

# U.S. ANTITRUST UNDER THE TRUMP ADMINISTRATION - A FEARLESS AND PERHAPS ACCURATE PREDICTION



BY KENT BERNARD<sup>1</sup>



I would feel much more confident about trying to predict what is likely to happen in a Trump antitrust administration if my crystal ball had correctly predicted the Trump election victory. When you have gotten the big prediction very wrong, it is hard to claim with a straight face that you are going to get the follow on predictions right. Of course, if ignorance and a terrible track record disqualified pundits, very little would get written. I would only caution the reader to keep his or her hand firmly on his or her wallet when reading any predictions (including mine). Recall that the vast majority of experts predicted both that Trump would lose, and that the stock market would crash if he won: he did; it didn't.

No administration comes into power for the first time with a track record in antitrust enforcement, for the simple reason that you can't enforce anything until you are in office. We really don't have much to go on here. But having accepted the assignment to do some antitrust prognostication, it is time to uncover that crystal ball and see what it can tell us.

At the start, the ball tells us that changes will be less than people hope/think/fear they will be. One of the few benefits of getting older is to have seen administrations come and go, and the world not ended. The influence of economics has blended with, and largely supplanted, the original populist strain in antitrust. And what we have today is neither the extreme wing of the Chicago School argument that "anything goes, because the market will self-correct in due course" of the 1980s, nor the "block everything" mood of the 1960s.<sup>2</sup> Things will change. But anyone hoping for repeal of Section 2 of the Sherman Act or an expansion of the Robinson-Patman Act is likely to be seriously disappointed.

In making more specific predictions as to what policy will be in specific areas, the first thing that we can look to is the makeup of the Trump's transition team. As of this writing, the two people on Trump's team with backgrounds in antitrust are Joshua Wright and David Higbee. These are not newcomers to antitrust.

I hope that Wright would not be offended if I described him as a seriously smart academic, with a passion for efficiency arguments. He has a great deal of enthusiasm for free markets, and has produced an extensive paper trail of articles, speeches and opinions. FTC Commissioners (and heads of the Antitrust Division) all pledge allegiance to the idea of free markets.

---

<sup>1</sup> Adjunct Professor, Fordham University School of Law.

<sup>2</sup> Who can forget such gems as [United States v. Von's Grocery Co.](#) 384 US 270 (1966)? A merger between the third and seventh largest grocery chain a geographic market, with a whopping combined 7.5 percent of total sales, was enjoined, and the people cheered in the streets (yes, that is sarcasm).

Wright actually walks the walk. He served as a Commissioner at the FTC from 2013-2015. Wright's return to the FTC as a Commissioner marked his fourth stint at the agency. In simple terms, he knows the Agency, and antitrust is his gig.

David Higbee comes from the law firm side, but also with significant government experience. He served at the Department of Justice as Deputy Assistant Attorney General and Chief of Staff of the Antitrust Division. Higbee also served as Deputy Associate Attorney General and as Counsel to the U.S. Attorney General and White House Liaison. To simplify again, he knows the Antitrust Division and he knows the way Washington DC operates.

So what do these choices tell us? First, they tell us that Trump has reached out for experienced antitrust lawyers, with practical experience at the antitrust agencies. Second, they suggest that while Trump may have personal views about antitrust issues, he has not gone to extreme doctrinaire people for his transition team. Yes, Wright favors efficiency arguments, and can be provocative. But he is still within the antitrust mainstream.

While surely some things will change under the new administration (they always do), and both Trump and his advisors tend to favor free markets over regulated ones, getting from there to a prediction as to a specific matter or case requires a leap of faith more than analysis. Trump doesn't come to us with a fully formed public view of the function of antitrust in the 21st century. There is a strong urge to fill in the blanks in Trump's views for him. For example, he has spoken about wanting to rebuild American industry. Surely he will want to "unshackle" U.S. corporations to compete with foreign entities, remove unnecessary regulation and require proof of bad effects from conduct before the agencies condemn it. Therefore, if we follow this trail, we can predict that mergers will be allowed and that single firm dominance will go unchallenged. I have no such confidence, however.

That line of analysis opens the door to a very old logical trap: the fallacy of the excluded middle. It is very easy to go from "Trump says he wants to revive American industry" to "I want to revive industry" and then to "Therefore Trump will/should adopt the policies X, Y and Z that I favor." The rest of the article can then be whatever the author favors or wishes that the law was.<sup>3</sup> While we may all agree on the goal that does not mean that we agree on the best way to get there. And what Trump himself has said on these issues is not totally consistent. For example, Trump is a big fan of job preservation, but cutting workers is often the primary "efficiency" driving a merger. So are mergers favored, or disfavored?

Yes, Trump's appointees are likely to want to change certain policies and practices at the FTC and the Antitrust Division.<sup>4</sup> Every administration does that. But even assuming that we actually know what Trump wants or favors doesn't really tell you what his appointees are going to do. This is especially true of FTC Commissioners, who do not serve at the pleasure of the President.

With that as our foundation, let us look at a couple of key antitrust areas, and what is more likely than not to happen to them under a new administration.

1. There will be pressure to use antitrust for broader policy issues than merely competition law. To the man with a hammer, everything looks like a nail. To an antitrust lawyer/scholar, every issue is a potential antitrust issue. While I personally do not see evidence that a Trump administration will fall prey to such antitrust mission creep, it could happen.
2. Horizontal cartels will still be prosecuted. The rules regarding the core offenses of antitrust evolve slowly, and likely will not change much under President Trump. Cartels are bad. We get it. The rules governing concerted activity will remain rel-

---

3 Another example would be: "*Kent is late for work. Either he has overslept or he has been abducted by Martians. We went to his house and learned that Kent isn't at home, so he must have been abducted by Martians.*" This argument is a fallacy, because there are many other reasons why I may have been late for work that day. For example, the New Haven Railroad might have broken down (the odds on favorite), or I might have decided to take the day off to go bungee jumping off the Brooklyn Bridge.

4 For a good overview of areas of potential change, at least at the FTC, see Bilal Sayyed, *President-Elect Trump Has Once-in-a-Century Opportunity to Substantially Revise the FTC's Law Enforcement and Regulatory Agenda* (December 2016), available at: <http://viewer.zmags.com/publication/ccd79339#/ccd79339/1>. The conclusion is that Trump will have to choose his appointees carefully. On that we can all agree.

atively constant. This certainly applies to horizontal conduct, and may well apply to vertical restraints. Revolutionary change is not likely in these areas. Even if Trump had a burning desire to alter basic antitrust learning, it is not that simple for even a President to do that unilaterally.<sup>5</sup>

3. In the area of single firm conduct, a new administration may well make an impact. The U.S. rules are considerably more accommodating of hard competition than are those in the EU.<sup>6</sup> However, Trump has spoken as if he sees certain companies – such as Amazon/Washington Post - as wielding too much power.<sup>7</sup> The fact that certain media companies and media owners seemed to go on a crusade to have Trump lose the election, may have sharpened that perception. There also should be some concern among the Silicon Valley tech giants and their potential to shape the information flow, especially given the over the top hysteria when Peter Thiel endorsed Trump.<sup>8</sup>

4. Mergers – Horizontal mergers (i.e. of competitors) will continue to be in the cross-hairs of the antitrust agencies. In my view, the agencies have sometimes taken an overly restrictive view of the market in which to judge the potential effects of a merger.<sup>9</sup> But the real excitement may well be in vertical cases. The big case now is *AT&T/Time Warner*. During the campaign Trump said that he was opposed to the merger.<sup>10</sup> More recently, the parties have said that they have been “reassured” by the Trump team’s statements that the merger will be “scrutinized without prejudice.” Apparently that reassurance is based on Trump’s appointment of Higbee and Wright to the transition team. Sources attributed to AT&T described the men as having a “hands-off record on antitrust enforcement.”<sup>11</sup> Yes, but... “hands off” generally, and a bland statement that a matter will be reviewed without prejudice, doesn’t exactly tell you anything about a specific, very high profile case. And the most recent reading of tea leaves reports that Trump is still opposed to the deal because he believes it would concentrate too much power in the media industry. This is allegedly according to people close to the president-elect, who has been publicly silent about the transaction for months.<sup>12</sup> Are you really willing to bet money on the outcome based on that?

So, here we are. We have a lot of unknowns. President Trump will get to appoint or nominate a lot of people, but it is unclear what he would like those people to do. Our track record in predictions about Trump should give us pause before we get too authoritative in predicting antitrust strategy. Perhaps we can take some comfort in the required disclosure in those ads for mutual funds and trial lawyers: past performance is no guarantee of future results. We shall see.

---

5 Recall what happened with the 1985 Vertical Restraints Guidelines; U.S. Department of Justice, Vertical Distribution Restraints Guidelines, 50 Fed. Reg. 6263 (1985), and the reaction to them. The Guidelines were perceived as an attempt to change the law and make it more permissive towards vertical restraints. An uproar ensued. A good description of the Guidelines themselves may be found at Fisher, Johnson, & Lande, *Do the DOJ Vertical Restraints Guidelines provide guidance?* 32 ANTITRUST BULL. 609 (1987). As for the reaction, as a later head of the Antitrust Division noted “The rescinded Vertical Restraints Guidelines, promulgated in 1985, were controversial from the outset. They were criticized by Congress and the National Association of Attorneys General....” Anne K. Bingaman, *Change and Continuity in Antitrust Enforcement*, Fordham Corporate Law Institute 1993, available at: <http://www.justice.gov/atr/public/speeches/0107.htm> page 13.

6 See, e.g. Bernard, *Is Full Transatlantic Competition Law Convergence Realistic, or Even Desirable?* CPI Antitrust Chronicle, December 2015 (1).

7 See Geyer, *Will President Trump Revive Section 2 of the Sherman Act?* (November 15, 2016), available at: [http://antitrustconnect.com/2016/11/15/will-president-trump-revive-section-2-of-the-sherman-act/?utm\\_source=CPI+Subscribers&utm\\_campaign=a12037c784-EMAIL\\_CAMPAIGN\\_2016\\_12\\_08&utm\\_medium=email&utm\\_term=0\\_0ea61134a5-a12037c784-234820525](http://antitrustconnect.com/2016/11/15/will-president-trump-revive-section-2-of-the-sherman-act/?utm_source=CPI+Subscribers&utm_campaign=a12037c784-EMAIL_CAMPAIGN_2016_12_08&utm_medium=email&utm_term=0_0ea61134a5-a12037c784-234820525)

8 There were cries to boycott companies with which Thiel was involved, demands to throw him off the board of other companies see: <http://www.dailymail.co.uk/news/article-3848206/Peter-Thiel-faces-Silicon-Valley-backlash-Donald-Trump-donation.html>. I would not be shocked if someone had suggested burning him at the stake for his heresy.

9 See Bernard, *An Integrative Approach to Evaluating Healthcare Provider Mergers in the Era of The ACA*, Antitrust, Vol. 30, No. 3, Summer 2016.

10 The quotes are collected in Geyer, *supra* note 6.

11 See: <http://arstechnica.com/tech-policy/2016/12/att-on-time-warner-merger-after-talking-to-trump-team/>

12 Smith and Green, *Trump Tells Confidant He Still Opposes AT&T – Time Warner*, available at: <https://www.bloomberg.com/news/articles/2017-01-05/trump-said-to-tell-confidant-he-still-opposes-at-t-time-warner>.