BakerHostetler

Presidential Powers and Antitrust Politics: Part One

By Carl W. Hittinger and Tyson Y. Herrold

July 28, 2017

In June, we discussed the Trump administration's candidate for the top post in the Department of Justice's Antitrust Division: Makan Delrahim. During Delrahim's confirmation hearing, Sen. Amy Klobuchar pressed him, "What would you do, if you're in this job, if the president, or the vice president, or a White House staffer calls, and wants to discuss a pending investigation of an antitrust matter?" Delrahim responded, "The role of the assistant attorney general for antitrust is a law enforcement function," and that "politics will have no role in the enforcement of the antitrust laws." Delrahim's comment appeared to placate Klobuchar's present concerns about White House intercession or interference in pending antitrust investigations, although a confirmation vote by the full Senate is still pending. However, viewed historically, the constitutional role of the executive branch and the president in particular in dictating, directing and controlling antitrust enforcement policy is far more complex and nuanced. As is often the case, history provides the necessary context to answer thorny constitutional questions.

President Theodore Roosevelt

While the Sherman Act was passed in 1890, it did not become a staple of federal domestic policy until 1901, when Teddy Roosevelt was sworn into the Office of the Presidency after William McKinley's assassination. Former Presidents Harrison, Grover Cleveland and McKinley had largely ignored the increasing consolidation of big industry. Meanwhile, the titans of the steel, oil and financial industries combined forces to build massive trusts—organizations designed to hold the stock of constituent organizations (like holding companies) – and conspired to fix and control prices, exclude and harm competitors with a panoply of predatory means and dominate the output of available goods and services in relevant markets.

For example, by the 1880s, John D. Rockefeller's Standard Oil Trust reportedly controlled 90 percent of U.S. oil refining. Roosevelt had for some time been critical of the trusts (and overcapitalization in general), referring to them in a speech as "evil," thereby not endearing himself to the titans of industry who felt it better to restrict Teddy to the (at the time) largely powerless vice-presidency. That plan worked for a short six months until Roosevelt became president after McKinley's assassination. Once he assumed the office, Roosevelt directed his attorney general, Philander C. Knox, to review the legality of the trust-created monopolies under the Sherman Act. Knox initially advised against prosecuting the trusts because of unfavorable Supreme Court precedent at the time, but on Nov. 13, 1901, J.P. Morgan announced perhaps the boldest trust then to date: the combination of the Great Northern, Northern Pacific and Union Pacific railways (each a monopoly in its own right) to form the Northern Securities Co. Sensing a political opportunity and intending to demonstrate his strength to stop the "evil" of trusts, on Feb. 20, 1902, a mere five months into his presidency, Roosevelt announced that the Department of Justice would file suit against Northern Securities. Roosevelt took an active role in the case, selecting a favorable forum (the District of Minnesota, where a related state case was pending) and directing Knox to conduct the investigation in secret until the day the Department of Justice filed suit. Within days of the announcement, Morgan arrived at the White House and demanded to know why the president had not first approached him with his concerns. As Morgan told the president, "If we have done anything wrong, send your man to my man and they can fix it up." Roosevelt tersely responded, "That can't be done." Knox added, "We don't want to fix it up, we want to stop it." Morgan's gambit to fix the problem in the usual manner of the day failed when faced with the presidential big stick. Roosevelt would ultimately win the fight against Morgan. After a legal battle all the way to the Supreme Court, on March 14, 1904, Justice John Marshall Harlan announced from the bench: “No scheme or device could more certainly come within the words of the [Sherman] Act ... or could more effectively and certainly suppress free competition.” Roosevelt had beaten Morgan by a 5-4 decision, and Northern Securities was dissolved under the Sherman Act.

President John F. Kennedy

Sixty years after Roosevelt’s inauguration, following further trust busting cases, always-evolving judicial decisions and increasing government investigations, the nation faced a new set of priorities. Set in the mire of the Vietnam War and facing off against the Soviet Union in the dead of the Cold War, the “military industrial complex” (a term made famous by President Dwight Eisenhower’s 1961 farewell address) was of paramount concern to national security. Early in President John F. Kennedy’s administration, a labor strike in the steel industry threatened to disrupt production and contribute to rising monetary inflation. To avoid these political nightmares, Kennedy using the full powers of the presidency pressured the largest steel company, United States Steel (ironically formed by J.P. Morgan and organized with the legal help of Roosevelt’s AG Philander Knox), and the United Steelworkers Union to reach a deal to keep wages low and avoid output disruptions. Kennedy’s strategy succeeded, and U.S. Steel and the union struck a deal to limit wage increases to 10 cents an hour, a major success for his administration.

However, less than two weeks later, the chairman and CEO of U.S. Steel, Roger Blough, personally handed the president a letter in the oval office informing him that U.S. Steel would be raising prices by 3.5 percent, which other steel companies would quickly follow. Furious, the president exclaimed to Blough “you double crossed me” and later confided with his Secretary of Labor (and later Supreme Court Justice) Arthur Goldberg, “He f--ked me. They f---ked us and we’ve got to try to f--k them.” In an April 11, 1962, press conference, Kennedy excoriated the “simultaneous and identical actions of U.S. Steel and other leading steel corporations,” accusing “a tiny handful of steel executives whose pursuit of private power and profit exceeds their sense of public responsibility” of showing “utter contempt for the interests of 185 million Americans.” The decision, he said, would increase consumer prices and “add ... an estimated $1 billion to the cost of [American] defenses, at a time when every dollar is needed for national security and other purposes.”

Kennedy’s private frustration and public speech was a declaration of war, and his brother, Attorney General Robert F. Kennedy, opened fire on the steel industry. Convinced the steel executives had colluded to raise prices by uniformly and nearly simultaneously increasing their prices, Bobby Kennedy convened a grand jury and directed FBI agents to investigate the steel executives, telling them, “we’re going for broke.” Agents called upon steel employees at 3 a.m. at their homes in Bethlehem and Pittsburgh, tapped their phones, and subpoenaed their bank accounts and tax records. Eventually, U.S. Steel capitulated and agreed to rescind the price increase. The other steel companies quickly fell in line. Kennedy’s aggressive executive style, like Roosevelt’s, succeeded.

Other Presidential Administrations

Roosevelt and Kennedy are remembered for the dramatic flair of their antitrust investigations. But they are hardly the only presidents to bring unique antitrust enforcement priorities and styles to the White House. Roosevelt would eventually buck his “trustbuster” moniker and regulate the trusts instead of prosecuting them. Roosevelt’s successor Taft, on the other hand, preferred an even more aggressive approach, directing his Attorney General George Wickersham to go after the trusts with a heavy hand (a point of disagreement with Roosevelt that would eventually lead to their personal falling out). Woodrow Wilson’s most enduring contribution to antitrust enforcement was legislative in nature. During his administration, Congress passed major legislation at the urging of Wilson: the Federal Trade Commission Act, which created the independent politically diverse Federal Trade Commission and banned “unfair methods of competition,” and the Clayton Act, which supplemented the Sherman Act by prohibiting specific anti-competitive conduct such as, according to the Federal Trade Commission, “mergers and interlocking directorates (that is, the same person making business decisions for competing corporations).”

Fuel has always been a political issue and an antitrust conundrum. During World War II, issues of national security and the war effort took priority over concerns about competition. In 1952, however, Truman ordered a grand jury investigation into the oil industry. Truman preferred criminal prosecution but eventually settling on civil enforcement over concerns that foreign policy (dominated by the post-war threat of the Soviet Union) was better served by a more circumspect approach. During the Eisenhower administration, the Department of Justice granted antitrust immunity to a consortium of oil companies exploiting Iranian oil for similar political reasons.

Fast forwarding to the 1970s, President Richard Nixon had a falling out with aggressive prosecutor Richard McLaren, then assistant attorney general of the Antitrust Division. In one of his infamous recorded conversations, Nixon told White House National Affairs adviser John Ehrlichman (of Watergate notoriety), "I don't know whether [International Telephone and Telegraph Co.] is good, bad, or indifferent. But there's not going to be any more antitrust activities as long as I am in this chair." He later ordered his Deputy Attorney General Richard Kleindienst, "I want something clearly understood, and, if it's not understood, McLaren's ass is to be out within one hour ... I do not want McLaren to run around prosecuting people, raising hell about conglomerates, stirring things up at this point. Now you keep him the hell out of it."

The case was eventually settled with Nixon's knowledge and apparent input, as revealed in other tapes.

Lessons Learned From History

The Constitution expressly grants the president the power to enforce the laws of the United States, which include the Sherman Act. Formulated in 1933, the Antitrust Division was created to civilly and criminally enforce the antitrust laws, and, as a division of the Department of Justice, reports to the attorney general and ultimately the president. Therefore, presidential politics have always played a significant role in the Antitrust Division's enforcement efforts.

Despite Sen. Klobuchar's recent call for independence from the White House, the Department of Justice's Antitrust Division is still part of the executive branch, unlike the independent Federal Trade Commission, which exercises civil authority to ban "unfair methods of competition." As the head of the executive branch, presidents have, some would argue, a Constitutional prerogative to direct, weigh and even dictate antitrust enforcement priorities (with informed guidance) for better or worse, as history shows. Next month we will examine other more recent uses of presidential powers and antitrust politics and will express some timely views. Stay tuned.

Carl W. Hittinger is a senior partner in Baker & Hostetler's antitrust group and the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters. He can be reached at 215-564- 2898 or chittinger@bakerlaw.com. Tyson Y. Herrold is an associate in the firm's Philadelphia office in its litigation group. His practice focuses on complex commercial and antitrust litigation matters. His experience also includes judicial clerkships for U.S. District Judge Malachy E. Mannion of the Middle District of Pennsylvania, Judge C. Darnell Jones II of the Eastern District of Pennsylvania and Judge Dolores K. Sloviter of the U.S. Court of Appeals for the Third Circuit. He can be reached at 215-568-3439 or therrold@bakerlaw.com.