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The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason

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Introduction

The increased importance of antitrust as a campaign issue and a political conversation raises long-standing troubling issues of whether antitrust enforcement (or non-enforcement) can, and is, being used for partisan political purposes. First, there were long standing rumors of White House direction to challenge the *AT&T-Time Warner* merger. Second, the President and other key officials have alleged that social media and tech giants have exhibited a political bias against conservative messages and that antitrust was one way to deal with such alleged abuses. Third, there have been press reports that the head of the Antitrust Division lobbied members of Congress in connection with the settlement of the *Sprint-T–Mobile* merger investigation and personally sought to broker the divestiture that was accepted to allow the transaction to move forward.[1]

Most recently, Congress also has heard recent testimony from a whistleblower that the Attorney General directed burdensome second requests, over the objection of career staff, to mergers posing few competitive risks in the cannabis industry out of a personal dislike for the industry.[2] These second requests represented 29 percent of the total second requests during the fiscal year in question.[3] The whistleblower also raised concerns about the Division's now-closed investigation — also over the objections of career staff — of car companies lobbying the state of California to maintain state emissions control at a level in excess of what the administration sought to impose at the federal level.[4]

This essay begins a long overdue conversation about how the legal system should deal with issues of personal animus or political favoritism in the enforcement of the antitrust laws.[5] We take no position on the merits of any of the current controversies, but instead focus on the broader issue of how animus and bias in the broadest sense should be dealt with, both when cases with some potential merit are brought against perceived enemies and when cases with some potential merit are declined to protect perceived allies.

We begin with distinguishing these situations of bias and animus from those of outright corruption and when antitrust considerations are set aside in favor of broader foreign policy and national interests. We then look at the limited tools within antitrust law to deal with issues of bias and political favoritism and survey related areas of the law which have been dealing with these issues more directly throughout their history.

A. Distinguishing Outright Corruption and Legitimate National Interest

The types of political bias in the news appear to be different from issues of outright corruption. Issues of bribery and *quid pro quo* corruption surfaced in the 1970s as an issue in the Watergate scandal when illegal campaign contributions were being used in part to influence antitrust merger decisions of the Nixon Justice Departments.[6] Congress reacted in the post-Watergate era by passing the Tunney Act requiring all consent decrees settling government antitrust litigation

by reviewed by a federal district court judge to determine whether the settlement was in the public interest.[7]

Similar troubling issues also arose in the Johnson Administration. As documented from transcripts of recorded calls and discussions in the Oval Office, President Johnson threatened to block a merger involving a leading Houston bank unless the head of the bank helped secure the endorsement of the leading Houston newspaper for Johnson's 1964 campaign.[8] Neither example requires sophisticated analysis to condemn on moral or legal grounds.

At the opposite end of the spectrum, it may be political, but hardly immoral or illegal, to refrain from an instance of antitrust enforcement because it threatens the broader national interest. This is the premise of virtually every immunity doctrine in antitrust law where the overall societal value of labor unions, agricultural cooperatives, certain regulated industries, export trading companies, certain research and development joint ventures, cooperatives activities to ensure adequate annual supplies of flu vaccines, and other forms of joint activities are deemed more important by Congress than the promotion of competition otherwise mandated by the antitrust laws.[9] Whether the balance was correctly struck by Congress or the judiciary is a very different question from whether the right thing was done for an improper political motive.

A similar calculus by the executive branch of the value of the overall national interest at the expense of antitrust enforcement in a specific matter is an exercise that may be political, but rarely immoral or unlawful. Few would be interested in the bringing of an antitrust case that risked starting an armed conflict with a trading partner. A decision not to prosecute the members of the OPEC cartel, or private firms carrying out its bidding, may be political and may be prudent or imprudent, but it is neither immoral nor unlawful on its own.[10]

For example, one can question the correctness of President Truman's decision to limit an investigation of middle eastern oil companies to a civil proceeding because of the political needs of the Cold War, or President Reagan's decision to not bring criminal antitrust charges against various foreign firms in connection with the demise of Laker Airlines because of foreign policy concerns and the diplomatic efforts of the British Prime Minister.[11] All are political in any normal sense of the word, but none are corrupt, immoral, or unlawful without more.

B. Bias, Animus, and Prosecutorial Discretion in Antitrust

The harder question is what to do when a public competition agency brings a non-frivolous antitrust investigation or case to punish a perceive political opponent or refrains from bringing a non-frivolous, but risky, case against a perceived political supporter. As outlined above, these are not hypothetical questions or thought experiments. Press reports abound that then-Candidate Trump and President Trump expressed his opposition to the proposed *AT&T-Time Warner* merger as well as his dislike for the coverage he received from Time Warner's CNN news network.[12] Subsequently, the Antitrust Division unsuccessfully challenged that merger in the

courts using valid, but unusual, theories that the Division had rarely used to seek to block a merger outright.[13]

Similarly, both Candidate Trump and President Trump expressed concern over the power of Amazon (and other tech companies) and his dislike for Jeff Bezos the founder of Amazon and the owner of the Washington Post, a frequent critic of Trump.[14] As of June 2020, Amazon remains under antitrust investigation by the Federal Trade Commission.[15] Separate reports indicated that the Attorney General and his deputy were personally directing and pushing an investigation into Google, which is reportedly entering its final phase.[16]

This is a particular concern for public rather than private enforcement. The public antitrust agencies in the United States have powers and resources far in excess of private litigants in civil litigation. Only the U.S. Department of Justice (through the Antitrust Division or its other Divisions) can empanel a grand jury or use the resources of the FBI, IRS, and other law enforcement agencies to investigate a potential criminal case. Only the government can compel testimony before the grand jury through the granting of immunity, or grant amnesty or leniency to a business entity and its employees. Only the government can issue a criminal information or seek an indictment from a grand jury. Only the government can arrest a defendant and compel them to stand trial which could result in lengthy imprisonment for individuals and substantial fines for business entities and individuals.

Even on the civil side, the powers and resources of the government normally dwarf those of most individuals and businesses. The FTC and the Antitrust Division each have hundreds of professionals dedicated to antitrust enforcement and broad pre-complaint investigative powers that far exceed the limited pre-complaint discovery available to a private litigant.[17]

1. Antitrust Division and DOJ Policy

There are two main internal policy manuals and guidelines that govern the investigation and prosecution of criminal activity by the Antitrust Division and the DOJ more generally. All condemn prosecutions motivated by political considerations. All are rather anodyne, and none are binding if action is taken and none would suffice to address if the Division or the DOJ as a whole refrained from action on political grounds.

The introduction to the Justice Department manual begins with a ringing condemnation of political influence. It states:

> "The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration."[18]

The Principles of Federal Prosecution section of the Justice Department also states that:

> "In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:
>
> 1. The person's race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs;...."[19]

The Antitrust Division Manual contains several references to past litigation where the question of political considerations was considered by the court. One section covers objections to CIDs because of government motives such as political motivation and states:

> "[I]t has been held that a CID may be quashed if it is issued for the purpose of intimidating or harassing the recipient. In Chattanooga Pharm. Ass'n v. United States Dep't of Justice, 358 F.2d 864 (6th Cir. 1966), the Government declined to answer the recipient's allegations that the purpose of the CID was to intimidate and harass the recipient into terminating a pending suit for enforcement of a state fair trade act. Since the Government did not respond, the court held that the allegations were admitted and set aside the CID."[20]

The Manual further discusses grounds for discovery of improper motives behind a subpoena stating:

> "Recipients have challenged CIDs and asked for discovery on the grounds that they were allegedly issued in response to outside political interference and pressure or to pay off a political debt and were not in a bona fide attempt to determine whether a violation occurred. In *In re Cleveland Trust Co*., 1972 Trade Cas. (CCH) ¶ 73,991, at 92,122 (N.D. Ohio 1969), the court applied grand jury standards applicable to issuance of a subpoena duces tecum to hold that the recipient was entitled to certain discovery to establish that the investigation was not a bona fide attempt to ascertain an antitrust violation."[21]

2. Motivation in *Noerr-Pennington* and Sham Litigation

Antitrust law has rarely engaged with the question of bias or animus in the bringing of a complaint. One area that touches on this question is the sham litigation exception to *Noerr-Pennington* immunity. The *Noerr-Pennington* doctrine hold that petitioning any branch of the government, including filing litigation, is immune from the antitrust laws as beyond the scope of the Sherman Act.[22]

The Supreme Court has also established an exception for the filing of baseless litigation where no special antitrust immunity would apply.[23] Unfortunately, the Court has spoken in two very different ways about the nature of the sham litigation doctrine. In *City of Columbia*, the Court stated: "The sham exception to *Noerr* encompasses situations in which persons use the

governmental *process* – as opposed to the *outcome* as an anticompetitive weapon."[24] This suggests an analogy to the common law of abuse of process. However, two years later the Court spoke in terms more akin to the notion of malicious prosecution stating:

> "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. … Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation, which must be a subjective intent to abuse the governmental process in order to interfere with a competitor's business."[25]

The closest the question of political bias or animus has directly come in an antitrust decision action was the previously mentioned *ATT-Time Warner* litigation, where the defendants sought discovery on potential communications between the White House and the Justice Departments about political influence in the decision to challenge the merger. There, the court denied the requested discovery request holding that "defendants have not made a 'credible showing' that they have been 'especially singled out' [by the DOJ]."[26] Even it turned out that there were no such communications,[27] how would one ever know whether officials eager to please their bosses brought a plausible antitrust (or other kind of case) because they believed it would make the White House happy? And what should one do (or conclude) if such information became available?

C. Analogies from Other Areas of the Law

The law deals in many areas with these questions of purpose versus effect, objectively baseless claims versus claims with evidentiary and factual merit but improper purpose, and cases where these issues of mixed motives and bases are intertwined.[28] These areas provide mixed signals how best to approach questions of political bias and personal animus in the antitrust realm.

1. Selective Prosecution

A defendant in a criminal case has a very narrow window to successfully establish a claim of selective prosecution. A selective prosecution claim is not a defense, but an independent assertion that the prosecutor has brought a charge for reasons forbidden by the Equal Protection Clause of the Constitution. *U.S. v. Armstrong* required that a defendant claiming selective prosecution must establish both that others similarly situated have not been prosecuted and that the government's selection was motivated by the type of invidious intent prohibited by the Equal Protection Clause.[29] This normally involves a decision to prosecute based on prohibited factors such as race, religion, or other arbitrary classification in the constitutional sense.[30]

The *Armstrong* Court held that to obtain discovery of information relevant to a selective prosecution claim, the defendant must produce "some evidence tending to show" the existence of discriminatory effect and discriminatory intent including that "similarly situated defendants of other races could have been prosecuted but were not."[31] This chicken and egg problem dooms most selective prosecution claims, including the attempt by the defendants in the *ATT-Time*

Warner merger challenge to seek discovery about the potential political motivations of the government suing to block this particular transaction. [32]

Despite its superficial appeal, selective prosecution, or selective enforcement in a civil or regulatory action, remains an unappealing road in most antitrust litigation. Courts are reluctant to interfere with the special province of the prosecutor or enforcement agency. Claims of political bias would then have to shoehorned into one or more of the protected categories under the Equal Protection Clause. The defendants would have to establish most of the facts necessary for the claim before obtaining disclosure or discovery on this topic from the government in litigation, a burden even well-heeled defendants like AT&T and Time Warner could not meet. Finally, even the most egregious of political favoritism would do nothing to attack a biased decision **not** to enforce the antitrust laws to benefit an ally.

2. Civil Procedure Analogies

Civil procedure provides another method of dealing with such questions. Federal Rule of Civil Procedure (FRCP) 11 requires attorneys to sign pleadings, motions, and most other writings, attesting that they have made an investigation reasonable under the circumstances and certify that the pleadings and other matters have a reasonable basis in both law and fact **and are not being brought for an improper purpose**.[33] Similar provisions dealing with discovery requests go even further and require written certification that each request is consistent with the federal rules of civil procedure, warranted by existing law or by a nonfrivolous argument for changing the law and are:

> "(i) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (ii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[34]

The limitations of FRCP 11 are also well known. The provision includes a 21-day safe harbor that allows a party to avoid violating the rule by withdrawing or modifying the pleading or other written submission.[35] The provision only states that the court "may" impose "appropriate" sanctions for violations of the rule.[36] Moreover, sanctions are limited to what is sufficient to deter repeated violations by the party or those in similar circumstances.[37] The court also has wide discretion as to the type of sanctions that can be imposed.[38]

3. Professional Responsibility

The model rules of professional responsibility also address these types of issues. MRPC 3.1 requires a meritorious basis for bringing or defending litigation.[39] At the same time, MRPC 4.4a states:

> "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[40]

These model rules only apply to members of the bar and would not apply to sanction a non-lawyer professional at either of the antitrust agencies. While the content of these rules is helpful, they only allow for the subsequent initiation of disciplinary proceedings with the relevant state bar authorities and those courts where the attorney in question is admitted to practice and provide little comfort to the litigants in the moment of responding to improperly motivated proceedings.

4. Tort Law

In tort law, a similar distinction plays out in the differences between the torts of malicious prosecution and abuse of process. Malicious prosecution is usually defined as the bringing of a prior civil or criminal legal action without probable cause, and with malice, that resulted in harm to the defendant in the original action.[41] No amount of malice is sufficient if the original claim has merit.

In contrast, the tort of abuse of process does not require proof of a lack of probable cause in the prior litigation. In general, an abuse of process requires proof that a person deliberately misused a prior court proceeding for an improper collateral purpose, regardless of whether the original civil or legal case had probable cause.[42] One common example would be a perfectly appropriate case brought at least in substantial part to harass the defendant, run up his litigation costs, damage his reputation, or pursue improper lines of discovery to obtain information unrelated to the otherwise meritorious suit.

5. Administrative Law

Administrative law requires an agency to support its decision with substantial evidence and prohibits arbitrary or capricious decisions.[43] Courts will grant agencies substantial discretion in deciding complex mixed questions of law and fact under this standard.[44] However, both the substantial evidence and arbitrary and capricious tests normally turn on a matching of the evidence in the record of the agency decision with the outcome, rather than a parsing of the motive behind the decision.

The Supreme Court has allowed a narrow role for motive in holding that a proven pretext for an agency decision may be grounds for overturning final agency action.[45] The Court rejected most attempts to inquire into the motive behind an agency decision, holding a court may not set aside under the APA an agency's policymaking decision solely because the decision might have been influenced by political considerations or prompted by an Administration's priorities.[46] The Court noted that agency policymaking is not a rarified technocratic process, unaffected by political considerations or the presence of presidential power, and such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, national security concerns, and other considerations.[47]

Nonetheless, the Court found a narrow exception to the general rule against judicial inquiry into the mental processes of administrative decisionmakers, such an inquiry may be warranted and may justify extra-record discovery, on a strong showing of bad faith or improper behavior.[48] It therefore remanded the case regarding questions about citizenship on the 2020 Census back for further proceedings in the district court stating that the question concerning citizenship status could not be adequately explained in terms of the proffered reason.[49]

6. Employment Law

Employment law has its own unique approach to the question of whether an employee was fired for permissible reasons, such as job performance, or for an impermissible reason such as of race, ethnicity, gender, sexual orientation, or some combination of both. Title VII of the Civil Rights Act prohibits discrimination "because of" an unlawful discriminatory factor.[50] The so-called *McDonnell-Douglas* test adopted a burden shifting approach to deal with situations where an employee asserts she was treated less favorably for an unlawful reason and the employer contends that the treatment was based on a permissible factor.[51]

In *McDonnell-Douglas*, the plaintiff alleged that he was not hired because he was African American, while the company contended that the decision was a result of the plaintiff's participation in a prior disruptive protest on company property. The Court held unanimously that the plaintiff must first establish a prima facie case of discrimination. This can include direct and indirect evidence that which he can satisfy by showing that: (i) she belongs to a racial minority (or other protected group); (ii) she applied and was qualified for a job the employer was trying to fill; (iii) though qualified, she was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications.[52]

The defendant (employer) must then produce evidence of a legitimate non-discriminatory reason for its actions.[53] If this occurs, then there is no presumption of discrimination. The plaintiff must then be afforded a fair opportunity to present additional facts to show discrimination. The plaintiff may do so either by showing that the defendant's explanation is insufficient, and therefore a pretext for discrimination, or by otherwise proving that the defendant's relied on one or more of unlawful discriminatory parameters.[54]

7. Civil Rights

In civil rights and constitutional litigation, the Supreme Court has wandered from approach to approach. In *Mt Healthy v. Doyle*, the Supreme Court considered whether a public school teacher could be fired or otherwise disciplined for constitutionally protected speech, where the same action might have taken place for other unprotected activities.[55] Here, the Court adopted a different type of burden shifting approach from that in *McDonnell-Douglas*. In order to prevail, the plaintiff must first prove that the activity they were allegedly disciplined for was indeed protected speech.[56] Then the burden shifts to the defendant who can prevail if it can show by a

preponderance of the evidence that the adverse action would have occurred anyway, even if the protected activity had never happened.[57]

In cases relating to pretextual traffic stops of defendants, the Supreme Court simply rejected any such burden shifting. In *Whren v. United States*, the Court held in a unanimous decision that if there is probable cause for a traffic stop there is no further inquiry into whether the stop was a pretext for other unlawful purpose.[58]

8. International Antitrust Norms

One of the few attempts within the antitrust community to grapple with these issues has come from the Trump Administration itself. The Antitrust Division has devoted substantial resources toward the development of a Multilateral Framework on Procedures in Competition Law Investigation and Enforcement through the International Competition Network ("MFP"). The MFP identifies what the Justice Department terms universal due process principles that are widely accepted across the globe, including commitments regarding non-discrimination, transparency and predictability, proper notice, access to information, meaningful and timely engagement, the opportunity to defend, timely resolution of proceedings, confidentiality protections, avoidance of conflicts of interest, access to counsel and privilege, written enforcement decisions and public access to decisions, and availability of independent review of enforcement decisions.[59]

The closest these principles come to addressing the questions of political influence on independent competition agencies comes in its conflict of interest principles. This section states:

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.[60]

It would be both interesting and ironic if an exercise designed to reign in the discretion of enforcement agencies around the world would have a similar salutary effect in the United States.

D. Beginning to Grapple with Political Bias

These limited examples from inside the antitrust arena, and other areas of the law, provide a smorgasbord of options for beginning to think about how to deal with these issues in the antitrust context. The task is complicated by the presence of two separate but connected stages where these issues arise. The first is the general issue of prosecutorial discretion and how potential issues of bias should be handled by a district court once the Antitrust Division or FTC file a case. The second is the even more complicated issue of dealing with politically charged decisions not to proceed.

The first stage has the best existing framework for dealing with these sorts of issues. As discussed above, the combination of the vigorous application of FRCP 11 and the rules of professional responsibility provide two avenues for asserting that a politically motivated civil case

was brought for an improper purpose. However, the existing mechanisms do not address the chicken and egg problem of how to document bad motives if denied discovery to the information that would verify the assertion of bias.

The decision to settle a matter has some procedural protections from this type of political influence. The Tunney Act requires a public interest showing before a settlement can be accepted by the court.[61] However, the *Microsoft* litigation has made this requirement more of a formality by focusing on limiting the inquiry to matching the nature of the relief to the civil complaint actually filed, rather than the scope of the case that should have been filed or the reasons why the agency acted or refrained from acting.[62]

The issue of a decision not filed because of political considerations is one where US law is silent, but EU law provides a partial answer. There is no mechanism in current US law for judicial review of a decision not to proceed with a civil or criminal matter. In general, there is no ability to challenge an agency's exercise of its discretion not to bring an action.[63] This latitude is inherent in the tradition notion of agency discretion. Prosecutorial discretion remains the great unanswered question of administrative law.[64]

Civil antitrust cases are brought by two different entities: the FTC, bound by the Administrative Procedures Act, and the Antitrust Division of the Justice Department, which is not. In neither case is the agency obliged to disclose the reasons behind not bringing a case although from to time both do so on an occasional basis.[65] Likewise, in neither case can affected parties challenge the decision not to proceed.

Asa far back as 1969, Professor Kenneth Culp Davis in his book Discretionary Justice challenged us to do better.

In prescient discussions of both the FTC and the Antitrust Division, he argued that:

> "Apart from the guidelines program … the Antitrust Division can move toward greater clarification of its prosecution policies by announcing findings and reasons whenever it takes action of any kind that is based upon significant policy. When it prosecutes a case, when it decides not to prosecute, when it decides to dismiss or to nol pros, when it enters into a consent arrangement, and when it grants a clearance, it can and should state publicly the policy reasons for its actions, and the policy statements should be treated as precedents which normally will not be retroactively changed."[66]

Not only did he include the FTC in proposing these important safeguards, he also highlighted the issue of inappropriate political influence as one of the main dangers requiring change.[67]

We can also strive for a system akin to that in place in the EU and similar administrative type systems in other jurisdictions. Any determination of the European Commission, whether to proceed or not to proceed with a matter, is an official decision requiring a statement of reasons

and which can be challenged by an affected party.[68] While the Commission's decisions are granted substantial deference, they are not immune from judicial scrutiny.[69] Adopting such an approach would institute such long needed reforms for both enforcement agencies and begin the process of dealing with this aspect of the potential political misuse of antitrust nonenforcement.

Conclusion

Antitrust has always been political in nature. How could it not be? It stems from broad legal commands dealing with how governments and private individuals can challenge different types of market behavior. Antitrust has reentered the political electoral arena, general mainstream media, and everyday discourse. Once mostly the domain of technocrats, antitrust issues have been proposed and debated by Presidential candidates, pundits, journalists, and voters alike. There are also a flurry of serious proposals and investigations that would make significant changes to the current system if adopted.

Part of that engagement has been the exploration of the potential political misuse of antitrust investigations and enforcement for political motivations and other types of animus and bias. The changing institutions and norms in the United States holding back authoritarian tendencies have begun to erode for antitrust enforcement and other aspects of law enforcement. There is real reason to be concerned that the enforcement agencies are consciously or unconsciously beginning to tailor aspects of their decision making to the stated, or perceived, political needs of the White House. Other areas of the law have been dealing with these issues far longer and provide potential solutions for consideration in the antitrust field. Regardless of which combination of tools we use to address these concerns, it is urgent that we start this discussion.

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[1] See Katie Benner & Cecilia King, *How a Top Antitrust Official Helped T-Mobile and Sprint Merge*, THE N.Y. TIMES (Dec. 19, 2019) https://www.nytimes.com/2019/12/19/technology/sprint-t-mobile-merger-antitrust-official.html.

[2] Testimony of John W. Elias, U.S. House Committee on the Judiciary, June 24, 2020 at 2-6, https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf.

[3] *Id*. at 2.

[4] *Id*. at 6-8. The Justice Department denied both of these allegations in a brief statement.

[5] This is part of a broader concern about the politization of the Justice Department as a whole which is beyond the scope of this essay.

[6] ANTHONY SAMPSON, THE SOVEREIGN STATE OF ITT xxx (1973).

[7] Antitrust Procedures and Penalties Act (Pub.L. 93–528, 88 Stat. 1708, enacted December 21, 1974, 15 U.S.C. § 16.

[8] MICHAEL R. BECHLOSS, TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES 1963-1964 xxx (1998).

[9] See generally ABA ANTITRUST SECTION, MONOGRAPH NO. 24, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007).

[10] See generally Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105 (2001).

[11] 2 SPENCER WEBER WALLER & ANDRE FIEBIG, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 2.16, 5.11 (4th ed.& ann. Supp. 2020).

[12] Editorial, Mr. Trump Casts a Shadow Over the AT&T-Time Warner Deal, New York Times, Nov. 15, 2017, https://www.nytimes.com/2017/11/15/opinion/att-time-warner-deal-trump.html.

[13] *United States v. AT&T*, 310 F. Supp. 3d 161 (D.D.C. 2018).

[14] Berkeley Lovelace, Jr., *Trump says administration is looking into antitrust violations by Amazon, other tech giants*, CNBC, Nov. 5, 2018, https://www.cnbc.com/2018/11/05/trump-looking-into-antitrust-violations-against-amazon-other-tech-giants.html.

[15] Jason Del Rey, Why Congress's antitrust investigation should make Big Tech nervous, Vox, Feb. 6., 2020, https://www.vox.com/recode/2020/2/6/21125026/big-tech-congress-antitrust-investigation-amazon-apple-google-facebook.

[16] David McCabe & Cecilia Kang, Barr's Interest in Google Antitrust Case Keeps It Moving Swiftly, New York Times, June 25, 2020, https://www.nytimes.com/2020/06/25/technology/barr-google-investigation.html.

[17] Federal Rule Civil Procedure 27.

[18] 1 Justice Manual § 8.100 (2019), https://www.justice.gov/jm/jm-1-8000-congressional-relations#1-8.100.

[19] 9 Justice Manual § 27.260, https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.260

[20] U.S. Dep't of Just. Antitrust Division, Antitrust Division Manual III-74 (5th ed. 2018).

[21] U.S. Dep't of Just. Antitrust Division, Antitrust Division Manual III-75 (5th ed. 2018). But see *United States v. Cotton Valley Operators Comm.*, 75 F. Supp. 1, 6 (W.D. La. 1948) (holding evidence antitrust suit was induced by political considerations and to pay a political debt is irrelevant because the court must award judgment, even though the case may have been politically motivated, if evidence supported the Government's allegations); *Finnell*, 535 F. Supp. at 413 ("We would note that the genesis of the investigation does not appear important to the validity of the CIDs as long as the investigation and the CIDs are pursued in good faith"). *Id*.

[22] Eastern R.R. Presidents *Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (19610; United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[23] *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[24] *City of Columbia v. Omni Outdoor Advertising, Inc*. 499 U.S. 365, 280 (1991).

[25] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc*., 508 U.S. 49, 63 (1993).

[26] Hadas Gold, *Judge blocks AT&T's request to see White House communications about Time Warner deal*, CNN Business, Feb. 20, 2018, https://money.cnn.com/2018/02/20/media/judge-blocks-att-white-house-communications/index.html?iid=EL; Hadas Gold, AT&T drops political bias defense in Time Warner deal suit, Mar. 9, 2018, https://money.cnn.com/2018/03/09/media/att-time-warner-lawsuit/index.html.

[27] But see David Shepardson, *White House will not turn over documents on AT&T-Time Warner merger*, Reuters, April 16, 2019, https://www.reuters.com/article/us-time-warner-at-t-congress-idUSKCN1RS28R (denial of House of Representatives request for documents relating to communications between White House and Justice Department regarding the merger).

[28] The more general philosophical debates about whether the merits or purposes of an action make it moral or not is beyond the scope of this essay.

[29] 517 U.S. 456 687 (1996). See also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Wayte v. United States*, 470 U.S. 598, 607 (1985). See generally Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing a Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071 (1997)

[30] See Dep't Homeland Security v. Regents, June 18, 2020 at p. 27-29, https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf (striking down termination of DACA program but denying selective enforcement claim).

[31] *Armstrong*, 517 U.S. at 469; see also *United States v. Parham*, 16 F.3d 844, 846-47 (8th Cir. 1994).

[32] See Gold, s*upra* note 26.

[33] Federal Rule Civil Procedure 11(b).

[34] FRCP 26G.

[35] FRCP 11 (c)(2).

[36] FRCP 11(c)(1).

[37] FRCP 11 (c)(4).

[38] *Id*.

[39] Am. Bar Ass'n, Model Rules of Professional Conduct §3.1, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions/.

[40] *Id*. at § 4.4a.

[41] STUART M. SPEISER, CHARLES F. KRAUSE, ALFRED W. GANS, 8 AMERICAN LAW OF TORTS § 28:1 (March 2020 Update).

[42] *Id*. at § 28.33.

[43] 5 U.S.C. at §706.

[44] See e.g. *FTC v. McWane*, 783 F. 3d 814 (11th Cir. 2015).

[45] Dept. of Commerce v. New York, 588 U.S. __, 139 S. Ct. 2551 (2019); See generally, Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (1990).

[46] Dept. of Commerce, 139 S. Ct. at 2573.

[47] *Id*.

[48] *Id*. at 2573-74.

[49] *Id*. at 2576.

[50] Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, Section 703, 42 U.S.C. 2000e, 2000e-2.

[51] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[52] *Id*. at 802.

[53] *Id*.

[54] *Id*. at 804.

[55] Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

[56] *Id*. at 287.

[57] *Id*.

[58] *Whren v. United States*, 517 U.S. 806 (1996). See also generally Stephen Rushin & Griffin Sims Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 72 STAN. L. REV. (2020)(forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506876.

[59] Justice News, New Multilateral Framework on Procedures Approved by the International Competition Network Framework Will Promote Fundamental Due Process in Antitrust Enforcement, April 5, 2019, https://www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network.

[60] ICN Framework on Competition Agency Procedures at G, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf.

[61] Antitrust Procedures and Penalties Act (Pub.L. 93-528, 88 Stat. 1708, enacted December 21, 1974, 15 U.S.C. § 16.

[62] John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies*," 34 LOY. U. CHI. L.J. 749 (2003).

[63] *Heckler v. Cheney*, 470 U.S. 821 (1985) (relying on section 701 of the APA for no judicial review of administrative decision not to proceed). See generally Aaron L. Nielson, Administrative Conference of the United States, Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices (Final Report: November 1, 2017), https://www.acus.gov/sites/default/files/documents/ACUS%20Waiver%20Report%20FINAL_0.pdf.

[64] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

[65] See, e.g. Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Samsung's Use of Its Standards-Essential Patents, Feb. 7, 2014, https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-samsung.

[66] Davis, *supra* note 64, at 203.

[67] *Id*. at 10-11, 14, 70-74, 113, 162, 189, 212-13, 224,

[68] COMPETITION LAW OF THE EUROPEAN COMMUNITY 993-97 (Van Bael & Bellis eds. 5th ed. 2010).

[69] Case C-413/06P, *Bertelsmann AG v. Indep. Music Publishers & Labels Ass'n.*, 2008 E.C.R. I-4951 ¶ 69.