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What is Trump Antitrust?

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Reflections on the next four years of antitrust enforcement

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1. By the votes of a nation's electors, the future of U.S. antitrust enforcement moved from "pragmatic aggressive enforcement as usual" to "too early to call." The unexpected election of President-elect Donald J. Trump opened wide the speculation or mystery of what he and his advisors are planning as his administration's antitrust policy. Given the paucity of his statements on antitrust policy, and the random nature of his few comments, we must dig deeply to formulate the outline of his enforcement plans or speculate about practices and policies in the spirit of the campaign's "America First" rhetoric. At this moment, there is little evidence of which way it will go—hence, "too early to call." Secretary Hillary Clinton, on the other hand, had a detailed policy statement on antitrust enforcement. In addition, the very substantial majority of articles and reports published in recent weeks discussed Secretary Clinton's very focused and well-prepared views in detail. In the interest of full disclosure, I must admit that this "reflection" was initially drafted to analyze Secretary Clinton's policies—at least until 11:00 PM on November 8, 2016. I know I was not alone!

2. Even when everyone was focusing most of their attention on Secretary Clinton's detailed enforcement plan, there were three issues that developed from President-elect Trump's brief excursions into antitrust enforcement or from significant campaign themes that are at the center of our analysis and reflection.

3. First, the announcement of the AT&T/Time Warner deal and the reaction of Mr. Trump shone a bright light on the likely magnitude and shape of President-elect Trump's antitrust enforcement policy themes. Importantly, we must determine if Mr. Trump's reaction to the AT&T/Time Warner matter brings about a return to the populist political consideration (as opposed to a strictly economic analysis) in antitrust enforcement. I suspect that is a position that would horrify the conservative lawyers and economists who will assist President-elect Trump in forming his government.

4. Second, it is what Mr. Trump did not say in his AT&T/Time Warner statement that is the central focus of antitrust enforcement -- that the courts, not the executive departments or the administrative agencies, make the final decision. The importance of the courts in giving the parties a fair and impartial hearing and making a sound, precedent-based decision is the centerpiece of our antitrust jurisprudence.

5. Third, in light of considerable concern about living and working globally in trade deals and military alliances, how will President-elect Trump and his Administration deal with international cooperation, comity and coordination in the antitrust world?

I. "The concentration of power in the hands of too few"

6. The most significant and strongest statement of antitrust policy that Mr. Trump delivered during the campaign related to his opposition to the AT&T/Time Warner transaction, announced in Gettysburg, Pennsylvania in October. At a campaign rally, Mr. Trump concluded that "[a]s an example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it's too much concentration of power in the hands of too few." He went on later to attack the Obama Administration's approval of the Comcast/NBC Universal deal in 2011 by making the same argument: it "concentrates far too much power in one massive entity that is telling the voters what to think and what to do. Deals like this destroy democracy." He suggested that he might reopen that matter: "we'll look at breaking that deal up and other deals like that." While the crowd cheered and journalists filled their notebooks, the statement has become the subject of great debate in the antitrust world. The President-elect's economic advisor also released a "statement on monopoly power of new media conglomerates." Investigating the monopoly power of "conglomerates" takes us back to the case law of the 1960s.

7. Thus, Mr. Trump's statements received—and are still receiving—great scrutiny as Mr. Trump became President-elect. Mr. Trump's statements recalled a time when the drafters and enforcers of the antitrust laws believed that enforcement actions challenging mergers and monopolization cases were not only subject to economic analysis and scrutiny, but also looked at the political aspect of antitrust. This is very similar to the populist sentiments that Mr. Trump expressed in his campaign speech—there is too much concentration of power in the hands of too few. Obviously, the fact that these are powerful media companies is an important element in the discussion. Much of the case law through the early 1970s took seriously the political values of antitrust, while also considering the economic impact of the transaction.

8. The best scholarship on the importance of alleging the political issue of limiting political power of corporate combinations is a seminal article by then Professor, and later FTC Chairman, Robert Pitofsky. His classic article, "The Political Context of Antitrust" appeared at 127 *University of Pennsylvania Law Review* 1051 (1979). Professor Pitofsky boldly—even defiantly—takes on whether antitrust law should be based purely on economic analysis, or whether there is a political context as well. The short summary of the political element relates to the concentration of power in the hands of a few. From Senator John Sherman to President Theodore Roosevelt and President (and later Chief Justice) William Howard Taft, the justification of the antitrust laws was both political and economic. The words of Professor Pitofsky's formulation are virtually identical to the words Mr. Trump uttered on the campaign trail.

9. Professor Pitofsky criticizes antitrust economists and lawyers for "*persuading the courts to adopt an exclusively economic approach to antitrust questions.*" He argues that "[i]t is bad history, bad policy and bad law" "*to exclude certain political values in interpreting the antitrust laws.*" Professor Pitofsky carefully defines what he means by "political values"—a fear of excessive concentration of economic power in a few hands, and, most importantly, "*if the free market is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.*" It is ironic that Mr. Trump's found his voice in raising concerns about the concentration of power in the hands of the few -- in media companies and throughout the economy.

10. It will be interesting to see, in the coming weeks, whether President-elect Trump maintains and further articulates this populist view or embraces the usual economics only policy. This issue will bring about some interesting discussions at Trump Tower, the White House, the Department of Justice and the Federal Trade Commission. I'm certain that the many lawyers and economists will advise Mr. Trump on their perspective on economic policy. The question remains: what will the President-elect say? What will he do? What is the Trump policy?

II. A government of laws, not men

11. In his statement regarding AT&T/Time Warner, Mr. Trump stated directly that this is "*a deal we will not approve in my administration.*" The ultimate decision on whether the transaction is approved or the practice is determined to be legal under the antitrust laws is not in the hands of President-elect Trump, or his assistant attorney general for Antitrust, or his FTC chairman—it is in the hands of an Article 3 federal district judge, and, as may be required, court of appeals judges and Supreme Court justices.

12. The Antitrust Division may file charges to stop a transaction or end an illegal practice, but it must present its case to a federal judge at trial. The Federal Trade Commission is an administrative agency that has the power to make an initial ruling in some cases, but its ruling will be reviewed by a federal appeals court panel, and, in the case of a merger challenge, the Commission must also bring its case to a federal district judge who has the power to issue an injunction to prohibit the transaction from moving forward. While the enforcement agencies have great power to bring cases and close cases and to do their best to shape the law, they are not the decision makers on challenges to deals or challenges to conduct: the courts are. We, as counsel for potential defendants, must, on occasion, gently remind our enforcer friends of this fundamental principle as well.

13. Our court-based system is completely different than the systems of many nations around the world where the administrative agency is empowered to judge the case, determine the outcome, set all of the terms and assess fines and penalties, although there may be some level of judicial review in certain cases. The fundamental difference is that many non-U.S. enforcement agencies are regulatory and the governments have enormous power to shape the national economy. Conversely, U.S. antitrust policy promotes the free market and combats those things that harm the free market. It is—and will remain—the courts that decide antitrust cases after hearing the evidence of the enforcers and defense counsel. When everyone is heard and has the opportunity to present evidence, the legitimacy of the system is assured. It is the independence of the judiciary and the guarantee of due process of law that make our system so much better than many around the world.

III. The promise of future international antitrust enforcement: Cooperation and coordination

14. A major theme of the 2016 campaign revolved around international trade agreements and defense alliances and the heightened concern that they were no longer of value or no longer a cost effective investment for the U.S. Although not specifically articulated or identified, the antitrust enforcement world has an enormous body of treaties, allowing for coordination and information exchange between and among nations, including collaboration and coordination in investigations. In recent times, such agreements were entered with Japan, India and China, among others.

15. Even more important than the bilateral agreements, however, was the formation of the International Competition Network (ICN). The ICN grew out of a recommendation of the International Competition Policy Advisory Committee (ICPAC), a group organized by Attorney General Janet Reno and Assistant Attorney General Joel Klein to evaluate the problems of economic globalization, particularly multi-jurisdictional mergers

and international cartels. Out of that idea, a new organization was formed to enhance cooperation and coordination among antitrust enforcers. The Network was launched on October 25, 2001, with 14 jurisdictions represented. Over its 15-year life, the ICN has grown to 120 jurisdictions.

16. Unlike trade agreements and military alliances, the ICN is not a place where jobs could be lost or weapon systems or U.S. troops could be sent to help allies. It is not, and cannot be, a decision-making entity like the World Trade Organization. The ICN brings together enforcers on a regular basis to establish best practices, to discuss cooperation and coordination and educate its members, especially from the developing world. It is an institution that the new Administration should embrace and nurture. For 15 years it has enhanced and developed antitrust globally. The importance of an organization where all its members learn from each other and cooperate with each other on the enforcement field will serve U.S. enforcement policy for decades to come.

IV. Conclusion

17. We certainly live in interesting times. After a chaotic campaign and a very, very surprising result, it is time to govern. The Sherman Act has served the country well for 126 years, protecting free enterprise and punishing those who broke the rules. In the end, it is the skill and dedication of the men and women of the Antitrust Division and the Federal Trade Commission that will make the difference. Those men and women need strong and able leadership to make that difference. ■

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This *Antitrust Tribute* is a selection of 31 essays providing an insightful and original look at the antitrust law to which Prof. William E. Kovacic has contributed so much. This first volume, mainly covering issues of U.S. and European antitrust law, gathers articles by prominent authors among Professor Kovacic's friends and colleagues. It is organized into two parts. Part I, entitled "An Antitrust Career", consists of 9 papers that pay tribute to Kovacic as a man, professor, and public official. They offer an original as well as enthralling picture of his scholarship and public enforcement efforts. Part II, entitled "New Frontiers of Antitrust", includes 22 articles covering different aspects of competition law, ranging from cartels in the U.S. and Europe to mergers analysis, private rights of action, antitrust settlements, etc. The overall result is a collective work that offers the opportunity to look over the antitrust world not only as a "cold" field of law, but also as a lively discipline to whose growth Prof. Kovacic has contributed greatly.

Volume II

In the wake of William E. Kovacic *Liber Amicorum* Volume I success, the Institute of Competition Law worked to release, less than one year after, Volume II. 36 prominent authors signed 28 contributions spanning various antitrust topics across the world. In Volume II, the authors pay tribute to Bill Kovacic's antitrust career tackling issues such as the international convergence and cooperation, agencies performance and effectiveness, cartels criminalization, vertical restraints, leniency policies, etc. Volume II sheds a light over the antitrust law world offering a unique combination of theoretical insights, practical knowledge, together with some more personal remarks on Bill Kovacic's antitrust career.

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