September 2011

Prepared for Conference Presentation Only

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Some Empirical Evidence on Dual Enforcement[1]

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[1] This paper is adapted from an earlier paper by Richard S. Higgins, William F. Shughart II, and Robert D. Tollison entitled "Dual Enforcement of the Antitrust Laws," in Robert Mackey, James, C. Miller III, and Bruce Yandle (eds.), Public Choice and Regulation (Stanford: Hoover Institution, 1987), pp. 154 -180. Only the empirical results of the earlier paper are discussed here. For anyone who wants to see the details of the model, see pp 160-169 of our original paper.

I. Introduction

In this paper we approach the issue of dual antitrust enforcement not as legal critics but as positive economists. We rely upon a model that shows that independent dual enforcement leads to more antitrust activity at a lower unit cost than would obtain with a single agency.[2] On the other hand, if the agencies collude, as they appear to do under present institutional arrangements, dual enforcement leads to less antitrust activity and is more costly than it otherwise would be. Empirical tests using historical agency budgets and case production figures fail to refute the model's predictions.

II. Empirical Setting

Under conditions of either constant or increasing cost, our positive theory of dual enforcement predicts that output (and output per budget dollar) will be at least as large under independent dual enforcement as under collusive dual enforcement or enforcement by a single agency (Higgins, Shughart, and Tollison 1987). We test the model's main prediction by contrasting FTC and Justice Department antitrust activity over time.

The historical development of U.S. antitrust institutions – especially the events of 1948 – supplies the conditions for a natural experiment. Between 1890 and 1914 the Department of Justice was the sole antitrust agency, having responsibility for enforcing the Sherman Act; dual enforcement began in 1914 when the FTC Act was passed. A period of 34 years followed in which the Commission and Antitrust Division respectively and independently enforced the FTC and Sherman Acts, and they had joint responsibility for seeing that the provisions of the Clayton Act were obeyed. In 1948 the Cement Institute decision and a formal liaison agreement between the two antitrust enforcement units ushered in a period of information exchange and case allocation that effectively turned antitrust law institutions into a system of collusive dual enforcement.

The independence of the two agencies prior to 1948 is illustrated by the confrontation that occurred between the Commission and Justice Department in separate investigations of the Aluminum Company of America. [3] In October 1924 the FTC wrote to the attorney general concerning evidence in its possession that Alcoa was continuing to violate the provisions of a 1912 consent decree. Because the statute of limitations would become operative, new evidence was requested by the Justice Department, and "it was refused unless *written* consent was given by the Aluminum Company." [4] After the dispute with the attorney general dispute had gone on for two months, the Senate intervened to halt any inquiry into Alcoa's alleged consent decree violations. In January 1926

[2] See Higgins, Shughart, and Tollison (1987), pp.160-169.

[3] The discussion draws heavily on the material in Thomas C. Blaisdell, *The Federal Trade Commission: An Experiment in the Control of Business* (New York: Columbia University Press, 1932).

[4] *Ibid.,* p. 90, emphasis in the original.

the Senate Judiciary Committee began an investigation of the two agencies' handling of the case, described by Thomas Blaisdell as "the amazing spectacle of a congressional committee's investigation of the Department of Justice's investigation of the Federal Trade Commission's investigation of the Aluminum Company of America. " [5] Similarly, "the lack of coordination of Commission activities with those of the Attorney General have never appeared to worse advantage" than in their contemporaneous investigations of RCA during the 1920s.[6]

TABLE 1
INDUSTRY AND VIOLATION ALLOCATIONS UNDER
THE 1948 LIAISON AGREEMENT

FTC	*Antitrust Division*
Brewing; monopolization and price discrimination	Brewing: acquisitions
Auto parts: monopolization and acquisitions	Automobile industry: monopolization and dealer relations
Tires, batteries, and accessories: distribution	Tires: manufacturing
Cement	Steel (primary)
Shopping centers: trade restraints	Aviation
Department stores: acquisitions	Newspapers: acquisitions
Healthcare	Aluminum
Food and food distribution	Patents and know-how (with some major exceptions)
Petroleum: monopolization	Communications
Copiers/business machines	International agreements
Franchising	
Textile mill products: acquisitions	
Dairy industry: acquisitions	

SOURCE: Roll, "Dual Enforcement of the Antitrust Laws," p. 2080.

The principal features of the 1948 liaison agreement are a division of enforcement responsibility according to industry of respondent and, to a lesser extent, according to type of violation. The major areas of responsibility given in Table 1 are suggestive of the rather detailed allotments made under the liaison agreement. Case allocations are handled through a procedure in which one agency grants "clearance" to the other. In the liaison process consideration is usually given to prior experience with the industry or respondent in question, with the exception that criminal violations are handled exclusively by the Justice Department.

III. Data

In order to test the prediction of our dual enforcement model, we obtained a time series of FTC and Antitrust Division budgets. FTC appropriations were available for each fiscal year from 1915 through 1981. Unfortunately, the Antitrust Division series is not as extensive because its appropriations were not listed as a separate line item in the Justice Department budget until 1932.

[5] *Ibid.,* p. 241.
[6] *Ibid.,* p. 243.

As a surrogate for agency output, we chose to use the annual number of antitrust cases initiated. Antitrust Division matters are given by Posner for the years 1890 to 1969.[7] Figures for 1970 through 1981 were obtained from the Commerce Clearing House's *Trade Regulation Reporter* (4 [1982]). FTC cases in which a complaint was issued or a consent order was executed were derived from the commission's "Matter Listing by Respondent," which is maintained by the Office of the Secretary, Inquiry and Search Branch.

IV. Results

The data were initially divided into four time periods. The years 1890 – 1914 represented an era of single-agency enforcement; 1915 – 1931 was a time of independent dual enforcement, but for which Antitrust Division budgets were unavailable; complete data were obtained for the independent dual enforcement period of 1932 – 1948; and 1949 –1981 represented a period of collusive dual enforcement.

TABLE 2
ANTITRUST OUTPUT, REAL BUDGETS,
AND OUTPUT PER REAL BUDGET DOLLAR, ANNUAL AVERAGES, 1890 -1981
(DOLLARS IN THOUSANDS)

	FTC			Antitrust Division			Aggregate Activity		
Time Period	Cases	Real Budget	Cases per Dollar	Cases	Real Budget	Cases per Dollar	Cases	Real Budget	Cases per Dollar
1890-1914	--	--	--	6.08	N/A	N/A	6.08	N/A	N/A
1915-1931	117.06	$3,246.06	0.0334	10.47	N/A	N/A	127.53	N/A	N/A
1932-1948	214.18	6,401.38	0.0319	25.06	$3,110.18	0.0081	239.24	$9,511.56	0.0252
1949-1981	199.48	19,188.30	0.0157	49.24	10,798.40	0.0049	248.72	29,986.70	0.0083

Mean annual case output, real budgets, and output per real budget dollar are given for each of the four periods in Table 2. Data unavailability makes it difficult to evaluate the transition from single-agency to independent dual antitrust law enforcement. Prior to 1915, however, the Justice Department instituted, on average, just over six Sherman Act cases per year. Entry by the FTC in 1914 raised the department's average annual case output to nearly 10.5 cases. The fact that total antitrust activity rose to about 127 cases per year gives some support to our prediction that output under independent dual enforcement will be at least as large as under single-agency enforcement.

[7] Posner, "Statistical Study of Antitrust Enforcement," p. 366. Posner's evidence (see p. 372) also reveals that it would be inappropriate to include private antitrust suits in our measure of aggregate antitrust activity. He reports, for example, that two-thirds (986 out of 1,456) of the private suits brought between 1946 and 1963 followed an Antitrust Division judgment. That is, civil plaintiffs often free ride on Justice Department complaints by suing for treble damages under the Sherman Act after respondents have been found guilty in a government case. Moreover, a lot of double-counting appears in the available data because a single Justice Department suit may give rise to more than one private action.

The most striking comparison is between the independent dual enforcement era of 1932 -1948 and the post -1948 collusive dual enforcement period. Total antitrust activity remained roughly the same (239 cases per year in 1932 – 1948 and 249 cases per year in 1949-1981), but average cases per budget dollar fell dramatically. The liaison agreement appears to have reduced the output per dollar of both agencies by half. The decline is statistically significant at the 1 percent level for each agency separately and for aggregate case output per budget dollar.

As a further test of the model's predictions, we regressed 1932-1981 agency and aggregate budgets on case output, real gross national product (GNP), and a dummy variable for collusion. GNP measures the overall level of transactions in the economy and serves as a proxy for the supply of potential antitrust violations. The case activity variable on the right-hand side of the regression equation is a primitive measure of the benefits to consumers and producers of antitrust regulation. The *ceteris paribus* relation between budgets and output can thus be viewed as indicating the amount society is willing to pay for antitrust regulation.[8] The collusion dummy variable is given a value of 1 for the years following 1948, and therefore accounts for budgetary effects arising from the FTC-Justice Department liaison agreement. The predictions of our model will be supported if the coefficient of the dummy variable has a positive sign.

TABLE 3
REGRESSION RESULTS
(LOGGED ANNUAL DATA, 1932 -1981)

Dependent Variable	*C*	*Aggregate Cases*	*FTC Cases*	*Antitrust Division Cases*	*Real GNP*	*Liaison Dummy*	ρ	R^2
Aggregate Budget	3.6358	0.0418			0.8970	0.2407	0.7618	0.659
		(0.80)			(6.59)***	(1.86)*		
	9.2083	0.0727				0.4390	0.9091	0.203
		(1.34)				(3.20)**		
FTC Budget	4.9415		0.0133		0.6620	0.2222	0.8703	0.363
			(0.33)		(3.89)***	(1.72)*		
	9.1898		0.0223			0.2900	0.9306	0.104
			(0.55)			(2.26)**		
Antitrust Division Budget	-0.5572			0.1892	1.3221	0.0177	0.3548	0.892
				(3.07)***	(8.93)***	(0.12)		
	6.7987			0.3552		1.0178	0.5115	0.619
				(4.23)***		(5.45)***		

NOTES: t-values in parentheses; ρ is the estimated autocorrelation coefficient. Asterisks denote significance at the 1 percent (***), 5 percent (**), and 10 percent (*) levels.

The budget and output data were transformed logarithmically, and the regressions were estimated using generalized least squares to adjust for the autocorrelation that was present in ordinary least squares estimates. The results are reported in Table 3.

[8] See George J. Stigler "The Process of Economic Regulation," *Antitrust Bulletin* 17 (1972): 207.

In row 1 variations in aggregate case output, real GNP, and the liaison dummy variable explain 66 percent of the variation in aggregate antitrust budgets. The coefficient on the dummy variable is positive and significantly different from zero at the 10 percent level. When real GNP is dropped as an explanatory variable in row 2, the liaison dummy variable coefficient reaches significance at the 1 percent level. Overall, aggregate antitrust budgets appear to be relatively insensitive to changes in either case output or GNP.

Qualitatively similar results are obtained when separate regressions are run for each law-enforcement agency. The FTC estimates in rows 3 and 4 mirror those for aggregate antitrust activity. For the Antitrust Division, however, the dummy variable coefficient is significantly different from zero only when real GNP is omitted. Moreover, in contrast to the previous results, the Antitrust Division displays a positive and significant *ceteris paribus* relation between appropriations and caseload. The findings suggest that the 1948 liaison agreement had a greater impact on the FTC than on the Justice Department. That is, the budget "fat" that our model predicted would arise from collusive dual enforcement appears to have been disproportionately garnered by FTC.

In summary, the empirical results provide broad support for our dual-agency enforcement model. The significant increase in antitrust activity following the entry of the FTC in 1914 is consistent with the prediction that output under independent dual enforcement will be at least as large as under single-agency enforcement. In addition, we found that the 1948 FTC-Justice Department liaison agreement, which led to cartel-like information exchanges and output allocations, caused antitrust case production per budget dollar to fall by half. Finally, regression estimates showed a *ceteris paribus* increase in the sum of FTC and Justice Department budgetary appropriations as a result of the transition from independent to collusive dual enforcement, with most of the collusive gains accruing to the FTC.

V. Concluding Remarks

We have modeled the competition between government agencies having identical responsibilities and analyzed the special case of dual antitrust law enforcement by the Justice Department and the FTC. We find that, as in the private sector, competition limits output restrictions and disciplines cost decisions. Our theory predicts that output, however measured, will be larger and produced at a lower unit cost under independent dual enforcement than under single-agency or collusive dual enforcement. An empirical test using historical antitrust agency budgets and case-production figures do not refute the model's main predictions. The implications of our analysis are quite straightforward and have general applicability. With respect to the antitrust agencies, more enforcement activity could be obtained at a lower unit cost if the 1948 FTC-Justice Department liaison agreement were abandoned. Far from resulting in wasteful duplication, bureaucratic competition leads to more efficient resource use. Empirically, we found that aggregate case production was roughly the same as competitive enforcement, but at twice the cost of real budget dollars.

We recognize that some would view the increased case output predicted by our model under independent dual enforcement as "bad" rather than as "good." For example, William Baxter has expressed the opinion that the preference of economists for competition is misplaced when applied to law-enforcement activities: "It is not at all clear to me that we ought to have more antitrust intervention by the government than we have had in the last twenty years."[9] His concern was that more cases would not necessarily mean better cases. Although we abstracted from this normative issue in the theoretical work, our empirical results indicate that the efficiency effect from antitrust-enforcement competition far outweighs the output effect. Our findings are therefore not particularly sensitive to case quality considerations.

Our results do provide support for Niskanen's contention that "the passion of reformers to consolidate bureaus with similar output… seems diabolically designed to…increase the inefficiency (and, not incidentally, the budget of the bureaucracy")."[10] The "fat" in agency budgets associated with collusive dual enforcement materializes as rents in payments to the inputs used in antitrust case production. That is, following implementation of the 1948 liaison agreement, the two agencies employed relatively more attorneys, economists, and other inputs per case than would have been used in the absence of collusion.

Our findings can be extended to other bureaucratic situations. More efficient output will be obtained if government goods and services are produced competitively. Examples include allowing the various armed services to bid for the right to supply national defense, establishing an alternative postal service, and providing for a dual Coast Guard. In government, as in most other markets, monopoly will not be preferable on efficiency grounds to competition.

Finally, the importance of our analysis for the dual enforcement debate is transparent. Dual enforcement has not existed since 1948. For the last 63 years, interagency collusion has effectively given us a single antitrust-law-enforcement institution.

[9] "Debate" The FTC Under Attack," pp.1495-96.
[10] Niskanen, "Nonmarket Decision Making," pp. 300-301.

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