

Does the Tail Wag the Dog?

Sixty Years of Government and Private Antitrust In the Federal Courts

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Much has been made recently of the short-lived Department of Justice report on Section 2 of the Sherman Act and the antitrust enforcement stance of the new administration.¹ While federal government antitrust policy is of enormous interest to practitioners and to the particular defendants, government cases have long comprised only the veneer of the overall antitrust structure; private antitrust cases have long dominated the totality of antitrust cases filed in federal courts.² Here I present the pertinent data on the number of cases filed so as to describe the relative sizes of the government and private antitrust sectors. I also examine the frequency of antitrust case filings according to the political party of the President, so as to gauge the likely direction of the new administration.

Civil Antitrust Cases Filed in Federal Courts: 1949–2008

The history of private and government antitrust case filings since 1949 is described in the chart below.³ Government cases are a small slice of the antitrust pie. The flat line at the bottom of the chart shows the number of government civil cases, those brought by either the Department of Justice or the Federal Trade Commission. The mountainous-looking line shows the number of private antitrust cases, excluding the cases arising from the “electrical-equipment” conspiracy. The column shows the number of those private electrical-equipment cases.

The private electrical-equipment cases followed the government antitrust case brought in 1960 against twenty-nine corporations supplying electrical equipment.⁴ More than 1,900 individual private cases were filed against those corporations from 1962 through 1967. These cases are shown as a separate category because no other industry cartel before or since has generated anything approaching that level of private litigation. Similar cases since then have been consolidated and handled by groups of plaintiffs, either through class-action litigation or by voluntary groupings.

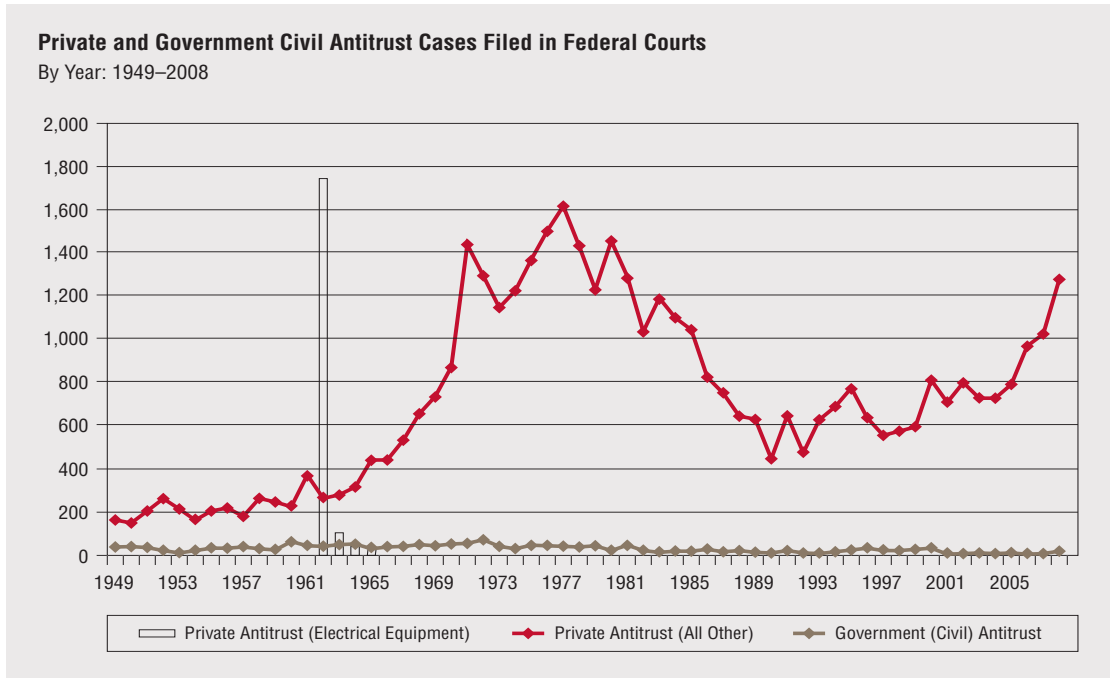
¹ See, e.g., Daniel A. Crane, *Obama's Antitrust Agenda*, REGULATION, Fall 2009, at 16; Andrea Agathoklis, *In Their Own Words: Predicting Enforcement Under Varney and Leibowitz*, ANTITRUST, Summer 2009, at 5; Daniel A. Crane, *The Brief Life of the Section 2 Report and the Uncertain Future of Bundled Discounts*, GLOBAL COMPETITION POL'Y, July 2009; Gregory K. Leonard & Maria A. Lopez, *Farrell and Shapiro: The Sequel*, ANTITRUST, Summer 2009, at 14. An article that touches on some of the same themes discussed here, but from a broader perspective, is Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008).

² This article deals only with cases filed in federal district courts as opposed to appellate courts and state courts. The term “government cases” refers to cases brought by the federal antitrust agencies, either the Antitrust Division of the Department of Justice or the Federal Trade Commission. The term “private cases” refers to cases brought either by private parties or non-federal public entities. The number of government cases does not include FTC administrative proceedings or those few cases in which the federal government is listed as the defendant.

³ The source for the data is *Judicial Business of the United States Courts, Annual Report of the Director*, published by the Administrative Office of the United States Courts, various issues 1949–2009.

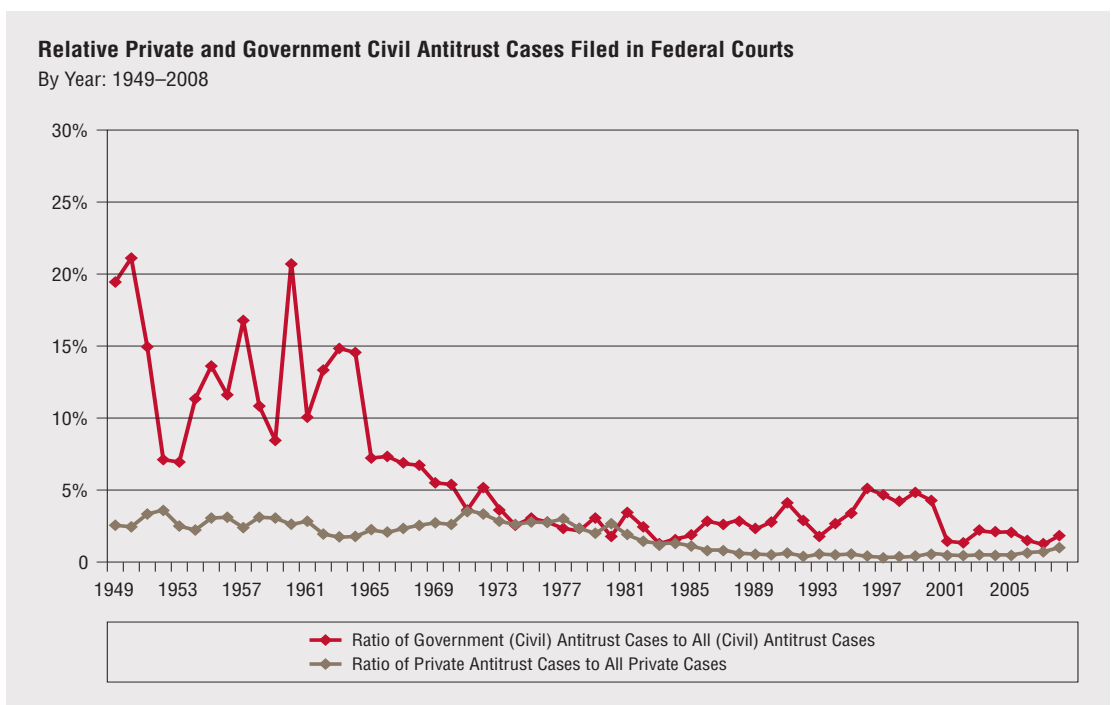
⁴ For a discussion of the electrical-equipment cases, see DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 128–30 (4th ed. 2005).

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Note as well that these data are limited to civil cases. That is, they do not include any criminal antitrust cases—those cases brought by the DOJ primarily under Section 1 of the Sherman Act and limited to allegations of explicit collusion among competitors. The number of criminal cases is discussed below. In addition, the number of government civil cases includes merger challenges filed in court by either the Department of Justice or the Federal Trade Commission. While it would be interesting to separate merger and non-merger cases, as well as DOJ and FTC cases, there is no source for those bifurcations over the entire period.

The chart below shows private and government antitrust cases expressed in relative terms. Government antitrust cases are shown as a fraction of all civil antitrust cases, government plus pri-



vate. Private antitrust cases are shown as a fraction of all private civil cases, antitrust plus all other. The private electrical-equipment cases are excluded from the calculations.

In this chart, the uppermost line is the ratio of government civil antitrust cases to all civil antitrust cases. Note that government civil antitrust cases have seldom accounted for more than 20 percent of all civil antitrust cases. The government share of antitrust cases has been below 10 percent since 1964. The lower line shows the ratio of private antitrust cases to all private civil cases filed in federal courts. That ratio has declined slowly and fairly steadily from 1971 through 1997 and has increased slightly since then. Over the last thirty years, antitrust cases have accounted for less than one percent of all civil cases.

To summarize the results so far: government cases, including merger cases, have long been a small share of total antitrust cases. Private antitrust cases as a share of all civil cases have been fairly stable, though sizable increases in the absolute number of private antitrust cases have occurred in recent years.

Democratic Versus Republican Administrations

The conventional wisdom seems to be that Democratic administrations are more pro-enforcement when it comes to antitrust. The recent pronouncements regarding the enforcement stance of the new administration are consistent with that impression. It may be informative to examine how much more “pro-enforcement” the antitrust agencies have been under Democratic administrations. The following table shows the average annual number of government cases, both civil and criminal, filed in federal courts by the party of the administration in power.⁵

Government Antitrust Cases Filed per Year 1949–2008

	AVERAGE	DEMOCRATIC	REPUBLICAN	DIFFERENCE
Civil	31.1	34.8	28.6	6.2
Criminal	33.1	28.9	35.9	-7.0
Total	64.2	63.7	64.5	-0.8

On average, relative to Republicans, Democrats bring 6 more civil cases per year and 7 fewer criminal cases. The total number of cases is virtually identical. The differences in the civil and criminal averages are close but not quite equal to the usual standards of statistical significance.⁶

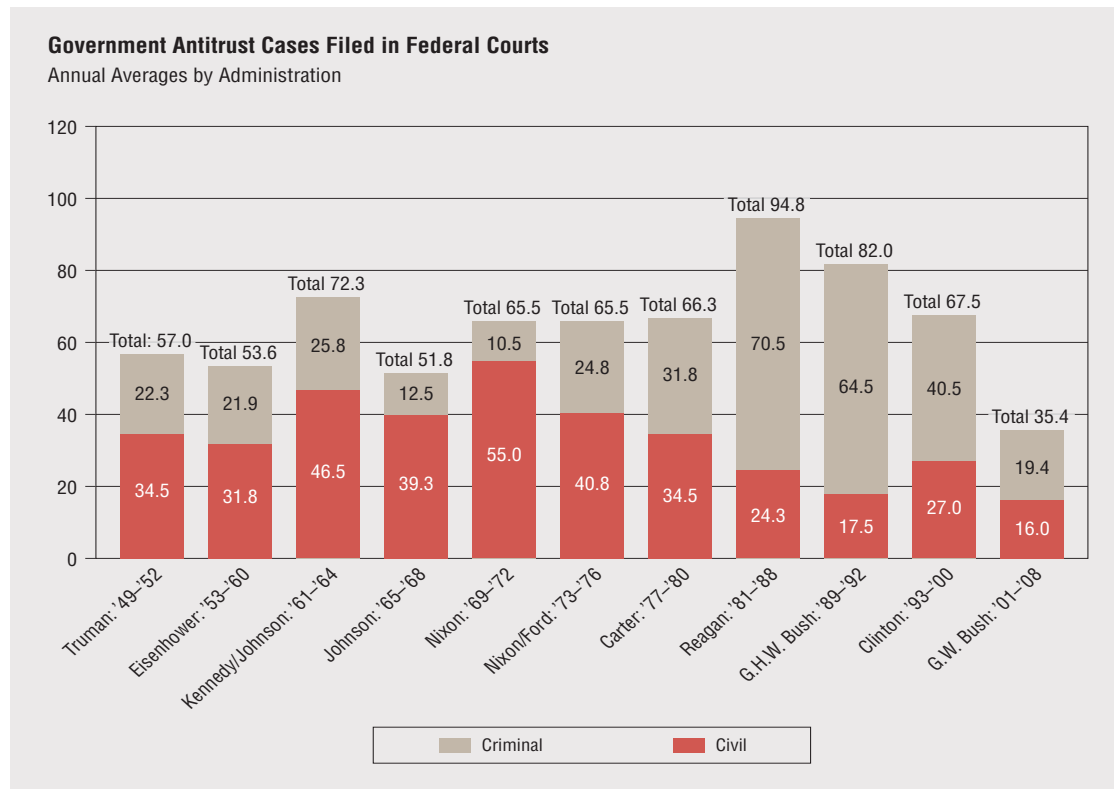
The details by administration are shown in the following chart. The chart shows the average number of government cases filed per year for the last eleven administrations. The dark portion of the column shows civil cases; the light portion shows criminal cases. The total number of cases is shown at the top of each column.⁷

Measured by the pace of case filings, the most activist civil-case enforcement occurred during the Nixon administration; the most activist criminal-case and overall enforcement occurred during the Reagan administration.

⁵ The party of the administration is assigned based on the calendar year. For example, all cases filed in the years 2001 to 2008 are assigned to the George W. Bush administration. This approach, of course, offers an imperfect measure of the policy intentions of an administration. Early in an administration, case filings may be generated by investigations that occurred in the previous administration. In addition, the composition of the FTC is less directly controlled by an administration than is the leadership of the DOJ.

⁶ Neither difference is significant at the 95 percent level; the difference in the number of civil cases is significant at the 90 percent level.

⁷ The total values may not equal the sum of the civil and criminal values due to rounding. The source for the data on criminal cases is the same as civil cases. See *supra* note 3.



Of course, these comparisons do not take into account the number of enforcement “opportunities” presented to the agencies—the supply of cases as opposed to the demand. For example, the volumes of merger cases and price-fixing cases are, to some extent, exogenously determined by the amount of such activity occurring in the economy. The same can be said of civil cases, although the enforcement priorities of the administration may be more relevant to civil cases. In any case, the nearly identical values for total cases across the two parties is consistent with the idea of an overall capacity constraint on government enforcement, with Democratic administrations showing a relative preference for civil over criminal cases.

Conclusion

Based on historical experience, the current antitrust administration may bring a few more civil cases than average and a few less criminal cases. That level of activity would represent a substantial increase over the preceding administration, however, which was well below the average in the number of cases brought. In any event, the number of government cases is likely to remain a small share of the totality of antitrust litigation in the United States. ●