

Milton Handler Lecture

A New Era: The Biden Administration's Antitrust Policy

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It is an honor today to deliver the 50th Milton Handler lecture. Milton Handler, was of course, one of the great architects of the antitrust law over the 20th century. He was also Columbia's leading antitrust professor and played a prominent role in government, particularly during FDR's administration. It is therefore a particular honor to deliver this lecture.

The subject of my talk is the antitrust policy of the Biden Administration in historic perspective. Describing the antitrust work of an Administration can be hard, especially midstream — it is easy to get stuck in the trap of fixating on big merger challenges went. Conversely, it is easy for officials in government often make the mistake of assuming the entire world is closely attuned to everything we say in fact-sheet.

So what I'm aiming to do tonight is put the Biden Administration's approach to antitrust in historic context. I'm hardly an objective observer but I will say that this is undeniably an Administration that has sought to turn the battleship, as the idiom goes.

We sought to reverse a 40-year trend; to return antitrust close to its statutory goals and original intent, and, as the President said, to restore the great American tradition.

That has meant substantive changes, and also institutional changes as well, but — rather critically - what might best be termed a change in categorization.

If I were to try and summarize the Biden Administration's approach in one sentence it would be this: we sought to treat antitrust policy as part of the nation's economic policy. We thought antitrust policy was economic policy. That might seem self-evident, but, in fact, much follows from that insight.

The insight matters because economic policy is public policy, an appropriate matter for democratic input and public concern. The competitiveness of industries, the power of specific industries, the sense of opportunity and employment — all these are impacted by antitrust, and all of these impact people's lives. People on the street may not have strong views on Section 3 of the Clayton Act. But they do care about things like wages, prices, a sense of opportunity and the power that companies have over us in daily life.

These are some of the reasons that FDR's approach to antitrust served as an important role model for the Biden Administration. In 1937, FDR gave a famous speech on antitrust which the White House took as something of a guide and inspiration for our own efforts. I'm not sure if Milton Handler played some role in developing this speech, but it centered on "two truths." Here's what FDR said:

The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself.

The second truth is that the liberty of a democracy is not safe if its business system does not provide employment and produce and distribute goods in such a way as to sustain an acceptable standard of living.

No people, least of all a people with our traditions of personal liberty, will endure the slow erosion of opportunity for the common man, the oppressive sense of helplessness under the domination of a few, which are overshadowing our whole economic life.

What I think is the most significant point of this speech is its recognition of the public stakes inherent in the kind of questions that antitrust deals with, namely, the relative competitiveness of major industries and the economic power thereby created, with its effects on prices, wages, and economic opportunity.

In that speech FDR called for a reinvigoration of antitrust — carried out by his appointees, but also a broader approach to economic power that transcended law enforcement. And that served as an important guide.

If FDR's approach was the inspiration, let me talk through the big changes and then dwell on some of the details. From the earliest days this Administration made it clear that, as in the FDR Presidency, both the President and White House were going to play a role in directing and coordinating antitrust policy. Not to the extent of actually dictating whom to sue, but going beyond merely a practice of appointing whomever seemed next in line for the DoJ and FTC and calling it a day.

You can see this in the President's first major antitrust speech, which took place on July 9 of 2021, and the signing of the Executive Order on Competition. In that speech the President set out antitrust and competition as a pillar of the Administration's economic policy with the goal. In that speech he heightened both Roosevelts with creating "the American tradition — an antitrust tradition. It is how we ensure that our economy isn't about people working for capitalism; it's about capitalism working for people."

He also made it clear that we wanted to turn the corner. After cataloguing some of the problems in specific industries, the President specifically announced that:

"we've been following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition. We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And where — what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents."

In the pursuit of this agenda, the President sought to appoint officials who were clearly in tune with the policies set out in his speech and his executive order and willing to pay attention to what Congress wanted when it passed the Clayton Act, the Anti-Merger Act, and other legislation. Lina Khan and Jonathan Kanter were great appointments, and officials committed to the Administration's goals and policies as set out in the Executive Order.

Finally, for too long, the Administration's competition policy was limited to the DOJ and FTC and the FCC. But the fact is that Congress created competition mandates at agencies ranging from the Defense Department to the Department of Transportation and the Surface Transportation Board. To coordinate and make real these mandates, the President created a Competition Council, chaired by the Director of the National Economic Council, comprised of the heads of 15 or so agencies. They've been meeting with the President every 6 months.

These innovations have borne fruit. A leading example is the Department of Transportation and its Secretary Pete Buttigieg, which is finally taking up the competition mandates entrusted to it by Congress. The DoT can enforce the Clayton Act and can review mergers. In March of this year it acted to join the Justice Department in challenging the JetBlue-Sprint proposed merger. "The Department of Transportation typically has not gotten involved in these merger cases, but that's changing today." The DoT has made major changes to how prices will be displayed, to include baggage and change fees, and sought to force the airlines to deal better with cancellations. A few weeks ago, Secretary Buttigieg gave a barn buster speech, ultimately concluding that the structure of the industry was key to better conditions for fliers. And meanwhile, the DOJ won its case against the AA - JetBlue merger.

Another representative example is the opening of the hearing aid market — a form of antitrust by rulemaking. It has long been my contention that some of the biggest changes have come from undoing industry ties, unbundling goods and services. In the hearing aid market, we had a tie between ear examinations and hearing aids that led to high prices and very weak competition. Now, after our rule, I read the headline "Hearing aids gain hipper reputation as 'lifestyle' products after going OTC." What's been surprising is uptake by people in their 30s and 40s who want to hear better, who see hearing aids as a form of wearable.

A third and final example of the White House's approach is the opening of the electric vehicle charging networks. We dedicated \$8 billion to the buildout of electric vehicle charging networks, contingent on those networks opening to all vehicles. And on March 1 of this year, Tesla, which owns the nation's largest charging network, became opening its network. I call this electric net neutrality.

There's plenty more. I like to think of truly free, pre-filled tax-filing option as part of the competition agenda. The FTC has sought to use its rulemaking powers to ban non-competes, another Presidential priority and in fact a campaign promise. And in more traditional antitrust work, we've had nearly a dozen abandoned mergers, including a large number of hospital mergers, something that the President was particularly focused on in the Executive Order. And of course we have the new merger guidelines coming soon — which may be the most consequential thing the Administration does over the longer term.

As I said earlier, we took antitrust as economic policy, and FDR thought it essential that great matters of economic policy needed to be subject to democratic processes.

As lawyers, we associate this idea and the 1930s with the overruling of *Lochner*, and through that, the acceptance of the idea that elected officials, like the President and Congress, should have both the power and the duty to oversee and manage the economy. That isn't heavily contested today — there may be many precedents up for grabs, but today's Supreme Court seems unlikely to overrule *West Coast Hotel v. Parrish* or say that Congress can't ban child labor.

But the animating idea of *Lochnerism* — that economic policy should be isolated from democratic input — can become manifest in other ways. One, far more subtle channel is through the insistence that the elected branches, Congress and the Presidency, need keep a great distance from certain areas of economic policy including those that are comprehended by the antitrust laws. This can lead to an antitrust doctrine that gets far too removed from the concerns of the population and broader economic goals. At its worst, a decade ago, Harry First and Spencer Weber-Waller called antitrust a “system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”

The President and Congress should not be walled off from antitrust policy, but that does raise the question of what the President's role should be. One model is presented by Theodore Roosevelt, who first brought the laws to life by suing JP Morgan, and thought of antitrust as a tool of popular sovereignty. As he put it, “when aggregated wealth demands what is unfair, its immense power can be met only by the still greater power of the people as a whole.”

He believed that the “trust question” could not be ignored in a democracy, noticing that the failure of a democratic government to respond to economic misery could easily lead to revolutions and a turn toward authoritarian leaders.

That is, of course, something we've seen in our times, both at home and overseas — the rising popularity of authoritarian leaders who promise to do what democracies have failed to do — namely take the side of the people against powerful companies, at home or overseas.

The first President Roosevelt reserved the final call on big antitrust decisions to himself. In his autobiography, he speaks of instructing his attorney general to seek the dissolution of Standard Oil. The advantage of this approach was its clear lines of accountability. When Roosevelt sought the breakup of Standard Oil — a major decision, almost akin to declaring war - he told Americans that that's what he was doing, as their elected leader. ^[1]_[SEP]

That the President should be accountable for big decisions is of course taken for granted in other areas. We assume that the President steers trade policy, as tariffs obviously hurt and help various industries and customers, but no one questions the President's role in trade. National defense is another example. If someone asked President Biden about the Russian invasion of Ukraine — it would have been absurd for him to say, sorry, that the President does not comment on pending invasions — and left it with the Secretary of Defense.

That said direct involvement of a President in antitrust decisions can be ethically fraught. The President is also not just the Art I Executive, but also a politician and a fundraiser. Theodore Roosevelt was accused of using the threat of antitrust as a tool for fundraising. And as many as you know, President Nixon in the ITT case ordered his Deputy Attorney General to abandon a merger appeal, suspiciously close in time to a major donation by ITT to the RNC.

For these reasons the Biden Administration did not seek to directly involve the President in individual cases. FDR was a better model. He appointed enforcement-oriented officials — the self-styled Brandeisians, including Robert Jackson, the future AG, and Thurman Arnold, the Yale professor. And he also commissioned a study of the problem of economic concentration, in which Milton Handler played a major role. In fact, in reviewing Handler’s work, I’ve noticed his proposals for much stricter controls on mergers largely became the law in 1950 and through the 1970s — though he did also recommend a “statutory pre-sumption making any acquisition or fusion pre-sumptively unlawful when the acquiring company after the acquisition will control more than 15 percent of [the market].”

The lesson we take is that the Democratic branches should be engaged in antitrust policy — at the right level. And not just the Presidency, but Congress as well — not just in industry-specific ways, but engaged in responding to the judiciary, clarifying what it meant, and generally in dialogue with the courts and Presidency. Congress played this role in the Clayton Act, and the Anti-Merger Act of 1950, but for too long has confined itself to industry-specific legislation and hearings. It is time for serious debate over general-purpose antitrust reform.

Let me close by noting a few things that remain to be done to institutionalize the Biden Administration’s approach, and to keep the ship turned. The judiciary is a key part of antitrust law’s development, and not unfortunately, in the race of priorities, not enough attention has been paid to the economic views of the judges we have been appointing. In addition, in the manner that President Reagan appointed Judges Posner, Bork, Ginsburg and Easterbrook to the bench, and President Clinton appointed President Diane Wood, the President in this term or his next term should appoint judges with deep antitrust expertise to the bench who shares his views.

The White House Competition Council which we created needs further institutionalization. It should stay within the National Economic Council, but should have an executive director, a few staffers, an economist and an antitrust lawyer working for it. We had all of these when I was there but it was an ad hoc arrangement, and it would be better institutionalized.

I want to leave you with the following ideas. First, in a democracy, elected officials should have the power and the duty to oversee and manage the economy. Second, questions of economic structure and competition form a major part of economic performance. Third, the President, while not the only elected official, is the only official in the United States elected by a national constituency. If one accepts these three premises, it follows that the Presidency’s engagement in antitrust law and competition policy is not only permissible but appropriate and important.

We face in our times a rise in authoritarian leaders in response to a failure of Democracies to provide for their people, and an erosion of the middle classes. The antitrust law has long been a tool for the rebalancing of economic power, and providing opportunities to act on economic liberties. The new era of antitrust is marked by a return to those ideals, which stand as our best path toward a future that continues to deliver on the American promise of opportunity and prosperity for all.

Thank you.