

Justice Kavanaugh's Antitrust Testimony Before the Senate Judiciary Committee

By Carl W. Hittinger and Jeanne-Michele Mariani

As some presidents can attest, U.S. Supreme Court justices are more likely to change their judicial philosophies once appointed than any other nominee to the federal court system.

As some presidents can attest, U.S. Supreme Court justices are more likely to change their judicial philosophies once appointed than any other nominee to the federal court system. Most recently Justice David Souter, the pick of President George H.W. Bush, was supposed to be a win for conservatism, but as time went by, he aligned himself more and more closely with the left. President Gerald Ford on and off lamented his appointing antitrust expert Justice John Paul Stevens to the court. The late great U.S. Court of Appeals for the Third Circuit Judge Arlin Adams was his alternative choice. President Dwight D. Eisenhower equally lamented his appointment of Chief Justice Earl Warren, saying it was “the biggest damn fool mistake I ever made.” President Harry S. Truman said that Justice Tom Clark was not “a bad man,” but “just that he’s such a dumb son of a bitch.”

Whether a judge is considered an originalist or a textualist, whether he or she claims to adhere to stare decisis or traipses over it like Bambi through a meadow, the president, the Senate and the public rely upon past conduct, judicial decisions, writings, speeches and testimony to try to calculate with as much precision as possible how a judge will behave and decide cases once elevated. Justice Brett Kavanaugh is no exception as the latest appointee to this nation’s highest court.

In a previous article, we discussed Kavanaugh’s sharp antitrust dissents sitting on the U.S. Court of Appeals for the District of Columbia Circuit in the merger-blocking cases of *FTC v. Whole Foods Market* and *United States v. Anthem*. In the latter case, he was accused by fellow D.C. Circuit Judge Judith Rogers of “applying the law as he wished it were, not as it currently is.” While we noted that

Kavanaugh had little background in antitrust, unlike Justice Neil Gorsuch, his willingness to dissent from the majority in these cases seemed to reflect a pro-merger attitude that favored business efficiency over government regulation. He also displayed in his dissents a sense of the law that balks at some of the safeguards put in place to enforce healthy competition. At his confirmation hearing before the Senate Judiciary Committee on Sept. 5, before the proceedings shifted to more personal topics, Sen. Amy Klobuchar, Ranking Member of the Subcommittee on Antitrust, Competition Policy and Consumer Rights, briefly focused on antitrust issues in her questioning. She called attention to Kavanaugh’s two antitrust dissents and his hardly veiled disdain for two of the oldest and most formative Supreme Court decisions in antitrust law, *Brown Shoe* and *Philadelphia National Bank*. In reviewing his dissents, Klobuchar remarked, “you did suggest that the court should disregard two cases that have been widely relied on for more than 50 years in antitrust, *Brown Shoe* and *Philadelphia National Bank*. Do you think courts now applying these cases are wrong to do so?”

Klobuchar’s question was in direct response to Kavanaugh’s endorsement of his own “modern antitrust” a phrase that peppers both his *Anthem* and *Whole Foods* dissents and relies on his view of changing economic theory and Robert Bork’s controversial “Antitrust Paradox” book. Kavanaugh and Bork’s philosophy holds little regard for either *Brown Shoe* or *Philadelphia National Bank*, though still binding Supreme Court precedent. Kavanaugh took particular aim at the former in his *Whole Foods* dissent, branding it a “1960s-era relic” with “loose antitrust standards” and “free-wheeling antitrust analysis” that “has not stood the test of time” and has been pushed “to the jurisprudential sidelines” where its test for market definition is “moribund.” Pretty bold criticism by a sitting federal circuit court judge about binding Supreme Court precedent.

In his response to Klobuchar's question, Kavanaugh tried to pay some lip service to *stare decisis* while also defending his own decisions, "I think the Supreme Court in the 1970s moved away from the analysis in those cases, because those cases focused on the effect on competition – I mean on competitors, not on competition. In the 1970s, the Supreme Court moved to focus on the effect on competition, which in turn is really consumer – what will be the effect on consumers."

While Kavanaugh remained mum on which 1970s Supreme Court cases he was referencing, he could have been talking about *Continental T.V. v. GTE Sylvania*. There, the Supreme Court held that a company's geographical restrictions on where a franchisee could sell the franchisor's licensed product, was not a *per se* violation of the Sherman Act, so long as the effect of the restriction was not an unreasonable restraint on trade. While *GTE Sylvania* may have represented a new line of antitrust jurisprudence, it was not a merger case, and therefore, the decision and its progeny did not touch the efficacy of *Brown Shoe* or *Philadelphia National Bank*, both of which remain good law. Another case which Kavanaugh may have been referring to – *United States v. General Dynamics* – did allow a merger of two coal companies that may have been considered *per se* invalid under *Brown Shoe*, but at the same time its holding grew out of a footnote encompassed within the earlier case and overall it has only slightly dimmed the holding of its predecessor holdings.

Audibly wary of his answer, Klobuchar at the hearing continued with some healthy skepticism of Kavanaugh's intentions to enforce both still binding cases fairly. She pressed him, "Again, I am very concerned about what's going on with these cases nationally, and then when I look at these two cases [*Brown Shoe* and *Philadelphia National Bank*], I – appears to me that you would go even further. And I think we need less mergers, not more, and more competition." While more of a concern as opposed to a query, Kavanaugh just passed on the point and answered her only with a clarification of a previous statement he had made on a different topic. He offered no assuaging comments to the senator or any general conception of his judicial philosophy on the subject.

Kavanaugh's depiction of "modern antitrust" holds less of a place for cases like *Brown Shoe* and *Philadelphia National Bank*, so what exactly are we to expect in the dawn of a new era with Kavanaugh's ascent to the often divided Supreme Court?

Despite Kavanaugh's predilections to label *Brown Shoe* a tired and antiquated piece of sluggish antitrust machinery, many argue that it still supplies some of the strongest and most fundamental principles of modern antitrust law. In reviewing the merger that was at the heart of that case – one larger shoe company gearing up to swallow a smaller one – no less than Chief Justice Earl Warren writing for a majority of the Supreme Court noted in that 1962 decision that it was then a changing time in American history, one where "the trend to a lessening of competition in a line of commerce was still in its incipiency" and only the federal courts constitutionally possessed the power to stop those mergers which would work to decrease market competition. Of course, not all mergers were anticompetitive at that time in history, as recognized in congressional legislation on the subject, but "as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." And so the heart of *Brown Shoe*, which became the linchpin of modern antitrust law, is the protection of competition and the need to curb industry concentration so as to protect the market from unilateral control. *Philadelphia National Bank* in 1963, written by Justice William Brennan, increased the reach of *Brown Shoe* by applying its restraint on mergers to venerable banks – a concept unheard of before the case was decided.

Kavanaugh is joining what many say is a decidedly conservative court, which means that his self-proclaimed textualist approach may show a conservative light even when that method of interpretation would objectively illuminate a more liberal approach. Will there be more pro-merger rulings issued by the Supreme Court that favor business over competition, as Kavanaugh seems to be leaning toward? Again the past does not necessarily predict the future when it comes to Supreme Court justices, as history has shown. At only 53 years of age, Kavanaugh has the time, and now the much sought-after position, to effect antitrust law for decades to come, possibly making cases like *Brown Shoe* and its progeny obsolete. Or will President Donald Trump come to privately regret his appointment? Stay tuned.

Carl W. Hittinger is a senior partner in Baker & Hostetler's antitrust group and 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. His experience also includes a judicial clerkship with U.S. District Chief Judge Emeritus Louis C. Bechtel of the Eastern District of Pennsylvania. He can be reached at 215-564-2898 or chittinger@bakerlaw.com.

Jeanne-Michele Mariani is an associate in the firm's Philadelphia office in its litigation group. Her practice focuses on complex commercial and antitrust litigation matters. Her experience also includes a judicial clerkship with Judge Thomas I. Vanaskie of the U.S. Court of Appeals for the Third Circuit. She can be reached at 215-564-1509 or jmariani@bakerlaw.com.

bakerlaw.com

Recognized as one of the top firms for client service, BakerHostetler is a leading national law firm that helps clients around the world address their most complex and critical business and regulatory issues. With five core national practice groups – Business, Employment, Intellectual Property, Litigation and Tax – the firm has more than 940 lawyers located in 14 offices coast to coast. For more information, visit bakerlaw.com.

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.

© 2018 BakerHostetler®

06.11.18.13.49_p2

Reprinted with permission from the 10/26/18 edition of the *The Legal Intelligencer*® 2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.