. BARRETT

KIMBERLY A. KELLY

ROBERT E. STUP, JR.**

SCOTT H. KESSLER***

RUBY D. CEASER

ANDREW M. FRIEDMAN

LORETTA J. GARCIA

DEBRA A. McGUIRE

1400 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

(202) 939-7900

FACSIMILE (202) 745-0916

INTERNET fw@fw-law.com

RECEIVED
DEPT OF JUSTICE
1996 NOV 20 1 A 9 47
EXECUTIVE
SECRETARIAT

November 19, 1996

* VIRGINIA BAR ONLY
** PENNSYLVANIA BAR ONLY
*** NEW YORK AND NEW JERSEY BARS ONLY

VIA HAND DELIVERY

Mr. Donald Gips
Chief, International Bureau
Federal Communications Commission
Washington, DC 20554

**Re: File No. 73-SAT-P-96 Application of MCI Telecommunications Corporation
For An Initial Construction and Launch Authorization in the Direct Broadcast
Satellite Service**

Dear Mr. Gips:

I am writing to provide additional relevant facts as a follow-up to the November 15, 1996 letter from Time Warner Inc. regarding the above-captioned application of MCI Telecommunications Corporation (MCI) for authority to construct, launch, and operate a Direct Broadcast Satellite (DBS) system. That letter stated that MCI's recently-announced agreement with British Telecom plc (BT), pursuant to which BT is to acquire one hundred percent ownership of MCI, changes material information contained in the pending application, *i.e.*, the increased level of foreign ownership of the proposed DBS system. It was also noted that Section 1.65 of the Commission's rules obligates MCI to notify the Commission "promptly and in any event within 30 days" of changes to information contained in the application.^{1/}

^{1/}It is beyond dispute that the execution of the MCI/BT merger agreement is a "substantial change . . . which may be of decisional significance" within the meaning of Sec. 1.65,

Mr. Donald Gips
November 19, 1996
Page 2

We understand that MCI and BT entered into an Agreement and Plan of Merger (Merger Agreement) on November 3, 1996. BT provided the requisite notification to the Securities and Exchange Commission (SEC) the very next day, November 4, by filing SEC Form 13-D. MCI submitted the Merger Agreement to the SEC on November 5 in conjunction with SEC Form 8-K. Apparently, MCI deemed it necessary to notify the SEC "promptly" of the acquisition by BT as required by that agency's rules while not yet notifying the Commission of the announced ownership change regarding its DBS application.^{2/} MCI's decision to file "promptly" with the SEC but to defer submission to the Commission of the requisite notification and amendment to its pending DBS application as required by Section 1.65, appears to be an attempt on its part to "game the process" by delaying notification of its announced acquisition by BT until after the Commission has granted its DBS application.

MCI is obviously attempting to stall its obligation to amend its DBS application for the full thirty days from November 3 in the hopes that the Commission will grant its application before triggering a formal opportunity for the public to comment on the vastly changed circumstances which now exist. If successful, the effects of MCI's dilatory tactics will be substantial. If its application is granted, and if MCI is subsequently found to be unqualified to hold a DBS authorization, *e.g.*, based upon foreign ownership considerations, it would likely be allowed to sell the licensed facility to a qualified entity and retain any profits. On the other hand, if the Commission follows proper procedures and defers action until MCI files the amendment required by FCC rules, then the full range of options will be open to the Commission, including the re-auction of this highly valuable and unique DBS orbital position, thus capturing any appreciation for the U.S. Treasury rather than MCI.

The announced acquisition of MCI by BT, combined with the substantial foreign ownership of American Sky Broadcasting (ASkyB), the joint venture between MCI and News Corp., which will select and provide programming and information to be distributed via the MCI DBS system, raise important public interest questions -- questions which must be

triggering the obligation for MCI to file a major amendment to its DBS application "as promptly as possible and in any event within 30 days." See, e.g., Algreg Cellular Engineering, 69 RR 2d 290 (1991); David A. Davila, et al., 69 RR 2d 564 (1991); Palmetto Communications Co., 69 RR 2d 119 (1991); Radio Gaithersburg, Inc., 42 RR 2d 1476 (1978). Indeed, the Report and Order adopting Sec. 1.65 plainly states, "[i]n general, applicants should report any substantial change in circumstances pertaining to basic qualifications . . . for example, it is clear that an applicant should report any substantial change in ownership or legal status such as a corporate merger . . ." Amendment of Part 1 Rules of Practice and Procedure, 3 RR 2d 1622, 1624 (1964).

^{2/}The relevant rules of the SEC employ the same "promptly" test as Sec. 1.65. See 17 C.F.R. § 240.13d-2.

Mr. Donald Gips
November 19, 1996
Page 3

considered before action is taken on the DBS application. The Commission should not act on the application until MCI has complied fully with the disclosure requirements contained at Section 1.65 of the rules, and until a complete record is developed regarding the public interest and foreign trade policy implications of MCI's increased foreign ownership as well as that of ASkyB.^{3/}

Respectfully submitted,



Aaron I. Fleischman
Counsel for Time Warner Inc.

MFB:kma:47068

cc: Mr. William Caton, FCC Secretary
Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Hon. Albert Gore, The Vice President
Hon. Charlene Barshefsky, Acting United States Trade Representative
Hon. Warren Christopher, Secretary of State
Hon. Mickey Kantor, Secretary of Commerce
Hon. Janet Reno, United States Attorney General
Larry A. Blosser, Esq., Counsel for MCI Telecommunications
Phillip L. Malet, Esq., Counsel for EchoStar Satellite Corp.
Gary M. Epstein, Esq., Counsel for DIRECTV, Inc.
Benjamin J. Griffin, Esq., Counsel for Primestar Partners
Mr. Alexander Netchvolodoff, Cox Enterprises
Daniel Brenner, Esq., Counsel for the National Cable Television Association

^{3/}Under the procedures governing DBS authorizations codified at Part 100 of the Commission's rules, the licensing process for DBS is a one step process. Unlike the procedures applicable to other radio-based services (*e.g.* broadcasting), separate construction permit and license applications are not required. Once the instant application is granted, MCI will become an authorized DBS provider. In short, this is the decisionally significant point in the authorization process and the Commission must ensure that the applicant is fully qualified, and that grant of the application would serve the public interest, before acting on the application.

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

1. FOLDER No: 219618
2. TRACKING ID No: X96-214377
3. RESERVED
4. DATE OF DOCUMENT: 11/15/96
5. DATE RECEIVED: 11/15/96
6. DUE DATE: No Due Date
7. FROM: Richard D. Parsons
President
Time Warner Inc.
New York, NY 10019
8. TO: Reed E. Hundt, FCC (cc: AG)
9. CATEGORY: GENERAL
10. SUBJECT:
(Copy) Letter expressing Time Warner's concern about the pending MCI Telecommunications Corporation application for the last remaining U.S. direct broadcast satellite license. (pdm) See Folders 220729 and 222125.
11. ACTION/INFORMATION:

Referred To:	Date Assigned:	Information:
ATR	11/19/96	For information.
EONS	11/19/96	For information.
OAG	11/19/96	For information.
OASG	11/19/96	For information. To ASG, OASG (Allegra).
12. RESERVED FOR EXECUTIVE SECRETARIAT USE
MCI broadcast satellite license.
13. EXECUTIVE SECRETARIAT CONTACT: Patricia Morgan, (202) 616-0081

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

1. FOLDER No: 220729
2. TRACKING ID No: X96-215527
3. RESERVED
4. DATE OF DOCUMENT: 11/18/96
5. DATE RECEIVED: 11/19/96
6. DUE DATE: No Due Date
7. FROM: Alexander V. Netchvolodoff
Vice President of Public Policy
Cox Enterprises, Inc.
Washington, DC 20036
8. TO: Reed E. Hundt, Chairman, FCC (cc: AG)
9. CATEGORY: GENERAL
10. SUBJECT:
(Copy) Regarding a letter that was filed with the FCC by Time Warner addressing the impact of the announced MCI merger with British Telecommunications and MCI's pending auction application for a DBS license. Advises that Cox Communications agrees with Time Warner's position and requests that the FCC review and resolve their concerns prior to any decision to award a license to MCI. See Folder 219618. (dda) See folder 222125.
11. ACTION/INFORMATION:

Referred To:	Date Assigned:	Information:
ATR	11/19/96	For information.
EONS	11/19/96	For information.
OAG	11/19/96	For information.
OASG	11/19/96	For information. To ASG, OASG (Allegra).
12. RESERVED FOR EXECUTIVE SECRETARIAT USE
MCI DBS license
13. EXECUTIVE SECRETARIAT CONTACT: Dorrence Andrews, 616-0074



DEPARTMENT OF JUSTICE
Antitrust Division


DAVID S. TURETSKY
Deputy Assistant Attorney General

November 21, 1996

EXECUTIVE SUMMARY

MEMORANDUM TO THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 

THROUGH: ACTING ASSISTANT ATTORNEY GENERAL KLEIN

FROM: David S. Turetsky ^{DST}
Deputy Assistant Attorney General

SUBJECT: Intelsat Restructuring: Letter to Foreign Governments From Certain Cabinet-level Officials

PURPOSE: Obtain Attorney General's agreement to "sign" letter to foreign governments supporting the United States position on Intelsat Restructuring.

TIMETABLE: We must respond as to whether you agree to join the Secretary of State, Secretary of Commerce, and United States Trade Representative in "signing" the letter no later than Friday, November 22, 1996.

DISCUSSION: The United States Government is supporting a restructuring plan for the International Satellite Organization, Intelsat, that would promote more competition in satellite telecommunications and video services. For a

variety of reasons, the response around the world to the plan has generally been unenthusiastic. In order to gain the attention of other governments at a higher level, and in order to stress to other governments the importance of the plan to the United States Government, a letter supporting the United States position has been drafted by an interagency group in which the Antitrust Division participates. It is proposed that the letter be sent on behalf of the Secretary of State, Secretary of Commerce, United States Trade Representative and the Attorney General.

RECOMMENDATION: Agree to join the Secretary of State, Secretary of Commerce and United States Trade Representative in sending the letter to foreign governments supporting the U.S. position.

APPROVED: _____

DISAPPROVED: _____

OTHER: _____

Attachment: Draft Intelsat Restructuring Letter and Cable



DEPARTMENT OF JUSTICE
Antitrust Division

DAVID S. TURETSKY
Deputy Assistant Attorney General

November 21, 1996

MEMORANDUM TO THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

THROUGH: ACTING ASSISTANT ATTORNEY GENERAL KLEIN

FROM: David S. Turetsky
Deputy Assistant Attorney General

SUBJECT: Intelsat Restructuring: Letter to Foreign
Governments From Certain Cabinet-level
Members

PURPOSE: Obtain Attorney General's agreement to "sign" letter to foreign governments supporting the United States position on Intelsat Restructuring.

TIMETABLE: We must respond as to whether you agree to join the Secretary of State, Secretary of Commerce, and United States Trade Representative in "signing" the letter no later than Friday, November 22, 1996.

DISCUSSION: The United States Government is supporting a restructuring plan for the International Satellite Organization, Intelsat, that would promote more competition in satellite telecommunications and video services. For a variety of reasons, the response around the world to the plan has generally been

unenthusiastic. In order to gain the attention of other governments at a higher level, and in order to stress to other governments the importance of the plan to the United States Government, a letter supporting the United States position has been drafted by an interagency group in which the Antitrust Division participates which is headed by Dan Tarullo, Deputy Assistant to the President for Economic Policy. It is proposed that the letter be sent on behalf of the Secretary of State, Secretary of Commerce, United States Trade Representative and the Attorney General.

I. Overview of Intelsat and Comsat

Intelsat is an international organization established by treaty that operates a global satellite telecommunications network, providing a variety of telecommunications services to fixed points, including switched telephone circuits, private lines, and video and audio distribution. Intelsat has been granted various privileges and immunities and is generally not subject to antitrust laws. In recent years, private satellite companies have begun to compete against Intelsat, which has enormous capacity and market share as compared to most of these competitors. Intelsat is structured as a consortium owned by "signatories," the entities that represent their countries in the consortium. These signatories also are the principal direct purchasers of Intelsat's capacity and services, and in turn distribute Intelsat's capacity and services to users.

Intelsat is governed by two bodies: the Board of Governors, which provides management of Intelsat's business affairs on an ongoing basis, and the Assembly of Parties, which conducts broader oversight through its meetings every two years. Voting in the ongoing management of Intelsat through the Board of Governors is based on each investor's share of total investment in Intelsat. Voting in the Assembly of Parties, which would have to approve any change to the treaty under which Intelsat exists, is based on a principle of one-country, one-vote. One hundred thirty-six countries were listed as members of Intelsat in that organization's 1994 Annual Report.

Comsat Corporation, a U.S. corporation whose stock is publicly held and traded, is the United States representative in the Intelsat consortium and holds the largest investment share. Comsat holds the exclusive right to distribute Intelsat capacity and services in the United States. Other U.S. carriers that want to obtain satellite capacity over Intelsat from the U.S. to foreign points, must purchase access to the Intelsat facilities and services from Comsat. In addition, to complete international circuits, U.S. carriers and users must deal with the foreign signatories to obtain the foreign half on an international circuit.

II. U.S. Restructuring Proposal

The United States government, together with Comsat Corporation, released on February 12, 1996 a proposal for the restructuring of Intelsat. Under the restructuring proposal, Intelsat would be divided into two entities, each with approximately an equal number of satellites. One entity would be the residual Intelsat, continuing to operate as an intergovernmental organization under existing treaties. The other entity would be a privatized corporation, which would be required to sell at least 60% of its equity to external investors (that is, persons other than Intelsat signatories) through an initial public offering and to have at least 80% of its equity sold to external investors within two years of the first offering. At the end of the restructuring, Intelsat signatories would not collectively have more than 20% of the equity in the new privatized entity and Intelsat itself would not be an owner of the new entity.

This proposal was arrived at and agreed by an interagency group that has been ongoing since mid-1994 with broad representation of policy expertise. Participants include: the National Economic Council, the Office of Science and Technology Policy, the Council of Economic Advisors, the Department of Justice's Antitrust Division, the Treasury Department, the Defense Department, the Central Intelligence Agency, the Transportation Department and the three "instructional agencies" -- the Commerce Department's National Telecommunications and Information Administration, the FCC and the State Department. The consensus of the group has supported the restructuring of Intelsat in the manner proposed, in order to promote competition in international satellite services while protecting the universal availability of traditional public telecommunications services and creating a more flexible means of participating in

new markets than the intergovernmental cooperative affords. At the same time, most of the key agencies participating in this process are opposed to allowing any reorganization that would give Intelsat greater market flexibility while retaining the advantages associated with being an intergovernmental organization, and believe that the substantial separation of ownership between Intelsat and the new entity reflected in this proposal is necessary if competition is to be adequately protected.

Congress also has actively expressed interest in the restructuring of Intelsat. Two GAO reports were prepared in 1996 on this issue. The most recent hearing was held in September by the Subcommittee on Telecommunications and Finance of the House Committee on Commerce. David Turetsky testified as part of an Administration panel. A few senior Members expressed concern with any compromise that might weaken the United States proposal, and questioned whether the proposal goes far enough to the achievement of competitive ends. Most of the members did not express any position.

III. Letter

The interagency group is considering a variety of options that can be undertaken by the United States in the event that the restructuring of Intelsat proceeds in a way that does not promote competition and which may instead be anticompetitive. Some of these options involve potentially harsh action, perhaps even barring a newly restructured Intelsat affiliate from the United States market through regulatory action. Prior to any decision on such potential responses to rejection of the U.S. plan, the interagency group wants to pursue by means of this letter a high level attempt to secure a satisfactory result through the bargaining process that will continue in December. The letter would underscore the resolve of the U.S. Government on these issues and also avoid any later claims that the U.S. did not adequately work to achieve its ends within the process or signal its concern at a high level about an unsatisfactory outcome.

Your signature is sought in particular because of the importance of the competition issues to the United States position. The Antitrust Division has played a key role in formulating the position of the United States and has spoken with competition officials abroad about these issues. There is also reason to believe that the international competition community may be more supportive of the United States position than some

portions of the telecommunications community.

The draft letter is contained in a draft cable that is attached at Tab 1. The cable will go to appropriate U.S. embassies abroad and contains not only the text of the proposed letter, but also instructions and talking points for our embassy officials. (The draft cable explains well the issues related to the restructuring.) There would not actually be any copy of the letter that you would hand-sign. The embassies would prepare and send the letters on behalf of you and the other Cabinet-level officials.

EEEEEEEEEEEEEEEEEEEEEEEEEEEEEEEE

VBM
MES
JG PP
DR RD
EM JB
CW MD
TB CR

UNCLASSIFIED

EB/CIP:M E Shapiro:MES
11/12/96 736-4762 SESC 001026 96 EB2 01324
EB/CIP:V B MoCann

COMMERCE/NTIA:J Gleason, USTR:P Paoletta, WH/NEC:D Robyn,
WH/OSTP:R DalBello, TREASURY:E Murphy, FCC:J Ball, JUSTICE:C Wilner,
OMB:M Deich, CEA:T Brennan, DOD:C Raiford

PRIORITY CANBERRA, OTTAWA PRIORITY, BONN PRIORITY, PARIS PRIORITY,
TOKYO PRIORITY, COPENHAGEN PRIORITY, JAKARTA PRIORITY +
PRIORITY INTEL

DAKAR ALSO FOR PRAIA

E.O. 12958: N/A

TAGS: ECPS, TSPA, TSPL, ETRD

SUBJECT: INTELSAT RESTRUCTURING: LETTER FROM SECRETARY
OF STATE, SECRETARY OF COMMERCE, AND U.S. TRADE
REPRESENTATIVE

REF: (A) 96 STATE 032029

SUMMARY AND ACTION REQUEST

1. Currently, the United States is in the midst of difficult negotiations over the future of the International Telecommunications Satellite Organization ("INTELSAT"). While momentum is growing in working-level meetings for INTELSAT to reorganize by creating a commercial affiliate, the USG is very concerned that unless the new entity becomes independent from INTELSAT, competition in the international satellite market will be impaired. In multilateral meetings held over the past several months, the USG has received virtually no support from even our closest traditional allies for measures necessary to ensure a pro-competitive outcome in the restructuring. Decisional INTELSAT working-level meetings on restructuring will take place the first two weeks of December. These meetings are crucial because INTELSAT's political body, the Assembly of Parties, has never overruled working-level recommendations. The USG is undertaking a final diplomatic push to gain the support of countries which are most influential in this

intergovernmental organization.

2. Posts are requested to deliver the following letter from the Secretary of State, the Secretary of Commerce, and the U.S. Trade Representative, to the appropriate ministerial-level contacts who are responsible for or may influence host government's position in INTELSAT: the Foreign Ministers, Ministers of Posts and Telecommunications/Communications Ministers, Economic or Finance Ministers, and/or other Ministers as deemed appropriate. (Posts should consider whether ministers responsible for economic and competition policy in host country may be more sympathetic to our pro-competition positions). Letters should be delivered by Ambassador or Charge, if available, using talking points provided below. Signed originals of the letter will not/not follow. Background information is also provided for embassy information, see paras 3-7.

THE LETTER

3. Begin Text:

United States of America

Secretary of State
Secretary of Commerce
United States Trade Representative
Attorney General of the United States

Washington

Dear Minister:

Thirty-four years ago, The United States called for the creation of the International Telecommunications Satellite Organization (INTELSAT) to share communications satellite technology for the benefit of all the peoples of the world. Today we are at a crossroads. In view of the rapidly evolving telecommunications market landscape, a multilateral Working Party of INTELSAT members is scheduled to make detailed recommendations in December on a restructuring plan for INTELSAT. The question is: will the final plan enhance or reduce the benefits to the users of this important communications technology?

In February, the United States made a specific proposal for INTELSAT restructuring based on the creation by INTELSAT of a fully-commercial affiliate company. INTELSAT member governments had previously approved work towards such an approach. Independent analysis of the U.S. proposal by financial experts shows that it would provide cash and equity benefits to INTELSAT's current investors (principally national "Signatories") and strengthen the long-term outlook for INTELSAT. Moreover, it would bring the benefits of increased competition to users of satellite communications. Many elements of the U.S. plan are incorporated in a proposal submitted by 17

African members in June that is the basis for the work now underway.

Unfortunately, at a meeting this past September, the Working Party participants, including those from your country, rejected principles for restructuring that the United States considers to be critical to enhancing the benefits for satellite communications users. The United States believes that, following its creation, the affiliate company must be made fully independent of INTELSAT and its Signatories. It must become a true and effective competitive alternative for consumers of telecommunications services. This ultimately means that INTELSAT must have no direct investment, that INTELSAT's investors must be collectively limited to no more than a 20 percent equity stake in the affiliate, and that any limited commercial relationships between INTELSAT and the new company must be open, transparent and on an "arms-length" basis. Otherwise, INTELSAT's Signatories, which have a (diplomatically immune forum) in which to transact business and which often control or directly influence access to their national telecommunications markets, will control not one, but two of only three global satellite networks. Such an outcome would reduce competition and hurt telecommunications users worldwide.

The United States will not support a restructuring plan that fails to promote competition. Your government should not support allowing the long-term opportunities for lower prices, improved services and greater profits to be sacrificed to short-sighted fears by Signatories about relinquishing control. The Working Party is potentially headed down a path that will thwart competition and deny benefits to the very people INTELSAT was created to serve. To protect these satellite telecommunications service users, the United States will consider the full array of options available to it in order to prevent from going forward a restructuring plan that does not embody principles to enhance competition.

I urge your government's support of the U.S. proposals for a competitive outcome on this very important economic issue.

End Text.

4. Because of consultant projections of a market share decline for INTELSAT's core business, and a belief that INTELSAT is ill-equipped to compete in expanding market segments under its cumbersome treaty structure, INTELSAT members are focusing on a restructuring approach that would spin off its non-core business activities to a new commercial affiliate. Consistent with this widely accepted approach, the USG and Comsat Corp., the U.S. Signatory to INTELSAT (INTELSAT's U.S. agent and investor) jointly made a specific restructuring proposal to meet the objectives of: (1) promoting market competition; (2) ensuring continuity of service for existing customers; (3) strengthening INTELSAT's ability to provide reliable service on a non-discriminatory basis to all areas of the world; and (4) protecting investor interests. (Ref. A)

5. From the USG perspective, the critical component of a pro-competitive restructuring will be to ensure the independence of the affiliate company ("INTELSAT New Corporation" or "INC") from the INTELSAT intergovernmental organization ("INTELSAT IGO"). This will require that there be no direct investment in INC by INTELSAT IGO, that there be a substantial level of external investment (i.e., ownership by entities other than Signatories or other INTELSAT investors), and that ongoing contractual relationships between the two be of a limited nature and transparent in character. The United States will not support a result that fails to promote competition.

6. The multilateral group tasked to examine the options for restructuring, known as the INTELSAT 2000 Working Party, decided at recent meetings to focus on a model similar to the U.S. proposal, but with key details yet to be resolved. Approaching the final scheduled Working Party meetings, the international momentum is toward a plan that does not include key pro-competition features that the USG considers essential. Moreover, there are potential questions regarding whether such a plan is consistent with provisions of the INTELSAT agreements (treaties). Aspects of the U.S. plan that have readily identifiable financial benefits to INTELSAT's Signatories have been embraced by most countries, but the parallel competition ingredients have been ignored. (Some countries, such as France and Italy, are still resisting any significant restructuring.) Even traditional U.S. allies on such issues, such as the British or Australians, have not been supportive on the floor of the multilateral meetings and seem to pay these issues only lip service in the corridors. Reticence by our usual allies appears to be related to views that we are being unnecessarily progressive/dogmatic or self-serving of our already strong telecommunications and satellite industries. At the last Working Party meeting in September, no country supported the U.S. call for mandatory minimum levels of external investment.

7. Major issues in the restructuring negotiations will be decided in the next several weeks during deliberations of INTELSAT's Special Committee on Future Structure (meeting 3-5 December; representation by Signatories) and its restructuring Working Party (11-13 December; representation by governments ("Parties") and Signatories). The Working Party's recommendations (which may require an unplanned meeting in February to finalize its recommendations) will be forwarded for action by INTELSAT's Meeting of Signatories and Assembly of Parties in April 1997.

8. Because the INTELSAT Assembly is unlikely to adjust the Working Party recommendations and because the Assembly is a one-country-one-vote environment in this 139-member organization, the Clinton Administration believes that it is essential to make a major diplomatic effort now to bring some key countries on-board to our position. This cabinet-level letter for use with several of the most influential countries is a critical component of this effort.

TALKING POINTS

-- INTELSAT is at a critical point in its restructuring debate. Significant decisions will have to be made in the next several weeks.

-- The United States has made a proposal that independent analysis by financial experts shows will lower prices to customers, improve the financial position of Signatories and protect the ability of INTELSAT to meet its global access mission. Many participants in the INTELSAT debate have embraced the general approach of this proposal.

-- The U.S. proposal would have INTELSAT create a commercial affiliate, transfer roughly half of its satellite assets (the part NOT used for core services) to the affiliate and then seek a level of outside investment in the affiliate from entities other than Signatories and other INTELSAT investors equal to eighty percent of its capitalization.

-- This outside investment will promote the commercial independence of the affiliate, thereby helping to give it the character that will be necessary to compete successfully in the increasingly competitive international satellite market.

-- If the U.S. proposal is implemented, customers will benefit from the introduction of a healthy new market participant; Signatories will benefit from the cash infusion from outside investors; and INTELSAT will benefit from a refocused mission on core telecommunications, where it has historic expertise, and from an improved balance sheet.

-- These benefits hinge, however, on commercial independence. Expert analysis in the United States shows that an eighty-percent level of outside investment is necessary to realize such independence.

-- We urge your support of the eighty-percent outside investment level for the affiliate, and for limiting other relationships between the two entities to ones that are absolutely necessary. The relationships which are maintained must be transparent and at "arms length".

-- Your country weighing-in to support these positions during the 3-5 December "Special Committee" meeting (at which typically only the Signatory would be in attendance) and the 11-13 December "Working Party" meeting (with both Signatory and Party participation) will help lead us to the benefits discussed above. Failure of these negotiations will mean lost benefits to us all.

-- There is no more time to lose. Your swift action, and your country's support at these December meetings will prove crucial for the negotiations to reach a successful conclusion.

UNCLASSIFIED

1

NEW DELHI PRIORITY
ROME PRIORITY
SEOUL PRIORITY
THE HAGUE PRIORITY
OSLO PRIORITY
MADRID PRIORITY
LISBON PRIORITY
SINGAPORE PRIORITY
PRETORIA PRIORITY
BERN PRIORITY
LONDON PRIORITY
CARACAS PRIORITY
BOGOTA PRIORITY
STOCKHOLM PRIORITY
BRASILIA PRIORITY
BUENOS AIRES PRIORITY
YAOUNDE PRIORITY
MANAGUA PRIORITY
ABIDJAN PRIORITY \

UNCLASSIFIED



Department of Justice

ANTITRUST POLICY FOR THE 21st CENTURY

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
Antitrust Section of the American Bar Association

The Willard Inter-Continental Hotel
Washington, D.C.

November 17, 1994

It is a great honor to speak here today and to be part of a program that includes so many of the current giants in the field of antitrust. All of us commend the Planning Committee for putting together a stellar program. Cas Hobbs, John Briggs, Eleanor Fox and Bob Pitofsky have done an absolutely tremendous job. Let me take this occasion to say how delighted I am that President Clinton has appointed Bob Pitofsky, the dean of the antitrust bar, to head the FTC. All of us at the Division look forward eagerly to his confirmation and swearing in, and to continuing a productive working relationship with the FTC. We also welcome Commissioner Christine Varney to the antitrust enforcement ranks. I understand that her shoulder is already to the wheel and she is making a tremendous contribution in her first weeks on the job.

My happiness at being here is tempered with sadness at the loss of Don Turner. Don will long be remembered as a towering figure in the development of antitrust theory. Just as important as his academic achievements was his singular contribution to the Antitrust Division during his tenure as Assistant Attorney General. As many of you know, he was one of the first to perceive the importance of economic analysis to sound antitrust enforcement policy, and he brought that then-innovative insight to the Division. He continually strove to infuse antitrust enforcement with the best of contemporary economic thought. In that respect, each of his successors as AAG has followed the trail that he blazed.

We can perhaps measure the importance of his legacy by noting how far along that trail we have traveled since he first started us on the journey. From his years as AAG, when he hired one young economist to serve as his special assistant, we now have come to the point of having a nationally known economist as Deputy Assistant Attorney General for Economic Analysis. That Deputy oversees three sections of the finest microeconomists in the country, a cadre of fifty-five professionals who are involved at all stages of litigation and policymaking. As the Division confronts the challenge of intelligently enforcing the antitrust laws in the complex economy of the 21st Century, it is due in large part to the insight and foresight of Don Turner that we are up to that challenge.

The title of this conference is "Antitrust Policy in the 90s." Although strictly speaking what we are doing these days in the Division is policy in the 90s, I would suggest that what we all need to think about -- and what we in the

Antitrust Division are focusing on -- is Antitrust Policy for the 21st Century. The new century is rushing toward us and the rate of change occurring all around us so staggers the imagination that we literally cannot describe it. The result is what I call metaphorical exhaustion -- we have a telecommunications revolution resulting in the construction of the information highway, which very quickly became the information superhighway, followed with little hesitation by countless spin-off metaphors -- road kill on the superhighway, the fast lane, the slow lane, the passing lane, the off ramp, toll booths. More quickly than these metaphors gain currency, they lose whatever descriptive power they may have. Polls show that, not surprisingly, most Americans have only a vague idea of what the information superhighway actually is.

Sometimes the metaphors get hopelessly confused and end up sounding positively frightening. One prominent newspaper, which I will not name, recently referred in an editorial to (and this is a direct quote) "a single wire [that] becomes a highway over which a flood of . . . services will flow into customers' homes." I guess that means that some of us may have to learn to dogpaddle in our living rooms. Before concluding the paragraph, the paper predicted that "a market now ruled by sometimes lazy monopolists would be turned into a competitive dogfight." Of course, a dogfight in the middle of a highway is dangerous for drivers and for dogs, even without the added problems of lazy rulers and floods.

I firmly believe that, amidst all of this change, dogfights and floods, the fundamental organizing principle of our economy remains sound: Free and open markets characterized by competition will stimulate innovation, promote prosperity and contribute to the international success of the U.S. economy and U.S. business. The central purpose of the antitrust laws, of course, is to promote that principle by protecting the competitive process. In this sense, vigorous, intelligent antitrust enforcement is as vital to the economic health of our nation in the 21st Century as it has been for the 20th Century.

There are those who suggest that antitrust enforcement is obsolete -- of no more relevance to the 21st Century economy than the rotary phone. Others go even further and suggest that antitrust enforcement will disadvantage American companies and will harm America's economic well-being. These suggestions are fundamentally wrong. As the role of innovation in the economy and the importance of international competitiveness grow, so does the necessity for intelligent antitrust enforcement. Such enforcement

promotes an environment in which competitors spur each other to faster innovation. Professor Michael Porter, in discussing his landmark study of international competitiveness, explained several years ago that "[a]ll we have learned about the innovation process suggests that a number of entities pursuing different avenues, watching each other to try to learn from the other's approach, is often the best structure. Diversity and multiple paths of innovation yield the most rapid progress." Intelligent antitrust enforcement in the 21st century will protect and promote competitive diversity, and the Antitrust Division and FTC will be here, on the job and on the beat.

To be sure, the dynamic economy implied by increasing globalization and accelerating technological change challenges antitrust enforcers to appreciate changing conditions in the marketplace. We must always be alert, for example, that we do not confuse protecting the competitive process with protecting a particular competitor. It is the nature of the competitive process that some competitors will fail; we cannot and should not try to prevent that outcome. What we must do -- what is critical to the nation's economic health -- is ensure that firms with market power do not distort the competitive process by imposing artificial restraints. What we strive for, in short, is fair competition on the merits -- a system that historically has benefited consumers by prodding competing firms to develop and deliver goods and services of the highest quality, at the lowest cost and has benefited American companies by preparing them to compete and succeed abroad.

As I have already suggested, the 21st Century economy will have at least two characteristics of particular concern to antitrust enforcement -- continuing globalization and the pervasive importance of intellectual property. In the past year, the Division has undertaken policy initiatives and enforcement action in both of these areas, which I would like briefly to discuss.

International Initiatives

As you know, one of my first steps as Assistant Attorney General was to seek and obtain approval from Congress to appoint the Division's first Deputy Assistant Attorney General for International Affairs. Establishing this position was critical to putting international concerns at the top of the Division's agenda. And I cannot imagine being more fortunate than to have Diane Wood as the first international deputy. Diane is the single person most responsible for the accomplishments that I am about to describe.

Last fall, we began to reexamine carefully the Guidelines on International Operations that the Division issued in 1988. We concluded that, substantively, those Guidelines no longer accurately reflected Division policy in several important respects. For example, the 1992 Joint DOJ-FTC Horizontal Merger Guidelines superseded the merger analysis in the 1988 Guidelines. Likewise, my rescission of the 1985 Vertical Restraints Guidelines cast doubt on some portions of the 1988 Guidelines. Developments in the case law -- most notably the Supreme Court's decision in Hartford Fire Insurance -- suggested the need for reconsideration of other portions of the 1988 Guidelines.

In drafting new guidelines, we decided to limit their scope to issues unique to international enforcement, such as comity and jurisdiction. Substantive enforcement policies -- such as those regarding mergers and intellectual property licensing -- are addressed, where appropriate, in separate guidelines or other policy statements. The fundamental approach to those substantive issues does not vary merely because a particular case has an international aspect to it.

On October 19, after months of hard work by a task force of Division attorneys and economists and a series of meetings and exchanges with the FTC staff, we and the FTC published for public comment draft International Guidelines. Let me underscore that these Guidelines represent the views of both the Department of Justice and the FTC. Because our two agencies have concurrent jurisdiction in most areas of international antitrust enforcement, the joint nature of these Guidelines substantially enhances their utility to foreign enforcement agencies, the bar and businesses. The joint publication of the Guidelines says clearly that in international antitrust, the United States antitrust authorities speak with one voice.

The draft Guidelines have as their foundation two principles. First, the Department and the FTC will protect consumers by vigorously enforcing the antitrust laws to the full extent of the jurisdiction conferred by Congress, while remaining sensitive to the sovereignty concerns and the legal and economic policies of foreign governments. Any other approach would amount to providing a safe haven overseas for companies imposing restraints that hurt American consumers or impede American exports. Second, we must develop strong, cooperative enforcement relationships with foreign antitrust enforcement officials, in order to improve our mutual ability to enforce the

competition policies of our respective nations. The experience of the past year has demonstrated the importance of such cooperation. Cooperation between countries -- each enforcing the law in their respective jurisdictions -- enhances the efficiency of our efforts, ensures for each nation the most effective enforcement possible and promotes for consumers in the global economy a freer market in goods and services.

Several recent cases illustrate the importance of cooperation with other countries' enforcement agencies. For example, we worked closely with Directorate General IV -- DG-IV -- of the European Commission in negotiating a settlement and consent decree in the Microsoft case. Without the cooperation between our two agencies -- which allowed a complete, consistent settlement of the charges against Microsoft -- the outcome would not have been as quick and as efficient as it was. Our cooperation in sharing materials, however, was possible only because Microsoft itself requested a cooperative procedure and waived its rights to confidentiality under both U.S. and European law. The result of that cooperation was an undertaking by Microsoft with DG-IV and a proposed consent decree with the Department that will ensure a level playing field to companies that seek to compete with Microsoft in the market for personal computer operating systems.

In two other cases, cooperation with Canadian authorities pursuant to a mutual legal assistance treaty between our countries was essential to the Department's success in breaking up criminal price-fixing conspiracies that were hurting consumers in both countries. In July, the Department announced that it and the Canadian Bureau of Competition Policy -- after two years of cooperative investigation -- had uncovered an international cartel that was inflating prices in the \$120 million thermal fax paper market. Each agency prosecuted the cartel under its respective law, with the U.S. prosecution resulting in guilty pleas and some \$8 million in fines. Similarly, the assistance of Canadian authorities was instrumental in gathering the evidence used to charge three corporations and seven executives with conspiring to drive up the price of plastic dinnerware products, a \$100 million market. To date, two corporate defendants have agreed to pay a total of \$8.36 million in fines, and we expect additional fines and possible jail sentences as the prosecution continues.

Without the invaluable cooperation of the Canadian Bureau of Competition Policy and other Canadian agencies, the Department would not have been

able to prosecute these illegal conspiracies effectively, because crucial evidence was located in Canada and beyond our investigative reach. Similarly, in the fax paper case, important and confidential evidence in the hands of the Department was vital to the Canadians' case. As these examples demonstrate, international cooperation in antitrust enforcement is a win-win situation: By promoting each country's antitrust enforcement efforts, it benefits each country's consumers. International price-fixing conspiracies hurt American consumers in the same way as domestic conspiracies, but they obviously pose special challenges to enforcement authorities. Often, only cooperation with authorities in other countries makes prosecution in the United States possible, and the absence of such cooperation may effectively offer a license to pick the pockets of American consumers.

Our determination not to allow these pickpockets to enjoy a safe haven outside our borders made it a priority for us to seek legislative authority to facilitate the exchange of critical information with foreign antitrust enforcement agencies. We therefore worked with members of Congress in both parties, the bar and the business community to draft the International Antitrust Enforcement Assistance Act of 1994 -- the International Cooperation Act. Attorney General Reno enthusiastically supported our proposal; it also received the unqualified support of a bipartisan coalition of lawmakers. In the House, the legislation was sponsored by Congressman Brooks, Chairman of the Judiciary Committee, and Congressman Fish, the Committee's ranking Republican. In the Senate, the bill was sponsored by Senators Metzenbaum and Thurmond, with co-sponsorship by Senators Biden, Kennedy, Leahy, Simon, Hatch, Simpson, Grassley and Specter. In the legal community, the bill enjoyed the strong and active support of former Assistant Attorney General Jim Rill, former Acting Assistant Attorney General Charles James, as well as Alan Silberman and many others in the Antitrust and International Law Sections. A number of major United States corporations -- including American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX, Viacom and Xerox -- also supported the legislation. In large part due to this broad-based and completely bipartisan support, Congress passed the bill unanimously -- 435 to 0 in the House and 100 to 0 in the Senate -- ten weeks after it was first introduced, possibly a record for antitrust legislation. President Clinton signed it into law two weeks ago.

The Act is modelled after legislation enacted in 1988 and 1990 to help the

Securities and Exchange Commission obtain evidence abroad. It authorizes the Department and the FTC to negotiate with foreign antitrust agencies written reciprocal assistance agreements, which will be subject to public notice and comment in the United States. These agreements will enable the Department and the FTC to obtain evidence already in the files of foreign antitrust enforcement agencies or in the possession of persons in their territory by permitting the U.S. agencies to offer reciprocal assistance to foreign antitrust investigators.

Specifically, the Act permits the Department and the FTC to exchange otherwise confidential investigative information with foreign antitrust authorities, provided that the exchange is in the public interest of the United States and that we have determined that the foreign agency will provide appropriate confidentiality requirements and other specified safeguards. In addition, the Act authorizes the Department and the FTC to obtain information from firms or individuals in the U.S. on behalf of foreign antitrust authorities, either by using their civil investigative powers or, in the case of the DOJ, by going to court and seeking an order compelling the production of evidence.

We have taken large strides in the past decade toward more antitrust cooperation with other countries through a series of bilateral agreements. But it is evident that greater convergence in antitrust enforcement requires continued progress in the areas of mutual assistance and procedural reciprocity, progress that the International Cooperation Act will promote. To that end, we already have begun to work actively with a number of countries on negotiating mutual assistance agreements.

Intellectual Property Initiatives

A second major area that will define antitrust policy in the 21st Century is the interaction between antitrust enforcement and intellectual property rights. No one can gainsay the pervasive importance of intellectual property to the 21st Century economy. Whether one looks to the things we buy or the way we pay our bills, to where we work or how we play, to how we travel or how we communicate across the globe without leaving our desks -- "high technology" is transforming our lives. And the building blocks of this technology are intellectual property.

When I first took office as Assistant Attorney General, many experienced practitioners -- many of you in this room, in fact -- suggested that the

relationship between the antitrust laws and the intellectual property laws is so important to our national well-being that the Antitrust Division should provide the business community with clearer guidance on that relationship and should devote more of its resources to intellectual property issues. After careful consideration, I agreed that our economic future demanded as much. To develop intelligent antitrust policy in the intellectual property area -- that is, a policy that protects the competitive process and provides guidance and certainty to the business community -- we formed a Division Task Force chaired by Deputy Assistant Attorney General Rich Gilbert. As you no doubt know, the fruits of the Task Force's labor were draft Guidelines for the Acquisition and Licensing of Intellectual Property, which we published for public comment in August. We are now reviewing the comments that we received and expect to publish the Guidelines in final form before too long.

I can safely say, however, that the foundation of those Guidelines will not change, and that foundation is that antitrust enforcement and the protection of intellectual property rights are complementary means to a common end -- creating an environment that promotes the innovation necessary for economic success in an era characterized by rapid technological change. Intellectual property rights contribute to such an environment by assuring innovators that they can appropriate the value of their innovations once those innovations are introduced. Intellectual property protection adds, in Lincoln's words, "the fuel of interest to the fire of genius."

Similarly, effective antitrust enforcement assures the innovator that he will not be unfairly excluded from the market. By prohibiting private restraints that impede entry or mute rivalry, antitrust enforcement creates the conditions in which entrepreneurial initiative can flourish and in which opportunities for bringing innovations to market can continue to be exploited by the multitude of private actors in this most free of market economies. The task of antitrust enforcement is not to pick winners, but to make sure that private restraints do not narrow the potential sources of innovation. By promoting an economic climate that rewards efficient sources of innovation, be they small or large, antitrust enforcement preserves the fundamental values of freedom and opportunity that are and always have been central to American economic success.

The Division long ago, and correctly, left behind the idea that antitrust and intellectual property protection are of necessity at loggerheads with each

other. Both policies seek to promote the well-being of consumers by spurring efficiency, innovation and investment. I believe that our Intellectual Property Guidelines, when released in final form, will provide increased understanding and clarity as to how the two policies interrelate in achieving that common goal.

I mentioned earlier our view that commercial rivalry is the best spur to innovation. That is not to denigrate the role of research and development joint ventures in facilitating both innovation and the transference of innovation to the marketplace. We certainly recognize that often there are efficiencies that can best -- or only -- be exploited by research joint ventures. Moreover, in many cases the rivalry that spurs innovation may be between individual firms and joint ventures or, where significant economies of scale and risk exist, between different joint ventures. The National Cooperative Research and Production Act reflects a congressional judgment that consumer welfare is enhanced by dispelling unwarranted antitrust concerns about joint R&D activities. In fact, we have never instituted antitrust enforcement action against a joint venture filed under the NCRPA. Moreover, we continue to review notification filings under the NCRPA in a manner that recognizes the potential competitive benefits of joint R&D activities. In that respect, our policies are the same as those of our predecessors.

Quite simply, nothing in the Intellectual Property Guidelines or our enthusiasm for rivalry and the competitive process as the best spurs for innovation should be taken as evidence of a "new hostility" toward R&D joint ventures. In every joint venture case, as in intellectual property licensing in general, our focus is on the competitive effects of the particular arrangement. The vast majority of both joint R&D ventures and intellectual property licensing arrangements are procompetitive and do not present antitrust concerns. In order to ensure that our evaluation of intellectual property licensing arrangements is appropriately sophisticated, we have added five lawyers with a background in intellectual property and intend to hire more.

The Interaction of Globalization and Technological Change

The significance of globalization and intellectual property to antitrust enforcement is already evident. I mentioned the Microsoft case, an intellectual property licensing case the resolution of which was speeded by close cooperation between the Division and DG-IV. Similarly, the Division

received invaluable assistance from foreign authorities in investigating two mergers with significant technological aspects. We worked with the U.K. antitrust authorities on the investigation that concluded in a complaint and consent decree arising out of the partial acquisition and joint venture between British Telecommunications, Plc., and MCI Communications Corp. The terms of the consent decree resolved the Division's concerns that the transaction could harm competition in the market for telecommunications services between the U.S. and the U.K. and in the market for global telecommunications services generally.

We also received invaluable assistance from our sister enforcement agency in Germany in our investigation of and ultimate challenge to the proposed acquisition of General Motor's Allison Transmission Division by ZF Friedrichshafen, a German firm. The merger was investigated by the German Cartel Office as well. This merger presented the first in which the Division alleged concerns over the effects of the proposed transaction on competition in an innovation market and signals the Division's commitment to protect competition in research and development, which is vitally important in the global, high-tech marketplace.

A major enforcement action involving intellectual property that had international implications was the case against Pilkington. We challenged that British company's use of unreasonably restrictive intellectual property licensing arrangements to prevent U.S. companies from competing internationally for the construction of glass manufacturing plants. The proposed consent decree will prohibit Pilkington from improperly using its intellectual property rights and would allow U.S. firms to compete for over 50 glass plants that are expected to be built around the world. We estimate that this could result in an increase in U.S. export revenues of anywhere from \$150 million to \$1.25 billion over the next six years.

These enforcement actions represent the type of cases that more and more will occupy the enforcement attention of the Division and of the FTC. Antitrust policy for the 21st Century must cope with the challenges that accompany a global, high-tech economy. The new International Guidelines, the International Cooperation Act, the new Intellectual Property Guidelines, and our experience in investigating and successfully resolving these important cases, are important first steps toward meeting those challenges. I am immensely proud of these steps. I have tremendous faith that when the 21st

Century officially arrives, just a little over five years from now, it will be nothing new to the professional women and men of the Antitrust Division.



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 2 1994

Memorandum To: Janet Reno, Attorney General
Jamie S. Gorelick, Deputy Attorney General
William Bryson, Acting Associate Attorney General

FROM: Anne K. Bingaman, Assistant Attorney General, Antitrust Division
Robert E. Litan, Deputy Assistant Attorney General

AMB/REL

REL

SUBJECT: Antitrust Division Investigation Of The
ABA's Law School Accreditation Activities

We opened an investigation of the law school accreditation practices of the ABA's Section of Legal Education and Admissions to the Bar in February. This followed a complaint to us by the Massachusetts School of Law (MSL) which was denied accreditation last year. MSL has been offering for the past several years an innovative and less expensive legal education for students from modest backgrounds who have wanted to launch a second career, helping ordinary people with ordinary legal problems. Among other things, MSL is able to do this by using practitioners as teachers, computer technology in lieu of libraries, and so forth -- all at a price to students well below the \$60,000 or more that students have to spend at many other schools.

The ABA has nevertheless denied accreditation to MSL for not meeting a series of its requirements relating to faculty salaries and devotion to research (rather than practice), faculty-student ratios, library facilities, and the like. As we note below, ABA accreditation is necessary in most states if graduates from the school are to be eligible to join the bar. MSL has responded to the ABA's denial of accreditation by suing the ABA and others, alleging antitrust violations. We have attached a May 18 Wall Street Journal article that is very sympathetic with MSL.

Following the complaint, the staff -- led by Bruce Pearson (who was the lead trial attorney in the "MIT" or "colleges" antitrust litigation) -- interviewed about a dozen law school deans and university presidents. These interviews substantially confirmed some of MSL's allegations that certain of the ABA's accreditation practices had the effect of fixing faculty and administrator salaries and raising law school costs unnecessarily. The National Law Journal had earlier published a lengthy and generally critical article about the Section of Legal Education and its consultant, James P. White.

In addition, we recently received a facsimile of an April 28 letter from 14 law school deans that is extremely critical of the ABA accreditation practices, complaining that they are an obstacle to competition among law schools, restrain innovation, and add unnecessary costs. We have attached a copy of the fax (we apologize for its relatively poor quality) and press articles describing this unusual letter. We suspect that the staff's interviews with certain of the deans who wrote this letter prompted the letter itself.

The staff requested authorization to serve the ABA with a Civil Investigative Demand and it was approved and issued on May 19. Last week, we met with the staff and suggested that it approach the ABA to achieve an early resolution of this investigation, possibly through a consent decree. The staff relayed this to the ABA's counsel. Yesterday, during negotiations over compliance with the Civil Investigative Demand, the ABA's counsel stated that it had "tremendous reservations" regarding a consent decree but would discuss with the client "memorializing" a public agreement to eliminate or modify some of the ABA's standards. The ABA is already in the process of altering the accreditation standard that appears to fix salaries.

In the wake of this most recent discussion with the ABA's counsel, we have not yet decided whether we want to ask the ABA to come in for a meeting with the two of us. Since you have expressed an interest in this matter, we would like to meet with all three of you (or a lesser combination if you so decide) to discuss this matter and what next steps should be taken.

A more detailed discussion of the background of this investigation follows.

Background

The ABA has accredited law schools for many years and its current power is derived from two sources. In 42 states, a candidate for the bar must have graduated from an ABA-accredited school. The ABA is also the only law school accrediting agency recognized by the Department of Education. Consequently, federally-subsidized student aid can only be awarded to students attending ABA-approved law schools.

The ABA accrediting program is within the jurisdiction of its Section of Legal Education and Admissions to the Bar. The Section's Consultant, James P. White, has administered the ABA's accrediting program since 1973. White is associated with the Indiana University Law School. We are investigating whether, in some ways, the ABA has operated as a guild for full-time law school faculty, administrators, and professional library staff. We are looking at the following ABA practices:

1. Salaries - The ABA requires law schools to compensate faculty at a level comparable with that paid faculty of peer schools. Salaries below the national median may not comply with the standard. Salaries that rank at the bottom of

national surveys are presumed to be non-compliant. These rules apply even where salary levels are statutorily imposed.

The ABA conducts annual surveys of faculty, administrator, and librarian salaries. ABA evaluators have used the surveys to pressure universities to raise salaries during the accreditation process. The ABA apparently requires that clinical teaching staff be paid at the same levels as other faculty, even though clinical teachers are readily available at different salary levels.

2. Student:faculty ratios - The ABA requires law schools to maintain student:faculty ratios under 30:1. The ABA refuses to include part-time faculty, administrators who also teach, adjuncts, emeritus professors who teach, and visiting professors in calculating student:faculty ratios. When calculating the student:faculty ratios, the ABA counts three part-time students as the equivalent of two full-time students. It does not make similar adjustments for faculty. The accreditation process does not appear to take into account actual class size or actual student-faculty contact. For example, the ABA found Massachusetts School of Law's student:faculty ratio to be 105:1, even though no single class has as many as 105 students.
3. Teaching loads, sabbaticals, research requirements - The ABA has mandated an eight-hour per term maximum teaching load and mandates time for research and sabbaticals. While many law schools, particularly the most prestigious ones, now have even lighter teaching loads than the ABA requirement, average teaching loads have been reduced greatly since 1973.
4. The ABA requires that first-year courses be taught only by "full-time" faculty. This seems arbitrary.
5. The ABA imposes library staffing, salary, and hard-bound volume requirements that fail to consider the development of electronic legal research.
6. The ABA prohibits law schools from offering bar review courses for credit, whether or not the law school's credit requirements exceed ABA minimum requirements. Paul Carrington, the former law school dean at Duke, has written that this standard is "indefensible" because it requires substantial spending by law school graduates to attend bar review courses taught by "moonlighting law faculty who are generously compensated."
7. The ABA prohibits law schools from giving credit for courses taken at law schools not approved by the ABA.

8. The ABA also requires law schools to require applicants to take the LSAT or some suitable other aptitude test. All ABA-approved law schools require the LSAT. This mandate, however, seems to be consistent with the DOE's requirement that accrediting agencies must require schools to use some type of aptitude test that will show whether or not the student is capable of successfully completing the school's program.

The ABA has indicated it will delete the faculty salary standard. Perhaps more troubling is the ABA's collection and dissemination of faculty salary data. We already have some evidence in the short time we have been investigating this matter suggesting that the ABA's use of salary data has increased faculty salaries.

The ABA's standards on student:faculty ratios, teaching loads, sabbaticals, and research requirements appear to be "featherbedding". Each standard, to some degree, results in the hiring of more full-time faculty (at artificially high salaries) than might be hired in a free market. Ultimately, these increased costs are passed on to the law student- consumer. The ABA claims that these standards, particularly the student:faculty standard, are directly related to the quality of a legal education and are, therefore, legitimate subjects for accreditation.

It is likely that if we brought suit the ABA would also defend itself by claiming that its requirements are "state action", and thereby immune from antitrust challenge. Under applicable case law, the state action defense requires clear evidence that states have acted in a manner to displace competition with regulation and are "actively supervising" the regulators (or, in this case, the accrediting body, the ABA). In fact, however, in this case so far we have found little or no evidence that the judicial branches in the states are engaged in the degree of active supervision of the ABA that would satisfy the second part of this test. To the contrary, the ABA appears to be acting without any supervision. We have a document request outstanding to the ABA that should clarify the facts on this question.

Attachments

The Little Law School That Could

ANDOVER, Mass.—The grand poohbahs of the American Bar Association can be forgiven for thinking that they're under siege. They are. A group of 14 prominent law school deans—including the chiefs of Harvard and Stanford—last month fired a broadside at the ABA's process for accrediting law schools, arguing that it is "overly intrusive, inflexible, [and] concerned with details not relevant to school quality (perhaps even at odds with maintaining quality)."

Rule of Law

By Max Boot

That only adds momentum to the efforts of the upstart Massachusetts School of Law to topple the whole edifice of American legal education built by the ABA since the 1920s.

Housed in an office park here, a half hour north of Boston, six-year-old MSL is run more like a business than a traditional law school. Its employees, full-time professors included, are expected to put in full days and work year-round. The starting salary for professors—\$37,000—is low by law school standards, but professors can earn rapid increases based on merit, not seniority. By squeezing productivity and controlling costs, MSL has managed to turn from a first-year deficit of \$18,000 into an estimated \$1.4 million operating surplus this year. All of the money goes into an endowment fund for the nonprofit school.

The differences don't stop there. The majority of MSL's faculty are practicing lawyers light on traditional academic credentials but heavy on real-world experience. Most of the 800 students aren't young hotshots headed for "The Firm" but older, working-class folks who want to hang up a shingle on Main Street. A group of a dozen students I met included a nun, a former Air Force officer and a probation officer.

With their untraditional backgrounds, many of the students were rejected by other law schools. They found it not only possible to get admitted to MSL—which doesn't use such traditional barometers as the LSAT—but also easier to afford: Tuition is \$9,000 a year, 60% of the median for private law schools in the state.

The curriculum is also a far cry from Harvard. There are no "law and feminism" or "critical legal studies" classes here. Instead, students learn such practical skills as drawing up a will, negotiating a contract and writing a brief. The courses are rigorous and a quarter of the students drop out.

MSL has won a thumbs-up from some prominent Bay State lawyers and judges, including a former state attorney general. The bottom line, of course, is how many students pass the bar exam. According to the Massachusetts Lawyers Weekly, MSL graduates had a 65% pass rate on the state bar exam last year. That's slightly lower than the average and way below Harvard's 95%. But it's pretty good for such a new school. The other unaccredited law school in the state, Southern New England, had a pass rate of just 38.2%.

Unfortunately, MSL students don't have the option of taking other states' bar exams—even that of neighboring New Hampshire. While MSL has been accredited by the state of Massachusetts, it hasn't received the ABA's seal of approval. And most states won't let students take the bar exam—let alone practice—unless they graduate from an ABA-accredited school.

MSL's reaction to the ABA rejection has been typically unorthodox. First, the law school sued the ABA, alleging that the bar association is a "cartel" in violation of the Sherman Act. Then MSL asked the Education Department to revoke the ABA's federal accreditation powers. Now the Justice Department has launched its own antitrust investigation.

All of the cases are in full swing, and

it's hard to know how they will turn out. But MSL has certainly made a strong case. Many of the ABA standards that MSL has violated don't sound like they have a whole lot to do with upholding standards of quality. James Halverson, a member of the ABA Board of Governors, disputes the charge but otherwise refuses to comment on "pending litigation."

One such questionable standard is that law schools may not offer for-credit bar re-

Six-year-old Massachusetts School of Law is run more like a business than a traditional law school It hasn't received the ABA's seal of approval.

view courses; another is that they must use the LSAT as an entrance test. MSL argues that both guidelines amount to a subsidy, worth millions of dollars a year, to the companies that run the for-profit bar review courses and the nonprofit LSAT. Lawrence Velvel, dean of MSL, says it's not a coincidence that many people involved in both enterprises have sat on the ABA accreditation committee. The ABA denies a conflict.

MSL also objects to ABA standards on faculty. The ABA requires full-time faculty at accredited law schools to teach no more than an eight to 10 hours a week, and no more than nine months a year. They must also be granted sabbaticals with pay. The faculty-student ratio must be less than 30 to 1. And faculty salaries must be "comparable" with those at neighboring law schools.

Mr. Velvel, a rumpled teddy bear of a man who founded MSL, says the basic problem is that the ABA is trying to impose a "research model" on all universities. He

thinks this is a terrible way to go. "In most law schools you have professors who know nothing about practice and who are interested solely in legal writing," he says, sitting in his cluttered office.

Prestigious institutions like Harvard have justified this approach by saying, in essence, that they're teaching "larval Blackstones" (to borrow H.L. Mencken's phrase) how to "think" like lawyers. But Mr. Velvel says this is an "outrageous" argument. "It assumes that people who learn practical skills don't learn to think like lawyers. That's wrong."

Right or wrong, Mr. Velvel has a point. It's hard to see why MSL should not be given a chance to try its approach. The Harvard or Yale model isn't for everyone. There should be balance in the profession. The ABA's accreditation committee doesn't see it this way, however. According to critics such as those at MSL, the bar association forces all law schools to churn out exactly the kind of lawyers people love to hate—jargon-spewing, brief-writing automatons divorced from the human face of the law.

This imbalance has produced grumblings even within the profession. Even before the critical letter from the 14 law school deans, the ABA's rank and file had endorsed a resolution at their winter meeting calling on law schools to put more emphasis on "skills" training.

That doesn't help MSL directly, however. At the same meeting, the members refused to overturn the decision by the Section on Legal Education and Admissions not to accredit the law school. That was hardly surprising, since the rank and file are traditionally reluctant to overrule any of their committees. But given the antitrust suit and the federal investigation, the vote may be the last hurrah for the dinosaurs of the accreditation section.

Mr. Boot is an assistant features editor on the Journal's editorial page.

Idea?

dustry was seeking products so as to be irradiated. We wonder? Furthermore, ns of international nned the sale of or ated foods.

industry become he necessity for s that truly serve mes even greater. ✓ this role depend ch as individuals eir operating extions were forced e would like, the eed suffer.

B. MOUNTCASTLE

* "It [irradiation] and insect pests, life and spares f food-borne dis- hing of this sort ent E. coli out- rants in Wash- at least[?] one d the food been ning would not f it had, one in- ional food irra- section is inad- will prevail in

messing with ny food alone. n bed with the ' about Food & credit irradiat- anyone. 'routinely buy for a month' "chicken that

smacks of in- y, big money. shelf life, but ay. I want no ant my super-

Boston University

School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215

Office of the Dean
617/552-3111
Fax: 617/552-7400



April 28, 1994

Dean Michael H. Hoeflich
Syracuse University
College of Law
Ernest I. White Hall
Syracuse, New York 13244

Dear Dean Hoeflich:

We—a group of law school deans—want to enlist your support in what we believe is an important endeavor: changing the American Bar Association's accreditation process. We find the current process overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly in administrative time as well as actual dollar costs to schools. At the close of this letter, we request your attendance at two meetings next winter to discuss these matters and possibly to form an organization to speak to other issues of concern to deans. For those of you who do not start with concerns about the ABA accreditation process, we first explain the basis for our interest in changing it.

Law schools, no less than law firms, face a serious challenge. Over the past two decades, the number of lawyers in America more than doubled. Businesses are pressuring lawyers to cut costs—and, with that, potential jobs for law graduates—while the already enlarged body of lawyers competes more aggressively for business. Many of our graduates find law practice less remunerative than just a few years ago. The college age population, from which our students come, is declining. Even if prospects for a satisfying career in law were strong, we would see a decline in applicants to law school.

That, inevitably, will increase competition among schools and difficulties for schools. The competition, though greater, will not be new. We compete with each other for students. We compete with other enterprises for financial support. It is this competition that keeps American law schools vital and responsive to the interests of students, employers, and the larger communities we serve.

The result of this competition is not a single model of legal education followed by each school in exact replication of others. Rather, we each pursue a vision of law and of legal education that we believe is right for our particular institution and for the type of legal or other employment our students are likely to pursue. For some of us, that vision is of an education that is the counterpart to a liberal arts education, preparing students for law practice by educating them broadly to understand law's predication, its operation, its evolution, its essential meaning. For others of us, that vision places greater emphasis on more focused professional training, concentrating more on giving students basic skills needed to function as practicing lawyers. Or law school may be self-consciously part of a university committed to scholarly inquiry, where training is more closely linked to academic pursuits than to vocational prospects and research published by the faculty has importance apart from its relation to students' education or immediate needs of the bar.

To some extent, these descriptions exaggerate our differences, as all schools are interested in providing preparation for a variety of careers our graduates may undertake. But, while the differences may not be so sharp, there are many visions and many variants. We differ with one another, sometimes consciously, sometimes not. Our differences provide choices to prospective students and enrich the profession and the academic community. Different responses to the changes in the profession are to be expected and applauded. Even less than in periods of stability, in times of change there is little basis for belief that any given prescription will be right for all. It is perhaps peculiarly the academic lawyers' responsibility to preserve and protect these differences and this diversity.

It is this sense of responsibility that gives rise to our concern that the accreditation process for law schools is heading in the wrong direction. Our varied visions of legal education focus on the results of the educational process, on the output of legal education—about the sort of graduates we produce, about the sort of lives they will lead, about the consequences of our writing and teaching. In contrast, the ABA's accreditation process increasingly concentrates on inputs—how many seats are there in the library, for example—and often on trivial inputs or inputs only haphazardly connected to the quality of our outputs. Admittedly, some inputs may correlate with good education and outputs seldom are easily measured. But the current process is excessively absorbed with inputs that are not directly connected to educational quality.

Moreover, the accreditation process increasingly manifests a one-size-fits-all attitude, with similar inputs required of all schools. Accreditation is not a Good Housekeeping seal of quality, assuring at least minimally accepted educational quality. Instead, it has become in substantial measure a barrier to difference—no law school can decide to concentrate resources on electronic forms of legal research instead of hard-copy; no law school can give course credit for certain activities; no law school can eschew expensive clinical programs; no law school can rely primarily on practitioners for its instructional faculty. Even as the profession becomes more diverse in many ways, diversity among law schools is strongly discouraged by the accreditation process.

The basic problem with accreditation is substantive: the ABA's Standards for law schools and the interpretations of those Standards are increasing in number, complexity, and intrusiveness. The ABA House of Delegates' recent adoption of a resolution recommending law schools' implementation of the MacCrate Report provides yet another basis for pressing all law schools to take steps that may be well worthwhile for some schools but far from the best use of scarce resources for others.

But the substance of underlying rules is not the only problem. The cost of this process to law schools has climbed as the attractiveness of the process has declined. We face a formidable set of explicit charges—due to the Section on Legal Education, fees so that proposals to change our academic programs can be considered by the Section's Consultant and Committee, fees of bringing teams of investigators to our schools for site evaluations and to send them overseas to check our foreign programs. We also pay a less visible, but probably larger, cost in the substantial staff time devoted to filling out ABA questionnaires, preparing mandated self-studies, and responding to the inevitable queries about the details of our programs, our budgets, our facilities.

Most problematic are the results of the process. Schools are not evaluated for conformity to any of a number of alternative models of acceptable legal education. And schools with unquestionably strong

educational programs are not quickly given the ABA's seal of approval while schools at the margin are given clear guidance on what must be done to step over the quality threshold. For virtually all law schools, the accreditation process drags on endlessly, under ABA requirements to file reports periodically explaining any departure from the pattern that has been prescribed for all schools—why, for instance, the clinical faculty are treated differently than the research faculty in some respect, or what plans exist for increasing square footage in the library, or how the "right" composition of the faculty will be achieved.

As individuals, we have found ourselves increasingly discomfited by this process. But there are strong pressures for each of us, in addressing issues relating to our own school's accreditation, to take the path of least resistance, to accommodate rather than confront the problems of this process. The costs of this approach continue to rise, with new Standards and Interpretations being proposed regularly and administrative fees rising, at the same time as many schools face serious funding constraints.

It is time for us to focus on the accreditation process as a group. We ask you to attend a meeting of deans in conjunction with the next meeting of the Association of American Law Schools (January 1995 in New Orleans) to discuss what further action we should take. One possibility is the formation of an organization that can give voice to the concerns of law school deans on issues for which no one else in legal education has both real interest and responsibility. We also ask you to support a request that the deans be given a day-long block of time at the next mid-winter meeting of the ABA (February 1995 in Miami) to discuss the accreditation process and its problems.

Please write or call any of the undersigned by June 1, 1994 to indicate your interest in these steps. We hope you will join with us to make the accreditation process more sensible, less intrusive, and less costly. And we look forward to seeing you in New Orleans and Miami.

Sincerely,

Ronald A. Cass
Boston University

David P. Currie
University of Chicago

Russell K. Osgood
Cornell University

Henry G. Manns
George Mason University

Robert Charles Clark
Harvard University

Harvey S. Perlman
University of Nebraska

Robert W. Bennett
Northwestern University

Collin S. Diver
University of Pennsylvania

Scott H. Bles
University of Southern California

Paul Brent
Stanford University

Mark G. Yudof
University of Texas

John I. Corboan
Vanderbilt University

Robert E. Scott
University of Virginia

Robert L. Mizer
Washington University

cc: Raymond Strickland, President, AALS
Ced Monk, Executive Director, AALS
Robert A. Stein, Chair, Section on Legal Education, ABA
James P. White, Consultant, Section on Legal Education, ABA

By Ken Myers

Citing Costs, 14 Deans Protest ABA's Accreditation Procedure

AFTER YEARS OF almost unchallenged authority, the ABA's Section of Legal Education and Admissions to the Bar, which is the arm of the ABA that is in charge of accrediting law schools, is on the verge of some major changes.

Two letters sent to the law school community in April, one by a group of deans from prominent law schools and the other by an ABA official, are calling for change in the way the ABA deals with law schools.

The first was signed by deans of 14 law schools, including Harvard Law School, Stanford Law School, the University of Chicago Law School, Northwestern University School of Law, Cornell Law School, the University of Virginia School of Law and the University of Texas School of Law, and was sent April 28 to deans of the 176 ABA-approved law schools and other legal education officials.

That letter asks the other deans for help changing the ABA's accreditation process, calling it "overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with school quality) and terribly costly in administrative time as well as actual dollar costs to schools."

The letter says that at a time when law schools face more competition and declining applicant pools, and thus should be finding ways to differentiate themselves, the ABA accreditation process forces all schools to be alike. And the cost of going through the process has become

steep, the deans say. The letter asks deans to attend a meeting at the next Association of American Law Schools convention in January in New Orleans, and another meeting at the ABA midwinter meeting the next month in Miami.

The signatories are Deans Robert C. Clark of Harvard, David P. Currie of Chicago, Robert W. Bennett of Northwestern, Paul Brest of Stanford, Robert E. Scott of Virginia, Mark G. Yudof of Texas, Russell K. Osgood of Cornell, Ronald A. Cass of Boston University School of Law, Henry G. Manne of George Mason University School of Law, Robert L. Misner of Willamette University College of Law, Harvey S. Perlman of the University of Nebraska College of Law, Scott H. Bice of the University of Southern California Law Center, John J. Costonis of Vanderbilt University School of Law and Colin S. Diver of the University of Pennsylvania Law School.

Six days before the letter went out, another also was sent to all 176 deans. It was signed by Robert A. Stein, chairman of the ABA's Section of Legal Education and dean at the University of Minnesota Law School.

In it, Dean Stein announced the formation of a special ABA committee to study the accreditation process. That committee, which will be comprised of deans, state high court judges, members of the ABA House of Delegates and one public member, will be appointed this summer.

The two letters constitute the latest volleys in an ongoing debate on the future of legal education. The deans' letter echoes many of the charges leveled at

the ABA by Massachusetts School of Law, which last year filed an antitrust suit against the nationwide bar group. ABA officials and deans deny that their letters have anything to do with the MSL suit, but MSL nonetheless sent copies of the deans' letter to members of the news media along with a press release touting the deans' displeasure with the ABA.

Several of the deans who signed the letter say it was born of frustration.

"It grew out of conversations deans have been having for several years," says BU's Dean Cass. "All of us are upset about the way the ABA accreditation process goes."

As an example, Dean Cass says that for a new program to win approval, a school must pay the ABA \$6,000 plus the cost of evaluation. When BU wanted to expand its study abroad program to three new locations, it cost \$18,000 to apply, plus the cost of sending site evaluators overseas.

Dean Cass thinks that is too high, given that each program would involve only one to five students.

"I think an awful lot of time, energy and money is spent spinning wheels to no particular effect in the accreditation process," says Northwestern's Dean Bennett, who gives the site evaluation as an example. Every seven years, each school undergoes an on-site evaluation by a team of five or six inspectors who are usually officials from other law schools. They ask for arcane and often irrelevant information that the school's staff has to spend time digging up or that the ABA already



Reform: Dean Ronald A. Cass says the goal is to change an unwieldy process.

has in another form, he says.

The goal of getting deans together is not to eliminate the ABA from the accreditation process, Dean Cass says, but merely to reform what has become an unwieldy process. He says that since sending the letter, he has heard from about 40 other deans, all of whom have expressed support for changing the process.

James P. White, the ABA's consultant on legal education, dismisses the deans' complaint that schools are forced to be all alike.

"If you tell me that Harvard, City University of New York [School of Law at Queens College] and George Mason are the same schools, then I will sell you the Brooklyn Bridge," Mr. White says.

He notes that the Standards Review Committee of the Section of Legal Education is just completing a thorough look at accreditation standards and will recommend some changes. He says, however, that regulations just promulgated by the U.S. Department of Education, which grants the ABA the authority to accredit schools, will require even more of the type of detailed information that the deans complain about, especially concerning admissions and placement.

Mr. White also wishes more of the deans from major law schools would participate in the ABA's rule-making process. "I regret the fact that unlike some years ago, [there are] some deans of nationally recognized law schools I've never seen at a deans' meeting or an ABA meeting," he says. "So I'm not sure how much they know about the process." □

After 51 years on the job, the "public voice of Yeshiva University" is stepping down—but not before receiving a doctorate.

Sam Hartstein, director of public relations, will retire this month from the position he created and held for half a century. He was awarded an honorary degree last week.

"My greatest achievement is to have survived in the business this long," Mr. Hartstein says. Yeshiva officials believe his tenure at the university is the longest of any college public-relations director.

Mr. Hartstein graduated from Yeshiva when it was a boys' high school. He went on to earn his undergraduate degree from Yeshiva College. He watched the college's transformation into a university.

In awarding the degree, Norman Lamm, Yeshiva's president, called him the public voice of the university. Mr. Lamm said Mr. Hartstein had "contributed immeasurably to the reputation of Yeshiva as the university of the Jewish people in America."

Yeshiva's reputation for providing information to the media is another matter. Over the years, it has staunchly refused to provide certain details about the president's salary or about lawsuits against the university.

Mr. Hartstein makes no apologies. He says public relations is no longer just a one-man job; it involves layers of bureaucracy. He also thinks the news media are too nosy about private matters. "Ask Bill Clinton," he adds.

Vassar College, embarrassed after a federal judge ruled it had discriminated against a female biologist because she was married and a mother, has vowed to appeal.

U. S. District Court Judge Constance Baker Motley last month found that Vassar had been guilty of age and sex discrimination against Cynthia J. Fisher. She sued after being denied tenure in 1985.

Vassar was a women's college until 1969, when it began admitting men. In a statement, Frances D. Ferguson, president of Vassar, said: "The Vassar community has reacted with great astonishment and distress to Judge Motley's decision, for it paints a picture of the College that we believe to be profoundly distorted and inaccurate."

The president's statement also said the ruling represented a "major departure" from the historic reluctance of courts to intervene in tenure cases. "To the best of our knowledge," she said, "no judge has ever made such definitive pronouncements on either a plaintiff's qualifications for tenure or the worthiness of other members of a plaintiff's department for promotion."

Judge Motley found that Ms. Fisher's scholarship record was far superior to that of three men in the department who received tenure at about the same time as her application.

Rebellion Brews in Tight-Knit World of Law Accreditation

14 law-school deans demand changes in American Bar Association standards

By Courtney Leatherman

LAW-SCHOOL DEANS have grumbled for years about the accrediting standards set by the American Bar Association. But until a little law school in Massachusetts mounted a major campaign against the ABA, most deans never translated that muttering into bold action.

This spring they did. The deans of 14 law schools sent a letter to their counterparts at the other 162 ABA-accredited institutions criticizing the standards as "overly intrusive, inflexible, and concerned with details not relevant to school quality." The letter called for meetings in January and February to discuss changing the accreditation rules. Signers ranged from the deans at Boston, Harvard, and Stanford Universities to the Universities of Nebraska, Texas, and Virginia.

'SIGNIFICANT STIMULUS'

The letter, they said, was not motivated by the challenges raised by the Massachusetts School of Law at Andover. But all were familiar with the school's actions and many of their complaints about the ABA mirror those of the school.

"I wouldn't deny that the Massachusetts School of Law has been a significant stimulus for discussion," says Robert A. Stein, dean of the University of Minnesota's law school, who is serving a one-year term as president of the ABA's accrediting division. He sent out a letter on behalf of the accrediting division calling for a review of the standards even before his colleagues did.

The dean of the Massachusetts school clearly believes that his institution made the move that opened the floodgates of criticism against the ABA. "I think the question you have to ask is to what extent was there a dike there that someone had to breach before others were willing to screw up their courage and proceed ahead," says the dean, Lawrence R. Velvel.

In November the Massachusetts School of Law filed a \$90-million federal lawsuit against the bar association after it denied the school accreditation (*The Chronicle*, December 1). The suit claimed that the ABA's accrediting arm violated antitrust laws. The U. S. Justice Department, meanwhile, has begun an investigation. The

school has also asked the U. S. Education Department to withdraw its recognition of the ABA as an accreditor. Loss of that recognition would strip the bar association of some of its clout. The suit, the investigation, and the complaint are pending.

ELIGIBILITY FOR BAR EXAMS

ABA accreditation carries a lot of weight, because most states limit eligibility for the bar exam to graduates of ABA-approved schools.

In 1989, the ABA won a case involving a similar antitrust claim. The association has refused to comment on the current suit. Says Mr. Stein: "We don't believe the accreditation process violates the antitrust law, and we expect the court to reach that conclusion."

Some experts in antitrust law aren't so sure. Some believe the lawsuit and the Justice Department investigation could represent a challenge not only to the ABA, but to all accreditation.

"There's nothing unique about the challenge made against the ABA," says Thane



Robert A. Stein of the ABA: "We don't believe the process violates the antitrust law."



Lawrence R. Velvel believes his law school opened the floodgates of criticism against the ABA.

D. Scott, an antitrust lawyer. "It is to have been raised against any of the accrediting bodies." He represented the Massachusetts Institute of Technology in its antitrust battle with the Justice Department over the institute's collaboration with elite colleges on student aid.

There's also nothing unique about colleges' clashing with, or even suing, accreditors. Even the deans' complaints and accreditation are typical.

THERE WILL BE AN EXPLOSION

But these actions, taken together, clearly signal that all is not well with law-school accreditation. And the confluence of events is bringing pressure on the ABA to reconsider its accrediting standards.

"If the ABA continues on this path there will be an explosion," because law schools can't do what they're being asked to do, says John J. Costanzo, dean of Vanderbilt University's law school and a signer of the letter.

Specifically, the deans charge that the

Continued on Page A10

ly for the cash prize that goes to the honor, but will now double contribution. Each of the four winners will receive \$5,000.

entries for the 1994 awards are July 8. Information about the program may be obtained by writing to the council at 11 Dupont Circle, Suite 400, Washington 20036, or by calling (202) 328-5946. Winners will be announced in October.

—DENISE K. MAGNER

Arch College is counting on rules Darwin to help students down the walls separating science from the liberal arts.

Using a \$235,000 federal grant, college has begun a three-year project called "Darwin and Darwinism: Scientific Theory and Social Construction."

The idea is for the college's professors to explore how Darwin's findings have influenced various scientific disciplines. The faculty members will then incorporate Darwin's ideas into a wide range of undergraduate courses.

Students tend to put knowledge in compartments, separating what they learn in a biology course from what they learn in an English class, says Bert Hansen, who will lead a faculty seminar on the subject.

"We wanted to break that down," says Mr. Hansen, executive assistant to the president and a

EDUCATION

uses on how community colleges can meet the challenges of the "information age."

Gender Gap in Higher Education: *10th Yearbook of Education, 1994*, edited by Suzanne Stiver Lie, Lynda Malik, Duncan Harris (Kogan Page, available from Taylor & Francis, 1900 Frost Road, Suite 101, Bristol, Pa. 19007; 250 pages; \$65). Essays on the relative position of men and women as students, administrators, and faculty members in Australia, Botswana, Britain, Bulgaria, Canada, France, Germany, Greece, Iran, Netherlands, Norway, Pakistan, Poland, Russia, Turkey, the United States, and Uzbekistan.

Writing the Qualitative Dissertation: Understanding by Doing, by Judith M. Melville (Lawrence Erlbaum Associates, 365 Madison Avenue, Hillsdale, N.J. 07642; 112 pages; \$29.95 hardcover, \$14.95 paperback). A guide for doctoral students engaged in ethnographic and other qualitative research.

example, might look at how most

says Susan G. Forman, vice-presi-

be awarded annually.

—D.K.M.

Law Deans Attack Bar Association's Accrediting Standards

Continued From Page A14

ABA has become overly prescriptive, setting rigid standards that force all law schools to adhere to one model of legal education. They also complain that the standards amount to bean counting.

For example, the ABA requires schools to have a student-to-teacher ratio of less than 30 to 1. The deans call that unrealistic and unnecessary. They also have complained that the association's definition of full-time professors is too narrow. Administrators, for instance, can't be counted as part of the full-time faculty, even if they carry a full teaching load. The deans are outraged over proposed standards—which they deem too expensive—that would require more clinical training for students.

PLEADERS FOR PET PROJECTS?

The deans blame some of the rigidity of the standards on the hierarchy of the bar association, which allows practitioners—not educators—to set accrediting standards. Those standards are enforced by the ABA's accrediting arm, which includes educators and practicing lawyers. In theory, practitioners serve in accrediting groups because they keep abreast of the profession and can help define what students need to know. In practice, educators complain, they become special pleaders for pet projects.

James P. White, head of the ABA's accrediting arm, denies that the standards are prescriptive. He says the association allows for wide variation in legal education, noting that ABA-approved schools range from Harvard to the City University of New York. But he says the association has a responsibility to set minimum standards that insure graduates are prepared to enter the basic practice of law.

Deans counter that many of the standards do little to insure quality but a lot to raise costs. The deans don't want to abolish ABA accreditation, they say, just to improve it.

"I'm not trying to dismantle ABA accreditation, I'm just trying to

make it a little more sensible," says Colin S. Diver, dean of the University of Pennsylvania's law school and one of the 14 who signed the letter. Mr. Diver mounted an unsuccessful campaign a few years ago to defeat a standard requiring law schools to report basic consumer information about themselves—such as how many books and seats are in their libraries. Mr. White believes the ABA will soon drop the seating requirement. But he notes that the Education Department is pressing all accreditors to get more, not less, consumer information from colleges.

Other deans have waged losing one-man battles against the ABA. What is different this time is the collective action the 14 deans have taken. Ronald A. Cass, Boston University's dean, and Henry G. Manne, the dean at George Mason University, were behind the effort.

"All the schools I know of have had some trouble with ABA accreditation," says Mr. Cass. "If every law school in America has had trouble getting accredited, something is wrong with the standards."

SCHOOL OPENED 6 YEARS AGO

That is the point that officials at the Massachusetts School of Law have been trying to make. The school, which opened six years ago and enrolls 820 students, sees its mission as providing basic and affordable legal education. Tuition is \$9,000 for full-time students. The school claims it was denied accreditation in June 1993, because, among other things, it does not require prospective students to take the Law School Admission Test and offers for-credit courses to help students prepare for the bar exam—a practice that the ABA frowns on. In addition, the school does not limit the number of courses that professors teach, offer sabbaticals, or disqualify practicing lawyers from serving as full-time professors. Those policies violate the ABA's standards.

In its suit, the school claims that a group of deans, professors, and

librarians in the ABA functions as a "cartel"—setting standards that raise the cost of legal education.

The school has suggested that the ABA—working with officials at the Association of American Law Schools and others who administer the LSAT and commercial bar-review courses—has a monopoly on legal education. Students who graduate from ABA-accredited law schools can sit for the bar exam in any state. Massachusetts is one of only a few states that allow students to take the bar exam if they have graduated from a state-licensed institution. The Massachusetts school was licensed in 1990.

EARLIER CHALLENGE FAILED

Mr. Scott, the antitrust lawyer, believes the Massachusetts school could have a case. He says this despite the fact that in a similar case he knows of, the college lost. In that case, Marjorie Webster Junior College—a proprietary school—sued the Middle States Association of Colleges and Schools. The accreditor refused to accredit for-profit schools even if they met all the other standards. In 1970 an appeals court ruled that federal antitrust law did not apply to the "non-commercial aspects of the liberal arts and the learned professions."

But Mr. Scott says the law has evolved since then. The outcome of the MIT case he argued was that antitrust law does apply to some extent to colleges. He believes a claim could now be asserted by any institution that felt "disadvantaged by the accreditation process."

"That's a pretty scary scenario for accreditors," he adds.

What may be bad news for accreditors could be good news for the Massachusetts School of Law, which desperately needs accreditation to stay afloat. If there is any doubt about the power of accreditation, Mr. Scott suggests that one need only stroll along the northwest campus of Gallaudet University, where a building stands dedicated to the memory of Marjorie Webster Junior College.