The Bipartisan Legacy

by Thomas B. Leary*

When Bert Foer and I discussed this event a few months ago, he said I would be the first Republican that the American Antitrust Institute has chosen to recognize in this way. Some ardent Democratic supporters of AAI, and some ardent Republican critics, may think this whole affair is a terrible mistake. With respect, I think they are living in a time warp. There really is no such thing as a "Republican" or a "Democratic" antitrust agenda today. People may have different views on the facts of individual cases for a variety of reasons, but there is a broad mainstream consensus on the basic approach to antitrust issues.

This was not always true. When the so-called "new learning" first emerged from the academic world to become part of the broad policy debate roughly thirty years ago,[1] there was a sharp ideological divide. There were widely divergent opinions on economic issues like the consequences of industrial concentration, the role of efficiencies and the justifications for vertical restraints. There was a basic disagreement on whether it was appropriate to focus on economics in the first place, to the exclusion of social and political factors. There undoubtedly was some correlation between party affiliations and policy positions on these issues. It is not

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* Commissioner, Federal Trade Commission. The thoughts expressed here are my own, and are not necessarily shared by my colleagues.

[1] *See* Industrial Concentration: The New Learning (Harvey J. Goldschmid *et al*., eds., 1974).

necessary to rehash that great debate here,[2] other than to observe, first, that actual antitrust enforcement practice was never as polarized by party as popular rhetoric suggested and, second, that in recent years even the rhetoric has cooled down as the areas of difference have narrowed dramatically.[3]

We play the antitrust game between the 40-yard lines today. The AAI still has an unabashedly pro-enforcement agenda, but the AAI does not emphasize the political and social content of antitrust. It does not argue that efficiency is bad. In fact, my experience in a bipartisan agency like the FTC - - as both a minority and a majority member - - is that no one, inside or outside, makes those old arguments anymore.[4] The FTC's differences with AAI, when we do differ, are not the stuff that lights political fires.

The present civil level of discourse is, however, not the only reason that I am pleased and honored by this event. There is a bond that runs deeper. The AAI, like the FTC, has in recent years sponsored a number of open forums to present varied viewpoints on controversial antitrust

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[2] For an extended discussion, *see*, *e.g.*, William Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, Keynote Remarks at the Antitrust Practice Group Retreat sponsored by Washington, D.C. law firm Howrey, Simon, Arnold & White, Chantilly, Virginia, May 2, 2003, *available at* <http://www.ftc.gov/speeches/kovacic/htm>.

[3] *See* Thomas B. Leary, The Essential Stability of Merger Policy in the United States, 70 Antitrust L. J. 105 (2002).

[4] For example, Robert Pitofsky, who had been critical of enforcement policies during the 1980s, agrees that there has been a bipartisan consensus for the past fifteen years. *See* Robert Pitofsky, Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission, 72 U. Chi. L. Rev. 209 (2005).

issues.[5] Both organizations support the virtues of research and discussion by people with different points of view. I once heard a talk to a business audience by Seymour Lipset, the political scientist.[6] He stressed that even the most ardent partisans should support independent research and discussion in a neutral forum, in words I have never forgotten: "If your side's arguments stand up well in that setting, they will have much greater credibility; if they do not, you want to be the first to know." Implicit in his comment is acknowledgment of human fallibility. Today, the FTC's and the AAI's mutual support for research and discussion reflects a common recognition that microeconomics is a still-evolving discipline and that it is possible that some of our current principles and methods "may be mistaken."[7]

When I reflect today about the differences between the experiences in my current job and my previous experiences as an antitrust lawyer in the private sector, the first thing that comes to mind is that a lot of cases now seem much more difficult. The reason is that I had clients in the private sector, and my job was to employ precedent and arguments, as best I could, to advance a client's objectives. There may have been close judgements about strategy and tactics, but I knew which side I was on. Today, I have to vote on whether to support a complaint (or, less

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[5] Each year, AAI sponsors a workshop on electricity restructuring and antitrust. Other AAI workshops have focused on defense procurement, retail category management, network access and e-commerce supplier joint ventures. *See* <http://www.antitrustinstitute.org>.

[6] The words have stuck, but I cannot remember the time or place.

[7] *See* Letter from Oliver Cromwell to the General Assembly of the Church of Scotland (Aug. 3, 1650)("I beseech you, in the bowels of Christ, think it possible you may be mistaken. . ."), *in* Familiar Quotations - John Bartlett 247 (Justin Kaplan ed., 16th ed. 1992).

frequently, to vote on whether a complaint was proved) and, going in, I don't know what side is right. There are likely to be eloquent counsel, economists and business people advocating different conclusions, based on a common analytical framework that I respect. Along with my colleagues,[8] I ultimately have to come down on one side or another but I am always conscious that I may be mistaken.

In this paper, I address some of the most difficult issues that we face and suggest that the policy implications of these uncertainties can sometimes be argued both ways, to support either a more or a less aggressive antitrust agenda. I will then describe how I attempt to cope with those uncertainties in my present job.

I. Some Big Issues

A. The Inherent Uncertainty of Predictions

With the exception of government prosecutions for so-called per se offenses, where the only issue is whether certain things were done or said, virtually all of antitrust involves predictions. This is obviously true when we try to predict what will happen in the future if a merger is consummated or a particular competitive strategy takes hold, but it is also true when we try to evaluate the competitive effects of something that has already happened. In the latter

[8] I cannot overemphasize how much I benefit from the views of my fellow commissioners, in a collegial exchange. I will re-visit this subject later on.

case, there is evidence of what has happened in the marketplace to date, but it is still necessary to weigh this outcome against a prediction of what is likely to have happened if the challenged conduct had not occurred.

The chief tools for these predictions are objective historical experiences, the opinions of people in the industry, other experts from the outside, and calculations based on various economic models. Of course, the past does not necessarily portend the future, inside and outside experts are often mistaken,[9] and economic models depend on initial assumptions that may or may not reflect reality. These uncertainties affect even predictions of the near term (a so-called "static analysis") but, obviously, things get progressively more difficult as you look further and further ahead.

In order to make the standards for antitrust liability predictable in an inherently unpredictable world, we rely on rules of thumb or presumptions of varied strengths. Price-fixing or market allocation is conclusively presumed to be illegal; internal capacity growth or expansion into new markets is conclusively presumed to be legal. On the other hand, the once conclusive presumptions against tying arrangements or group "boycotts" are now weaker, and presumptions based solely on market shares have become weaker still. Conversely, the common

[9] We tend to give particular weight to so-called "hot documents" from company files that predict anticompetitive consequences because they appear to be statements against interest, but they might not have been against interest at the time they were made.

assumptions that supra-competitive prices will promptly be disciplined by entry, or that predation is rarely successful, have been weakened.[10]

Obviously, ongoing research and debate could further modify these various presumptions, or perhaps suggest other ones. I do not know whether more aggressive or less aggressive antitrust policies will emerge. Given the uncertainties of predictions, it has been argued that risks of over-enforcement are most serious because competition will ultimately erode transitory market power gained when a strategy is mistakenly allowed, while the efficiencies lost when a strategy is mistakenly prohibited are gone forever.[11] This rhetoric sounds good but, in my experience, efficiencies are rarely dependent on a single competitive strategy; one-shot efficiencies (like some in a merger) tend to erode; and, in some industries, the existence of market power may impede rather than speed competitive responses. In any event, I do not know how the issue could be resolved empirically.[12] I may be particularly wary of over-enforcement myself, but for a different reason.[13]

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[10] *See* Leary, *supra* n.3 at 115 (on entry); Susan Creighton, Cheap Exclusion, Remarks Before the Charles River Associates 9th Annual Conference on Current Topics in Antitrust Economics and Competition Policy, Washington, DC, February 8, 2005, *available at* <http://www.ftc.gov/speeches>. *See also* discussion of "agency" issues at pp. 7-9 *infra*.

[11] *See* Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. R. 1, 3 (1984) ("Judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not").

[12] Calculations of consumer benefits from antitrust enforcement are themselves highly speculative; calculations of efficiencies lost when transactions are challenged - - or aborted early on because a challenge is feared - - would seem to be even more speculative.

[13] *See* pp. 14-15 *infra*.

B. The Agency Problem

The fundamental assumption of current antitrust analysis is that a business enterprise is a unitary entity dedicated to the maximization of profit. This means that we assume there must be a rational economic explanation for potentially troublesome conduct like acquisitions, restrictive agreements or aggressive prices. If there are no readily apparent short-term advantages, we assume that there must be subtle long-term strategies in play. These long-term strategies may have effects that are either benign or harmful. For example, we are likely to assume that a manufacturer's restrictions on dealer sales, with immediate adverse effects on volume and profit, must have been designed to motivate dealers to do a better job in the long run. On the other hand, we are also likely to assume that a manufacturer's sales below its own variable cost suggest a design to drive out competition and facilitate price increases later on.

In the real world, things are not so simple. In any enterprise, however large, business decisions ultimately are made by a single individual or a small group. These people have monetary and non-monetary "profit" objectives of their own, which do not necessarily coincide with those of the enterprise as a whole. There are abundant illustrations of situations where the individual incentives of employee agents can prompt conduct that does not maximize the profits of their employer. An understanding among competitors not to solicit business from a rival's best customers can make life much easier for some employees, even though it may sacrifice short-term profits of the enterprise and risk horrendous long-term legal consequences. Participants in a cartel may not "cheat," even if they could get away with it, out of perverse

loyalty to the group. A manufacturer's employee, who depends on the goodwill of his dealer customers, may facilitate dealer activities that are not only anti-competitive but flatly contrary to his employer's interests.

Other employees may be overly aggressive. An employee whose compensation depends on sales volume may be tempted to get business below cost, particularly if it will hurt an unusually irritating rival, without any concern about the likelihood of recoupment. In fact, people with a keen competitive instinct seem to derive as much satisfaction from a hated rival's losses as they do from their own company's gains.[14] At a much higher level, a CEO under pressure from the Board, who has run out of good ideas or is simply frustrated by the demands of day-to-day management, may seek the diversion of a spectacular acquisition that is unlikely to benefit shareholders. I have personally seen all of these things; companies are managed by human beings, not robots.

The "agency problem" means that corporate "intent" is an elusive concept and that internal predictions of competitive consequences are apt to be particularly unreliable when they are affected by personal motivations. Practicality may demand that we ignore these individual motivations, for the most part. But, at the same time, it does not make sense to insist always that certain conduct must be efficient or must be predatory, based on what would be rational for the

[14] Compare the avid Red Sox fans who are particularly elated when the Yankees lose, and vice versa.

entire enterprise. It might even be useful to take another look at the automatic application of vicarious criminal liability, or the enhanced penalties for concealment.

C. Non-Price Competition

When people in the antitrust community talk about competitive effects, they almost always have price effects in mind. An imaginary condition of perfect competition is the ideal against which the real world is measured; markets are viewed as non-competitive to the extent that prices deviate from marginal cost; and "quality" differences are an inconvenient nuisance if they cannot be captured in a measurement of price or cost. Market definition is the initial step for the analysis in most antitrust cases, and markets are defined in the first place by an examination of the impact that an assumed increase in price will have on demand.[15]

We focus on price, but in significant and growing segments of the economy it is not the most important variable.[16] Consider, for example, the Harry Potter phenomenon. I recently read that J.K. Rowling, the creator of Harry Potter, was an impoverished single mother a decade ago and is a billionaire today. Whether that is true or not, I am confident the standard Guidelines test would conclude that the elasticity of demand for Harry Potter books and associated products is

[15] U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines (Apr. 2, 1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at § 1.

[16] Thomas B. Leary, The Significance of Variety in Antitrust Analysis, 68 Antitrust Law Journal 1007 (2001).

very low. The collective enterprises that make up the Harry Potter empire are in a market by themselves; they have monopoly power and they could price like monopolists if they wished.

What are we to make of that? Does this mean that "Harry Potter, Inc.," should be subject to the special strictures on competitive behavior that are sometimes imposed on monopolists? And, if the immediate reaction is that this is silly, why is it silly? The activities of much smaller enterprises have been the subject of antitrust litigation, and there is no obvious reason to be less concerned about fans of Harry Potter than skiers in the mountains of Aspen, Colorado.[17]

As a thought experiment, imagine how we would analyze a hypothetical combination of Harry Potter and Disney, which may have unique appeal of its own. Would it be appropriate to view the merger as horizontal in the first place and, if we did not, would we have any currently respectable basis for concern? If we were indeed concerned, would price effects really be the issue? In fact, how would anyone decide what is a "competitive" price for businesses like these that obviously do not need to focus on marginal costs?

These thought experiments are not frivolous because the Potter-like part of our economy is growing, while smokestack America declines in relative importance. I do not suggest that we need new antitrust laws, or that we do not have the present capability, to deal with the highly differentiated products of a modern economy - - including the so-called "high-tech" sector,

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[17] *See* Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

which also does not price at marginal cost. I do suggest that current antitrust doctrine needs to take larger account of non-price competition, whichever way it cuts.

D. Efficiencies

It is virtually impossible to balance the effects of potential efficiencies and potential anti-competitive effects in a rigorous way, and we often do not even try. In a case that involves vertical restraints, courts will simply assume that the interbrand effects of an efficient distribution system will outweigh the loss of intrabrand competition.[18] When the FTC looks at collective action by a group of integrated medical professionals, we generally are willing to assume that the pro-consumer effects of their financial or clinical integration will outweigh the adverse effects of their collective bargaining.[19] When we review mergers internally, the econometric analyses of potential efficiencies is not likely to be outcome-determinative, and even sophisticated courts avoid reliance on the calculations.[20]

This wariness is predicated in part on the inherent inability to model the future, which has already been mentioned, but it also may be based on the intuition that the most significant

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[18] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[19] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Statements of Antitrust Enforcement Policy in Healthcare (1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153, at § 8.

[20] *See, e.g.*, Federal Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001). *See also* Thomas B. Leary, Efficiencies and Antitrust: A Story of Ongoing Evolution, Prepared Remarks before ABA Section of Antitrust Law, 2002 Fall Forum, Washington, DC, November 8, 2002, pp. 27 - 32, *available at* <http://www.ftc.gov/speeches/leary/efficienciesandantitrust.htm>.

potential efficiencies simply cannot be captured by numbers. Intangible efficiencies like the quality of management or the compatibility of different corporate cultures may be more important than anything else,[21] but we do not take formal account of them in our Merger Guidelines.

The odd thing is that we routinely take account of some intangible factors in those situations where there is a troublesome horizontal overlap and the merging parties propose to cure the problem by a partial divestiture to a third-party buyer. The issue is whether the divested entity, with a new owner, will be able to replace the competition that would otherwise be lost by the merger, and we closely examine the adequacy of the management and the future business plans of the third-party buyer - - even though we do not do the same for the main transaction. One rationale may be that the burden of persuasion is different: the FTC (or DOJ) bears the burden of showing that the main transaction is likely to be anticompetitive and the parties may bear the burden of showing that the "fix" is adequate.[22] But, that rationale really does not explain why some evidence is more relevant in one context than in another.

There is also a curious difference in the way we take account of financial strength - - which is subject to objective measurement and which surely can have an impact on the future

[21] Mergers are in many ways like marriages, and the clash of egos can sink marriages that, objectively, appear to be made in Heaven.

[22] The "may" is appropriate because, if the fix is timely, the prosecutor may have the burden of proving that the fixed transaction is likely to be anticompetitive.

competitive potency of a new entity. In the "merger wave" of the late 1980s (in contrast with the much larger "wave" of the late 1990s), many transactions were so-called "leveraged buyouts," in which a company or group of individuals bought a much larger publicly-held company with funds obtained by pledging the assets of the target company itself. If there were no horizontal overlaps between the buyer(s) and the target, there could be no effect on the number of competitors or the level of concentration. One competitor was substituted for another. In the 1980s, when concentration statistics were strongly emphasized, such a transaction was viewed as competitively benign, even though the surviving entity could be constrained by debt and unable to compete as effectively in its market. We pay less attention to concentration numbers today but the competitive impact of financial strength - - pro or con - - is still not formally recognized in our guidelines. At the same time, this factor is closely scrutinized when the agency is vetting a potential third-party buyer of divested assets. Again, I am not sure why this is different.

These are just illustrations of some perplexing issues we face in antitrust today, even with a common agreement that economic principles should drive our decisions. The basic problem is that economics is not Newtonian physics, but we are nevertheless required to make binary decisions up or down. I cannot get away with a statement that I am 60/40 persuaded a particular transaction will (or will not) have an anticompetitive effect. In theory, the "reason to believe" standard[23] accommodates these feelings of fuzziness but a vote will often be outcome

[23] Under the FTC Act, the Commission has authority to issue a complaint when it has "reason to believe" that a violation has occurred and that a proceeding would be in the public interest. Sections 5 & 13(b) of the FTC Act, 45 U.S.C. §§ 45 & 53(b); *see, e.g.*, FTC v. Standard Oil Co.,

determinative in practice, and my colleagues and I are all aware of it. We each need to have some default assumptions that can be relied on when a computer cannot spit out a solution.

II. Some Tie-Breakers

Like every one else, I have my own deep-rooted values that can tilt my decision in one direction or another, and serve as "tie-breakers" in appropriate cases. Let me mention four that are particularly important: a preference for freedom, lessons from personal experience, the views of my colleagues on the Commission, and the obligations imposed by my confirmation promises.

A. A Preference for Freedom

At the risk of appearing heretical, I concluded some years ago that the true animating spirit of antitrust was not microeconomics but freedom - - the freedom of producers to sell whatever they please in the manner they please and the freedom of consumers to buy whatever they please in a competitive market.[24] The role of microeconomics is to mediate when these freedoms conflict, as they often will. In other words, we rely on the economics of consumer welfare to inform the outcome in actual antitrust cases, but a matter does not become a "case" in the first place unless there is a claimed intrusion on someone's freedom.[25] Government

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449 U.S. 232, 241 (1980).

[24] *See* Thomas B. Leary, Freedom as the Core Value of Antitrust in the New Millennium, 68 Antitrust L. J. 545 (2000).

[25] *Id*. at 547.

regulators do not have a roving authority to impose their own ideas about optimal economic outcomes.

I would not attempt to justify this opinion by reference to anything specific in legislative history. (You can, in fact, find support for a variety of views in the history of the antitrust laws.) The opinion is rather based on my belief that producer and consumer freedom is what Western civilization is all about, and antitrust law (and consumer protection law) should be applied in a way that respects freedom of choice.[26] My particular preference for freedom may explain why, at the margin, I may be somewhat more concerned about the risks of over-enforcement than the sponsors of this event. When in doubt, I would tend to leave the private sector alone. This may be just a restatement of the government's burden of proof, but I think it is a little more than that. On the other hand, there are other preferences that pull in the opposite direction in some situations.

[26] I also firmly believe that the respect for freedom, unruly as it often is, contributes to innovation and overall economic welfare in the same diffused way that the respect for intellectual property rights does.

B. Experiences of a Lifetime

Those who work with me know that I sometimes fall back on my "non-random sample of one," meaning my experiences in the private sector. I do not believe it is wrong to do that: presumably, people are sought out for advice or appointed to office in part because they bring some experience to the job. Depending on the case, these experiences can tilt in the direction of more or less enforcement.

For example, my particular (some would say excessive) concern about 3-2 mergers [27] is not based just on statistical models. It is also based on the personal observation that overt collusion is a lot safer and more effective when only two people need to communicate. In another article, I described how an overt agreement may have been reached with two words and a nod of the head when my back was turned for a few seconds at a meeting I was supposed to chaperone![28] And, I still remember the chilling reaction of a convicted conspirator who was one of the first to actually serve jail time for price-fixing many years ago. When asked during preparation for later testimony what he had learned from the experience, he replied: "I learned never to talk prices with more than one other guy in the room." We should not forget that

[27] *See* David Balto, The Efficiency Defense in Merger Review: Progress or Stagnation, Antitrust, Fall 2001, Vol. 16, No. 1, at 74; William J. Kolasky, Lessons from Baby Food: The Role of Efficiencies in Merger Review, Antitrust, Fall 2001, Vol. 16, No. 1, at 82; Thomas B. Leary, An Inside Look at the Heinz Case, Antitrust, Spring 2002, Vol. 16, No. 2, at 32.

[28] Thomas B. Leary, Lessons From Real Life: True Stories that Illustrate the Art and Science of Cost Effective Counseling, The Antitrust Source, March 2003, *available at* <http://www.abanet.org/antitrust/source/march03.html>.

antitrust principles are not always intuitively obvious and that many people in business still think antitrust offenses are more like speeding than stealing.

Another example based on personal experience is a strong view that efficiency claims should be discounted if there are less restrictive alternatives. I have spent many years advising clients on the hierarchy of antitrust risks: mergers are riskier than joint ventures; joint ventures are riskier than requirements contracts; requirements contracts are riskier than obligations to supply specified amounts; and "loyalty" discounts are riskier than volume discounts. The issue is not whether a hypothetical less restrictive alternative is available once a transaction has been negotiated; the issue is why the more restrictive alternative was selected in the first place. For example, we recently reviewed a merger in which the ostensible justification for a multi-billion dollar horizontal acquisition was the desire to obtain the services of the target company's CEO! I strongly suspected that something else was going on.[29]

Observations from experience can also be neutral or cut the other way. For example, I tend to be more impressed by historical evidence of entry and exit than I am by hypothetical calculations. I also believe that there can be strong competitive influences from the outside, even in a broadly defined "market," and I am receptive to "flailing" company and "flailing" market defenses. And, while I am wary of the claim that particular forms of predation are

[29] I was also influenced by the apparent availability of a less restrictive alternative when I voted to bring the "Baby Food" case, H.J. Heinz Co., *supra* n.20.

unlikely because they would not make economic sense for the entire enterprise, I also believe that individually motivated predatory conduct is particularly unlikely to result in antitrust harm.

C. Views of Other Commissioners

The fact that I am only one of five Federal Trade Commissioners is both constraining and liberating. The constraining part is obvious. Absent recusals, it takes three votes to authorize affirmative action. The statutory restraints on single-party domination of the FTC, the staggered terms, and the politics of nomination and confirmation tend to promote some diversity of opinions. All commissioners, including the chairman, have to take account of the views of others, whether they want to or not.

The liberating part may be less obvious but it is equally important. For the reasons outlined above, some important matters are extraordinarily difficult to decide. We do not deal with issues of personal liberty on the Commission but, at the same time, disputes are not just about money. Reputations, careers, employment, the welfare of entire communities and perhaps the future contours of entire industries can be affected by what we do. A state of indecision is both frustrating and confining. Consultation with trusted peers can often help to break the logjam. They may have charted a different path through the maze or they may be able to reinforce individual confidence in a path tentatively under consideration.

The pros and cons of collective decision-making really merit a more extensive treatment. It obviously can be inefficient, and that inefficiency may be too high a price to pay when the issues are black and white. When we deal with shades of gray, however, I believe that the process is likely to produce better outcomes. It certainly nudges people toward the center.

D. Commitments and Oaths

Finally, I always need to consider the implicit and explicit assurances I gave before and after I was confirmed in my present job. Like thousands of other people who hold federal office, I took an oath to uphold the Constitution and laws of the United States. This oath obviously leaves a great deal of room for individual flexibility because both the Constitution and the antitrust laws speak in very general terms. The general commands of antitrust law are fleshed out by a rich body of judicial and administrative interpretation, which has evolved for over a century - - but, more often than not, some reputable authority can be found for opposite conclusions in a particular case.

Nevertheless, there are some boundaries. Take one extreme: I believe we have the discretion to target enforcement efforts in one direction or another, but I do not believe we have the discretion to resist all enforcement efforts across the board on the ground that the overall costs and benefits of antitrust have not been, and probably cannot be, empirically determined. Academic detachment is not an option. I have, for example, been profoundly influenced by a remarkable speech that Harold Demsetz gave about fifteen years ago. He was one of the

founding fathers of the so-called "New Learning," later identified with "Chicago-school" economics. The powerful logic of this economics transformed antitrust law, and was popularly believed to provide firm guideposts. Yet, Harold acknowledged up front in 1989 that *"[w]e do not yet possess an antitrust-relevant understanding of competition,"* and concluded that it was possible for reasonable people to arrive at contrary conclusions on many matters.[30] His call for humility has colored everything I have since said or done, but I cannot go further and adopt his profound agnosticism about the ultimate value of antitrust, even if I were inclined to do so.

At the other extreme, I cannot use the bludgeon of the antitrust process to retaliate against people just because they have behaved in ways that some believe are socially undesirable. An oath to uphold the law is not just an affirmative commitment, it is also an implicit acknowledgment of limitations. The FTC has recently been publicly excoriated by certain legislators because we do not restrain high gasoline prices. We have investigated these matters many times, and failed to find antitrust violations. The easy thing would be to cobble up some theory at the limits of our jurisdiction and rely on a court to sort it all out at the end, but it would also be irresponsible to indulge the temptation.

There is another obligation that confines me more narrowly than the broad boundaries set by the oath to uphold the law. For at least fifteen years, we have lived in an atmosphere of

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[30] Harold Demsetz, 100 Years of Antitrust, Should We Celebrate?, Brent T. Upson Memorial Lecture, George Mason University School of Law, Law and Economics Center (Sept. 21, 1989)(unpublished speech on file with Thomas B. Leary), italics in original.

bipartisan consensus on antitrust, where law is expected to evolve slowly. There is agreement that, for the most part, antitrust is on the right track today. I said this publicly[31] and privately to clients many times before I was ever considered for my present job, and I have an obligation to be predictable. I am mindful of the fact that I was initially proposed by a Republican Senator (Trent Lott), nominated by a Democratic President (William Clinton) and then confirmed by unanimous vote in the Senate. During the process, I wrote the following in response to the questions of the Senate Committee on Commerce, Science and Transportation:[32]

> I assume that I have been proposed and nominated, and hopefully will be confirmed, because my philosophical views on the relevant issues lie in the mainstream. In my opinion, any sudden reversal of form would be a betrayal of trust.

This is a serious commitment, and it is yet another factor that nudges me toward the center.

No one should conclude from the foregoing reference to individual subjective factors that decisions are typically made in a fog of feeling. In fact, we always try to evaluate the best data available on the competitive effects of transactions under review, and in many cases, the data overwhelmingly suggest particular conclusions. But, there also are some cases where the data

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[31] *See*, *e.g.*, Testimony at FTC Hearings on Global and Innovation-Based Competition, Washington, D.C., Oct. 17, 1995 at p. 226 (". . . I sense on the political side an era of general good feeling about antitrust matters as a result of the good efforts of the incumbents in both agencies and their immediate predecessors.") *available at* <http://www.ftc.gov/opp/global/GC101795.htm>.

[32] These answers are reprinted, for some reason, in 7 CCH Trade Reg. Rep. ¶ 50,170 at p. 49,279 (Sept. 9, 1999).

are inconclusive or point in opposing directions, and various default assumptions become important. This process should be familiar to anyone who has had experience with high-level decisions in the business world - - except that we probably have less freedom to "fly by the seat of the pants" than business executives do, because we often are required to defend our decisions in court and because we can create precedents. (On the other hand, we cannot be fired.)

Conclusion

We hear a lot of talk today about the loss of civility in our political life, but I am not sure we ever had it. I grew up at a time when the epithet "that *@!! in the White House" referred to Franklin Roosevelt, and his adversaries were called "malefactors of great wealth," if not worse. The dialogue during the terms of subsequent Presidents has been hardly more polite. Whatever the record on big-picture political issues, however, the dialogue on antitrust is far more civil today than it has ever been. For me, an important root cause is a growing appreciation of the limits of our knowledge about the market system, particularly when it comes to long-term predictions. (Knowledge about many, many other things is limited, as well, but very few politicians or political commentators want to admit it.)

Therefore, I do not think that this event is really about me. It is rather a celebration of our common bipartisan objective to learn more about the way markets work and to improve our policy responses. Complete objectivity, however, will always be unattainable and our individual

responses will continue to be affected by varied value judgements and life experiences. I have not always agreed with the sponsors of this event in the past, and I am sure that we will continue to have differences in the future, but I trust that we can always disagree with mutual respect and goodwill.