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ARTICLE

Politics, Policy, and Antitrust: Revisiting the ITT Affair

Donald I. Baker[*] *& Mark J. Niefer*[†]

[*] Donald Baker is Founding Partner Emeritus at Baker & Miller PLLC and was formerly Assistant Attorney General in Charge of the Antitrust Division, U.S. Department of Justice. At the time of the events discussed in this Article, he was a member of the Antitrust Division career staff serving as Director of Policy Planning and then Deputy Assistant Attorney General for policy. This Article relies in part on his recollections from his DOJ service.

[†] Mark Niefer is an Adjunct Professor of Law at Antonin Scalia Law School - George Mason University. He was a longtime attorney at the Antitrust Division, U.S. Department of Justice, serving in a variety of roles.

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Introduction

At a time when so much public attention is focused on the law enforcement activities of the U.S. Department of Justice ("DOJ"), we find it timely to go back to the Watergate era to reconsider what has long been accepted as being the biggest political scandal in U.S. antitrust enforcement history, and what was done in response to it.

In February 1972, syndicated columnist Jack Anderson alleged that the DOJ had settled three major antitrust lawsuits against International Telephone and Telegraph Co. ("ITT") in exchange for a contribution of $400,000 toward the 1972 Republican National Convention to be held in San Diego.[1] The DOJ official with primary responsibility for negotiating the ITT settlements claimed that he had never even heard of this alleged campaign contribution until he read the Anderson column in the papers, and there was no contrary evidence. Nevertheless, this allegation gained serious political momentum with the dramatic emergence of the larger Watergate scandal four months later and caused lasting damage to the DOJ's institutional reputation.

Although many others have told this story,[2] we want to consider an aspect of it that has largely been overlooked, which turns out to be surprising and positive. Our account of the ITT affair draws on the historical record and the recollections of one of us (Baker) who was at the DOJ as a senior member of the Antitrust Division staff during the ITT affair.

During the early years of the Nixon administration, in the late 1960s and early 1970s, the Antitrust Division had been pursuing an aggressive, high-visibility enforcement program to block major conglomerate mergers, even though the President and his White House advisors clearly opposed this effort. Moreover, the Attorney General ("AG") clearly supported the anti-conglomerate efforts—even though he knew of the President's opposition from the start.

Our reconsideration of the ITT affair leads us to believe that the key decision maker at the DOJ, Assistant Attorney General for Antitrust, Richard McLaren, likely acted independent of any purported political motives when he negotiated a settlement that the DOJ staff clearly supported. Although a few contrary inferences are clearly possible, we believe the weight of the evidence suggests that McLaren's efforts to settle the ITT cases were driven by his heartfelt desire to curb the expansive efforts of the major conglomerates.

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[1] *See* Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, WASH. POST, Feb. 29, 1972, at B11. Shortly thereafter he published two more columns about the alleged quid pro quo. *See* Jack Anderson, *Kleindienst Accused in ITT Case*, WASH. POST, Mar. 1, 1972, at B15; Jack Anderson, *Contradictions Cited in ITT Case*, WASH. POST, Mar. 3, 1972, at D15.

[2] The most comprehensive treatment of the ITT merger cases is ROBERT M. GOOLRICK, PUBLIC POLICY TOWARD CORPORATE GROWTH: THE ITT MERGER CASES (1978).

This story is particularly timely because there is so much current discussion of efforts by President Trump and his White House staff to direct DOJ enforcement efforts across the board. Recent press reports suggest that such efforts have gotten closer to the Antitrust Division. For example, it has been reported that the Attorney General's office overruled the Division's plan to litigate a merger between Hewlett Packard Enterprises and Juniper Networks, two of the top three competitors in a market for enterprise wireless networking solutions.[3] Instead of litigating, as appeared to be the Division's original plan, the AG's office directed the Division to accept a settlement that its own staff regarded as weak because it required only minor divestitures. In addition, two of the Division's top political officials were dismissed for insubordination, apparently because they opposed the proposed settlement too vigorously. Press reports further suggest that consultants close to the White House facilitated the seemingly weak settlement.[4] This is a serious matter of concern; the alleged actions of the AG's office go well beyond anything that we ever saw during our respective periods of service at the Antitrust Division, totaling nearly four decades.

These recent events recall the ITT affair, which also raised serious concerns about the credibility of the DOJ enforcement process. As we discuss below, our reconsideration of the ITT affair provides an example of an Assistant Attorney for Antitrust acting courageously to press ahead with an antimerger enforcement program in the public interest (as he saw it) despite extreme pressure to the contrary from the White House. Whether today's antitrust leaders would be willing to do something similar is an open question that only history will be able to answer.

I. The Key Players at Nixon's DOJ: Mitchell, Kleindienst, and McLaren

The ITT affair could never have occurred if the DOJ leadership had not agreed among themselves to pursue a strong, independent campaign to block conglomerate mergers rather than follow the White House's belief that antitrust law should not be used for this purpose. There were three key DOJ decision makers in this effort.

President Nixon's top two DOJ appointees had been deeply involved in his 1968 presidential campaign. *Attorney General John Mitchell* had overseen the entire campaign, and he had been a partner with Nixon in

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[3] For an overview of the DOJ's complaint, see *Justice Department Sues to Block Hewlett Packard Enterprise's Proposed $14 Billion Acquisition of Rival Wireless Networking Technology Provider Juniper Networks*, U.S. DEP'T OF JUSTICE (Jan. 30, 2025), https://perma.cc/M4PJ-UBKF.

[4] *See* Dave Michaels & Annie Linskey, *MAGA Antitrust Agenda Under Siege by Lobbyists Close to Trump*, WALL ST. J. (Aug. 6, 2025, at 18:19 ET), https://perma.cc/5RD8-46LK.

their New York City law firm.[5] *Deputy Attorney General ("DAG") Richard Kleindienst,* an unsuccessful Republican candidate for Governor of Arizona in 1964, had overseen the Nixon campaign there.[6] Despite their support for the President and his political goals, Mitchell and Kleindienst found themselves at odds with the White House when they cast their lot with the third key player in this drama: *Assistant Attorney General ("AAG") for Antitrust, Richard McLaren*.

AAG McLaren had a totally different background than Mitchell and Kleindienst. He was "a corporate lawyer from Chicago with no political background."[7] A highly regarded antitrust litigator, he had recently served as Chairman of the American Bar Association's Antitrust Section. His prior career suggested he would be an effective professional leader of the Antitrust Division staff and a centrist on antitrust policy.[8] Instead, McLaren turned out to be a man with a mission. During and shortly after his Senate confirmation hearing in early 1969, it quickly became clear that McLaren was concerned about the economic and social effects of the ongoing conglomerate merger wave and that he was determined to find an antitrust solution.[9] Almost immediately upon assuming office—and

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[5] For an account of the relationship between Mitchell and Nixon, including their formation of the Nixon Mudge Rose Guthrie Alexander & Mitchell law firm and Mitchell's role in Nixon's 1968 presidential campaign, see JAMES ROSEN, THE STRONG MAN: JOHN MITCHELL AND THE SECRETS OF WATERGATE 30–58 (2008).

[6] Kleindienst described his role in Nixon's 1968 presidential campaign and his relationship with Mitchell in RICHARD G. KLEINDIENST, JUSTICE: THE MEMOIRS OF ATTORNEY GENERAL RICHARD KLEINDIENST 39–57 (1985).

[7] ROSEN, *supra* note 5, at 71; *see also* GARRETT M. GRAFF, WATERGATE: A NEW HISTORY 130 (2022) (McLaren was "the lone non-Nixon aide or losing politician among the [DOJ's] eight senior officials. He appeared beyond reproach. . . .").

[8] McLaren claimed that he joined the Nixon administration on three conditions: He would enforce the antitrust laws vigorously; he would follow his personal beliefs about conglomerate mergers; and he would decide all cases on the merits regardless of politics. *Richard G. Kleindienst—Resumed: Hearing on Nomination of Richard G. Kleindienst, of Arizona, to be Attorney General Before the S. Comm. on the Judiciary*, 92nd Cong., pt. 2, 116–17 (1972) [hereinafter *Kleindienst Nomination Hearing*].

[9] In his January 1969 nomination hearing, McLaren expressed a belief that section 7 of the Clayton Act could reach pure conglomerate mergers, describing them as "a matter of great concern." *Department of Justice Nominations: Hearing on the Nominations of Richard G. Kleindienst to Be Deputy Attorney General; William H. Rehnquist to Be Assistant Attorney General, Legal Counsel; Will Wilson to Be Assistant Attorney General, Criminal Division; Richard W. McLaren to be Assistant Attorney General, Antitrust Division; Johnnie M. Walters to Be Assistant Attorney General, Tax Division; William D. Ruckelshaus to Be Assistant Attorney General, Civil Division; Jerris Leonard to Be Assistant Attorney General, Civil Rights Division Before the S. Comm. on the Judiciary*, 91st Cong. 36–37 (1969). In March 1969 testimony before Congress, he elaborated on his views, stating that he was unwilling to wait for legislation dealing with conglomerate mergers: "I feel the matter is too pressing to wait, and we are willing to risk losing some cases to find out how far Section 7 will take us in halting the current accelerated trend toward concentration by merger and—as I see it—the severe economic and social dislocations attendant thereon." Richard W. McLaren, *Merger Policy Statement by the Assistant Attorney*

with support from AG Mitchell, who ran interference with the White House for him—McLaren began to pursue an extremely aggressive pro-enforcement agenda vis-à-vis conglomerate mergers, which included filing three lawsuits seeking to block ITT's merger with Canteen Corporation and its proposed mergers with Grinnell Corporation and Hartford Fire Insurance Company.[10]

Mitchell recused himself from the ITT cases because of his law firm's prior representation of ITT.[11] Thus, it largely fell to DAG Kleindienst to oversee McLaren's ITT efforts and to receive occasional communications from the White House criticizing them. These included an April 1971 phone call when the President ordered Kleindienst to drop the ITT cases, which later led to questions about whether the White House was improperly interfering with antitrust enforcement and thus feeding into Jack Anderson's allegation that the cases had been settled for political reasons.[12]

II. The Key Events in the Saga

The ITT affair unfolded over the course of four years in a series of events that occurred in steady succession:

* In Spring 1969, shortly before the DOJ filed its cases seeking to block ITT's acquisitions of Hartford Fire Insurance Company, Grinnell Corporation, and Canteen Corporation, President Nixon wrote to AG Mitchell expressing concerns about anti-conglomerate merger enforcement.[13]

* In late 1970 and mid-1971, two of the three ITT cases yielded losses for the DOJ. Two district courts soundly rejected its *Grinnell* and *Canteen* cases, while the *Hartford* case, however, had yet to reach trial.[14]

General, Antitrust Division U.S. Department of Justice, House Ways and Means Committee, House of Representatives on March 12, 1969, 1 J. REPRINTS ANTITRUST L. & ECON. 201, 205 (1969).

[10] *See* discussion *infra* Section VI.

[11] Despite his purported recusal, which he testified about before Congress, Mitchell continued to discuss the ITT mergers with Kleindienst and the White House. *See* H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 646 ("Mitchell testified that he had recused himself in the ITT cases. In fact, Mitchell had been involved in contacts with ITT officials concerning the cases during 1970 and had various discussions with White House staff members about the ITT antitrust cases." (citation omitted)).

[12] *See, e.g.*, *I.T.T. Is Accused of Having Tried to Influence U.S. Policies in Latin America*, N.Y. TIMES, Mar. 23, 1972, at 16.

[13] *See infra* text accompanying notes 36–37.

[14] Hartford, 306 F. Supp. 766, 799–802 (D. Conn. 1969) (holding at only the preliminary injunction stage that the Government had not established reasonable probability of success in the Hartford and Grinnell cases); Grinnell, 324 F. Supp. 19, 55 (D. Conn. 1970) (dismissing the

* During the summer of 1971, AAG McLaren negotiated settlements for all three ITT mergers, which were then filed with the courts.[15]

* In early 1972, Mitchell announced his intention to resign as Attorney General to head up Nixon's 1972 re-election campaign, with Kleindienst nominated to take his place. Kleindienst's initial Judiciary Committee hearings regarding his nomination were held in late February 1972.[16]

* Within days of the Kleindienst hearings concluding, Anderson published his "ITT campaign contributions" column.[17] Kleindienst then asked that his hearings be reopened to defend himself against allegations made in the column. During the second set of hearings, which began in March 1972, Kleindienst, McLaren and others testified about Anderson's alleged payoff.[18]

* In June 1972, Kleindienst was confirmed as AG by the Senate.[19] Soon after that, the infamous Watergate break-in was discovered, which marked the beginning of the unraveling of the Nixon Presidency.[20]

* The ITT affair came to an end in 1973, when the Watergate Special Prosecutor's Office investigated Kleindienst's and McLaren's testimony at the confirmation hearing, ultimately charging only Kleindienst with a misdemeanor for failure to provide full and complete testimony about his conversations with Nixon about the ITT cases.[21]

Government's complaint in the Grinnell case); Canteen, No. 69 C 924, 1971 WL 541, at *36–37 (N.D. Ill. July 2, 1971) (dismissing the Government's complaint in the Canteen case).

[15] *See infra* text accompanying notes 61–64.

[16] *See* Fred P. Graham, *Mitchell Quits; Nomination Goes to Kleindienst*, N.Y. TIMES, Feb. 16, 1972, at 1.

[17] *See* Anderson, *supra* note 1, at B11.

[18] *Kleindienst Nomination Hearing*, *supra* note 8, at 115–16.

[19] John W. Finney, *Senate Backs Kleindienst in Attorney General Post*, N.Y. TIMES, June 9, 1972, at 1.

[20] For a description of the Watergate break-in and its consequences for the Nixon administration, see generally GRAFF, *supra* note 7.

[21] Anthony Ripley, *$100 Fine, 30-Day Term Suspended for Kleindienst*, N.Y. TIMES, June 8, 1974, at 65.

III. The Immediate Political Consequences of Anderson's Allegations of a Quid Pro Quo

The public became aware of the ITT affair with the publication of Anderson's column and the reopening of Kleindienst's confirmation hearings in March 1972. The first of three Anderson columns on the ITT settlements appeared on February 29, only five days after the Judiciary Committee had voted unanimously to advance Kleindienst's nomination to the full Senate. Concerned about Anderson's allegations, Kleindienst requested that the Judiciary Committee reopen his hearing to defend himself and the administration from charges of impropriety.[22] The resulting reopened hearings lasted for twenty-one days, running from March 2 through April 27, 1972.

McLaren was brought back from Chicago, where he was now serving as a newly confirmed District Judge, to testify alongside Kleindienst over the course of four days. Both were sworn in and required to testify under penalties of perjury. McLaren testified that, "I knew nothing about any of this whole business, or even that the convention was going [to be held in San Diego] until I read about it in the newspapers where someone tried to make a connection between an alleged payment and the settlement of the case."[23] Kleindienst testified that he first heard the rumor at the end of 1971, four months after the settlements had been filed in court.[24] However, Kleindienst ducked questions about his communications with the White House concerning the ITT cases (which would get him in a lot of trouble with the new Watergate Special Prosecutor a year later).[25] Despite Anderson's allegations, the Senate confirmed Kleindienst as AG on June 8, 1972.

Understanding why the ITT affair gained so much political and media traction requires recalling the public attention and political concern that conglomerate mergers had been generating well before the DOJ's challenges of ITT's three mergers. The ITT prosecutions were more than just another "antitrust" news story buried in the back pages of the Wall Street Journal or the New York Times.

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[22] KLEINDIENST, *supra* note 6, at 103–04.

[23] *Kleindienst Nomination Hearing*, *supra* note 8, at 116.

[24] *Id.* at 100 ("I never talked to a person on the face of this earth about any aspect of the San Diego Republican National Convention or the I.T. & T. Corp. I never talked to Mr. Mitchell about any aspect of this case.").

[25] *See* H.R. REP. NO. 93-1305, *supra* note 11, at 253–55 (describing Kleindienst's testimony, concluding that "both Kleindienst and former Attorney General John Mitchell gave false testimony regarding the President's involvement in the ITT antitrust cases. Clearly, Kleindienst and Mitchell were protecting the President.").

IV. Political Concerns About Conglomerate Mergers at the Time

The antitrust political situation in the 1960s concerning conglomerates was somewhat analogous to today with the serious public concern and debate about the major social and economic impacts of large digital platforms like Facebook and Google. Conglomerate firms were the subject of intense media attention and public scrutiny, as the ongoing conglomerate merger boom was changing the face of many industries.[26] Big, often-distant acquirers were buying up independent businesses to create large, diverse corporate empires—in transactions that, on their face, seldom appeared to have any anticompetitive consequences for consumers. These developments generated active debates among politicians, law enforcers, and policymakers about their political, social, and economic effects; and about whether the antitrust laws could be used to rein them in.[27] The debate went on within the Nixon administration as well—with McLaren publicly advocating strong enforcement, while the White House seemed to favor caution.

Conglomerate mergers are neither horizontal (between competitors) nor vertical (between customers and suppliers).[28] When McLaren arrived at the DOJ in early 1969, the case law was fairly favorable to the government on horizontal and vertical mergers: section 7 of the Clayton Act,[29] the primary anti-merger statute, could be used to stop many of them, as long as they were shown to lessen competition in a market. On the other hand, the law on conglomerate mergers under section 7 was sparse and unsettled. In some limited circumstances, the case law clearly indicated that conglomerate mergers could be challenged under section 7, but the law was ambiguous in most other circumstances.[30]

The pro-antitrust Supreme Court of mid-1960s allowed the Federal Trade Commission to use section 7 to block a conglomerate merger when (i) it was likely to eliminate the "potential competition" of the acquiring company as a future entrant in a market dominated by the other merging party,[31] or (ii) the merger would create a risk of post-merger "reciprocity"

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[26] *See, e.g.*, John J. Abele, *Giant Mergers Are Stirring Up Giant Questions*, N.Y. TIMES, Oct. 6, 1968, Section 3, at 1 (describing a "continuing and growing debate in the worlds of finance and Government about the merits of conglomerate corporations").

[27] *See generally, e.g.*, *Economic Concentration: Hearing Pursuant to S. Res. 40 Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary,* 91st Cong. pt. 8 (1970) (gathering academics, business leaders, and law enforcers to discuss the impact of mergers).

[28] *See, e.g.*, Jeffrey Church, *Conglomerate Mergers*, *in* 2 ISSUES IN COMPETITION L. AND POL. 1503, 1506 (2008); Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1314 (1965).

[29] 15 U.S.C. § 8.

[30] *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 578–81 (1967) (recognizing potential competition doctrine).

[31] *Id.*

(*i.e.*, a situation in which a merger partner could pressure its customers or suppliers to agree to purchase goods or services from the other partner).[32]

The still open question in 1969 was whether Section 7 could or should be used to block other transactions, which were generally referred to as "pure" conglomerate mergers. At his confirmation hearing, McLaren had testified that he believed that section 7 could reach pure conglomerate mergers but conceded that the law was unsettled.[33]

President Nixon and his White House economic advisors thought otherwise. Early on, the administration formed a task force to consider antitrust law and policy, chaired by future Nobel Prize-winning economist George Stigler of the University of Chicago. The Stigler Task Force report, made public in May 1969, dismissed anticompetitive concerns about conglomerate mergers as "makeweights."[34] It criticized the notion that conglomerate mergers should be attacked "on the basis of nebulous fears about size and economic power."[35] And it concluded that "[v]igorous action [against conglomerates] on the basis of our present knowledge is not defensible."[36]

The views expressed in the Stigler report were consistent with those of President Nixon. In a note he wrote to AG Mitchell in March 1969, the President indicated that he agreed with a *Barron's* editorial that characterized conglomerates as "corporate scapegoats," and that stated "[t]he real villains happen to be the U.S. trustbusters."[37] Nixon asked Mitchell to "[k]eep a very close watch on [the trustbusters]. They tend, at times, to be anti-business professionals."[38] Whether Nixon's criticisms were ever conveyed to McLaren by Mitchell seems doubtful; and even if they were, they seem to have done little to dissuade McLaren or Mitchell from pursuing their campaign against conglomerate mergers.

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[32] FTC v. Consol. Foods Corp., 380 U.S. 592, 594 (1965) (recognizing reciprocity as "one of the congeries of anticompetitive practices at which the antitrust laws are aimed").

[33] *Department of Justice Nominations, supra* note 9, at 36. McLaren indicated that until it was clear that section 7 could not reach pure conglomerate mergers ("until we stumble," was how he put it), he would not seek legislation to ensure that it did. *Id.* at 37.

[34] 115 CONG. REC. 15936 (1969) (Report of President Nixon's Task Force on Productivity and Competition). The Task Force was heavily weighted toward University of Chicago scholars who generally were hostile toward expansive antitrust doctrines, particularly in the merger area. In addition to Stigler, Richard Posner and future Nobel Prize-winner Ronald Coase, both of the University of Chicago, were among its nine members. Coase wrote the Task Force working paper on conglomerate mergers, Stigler the working paper on reciprocity. *Id.* at 15938–39.

[35] *Id.* at 15936.

[36] *Id.*

[37] ROSEN, *supra* note 5, at 184.

[38] *Id.* at 184–85.

V. The Forceful Antitrust Campaign Against Conglomerate Mergers by Mitchell and McLaren

McLaren's very different view and his aggressive agenda to block large conglomerate mergers came right from his heart, as he made very clear to his new colleagues in the Antitrust Division (Baker had recurring conversations on this subject with McLaren, who was a very active advocate for ideas that he believed in). As someone from middle America, McLaren believed that solid regional companies were being gobbled up by distant conglomerates and far-off technocrats, who lacked the local roots of their hometown predecessors, were assuming their decision-making powers. Throughout the spring and summer of 1969, he and Mitchell continued to voice their concerns about the effects of conglomerate mergers on competition, economic concentration, and local communities.

In June 1969, Mitchell delivered a major speech that made it very clear that the DOJ was serious about trying to curb the conglomerate merger boom. Remarkably populist in tone, and delivered in Savannah, Georgia—not, as he pointed out, New York, Chicago, or Los Angeles—his speech laid out the DOJ's concerns about conglomerates and concentration. Warning that the top 500 industrial firms controlled seventy-five percent of all manufacturing assets, he told the audience that "[t]he danger that this super-concentration poses to our economic, political and social structure cannot be overestimated."[39] "We do not want," he said, "our middle-sized and smaller cities to be merely 'branch store' communities; nor do we want our average consumers to be 'second class economic citizens.'"[40]

In light of the economic and non-economic effects of conglomerates, the DOJ, said Mitchell, would likely challenge any merger among the top 200 manufacturing firms, and it probably would challenge any merger by one of the top 200 firms of any leading firm in a concentrated industry.[41] A decision to challenge such mergers would not depend on whether there was any direct competition between the merging firms; all that would matter, according to Mitchell, was the relative size of the acquiring and acquired firms. These standards went well beyond anything DOJ had proposed in the past, including the Johnson administration's 1968 Merger Guidelines,[42] and they were clearly contrary to the Stigler Report's recommended focus on identified competitive effects in economically

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39 115 CONG. REC. 15941 (1969) (address by the Hon. John N. Mitchell before the Georgia State Bar Assn., Savannah, Ga., June 6, 1969).

40 *Id.*

41 *Id.* at 15942.

42 *See, e.g.*, *1968 Merger Guidelines*, U.S. DEP'T OF JUSTICE (Aug 4, 2015), https://perma.cc/N796-GXBD; McLaren, *supra* note 9, at 204 (warning the business community against relying on the 1968 Merger Guidelines for conglomerate mergers because "we may sue even though particular mergers appear to satisfy those Guidelines").

defined markets.[43] If Mitchell's standards for challenging mergers had ever been fully implemented, the resulting case load would have vastly expanded the Antitrust Division's merger enforcement agenda, apparently based at least as much on broader social concerns as on identified economic effects.

Going forward, McLaren made it clear that he intended to implement Mitchell's stated policy (which McLaren likely was responsible for drafting). The press widely reported the Mitchell–McLaren enforcement pronouncements, and yet the White House remained publicly silent despite their inconsistency with the President's views.[44] The political reality may have been that the DOJ conglomerate merger enforcement program was popular with the general public and attracting plenty of positive media attention. This may help explain why Anderson's "ITT pay off" story made such a big splash three years later.

VI. The DOJ's Anti-Conglomerate Campaign and the ITT Merger Cases

Early in AAG McLaren's tenure, DAG Kleindienst authorized three DOJ lawsuits recommended by McLaren that challenged three acquisitions by ITT, which was a leading conglomerate and the eleventh-largest corporation in the United States. ITT already was the poster child for the conglomerate merger boom, with CEO Harold Geneen appearing on the cover of Time magazine in September 1967.[45] Between 1961 and 1968, ITT had acquired or merged with over 100 companies operating in a variety of industries, including baking, hotels, real estate, and wood and pulp.[46] The DOJ cases against ITT, filed in late 1969 and mid-1970, concerned its proposed acquisitions of Canteen Corporation (a food service company), Grinnell Corporation (a manufacturer of fire alarms and provider of alarm services), and Hartford Fire Insurance Company (a major property and casualty insurer).[47]

The DOJ's challenge of the Hartford and Grinnell mergers included an aggressive and controversial claim that a merger could violate section

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43 115 CONG. REC. 15938 ("The acquiring of an enterprise by a firm which has interests in other unrelated enterprises, unlike a horizontal merger, has no direct anti-competitive effects. It leaves the competitive situation essentially unchanged. Indeed, the main complaints about the conglomerate relate to other things.").

44 *See, e.g.*, Eileen Shanahan, *Nixon's Antitrust Chief Says Such Companies Face Court Battles*, N.Y. TIMES, Mar. 1, 1969, at 43 (reporting that McLaren indicated "he expected to bring antitrust suits against 'pure' conglomerate mergers").

45 TIME, Sept. 8, 1967, at cover.

46 Hartford, 306 F. Supp. 766, 771 (D. Conn. 1969).

47 Canteen, No. 69 C 924, 1971 WL 541, at *4 (N.D. Ill. July 2, 1971); Grinnell, 324 F. Supp. 19, 24–25 (D. Conn. 1970); *Hartford*, 306 F. Supp. at 772.

7 if it contributed to an increase in concentration in the economy.[48] This *aggregate concentration* theory reflected a belief that conglomerate mergers potentially may reduce competition, including in markets in which merging firms might not ever compete. Perhaps the most extreme version of this argument was articulated by Dr. Willard F. Mueller, who testified for the DOJ during the *Grinnell* merger challenge that "in the wake of a 'trend among large diversified industrial firms to acquire other large corporations', [sic] it can be established that 'anticompetitive consequences will appear in numerous though *undesignated individual "lines of commerce".*[sic]'"[49]

The DOJ lost the *Canteen*[50] and *Grinnell* cases following trial, while the Hartford merger had not made it to trial by 1971. The Northern District of Illinois Court dismissed the *Canteen* merger challenge because the DOJ's proposed "opportunity for reciprocity" claim was insufficient as a matter of law.[51] The District of Connecticut Court, which had both the Hartford and Grinnell mergers, flatly rejected the DOJ's argument in *Grinnell* that section 7 proscribed mergers whose effect may be substantially to increase economic concentration—stating that Section 7 required the DOJ to show an adverse effect on competition in a specific relevant market, which was essentially the view taken by the White House's Stigler Report in 1969.[52]

In short, the DOJ's pure conglomerate merger theories failed miserably in the lower courts, and it had to decide whether to pursue the cases any further. At this point, what had been a courtroom dispute between the DOJ and ITT became an enforcement debate between the DOJ and the White House. McLaren favored appealing the DOJ's *Grinnell* loss to obtain the Supreme Court's final word on pure conglomerate mergers, even though there were serious doubts within the DOJ about the merits of such an appeal. The White House initially opposed the appeal but then apparently relented, giving the DOJ the green light to appeal.[53]

VII. White House Opposition to the DOJ's Campaign: President Nixon's Order to Drop the ITT Cases

After failing to convince DAG Kleindienst to drop DOJ's suits against it, ITT took its case to the White House in the Spring of 1971. The matter came to the attention of the President, who weighed in with DOJ directly, calling Kleindienst to order him to drop the DOJ's proposed appeal of the

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48 *See Hartford*, 306 F. Supp. at 796 (rejecting claim that increased concentration of economic power may serve as a basis for liability under section 7).

49 *Grinnell*, 324 F. Supp. at 52. The court emphatically rejected this argument. *Id.*

50 *Canteen*, 1971 WL 541, at *36–37 (N.D. Ill. 1971).

51 *Id.* at *15.

52 *Grinnell*, 324 F. Supp. at 52.

53 *See infra* note 59 and accompanying text.

Grinnell decision to the Supreme Court. In an April 19, 1971 phone call recorded by the White House, which Kleindienst later referred to as "the most fateful phone call of my life,"[54] Nixon told Kleindienst,

> I'm going to talk to John [Mitchell] tomorrow about my general attitude on antitrust, and in the meantime, I know that he has left with you, uh, the IT & T thing because apparently he says he had something to do with them once. Well, I have, I have nothing to do with them, and I want something clearly understood, and, if it is not understood, McLaren's ass is to be out within one hour. The IT & T thing—stay the hell out of it. Is that clear? That's an order.
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> The order is to leave the goddamned thing alone.[55]

It was clear that Nixon did not like the way McLaren ran the Antitrust Division, telling Kleindienst,

> Now, I've said this, Dick, a number of times, and you fellows apparently don't get the me--, the message over there. I do not want McLaren to run around prosecuting people, [sic] raising hell about conglomerates, stirring things up at this point. Now, you keep him the hell out of that. Is that clear?
>
> Or either he resigns. I'd rather have him out anyway. I don't like the son-of-a-bitch.
>
> . . . .
>
> . . . Don't file the brief.
>
> Your —my order is to drop the God damn thing. Is that clear?[56]

After the call from Nixon, Kleindienst told Mitchell that he would resign if forced to drop the *Grinnell* appeal.[57] He also told Mitchell the withdrawal would cause substantial controversy and that the President did not fully appreciate the consequences of his order.[58] A few days later, Kleindienst claimed, Mitchell told him that the White House no longer objected to the *Grinnell* appeal.[59] The DOJ then filed its jurisdictional statement with the Supreme Court on May 17, 1971, but never finalized its

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54 KLEINDIENST, *supra* note 6, at 90.

55 *Transcript Prepared by the Impeachment Inquiry Staff for the House Judiciary Committee of a Recording of a Meeting Among the President, John Ehrlichman, and George Schultz on April 19, 1971, from 3:03 to 3:34 P.M.*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (Oct. 28, 2002), https://perma.cc/RG94-59DC.

56 *Id.*

57 KLEINDIENST, *supra* note 6, at 92.

58 *Id.*

59 *Id.* at 93 (quoting Mitchell as telling him that "[b]y the way, your friend at the White House says that you can handle your [expletive deleted] antitrust cases any way you want" (second alteration in original)); *see also Statement of Information: Hearing Pursuant to H. Res. 803, a Resolution Authorizing and Directing the Committee on the Judiciary to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Exercise Its Constitutional Power to Impeach Richard M. Nixon, President of the United States of America, Before the H. Comm. on the Judiciary*, 93d Cong., Book V, Pt. 1 372–76 (1974) (transcript of April 21, 1971, between the President and John Mitchell regarding appeal of *Grinnell*).

appeal.[60] Instead, it dropped the appeal and settled all three ITT cases three months later.[61]

VIII. The ITT Settlements

The settlements imposed substantial conditions on ITT, which seems remarkable in retrospect given how poorly the DOJ had fared in court. In order to proceed with the three mergers, ITT agreed to divest assets, abide by behavioral restrictions, and justify future acquisitions before it could consummate them.[62] However, after extensive lobbying of Kleindienst and McLaren by ITT, the *Hartford* settlement allowed it to retain Hartford, which ITT argued was a critical element of any settlement.[63] The settlements were negotiated jointly and filed simultaneously. The Northern District of Illinois and District of Connecticut Courts entered consent judgments in all three cases on August 24, 1971.[64]

The *Grinnell* judgment was the simplest of the three, calling for ITT to divest the Fire Protection Division of Grinnell.[65] The *Canteen* judgment was slightly more complicated: It called for divestiture of Canteen, and it imposed terms on ITT intended to limit its ability to engage in reciprocity.[66] The *Hartford* judgment called for ITT to divest (i) Hartford, or (ii) Levitt and Sons, Avis, and Hamilton Life Insurance.[67] ITT elected to retain Hartford and divest the other three companies.[68] In addition, the judgment imposed restrictive terms on certain future acquisitions by ITT, including a requirement that ITT establish by a preponderance of the evidence that such acquisitions would not lessen competition.[69]

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[60] *Statement of Information*, *supra* note 59, at 365.

[61] United States v. Int'l Tel. & Tel. Corp., 404 U.S. 801, 801 (1971) (August 23, 1971, dismissal of *Grinnell* appeal to Supreme Court).

[62] United States v. Int'l Tel. & Tel., No. 13,319, 1971 WL 548, at *1–3 (D. Conn. Sept. 24, 1971) [hereinafter *Grinnell Final Judgment*]; United States v. Int'l Tel. & Tel. Corp., No. 13,320, 1971 WL 549, at *1–7 (D. Conn. Sept. 24, 1971) [hereinafter *Hartford Final Judgment*]; United States v. Int'l Tel. & Tel. Corp., No. 69-C-924, 1971 WL 550, at *1–5 (N.D. Ill. Sept. 24, 1971) [hereinafter *Canteen Final Judgment*].

[63] For an account of ITT's lobbying efforts to retain Hartford, see GOOLRICK, *supra* note 2, at 134–43.

[64] *Grinnell Final Judgment*, 1971 WL 548, at *1; *Hartford Final Judgment*, 1971 WL 549, at *1; *Canteen Final Judgment*, 1971 WL 550, at *1.

[65] *Grinnell Final Judgment*, 1971 WL 548, at *1.

[66] *Canteen Final Judgment*, 1971 WL 550, at *1, *5.

[67] *Hartford Final Judgment*, 1971 WL 549, at *1.

[68] Robert J. Cole, *I.T.T. Inaugurates Divestiture Plan*, N.Y. TIMES, May 17, 1972, at 63 (reporting on divestiture of Hamilton Insurance); Alexander R. Hammer, *Levitt Set to Buy Back Concern He Sold I.T.T.*, N.Y. TIMES, Feb. 15, 1974, at 43 (reporting on divestiture of Levitt & Sons, Inc.); William D. Smith, *I.T.T., in a Sniff, Takes Avis Plan*, N.Y. TIMES, Dec. 24, 1974, at 25 (reporting on divestiture of Avis).

[69] *Hartford Final Judgment*, 1971 WL 549, at *3.

Baker recalls that he and others in the Antitrust Division at the time generally thought the consent decrees represented a real negotiating success for McLaren.[70] Perhaps, because he really believed in the merits of the DOJ's legal theories, he was able to get some limitations on future acquisitions and significant divestitures from ITT. The strength of the settlements, in the wake of the DOJ's judicial defeats, suggests that McLaren was motivated by the antitrust merits as he saw them rather than any political pressure from the White House or arising from the purported campaign contribution (which he later testified that he had not known about in 1971). That is, the ITT settlements do not appear to have been intended to benefit or appease friends of the White House.

IX. The Consequences of the Alleged Quid Pro Quo for the DOJ

By early 1972, we at DOJ had assumed the ITT cases were successfully behind us. But we proved to be wrong indeed. Anderson's February 29th column, alleging a quid pro quo, suddenly created loud, negative prime-time news about the Antitrust Division.[71] Those of us who knew McLaren well were sure he would never have agreed to dismiss or settle a DOJ case in return for a campaign contribution. Instead, if instructed to do so, he

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[70] Even outside the Antitrust Division, the ITT settlements were viewed as a success. Solicitor General Erwin Griswold, who would have been responsible for the Supreme Court appeal of the *Grinnell* decision, testified under oath that he thought the government ultimately would lose all three ITT merger cases, and that "the settlement was an extremely favorable one." *Kleindienst Nomination Hearing*, *supra* note 8, at 374. Upon its review of the *Hartford* and *Grinnell* final judgments, the Connecticut District Court stated that

> close scrutiny of the proposed decrees reveals that they are carefully tailored to eliminate the aspects of the acquisitions which the original complaints alleged to be illegal. Within the limits of existing statutory law and judicial power, the provisions of the proposed decrees constitute a commendable achievement toward safeguarding the public interest.

United States v. Int'l Tel. & Tel. Corp., No. 13,319, No. 13,320, 1971 WL 599, at *1 (D. Conn. Sept. 24, 1971); *see also* United States v. Int'l Tel. & Tel. Corp., No. 13,320, 1974 WL 822, at *2 (D. Conn. 1974) (noting that Watergate Special Prosecutor Archibald Cox believed that "'the terms of the ITT settlement were a perfectly good bargain from the Government's point of view, the substantive terms of the settlement, and that is the opinion I get from most antitrust lawyers" (emphasis omitted)). In short, based solely on their substance, the IT&T settlements were widely viewed as a success.

Additionally, the Connecticut District Court reconsidered the *Hartford* and *Grinnell* judgments when amici curiae sought to intervene after the alleged quid pro quo came to light and had been the subject of congressional hearings. United States v. Int'l Tel. & Tel. Corp., 349 F. Supp. 22, 24 (D. Conn. 1972), *aff'd mem sub nom.*, Nader v. United States, 410 U.S. 919 (1973). Upon its re-review of the judgment, the court stated, "[t]here has been no showing whatever by the prospective intervenors that the Justice Department acted in bad faith in entering into settlement negotiations with ITT, in negotiating a settlement, or in accepting the consent decrees which were the products of these negotiations." *Id.* at 33.

[71] Based on the personal recollection of Baker. The ITT affair was widely reported by the mainstream press in Spring 1972. *See, e.g.*, *Scandal in Justice*, N.Y. TIMES, April 1, 1972, at 22.

would have resigned and gone home to Chicago to resume his successful career as an antitrust adviser and litigator.

But it was the public's reaction to this eye-catching story—not our reactions on the inside—that would matter then and historically. This was serious bad news for the credibility of law enforcement by the DOJ, and it centered on the Antitrust Division. Internally, Baker and others worried a lot about it.

Given the seriousness of these concerns, it is not surprising that Kleindienst, without even consulting the White House, asked the Judiciary Committee to reopen his nomination hearings to address them. Kleindienst and McLaren testified that the decision to settle the ITT cases was based on the merits, and the cases were settled well before they had ever become aware of an alleged political payoff.[72] The committee also heard testimony from Jack Anderson and his colleague, Brit Hume, as well as from ITT lobbyist Dita Beard, who had written a memo suggesting a quid pro quo.[73] After receiving all this testimony, the Judiciary Committee voted to approve Kleindienst's nomination to be AG, and the Senate confirmed him in a 64 to 19 roll-call vote on June 8, 1972.[74]

A year later, Kleindienst ran into trouble with the Watergate Special Prosecutor because he had been less than forthcoming in his nomination hearings about his conversations with the White House regarding the ITT mergers.[75] Despite multiple questions that seemed to require him to reveal the President's call ordering him to drop the *Grinnell* appeal, Kleindienst did not mention it.[76] Although the Special Prosecutor's office considered charging Kleindienst with a felony for his dodging clearly relevant questions, it eventually decided to charge him with a misdemeanor, to which he pleaded guilty.[77]

Well before Kleindienst's plea in June 1974, the ITT affair had begun to undermine the DOJ's credibility and the morale of Antitrust Division staff. Some staff members raised concerns about Anderson's allegations with their superiors in a series of meetings soon after publication of his column, and some lawyers questioned the decision to settle the ITT mergers despite McLaren's clearly stated preference for seeking Supreme

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72 *See supra* notes 23–24.

73 *Kleindienst Nomination Hearing*, *supra* note 8, at 391–538 (testimonies of Anderson and Hume); *id.* at 733–73 (testimony of Beard); *id.* at 447–48 (reproduction of Beard memo).

74 FINNEY, *supra* note 19.

75 LEON JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 151–55 (1976).

76 *Kleindienst Nomination Hearing*, *supra* note 8, at 157 (Kleindienst stating that he received no suggestions from the White House regarding how to handle the ITT mergers).

77 Ripley, *supra* note 21, at 65. Members of the Special Prosecutor's ITT Task Force wanted to charge Kleindienst with a felony, but Special Prosecutor Leon Jaworski took account of Kleindienst's willingness to come forward with evidence related to other aspects of the Watergate scandal and decided to charge him only with a misdemeanor. Three members of the Task Force resigned in protest. JAWORSKI, *supra* note 75, at 151–55.

Court review.[78] The work of the Antitrust Division also became more difficult as defendants argued that the DOJ cases against them were politically motivated;[79] and as the broader Watergate scandal unfolded, defendants in Antitrust Division cases sought tapes made by Nixon of White House conversations, which had come to light during the scandal.[80] Morale at the DOJ would nosedive even further following the Saturday Night Massacre in October 1972, when more career attorneys (including Baker) considered resigning.[81]

Conclusion

When the "ITT pay off" story first appeared in February 1972, nobody could have anticipated the immense storm of suspicion that was about to descend on the DOJ and the rest of the Nixon administration. The dramatic Watergate break-in was discovered four months later—triggering the unforgettable cascade of ever-more-surprising misdeeds—which led to the appointment of a Special Prosecutor later that year. Nobody was above suspicion, and Mitchell, Kleindienst, and McLaren were swept into the net of suspicion with the ITT settlement payoff story.[82]

As former members of the Antitrust Division staff, we have long been unhappily aware of how the ITT affair seriously harmed the Department of Justice. The alleged quid pro quo helped to create a widespread public suspicion that the decision to bring, terminate, or settle a DOJ antitrust case could sometimes be improperly influenced by a political payment from an interested party. The reputational damage to DOJ—which is still felt today—occurred without any demonstration that McLaren settled the

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78 Robert M. Smith, *Justice Lawyers Question I.T.T. Case*, N.Y. TIMES, April 2, 1972, at 38.

79 Thomas E. Kauper, *Politics and the Justice Department: A View from the Trenches*, 9 J. L. & POL. 257, 262 (1993).

80 *Id.*

81 *Id.* Baker seriously considered writing an op-ed article and resigning but was talked out of doing so by some of his more level-headed colleagues. The "Saturday Night Massacre" occurred on Saturday, October 20, 1973 when President Nixon ordered Attorney General Elliot Richardson to fire Special Prosecutor Archibald Cox; Richardson refused to do so and resigned, followed by Deputy Attorney General William Ruckelshaus, who was fired for refusing to follow the President's order. The bloodbath came to an end when Solicitor General Robert Bork agreed to obey the President by dismissing Cox. For an account of the Saturday Night Massacre, see GRAFF, *supra* note 7, at 505–15.

82 Both Kleindienst and Mitchell were implicated in the broader Watergate scandal. Kleindienst pleaded guilty only to a misdemeanor in connection with his ITT testimony; Mitchell, however, was convicted of conspiracy and obstruction of justice in connection with the broader scandal, serving nineteen months of a two-and-a-half- to eight-year prison sentence. *Mitchell, Last Watergate Prisoner, Is Freed on Parole*, N.Y. TIMES, Jan. 20, 1979, at 6.

ITT mergers based on a political payoff.[83] Appearances alone were enough to cast doubt on the integrity of the DOJ's law enforcement efforts.

Although there have been a few other instances where politics has been alleged to have distorted antitrust enforcement decisions,[84] the ITT affair was extraordinary because no other episode has attracted so much attention or generated so much widespread suspicion about Antitrust Division law enforcement, all without it ever being shown that the allegation was true.

Generally lost in discussions of the ITT affair is the fact that Richard McLaren seems to have acted based on principle, not on politics, in negotiating a surprisingly strong settlement in the wake of DOJ's decisive losses in court. This side of the story seems more hopeful—it is a story of McLaren undertaking active independent law enforcement in the face of serious White House opposition to the effort. That he was never able to secure a Supreme Court review of a pure conglomerate merger theory (which carried the serious risk of failure, thereby creating an adverse precedent compromising any future DOJ conglomerate enforcement efforts) seems a minor shortcoming when compared to the relief he secured in the ITT settlements.

Following President Nixon's resignation in August 1974, several policies were gradually adopted to try to insulate law enforcement from political interference. For example, the AG was no longer required to review and approve every merger challenge or other civil antitrust complaint. The AG was also given greater independence from the White House during the Ford administration. A dramatic example of this newly-recognized independence occurred in late 1974, when AG William Saxbe quickly approved the Antitrust Division's recommendation to file a major lawsuit against AT&T—which eventually led to the breakup of the Bell System—without even informing the White House before it filed the complaint.

In December 1974, President Ford signed into law the Antitrust Procedures and Penalties Act (the Tunney Act), which sought to ensure that consent decrees are in the public interest.[85] The Tunney Act required that a District Court review and approve any DOJ civil antitrust consent

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[83] Critics often refer to the "ITT scandal" whenever they raise concerns that the Antitrust Division may be acting in a "political" manner rather than in the interest of consumers or competition. *See, e.g.*, Steven C. Salop & Carl Shapiro, *Whither Antitrust Enforcement in the Trump Administration?*, *in* 16 ANTITRUST SOURCE at 18 (2017) (raising concerns that the first Trump administration might use antitrust enforcement to punish enemies and reward friends, and noting that such concerns "are not unprecedented," citing the ITT affair).

[84] *See generally* James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577 (2014) (describing multiple examples of presidential involvement in antitrust enforcement decisions).

[85] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (amending 15 U.S.C. § 16).

decree under a detailed regulatory process, and it required that defendants disclose their contacts with the Executive Branch regarding a decree.[86] This legislation brought greater transparency to antitrust settlements in the hope that it would reduce the influence of politics on enforcement decisions. In addition, there was more Congressional interest and oversight of any relationships between the White House and the Antitrust Division regarding pending cases.

Even with the safeguards adopted post-Watergate, however, recent events suggest that the White House can use the tools of law enforcement in ways that undermine the credibility of federal law enforcement.[87] There may be legitimate reasons for the President to express views about or otherwise be involved in law enforcement, since he has the ultimate constitutional responsibility that "[l]aws be faithfully executed."[88] In the case of antitrust, for example, it is reasonable for the President to express his views on broad policy issues (as President Nixon had done in voicing his opposition to McLaren's conglomerate merger program). In such a case, the President is not clearly using DOJ's enforcement powers to punish or reward individuals or businesses for political (as opposed to legitimate law enforcement) reasons. At the other extreme, it clearly would undermine public confidence in the integrity of antitrust law enforcement if the President were to order the DOJ not to prosecute a merger because the merger would benefit a major campaign contributor or close political ally of the President.

In between those two extremes—broad statements about policy and an enforcement order in a particular case—the White House still may be able to engage in considerable mischief. For example, the mere threat of an unwarranted investigation for political purposes might temper the actions of private actors and lead the public to believe that law enforcement is being used in a discriminatory manner. In addition, an actual investigation can be used for no other reason than to harass or punish political enemies. Investigations, once they become public, cast a cloud of suspicion over the individuals or firms involved; and they can lead those investigated to incur considerable costs defending themselves. It clearly would be desirable to limit the ability of the White House to engage in such behavior.

Moreover, there is no reason why the White House should ever be involved in a *criminal* investigation of a suspected antitrust conspiracy (*e.g.*, price fixing, market allocation, or group boycott). The decision whether or not to prosecute any particular individual or enterprise may be close and difficult and actively debated within the Antitrust Division,

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[86] 15 U.S.C. § 16(e)–(g).

[87] *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *Depoliticizing Federal Prosecution*, 100 DENV. L. REV. 817, 824–25 (2023).

[88] U.S. CONST. art. II, § 3.

but the debates are all about the evidence, not policy. The Antitrust Division's ultimate choices are reflected in its final recommendations to the grand jury (where they are almost invariably followed).

There have, of course, been many proposals that seek to limit the political use of law enforcement by the DOJ. Here, we would like to mention one that so far seems to have escaped the notice of many in the antitrust world. One way to reduce the likelihood of the political use of antitrust is to enhance transparency whenever there is a significant departure from the Antitrust Division's normal processes for investigating, litigating, or settling a case. In such circumstances, the DOJ should consider issuing a press release or having a senior official discuss the matter in a speech or Congressional testimony. The Tunney Act was one step toward greater transparency that likely has curbed the risk of the DOJ entering into any patently political settlement.[89] However, we believe more can be done to enhance the transparency of DOJ operations in ways that might further limit the political use of antitrust, without substantially compromising its legitimate law enforcement activities.

When the President (or one of his White House advisers) interferes with the Antitrust Division's exercise of its independent judgment regarding a specific case, it should be publicly disclosed. Consider two examples, both of which happened to involve President Reagan. In the first one, he ordered the Antitrust Division to close a grand jury investigation into an alleged conspiracy involving transatlantic airlines. He did this because the investigation was making the British Prime Minister so angry that it was disrupting diplomacy between the U.S. and its closest European ally. This decision was publicly disclosed, and there were no serious objections to the President's decision to let diplomatic considerations trump the Antitrust Division's independent judgment that the case should proceed.[90]

The second example involved the famous 1982 consent decree breaking up the AT&T telephone monopoly into three separate pieces—the long-distance business (which AT&T would keep), several operating companies to provide local telephone service in different parts of the country, and a communication equipment company (Western Electric).[91] The Department of Defense ("DOD") vehemently objected to breaking up the Bell System on alleged national security grounds; and senior DOD officials went to the White House to urge the President to prohibit the Justice Department from finalizing the consent decree that would

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[89] The current HPE-Juniper merger settlement has not yet been fully considered under the Tunney Act, so we do not know how DOJ may try to explain this controversial settlement.

[90] *See* Stuart Auerbach, *Jury Probe of Airlines Called Off*, WASH. POST (Nov. 19, 1984) https://perma.cc/NJH5-VQXE.

[91] United States v. AT&T Co., 552 F. Supp. 131, 141–42 (D.D.C. 1982) (modifying final judgment), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

mandate the breakup.[92] President Reagan ultimately decided in favor letting DOJ proceed with the decree.[93] Since the result was that the President confirmed the DOJ's independent judgment regarding the litigation and decree, there was less of a need to publicly disclose the President's role in the process, but it still would have been desirable to disclose the President's role in a perfect world.[94]

A look back at the ITT affair serves to remind us that public confidence about the integrity of law enforcement is so fragile. The President bears the ultimate constitutional responsibility for faithfully executing the laws and delegates that responsibility to the DOJ with the expectation that (i) there will be no presidential interference in criminal case management, and (ii) that there will be reasonable transparency concerning any presidential (or White House) involvement in the decisions to bring, try, or settle a significant civil antitrust case. If either one of these conditions is not met (as was the case in the ITT affair), the public would have reason to suspect the credibility of DOJ enforcement efforts. Indeed, even absent proof of any wrongdoing, appearances may call enforcers' credibility and integrity into question.

No set of rules or policies is failsafe; there will always be opportunities for unscrupulous politicians to use law enforcement for improper purposes. It would, for example, be difficult to craft a watertight rule regarding when White House contacts with the Antitrust Division regarding a civil antitrust case should be made public; there simply are too many contingencies and judgment calls that would go into the actual implementation of a transparency policy. At the end of the day, the efficacy of such a policy—and the public's faith in the evenhanded administration of justice—would depend in large measure on the goodwill created by those charged with abiding by it, their candor, and their sensitivity to even the slightest appearance of impropriety. As Baker wrote in 1974, during the darkest days of the Watergate crisis, "[n]obody can *command* public confidence in law enforcement, but we can all work to create conditions which *encourage* it."[95]

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92 *See* Rill & Turner, *supra* note 84, at 590.

93 *Id.* at 591.

94 The full scope of President Reagan's involvement in the AT&T case did not become public until after the consent decree was entered. If the President had intervened and demanded changes, the case for making his involvement public would have been greater.

95 Donald I. Baker, *Antitrust: The Long and Short Perspectives*, CORN. L.F., May 1974, at 10, 10 (1974).