

# Candide Meets The Sherman Act

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According to Professor Daniel Crane,<sup>1</sup> political interest in federal antitrust enforcement—as measured by references to antitrust issues in presidential speeches and political party platforms—has essentially disappeared since the Reagan administration took office. Professor Crane asserts that, over the same period, the staffs of the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) Antitrust Division have become increasingly professional and “technocratic” by adopting the more rigorous analytical approach of the Chicago school. As a result of these developments, Professor Crane argues that the principal problems that remain for federal competition policy derive from populist interference with the FTC and Antitrust Division’s sound technocratic judgments. Professor Crane’s analysis is fundamentally flawed. First, his measure of how to judge political interest is constricted. Second, because both the Federal Trade Commission and the DOJ are overseen by political appointees, one cannot remove the values of these appointees from the regulatory process, which necessarily means that the ultimate decisions made by federal regulatory agencies have a substantial political component.

Professor Crane’s problems begin in the way he measures political saliency. For a subjective measure, Professor Crane contrasts Theodore Roosevelt’s personal involvement in the filing of the Standard Oil Trust case in 1906 with Gerald Ford’s and Bill Clinton’s lack of involvement in the AT&T and Microsoft cases brought in 1974 and 1998 respectively.<sup>2</sup> For an objective measure, he counts the number of references in major speeches made by presidential candidates and presidents and statements made in major party political platforms to measure political saliency, and determines that, in presidential politics, there has been a comparative dearth of public discussion of antitrust issues since Ronald Reagan took office.<sup>3</sup> Both of these statements are likely true, but they are not particularly relevant in determining political saliency in contemporary America.

Professor Crane’s subjective measure is oddly ahistorical. That President Theodore Roosevelt was more actively involved than Presidents Ford and Clinton in the major antitrust case of his day cannot be disputed. But this comparison fails to take into account the broader historical context.

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1. Daniel Crane, *Technocracy and Antitrust*, 86 TEXAS L. REV. 1159 (2008).
2. *Id.* at 1171–74.
3. *Id.* at 1165–70.

One reason that President Theodore Roosevelt was so actively involved in trust-busting was because there were at that time actual trusts that controlled an astonishingly high percentage of the assets of the U.S. economy and there was still a substantial legal question whether the federal government could regulate their conduct.<sup>4</sup>

Another reason for President Theodore Roosevelt's more active involvement is that the federal government as a whole was substantially smaller in the Theodore Roosevelt administration and so the President, by necessity, was more involved in all aspects of government activity at that time. DOJ antitrust enforcement is just one example. In 1904, after receiving the first funding appropriation in 1903, there were six employees working on antitrust matters at the DOJ. The FTC did not exist, nor did the field of industrial organization economics. In 1933, when President Franklin Roosevelt took office, there were fifteen attorneys working on antitrust issues at the DOJ.<sup>5</sup> By 1974, the DOJ Antitrust Division (and the federal government as a whole) was exponentially larger.

Professor Crane's objective measure of political saliency counts the number of times antitrust was mentioned in major presidential addresses and party platforms and uses this data to assert that antitrust has less political saliency today. This measure fails to take into account the political activities of potentially affected parties, as measured by such things as political contributions. For this reason, it misses the mark.

Let's use a real world example. In May 1998, following a variety of investigations and disputes over the terms of existing consent decrees, the Clinton era Antitrust Division filed an ultimately successful antitrust enforcement action against Microsoft.<sup>6</sup> This suit raised for the first time the possibility that significant structural remedies might be imposed against the company. During this period, for the first time, Microsoft officers, employees and representatives began donating substantial sums of money to federal political candidates, with 64% of the money going to Republican political candidates.<sup>7</sup> In 2000, then Texas Governor George W. Bush was

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4. See, e.g., EDMUND MORRIS, *THEODORE REX* 27–29, 87–92 (2001).

5. The Federal Trade Commission Act was enacted in 1914. In 1933, Edward Chamberlin published the first edition of *THE THEORY OF MONOPOLISTIC COMPETITION*, and Joan Robinson published *THE ECONOMICS OF IMPERFECT COMPETITION*. It was not until 1938 that the first economists were retained by the DOJ Antitrust Division.

6. It is a matter of public record that Texas OAG investigated Microsoft in the 1990s. See, e.g., JOHN HEILEMAN, *PRIDE BEFORE THE FALL: THE TRIALS OF BILL GATES AND THE END OF THE MICROSOFT ERA* 21–25 (2001). However, by the time I started work at Texas OAG, Texas's investigation of Microsoft had been essentially completed, so I was never involved in the Microsoft investigation.

7. Ian Christopher McCalb, *Will Microsoft Ruling Affect Campaign Contributions?*, CNN, June 7, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/06/07/microsoft.politics/index.html>; John Wildermuth, *Will Political Donations Keep Microsoft Intact*, S.F. CHRONICLE, July 1, 2001, at A1; Greg Johnson, *War of Words to Continue As Software Giant Struggles to Shape Public Opinion*, L.A. TIMES, June 8, 2000, at C5. While the data on campaign contributions is not

campaigning for President in Washington State and, without directly commenting on the Microsoft litigation, strongly suggested that he was troubled by it.<sup>8</sup> During this same period, Bush's campaign supporters and advisors stated to the press that, if Bush is elected President, his administration will end the Microsoft litigation and not impose structural remedies on the company.<sup>9</sup> Also during the 2000 election cycle, political donations by Microsoft officers, employees, and representatives to federal candidates increased by 339%, with the majority going to Republican candidates. George W. Bush was elected President. Bush nominated Charles James, who had publicly eschewed the possibility of a structural remedy in the *Microsoft* litigation, to head the Antitrust Division.<sup>10</sup> In June

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determinative, it is strongly suggestive. But Professor Crane ignores it. For the federal election years of 1990, 1994, and 1996, Microsoft officers, employees, and representatives contributed comparatively little money to candidates for federal office, with the majority of the money going to Democratic Party candidates. In 1996, for example, a total of \$251,474 was contributed by Microsoft representatives with 54% flowing to the Democrats. For the federal election cycle of 1998, during the period when the DOJ was ramping up its litigation against Microsoft, Microsoft's officers, employees and representatives vastly increased their donations to candidates, to \$1,364,821, with 64% of the donations going to Republican candidates. For the 2000 federal election cycle, Microsoft officers, employees and representatives contributed \$4,628,893 to federal election candidates, with 53% going to Republican candidates. For the 2002 election cycle, during which the Bush era Antitrust Division settled the Microsoft litigation without seeking to impose structural penalties on the company, Microsoft officers, employees, and representatives contributed \$4,210,198 to federal candidates, with 60% going to Republican candidates. All of this data is publicly available at Center for Responsive Politics, [Opensecrets.org: Microsoft Corp. Donor Profile, http://opensecrets.org/orgs/summary.php?id=D000000115](http://opensecrets.org/orgs/summary.php?id=D000000115) (last modified Mar. 2, 2009).

8. Professor Crane addresses the Microsoft litigation but concludes that, because Bush did not specifically condemn the antitrust litigation in his speeches, his campaign did not take a position on the litigation. Crane, *supra* note 1, at 1173–74. This analysis misstates the record evidence. First, while Bush never publicly addressed the Microsoft litigation during the campaign, his public statements strongly suggested he was opposed to it. For example, as Albert Foer, the President of the American Antitrust Institute, observed in the LEGAL TIMES, “Bush, while campaigning in Microsoft's home state this February, said he thought it was important ‘when there is innovation taking place, to understand the consequences of litigation.’ He went on to express his worries about the consequences for growth if Microsoft were to be broken up, and said that as president he would be ‘slow to litigate.’ While Bush said he would not take a stand on Microsoft, Sen. Slade Gorton told reporters, with Bush standing silently at his side, that Bush would ‘seek to resolve [the case] in a way that does not break up the company’ and that ‘I don't think a Bush administration would have brought the case to begin with.’” Albert Foer, *What About the Issues? Presidential Candidates Have Told Us Too Little About Their Antitrust Policy*, LEGAL TIMES, April 3, 2000. This is a very strong signal by Bush of his position on the Microsoft litigation.

9. As noted in April 2000, “George W. Bush refuses to condemn the Justice Department's antitrust lawsuit against Microsoft, but some of his advisers say he would not have allowed the suit to be filed and would drop it if he became president.” Donald Lambro, *Bush Camp Sees Him Saving Microsoft*, THE WASHINGTON TIMES, April 10, 2000, at A4; see also Jube Shiver, Jr., *The Cutting Edge: Focus on Technology, States Remain United in Battle With Microsoft*, L.A. TIMES, Nov. 27, 2000, at C1 (“Microsoft appealed [Thomas Penfield Jackson]'s scathing antitrust rebuke and petitioned for repeated delays in the case--a strategy many experts believe was motivated by Microsoft's hope that a new administration might look more kindly on the company's antitrust plight.”).

10. Before his appointment, Charles James had stated that, because “consumers have so clearly benefited from the development of a common software problem, any relief in the *Microsoft* case should be limited to appropriate conduct prohibitions, that is, that a break-up of Microsoft makes no

2001, James's nomination was confirmed by the Senate. In September 2001, according to rumor over the objections of Antitrust Division staff, James announced publicly that the DOJ was dropping any claim for structural relief.<sup>11</sup> In November 2001, the DOJ entered into a settlement with Microsoft on terms that were criticized as short of what the Clinton era Antitrust Division had explicitly rejected two years before.<sup>12</sup>

There are two possibilities for the ultimate result in the Microsoft litigation. The first, implied by Professor Crane, is that the Antitrust Division staff, after applying a non-political technocratic analysis, determined that structural remedies should not be sought in the Microsoft litigation. The second possibility is that politics played a critical role in the resolution of the Microsoft litigation, because the Bush Administration appointed to head the Antitrust Division an individual who had already concluded that structural remedies were not called for in the Microsoft litigation. The record evidence better supports the second proposition.

Another example: In his article, Professor Crane discusses various reasons why merger challenges by the Antitrust Division have declined over the last eight years.<sup>13</sup> Professor Crane discusses three possible factors.<sup>14</sup> None of the factors takes into account the reality that Bush political appointees might be less likely to challenge mergers or otherwise pursue enforcement actions than would Clinton political appointees based on their already stated antitrust philosophies. Yet articles written at the beginning of the Bush administration suggested that, based on their already published statements, the Bush political appointees would be less willing to challenge various types of mergers than would Clinton era political appointees,<sup>15</sup> and articles written now argue that the politically-appointed leadership of the Bush-era Antitrust Division has gone too far in failing to challenge potentially anti-competitive mergers.<sup>16</sup> Based on discussions I've had over

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sense." Deborah A. Garza, *A Comparative Analysis of the Clinton Antitrust Program and Suggestion of Changes to Come*, 15 ANTITRUST 64, 68 (2001), citing John R. Wilke, *Bush's Likely Antitrust Pick Takes Cautious Approach*, WALL ST. J., Feb. 13, 2001.

11. John R. Wilke & Ted Bridis, *Regulators Won't Seek Microsoft Breakup – Antitrust Officials Will Ask For Broad Restrictions on Business Practices*, WALL ST. J., Sept. 7, 2001, at A3.

12. E.g., John R. Wilke, Rebecca Buckman & Donald Clark, *Microsoft Antitrust Accord Would Place Few Restrictions on Entering New Markets*, WALL ST. J., Nov. 2, 2001, at A3.

13. Crane, *supra* note 1, at 1178–79.

14. The three factors that Professor Crane addresses are: (1) a policy shift from formal adjudication toward informal administration, (2) that the Antitrust Division has come to view its mandate as broader than simply enforcing the federal antitrust statutes, and (3) that because, contemporary antitrust litigation is more resource intensive, individual cases consume a greater share of resources. *Id.*

15. See, e.g., Garza, *supra* note 10, at 65–67.

16. See, e.g., *Round Table Discussion: Advise for the New Administration*, 23 ANTITRUST 8 (2008) (Former federal antitrust enforcement officials from the Clinton and George H. Bush administrations debate whether the Bush administration DOJ has been too lax in merger enforcement); Jonathan Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 23 ANTITRUST 29 (2008).

the last eight years with staff-level federal antitrust enforcers, I believe that changes in the antitrust philosophy of George W. Bush political appointees provide a better explanation than any of those mentioned by Professor Crane as to why merger challenges have decreased over the least eight years.

To be clear, there is nothing necessarily illegal or immoral about politicians and their appointees taking positions on matters of antitrust policy that may differ from their predecessors or that may favor the interests of their supporters.<sup>17</sup> That's one reason we have elections. But if we've learned anything from the George W. Bush Administration, it is that political appointees play a substantial role in the decisions that governmental agencies make, even when the political appointees oversee agencies with a substantial technocratic component. Often, the decisions reached by Bush political appointees have contradicted the recommendations of technical staffs.<sup>18</sup> For Professor Crane to conclude otherwise suggests that even Doctor Pangloss might find him to be naive.

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17. A personal note: I've known Tom Barnett and Deb Garza for almost twenty years. They are lawyers of great personal integrity. But they would not have overseen the Antitrust Division in the Clinton administration. In the same way, Anne Bingaman and Joel Klein would not have overseen the Antitrust Division in the George W. Bush administration.

18. For a detailed critique of how political factors have driven agency regulatory determinations in the Bush administration, see generally OMB WATCH, *THE BUSH LEGACY: AN ASSAULT ON PUBLIC PROTECTIONS* (Jan. 2009), available at <http://www.ombwatch.org/files/bushlegacy.pdf>.