

Efficiency Dept. Should Consolidate Antitrust Enforcement

By **Susan Braden** (November 13, 2024, 8:19 PM EST)

In 1978, former President Jimmy Carter established the National Commission for the Review of Antitrust Laws and Procedures to recommend ways to expedite litigation, improve remedies, and review certain immunities and exceptions.

As the late Arthur Austin, my former antitrust law professor at Case Western Reserve University School of Law, observed, however, the commission was largely unsuccessful because it ignored an underlying problem.

Austin wrote that "Despite strong public support and high esteem among politicians, antitrust is a failing institution, collapsing under the weight of self-created chaos and inefficiency. Inscrutable decisions make it difficult for firms to distinguish 'safe' methods of competition from illegal conduct. Litigation is a mess."^[1]

Sound familiar in 2024? Just think of the Federal Trade Commission's recent, ill-conceived assault on Microsoft Corp.'s acquisition of the video game firm Activision Blizzard and Meta Platforms Inc.'s interest in Within, a virtual reality company. Fortunately, the federal courts struck down the FTC's use of the public fisc to preserve competition in these marginal recreation markets.

Of course, much substantive progress in antitrust analysis has been made since 1978.^[2] But each new class of political appointees seems compelled to issue a revised, improved set of merger guidelines and other policy initiatives, leaving American business leaders with compliance whiplash,^[3] while ignoring the obvious need to make the basic structural change required to ensure efficient and accountable enforcement.

Simply put — if the full weight of the federal government is required to intervene in private economic activity, with potential global implications, that decision should only be made by the executive branch.

And, as a matter of sound management, there is no rational justification for American taxpayers to continue to fund two separate federal entities and bureaucracies to enforce antitrust and competition laws.

That is why the new Department of Government Efficiency should create a task force to recommend the consolidation of antitrust enforcement.

The task force should have the specific charge of drafting legislation transferring the authority of the



Susan Braden

Federal Trade Commission's Bureau of Competition, its budget, and relevant lawyer and economic staff to the Antitrust Division of the U.S. Department of Justice, accountable to the executive branch.

The authority of the FTC's Bureau of Consumer Protection, its budget, and relevant lawyer and economic staff should be transferred to the Consumer Product Safety Commission, accountable to Congress.

The task force members — no more than 15 — should not be currently affiliated with law firms, with the inherent conflict of interest issues, but alumni of the relevant agencies or former U.S. Senate staff.

The task force should prepare draft legislation and a short report to the new Department of Government Efficiency within four months for its consideration. There is absolutely no reason why the department needs to wait until July 2026 to issue recommendations en masse if individual ones can be considered and implemented sooner.

A lesson from the past is worth mentioning on this point. In 1981, David Stockman, President Ronald Reagan's then-director of the U.S. Office of Management and Budget, appeared before the U.S. House of Representatives Government Operations Consumer Subcommittee. There, he proposed a \$23 million cut in the FTC's funding, eliminating its antitrust authority in three years, reducing the FTC staff by 25% and closing all 10 regional offices citing that the FTC "has adventured into uncharted waters, looking for new causes, new doctrines, and more influence." [4]

Stockman's off-the-cuff remarks came to naught, as an anonymous administration official was quoted in the New York Times as saying at the time: "[He's] way out in front on this one." [5]

The task force suggested here properly would submit its recommendations to the Department of Government Efficiency regarding legislation to consolidate antitrust enforcement authority within the executive branch, as a matter efficient and prudent management, for President-elect Donald Trump's decision.

Subsequent funding of staff required either in Washington, D.C., headquarters or field offices, ultimately would be left to Congress after consulting with the agencies.

Susan G. Braden served as a judge in the U.S. Court of Federal Claims from 2003-2017 and was designated chief judge from 2017 until her retirement in 2019. From 1973-1980, she was a senior trial attorney in the DOJ's Antitrust Division, and from 1980-1984, she was a senior attorney adviser and counsel to two FTC chairmen.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Arthur D. Austin, "National Commission for the Review of Antitrust Laws and Procedures: Reports on Symptoms but Ignores Causes," 54 Notre Dame L. Rev. 873 (1979).

[2] See e.g., William E. Kovacic, "The Modern Evolution of U.S. Competition Policy Enforcement Norms," 71 Antitrust Law Journal No. 2, 377 (2003).

[3] Alden Abbott, "Time For A Merger Policy Reset," Forbes (Nov. 8, 2024) (observing that the 2023

Merger Guidelines increased uncertainty by suggesting "a wide variety of dubious potential theories . . . in tension with the rule of law" and imposed a "stealth tax" on contemplated mergers or aborting mergers that would be otherwise lawful "for fear of steep compliance costs.")

[4] "Stockman Attacks FTC, CPSC Policies," Washington Post (March 16, 1981).

[5] "Cut In Antitrust Budget Provokes A Dispute," New York Times (Feb. 26, 1981).