ANTITRUST 2020 AND THE HOUSE MONOPOLY REPORT: HOW DO YOU FIX THIS HOT, COLOSSAL MESS, AND WHO'S GOING TO DO IT?

HELLO
my name is
HOT MESS

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I. INTRODUCTION

The House Democrats' big-tech monopoly report[2] was several things. Measured by length and detail, the Report was above all a fact-finding exercise. Its vast majority — upwards of four hundred pages and more than 2,400 footnotes — consists of very long, meticulous analyses of the conduct of four particular firms. It reads more or less like a complaint in litigation, and indeed, the pending government lawsuits against Google[3] and Facebook[4] both track it closely. In some respects, the fact-finding work is loose and lacks rigor, for what that may be worth. For my money that includes its routine, unelaborated conclusions that particular firms have market power in particular areas, and its essentially undefended claim that "Amazon has adopted a predatory-pricing strategy across multiple business lines at various stages in the company's history."[5]

But put that aside, because the Report does so much else that is important. It was the first American government document to clearly explain some of the most important theoretical ideas in the pending government cases, like why Google in fact has probably an unassailable position in search because of the cost of building an alternative "index" of web pages,[6] or that Facebook's acquisitions of Instagram and WhatsApp were so dangerous precisely because they weren't horizontal.[7] To a striking degree the suits and the report even emphasize the same specific emails, communications, and particular evidence. While I guess I don't know and I couldn't really confirm from press accounts, Congress's investigation was not formally coordinated with the work of the agencies. One imagines the subcommittee's quite progressive majority and their staff are not in close cooperation with the Trump antitrust leadership. The agencies apparently did plenty of their own work, and the Facebook cases in particular follow a § 6 informational investigation by the Federal Trade Commission[8] that presumably turned up much of that case's deep, meticulous detail. So who really knows who discovered what, but the House subcommittee and its small staff's review of 1.3 million documents and days of testimony and interviews with dozens or hundreds of witnesses was a substantial feat and public service, and it was presented with important conceptual reasoning about competitive effects and motivations. One imagines the agencies read the Report and benefitted substantially from it.[9]

This seems to me socially indispensable work, if nothing else in that the Report laid the foundation for popular legitimacy of new ideas of liability. Just as the suit against Microsoft struck many as crazy until the government secured a resounding victory on the merits before the *en banc* D.C. Circuit, today's claims against the online platforms will benefit from this foundation-building. Consider how crazy the FTC's investigation of Google seemed to many Americans in 2012 and 2013. "Search?," people said, "You think they monopolized search? It's free!" But that was then and this is now, and a well-publicized, 18-month congressional investigation may well have helped to establish the plausibility of challenge to online dominance.

By contrast, as a reform proposal, the House report is much more limited and tentative. That's perhaps a surprise, since Congress exists to legislate, and celebrated committee investigations of the past have often generated specific legislative proposals. But in any case, the nearly four hundred-page factual monograph is followed by a reform policy discussion of about 25 pages that merely describes a collection of ideas in very general terms. Only one is at

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2 Subcomm. on Antitrust, Commercial, and Administrative Law, Comm. on the Jud., U.S. House of Reps., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 152 (2020) [hereinafter "House Report"].

3 United States v. Google, LLC, (D.D.C. Oct. 20, 2020) (complaint), available at https://assets.documentcloud.org/documents/7273457/10-20-20-US-v-Google-Complaint.pdf [hereinafter "Google Complaint"].

4 On December 9, 2020, the Federal Trade Commission and a coalition consisting of nearly every U.S. state sued Facebook, filing complaints that were separate but tracked very closely in allegations, theories of liability, and prayers for relief. See *FTC v. Facebook, Inc.*, (D.D.C. Dec. 9, 2020) (complaint), available at https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf [hereinafter "FTC Facebook Complaint"]; *New York v. Facebook, Inc.*, (D.D.C. Dec. 9, 2020) (complaint), available at https://ag.ny.gov/sites/default/files/facebook_complaint_12.9.2020.pdf.

5 House Report, *supra* note 2, at 299.

6 *Compare* House Report, *supra* note2, at 79-80, with Google Complaint, *supra* note 3, at ¶¶ 22, 94.

7 *Compare* House Report, *supra* note 2, at 144-45, with FTC Facebook Complaint, *supra* note 4, at ¶ 14.

8 FTC, *Press Release: FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), available at https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

9 The House Report was made public first, on October 6, 2020. The federal Google case was filed on October 20 and the Facebook cases were both filed December 9. Subsequent state cases against Google were filed on December 16 and 17. Colorado v. Google, LLC, (D.D.C. Dec. 17, 2020), available at https://beta.documentcloud.org/documents/20431671-colorado-v-google; Texas v. Google, LLC (E.D. Tex. Dec. 16, 2020), available at https://www.courtlistener.com/recap/gov.uscourts.txed.202878/gov.uscourts.txed.202878.1.0.pdf.

all specific, an antitrust exemption for newspapers already introduced in 2019 by subcommittee Chair David Cicilline.[10] Less surprising is that the proposals bear a family resemblance to the long, striking draft bill circulated by Senator Elizabeth Warren in late 2019 (of which Congressman Cicilline was reportedly a tentative co-sponsor). That bill comprised twenty-four single-spaced pages setting out a barrage of ideas many of which would be historic and consequential.[11] That similarity seems less surprising because the activists who seem mainly to have influenced Senator Warren's antitrust work, associated with the Open Markets Institute and similar groups, were pretty well represented among the Subcommittee's staff and the witnesses who assisted it. To be clear, this new House Report is only a distant echo of the Warren bill. For one thing, the Report's reform discussion is breezy and abstract, whereas the Warren bill was dense, hyperdetailed, and complex. The report also pulls a lot of punches, as when it (mostly) avoids the Warren bill's full-frontal attack on the "consumer welfare" standard.[12] The Warren bill, for its part, was as quixotic and unapologetic as Leroy Jenkins,[13] giving exceptional new powers to the Federal Trade Commission,[14] banning a substantially expanded range of group boycotts,[15] finding § 2 market power on very loose anecdotal evidence,[16] and presumptively outlawing *all* exclusive dealing or refusal to deal by *any* firm with 40 percent of sales or 25 percent buyer market share.[17]

What the report nevertheless shares with the Warren bill, and with the progressive antitrust project, is a mood, and an approach. Most of its ideas evoke a nostalgia for a kind of regulatory policy we mostly don't have any more. It is fairly striking to read a report prepared for the Congress of 2021 that begins selling its ideas by highlighting the Hepburn bill, a railroad rate-regulation law of 1906, and the Bank Holding Company Act of 1956.[18] Some of its proposals would conventionally be called "antitrust" ideas, but quite a lot of them would not. To be clear, that is no criticism in itself. It makes perfect sense to me and maybe it's essential to use other policies and other approaches to bolster the essentially tort-style law-enforcement regime of our antitrust. What now usually goes by the name "antitrust" mostly waits for business to do its thing, and asks after the fact if the conduct was consistent with rules meant to protect market institutions. Situations seem routine in which rules like that alone are not enough. I also don't mean to say that the Report *rejects* received antitrust, in any overall fashion. A fair number of its proposals just call for reinstating Warren-era doctrinal standards, like a call to strengthen and codify the *Philadelphia National Bank* presumption,[19] or to fund the law again with appropriate agency budgets.

But in dwelling on many of its ideas, the Report betrays a dissatisfaction with the broader picture of American economic policy, in a way that may seem subtle and muted but is also fundamental. It includes proposals for prospective line-of-business limits and prohibition of some vertical integrations. In its implicit economic theory, it displays a preoccupation with discrimination and "conflicts of interest," and thus a desire for government oversight of "fairness." It includes a reconceptualization of monopolization law to reach what the Report calls "abuse of dominance," seeming to invoke European monopolization law, but describing it in ways more like the "abuse of superior bargaining position" controlled under national laws in a few Asian and European countries. That is, it envisions rules under which courts or regulators would police bilateral price negotiations to prevent exercises of market power, apparently however gotten.[20] Chairman Cicilline's newspaper exemption is literally the opposite of "antitrust," as it authorizes conduct that would otherwise violate the law, and it implies a model of countervailing power as a solution

10 House Report, *supra* note 2 at 390 (discussing the Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong., 1st Sess. (2019)).

11 Anti-Monopoly and Competition Restoration Act, Draft Copy of SIL19C37 (Dec. 2019), available at https://www.hausfeld.com/uploads/documents/2019_12_02_Warren_draft_antitrust_bill.pdf [hereinafter "Warren Bill"].

12 See Warren Bill, *supra* note 11, at §§ 2(a)(11)-(12); 2(b). But see House Report, *supra* note 2 at 393.

13 *Cf.* https://www.youtube.com/watch?v=mLyOj_QD4a4.

14 Warren Bill, *supra* note 11, at §§ 4(c)(2) (requiring FTC administrative approval — not just review — for all mergers over certain size); 7(c) (requiring FTC to promulgate substantive conduct rules interpreting Sherman Act §§ 1 and 2); 7(e)(2) (requiring judicial deference to any reasonable market definition, market share, or anticompetitive conduct even *alleged* by the Commission in an "enforcement action").

15 *Id.* at § 5(b)

16 *Id.* at § 6(a).

17 *Id*. at § 6(a).

18 House Report, *supra* note 2 at 381-82.

19 *Id*. at 395.

20 See *id*. at 391, 397. On abuse of superior bargaining position, see generally Thomas K. Cheng, *Sherman vs. Goliath?: Tackling the Conglomerate Dominance Problem in Emerging and Small Economies-Hong Kong As A Case Study,* 37 Nw. J. Intl. L. & Bus. 35, 81-83 (2016); Albert A. Foer, Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners? (AAI Working Paper No. 16-02, Sept. 29, 2016), available at https://perma.cc/37U7-DNHW.

to monopoly, rather than just breaking up the monopoly itself. Of course, none of these ideas is foreign to American law and several of them were parts of the law during the twentieth century. What seems notable is the degree to which they reflect what is subtly, implicitly, basically a critique of unregulated capitalism.

I guess a chief reason I stress this aspect of the Report's nature is just to consider how unlikely any of it is to become American law in the near- or middle-term. The odds against it are spectacular. America enters 2021, the 117th Congress, and the 46th Presidency with dysfunctional institutions and a divided people, about half of whom apparently remain very conservative. The legislature is barely able to enact minimal funding measures, and in what appears now to be our long-term cycle, meaningful legislation occurs only during those infrequent periods when one party has the White House and both chambers of Congress. Even in the apparently unlikely event that Democrats win both Senate run-off elections in Georgia, and therefore that we have one of those two-year periods during the 117th Congress, antitrust will presumably appear on an agenda behind many other very pressing matters. And while we flatter ourselves that there is some bipartisanship in the new concern for American monopoly, nearly half of the subcommittee itself joined a dissenting statement with very different preoccupations. While it may or may not be thoroughly crazy-pants in its allegations of an anti-conservative pogrom, the minority statement betrays a legislature half of which is given to gadfly political distractions with no interest in serious policy, least of all any policy even slightly disagreeable to business or calling on government for any act other than to shrink it, hobble it, and call it ridiculous. And indeed even most Democrats in Congress are probably too moderate to support many of the Report's proposals. Its ideas may be less ambitious than the Warren bill, but they are still far more ambitious than typical Democratic antitrust proposals. Consider the congressional Democrats' "Better Deal" platform of 2018,[21] as partly implemented in a set of bills submitted by Sen. Klobuchar during the past few years,[22] or in other miscellaneous proposals over time, like the § 2 civil penalty authority proposed by Sens. Klobuchar & Blumenthal.[23] I thought many of those ideas were fine, but they were not fundamental and would only fine-tune an existing model. None of those dynamics within Congress seem likely to change very much, as our legislators maintain extremely high incumbency rates despite remaining routinely less popular than colonoscopies, communism, and head lice.[24]

One other thing seems clear after an election in which more people voted for Donald Trump than for any other presidential candidate in history except Joe Biden: public opinion is more conservative than many might like to have believed, and much more susceptible to influence by the business-friendly, anti-government news media of the right. It's just awfully hard to imagine the U.S. Congress enacting anything resembling most of the proposals in the Report, any time for a generation or more.

But that leaves, finally, one other thing that the Report undoubtedly was. Just as with its work in establishing a baseline of legitimacy for lawsuits like *United States v. Google* and *FTC v. Facebook,* this Report of a very official U.S. institution may someday seem like a first, an important step in some serious reform. Though radical and quixotic it may sometimes seem, there is probably something to be said for just saying things, like they're not crazy, so that other people might consider them possible as well. The Report may therefore represent early, agenda-setting groundwork for later reform. It joins in the building international consensus not only that digital competition is a problem, but even what specific conduct is of concern, and what evidence proves it, joining other closely watched government investigations in Australia, Britain, France, Germany, and the European Commission.

And if I am at all hopeful for that, or even seriously entertain that amendment to statutory antitrust could be a good idea, that is just a sign how dire things have become. Even five or ten years ago, I would have said that meddling in the text of the Sherman or Clayton Acts, by the venal, distracted, and often seemingly incompetent Congress by which we are governed, would be a serious mistake. Since then, having read decision after maddening decision by a judiciary that seems to find it impossible to imagine an antitrust plaintiff ever winning, "[t]he sole consistency" in antitrust has come to seem "that . . . the Government always [loses]."[25] At this point in history, laying some sort of groundwork for legislation is the only hope left. ■

21 Democrats in Congress announced a loose collection of economic reforms in July, 2017, as part of an electoral platform for the midterm elections of 2018, and it included several antitrust suggestions. They touched to some degree on progressive values like those in the Report, but generally dwelt on corrections to run-of-the-mill antitrust doctrine. See generally Chris Sagers, *Trustbusters: The One Economic Proposal In The Democratic "Better Deal" Platform That Could Actually Change The World,* Slate, July 27, 2017, available at https://slate.com/news-and-politics/2017/07/the-one-proposal-in-the-democratic-better-deal-platform-that-could-actually-change-the-world.html.

22 Consolidation Prevention and Competition Promotion Act, S. 307, 116th Cong., 1st Sess. (2019) (also introduced as S. 1812, 115th Cong., 1st Sess. (2017)); Merger Enforcement Improvement Act, S. 306, 116th Cong., 1st Sess. (2019) (also introduced as S. 1811, 115th Cong., 1st Sess. (2017)).

23 Monopolization Deterrence Act, S. 2237, 116th Cong., 1st Sess. (2019).

24 Public Policy Polling, *Press Release: Congress Less Popular Than Cockroaches, Traffic Jams* (Jan. 8, 2013), available at https://www.publicpolicypolling.com/wp-content/uploads/2017/09/PPP_Release_Natl_010813_.pdf.

25 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).