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Whither Antitrust Enforcement in the Trump Administration?

Steven C. Salop and Carl Shapiro

What should one expect in the area of antitrust from the Trump administration?

The Republican platform did not mention antitrust. However, as a candidate, President Trump made several statements that suggest a very aggressive approach to antitrust.[1]

Antitrust enforcement generally has bipartisan support. Washington antitrust lawyers tend to say that Republican and Democratic administrations differ only "at the margins."[2] Perhaps, but those "margins" can be pretty large. Price-fixing enforcement is a priority, regardless of the party controlling the White House.[3] However, merger enforcement and civil non-merger enforcement can vary significantly, depending on the inclinations of the leadership at the Department of Justice Antitrust Division and the Federal Trade Commission and the overall approach of the administration.

We sketch out in this article two broad—and generally conflicting—approaches that might form the basis for Trump administration antitrust policy. As a kind of shorthand, we refer to these as "reining in corporate power" and "laissez faire." In the language of the angry electorate, these instead might be called "fixing the rigged system" and "triumph of the 1%." There is, of course, a continuum of policy choices along this dimension, from more to less interventionist.

As a candidate and since the election, President Trump's rhetoric has sounded like he would adopt policies reflecting the first approach. When announcing the agreement with Carrier to maintain certain jobs in the United States, Vice-President Pence said, "The free market has been sorting it out and America's been losing;" and Mr. Trump responded by saying, "Every time, every time."[4]

Despite this rhetoric, other signals have pointed in the opposite direction. The administration has been stressing less government regulation, which may be associated with less antitrust as

Steven Salop *is Professor of Economics and Law, Georgetown Law Center.* ***Carl Shapiro*** *is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley. Shapiro served as Deputy Assistant Attorney General in the Antitrust Division of the DOJ from 2009–2011 and on the President's Council of Economic Advisers from 2011–2012. All opinions are the authors' and do not necessarily represent the views of colleagues or consulting clients.*

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1 As a business person, Trump has been involved in several antitrust matters. *See* Robert A. Skitol, *Donald Trump's Major Antitrust Encounters*, Antitrust Source (Apr. 2016), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr16_skitol_4_11f.authcheckdam.pdf.

2 *See, e.g.*, *Timothy J. Muris of the FTC: The More Things Stay the Same, The More Things Change* 1 (Proskauer Rose, Oct. 2001), http://www.proskauer.com/files/News/e9c9d728-d2dd-4e91-922a-fd53273b9490/Presentation/NewsAttachment/a53f81d2-a6da-44ef-a144-d5d7668319ef/f814168b-0966-4fd4-8725-c781f62a6732.pdf.

3 Protecting this priority in healthcare may be an early challenge for the Trump DOJ. The nominee for Secretary of Health and Human Services, Congressman Tom Price, has proposed an Obamacare-repeal bill that includes an antitrust exemption for doctors collectively negotiating with health plans. *See* Empowering Patients First Act, H.R. 2300, 114th Cong. § 1001 (2015), http://tomprice.house.gov/sites/tomprice.house.gov/files/HR%202300%20Empowering%20Patients%20First%20Act%202015.pdf. Under the *Maricopa* case, such joint negotiations are per se illegal. Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982).

4 *See* Nelson D. Schwartz, *Trump Sealed Carrier Deal with Mix of Threat and Incentive*, N.Y. Times, Dec. 1, 2016, http://www.nytimes.com/2016/12/01/business/economy/trump-carrier-pence-jobs.html?_r=0.

well.[5] Although this does not mean that every policy decision will be the laissez-faire choice and none will be reining in, we expect that the mix will tilt towards laissez faire. The question is by how much. After all, while aggregating voters' preferences is complicated, there is no reason to think that the working-class voters who are credited with giving Trump the edge in the election wished for a laissez-faire approach to antitrust. And Republican primary voters rejected traditional laissez-faire candidates like Mitt Romney and Jeb Bush. Instead, based on polls and media reports, working-class voters hoped for a Trump administration that would rein in corporate power, not one that would give large corporations greater discretion or enable further corporate consolidation and power.

Quite apart from the possible divergent approaches to antitrust we present here, we also mention the potential for the improper use of antitrust enforcement or threats (implicit or explicit) of enforcement to further the political or economic interests of the President and his allies. Concern about possible abuse of power is not typically a part of the debate about antitrust policy, at least not in the United States, but there are some worrisome signs that warrant its inclusion. The improper use of antitrust enforcement can occur regardless of the overarching approach to antitrust policy. It can occur in any administration, and to some extent did during the Nixon Administration.

Reining in Corporate Power: Fixing the Rigged System

We use "reining in corporate power" to signify the overarching goal of reducing the power of large corporations in the American economy. This approach is motivated in significant part by concerns expressed by voters that large corporations today exert significant control over the lives of the American working class, without much regard for their welfare or that of their communities, all the while enriching their owners and executives in the process. A slogan for this approach could be "fixing the rigged system." This approach demands that the federal government resist the power of large corporations, not facilitate such power. The term "populism" also has been used to describe this approach. Although antitrust in the United States has its roots in the populism of the late 19th and early 20th century, populism overall connotes a much broader set of issues and concerns than we can address in this article.[6]

Photo by Carl Shapiro

Man Controlling Trade: The Federal Trade Commission Reining in Corporate Power

[5] Antitrust is law enforcement, not regulation. And, deregulation might require *more* antitrust oversight, not less, as pointed out by the Supreme Court in *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004). Still, antitrust does involve oversight of business behavior and the Hart-Scott-Rodino Act creates a structure that shares some features of regulation, so there is a common association between antitrust and regulation.

[6] For two recent journalistic accounts of Trump in the context of populism, see George Packer, *The Populists*, New Yorker (Sept. 7, 2015), http://www.newyorker.com/magazine/2015/09/07/the-populists; Michael Kazin, *Trump and American Populism*, Foreign Aff. (Oct. 6, 2016), https://www.foreignaffairs.com/articles/united-states/2016-10-06/trump-and-american-populism.

President Trump ran a campaign to appeal to working-class Americans who believe the political and economic system is not working for them.[7] For example, President Trump made the following statement at a campaign rally: "As 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."[8] Using antitrust enforcement to rein in corporate power would thus respond to the will of the working-class Trump voters, along with many Clinton voters (especially those who supported Sanders and then voted for Clinton) by giving precedence to the interests of the working class over the interests of corporate shareholders.

One exit poll, conducted on Election Day in all 50 states, indicates that 72 percent of voters agree with the statement that "the American economy is rigged to advantage the rich and powerful."[9] Many voters are concerned with the power of large firms, which they see as having reduced their incomes and weakened their communities. These concerns are not new—Wal-Mart was under attack years back for destroying small-town retail businesses while earning high profits that were taken out of the community.[10] These concerns have been growing over the past 30–40 years as foreign competition, deregulation, the decline of unions, and technological innovation have taken their toll on wage norms and the incomes of working class, their communities, and the prospects for their children.[11] Whereas it used to be common for a firm's owners to live nearby and feel a responsibility for workers' and community welfare, that culture has been replaced by multinational corporations that are seen by critics to care only about the profits of their wealthy investors and the compensation of their non-local top executives.[12]

These economic stresses have become even more visible in the wake of the Great Recession and the sluggish growth in median family income during the recovery. For example, median income and wealth both declined in real terms between 2010 and 2013.[13] Over roughly the same period,

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[7] Jed Kolko, *Trump Was Stronger Where the Economy Is Weaker*, FIVE THIRTY EIGHT (Nov. 10, 2016), http://fivethirtyeight.com/features/trump-was-stronger-where-the-economy-is-weaker/.

[8] Brian Fung, *Why Trump Might Not Block the AT&T-Time Warner Merger, After All*, WASH. POST, Nov. 11, 2016, https://www.washingtonpost.com/news/the-switch/wp/2016/11/11/trump-may-have-a-harder-time-blocking-the-massive-att-time-warner-merger-than-he-thought/.

[9] Chris Kahn, *U.S. Voters Want Leader to End Advantage of Rich and Powerful: Reuters/Ipsos Poll*, REUTERS (Nov. 8, 2016), http://www.reuters.com/article/us-usa-election-poll-mood-idUSKBN1332NC; *see also* Kai Ryssdal, *Poll Finds Americans' Economic Anxiety Reaches New High*, MARKETPLACE (Oct. 13, 2016), http://www.marketplace.org/2016/10/13/economy/americans-economic-anxiety-has-reached-new-high (survey finding that 62% of Americans, including Democrats, Republicans, Independents, and all income levels, believe that the economy is rigged for the rich, politicians, banks, and corporations).

[10] Floyd Norris, *Swiping at Industry from Atop the Stump*, N.Y. TIMES, Aug. 20, 2006, http://www.nytimes.com/2006/08/20/weekinreview/20norris.html ("[Wal-Mart] has been blamed for destroying downtowns as shoppers desert local merchants for the big-box store.").

[11] For one analysis from 2007, see Thomas Kochan, *Wages and the Social Contract*, AM. PROSPECT (Apr. 22, 2007), http://prospect.org/article/wages-and-social-contract. On the role of fairness norms, see Alan Krueger, Chairman, Counsel of Economic Advisors, Remarks at the Learning and Labor Economics Conference at Oberlin College, Fairness as an Economic Force (Apr. 26, 2013), https://www.whitehouse.gov/sites/default/files/docs/oberlin_final_revised.pdf.

[12] *See, e.g.*, Josh Freedman & Michael Lind, *The Past and Future of America's Social Contract*, ATLANTIC (Dec. 19, 2013), http://www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511/.

[13] Edward N. Wolff, *Household Wealth Trends in the United States, 1962–2013: What Happened over the Great Recession?* 49 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No. 20733, Dec. 2014), http://www.marineconomicconsulting.com/w20733.pdf; *see also* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015) (summarizing other data on inequality). In contrast, real median houseful income grew 5.2% from 2014 to 2015, the fastest growth on record, with the most rapid growth taking place among working-class households. The poverty rate also showed the largest one-year drop since 1968, from 14.8% to 13.5%. *See* U.S. Census Bureau, *Income and Poverty in the United States: 2015* (Sept. 2016), http://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf. These recent gains were evidently not enough to alter the perception among many working-class voters that the American economic system was rigged against them.

the real income of the top 1 percent grew by 31.4 percent.[14] The growing awareness of drug addiction and suicide in white working class communities also is a visible sign of the despair.[15] Although antitrust enforcement is but one of many possible instruments to address these concerns, it can have a salutary role.

Mergers. Reining in corporate control would involve strong merger enforcement, including additional demands for injunctions and more significant remedies. Anticompetitive mergers generally harm consumers by raising prices and reducing services and/or innovation. These effects may also enrich top executives and stockholders. Such mergers also tend to reduce employment along with output, though reduced employment is not typically considered to be an antitrust harm unless it results from buyer power in the labor market.

Reining in corporate control would involve strong merger enforcement . . .

One hallmark of the reining-in approach to mergers would be a skepticism of corporate consolidation and the enhanced economic and political power that results from mergers, especially those involving very large firms. The reining-in approach would focus on competition to the benefit of consumers if the interests of consumers and shareholders come into conflict. It would not take political power into account in analyzing specific mergers, but general social and political concerns would be relevant to setting the overall standard, as discussed in more detail below.

Antitrust law and precedent, as it has developed for decades, is well suited to this task because of its focus on consumer welfare. If a merger is predicted to raise prices and reduce output, it typically violates the Clayton Act, even if it would benefit the stockholders of the merging firms.[16] Two current examples of mergers alleged to harm the working class come to mind.

First, the DOJ issued complaints to enjoin two mergers involving national health insurance companies.[17] Whatever one thinks of Obamacare, the availability of low-cost health insurance is a major issue for working-class families. If meaningful health insurance costs $900 to $1000 per month, that comprises a large share of the budget for a family earning $50,000 per year; and many such families struggle to pay for rent, food, and other necessities.[18] A dominant health insurer might use MFN-plus provisions or exclusives with providers to erect barriers to smaller competi-

[14] Updated Tables and Figures (2013) to Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. Econ. 1 (2003), Tables and Figures Updated through 2015 in June 2016, https://eml.berkeley.edu/~saez/lecture_saez_chicago14.pdf, at 13. During the 2009 to 2012 economic recovery, the top one percent of the income distribution captured 95% of the economy's overall income growth. *Id.* at 10.

[15] Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, PNAS (Dec. 8, 2015), http://www.pnas.org/content/112/49/15078.full.pdf.

[16] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1, at 2 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf; *cf.* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984) (stating that the "hallmarks of anticompetitive behavior" are raising prices and reducing output).

[17] Complaint, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C. July 21, 2016), https://www.justice.gov/atr/file/903111/download; Complaint, United States v. Aetna, Inc., No. 1:16-cv-01494 (D.D.C. July 21, 2016), https://www.justice.gov/atr/file/878196/download. We are not involved in these mergers and offer no view on whether they are anticompetitive as alleged by the DOJ. In January 2017, Judge John Bates sided with the DOJ and issued an order blocking Aetna's proposed acquisition of Humana. *See* Memorandum Opinion, United States v. Aetna Inc., No. 1:16-cv-01494-JDB (D.D.C. Jan. 23, 2017), https://www.justice.gov/opa/press-release/file/930361/download.

[18] For example, according to a calculator created by the Henry J. Kaiser Foundation, absent financial help, the cost of the lowest tier ("silver plan") policy for a family of four would be $923 per month. *See* Health Insurance Marketplace Calendar, Henry J. Kaiser Family Foundation, http://kff.org/interactive/subsidy-calculator/.

tors or new entrants.[19] Having more competition among health insurers in offering insurance would tend to give consumers lower health insurance prices and more choices.[20] Similarly, the DOJ's successful challenge to the proposed merger between Aetna and Humana, by preventing a loss of competition in the market for Medicare Advantage, protected senior citizens, especially those with lower incomes, for whom affordable health care is a major concern. By the same token, preventing anticompetitive hospital mergers, grocery store mergers, or dollar store mergers also protects working-class consumers.

Second, the DOJ and FTC are currently reviewing several major agricultural seed/chemical company mergers: Bayer/Monsanto, Dow/DuPont, and Syngenta/ChemChina.[21] Approving these mergers could be politically risky for the Trump administration if it is concerned about corporate power over farmers and the working class. At Judiciary Committee hearings in September on Consolidation and Competition in the U.S. Seed and Agrochemical Industry, Senator Grassley (R-IA) said, "I'm concerned that further concentration in the industry will reduce choice and raise the price of chemicals and seed for farmers, which ultimately will affect choice and costs for consumers."[22]

For better or worse, the consolidation in the American economy over the past 30 years has gone hand-in-hand with a more lenient approach to horizontal mergers. Indeed, from today's perspective, the 1968 Merger Guidelines are shockingly tough. As one example, they state that the DOJ will ordinarily challenge mergers in which the acquiring firm has a market share of at least 15 percent and the acquired firm has a market share of at least 3 percent.[23] The significant changes in antitrust enforcement over the past 30 years are reflected in counseling clients. In today's antitrust world, counselors commonly explain that 6-to-5 and 5-to-4 mergers rarely are challenged and many 4-to-3 and 3-to-2 mergers are approved.[24] This trend could be reversed by the Trump administration if it adopts the reining-in approach.

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[19] Complaint, United States v. Blue Cross Blue Shield of Michigan, No. 2:10-cv-15155-DPH-MKM (E.D. Mich. Oct. 18, 2010), https://www.justice.gov/atr/case-document/complaint-43. The case was settled on March 25, 2013, a week after the State of Michigan passed a law banning MFNs. *See* Stipulated Motion and Brief to Dismiss Without Prejudice, United States v. Blue Cross Blue Shield of Michigan, No. 2:10-cv-15155-DPH-MKM (E.D. Mich. Mar. 25, 2013), https://www.justice.gov/atr/case-document/file/489421/download. Shapiro was at the DOJ when the complaint was filed in this case.

[20] For example, the DOJ complaint in the Anthem/Cigna case states: "If permitted to proceed, Anthem's purchase of Cigna likely would lead to higher prices and reduced benefits, and would deprive consumers and healthcare providers of the innovation and collaboration necessary to improve care outcomes." Complaint, United States v. Anthem, Inc., *supra* note 17, ¶ 9.

[21] *See* Jacob Bunge, *Agricultural Seed Company Executives Defend Mergers in Washington*, WALL ST. J., Sept. 20, 2016, http://www.wsj.com/articles/agricultural-seed-company-executives-appear-on-capitol-hill-tuesday-1474397837. We are not involved in these mergers and offer no view on whether they are anticompetitive.

[22] Senator Chuck Grassley, Statement at Judiciary Committee Hearing on Consolidation and Competition in the U.S. Seed and Agrochemical Industry (Sept. 20, 2016), http://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-consolidation-and-competition-us.

[23] U.S. Dep't of Justice, 1968 Merger Guidelines, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf. The 1968 Merger Guidelines apply even more stringent standards to markets where the top four firms have a combined market share of at least 75% and to markets exhibiting a trend toward concentration. The 1968 Merger Guidelines remained in force until 1982.

[24] For example, in FTC merger reviews over the 1993–2010 period, in markets with entry barriers, only 47% of mergers were challenged when the HHI increase was less than 800 points, but 86% were challenged when the HHI increase was more than 1000 points. There was an over-90% challenge rate for transactions that led to three or fewer competitors when there were entry barriers, but a challenge rate of 17 to 23% in mergers resulting in markets of four or more competitors in the market. *See* Malcolm B. Coate, *Benchmarking the Upward Pricing Pressure Model with Federal Trade Commission Evidence*, 7 J. COMPETITION L. & ECON. 825, 834 tbl. 2 (2011). These figures are based on Coate's "Raw Sample." His "Adjusted Sample" does not identify the number of firms when there are "Entry Issues" or "Proof of Concern."

Merger Remedies. There are other actions that a Trump administration could take to ramp up merger enforcement. For example, it could emphasize stronger consent decrees for transactions that are permitted. The Agencies traditionally have sought to facilitate proposed mergers using the most limited interventions thought necessary to preserve competition, through divestitures or other remedies. The policy toward merger remedies recently has been tightened up, which has led to some additional mergers being litigated or abandoned. But when mergers are attacked in court, the courts may permit the merging parties to "litigate the fix," not the original consolidation that was proposed.[25]

Studies have shown that merger enforcement and remedies are often insufficient, and prices may rise or service may decline.[26] Multiple agency reports have discussed the need for improved merger remedies.[27] The FTC recently issued a report evaluating the FTC's merger remedies from 2006 to 2012.[28] The FTC study finds that 17 percent of the remedies studied failed to maintain the pre-merger level of competition. Moreover, the success rate was lower for divestitures that did not involve an entire ongoing line of business. The FTC study also identified some areas where the process of designing and implementing merger remedies can be improved, including the scope of the assets to be divested and the adequacy of the due diligence. In addition to this study, we know that the merger remedies in some cases have failed. For example, in the recent supermarket merger of Safeway and Albertsons, the divestee (Haggen) went bankrupt not long after it acquired the divested assets.[29] The FTC then permitted Haggen to resell many of those stores *back to the merged firm*.[30] Another example is the bankruptcy of the divestee in the Hertz/Dollar Thrifty merger, though this led to the sale to a different third party, which potentially may have created a stronger competitor.[31] The Agencies do not currently include a mechanism in consent decrees to monitor merger performance or to correct remedial errors—neither errors involving the initial assessment of the competitive risks of the merger nor errors about the necessary remedy.[32]

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[25] For further discussion, see David I. Gelfand & Leah O. Brannon, *A Primer on Litigating the Fix*, ANTITRUST, Fall 2016, at 10.

[26] *See generally* Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. 67 (2014); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). For a critical view of this work, see Michael Vita & F. David Osinski, John Kwoka's Mergers, Merger Control and Remedies: A Critical Review (Dec. 21, 2016), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2888485.

[27] *See, e.g.*, U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (June 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf. This updated a 2004 version of the same report. U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), https://www.justice.gov/atr/archived-antitrust-division-policy-guide-merger-remedies-october-2004; *see also* Deborah L. Feinstein, *Conduct Merger Remedies; Tried But Not Tested*, ANTITRUST, Fall 2011, at 5.

[28] FED. TRADE COMMISSION, THE FTC'S MERGER REMEDIES 2006–2012 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[29] *See* Complaint, Haggen Holdings, LLC v. Albertson's LLC, No. 1:99-mc-09999, 2015 WL 5138125 (D. Del. Sept. 1, 2015).

[30] *See* Ángel González, *Judge Approves Sale of Haggen to Albertsons*, SEATTLE TIMES (Mar. 29, 2016), http://www.seattletimes.com/business/retail/judge-approves-sale-of-haggen-to-albertsons/; Iván Cruz, *Albertsons Paying 5.75 Million to Settle Haggen Lawsuit*, ABASTO (Jan. 26, 2016), https://abasto.com/en/news/albertsons-paying-5-75-million-to-settle-haggen-lawsuit/.

[31] Hertz divested the Advantage brand in December 2012 to FNSA in a transaction financed by Macquarie. *See* David McLaughlin, Mark Clothier & Sara Forden, *Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned*, BLOOMBERG (Nov. 19, 2013), http://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned. The Advantage assets were subsequently sold to a private equity firm, Catalyst Capital, in January 2014, which then acquired the EZ Rent-A-Car chain in a transaction that closed in June 2015. *See* Danny King, *Advantage Completes E-Z Rent-A-Car Deal*, TRAVEL WEEKLY (June 8, 2015), http://www.travelweekly.com/Travel-News/Car-Rental-News/Advantage-completes-EZ-Rent-A-Car-deal?ct=.

[32] For further discussion, see Steven C. Salop, *Modifying Merger Consent Decrees: An Economist Plot to Improve Merger Enforcement Policy*, ANTITRUST, Fall 2016, at 15.

Such a mechanism would incentivize the merging companies to provide better information to the government and to divestees, ultimately leading to more viable and competitive divestees.

Antitrust policy that pays attention to corporate power would recognize that problems with merger remedies are a symptom of a more systemic problem. The merged firm has considerable influence over the choice of the divestee. The merged firm also has a natural informational advantage over the Agency regarding industry conditions in general and the strengths and weaknesses of the candidates to acquire the divested assets in particular. And the merged firm has no incentive to choose the most effective competitor. Under current practice, if a merger consent decree fails to correct the competitive concerns identified by the Agency, consumers take the hit, not the merged firm.

. . . the current system is peculiar because the result is that the risk of failed merger enforcement is placed entirely on consumers . . .

Why is this? The current system could be defended based on the view that exposing the merged firm to the risk that an ineffective consent decree will be modified would discourage mergers and disrupt business planning by the merged entity. Businesses, however, manage various risks all the time, and making firms pay for the costs they impose on third parties is a plus, not a minus. This remedial approach might make more sense if mergers in concentrated markets commonly generated large efficiencies that typically benefited consumers on balance, but that evidence is lacking.[33] More fundamentally, the current system is peculiar because the result is that the risk of failed merger enforcement is placed entirely on consumers, who generally have lower average incomes and thus are likely to be more risk-averse than the shareholders of the merged firm. Instead, a Trump administration seeking to rein in corporate power could strengthen merger remedies so that the merged firm rather than consumers bears some risk of a failed or inadequate divestiture.

Public Interest Prong. Going further, if the Trump administration decides to be aggressive about using antitrust to rein in corporate power, it could even add a "public interest" prong to merger law and enforcement. Concerns about the traditional small-town community way of life were expressed at the time that Congress amended the Clayton Act in 1950.[34] These concerns, though, are not taken into account in merger enforcement today. Currently, the adverse impact on workers and communities when the merged firm consolidates operations and shuts down facilities to save costs or rationalize production is not part of the antitrust analysis. Those types of impacts would appear to have been effectively ruled out under current law by the Supreme Court in *Philadelphia National Bank*, where the Court stated that an anticompetitive merger could not be saved by analysis of "some ultimate reckoning of social or economic debits and credits."[35]

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[33] It is difficult to do rigorous empirical analysis to test the effects of such mergers (or other alleged anticompetitive conduct). Even aside from the usual econometric issues, data is often limited to a non-random sample of markets. The samples also are non-random because antitrust concerns deter the conduct in the more problematical market structures. For a critical literature review, see Lars-Hendrick Röller, Johan Stennek & Frank Verboven, *Efficiency Gains from Mergers*, *in* EUROPEAN MERGER CONTROL: DO WE NEED AN EFFICIENCY DEFENCE ch. 3 (Fabienne Ilzkovitz & Roderick Meiklejohn, eds. 2006). For an interesting new study based on plant-level data, see Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* (Finance and Economics Discussion Series Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, No. 2016-082), https://www.federalreserve.gov/econresdata/feds/2016/files/2016082pap.pdf.

[34] Brown Shoe Co. v. United States, 370 U.S. 294, 333 (1962) (The Court considered the "probable effects upon the economic way of life sought to be preserved by Congress," stating that "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.").

[35] United States v. Phila. Nat'l Bank, 374 US. 321, 371 (1963). This language does not answer the "reverse question" of whether an otherwise acceptable merger could be condemned for harming the broader public interest. But other language in *Philadelphia National Bank* and *Professional Engineers* can be read as counseling antitrust courts to focus only on competitive effects in carrying out the rule of reason. *See id.* at 363; Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

However, a Trump administration strongly committed to reining in corporate power could seek legislation to bring public-interest considerations, including effects on employment and local communities, into merger analysis. The logical implication of President Trump's campaign rhetoric is to bring these and perhaps other social and political factors into the analysis. Indeed, President Trump has already indicated his concern about the political consequences of consolidation resulting from media mergers.[36]

We do not believe that such legislation is necessary or wise at this time. Corporate power instead could be reined in significantly, and the ancillary harms to workers and communities reduced or avoided, using more conventional antitrust enforcement tools by: (1) raising the budgets of the FTC and DOJ; (2) affirming the appropriateness of enforcement targeted at protecting consumer welfare; and (3) adopting a more interventionist merger enforcement policy based on current enforcement principles, while recognizing that current economic conditions and social and political concerns about corporate power in America demand a greater concern with false negatives (allowing or under-deterring anticompetitive mergers to proceed) relative to false positives (blocking or over-deterring benign or procompetitive mergers). These conditions and concerns also would strengthen the role of the anticompetitive presumption for certain mergers, along with a high evidentiary burden to rebut that presumption and the use of sliding scale evidentiary standards. This would fit comfortably within the approach adopted by the Supreme Court in the *Philadelphia National Bank* opinion, which was decided in response to then-current concerns about corporate power. As the Court stated:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically . . . a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. *Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration.*[37]

The Agencies could also place greater emphasis on buyer cartels that harm workers and insist on criminal penalties when such cartels are uncovered.[38]

The Trump administration could also use the FTC Act to more actively rein in corporate power, without the need for new legislation. The FTC Act can take into account broader considerations than the Clayton Act. Section 5 of the FTC Act can be used to attack "unfair methods of competition."[39] While the FTC's 2015 Statement of Enforcement Principles narrowed the scope of Section

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[36] The FCC already operates under a public-interest standard, but the FCC's jurisdiction does not necessarily cover mergers and acquisitions of firms that create content.

[37] *Philadelphia Nat'l Bank*, 374 U.S. at 363 (emphasis added) (internal citations omitted). An anticompetitive presumption also might be based on other market factors as well. Several possibilities are mentioned in the Merger Guidelines. *See* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 Antitrust L.J. 269, 298–306 (2015).

[38] The Department of Justice did not prosecute the Silicon Valley no-poaching agreements criminally. However, the DOJ and FTC recently offered guidance that they would begin to prosecute such agreements criminally. *See* U.S. Dep't of Justice, Press Release, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

[39] 15 U.S.C. § 45.

5 as enforced by the FTC,[40] President Trump's pick to head the FTC could seek to reverse course and use Section 5 more broadly in a principled way—subject of course to whatever limitations the courts would impose.

Were the Trump administration to go further and work with Congress to add an explicit public-interest prong to Section 7 of the Clayton Act, such a legislative change should be implemented in a limited and highly principled way, both to avoid doing more harm than good and to avoid arbitrariness or distortion of the antitrust process to further other goals. Absent strict limitations, there is a risk of introducing unreviewable discretionary elements into the antitrust law and policy. One possible principle would be to treat as "non-cognizable" any efficiency claims based on reductions in employment or plant closings, or only to those that likely would lead to significant economic dislocations for affected communities, much the way that efficiency gains based on reductions in output are currently treated as "non-cognizable." This approach to rejecting these claimed efficiencies also would be highly consistent with the theme that corporate power harms workers by ignoring the impact on their welfare.[41]

Going further, employment increases resulting from a merger could be treated as a public-interest benefit. If this approach were taken in the context of Section 7, it would become necessary to evaluate the incremental employment impact of the merger. It also would be necessary to balance the welfare of working-class individuals as workers with their welfare as consumers, and with the welfare of other consumers. This would not be easy to do, which is why we are skeptical of this approach.

It appears that President Trump may be moving in this direction of treating employment as a public interest benefit that should be taken into account in reviewing proposed mergers, albeit in an ad hoc way so far. For example, after meeting President Trump, the CEOs of Monsanto and Bayer pledged to add 3,000 jobs, invest $8 billion, and maintain Monsanto's headquarters in St. Louis, if their merger is approved.[42] Although it has no merger before the agencies, the Chairman of Sprint and SoftBank (Sprint's majority owner), Masayoshi Son, has met with President Trump and pledged to create 50,000 jobs in the United States.[43]

Exclusionary Conduct. Concerns about corporate power also arise when monopolists and firms with market power engage in exclusionary conduct that helps them maintain or enhance their market power. In this regard, as an owner of a United States Football League team, President Trump once was a plaintiff in an antitrust case against the NFL that rested on exclusionary conduct by the NFL.[44] A Trump administration seeking to rein in corporate power could aggressively

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[40] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[41] We certainly recognize that reducing variable costs by laying off workers can be cost-efficient for the merged firm and can lead to lower prices. At the same time, such layoffs also can have adverse social impacts, including increased depression, drug and alcohol addiction, and suicide in affected communities. While these are not "competitive effects" concerns, they are real social costs that might be relevant for setting merger policy under a public-interest approach. However, as noted, we do not favor distorting the modern approach to merger analysis in this way. We prefer setting tighter general merger standards in light of these concerns.

[42] Justin Sink & Mario Parker, *Bayer-Monsanto Pledge Investment, Jobs After Trump Meeting*, Bloomberg (Jan. 17, 2017), https://www.bloomberg.com/politics/articles/2017-01-17/bayer-to-invest-8-billion-and-add-3-000-jobs-trump-aide-says.

[43] Ryan Knutson, *SoftBank Hopes Trump Connection Reopens Doors for Sprint*, Wall St. J. (Dec. 30, 2016), http://www.wsj.com/articles/softbank-hopes-trump-connection-reopens-doors-for-sprint-1483127211.

[44] The USFL won on liability. U.S. Football League v. Nat'l Football League, 644 F. Supp. 1040, 1058 (S.D.N.Y. 1986). But damages were set by the jury at only $1, trebled to $3. This award was affirmed by the appellate court, which stressed the league mismanagement in building up the league and instead changing to a fall schedule in order to induce the NFL to merge with it. *See* U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1350, 1370 (2d Cir. 1988).

challenge exclusionary conduct by hospitals, health insurers, agricultural product suppliers, banks and other financial institutions, and other firms selling products and services used by working-class families.

Impact on Democracy. Furthermore, President Trump has suggested that corporate consolidation can adversely affect democracy. As a candidate, he condemned the proposed AT&T/Time Warner vertical merger and media consolidation generally. He stated, "Deals like this destroy democracy. And we'll look at breaking that deal up and other deals like that."[45] He also attacked the Comcast/NBCU vertical merger, stating, "This should never ever have been approved in the first place."[46]

Concerns about the impact of mergers on democracy are outside the range of competitive-effects analysis, though the impact of corporate consolidation on democracy was a concern when Congress amended Section 7 in 1950. Recognizing these concerns, antitrust standards could strengthen the role of the anticompetitive presumption for certain mergers and require a higher evidentiary burden to rebut that presumption.[47] Under this approach, the Agencies and the courts would not attempt to analyze the impact on democracy of a specific merger but would set the bar higher for the most sensitive mergers.

Concerns about rent-seeking and capture could be an area where conservatives and progressives agree about the need for a reining-in approach.

Rent Seeking. Consolidation increases the political power of corporations to influence or control governmental actions, which also can threaten democracy. Conservatives have long expressed concerns about "rent-seeking" behavior and the "capture" of regulators to protect incumbents and blockade disruptive new entrants. Concerns about rent-seeking and capture could be an area where conservatives and progressives agree about the need for a reining-in approach.

Trade Policy. Trade policy is a classic area of rent-seeking via protectionism. In this short antitrust article, we do not focus on trade policy or other policies to protect domestic firms from foreign competition. We note, however, that adopting such protections would have implications for antitrust enforcement policy. In particular, if the administration erects trade barriers, it will be important for merger enforcement to adjust by taking a tougher stance toward mergers between domestic firms. This is because trade barriers make foreign competition a less effective constraint on price increases by domestic firms.

Banking Regulation. As a candidate, President Trump indicated that he is in favor of "breaking up the big banks" as well as adopting a new Glass-Steagall Act limiting the scope of what banks can do.[48] This corporate power issue involves more than antitrust, however. While we have not focused on consumer protection in this article, we note that there is an enormous tension between President Trump's call to rein in the big banks and other plans already taking shape to repeal the Dodd-Frank Act and potentially to eliminate or weaken the Consumer Financial Protection Bureau

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[45] Ryan Knutson, *Trump Says He Would Block AT&T-Time Warner Deal*, Wall St. J., Oct. 22, 2016, http://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214.

[46] *Id.*

[47] These considerations can be taken into account by the FCC, for media mergers under its jurisdiction, by applying the FCC's public-interest standard.

[48] *See* Ryan Tracy, *Donald Trump's Transition Team: We Will "Dismantle" Dodd-Frank*, Wall St. J., Nov. 10, 2016, http://www.wsj.com/articles/donald-trumps-transition-team-we-will-dismantle-dodd-frank-1478800611. The original Glass-Steagall Act was repealed under the Clinton administration in 1999.

(CFPB).[49] Whatever might be the inefficiencies in Dodd-Frank, that statute was an attempt to rein in the large banks that contributed to the financial meltdown in 2008 and the worst economic catastrophe in the United States since the Great Depression. Undoubtedly, many working-class voters or members of their families were among those who became unemployed or lost their homes during this period. Indeed, the perception that the big banks and their highly paid executives were receiving favorable treatment (including bail-outs), while working families were suffering, losing their jobs and their homes, helped fuel the anger that President Trump rode into office.

Laissez Faire: Triumph of the 1%

Although working-class Trump voters were hoping that the Trump administration would rein in corporate power, some initial indications suggest that the administration instead will adopt a more laissez-faire approach to antitrust enforcement. By laissez faire, we mean to suggest a highly permissive, minimalist approach to antitrust (outside of price-fixing enforcement) of the type associated with Robert Bork. The laissez-faire approach is much more fearful of over-deterrence than under-deterrence. This is based on the belief that markets self-correct when anticompetitive conduct occurs, plus a greater acceptance of efficiency explanations for business conduct, combined with skepticism regarding the competence and objectivity of judges and juries to evaluate antitrust issues.[50] The result is a far more permissive overall approach to antitrust enforcement. While laissez-faire proponents believe that a permissive approach to antitrust is the best route to higher efficiency and long-run consumer welfare, we do not. We also do not think that this is the approach hoped for by working-class voters who put Trump into office. As we noted earlier, a slogan for this laissez-faire approach by angry voters might be "Triumph of the 1%."

Antitrust permissiveness runs along a continuum, depending on the strength of these beliefs. To illustrate what the more permissive end of the continuum might be, we will highlight some of the policy positions advocated by Professor Joshua Wright. Professor Wright is a conservative law professor who teaches at the Antonin Scalia Law School at George Mason University and was an FTC Commissioner from 2013–2015. Most importantly, he has advised the FTC transition team, recently has met with President Trump, and has been reported to be under consideration for AAG.[51] Professor Wright has described his positions on antitrust law and policy in his extensive writings. While Wright's positions highlighted here do not reflect the totality of his views, they can serve as a useful signal of the type of policies that would that be adopted if the Trump administration pursues a laissez-faire approach.[52]

Horizontal Mergers. A laissez-faire approach toward merger enforcement could be highly permissive. The ideology behind laissez-faire presumes that mergers generally will lead to increased

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[49] *See id.*; Ben White, *Bankers Celebrate Dawn of Trump Era*, POLITICO (Nov. 17, 2016), http://www.politico.com/story/2016/11/donald-trump-wall-street-bankers-231524. President Trump recently issued an Executive Order to reduce financial regulation. He also stated, "We expect to be cutting a lot out of Dodd-Frank." *See* Ben Protess & Julie Hirschfield Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES, Feb. 3, 2017, https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?_r=0.

[50] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11, 16 (1984). For a recent critique, see Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

[51] David McLaughlin & Jennifer Jacobs, *Wright Under Consideration as Trump's Antitrust Chief, Source Says*, BLOOMBERG (Jan. 19, 2017), https://www.bloomberg.com/politics/articles/2017-01-19/wright-said-to-be-under-consideration-as-trump-s-antitrust-chief.

[52] David Higbee, an antitrust lawyer at Hunton and Williams (and a former Antitrust Division official during the George W. Bush administration), also has reportedly been appointed to the DOJ transition team. However, we have not found any major articles setting out his general policy views.

efficiencies—lower costs, higher quality products, and more innovation—and that entry and competition from non-merging firms will tend to protect consumers from any potential market power resulting from a merger. Furthermore, merger policy based on the laissez-faire approach treats transfers of wealth and income from consumers to stockholders as irrelevant to antitrust policy.[53] According to this general view, any income distribution concerns are better addressed using income tax policies.[54]

[E]liminating the anticompetitive presumption could make it significantly more difficult for the Agencies to prevail in court when they challenge anticompetitive mergers.

We interpret a number of Wright's merger enforcement positions as consistent with aspects of the laissez-faire approach. He has advocated eliminating the *Philadelphia National Bank* anticompetitive presumption quoted earlier, which has governed merger law since 1963.[55] This goes well beyond the D.C. Circuit's position in *Baker Hughes*, where the D.C. Circuit panel reduced the defendant's rebuttal standard from "clear showing" down to simply a "showing."[56] Because the Agencies routinely rely on this presumption when they go to court to challenge mergers, eliminating the anticompetitive presumption could make it significantly more difficult for the Agencies to prevail in court when they challenge anticompetitive mergers. This would likely lead to much more lenient merger enforcement and under-deterrence of anticompetitive mergers, not only during the Trump administration but potentially for many years to come.[57]

As an FTC Commissioner, Wright advocated more permissive merger enforcement than his colleagues. He supported the majority of the merger complaints brought by the FTC but dissented in numerous cases. Overall, he dissented in about 23 percent of the merger complaints where a consent decree was signed while he was a Commissioner (8 out of 35). He was the lone dissenter in seven of these eight matters. Both the reasoning and frequency of these dissents indicate how a laissez-faire antitrust approach could affect merger policy.

Commissioner Wright generally based his dissents on the grounds that there was insufficient evidence of anticompetitive harm to support a complaint, which also is consistent with his disagreement with the *Philadelphia National Bank* presumption—and the use of presumptions based on market shares more generally. One dissent involved a 3-to-2 merger where the parties proposed a divestiture shortly after the second request was issued, which apparently truncated somewhat the evidentiary record.[58] In this context, Commissioner Wright found no credible basis to conclude that the merger would enhance the likelihood of coordination, notwithstanding the market structure.[59] This indicates a higher relative concern with false positives than with false negatives, and associated evidentiary standards for efficiencies and harm evidence.

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[53] *See, e.g.*, Robert Bork, The Antitrust Paradox 111 (1978) ("[I]t seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity.").

[54] Of course, taxation has been critiqued by separate arguments based on economic incentive effects, for example, as reflected in the famous Laffer curve.

[55] Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 377, 380–81 (2015).

[56] United States v. Baker Hughes Inc., 908 F.2d 981, 989, 991 (D.C. Cir. 1990).

[57] As explained by Judge Posner, "I don't think turning an antitrust case into a graduate economic seminar is feasible." Philadelphia National Bank *at 50: An Interview with Judge Richard Posner*, 80 Antitrust L.J. 205, 207 (2015).

[58] Dissenting Statement of Comm'r Joshua D. Wright, In the Matter of ZF Friedrichshafen AG and TRW Automotive Holdings Corp., FTC File No. 141-0235 (May 8, 2015), https://www.ftc.gov/system/files/documents/public_statements/641701/150508zeppelinjdwstmt.pdf. On the issue of the truncated evidentiary record, *see id.* at 8–9; *see also* Statement of the Fed. Trade Comm'n, In the Matter of ZF Friedrichshafen AG and TRW Automotive Holdings Corp., FTC File No. 141-0235, at 3 n.7 (May 8, 2015), https://www.ftc.gov/system/files/documents/public_statements/641721/150508zeppelincommstmt.pdf.

[59] *Id.*

He dissented in another matter on the grounds that there was insufficient evidence of anti-competitive effects, based on his conclusion that there were efficiency benefits to consumers that outweighed the likely competitive harms.[60] His disagreement with the other members of the Commission appears to have involved different views of the proper burden of proof to be placed on the merging firm to prove the efficiency benefits, as well as the burden on the Commission to prove competitive harms. Wright was generally less skeptical of efficiency claims, a view that is in line with laissez-faire antitrust and is more permissive than current FTC policy.

Vertical Mergers. The laissez-faire approach takes a very permissive view of vertical mergers. A key rationale is that vertical mergers are generally efficient. One of Commissioner Wright's merger dissents illustrates this permissive approach. That dissent involved a matter where, perhaps as a way to speed up resolution of the transaction, the merging firms themselves had identified a potential competitive problem relating to its vertical integration and were negotiating the remedial solution with a third party even before the Commission identified the issue as a competitive concern.[61] Nevertheless, Commissioner Wright concluded that there was insufficient evidence to believe that there was a competitive problem.[62] Under a permissive approach, vertical mergers like AT&T/Time Warner would have a much higher likelihood of success and receive approval with fewer limitations.

Exclusionary Conduct. The laissez-faire approach also would be permissive with respect to other allegedly exclusionary conduct. To illustrate, Commissioner Wright's dissent in the FTC's *McWane* exclusive-dealing case opined that exclusive dealing even by a monopolist should be treated as presumptively procompetitive, and that the plaintiff would need "clear evidence" to rebut this presumption.[63] The Eleventh Circuit rejected that position.[64] However, it nonetheless could animate enforcement policy during a Trump administration. Similarly, while accepting the logic of the modern economic approach to analyzing foreclosure, Professor Wright and other commentators propose raising the evidentiary bar to establish that exclusionary conduct creates significant foreclosure.[65] Setting a higher evidentiary bar for showing harm and a lower bar for showing efficiencies would come close to treating exclusionary conduct by monopolists as nearly per se legal.

In the context of Section 5 of the FTC Act, Commissioner Wright voted with Chairman Ramirez and Commissioners Brill and McSweeny in support of the FTC's Statement of Principles Regarding

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[60] Dissenting Statement of Comm'r Joshua D. Wright, In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, FTC File No. 131-0087, at 1 (Apr. 11, 2014), https://www.ftc.gov/system/files/documents/public_statements/568821/140411ardaghstmt.pdf.

[61] Statement of the Fed. Trade Comm'n, In the Matter of Par Petroleum Corp. and Mid Pac Petroleum, LLC, FTC File No. 141-0171 (Mar. 18, 2015), https://www.ftc.gov/system/files/documents/public_statements/642341/150318parpetroleumstatement.pdf.

[62] Dissenting Statement of Comm'r Wright, In the Matter of Par Petroleum Corp./Koko'oha Investments, Inc., FTC File No. 141-0171 (Mar. 18, 2015), https://www.ftc.gov/system/files/documents/public_statements/630951/150318parpetroleumwrightstatement.pdf.

[63] Dissenting Statement of Comm'r Joshua D. Wright, In the Matter of McWane, Inc. and Star Pipe Prods., Ltd., FTC Docket No. 9351, at 17–18 (Feb. 6, 2014), https://www.ftc.gov/system/files/documents/public_statements/202211/140206mcwanestatement.pdf.

[64] *See* McWane, Inc. v. FTC, 783 F.3d 814, 836 (11th Cir. 2015).

[65] The more permissive foreclosure standard would demand a showing that the rival's output has fallen below minimum efficient scale (MES) or minimum viable scale (MVS), rather than be satisfied by a showing that the rival's costs were raised materially or its capacity reduced and these foreclosure effects permit the defendant to achieve, maintain, or enhance market power. *Compare* Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 Geo. Mason L. Rev. 1163 (2012), *with* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test*, 81 Antitrust L.J. (forthcoming 2017). Commissioner Wright proposed the use of the MES standard in *McWane*, 783 F.3d at 824.

Enforcement of FTC Act as a Competition Statute. Nevertheless, prior to that vote, in his own writings on Section 5, Commissioner Wright crafted an absolute defense for conduct that generated any efficiency benefits, regardless of whether those benefits were outweighed by harms to consumers and to the competitive process.[66]

Antitrust and Patents. Another key test for Trump administration antitrust policy will be how it handles knotty questions at the intersection of antitrust law and patent law. During the George W. Bush administration, the FTC, under Chairman Timothy Muris, took a balanced view of how antitrust and patent law intersect and interact. The Muris FTC issued a highly influential report in 2003 raising concerns that "overly generous patent rights" were stifling rather than promoting innovation.[67] The report made a number of recommendations to reverse the expansion of patent rights resulting from decisions by the Federal Circuit Court of Appeals. The FTC report was widely cited in the debate over patent reform that ultimately led to the passage of the America Invents Acts in 2011. The FTC also brought a cutting-edge case against Unocal for its deceptive use of patents to achieve market power in the context of the development of reformulated gasoline standards set by the State of California.[68] The Muris FTC also brought a case against Bristol Myers Squibb for abuse of process by improperly filing an Orange Book listing and inequitable conduct at the Patent and Trademark Office.[69]

Two specific areas at the intersection of antitrust law and patent law have been active in recent years and are likely to remain lively over the coming years: pay-for-delay agreements in the pharmaceutical industry and the treatment of standard-essential patents. The positions taken by the Trump administration are likely to be of considerable consequence in both of these areas.

As to pay-for-delay agreements, during the first term of the George W. Bush administration, under Chairman Muris, the FTC continued the Pitofsky FTC's policy of challenging pay-for-delay agreements in the pharmaceutical industry. These efforts were further continued by FTC Chairwoman Deborah Majoras, Chairman Jon Leibowitz, and Chairwoman Edith Ramirez, culminating in the Supreme Court's landmark 2013 decision in *Actavis*, which largely adopted the position that the FTC had taken for some 15 years that those agreements can be anticompetitive.[70] Defenders of these agreements have pushed back against the view that large "reverse payments" are evi-

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[66] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf; Statement of Comm'r Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 9 (June 19, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf. Note, however, that Commissioner Wright did not dissent from adoption of the more moderate FTC Section 5 Guidelines that applied the rule of reason under the consumer welfare standard. *Cf.* Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, Antitrust Source (Oct. 2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf.

[67] Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy 32–33 (2003), https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf.

[68] Press Release, Fed. Trade Comm'n, FTC Charges Unocal with Anticompetitive Conduct Related to Reformulated Gasoline (Mar. 4, 2003), https://www.ftc.gov/news-events/press-releases/2003/03/ftc-charges-unocal-anticompetitive-conduct-related-reformulated. Shapiro testified on behalf of the FTC in this case.

[69] Press Release, Fed. Trade Comm'n, FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition (Mar. 7, 2003), https://www.ftc.gov/news-events/press-releases/2003/03/ftc-charges-bristol-myers-squibb-pattern-abusing-government.

[70] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

dence of anticompetitive agreements to delay entry.[71] The FTC has found that these pay-for-delay agreements have been extremely costly to consumers.[72] A laissez-faire approach to pay-for-delay deals could dramatically reduce generic competition and harm working-class consumers.

As to standard-essential patents, the DOJ and the FTC have warned about the dangers of patent holdup and the harm to competition that can occur if a patent holder fails to abide by its promise to license its standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms.[73] In 2013, the FTC brought enforcement actions in this area against Google and Bosch, both of which were ultimately resolved by consent decrees.[74]

The DOJ business review letter issued in 2015 to the Institute of Electrical and Electronics Engineers (IEEE) illustrates what is at stake in this debate.[75] The IEEE sought the DOJ's view when the IEEE was seeking to update its policies to better prevent patent hold-up by firms that promise to license their SEPs on FRAND terms. The DOJ concluded that the proposed IEEE updates had "the potential to benefit competition by facilitating licensing negotiations, mitigating hold up and royalty stacking, and promoting competition among technologies for inclusion in standards."[76]

The DOJ's business review letter was sharply criticized by some commentators, who expressed grave concern that the IEEE updates would reduce the value of SEPs.[77] These commentators and

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[71] These critics argue that the fact that a settlement involves a large and unexplained reverse payment is not reliable evidence of anticompetitive delay. This view was rejected by the Supreme Court in *Actavis*. Without the "*Actavis* Inference" established by the Supreme Court, it would become much more difficult for the FTC to prevail in those cases. Professor Wright and his co-authors criticized the Supreme Court's decision in *Actavis*, stating that the rule established by the Supreme Court "will deem some welfare increasing settlements anticompetitive." Bruce H. Kobayashi, Joshua D. Wright, Douglas H. Ginsburg & Joanna Tsai, Actavis *and Multiple ANDA Entrants: Beyond the Temporary Duopoly*, ANTITRUST, Spring 2015, at 89, 95. Shapiro has criticized that article. *See* Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *The* Actavis *Inference: Theory and Practice*, 67 RUTGERS L. REV. 585 (2015).

[72] *See* FTC STAFF, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS: A FEDERAL TRADE COMMISSION STUDY 1 (2010).

[73] *See, e.g.*, FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf; Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Innovation Through Patent and Antitrust Law and Policy, Remarks as Prepared for the Joint Workshop of the U.S. Patent and Trademark Office, the Federal Trade Commission, and the Department of Justice on the Intersection of Patent Policy and Competition Policy: Implications for Promoting Innovation (May 26, 2010), https://www.justice.gov/atr/file/518211/download; *see also* Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (Judge Richard Posner's view of patent hold up).

[74] *See* Decision and Order, In the Matter of Motorola Mobility LLC and Google Inc., FTC Docket No. C-4410 (July 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf; Decision and Order, In the Matter of Robert Bosch GmbH, FTC Docket No. C-4377 (Apr. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf. Commissioner Ohlhausen dissented in both of these matters. *See* Dissenting Statement of Comm'r Maureen K. Ohlhausen, In the Matter of Motorola Mobility LLC and Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf; Statement of Comm'r Maureen K. Ohlhausen, In the Matter of Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/121126boschohlhausenstatement.pdf.

[75] *See* Letter from Renata B. Hesse, Acting Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Michael A. Lindsey, Attorney, Dorsey & Whitney, LLP (Feb. 2, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2015/02/02/311470.pdf.

[76] *Id.* at 16.

[77] For example, referring to the IEEE business review letter, David Teece stated: "I conclude that the DOJ (i) doesn't know what it is doing and (ii) has once again shown that is it biased against innovation and (iii) has chosen to listen to users of IP, not inventors." David Teece, Opening Remarks at First Annual IP Management Conference, Intellectual Property Issues in a Global Context: Management & Policy Concerns (July 2015), http://innovation-archives.berkeley.edu/businessinnovation/documents/DJT-Opening-Remarks.pdf; *see also* Alden Abbott, *Undermining Investment in Standard Setting by Weakening Patents: How a Recent Justice Department Business Review Letter Gets Things Wrong*, TRUTH ON THE MARKET (Mar. 24, 2015), https://truthonthemarket.com/2015/03/24/undermining-investment-in-standard-setting-by-weakening-patents-how-a-recent-justice-department-business-review-letter-gets-things-wrong/.

others have expressed skepticism about the significance of patent hold-up. One fact commonly cited by these skeptics is the rapid growth of smartphone sales in recent years, which is treated (erroneously in our view) as evidence inconsistent with the presence of patent hold-up in the smartphone industry.[78] If the Trump administration takes a narrow view of the role of antitrust and patent law in preventing SEP owners from evading their FRAND commitments, potentially very large amounts of money would flow from ordinary consumers purchasing smartphones (as one leading example) to a small number of entities that hold SEPs relating to smartphones and have promised to license those patents on FRAND terms. The FTC's recent complaint against Qualcomm,[79] which provoked a strong dissent from Commissioner Ohlhausen,[80] is illustrative.

Occupational Licensing and State Restrictions on Entry. One area where the laissez-faire approach likely would *not* roll back current policy would be occupational licensing and other state restrictions on entry. Conservatives led the way in recognizing how state regulations can reduce competition; progressives have generally followed that lead, while aiming to keep legitimate consumer protections in place.[81] In fact, the Trump administration might go further than previous administrations in removing such regulations. In this regard, President Trump has called for the repeal of the McCarran-Ferguson Act, which restricts competition in insurance, including health insurance.[82] He was quoted as saying, "The insurance companies, they'd rather have monopolies in each state than hundreds of companies going all over the place bidding."[83]

Summary. We have contrasted the reining-in and laissez-faire approaches. While we expect the latter, the direction has not yet been resolved. As we have discussed, there is a policy continuum, and the Trump administration could follow a mix of policies. That will depend on who President Trump appoints to be Chair of the FTC and Assistant Attorney General for Antitrust. For example, in addition to the approach he took in the patent and pay-for-delay area, FTC Chairman Muris stressed bipartisan cooperation and continuity between his approach and that of the previous

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[78] For example, see Joshua D. Wright & Douglas H. Ginsburg, Comment on the Japan Fair Trade Commission's Draft Partial Amendment to the Guidelines for the Use of Intellectual Property Under the Antimonopoly Act 5 n.21 (Aug. 3, 2015), https://www.ftc.gov/system/files/documents/public_statements/693631/150803japantradecomments.pdf. By contrast, we consider it obvious that the dramatic growth in smartphone sales is due to impressive technological progress, and this evidence of growth is perfectly consistent with the hypothesis that patent hold-up has caused smartphones to be somewhat more expensive due to excessive royalties for SEPs. More generally, patent-holdup skeptics frequently ignore the costs borne by potential infringers to *avoid* patent hold-up, including by paying higher royalties. This is a notable oversight: in determining the cost of theft, it would be a major error to ignore the costs people incur to avoid having their property stolen and the "protection money" they pay to criminal enterprises to leave their property alone. *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. Econ. J. 224 (1967).

[79] Complaint, FTC v. Qualcomm Inc., No. 5:17-cv-00220 (Jan. 17, 2017), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf. Professor Shapiro is consulting for the FTC in this matter.

[80] Dissenting Statement of Comm'r Maureen K. Ohlhausen, In the Matter of Qualcomm, Inc., FTC File No. 141-0199 (Jan. 17, 2017), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

[81] *See, e.g.*, White House, Occupational Licensing: A Framework For Policymakers (2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (discussing the pros and cons of licensing regulations on competition and consumer protection); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209 (2016).

[82] Donald J. Trump, *Healthcare Reform to Make America Great Again*, https://www.donaldjtrump.com/positions/healthcare-reform.

[83] Matt Taibbi, *How America Made Donald Trump Unstoppable*, Rolling Stone (Feb. 24, 2016), http://www.rollingstone.com/politics/news/how-america-made-donald-trump-unstoppable-20160224.

administration.[84] Under Chairman Muris, the FTC took the initiative to reinvigorate the FTC's hospital merger enforcement[85] and to assess limitations in the state action doctrine.[86]

Another example of a more moderate Republican approach can be found in some of the positions taken by Commissioner Maureen Ohlhausen. For example, Commissioner Ohlhausen was part of the four-Commissioner majority in the *McWane* case holding McWane liable for anticompetitive exclusive dealing.[87] Commissioner Ohlhausen has not dissented from any merger consent decrees based on a lack of finding potential anticompetitive harm to be caused by the acquisition.[88] On January 25, 2017, President Trump named Commissioner Ohlhausen Acting Chair of the Federal Trade Commission.

Abuse of Power Using Antitrust

Conservative commentators have expressed concerns that the Trump administration might abuse Presidential power with "political coercion" and "crony capitalism."[89] For example, the widely reported negotiation with Carrier appeared to threaten Carrier's parent company with the loss of government contracts if Carrier moved certain jobs to Mexico. Saving domestic jobs is a goal consistent with reining in corporate power, but the concern is that it was implemented by way of an ad hoc threat of retaliation rather than as part of a rule-based process.[90] That is, Trump did not call on Congress to implement a government procurement law that would deny government contracts to firms that exported jobs, nor did he announce that he would implement an Executive Order to that effect.

Abuse of power can involve carrots or sticks. Governmental antitrust enforcement could be used to frighten or punish enemies of the administration or reward its friends.[91] Antitrust investigations can be initiated, and antitrust enforcements actions can be brought, against firms that

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[84] Press Release, Fed. Trade Comm'n, Expect Continuity in Antitrust Enforcement FTC's Muris Tells ABA (Aug. 7, 2001), https://www.ftc.gov/news-events/press-releases/2001/08/expect-continuity-antitrust-enforcement-ftcs-muris-tells-aba.

[85] Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, at 4 (Apr. 6, 2007).

[86] Fed. Trade Comm'n, *Fulfilling the Original Vision: The FTC at 90*, at 10–11(Apr. 2004), https://fraser.stlouisfed.org/files/docs/publications/ftc/ftc_ar_2004.pdf; *see also* Press Release, Fed. Trade Comm'n, South Carolina Board of Dentistry Settles Charges that It Restrained Competition in the Provision of Preventive Care by Dental Hygienists (June 20, 2007), https://www.ftc.gov/news-events/press-releases/2007/06/south-carolina-board-dentistry-settles-charges-it-restrained.

[87] Opinion of the Commission, In the Matter of McWane, Inc. & Star Pipe Prods., Ltd., FTC Docket No. 9351 (Jan. 10, 2014), https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf.

[88] Although Commissioner Ohlhausen partially dissented to the consent decree in the Robert Bosch GmbH merger, her partial dissent expressed concerns regarding only FTC Act § 5 conduct by the parties. *See* Statement of Comm'r Maureen K. Ohlhausen, In the Matter of Robert Bosch GmbH, FTC File No. 121-0081 (Apr. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschohlhausenstatement.pdf.

[89] George F. Will, *Trump's Carrier Plan Is the Opposite of Conservatism*, Wash. Post, Dec. 7, 2016, https://www.washingtonpost.com/opinions/trumps-carrier-deal-is-the-opposite-of-conservatism/2016/12/06/ccbb1732-bbe4-11e6-94ac-3d324840106c_story.html?utm_term=.069a5bf1ce5c; Gov. Sarah Palin, *But . . . Wait . . . The Good Guys Won't Win with More Crony Capitalism*, Young Conservatives (Dec. 2, 2016), http://www.youngcons.com/sarah-palin-but-wait-the-good-guys-wont-win-with-more-crony-capitalism/.

[90] For a similar view from the other side of the political spectrum, see Lawrence H. Summers, *Trump's Carrier Deal Could Permanently Damage American Capitalism*, Wash. Post, Dec. 2, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/12/02/why-trumps-carrier-deal-is-bad-for-america/?tid=a_inl&utm_term=.54e5e41578f5.

[91] Crony capitalism is a fear in every administration. However, this concern is heightened by the Trump family's extensive business interests. University of Chicago Professor Luigi Zingales, author of A Capitalism for the People: Recapturing the Lost Genius of American Prosperity (2012), has written that Donald Trump is "the essence of that commingling of big business and government that goes under the name of crony capitalism." *See* Luigi Zingales, *Donald Trump, Crony Capitalist*, N.Y. Times, Feb. 23, 2016, http://www.nytimes.com/2016/02/23/opinion/campaign-stops/donald-trump-crony-capitalist.html?_r=0.

challenge the administration or do not accede to its demands. Likewise, antitrust enforcement actions can be withdrawn as a way to reward friends or to line the pockets of government officials themselves. Friends of the administration also can be rewarded by bringing antitrust cases against their competitors. Depending on the specifics, these actions could well be illegal. Certainly, forgoing enforcement as a quid pro quo for payment would be. Even putting aside such criminal violations, using antitrust enforcement to frighten or punish enemies or reward friends is inconsistent with the rule of law.[92]

As noted above, President Trump announced as a candidate that he would block the AT&T/Time Warner transaction. That stance could be based on conventional concerns over vertical mergers in the media industry or on reining in corporate power because of the threat that media consolidation poses to democracy, as discussed above. However, President Trump's statement also could have been a way to threaten media players like CNN that he may view as his enemies.

As a candidate, President Trump threatened a monopolization case against Amazon.[93] In doing so, he specifically flagged the fact that Jeff Bezos, Amazon's controlling owner and CEO, owns the *Washington Post*, an apparent Trump enemy. Threats—even if veiled—can harm the victim, and so can be used to chill opposition. *Forbes* reported that Amazon's stock price fell 6 percent several days after President Trump's election.[94] President Trump made other threats against media during the campaign. As early as February 2016, referring to media companies, Trump said, "Believe me, if I become president, oh, do they have problems."[95]

These are not unprecedented concerns. Political pressure by Congress and the White House on the antitrust agencies is a fear in every administration. While one hopes that such pressure is rarely applied, and fails when it is applied, instances of the significant abuse of power involving antitrust occurred during the Nixon administration.

One example that figured prominently in the Nixon impeachment hearings involved the alleged White House intervention in the DOJ's conglomerate antitrust cases against International Telephone & Telegraph in exchange for ITT's contribution of $400,000 to the cost of the 1972 Republican presidential convention in San Diego.[96]

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[92] A related issue is the misuse of antitrust enforcement as a way to obtain cooperation in other areas of the administration's agenda. Permitting an anticompetitive merger as a quid pro quo for the merged firm's agreement (say) not to export jobs of employees in a separate division of the company would be one example.

[93] *See* David Goldman, *Donald Trump's War on Jeff Bezos, Amazon and the Washington Post*, CNN (May 13, 2016), http://money.cnn.com/2016/05/13/technology/donald-trump-jeff-bezos-amazon/.

[94] Ryan Mac, *Why Did Jeff Bezos Make Nice with Trump? Amazon Depends on It*, FORBES (Nov. 10, 2016), http://www.forbes.com/sites/ryanmac/2016/11/10/why-did-jeff-bezos-make-nice-with-trump-amazon-depends-on-it/#6c774898334a.

[95] Callum Borchers, *4 Threats to the Media Under President Trump*, WASH. POST, Nov. 10, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/10/4-threats-to-the-media-under-president-trump/. He went on to say, "They're gonna have such problems. . . . I'm going to open up our libel laws, so when they write purposely negative and horrible and false articles, we can sue them and win lots of money." *Id*.

[96] *See, e.g.*, ABRAHAM ZALEZNIK, HEDGEHOGS AND FOXES: CHARACTER, LEADERSHIP, AND COMMAND IN ORGANIZATIONS 132–33 (2008) (stating that the "highest reaches of the [Nixon] administration"—including Nixon, the Attorney General, and the Deputy Attorney General—were involved in pressuring the AAG in charge of DOJ Antitrust to settle the ITT antitrust cases and permit ITT's merger to proceed); George Lardner Jr., *On Tape, Nixon Outlines 1971 "Deal" to Settle Antitrust Case Against ITT*, WASH. POST, Jan. 4, 1997, https://www.washingtonpost.com/archive/politics/1997/01/04/on-tape-nixon-outlines-1971-deal-to-settle-antitrust-case-against-itt/246628a9-8abf-47f3-80ec-379569e0f350/ (quoting tapes of Nixon and members of his administration regarding ITT's contribution to the 1972 Republican convention in exchange for favorable antitrust treatment by the DOJ); *Text of Memo from Colson to Haldeman on Kleindienst Nomination*, N.Y. TIMES, Aug. 2, 1973, http://www.nytimes.com/1973/08/02/archives/text-of-memo-from-colson-to-haldeman-on-kleindienst-nomination.html (discussing various memos sent within the White House that implicate Nixon and members of his administration).

Another example was the assurances the White House allegedly gave to Howard Hughes that it would not attempt to use Section 7 of the Clayton Act to block his purchase of an additional Las Vegas hotel—over the opposition of the Antitrust AAG, Richard McLaren—in exchange for a $100,000 contribution.[97] Although there is some controversy on the point, one of the possible motives for the Watergate burglary may have been either to unearth what the Democrats knew about the Howard Hughes contributions or to dig up other information with which to persuade the Democrats to withhold such information.[98]

But perhaps most telling was the Nixon administration's delaying a threatened lawsuit against the three prominent TV networks as a way of obtaining more favorable news coverage of the administration.[99] Apparently, the DOJ was considering an antitrust case against the networks involving ownership of "prime-time" programming. As reported by the *Washington Post* in 1997 when Nixon White House tapes relating to this matter were released, the tape transcript indicated that, "Nixon decided to have [Attorney General] Mitchell 'hold it for a while, because [Nixon was] trying to get something out of the networks.'"[100] As the President himself declared in the tape, "We don't give a goddam about the economic gain. Our game here is solely political. . . . As far as screwing them is concerned, I'm very glad to do it."[101]

Summary. We certainly hope that the Trump administration (or any other administration) avoids the use of antitrust as a tool for political leverage or retribution, or even permits any appearance or hint of such an abuse of the rule of law in antitrust. We fear that if the Trump administration does act in that manner, doing so would seriously undermine the legitimacy of U.S. antitrust enforcement. That would harm American antitrust institutions. In addition, it would weaken the ability of the United States to convince foreign jurisdictions to adopt the U.S. approach to antitrust. The result could be that other countries either resort more to intrusive forms of regulation or depart from sound competition policy in ways that harm U.S. corporations and consumers around the world.

Conclusion

If the antitrust leaders in the Trump administration take a cue from the substantial majority of voters who believe that the American economy is rigged in favor of the rich and the powerful, they will take the approach of reining in corporate power. However, at this point it seems more likely that the Trump administration will adopt a more laissez-faire approach.

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97 *See* Jack Anderson, *A Scenario on Hughes' $100,000*, S.F. Chron., Feb. 6, 1974; George Lardner Jr., *Mitchell Tied to Hughes Bid*, Wash. Post, June 23, 1974, at A1, A9.

98 *See* J. Anthony Lukas, *Why the Watergate Break-in?*, N.Y. Times, Nov. 30, 1987, http://www.nytimes.com/1987/11/30/opinion/why-the-watergate-break-in.html. But this is not the only theory. *See* John W. Dean III, *Watergate: What Was It?*, 51 Hastings L. Rev. 609, 638 (2000) (suggesting that the Watergate burglary was an effort to find evidence of Democrats' alleged kickback scheme to be used as a shield against the Democrats' attempts to tarnish Nixon's reputation with the ITT controversy).

99 One of the Watergate tapes also suggested that the Nixon White House was considering engineering opposition to renewal of *Washington Post* radio station licenses, although this was an FCC issue, not an antitrust issue. For a description and citation to the tape, see Nancy Scola, *Why Obama Called Out the FCC in Public*, Wash. Post, Nov. 12, 2014, https://www.washingtonpost.com/news/the-switch/wp/2014/11/12/why-obama-called-out-the-fcc-in-public/?utm_term=.6d8df91b2453.

100 Walter Pincus & George Lardner Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, Wash. Post, Dec. 1, 1997, http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm. The Justice Department did not file suit until April 1972, and the suit was ultimately dismissed in 1974 when the Nixon White House refused to turn over subpoenaed records. Eventually, the Ford administration renewed the complaints and subsequent consent decrees curtailed prime-time productions by the networks. *See id.*

101 *Id.*

We hope that the Trump administration will honor the preferences of the working-class voters who put Trump into office by adopting a reining-in approach to antitrust.

Still, it remains possible that the incoming antitrust leaders at the FTC and the DOJ will adopt the reining-in approach in significant part. These leaders could be moderate Republicans or Trump supporters who view antitrust from a more centrist perspective. Or they might be more laissez-faire Republicans who substantially moderate their views in keeping with current political and economic conditions.

Finally, we note that if the Trump administration does substantially cut back on antitrust enforcement, the state attorneys general may pick up some of the slack. The states often are involved in merger analysis where local issues predominate, as with hospital and supermarket mergers. But they have not limited their efforts to issues of purely local concern. For example, the recent "product hopping" case against Actavis was brought by the state of New York.[102] Looking further back in time, many states were involved in the Microsoft case.[103]

We hope that the Trump administration will honor the preferences of the working-class voters who put Trump into office by adopting a reining-in approach to antitrust. This would involve vigorously enforcing the antitrust laws that control mergers and exclusionary conduct by dominant firms. While antitrust enforcement may not be the most important instrument for maintaining a democratic system, it is vitally important for protecting consumer welfare and maintaining confidence in the market system. ●

[102] New York v. Actavis PLC, 787 F. 3d 638, 659 (2d Cir. 2015) (successfully enjoining pharmaceutical company's "product hopping" effort for an Alzheimer's treatment drug).

[103] Andrew I. Gavil & Harry First, The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century 51–89 (2014) (detailing states' efforts in the litigation and settlement of federal and state monopolization suits against Microsoft, including some states' substantial disagreement with the remedy accepted by the Justice Department).