WHAT CONSENSUS? WHY IDEOLOGY AND ELECTIONS STILL MATTER TO ANTITRUST

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In his provocative essay, Theodore Voorhees asks whether politics still plays a role in contemporary American antitrust.[1] At first glance, the answer would seem to be a simple *Yes*. After all, Congress promulgates the antitrust laws. Political power no doubt played a major role in the legislation to grant the 30 or so statutory antitrust exemptions identified by the Antitrust Modernization Commission.[2] Moreover, the Supreme Court is an inherently political body in that it uses majority rule, where outcomes are subject to the Arrow Impossibility Theorem, agenda control, and logrolling.[3] The President and Congress have the power, respectively, to appoint and confirm judges, Department of Justice Assistant Attorney Generals (AAGs), and Federal Trade Commission Commissioners. Meanwhile, Congress has the ability to grill FTC and DOJ AAG nominees on their views as well as the ability to put

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[1] Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirational, or Imaginary?*, *supra* this issue, 79 ANTITRUST L.J. 557, 557–58 (2014).

[2] *See generally* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007) [hereinafter AMC REPORT], *available at* govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[3] Kenneth Arrow showed that except under very limited conditions, majority rule does not provide a unique social ordering when all options are under consideration. This implies that control over the voting agenda can significantly affect the outcome. For discussion, see Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multi-Judge Panels*, 80 GEO. L.J. 743 (1992); Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke*, the FCC and the Courts*, 88 YALE L.J. 717 (1979).

pressure on the agencies in particular cases, whether based on their own antitrust philosophy or on behalf of constituents, campaign donors, or political allies.

Despite these various pressure points, Voorhees asks whether "the common law framework, the paramount role of judges, the impact of economic analysis, and the overlapping enforcement roles of the Antitrust Division, the FTC, and state and private attorneys general . . . have produced a broad consensus."[4] He suggests that there is more of a consensus about antitrust policy today. This is an interesting hypothesis. Perhaps there are no longer any significant political issues over which there is conflict. Perhaps antitrust has become a purely economic exercise of applying consensus economic and legal theory to facts and other evidence to determine the likely effects of allegedly anticompetitive conduct on an agreed-upon measure of economic welfare and other norms. Using Chief Justice Roberts's famous analogy, maybe antitrust enforcement has simply become a "job to call balls and strikes[.]"[5]

Whatever its merits as a descriptor of the role of the judiciary in other matters, this is a poor analogy for antitrust law and enforcement. Different individuals within the courts and agencies bring different ideological views to bear on antitrust enforcement. To stretch the analogy further, these differential ideologies can be thought to affect the strike zone applied by the umpire, such as how umpires' relative views on the costs of erroneous strikeouts, harm from batters hit by pitches, and fan enjoyment of pitching duels might alter an actual baseball umpire's calls.

In antitrust policy, the existence of ideological differences means that elections can affect agency enforcement by changing the decision makers. Thus, by looking for evidence of variation in enforcement activity across different administrations, we can infer whether elections still do matter. Across a range of different types of evidence, in this article I find robust evidence of differences among administrations consistent with common sense characterizations of their respective ideological views.

For example, comparing the G.W. Bush DOJ to the Clinton DOJ and the Obama DOJ, I find that the Bush administration brought many fewer civil non-merger complaints. Similarly, its enforcement record on Section 2 and exclusionary conduct more generally was minimal. The Bush DOJ also was less aggressive than the bipartisan FTC during the same era. The Bush DOJ began by settling the *Microsoft* case with a weak remedy and ended by issuing

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[4] Voorhees, *supra* note 1, at 558.

[5] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

a Section 2 report that the FTC declined to join. Moreover, outside of the cases that it pursued, the Bush DOJ sided with the defense side at the Supreme Court in almost every matter in a series of cases that led to more permissive antitrust standards, particularly with respect to exclusionary conduct. In parallel, the Bush DOJ also demonstrated risk aversion by focusing more of its efforts on smaller firms and by avoiding litigation, even to the point of accepting two non-binding voluntary settlements. While the Obama DOJ has reversed direction, it has not regained the momentum of the Clinton DOJ. Whether it will do so in the second term or not remains to be seen.

The remainder of this article is organized as follows. In Part I, I discuss the role of ideology in antitrust policy and the fact that even economists have not reached consensus on some important topics. In Part II, I address the issue of whether and how elections matter to antitrust, and I analyze DOJ civil non-merger complaints in detail, comparing the number, type, and characteristics of enforcement over time and in comparison to the FTC. In addition, in Part II, I examine other policy activities, such as amicus briefs, guidelines, and reports, and the *Microsoft* settlement. In Part III, I discuss some historical examples of political pressure by Congress and the President on the Court and its impact on antitrust doctrine. The Appendix lists and classifies the DOJ and FTC non-merger civil enforcement complaints in the last 20 years.

I. THE ROLE OF IDEOLOGY AND POLITICS

Partisan politics is less of a driving force in antitrust today than is ideology. By ideology, I mean the political and economic philosophy and experience that frames one's preferred enforcement policy and antitrust legal standards. Ideological differences can lead enforcers, courts, and economists to diverge systematically from one another in the conclusions drawn from a given set of facts. The differences also might suggest disparities in the type of evidence deemed most relevant.

Antitrust law and policy are characterized by large variations in enforcement ideology among scholars, enforcers, commentators, and courts. Former Justice Stevens and Justice Scalia obviously do not share the same view of the proper antitrust approach. The same is likely true for AAGs, FTC Commissioners, and academics associated with the different "schools" of antitrust.

There are various ways to characterize these ideological differences about the economic foundations of antitrust policy. The differences might be distilled to the following description: Conservatives believe that markets are gen-

erally self-correcting.[6] They believe that markets self-correct because entry generally eliminates monopoly power and because collusion is very difficult to sustain in the face of incentives to defect. They also believe that industrial organization theory and factual analysis are sufficiently complex that decision making by lay juries and generalist judges is prone to error. Some conservatives also are concerned that jurors are biased against large companies and innovative business strategies. For these reasons, they are more concerned about false positives and over-deterrence than false negatives and under-deterrence.[7]

In contrast, liberals have less confidence in market self-correction.[8] They believe that natural and strategically erected barriers to entry can deter market correction and that empirical evidence suggests that cartels and tacit coordination are more stable in practice than some conservatives might expect. Liberals also place more weight on income distribution. They fear that even conduct that leads to efficiencies can often harm consumers, particularly lower and middle income consumers. Liberals also have a greater confidence that actions by the various arms of government can improve the both efficiency and consumer welfare. They believe that courts are no longer prone to the biases of the past. For all these reasons, they are relatively more concerned about false negatives and under-deterrence than are conservatives.

The differences in antitrust ideology cut most sharply with respect to monopolization and exclusionary conduct. This is because Section 2 and other exclusionary conduct complaints attack the firms that were "winners" in the market, and the cases often arise from complaints by the "losers." Moreover, the winners often are the lower-cost firms, and their exclusionary behavior may have been motivated by and achieve efficiency benefits.

These differences in antitrust ideology sometimes flow from broader differences in the two philosophical groups' respective concerns about economic liberty.[9] Liberals seem most concerned about providing the people with protection from the powerful, and see the state as a way to provide that protection. In contrast, conservatives seem most concerned about protection from

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[6] *See, e.g.*, ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 66 (2d ed. 2008).

[7] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (describing Easterbrook's error-cost framework).

[8] GAVIL ET AL., *supra* note 6, at 70.

[9] The Chicago School of law and economics grew out of the Mont Pelerin Society, a group organized by Frederick Hayek that (as stated by George Priest) "was, and to some extent still is, dedicated to the proposition that political interference with market activities is harmful to freedom." George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 2 (2010).

the state itself and place more trust in private contracting.[10] In a sense, this is a clash between the Coasian and Hobbesian views of the world.[11] Conservatives see laissez-faire markets as enhancing economic liberty and economic efficiency by facilitating private cooperation and are willing to accept the economic inequality that may come with it. In contrast, liberals see laissez-faire markets as involving highly asymmetric bargaining power and inefficient strategic behavior, leading to entrenchment of economic power and exploitation of the weak.

While these differences involve ideology, not partisan politics, they clearly can lead to a political spin on decisions. For example, in an important recent article, George Priest explains that the law and economics movement at University of Chicago "derived from what might be called a deeply held belief system that political interference in market activities interfered with freedom and reduced societal welfare."[12] In his view, the underlying goal of the Chicago School antitrust program was partially to advance the science but, "more centrally, it was to ridicule the grounds upon which courts interfered with the marketplace."[13] In this regard, Priest makes the point that "[t]he political or ideological dimension of the Coase Theorem is often ignored."[14] Indeed, "Coase's ambition was to deflate arguments for more intrusive government, not—as it happened—to revolutionize our understanding of the operation of the legal system."[15]

These conflicts between liberal and conservative ideologies are played out across the entire range of economic regulation, including telecommunications, financial markets, and transportation. They also play out in various aspects of antitrust law and policy. To illustrate, there has been an ongoing controversy over the whether the goal of an economics-based antitrust is or should be *total* welfare (i.e., efficiency) versus *consumer* welfare.[16] While it is an oversimplification, I believe that more conservatives favor the total welfare standard while more liberals favor the consumer welfare standard. The justifications

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[10] This sketch is over-simplified, of course. For example, some conservatives see the market as providing people with more protection from the powerful because the state often is controlled by the powerful.

[11] *See generally* Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

[12] Priest, *supra* note 9, at 2.

[13] *Id.* at 4.

[14] *Id.* at 6.

[15] *Id.*

[16] This discussion has become confused by the fact that Robert Bork used the term consumer welfare to describe total welfare. ROBERT H. BORK, THE ANTITRUST PARADOX 90–91, 104–117 (1978). For one of many discussions of the confusion, see Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

given by particular commentators for their favored standard may vary, but the general tendency remains.

The persistence of ideological differences can lead to significant variation in outcomes, even beginning from a common conceptual and factual starting point. For example, two commentators or FTC Commissioners both might begin with the foundational role of decision theory in setting antitrust standards. They both may favor the use of evidence.[17] But they may differ with respect to how much evidence should be required and which side should have the burden. Even putting aside any disagreements about the antitrust goal and assuming that they both observe and absorb the same facts, they still may disagree when the effects are not certain. They may disagree about whether the conduct is presumptively procompetitive or anticompetitive. Even if they agree on the direction of the presumption, they may disagree about the strength of the presumption. They also may disagree about the relative importance of false positives and over-deterrence versus false negatives and under-deterrence, which will affect the respective burdens of persuasion placed on the plaintiff versus defendant. They might agree about what efficiencies should be deemed legitimate. But they may disagree about the ability to achieve legitimate efficiencies absent the restraint in question. These disagreements also may inadvertently affect their evaluation of the evidence itself. One group might suggest that the other is overly critical of the benefits evidence while being overly accepting of the harm evidence, and vice versa. For all these reasons, one group might reject a liability finding in a particular case where the other might find liability.

This focus on ideological differences is not intended to claim that partisan or constituent politics never matters, or that political pressure is never exerted.[18] Both have been important determinants of outcomes. One way to identify the role of politics is to consider when a politician takes a position that appears inconsistent with his ideology. For example, President Reagan took a conservative approach to antitrust, appointing William Baxter as AAG and generally supporting the DOJ's controversial efforts to loosen vertical

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[17] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J 209 (1986); Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241 (2012).

[18] Politics and ideology are fundamentally different. Politics is focused on obtaining votes, not maintaining a philosophy. Ideological positions must be consistent. In contrast, political positions sway with the wind or represent compromises. Indeed, political behavior is clearest when an individual makes a decision or takes a position that is inconsistent with his ideology. However, because politicians often do have underlying philosophies, politics and ideology interact. In this regard, Republicans tend to be more conservative and Democrats more liberal with respect to antitrust and other forms of market regulation.

restraints law. However, Reagan did not veto the bill[19] that prohibited the DOJ from arguing in favor of overturning or altering the per se prohibition on resale price maintenance in in *Monsanto*.[20] He also famously deviated from his ideology with respect to the FCC's Financial Interest and Syndication Rules.[21] These rules prevented the TV networks from gaining more control over syndicated programming by banning certain vertical restraints in the contracts. Both the FCC and the DOJ in the early 1980s supported termination of these rules. In this fight between the New York TV networks and the Hollywood studios, President Reagan sided with Hollywood. He intervened and announced a two-year moratorium on rule changes on any changes to the rules, despite opposition from the DOJ and the FCC.[22]

II. DO ELECTIONS MATTER FOR ANTITRUST ENFORCEMENT?

The Voorhees essay suggests that the influence of elections on agency enforcement has declined.[23] If a basic consensus in antitrust has emerged and the state of the law were stable, then the influence of elections would be waning. However, if ideology has remained important, then there might be large differences, particularly regarding monopolization and exclusionary conduct. Thus, for example, one might expect that DOJ enforcement of criminal price fixing might not vary across administrations but its enforcement of exclusionary conduct might vary significantly.

Voorhees's hypothesis that elections no longer matter is not consistent with my review of the evidence. As discussed in more detail below, there have been significant differences in the enforcement records of the two political parties in recent years that are consistent with different antitrust ideologies. I submit that this can be seen in the number, type, and other characteristics of DOJ civil non-merger complaints, both over time and in comparison to the FTC, across the three administrations discussed here. There also have been differences in both vertical and horizontal merger enforcement.[24] These results

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[19] Pub. Law No. 98-166, § 510, 97 Stat. 1071, 1102 (1983).

[20] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[21] 47 C.F.R. § 73.658 (1970).

[22] *See, e.g.*, Christopher J. Pepe, *The Rise and Fall of the FCC's Financial Interest and Syndication Rules*, 1 JEFFREY S. MOORAD SPORTS L.J. 67, 74 n.46 (1994), digitalcommons.law.villanova.edu/mslj/vol1/iss1/5.

[23] Voorhees, *supra* note 1, at 564–66.

[24] I did not study horizontal merger enforcement. The issue of whether the DOJ during the Bush administration reduced horizontal merger enforcement has been well-discussed in the literature and need not be repeated here. *See* Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29; Daniel A. Crane, *Has The Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (2012), www.stanfordlawreview.org/sites/default/files/online/articles/65_Stan._L._Rev._Online_13.pdf; John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, ANTITRUST, Summer 2008, at 43; John D. Harkrider,

indicate that elections do matter. Of course, commentators may disagree about whether these differences amount to better or worse antitrust enforcement.

At the same time, I do not find this effect of elections at all surprising. Antitrust has an important role in the regulation of our economic system. It can affect the vitality of the competitive process, the speed of innovation, the distribution of income, and the efficiency of the market.[25] No one would expect that tax policy or climate change policy would be unaffected by elections, and antitrust policy is no different.

The empirical question is whether and by how much elections matter for antitrust enforcement. I analyze this issue with respect to the number, type, and other characteristics of DOJ civil non-merger actions over time. To be clear, this time series comparison abstracts from all the other possible effects on the number of complaints brought. For example, it fails to control for the state of the law, economic climate, and DOJ budgets, all of which could affect the amount of anticompetitive activity. To partly control for these factors, I also use the FTC enforcement record as a point of comparison to the DOJ. The FTC is similarly affected by the economic climate and state of the law.[26] I also discuss other areas of enforcement and policy, which will be at least a partial control for enforcement priorities.

My study used DOJ press releases to identify complaints.[27] I then examined the complaints to determine the nature of the allegations (whether collusive, exclusionary, or both) and whether the complaint alleged a violation of Section 1, Section 2, or both.[28] I included only matters in which there were com-

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Obama: The First Year, ANTITRUST, Summer 2010, at 8; Jonathan M. Jacobson & Sara C. Walsh, *Merger Enforcement in an Obama Administration*, THE THRESHOLD, Fall 2008, at 26 (ABA Section of Antitrust Law, Newsl. of the Mergers & Acquisitions Comm.); Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST, Summer 2008, at 37; D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055 (2010). For Baker and Shapiro's response to Crane, *supra*, see Jonathan B. Baker & Carl Shapiro, *Response: Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28 (2012), www.stanfordlaw review.org/merger-enforcememt-obama-administration.

[25] Antitrust also reflects and defines norms of "proper" business conduct, though the declaration of such values is no longer considered a primary purpose of antitrust rules.

[26] I have assumed that the FTC faces similar budget constraints.

[27] Some previous studies have counted complaints by using the DOJ workload statistics. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 2003–2012 (2013) [hereinafter DOJ WORKLOAD STATISTICS], www.justice.gov/atr/public/workload-statistics.html. For example, Daniel Crane used the workload statistics to compare the G.W. Bush and Obama administrations. In the last two years of the G.W. Bush administration (2007–08), the DOJ filed three non-merger civil complaints. During its 2009 ramp-up year, the Obama administration brought no cases. But, in the first two full years, 2010–11, the Obama DOJ brought seven cases. Crane, *supra* note 24, at 13.

[28] It is interesting to note that none of the three administrations brought any complaints during their transition years. There were no complaints counted in Calendar 1993, 2001, or 2009. This

plaints. I did not include Business Review Letters or matters that were resolved without a complaint.[29] The number and characteristics of the DOJ complaints are summarized in Table 1. The DOJ complaints are listed in Table 4 in the Appendix.[30]

TABLE 1: DOJ CIVIL NON-MERGER COMPLAINTS—SUMMARY COUNTS

	Clinton (1993–2000)	G.W. Bush (2001–2004)	G.W. Bush (2005–2008)	G.W. Bush (2001–2008)	Obama (2009–2012)
Collusive	20	6	7	13	8
Exclusionary	21	0	3	3	2
Both	7	0	0	0	1
Total	48	6	10	16	11

may reflect the previous administration clearing out its inventory of viable investigations before it leaves. Or, it may take a new administration a period of time to get its appointees in place, set its priorities, and carry out its own investigations.

[29] This raises the issue of the line between law enforcement and informal advice. I have taken a bright-line approach. I do not count Visa's voluntary and non-binding decision to rescind its debit card rule in 2008. Press Release, U.S. Dep't. of Justice, Visa Inc. Rescinds Debit Card Rule as a Result of Department of Justice Antitrust Investigation (July 1, 2008), *available at* www.justice.gov/atr/public/press_releases/2008/234577.pdf. I also do not count the voluntary abandonment of the Google/Yahoo advertising agreement in 2008. Press Release, U.S. Dep't. of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), *available at* www.justice.gov/atr/public/press_releases/2008/239167.pdf. (I consulted for Yahoo in the Google/Yahoo matter.) (This latter agreement arguably also would have fit more closely into the merger category because it was a joint venture to partially combine.) I discuss these voluntary settlements in more detail below.

[30] These complaint lists were developed by reviewing the DOJ website for press releases and other sources. This data is organized by Calendar Years, not Fiscal Years. (However, because there were no complaints counted in Calendar 1993, 2001, or 2009, this convention does not change the totals for each administration. The Clinton DOJ total does not include the March 17, 1993 Canstar Sports USA consent decree, entered before AAG Anne Bingaman was officially nominated on April 29, 1993. The list reflects my judgment calls regarding whether groups of complaints should be treated as separate complaints. I generally collect complaints despite there being multiple defendants or settlements in the same matter. For example, the Obama DOJ complaints against Visa, MasterCard, and American Express are treated as a single case, as are both the earlier litigation against Visa and MasterCard during the Clinton administration and the recent eBooks litigation. In contrast, the Obama DOJ complaint against eBay in 2012 originated in the 2010 employee poaching complaints that involved Lucasfilm and other companies, but is treated as separate based on my understanding from a DOJ official that the eBay matter involved a separate investigation. Similarly, the G.W. Bush MLS complaints are treated as separate matters, based on my understanding from a DOJ official that the two complaints were treated as independent of one another. In contrast, I treated the separate KeySpan and Morgan Stanley complaints as a single case. It was suggested to me by a DOJ official that there were separate issues involved in the disgorgement remedy for Morgan Stanley, so my decision arguably undercounts the Obama complaints by one. However, I wanted to be conservative in light of my conclusion that the Bush DOJ engaged in less enforcement.

A. TOTAL NUMBER OF DOJ COMPLAINTS

I focus first on the total number of complaints brought by each administration. In carrying out this analysis, I essentially concur with William Kovacic that counting complaints alone is not sufficient to evaluate the beneficial productivity of the enforcement agency.[31] However, the use of complaint counts here is intended to suggest the existence of differences in agency behavior over time. Complaint counts seem like a useful measure for this purpose, subject to the issues discussed below. To partially address some of the concerns about complaint counts, I go beyond the numbers and discuss the characteristics of the complaints as well.

One issue is that the supply of potentially problematic conduct is not exogenous. It depends on the state of the law and law enforcement. For example, as discussed below, the first-term Obama DOJ brought more complaints than did the first-term G.W. Bush DOJ, but many fewer complaints than did the Clinton DOJ during its first term. This raises the question of why the number of DOJ complaints during Obama's first term has not returned nearly to the Clinton level, particularly in light of the rhetoric of AAG Christine Varney when she took office.

One possible answer is that mainstream antitrust ideology has moved significantly in a conservative direction, so that even a Democratic administration would find it appropriate to bring fewer complaints. Another possible answer is that antitrust law itself has changed dramatically, so that there are fewer antitrust violations to attack. Of course, this latter answer does not mean that ideology is irrelevant. To the contrary, the changes in antitrust law may be driven by the ideology of the courts, particularly the Supreme Court. Moreover, those changes may have been driven or supported by DOJ amicus briefs.

However, the answer that it is solely changes in ideology or law that has led to fewer antitrust violations is problematic for two reasons. First, subsequent analysis below controls for changes in the law by comparing the differences in FTC and DOJ enforcement rates over time.[32] Second, attributing all the differences to changes in the law raises other analytical problems. If merger enforcement and outcomes in court were perfectly predictable, there would be no challenges, regardless of the standard. Firms might engage in conduct right up to the current line, but they would go no further.[33] This analysis suggests

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[31] William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 908–09 (2009).

[32] *See infra* Part II.D. In addition to comparing the case loads of the two agencies, I also make other qualitative comparisons.

[33] It a firm knew for certain its merger would be challenged and it would lose in court under the current legal standard, then it would be a waste of time and money to litigate.

that there are only violations when law or law enforcement is uncertain, or when there are errors. Economists refer to this analysis as a *selection effect*.[34]

According to this reasoning, enforcement rates would fall when firms and their counselors are surprised by the unexpected leniency of the administration relative to the law, and vice versa.[35] This selection effect obviously is weakened if the conduct generally at issue would have resulted in complaints by successive administrations.[36] But, if a significant selection effect remains, then the interpretation of the counts would change. A low rate of complaints would mean that potential defendants were pleasantly surprised by the permissiveness of the administration, relative to their expectations. A high rate of complaints would mean that the potential defendants were unpleasantly surprised by the hostility of the administration.

Looking back over time at the total number of complaints, the Clinton DOJ over its two terms filed many more such complaints than did the G.W. Bush administration over its two terms. According to my count, the Clinton DOJ brought 58 complaints. In contrast, the G.W. Bush DOJ brought only 16 complaints.[37] Thus, the Bush administration was either more lenient than the Clinton administration or more lenient than potential defendants expected, or both. Since the business community and outside counsel probably did expect more lenient antitrust enforcement under G.W. Bush, then the selection effect would compound factors, that is, the Bush DOJ must have been even more lenient than the greater leniency that was expected to occur.

I also compared the first-term Obama DOJ to the first-term G.W. Bush DOJ. I compared the first terms for each because it always takes a while for each administration to ramp up enforcement. In fact, none of the AAGs brought any complaints during the first year of a new administration. There-

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[34] *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995). The selection effect also suggests that a high loss rate by the agencies does not imply agency over-reaching of the law but rather flows from asymmetric stakes. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1031 (1986).

[35] This is because leniency that was unanticipated would not affect the set of mergers proposed. So a lower percentage of the set of mergers proposed under the anticipation of a more intrusive policy would attract enforcement. For a similar analysis, see Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 235, 245–47 (Robert Pitofsky ed., 2008).

[36] Note, however, that none of the AAGs brought any cases during the first year of a new administration, which suggests that the carryover of investigations is somewhat limited.

[37] According to the DOJ Workload Statistics, the Clinton DOJ filed 50 Section 1 complaints and 8 Section 2 complaints. The difference may involve some double counting of complaints with multiple allegations in the workload statistics. In contrast, it reports that the G.W. Bush DOJ brought 16 Section 1 complaints and zero Section 2 complaints. Differences also may be caused by variations in the way of counting complaints with multiple defendants.

fore, comparing G.W. Bush's second term to Obama's first term does not seem like an apples-to-apples comparison.

The Obama DOJ brought 11 complaints during its first term. This compares to six complaints during the first four years of the G.W. Bush administration. Thus, the Obama DOJ so far is running at a higher rate than the DOJ during the first term of G.W. Bush. But the Obama DOJ is certainly far below the number of complaints brought during the first term of the Clinton administration. In addition, the G.W. Bush DOJ brought ten complaints during its second term versus only six complaints in its first term. The comparison of second terms will have to be made in 2017.

This data also raises the question of how the selection effect would affect the interpretation of the results. The increase in Obama complaints over G.W. Bush complaints could be said to indicate that potential defendants were a bit surprised by the possibly tougher stance of the new administration. But the selection effect by itself is unlikely to explain the huge difference between the Clinton and Obama caseloads. There was some rhetoric by the Obama team that the DOJ would be tougher than it was during G.W. Bush's presidency. Thus, the selection interpretation could be that the business community was pleasantly surprised by the permissiveness of the Obama DOJ.

Finally, one issue raised by this review of the respective enforcement records is whether the differences are the serendipitous result of complaints that came through the door or whether they reflect decisions based on divergent ideologies. I conclude that ideology appears to be a major factor. Looking at the Clinton DOJ complaints, it seems unlikely to me that the G.W. Bush DOJ would have brought the *Microsoft* case,[38] and certainly would not have proposed a structural remedy if it did. It similarly seems unlikely that it would have brought the *American Airlines* predatory pricing/capacity expansion case.[39] *Visa*[40] would be a closer call because it involved concerted action. The Bush DOJ pursued the appeal in *Dentsply*,[41] but whether it would have filed the complaint originally is a separate question that I cannot answer.

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[38] *See United States v. Microsoft Corporation [Browser and Middleware]*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/cases/ms_index.htm [hereinafter U.S. v. Microsoft Filings] (Complaint filed May 18, 1998).

[39] *See United States v. AMR Corporation, American Airlines, Inc., and AMR Eagle Holding Corporation*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/cases/indx199.htm [hereinafter U.S. v. AMR Filings] (Complaint filed May 13, 1999).

[40] *See United States v. VISA U.S.A. Inc., VISA International Corp., and MasterCard International Inc.*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/cases/indx57.htm [hereinafter U.S. v. VISA Filings] (Complaint filed Oct. 7, 1998).

[41] *See United States v. Dentsply International, Inc.*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/cases/indx102.htm (Complaint filed Jan. 5, 1999).

Looking at the Obama DOJ complaints, my expectation is that the Bush DOJ would probably have pursued the employment poaching complaints. The investigation of the Keyspan/Morgan Stanley agreement was initiated during the Bush administration. No complaint was filed, but Deborah Garza, who was Acting AAG at the end of the G.W. Bush administration, has said that she supported this complaint—and the aggressive disgorgement remedy.[42] I expect that the eBooks litigation[43] would have been brought because of the horizontal agreement. However, once the publishers settled, or if DOJ had accepted Apple's argument that Apple was not privy to the discussions among the book publishers, it is less clear that the G.W. Bush DOJ would have litigated the matter. That case would amount to an attack on the combination of RPM and MFNs adopted through parallel vertical agreements.

I do, however, want to emphasize that these are just my observations. It would be very interesting to have the former AAGs themselves explain what led to their case selection criteria and why they brought certain complaints and did not bring others. They also could opine about the complaints of other AAGs that they would or would not have brought and why. That process could provide a much deeper understanding of the antitrust-related implications of ideological differences.

B. EXCLUSIONARY CONDUCT COMPLAINTS

As discussed above, the impact of ideological differences on policy choices can be expected to be largest with respect to monopolization and other exclusionary conduct. The Voorhees essay suggests that Section 2 enforcement policy may not have changed significantly at the DOJ because of change in administration.[44] He specifically makes the point that the Obama administration has brought only one Section 2 complaint and it did not involve a prominent defendant,[45] despite AAG Varney's rhetoric in withdrawing the Bush administration's Section 2 report in 2009.[46]

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[42] Personal communication.

[43] *See United States v. Apple, Inc. et al.*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/cases/applebooks.html (Complaint filed Apr. 11, 2012).

[44] Voorhees, *supra* note 1, at 564–66.

[45] The one monopolization case involved United Regional Health Care System of Wichita Falls, Texas. *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers (Feb. 25, 2011), *available at* www.justice.gov/opa/pr/2011/February/11-at-249.html.

[46] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter DOJ SECTION 2 REPORT], *available at* www.usdoj.gov/atr/public/reports/236681.pdf. As of May 2009, the *DOJ Section 2 Report* was withdrawn. *See* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009) [hereinafter DOJ Press Release Withdrawing Report], *available at* www.usdoj.gov//atr/public/press_releases/2009/245710.pdf.

To test this hypothesis, I classified the complaints according to whether they alleged a violation of Section 1 or Section 2 of the Sherman Act, or both Sections. I also classified the complaints according to whether the complaints alleged collusive conduct (i.e., elimination of competition among the defendants) or exclusionary conduct (i.e., conduct intended to exclude competition by non-parties), or both.[47]

There are large differences in the number of exclusionary conduct complaints and the breakdown between collusive and exclusionary conduct complaints across the administrations. As summarized in Table 1, I counted nine complaints with Section 2 counts brought by the Clinton DOJ.[48] In contrast, there were no Section 2 complaints brought by the DOJ during the G.W. Bush administration. It is useful also to widen the focus beyond just Section 2 to exclusionary conduct allegations brought under Section 1 as well as Section 2. The controversy among antitrust commentators—and the ideology behind the DOJ's Section 2 report—involves the concerns raised by exclusionary conduct generally, not simply exclusionary conduct that might violate Section 2. Exclusionary conduct may be carried out by the unilateral conduct of monopolists. But exclusionary conduct also may occur in vertical mergers or agreements that might be attacked under Section 1.

This broader focus affects the scorecard even more. Among the 48 Clinton complaints, 21 involved exclusionary conduct and 7 involved exclusionary as well as collusive conduct, for 28 complaints with exclusionary conduct allega-

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[47] I also identified whether the complaints focused on vertical price fixing (resale price maintenance or RPM). The RPM case counts are not surprising. Even while vertical price restraints law was becoming more permissive, the Clinton administration brought more such complaints: eight for the Clinton DOJ versus none for the Reagan/G.H.W. Bush DOJ. Perhaps more surprisingly, the Obama DOJ has not brought any standard RPM complaints under the *Leegin* rule of reason standard. However, there is a caveat here. The Apple/eBook publishers case does involve resale price maintenance, though this was not the focus in light of the horizontal agreement allegations. The difference from *Leegin* is, of course, that the adoption of the RPM allegedly involved a horizontal conspiracy as well as vertical agreements. My count had three RPM complaints by the Clinton DOJ, excluding the Canstar Sports matter. But there are other types of vertical restraints besides RPM that I did not break out.

[48] See Tables 4 and 5 in the Appendix for a listing of the complaints. The Antitrust Division Workload statistics report eight complaints. According to the data collected by William Kovacic and cited by Timothy Muris, the Clinton DOJ brought seven monopolization and attempted monopolization complaints. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 449 tbl.4 (2003); Timothy J. Muris, Chairman, Fed. Trade Comm'n, Remarks Before the ABA Antitrust Section Fall Forum: How History Informs Practice—Understanding the Developments of Modern U.S. Competition Policy (Nov. 19, 2003), *available at* www.ftc.gov/speeches/muris/murisfallaba.pdf. However, commentators may differ on the exact counts because some complaints allege violations of Section 1 as well as Section 2 or because they involve separate complaints against multiple defendants. The data reported above indicate that the Reagan DOJ brought two Section 2 complaints while the G.H.W. Bush administration brought none. These results from the FTC also showed the same contrast: two during Reagan; zero during G.H.W. Bush; four during Clinton. *Id.* These caveats suggest that small differences are not surprising. Nor do they change the basic conclusion.

tions. This is substantially more than half of the Clinton complaints. These complaints included the gamut of exclusionary conduct (e.g., predatory pricing, contractual and physical tying, exclusive dealing, MFNs, exclusionary group boycotts, and so on). A number of these complaints were criticized at the time as being novel or over-reaching.

In contrast, the G.W. Bush administration brought only three exclusionary conduct complaints. These complaints all involved multiple listing services. One targeted the National Association of Realtors and the other two targeted local multiple listing services. These were all brought during the second term.

The Obama DOJ administration had only one Section 2 complaint during its first term. However, the Obama DOJ brought several significant Section 1 complaints that allege exclusionary conduct. There were three exclusionary conduct matters during the first term: two that were purely exclusionary and one that was both collusive and exclusionary. In contrast, the G.W. Bush DOJ had none during the first term.

The exclusionary conduct allegations in several of the Obama DOJ complaints have focused on MFNs. For example, the complaint against Blue Cross Blue Shield of Michigan[49] alleges that the dominant insurer used most MFN provisions to exclude rivals in order to maintain its market power.[50] The DOJ also brought Section 1 exclusionary conduct complaints against the credit card companies for agreements involving MFNs. Visa and MasterCard settled, while the American Express case is still headed to trial.[51] The *econom-*

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[49] *See United States and State of Michigan v. Blue Cross Blue Shield of Michigan*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/cases/bcbsmfn.html (Complaint filed Oct. 18, 2010).

[50] The fact that these complaints were brought until Section 1 instead of Section 2 also raises another confounding issue regarding the impact of politics and elections on antitrust enforcement. Over the past two decades, with the aid of amicus briefs from the agencies during Republican administrations, the Supreme Court has made it significantly more difficult for the agencies to win monopolization complaints. *Brooke Group*, *Trinko*, *linkLine*, and *Weyerhaeuser* have tightened the standards for predatory pricing, refusals to deal, price squeezes, and predatory overbuying, respectively. *See* Pac. Bell Tel. Co., v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). Therefore, the agencies understandably may have been reluctant to bring Section 2 complaints where Section 1 would suffice.

[51] *See* Final Judgment as to Defendants MasterCard Int'l Inc. and Visa Inc., United States v. Am. Express Co., No. 10-4496 (E.D.N.Y. July 20, 2011), *available at* www.justice.gov/atr/cases/f273100/273170.pdf; Complaint, United States v. Am. Express Co., No. 10-4496 (E.D.N.Y. Oct. 4, 2010) [hereinafter Amex/VISA/MasterCard Complaint], *available at* www.justice.gov/atr/cases/f262800/262864.pdf; *see also* Alex Lawson, *DOJ Moves to Block AmEx Case Consolidation in NY*, Law360 (Nov. 22, 2013, 3:52 PM), www.law360.com/articles/491004/doj-moves-to-block-amex-case-consolidation-in-ny.

ics of the allegations in the eBooks complaint[52] involves the combined use of MFNs and RPM as exclusionary conduct to harm consumers by disadvantaging Amazon's business strategy relative to Apple.[53] The Wichita Falls Section 2 complaint[54] concerns loyalty discounts. Thus, the Obama administration is indicating more concern with exclusionary conduct than the G.W. Bush administration.

C. Risk Aversion in Enforcement

More of the Clinton DOJ complaints involved complaints against well-financed large national entities. For example, the Clinton DOJ brought complaints against Microsoft,[55] Visa and MasterCard,[56] GE,[57] American Airlines,[58] and NASDAQ.[59] A number of these were high profile, complex complaints. In comparison, the G.W. Bush DOJ brought more cases against smaller firms. Litigation involving large firms generally generates more consumer benefits, *ceteris paribus*, because more people and more revenue are affected. The greater visibility of these cases also would tend to generate more deterrence.

It is not entirely clear what caused the differences by the G.W. Bush DOJ. In my view, three possibilities seem most likely. One possibility is a lessened concern with deterrence. Another possibility is a different political or ideological bias with respect to large corporations. A third possibility is risk aversion and fear of losing. Larger national firms generally have deeper pockets, which creates a greater threat of litigating and litigating more intensely as compared to smaller firms. Larger firms also are more likely to be repeat players in the litigation threat game, which also gives them an incentive to play hardball.

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[52] Complaint, United States v. Apple, No. 12-cv-2826 (S.D.N.Y. Apr. 11, 2012) [hereinafter Apple eBooks Complaint], *available at* www.justice.gov/atr/cases/f282100/282135.pdf.

[53] This analysis can be placed in the exclusionary conduct framework set out in *Leegin*. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893–94 (2007) (use of RPM to forestall innovation or exclude smaller rivals or new entrants).

[54] Complaint, United States v. United Regional Health Care Sys., No. 11-cv-00030 (N.D. Tex. Feb. 25, 2011), *available at* www.justice.gov/atr/cases/f267600/267651.pdf.

[55] Complaint, United States v. Microsoft Corp., No. 98-1232 (D.D.C. May 18, 1998), *available at* www.justice.gov/atr/cases/f1700/1763.pdf; U.S. v. Microsoft Filings, *supra* note 38.

[56] *See* United States v. Visa, U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003); U.S. v. VISA Filings, *supra* note 40.

[57] Complaint for Equitable Relief for Violations of 15 U.S.C. §§ 1 and 2 (Sherman Antitrust Act), United States v. General Electric Co., No. 96-121 (D. Mont. Aug. 1, 1996), *available at* www.justice.gov/atr/cases/f1000/1047.pdf (Diagnostic Software Licenses).

[58] Complaint, United States v. AMR Corp., No. 99-1180 (D. Ky. May 13, 1999); U.S. v. AMR Filings, *supra* note 39.

[59] Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, United States v. Alex Brown & Sons Inc., No. 96-5313 (S.D.N.Y. July 17, 1996), *available at* www.justice.gov/atr/cases/f0700/0740.pdf; *United States v. Alex Brown & Sons, et al. (Nasdaq Market Makers)*, U.S. Dep't of Justice, www.justice.gov/atr/cases/alexbr0.htm.

Several facts support the risk-aversion explanation. Not only did it target smaller firms, the DOJ also failed to litigate any complaints after its 2004 loss in *Oracle*.[60] It is also consistent with the DOJ's behavior in two 2008 matters, the Visa rule[61] and the Google/Yahoo advertising agreement.[62] The DOJ resolved both of these matters informally without a complaint (and I did not include either in my counts). While the DOJ may have threatened litigation, accepting voluntary agreements did significantly reduce the DOJ's risk of having to go to trial and possibly losing. A complaint and consent decree in the Visa matter likely would have alleged that Visa had market power, that the proposed rule was a violation of Section 1, and that Visa was not simply a single entity imposing a vertical restraint. Having these allegations in a complaint might have materially weakened Visa's position in the class action litigation and other matters. Thus, it would have been less likely to settle and more likely to take the case to trial.

Similarly, in Google/Yahoo, a complaint and consent decree likely would have required a search market to be defined and high market shares to be calculated. Again, the parties likely would have been more reluctant to settle, which then would have forced the DOJ into risky litigation or forced them to cave. The informal agreements were a way for DOJ to eliminate these litigation risks.

Of course, such non-binding informal agreements constitute less effective law enforcement and provide less deterrence than do binding consent decrees obtained through negotiation or successful adjudication.[63] While such informal actions do terminate the immediate conduct, they also carry less weight because they cannot be used by the agencies or third parties in future proceedings. While less risky for the agency, they also reduce deterrence because they deter the parties from proposing anticompetitive activities at no risk. Indeed, if informal settlements were considered equally effective, then it raises the question about why agencies should ever issue complaints and require consent decrees for matters that could be resolved informally by such gentlemen's agreements.[64]

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[60] *See, e.g.*, James A. Keyte, United States v. H&R Block: *The DOJ Invokes* Brown Shoe *to Shed the* Oracle *Albatross*, ANTITRUST, Spring 2012, at 32.

[61] Press Release, U.S. Dep't. of Justice, Visa Inc. Rescinds Debit Card Rule as a Result of Department of Justice Antitrust Investigation (July 1, 2008), *available at* www.justice.gov/atr/public/press_releases/2008/234577.pdf.

[62] Press Release, U.S. Dep't. of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), *available at* www.justice.gov/atr/public/press_releases/2008/239167.pdf.

[63] For further discussion of why weak settlements lead to reduced deterrence, see Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647 (2013).

[64] This is not to say that all consent decrees have significant deterrent effects.

This behavior is not unique to the G.W. Bush administration. The Obama FTC recently accepted a similar non-binding voluntary commitment from Google that raises these same issues.[65] Commissioner J. Thomas Rosch condemned this remedial approach as ineffective law enforcement.[66] He also pointed out that the ABA Commission to Study the FTC criticized voluntary compliance programs as ineffective in 1969.[67] The European Commission under Article 9 of Regulation 1/2003 accepts voluntary commitments. But, while they also avoid a formal complaint, they are legally binding.[68]

In my view, the Obama DOJ thus has been in between the Clinton and G.W. Bush administrations with respect to risk-taking and cutting-edge theories. Some of its complaints raised more novel issues; several involved MFNs. The complaint against Apple and the top book publishers[69] involved collective action to adopt RPM and MFNs. The complaint would have more cutting-edge, absent strong evidence of a horizontal agreement. In fact, since the Court ruled in *Leegin*, the DOJ has brought no purely vertical price agreement cases. The complaints against Keyspan[70] and Morgan Stanley[71] were the first use of a disgorgement remedy by the DOJ. A number of the Obama complaints have involved deep-pocket national competitors that might be expected to litigate, including Apple,[72] American Express, Visa, and MasterCard,[73] and the high-tech Silicon Valley firms accused of employee

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[65] Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc; Letter from David Drummond, Senior Vice President of Corporate Dev. and Chief Legal Officer, Google Inc., to The Honorable Jon Leibowitz, Chairman, Fed. Trade Comm'n (Dec. 27, 2012), *available at* www.ftc.gov/sites/default/files/attachments/press-releases/google-agrees-change-its-business-practices-resolve-ftc-competition-concerns-markets-devices-smart/130103googleletterchairmanleibowitz.pdf (Google commitment letter).

[66] Concurring and Dissenting Statement of Comm'r J. Thomas Rosch Regarding Google's Search Practices at 6–8, Google Inc., FTC File No. 111-0163 (Jan. 3, 2013), *available at* www.ftc.gov/sites/default/files/documents/public_statements/concurring-and-dissenting-statement-commissioner-j.thomas-rosch-regarding-googles-search-practices/130103googlesearchstmt.pdf. Commissioner Rosch also did not believe that Google violated the law. *Id.* at 1.

[67] *Id.* at 7 n.16.

[68] European Comm'n, Antitrust: Commitment Decisions—Frequently Asked Questions (Mar. 3, 2013), *available at* europa.eu/rapid/press-release_MEMO-13-189_en.htm.

[69] Apple eBooks Complaint, *supra* note 52.

[70] Complaint, United States v. Keyspan Corp., No. 10-cv-1415 (S.D.N.Y. Feb. 22, 2010, *available at* www.justice.gov/atr/cases/f255500/255507.pdf.

[71] Complaint, United States v. Morgan Stanley, No. 11-cv-6875 (S.D.N.Y. Sept. 30, 2011), *available at* www.justice.gov/atr/cases/f275700/275762.pdf.

[72] Apple eBooks Complaint, *supra* note 52.

[73] Amex/VISA/MasterCard Complaint, *supra* note 51.

market division.[74] However, it has not achieved a level of enforcement coming anywhere close to the Clinton DOJ.

D. COMPARISON TO FTC ENFORCEMENT

Another important issue is whether the FTC and DOJ differed with respect to exclusionary conduct.[75] I have analyzed the FTC's non-merger complaints for the three administrations. In addition to showing how FTC enforcement has changed, the FTC data also is useful for comparison to the DOJ. Bringing the FTC record into the mix permits some control for changes in the legal and economic climate over time. The preliminary results are listed below in Table 2. The FTC complaints are listed in Table 5 in the Appendix.[76]

TABLE 2: FTC NON-MERGER COMPLAINTS—SUMMARY COUNTS

	Clinton (1993–2000)	G.W. Bush (2001–2004)	G.W. Bush (2005–2008)	G.W. Bush (2001–2008)	Obama (2009–2012)
Collusive	48	34	13	47	9
Exclusionary	21	5	15	20	7
Both	6	0	0	0	0
Total	75	39	28	67	16

The FTC is an independent, bipartisan agency with members whose terms overlap administrations. While, as Tim Muris has emphasized, the Chairman of the FTC has the power to set the agenda for non-merger investigations and complaints,[77] there also are opportunities for logrolling, given the Commission's multi-member set-up. In addition, the fear of adverse publicity from strong dissents by other Commissioners is likely another deterrent to extremism. For this reason, one would expect the FTC to be somewhat more tethered to the middle and subject to milder swings, relative to the DOJ.

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[74] Complaint, United States v. Adobe Systems, Inc., No. 10-cv-01629 (D.D.C. Sept. 24, 2010), *available at* www.justice.gov/atr/cases/f262600/262654.pdf.

[75] The analysis of FTC enforcement is more complex because the terms of the Chairman differ from the Presidential terms. *See infra* note 78.

[76] I began with a list of FTC complaints since 1996 posted by the Commission. *See Cases and Proceedings*, FED. TRADE COMM'N, www.ftc.gov/enforcement/cases-proceedings. The complaints decided before 1996 are available at www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes, but the list gives the decisions, not the dates of the complaints. This leaves a potential gap for pre-1996 matters that leaves some potential for error. One judgment call involves whether to aggregate similar complaints brought on the same day but that are not part of the same complaint. I have chosen to aggregate these.

[77] *See* John H. Carley et al., *Panel Discussion: Politics & Policy in 1981*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 8–22 (James C. Cooper ed., 2013).

I begin by examining the FTC complaints over time. Comparing the FTC complaints under the Clinton and G.W. Bush administrations produces significant similarities.[78] First, the G.W. Bush FTC did not bring substantially fewer complaints than the Clinton FTC.[79] Second, the G.W. Bush FTC did not stop bringing exclusionary conduct complaints, though they did bring somewhat fewer than the Clinton FTC (i.e., 20 vs. 27). The G.W. Bush FTC continued the Clinton FTC's program of cutting-edge exclusion complaints involving the pharmaceutical pay-for-delay agreements that excluded generic pharmaceuticals.[80] The G.W. Bush FTC also brought exclusion actions against

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[78] The bipartisan nature of the Commission raises some complexity with regard to classifying complaints. For example, Republican Timothy Muris became Chairman in June 2001. *Schering-Plough* was brought under Robert Pitofsky's chairmanship in April 2001 and was counted as part of the Pitofsky chairmanship, despite it being brought in Calendar 2001. *See* Complaint, Schering-Plough Corporation, FTC Docket No. 9297 (Apr. 2, 2001), *available at* www.ftc.gov/sites/default/files/documents/cases/2001/04/scheringpart3cmp_0.pdf. During the Clinton administration, Republican Janet Steiger remained Chairman until April 1995, when she was replaced by Democrat Robert Pitofsky. I have not adjusted the counts to reflect this fact. (There were 21 complaints in 1993–94 and 13 complaints in 1995. Of those 13, 4 were issued before Pitofsky took over. So, the total for Chairman Steiger is 25 and the total for Pitofsky is 46.) This reduces the Pitofsky complaints per year (because there were relatively more complaints brought in 1993 and 1994). But the basic conclusions would not change because the most significant complaints were brought subsequently, including *Dell*, *Intel*, *Mylan*, *Toys-R-Us*, and the pharma complaints (e.g., *Schering-Plough* and *Mylan*). *See* Complaint, FTC v. Mylan Labs, Inc., No. 98-cv-03114 (D.D.C. Dec. 21, 1998), *available at* www.ftc.gov/enforcement/cases-and-proceedings/cases/2000/11/mylan-laboratories-inc-cambrex-corporation; Complaint, Intel Corp., FTC Docket No. 9288 (June 8, 1998), *available at* www.ftc.gov/sites/default/files/documents/cases/1998/06/intelcmp_0.pdf; Complaint, Toys "R" Us, Inc., FTC Docket No. 9278 (May 22, 1996), *available at* www.ftc.gov/sites/default/files/documents/cases/toysrus.cmp_.htm; Complaint, Dell Computer Corp., 121 F.T.C. 616 (1996).

[79] During the period of Steiger and Pitofsky leadership, the FTC brought 75 complaints, versus 67 under the G.W. Bush administration. (Note that the FTC was led by Republican Chairman Janet Steiger until April 1995, and a significant number of the Clinton administration complaints were brought under her leadership.)

[80] These included the complaint against Biovail and three related complaints against Bristol Myers Squibb. *See* Complaint, Biovail Corp., FTC Docket No. C-4060 (Apr. 23, 2002), *available at* www.ftc.gov/sites/default/files/documents/cases/2002/04/biovailcomplaint.htm; Complaint, Bristol-Myers Squibb Co., FTC Docket No. C-4076 (Apr. 18, 2003), *available at* www.ftc.gov/sites/default/files/documents/cases/2003/04/bristolmyerssquibbcmp.pdf; Complaint for Injunctive Relief, FTC v. Cephalon, Inc., No. 2:08-cv-2141, 2008 WL 446785 (D.D.C. Feb. 13, 2008), *available at* www.ftc.gov/sites/default/files/documents/cases/2008/02/080213complaint.pdf; Complaint for Injunctive and Other Equitable Relief, FTC v. Warner Chillicott Holdings Co. III, Ltd., No. 1:05-cv-02179, 2005 WL 3439585 (D.D.C. Nov. 7, 2005), *available at* www.ftc.gov/sites/default/files/documents/cases/2005/11/051107comp0410034.pdf.

Rambus,[81] Unocal,[82] and N-Data[83] for opportunistic behavior involving standard setting, complaints that followed the *Dell* complaint[84] brought under FTC Chairman Pitofsky. Third, complaints against healthcare providers for collusive price setting were a high priority in both decades. Fourth, it appears that FTC Chairmen Deborah Majoras and William Kovacic followed roughly the same agenda as Chairman Muris, though with somewhat fewer complaints. In 2001–2004, the FTC brought 39 complaints, versus 28 in the 2005–2008 period.[85]

There also were some differences that show the power of the Chairman to set the agenda. First, the Pitofsky (and Steiger) FTC brought a number of RPM complaints, whereas the Bush administration brought none. Second, the Muris FTC brought a significant number of state action complaints, which were not a priority for Pitofsky. However, the Chairman's power has limits. For example, the N-Data complaint was issued over the dissent of Chairman Majoras and future Chairman Kovacic.[86]

Comparing the other high visibility FTC complaints, I expect that Chairman Pitofsky would have supported the PolyGram complaint[87] brought by Chairman Muris. Chairman Muris suggested that he likely would not have brought the single-firm exclusionary conduct complaint against Intel.[88] He likely would have supported the Toys-R-Us complaint[89] in light of the evi-

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[81] *In the Matter of Rambus Incorporated*, FED. TRADE COMM'N, www.ftc.gov/enforcement/cases-and-proceedings/cases/2009/05/matter-rambus-incorporated (Complaint filed June 18, 2002).

[82] *In the Matter of Union Oil Company of California*, FED. TRADE COMM'N, www.ftc.gov/enforcement/cases-and-proceedings/cases/2005/08/matter-union-oil-company-california (Complaint filed Mar. 4, 2003).

[83] *In the Matter of Negotiated Data Solutions LLC*, FED. TRADE COMM'N, www.ftc.gov/enforcement/cases-and-proceedings/cases/2008/09/negotiated-data-solutions-llc-matter (Complaint filed Jan. 23, 2008).

[84] Complaint, Dell Computer Corp., 121 F.T.C. 616 (1996).

[85] *See supra* Table 2.

[86] For the majority statement, see Statement of the Federal Trade Comm'n, Negotiated Data Solutions LLC, FTC File No. 051-0094 (Jan. 23, 2008), *available at* www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf. For Chairman Majoras's dissent, see Dissenting Statement of Chairman Majoras, Negotiated Data Solutions LLC, FTC File No. 051-0094 (Jan. 23, 2008), *available at* www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf. For Commissioner Kovacic's dissent, see Dissenting Statement of Commissioner William E. Kovacic, Negotiated Data Solutions LLC, FTC File No. 051-0094 (Jan. 23, 2008), *available at* www.ftc.gov/sites/default/files/documents/cases/2008/01/080122kovacic.pdf.

[87] PolyGram Holding, Inc., FTC Docket No. 9298 (July 31, 2001), *available at* www.ftc.gov/sites/default/files/documents/cases/2001/07/tenorscmp.htm.

[88] Complaint, Intel Corp., FTC Docket No. 9288 (June 8, 1998), *available at* www.ftc.gov/sites/default/files/documents/cases/1998/06/intelcmp_0.pdf; personal communication. He reported that he lacked sufficient information from the press release to speculate about his likely determination in the *Mylan* case.

[89] Complaint, Toys "R" Us, Inc., FTC Docket No. 9278 (May 22, 1996), *available at* www.ftc.gov/sites/default/files/documents/cases/toysrus.cmp_.htm.

dence of horizontal communication among the manufacturers. However, in the absence of this evidence, he was unlikely to have supported the case, whereas I expect that that Chairman Pitofsky would have.

Comparing the G.W. Bush and Obama FTC, the Obama FTC has brought many fewer complaints—16 in the first term versus 40 during the first term of G.W. Bush. This small number of Obama FTC complaints raises the big question of why the caseload has declined. One answer is that the FTC, particularly under Chairman Muris and Bureau of Competition Director Joseph Simons, had a very aggressive enforcement agenda, one that was particularly geared towards restrictive governmental regulation.[90] Comparing the types of complaints, the Obama FTC has brought seven exclusionary conduct complaints during the first term versus five during the G.W. Bush first term. The Obama administration's exclusionary conduct cases were significant ones, but their pharma cases followed on the work of the agency since the Clinton administration. The Obama FTC was not risk averse in that it continued the program of bringing pharma exclusion complaints, despite a number of losses. And, indeed, its risk-taking paid off with its major victory at the Supreme Court in *Actavis*.[91] Outside of pharma, the Obama administration brought high visibility exclusionary conduct complaints against Intel[92] and Transitions,[93] both of which were settled by consent decrees.[94]

The Voorhees essay asks whether the FTC and DOJ differed from one another during the G.W. Bush administration, and that was a focus of my empirical analysis. To analyze this issue, I calculated the number of DOJ complaints of a particular type as a fraction of the number of FTC complaints in the same administration period. The differences are striking.

This use the enforcement ratio also is important as a way to control for other factors. The use of the ratio of DOJ to FTC cases helps to control for changes in the law and economic climate. It also helps to control for differences in industry focus between the two agencies. The use of the ratio makes it clear that changes in the law or industry focus cannot explain the lower

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[90] *See generally* Priest, *supra* note 9. Another possibility is that the law has become more permissive. However, I control for this below by examining differences between FTC and DOJ enforcement.

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

[92] *In the Matter of Intel Corporation*, FED. TRADE COMM'N, www.ftc.gov/enforcement/cases-and-proceedings/cases/2010/11/matter-intel-corporation-corporation (Complaint filed Dec. 16, 2009; Decision and Order filed Nov. 2, 2010).

[93] *Transitions Optical, Inc.*, FED. TRADE COMM'N, www.ftc.gov/enforcement/cases-and-proceedings/cases/2010/04/transitions-optical-inc (Complaint filed Mar. 3, 2010; Decision and Order filed Apr. 27, 2010).

[94] The FTC's Google patent settlement in 2013 is not included in the sample. *In the Matter of Motorola Mobility LLC, and Google Inc.,* Fed. Trade Comm'n, www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/07/motorola-mobility-llc-and-google-inc-matter.

number of DOJ cases. Both the FTC and the DOJ faced the same basic legal and economic environment, and the industry focus has not changed significantly.[95] The results of comparing Tables 1 and 2 in this way are summarized in Table 3.

TABLE 3: DOJ CIVIL NON-MERGER COMPLAINTS AS A PERCENTAGE OF FTC COMPLAINTS

	Clinton (1993–2000)	G.W. Bush (2001–2004)	G.W. Bush (2005–2008)	G.W. Bush (2001–2008)	Obama (2009–2012)
Collusive	42%	18%	54%	28%	89%
Exclusionary (or Both)	104%	0%	20%	15%	43%
Total	64%	15%	36%	24%	69%

This comparison of differences in the ratios yields a number of interesting results about the dramatically lower enforcement levels at the G.W. Bush DOJ in comparison with the G.W. Bush FTC.

- First, the Clinton DOJ brought about 64% of the number of complaints brought by the FTC (i.e., 48 vs. 75),[96] whereas the G.W. Bush DOJ brought only 24% as many complaints as the FTC (i.e., 16 vs. 67).

- Second, the Clinton DOJ brought 104% as many complaints that raised exclusion issues as did the FTC (i.e., 28 vs. 27), whereas the G.W. Bush DOJ brought only 15% as many exclusionary conduct complaints (i.e., 3 vs. 20).

- Third, the first-term Obama DOJ brought 69% as many complaints as did the FTC (i.e., 11 vs. 16), whereas the first-term G.W. Bush DOJ brought only 15% as many complaints as did the FTC (i.e., 6 vs. 34).

- Fourth, with respect to exclusionary conduct complaints, the first-term Obama DOJ brought 43% as many complaints that raised exclusion concerns as did the FTC (i.e., 3 vs. 7), whereas the first-term G.W. Bush DOJ brought no complaints while the FTC brought 5.

- Fifth, the ratios for purely collusive conduct complaints are more similar between Clinton and G.W. Bush. The Clinton DOJ brought 42% as many

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[95] The reach of Section 5 is broader than the Sherman Act, but they move together. Moreover, the FTC's two major exclusion cases were brought against Intel and Transitions, both of which allegedly had monopoly power, not just market power.

[96] *See supra* Tables 1–2.

as the FTC (i.e., 20 vs. 48), whereas the G.W. Bush DOJ brought 28% as many collusive complaints as did the FTC (i.e., 13 vs. 47). However, comparing the first terms of Obama and G.W. Bush, the differences are much larger. The first-term Obama DOJ brought 89% as many purely collusion complaints as the FTC (i.e., 8 vs. 9), whereas the first-term G.W. Bush DOJ brought only 18% as many (i.e., 6 vs. 34).

- Finally, another noteworthy difference between the G.W. Bush FTC and DOJ involves the pharma exclusion complaints. The G.W. Bush DOJ did not join the FTC in its petition for certiorari in *Schering-Plough*.[97] In contrast, the Obama DOJ supported the FTC in the *Actavis* case.[98] The Obama DOJ also filed an amicus brief in support of reconsideration of the legality of pay-for-delay payments at the Second Circuit in the *Cipro* case.[99] In addition, the FTC demonstrated aggressiveness by continuing to pursue this litigation agenda, despite several losses in court, and its approach ultimately was supported by the Supreme Court in *Actavis*.[100]

E. VERTICAL MERGER ENFORCEMENT

I also analyzed differences in vertical merger enforcement because vertical mergers also raise exclusion concerns.[101] There are significant differences between the G.W. Bush DOJ and the Democratic administrations that preceded and followed it. I did not make an independent count but have relied on the work of others. Jeffrey Church lists nine DOJ vertical merger enforcement actions during the Clinton administration.[102] Church and the *Antitrust Law De-*

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[97] *See* Brief for the United States as Amicus Curiae, FTC v. Schering-Plough, 2006 WL 1358441 (May 17, 2006) (No. 05-273), *available at* www.justice.gov/atr/cases/f216300/216358.pdf.

[98] *See* Brief for the Petitioner, FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416), *available at* www.justice.gov/atr/cases/f291700/291720.pdf. (jointly prepared by the DOJ and FTC).

[99] *See* Brief for the United States in Response to the Court's Invitation, *In re* Ciprofloxacin Hydrochloride Antitrust Litigation, No. 05-2851 (2d Cir. July 6, 2009), *available at* www.justice.gov/atr/cases/f247700/247708.pdf.

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

[101] As discussed, *supra* note 24, I did not analyze horizontal merger enforcement. This has been studied by others and my focus was more on exclusionary conduct.

[102] Jeffrey Church, *Vertical Mergers*, *in* 2 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 1455, 1460 nn.26–27 (W. Dale Collins ed., 2008). The DOJ matters are: United States v. Enova Corp., 107 F. Supp. 10 (D.D.C. 1999); United States v. USA Waste Servs., 1998-1 Trade Cas. (CCH) ¶ 72,171 (W.D. Pa. 1997); United States v. Allied Waste Indus., 1998-1 Trade Cas. (CCH) ¶ 72,156 (N.D. Tex. 1997); United States v. Thomson Corp., 1997-1 Trade Cas. (CCH) ¶ 71,754 (D.D.C. 1996); United States v. Sprint Corp., 1996-1 Trade Cas. (CCH) ¶ 71,300 (D.D.C. 1995); United States v. Tele-Commc'ns, 1996-2 Trade Cas. (CCH) ¶ 71,496 (D.D.C. 1994); United States v. MCI Commc'ns, 1994-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994); United States v. AT&T Corp., 59 Fed. Reg. 44,158 (D.D.C. 1994); United States v. Lockheed Martin Corp., No. 98-CV-00731 (D.D.C. Mar. 23 1998).

velopments editors have identified 15 vertical merger enforcement matters by the FTC during the Clinton administration.[103] In contrast, I have identified only one clearly vertical merger action by the G.W. Bush DOJ, Northrop Grumman/TRW.[104] There were two other DOJ horizontal merger enforcement actions that had vertical exclusion aspects, Premdor/Masonite[105] and Monsanto/Delta and Pine.[106] In my view, both of these primarily concerned horizontal overlaps.[107] I have identified three vertical merger actions by the FTC during the G.W. Bush administration, Cytyc/Digene,[108] Boeing/Lockheed (United Launch Alliance JV),[109] and Fresenius/Daiichi Sankyo.[110]

The Obama DOJ in the first term has brought enforcement actions involving exclusionary effects from vertical/complementary product mergers prima-

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[103] Church's list includes: Shell Oil Co., 125 F.T.C. 769 (1998); Cadence Design Sys., 124 F.T.C. 131 (1997); Time Warner Inc., 12 F.T.C. 171 (1997), *modified*, 2004 WL 3118877 (FTC 2004); Silicon Graphics, 120 F.T.C. 928 (1995); Eli Lilly & Co., 120 F.T.C. 243 (1995); Tele-Communications, Inc., 119 F.T.C. 593 (1995); America Online, Inc., FTC Docket No. C-3989 (Apr. 17, 2001), *available at* www.ftc.gov/enforcement/cases-and-proceedings/cases/2002/11/america-online-inc-and-time-warner-inc; Dominion Resources, 128 F.T.C. 636 (1999); Hughes Danbury Optical Sys., 121 F.T.C. 495 (1996); Eli Lilly & Co., 120 F.T.C. 243 (1995); TRW, Inc., 125 F.T.C. 496 (1998); Lockheed Corp., 119 F.T.C. 618 (1995); Alliant Techsystems Inc., 119 F.T.C. 440 (1995); Martin Marietta Corp., 117 F.T.C. 1039 (1994). The proposed Barnes & Noble/Ingram merger was also abandoned in the face of FTC opposition. *See* Church, *supra* note 102, at 1460 nn.26–27; *see also* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 383–85 (6th ed. 1997) (the ABA list also includes the FTC's 1999 attack on Ceridian's acquisitions of NTS and Trendar, though the former acquisition was primarily horizontal and the latter was vertical).

[104] Complaint, United States v. Northrop Grumman Corp., No. 1:02CV02432 (D.D.C. Dec. 11, 2002), *available at* www.justice.gov/atr/cases/f200500/200555.pdf.

[105] Complaint, United States v. Premdor, Inc., No. 1:01-cv-01696 (D.D.C. Aug. 3, 2001), *available at* www.justice.gov/atr/cases/f8900/8909.pdf. I consulted with Monsanto in this matter.

[106] Complaint, United States v. Monsanto Co., No. 1:07-cv-00992 (D.D.C. May 31, 2007), *available at* www.justice.gov/atr/cases/f223600/223677.pdf. Monsanto's previous attempt to acquire Delta and Pine was abandoned in 1999 in the face of DOJ concerns. I consulted for an interested party in this matter.

[107] The Premdor/Masonite CIS also makes the argument that the merger would facilitate coordination by lowering the cost of the merged firm and thereby making it more similar to the other large vertically integrated firm. *See* Competitive Impact Statement, United States v. Premdor, Inc., No. 1:01-cv-01696 (D.D.C. Aug. 3, 2001), *available at* www.justice.gov/atr/cases/f9000/9017.pdf. The claim that the greater symmetry would make merger-specific cost reductions *anticompetitive* amounts to a claim that efficiency benefits are anticompetitive.

[108] FTC criticism led to the abandonment of the Cytyc/Digene merger in 2002. Press Release, Fed. Trade Comm'n, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002), *available at* www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp.

[109] Press Release, Fed. Trade Comm'n, FTC Intervenes in Formation of ULA Joint Venture by Boeing and Lockheed Martin (Oct. 3, 2006), *available at* www.ftc.gov/news-events/press-releases/2006/10/ftc-intervenes-formation-ula-joint-venture-boeing-and-lockheed.

[110] Press Release, Fed. Trade Comm'n, FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo (Sept. 15, 2008), *available at* www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-vertical-agreement-between-fresenius-and-daiichi.

rily in four matters: Comcast/NBCU,[111] Live Nation/Ticketmaster,[112] Google/ITA,[113] and GrafTech/Seadrift Coke.[114] These Obama vertical merger complaints also involved the type of conduct remedies that often are criticized by conservative commentators. The Obama FTC had two vertical merger matters involving soft drink bottling, PepsiCo/PBG/PAS/PYC,[115] and Coca-Cola/CCE.[116] The FTC has brought several vertical/complementary product merger challenges in 2013, Google/Motorola,[117] GE/Avio,[118] and Nielsen/Arbitron.[119] However, the Obama DOJ and FTC also did not propose revision of the 1984 Non-Horizontal Merger Guidelines.[120]

Thus, contrary to Voorhees's suggestion, elections have seemed to matter with respect to exclusion issues in vertical merger complaints too, but by less than might have been expected.[121]

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[111] Complaint, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), *available at* www.justice.gov/atr/cases/f266100/266164.pdf.

[112] Complaint, United States v. Ticketmaster Entertainment, Inc., No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010), *available at* www.justice.gov/atr/cases/f254500/254552.pdf. The DOJ appeared to focus more on the horizontal aspects of the merger.

[113] Complaint, United States v. Google, Inc., No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011), *available at* www.justice.gov/atr/cases/f269600/269618.pdf. I consulted with DOJ on this matter.

[114] Complaint, United States v. GrafTech Int'l Ltd., No. 1:10-cv-02039 (D.D.C. Nov. 29, 2010), *available at* www.justice.gov/atr/cases/f264600/264606.pdf.

[115] Press Release, Fed. Trade Comm'n, FTC Puts Conditions on PepsiCo's $7.8 Billion Acquisition of Two Largest Bottlers and Distributors (Feb. 26, 2010), *available at* www.ftc.gov/news-events/press-releases/2010/02/ftc-puts-conditions-pepsicos-78-billion-acquisition-two-largest.

[116] Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Coca-Cola's $12.3 Billion Acquisition of its Largest North American Bottler (Sept. 27, 2010), *available at* www.ftc.gov/news-events/press-releases/2010/09/ftc-puts-conditions-coca-colas-123-billion-acquisition-its.

[117] *See* Press Release, Fed. Trade Comm'n, FTC Finalizes Settlement in Google Motorola Mobility Case (July 24, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/07/ftc-finalizes-settlement-google-motorola-mobility-case.

[118] Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges that General Electric's Acquisition of Avio Aviation's Business Would be Anticompetitive in Market for Airbus's A320neo Aircraft Engines (Aug. 30, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/08/ftc-approves-final-order-settling-charges-general-electrics.

[119] Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Nielsen's Proposed $1.26 Billion Acquisition of Arbitron (Sept. 20, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsen%E2%80%99s-proposed-126-billion-acquisition. This merger involved potential competition allegations. I include it as vertical because Nielsen and Arbitron sell complementary components into the creation of a hybrid cross-platform product, and an independent entrant would need to engage in the type of multi-level entry associated with the effects of vertical mergers.

[120] U.S. Dep't of Justice, Non-Horizontal Merger Guidelines (1984), *available at* www.justice.gov/atr/public/guidelines/2614.pdf. For the views of the FTC Bureau of Competition Director Richard Feinstein, see Aruna Viswanatha, *New Vertical Merger Guidelines? Not Likely, FTC's Feinstein Says*, MAIN JUSTICE (June 11, 2010, 3:42 PM), www.mainjustice.com/2010/06/11/changes-for-vertical-merger-guidelines/. For the views of Deborah Feinstein before she became FTC Bureau of Competition Director, see Deborah L. Feinstein, *Are the Vertical Merger Guidelines Ripe for Revision?*, ANTITRUST, Summer 2010, at 5.

[121] Voorhees, *supra* note 1.

F. AGENCY MERGER GUIDELINES

Guidelines also serve as a forum to influence the courts. The 1982 Merger Guidelines were intended to loosen merger law and policy by giving more prominence to economics, and they clearly succeeded in doing so.[122] The DOJ's 1984 Non-Horizontal Merger Guidelines also were intended to reflect the conservative approach to vertical mergers and influence the courts to adopt a more permissive stance. The DOJ's 2008 *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act*[123] had a similar goal, as discussed in more detail below.

The Obama administration issued new Horizontal Merger Guidelines in 2010.[124] These Merger Guidelines raise the HHI thresholds. But they otherwise indicated a somewhat more pro-enforcement tilt, including a modernized critical loss methodology that leads to narrower markets, the introduction of the parallel accommodating coordinated conduct theory that does not require detailed evidence of rapid detection and punishment, as well as greater suspicion of entry and powerful buyers as constraints on coordination. The Merger Guidelines also now explicitly incorporate competitive concerns regarding partial ownership interests and exclusionary effects. Some of these ideas were contained in the joint FTC/DOJ 2006 Merger Commentary,[125] but they are given greater visibility and greater emphasis in the Merger Guidelines. However, I have not studied whether this has translated into more intrusive merger policy.

The impact of ideology and politics can be illustrated by the treatment of unilateral effects in the Merger Guidelines. The 1982 and 1984 Merger Guidelines focused on what we now call coordinated effects concerns. For example, in his 1986 *Hospital Corporation of America* opinion, Judge Posner stated that "[w]hen an economic approach is taken in a section 7 case, the ultimate

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[122] U.S. Dep't of Justice, 1982 Merger Guidelines (1982) [hereinafter 1982 Merger Guidelines], *available at* www.justice.gov/atr/hmerger/11248.pdf. Two notable circuit court opinions that cited the Merger Guidelines in finding against the government were *United States v. Waste Management, Inc.*, 743 F.2d 976, 982–83 (2d Cir. 1984) and *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990).

[123] DOJ SECTION 2 REPORT, *supra* note 46; DOJ Press Release Withdrawing Report, *supra* note 45.

[124] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 Merger Guidelines], *available at* www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[125] Fed. Trade Comm'n & U.S. Dep't of Justice, *Commentary on the Horizontal Merger Guidelines* (2006), *available at* www.ftc.gov/os/2006/03/CommentaryontheHorizontalMerger GuidelinesMarch2006.pdf. For a description that stresses the continuity with the *Commentary*, see Carl Shapiro, Deputy Assistant Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Remarks Before the ABA Section of Antitrust Law Fall Forum: Update from the Antitrust Division (Nov. 18, 2010), *available at* www.justice.gov/atr/public/speeches/264295.pdf.

issue is whether the challenged acquisition is likely to facilitate collusion."[126] Unilateral effects had no role, despite the fact that there was a well-established economic analysis of non-collusive oligopoly conduct dating back 100 years—the famous Cournot and Bertrand equilibria.[127] The only mention of what we would now call unilateral effects was in the "leading firm proviso" that applied to firms with market shares in excess of 35 percent.[128] Product differentiation was viewed as a reason why coordination would be less likely to succeed, but not why there would be greater concerns about unilateral effects.

The theory of unilateral effects from mergers was included first in the 1992 Merger Guidelines, adopted when James Rill was AAG.[129] It was given great emphasis by the economists involved in the drafting.[130] However, there was an apparent concern that a full embrace of unilateral effects would lead to a significant increase in merger enforcement. This is because significant unilateral effects concerns can arise even if the combined market shares of the merging parties and market concentration are low. Indeed, the analysis of unilateral effects does not even strictly require markets to be defined. Apparently to avoid supporting over-enforcement, the 1992 Merger Guidelines added a sentence that could be read to suggest that unilateral effects theories would only be pursued if the combined market shares of the merging parties exceeded 35 percent and/or the parties' products were *uniquely closest* substitutes, two caveats that do not follow directly from the economic analysis of unilateral effects.[131]

The role of unilateral effects in merger review increased considerably during the Clinton administration. The use of sophisticated empirical data in the *Staples* case[132] led to greater visibility for unilateral effects analysis. For ex-

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[126] Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986).

[127] For a non-technical description, see William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the ABA Section of Antitrust Law Spring Meeting: Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks (Apr. 24, 2002), *available at* www.justice.gov/atr/public/speeches/11050.pdf.

[128] 1982 Merger Guidelines, *supra* note 122, at 15.

[129] For one view of the history, see Jonathan B. Baker, *Why Did the Agencies Embrace Unilateral Effects?*, 12 GEO. MASON L. REV. 31 (2003).

[130] *See* Janusz A. Ordover & Robert D. Willig, *Economics and the 1992 Merger Guidelines: A Brief Survey*, 8 REV. INDUS. ORG. 139 (1993); Robert D. Willig et al., *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, 1991 BROOKINGS PAPERS ON ECON. ACTIVITY (MICROECONOMICS) 281.

[131] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 22–24 (1992), *available at* www.justice.gov/atr/public/guidelines/hmg.pdf.

[132] *See* Plaintiff's Memorandum of Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction, FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997) (No. 97-cv-00701), *available at* www.ftc.gov/sites/default/files/documents/cases/1997/04/pubbrief.pdf.

ample, Malcolm Coate and Shawn Ulrick report on a sample of 128 mergers evaluated by the FTC over the 1996–2003 period for which detailed data was collected on mergers that had second requests.[133] The agency analysis appeared to focus on unilateral effects in about 70 percent of these mergers. In addition, unilateral effects theories were disproportionately likely to lead to enforcement actions. About 77 percent of the enforcement actions involved unilateral effects.[134]

The change of administration in 2001 rekindled interest in coordinated effects theories at the DOJ.[135] One reason for this was a concern about over-enforcement resulting from unilateral effects theories. This is because harms from unilateral effects do not necessarily require high market shares, or even market definition at all.[136]

Unilateral effects concerns take on a more prominent role in the 2010 Merger Guidelines. This includes the explicit adoption of upward pricing pressure indices.[137] Over-enforcement concerns were raised in the comments on the draft version of the Guidelines by the ABA Antitrust Section, particularly the impact of high margins on market definition and unilateral effects analysis.[138] However, these concerns did not deter the agencies from giving more importance to unilateral effects concerns in the 2010 Merger Guidelines.

Another potentially very significant change involves the hypothetical monopolist test methodology for relevant product market definition for markets

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[133] Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996–2003*, 73 ANTITRUST L.J. 531 (2006). The fraction of unilateral effects challenges was somewhat smaller for a similar study over the 1989–2009 period. *See* Malcolm B. Coate, *Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission*, CPI ANTITRUST CHRON., Sept. 2009, Vol. 9, No. 2. Of course, all these comparisons are imperfect because the methodologies evolve over time and the number of deals of each type is not necessarily the same in each period. Moreover, Coate's data sets include only the FTC.

[134] This figure includes merger to monopoly (i.e., 2-to-1) complaints.

[135] For some contemporaneous commentary, see Charles A. James, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the ABA Section of Antitrust Law Annual Meeting: Rediscovering Coordinated Effects (Aug. 13, 2002), *available at* www.justice.gov/atr/public/speeches/200124.pdf; *see also* Baker, *supra* note 129; Stuart D. Gurrea & Bruce M. Owen, *Coordinated Interaction and Clayton § 7 Enforcement*, 12 GEO. MASON L. REV. 89 (2003); Kolasky, *supra* note 127.

[136] As AAG Charles James colorfully put it, "[I]f placed under sodium pentathol, most economists would concede that market definition is not particularly important in unilateral effects analysis, an additional fact that can make it difficult to square the case theory with the way many courts tend to view merger issues." James, *supra* note 135, at 8–9.

[137] 2010 Merger Guidelines, *supra* note 124, § 6.1.

[138] *See* ABA SECTION OF ANTITRUST LAW, COMMENTS OF THE ABA SECTION OF ANTITRUST LAW REGARDING THE FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE HORIZONTAL MERGER REVIEW PROJECT NO. P092900, at 27 (Nov. 9, 2009), *available at* www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-545095-00010/545095-00010.pdf.

with differentiated products. The 2010 Merger Guidelines use a newer critical loss methodology that incorporates into the analysis the information about demand substitution revealed by the price-cost margins of profit-maximizing firms.[139] This methodology leads to systematically narrower markets. For example, the 2010 Merger Guidelines provide an example of a market satisfying the hypothetical monopolist test where two-thirds of the customers lost by a firm that raises price would substitute to firms outside the relevant market.[140] Of course, it remains to be seen the extent to which this test will be used by the agencies and whether it will be accepted by the courts.

The 2010 Horizontal Merger Guidelines also indicate a heightened concern with exclusionary conduct. First, the Guidelines explicitly identify exclusionary effects as a relevant concern in horizontal mergers.[141] Second, along the same lines, the Guidelines note that complaints from competitors are consistent with consumer harm when their complaints involve exclusionary effects.[142] Third, the Guidelines raise the concern that some customers may favor an anticompetitive merger that disadvantages its competitors.[143] Finally, the Guidelines note that the market definition test may be altered in monopolization cases.[144]

G. THE 2001 *MICROSOFT* SETTLEMENT[145]

The Voorhees essay specifically asks about the *Microsoft* settlement and how it was affected by the 2000 election.[146] This is relevant to the discussion of exclusionary conduct because it is the most important Section 2 complaint to be brought in a generation. In my view, the treatment of the *Microsoft* case is a very good example of how elections matter.[147]

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[139] 2010 Merger Guidelines, *supra* note 124, § 4.1.3.

[140] *Id* § 4.1.1 (Example 5).

[141] 2010 Merger Guidelines, *supra* note 124, § 1 ("Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct."); *id*. § 6 ("exclusionary unilateral effects").

[142] *Id*. § 2.2.3 ("[T]heir overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.").

[143] *Id*. § 2.2.2 ("A customer that is protected from adverse competitive effects by a long-term contract, or otherwise relatively immune from the merger's harmful effects, may even welcome an anticompetitive merger that provides that customer with a competitive advantage over its downstream rivals.").

[144] *Id*. § 4.1.2 n.5 ("Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring.").

[145] Final Judgment, United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (No. 98-1232), *available at* www.justice.gov/atr/cases/f200400/200457.pdf.

[146] Voorhees, *supra* note 1, at 568.

[147] I consulted with clients on the anti-Microsoft side of the case and settlement.

The case obviously was highly visible and politically sensitive from the very beginning. While still a Presidential candidate, George W. Bush expressed great reservations about the *Microsoft* case and the break-up remedy. Speaking at a campaign event in the state of Washington, 15 miles from Redmond, he is quoted as saying that "he was 'worried' about the consequences 'if this company were to be broken apart, this engine of change, engine of growth . . . but we'll see what the courts say on the issue.'"[148] Several days later, Mr. Bush discussed the proposed breakup remedy in even clearer negative terms: "Asked before a campaign event Friday on Long Island whether Redmond, Washington-based Microsoft should be broken up, Bush said, 'I'm against it. There has got to be a better remedy than to break up a successful company that employs lots of people.'"[149]

It is certainly reasonable to expect that this statement would have had salience for the Bush DOJ Transition team and the people he appointed to lead the Justice Department. In fact, two members of the transition team were Charles (Rick) Rule and Charles James. Rick Rule was one of Microsoft's outside attorneys and one of the lead negotiators for the *Microsoft* settlement; Charles James was later appointed Antitrust AAG and agreed to the *Microsoft* settlement.[150]

The Voorhees essay suggests that the weakness of the settlement was mainly the result of a weak court of appeals decision.[151] It is not clear why one would conclude that the decision was weak. It affirmed the primary Section 2

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[148] Mike Allen, *Bush Hints He Would Not Have Prosecuted Microsoft*, WASH. POST (Feb. 28, 2000, 12:00 PM), www.washingtonpost.com/wp-srv/pmextra/feb00/28/A43853-2000Feb28.html.

[149] *Bush Opposes Microsoft Breakup*, USA TODAY (Mar. 3, 2000, 5:51 PM), usatoday30.usatoday.com/news/e98/e1296.htm.

[150] Former Reagan AAG and Microsoft outside counsel Rick Rule has reversed his strongly held public position on Section 2. In testimony submitted to the Antitrust Modernization Commission in 2005, for example, he opined that consumer welfare would be increased if Section 2 were repealed or at least greatly restricted. Charles F. (Rick) Rule, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP, Statement to the Antitrust Modernization Commission: The Section 2 "Mess": Do We Really Need It or Can We at Least Make It Better? 12–13 (Sept. 29, 2005). I noted at the time that Rule wanted to "fix" Section 2 in the same way that one "fixes" a cat. *Id.* at 42. But, five years after his AMC testimony, Rule's continued representation of Microsoft led him to change his public position in a dramatic way. In a 2010 *Wall Street Journal* Op-Ed piece ironically entitled "'Trust Us' Isn't An Answer," he opined that "the last 10 years have shown that reasonable antitrust rules can be applied to prevent exclusionary conduct by dominant tech firms without destroying market forces" and an antitrust case should be brought against Google. Charles F. (Rick) Rule, *Is Google a Monopolist? A Debate—'Trust Us' Isn't an Answer*, WALL ST. J. (Sept. 17, 2010, 12:01 AM), online.wsj.com/news/articles/SB10001424052748703466704575489582364177978#U301271935944CYF. (In this regard, I was not involved in the FTC's investigation or related matters for either side. I have consulted with Google and with the DOJ in its investigation of the Google/ITA merger.)

[151] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Voorhees, *supra* note 1, at 568–69.

monopolization count and adopted a Section 1-style rule of reason balancing standard in the process.[152] It did remand the tying count.[153] The district court rejected the Section 1 exclusive dealing count, which was not appealed, but the D.C. Circuit stated its disagreement with the overly high standard used by the district court.[154] The D.C. Circuit also affirmed the illegality of Microsoft's exclusive dealing under Section 2.[155] To make a criminal law analogy, it is as if the defendant was found guilty of kidnapping but acquitted of the weapons charge.

The D.C. Circuit did express reservations about the break-up remedy[156] and a Democratic administration also might have abandoned that remedy. But even the conduct constraints placed on Microsoft's behavior by the settlement were weak, including provisions that said little more than that Microsoft should not "unreasonably" exclude. The settlement also did not prohibit the commingling of browser and operating system code, despite the fact that this conduct was explicitly held to be anticompetitive in the D.C. Circuit opinion.[157] At a conference at the time, my oral comments characterized the settlement as "catch and release" antitrust enforcement. Microsoft retains its monopoly in desktop operating systems, though it has not been able to leverage this monopoly into Internet search or mobile operating systems.[158]

H. THE BUSH DOJ'S SECTION 2 REPORT

The Voorhees essay also raises the issue[159] of the DOJ's Section 2 report issued in 2008 and subsequently withdrawn in 2009.[160] I think this episode is consistent with the interaction of politics, ideology, and elections. The primary purpose of the Section 2 report was unlikely to be a statement of the DOJ's enforcement intentions: the report was issued two months before the 2008 election, seven years into the G.W. Bush administration. Thus, it was already quite clear that the Bush Antitrust Division was unlikely to bring any Section 2 complaints in its remaining months. Instead, the likely audience of

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[152] *See Microsoft*, 253 F.3d at 50–58.

[153] *Id.* at 84.

[154] *Id.* at 70.

[155] *Id.* at 72.

[156] *See id.* at 101–02.

[157] *Microsoft*, 253 F.3d at 66.

[158] The DOJ consent decree did not prohibit Microsoft from tying Internet Explorer to Windows or using Windows to give Internet Explorer a distributional advantage over other browsers. *See* Final Judgment, United States v. Microsoft Corp., No. 98-cv-1232, 2002 WL 32153514 (D.D.C. Nov. 12, 2002), *available at* www.justice.gov/atr/cases/f200400/200457.pdf.

[159] Voorhees, *supra* note 1, at 570.

[160] DOJ SECTION 2 REPORT, *supra* note 46; DOJ Press Release Withdrawing Report, *supra* note 45.

the report was the courts and its likely message was that the courts should take a very permissive approach to exclusionary conduct.

Nor did the report provide a consensus view of Section 2 law. The FTC dissented from its conclusions.[161] The report also reached more conservative conclusions than did the bipartisan Antitrust Modernization Commission. Thus, AAG Varney's withdrawal of the report in 2009 was no surprise. It was an obvious tit-for-tat response to the issuance of the report and served as a clear signal to the courts about the lack of a consensus. The Section 2 report represented a statement of AAG Tom Barnett's ideology regarding proper enforcement of Section 2. The withdrawal of the report by AAG Varney thus similarly was a statement that the Obama DOJ did not share this antitrust ideology.[162]

Withdrawing the report also was necessary if the administration were to have any interest in litigating exclusionary conduct cases. Herbert Hovenkamp has stated this point as follows:

> As soon as President Obama was elected, withdrawal of the Section 2 Report was virtually a foregone conclusion. The Report was extremely tolerant of single-firm conduct, making it extraordinarily difficult to prove a violation in many areas, particularly those involving pricing and refusals to deal. If President Obama's antitrust enforcers were to act consistently with his own campaign positions, they very likely would have ended up litigating against their own Report. Bitter experience with an earlier version of the Justice Department's Merger Guidelines demonstrated that business firms are entitled to rely on antitrust guidelines. As a result, the Division could not state a position declaring one standard and later bring an action seeking to establish a standard that is harsher on defendants. Thus, the Obama Antitrust Division's hand was forced: unless the Division withdrew the Report, the Division would continue to be noosed in by it.[163]

* * *

Based on the evidence presented here, it seems clear that elections and ideology have mattered with respect to DOJ enforcement. The DOJ under G.W. Bush brought fewer civil non-merger complaints, relative to the Clinton DOJ and the Obama DOJ during its firm term. The G.W. Bush DOJ had less focus

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[161] *See* Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), *available at* www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and ("The Federal Trade Commission does not join or endorse this report.").

[162] In this interpretation, the FTC statement similarly represented opposition to the DOJ's ideology, not just the DOJ's enforcement agenda.

[163] Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1613 (2010) (footnotes omitted).

on exclusionary conduct enforcement, both with respect to civil non-merger complaints and with respect to vertical merger cases. Even aside from the numbers, its enforcement record showed a disinclination to take on large national firms or go to court.

The same conclusions follow from the more refined analysis that flows from a comparison of the DOJ to the FTC during the G.W. Bush administration. The DOJ brought relatively fewer cases, and relatively fewer exclusionary conduct complaints, although the FTC also was not active in vertical merger enforcement. In addition, as a statistical matter, the changes in the ratio of DOJ to FTC cases over time helps to control for changes in the law and the economic climate.

These numerical differences also are reinforced by other qualitative evidence. In the policy realm, the G.W. Bush DOJ expressed its distaste for exclusionary conduct enforcement with the *Microsoft* settlement in 2001 and the Section 2 report in 2008 serving as bookends to a period of minimal enforcement. At the Supreme Court, it sided regularly with defendants' attempt to limit class action litigation, particularly with respect to Section 2. It also did not support the FTC in the FTC's pharma exclusionary conduct appeals

The Obama DOJ has reversed direction. It withdrew the Section 2 report and has issued more enforcement-oriented Merger Guidelines. It has taken aggressive action towards MFNs and has been willing to take large cases to court, including mergers. At the same time, it has not so far generated the degree of change that some expected. Of course, a DOJ generally blossoms in the second term of the administration. So, the Obama DOJ must still be treated as a work in progress.

III. POLITICAL PRESSURE

The Voorhees essay also raised the issue of political pressure on the agencies and the courts.[164] Although politicians can affect the courts and the agencies through the appointment process, this does not mean that they often try to place pressure in specific matters or that they succeed when they do. The successful application of such pressure does appear rare, but it also is hard for outsiders to detect.

The Voorhees essay did not raise the issue of political pressure being placed on the Supreme Court, which also can occur.

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[164] Voorhees, *supra* note 1, at 571–75.

A. POLITICAL PRESSURE ON THE SUPREME COURT: THE CASE OF VERTICAL PRICE AGREEMENTS

Sylvania and its progeny are perhaps the best and most important modern examples of politics affecting antitrust doctrine. *Sylvania* was decided in the context of longstanding political developments involving vertical price restraints. The *Sylvania* opinion notes the fact that Congress had recently approved the per se rule against vertical price fixing by repealing the Miller-Tydings and McGuire Acts.[165]

The *Monsanto* case is even more interesting in the context of the effect of political developments on the Court.[166] The DOJ amicus brief supported reversal of *Dr. Miles*.[167] In response, Congress denied the DOJ funding to argue in favor of overturning the per se prohibition against RPM the case at the Supreme Court. DOJ AAG Baxter famously attended the oral argument and was silent on the matter of the per se prohibition.[168]

This political controversy seemed to affect the Court too. Andrew Gavil's study of the Powell and Marshall papers makes it clear that Justice Powell did not attempt to overrule *Dr. Miles* in *Monsanto* in light of Congress's views on the case.[169] In his file memo, Justice Powell noted that Congress had prohibited the Justice Department from participating in the *Monsanto* oral argument and that it was not the right time to overrule *Dr. Miles*. This is a clear example of political pressure having a potentially very significant impact on Supreme Court decision making.

Perhaps the most interesting part of story is the way in which the Supreme Court dealt with this pressure. Although it found for the plaintiff in *Monsanto* and did not reverse *Dr. Miles*, the Court in its opinion tightened the legal standards governing the agreement requirement and thereby restricted the scope of *Dr. Miles*'s per se rule. In *Monsanto* and then in *Sharp*, the Court made it more difficult for plaintiffs to prove the existence of a vertical price-fixing agreement to which the per se rule would then be applied. In *Monsanto*,

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[165] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977).

[166] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[167] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); *see also* Brief for the United States as Amicus Curiae in Support of Petitioner, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914), 1983 U.S. S. Ct. Briefs LEXIS 375, at *32–47.

[168] *See* Transcript of Oral Argument Before the Supreme Court, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), *available at* www.oyez.org/cases/1980-1989/1983/1983_82_914 ("Unidentified Justice: —Mr. Baxter, had Congress not adopted the proviso in its appropriation act, would you have made possibly a different argument to us today? William F. Baxter: We have not withdrawn part 2(b) of our brief, Justice O'Connor. Beyond that I would prefer not to deal with that question.").

[169] *See* Andrew I. Gavil, Sylvania *and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 10.

the Court held that it was insufficient for the plaintiff merely to establish that termination of a dealer followed the complaints of a rival.[170] In *Sharp*, the Court held that it was necessary to show an agreement about a specific price, rather than just a price range.[171] Moreover, the Court was quite explicit that this required showing was to restrict the continued impact of *Dr. Miles* in order to protect the rule of reason standard set out in *Sylvania*.[172]

The question remains, however, of how best to interpret the Court's response to this political pressure from Congress. One interpretation is that the Supreme Court successfully resisted the political pressure and loosened the law of vertical price restraints. Another interpretation is that the Court evaded the political pressure, but only by manipulating and distorting the antitrust doctrine of agreement.[173] The Court accounted for potential efficiencies from vertical price restraints by making it more difficult to prove a price agreement. But, by doing so, the Court also raised the bar for proving horizontal price-fixing agreements, which has had a significant impact on horizontal collusion cases, such as the Eighth Circuit's opinion in *Blomkest*.[174] Since horizontal price fixing often is called the worst antitrust offense, one would have to question whether the Court's tradeoff just resulted in throwing out part of the baby with the bath water.[175]

Moreover, the harm from this doctrinal tactic survives to this day. Even though *Leegin*[176] has now finally reversed *Dr. Miles*, the Court has not adjusted the doctrine to alter the requirements for showing vertical or horizontal agreements.

B. PRESSURE ON THE AGENCIES IN SPECIFIC CASES

An easier question involving political pressure is whether and how Congress and the President affect *particular* antitrust actions by the agencies, as opposed to antitrust policy generally. There are a number of classic examples, including President Nixon's attempt to stop the *ITT* case in exchange for cam-

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[170] *Monsanto*, 465 U.S. at 760–64.

[171] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735–36 (1988).

[172] *See id.* at 724–26.

[173] For a general discussion of the ways in which changes in substantive and procedural standards might be related, see Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

[174] Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc., 203 F.3d 1028 (8th Cir. 2000) (citing *Monsanto* for determining whether or not there was a horizontal agreement).

[175] While *collusion* may be the worse offense, *exclusion* may be considered the more fundamental conceptual concern in that some type of barriers to entry and expansion is necessary for durable collusion. *See* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

[176] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

paign contributions,[177] President Johnson's promise of DOJ clearance of a newspaper merger in exchange for political support,[178] President's Reagan's intervention in the Financial Interest and Syndication rules,[179] and the pressure his administration placed on the DOJ to approve the LTV/Republic merger,[180] and support for the *Microsoft* case by Senators Hatch and Metzenbaum (as well as political opposition, as discussed earlier in Part II.G).[181] But there is an issue of how often pressure is applied and, more importantly, how often it actually succeeds in affecting the outcome.[182]

I expect that most antitrust lawyers generally believe that attempting to intervene politically is virtually never successful. But, if so, this raises the question of why otherwise rational profit-maximizing firms would spend considerable sums of money on unsuccessful public relations gambits. Economists have a simple answer to this question—the *Prisoner's Dilemma*. The opposing firms may be stuck at a *lose-lose* Nash equilibrium where both sides are making large expenditures that essentially cancel out one another. Yet, if either side forgoes the spending, the other side will prevail.

IV. CONCLUSION

Taken as a whole, there is evidence that ideology and politics have a continued impact on antitrust law and agency enforcement. Antitrust has not become a purely technocratic exercise where all the participants agree on the

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[177] *See, e.g.*, CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 252, 254–57 (1974); Nicholas Gage, *Nixon Linked Directly to I.T.T. Case*, LAKELAND LEDGER, Oct. 30, 1973, at 2A, *available at* news.google.com/newspapers?nid=1346&dat=19731030&id=r41OAAAAIBAJ&sjid=fPoDAAAAIBAJ&pg=7107,8424025.

[178] *See* ROBERT A. CARO, THE PASSAGE OF POWER 523–27 (2012.

[179] JENNIFER HOLT, EMPIRES OF ENTERTAINMENT: MEDIA INDUSTRIES AND THE POLITICS OF DEREGULATION, 1980–1996, at 19 (2011) ("President Reagan intervened with the FCC's plans to eliminate fin-syn, and the rules remained in place.").

[180] For a sampling of contemporary news reports, see Leslie Maitland Werner, *Steel Decision Called No Surprise*, N.Y. TIMES, Feb. 17, 1984, at D1; *Optimism on Steel Tie*, N.Y. TIMES, Feb. 27, 1984, at D2; Kenneth B. Noble, *Antitrust Pact Seen on Steel*, N.Y. TIMES, Mar. 21, 1984, at D1; Robert D. Hershey, Jr., *Approval Is Given to Amended Plan for Steel Merger*, N.Y. TIMES, Mar. 21, 1984, at A1; *Steel Merger Go Ahead*, PITT. PRESS, Mar. 26, 1984, at B2. In the end, Republic divested two plants and the merger was permitted.

[181] JOHN HEILEMANN, PRIDE BEFORE THE FALL 80 (2002); Shawn Willett, *Microsoft Agrees to Cooperate in Justice Department Inquiry*, INFOWORLD, Aug. 30, 1993, at 12.

[182] I am not a political scientist or investigative reporter and it is difficult for an outsider to detect the responses by the agencies to such pressure. First, the subtle effect of the AAG or FTC simply wanting to remain in the good graces of the powerful, whether it is the Congressional committee or the President, may be hard to detect. Second, the fact that observations of political pressure are limited to public statements means that the incidence of successful political pressure may be understated. The most effective pressure does not require public pronouncements, but may involve secret threats or promises. Third, the AAG or FTC Chairman who succumbs to the pressure likely would have a strong incentive to keep it secret to avoid being tarred as someone who can be controlled.

goals and the proper standards. While every AAG and FTC Chairman can be said to be acting like an umpire calling balls and strikes, their strike zones differ in systematic ways.

There are numerous possible extensions of this analysis. One extension would add the record on horizontal merger enforcement and criminal enforcement. Another would extend the time frame to the end the Obama administration. The agencies' numerous amicus briefs to both circuit courts and the Supreme Court could be added to the analysis. The Solicitor General has significant influence on the Court because the SG generally ends up on the winning side.[183] For example, the G.W. Bush administration supported defendants in almost[184] every one of the large number of cases that came before the Court during its term. These included *Trinko*,[185] *Twombly*,[186] *linkLine*,[187] *Dagher*,[188] *Weyerhaeuser*,[189] and *Leegin*.[190] In contrast, the Obama administration supported the plaintiffs in *American Needle*[191] and *Actavis*.[192] *Actavis* is particularly significant in that the SG did not join the FTC in its petition in *Schering Plough*[193] during the G.W. Bush administration.[194] This shows the ideological differences between the DOJ and FTC during the G.W. Bush administration as well as the difference between the G.W. Bush DOJ and the Obama DOJ.

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[183] *See* Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL'Y INT'L, Autumn 2007, at 3.

[184] The exception is *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), where the DOJ and SEC had taken opposite positions at the appellate court and the Solicitor General recommended an intermediate (but pro-plaintiff) position to the Supreme Court.

[185] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[186] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[187] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009).

[188] Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

[189] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007). I consulted with Weyerhaeuser on this matter.

[190] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[191] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

[192] Brief for the Petitioner, FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416), *available at* www.justice.gov/atr/cases/f291700/291720.pdf.

[193] *See* Brief for the United States as Amicus Curiae, FTC v. Schering-Plough, 2006 WL 1358441 (May 17, 2006) (No. 05-273), *available at* www.justice.gov/atr/cases/f216300/216358.pdf.

[194] Surprisingly perhaps, the SG did not file a brief in the *Comcast* class action just decided by the Court in March 2013. *See* Docket, Comcast Corp. v. Behrend, No. 11-864 (Jan. 12, 2012), *available at* www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-864.htm (showing that the DOJ did not submit a brief). One might have expected the Obama DOJ to undertake action because this case involved exclusionary conduct.

APPENDIX

TABLE 4: DOJ CIVIL NON-MERGER COMPLAINTS: 1993–2012[195]

	Collusive/ Exclusionary	**Section 1 or 2**
1993		
[Canstar Sports USA, Inc.] (Not counted in totals)	Collusive (RPM)	1
1994		
Microsoft Corp.	Exclusionary	1&2
Topa Equities	Exclusionary	1
Ass'n of Retail Travel Agents	Collusive	1
Delta Dental of Arizona	Exclusionary (MFN)	1
Vision Service Plan	Exclusionary (MFN)	1
Pilkington Plc.	Exclusionary	1&2
Nagel Motors, Inc. et al.	Collusive	1
S.C. Johnson/Bayer, Inc.	Collusive/Exclusionary	1
California SunCare, Inc.	Collusive (RPM)	1
Electronic Payment Services, Inc.	Exclusionary (Tying)	1&2
Utah Soc'y for Healthcare Human Resources Admin.	Collusive	1
Alliant Techsystems Inc./Aerojet-General Corp.	Collusive/Exclusionary	1
1995		
Health Choice of Northwest Missouri, Inc.	Exclusionary	1
National Auto. Dealers Ass'n	Collusive/Exclusionary	1
American Bar Ass'n	Collusive/Exclusionary	1
Greyhound Lines, Inc.	Exclusionary	1
HealthCare Partners, Inc.	Collusive/Exclusionary	1&2
Lykes Bros. Steamship Co., Inc.	Exclusionary (MFN)	1
Playmobil USA, Inc.	Collusive (RPM)	1
NASDAQ	Collusive	1
1996		
General Elec. Co.	Exclusionary	1&2
City of Stilwell	Exclusionary (tying)	1&2

[195] Complaints are listed by Calendar Year, not Fiscal Year.

Delta Dental of Rhode Island	Exclusionary (MFN)	1
American National Can Co./KMK Mashinen	Collusive/Exclusionary	1
Brush Fibers, Inc./A & L Mayer Associates, Inc.	Collusive	1
Universal Shippers Ass'n, Inc.	Exclusionary (MFN)	1
AnchorShade, Inc.	Collusive (RPM)	1
Women's Hosp. Foundation	Exclusionary (MFN)	1&2
Ass'n of Family Practice Residency Directors	Collusive	1
Waste Management of Georgia, Inc.	Exclusionary	2
Browning-Ferris Industries of Iowa, Inc.	Exclusionary	2
Texas Television, Inc.	Collusive	1
Scuba Retailers Ass'n	Collusive	1
1997		
Seminole Fertilizer Corp.	Collusive	1
IBM/Storage Technology	Collusive/Exclusionary	1
1998		
Visa U.S.A., Inc./MasterCard	Exclusionary	1
Federation of Physicians Dentists, Inc.	Collusive	1
Microsoft Corp.	Exclusionary	1&2
Mercury PCS II, L.L.C.	Collusive	1
Medical Mut. of Ohio	Exclusionary (MFN)	1
1999		
Dentsply International, Inc.	Exclusionary	1&2
AMR Corp.	Exclusionary	2
Federation of Certified Surgeons & Specialists, Inc.	Collusive	1
Citadel-Triathlon JSA	Collusive	1
2000		
American Soc'y of Composers, Authors, and Publishers	Collusive	1
American Stock Exch./CBOE/Pacific Exch./Phila. Exch.	Collusive	1
Citadel/Capstar	Collusive	1
FCSSI	Collusive	1
2001		
None		

2002		
Mountain Health Care, P.A.	Collusive	1
Math Works/Wind River Systems	Collusive	1
Nat'l Ass'n of Police Equipment Distributors, Inc.	Collusive	1
2003		
Nat'l Council on Problem Gambling, Inc.	Collusive	1
Village Voice Media, LLC	Collusive	1
2004		
Eastern Mushroom Marketing Coop., Inc.	Collusive	1
2005		
National Ass'n of Realtors	Exclusionary	1
Federation of Physicians and Dentists	Collusive	1
Ecast/NSM Music Group	Collusive	1
Professional Consultant Insurance Co.	Collusive	1
Bluefield Reg'l Med. Ctr./Princeton Cmty. Hosp. Ass'n	Collusive	1
Kentucky Real Estate Commission	Collusive	1
2006		
None		
2007		
Daily Gazette Co./MediaNews Group	Collusive	1&2
Hilton Head MLS	Exclusionary	1
Arizona Hospital and Healthcare Ass'n	Collusive	1
2008		
Consolidated Multiple Listing Service, Inc.	Exclusionary	1
2009		
None		
2010		
American Express/Visa/MasterCard	Collusive	1

Michigan BCBS	Exclusionary (MFN)	1
Lucasfilm/Adobe/Apple/Google/Intel/Intuit/Pixar	Collusive	1
Keyspan Corp./Morgan Stanley	Collusive	1
Idaho Orthopaedic Society	Collusive	1
2011		
United Regional Health Care System	Exclusionary	2
2012		
Gunnison Energy/SG Interests I, Ltd.	Collusive	1
Apple/Book Publishers	Collusive/Exclusionary	1
eBay	Collusive	1
Twin America	Collusive	1

TABLE 5: FTC NON-MERGER COMPLAINTS: 1993–2012

1993	**Collusive/1Exclusionary**
AE Clevite	Collusive
American Industrial Real Estate Ass'n	Exclusionary
Ass'n of Soil & Foundation Engineers (ASFE)	Collusive
B&J School Bus Services Inc.	Collusive
Baltimore Metropolitan Pharmaceutical Ass'n, Inc.	Exclusionary
National Ass'n of Social Workers	Collusive
Southeast Colorado Pharmacal Ass'n	Collusive
United Real Estate Brokers of Rockland, Ltd.	Exclusionary
YKK	Collusive
California Dental Ass'n	Collusive
Nat'l Soc'y of Prof'l Engineers	Collusive
1994	
Arizona Automobile Dealers Ass'n	Collusive
Community Associations Institute	Collusive
Keds Corp.	Collusive (RPM)
McLean County Chiropractic Ass'n	Collusive
Personal Protective Armor Ass'n	Collusive
American Ass'n of Language Specialists	Collusive
American Soc'y of Interpreters	Collusive
Boulder Ridge Cable TV	Collusive
Certain Home Oxygen/Home Oxygen	Exclusionary
Homecare Oxygen & Medical Equipment Company	Exclusionary
Trauma Associates of North Broward, Inc.	Collusive
International Ass'n of Conference Interpreters	Collusive
1995	
Dell Computer Inc.	Exclusionary
New England Juvenile Retailers	Collusive/Exclusionary
Baby Furniture Plus	Exclusionary
Medical Staff of Good Samaritan	Exclusionary
Del Monte Foods Company	Collusive
La Asociacion Medica De Puerto Rico	Collusive/Exclusionary
Korean Video Store Ass'n of Maryland	Collusive

Reebok	Collusive (RPM)
Physicians Group	Collusive
The Council of Fashion Designers of America	Collusive
Summit Communication Group	Collusive
Port Washington Real Estate Board, Inc.	Exclusionary
Federal News Service Group, Inc.	Collusive
Reuters America, Inc.	Collusive
Santa Clara County Motor Car Dealers Ass'n	Exclusionary
1996	
MT Associated Physicians	Collusive/Exclusionary
Hale/Waterous	Exclusionary
New Balance Athletic Shoe, Inc.	Collusive (RPM)
Precision Moulding	Collusive
RxCare	Collusive/Exclusionary (MFN)
Toys "R" Us, Inc.	Exclusionary
1997	
American Cyanamid	Collusive (RPM)
College of Physicians	Collusive
Mesa County Physicians, IPA	Collusive
1998	
Asociacion de Farmacias Region	Collusive
Columbia River Pilots Ass'n	Exclusionary
Dentists of Juana Diaz, Coamo,	Collusive
Chrysler Dealers	Exclusionary
South Lake Tahoe Lodging Ass'n	Collusive
M.D. Physicians of Southwest LA Inc.	Collusive
Institutional Pharmacy Network	Collusive
Fastline Publications, Inc.	Collusive (RPM)
Great Lakes Chemical Corp.	Collusive
Container Board Mfrs.	Collusive
Sensormatic	Collusive
Urological Stone Surgeons, Inc.	Collusive
Mylan Pharmaceuticals, Inc.	Exclusionary
Intel Corp.	Exclusionary

Summit Technology	Collusive
1999	
Southern Valley Pool Ass'n	Collusive/Exclusionary
Tahoe Health System	Collusive
2000	
Schering-Plough/Upsher Smith[196]	Exclusionary
MCC Manufacturers	Collusive/Exclusionary
Alaska Healthcare Network	Collusive
MAP Policies of Prerecorded Music (CDs)	Collusive
Texas Surgeons	Collusive
Colegio de Cirujanos Dentistas de PR	Collusive
Abbott/Invamed	Exclusionary
McCormick Spices	Exclusionary
WI Chiropractic Ass'n	Collusive
Nine West Group Inc.	Collusive (RPM)
ANDRX/Hoechst (Generic Cardizem)	Exclusionary
2001	
Polygram Holding Inc. (The Three Tenors)	Collusive
2002	
Nat'l Academy of Arbitrators	Collusive
Am. Inst. for Conservation	Collusive
System Health Providers	Collusive
Professionals in Women's Care	Collusive
Biovail / Elan (Generic Adalat CC)	Collusive
Physician Integrated Systems	Collusive
Aurora Ass'n Primary Care Phys	Collusive
Biovail / Tiazac	Exclusionary
Napa County OB/Gyns	Collusive
Rambus, Inc.	Exclusionary

[196] The complaint was filed in April 2001, but while Robert Pitofsky was still Chairman. Therefore, I have counted it as a Clinton case and placed in this list under 2000 for convenience.

2003	
Tenet Healthcare Corp. & Frye Regional Medical Ctr, Inc.	Collusive
Memorial Hermann Health Network	Collusive
New Hampshire Motor Transport Association	Collusive
South GA Health Partners (SGHP)	Collusive
Surgical Specialists of Yakima	Collusive
The Iowa Movers & Warehousemen's Ass'n	Collusive
Minnesota Transport Services Ass'n	Collusive
Physician Networks Consulting	Collusive
Maine Health Alliance	Collusive
Washington University Physician Network	Collusive
Southwest Physician Associates	Collusive
Anesthesia Service Medical Group	Collusive
Carlsbad Physician Ass'n	Collusive
The Institute of Store Planners	Collusive
Indiana Household Movers & Warehousemen	Collusive
BMS (Buspar; Cisplatin; Taxol)[197]	Exclusionary
Piedmont Health Alliance	Collusive
North Texas Specialty Physicians	Collusive
South Carolina State Board of Dentistry	Exclusionary
Movers Conference of Mississippi	Collusive
Alabama Trucking Ass'n	Collusive
Kentucky Household Goods Carriers Ass'n, Inc.	Collusive
California Pacific Medical Group	Collusive
Union Oil of California	Exclusionary
2004	
White Sands Health Care System, LLC	Collusive
Clark County Attorneys	Collusive
Southeastern New Mexico Physicians, IPA	Collusive
Alpharma, Inc.	Collusive
2005	
Partners Health Network, Inc.	Collusive
San Juan IPA	Collusive

[197] These were three separate but related complaints.

New Millennium Orthopedics LLC	Collusive
Preferred Health Services	Collusive
Warner Chilcott / Barr Laboratories[198]	Exclusionary
2006	
Advocate Health Partners	Collusive
Monmouth County Ass'n of Realtors	Exclusionary
Realtors Ass'n of Northeast Wisconsin, Inc.	Exclusionary
Williamsburg Area Ass'n of Realtors, Inc.	Exclusionary
Northern New England Real Estate Network, Inc.	Exclusionary
IRES MLS for Northern Colorado	Exclusionary
New Century Health Quality Alliance, Inc.	Collusive
Puerto Rico Ass'n of Endodontists, Corp.	Collusive
Austin Board of Realtors	Exclusionary
Valassis Communications, Inc.	Collusive
Health Care Alliance of Laredo, L.C.	Collusive
RealComp II Ltd.	Exclusionary
MiRealSource, Inc.	Exclusionary
2007	
Multiple Listing Service, Inc.	Exclusionary
Colegio de Optometras de Puerto Rico	Collusive
Motor Oil Importers of Puerto Rico	Exclusionary
Missouri State Board of Embalmers & Funeral Directors	Exclusionary
2008	
AllCare IPA	Collusive
Boulder Valley IPA	Collusive
Golf Galaxy (Dick's Sporting Goods)	Exclusionary
Conn. Chiropractic Ass'n	Collusive
Negotiated Data Solutions, LLC[199]	Exclusionary
Cephalon, Inc.	Exclusionary

[198] These non-compete agreements are treated as exclusionary.

[199] I have classified these "opportunism" or "hold-up" cases as exclusionary because the opportunism is often used against competitors, as in the case of *Unocal*. But, the opportunism could involve a standalone patent holder as in this matter.

2009	
Alta Bates Medical Group	Collusive
MAP Policies of Musical Instrument Mfg.	Collusive
West Penn MLS	Exclusionary
Actavis Unimed	Exclusionary
Intel Corp.	Exclusionary
2010	
Minnesota Rural Health Cooperatives	Collusive
Amerco/Avis Budget Group	Collusive
Transitions Optical, Inc.	Exclusionary
Boulder Valley IPA (M. Catherine Higgins)	Collusive
Roaring Fork Valley Physicians, IPA, Inc.	Collusive
North Carolina Dental Board	Exclusionary
2011	
Pool Corp.	Exclusionary
Southwest Health Alliances, Inc.	Collusive
2012	
IDEXX Laboratories, Inc.	Exclusionary
Coopharma	Collusive
McWane/Sigma/Star Pipe	Collusive