

Is a New Era of Trustbusting Upon Us?

Sam Gandhi and Tim Muris

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Hello. I'm Sam Gandhi and welcome to *The Sidley Podcast*. In today's podcast, we present my talk with Sidley senior counsel Tim Muris, about changes in antitrust law and how he thinks the antitrust landscape will evolve.

We like to say at *The Sidley Podcast* that we tackle cutting-edge issues in the law and put them in perspective for business people today. Turns out in this case, we were literally on the cutting edge.

On Tuesday, October 20, a day after we recorded this podcast, the Justice Department filed suit against Google, charging it with violating antitrust law and with holding monopolies in search and search advertising.

We recorded our conversation the day before, with Tim focusing on the House report and likely changes in the new year. Regardless of the election, observers expect the Google suit to continue, making Tim's discussion of antitrust's future even more relevant.

We now present my conversation with Tim Muris.

Sam Gandhi:

As a presidential election looms, a new government report is taking aim at giant technology companies. It charges that these once underdog startups have been transformed into monopolies and it proposes changes to antitrust law that could lead to the breakup of these companies. How has antitrust evolved and where is it going? Is this the dawn of a new era in trustbusting? We'll find out in today's podcast.

Tim Muris:

We have this effort to focus on these big companies and to, quite frankly, break them up in various ways; for example, they're recommending that certain parts of Facebook be split off. So, I would think that we are headed for enforcers in the government who are quite sympathetic to the views in that report. We are in another one of these periods where there's this

movement to change antitrust, to really call “big is bad,” and that would have profound consequences.

Sam Gandhi:

From the international law firm Sidley Austin this is *The Sidley Podcast*, where we tackle cutting-edge issues in the law and put them in perspective for business people today. I’m Sam Gandhi. Hello and welcome to this edition of *The Sidley Podcast*, episode number 13. Today we focus on recent governmental recommendations in antitrust law, how the laws have changed over time and what the future may hold in this area after the election.

And I’m joined by Sidley senior counsel Tim Muris. Tim is a member of Sidley’s Antitrust/Competition practice and advises clients on wide-ranging matters involving antitrust enforcement, with a particular focus on mergers, civil investigations and strategic counseling. He was chairman of the Federal Trade Commission from 2001 to 2004 and is the only person ever to be the director of both of FTC’s enforcement bureaus, competition and consumer protection. Tim, it’s great to speak with you today.

Tim Muris:

Nice to see you, Sam.

Sam Gandhi:

Very recently in some rather high-profile antitrust news, the House Judiciary Committee released its conclusions on whether several large technology companies are violating antitrust laws. So, the report that was released on October 6 criticizes the companies and it lays out a number of policy recommendations. What’s your top-level view of the report and what are the main takeaways from that report that people should know?

Tim Muris:

This is certainly an important development. It was a staff report, but it clearly enjoys broad support among the House Democrats. The report essentially claims that these very large tech companies are already violating the antitrust laws. It states that they should face what they call structural separation, which is a kind of breakup. The report, although it says they’re already violating the law, it says we ought to rewrite the laws to make it easier to go after these kind of companies. And it’s also very

critical of modern antitrust enforcement, and by modern I mean over the last 40 years.

Sam Gandhi:

Tell me what that means. And I guess the question is that how much of this is being driven also by, you know, we're sitting here on the eve of the presidential election? And you know as we speak there are some issues out there in the news about certain members of Congress are angry at both Facebook and Twitter for banning certain news stories, et cetera. How much of this regulation of these large tech companies is driven by purely political issues?

Tim Muris:

Well, both on the left and the right in the political spectrum there is animosity toward big tech. On the left its traditional populace grounds, which have reared their heads in antitrust every 40 years or so. That's on the left. On the right there is a concern two-fold. One is the concern that you just mentioned that these companies are stifling conservative opinion. The other is that if you look at Silicon Valley the people on the right feel that they're overwhelmingly supportive of people on the left.

Sam Gandhi:

And so, from your perspective how helpful is the guidance in the report? You talked about how it's quite critical in modern antitrust enforcement, so what are the interesting or novel recommendations that it's got in there for our current landscape?

Tim Muris:

I think it's important to recognize that, as Mark Twain famously said, history might not repeat itself, but it rhymes. And we have some serious rhyming here. In the '30s and '40s antitrust went on a big is bad jag with The Great Atlantic & Pacific Tea Company, which no longer exists, it was the largest retailer in the United States that was the villain. In the '60s and '70s, we went on another big is bad attack where the villain was the U.S. auto industry, especially General Motors, which was you know far and away the largest company.

That changed over the last 40 years, but again we have this effort to focus on these big companies and to, quite frankly, break them up in various

ways. For example, they're recommending that certain parts of Facebook be split off. They're recommending what's called structural separation, which means that if a company runs a platform like a marketplace where people can sell their products on that platform then the company that sponsors the platform can't also put its own products on the platform. So, there are a variety of proposals of the type we have not seen since the '60s and '70s.

Sam Gandhi:

What are the reactions on these historical trends? There's a huge history here and it looks like we're kind of flipping back to the past. What's the reaction, in your view, on these historical trends?

Tim Muris:

The interesting thing again is how much history is rhyming. With the two big is bad attacks, the one from the '30s and '40s and the one from the '60s and '70s, when they were rejected, they were rejected on the basis that antitrust law ought to be about consumers and not protecting small businesses, which is a lot of what's going on here again. And so, this is very serious, because we have these companies that in many ways could have only arisen in the United States because the United States has an antitrust law that as Learned Hand famously said, we encourage firms to win, but then we don't turn on them once they've won.

The idea here is to turn on the winners even though historically, as I mentioned, A&P was the villain and it no longer exists, General Motors was the villain and of course General Motors had tremendous problems. The market is very dynamic, but we are in another one of these periods where there's this movement to change antitrust, to really call big is bad and that would have profound consequences.

Sam Gandhi:

Let's talk about kind of the historical lens we were just talking about. I want to get your thoughts on kind of how the House Judiciary Committee, currently controlled by the Democrats, is characterizing the current state of affairs. So, it wrote in the October report, to put it simply, companies that once were scrappy underdog startups to challenge the status quo had become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons. So, that's kind of a really interesting quote because, I

mean, as you said these companies, what they're really going after are the classic disrupters to drive down prices potentially and give consumers a different choice, but they become, in their view, behemoths. So, how would you characterize their assessment?

Tim Muris:

It's certainly ahistorical. The people that are writing this report really don't realize that they are repeating almost word for word attacks that were made in these two earlier periods. They also thoroughly reject modern antitrust law. They associate it with people that they demonize. They associate it with Robert Bork, for example, who was important in antitrust history. But the most important person on the Supreme Court is Stephen Breyer, who the last time I checked was a liberal in good standing, but he's been far and away in the last 40 years as a judge one of the two or three most important judges and now justice at writing antitrust opinions. So, the view that has existed for the last 40 years has enjoyed widespread support across the antitrust spectrum, but now it's being seriously challenged.

Sam Gandhi:

We're always concerned about the judiciary going one way or the other to the political winds, but what relevance, when we talk about Congress or in this case the majority view of one house, really have on the courts and the FTC when antitrust is really litigated?

Tim Muris:

That's an important question, Sam. As we talk, we're very close to a presidential election, there's widespread belief, if you believe the polls, that Vice President Biden will win. The leader intellectually in the Democratic Party has been Senator Elizabeth Warren. Every democrat who ran for president, and there were a lot of them before the Vice President prevailed, has the same aggressive views that are reflected to a significant degree or another in that report. So, I would think that we are headed for enforcers in the government who are quite sympathetic to the views in that report.

Sam Gandhi:

You're listening to *The Sidley Podcast* and we're speaking with Sidley senior counsel Tim Muris about recent governmental recommendations in antitrust law and what the future may hold in this area after the election. Tim is a senior counsel in Sidley's Antitrust/Competition practice and a

member of the ABA's antitrust law section. And he represents clients on wide-ranging matters involving antitrust and competition law and enforcement. So, Tim, I want to come back. There's some basic fears in society about internet-based companies that they're going to just absorb other companies and eliminate jobs. And I think we've heard some of that with some of the political rhetoric that we've been hearing currently in Congress and also on the campaign trail. So, to what degree are we seeing a return to the belief that big is bad?

Tim Muris:

That is certainly what's reflected in this new House report. It's a road that we've travelled before and the irony is that small business has thrived over time, although it's thrived in different modes. When The Great Atlantic & Pacific Tea Company pioneered the retail store and the supermarket, that obviously hurt some small companies. They changed and others thrived. Walmart came in with a big-box format. Amazon has pioneered online retail. Small business has managed to adjust and thrive in the economy, even though these companies have been disruptive, that is the nature of a market economy.

Sam Gandhi:

Let me follow up on that a little bit. Because before you talked about the philosophy of antitrust law in the sense that it's really there, and FTC law, to really focus on the protection of consumers, but now we're hearing about the protection of small businesses. Are they kind of the same?

Tim Muris:

Well, not necessarily. One of the key attributes of this report is a return to an aggressive use of something called predatory pricing cases, which simply means that these big companies may be charging prices that are too low. And that by charging low prices they can drive out competitors and when the competitors are gone they can raise their prices. Led by then judge, now Justice Breyer, antitrust law has made it very hard to bring those cases and I think appropriately so. It's conceivable that you could have such a case, but we're talking about low prices and antitrust, if it protects anything, it should protect low prices. Sometimes, of course, low prices can hurt competitors, but they help consumers.

Sam Gandhi:

So, in your view we should be looking less like the ability to compete and more about how it protects consumers in terms of the purposes of antitrust law?

Tim Muris:

Yes. For the last 40 years antitrust has focused on something that it calls the consumer welfare standard. And that's being challenged by people who want to replace things like competitor protection, like income inequality, a whole series of issues that antitrust law is really not well suited to deal with.

Sam Gandhi:

So, when you think about this how do you assess the market impact of those so-called internet giants today? And how are we supposed to judge their dominance in the context of antitrust law?

Tim Muris:

If you look at the internet giants, they've transformed our lives for the better. But look, the first thing you have to worry about in antitrust is that a company, this is a necessary but not sufficient condition, a company to be a monopolist has a very large market share in a well defined antitrust market. And if you look at the companies that the report is criticizing they painted them all with the same brush. Where some of those companies, you know, Google, for example, I think most people agree it doesn't make it necessarily a violator of the antitrust laws, but it does have very large market shares in things like search and advertising technology. Where some of these other companies do not dominate retail, for example. I mean, no company, even Walmart, which is far and away the largest retailer in the United States, has something like a 30 percent share.

Sam Gandhi:

Well, maybe let's talk about a different commodity, which is data. What role does the massive amount of data on consumers that some of these giants have been able to gather have in stifling competition? And is there a place for FTC enforcement of that?

Tim Muris:

The question of data is a very important question. There are issues in data that are non-antitrust issues, of course, and my 15 minutes of fame in life

was when as chairman we created the National Do Not Call Registry. And that was based on misuse of data, misuse of information, and the FTC spends a lot of time on that and that's in its consumer protection function. In terms of antitrust though data turns out to be like a lot of other attributes that companies have. There's competition to have data, to use data, and so far at least no one has misused data in the antitrust context outside of there are allegations of traditional exclusionary practices where data is involved, but they're certainly not data specific. So, although there are data issues, what bothers people most about data, I think, is best handled in the consumer protection context, not antitrust.

Sam Gandhi:

I want to go back to our big is bad question and is the trustbusting analogy apt today?

Tim Muris:

The trustbusting analogy; the irony is there's actually been very little trustbusting in the history of the United States. There's a lot of economic history and what the economic history showed, what's not surprising, is that the rise of big corporations produce tremendous benefits for the country. There could be problems, but antitrust law should not be painted with the broad brush of the House Judiciary Committee. It should be what's happening now as individual investigations of companies to see if their individual practices, in fact, harm consumers.

Sam Gandhi:

And so, as we start ending the year, and I'm sure most people can't wait for this year to be over, but what do you foresee as the trends in antitrust as we potentially end the year and we may be going into a new administration?

Tim Muris:

Well, I do think that if the election turns out the way that it appears to that the people who will run the government agencies will be people who will be very sympathetic to the House Judiciary report, they will attempt to be very aggressive. That report says that we ought to overturn a lot of Supreme Court cases, so I think unless there's a dramatic change in the federal judiciary, some of what the House wants to do can't be done under current law. But they are also talking about rewriting current law, so I think we're

looking at a turbulent time. And it's important to recognize that although that report focused on these four very large companies, the principles they're talking about don't stop in the Fortune 10. They're going to apply to big companies around the world and, certainly, in the United States.

Sam Gandhi:

And where do you see this affecting private right of action, such as the plaintiff's bar? Do you see it just in government enforcement or future civil cases as well?

Tim Muris:

The plaintiff's bar is very aggressive and I think they're already bringing some of these cases, they will bring more of these cases, they will bring follow-on cases. Once the government starts investigating, the plaintiff's bar often jumps in quickly, even before the government files suit. And I think some of that is there's competition among plaintiff's lawyers. I think some of that will happen here and the plaintiff's bar is obviously a very important part of United States antitrust law.

Sam Gandhi:

So, Tim, what does the Congressional report mean for future mergers and the possibility of enforcement against those mergers?

Tim Muris:

It could be particularly important for mergers. If you look at the trajectory of mergers, back in the '60s there was a belief that you needed seven or eight firms in an industry to be competitive. By the time we got to the experience of the Clinton administration, between the cases they investigated and the progress in economics, that belief was more that three or four in most industries was enough. And this report will push to move that number up again, so that mergers that have gone through, particularly in the last 30 or 40 years, are going to be challenged in an effort to move the line back toward having more firms in an industry. And that's another important part of this report.

Sam Gandhi:

We've been speaking with Sidley senior counsel Tim Muris about the history and potential future of antitrust law. Tim, thanks. This has been a

great and informative look at the antitrust landscape and thanks for sharing your insights.

Tim Muris:

Thank you, Sam.

Sam Gandhi:

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