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## Merger enforcement across political administrations in the United States

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## Abstract

*Bill Kovacic has written persuasively that the political rhetoric of antitrust has often been at odds with what the antitrust agencies have actually done and with any meaningful assessment of their performance. This article follows Kovacic by analyzing data from the FTC's and the DOJ's review of mergers over thirty years, from 1981 through 2010, for correlations to shifts in political administration. We analyze historical trends from one administration to the next with regard to five metrics: (1) agency budgeting, (2) the number of transactions reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (3) requests for and grants of early termination of the waiting period, (4) the issuance of second requests by the agencies, and (5) transaction challenges brought by the agencies. These data demonstrate some interesting, and at times counterintuitive, relationships between specific administrations and merger review and enforcement activity. On a more granular level, these data also demonstrate some trends regarding how merger review and enforcement statistics have been sensitive to change over from one agency chief to the next within administrations. By some measures, enforcement activity appears to decline during Republican administrations and increase during Democratic governments. At the same time, there are other measures that contradict that pattern. Our analysis therefore supports Kovacic's skepticism about any simple relationship between antitrust enforcement and political administration and reinforces his call for moving beyond activity measures in judging the success of an administration's antitrust policies*

*Cet article étudie la thèse de Bill Kovacic selon lequel le discours des responsables politiques américains en matière de concurrence a souvent été contredit par l'action des autorités antitrust, sans que l'action de ces dernières n'a jusqu'à présent fait l'objet d'une véritable évaluation. L'auteur examine cette thèse en exploitant plus de trente ans - 1981 à 2010 - de données de la FTC et du DOJ dans le domaine des concentrations et en les rapprochant des changements politiques. Cinq facteurs sont pris en compte pour comparer les différentes administrations s'étant succédées : (1) le budget alloué aux autorités de concurrences ; (2) le nombre de concentrations déclarées sur la base du Hart-Scott-Rodino Antitrust Improvements Act de 1976 ; (3) le nombre de demandes de dérogation de la période de suspension ainsi que le nombre de demandes accordées, (4) le nombre d'enquêtes approfondies déclenchées par les autorités, et (5) les demandes d'interdiction faites par les autorités. Ces données permettent de lever le voile sur la mise en œuvre du contrôle des concentrations par les différentes administrations ; des liens entre administrations et pratiques décisionnelles sont mis en valeur. De manière générale, les différentes administrations républicaines paraissent avoir été moins interventionnistes que les administrations démocrates. Cependant, certaines données suggèrent le contraire. L'auteur conclut dans le même sens que Bill Kovacic en rejetant toute corrélation simpliste entre majorité politique et contrôle des concentrations et en appelant à la prise en compte d'indicateurs non chiffrés permettant d'évaluer les politiques de concurrence.*

# Merger enforcement across political administrations in the United States

## I. Introduction<sup>1</sup>

1. New political administrations often come into office with assumptions, and sometimes clear statements, about how their approach to antitrust enforcement will differ from that of their predecessors. Thus, President George W. Bush took office in the wake of his statements that antitrust law “needs to be applied where there are clear cases of price-fixing” and that he would not see other roles for antitrust enforcement because “everything evolves into price-fixing over time”<sup>2</sup>. Such radical sentiments stoked strong expectations that Bush administration appointees to the Antitrust Division of the U.S. Department of Justice (“Antitrust Division” or “DOJ”) and to the Federal Trade Commission (“FTC”) would greatly reduce antitrust enforcement. Indeed, during his campaign President Obama stated that antitrust enforcement under President Bush “may be the weakest” of “any administration in the last half century”, signaling that there would be increased enforcement during an Obama administration<sup>3</sup>. Shortly after Christine Varney took over as President Obama's Assistant Attorney General (“AAG”) for antitrust, she delivered a speech promising a more aggressive approach to antitrust enforcement than that of her predecessors<sup>4</sup>. She also specifically withdrew a report that the Bush DOJ had issued that was viewed as establishing a less aggressive approach to alleged monopoly conduct.

2. Bill Kovacic has persuasively written that the political rhetoric of antitrust has often been at odds with what the antitrust agencies have actually done and with any meaningful assessment of their performance<sup>5</sup>. He is particularly skeptical of uncritical, activity-based measures of agency performance<sup>6</sup>. Kovacic notes that there is a basic lack of agreement or understanding of what level of activity in fact took place<sup>7</sup> as well as little critical assessment of the value of judging the agencies based on activity levels in the first place<sup>8</sup>.

3. In this article, we follow in Kovacic's line of thought by taking a preliminary look at data on merger review by the FTC and DOJ across political administrations from 1981 through 2010. Our goal is not to address Kovacic's important second question about the value of activity-based measures; it is instead to investigate, in the context of merger review, his basic point that antitrust activity levels cannot be assumed to correlate with the political party in power. In finding the available data to support Kovacic's skepticism about a simple relationship between politics and antitrust, we reinforce his arguments for measures of antitrust agency performance that transcend activity levels and join his call to focus not on case counts but on “progression toward a durable consensus on what constitutes good policy”<sup>9</sup>.

- 1 We wish to thank Kevin G. Danchisko for his excellent research assistance.
- 2 See S. Labaton, “The World Gets Tough on Fixing Prices”, *The New York Times*, June 3, 2001.
- 3 Sen. Barack Obama, Statement for the American Antitrust Institute (Feb. 20, 2008), available at <http://www.antitrustinstitute.org/>.
- 4 Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, “Vigorous Antitrust Enforcement in This Challenging Era”, Remarks Prepared for the Center for American Progress (May 11, 2009), available at <http://www.justice.gov/atr/public/speeches/245777.htm>.
- 5 W. E. Kovacic, “Rating the Competition Agencies: What Constitutes Good Performance?”, 16 *Geo. Mason L. Rev.* 903, 904 (2009).
- 6 *Id.* at 910-12, 918.
- 7 *Id.* at 911.
- 8 *Id.* at 918.
- 9 *Id.* at 926.

## II. Agency budgeting

4. As we consider how merger review has evolved from administration to administration, one place to start is with a measure that would systematically affect the agencies' ability to enforce the antitrust laws at all: funding. In this regard, it is useful to look at both combined funding for the DOJ's and the FTC's antitrust missions and at the relative allocation of that budget between the agencies. One might imagine, for example, that an administration with a strong antitrust agenda one way or the other might not only change budgeting but allocate that budget away from the more independent and bipartisan FTC and toward the Antitrust Division, which is within the executive branch and under more direct presidential control.

5. The available evidence, however, suggests that neither the overall level of antitrust enforcement funding nor the allocation of that funding cycles significantly with administrations. In fact, the federal budget for antitrust enforcement has increased steadily and substantially since the first Bush administration, including strong growth during the second Bush administration.

6. The allocation of antitrust enforcement budgets between the FTC and the DOJ has varied somewhat, but not dramatically or predictably with political party. If we examine federal budget data back to the beginning of the Reagan administration in 1981<sup>10</sup>, the FTC's Bureau of Competition has historically received an allocated budget that is approximately 60% the size of the Antitrust Division's budget, which is not surprising given the large amount of criminal cartel and price-fixing enforcement done by the DOJ, an area over which the FTC has no jurisdiction. For example, during President George W. Bush's administration, the Bureau of Competition received an allocated budget that was, on average, 62.5% the size of the budget that the Antitrust Division received:

**Fig. 1: Average Total Annual Budget Allocations for Antitrust Division and Bureau of Competition by Political Administration, 1989-2011<sup>11</sup>**

Admin.	Total Budget for Antitrust Enf't (\$M)	% Change	Antitrust Division Budget (\$M)	% Change	Bureau of Comp. Budget (\$M)	% Change	Bureau as % of Division Budget
Bush (1989-1992)	65.8	–	41.3	–	24.5	–	59.5%
Clinton (1993-2000)	120.0	82.5%	87.9	113.0%	32.2	31.2%	36.7% [52.1% ('97-'00)] <sup>12</sup>
Bush (2001-2008)	218.5	82.0%	134.5	53.1%	84.0	161.1%	62.5%
Obama (2009-2011)	286.7	31.2%	166.0	23.4%	120.7	43.7%	72.7%

7. As Figure 1 shows, the 62.5% average allocation under President George W. Bush is slightly higher than the average allocation during President Clinton's second term (when the Bureau of Competition received a federal budget that was on average 52.1% of the size of the Antitrust Division's budget from 1997 to 2000) and comparable to the average allocation during the term of President George H.W. Bush (59.5% between 1989 and 1992).

8. The Obama administration, however, has departed to some degree from this historical trend. In the first three years of the Obama administration, the Antitrust Division's budget grew by an average of 2.6% annually, while the Bureau of Competition's budget grew by 6.7% – narrowing the gap between the agencies to some degree and providing the Bureau of Competition a budget that is, on average, 72.7% the size of the Antitrust Division's budget.

9. These budgeting patterns do not, however, correlate with the level of FTC enforcement. To the contrary, by at least some common measures the Bureau of Competition's rates of activity relative to the Antitrust Division's are slightly *lower* under President Obama than they were under President George W. Bush, when the Antitrust Division had a larger budget relative to the Bureau of Competition. Since Obama

<sup>10</sup> In our analysis, we track agency review and enforcement figures back to the beginning of the Reagan administration in 1981 rather than to 1977, the first year in which agency review was implemented. We do so primarily because using the Reagan administration as a starting point permits us to examine the data after several transitional years in which processes for merger review were implemented at the agencies.

<sup>11</sup> See Budget of the United States Government, Fiscal Years 2003-10, available at <http://www.gpo.gov/fdsys/> (referencing actual expenditures for 2001-08). The Antitrust Division at the DOJ receives its own line item, while the Bureau of Competition is referenced in a line item for "Maintaining Competition." We have derived all budget calculations in our analysis from publicly available federal budgets, which are available online at <http://www.gpo.gov/fdsys/> for Fiscal Years 1996-2013 and in print form for years prior to 1996. The federal budgets for the years of the Reagan administration (1981-88) do not clearly identify the allocated funds for the Antitrust Division and the Bureau of Competition, so we do not include this data here.

<sup>12</sup> We must qualify the comparative data between the Bureau of Competition and the Antitrust Division for the first term of President Clinton's administration. From 1994 to 1996, the Bureau of Competition received either a minimal directly allocated budget (\$18.7M in 1994 and \$2M in 1995) or no directly allocated budget at all (the case in 1996), with the Bureau of Competition receiving funding through offsets of fees, as we discuss *infra*. Therefore, factoring in the anomalous years 1994-96 suggests that the Bureau of Competition received a budget only 36.7% of the size of the Antitrust Division's budget during the Clinton administration. If we look instead to President Clinton's second term (1997-2000), we see that the Bureau of Competition received 52.1% of the size of the Antitrust Division's budget – much closer to historical trends.

took office, the FTC has issued 45.9% of second requests, down 4.9% from an average 50.8% under President Bush, and it has accounted for 56.9% of transaction challenges, down 0.9% from an average 57.8% during the Bush administration<sup>13</sup>. Moreover, since the Obama administration took office, the rate at which the FTC issues second requests has declined slightly (from 14.6% average under President George W. Bush to 14.2% average under President Obama).

10. It is important to note that the federal funds allocated to the antitrust agencies approximate – but do not fully identify – all resources available to these agencies. Funding allocations from the annual federal budget are offset (and, potentially, supplemented) by fees collected from the premerger notification regime; the allocated budget figures therefore do not necessarily represent all funds available for agency expenditure over time<sup>14</sup>. President Clinton’s first term provides a useful example: in 1996, the Bureau of Competition technically received no directly allocated federal funds<sup>15</sup>. However, the budget provided up to \$48.3 million of offsetting collections derived from premerger notification fees for FTC expenditure, including but not limited to expenditures for the Bureau of Competition<sup>16</sup>. We do not know how much of this \$48.3 million went to the Bureau of Competition, limiting the degree to which we can interpret the available data.

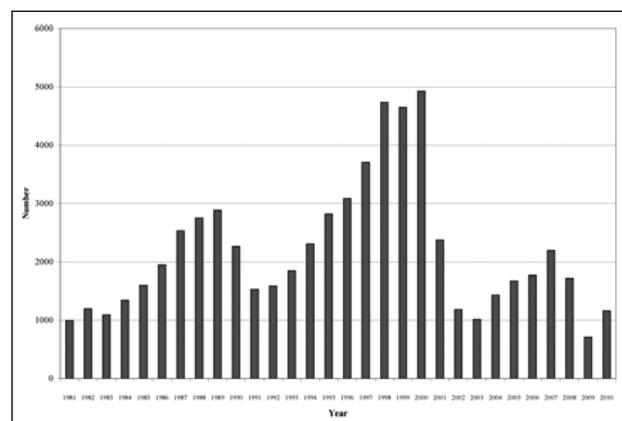
11. To the extent we can draw a lesson from these data, then, it is that merging parties should not assume that a particular administration will allocate funds in a way that would predictably affect either the level of overall antitrust enforcement or the relative levels of FTC versus DOJ enforcement activity. We turn next to data on that activity itself.

### III. Reportable transactions

12. The number of reported transactions per year, not surprisingly, tends to reflect periods of economic expansion or recession in the general U.S. economy far more than it correlates with political administrations. In fact, the high-water mark for reported transactions came during a Democratic administration (the Clinton administration), when the average number of reported transactions rose approximately 70% over what they had been during the Bush administration.

13. The number of transactions reported annually pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”)<sup>17</sup> has tended to drop only during periods of economic downturn, such as 1982-83 (corresponding roughly to the January 1980 – July 1980 and July 1981 – November 1982 “double dip” recession), 1990-92 (corresponding to the July 1990 – March 1991 recession), 2000-01 (corresponding to the March 2001 – November 2001 burst of the late 1990s “bubble”), and 2008-09 (corresponding to the December 2007 – June 2009 subprime mortgage collapse and the global financial crisis)<sup>18</sup>:

**Fig. 2: Total Number of Transactions Reported under HSR Act, 1981-2010**



14. Notably, during these periods of economic recession or contraction, when the number of reportable transactions has declined, that reduction has tended to occur across all deal values; the distribution of low-value, medium-value, and high-value deals has not changed significantly. In most years, about 50-60% of transactions are valued at \$1 billion or higher, about 10% of reported transactions are valued at \$500 million to \$1 billion, and the remainder are valued at below \$500 million. This distribution tends not to change even during periods of recession, such as 2000-02 or 2007-09.

15. These data, of course, cannot capture the number of potentially merging parties that choose not to enter into a transaction due to concerns that, for example, the political administration in power will impose transaction costs, delays, or modifications that would undermine the efficiencies of a merger. We might expect merger and acquisition activity to be higher during Republican administrations that are said to champion more restrained intervention in the merger market than under Democratic administrations assumed to be more enforcement-minded. If there is anecdotal evidence of this phenomenon, however, it is not reflected in the data of reported transactions, which increased most during President Clinton’s second term – precisely the time when the DOJ brought its monopolization case against

13 See Federal Trade Commission, Bureau of Competition, and Department of Justice, Antitrust Division, Annual Report to Congress, Fiscal Years 2000-10, Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Twenty-Third Report through Thirty-Third Report), available at <http://www.ftc.gov/bc/anncompreports.shtm>. All percentage calculations and averages reported throughout are made simply by averaging and comparing the review and enforcement data included in these annual reports.

14 See, e.g., Budget of the United States Government, Fiscal Year 2013, available at <http://www.gpo.gov/fdsys/>, at 774 (stating that allocated funds will remain available, provided that “fees collected for premerger notification filings . . . shall be retained and used for necessary expenses in this appropriation” and that the sum allocated in the general fund shall be reduced by offsetting collections received during the fiscal year).

15 See Budget of the U.S. Government, Fiscal Year 1998, available at <http://www.gpo.gov/fdsys/>, at 1062.

16 See Budget of the U.S. Government, Fiscal Year 1996, available at <http://www.gpo.gov/fdsys/>, at 998.

17 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a), amending the Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730. The regulations adopted by the FTC to implement the HSR Act appear at 16 C.F.R. §§ 801-03.

18 U.S. Business Cycle Expansions and Contractions, The National Bureau of Economic Research, available at <http://www.nber.org/cycles.html>.

Microsoft<sup>19</sup> and the FTC made several high-profile merger challenges<sup>20</sup>. Not surprisingly given the economic expansion and “tech boom” that occurred in the 1990s, President Clinton’s administration saw the highest average level of annual transactions out of the five administrations that we consider here:

**Fig. 3: Average Annual Number of Transactions Reported Under HSR Act by Political Administration, 1981-2010**

Administration	Transactions Reported (Avg.)	% Change
Reagan (1981-88)	1,682.9	–
Bush (1989-92)	2,065.8	22.8%
Clinton (1993-2000)	3,506.5	69.7%
Bush (2001-08)	1,671.9	-52.3%
Obama (2009-10)	941.0	-43.7%

16. Taken on its own, the decline in the number of reported transactions during the first two years of the Obama administration looks stark: a 43.7% decline in the number of transactions reported under the HSR Act during a period in which then-AAG Christine A. Varney called for more robust antitrust enforcement. When we place this decline in context, however, it is clear that it is less dramatic than the decline in the number of transactions reported under President George W. Bush (a 52.3% decline, or a decline 8.6% greater under a Republican president than a Democratic one). By contrast, the number of transactions increased 69.7% from President George H.W. Bush to President Clinton. These data suggest that, to the extent that transactions reported have fallen and remained low under President Obama, the reduced number of transactions is a reflection of general economic conditions more so than businesses’ unwillingness to file under the HSR Act during a Democratic administration, even one that came in vowing stronger antitrust enforcement.

## IV. Early termination

17. To assess the rate at which different political administrations and different agency heads have granted early termination<sup>21</sup>, we must examine two figures: (1) the rate at which parties request early termination, and (2) the rate at which the agencies grant those requests.

19 See Final Judgment, *United States v. Microsoft Corp.*, Civ. Action No. 98-1232 (CKK) (Nov. 12, 2002), available at <http://www.justice.gov/atr/cases/f200400/200457.pdf>.

20 See Press Release, Federal Trade Commission, *FTC Wins Court Order Blocking Staples and Office Depot Merger* (June 30, 1997), available at <http://www.ftc.gov/opa/1997/06/stapdec.shtml>; Press Release, Federal Trade Commission, *FTC to Challenge Merger of Beech-Nut Nutrition Corp. and H.J. Heinz Co.* (July 7, 2000), available at <http://www.ftc.gov/opa/2000/07/heinz.shtml>.

21 The HSR Act imposes an “initial waiting period” for agency review before the transaction can be completed, which, for most acquisitions, is 30 days. Filing parties may, however, request that the reviewing agency terminate the waiting period before the statutory period expires. A grant of early termination by an agency signals that the reviewing agency has determined not to take enforcement action against the merging parties during the waiting period. See FTC, *Early Termination Notices under the Hart-Scott-Rodino Act*, <http://www.ftc.gov/bc/earlyterm/index.shtml>.

18. On a macro level, the political affiliation of the administration does not appear to affect the rate at which parties request early termination. In fact, rates of request for early termination have been remarkably flat since the middle of the Reagan administration, reaching 80% by 1985 and remaining since then in the 80-90% range:

**Fig. 4: Average Annual Requests for Early Termination by Political Administration, 1981-2010**

Administration	Transactions Reported	Early Termination Requests	% of Transactions Requesting Early Termination
Reagan (1981-88)	1,682.9	1,197.4	71.2%
Bush (1989-92)	2,065.8	1,820.3	88.1%
Clinton (1993-2000)	3,506.5	3,152.8	89.9%
Bush (2001-08)	1,671.9	1,390.5	83.2%
Obama (2009-10)	941.0	764.0	81.2%

19. The progression from President George H.W. Bush to President Clinton to President George W. Bush is perhaps surprising: the rate at which parties requested early termination rose almost 2% in a Democratic administration and then fell 6.7% under the following Republican administration. While it is true that requests for early termination have fallen 2.0% under President Obama, that drop is less than one-third the reduction of parties requesting early termination from President Clinton to President George W. Bush (a 6.7% reduction).

20. Not only does it appear that the rate at which parties request early termination does not correspond to the political affiliation of the administration, the rate at which the agencies grant requests for early termination does not appear to correlate with party politics, either. In fact, the nadir of early termination grants occurred during a Republican administration – 71% under President George H.W. Bush:

**Fig. 5: Average Annual Grants of Requests for Early Termination by Political Administration, 1981-2010**

Administration	Early Termination Requests	Grants of Early Termination	% of Requests Granted
Reagan (1981-88)	1,197.4	928.5	77.5%
Bush (1989-92)	1,820.3	1,290.8	70.9%
Clinton (1993-2000)	3,152.8	2,373.4	75.3%
Bush (2001-08)	1,390.5	1,057.9	76.1%
Obama (2009-10)	764.0	550.0	72.0%

21. While grants of early termination rose from President Clinton to President George W. Bush, they did so by less than 1%. And if early terminations rose under President George W. Bush less than one might have expected, they also decreased under President Obama less than one might have expected. In the first two years of the Obama administration, 72.0% of early termination requests were granted – a slightly

higher rate than under President George H.W. Bush and only a 4.1% reduction from President George W. Bush. If we look to the Obama administration for increased antitrust enforcement, it does not appear to have increased scrutiny by significantly decreasing the rate of early terminations. It has, however, supplied increased scrutiny by raising the rates at which it issues second requests and challenges transactions, as we will explore below.

## V. Second requests

22. For almost every year since 1981, the range of second requests has been 2% to 5% of the total number of transactions reported to the agencies under the HSR Act. Among the subset of reported transactions that clears to one agency or the other<sup>22</sup>, second requests generally have been issued in 15% to 40% of cases. But the rate at which different administrations have issued second requests, as well as the relative activity of the FTC and the DOJ in issuing second requests within administrations, leads to several observations related to political administrations and to the agency chiefs within those administrations.

23. Among the total pool of transactions reported each year, the parties are typically eligible to receive a second request in approximately 95% of cases<sup>23</sup>. If we compare the rate at which administrations have issued second requests, the average rate of issuance peaked during the early years of the Reagan administration and then fell steadily until the Obama administration, which has increased the rate of issuing second requests from 3.1% to 4.3% of reportable transactions:

**Fig. 6: Average Second Requests Issued on an Annual Basis Out of Eligible Transactions, by Political Administration, 1981-2010**

Administration	Second Requests Issued (Annual Average)	% of Eligible Transactions with Second Requests	% Change
Reagan (1981-88)	61.6	5.3%	–
Bush (1989-92)	65.3	3.7%	-30.3%
Clinton (1993-2000)	100.3	3.2%	-12.7%
Bush (2001-08)	48.5	3.1%	-4.1%
Obama (2009-10)	38.5	4.3%	38.7%

22 Most transactions filed under the HSR Act are never “cleared” – which is to say formally investigated – by one agency or the other. While the agencies will clear certain transactions that look like they warrant more than passing review to either the FTC or the DOJ, most filed mergers undergo only a preliminary review by FTC and DOJ staff and then either they are granted early termination or their waiting periods are allowed to expire. For example, in 2010, there were 1,166 transactions reported under the HSR Act and 1,128 eligible for agency review; of these, 222 were cleared to one agency or the other (149 to the FTC and 73 to the DOJ). The remaining 906 transactions eligible for agency review (or 80.3% of reported transactions) did not clear to either agency.

23 In the remaining 5% of reported transactions, the filings are incomplete, the transactions are exempt from reporting, or the transactions are simply non-reportable. See, e.g., Federal Trade Commission, Bureau of Competition, and Department of Justice, Antitrust Division, Annual Report to Congress, Fiscal Year 2010, Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Thirty-Third Report), available at <http://www.ftc.gov/bc/anncompreports.shtm>, at Appendix A, n. 2 (stating that the adjusted figures in which the parties were eligible to receive a second request are calculated by omitting incomplete transactions, transactions reported pursuant to the exemption provisions of the HSR Act, and transactions that were found to be non-reportable).

24. Looking only at transactions that cleared to one of the agencies for review – arguably representing the subset of transactions to which the agencies really pay attention – the rate at which second requests have been issued has generally fallen from administration to administration, with only a slight increase under President Clinton until a larger increase in the early Obama administration:

**Fig. 7: Average Second Requests Issued on an Annual Basis Out of Cleared Transactions, by Political Administration, 1981-2010**

Administration	Second Requests Issued (Annual Average)	% of Cleared Transactions with Second Requests	% Change
Reagan (1981-88) <sup>24</sup>	61.6	31.6%	–
Bush (1989-92)	65.3	24.3%	-23.0%
Clinton (1993-2000)	100.3	25.1%	3.2%
Bush (2001-08)	48.5	18.3%	-27.3%
Obama (2009-10)	38.5	20.5%	12.2%

25. Looking at total transactions, the data show a steady drop in the issuance of second requests from the Reagan through George W. Bush administrations – with second requests stabilizing in the low 3% range from 1993-2008. Among transactions that cleared to one of the agencies, the trend similarly shows a decline from Reagan through George W. Bush, although with a slight uptick under Clinton and a sharper decline under George W. Bush. By each measure, the Obama administration in its first two years reversed that trend, increasing the rate of second requests among total reported transactions to 4.3% and to 20.5% among transactions that cleared to one agency or the other. While the increase under Obama might be worth noting by parties currently contemplating a merger in the U.S., these data do not show a systematic political correlation; indeed, note the decline under Clinton among total transactions and the very slight increase under Clinton among cleared transactions. Moreover, in themselves, these data say nothing about the nature of the investigations or whether the change is due to the particular pool of transactions or to the agencies’ use of a more aggressive standard for launching second requests.

26. Looking further at the data on second requests, they show that within a given administration, the FTC and the DOJ have varied in their comparative rates of issuing second requests. Since the administration of President George H. W. Bush, the data show relatively higher rates of FTC activity under Republican presidents and relatively higher rates of DOJ activity under Democratic presidents:

24 The data provided for President Reagan exclude fiscal years 1981 and 1986, for which the number of transactions cleared to the agencies is unavailable in the annual HSR reports.

**Fig. 8: Average Distribution of Second Requests Between DOJ and FTC by Political Administration, 1981-2010**

Administration	DOJ-Issued Second Requests	FTC-Issued Second Requests	Advantage
Reagan (1981-88)	55.6%	44.4%	DOJ (11.2%)
Bush (1989-92)	43.2%	56.8%	FTC (13.6%)
Clinton (1993-2000)	53.7%	46.3%	DOJ (7.4%)
Bush (2001-08)	49.2%	50.8%	FTC (1.6%)
Obama (2009-10)	54.1%	45.9%	DOJ (8.2%)

27. The above comparative data might appear to suggest a political dynamic in which, at least since 1989, the relatively independent, bipartisan FTC has been more consistent in enforcement than the more institutionally political DOJ, which one might predict to increase enforcement during Democratic administrations. (As we will see, the tendency for DOJ scrutiny to rise under Democratic administrations and fall under Republican administrations is also evidenced in data suggesting that merger challenges by the DOJ tend to fall under Republican administrations and rise under Democratic administrations.)

28. Interestingly, however, when one adjusts the rates at which the DOJ and the FTC issue second requests for the relative number of transactions that cleared to each agency, a somewhat different picture emerges. Compare *Figure 9* and *Figure 10*, below:

**Fig. 9: Average Rate of Issuance of Second Requests for Transactions Cleared to the DOJ by Political Administration, 1981-2010**

Administration	Transactions Cleared to DOJ (Annual Average)	Average Rate of DOJ Issuance of Second Requests for Transactions Cleared to DOJ	% Change
Reagan (1981-88)	79.5	42.5%	-
Bush (1989-92)	71.3	39.3%	-7.4%
Clinton (1993-2000)	162.4	34.1%	-13.2%
Bush (2001-08)	99.6	24.3%	-28.6%
Obama (2009-10)	64.5	32.6%	33.8%

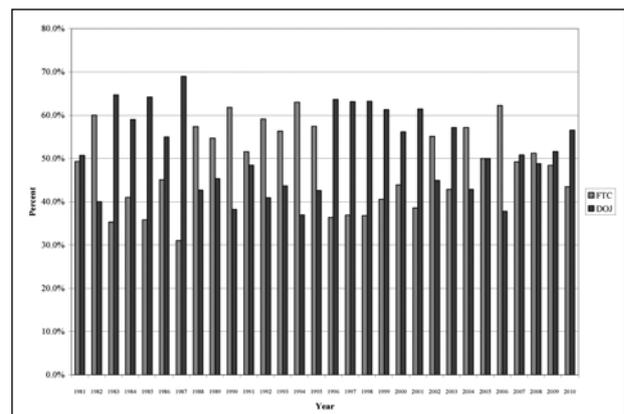
**Fig. 10: Average Rate of Issuance of Second Requests for Transactions Cleared to the FTC by Political Administration, 1981-2010**

Administration	Transactions Cleared to FTC (Annual Average)	Average Rate of FTC Issuance of Second Requests for Transactions Cleared to FTC	% Change
Reagan (1981-88)	115.7	24.1%	-
Bush (1989-92)	197	18.9%	-21.5%
Clinton (1993-2000)	236.9	18.9%	0.2%
Bush (2001-08)	166.1	14.6%	-22.9%
Obama (2009-10)	123.5	14.2%	-2.9%

29. These data show that in every administration since Reagan's, when a transaction is cleared to the DOJ it is more likely (24-43%) to receive a second request than is a transaction that is cleared to the FTC (14-24%). The data also show that the DOJ steadily reduced the frequency of second requests from administration to administration until that of President Obama, whose administration oversaw a rise in the rate at which second requests were issued, from 24.3% to 32.6% in 2009 and 2010. The FTC data show a drop in second requests from the Reagan administration to the present. Notably, unlike the DOJ, which has increased the rate of second requests under Obama, the FTC has issued second requests slightly less frequently during the Obama administration than under the George W. Bush administration.

30. The data shown above make it difficult to draw overarching conclusions about FTC and DOJ activity from administration to administration. They do, however, reveal some interesting correlations between agency activity and the tenures of specific agency heads. Consider the following comparative distribution of second requests between the FTC and the DOJ from 1981 to 2010:

**Fig. 11: Annual Distribution of Second Requests Between FTC and DOJ, 1981-2010**



31. Importantly for any inferences tied to political administration that one might be tempted to draw, many – though not all – of the inflection points in *Figure 11*, above, coincide with notable shifts in agency personnel *within* administrations.

32. During the Reagan administration as a whole, the DOJ typically issued second requests more frequently than the FTC (55.6% to 44.4%). That overall figure, however, masks significant variation during the Reagan administration. In 1982, for example, that distribution changed dramatically, with the FTC issuing 60% of second requests in 1982 – up from 49.3% in 1981. That nearly 11% jump coincides closely with Thomas J. Campbell's tenure as Director of the Bureau of Competition (October 1981 – March 1983)<sup>25</sup>. When Timothy J. Muris succeeded Campbell as Director of the Bureau of Competition, the FTC's share of second requests fell by nearly half to 35.3% and remained roughly in the 35-40% range during Muris' tenure. That trend is confirmed if we examine the rate at which the FTC issued second requests to transactions cleared to the FTC; in 1982, Campbell's Bureau issued second requests to 48.1% of transactions that cleared to the FTC; in 1983, Muris' Bureau issued second requests to 15.0% of its transactions.

33. In 1986, when Douglas H. Ginsburg served as AAG<sup>26</sup>, the pendulum swung back and the rate at which the DOJ issued second requests relative to the FTC dropped notably. While the DOJ continued to issue relatively more second requests than the FTC from 1985-87, the DOJ issued an approximately 10% to 15% greater share of second requests under Charles F. Rule in 1985 (64.2%) and in 1987 (69.0%) than it did during the bulk of Ginsburg's tenure in 1986 (54.9%).<sup>27</sup>

34. Beginning in 1996, we see a marked departure in distribution from the first three years of the Clinton administration, with the DOJ increasing its share of second requests by 21.0% in the space of one year (from 42.6% to 63.6%). This shift coincides roughly – if not exactly – with the tenures of Joel I. Klein as AAG (October 1996 – September 2000) and William J. Baer as Director of the Bureau of Competition (May 1995 – August 1999)<sup>28</sup>. Such a dramatic shift in the middle of the administration – from a period of relatively greater FTC share of second requests to relatively greater DOJ share – may be explained by other factors (e.g., the relative mix of industries

experiencing consolidation in the late 1990s), but the general correspondence to personnel changes is nonetheless striking. The result appears driven more by an increase in DOJ activity than a decrease in FTC enforcement. The DOJ issued second requests to 31% of transactions clearing to the DOJ during President Clinton's first term. Then, during the majority of AAG Klein's tenure in President Clinton's second term, the DOJ issued second requests in nearly 38% of transactions – an almost 22% change in rate from Clinton's first term to his second.

35. While the distribution of second requests between the DOJ and the FTC was relatively even during President George W. Bush's administration (49.2% by the DOJ and 50.8% by the FTC), the overall rate at which the agencies issued second requests declined substantially during President Bush's second term. During President Bush's first term, second requests actually *increased* 0.2% from President Clinton (3.2%) up to 3.4%, whereas during his second term, second requests dropped 2.7% on average for the three years between 2006 and 2008. The years 2006-08 coincide approximately with the tenures of Thomas O. Barnett as AAG (June 2005 – November 2008) and Jeffrey Schmidt as Director of the Bureau of Competition (December 2005 – August 2008)<sup>29</sup>.

36. We do not yet have enough data from the Obama administration to know how second requests relate to enforcement personnel; Christine A. Varney and Richard A. Feinstein served continuously as AAG and Director of the Bureau of Competition, respectively, during the only two years of data we have available. After Congress confirms the next AAG, however, we may receive a better sense of how agency personnel affect the issuance of a second request in the Obama administration.

37. We do not present the data and discussion above to argue causality between personnel changes and patterns of enforcement activity, but instead to show that activity levels fluctuate as much or more within administrations as across them. These data also confirm that perceptions of antitrust activity from one administration to the next change depending upon which measures and comparisons one uses. These results should cast doubt on any inferences that one might draw from simple correlations between enforcement activity and political party, to the extent that such correlations appear.

## VI. Transaction challenges

38. The rate at which each administration has challenged reported transactions has increased steadily since the Reagan administration, with particular increases under President

25 *New FTC Chief Appoints Heads to Energy Bureau [sic]*, *The Wall Street Journal*, Oct. 6, 1981; *FTC Appointments*, *Platt's Oilgram News*, Oct. 8, 1981; *Muris Gets FTC Post*, *The Associated Press*, March 15, 1983.

26 E. V. Quigley, "Washington's Movers and Shakers", *The National Journal*, April 13, 1985; N. Henderson, "New Antitrust Chief Prompts Uncertainties", *The Washington Post*, Sept. 15, 1985; N. Lewis, "U.S. Lawyer Said to Lead Field for Appeals Bench", *The Washington Post*, July 22, 1986; "Trust Busted", *American Banker Weekly Review*, Oct. 20, 1986; R. Marcus, "Rule Defends Antitrust Enforcement", *The Washington Post*, Sept. 4, 1987.

27 As noted above, the agencies did not disclose how many transactions cleared to each agency in 1986; we therefore can compare issuances of second requests under AAG Ginsburg only on a comparative rather than absolute scale.

28 E. Newlin Carney, "Washington's Movers and Shakers", *The National Journal*, May 13, 1995; R. J. O'Connor, "Senate Prepares to Confirm New Antitrust Chief", *San Jose Mercury News*, July 14, 1997; M. Taylor, "Status Quo Expected from New FTC Director", *Modern Healthcare*, August 9, 1999; J. R. Wilke, "Klein to Step Down from Antitrust Unit in Washington", *The Wall Street Journal*, Sept. 21, 2000.

29 "Competition Director Susan Creighton to Leave FTC", *States News Service*, Dec. 20, 2005; J. R. Wilke, "New Antitrust Chief Has Full Plate", *The Wall Street Journal*, Feb. 13, 2006; Press Release, "Federal Trade Commission, Competition Director Jeffrey Schmidt to Leave FTC" (Aug. 7, 2008), available at <http://www.ftc.gov/opa/2008/08/bechanges.shtml>; Press Release, "U.S. Department of Justice, Statement of Attorney General Michael B. Mukasey on the Resignation of Assistant Attorney General Thomas O. Barnett" (Nov. 7, 2008), available at [http://www.justice.gov/atr/public/press\\_releases/2008/239277.htm](http://www.justice.gov/atr/public/press_releases/2008/239277.htm); "Deborah A. Garza Acting Assistant Attorney General for Antitrust", *States News Service*, Nov. 20, 2008.

Clinton, President George W. Bush, and President Obama. Between the agencies, the FTC has historically challenged transactions more frequently than the DOJ, possibly because the FTC has administrative mechanisms for challenging a transaction that the DOJ does not and possibly because substantially more transactions clear every year to the FTC than clear to the DOJ (see *Figure 9* and *Figure 10*).

39. The data reflect a significant increase in the number of challenges brought over time, with the greatest increases during the Democratic administrations of Presidents Clinton and Obama, although there was a still-significant increase of 21.0% under President George W. Bush:

**Fig. 12: Average Percentage of Reported Transactions Challenged by Political Administration, 1981-2010**

Administration	% Challenged	% Change
Reagan (1981-88)	1.1%	–
Bush (1989-92)	1.2%	9.5%
Clinton (1993-2000)	1.7%	45.2%
Bush (2001-08)	2.0%	21.0%
Obama (2009-10)	3.8%	89.6%

40. Interestingly, when we consider the raw data underlying these rates, the absolute number of transactions challenged has not increased significantly under President Obama, with an average 36 annual challenges, up from an average 33.8 annual challenges under President George W. Bush. The difference, however, is that while there was an average of 1,672 transactions reported annually between 2001 and 2008, there was only an average of 941 transactions in 2009-10.

41. These data show that the Obama administration has nearly doubled the rate of transaction challenges over the previous administration. But the data also belie the notion that President George W. Bush diminished merger enforcement; to the contrary, the rate of enforcement actions increased approximately 20% from President Clinton to President George W. Bush.

42. It is notable that, in general, the FTC has historically challenged more transactions than the DOJ has, particularly during Republican administrations:

**Fig. 13: Average Distribution of Challenges Between DOJ and FTC by Political Administration, 1981-2010**

Administration	DOJ Challenges	FTC Challenges	Advantage
Reagan (1981-88)	45.1%	54.9%	FTC (9.8%)
Bush (1989-92)	44.2%	55.8%	FTC (11.6%)
Clinton (1993-2000)	54.9%	45.1%	DOJ (9.8%)
Bush (2001-08)	42.2%	57.8%	FTC (15.6%)
Obama (2009-10)	43.1%	56.9%	FTC (13.8%)

43. The FTC's larger number of merger challenges is not surprising given that a significantly higher number of transactions clear to the FTC than to the DOJ each year. Indeed, when we adjust for the number of transactions that cleared to each agency, we see consistently higher rates of challenge at the DOJ across administrations, with particular increases in enforcement during Democratic administrations:

**Fig. 14: Average Rates of Challenges by DOJ and FTC Out of Cleared Transactions, by Political Administration, 1981-2010**

Administration	DOJ Annual Challenges	% of DOJ-Cleared Mergers Challenged	FTC Annual Challenges	% of FTC-Cleared Mergers Challenged
Reagan (1981-88)	8.0	13.0%	9.8	8.4%
Bush (1989-92)	10.5	14.9%	13.3	6.7%
Clinton (1993-2000)	32.1	19.9%	26.4	11.1%
Bush (2001-08)	14.3	14.2%	19.5	11.7%
Obama (2009-11)	15.5	23.7%	20.5	16.6%

44. The reasons for the different rates of challenge between the FTC and the DOJ reflected in *Figure 14* may be related to the nature of the industries reviewed by the respective agencies, the different administrative structure of the FTC, the comparative political independence of the FTC, or to other reasons.

45. Whatever the reasons for the different rates of challenge, one data point reflected in *Figure 13* and *Figure 14* is particularly striking. During the Clinton administration, between 1993 and 2000, the DOJ challenged significantly more mergers than the FTC. The increased share of challenges by the DOJ coincides with the 1996-2000 period in which the DOJ began to issue second requests more frequently than the FTC did. Notably, the comparative increase in DOJ challenges over FTC challenges is due less to reduced enforcement by the FTC than to increased enforcement by the DOJ. Indeed, the FTC challenged an average 29.2 transactions per year between 1996 and 2000, slightly above the average number of transactions challenged per year during the Clinton administration overall (26.4 challenges). By contrast, the DOJ averaged 20 challenges per year during President Clinton's first term, but averaged 44.3 challenges per year in his second term during the years that Joel I. Klein served as AAG.

46. As we have noted, the increase in merger challenges under AAG Klein appears to reflect a general trend toward increased rates of challenge by the DOJ during Democratic administrations and reduced rates of challenge by the DOJ during Republican administrations. This trend appears to hold true regardless of whether we examine DOJ challenges against the total number of transactions eligible for review or against only those transactions that cleared to the DOJ. Consider *Figure 15* and *Figure 16*, which show fewer DOJ challenges under President George W. Bush and more

challenges by the DOJ under Presidents Clinton and Obama, using both the total number of transactions eligible for review as well as only those transactions that cleared to the DOJ:

**Fig. 15: Average Rate of DOJ Merger Challenges of Total Eligible Transactions by Political Administration, 1981-2010**

Administration	Average Rate of DOJ Challenge of Total Eligible Transactions	% Change
Reagan (1981-88)	0.6%	–
Bush (1989-92)	0.6%	-1.2%
Clinton (1993-2000)	1.0%	69.3%
Bush (2001-08)	0.9%	-8.6%
Obama (2009-10)	1.7%	92.8%

**Fig. 16: Average Rate of DOJ Merger Challenges of Transactions Cleared to the DOJ by Political Administration, 1981-2010**

Administration	Average Rate of DOJ Challenge of Transactions Cleared to the DOJ	% Change
Reagan (1981-88)	13.0%	–
Bush (1989-92)	14.9%	15.0%
Clinton (1993-2000)	19.9%	33.3%
Bush (2001-08)	14.2%	-28.5%
Obama (2009-10)	23.7%	66.7%

## VII. Limitations and unanswered questions

47. In our analysis, we have sought to analyze public data to tease out correlations between agency activity on merger review and the governing administration. We note that there are some gaps in the data that the agencies provide to Congress each year on their activities under the HSR Act, which leave us with some unanswered questions.

48. For example, we cannot tell from the agencies' annual reports to Congress what happens to transactions that are not subject to specific agency action, such as a grant of early termination, the issuance of a second request, or a transaction challenge. Most of those probably just go forward after the waiting period expires. Of greater interest would be the fate of transactions that receive a second request but never receive a challenge. In many of those cases, the agency closes the investigation and allows the transaction to proceed. But in others the parties abandon the transaction during the review process. We know that the costs of complying with a second request can be significant for merging parties and, in some transactions, even fatal to a transaction. Because the agencies do not report the number of transactions abandoned during the review process – and

how many of those transactions are abandoned as a result of an agency issuing a second request, notifying the parties that it plans to do so, or indicating serious concerns during the second request – it would require significant research beyond the reported data to understand the effect of agency activity and changes in political administration on parties' decisions to abandon or persist with a transaction.

## VIII. Conclusion

49. This article has presented descriptive data that reinforce the conclusion that simple activity measures are of little help in understanding the ways that political administrations differ in antitrust enforcement or in assessing the performance of a given antitrust enforcement regime. Indeed, several important trends hold across administrations and other measures vary more with personnel changes within administrations. While by some measures enforcement by the DOJ declines in Republican administrations and increases during Democratic governments, this trend is contradicted by other measures and does not hold for antitrust enforcement overall.

50. To be sure, the data and analysis we present do not mean that there are no meaningful differences among administrations in how they enforce the antitrust laws. The Obama DOJ has been more aggressive in investigating vertical mergers than past administrations, while the George W. Bush administration was overtly more skeptical about single-firm anticompetitive conduct. What our results do show, in furtherance of Bill Kovacic's important work on the assessment of enforcement performance, is that activity counts neither capture important differences in enforcement nor do they say anything about the performance and social value of an administration's antitrust regime. Political rhetoric about levels of antitrust enforcement are thus unlikely to tell us much about a particular administration's seriousness about competition policy or to help us with the far more important goal that Kovacic identifies: the development of greater consensus about what constitutes sound competition policy and how the agencies should deal with novel and difficult cases. It is with an eye toward this latter objective that the research agenda on the measurement and evaluation of antitrust enforcement should move forward. ■

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