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A Framework for Evaluating the Antitrust Legacy of the Reagan Administration

Robert H. Lande
University of Baltimore School of Law, rlande@ubalt.edu

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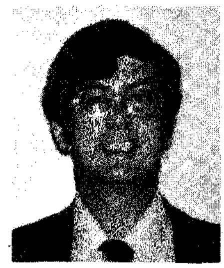


By ROBERT H. LANDE*

The authors whose articles follow have undertaken an extraordinarily difficult task. To evaluate properly the antitrust output of the Reagan administration, and thus to be in a position to predict how its legacy will survive, requires the analysis of at least five broadly defined categories of tasks. Although each is interrelated, a comprehensive evaluation should consider the administration's success or lack of success concerning: 1) Cases; 2) Guidance to Business; 3) Effects on the Rest of the Antitrust World; 4) Advances in the Antitrust Field; and 5) Fidelity to the Antitrust Laws.

My task is to suggest how these five themes might be analyzed. I do not intend to fill in the framework—to do so would be an enormous project. My task instead is to set out some of the factors involved in this endeavor. Throughout this article I will use the areas of horizontal mergers and vertical restraints as illustrations. These examples, however, by necessity will be used only in a superficial manner, merely as a hint of the type of analysis that should be performed in detail in a proper analysis of the antitrust legacy of the Reagan administration.

The four articles that follow have the difficult task of helping to fill in the framework I will construct. None, however, conceivably could come close to analyzing all of the relevant issues accurately and completely. Their mission is only to start the process.

I. Cases

The first way of analyzing the legacy of the Reagan administration is in terms of cases. Perhaps the first question most of us ask in performing such an evaluation is, "How many cases of each type of antitrust violation did the administration file?" Of course, we all understand that the raw numbers game is far too simple an analytical tool. In addition to knowing the number of filed cases for each type of antitrust violation, we also want to know the percentage the government won,[1] how each case affected consumers, and the magnitude of the effects of each case (i.e., was the case large or small).[2] Any rigorous analysis along these lines is extraordinarily difficult to perform.

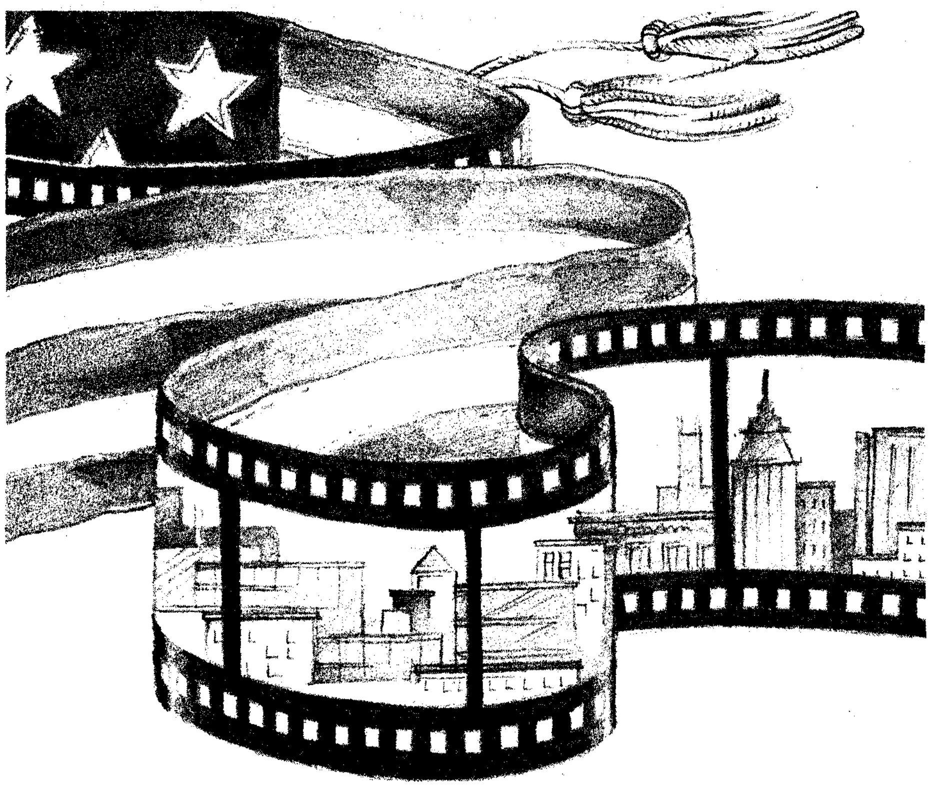
For example, what is the optimal number of vertical restraints cases the administration should have brought per year? The number of such cases brought by the Reagan administration has, of course, been close to zero.[3] Many believe that the optimal number is zero, but other respected analysts believe the optimal number is significantly greater.[4] In fact, it is difficult to evaluate the welfare effects of most vertical restraints cases. In principle, of course, this can be done, since each successful case involved a challenge to an existing vertical restraint. The market(s) can be evaluated both before and after the suit. As a practical matter, however, this task is extremely difficult to perform.

For instance, late in the Carter administration the Federal Trade Commission prevailed. The Commission hired outside economists and devoted a considerable amount of in-house staff time to the project. Their conclusion was that the Commission's suits probably helped consumers in ten cases and probably hurt them in five.[5] Significantly, however, this study took five years to complete. This powerfully illustrates how difficult it is to evaluate the legacy of the Reagan administration. For if we undertake the kind of rigorous analysis that the task truly requires we might not know the results for several years.

As another illustration of a the difficulties involved, consider the problems that inevitably arise in an evaluation of the administration's horizontal merger program. We start again with an ideological question—what is the optimal number of merger cases that the government should have brought per year? A recent head of the Federal Trade Commission's Bureau of Economics, Dr. Robert Tollison, stated that the optimal number was zero, that the government should perform a natural experiment and not challenge any mergers.[6] Most analysts, of course, disagree with Dr. Tollison and believe that the government should closely monitor the merger business. Assuming the latter, how do we know what the optimal number should be? And even if we can determine this, it becomes quickly apparent that the number, by itself, tells us very little, since merger challenges virtually always hover near the margin of legality, and that margin can shift.

To illustrate, suppose that in 1980 the government usually challenged a merger when the Herfindahl increase exceeded 100.[7] Suppose also that the threshold for suspicion used by the Reagan administration in 1988 is that the Herfindahl-Hirschman Index increase must be at least 200 (this seems to be the generally accepted perception in the private bar, despite the lower numbers contained in the Merger Guidelines). Once the antitrust community perceived and adjusted

*Mr. Lande is an assistant professor of law at the University of Baltimore School of Law. He is chairperson of the Private Litigation Committee of the Antitrust and Trade Regulation Section of the Federal Bar Association.



to this new, higher threshold, firms would be more aggressive in their merger activity. Many mergers that never would have been attempted eight years ago (since they would surely have been challenged) would now be attempted since the thresholds had risen. Thus, the number of mergers actually challenged might be the same in 1988 as in 1980, except that the market shares of the ones actually challenged would be two or three times as large in 1988 as in 1980. Since the effective threshold for challenging mergers has approximately doubled, we fairly must conclude that we have a very different merger policy today than in 1980.

Whether this policy aids consumers is debatable, but at a minimum any sensible evaluation of the merger policy of the Reagan administration must take this changing margin into account and look beyond the number of cases filed per year.[8] For this reason, even if the number challenged in 1988 is the same as the number challenged in 1980, the present merger policy might be too lax.[9]

Moreover, it is extraordinarily difficult to evaluate the impact of any individual merger case. Consider a merger challenge where the government was successful. We can study the market both before and after the merger was attempted. But the market might be the same on both occasions, since the merger was blocked. It is close to impossible to predict the market power and efficiency effects that would have occurred if the merger had been allowed to take place, so it is virtually impossible to evaluate a challenged merger when the government is successful.

It may be possible, however, to evaluate the impact of a merger that the administration decided not to challenge. In these instances one could compare a market before the merger to a more concentrated one following the merger. It might be possible to get enough data to determine whether price and/or efficiency had risen because of the merger. Nevertheless, while this is true in principle, this task has been made much more difficult since the Reagan administration has eliminated the single best source of data for these purposes that had ever been constructed—the Federal Trade Commission's Line of Business Program. We may never be able to evaluate rigorously and systematically the administration's performance in this area. At best it will take years to accomplish.

II. Guidance to Business

A second major task facing the administration has been to provide guidance to business. One way of describing the enforcers' role is to envision a cop on the beat preventing bad conduct and providing clear signals to business to modify its behavior appropriately. If, through effective guidance, the government successfully deters most anti-competitive violations while successfully encouraging most pro-competitive practices, it probably is doing an outstanding job even if it brings very few cases. We therefore must evaluate critically what the Reagan administration has done to affect business certainty, to enhance business planning, and to lower litigation costs.

In undertaking this evaluation, we might profitably examine the 1982 Department of Justice Merger Guidelines, which were widely hailed, even by liberal critics, as doing a relatively good job of providing certainty to business.[10] The 1984 revisions, by contrast, were routinely criticized, even by conservatives, for being overly indefinite and providing inadequate guidance to business.[11] A key provision of the 1982 Guidelines, for instance, stated that efficiencies were not to be considered in the enforcement decision except in "extraordinary cases" that were "otherwise close." By contrast, the 1984 Guidelines provide that the Department always will consider any claimed type of efficiency (in management, administration, overhead, etc.) and then will somehow balance these alleged effects against any market power effects that the department predicts. The 1984 Guidelines never state how much efficiency will be required to counterbalance what degree of anticipated market power, or how the two are to be traded off.[12] To be sure, it is controversial whether there should be an efficiency defense in merger cases.[13] Even if efficiency should be an explicit defense, however, many believe that the administration should get low marks because its chosen norm of the defense provides very little guidance to business.[14]

To make matters worse, it generally is conceded throughout the antitrust community that the Reagan administration does not follow its own Merger Guidelines. It is hardly a secret, for example, that the market definition standards actually used are looser than those written into the Guidelines, and that the market share and market concentration numbers actually used are more permissive.[15] Astute lawyers advise their clients of the conventional wisdom that the administration ignores its own Guidelines. While the Federal Trade Commission in 1982 issued its own set of merger guidelines, it also has plainly ignored them. In fact, the current Director of the Bureau of Competition, Jeffrey Zuckerman, acknowledged that the Commission actually used significantly higher thresholds of suspicion than those contained in the

Department of Justice Merger Guidelines.[16] It may fairly be asked, how good a job has the Reagan administration done in providing guidance to business, when it issues two contradictory sets of merger guidelines and then follows neither?

Much the same analysis applies in the vertical restraints area. The Department of Justice issued a set of Vertical Restraints Guidelines in 1985. But, as with mergers, everyone in the antitrust community knows it does not follow them. In fact, one wonders whether the Department of Justice ever has undertaken the type of analysis dictated by these Guidelines. Experienced observers know that the Reagan administration is simply not interested in bringing vertical restraints cases (unless a government entity is involved).[17] Virtually all vertical restraints challenged in this period have come from the states and from private parties. Regardless what one thinks about this as an ideological matter, the administration's disdain for its own Guidelines must be evaluated in light of the clarity of the behavioral signals provided to business.

A different administration might successfully assert that it brought few merger cases and even fewer vertical restraint cases because it didn't have to: that the business community perceived it as being so tough and so unmistakably clear in these areas that virtually no firms ever attempted illegal activity.

III. Effects on the Rest of the Antitrust World

A third major task of the federal antitrust enforcers is to influence the other players in the antitrust world. There are at least five other important participants whose presence the administration must consider, and whom it must seek to influence favorably. Let me briefly outline the nature of the inquiry that must be made into these relations by one who desires to fairly evaluate the antitrust legacy of the Reagan administration.

A. *Congress*—Every administration wants preferred legislation to pass (such as the proposed Merger Modernization Act of 1986,[18] which Congress did not enact). There is always some legislation that no administration wants: the Reagan administration, for instance, is generally opposed to the vertical restraints legislation currently progressing through Congress.[19] One crucial question, therefore, is how well the administration has done in its relations with Congress.

B. *The Courts*—The administration's Guidelines are the primary mechanism by which it seeks to influence the courts. The Department of Justice Merger Guidelines, for example, routinely are cited by courts in merger decisions. On the other hand, the Department of Justice Vertical Restraints Guidelines are rarely cited by the courts. A recent search uncovered more than 100 vertical restraints opinions by federal judges that could have cited the Department's Vertical Restraints Guidelines. Only two did.[20] The influence of the Department of Justice Vertical Restraints Guidelines on the courts has been minimal. Beyond the Guidelines, the antitrust enforcers also file amicus briefs and petitions for certiorari with the courts and, at least during past administrations, have filed test cases. A second crucial question, then, is how well have administration efforts in these areas been received?

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C. *The state antitrust enforcers*—How have the relations been between the federal and the state antitrust enforcers? Have they harmoniously worked together to help each other bring cases that benefit the public, or have the federal enforcers been uncooperative, forgetting that our form of government is one where the states also are supposed to play an important role? It seems probable that the administration's hostility toward the state antitrust enforcers and the lack of federal enforcement against both mergers and vertical restraints were major factors prompting the states to issue their own sets of guidelines in these areas.[21] One can usefully debate the wisdom of having two sets of guidelines in each area (three for mergers, when one includes the Federal Trade Commission's version). If one is of the opinion this multiplicity of conflicting guidelines is undesirable, a large portion of the blame must be attributed to the lack of federal cooperation and the paucity of federal antitrust enforcement in these areas. The federal "enforcer" created a vacuum; the state enforcers filled it.

D. *Other government agencies*—The federal antitrust enforcers seek to influence other government agencies on the federal, state, and local levels. The Federal Trade Commission's large and active intervention program, for example, started well before the Reagan administration but has grown substantially in recent years. How has this program done in terms of "bang for the buck"?

E. *The private Bar*—Private attorneys look to the federal government for guidance in many ways. How good a job has the administration performed educating the private bar and the private business community? Has the cooperation been constructive, helping private parties bring good cases and avoid bad ones? How good have the administration's outreach and education programs been?

IV. Advances in the Antitrust Field

The fourth main task of any administration's antitrust enforcers is to advance the state of the antitrust field. Regardless of one's ideology, surely we all want the field to progress, both theoretically and empirically. If the Reagan administration wants its own policies to live beyond January 20, 1989, it cannot afford to be content with the state of knowledge it found on January 20, 1981. If the administration's efforts have been limited to the assertion of ideological presumptions and conclusions, its successors will be relatively free to ignore its accomplishments. If, on the other hand, the administration undertook evenhanded research—like the vertical restraints impact evaluation study launched during the Carter administration—future administrations will be far more likely to perpetuate the administration's policies.

For example, our knowledge about vertical restraints in 1988 is much more advanced than it was in 1980. Is any of this advance due to the Reagan administration's efforts? Has the administration helped clarify rule-of-reason analysis in this area? To illustrate the value of advances in our knowledge of vertical restraints, suppose for simplicity that all instances of resale price maintenance (RPM) can be explained by two causes—free rider problems and cartels. Also assume that any RPM caused by free rider problems is good for consumers, and any RPM caused by cartel behavior hurts consumers. Suppose also that it is extremely difficult to determine in a litigation setting whether a particular instance of RPM was imposed by cartel behavior or whether it was designed to overcome free rider problems.

For any administration to make the optimal policy choice in this area, one important issue is the relative empirical importance of these two causes. Suppose, for the moment, that ninety-five percent of the time RPM is imposed to overcome free rider problems. Under these circumstances we might wish for the government to challenge all instances of RPM despite the fact that doing so would result in harm five percent of the time. This policy might be the only way to send clear signals to businesses not to use RPM and, thus, to incapacitate businesses from using RPM to harm consumer welfare.[22] One of the tasks of the Reagan administration has been to promote research to answer such questions so that future administrations can fashion a wise enforcement policy. If even-handed research during the last eight years were to support the administration's view that RPM is virtually always desirable, this would do much to ensure the successful continuation of the administration's programs. Can this administration point to such unbiased, careful research, or instead was it content to conduct only limited research or to conduct research as if it knew all the answers? If the latter is true, its successors cannot be blamed if they give relatively less import to the Reagan administration policies than if the administration had verified its beliefs with even-handed research.

V. Fidelity to the Antitrust Laws

The fifth broad task for the antitrust enforcers is to follow the law.[23] Regardless of what elements the Reagan-appointed antitrust enforcers believe constitute the public interest, the enforcers are after all, charged with enforcing existing legislation. This means fidelity to the congressional intent embodied in these laws. How well did the administration do in this fundamental area? In the vertical restraints field this administration has made it clear it would not prosecute a vertical restraints case, absent involvement by some unit of government. While the system should naturally provide for prosecutorial discretion, we need to inquire as to when the exercise of prosecutorial discretion turns into open disdain for the wishes of Congress. Even if the Reagan administration's disregard for Congress has not been so blatant that the administration can be held in contempt, can we conclude that this was a good strategy for it to pursue? Or did the administration simply encourage tighter congressional control and potentially damaging legislation in the area? In this connection, consider that Section 7 of the Clayton Act clearly was intended by Congress to impose a more restrictive merger policy than Section 2 of the Sherman Act provides. The legislative history is indisputable.[24] Yet, Paul McGrath, while head of the Antitrust Division, announced that the Department of Justice knowingly was using a Sherman Act standard to evaluate mergers![25] How was the administration being faithful to the intentions of Congress? Is it enough for the administration's antitrust enforcers to remind us that they were never found to be in contempt of Congress, or should their conduct have conformed to a higher standard of faithfulness to the law?

As the preceding discussion has shown, a systematic evaluation of the antitrust legacy of the Reagan administration is a formidable undertaking. The foregoing contains some of the necessary questions. I don't pretend to have the answers, and it would be asking too much of the authors of the articles to follow to require them to fully answer them. Each of the authors has, of necessity, only undertaken part of the task of filling in the analytical framework I have laid out above, yet each will contribute to history's final judgment.

FOOTNOTES

[1] It is often difficult to determine whether and to what extent the government prevailed. Moreover, the government's optimal rate of victory probably is less than 100. If it wins all its cases it probably has been overly cautious in its enforcement efforts by avoiding the stronger defendants.

[2] Even this is far too simple a measure. For example, we must be sensitive to the shrinking staff size of the federal enforcement agencies and cast the relevant numbers in terms of cases per attorney year. We also must ask, if we believe the human capital of the federal antitrust enforcers has decreased dramatically during the Reagan administration, whether this administration bears responsibility for this decline.

[3] Some early cases were brought by the Federal Trade Commission over the objection of Reagan appointees. It hardly seems fair to count these as part of their Reagan administration legacy. In addition, the federal antitrust enforcers have brought vertical restraint cases where a unit of government was involved. It also seems unfair to count these as "vertical restraint" cases—they would not have been brought if they were purely private, and they only reflect this administration's belief that the primary source of antitrust problems is the government. For further discussion of recent vertical restraint—cases, *see* Fisher, Johnson, & Lande, *Do the DOJ Vertical Restraints Guidelines Provide Guidance?* 32 Antitrust Bull. 609 (1987).

[4] *See id.*

[5] *See* Lafferty, Lande, & Kirkwood, Impact Evaluations of Federal Trade Commission Vertical Restraint Cases (1984). The fifteen cases were chosen because they were amenable to impact evaluation analysis. *See id.*

[6] *See FTC's Chief Economist Resigns: Gramm is Likely Candidate for Post*, 44 Antitrust & Trade Reg. Rep. (BNA) 227 (1983).

[7] The Herfindahl-Hirschman Index is a measure of market concentration. It consists of the sum of the squares of the market shares of the firms in the relevant market. For example, the merger of a firm with 10% of a market and one with 5% would yield a Herfindahl increase of 100.

[8] The preceding analysis assumes that market share is the only important variable in the decision to challenge a merger. This is, of course, incorrect, and I use this assumption for simplicity of illustration only.

[9] Another complicating factor is that the number of large horizontal mergers has risen dramatically since 1980.

[10] *See* Sims & Lande, *DOJ Adds Revisionist Dollop to '82 Merger Guidelines*, Legal Times, June 25, 1984, at 15, col. 1.

[11] *See id.*

[12] *See id.*

[13] *See* Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 Calif. L. Rev. 1580 (1983).

[14] For alternative approaches that provide more business certainty, *see id.*

[15] *See* Sims & Lande, *supra* note 10, and the sources cited therein.

[16] Speech by Jeffrey Zuckerman before the District of Columbia Bar Association Antitrust Section (Nov. 3, 1986).

[17] *See* Fisher, Johnson & Lande, *supra* note 3, at 614-15, 637-42.

[18] S. 2160, 99th Cong., 2d Sess. (1986).

[19] H.R. 585, 100th Cong., 1st Sess. (1987).

[20] *See id.* at 641.

[21] The Horizontal Merger Guidelines of the National Association of Attorneys General are *reprinted in* 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306, at S-4 (Spec. Supp. Mar. 12, 1987).

[22] Of course, if the percentages were reversed, per se legality might be appropriate.

[23] There is, perhaps, a sixth overall task of the antitrust enforcers. This concerns various internal matters at the antitrust enforcement agencies. For example, did the administration build or dissipate the human capital of the agencies? How well did it institute and implement affirmative action programs? How fairly did it treat employees? These goals are, of course, important insofar as they affect the output of the agencies. But they are also important considered alone.

[24] *See* Fisher & Lande, *supra* note 13, at 1587-93.

[25] *See* Henderson, *Baldrige Merger Plan Criticized*, Wash. Post, Mar. 3, 1985, at F1, F8, col. 6.