Antitrust Enforcement During the Bush Administration—An Economic Estimation

BY JOHN D. HARKRIDER

OVER THE LAST SEVERAL YEARS, there has been a spirited debate about whether merger enforcement has declined during the Bush administration. Those who believe that merger enforcement has declined point both to the decisions of the Antitrust Division of the U.S. Department of Justice (Antitrust Division) not to challenge transactions, such as XM/Sirius and Whirlpool/Maytag, which appeared to raise significant antitrust concerns, and to the significant drop-off in the annual number of requests under the Hart-Scott-Rodino (HSR) Act for additional information or documentary material (Second Requests), as well as the number of consent decrees and litigated merger cases (Challenges or Merger Challenges)[1] since 2001.[2] Others, however, have questioned the usefulness of these anecdotes and statistics, noting correctly that it is difficult to draw any meaningful conclusions about specific cases without access to the confidential documents and data obtained from the parties and industry participants.[3] Furthermore, many have noted that the decline in the number of Second Requests and Challenges coincided with a substantial decrease in merger filings due, in part, to an increase in the HSR filing thresholds on February 1, 2001, and a decline in merger activity after the dot.com bubble burst.[4]

Below I briefly review the statistical evidence presented on this issue to date, noting both evidence supporting and refuting the conclusion that antitrust enforcement has declined since 2001. Next, I present an econometric model utilizing a dataset of more than 200 transactions that received Second Requests between 1996 and 2006. This model is designed to assess whether the likelihood of government challenge differed depending on when the transaction was reviewed (between 1996 and 2000 or between 2001 and 2006) or on whether the transaction was reviewed by the Federal Trade Commission or the Antitrust Division (collectively, the Agencies). Importantly, the model attempts to control for the underlying antitrust risk of a deal by taking into account how the parties allocated the underlying antitrust risk in the merger agreement.

The analysis of these 200 mergers reveals that, all else being equal, transactions reviewed by the Antitrust Division during the Bush administration were approximately 24 percentage points *less* likely to be challenged than transactions reviewed by the Antitrust Division or FTC during the Clinton administration, a result that was statistically significant at the 95 percent confidence interval. On the other hand, all else being equal, transactions reviewed by the FTC during the Bush administration were not less likely to be challenged than transactions in previous years. In addition, the analysis confirms a conclusion reached on a more limited data set:[5] that, regardless of the reviewing agency or administration, transactions setting forth a specific obligation for the buyer to divest assets to obtain approval were approximately 24 percentage points more likely to be challenged, and transactions in which the buyer has the right to refuse to make divestitures were approximately 13 percentage points less likely to result in divestitures. Both of these results are statistically significant at either the 95 percent or 90 percent significance level.

While risk-shifting provisions in merger agreements are correlated with antitrust risk, they are imperfect controls. As such, the omission of more direct controls for antitrust risk may bias the results of the regressions. Put another way, the inclusion of the contract provision should reduce the potential bias as compared to not including a control variable for the risk-shifting provision, but may not entirely eliminate it. Furthermore, the risk-shifting provision in the merger agreement fundamentally affects the bargaining position of the parties vis-à-vis the government. Thus, the fact that the Antitrust Division during the Bush administration was less likely to challenge transactions containing these clauses than either the FTC or the Antitrust Division during the Clinton administration may simply reflect a reluctance to use this bargaining power to obtain relief that it otherwise would not seek. Thus, the estimated effect of the risk shifting provisions will reflect a mixture of various factors.

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The Controversy

At the outset it is useful to question why there should be a controversy at all. Indeed, why would it be surprising that a change in administration would cause a change in enforcement behavior? After all, there is no serious dispute that the Bush administration brought different enforcement activity in civil rights[6] and environmental protection,[7] for example.

There are, however, two reasons why one would expect less of a change in antitrust enforcement behavior. The first is that there has been a general bipartisan agreement that antitrust enforcement is an important tool to ensure that markets are competitive and that the Merger Guidelines set forth the appropriate methodology to analyze the competitive effect of transactions (though of course the Merger Guidelines can be relied on to support very different conclusions in any given transaction).[8]

The second, perhaps more fundamental, reason that one should not expect a dramatic decline in enforcement behavior is that most companies are at once both producers and consumers, which is to say that the business community, at least in individual cases, does not have a homogeneous view of enforcement. For this reason, a number of Republican politicians have called for aggressive antitrust enforcement in particular transactions on behalf of both their producing and consuming constituencies.[9] Thus, while merger enforcement may change at the margins between administrations, one would not expect it to undergo large fluctuations.

However, given that there is little question that many Chicago School theorists, aligned with the Republican Party by their shared belief in the benefits of free markets,[10] are generally suspicious of merger enforcement, at times suggesting that only mergers to monopoly should be prohibited.[11] Significantly, however, these same theorists are generally in favor of aggressive criminal enforcement, suggesting that their objection is to merger enforcement in particular, not antitrust enforcement in general.[12]

In sum, given the bipartisan support for antitrust enforcement, it would be surprising if the Bush administration had dramatically reduced enforcement activity. Given the relative weight the administration places on criminal enforcement and the general suspicion of some Chicago School theorists about the efficacy of aggressive merger enforcement, it should not be surprising to have seen some decline in merger enforcement since 2001. The question I attempt to answer here is exactly how much decline has occured.

Review of the Simple Statistics

At first glance, the simple statistics seem to support the argument that merger enforcement has declined by approximately one-half since 2001. As Table 1 indicates, between 2001 and 2006, the Agencies issued 47 Second Requests in an average year, less than half of the average of 111 Second Requests issued by the Agencies between 1996 and 2000. Significantly, the decline was most pronounced at the Antitrust Division, where the average annual number of Second Requests declined 65 percent from an average of 68 a year between 1996 and 2000 to an average of 24 a year between 2001 and 2006. During this same period of time, the average annual number of Second Requests issued by the FTC declined by 45 percent, from 43 to 24.[13]

Table 1: Second Requests Issued, 1996–2006[14]

YEAR	FTC	ANTITRUST DIVISION	TOTAL
Total 1996–2000	215	342	557
Average 1996–2000	43	68	111
Total 2001–2006	142	142	284
Average 2001–2006	24	24	47

The same directional results hold when one examines the number of Merger Challenges made by the Agencies from 2001 to 2006 as compared to those made by the Agencies between 1996 and 2000. As Table 2 indicates, the Agencies between 1996 and 2000 challenged an average of 71 transactions as compared to an average of 33 transactions between 2001 and 2006. Again, the decline is more pronounced at the Antitrust Division where the average annual number of Challenges fell 65 percent, from 41 between 1996 and 2000 to 14 between 2001 and 2006. Between these same time periods, the average annual number of FTC Challenges declined 37 percent, from 30 to 19.

Table 2: Challenges Issued, 1996–2006

YEAR	FTC	ANTITRUST DIVISION	TOTAL
Total 1996–2000	150	207	357
Average 1996–2000	30	41	71
Total 2001–2006	113	86	199
Average 2001–2006	19	14	33

As some commentators have pointed out, these statistics are potentially misleading because the number of HSR filings fell dramatically after the thresholds were increased in 2000.[15] Specifically, average annual HSR filings fell from 3,993 between 1996 and 2000, to 1,513 between 2001 and 2006.[16] Thus, if there was no correlation between deal size and antitrust risk, one would expect to see a proportionate decline in the number of Second Requests and Merger Challenges.

Yet there are reasons to believe that larger deals have greater antitrust risk. Specifically, all else being equal, one would expect that the larger the size of the transaction, the larger the market share for the parties to the merger, and the larger the chance of an overlap between multi-product firms. This intuition is confirmed by looking at the relationship between the size of transactions and the probability of a Second Request prior to the threshold being increased. From 1997 to 2000, approximately half of the transactions filing

under the HSR Act were under $50 million; however only approximately 20 percent of the Second Requests were issued for transactions of this size.[17] Thus, one would not expect a 50 percent reduction in Second Requests and Challenges even if an increase in filing threshold reduced the number of HSR filings by half.

This seems to be corroborated by an examination of the ratio of Challenges to HSR filings. Table 3 reveals that the ratio of Challenges to HSR filings was, as expected, higher between 2001 and 2006 than between 1996 and 2000, with the Agencies challenging 1.8 percent of transactions during the earlier period and 2.3 percent of transactions during the later period.[18] Eliminating the smallest transactions from the review pool thus appears to have resulted in a higher ratio of total Challenges.

Table 3: Ratio of Challenges to HSR Filing, 1996–2006

YEAR	CHALLENGES	HSR	RATIO
Average 1996–2000	71	3,993	0.018
Average 2001–2006	33	1,513	0.023

Because HSR filings are not allocated to individual Agencies until after the clearance process,[19] examining the percentage of Challenges to HSR filings over time does not permit one to distinguish properly the performance of the FTC from the Antitrust Division. Furthermore, since such a small percentage of HSR filings raise antitrust issues, it may be more useful to examine the ratio of Challenges to Clearances, a statistic that distinguishes between the Agencies as well as introduces a more meaningful denominator as the Agencies only seek clearance when they have some substantive interest in the transaction. As reported in Table 4, this statistic supports the basic pattern revealed above: the percentage of Challenges to Clearances falls significantly from roughly 18 percent (between 1997 and 2000) to approximately 13 percent (between 2001 and 2006). This decline is more dramatic at the Antitrust Division (falling from 24 percent to 14 percent) than at the FTC (falling from 14 percent to 12 percent).

Table 4: Ratio of Challenges to Clearances, 1997–2006

YEAR	FTC	ANTITRUST DIVISION	TOTAL
Total 1997–2000	0.14	0.24	0.18
Total 2001–2006	0.12	0.14	0.13

Similarly, as reported in Table 5, there was a decline in Second Requests as a fraction of Clearances from roughly 27 percent (between 1997 and 2000), to 18 percent (between 2001 and 2006), with the decline being more pronounced at the DOJ (falling from 37 percent to 23 percent) than at the FTC (falling from 19 percent to 15 percent).

Table 5: Ratio of Second Requests to Clearances, 1997–2006.

YEAR	FTC	ANTITRUST DIVISION	TOTAL
Total 1997–2000	0.19	0.37	0.27
Total 2001–2006	0.15	0.23	0.18

Finally, it is informative to examine the ratio of Challenges to Second Requests. This statistic is a measure of efficiency, in that a higher ratio suggests that the reviewing agency is only issuing Second Requests when it is likely to challenge the transaction, sparing other transactions the significant direct and indirect costs imposed by a Second Request. Significantly, as illustrated in Table 6, the Agencies challenged a *higher* percentage of transactions that received a Second Request between 2001 and 2006 than they did from 1996 to 2000. Importantly, this was accounted for entirely by the FTC, which raised its ratio from 70 percent between 1996 and 2000 to 82 percent between 2001 and 2006. The Antitrust Division, in contrast, reduced its ratio from 61 percent between 1996 and 2000 to 59 percent between 2001 and 2006. Note, however, this says nothing about the potential antitrust issues raised by transactions for which no Second Request was issued, including the possibility of false negatives (i.e., transactions that raised anticompetitive issues, but for which no Second Request was issued).

Table 6: Ratio of Challenges to Second Requests, 1996–2006

YEAR	FTC	ANTITRUST DIVISION	TOTAL
Average 1996–2000	70%	61%	64%
Average 2001–2006	82%	59%	70%

In conclusion, whether measured by total Second Requests, total Challenges, or the ratio of Challenges to Clearances, most of these statistics support the same conclusion: there has been a significant reduction in antitrust enforcement from 2001 to 2006 as compared to 1996 to 2000, and this decline was far more significant at the Antitrust Division than at the FTC.

An Econometric Estimation

In this section, I attempt to present a more sophisticated analysis of whether the probability of a specific transaction being challenged is affected by which agency and which administration reviews it. This section will present a probit model that estimates the marginal effect of the Bush administration on the probability of a transaction being challenged. This probit model will control for whether the transaction was reviewed by the FTC or the Antitrust Division.

In addition, the probit model will attempt to control for underlying antitrust risk by looking to see how the parties allocated the underlying antitrust risk in the merger agreement. Finally, the probit model will control for the size of the

transaction and what type of efforts that the buyer was required to undertake in order to close the deal.

The Sample. The data used for the econometric analysis is a sample of 213 transactions, which represent all transactions from 1996 to 2006 for which there was public information that a Second Request had been issued and for which the parties filed merger agreements with the SEC. The sample would thus exclude transactions where there was no public information that a Second Request had been issued or for which there was no disclosed Merger Agreement.

The date of the Second Request is used in this analysis, rather than the date of the Merger Agreement or the date of the closing or challenge, if any. So, for example, a transaction that was signed in December 1999, received a Second Request in April 2000, and was challenged in February 2001, would be treated as a 2000 transaction. The reason this analysis uses the date of the Second Request is to guard against the possibility that there would be a transitional period during which the decision whether to challenge a transaction would be influenced by staff members who reflected the views of the prior administration.[20] Furthermore, for this reason, transactions in 2001 were coded as part of the Clinton administration if the Second Request was issued prior to the confirmation of Tim Muris and Charles James, which occured on May 25, 2001 and June 14, 2001, respectively.[21]

These 213 transactions represented approximately 25 percent of all Second Requests and approximately 18 percent of all Merger Challenges during this time period. The transactions in the sample from 2001 to 2006 represent a higher percentage of Second Requests and Merger Challenges in that time period (40 percent and 23 percent respectively) than the transactions in the sample from 1996 to 2000 (18 percent and 15 percent).

The transactions range in size from Schnitzer Steel's $42.9 million acquisition of Proler International to AOL's $182 billion acquisition of Time Warner. The average size of the transaction in the sample is $7.8 billion. The probability that any given transaction in the sample would result in a Merger Challenge is approximately 47 percent.

Explanatory Variables. Seven explanatory variables are included in the probit model: (1) whether the transaction was reviewed by the FTC during the Bush administration (FTC Bush variable) (2) whether the transaction was reviewed by the Antitrust Division during the Bush administration (DOJ Bush variable); (3) whether the merger agreement expressly requires the buyer to divest assets in order to obtain regulatory approval (Divest Yes variable); (4) whether the merger agreement allows the buyer to refuse to divest assets in order to obtain regulatory approval (Divest No variable); (5) whether the merger agreement requires the merging parties to take reasonable efforts (Low Efforts variable) or (6) best efforts (High Efforts variable) to obtain regulatory approval;[22] and (7) the size of the transaction measured in billions of dollars (Billions variable).

The model distinguishes between the FTC and Antitrust Division for several reasons. The first is simply that they are different organizations, with different procedural rules. For example, the FTC has an internal target that they will reach a positive outcome in 90 percent of all transactions in which they issue a Second Request.[23] The second is that the FTC is by its very nature more of a bipartisan organization, with two Commissioners representing the opposing political party. Thus, one would expect the partisan effect of a change in administration to be muted in the FTC as opposed to the Antitrust Division.

The probit model attempts to control for antitrust risk by examining how the parties allocated the underlying antitrust risk in the merger agreement. The intuition is that if the buyer agrees to divest any and all assets to consummate the transaction, then it is more likely that there are antitrust issues in the underlying transaction. This is especially true if the buyer agrees to divest specific assets in order to complete the transaction.[24]

This intuition is confirmed by prior empirical work that found a statistically significant relationship between whether the buyer agreed to divest assets to consummate the transaction and the probability that the Agencies would, in fact, seek divestiture of assets.[25] As will be demonstrated below, this relationship continues to hold for this sample as well.

The risk-shifting provisions in the merger agreement, as well as other clauses in the merger agreement, such as the best efforts clause, are also important controls because they affect the bargaining position of the parties vis-à-vis the government. The bargaining position of the buyer, and in particular, its ability to credibly threaten that it will litigate with the government rather than make the requested divestitures, is directly affected when the merger agreement requires the buyer to make any and all divestitures requested by the Agencies. Moreover, a merger agreement that is silent on divestitures but requires the buyer to take best efforts to close the transaction may be read as requiring the buyer to divest assets in order to close the transaction. Thus, such a clause may also affect the ability of the buyer to credibly threaten to litigate with the government.

Three caveats should be noted before presenting the results. First, the econometric model only examines the probability of a Merger Challenge once a Second Request has been issued. Thus, it does not take into account the possibility that the Agencies did not issue a Second Request on a merger that would have received a Second Request in a different administration. The reduction in the percentage of Second Requests to Merger Clearances from an average of 27 percent between 1997 and 2000 to 18 percent between 2001 and 2006 reported in Table 5 is suggestive that this may have occurred.[26]

Second, the econometric analysis presented in this article does not account for the possibility that the scope of remedies obtained by the Agencies may have changed with the change in administration. For example, two grocery store deals of similar size and scope, one of which required divesti-

ture of a handful of stores and the other of which required wholesale divestitures, would be treated equally in this analysis. Third, this model is run only on transactions that receive a Second Request, which is most certainly not a random event. This means it may be difficult to extrapolate these results beyond those transactions for which a Second Request has been issued to transactions for which a Second Request has not yet been issued.

Results. The statistical model used is a probit model, which is appropriate where one has a binary discrete dependent variable—here whether there is a merger challenge—which is to say that the variable of interest takes on the values of either yes (a merger challenge) or no (no merger challenge). Because the coefficients of the probit model are difficult to interpret, this article reports results based on the dprobit command in STATA, which provides estimates of the marginal effect on the probability of a Merger Challenge of a change in a unit of a given independent variable. The model also reports Z statistics[27] and P-values (the probability that an estimated coefficient of this magnitude or larger could have occurred by chance if the true value of the coefficient were zero).

The results of the probit model reported in Table 7 are consistent with the conclusion that, all else being equal, transactions in the sample were nearly 24 percentage points less likely to be Challenged by the Antitrust Division during the Bush administration than transactions reviewed by the Antitrust Division or FTC during the Clinton administration, a result that is statistically significant at the 95 percent confidence level. In contrast, transactions reviewed by the FTC under the Bush administration were not less likely to be Challenged.[28]

Table 7: Probit Results

VARIABLE	COEFFICIENT	Z STAT	P-VALUE
Bush DOJ	-23.7%	-2.55	1.1%
Bush FTC	-11.9%	-1.37	17.1%
Divest Yes	24.3%	2.40	1.6%
Divest No	-15.3%	-1.75	8.0%
Low Efforts	-16.0%	-1.97	4.9%
High Efforts	-4.9%	-0.44	65.6%
Billions	0.63%	2.26	2.4%

In addition, transactions in which the merger agreement provides that the buyer has an express obligation to divest assets (unconditional or specific) are associated with a 24 percentage points *greater* likelihood of divestiture. Furthermore, transactions where the merger agreement allows the buyer to refuse to make divestitures to obtain regulatory approval are associated with an approximately 15 percentage points *lower* likelihood of divestiture. Both of these estimated associations are statistically significant, with Divest Yes statistically significant at the 95 percent level, and Divest No statistically significant at the 90 percent level.

Unfortunately, it is somewhat difficult to interpret the results regarding the effect of contractual divestiture provisions. First, the presence of language regarding divestitures in a merger agreement is likely correlated strongly with transactions that raise potential anticompetitive issues, which are likewise correlated strongly with merger challenges. In other words, the contractual provisions in some cases do not cause the governmental challenge; rather the governmental challenge is affected by the underlying antitrust risk. Second, risk-shifting clauses reflect bargaining position as much as underlying antitrust risk. In other words, all else being equal, buyers in a strong negotiating position are less likely to agree to a requirement to divest assets than buyers in a weak negotiating position. Third, buyers may be aware that the Agencies in the Bush administration are less likely to use this clause for tactical reasons, and, therefore, at the margin, such buyers may be more willing to agree to such provisions than they would be under the Clinton administration. In sum, it is difficult to determine exactly why the requirement to make divestitures is associated with a higher probability of government challenges.

The results also suggest that transactions in which the buyer is required to take low levels of efforts (e.g., reasonable efforts) to obtain clearance are 16 percentage points less likely to be Challenged, a result that is statistically significant at the 95 percent confidence level. One possible explanation is that a seller is less likely to spend significant negotiating capital to require the buyer to agree to a best efforts provision where a transaction does not raise significant antitrust issues Put another way, the low efforts clause may be correlated with low antitrust risk. Transactions requiring best efforts were not statistically more (or less) likely to lead to a Challenge.

Finally, as anticipated, for every billion dollars there is a 0.6 percentage point increase in the probability of Challenge, a result that is statistically significant at the 95 percent level. This result is consistent with the intuition that larger transactions are more likely to raise antitrust issues than smaller transactions.

Conclusion

The statistical evidence reviewed in this article is consistent with the conclusion that transactions reviewed by the Antitrust Division during the Bush administration were less likely to be Challenged than transactions reviewed by the Antitrust Division during the Clinton administrations or by the FTC during either the Clinton or Bush administrations.[29] It is unclear from the evidence, however, whether this change in enforcement behavior is due to over-enforcement between 1996 to 2000 or under-enforcement between 2001 and 2006.

In addition, there is the possibility that the types of mergers before the Agencies after 2001 were qualitatively different from the types of mergers between 1996 and 2000, although I have included variables to attempt to control for underlying antitrust risk in the deals studied. While possible, this does not account for the apparent difference in antitrust

enforcement between the FTC and Antitrust Division after 2001. Furthermore, this analysis is unable to determine whether the Agencies between 2001 to 2006 were less likely to challenge mergers that raised significant antitrust issues or simply less likely to use the leverage given to them by the merger agreement. Despite all of these caveats, it seems clear that the merger enforcement behavior was different in 2001 to 2006 as compared to 1996 to 2000, a result that is hardly surprising given the change from a Democratic to a Republican administration. ■

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[1] "Challenges" includes not only cases where the Antitrust Division or the Federal Trade Commission files a complaint in U.S. district court or before an administrative law judge, but also cases settled by consent decree and transactions restructured by the parties to avoid competitive concerns raised by the agencies. See FEDERAL TRADE COMMISSION & DEPARTMENT OF JUSTICE ANTITRUST DIVISION, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2006 at 10 (2007) [hereinafter HSR ANNUAL REPORT 2006], *available at* http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf.

[2] See, e.g., Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29; Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down But Not Out*, ANTITRUST, Summer 2007, at 74.

[3] See, e.g., David L. Meyer, Deputy Assistant Att'y Gen. for Civil Enforcement, U.S. Dep't of Justice Antitrust Div., Merger Enforcement Is Alive and Well at the Department of Justice 18 (Nov. 15, 2007) (noting that the Antitrust Division's decision in Whirlpool/Maytag "was based on an extraordinary amount of non-public information on market conditions that informed the Division's in-depth analysis"), *available at* http://www.usdoj.gov/atr/public/speeches/227713.pdf.

[4] See Feinstein, *supra* note 2. The HSR filing threshold increased from $15 million to $50 million on February 1, 2001. Pub. L. No. 106-553, § 630, 114 Stat. 2762 (2000).

[5] John D. Harkrider, *Risk-Shifting Provisions and Antitrust Risk: An Empirical Examination*, ANTITRUST, Fall 2005, at 52.

[6] See, e.g., Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 MICH. J. RACE & L. 513, 516 (2007) (noting that DOJ objection letters under the Voting Rights Act "dropped calamitously" during the first five years of the Bush administration).

[7] See, e.g., David H. Getches, *The Legacy of the Bush II Administration in Natural Resources: A Work in Progress*, 32 ECOLOGY L.Q. 235, 237 (2005) (noting that between 2001 and 2003, the Bush administration filed only 35 environmental enforcement actions, whereas the Clinton administration had filed 152 actions between 1998 and 2000).

[8] See Timothy J. Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity (Aug. 7, 2001) ("Antitrust has become an area of bipartisan cooperation. Although there are disagreements about specific cases, there is widespread agreement that the purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, are the mainstays of antitrust. Moreover, today there is bipartisan recognition that antitrust law is a way of helping to organize our economy. A freely functioning market, subject to the rules of antitrust, provides maximum benefits to consumers."), *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm.

[9] See, e.g., Letter from Senators Mike Enzi and John Barrasso to Attorney General Michael B. Mukasey (Mar. 14, 2008) (encouraging scrutiny of acquisition of National Beef and Smithfield Beef Group by JBS S.A.), *available at* http://enzi.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=a4fd3c9e-f85d-4fb1-a104-ebff320ce382; Letter from Senators Herb Kohl and Orrin Hatch to FTC Chairman Deborah Platt Majoras (Nov. 19, 2007) (urging FTC to scrutinize Google's acquisition of DoubleClick), *available at* http://hatch.senate.gov/public/index.cfm?FuseAction=DataPipes.ViewPDF&id=c5ee0464-80d8-4ee9-9db6-9450e13c7e99; Jeffrey Silva, *Senators Urge WiMAX Divestiture As Condition to AT&T-BellSouth Tie-Up*, RCR WIRELESS NEWS, Oct. 2, 2006, at 11 (noting that Republican Senator Mike DeWine (OH) and Democratic Senator Herb Kohl (WI) submitted letter to FTC and DOJ suggesting that AT&T and BellSouth divest WiMAX spectrum as condition for merger), *available at* http://www.rcrnews.com/apps/pbcs.dll/article?AID=/20061002/SUB/610020714.

[10] Indeed, prominent Chicago School scholars were appointed to the federal judiciary by Republican presidents. See Robert E. Norton, *Reagan's Imprint on the Courts*, FORTUNE, Nov. 24, 1986, at 121 (noting that President Reagan appointed Richard Posner and Frank Easterbrook to the Seventh Circuit Court of Appeals, Robert Bork to the D.C. Circuit, and Douglas Ginsburg as Assistant Attorney General for Antitrust and later to the D.C. Circuit), *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1986/11/24/68328/index.htm.

[11] See, e.g., Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933 (1979) ("By 1969, then, an orthodox Chicago position (well represented in the writings of Robert Bork) had crystallized: only explicit price fixing and very large horizontal mergers (mergers to monopoly) were worthy of serious concern."); see also ROBERT H. BORK, THE ANTITRUST PARADOX 221 (1978) ("Since the amount of restriction of output seems to decrease greatly from one-firm to two-firm markets . . . and since mergers may very well create substantial new efficiencies, we are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is that they should not . . . .").

[12] See, e.g., Posner, *supra* note 11, at 933. Similarly, Bush administration officials have frequently emphasized strong criminal antitrust enforcement as evidence of a continued focus on antitrust enforcement more generally. See, e.g., *Roundtable Conference with Enforcement Officials*, ANTITRUST SOURCE, Apr. 2008, at 4 (remarks of Assistant Attorney General Thomas Barnett at 2008 ABA Antitrust Section Spring Meeting) (emphasizing that "the Division's cartel enforcement program . . . is by all measures doing as well or better than it ever has before"), http://www.abanet.org/antitrust/at-source/08/04/Apr08-EnforceRT4=25f.pdf.

[13] In fact, the Antitrust Division issued 50 percent *more* Second Requests than the FTC from 1996 to 2000; yet the Antitrust Division issued the same number of Second Requests as the FTC from 2001 to 2006. Averages are rounded to the nearest whole number, but percentages are calculated using unrounded numbers.

[14] The data from this and subsequent tables is drawn from the FTC and Antitrust Division Annual Reports to Congress for fiscal years 1996 to 2006. See Federal Trade Commission, Premerger/Hart-Scott-Rodino Act Publications and Helpful Information, http://www.ftc.gov/bc/hsr/hsrinfo pub.shtm, and http://www.ftc.gov/bc/hsr/96anrpt.shtm; Federal Trade Commission, Annual Report to Congress for Fiscal Year 1996, http://www.ftc.gov/bc/hsr/96anrpt.shtm.

[15] See, e.g., Feinstein, *supra* note 2.

[16] See *supra* Table 3.

[17] FTC and Antitrust Division Annual Reports to Congress for fiscal years 1997 to 2001, *available at* http://www.ftc.gov/bc/hsr/hsrinfopub.shtm.

[18] These numbers reflect not total HSR filings, but rather adjusted transactions, in which a Second Request could have been issued, thus excluding transactions where only one party filed, or that are exempted or non-reportable.

[19] Under the clearance process either agency may request clearance to review a merger, and individual mergers are assigned to either the FTC or Antitrust Division to review, based on the Agencies' comparative experience in the industries at issue. Where both Agencies claim expertise, this can lead to disputes over which will review the transaction.

[20] For a different approach, see Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996–2003*, 73 ANTITRUST L.J. 531 (2006). The authors in that study used the date of the FTC's decision to challenge a merger, rather than its decision to issue a Second Request. As a result, there may have been transactions in their data where the Second Request and staff investigation

occured prior to Chairman Muris's confirmation but the decision whether to challenge occured after his confirmation.

[21] In robustness check using the date of the merger challenge instead of the date of the Second Request, the probit model generates similar results.

[22] Also included in the Low Effects variable are reasonable endeavors, commercial efforts, diligent efforts, commercially reasonable efforts, and reasonable commercial efforts. The middle level of efforts (e.g., reasonable best efforts) is excluded from the model, which means that when both the coefficients on Low Efforts and High Efforts are zero, the model reports the result for the middle level of efforts.

[23] FEDERAL TRADE COMMISSION, STRATEGIC PLAN: FISCAL YEARS 2006–2011 at 21 (Sept. 30, 2006) (noting that for fiscal years 2006–2011, the FTC seeks to "[c]ontinue effective administration of merger review under the HSR program so that at least 90 percent of HSR requests for additional information result in a positive outcome, which includes Commission authorization of a complaint for preliminary injunction in federal court, issuance of an administrative complaint, acceptance of a consent agreement, the parties' voluntary abandonment or restructuring of a proposed transaction based on FTC antitrust concerns, and closing of an investigation without subsequent events indicating that the transaction injured competition"), *available at* http://www.ftc.gov/opp/gpra/spfy06fy11.pdf.

[24] For example, the merger agreement between Inco Limited and Falconbridge Limited specifically referenced the divestiture of the Nikkelverk, Norway, nickel refinery and related assets. See Support Agreement Between Inco Limited and Falconbridge Limited 17 (Oct. 10, 2005), *available at* http://www.sec.gov/Archives/edgar/data/49996/000090956705001587/t1819Oexv2w1.htm. The consent decree with the Antitrust Division ultimately required that these assets be divested. Press Release, U.S. Dep't of Justice Antitrust Division, Justice Department Reaches Settlement in Inco Limited/Falconbridge Limited Deal (June 23, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/216813.pdf.

[25] Harkrider, *supra* note 5.

[26] FTC and Antitrust Division Annual Reports to Congress for fiscal years 1997 to 2006, *available at* http://www.ftc.gov/bc/hsr/hsrinfopub.shtm.

[27] A Z statistic greater than 1.96 in absolute value allows one to reject the null hypothesis that the underlying true coefficient is zero at a 95 percent confidence level, meaning that we are 95 percent confident that the true coefficient is not zero. For a 90 percent confidence level, the relevant Z statistic is 1.645, meaning that we are 90 percent confident that the true coefficient is not zero.

[28] More technically, the coefficient on Bush FTC is not statistically significant at the 90 percent confidence level.

[29] Finally, it should be noted that these results are consistent with the analysis performed by Coate and Ulrick, who performed an econometric analysis of 151 transactions that received a second requested between 1996 and 2003 and concluded that there was not a statistically significant decline in merger enforcement at the FTC after Chairman Muris was appointed. This analysis did not examine transactions reviewed by the DOJ. See Coate & Ulrick, *supra* note 20.