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Presidential Power and Antitrust Politics: Part Two

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Last month we discussed the role of the presidency in formulating antitrust policy, pointing out the fallacy of the view that the Antitrust Division of the Department of Justice has historically been (or should be) completely independent of the White House. We posited that history shows that the Antitrust Division's enforcement decisions have been (and should be) a product of informed presidential policy and that past presidents have attempted to apply the Sherman Act in a way that balances the panoply of challenges, both foreign and domestic, that every president elected by the people invariably faces.

Last month's article covered the history of the Sherman Act from President Theodore Roosevelt's decision to go head-to-head with J.P. Morgan and challenge the legality of J.P. Morgan's powerful Northern Securities Co. to President John F. Kennedy's threat to use of the Sherman Act against the powerful steel industry to curb inflation. While Roosevelt and Kennedy may be two of the more colorful figures in the history of antitrust enforcement, they are not the only presidents to leave their mark on the Sherman Act.

President Ronald Reagan

President Ronald Reagan inherited one of the largest antitrust cases in history. In 1974, the Gerald Ford administration's Department of Justice sued AT&T for violations of the Sherman Act. The Department of Justice (DOJ) was particularly concerned by the alleged conduct of AT&T's subsidiary equipment manufacturer Western Atlantic and research department Bell Laboratories. According to the DOJ, Western Electric had a virtual monopoly in the manufacture of telephone equipment, and Bell Laboratories was responsible (in large part) for developing UNIX, an operating system that formed the backbone of the nascent internet (although a consent decree prevented AT&T from itself capitalizing on UNIX).

More so than many antitrust cases, the AT&T litigation had significant national and foreign political consequences. Many argued that a unified and regulated telephone network provided significant value to consumers and ensured stability in an industry that had national security implications. In 1981, Defense Secretary Caspar Weinberger testified before the Senate that he had sent a letter to Attorney General William Smith requesting that the case be dropped for national defense reasons. Others argued that the lack of competition in the telecommunications industry threatened innovation and resulted in higher consumer prices. Assistant Attorney General William Baxter (Attorney General William Smith recused himself) rejected the Department of Defense's concerns and pledged to "litigate to the eyeballs."

President Reagan intervened and sided with his assistant AG Baxter, notwithstanding his defense secretary's "furious lobbying." Therefore, the DOJ continued to litigate the case. In 1982, after nearly a decade of litigation, AT&T chose to settle the case and entered into a consent decree with the DOJ that required AT&T to divest its ownership of the regional telephone companies (which became known as "Baby Bells"), a solution originally proposed much earlier in the litigation. However, in a significant concession to AT&T, the consent decree permitted the company to keep its long-distance telephone service division and subsidiaries Western Electric and Bell Laboratories.

President Bill Clinton

Fast forwarding to the 1990s and the beginning of the golden age of computers, President Bill Clinton presided over one of the healthiest economies in history at that time. Some consider the beginning of Clinton's first term to be, in large part, a continuation of the laissez-faire antitrust policy of George H.W. Bush and the

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second term of Ronald Reagan. But several high profile antitrust lawsuits filed during his administration suggest otherwise. One of the most prominent cases of the time was *United States v. Microsoft*.

In 1990, the Federal Trade Commission (FTC) commenced an investigation into, among other things, Microsoft's vertical integration of its operating system and its software applications that, according to industry rivals at the time, unfairly disadvantaged competing software developers. (We discussed a similar case in our February article concerning Justice Neil Gorsuch's antitrust record on the U.S. Court of Appeals for the Tenth Circuit.) In 1993, after the FTC deadlocked over whether to continue the investigation, the DOJ, led by newly appointed Attorney General Janet Reno, picked up the civil investigation and eventually entered into a consent decree with Microsoft enjoining Microsoft from charging license fees for products that did not incorporate the Microsoft operating system and (prohibiting Microsoft from placing restrictions on collaborative software developers. (The decree did not address the vertical software integration issue).

In October 1997, the DOJ filed a new lawsuit against Microsoft, alleging that the company's practice of tying its web browser (Internet Explorer) to its Windows operating system violated the terms of the prior consent decree. In 2000, presiding Judge Thomas Penfield Jackson issued a decision finding Microsoft guilty of violating the Sherman Act. He later directed Microsoft to submit a plan for the dissolution of its business units and the "separation of the Operating Systems Business from the Applications Business." The D.C. Circuit subsequently overturned the lower court's dissolution order but upheld its ruling that Microsoft violated the Sherman Act. In the fall of 2001, the DOJ and Microsoft entered into a new consent decree, disposing of the case.

Given the gravity of the Microsoft antitrust litigation, one would assume the otherwise hands-on President Clinton, himself an attorney and former Attorney General of Arkansas, played an important role in the decision to investigate Microsoft. After all, Teddy Roosevelt took a personal interest in the biggest antitrust case of his day: the Northern Securities Co. (the history of which we discussed in last month's article). Likewise, John F. Kennedy took affront to the steel industry's decision to raise prices and personally directed his Attorney General Robert F. Kennedy to oversee the investigation. However, by Clinton's own later admission, he played no part in the decision to bring the case. In a 2007 visit to Microsoft's Redmond, Washington campus, President Clinton claimed: "In our administration we had no contact between the White House and the Justice Department over enforcement of the laws. The first time I heard about the Microsoft case was when I read about it in the paper."

President Barack H. Obama

President Barack Obama was inaugurated during what many economists consider one of the largest economic recessions in American history, and certainly one of the biggest since the Great Depression, which he inherited from President George W. Bush. In late 2007, the residential housing bubble burst, a product of dubious subprime mortgage lending practices and the spread of collateralized debt obligations. The downturn triggered a domino effect in the financial markets and eventually led to the collapse of Lehman Brothers, the $182 billion government cash infusion for insurer American International Group, and the U.S. Treasury's conservatorship of Fannie Mae and Freddie Mac. "Too big to fail" became a familiar moniker to the American public and a memorable soundbite for those who called for the breakup of the largest financial institutions on Wall Street.

During his campaign, Obama criticized the George W. Bush administration for "what may be the weakest record of antitrust enforcement of any administration in the last half century" and promised to "direct his administration to reinvigorate antitrust enforcement." This campaign rhetoric was tempered by the recession as the early years of the Obama administration were dominated by government bailouts and legislative reform aimed at preventing a meltdown of the U.S. economy. The crisis led to a downturn in merger activity as fearful executives hoarded their cash reserves, expecting further market turbulence. In June 2009, amidst some of the darkest days of the recession, the White House proposed legislative reform for the financial sector. Just over a year later, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, which overhauled the regulation of the financial industry.

Notwithstanding the financial crisis and resulting economic recession, the Obama administration eventually left its promised mark on antitrust enforcement. One key policy initiative was health care reform and on March 23, 2010, the president signed

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into law the Patient Protection and Affordable Care Act. The administration supplemented the Affordable Care Act (Obamacare) by systematically reviewing a number of health care related mergers, including on the local level, claiming that such mergers would cause higher prices for patients and would curtail available medical options (as reported in our November and December 2016 articles about the Federal Trade Commission's challenge to health care mergers).

In November 2015, American pharmaceutical company Pfizer and Irish-headquartered pharmaceutical company Allergan announced a reported $160 billion merger. The deal would constitute, according to the Obama administration, an "inversion," in which "a U.S.-based multinational corporation with operations in other countries restructures itself so that the U.S. 'parent' is replaced by a foreign corporation." Concerned that the combined company would relocate to Ireland to take advantage of the country's lower corporate tax rate, the Treasury Department unexpectedly announced a temporary (and complex) rule change that would limit the benefits of combinations structured as inversions. The rule change was widely reported to be a response to the Pfizer/Allergan merger and it apparently accomplished its goal. In April 2016, Pfizer and Allergan announced their decision not to pursue the deal, citing the Treasury Department's rule change. The merger was blocked, but the antitrust laws were not the tool chosen by the Obama administration to do so.

Looking Forward

History demonstrates that antitrust enforcement has increasingly become more of a technocratic exercise by nonelected decision-makers and less of a political vehicle. As an elected official, presidents can (and should) play an important role in setting antitrust policy and even directing investigations with the informed guidance of the DOJ. President Donald Trump has publicly commented on proposed high-profile merger cases, but only time will tell how active and informed a role he will play in establishing DOJ policy. The still-pending nomination of Makan Delrahim to head the DOJ's Antitrust Division has likely hampered the administration's ability to implement the president's campaign promises, and it is currently unclear when (or if) Delrahim will be confirmed. Massachusetts Sen. Elizabeth Warren recently put a political hold on Delrahim's nomination, notwithstanding the Senate Judiciary Committee's 19-1 approval, delaying a full Senate vote until at least September. Stay tuned.

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