

November 13, 2023

Mr. Ed Siskel
White House Counsel
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Siskel:

Congratulations on your recent appointment as White House Counsel. As you begin your tenure, we write to urge your office to consider the Administration’s competition policy when vetting judicial nominees. To ensure newly appointed federal judges are aligned with the Administration’s policy of “enforc[ing] the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony,”ⁱ we urge you to integrate questions related to antitrust and competition in the judicial vetting process; raise competition-related issues during discussions with home state Senators; and advocate for the advancement of nominees aligned with the Administration’s competition policy.

President Biden has made historic commitments to promote competition to advance the interests of American workers, businesses, and consumers. He issued a sweeping Executive Order in July 2021 directing “a whole-of-government approach . . . to address overconcentration, monopolization, and unfair competition in the American economy.”ⁱⁱ Reflecting these aims, President Biden has nominated agency heads and other high-level officials who are committed to the Administration’s competition agenda. These appointments have produced meaningful shifts in federal competition policy.

In accordance with these commitments, we urge your office to implement a vetting process that ensures candidates to the federal judiciary also have a demonstrated commitment to interpreting antitrust law robustly. The antitrust laws enacted by Congress were squarely aimed at reining in the economic and political power of the monopolies and cartels of the day.ⁱⁱⁱ Courts have since radically rewritten these laws in ways that undermine this congressional intent,^{iv} including legitimizing the consumer welfare standard that was first popularized in the 1970s. Consequently, “75% of industries are more concentrated and [consumer prices] have increased from 21% to 61%.”^v The work of the US Department of Justice (DOJ) and Federal Trade

ⁱ Exec. Order No. 14036, 86 F.R. 36987 (2021).

ⁱⁱ *Id.*

ⁱⁱⁱ See Robert H. Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982) (“Congress was concerned principally with preventing ‘unfair’ transfers of wealth from consumers to firms with market power.”).

^{iv} See *id.* at 86 (“In summary, Judge Bork concluded that the Sherman Act was intended to improve economic efficiency and does not reflect any congressional concern with the effects of monopoly power on the distribution of wealth and other nonefficiency goals.”).

^v KJ Boyle & Andrea Beaty, *Wilson’s Parting Shots Draw Attention to Her Actual Conflicts of Interest*, REVOLVING DOOR PROJ., (Mar. 12, 2023), <https://www.therevolvingdoorproject.org/following-loud-and-lousy-exit-ftc-better-off-without-christine-wilson/>.

Commission to combat this trend by restoring the original intent of our nation’s antitrust laws is one of the most significant achievements of the Biden administration's competition agenda.

There is extensive precedent for vetting potential judicial nominees based on their views on antitrust, competition policy, and the administrative state.^{vi} President Reagan, for example, sought to select nominees skeptical of government regulation,^{vii} such as Robert Bork and Douglas Ginsburg.^{viii} Absent consideration of judicial nominees’ views on antitrust, the Administration may be undermining its own antitrust and competition priorities.

The Administration can take several steps to ensure that its judicial nominees robustly interpret antitrust statutes.

1. The White House Counsel’s Office—which alongside DOJ’s Office of Legal Policy selects candidates to recommend to the President for nomination—can and should include questions related to competition in its initial screening, questionnaire, and evaluation for judicial candidates. Specifically, nominees should be asked questions such as: which factors—aside from market share—should be considered in monopolization or monopsony cases; and what level of market share can demonstrate monopolization.
2. The White House Counsel’s Office should consider selecting nominees with backgrounds in antitrust law that have worked in antitrust law outside of the corporate defense context.
3. The Administration should highlight the importance of potential nominees’ competition views with home-state Senators (as well as states historically associated with a circuit court), and work with these Senators to find a candidate that aligns with these views. The Administration should also encourage the senators to ask specific questions about antitrust law or policy.
4. The Administration should highlight the importance of potential nominees’ competition views with members of the Senate Judiciary Committee, which ultimately decides whether a nominee is considered by the full Senate.

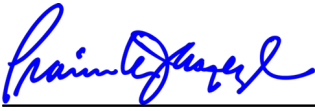
We urge you to adopt the above procedures to continue advancing the Administration’s important work promoting competition to power the American economy.

Sincerely,

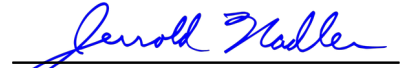
^{vi} See William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REV.* 49, 51-52 (1991) (noting legal experts believe “the power to nominate judges with a shared vision of competition policy is probably a president's most effective means for ensuring that his antitrust preferences will endure well after his term of office has ended.” (internal citation omitted)).

^{vii} See *id.* at 52 (“In making these appointments, the Reagan Administration sought to alter the federal judiciary’s ideological perspective by choosing individuals who, among other traits, were more likely to doubt the efficacy of government intervention in the affairs of business.” (internal citation omitted)).

^{viii} See Matt Stoller, *All Rise: How Judges Rule America*, *BIG*, May 3, 2023, <https://www.thebignewsletter.com/p/all-rise-how-judges-rule-america> (“In the early 1980s, Reagan put a whole bunch of Chicago School judges, like Robert Bork and Douglas Ginsburg, on the circuit courts.”).



Pramila Jayapal
Member of Congress



Jerrold Nadler
Member of Congress
Ranking Member, Committee
on the Judiciary



Henry C. "Hank" Johnson, Jr.
Member of Congress



Barbara Lee
Member of Congress



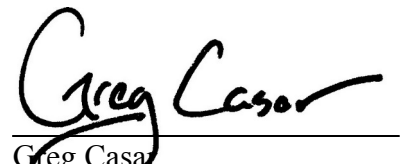
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