The Elephant In The Room

JOE SIMS*
jsims@jonesday.com
Partner, Jones Day

Abstract

Bill Kovacic understands the American antitrust process from the inside. He has also consulted with countries all over the globe about how to best establish competition law structures and processes. So when he says the U.S. system needs to be improved, people should pay attention. In fact, however, he is either overly optimistic or just too nice to make the real point: American antitrust is in a state that requires outside intervention, since it is (like people who require intervention) unable to fix its problems by itself. The only possible solutions are all hard and require structural change, up to the abolition or complete refocusing of one of the two federal antitrust agencies. Of course, these may be the only solutions, but that does not make them likely. So in the end, this discussion may be purely conceptual. But at least we should be talking about solutions that would solve the problem if implemented. This article suggests four options that could work.

I. Introduction

I have been around a long time—even longer than Bill Kovacic. I started at the Antitrust Division of the U.S. Department of Justice ("DOJ") in 1970, right out of law school. I left for Jones Day in 1978, and the next year Bill began his career at the US Federal Trade Commission ("FTC"). I first met him a few years later, when he was an associate at Bryan Cave.

Eventually he became Kathy Fenton's husband, one of his most impressive accomplishments. I was smart enough to lure Kathy away from the FTC in 1984, and she has become one of Jones Day's most important partners over the years—making me look a lot smarter on a regular basis, becoming recognized as one of the leading antitrust lawyers in the world, and recently serving as the Chair of the ABA's Antitrust Law Section. Bill and Kathy are clearly one of the power couples of antitrust.[1]

In addition to being Kathy Fenton's husband, Bill is one of those relatively rare lawyers with a constantly curious mind. He is definitely not just a mechanic, like many lawyers, merely fixing broken toys; he is more of a designer, as exemplified by his work helping emerging economies create competition regimes, often from the ground up. I remember asking him, when he told me he was going someplace remote and very definitely still developing to help write the local competition laws, whether that country should not focus on getting an economy before they tried to figure out how to regulate it? His answer: better they start with at least some rational competition concepts, even if there is not much to apply them to in the beginning. Pretty good answer.

In addition to his global Johnny Appleseed work, trying to plant rational competition law principles in what was frequently quite infertile ground, Bill has been a very productive antitrust historian, producing analyses of antitrust historical performance that are always interesting and sometimes quite revealing. And he has, ever since his first tenure at the FTC as a young lawyer and throughout his most recent service as a Commissioner and Chairman, always been a big advocate for and fan of the FTC. So it is interesting that in his paper in Concurrences late last year, as he was leaving the FTC for probably the last time, he raises serious issues about the interaction of the two American antitrust agencies, including the possibility of rethinking the whole notion of dual antitrust enforcement.[2]

II. American Antitrust—a Great Ship with Lots of Barnacles

Modern antitrust/competition law is an American invention, albeit with a significant debt to English common law. Like so many American inventions, it has been widely used and misused, in this country and around the world. It has spawned many global imitators, some of which improved on aspects of the original and many of which have not. Even in America, the combination of antitrust enforcement by the various states, private parties, and at the federal level, by not one but two primary agencies and other niche applications (the Federal Communications Commission ("FCC") in telecommunications, the Federal Energy Regulatory Commission ("FERC") in energy, the Department of Transportation ("DOT") with respect to airlines and railroads, etc.) has produced a historical smorgasbord of decisions and approaches—some quite appealing and many unappetizing. The pros and cons of this multiplicity of American sources of antitrust oversight are well known, and will not be recited here. But Bill's recent article at least implicitly recognizes the largest elephant in the room: is it time to reconsider the very existence of two federal antitrust enforcement agencies in America?

There are not many other places in the world that still have multiple national enforcement bodies. The UK, Brazil and France, among others, have either recently combined or are in the process of combining multiple national competition agencies; soon the United States will be alone in this category among the advanced economies of the world. This is not a distinction to be valued. For all the logical reasons, the notion that it is a good idea to have competition between federal enforcement agencies is so hard to justify as to be nonsensical. Bill obviously gets this point, but he also recognizes that the bureaucratic and political forces that have grown up like kudzu around the status quo make it difficult to imagine that changing for the better in the real world. So instead, Bill advocates for better cooperation between the two agencies. Here, he reveals that he is a true academic at heart, since this makes a lot of sense but is never going to happen in the real world.

III. Antitrust Enforcement Competition Is an Oxymoron

While the two agencies do cooperate from time to time (Horizontal Merger Guidelines is the best example) they are never going to fully coordinate their activities or policies, because the people at the two agencies, and the people that are connected to or support each agency, do not really want it to happen. The people at the agencies want their agency to be the pre-eminent national enforcer, and being first is not a goal conducive to cooperation. They want to do the most interesting stuff; they want to be the most influential U.S. enforcer, here and abroad, and they want to attract the best lawyers to their agency.

On the other side, the people that depend on or are closely connected to each agency, which includes the alumni that practice before the agencies and the politicians that oversee each agency, do not want the world to change because that could adversely affect them. For the alumni, the confusion and uncertainty that is endemic under the *status quo* is just one more reason they can give for why you need to hire them. The politicians like the fact that people who want to gain their influence over the agency make contributions to them, hoping that will gain them an audience when and if necessary, and that the audience will result in some positive (from their perspective) effect on the agency. In other words, like most human enterprises, the antitrust agencies and the people that surround them reflect common human instincts of winning over cooperating, being first rather than helping the overall community be better, and putting their interests before those of the commons. They are much more Donald Trump than Mother Teresa, or for that matter, even your typical NGO. This approach will actually serve the greater good in many circumstances in life, but not in government regulation.

This may be a cynical view of the world, but it is also demonstrably true. There are any number of ways to prove this point, but let me fall back to one in which I was personally involved—the effort a decade ago to redo the clearance system between the two agencies that determines which agency investigates a particular merger or other matter. For background, even these two competitive agencies long ago figured out that it would be a bad idea if both of them simultaneously investigated a particular merger or some other conduct. It is easy to imagine the adverse reaction to having two different federal agencies seeking (probably) different sets of information, and then seeking to impose (probably) different conditions on the parties. Even in America this would resonate as stupid, and probably produce some negative impact on one or both agencies. To avoid this reaction, the agencies decades ago created what they call the clearance system—a process by which the two agencies allocate between themselves every individual investigation.

The clearance process has frequently worked reasonably well, but since it is a voluntary accommodation of and between the two agencies, it depends entirely for its success on the approach and attitude of the people at both agencies at any given moment. As a result, there have been regular spurts of working less well, and occasional moments of not working at all.[3] Even when it works reasonably well, it is not consistently predictable which agency will review a particular matter or set of circumstances, as recent history shows, especially in technology related matters or transactions. The current accommodation with respect to Google, where certain of its conduct is being investigated by one agency and its acquisitions by another, is indefensible on any grounds other than bureaucratic parochialism. It should be embarrassing to

both agencies, but they have each long since progressed beyond embarrassment in this context, to the point that they actually can assert, as they have, that this completely inappropriate arrangement proves the process works.

Bill Kovacic, in his Concurrences article, argues that the current system is perverse and needs to be replaced, but then notes that any new system will probably require congressional approval.[4] You might wonder why this is so, since the existing system was not authorized or approved by Congress, but Bill explains why: "When an agency ceases to exercise jurisdiction over a company (for example, by allocating oversight to another federal agency), the incentive to provide contributions to the agency's congressional oversight committee diminishes. For the affected oversight committee, this is the equivalent of losing an income stream."[5] And we know that Bill is right because that is exactly what happened in 2002.[6]

IV. A Case Study

The then-heads of the FTC and the DOJ Antitrust Division (ATD), Tim Muris and Charles James, had arrived in office with one real advantage over most of their predecessors—they had been there before, either actually running the agency (James was Acting Assistant Attorney General ("AAG") for about a year) or in very senior positions (Muris had run both the Bureau of Consumer Protection and the Bureau of Competition at the FTC). So neither had much of a learning curve, and importantly they also had a good personal relationship. Both knew from their experience at the agencies and in private practice that the clearance process had become a bad joke—eating up time and resources, and generating inter-agency jealousies and animosities that were impairing effective antitrust enforcement.[7]

They also found on their arrival one pending matter, involving a proposed joint venture, that had been pending in the clearance process for more than a year.[8] In the old clearance process, if all else failed, the FTC Chair and the AAG would decide it. Apparently, the previous heads of the two agencies could not reach agreement on this matter, and left it pending for their successors. James and Muris unsuccessfully tried to resolve the dispute themselves. Unfortunately, the arguments for both agencies had some merit, and both were under considerable pressure from their staffs to not give in—in large part because under the existing clearance system, which was largely based on recent experience, once an agency gave up a matter it largely gave up all future matters that were in the same industry area. In desperation, they came up with the idea of going to a neutral arbiter, selected a local law professor, had each agency present their arguments, and let him decide. He decided that the DOJ had the better claim, and on that basis it was cleared to the DOJ.

Although this solved this particular problem, Muris and James had absolutely no desire to go through this again, and certainly not on a regular basis. In addition, both of them were committed to fixing what they saw as a variety of procedural problems for the agencies that, in their view, had gotten in the way of effective enforcement and reduced the bar and business support for the agencies that is critical to long-term enforcement success. This commitment had already resulted in a reorganization of the ATD, a new approach to Hart-Scott-Rodino investigations and second requests at both agencies, and now it produced a new attempt to fix the clearance process.

Given the historical inability to get the agencies themselves to agree on a fix to the clearance mess (agency staffs had become more competitive than cooperative, caused in large part by constant disputes over clearances), Muris and James decided it would be useful to seek help from a small group of respected former agency officials—from Republican and Democratic administrations and both agencies—to come up with a workable plan. The theory was that such a group would have useful experience and knowledge, and (hopefully) because they had long histories of practice before both agencies, less parochialism. In other words, they could be experienced and honest brokers—willing and able to suggest the right thing from the perspective of federal antitrust enforcement in the aggregate.

I was one of that group, having served as a Deputy Assistant Attorney General ("DAAG") in the ATD in the early part of my career. The other three were all experienced and respected antitrust lawyers—Steve Sunshine, also a former DAAG in the ATD, and Bill Baer and Kevin Arquit, each of who had served as heads of the Bureau of Competition at the FTC. Sunshine and Baer had served in Democratic administrations (and Baer is now the Obama Administration's nominee to head the ATD), and Arquit and I in Republican administrations, so the group was both professionally and politically balanced.

This outside expert group spent four months working the problem. They talked with both agency heads, and with the people who actually do the clearance processing. They got statistics and information relating to the historical clearance process. And most importantly, they approached the problem with the starting assumption that it was generally irrelevant which agency did which matter—since both are fully capable of doing any antitrust matter (taking into account certain limited statutory and constitutional exceptions, of which the most important is all criminal matters must be done by the DOJ). We believed that having matters done in a timely and effective way was much more important than which agency did them. This group produced an initial report and recommendations that suggested a revamping of the entire process—from original input to internal agency handling to communicating between agencies.[9] As part of this report, it also suggested updating the existing historical commodity allocation list to (1) make it

more effective—broader categories of like matters grouped together, and old exceptions rationalized, and (2) create an essentially even distribution of matters between the two agencies, emphasizing wherever possible historical patterns.[10]

V. Good Government Meets the Real World

The report was considered by both agencies, and after a careful review largely adopted, despite the fact that staffers at both agencies were not at all enthusiastic, and agency alumni from both agencies almost universally did not like the proposed solution—not because it was not workable, not because it did not do a good job of creating a process that would reasonably equally divide the federal antitrust workload, but because looking at the solution from the prism of *their* agency, they believed that *their* agency had gotten the short end of the stick. In my view, this reaction—both sides thinking the other side got the better deal—was a strong affirmation that we had gotten it about right. When all sides to a solution are unhappy, that is strong evidence that no one was unduly favored. And to their credit, that is where Muris and James came out. Despite some significant opposition from their respective staffs, they signed off on it, a majority of FTC Commissioners endorsed it, and with very small modifications it was put into place.

While it is true that, as a public matter, most knowledgeable observers saw the new system as quite positive, the reality is that the public support was fairly tepid. For example, the American Bar Association Antitrust Law Section concluded that "a publicly announced agreement allocating responsibility by industry will lead to a more expeditious, efficient and transparent review process at least with respect to the allocated industries . . . ."[11] But it did not explicitly endorse the actual solution. In another letter, signed by 11 former heads of both antitrust agencies from the last four Administrations, reaching back 25 years, the effort to "clarify historical allocations of industries and products between the agencies, and introduce clear procedures for processing those few matters that do not clearly fall within existing allocations" was characterized as "desirable objectives" that could be "a real contribution to good government."[12] But they too did not explicitly endorse the specific solution. In my view, this was almost solely the result of agency alumni parochialism—they could not be against the concept, because it so obviously made sense, but they were not going to endorse a solution that many of the staffers they dealt with thought was not "fair," whatever the meaning of that term in this context could be.

Finally, the business community, who one would think would see themselves as most directly affected by the historical failures of the process and thus would be enthusiastic about its improvement, was also only generally supportive. The nation's leading business organizations

(the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce) issued a joint letter saying that "It is universally recognized that this [existing clearance] process is not an example of good government. It wastes the time and resources of both the agencies and the merging parties."[13] The letter urged the FTC and DOJ to "work together to resolve problems with 'clearance' that too often impair the most efficient use of scarce antitrust enforcement resources," and concluded that an "agreed process for resolving clearance disputes and an agreed allocation of particular industries between the agencies would represent an exercise in 'good government,' be far more efficient than the current system, and also provide certainty to the business community, bar and the agencies." But here too, no explicit endorsement of the specific solution, which frankly is consistent with the historical failure of the business community to actually put many chips on the table when there are debates about antitrust, no matter how much individual businesses railed against individual actions. Unlike taxes or many other kinds of regulation, antitrust is only an episodic problem for most businesses, and they choose (perhaps rationally) to spend their political energy on more comprehensive problems.

Still, while the support was less fulsome than would have been desirable, there was no real opposition from any objective and knowledgeable observer. This effort had about as close to universal acceptance as you could imagine in the circumstances, which I (perhaps immodestly) believe was at least in part a perception that the solution was well-designed to deal with the problem. Despite this fact, this new solution to an old problem did not survive the political attacks that, frankly, those of us involved in trying to fix the problem just did not foresee.[14] The resulting firestorm, led by Senator Ernest Hollings (who fortunately has long since left government service, with this as only one of the embarrassing entries on his particular record of "government service") eventually led the DOJ to abandon the new program, under the threat of continued harassment by its congressional appropriators, and the agency agreement collapsed.[15]

Of course, the fear of losing political contributions was never mentioned by Senator Hollings (a man of whom some of his colleagues said that he had been with them and against them, and it was hard to tell the difference). This would not have been a palatable explanation for his opposition; notwithstanding that it was the truth. Senator Hollings got excited because the groups that supported him politically got excited, not because he gave a damn about the subject. And those groups were almost exclusively driven by the fact that the new clearance process, and the new commodity list division between the two agencies, gave jurisdiction over media issues to the DOJ.

VI. The Importance of Happenstance

As it happened, the most visible media merger in a long time, maybe forever at that time, was AOL/ Time Warner ("TW"),[16] which had been reviewed by the FTC because the then-FTC Chair, Bob Pitofsky, had insisted on it and the ATD had, inexplicably, allowed him to take it, despite the fact that the DOJ had historically reviewed most media transactions. Pitofsky had a particular interest in media mergers, and really, really wanted to have a say on this one, which at the time was also the biggest merger in history. Somehow, despite the DOJ's historical record of reviewing virtually all media mergers before this, Chairman Pitofsky managed to get the DOJ to defer to him on this one. While the transaction was eventually permitted to proceed with only very minor remedies, it took a long time to get there and opponents had extraordinary access to the FTC to argue their case. I was representing AOL, and met with Pitofsky seven times on that transaction (more than on any other transaction I have ever been involved in), and he met with lawyers representing third parties opposing the transaction multiples of that; I used to bump into them coming out when I was going in. And so while the outcome was ultimately not any different than it likely would have been if the deal had been reviewed by the DOJ, the process certainly was more accommodating to the deal's opponents. The result was a belief among media activists (who typically oppose most media mergers) that the FTC would likely be more amenable to their concerns about future media mergers than would the DOJ. Given this, the fact that the DOJ would resume its historical role once this new system was put in place was enough to energize them to oppose it.

VII. Do not Be Fooled into Thinking the Merits Matter in Political Debate

Of course, most of the arguments the opponents of the new clearance agreement made were either demonstrably wrong or silly. For example, they asserted that media mergers are different, but it was never clear why this was so. Where do the antitrust laws distinguish media mergers from any others? What exactly are the different standards that should be applied? What statute do these different standards come from? How are they to be tested? If the First Amendment is the basis, shouldn't that mean less regulation rather than more?

They argued that this was a secret back-room deal. But the clearance process had been in place for more than 40 years. It has never been a secret. The only things that have been opaque are the actual processes and standards the agencies use to make decisions. The main difference in the new modifications was that they were actually announced to the public and set forth as a public

description of how the process was going to work in the future, while other agreements over the years were in fact secret back-room deals.

There had been a public commodity list that divides up commodities between the FTC and the DOJ for decades. But over time, it had become essentially unusable, with obscure distinctions and the accumulated weight of many years of disputes and compromise. The new list was remarkable only for its clarity—which would normally be desirable but in the political climate of the time turned out to be a detriment. The great benefit of a clear commodity list is that the parties would know in advance, in the vast majority of situations, which agency will handle that matter; this would eliminate (or at least minimize) the forum shopping, confusion and delays that characterized the clearance process for decades. To most people, these would be good things.

Another argument was that the FTC would be tougher on media mergers, and that would be a good thing. At that time, the FTC had reviewed exactly two—count them, two—significant media mergers in recent memory: TW/Turner[17] and AOL/TW. I was directly involved in both. The other common thread was Bob Pitofsky, the FTC's Chairman when both deals were done. As a result of the latter fact, both matters were characterized by the vigorous and lengthy exploration of very creative theories of liability, mostly having nothing at all to do with the facts. This was NOT indicative of a core difference between the FTC and the DOJ; instead, it reflected Bob Pitofsky's personal approach and perspectives, not institutional ones. Does anyone really believe that Jim Miller or Dan Oliver or Tim Muris or Debbie Majoras (all former FTC Chairs appointed by Republican Presidents) would have approached these transactions in the same way that Bob Pitofsky did? The notion that the FTC is uniformly and institutionally tougher than the DOJ was nonsense then, just as it is now. The people in charge are political appointees, and can be more or less aggressive and have various agendas. The agency staff will respond to that leadership, but there is nothing institutional that makes one agency tougher or milder than the other.

In addition, I defy anyone to explain to me what exactly was "tough" about the FTC's handling of TW/Turner or AOL/TW, other than the seemingly interminable process itself. Here is a News Flash: THE DEALS WENT THROUGH! Notwithstanding the rhetoric, the FTC finally conceded that any competitive issues were marginal, and demanded only very marginal relief. As a result, the deals were consummated with very few conditions and none that went to the core of the transaction. Of course, history has made it very clear that even this very mild set of constraints was completely useless and unjustified. It did not take long for it to become perfectly obvious that not only did TW's acquisition of AOL not produce any market power, it was also one of the most costly and least successful acquisitions in history (at least for TW shareholders).[18] Looking

back, now that TW has spun off AOL and the latter is struggling to become relevant and perhaps to stay viable, Pitofsky's concerns are obviously even less valid than they appeared then, which is hard to imagine for those who lived through this process, but true.

Some argued that the FTC has a broader statutory mandate, and thus was better suited to review important mergers. The FTC does have another statute it can enforce, the infamous FTC Act. And its language does indeed seem to leave more room for FTC discretion than the Clayton Act does. But there are at least three problems with this argument:

> (1) The last time the FTC tried to argue that the FTC Act gave it greater discretion in the antitrust area than did the Sherman and Clayton Acts, it almost got disbanded. This was in the Mike Pertshuck era of the 1970's, when the FTC earned the name "National Nanny" by its expansive readings of its authority to tell everyone else what they could and could not do—all in the name of the "public interest."[19] Now, it is one thing to attempt to use the FTC Act in non-merger contexts, which some at the Commission today would like to do; while the wisdom of such an effort is itself highly questionable, any such standards that became part of the existing jurisprudence would at least (presumably) be applied to all industries, much like criminal penalties are universally enforced by the DOJ. Thus, there would not be a different standard applied to merger transactions in different industries simply because of which agency is assigned the enforcement responsibility. But to have some mergers evaluated by the DOJ under the Clayton Act, and some others by the FTC under the FTC Act, would likely revive the calls for reform that were generated by the last effort to use the elastic language of the FTC Act as, in effect, a way to unilaterally extend the reach of the primary antitrust laws.
>
> (2) If it wants to get a transaction enjoined, the FTC has to go to court—just like the DOJ, and it must do so using essentially the same substantive legal standards as the DOJ would have to use.[20] This is the principal difference between the FTC and the EU, and is the main factor (other than general good judgment, which is too highly variable to be a reliable restraint) that constrains all American antitrust enforcers. Judges are, as a group, not inclined to allow the government to stop otherwise normal business behavior without a persuasive showing that the public interest is going to be adversely affected if the transaction goes forward. Put yourself in the judge's shoes: the FTC comes into court, and says "We don't have a good case under the Clayton Act (the anti-merger statute that both we and the DOJ normally use), but here's a theory under the FTC Act, that prohibits not anticompetitive mergers but: "unfair methods of competition." Please enjoin (and as a practical matter kill) this merger, or if the parties want to go forward,

> we can go back to our administrative hearing sandbox and play around for a couple of years with some new, not-quite-antitrust theories of why this merger is bad for the 'public interest'." Do you really think there would be competition within the FTC staff for the speaking role in this case?
>
> (3) Finally, we already can see some indications of what the world would be like if the FTC and the DOJ applied truly different standards in merger cases—so that the outcome depends not on the facts and the law but on the bureaucratic roll of the dice that decided, on whatever criteria, which agency would review the transaction. Because of the statutory terms of FTC Commissioners, changes in administration that can make a significant change in the policy approach of the ATD will frequently have less immediate impact on the FTC. The result has been, on too many occasions in the past, some fairly dramatic policy differences between the two agencies. It is unfortunately true that which agency reviews a particular transaction can have a significant effect on the outcome. At the time of the clearance contretemps, that was more a possibility than a reality, but even as that, it was obviously not a desirable outcome. In recent years, the gulf between the two agencies in terms of policy and approach has periodically been very wide, and this is a terrible thing. To have the two federal agencies taking dramatically different positions on important policy issues should be embarrassing, but as noted earlier, both agencies have developed very high embarrassment thresholds.

The U.S. antitrust laws are already screwed up enough, with two federal agencies, state AGs, and specialized agencies like the FCC, the DOT, and the FERC.[21] If the two federal enforcement agencies actually started using really different rules, thus producing different outcomes based not on the facts but merely because of the identity of the agency, that would be a disaster that should immediately generate pressure for a fix. Indeed, this reality is no doubt the reason why not only Bill Kovacic but also a recent head of the Antitrust Division, Christine Varney, have called for a rethinking of the issues that are generated by the existence of two merger review agencies in the U.S.[22]

Finally, there was the argument that somehow it was improper for the agencies to seek advice from private practitioners. The most common attack was that it was outrageous that Muris and James asked private practitioners for their advice, and did not ask Senator Hollings, or the heads of various special interest groups, or maybe Madonna (today it would be Lady Gaga) for all I know. This was portrayed as somehow avoiding scrutiny or finding a way to do something secret and nefarious. In fact, of course, they asked us and not any of those others because we actually had something to contribute to solving the problem—experience both in and outside the agencies,

a resulting understanding of the clearance process and the agencies, and a collective reputation based on that experience and knowledge that would presumably provide some credibility to any recommendations we made. Whatever their other accomplishments, those that were complaining the loudest about not being asked for their views did not share those attributes.

VIII. Lessons Learned

Notwithstanding the silliness of the various arguments made, the ultimate outcome of this imbroglio was unfortunately predictable—a determined politician with power and little to lose can have disproportionate weight in the Washington process. Good government has no heroes in Washington, and damn few defenders. For both agencies, having to spend precious time on stuff like this is a real cost. But on the list of priority issues for the entire DOJ, it is unfortunately true that improving the antitrust clearance system was not high on the list. When international and domestic terrorism are on your plate, the allocation of industries between the FTC and DOJ is likely to get little attention, and to justify spending few chips. And so the DOJ caved, and this effort died.

IX. Whither the Future?

What does this tell us about what makes sense today? It tells me that depending on bureaucracies to reform themselves is a fool's errand. This is probably not a revelation to most sentient creatures. It also tells me that Bill is probably right—the odds of fixing even this little piece of the problem are pretty low. Here we had a bi-partisan and highly informed group, agency heads that were willing to take some heat from their staff, and a general consensus on the solution, but it still failed to survive what were blatantly political attacks. I can tell you that there are many experienced antitrust practitioners who, in private conversation, will concede that the current system makes no sense, but who are not willing to come out and say so because of the fear of adverse reactions from the regulators before whom they must practice. And I can also tell you that it is not an imaginary fear, based on the reaction we got from the relatively minor proposed change to the *status quo* we recommended.

But even given all that, those of us who know what they are talking about should be willing to speak out and advocate for improvements to what is, in my view, an indefensible *status quo*, so here is my contribution on that front: we should either eliminate one of, or rationalize the scope of both of, our federal antitrust agencies.

There are several ways this could be done. We could remove antitrust jurisdiction from the FTC, and leave it with just its consumer protection responsibility, perhaps augmented to fill what some

see as real holes in the FTC's reach and jurisdiction. We could eliminate the ATD, move its criminal enforcement responsibility to either the Criminal Division of the DOJ or the various U.S. Attorney's offices (for constitutional reasons, all criminal enforcement must remain in the Executive Branch of government in the U.S.) and leave the FTC as the sole federal antitrust enforcement agency. We could create a new federal agency that combines all the civil antitrust enforcement responsibilities of the two agencies, again leaving all criminal work in the DOJ; this new agency could be part of the Executive Branch, like the EPA, or an independent agency like the FTC. Or we could take a more modest step, focusing on the most indefensible aspect of the current system, and consolidate all merger authority in a single federal agency.

Any of these options would be an improvement over the *status quo*, which in my view has nothing to recommend it. If I had my druthers, I would chose either the first or second of my proposed solutions, either of which would consolidate what should be a single federal enforcement effort. But the most realistic option is probably the last—to simply consolidate merger enforcement. In fact, this is the most screwed up part of dual enforcement today. With arguably different legal standards in seeking preliminary injunctions and periodically different institutional and policy approaches, the stage is set for bad results. The notion that a merger result should be subject to the whim and fortuity of which agency happens to be able to convince the other to give it jurisdiction—whether, like in AOL/TW, that makes sense or not—is absurd. My personal view is that merger policy should be part of an Administration's economic policy, and thus it makes more sense to have this lodged in the Executive Branch, but frankly we also would be better off than we are today if all mergers were handled by the FTC, so long as they had to go to federal court with any challenges.

It is interesting that people as diverse as Bill Kovacic and Christine Varney—a Republican and a Democrat, a "do no harm" person and a "can we help" person in terms of antitrust philosophy—both see their experience with this process leading them to the same conclusion. It is, in my humble opinion, impossible to argue against this on the merits. But as history has shown, the merits might sometimes be relevant but are never determinative when you are dealing with Washington. So this suggestion, like most other good government suggestions, will probably accomplish nothing more than filling up a few pages of this esteemed *Festschrift*. Hoping for more is probably at best Sisyphean.

---

* I benefited from the help of several colleagues and friends in producing this article, but for obvious reasons, they will remain nameless. I am responsible for any errors or unpersuasive ideas.

[1] Maybe there is something in the Jones Day water, since another of the more prominent antitrust couples is Debbie and John Majoras, the former the Chief Legal Officer and Secretary of Procter & Gamble and a former Jones Day partner and FTC Chair, and the latter a senior Jones Day antitrust litigation partner.

[2] William E. Kovacic, *U.S. Antitrust Policy: The Underperforming Federal Joint Venture*, CONCURRENCES N° 4-2011, 65-69 (2011).

[3] As Bill Kovacic has noted, "The number of smash-ups in the clearance process is relatively small, given the total volume of matters that the agencies clear to each other, but the individual smash-ups are costly to the parties . . . and they demand effective cooperation between the agencies." *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, ANTITRUST SOURCE (Aug. 2008).

[4] Kovacic, *supra* footnote 2, at 69.

[5] *Id.*; s*ee also* William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 887 (1989) (discussing rent-seeking model of FTC-Congressional relations, "In the rent-seeking model, legislators seek to generate electoral resources (chiefly votes, and campaign contributions) by influencing the FTC's choice and disposition of specific enforcement initiatives").

[6] *See* Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307 (2007).

[7] *See* Timothy J. Muris, Comments on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission 3-4 (2005), *available at* http://www.amc.gov/commission_hearings/pdf/ Muris_Statement.pdf (recognizing "deficiencies" and "deterioration" in the clearance process).

[8] *Id.* at 4-5.

[9] Letter from Kevin Arquit, Bill Baer, Joe Sims and Steve Sunshine to Timothy Muris, Chairman, FTC and Charles James, Assist. Atty. General for Antitrust Division of U.S. Department of Justice (Dec. 21, 2001), *available at* http://www.ftc.gov/opa/2002/02/clearance/clearideas.htm.

[10] *See* Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Concerning Clearance Procedures for Investigations 8-11 (Mar. 5, 2002), *available at* http:// www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf (setting forth the final negotiated division). Under this agreement, the FTC was given jurisdiction over mergers in the following industries, among others: airframes; autos and trucks; building materials; chemicals; computer hardware; energy; healthcare; munitions; retail and grocery stores and grocery manufacturing, including distilled spirits and tobacco; pharmaceuticals and biotechnology; professional services; satellite manufacturing and launch; and textiles. The Antitrust Division was given authority over the following industries, among others: agriculture and associated biotechnology; avionics, aeronautics, and defense electronics; beer; computer software; cosmetics and hair care; financial services/insurance/stock and option, bond, and commodity markets; health insurance; industrial equipment; media and entertainment; metals, mining and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, and lumber; telecommunications; travel and transportation; and waste. *Id.*

[11] ABA Section of Antitrust Letter to FTC/DOJ (Jan. 23, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/aba.pdf.

[12] Letter to FTC/DOJ from Former Antitrust Enforcement Officials (Feb. 4, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/multiletters.pdf.

[13] Letter to FTC from the Business Roundtable, the National Association of Manufacturers and the U.S. Chamber of Commerce (Feb. 25, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/ brt.pdf.

[14] *See* Philip Shenon, *Plan to Split Up Antitrust Oversight Stalls*, N.Y. TIMES, Jan. 18, 2002, at C2.

[15] Charles A. James*, Statement Regarding DOJ/FTC Clearance Agreement* (May 20, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/May/02_ag_302.htm ("[I]n view of the opposition expressed by Sen. Hollings, Chairman of the Commerce, Justice, and State Appropriations Subcommittee, to the agreement and the prospect of budgetary consequence for the entire Justice Department if we stood by the agreement, the Department will no longer be adhering to the agreement").

[16] In the Matter of America Online/Time Warner, 131 FTC 829 (Apr. 17, 2001).

[17] In the Matter of Time Warner, et al., 123 FTC 171 (Feb. 3, 1997).

[18] *See, e.g.,* NINA MUNK, FOOLS RUSH IN: STEVE CASE, JERRY LEVIN, AND THE UNMAKING OF AOL TIME WARNER (HarperBusiness 2004); ALEC KLEIN, STEALING TIME: STEVE CASE, JERRY LEVIN, AND THE COLLAPSE OF AOL TIME WARNER (Simon & Schuster Paperbacks 2004); KARA SWISHER, THERE MUST BE A PONY IN HERE SOMEWHERE: THE AOL TIME WARNER DEBACLE AND THE QUEST FOR THE DIGITAL FUTURE (Three Rivers Press 2003).

[19] *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 584, 662-67 (1982).

[20] The issue of whether there are or should be different preliminary injunction standards for the FTC and the DOJ is beyond the scope of this article. But it is relevant to note that the FTC argues that it has to meet a lesser standard in order to justify an injunction than does the DOJ. Since a district court injunction is frequently the death of a deal, this means that if the FTC is right there are already different standards for merger enforcement today, and thus the fate of your deal may depend on the fortuity of which agency reviews it. This banana republic approach should be unacceptable in an advanced economy.

[21] This was highlighted by the February 16, 2012 FERC announcement that it would not revamp its merger procedures for utility mergers to reflect the changes resulting from the 2010 DOJ/FTC Horizontal Merger Guidelines. Order Reaffirming Commission Policy And Terminating Proceeding, 138 FERC ¶ 61,109 (Feb. 16, 2012), *available at* http://www.ferc.gov/whats-new/comm-meet/2012/021612/E-2.pdf.

[22] Brent Kendall and Thomas Catan, *Antitrust Chief Urges a New Look at Merger Reviews*, WALL ST. J., July 13, 2011, at B4.