

NetChoice Promoting Convenience, Choice, and Commerce on the Net

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June 15, 2020

Rep. David N. Cicilline, Chair
Rep. F. James Sensenbrenner, Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Reconsideration of the Committee’s Subpoena Threat to Tech CEOs

Dear Chairman Cicilline, Ranking Member Sensenbrenner, & Members of Congress:

As you know, the United States was the first country to pass antitrust legislation. It was also the first country to reorient its antitrust doctrines away from political considerations toward objective enforcement based on empirical evidence. This reorientation, which occurred primarily because of the country’s adoption of the consumer welfare standard, has largely insulated antitrust enforcement from politics. So successful was this reorientation that it is now the norm in the United States for antitrust enforcement to be above the political fray.

Against this backdrop, we ask that you reconsider your recent decision to demand that the CEOs of America’s leading technology companies testify before your Committee voluntarily or risk being forced to do so under threat of subpoena. Although Congress has broad subpoena power, the unnecessary exercise or threat of that power can often serve to undermine the public’s trust in American institutions, including Congress. It can also inject an unnecessary amount of political theater into antitrust investigation and enforcement.

Here, the Committee has already received from Apple, Amazon, Facebook, and Google *millions* of documents related to its antitrust probe, as well as *hundreds* of answers to Members’ questions. And the companies have publicly offered to make the appropriate executives available to testify when warranted. But the Committee’s recent demand is not warranted. Indeed, if questions remain, the Committee ought to pose those questions to companies in writing. Doing so would allow them to consult the most-relevant and most-knowledgeable employees. The buck may stop with a company’s CEO, but the best insights will come from a company’s team.

Even if the Committee insists on an in-person hearing, it should still reconsider subpoenaing or threatening to subpoena CEOs. This practice usually results in more intrigue and spectacle than in information and specifics. To be sure, we have no doubt that CEOs can prepare adequately for the

Committee’s hearing. But we do not believe this is a sound or useful congressional practice. To the contrary: If the Committee’s goal is to collect more testimony about specific concerns, then the Committee should request that information from those whose jobs are most directly related to it.

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Antitrust enforcement is a powerful remedy. So much so that the government can upend markets and affect millions of consumers and businesses in the process. Given this enormous power, the federal government has a heightened obligation to exercise special care when pursuing antitrust investigations.

To that end, we worry that the subpoenas or threat of subpoenas will weaponize antitrust. In terms of substance, there is no antitrust case against Amazon, Apple, Facebook, and Google: Prices have never been lower and consumers have never had more choices. These companies also enable millions of small-business owners to compete in national and international markets.

We of course recognize that you may not agree with us on the merits. But that aside, we hope you do agree with us that process matters. Subpoenaing or using the threat of subpoenaing CEOs, even when companies have complied with the Committee’s investigatory demands thus far, appears political. Indeed, history has shown that hearings with CEOs tend to be used—and abused—by some Members of Congress to create soundbites and fundraising clips, rather than to engage in a meaningful search for the truth.

Even if that were not the Committee’s intent, that will unfortunately be the result. And that will signal that the federal government is moving away from its objective, non-political approach. It will also signal to future politicians, including future presidents, that antitrust can and should be used for political gain.

This is not theoretical. President Richard Nixon, for example, wanted to use the threat of antitrust enforcement to coerce media outlets into giving him more favorable coverage.¹ Likewise, the media have reported that President Donald Trump has been motivated, at least in part, to pursue antitrust enforcement against Amazon because its CEO is also the owner of the *Washington Post*, which the president believes covers his administration unfairly.²

President Nixon was unsuccessful because antitrust was, by the early 1970s, insulated from politics and based on empirical evidence. President Trump will also be unsuccessful because empirical evidence is not on his side. But even when the executive branch is unsuccessful on the merits, it can still unfairly damage a company’s reputation and saddle that company with enough costs that the company complies with the president’s wishes regardless.

¹ Walter Pincus & George Lardner Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, WASH. POST (Dec. 1, 1997), <https://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm>.

² See, e.g., Jonathan Chait, *Trump’s Retribution Against the Washington Post Owner Is His Gravest Abuse of Power*, NY MAGAZINE (Nov. 18, 2019), <https://nymag.com/intelligencer/2019/11/trump-amazon-bezos-defense-cloud-washington-post-pentagon-scandal.html>.

If Congress begins or is seen as using antitrust enforcement for political ends, then it is hard to see why future presidents or congresses will not do the same. More concerning, if the federal government injects politics into antitrust enforcement, it will encourage cronyism, breed cynicism, and hurt consumers.

First, if businesses believe that their fates are tied not to market conditions, facts, or the law, but instead tied to political whims, businesses will focus their energies on the latter. This may mean that businesses increase their political contributions to politicians who have the power to hobble their success or prevent their entry into the market. It could also mean that businesses increase their spending on lobbyists whose job is not only to help their clients but also to hurt their clients' opponents. Indeed, if antitrust becomes political, then we can expect that some companies will use it to hurt their competitors. Even worse, we can expect at least some of those companies to succeed.

Second, if the government is seen as using antitrust as yet another means to pursue politics, then the public will grow even more cynical. Consider the current atmosphere. When the Trump Administration announced an investigation into Amazon, Democrats were able to point to the president's criticisms of Jeff Bezos and the *Washington Post* as the likely impetus behind the decision. When a Democrat regains the White House and announces an investigation into a company popular among the political right—say, for instance, Fox News—we can expect Republicans to lodge the same complaints.

Third, these political assaults on America's leading tech businesses will be most damaging to consumers. Under existing law, the government intervenes in the market only when a business's actions hurt consumers. As we've noted and reported, the companies under investigation have helped, not hurt, consumers.³ But if politicized antitrust were to become the norm, or at least more acceptable, then consumers' wellbeing would be but a mere afterthought. When the government's antitrust actions hurt consumers but help those in power, the political branches will not have the credibility to stand up and say so.

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Antitrust law is largely objective and insulated from politics today, but that was not always the case. From the time Congress passed the Sherman Antitrust Act through the late 1960s, the government used antitrust to pursue subjective policy goals that benefitted some and hurt others. A company's rise or fall depended in some cases on which party was in power and which president controlled the Department of Justice. To be sure, those in power often claimed that their antitrust actions were meant to help Americans. But more often than not, these unprincipled enforcements "led to contradictory results that purported to advance a variety of social and political goals at the expense of American consumers."⁴

³ See, e.g., CHRIS MARCHESE, *IS GOOGLE SEARCH AN ADVERTISING GOLIATH? THINK AGAIN: COMPETITION IN DIGITAL ADVERTISING IS STRONG & GROWING STRONGER*, NETCHOICE (June 2020), <https://netchoice.org/wp-content/uploads/2020/06/Is-Google-Search-an-Advertising-Goliath-Think-Again-FINAL.pdf>.

⁴ Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise & Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294, 299 (May 2019), <http://arizonastatelawjournal.org/wp-content/uploads/2019/05/Wright-et-al.-Final.pdf>.

In recent years, the consumer welfare standard has come under attack. Although we strongly disagree with these critics, and although there is still a broad, bipartisan consensus that supports the consumer welfare standard, we welcome a healthy debate on its continued relevance. What we do not welcome—indeed, what we fret—is the transformation of antitrust from a tool to protect consumers into a tool for politicians to pursue their own ends.

Congress is but one player in the antitrust sphere. And the Committee is but one segment of Congress. But the Committee’s actions—both in terms of substance and in terms of process—matter. What the Committee does will set a standard not just in the halls of Congress, but down Pennsylvania Avenue to the DOJ, FTC, and White House.

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We therefore ask the Committee to reverse course on subpoenaing or threatening subpoenaing CEOs. In the case of Amazon, Apple, Facebook, and Google, the Committee has already asked and had answered all its questions and has seen no evidence of unlawful behavior. It would thus be best if the Committee turned its attention toward actual threats to consumer welfare. This is not just our opinion: more than 95% of consumers say the government should not focus on technology companies⁵. Instead, 30% say that the focus should be on pharmaceutical companies and nearly 11% say it should be on electricity and gas.

In sum, the Committee should embrace the decades-old norm of pursuing objective antitrust that cares about facts, not opinions and consumer benefits, not polls. In that vein, it should abandon this quixotic antitrust campaign against America’s leading technology businesses.

Sincerely,

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⁵ Techlash Poll, <https://netchoice.org/wp-content/uploads/2020/06/TechlashPollingResults.pdf>.