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# ANTITRUST AT THE TURN OF THE TWENTY-FIRST CENTURY: A VIEW FROM THE MIDDLE†

ROBERT T. PITOFSKY††

It is an exceptional honor to be invited to deliver the Lewis Bernstein annual lecture on antitrust at St. John's University School of Law. Lew Bernstein, representing the Antitrust Division of the Department of Justice (DOJ), was the lead attorney on the first private litigation in which I participated after law school. It was a lengthy criminal price-fixing trial before a jury—an unusual experience for a young lawyer.<sup>1</sup> Lew was extremely competent, hard-working, diligent, and decent—an exceptional representative of what is best in public service. It is most satisfying to be invited to participate in this program in his honor.

I will examine today, in fairly broad terms, the location of Clinton antitrust enforcement in the spectrum of antitrust policy.<sup>2</sup> My broad theme is that there has been an overall “convergence” of antitrust thinking in the United States. There are, of course, differences at the margin depending on whether the Antitrust Division of the DOJ and the Federal Trade Commission (FTC or “Commission”) are led by liberals, moderates, or conservatives, but the differences in recent years have not been radical. To appreciate the present, it is helpful to consider enforcement levels in the recent past.

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† This Article is an updated version of the Lewis Bernstein Memorial Lecture given at St. John's University School of Law in 2002.

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<sup>1</sup> See *United States v. Eli Lilly & Co.*, 24 F.R.D. 285, 287 (D.N.J. 1959) (alleging price fixing by five leading pharmaceutical houses in the sale of Jonas Salk's polio vaccine).

<sup>2</sup> This paper deals entirely with the substance of antitrust. For the companion piece on antitrust remedies see Robert T. Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, GEO. L.J. (forthcoming 2002).

## I. RECENT HISTORY OF ANTITRUST ENFORCEMENT

In the 1960s, United States antitrust enforcement was extremely aggressive. For example, practices and transactions such as conglomerate mergers<sup>3</sup> and arrangements based on expectations of reciprocity<sup>4</sup> were added to the zone of illegal behavior. The area of abbreviated treatment to find illegality—the so-called *per se* approach—was expanded to cover additional categories of behavior.<sup>5</sup> Antitrust considerations regularly trumped exclusivity rights granted to innovators of intellectual property.<sup>6</sup> Price discrimination with little or no discernable market effects was frequently challenged under the Robinson-Patman Act.<sup>7</sup> Additionally, any transactions among small players in unconcentrated markets were blocked on what would now be regarded as tenuous theories.

The most extreme examples of questionable enforcement occurred in the merger area. In one notable case, *Brown Shoe Co. v. United States*,<sup>8</sup> a merger in the shoe business was declared illegal because of its effects in the vertical line when a manufacturer with four percent of the production market acquired a distributor with less than two percent of the nation's retail sales, despite the fact that there was low concentration and moderate or low barriers to entry at both the manufacturing and retail level. In another example of extreme activism, *United States v. Von's Grocery*,<sup>9</sup> a horizontal merger between retail

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<sup>3</sup> See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 n.2 (1967) ("A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm.")

<sup>4</sup> See *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 594 (1965) (holding reciprocity arrangements within the scope of antitrust legislation).

<sup>5</sup> See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (addressing non-price vertical restrictions), *overruled by Continental T.V., Inc. v. GTE Sylvania, Inc.* 433 U.S. 36 (1977); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (discussing boycotts); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (addressing tie-in sales).

<sup>6</sup> See Bruce B. Wilson, *Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions*, in *ANTITRUST PRIMER: PATENTS, FRANCHISING, TREBLE DAMAGE SUITS* 11, 12-14 (1970); see also Bruce B. Wilson, Address at the American Patent Law Association (Jan. 21, 1975).

<sup>7</sup> 15 U.S.C. §§ 13a-13b, 21a (2000); see, e.g., *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 650 (1969) (reinstating jury verdict for the plaintiff-petitioner for price discrimination); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 687 (1967) (finding violations under the Robinson-Patman Act amendments for price discrimination).

<sup>8</sup> 370 U.S. 294, 345-46 (1962).

<sup>9</sup> 384 U.S. 270, 272-73, 277-79 (1966).

supermarkets in Los Angeles producing a combined market share of approximately eight percent was blocked. These initiatives were backed consistently by the Warren Court, a majority of the Court believing that Congress intended a very aggressive antitrust program.<sup>10</sup>

The heightened enforcement levels of the 1960s led to a reaction in the Bar, in the private sector, and in academia. The result was a steady but substantial moderation in antitrust enforcement.<sup>11</sup> By the 1980s, a little more than a decade later, all that was left of antitrust enforcement at both the Antitrust Division of the DOJ and the FTC were regular challenges to hard-core cartels, some facilitating practices that supported cartel behavior, and a few challenges to very large horizontal mergers that were thought to contribute to high concentration and cartel-like behavior. During the eight years of the Reagan Administration, there was an absence of enforcement initiated against vertical and conglomerate mergers, monopolization and attempts to monopolize—at least after the DOJ settled the earlier challenge to AT&T by supervising a breakup of the telephone monopoly, vertical distribution arrangements, including minimum price-fixing, exclusive dealing arrangements, and tie-in sales, boycotts, and all forms of discriminatory pricing.<sup>12</sup>

An effort to restore something more than a minimalist antitrust enforcement program was initiated during the first Bush Administration, and many of the practices deleted from enforcement efforts were restored during the period 1988–1992.

The goal of Clinton Administration antitrust was to be moderately aggressive—that is to build upon the initiatives of the first Bush Administration but with serious attention to private sector claims of efficiency and innovation, and a recognition of fundamental changes brought about as a result of the increase in international competition. Put another way, the goal was to produce a program falling somewhere between the excessive activism of the 1960s and the minimalist enforcement

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<sup>10</sup> See Gary Minda, *Antitrust in the Twenty-First Century*, 48 SMU L. REV. 1749, 1755–57 (1995) (discussing a peak in antitrust enforcement under the Warren court).

<sup>11</sup> See *id.* at 1755 (stating that in the 1980s, antitrust enforcement moved toward a minimal enforcement level).

<sup>12</sup> See generally Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399 (1986).

of the 1980s, in the hope that a program could be defined in a way that would survive future elections and consequent changes in administrations.

## II. A MATTER OF SHARED PREMISES

Why has antitrust enforcement stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust? To a large extent I believe this is because of a fairly widespread agreement on premises. There will always be outliers—for example, people on the enforcement margin who believe that virtually all mergers among large firms should be blocked and people on the free market margin who believe that cartels are unstable, self-containing, and need not be challenged by the government. But a broad range of informed people now finds common ground between those extremes. The premises mentioned above described below.

### A. *Goals of Antitrust*

Antitrust in the United States is now primarily, though not exclusively, designed to protect the welfare of consumers. The enforcement agencies and the courts are occasionally willing to step in and protect an equally efficient small firm from being flattened by a much larger company—for example, by imposing limits on below-cost pricing<sup>13</sup> or by preventing an incumbent powerful retailer from organizing a boycott of its suppliers against a smaller new entrant.<sup>14</sup> These are rare interventions, however, and occur not because of some sense that the small business community is made up of more worthy citizens, but rather because of the view that long term it is important to the welfare of consumers to keep market access open and prevent artificial increases in barriers to entry.<sup>15</sup>

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<sup>13</sup> *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993).

<sup>14</sup> *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 939 (7th Cir. 2000).

<sup>15</sup> The principal area of divergence between European and American antitrust law is the EU's apparent willingness to protect competitors rather than the competitive process. See Dimitri Giotakos et al., *General Electric/Honeywell—An Insight Into the Commission's Investigation and Decision*, COMPETITION POLICY NEWSLETTER, Oct. 2001 (discussing the European Commission's July 3, 2001 declaration that the General Electric/Honeywell merger was incompatible with the common market).

### *B. Aggregation of Market Power*

The free market is usually effective in preventing the aggregation and abuse of market power. As a result, it is important for the enforcement agencies to be cautious about intervening to prevent aggressive competition, even by firms with substantial market power, and to be particularly cautious about proposing restructuring of existing enterprises. On the other hand, extreme examples of abuse must be effectively challenged.

### *C. Enforcement Emphasis*

The central concerns of antitrust should be to detect and deter cartel behavior—usually price fixing, bid rigging, and market division—and to block horizontal mergers that lead to high levels of concentration and then to coordinated price and non-price competition. In practical terms, that means that the government would put most of its resources into anti-cartel and anti-merger review and enforcement.

### *D. Subordinate Practices*

The area of antitrust where Clinton era enforcement was most different from the level of enforcement in the Reagan years related to challenging practices that facilitated cartels or led to the accumulation or maintenance of high levels of market power, where there were few, if any, efficiencies or other justifications. As noted earlier, during the Reagan years, there was no enforcement whatsoever against non-horizontal mergers and joint ventures, boycotts, minimum resale price maintenance, exclusive dealing contracts, tie-in sales, attempts to monopolize, and monopolization. That agenda was restored during the Bush years and that restoration continued at a somewhat heightened level during the Clinton Administration.

### *E. Per Se Versus Rule of Reason*

There is now wide acceptance of the proposition that the value to per se rules is limited. There are a few practices—hard-core price-fixing, bid rigging, and market division—that are so likely to produce anti-competitive effects and efficiencies are so rare that a full-blown trial is unnecessary. Since the 1960s, per se treatment has been eliminated or substantially reduced in

connection with maximum resale price maintenance,<sup>16</sup> boycotts,<sup>17</sup> tie-in sales,<sup>18</sup> and information exchange programs.<sup>19</sup>

#### *F. Price Discrimination*

Price discrimination is almost never an anti-consumer strategy and, therefore, challenges to price discrimination under the Sherman Act,<sup>20</sup> and particularly according to the quasi-per se rules of the Robinson-Patman Act,<sup>21</sup> should be approached with great caution.

#### *G. Economic Input*

The courts are generally comfortable with the view that formal economic analysis is an aid rather than a hindrance to sensible conclusions about pro and anti-competitive effects.

### III. ANTITRUST ENFORCEMENT DURING THE 1990S

Let me turn now to an effort to support my earlier statement—that antitrust enforcement in the 1990s reflecting those shared premises, during both the Bush and Clinton Administrations, was moderately aggressive but at the same time sensitive to incentives to innovate, to claims of efficiency, and to the realities of global competition. In this discussion, I will usually illustrate points with examples of FTC enforcement; however, DOJ enforcement, with which I am not as familiar, generally follows the same patterns.

#### *A. Resources*

The clearest indication of continuity in enforcement is the fact that the majority of resources during the 1990s were committed to challenges to cartel behavior and large horizontal mergers. The DOJ devoted perhaps one-third of its resources to investigation and challenges to hard-core cartels, and another one-third to merger review. The FTC devoted over two-thirds of

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<sup>16</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

<sup>17</sup> See *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

<sup>18</sup> See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15–17, 46 (1984).

<sup>19</sup> See *United States v. United States Gypsum Co.*, 438 U.S. 422, 446–47 (1978).

<sup>20</sup> 15 U.S.C. §§ 1–7 (2000).

<sup>21</sup> See 15 U.S.C. §13 (2000).

its resources to merger review.<sup>22</sup> Part of this commitment reflected the fact that the country witnessed perhaps the greatest surge of merger activity in its history during the 1990s, and merger review, therefore, was essential.<sup>23</sup>

One difference in approach relates to the targets of cartel enforcement. In the 1980s there was vigorous enforcement against hard-core cartels, but the targets tended to be relatively small companies engaged in road paving or production of cement, and collections of small competitors and trade associations. In 1990, the total fines for cartel behavior was about twenty-four million dollars—not out of line with earlier years. In the 1990s, the DOJ conducted a vigorous campaign of challenges to cartel behavior that affected vast amounts of trade. In 1999, fines against hard-core cartels totaled \$1.1 billion, a more than forty times increase in collections.<sup>24</sup> As an odd reflection on the growth of global competition, over ninety percent of the fines collected were against international cartels.<sup>25</sup>

### B. *Efficiency Defenses*

In 1997, the Clinton Administration affirmed and clarified a section of the DOJ-FTC Merger Guidelines that allowed efficiency claims in defense of mergers.<sup>26</sup> Previous guidelines had been grudging in their interpretation of efficiency defenses, and, as a practical matter, restricted the effect of efficiency claims to an influence on prosecutorial discretion. Once the government was in court challenging a merger, it was inclined to

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<sup>22</sup> Chairman Robert Pitofsky, Statement of the FTC: Mergers and Corporate Consolidation in the New Economy (June 16, 1998) (presented to the Committee on the Judiciary, United States Senate), available at <http://www.ftc.gov/os/1998/9806/merger98.tes.htm>.

<sup>23</sup> See *id.* (“The number of mergers reported to the antitrust agencies . . . has increased dramatically from 1,529 filings in . . . 1991 to an estimated 4,500 in . . . 1998.”); see also DOJ ATTY GEN. FISCAL YEAR 1999 ANN. ACCOUNTABILITY REP., Mar. 31, 2000 [hereinafter 1999 ANN. ACCOUNTABILITY REP.] (stating that 1998 and 1999 pre-merger review more than doubled from a few years earlier and that the DOJ is experiencing the “highest level of merger activity in its history”), available at <http://usdoj.gov/ag/annualreports/ar99/fullrep.htm>.

<sup>24</sup> See ANN. ACCOUNTABILITY REP., *supra* note 25 (“The Antitrust Division . . . brought in . . . more than \$1.1 billion, including a \$500 million fine against one of the largest vitamin manufacturers in the world.”).

<sup>25</sup> See *id.* (“[T]he Antitrust Division has obtained over \$1.5 billion . . . in criminal fines, well over 90 percent [of which] were imposed in connection with the prosecution of international cartel activity.”).

<sup>26</sup> Revision to the DOJ and FTC Joint Horizontal Merger Guidelines (1997).



ask the court to restrict efficiency claims to the point where they were virtually irrelevant to the result.<sup>27</sup>

Under the revised guidelines, efficiencies would be counted in favor of the legality of a merger only if they were shown to be substantial, merger specific (in the sense that comparable efficiencies could not be achieved in a less anticompetitive way), and likely to be passed on to consumers. The revised guidelines were clear that efficiencies would almost never justify a merger to monopoly or near monopoly. Satisfying the many conditions is a formidable task, but that was anticipated by the people revising the guidelines. The central idea was to allow efficiencies as a tie-breaker in close cases—usually mergers of five-to-four or four-to-five in a properly defined market—but not to allow efficiencies to justify extremely high levels of concentration. While no party has yet succeeded in persuading a court that an otherwise illegal merger was justified by presence of likely efficiencies, there have been instances in which the Commission declined to challenge a transaction as a matter of prosecutorial discretion because of the presence of substantial efficiencies.

### C. *Restoration of Targeted Enforcement Against Vertical and Conglomerate Mergers*

As noted, there was no vertical or conglomerate merger enforcement activity by the federal agencies in the 1980s. In the 1990s, vertical enforcement was restored but typically in a cautious way against transactions that involved very substantial market shares. An example would be the proposed merger between Barnes & Noble, the largest retail bookseller in the United States, with thirty-four percent of national sales, and Ingram, the largest book wholesaler in the United States with twenty-three percent of national sales.<sup>28</sup> The theory of the case

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<sup>27</sup> See, e.g., Mem. in Supp. of Pls' Mot. *in limine* Relating to Efficiencies, at 4, United States v. Archer-Daniels-Midland Co., 1991-92 TCM (CCH) ¶ 69,647 (S.D. Iowa 1991).

<sup>28</sup> See Richard G. Parker, Remarks at the Meeting of the International Bar Association (Sept. 28, 1999) (providing the FTC's analysis for its decision to challenge the Barnes & Noble/Ingram merger and noting that the parties abandoned their attempts after the press released information about the FTC's intention to challenge the merger), available at <http://www.ftc.gov/speeches/other/barcelona.html>; see also Stephen Labaton, *Staff of F.T.C. Is Said to Oppose Barnes & Noble Bid to Wholesaler*, N.Y. TIMES, June 1, 1999, at A1; Stephen Labaton, *Book*

would have been that smaller bookstores competing with Barnes & Noble would not have received comparable discounts, terms of sale, delivery dates or marketing specials from a wholesaler owned by their direct competitor. The merger collapsed before being challenged in court. Other vertical cases involved comparable market shares. As to conglomerate enforcement, the FTC has brought only one case in seven years.<sup>29</sup>

*D. Restoration of Antitrust Agenda Without Resort to Questionable Per Se Rules*

Much of the activist agenda of the 1960s was based on per se rules. In succeeding decades, the Supreme Court has indicated that it will maintain per se approaches only where it is persuaded that the conduct at issue is almost always likely to produce anticompetitive effects and is almost never justified by good business reasons.<sup>30</sup> As a result, courts are unlikely to expand the zone of per se coverage—or even maintain previous per se approaches—unless there is considerable experience with the competitive effects of the conduct at issue:

In recognition of that trend, 1990s antitrust either abandoned per se approaches or, more frequently, prepared or litigated cases on alternative theories of per se versus rule of reason. A few examples are highlighted below.

1. Boycotts

The FTC challenged Toys “R” Us (“TRU”) behavior in inducing toy manufacturers, such as Mattel and Hasbro, not to sell to price clubs, or to sell on discriminatory terms, to prevent the price clubs from competing effectively with TRU.<sup>31</sup> In almost all respects, the case was a virtual duplicate of the facts reviewed in 1959 by the Supreme Court in *Klor’s, Inc. v.*

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*Chain Gives in, Barnes & Noble Won’t Seek \$600 Million Deal*, N.Y. TIMES NEWS SERV., June 3, 1999, 1999 WL 19740337.

<sup>29</sup> FTC v. Questar Corp., No. Civ. 2:95-CV-1127 S, 1995 WL 1053848 (D. Utah 1995).

<sup>30</sup> See *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (narrowing application of per se rule regarding boycotts); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58–59 (1977) (overruling per se application to vertical non-price restrictions and noting that “departure[s] from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing”).

<sup>31</sup> Toys “R” Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

*Broadway-Hale Stores, Inc.*<sup>32</sup> The Commission noted the similarity but also observed the wide-spread criticism in lower courts of the *Klor's* per se doctrine. It therefore litigated the case, in the alternative, on a broad rule of reason basis, following the roadmap set out by the Supreme Court in its 1985 *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.* opinion.<sup>33</sup> The Commission not only addressed market power, purpose, and effect, but also fully explored the alleged business justifications of the agreement between TRU and the toy manufacturers.<sup>34</sup> The Seventh Circuit Court of Appeals affirmed on the basis of the full rule of reason analysis.<sup>35</sup>

## 2. Resale Price Maintenance

The FTC restored challenges to agreements to establish minimum resale prices. In the largest such case by far, the actions by compact disc music companies to influence retail prices were not ordinary manufacturer/retailer agreements on price. Rather, the vertical agreements related to public and in-store advertising, and the sanction against companies not following recommended prices was the denial of certain kinds of marketing assistance. The Commission elected to prepare the case on the basis of a full rule of reason, though the Supreme Court has never departed from its view that minimum resale price maintenance is illegal per se, it announced its reasons for the challenge in rule of reason terms when the case settled.<sup>36</sup>

### E. Price Discrimination

In the 1950s and 1960s, the FTC was aggressive in bringing price or service discrimination cases under the Robinson-Patman

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<sup>32</sup> 359 U.S. 207 (1959).

<sup>33</sup> 472 U.S. 284, at 297-98 (1985).

<sup>34</sup> See *Toys "R" Us, Inc. v. FTC*, No. 9278, 1998 FTC LEXIS 185 (Oct. 14, 1998).

<sup>35</sup> See *Toys "R" Us*, 221 F.3d at 928.

<sup>36</sup> Press Release, FTC, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market (May 10, 2000), available at <http://www.ftc.gov/opa/2000/05/cdpres.htm>. The FTC stated that "the [Big Five] required retailers to advertise CDs at or above the [minimum advertised price]." *Id.* In a related development, the Commission joined the DOJ in an amicus brief in the Supreme Court advocating that the court rescind its previous rule that maximum resale price maintenance is also illegal per se. The private parties urging the abandonment of the per se rule were successful. See *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

Act.<sup>37</sup> The DOJ resisted any such interpretation and has never brought a case under that statute. In the 1990s, the FTC brought one Robinson-Patman case—a record of minimal enforcement that would be hard to beat.

The one case involved discounts by McCormick and Co., the world's largest manufacturer and distributor of spice products sold through supermarkets and other grocery outlets.<sup>38</sup> McCormick offered substantial discounts to some large supermarket chains, but not to competing stores. The payments commonly required that the customer allocate to McCormick a large portion, often as much as ninety percent, of the shelf space devoted to spice products. Since the discriminations were substantial, and the competing purchasers that were adversely affected operated in an area where profit margins were low and competition keen, the Commission could have rested its case on the precedent of *FTC v. Morton Salt*,<sup>39</sup> which found injury to competition when only those factors were present. Not content with the virtual per se approach of that Supreme Court case, the Commission went on to demonstrate a wide array of additional factors to demonstrate an injury to competition, including the shelf space allocation.

#### F. Duration Issues

When the government entered an order, its standard course was to incorporate no time limit. Parties were required to demonstrate a significant change in fact or law in order to be relieved of the obligations of an order previously accepted.<sup>40</sup>

As the economy grows more and more dynamic, there is an increasing risk that orders in place for many years will be inappropriate for changed market conditions and will do more harm than good. As a result, the Commission in the mid-1990s

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<sup>37</sup> AM. BAR ASS'N, AM. BAR ASS'N STUDY OF THE FTC 67 (1969).

<sup>38</sup> *In re McCormick & Co., Inc.*, No. C-3939 (F.T.C. April 27, 2000), available at <http://www.ftc.gov/os/2000/05/mccormick.do.htm>.

<sup>39</sup> 334 U.S. 37 (1948).

<sup>40</sup> See, e.g., Press Release, DOJ Antitrust Division, Protocol to Expedite Review Process for Terminating or Modifying Older Antitrust Decrees (Apr. 13, 1999), available at [http://www.usdoj.gov/atr/public/press\\_releases/1999.2355.htm](http://www.usdoj.gov/atr/public/press_releases/1999.2355.htm); see also JOHN J. FLYNN ET AL., ANTITRUST STATUTES, TREATIES, REGULATIONS, GUIDELINES, POLICIES 313–14 (2001) (referring to changes in the factual circumstances or the law as it relates to the decree in question).

cut the duration of all competition orders to twenty years.<sup>41</sup>

Even twenty years can be a long time in certain dynamic sectors of the economy. Consider, for example, new software programs that became available in the last ten years and changes in the market for Internet service providers in the last five years. As a result, the Commission introduced orders of very limited duration. The first instance involved conditions imposed on Time Warner-Turner before allowing the merger to proceed—an order that would expire in ten years.<sup>42</sup> The most extreme example up to the time it was entered was the five-year order imposed on AOL-Time Warner as a condition for permitting that merger.<sup>43</sup>

### CONCLUSION

Statements by the new leadership at the Antitrust Division of the DOJ and the FTC have emphasized “continuity” rather than “departures” from the antitrust enforcement programs of the 1990s. There has been nothing like the level of strife and criticism of prior policies that characterized earlier decades. By comparison, criticism has been muted and moderate. Time will tell whether the Bush I and Clinton Administrations have identified a middle course that will survive political changes and election results.

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<sup>41</sup> See Press Release, FTC, FTC to “Sunset” Existing Administrative Orders Automatically After 20 Years Under New Rule (Nov. 20, 1995) (“The [FTC] announced today that . . . orders issued prior to Aug. 16, 1995 will expire automatically after 20 years after they were issued. . .”), available at <http://www.ftc.gov/opa/1995/9511/sun3.htm>.

<sup>42</sup> Time Warner Inc. and Turner Broadcasting System, Inc., No. C-3709 (F.T.C. Feb. 3, 1997), available at <http://www.ftc.gov/os/caselist/c3709.htm>.

<sup>43</sup> America Online, Inc. and Time Warner, Inc., No. C-3989 (F.T.C. Apr. 17, 2001), available at <http://www.ftc.gov/os/caselist/c3989.htm>.