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The Political Stars Align for a Criminal Antitrust Whistleblower Statute

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In 2018 the [SEC reported](#) another “record-breaking year for [its] whistleblower program.” Whistleblower awards of approximately \$168 million were made to 13 individuals. The success story told in the [CFTC annual report](#) was similar, including reporting the largest-ever CFTC whistleblower award of approximately \$30 million. At the United States Department of Justice Antitrust Division, there was no story. There is no antitrust whistleblower statute. No anti-retaliation protection for a whistleblower, no potential financial reward for taking the enormous career, financial and emotional risk of coming forward. Secret price fixing cartels are engaged in fraud against the consumer. It’s time for the Antitrust Division to have the same tools to fight cartels that the SEC, CFTC and other agencies have to fight other forms of fraud.

The Republican controlled Senate has previously passed criminal antitrust whistleblower protection. This legislation, however, did not include any financial incentive for coming forward. The last version of this legislation was the Grassley-Leahy [Criminal Antitrust Anti-Retaliation Act of 2017](#). The legislation passed unanimously in the Senate but, like previous bills, this very modest legislation was never even given a vote in the Republican controlled House of Representatives. The Senate anti-retaliation legislation falls far short of the SEC style legislation that provides some potential financial reward for coming forward. A whistleblower is not likely to trust that she will be “protected” from retaliation in this David versus Goliath situation. The political stars, however have now lined up to create an environment for passage of SEC-style (whistleblower retaliation protection plus an incentive for coming forward) legislation.

The new House Democratic majority will certainly be receptive to antitrust whistleblower legislation. The House has already adopted whistleblower rules for itself, including establishing its first [Office of the Whistleblower Ombudsman](#). The office is tasked with developing “best practices for whistleblower intake for offices of the House” and providing “trainings for offices of the House on whistleblower intake.” [The Democrats promise to exercise strong antitrust oversight](#). On questions like industry concentration and the consumer welfare standard, Democrats and Republicans are not likely to agree. But a statute that encourages individuals to provide information about price fixing and bid

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rigging cartels should find widespread bipartisan support. Its good policy and price fixing cartels do not have a strong lobby. With upwards of 20 candidates seeking the Democratic nomination, most if not all will pledge a strong antitrust platform. This legislation should be part of it.

The support of the Department of Justice is also very important. In the past the DOJ has expressed disapproval of a financially rewarding a whistleblower, [expressing fears that a witnesses' credibility might be undermined by a potential financial reward](#). These objections and others are discussed and dismantled in [It's a Crime There Isn't a Criminal Antitrust Whistleblower Statute](#). This article discusses why a criminal antitrust whistleblower statute is good public policy and will reinvigorate the fight against cartels. A criminal antitrust statute may prove even more successful than the SEC program because price fixing cartels often involve many insiders (including foreigners) who could expose a cartel if they had some possible benefit for doing so.

Oddly enough, the expected confirmation of William Barr as Attorney General may swing the Department's support behind a robust cartel whistleblower statute. Mr. Barr has been a fierce critic in the past of whistleblower cases but at his confirmation hearing he stated: "[I will diligently enforce the False Claims Act](#)," marking a reversal from prior comments he made in which he declared the law was an abomination and unconstitutional. In 1993 the Department of Justice adopted the Corporate Leniency Policy—a form of whistleblower reward for corporations to self-report--and cartel prosecutions entered into a new era. There is not a single Attorney General, Republican or Democrat who does not wish the program was adopted under his/her watch. Attorney General Barr could have his "Nixon to China" moment and support a new tool for cartel prosecutors to take the next step in strong enforcement.

Currently, the only sure thing a cartel whistleblower can expect is career ending publicity, huge legal bills that come from cooperating with the government and a lifetime of diminished earning potential. [Divorce and other family hardships also often come along with the title "whistleblower."](#) As an Antitrust Division prosecutor, I investigated and prosecuted criminal antitrust cartels and I know that there are potential antitrust cartel whistleblowers out there. Price fixing and bid rigging schemes are usually approved at the top of the corporate ladder, but the dirty work that leaves fingerprints is carried out, on orders, by lower level employees. Cartels even have names for this division of criminal labor: "Masters" and "sherpas," "Top guy" and "working level guy." There are undoubtedly a few "working level" guys who would like to see the "Top guy" go down for sending the working stiffs to the price fixing or bid rigging meetings (and possibly prison). There is, however, no vehicle, like the SEC and CFTC have, that makes this a realistic possibility. While there are many potential whistleblowers, currently the risk and expense of coming forward is too high.

It sometimes takes a crisis to move legislation forward. The financial crisis of 2008 was the catalyst that [allowed the SEC whistleblower legislation to overcome opposition by the business community](#). While not a crisis, the number of criminal cartel cases filed by the Antitrust Division has [trended sharply downward](#) over the last few years. This isn't a Republican versus Democrat issue. There are [many non-political reasons](#) for fewer cartel prosecutions. After two decades of highly successful international cartel prosecutions, producing huge fines and increased prison sentences for both U.S. and foreign defendants, conspirators have learned to be more careful and not take such detailed

notes of collusive agreements. Foreign executives now understand they are not beyond the reach of U.S. antitrust laws. As criminals get smarter, so too should prosecutors. As paper trails grow fainter, whistleblower cooperation becomes even more important.

Here's another reason that a cartel whistleblower statute should enjoy bipartisan support. There is already legislation that allows a whistleblower to come forward and be rewarded—but only if the victim of the antitrust crime is the federal government! A whistleblower can file a [False Claims Act](#) case, alleging that the United States was defrauded and collect a substantial reward if the government recovers. [A whistleblower recently exposed a cartel that fixed prices and rigged bids on Department of Defense fuel oil contracts in South Korea.](#) The defendants have agreed to plead guilty to criminal charges and pay a total of approximately \$82 million in criminal fines and have also agreed to pay a total of approximately \$154 million to the United States for civil antitrust and False Claims Act violations related to the bid-rigging conspiracy. The whistleblower (credibility intact) will collect between 15 and 25% of this recovery and the investigation is continuing. Whistleblower rewards work. But if the same whistleblower had information about price fixing on consumer contracts or products there would be no potential whistleblower reward—and likely no whistleblower. Why should there be an incentive for a whistleblower to come forward and expose bid rigging on government contracts, but not bid rigging against consumers at large? There shouldn't; consumers deserve the same protection.

In November 2016, then SEC chair Mary Jo White said: [“The whistleblower program has had a transformative impact on enforcement and that impact will only increase in the coming years.”](#) She was correct. Republican and Democrats, antitrust “hipsters” and Chicago School oldsters tend not to agree on much, but there is one thing they should agree on: It's time for a criminal antitrust whistleblower statute! The Supreme Court has called cartels “the supreme evil of antitrust,” and almost everybody is against supreme evils. It's time to add a whistleblower tool to the Antitrust Division's arsenal to fight cartels.