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## ARTICLES

# ESTABLISHMENT OF THE ANTITRUST DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

GREGORY J. WERDEN<sup>†</sup>

The *Antitrust Division Manual*, issued by the U.S. Department of Justice (DOJ), states that “in 1933, under the administration of President Franklin D. Roosevelt and Attorney General Homer S. Cummings, the Antitrust Division was established.”<sup>1</sup> Celebrating the Antitrust Division’s 60th anniversary,<sup>2</sup> Attorney General (AG) Janet Reno explained that: “It was during Roosevelt’s tenure that the Antitrust Division was established by the Department of Justice, Department Order Number 2507.”<sup>3</sup> Neither the *Antitrust Division Manual* nor AG Reno’s remarks provided corroboration, and until now, AG Reno’s sketchy history was the most detailed to be found in print.

To fill in the knowledge gaps, this Article proceeds largely in reverse chronological order. First, it reviews Order No. 2507 and related circumstances, finding clear and convincing evidence that the Order did not create the Antitrust Division. Next, the Article examines the prior tenure of AG Cummings, finding clear and convincing evidence that the Antitrust Division existed before Roosevelt became President and Cummings became AG, and that

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<sup>†</sup> Gregory J. Werden is Senior Economic Counsel, Antitrust Division, U.S. Department of Justice. The views expressed herein are not purported to reflect those of the U.S. Department of Justice.

<sup>1</sup> ANTITRUST DIV., U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL 1–2 (5th ed. 2017), available at <https://www.justice.gov/atr/file/761126/download> (accessed Feb. 7, 2018). The first edition of the *Antitrust Division Manual*, issued in 1939, was silent on the Division’s origins, which seems odd if the Division was less than a decade old. The 1933 origin story first appeared in the 1979 edition.

<sup>2</sup> The author attended the two-and-a-half hour event held January 10, 1994 at the Andrew W. Mellon Auditorium on Constitution Avenue in Washington, D.C. Proceedings published in the *Antitrust Bulletin* include remarks from nine dignitaries present plus an introduction written later. A video of the event can be viewed on the Web. *60th Anniversary of the Antitrust Division*, C-SPAN television broadcast Jan. 10, 1994, <https://www.c-span.org/video/?53648-1/60th-anniversary-antitrust-division> (accessed Feb. 7, 2018). The video includes unpublished remarks by Professor Phillip Areeda (at 2:01:50).

<sup>3</sup> Janet Reno, *Remarks of Janet Reno, Attorney General of the United States*, 39 ANTITRUST BULL. 831, 831 (1994). Order No. 2507 is reproduced in: HOMER CUMMINGS, *SELECTED PAPERS OF HOMER CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES 1933–39*, at 13–15 (Carl Brent Swisher ed., 1939).

Cummings lowered the standing of the Antitrust Division within the DOJ prior to issuing Order No. 2507. Finally, the Article scours the prior history of the DOJ and determines that the Antitrust Division actually was established in 1919 by Republican AG A. Mitchell Palmer.

#### I. ORDER NO. 2507

On December 30, 1933, AG Homer S. Cummings issued Order No. 2507. Mimeographed copies of the order, along with its annexes and supplements, are preserved at the U.S. National Archives and Records Administration facility in College Park, Maryland.<sup>4</sup> In so many words, Order No. 2507 did not create or abolish anything; nor did it appoint anyone. Order No. 2507 is a two-page statement of the organization of the Department of Justice (DOJ) effective January 1, 1934, listing 15 DOJ components, along with the title and name of the person heading each component.<sup>5</sup> The original annexes to Order No. 2507 listed the responsibilities assigned to each component as of January 1, 1934, while the supplements amended those assignments.

The Office of the Attorney General was listed at the top of Order No. 2507, and the remaining components were listed in their order of succession to the AG. Next was the Office of the Solicitor General, headed by the Solicitor General (SG), and after that came the Administrative Division headed by the Assistant to the Attorney General (AtAG). Fourth was the Anti-Trust Division headed by Assistant Attorney General (AAG), Harold M. Stephens.<sup>6</sup> After them followed the Tax, Criminal, Claims, Lands, and Customs Divisions, which were followed by six components not designated as divisions. All the same components, listed in the same order, were listed in the 1934 *Register of the Department of Justice and the Courts of the United States*,<sup>7</sup> which gave DOJ's organization and named every attorney employed by each component.

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<sup>4</sup> Order No. 2507 is in Record Group 60, Finding Aid A1, Entry 121-A, Box 13. A copy that had been delivered to the Antitrust Division can be viewed at the Library of Congress. Collection of Harold Montelle Stephens, Box 136.

<sup>5</sup> SELECTED PAPERS OF HOMER CUMMINGS, *supra* note 3, at 14–15.

<sup>6</sup> Cummings' Order No. 2438 had placed AAG Stephens fourth in the order of succession.

<sup>7</sup> REGISTER OF THE DEPARTMENT OF JUSTICE AND THE COURTS OF THE UNITED STATES 2–8 (37th ed. 1934). The 1934 *Register* referred not to the "Anti-Trust Division" but rather to the "Division for the Enforcement of the Antitrust and Kindred Laws." *Id.* at 2. The *Register* did not refer to the "Antitrust Division" until

For outsiders, a newspaper story provided the only available indication of what changes to DOJ's organization AG Cummings was making as of January 1, 1934. The *Washington Post* explained that Cummings was abolishing the Admiralty Division and creating the Tax Division, while seven officials would "continue to head their respective agencies, virtually unaffected," including "Harold M. Stephens, head of the antitrust division."<sup>8</sup>

Six months before the issuance of Order No. 2507, on June 14, 1933, Stephens had been sworn in as AAG and placed in charge of the Antitrust Division.<sup>9</sup> Stephens' papers at the Library of Congress confirm that Order No. 2507 affected neither his responsibilities nor the name of the DOJ component he headed. Both before and after the issuance of Order No. 2507, Stephens reported weekly to AG Cummings on the "work of the Antitrust Division."<sup>10</sup>

Just after issuing Order No. 2507, AG Cummings provided proof that the order did not establish the Antitrust Division. On January 5, 1934, he delivered his annual report for the fiscal year ending June 30, 1933,<sup>11</sup> which was six months before the issuance of Order No. 2507. The report included a chapter titled "Report of Assistant Attorney General Harold M. Stephens, in Charge of the Antitrust Division."<sup>12</sup> Appended to the chapter heading was a footnote explaining that the term of the AAG "signing the report did not commence until June 14, 1933," and that two other men headed the "Antitrust Division" earlier in the fiscal year.<sup>13</sup> Thus, the Antitrust Division existed before July 1, 1932. AG Homer S. Cummings and President Franklin D.

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1955. REGISTER OF THE DEPARTMENT OF JUSTICE AND THE COURTS OF THE UNITED STATES 4 (42d ed. 1955).

<sup>8</sup> *Department of Justice Reorganized*, WASH. POST, Dec. 31, 1933, at 1, 4.

<sup>9</sup> 1934 REGISTER, *supra* note 7, at 2.

<sup>10</sup> Library of Congress, Collection of Harold Montelle Stephens, Box 134.

<sup>11</sup> ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1933 (1934).

<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.* at 16 n.1. The report states that "Russell Hardy was acting head of the Antitrust Division" immediately before Stephens took office. Hardy filed two Sherman Act cases with signature blocks designating him "Acting Head of Antitrust Division": *United States v. Millinery Quality Guild, Inc.*, Eq. No. 75-99 (S.D.N.Y., filed Mar. 23, 1933); *United States v. National Retail Credit Ass'n*, Eq. No. 10-420 (E.D. Mo., filed June 12, 1933). Hardy evidently signed as he did because he was not officially made either the Acting AtAG or an Acting AAG. No prior signature blocks on antitrust complaints included "Antitrust Division," which was not part of the official title of the Division's head.

Roosevelt assumed office on March 4, 1933, so AG Reno undoubtedly was mistaken in crediting them with establishing the Antitrust Division.

An enduring mystery is how and when people came to believe that the Antitrust Division was established in 1933. The earliest published claim of the 1933 establishment date appears to have been made in 1967 with the unelaborated and unsupported assertion that “the Antitrust Division was established in 1933.”<sup>14</sup> The author of the assertion had served as DOJ’s Director of Public Information under AG William P. Rogers in the years 1957–61.<sup>15</sup> Had he written about the history while at the DOJ, he likely would have consulted senior career attorneys in the Antitrust Division.<sup>16</sup> For example, the Chief of the Division’s Appellate Section at the time, Charles H. Weston, had worked on antitrust in DOJ continuously since 1929.<sup>17</sup> He surely knew that the Division was not created in 1933.

A mythology about Order No. 2507 likely existed within DOJ during the late 1950s, and that myth was more powerful than the truth. Repeating stories without verification is easier than archival research, and when AG Reno spoke at the 60th anniversary celebration, no one in DOJ’s career staff had been there long enough to have known that the Division was not created in 1933.

## II. THE CONTRIBUTION OF HOMER S. CUMMINGS TO THE HISTORY OF THE ANTITRUST DIVISION

Order No. 2507 codified the limited reorganization of DOJ that AG Homer S. Cummings did prior to its issuance. Understanding what he did, and its significance, requires some additional historical background.

The AG position was created by the Judiciary Act of 1789,<sup>18</sup> which also created the federal district courts, and a position in each district of an “attorney for the United States,”<sup>19</sup> a position

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<sup>14</sup> LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 90 (1967).

<sup>15</sup> *Luther A. Huston, Ex-Reporter, Dies*, N.Y. TIMES, Nov. 27, 1975, at 36.

<sup>16</sup> The preface of the 1967 book thanks DOJ officials for their cooperation but does not describe that cooperation. HUSTON, *supra* note 14, at x.

<sup>17</sup> REGISTER: DEPARTMENT OF JUSTICE AND THE COURTS OF THE UNITED STATES 4 (45th ed. 1960); Joan Cook, *Charles H. Weston, U.S. Antitrust Aide for Decades, Is Dead*, N.Y. TIMES, Aug. 26, 1987, at D23. As will become significant in Part III of this Article, Weston also had worked on antitrust at DOJ during 1918–19. *Id.*

<sup>18</sup> Ch. 20, § 35, 1 Stat. 73, 93 (1789).

<sup>19</sup> Ch. 20, §§ 2–3, 35, 1 Stat. 73, 73–74, 92 (1789).

that has long been referred to as the “U.S. attorney.” The Judiciary Act of 1789 provided that the AG would be compensated, but did not authorize any staff or operating funds. Both were first authorized in 1831, when the AG was provided with a clerk and a messenger.<sup>20</sup> The first professional staff was authorized in 1859 when Congress provided for the appointment of an “assistant.”<sup>21</sup> Two “assistant attorneys-general” were authorized in 1868.<sup>22</sup>

The DOJ was established in 1870 by legislation authorizing several positions below the AG, including a “solicitor-general” and the two “assistants.”<sup>23</sup> In funding the latter positions, Congress referred to them as “assistant attorneys-general.”<sup>24</sup> The legislation establishing the DOJ required the AG to report to Congress annually.<sup>25</sup> The first annual report, delivered January 31, 1871, used the capitalized titles “Solicitor General” and “Assistant Attorney General,”<sup>26</sup> which have been used ever since. As DOJ grew, so did the number of authorized AAGs, which reached seven in 1914.<sup>27</sup>

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<sup>20</sup> An Act making appropriations for support of government for the year one thousand eight hundred and thirty-one, ch. 55, 4 Stat. 452, 457 (1831).

<sup>21</sup> An Act making Appropriations for the Legislative, Executive, and Judicial Expenses of Government for the Year ending thirtieth of June, eighteen hundred and sixty, ch. 80, 11 Stat. 410, 419–20 (1859).

<sup>22</sup> An Act to provide for Appeals from the Court of Claims, and for other Purposes, ch. 71, § 5, 15 Stat. 75, 75 (1868).

<sup>23</sup> An Act to Establish the Department of Justice, ch. 150, § 2, 16 Stat. 162, 162 (1870).

<sup>24</sup> An Act making Appropriations for the legislative, executive, and judicial Expenses of Government for the Year ending June thirty, eighteen hundred and seventy-two, ch. 113, 16 Stat. 475, 494 (1870).

<sup>25</sup> An Act to Establish the Department of Justice, ch. 150, § 12, 16 Stat. 162, 164 (1870).

<sup>26</sup> ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1870 1 (1870).

<sup>27</sup> See An Act making Appropriations for the legislative, executive, and judicial expenses of government for the year ending June thirtieth, eighteen hundred and eighty-four and for other purposes, ch. 128, 22 Stat. 531, 562 (1883) (authorizing three AAGs); An Act making appropriations for the legislative, executive, and judicial expenses of Government for the year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes, ch. 211, 27 Stat. 675, 712 (1893) (authorizing four AAGs); An Act To provide revenue, equalize duties and encourage the industries of the Unites States and for other purposes, ch. 6, § 28, 36 Stat. 11, 108 (1909) (authorizing an AAG position relating to customs administration); An Act making appropriations for the legislative, executive, and judicial expenses of Government for the fiscal year ending June thirtieth, nineteen hundred and fifteen, and for other purposes, ch. 141, 38 Stat. 454, 497 (1914) (authorizing six AAGs).

The Sherman Act, enacted July 2, 1890, invested the federal district courts with jurisdiction to hear cases arising under the Act and directed the U.S. attorneys to enforce the Act under the supervision of the AG.<sup>28</sup> In the early days of Sherman Act enforcement, the AG and his tiny Washington staff typically had no significant involvement in the cases unless and until they reached the Supreme Court.<sup>29</sup> The DOJ had no need for an Antitrust Division.

Many older sources incorrectly state that the Antitrust Division was established in 1903,<sup>30</sup> but it is correct to say that the events of 1903 gave rise to “what was to be named the Antitrust Division.”<sup>31</sup> On February 25, 1903, Congress earmarked \$500,000 for antitrust enforcement,<sup>32</sup> and those funds proved sufficient for the next five years. While operating on these funds, the DOJ filed the landmark *American Tobacco* and *Standard Oil* cases.<sup>33</sup>

On March 3, 1903, at the suggestion of AG Philander C. Knox,<sup>34</sup> Congress created the position of the AtAG, with a salary to be paid out of the funds earmarked for antitrust enforcement.<sup>35</sup> William A. Day became the first AtAG on March 17, 1903 and

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<sup>28</sup> An Act to protect trade and commerce against unlawful restraints and monopolies (Sherman Act), ch. 647, § 4, 26 Stat. 209, 209 (1890).

<sup>29</sup> The first Sherman Act case to be instigated and directed at the highest levels appears to have been *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). It was widely reported that President Theodore Roosevelt directed AG Philander C. Knox to file the case. Roosevelt enjoyed the sobriquet “Trust Buster,” but an absence of antitrust enforcement activity was frequent subject of political cartoons.

<sup>30</sup> See WALTON HAMILTON & IRENE TILL, ANTITRUST IN ACTION 27–28 (1940) (Temporary Economic Committee Monograph No. 16) (“1903—when the Antitrust Division was established”); ALBERT GEORGE LANGELOTTIG, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES 27 (1927) (“the Anti-Trust Division . . . was created in 1903”); VERNON A. MUND, GOVERNMENT AND BUSINESS 190 (1950) (“In 1903 a special Antitrust Division was created in the” DOJ); 1 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 6 (1958) (DOJ’s “Antitrust Division [was] established in 1903”). Perhaps most significantly, an internal Antitrust Division document prepared in 1933 states that the Division was created in 1903. W.B. Watson Snyder, *History of the Antitrust Division*, Library of Congress, Collection of Harold Montelle Stephens, Box 241.

<sup>31</sup> HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 537 (1954).

<sup>32</sup> Act of 25 Feb. 1903, ch. 755, 32 Stat. 854, 903–04 (1903).

<sup>33</sup> *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (filed July 10, 1907); *United States v. Standard Oil Co of New Jersey*, 221 U.S. 1 (1911) (filed Nov. 16, 1906).

<sup>34</sup> See ARTHUR J. DODGE, THE ORIGIN AND DEVELOPMENT OF THE OFFICE OF THE ATTORNEY GENERAL 69 (H. Doc. No. 510, 1929).

<sup>35</sup> Act of 3 March 1903, ch. 1006, 32 Stat. 1031, 1062 (1903).

was given “special charge of all suits and other matters arising under the federal antitrust and interstate commerce laws.”<sup>36</sup>

The 1904 DOJ *Register* identified the two professional staffers responsible for “enforcement of anti-trust laws.”<sup>37</sup> One was Law Clerk George Carroll Todd, who worked his way up to become the sixth AtAG in 1913.<sup>38</sup> Todd directed DOJ antitrust enforcement from August 6, 1913 through March 31, 1919, a total of 2064 days.<sup>39</sup> He argued four landmark cases in the Supreme Court during his tenure as AtAG.<sup>40</sup>

From March 1903 to December 1932, twelve men held the title AtAG, and all were in charge of antitrust enforcement.<sup>41</sup> The two most prominent among them served for the last eight years of this period, and substantial documentation indicates that both served as head of the Antitrust Division.<sup>42</sup>

William J. Donovan was AtAG under President Herbert Hoover and AG John G. Sargent from March 23, 1925 to March 2, 1929. Biographic sketches of Donovan while he was the AtAG said he was in “charge of the Anti-Trust Division,”<sup>43</sup> and a book on the DOJ published during his AtAG tenure listed the “Anti-

<sup>36</sup> JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* 28 (1905); see REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES 16 (16th ed., 1906).

<sup>37</sup> REGISTER OF THE DEPARTMENT OF JUSTICE xxiii (15th ed. 1904).

<sup>38</sup> REGISTER OF THE DEPARTMENT OF JUSTICE AND THE COURTS OF THE UNITED STATES 18 (22d ed. 1914).

<sup>39</sup> Thurman W. Arnold was the longest-serving head of the Antitrust Division, but he directed DOJ antitrust enforcement for just 1824 days.

<sup>40</sup> *Eastern States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600 (1914); *Bd. of Trade of the City of Chi. v. United States*, 246 U.S. 231 (1918); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920). Todd argued *U.S. Steel* in March 1917, after which it was restored to the docket for reargument and not decided until three years later.

<sup>41</sup> The AtAG position was eliminated in 1950 and replaced by the position of Deputy AG. Reorganization Plan No. 2 of 1950, § 2, 3 C.F.R., 1949–1953 Comp. 1003. While the AtAG was behind the SG in the order of succession, the Deputy AG was placed ahead of the SG.

<sup>42</sup> For example, DOJ officials referred to the Antitrust Division in congressional appropriations hearings. See, e.g., *Department of Justice Appropriation Bill for 1931, Before Subcomm. of the H. Comm. on Appropriations*, 71st Cong. 11, 15, 20–21, 68, 71 (1929); *Appropriations, Department of Justice, 1928, Before Subcomm. of the H. Comm. on Appropriations*, 69th Cong. 8, 19, 194 (1926).

<sup>43</sup> *Colonel William J. Donovan*, 2 STATE BAR J. (CAL.) 101, 102 (1927); *William J. Donovan*, 3 OHIO ST. BAR ASS’N BULL. 45 (1926). In addition, the *Official Register of the United States* stated that the AtAG was in charge of the “Antitrust Division” from the outset of Donovan’s tenure in 1925. OFFICIAL REGISTER OF THE UNITED STATES: 1925, at 42 (1925). Earlier editions of the book, which was not published annually, did not name any DOJ components.



Trust Division” as one of DOJ’s components.<sup>44</sup> Donovan was awarded the Congressional Medal of Honor for service in World War I while later serving as a U.S. Attorney. He briefly served as an assistant to AG Harlan Fiske Stone and as one of Stone’s AAG’s before becoming the AtAG. Donovan had a reputation for skilled oral advocacy, and he argued a total of seven antitrust cases in the Supreme Court, most in later private practice.<sup>45</sup> During World War II, he headed the Office of Strategic Services (OSS). The OSS was dissolved after the war but later reconstituted as the Central Intelligence Agency.

Under President Calvin Coolidge and AG William D. Mitchell, John Lord O’Brian was the AtAG from June 14, 1929 to December 20, 1932, and AG Cummings’ first annual report asserted that O’Brian “headed the Antitrust Division.”<sup>46</sup> During O’Brian’s tenure, congressional testimony by SG Charles Evans Hughes, Jr. explained that: “The Department of Justice was divided into divisions according to the subject matter. The [AtAG] for some years has been traditionally in charge of the antitrust division.”<sup>47</sup> O’Brian probably was the first AtAG to have prior antitrust experience. As a U.S. Attorney (for the same district as Donovan), he had successfully litigated a Sherman Act monopolization suit.<sup>48</sup> During his DOJ tenure, O’Brian argued six antitrust cases in the Supreme Court.<sup>49</sup> Four decades later,

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<sup>44</sup> LANGEUTTIG, *supra* note 30, at 36.

<sup>45</sup> *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Sial Sales Corp.* 274 U.S. 268 (1927); *United States v. Int’l Harvester Co.*, 274 U.S. 693 (1927); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). In private practice, Donovan also argued the case dealing with the constitutionality of the Federal Trade Commission: *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

<sup>46</sup> 1933 ANNUAL REPORT OF THE ATTORNEY GENERAL, *supra* note 11, at 16 n.1.

<sup>47</sup> *Compensation of Assistant Heads in the Executive Departments, Before the H. Comm. on Expenditures in the Executive Depts.*, 71st Cong. 23 (1930). See Charles E. Hughes, Jr., *The Solicitor General of the US—His Duties*, 3 N.Y. STATE BAR ASS’N BULL. 245, 246 (1931) (listing eight divisions, beginning with “the Anti-Trust Division”). Charles Evans Hughes, Jr. resigned his position as SG to avoid conflicts of interest when his father became a Supreme Court Justice.

<sup>48</sup> *United States v. Eastman Kodak Co.*, 226 F. 62 (W.D.N.Y. 1915).

<sup>49</sup> *Int’l Shoe Co. v. FTC*, 280 U.S. 291 (1930); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). He argued only one antitrust case in private practice: *United States v. Line Material Co.*, 333 U.S. 287 (1948).

he was eulogized by the Chief Justice of the United States as “dean of the Supreme Court Bar.”<sup>50</sup>

Franklin D. Roosevelt was elected President in November 1932, and inaugurated March 4, 1933.<sup>51</sup> Roosevelt initially selected Montana Senator Thomas J. Walsh to serve as AG, while Homer S. Cummings agreed to be Governor General of the Philippines. But Walsh died suddenly on March 2, 1933 while travelling to the inauguration. Cummings was asked to undertake the duties of the AG temporarily<sup>52</sup> and did so beginning March 4, 1933. Roosevelt announced a month later that he had decided to make Cummings’ appointment permanent,<sup>53</sup> and Cummings ultimately held the position for almost six years.<sup>54</sup>

O’Brian left the DOJ before Cummings became AG, leaving the AtAG position vacant. On June 14, 1933, six months before the issuance of Order No. 2507, William Stanley was sworn in as the AtAG and placed in charge of the Administrative Division. In the same ceremony,<sup>55</sup> Harold Stephens was sworn in as AAG and placed in charge of the Antitrust Division.<sup>56</sup> AG Cummings’ only contribution to the history of the Antitrust Division was to make it less important in the DOJ hierarchy.<sup>57</sup> Cummings ended

<sup>50</sup> *John Lord O’Brian Dies at 98; Dean of the Supreme Court Bar*, N.Y. TIMES, Apr. 11, 1973, at 51.

<sup>51</sup> This was the last presidential inauguration on the date originally prescribed by the Constitution. Before Roosevelt’s inauguration, the 20th Amendment to the Constitution was ratified, changing the date of the inauguration to January 20, but section 5 of the 20th Amendment specified that it took effect October 15, 1933.

<sup>52</sup> SELECTED PAPERS OF HOMER CUMMINGS, *supra* note 3, at xiv.

<sup>53</sup> *Id.*

<sup>54</sup> Frank Murphy was appointed instead of Cummings as Governor General of the Philippines. Murphy later succeeded Cummings as AG, and a year later became a Justice of the Supreme Court.

<sup>55</sup> The author possesses a photograph of the event from the archives of Acme Newspictures, Inc. The description on the back reads: “Attorney General greets his new assistants. Harold Stephens, of Utah (left), newly-appointed Ass’t Attorney General, and William Stanley, of Maryland (center), newly-appointed Assistant to the Attorney General, are shown with Attorney General Homer S. Cummings, shortly after they were sworn in at the Justice Department Building in Washington, D.C., June 14th.”

<sup>56</sup> 1934 REGISTER, *supra* note 7, at 2. Stephens succeeded Stanley as AtAG, but he served only very briefly in that position before becoming a federal district court judge on July 27, 1935. In 1948 he was elevated to the Court of Appeals and remained in that position until his death in 1955.

<sup>57</sup> The published introduction to the 60th anniversary proceedings erroneously asserts that appointing an AAG to head the Antitrust Division had the effect of “raising the standing of antitrust enforcement to a level commensurate with that of other divisions.” Theodore P. Kovaleff, *Introduction*, 39 ANTITRUST BULL. 813, 815

the thirty-year practice of placing the number-three person in DOJ in charge of antitrust enforcement.<sup>58</sup>

### III. THE ESTABLISHMENT OF THE ANTITRUST DIVISION

A. Mitchell Palmer became AG on March 5, 1919, but he was not confirmed until August 29. While serving without confirmation, he “effected the first important reorganization” of DOJ since it was first established in 1870.<sup>59</sup> Palmer organized DOJ into divisions,<sup>60</sup> and he placed the AtAG “in charge of the Anti-Trust Division.”<sup>61</sup>

On December 8, 1919, Palmer delivered his annual report for the fiscal year ending June 30, 1919. It contained the first public statement that DOJ had a component called the “The Antitrust Division.”<sup>62</sup> A few weeks later, a DOJ official testifying in a congressional appropriations hearing presented a statement of the employees and salaries for the “Antitrust Division.”<sup>63</sup>

Palmer’s annual report for the year ended June 30, 1920, delivered December 11, 1920, included two fold-out charts detailing his new organization for the DOJ.<sup>64</sup> Appearing one level below the AG were the SG and the AtAG in charge of the “Anti-Trust Division.” At the next level down were seven AAGs

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(1994). It had the effect of lowering the standing of antitrust enforcement to a level commensurate with that of other divisions.

<sup>58</sup> When Cummings transferred responsibility for antitrust from the AtAG to a lower-ranking AAG, the newspapers took note. *Cummings Changes Aids*, N.Y. TIMES, June 15, 1933; *Cummings Shifts Assistants’ Duties*, WASH. POST, June 16, 1933, at 2.

<sup>59</sup> LLOYD MILTON SHORT, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 340–41 (1923).

<sup>60</sup> See CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 30–31 (1992). However, one division operating under Palmer had existed for more than a decade. The Public Lands Division was established Nov. 16, 1909 by Circular No. 114. See ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30, 1910 26 (1910).

<sup>61</sup> SHORT, *supra* note 59, at 341.

<sup>62</sup> ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1919, at 53 (1919). Citing the 1919 annual report, the DOJ Criminal Division webpage states that it was created in 1919. See <https://www.justice.gov/criminal/history> (accessed Feb. 7, 2018).

<sup>63</sup> *Legislative, Executive and Judicial Appropriation Bill, 1921, Pt. 2, Before Subcomm. of the H. Comm. on Appropriations*, 66th Cong. 1351 (1920) (Dec. 29, 1919 testimony of Charles E. Stewart, DOJ’s Chief Clerk and General Administrative Agent). See also *Appropriations, Department of Justice, 1925, Before Subcomm. of the H. Comm. on Appropriations*, 68th Cong. 117, 119, 122, 288 (1924).

<sup>64</sup> ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1920 facing page VI (1920).

heading divisions.<sup>65</sup> The first female AAG, Annette Abbott Adams,<sup>66</sup> headed the Division of Taxation, Prohibition, Insurance, and Minor Regulations of Commerce from June 3, 1920, but that division was short-lived.<sup>67</sup> DOJ's division structure remains in place, although it has been revised many times. Only two divisions extant under AG Palmer have survived to the present without at least a substantial name change—the Criminal Division and the Antitrust Division.<sup>68</sup>

The first AtAG to head the Antitrust Division was Charles B. Ames, who was the immediate successor to George Carroll Todd, and served as the AtAG from June 1, 1919 to August 31, 1920.<sup>69</sup> He briefed and argued the *U.S. Steel* case before the Supreme Court when it was reargued in October 1919.<sup>70</sup> As of December 1919, four attorneys worked under Ames.<sup>71</sup> Ames' successors, prior to Donovan, were: Frank K. Nebeker, who served from November 20, 1920 to March 17, 1921; Guy D. Goff, who served from April 26, 1921 to November 9, 1922; and Augustus T. Seymour, who served from March 23, 1922 to March 22, 1925. Seymour, remarkably, filed four cases that produced Supreme Court decisions.<sup>72</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Mrs. Adams had been the first female federal prosecutor. At the outset of World War I, she successfully prosecuted five individuals involved in sabotage plots organized in the German Consulate in San Francisco for violations of the Sherman Act and the Neutrality Act. All were convicted and imprisoned.

<sup>67</sup> Palmer's successor, AG Harry M. Daugherty, changed the names and responsibilities of several divisions in 1921. See SHORT, *supra* note 59, at 341.

<sup>68</sup> The first division to be established in the DOJ, originally called the Public Lands Division, has had multiple name changes and is now called the Environment and Natural Resources Division. See Richard J. Lazarus, *One Hundred Years of the Environmental and Natural Resources Division*, 41 ENVTL. L. REP. 10986, 10986 (2011).

<sup>69</sup> His nomination was confirmed by the Senate on June 30, 1919.

<sup>70</sup> *United States v. U.S. Steel Corp.* 251 U.S. 417 (1920). He also filed a case that produced a significant Supreme Court decision, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). After leaving the government, he argued *Standard Oil Co (Ind.) v. United States*, 283 U.S. 163 (1931).

<sup>71</sup> REGISTER OF THE DEPARTMENT OF JUSTICE AND THE COURTS OF THE UNITED STATES 17 (27th ed. 1919). One of those attorneys, and the lowest paid, was Russell Hardy, who would later serve as "Acting Head of the Antitrust Division." See *supra* note 13.

<sup>72</sup> *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Standard Oil (Ind.)*, 283 U.S. 163. The high productivity of the Antitrust Division under Seymour might have been partly due to James A. Fowler, who was the AtAG during 1911–13, but was a senior staff attorney under Seymour. Fowler argued several antitrust cases in the Supreme Court while under Seymour.

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A. Mitchell Palmer is remembered for a series of raids, planned and executed by a young J. Edgar Hoover, aimed at rooting out what he saw as dangerous left-wing anarchists. The Palmer Raids are now viewed as inconsistent with cherished civil liberties.<sup>73</sup> But, Palmer also should be remembered for establishing DOJ's Antitrust Division.<sup>74</sup> He declared the existence of a DOJ component called the "Antitrust Division" as of June 1919, and no evidence supports the existence of the Antitrust Division before Palmer became AG a few months earlier.

The precise date of the Antitrust Division's creation might have been lost to history.<sup>75</sup> This Article, nonetheless, provides ample evidence to support celebrating the Division's centennial in June 2019. Preparations should commence immediately.

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Fowler reportedly declined reappointment as the AtAG. See William Wicker, *To James A Fowler—A Dedication*, 23 TENN. L. REV. 607, 610 (1955).

<sup>73</sup> See ROBERT W. DUNN, *THE PALMER RAIDS* (1948).

<sup>74</sup> Since the beginning of the Obama Administration, Palmer's official AG portrait has hung in the conference room of the AAG in charge of the Antitrust Division.

<sup>75</sup> At the U.S. National Archives and Records Administration at College Park, Maryland, the author reviewed every official order issued by AG Palmer in 1919. None mentioned creating a DOJ division.