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Pangloss Responds

Daniel A. Crane*

I am afraid that William Shieber and I are speaking past each other. I agree wholeheartedly with his assertion that anyone who believes that political appointees do not exert a considerable influence over the antitrust agencies is naïve. However, *Technocracy and Antitrust*[1] does not advance the Panglossian view that the antitrust agencies are apolitical, if by that we mean that robotic machines devoid of human perspective or ideological commitment churn out scientifically predetermined antitrust results. Instead, my article extends and updates Richard Hofstadter's claim[2] that antitrust has ceased to be a popular political movement, that it has virtually disappeared from national political debate, that it is beyond the view or concern of the average voter, that Presidents and elected officials no longer pay much attention to it, and that the enterprise is largely run by specialized experts. It is in that sense that antitrust has become "technocratic."

To say that antitrust is largely technocratic (although my article also discusses a number of ways in which it is not), is not to say that antitrust cases are devoid of political maneuvering. Indeed, contrary to the impression left by Mr. Shieber, in the article I explicitly acknowledge that there was much political maneuvering in the Microsoft case.[3] I note that "[p]oliticians from the State of Washington (where Microsoft is headquartered) lobbied behind the scenes for Microsoft while politicians from Utah (where Microsoft's rival Novell is located) lobbied against Microsoft" and that "Microsoft lavished its ample resources to make friends and influence people."[4] The important point, however, is that neither political party elevated the *Microsoft* case to a campaign issue and the skirmishing did not track ideological fault lines. Indeed, it is worth noting that Robert Bork, the very portrait of Chicago School conservatism,[5] became a high-profile advocate for Netscape against Microsoft[6] while Democratic politicians from Washington were standing up for their hometown favorite.

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1. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEXAS L. REV. 1159 (2008).

2. Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1966).

3. Crane, *supra* note 1, at 1170.

4. *Id.*

5. On this point, see my book review essay, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV (forthcoming 2009).

6. Ellen Frankel Paul, *Hayek on Monopoly and Antitrust in the Crucible of* United States v. Microsoft, 1 N.Y.U. J. L. & LIBERTY 167, 200–01 (2005).

Mr. Shieber thinks that the best evidence of ideological influences in *Microsoft* is that the Bush Justice Department ended up settling the litigation on terms explicitly rejected two years earlier by the Clinton Administration. However, Mr. Shieber omits to mention a game-changing event that occurred in the intervening years. The D.C. Circuit vacated large portions of the District Court opinion, upheld a number of Microsoft's practices as legal, entirely vacated Judge Jackson's remedy decision, and remanded the case to a new district judge after finding impropriety on Judge Jackson's part.[7] Although the Circuit Court affirmed some important findings of liability against Microsoft, the decision altered the dynamics of the case in Microsoft's favor. In particular, it took away the government's whip hands—a break-up remedy and Judge Jackson.

I do not doubt that the Bush Administration's greater friendliness to big business played a role in the Microsoft settlement and its merger policy. I do not doubt that ideology continues to play a role in antitrust enforcement, that the choice of political appointees matters, and that "conservative" administrations will generally pursue less enforcement than "liberal" administrations. My article did not claim that ideology and politics have no more purchase in antitrust. On the other hand, I think it is also beyond dispute that the ideological chasm in antitrust has narrowed considerably, that antitrust has lost its popular political salience, that inter-administration shifts in enforcement are far less pronounced today than they were during the first half of the twentieth century, and that antitrust today is largely the province of experts.

Whether this is all to the good is another question. I believe it is, but since Mr. Shieber does not raise that question, I will let it rest as well.

7. U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).