

THE BROOKINGS INSTITUTION

WEBINAR

THE FUTURE OF TECH ANTITRUST
IN THE BIDEN ADMINISTRATION

Washington, D.C.

Monday, December 1, 2020

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P R O C E E D I N G S

MR. WEST: Good morning, I'm Darrell West, vice president of Governance Studies at the Brookings Institution. I would like to welcome you to our discussion on "The Future of Tech Antitrust Policy in the Biden Administration."

The growth of technology companies has generated considerable attention from government authorities. There's concern about potential harms to consumers and ways that large firms use mergers to remove competitors. There have been a number of different remedies proposed, everything from breaking up the companies or limiting future acquisitions to providing stronger antitrust enforcement and strengthening competition policy, more broadly defined.

To help us think about these issues we have four distinguished experts. Avery Gardner is general counsel and senior fellow for Competition, Data, and Power at the Center for Democracy & Technology. Leah Nylen is a technology reporter for POLITICO Pro. Matt Perault is director for the Center for Science & Technology Policy and an associate professor at Duke University, which also is cosponsoring this event. And my colleague, Nicol Turner Lee, is a senior fellow in Governance Studies and director of the Brookings Center for Technology Innovation.

For audience members who would like to pose questions, you can email us at events@Brookings.edu — that's events@Brookings.edu, or we've also set up a Twitter hashtag at #Antitrust. So we can get questions through either one of those means.

So I'd like to start with Avery. How would you describe the current situation in regard to antitrust enforcement?

MS. GARDINER: Thanks so much, and thanks for having me here today. I'm really excited to be part of this panel.

In terms of enforcement in antitrust, what we've seen is over a decade of focus on what we call Section 1 of the Sherman Act, looking at how companies collude in ways that are illegal. And that's great, we should enforce that. But there has been drastic under enforcement of the other part of the Sherman Act. That's Section 2. And that's what so important when we talk about tech and antitrust because so many of the digital winners we see are in markets that tip in what economists call winner take all markets, right, where there are good reasons for only one company to survive. Say they bring

together all of the relevant users for a particular application, right, there's a good reason to have only one company there potentially. But that means that you need to look at Section 2 of the Sherman Act. You need to look at how those companies are using or abusing their market power in ways that might hurt consumers. And that has been so under enforced that until the Department of Justice brought its case against Google earlier this fall, it had only brought one other Section 2 antitrust case since the Microsoft case back in the '90s, right. So when I say under enforcement, I mean one or two cases in 20 years, that's a lot of under enforcement. The FTC has done a little better, but you could count them on about one had the number of Section 2 cases they've brought.

So what I'm hoping to see as we look forward to the Biden administration is a drastic increase in the resources available to both of those agencies to do litigation so that they can bring more than one or two or three cases in a year, but also a signal from the administration that, hey, try some of these cases, try bringing some new life into Section 2 when it comes to the digital economy. And if you lose a few, that's okay, because what we need is to see if our antitrust laws, which date back a long time, right — this law was written in 1980 — we need to see if they are flexible enough to handle the challenges of the modern digital economy. But we can't make that assessment without trying a few more cases.

So that's what I'm hoping to see at a very high level, Darrell.

MR. WEST: Leah, you cover the tech sector for POLITICO and you've written about the Biden transition teams. What do you expect from the Biden-Harris administration in regard to antitrust policy and enforcement?

MS. NYLEN: Thanks for having me on, Darrell. I'm looking forward to it.

So it's a little bit early still to figure out how serious they're going to be about antitrust. Even though antitrust was a pretty big issue during the primary, Democratic primary, during the general campaign the Biden team really didn't want to talk about antitrust, they really wanted to focus on just a couple of issues related to the economy and Coronavirus. So it's still a little bit up in the air.

The first sort of big indications of how serious they're going to be about antitrust enforcement will really be when they name the FTC chair and then when they name the assistant attorney general for antitrust. And there's sort of one other thing that people are watching a little bit right

now, which is a group of pretty prominent Obama-era veterans from the FTC and DOJ recommended creating a White House Office of Competition Policy that would focus on sort of competition writ large across the federal government, things that different agencies could do.

So people are really like watching to see if Biden decides to pick upon that as they sort of focus on the different economic recovery items.

MR. WEST: So, Matt, I know you would like to see more information about the market in terms of how it operates and how it affects particular firms. How do we learn how the market is affecting consumers and companies?

MR. PERAULT: Yes, that is something that I'd love to learn. And, Darrell, thanks so much for having me on and thank you so much for co-hosting this event with our Center on Science & Technology Policy at Duke.

I am interested in learning more about the market and I'm interested in learning more about it in part because of the gap between the current rhetoric that often exists in antitrust and the experience that I had when I was working at Facebook. So we hear all the time now, for instance, that Apple, Amazon, Google, and Facebook are each dominant in separate markets. But during my time at Facebook I would have been laughed out of the room if I had ever walked into a room and said, you know what, Facebook no longer competes with Google, we've won. That would have surprised the engineers at our company, that would have surprised the sales team at our company.

And so I think that that's an issue where we need to learn more and where it would be helpful to figure out some pathways for learning more.

A second one is quality. There have been accusations about declining quality of tech products, in part because of privacy protections that they offer, for instance. But I think in many of those instances, companies are trying to do many different things at once. They're trying to offer better products for advertisers, as well as trying to deliver a valuable product for consumers. And I think that looking closely at non-price effects, including quality and trying to develop better metrics for how we think about them would be very helpful.

A final area where I think it would be helpful to learn more is about the relationship between platforms and sellers. So there are lots of debates now about whether app store pricing, like a

30% tax for instance, is appropriate and competitive. I think that's an area where we'd like to understand more about what a competitive price might actually be and whether 30% is a competitive price. And there are also lots of questions about data sharing. So if Amazon is running a platform and also sells competing products on that platform what is appropriate data for Amazon to share as a platform with the people who build its products.

I'm hoping that in a Biden administration we won't just operate from a position of certainty, but we'll operate from a position of curiosity, where we're actually trying to learn more about these areas that I think remain somewhat murky. I think there are a couple of different things that we could do if we were operating from a position of curiosity to try to learn more. One is focused on transparency in data sharing. And I think there are things that congress could do to make it easier for companies to share data. The second is experimentation, so looking at models that have been used in other markets, like regulatory sand boxes for instance, where you try a regulatory model for a period of time, you use that time to gather data, and then hopefully that data informs future policy making. And then the third — and this is one where Avery has convinced me — is to look at litigation as a way to learn. I historically hadn't thought of litigation as a tool for learning. Typically, I think it's often viewed as a tool for certainty, but I think Avery's approach where she has suggested bringing more cases, including more cases that agencies lose, as a way to learn more about the markets and a way to learn more about how the law is functioning would be very productive.

MR. WEST: So, Nicol, what do you expect from the Biden-Harris administration in regards to antitrust?

DR. TURNER LEE: So this is interesting — and thanks, Darrell, for hosting. And you and I have sort of did this what to expect series for quite some time. And if you're interested in learning more about that, we also have a podcast at CTI where you can actually pick up on Tech Tank a lot of these concerns and issues.

You know, being the last person I actually want to echo what everybody said. I think going into this new administration is clearly going to be an obvious — and I like the way Matt put it — period of exploration. There has been a lot that's been stacked up, you know, particularly leading up to the election, that this new administration will have to sort of disentangle and figure out what's important to

them. But I do want to go back to Leah. A lot of this will be predicated on who gets elected in these key appointments, who is going to be taking the helm and managing the direction that the administration will go. And that will matter going forward, particularly if it's also a person who understand that congress has simultaneously been putting through their own process in terms of what they think should be some legislative directives around antitrust.

I also think going forward that there will be, in addition to, you know, examination of anti-competition behavior, market concentration, and those things that are typical of antitrust cases, there will be this examination of the consequences of the new markets. Consequences around privacy I think are going to show up in some way or form — consequences when it comes to small business compliance, consequences when it comes to income disparities.

We talked about prior to the pandemic I think there was a lot of conversation of keeping things like privacy out. I think it actually may go in in the consideration on whether or not their monopolistic practices that are showing up.

And then finally I would just add this one caveat that has not been mentioned yet. You know, the Biden administration does have one secret weapon that people are not really thinking about, and that is Senator Harris. Senator Harris represents these constituents. She did, you know, in her previous role. It's been rumored that she may err on the side of these companies. Well, I don't think that's actually going to be the case. I've said to several people (inaudible) here that she actually may become the deal maker that we've been looking for that will be able to sort of go behind the scenes and find better compromise, as well as keeping up a front facing sternness when it comes to taking on this issue that I think is going to continue to be very important to the Democratic Party.

So I want to put that out there because people tend to forget that she's played a role in same way or form with many of these companies and we may actually have a silver bullet of someone who's able to negotiate differently and really reel back I think some of the concerns that people have, which is why we keep having conversations on antitrust.

MR. WEST: Yes, I think that's a great point about Vice President-elect Harris, because some people do think she may end up being closer to industry. Personally, I'd be surprised if that's the case just because the locus of the Democratic Party, as well as the country as a whole, has changed so

much just in the last couple of years. You know, we've written about the rising tech lash and just people's concerns about a variety of different fronts. So I'd be surprised if she — if Biden ends up being a one term president, she will want to run in 2024 and she's going to have to recognize those new realities.

So there's a question I'd like to pose and have each of you answer, which is on the question of remedies. So I mentioned there are lots of different proposals to deal with some of the antitrust concerns that are out there, ranging from breaking up the large firms, restricting future acquisitions. The House Antitrust Subcommittee wants to rewrite antitrust laws to have a broader definition of consumer harms, going beyond the consumer welfare standard. Several of you mentioned the need for tougher antitrust enforcement. People have suggested the FTC and the Department of Justice need more funding and more staffing in order to be able to file those types of cases. Some people suggest we need to go beyond antitrust to thinking about competition more broadly defined. Like how do you encourage small and medium-sized enterprises to develop and compete effectively.

So there are lots of different remedies that have been proposed. I'd like to get a sense from each of you what do you think is the most productive way, should we be doing all these things, some of these things, none of these things?

Avery, why don't we start with you?

MS. GARDINER: Oh, gosh, that's a big question. I love it though.

So antitrust is fundamentally fact based, right. It's about the actions of an individual company and those effects on the market. And so it's really, really hard to approach it from a regulatory perspective. I think that's why our system is not a regulatory one when it comes to antitrust law. It's an enforcement regime, right? We don't say you can sell this product and you must sell it at this price. We don't regulate it the way we used to regulate railroad tariffs. It's an enforcement system. So that's why I'm a big fan of more enforcement.

But there are a lot of tools there, Darrell, as you mentioned. And the notion of really focusing on competition policy beyond just the strictures of antitrust law will be incredibly important for the new administration. So Leah mentioned the possibility of a White House office on competition policy and I think that would be a stellar idea as we think about how to encourage competition broadly. What does that mean? Well, maybe that means that we could use a little more competition in the provision of

broadband, as an example, right. Most of us only have one or maybe two options for how we get broadband connectivity. That's not something that additional enforcement from the DOJ is going to remedy, that's something that we have to think about with the FCC and policy there. How do we think about encouraging small businesses and developing the tools for them to be successful? That again is not a matter of antitrust enforcement, nor is it really the responsibility of big private companies. That's our responsibility as a society and one that we can embrace from the executive branch, but also from the legislative branch.

When it comes to new tools in the legislative arena, I think there are a few that are pretty easy big ones, and obvious bipartisan support exists for them. Increasing resources, I think will happen. That is very likely. Another one that could be interesting would be to grant civil fining authority to the antitrust agencies, right. There have been a lot of people who think that Europe is ahead of us on antitrust law and I would submit that that's not true. I think that our systems just work differently. In the United States we do an investigation, identify harm, litigate over it, and then remedy. In the European Union, they identify the harm and fine somebody and then they go to court to try to sort it out. And I wonder if an approach in the U.S. to grant civil fining authority to the agencies is something that we should at least explore as a potential to speed these things up.

One of the things we haven't touched on yet is that when it comes to tech a year or two or three years is an eternity. And our processes so far have been very, very slow, whether they are enforcement actions at the agencies, which hardly ever happen, or even things like 6(b) industry studies that the FTC can do. They are slow. So we need to look at ways we can speed up the development of antitrust law and competition policy.

And I'll give the other panelists a chance now, but I have to say one more part, and that is when I was at the Department of Justice in the Antitrust Division, we put a priority on issuing closing statements when we conducted an investigation and ended it without taking action and we would explain why. And that practice has fallen out of favor at both agencies. They don't write those closing statements very often. And I would hope that in the next administration, as a matter of increased transparency, that that practice would come back. And so if the agency decides not to take action, tell us why, help us understand, and give us that guidance for how policy is being developed at the agencies. Because, you

know, things happen on the positive side, they also happen on the negative side. And I think there could be a lot more learning and development of our thinking on this in that curiosity and exploratory manner that Matt was describing earlier.

MR. WEST: So, Leah, your thoughts on possible remedies? Either things you'd like to see happen or things that you expect to see happen under the Biden-Harris administration.

MS. NYLEN: I want to pick up on a couple of things that Avery said. I do think one thing that you have seen a lot of discussion of in congress is the civil fining authority. It is sort of interesting, on the cartel side, which Avery said we've done a lot of enforcement over the last 20 years, we have this idea that it's very important to fine the companies themselves and potentially bring criminal charges against individuals who are involved in cartels. And the reason we do this, unlike most other places in the world who don't actually have individual sanctions, is we think that when you make the people in charge of a company potentially liable for these illegal acts, it's going to like make them pay much more attention.

So you do see in Europe lots of people having criticisms of the European Commission for just fining people and not really focusing the remedy, but I think there is something to the idea that if you do impose some significant financial penalties it's going to make people pay much more attention.

A couple of other things. You know, the U.S. invented sort of the concept of antitrust, but a lot of the more developments of late have happened in Europe. And so some of the really interesting things that are going on there, the U.K. just announced this week that they're going to be creating a digital authority that will be focused on competition among the major tech players.

The EU next week is expected to unveil some guidance for platforms that might include a blacklist of sort of dos and don'ts, things that they do want them to — or things that are okay for them to do, things that are just not okay once you have a certain market power. You saw a little bit of that in the House report. One of the proposals that House Democrats have been really excited about is this idea of sort of creating a Glass-Steagall for the internet, as they've been calling it. Structural separations between companies so that, you know, you can be the marketplace or you can be a seller, you can't be both. That one is — as some Republicans have said, that's like dead on arrival, so I'm not quite sure how far that one will go. But I think at least people are sort of talking about whether we need to have some sort of either structural separation, some black letter lines that major platforms should not be able to

cross. Those are sort of things that I think will be pretty interesting as the discussion continues next year.

MR. WEST: That is interesting you mentioned the Glass-Steagall possibility. On our Tech Tank podcast a couple of months ago we had Congressman Cicilline on discussing that. It was interesting just to hear how he thought about that issue. But, as you point out, Republicans have been pretty hostile to that idea.

Matt, your thoughts on possible remedies, how should we approach this sector, how should we be thinking about it?

MR. PERAULT: Yeah, so I love Leah's point about looking to other jurisdictions where there may be more innovation right now in antitrust law and policy to see how new policy ideas unfold there and see what we can learn and bring in. The digital markets unit in the U.K. I think is a great example of that, given some of the proposals for institutional homes for more competition policy in the U.S. There's a paper from the Shorenstein Center — that I think a Brookings author was a participant in — a few months ago about a digital platforms authority. And so that's an idea that's being considered in the U.S. as well. Australia has proposed something similar. I think those types of proposals for a competition institution tend to be a little bit of a Rorschach Test, you see in them what you want to see in them. And there is a lot of uncertainty about how they will play out in practice. I think we have a lot to learn from looking to markets like the U.K. and Australia and seeing how they perform there.

One thing that I would like to learn more about, and I hope there will be legislative action on, is the idea of portability and interoperability. And so that was included in the House Judiciary Committee report as one possible remedy. But I think there are core things that we still don't know about the concepts of portability and interoperability. We don't know about their implications for privacy and security. So if you can take data easily from one platform to another what happens when another platform violates your privacy in some way or is more vulnerable to hacking, for instance? And we also don't know what the value will be for competition. It's possible that being able to take your data out of Facebook into a competitor more easily will be good for an incumbent. It's possible that mandates for challenger companies to share data with incumbents might actually help incumbents. And so it's possible I think that portability might actually result in advantages for incumbent companies.

So I think that that's one where it would be really useful to have some sort of legislation

that creates some sort of trial in portability and interoperability and allows us to understand more about how they work in practice and what kind of privacy and security safeguards would be helpful to help them work as intended.

One thing that I think is worth thinking about as we look forward toward legislative solutions, is this wonderful section of Representative Buck's concurrence and dissent report that he authored alongside the House Judiciary Committee's majority report, where he had a category that was devoted solely to the need for clarification and expert feedback. So it was a set of recommendations in the majority report that he didn't endorse, but he also didn't reject, and suggested that there would be need for further study.

I think that those items, and possibly other items as well, it would be beneficial to consider that approach, to look at them not as things that we're ready to implement, but that could benefit from further investigation.

MS. GARDINER: Darrell, could I pick up on something that was just said there?

MR. WEST: Sure, go ahead.

MS. GARDINER: When he's talking about interoperability and portability, which are really fascinating concepts that deserve a lot more investigation, it calls into question one of the fundamental issues in antitrust that has been a feature of our jurisprudence for a long time, and that is we don't have a generalized duty to deal with your rivals in this country, right. So as a general matter, companies don't have to engage with their rivals, they don't have to let companies onto their platform if they don't want to, they don't have to make them part of their package deal. That's been our law for a really, really, really long time. And a lot of the conversation now that's happening in Capitol Hill and in the agencies, is questioning that. And that's a really big question and it's one that I think would benefit from way more conversation openly that what we're really talking about is questioning this long-standing notion that you don't have a duty to deal with your competitor and kind of saying well, maybe you do. Maybe you have a duty to be interoperable with them, maybe you do have a duty to make your platform accessible to them, maybe you have to allow for your users to port their data there. Those are questions that I don't think any of us can say today are a good idea or a bad idea, but I think we need to recognize that that's a really big part of the way our antitrust law has been shaped for the past — I'm going to say about five decades,

right. We could go back longer, probably, to Aspen Skiing to get to those kinds of duty to deal cases.

And having that conversation and really deciding whether that's the right path or the wrong path for competition for a lot of the reasons that Matt suggested, the effects are currently unknown, right. But calling that out as a question and engaging the legal scholarship would be really, really helpful in trying to figure out where all of this is developing.

MS. WEST: Thanks, Avery. That's a great addition.

So, Nicol, your thoughts on possible remedies?

DR. TURNER LEE: No, I mean I think what everyone has said is really interesting and I want to pick up on Avery's last point. I mean I think part of the challenge that the Biden administration will have going into this is that everything has changed, right. And we're also talking about reviewing antitrust in the midst of economic recovery, which makes it even more complicated in terms of the types of market failures and market concentration that's actually happened, and the need for more small business support.

And so I think going forward we have to contextualize these issues more so than ever because prior to the pandemic I think there were things that we needed to do, but now I think they will actually influence the extent to which we actually take this more seriously.

I want to echo, in terms of remedy I do like this idea of a separate office that is actually focused on this for the reasons that I just mentioned. I think that an office that looks carefully not just at the antitrust side of it but somewhat, as Tom Wheeler has also indicated, looking at these other issues that are sort of embodied and encased in these challenges of platforms I think would be a step ahead, particularly as we're looking at — and, again, I'm a data person — the fact that we have these spaces that we've not really looked at how they applied to the new digital normal to me makes sense to really go into this — and Bill Baer, our colleague here at Brookings, has said the same thing — go into this with an open mind because that open mind may allow us to actually innovate our current legislation and regulatory statutes in ways that actually make better sense.

One thing that we haven't talked about that I think will also be a remedy under this administration are state AGs. It's still not clear what their role will be in the litigation of antitrust issues. We saw that the DOJ put forth a case against Google and AGs came behind, or the same thing with

Facebook. We're seeing them as a result of this current administration, you now, playing a significant role. It will be interesting to see how they are further emboldened to take on these case, or if there will be some general standard perhaps through an agency that will help them to align.

One last thing I would say too is I think — and I may be bold in saying this — I think it's going to be very difficult to just go back to the rhetoric of tech break up because I think what we found the last few years, it is really hard to define what we're breaking up, given that these are not like the — as Avery talked about — the railroad. These aren't typical baby bell companies and so it may be interesting to see if there will be more pressure and remedy on future mergers and acquisitions and what that looks like in terms of market concentration versus trying to go in and figure out what aspects of a platform company or a tech company — outside of Amazon perhaps — but, you know, what part can you break up without imploding other parts of the ecosystem?

And I think that's one of the biggest challenges that we saw before the pandemic and before this new presidency that we're actually going to see going out of this. Where are the pressure points? And I think all of us know there have been lots of legislators who tried to figure that, like Senator Warren, Elizabeth Warren, but I don't think it's real clear, you know, what we're trying to actually get at when we try to break up tech companies and what problems we're really trying to solve that are based in fact, which is what Avery just actually talked about.

MR. WEST: So, Leah, it seems like president-elect Biden has several different options as he thinks about the antitrust area. So some of the ideas basically have to go through congress, so would require new legislation. There are things he could do through executive orders. Certainly, Presidents Obama and Trump kind of increased the use of executive orders, so you can actually have a tremendous impact through that means. We've talked a little bit about agency operations and department enforcement mechanisms, so as you're looking ahead to the Biden administration, how much do you think he's going to go through congress and how much is he going to rely on executive orders, how much will he rely on the Federal Trade Commission and the Department of Justice just for tougher enforcement?

MS. NYLEN: That's a really good question I think, especially if the Senate stays in the hands of the Republicans next year. It's going to be a lot harder to get any of the bigger ideas on antitrust through. The Republicans — and I mean there are some, like Josh Hawley, Marsha Blackburn, who are

much more amenable to some of the antitrust changes focused on tech, but in general there a lot of Senate Republicans who are less thrilled, and Mike Lee is one of those who is the Senator in charge of antitrust in the Senate.

So I think one of the things I will be looking for a lot is to see how much the agencies themselves do. I think Nicol mentioned this idea of future acquisitions. The FTC started a study this year looking at the previous acquisitions that they hadn't looked at for the past 10 years for the five big companies; Apple, Amazon, Google, Facebook, and Microsoft. And so they're looking at what I like to call the little acquisitions by big tech. And they have said that, you know, if they sort of — if they find something there, they think they might be able to sort of put some restrictions on those companies without any kind of legislative action. They could, for example, require anytime one of those five wants to acquire something to let the FTC and DOJ know so that they can take a look at it if they want so that these things sort of don't fly under the radar.

Another option that has come up is, you know, the FTC does have — it was created to be a separate agency from the Justice Department and it does have a little bit more rule making authority. That hasn't ever really been explored at the FTC. But one thing that particularly Democratic commissioner Rohit Chopra has really pushed for is perhaps the next administration could explore that more, perhaps making some — they have the authority to challenge unfair methods of competition. They could try defining what that means.

One area where they have suggested that they might do that is in the area of non-compete agreements. You see those a lot — you know, they've sort of become much more common and sometimes you see them in very strange industries. There was the Jimmy Johns example where there were people having to sign non-compete agreements so they wouldn't go to other sandwich shops. But that was — that's not really the idea of what a non-compete is for. So that is I think one area where you might see some movement next year.

I wanted to pick up on one thing that Matt said. When we talk about the idea of a digital regulator, some of the reasons that people are a little bit concerned about that is because everything is starting to become digital. Like even industries that you might not necessarily think of as digital, like farming, now involve a lot more — they do involve a lot more technology. So if you have a regulator that

is only focused on technology, like how much does that apply to the rest of the economy? Does that apply to Monsanto as it's trying to come up with stuff?

And in terms of like looking at interoperability and data portability, one area that has been pretty interesting under the Trump administration is the area of electronic health records. The HHS has been very focused on that. So I think that might be one area where, you know, we sort of accept that the idea that you should be able to like take your medical records with you as sort of a social good. So the government has used a little bit of its authority with Medicare and Medicaid to push people into having more interoperability. That might be an area for study to see how that works and whether that could be sort of transferred to other industries.

MR. WEST: That's a good point.

Matt, so what happens if every company basically becomes a tech company? Like right now we're focused on the large internet platforms, but do we expect some of these antitrust enforcement actions to start to move beyond technology? And I'd also love to get your thoughts on, you know, how much you think Biden is going to rely on executive orders versus agency enforcement.

MR. PERAULT: Yeah, I think it probably will continue to focus on technology and probably on a small set of the technology industry. There's been an enormous focus on a very small number of firms. But I think Leah's kind of underlying point is right, which is it shouldn't be the case that you develop rules only for four companies and that you develop antitrust jurisprudence only for four companies. I think it's important if you care particularly about issues like privacy and security that the rules that you develop apply to a broader set of companies.

I am now looking at the industry from a somewhat different perspective than when I was sitting in Washington, D.C. I'm now at Duke and so I'm a few miles from the Research Triangle Park, and the companies that are in Research Triangle Park are looking to be acquired, they're pursuing venture capital funding on the basis that they might be acquired at some point. And so the rhetoric that I heard often in D.C. about problems in the merger and acquisitions market looks very different when you're sitting in the perspective — looking at from the perspective of startups that are looking to grow and looking for means of exit. That is how they attract capital.

And so I don't think that that means that we shouldn't pursue smarter policy in this area, I

just think we should do it with the idea that we need to develop policy that applies to a broad set of companies. And so I think when we think about how to develop smart rules around things like portability and interoperability for instance, we should do that thinking about a broader set of companies.

In terms of the balance between legislative and executive, I agree that the big — the ideas for big sweeping reform like Glass-Steagall are probably off the table. I think that's a good thing because I think Glass-Steagall sort of makes for good politics but probably doesn't make good policy. I think more incremental reform is probably a more productive direction to go in. But I do think that the big issue on the executive side is going to be the cases. And I am trying now to be very optimistic about them with the perspective that Avery is bringing to the table of thinking of them as a way to gather information that will be really important.

DR. TURNER LEE: Darrell, could I —

MR. WEST: Nicol, I know you wanted to jump in on that topic too.

DR. TURNER LEE: Yeah. I mean I think it's really interesting, your question, right, because I do think that that's the case, that companies that were not considered big tech are going to become big tech for a couple of reasons. One, because we're going to shift from a brick and mortar framework in terms of how we conduct goods and service, but also, just like we saw in California with the California Privacy Act, these rules — and then I'm going to pick up on what you said — will be very hard to just apply to a certain sector of the economy. At some point, there will be mergers and acquisitions made by banking industries or, you know, transportation industries and others that need to actually do that to evolve in the 21st century marketplace.

So I think we're fooling ourselves when we think that we're not putting together something that is actually going to give guidance to the future economy. I mean this is now an information age and in many respects, you know, just like we deal with issues related to privacy, the more actors that jump into this sector, you know, it does not necessarily absolve them from any type of responsibility, corporate responsibility at that, in doing the right thing around, you know, avoiding anti-competitive behaviors.

So, you know, that would be my answer to that. And I think this administration — in all honesty, I think that they're going to take on I think the horrors that the average consumer has on some of the big tech controversy. But I also think that if they're forward thinking, and it goes back to what Leah

said, whoever they appoint is actually going to be the game changer. Those folks will actually try to put in place something that's much more resilient and long standing so that we don't keep revisiting these conversations. Because I think that's ultimately where we're going to end up.

MR. WEST: Avery, your thoughts on that?

MS. GARDINER: Thanks.

So one of the things I try to think through is of the massive levels of concentration we have throughout the American economy, from everything from candy making to casket making, right — we've got incredible concentration in this American economy — how should we identify what I like to call the tier one antitrust problems, right — what are the things that are affecting most Americans most of the time. Because we know we don't have the resources to go after everything from candy makers to casket makers. So how do we pick? And I think the administration can help do that, whether that's by formal executive order or by telling the attorney general, hey, I want you to go prioritize these things and figure it out. I would love to see a lot more of that.

So we know that the incoming administration is going to have a focus on healthcare, and it should. Levels of concentration in healthcare providers, meaning groups of doctors and hospitals, is massive. Levels of concentration in the health insurance industry is massive, and in the pharmacies, is massive. Oh, and by the way, just to make it more complicated, they're all interrelated structurally. So you've got vertical and horizontal issues that are incredibly complicated. And, by the way, if that wasn't enough to make healthcare an area that I think should be prioritized for antitrust, we spend a huge amount as taxpayers on all of these services through the Medicare and Medicaid programs, as well as other kinds of healthcare provisions.

So how can the new administration identify and prioritize those tier one issues? Healthcare would be on my list, broadband access or general connectivity to the internet, whether that's wireless or wire lined, I think would go on a lot of people's lists. Just the other day the Federal Trade Commission brought a lawsuit in the housing sector challenging the acquisition of two companies that do apartment listings. That also makes a lot of sense to me. That's a huge item in most people's monthly budget is their rent or their mortgage payment. So making sure that we're policing antitrust issues in the housing sector is important.

And I would love to see the administration come in and whether by executive order or something else, really say, hey, let's focus our resources — our limited resources on the industries that are so important and have been plagued by competition concerns. And that's something that they could either do publicly or behind the scenes. I would love for it to be a public conversation and debate, but it's one that we need to be having given how much concentration there is and our inability to combat it across the board.

MR. WEST: That's a great point about government procurement and government contracting power because, you're right, the government spends a lot of money and one vehicle for the next administration will be to use its spending power to promote greater competition as opposed to, you know, targeting a lot of the money on large companies, trying to spread it out, creating vehicles for small and medium-sized enterprises to get government contracts.

We're getting some interesting questions.

Nicol, you wanted to make a quick comment, then we're going to ask (inaudible).

DR. TURNER LEE: Yeah, I just wanted to make a real, real quick comment.

So, Avery, I wanted to just pick up though on something that you said that sort of had me thinking about broadband access, just as an example, and where I think going into the conversation on antitrust will be interesting primarily because we've got these market failure issues, we've got these issues around, you know, whether or not there's competition in broadband generally.

But I think the third thing that's most important, and I would love to figure out how we tease this out later, is that we have resource constraints, right, not just on the law enforcement side, but resource constraints if you look at broadband access in terms of what universal service actually provides for us to actually build it out. I'm not so certain that these will be just antitrust issues, right. And I think as we have this conversation around what should be in the bucket, we have to be careful not to sort of conflate a whole lot of other things that are going on that have created the consequences.

And perhaps — one of the things I'm excited about in this new administration — and it goes back to everything that we've said — if they actually take a time out for a minute and sort of come back and think through and analyze where they need to be spending most of their time. They may actually find out that some of these issues can be identified and mitigated through other resources and

not necessarily consume the time of the antitrust authority to sit there and figure it out, because some of these things are also due to a general failure in the way that we've actually set up and executed telecom policy over the last decades.

MR. WEST: Okay. We're starting to get some great questions from the audience. And those of you would like to pose a question, you can email us at events@Brookings.edu or use Twitter #Antitrust. So we'll try and get as many of your questions as possible.

So one question — and I'll just open it to whoever on the panel would like to answer this: do we need stronger transatlantic coordination with the European Union in terms of antitrust policy or antitrust enforcement? Anybody want to jump in on that?

MS. NYLEN: So I've covered antitrust now for about nine years and I will say one thing that they love to talk about at conferences, international conferences, is how much coordination they already do, that they have this — they always this one panel in which they talk about how they love having pick up the phone relationships and they work together on all the cases. And they do on enforcement cases work very, very closely, particularly in the big mergers that have international implications.

You don't see as much convergence — one of their fancy words that they love to talk about — in antitrust policy, in part because some of the thing that we think about competition here, they think about differently in Europe. In particular, with big companies we think of it as monopolization, you have to be a monopoly before it's a problem. They have an abuse of dominance standard, meaning even if you're a little bit smaller, say not a monopoly, you can still be abusing the position you have.

And so, I think that's why you've seen a lot more action in Europe than you have here on some of the tech companies and also on, you know, monopolies in general. And also, why a lot of the U.S. — there's a feeling that the U.S. has sort of lost its stature on monopolization and all of the other countries are now sort of looking to Europe as the example for what you should do about monopolies.

As Matt said, some of the countries that have been the most interesting and thinking the most about this are actually Australia and the U.K., which if you asked me three years ago which jurisdictions I would be paying the most attention to probably would not have been on my list.

MR. WEST: Okay. We have a question on China. Why get tough on antitrust in the

United States when China has very large tech companies and the U.S. needs to compete with it. Is that a reason for the United States not to engage in tough antitrust enforcement, or is that just rhetoric?

MS. GARDINER: So I'll take a stab at that one. We have for a long time considered national security issues in our antitrust policy, right. It is the practice of the agencies when there's a proposed merger in the defense industry, for example, to call the Department of Defense and ask for their perspectives on it. And we have CFIUS — the Committee on Foreign Investment in the United States, which is charged with assessing possible transactions for their effects on national security so that the antitrust agencies don't have to do that. I think that the China question is one that we couldn't possibly figure out in the next 16 minutes because there are massive issues that go beyond antitrust.

And I'll sound a theme that my co-panelists have been hitting since the beginning of this session. Antitrust is not the solution to all problems, right. We kind of have this belief in the United States that because we have both antitrust laws and Section 230 of the Communications Act, all problems we see in the tech space should be fixed by either antitrust or changes to 230. We need to get beyond that. We need to actually figure out what are the harms that we catalog and then what are the right remedies for those. Because sometimes it's going to be antitrust, sometimes it's going to be privacy legislation, in my view, sometimes it might be national security concerns about domestic manufacturing for all kinds of different things, but those are issues that on the outer edges of traditional antitrust issues and should probably be considered separately for the important risks that they have to the United States.

I mean I think a year ago I would not have predicted that domestic production of pharmaceuticals would be something that people are talking about, but the pandemic has made that apparent. That's not something that the FTC is going to be able to fix, but it might be something that an office of competition policy could help quarterback for the administration to pull together different kinds of voices and concerns to address all of those sorts of issues.

So the short answer is I don't know about China, but I do know that antitrust is probably too limited and too old to figure it out.

MR. PERAULT: I think this is an issue — I'm sorry, Nicol.

MR. WEST: Actually, Nicol, you're muted. Can you unmute?

DR. TURNER LEE: Okay, I was going to — look, I was playing the dashboard like, okay,

who could talk first. Let me mute myself because Matt started talking.

I would actually say on the China piece I think that's interesting because the other way to look at the question is are we putting too much pressure on the United States companies that will stifle the innovation again that we're trying to set up for China. And that's interesting, right, because the argument could be made the more we over regulate here the less likely we're able to compete in China.

I do want to just echo what Avery said, that antitrust is not the answer to everything, but it does beg the question of is everything we talked about today, the extent to which this new administration will balance innovation as well as the types of protections that are going to be needed to protect consumers. And whether or not that balance will be a healthy balance to allow for this ecosystem to continue to flow and grow and develop, or will it be one that will actually have constraints or limitations on these companies that we're talking about.

To me, that's the million-dollar question going forward, particularly as the Chinese put more pressure on the United States in these spaces like AI, like 5G, and other verticals that will essentially, you know, be a race versus a marathon to the finish.

MR. WEST: Matt, you wanted to jump in?

MR. PERAULT: I agree. I also think this is an area where I think tech companies have really taken the wrong approach. The idea that if tech companies are guilty of violating existing antitrust law, that for some reason antitrust agencies or congress or others who are interested in this issue should act more softly because of potential competition with China seems to me to be really deeply problematic. I do think at the same time that tech companies — U.S. tech companies do compete with Chinese companies or do compete with subsidiaries of Chinese companies, like Facebook and Tik Tok clearly compete.

And so, we should think carefully about the action we take that might restrain the ability of U.S. companies to be competitive. But if there is evidence of anti-competitive conduct in a way that violates the antitrust laws, then I don't think the fact that some companies compete with China is a reason not to enforce.

MR. WEST: Just a quick plug, we had a great Tech Tank podcast on the Tik Tok question about a month ago, which is on line at [brookings.edu](https://www.brookings.edu).

So we have a question that actually starts with a statement. The statement is the last four presidents have not really cared about antitrust enforcement. And Avery mentioned that the one — or I guess now two, if you include Google cases — that have been brought in the last 20 years. So his question is what makes you think Biden is going to be any different? What makes you think he will be tougher on antitrust?

Leah?

MS. NYLEN: So I think he — as I said, the Biden campaign really did not focus on antitrust as a campaign issue, except in the areas related to labor. And Biden has given some very interesting speeches and said some interesting things about how antitrust can help labor issues.

So I think, you know, to the extent that labor is going to be a very important issue in the Biden administration, I think this will definitely come up. I mean not just in unionization, in discussions about gig workers, in discussions possibly about non-compete, as I mentioned earlier. And, you know, he actually said the word — like (laughing) we used to joke about how presidents never ever talked about antitrust, but, you know, he's at least said it in various debates and given speeches about it. So I know he knows what it means.

MS. GARDINER: Darrell, I think there's a historical analog here that I've been thinking about a lot. And I go back to the populist era in American politics, right, where we had a lot of the same concerns that I'm hearing about today in conversation, not specifically about antitrust, but about general concerns that the powerful are acting in ways that advance themselves, that we are not doing enough to take care of the disadvantaged, that workers are not being treated fairly, right. Back in the populist era we were talking about child labor, now we're talking about different kinds of labor issues, but there's a thematic similarity there.

Back in the populist era, again, we were talking about direct election of senators as being a way to restore power to the people. And I'm seeing a lot of similarities in the general discourse over the last three years in the United States. Again, not specifically on antitrust, but concerns about those populist principles, that maybe we're letting the rich and the powerful have too much of the rich and the powerful parts of our society. Maybe we need to look at some broader redistribution.

And so using that historical parallel, I look at what happened toward the end of the

populist era, and that was the Sherman Act was passed in 1890 because there was a general belief between both political parties that they had to do something or the farmers were going to come in and take over the federal government right. They were so worried and frustrated.

So I think one of the differences between the last four presidents and where we are now is there has been a dialogue about those sorts of concerns writ broadly. And antitrust is one tool to address them. It's not the only tool and it shouldn't be, but it does give me some belief that the next administration will acknowledge that similarity and say this too is a time to breathe new life into antitrust enforcement and competition policy more broadly.

MS. NYLEN: I'd like to say —

MR. WEST: Yeah, I think that's a great point in the sense that I think there is a lot of discontent now that actually does change the politics of the situation.

But we do have to keep in mind that if Republicans win those two Senate seats in Georgia, there will be a Republican majority in the Senate and many of the things that President Biden might want to do are not going to make it through that Senate. So that could be a four-year delay on some of these issues getting addressed.

MS. NYLEN: I was going to add one more thing, building off of Avery.

I think if you talk to a lot of the people who are really interested in like what we call anti-monopoly policy right now, there's like a direct line between them feeling very energized and upset about how the financial bailouts happened in 2008 to today. Like there's a lot of feeling that those bailouts in 2008 took care of the corporate interests, it took care of the companies, it didn't take care of the people. And so now we have a Democratic administration again and they don't want this Democratic administration to be making the same mistakes of the Obama years.

MR. WEST: Okay. That's a —

DR. TURNER LEE: Darrell, if I —

MR. WEST: — great point.

Yeah, quickly Nicol. And then I have one more question I want to ask.

DR. TURNER LEE: Yes. And if I could add in, I think going back to Avery's analogy of the populists, I think the populists though is also more progressive today. And so, I too think that we will

also see some other areas that have not typically been included in antitrust conversations. You know, the income inequalities, the racial disparities the result, the lack of support for small businesses or the lack of entry for small businesses. I actually think that those are going to become topic of concern, they're going to be part of the fact finding when it comes to anti-competitive behaviors. And that, your analogy is spot on, because the new America looks very differently, you know, from 1890. And I think that it's going to be under this incoming administration, sort of this call for more inclusivity, which is why I think Senator Harris a great choice with regards to being our vice president-elect because I think she can actually help maneuver some of that that actually may also crowd the space in terms of what should be taken on.

MR. WEST: Okay. We have a question that kind of takes on this idea of possibly creating an office of competition policy within the White House. And the particular question is if we do that what is the threat of political abuse of antitrust authority or competition policy to go after particular sectors or particular companies? The fear is that the White House might use these tools to weaponize the situation. Kind of obviously taking off on some of the things we've seen from the past administration.

DR. TURNER LEE: Darrell, I would say I think that's a really good question because I think, you know, we're talking about for the FTC and the FCC independent agencies and the extent to which the White House is actually in many respects coercing or influencing the decisions that they make as an independent agency could be problematic. We've seen this happen in other debates, like net neutralities, essentially where the White House has played a huge role in sort of influencing the leadership to do something different. You know, the extent to which the people who are affected or impacted by these decisions feel that they were given, you know, space to sort of identify and address their concerns. You know, that could create some contention I believe if it's not handled carefully. And, going back to Avery's point, if the top priorities of the White House are not clearly explicated at the beginning of where they think they make more sense of stepping in.

MR. WEST: Okay. Thank you very much.

So we are out of time, but I want to thank Avery, Leah, Matt, and Nicol for sharing your thoughts. It was a tremendous conversation, lots of insightful comments. Those of you who would like more information, either on antitrust or tech policy more generally defined, check out our Tech Tank blog as well as our Tech Tank podcast. We address many of these types of questions there.

So thank you very much for tuning in and we appreciate your interest.

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