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A TRIBUTE TO BOB PITOFSKY AT THE START OF FTC HEARINGS ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY

By Bill Baer

Thanks Joe [Simons] for that kind introduction. And congratulations to you and your colleagues on these hearings. They are both timely and important.

Thanks too to David Pitofsky and Howard Shelanski for asking me to pinch hit for Bob to talk about the 1995 hearings. It is an honor. But I do feel out of my league – like sending a Double A player to bat for Bryce Harper in the bottom of the 9th.

Bob assumed the FTC chair in April 1995. The exceptional Jodie Bernstein and I joined him as bureau chiefs that first day. Well before that, Bob had a vision for where he wanted to take the agency. One aspect involved a broad set of hearings on the future of consumer protection and competition enforcement.

That vision was not some overnight apparition. Bob's professional career had prepared him for this challenge. Not just from an academic perch. Yes he taught at Georgetown, NYU, Columbia and Harvard and edited the leading casebook on antitrust. But he knew the FTC better than anyone: as the lead staff on the ABA's Kirkpatrick Commission's scorching critique of the agency in the late 1960's, heading the Bureau of Consumer Protection in the early 70's; as a Commissioner later that decade, and throughout serving on various presidential and ABA transition teams. In short, he rejoined the FTC in 1995 knowing his stuff.

So why commit the considerable time and energy to hearings on the future of consumer protection and antitrust enforcement at the outset of a new Commission when there was so much law enforcement to be done? (Joe, this may be a question some of your staff are asking when you are not in the room). In the mid-90's merger filings and consumer protection enforcement actions were at record levels. Resources were scarce. Yet Bob was committed to making these hearings a priority.

Why? I think Bob had three basic thoughts in mind. First he knew well that investigating and reporting to Congress and the public was a core reason Congress created the Federal Trade Commission. Early on the agency had embraced that role. Its study of radio led to passage of the Federal Communications Act of 1934. Hearings on public utilities and on securities gave impetus to the 1935 Public Utility Holding Company Act and to the Securities Act of 1933. Congress' decision to amend Section 7 of the Clayton Act after World War II relied heavily on Commission hearings as well. That part of the Commission's mission had almost disappeared in the 60's, 70's and 80's. Bob thought it important and wanted to bring it back. As he said in opening the hearings just about 23 years ago:

“These hearings are designed to restore the tradition of linking law enforcement with a continuing review of economic conditions to ensure that the laws make sense in light of contemporary competitive conditions.”

Second, Bob understood that the world economy was changing and changing fast. He wanted to make sure antitrust and consumer protection enforcement understood and accounted for:

- The need for American firms to compete in an increasingly global economy
- The challenges posed by the dramatic increase in nation states with a competition enforcement regime
- The growing importance of innovation and of scale
- The increasing significance of patent thickets, network effects, “lock-in” and tipping points in understanding market dynamics
- Whether efficiencies were under-appreciated and under-valued by antitrust enforcers
- Whether, in a prescient question he asked on Day One of the hearings: “Are consumers in need of different types or levels of government enforcement against fraud and deception where new marketing techniques are involved – especially marketing by telephone, over television, or on the Internet.”

Bob’s third point was more subtle, but equally important. He had witnessed in the 1970’s and 80’s both the rise of the Chicago School critique of antitrust and the broad-based revolt against regulation. He was sympathetic to many of those criticisms. But he also thought – as reflected in a collection of essays he edited in 2008 – that the critics had “Overshot the Mark”, causing undue caution in antitrust enforcement and a reluctance to regulate in situations where consumers were being harmed and markets were not self-correcting. So there was a sense in which the hearings provided a vehicle to promote effective, thoughtful and legally and economically sound enforcement. Teddy Roosevelt said “speak softly and carry a big stick.” I doubt TR’s contemporaries or his biographers thought he embraced the first part of that notion. Bob, in his wonderfully understated manner, clearly did. And he knew too that the Commission had considerable authority, a big stick. He thought the hearings would both energize and legitimize the agency when it identified a real world problem and sought to act.

The hearings went forward and a dedicated staff led by Susan DeSanti and Debra Valentine produced an impressive two volume report eight months later: volume one focused on competition, volume two on consumer protection. Both placed their findings and recommendations in the context of “the New High-Tech, Global Marketplace.” And if you look at the FTC’s remarkable achievements in the intervening years, a lot is traceable to the 1995 hearings and the 1996 report. The agency – together with the Department of Justice – engaged internationally like never before; it took on and won tough cases – think Toys R Us and Staples/Office Depot – that skeptics saw as sure losers; it improved guidance to the business community on issues like the intersection of intellectual property rights and antitrust, how to view standard setting organizations and standard essential patents, and the weight to be afforded efficiencies in merger analysis. The consumer protection volume warned of the concerns we live with daily: fraud and deception on the internet and the privacy risks consumers would inevitably face in a digital economy.

It was and remains an impressive piece of work. But it is 20 plus years old. And Bob, I know, would be the first to applaud Joe and the Commission for saying that it is time for phase two. We confront a host of challenges, some anticipated in the 1996 Report; some not. The issues are well framed in the Commission's initial announcement and in the ambitious hearing schedule you have laid out: protecting privacy and combatting identify theft; balancing the pros and cons of on-line successful platforms; reassessing whether the consumer welfare standard as currently applied guarantees consumers the benefits of competitive markets.

And by tying these areas to the Pitofsky hearings you reinforce the notion that consumer protection and antitrust enforcement are most effective when they are non-partisan, analytically sound, fact-based and respect the importance of continuity. You embrace the idea that we must be forward looking and always open to critical reexamination of first principles.

For the last 30 years or so that has been the approach of those of us privileged to work in this field. Under both Republican and Democratic leadership. And it has worked. It has enhanced the credibility, the predictability and the judicial acceptance of enforcement.

You honor Bob by tying this important and ambitious effort to his prior hearings. But you honor him even more by carrying on the tradition of non-partisan, forward-looking and consumer-oriented law enforcement that was and is at the core of his being.