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The Tempting of American Antitrust Law: An Open Letter to President Trump

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President Donald J. Trump
The White House
Washington, D.C. 20500

Dear Mr. President:

You need a pragmatic antitrust policy that unapologetically advances the self-interest of the American nation-state.

You should start by reminding the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) that they may act only within the rule of law. But who defines what the law is? Justice Holmes gave a famous answer: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[1] By this understanding, antitrust law is not what the Antitrust Division or the FTC says it is; until Congress hands the Judiciary a new statute to interpret, antitrust law is what the courts will say it is in the next case that arises.

The greatness of American antitrust law derives from its having been forged since 1890 by federal judges who possessed not only practical experience across many fields of law, but also the courage and intellect to express their reasoned decisions forthrightly. To be sure, the courts made mistakes along the way. But in less than a century the evolutionary process of adjudication had distilled an admirable set of general principles from individual cases actually litigated on a factual record and scrutinized under the Federal Rules

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1 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

of Evidence—including government cases in which the Antitrust Division or the FTC bore the burden of proof.

But the Antitrust Division and the FTC today certainly do not define the law of antitrust as Justice Holmes would. They have become commissariats dispensing ukases of "soft law" through guidelines, business review letters, speeches, press releases, and raised eyebrows. They avoid litigating because they lose too often when they need to convince a federal judge of the righteousness of their interpretations of the law.

The degeneration of U.S. antitrust enforcement has global ramifications. Starting several decades ago, America urged every nation with running water, and even some without, to enact antitrust laws. With varying degrees of enthusiasm and competence they all complied. Having won that battle, America lost the war as the new converts to antitrust soon embraced Europe's far more interventionist "best practices," which enforcers surreptitiously use to pursue industrial policy rather than competitive markets.

Foreign antitrust enforcers have proven adept at what economists euphemistically call rent seeking. Citing an "abuse of dominance," these enforcers routinely threaten to punish the most successful American multinational companies that compete with or supply their national champions. These foreign enforcers pursue what are, by American standards, implausible theories of liability that most U.S. district judges would quickly discern to be unsupportable by facts and sound economic analysis. Of course, everyone understands that the substantive merits of those antitrust theories are irrelevant to the real game that these foreign enforcers are playing.

Typically, these foreign enforcers also deny American companies the due process that the U.S. Constitution would guarantee a defendant in any American courtroom. For example, according to the *Financial Times*, the U.S. company InterDigital, which licenses its portfolio of standard-essential patents to manufacturers of wireless devices, was warned by China's National Development and Reform Commission (NDRC) in December 2013 that any executives or legal representatives who attended a meeting due to take place in Beijing that month to defend the company's practices in connection with an antitrust investigation of the pricing of InterDigital's patent licenses might be detained or arrested.[2]

The latest example of rent seeking by a foreign antitrust enforcer occurred in December 2016, when the Korean Fair Trade Commission (KFTC) imposed an $865 million fine on Qualcomm, the U.S. pioneer in cellphone technology.[3] The decision consists of a 27-page press release that

[2] *See* Richard Waters, *China Arrest Threat for Staff of US Patent Group*, Fin. Times, Dec. 17, 2013.

[3] *See* Press Release, Qualcomm Inc., Qualcomm Responds to Announcement by Korea Fair Trade Commission (Dec. 27, 2016), https://www.qualcomm.com/news/releases/2016/12/27/qualcomm-responds-announcement-korea-fair-trade-commission (linking to unofficial English translation of KFTC

resembles a PowerPoint presentation. The actual order has yet to be written and might—or might not—rely on the same reasoning. Intellectually, the press release reveals a fundamental misunderstanding of the legal and economic principles that properly motivate antitrust law. Politically, the press release confirms how America's trading partners exploit antitrust enforcement to pursue industrial policy, for the KFTC acknowledged the assistance of four companies it called "Major Interested Parties Participating in the Case Examination," the most prominent being Korea's national champion, Samsung. Could Qualcomm possibly have been treated any worse if America had not entered into the Korea-U.S. Free Trade Agreement?

Antitrust enforcers in countries like Korea and China are an even bigger threat to American interests than these cases might initially suggest. The ease with which one can flagellate an American multinational before a foreign antitrust authority can corrode the rule of law *within* the United States. It is tempting for American antitrust enforcers to encourage their foreign counterparts to prosecute American multinationals under more parsimonious standards of due process and more invasive theories of antitrust liability than American law would ever permit. Often the business practice being investigated is one that the American multinational employs in every country throughout the world and cannot feasibly vary from one nation to another. Consequently, the practical economic effect of the prosecution of the American multinational by the foreign antitrust authority can be to produce a result having extraterritorial effect throughout the world—even in the United States, where the conduct is unquestionably lawful.

Here in America, President Obama's Antitrust Division, encouraged by several Silicon Valley giants, aggressively sought to suppress the price that those companies needed to pay to use U.S. patents that are essential to manufacturing smartphones and other mobile devices. The Division's problem, however, was that under no legitimate understanding of American antitrust law had the patent owners done anything remotely unlawful.

So the Antitrust Division pivoted from being an enforcer of U.S. antitrust law to being a global industrial planner that favored the business model of users of standard-essential patents and disfavored the business model of companies that offered to license their portfolios of such patents. The Antitrust Division then concocted and disseminated soft law in the form of speeches and business review letters that favored the economic interests of

press release dated Dec. 28, 2016). The fine is 1.03 trillion South Korean Won, which approximates $865 million at the exchange rate applicable on the date of the KFTC's press release.

the Silicon Valley giants.[4] Such edicts circle the globe in a mouse click and abet antitrust enforcers in Korea and China, as well as Europe.[5]

Just as Henry II asked in the presence of his barons, "Will no one rid me of this troublesome priest?," an Antitrust Division that believes that the ends justify the means is easily tempted to express to its confrères in Europe and Asia its exasperation that American law denies it the muscle to get the job done. Did President Obama's Antitrust Division encourage other nations to direct their incoherent theories of antitrust liability and their autocratic brand of due process on InterDigital, Qualcomm, and other American companies licensing U.S. patents to smartphone manufacturers in China or Korea? In the same press release announcing that it would fine Qualcomm $865 million, the KFTC also officially acknowledged Apple and Intel for their help.

By executive order, you should instruct your administration that no official of the U.S. government may aid a foreign antitrust authority (1) that seeks to prosecute an American company doing business in its jurisdiction on a theory of "abuse of dominance" that would be unlikely to withstand a motion to dismiss if instead pleaded under U.S. antitrust law in an American court or (2) that employs investigatory or judicial procedures that lack the fundamental fairness that American justice requires.

Finally, you should appoint to the Antitrust Division and the FTC only persons who are willing to bear the burden of proving in federal court that the interpretation of antitrust principles that they espouse deserves to be called the law of the United States.

Sincerely,

J. Gregory Sidak

[4] *See* J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 Geo. L.J. Online 48 (2015); J. Gregory Sidak, *Testing for Bias to Suppress Royalties for Standard-Essential Patents*, 1 Criterion J. on Innovation 301 (2016).

[5] *See* J. Gregory Sidak, *How Commissioner Vestager's Mistaken Views on Standard-Essential Patents Illustrate Why President Trump Needs a Unified Policy on Antitrust and Innovation*, 1 Criterion J. on Innovation 721 (2016).