

Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People. A weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people. President Biden recently issued the executive order on competition, which aims to break up corporate power across the economy. This week, we will explore the executive order and its potential impact on antitrust policy and on America, with two of America's leading experts on antitrust and the constitution. Barry Lynn is executive director of the Open Markets Institute. He is the author of *Liberty from All Masters*, *The New American Autocracy Versus the Will of the People*. Barry, it is wonderful to have you back on the show.

Barry Lynn: [00:00:58] Thanks, Jeff. It's great to be here.

Jeffrey Rosen: [00:01:00] And Bill Kovacic is global competition professor of law and policy, professor of law and director of the Competition Law Center at GW Law. He was previously a member and chair of the Federal Trade Commission. His most recent book is *Global Competition Enforcement, New Players, New Challenges*. Bill, thank you so much for joining.

Bill Kovacic: [00:01:21] Thanks for the chance to do this Jeff.

Jeffrey Rosen: [00:01:23] Barry, you have called President Biden's executive order on competition the most significant contribution to antitrust policy since the new deal or the progressive era. And you've said, with Lina Khan at the Federal Trade Commission, Tim Wu on the National Economics Council and dozens of other strong leaders in departments and agencies across the Biden administration, Jonathan Kanter's nomination to lead the Antitrust Division, spells the end of an era of unaccountable monopoly power in America. Tell us why you think that the executive order combined with President Biden's antitrust appointments are so significant?

Barry Lynn: [00:02:00] Well, thanks Jeff. I mean it's, the, well, the key thing here, the most important thing in the executive order is a new statement of philosophy, a new, you know, sort of a, a approach to competition policy, to, you know, anti-monopoly law. And you know, for the last 40 years, we've had this approach that was established in the early days of the Reagan administration, then solidified under the, the Clinton administration, which sort of, to... It basically said that the purpose of anti-monopoly law is to promote our wellbeing, our welfare as consumers. And and you know, that the way to achieve that is through promoting greater efficiency and, and how we produce things and how we deliver services.

And that was a radical change from where we were before. Which is that the, you know, from the founding of the nation until Reagan came along the idea was that the purpose of anti-monopoly law was to protect our democracy. It was to protect our liberties as, as, as individuals. It was to protect our communities. It was to prote- protect innovation. Our ability to, to build, you know, and create new and better things and create new and better technologies. And so what we saw a couple of weeks ago with the executive order was we saw the president of the United States say this experiment... And he used the word experiment. This experiment of the last 40 years was a failure.

And we're, and we're ending it. We're, we're, we're, we're s... This was... is not something we will continue ever again. And he said, "We're going back to what we were doing before." And so so it's a... In terms of the content of the you know, of the order, it's like, you know, it's a, it's a radical restatement of the purpose of our anti-monopoly laws. And you know, it's like, we're gonna use these to protect us against concentration of power that threatens our democracy. And that's the thing, because right now in, in the United States, we see the... perhaps the biggest set of threats to our democracy in the politically, you know, large corporations, from the private sector, you know, since in a hundred years, you know, perhaps since the Civil War.

And this is, you know, the, the power and control that has been concentrated by Google, Facebook and Amazon. So this radical restatement is of just immense importance for how we see and how we, we talk about and how we regulate the political economy. A- and, you know, Jonathan Kanter and Lina Khan you know, and other folks who are in the administration, these people understand this and they now have their hands on the regulatory leavers.

Jeffrey Rosen: [00:04:41] Thank you so much for that. Bill you are among the most respected antitrust scholars in the country. You served on the Federal Trade Commission and chaired it under President George W. Bush. Do you agree with Barry's historical claim that for much of American history, antitrust focused on power that threatened democracy, that since the Reagan years, the focus was on efficiency and this new Biden order represents a return to a focus on democracy, or do you disagree?

Bill Kovacic: [00:05:10] The, the Biden order is unmistakably significant. When you have the head of state issue such an elaborate statement of the importance of competition and an elaboration of its goals and names, that's a significant event. And I think Barry's right that no president has set out an agenda of this kind arguably since various expressions by Franklin Roosevelt during the New Deal or back to the formative era of the US system itself. How significant depends on a lot of things though. The actual effect and the success of the program in reorienting the objectives, the purpose, the focus of competition law, will not happen instantaneously, even with the new leadership in key positions within the federal government.

A major question that two political scientists and students of public administration posed at the Kennedy School in the 1990s, Ernest May and Richard Neustadt, in a wonderful volume called *Thinking In Time*, offered the following test for reform. Will it stick? Will it work? And making this kind of program stick will require an effort that certainly outlasts a single presidential term of four years. This is a program to be effective that will require a sustained effort, certainly throughout the decade, but into the next as well. So a vital issue for the future is, are the ambitious objectives here along with the administrative infrastructure that is being created to achieve it, will those be implemented successfully?

I say that to make this work, it's it's an important beginning, but this is more of a marathon than say a hundred meter dash or even a half mile, two miles, 10 kilometers. This is a long race. And a vital question will be, does the administration have the stamina, the

commitment to carry it out and to hand it off successfully to future administrations, including in the face of possible regime changes that can happen later on? The second is that, I don't know that the statement of aims is so pristine as Barry suggests. That is the impulse that guides competition law, even as formulated in the executive order, co-exists with a host of other economic policy commands. That will continue to be important and will work against the achievement of competition as an effective tool for accomplishing the broad egalitarian purposes that Barry mentioned.

And President Biden did not seek to reconcile all of those policy impulses. In giving this command, important though it is, he did not seek to tie up and knit together all of the different impulses and reconcile them. That will also be a tension that affects implementation. So I would characterize it as an important beginning, but it's a long journey. And success depends upon sustained effective implementation over time. A form of implementation that our system of democracy has not always done well in delivering for longterm projects.

Jeffrey Rosen: [00:08:27] Thank you so much for that. Well, let's run through the executive order. And both of you can help We the People listeners understand it. The first section is called Policy and it begins, "A fair open and competitive marketplace is the cornerstone of the American economy. Excessive market concentration threatens economic liberty, democratic accountability and consumer welfare. Consolidation over the last few decades has contributed to racial income and wealth inequality, reduced bargaining power of workers and reduced consumer welfare." And then it sets out some administration policies, including enforcing antitrust laws to combat the excessive concentration of industry and abuses of market power and legislative reforms to lower prescription drug prices and create a public health insurance option among others. Barry, walk us through the policy section of the executive order and tell us what's significant about it.

Barry Lynn: [00:09:16] Yeah, I mean, it's a great question and, it's, it's actually the second... You know, the, the, the EO, the, the order, the executive order is, you know, fundamentally important as a statement of, of philosophy. It's also fundamentally important because of the breadth of what it's, it's setting out to do. It's the, the breadth of the agenda that the administration is, is assuming for itself. And the, you know, there's 72 different actions here. And you know, they, they sort of reach into many corners of the political economy. They... You know, we, we see the executive, w- we see the Biden administration saying, "Hey, we need to be dealing with Google, Facebook and Amazon, the platform."

We see the uh, the administration saying, "Hey, we need to also be dealing with concentration in hospitals and, and the effects of concentration on drug prices." You know, we, we see them sort of you know, saying that, "We need to be dealing with you know, the, the regulation of the beer and, and the alcohol markets in the United States." we... There, there... You know, this talks about railroads and, and airlines and steamships. I mean, no one in the White House has talked about the steamship industry and it's gotta be like 40, 50 years.

So so what's significant here is they're basically... Wh- what the document says in addition to, "Hey, we... The purpose of the law is, is a lot different than we have been, assuming for the last 40 years." They're also saying, "This affects you in every single part of your life. It affects the wages you earn, as well as the prices you pay. It affects the healthcare you are delivered, you know, as well as the quality of the drugs that, that you get." so so that's act... You know that in itself is also... You know, it- it's perhaps not as revolutionary as the statement itself, but it is a a really significant change in terms of how we understand the, the reach... th- the extent of the reach of anti-monopoly law.

We've really been taught that anti-monopoly law is something that's rather technical, it's something that is... the DOJ and the FTC do. They set general rules for the political economy. And what the... Administration is saying, "Hey, you know what, every single piece of the government has a role in the enforcement of our anti-monopoly goals the enforcement of the protection of our democracy and the protection of our liberties." so it's actually... What we're saying here is a... also a statement that says, you know, it's a radically different v- vision of the, you know, the importance of regulating competition throughout the political economy. It's also a radically different vision of what the government is, of what the state is, of what the state apparatus that was built early in the 20th century, rebuilt in the mid 20th century.

You know, what's the purpose of the state? So it's, you know, so that's... You know, when you really go into the, the, the, the, the line-by-line sort of you know, you look at the order line-by-line, what you actually are seeing is a re-interpretation of the purpose of the state, a re-interpretation of the, the reach of anti-monopoly policy.

Jeffrey Rosen: [00:12:18] Bill, what are your thoughts about the policy statement section of the executive order? And then begin to take us into some of the substantive areas which Barry outlined, which include interventions in labor markets, healthcare, transportation platform, policy, agriculture, internet service, and technology.

Bill Kovacic: [00:12:43] One of the most attractive features of the executive order is its recognition that the quality of competition and the effectiveness of the economic system are the function of a wide variety of government policies. That any trust enforcement which involves the challenge to structural transactions such as mergers conduct behavior, are one dimension of a larger set of policies that determine the quality of competition throughout the economy. And the report does that. The phrase that it uses is whole of government competition policy to recognize this wide collection of policy instruments and interventions that affect competition.

So it's very helpful, I think, to have that framed as the context in which you evaluate the scope of competition policy nationwide. That's extremely useful. As Barry mentioned the scope of the program is far-reaching. A, a, a problem with the focus on tech in so much modern discussion is, is, is that it crowds out attention to other sectors of the economy that are extremely important. I suppose, in some ways, everything becomes tech, as you have the integration of information services, revolutionary advances into all aspects of, of technology.

When I was a child spending my summers on my grandparents dairy farm, operating a very simple John Deere model B tractor produced in the late 1940s, we didn't worry much about whether the computer system on the tractor worked because there was not. The tractor was a fairly simple machine. Today, it's a computer on wheels which implicates some of the issues regarding say the right to repair your own, your own vehicle. Yeah, so maybe everything becomes tech, but there's so many areas of the economy covered here that are not, strictly speaking, the domain of the major information services platforms. That's a very healthy way of thinking about the, the larger, larger program.

And, and specific suggested interventions are, are, are very useful as well. That is the admonition to executive branch agencies. For example, the Department of Agriculture to some extent, the Department of Defense in setting defense procurement, examining the defense industrial base. The, a variety of other regulators to consider what they do, that's also very healthy, to take this into account. Let me mention a couple of limitations. One is that the executive order doesn't talk about where a lot of the restrictions on competition that are embodied in the mandates of some of these agencies came from. That is, Congress has taken a somewhat schizophrenic approach to competition over time.

On the one hand, it exhorts agencies to, to exercise and mandate that promotes competition. On the other hand, it embeds in the mandate of many of these agencies limitations on competition. The executive order in a sense says, "Give greater weight to the pro competition mandate." But it doesn't really tell us how to reconcile conflicts that these agencies are gonna face in dealing with the mandates that do not encourage competition. Another feature of it is, I would have been much more heartened if it had recognized that there are important antecedents for what the order seeks to do throughout the past 40 years. In order to make the case for reform, there's been a tendency in the modern era to say that the past 40 years were an unmitigated catastrophe, a wasteland.

And a wasteland by definition is barren, there's nothing to look for there. Yet in a number of areas, including in the agenda that the Biden executive order deals with, there are valuable antecedents over the past 40 years that, at different times in different ways, tried to do a number of these things, perhaps not in the same comprehensive way. And if you look at good government policy, in many ways, or good policy for any institution, being a gradual accumulation of what has worked, learning from what has not and advancing. The inability in our political process to acknowledge that anything good happened in the past 40 years, I think is a poverty of expression in our program of public policymaking.

It would have been nice in even one place for the president to say, "By the way, there are a few good things that have happened in the past 40 years that are worth carrying forward. And I intend to build on them. Indeed, I have a different agenda in mind, but that would have been healthy." Instead of this tendency in our process to think that you can't build a case for reform with anything short of annihilating the status quo. And I think that is regrettable.

Jeffrey Rosen: [00:17:43] Barry, I do wanna dig into some of the other aspects of the executive order, but it'd be great if you could respond to the important points Bill just made.

First, were there good things in antitrust policy over the past 40 years that the executive order could have built on? And second, I heard him say that to the degree that the statute authorizing executive action hinge on promoting competition, there may be aspects of the proposed executive actions that don't do that and could run into some legal roadblocks?

Barry Lynn: [00:18:03] Yeah, no, I'd say it's, it's... You know, most of what Bill said so far, I actually agree with, either, you know, entirely or in large part. And I, and I agree with that point. I mean, there, there have, there were there's a number of good stories we can tell that happened in the last 40 years. You know, it was not a sort of completely bleak period. You know, I mean the, the Microsoft case 20 years ago. You know, you actually see this. You know, you go back and you look at some of the writings just after the, the, the, the Microsoft case and you see this awakening.

People kind of saying, "Hey, you know, there's, there's something going on here that we haven't actually been studying in the, in the, in the books. And, and we need to build on that, learn on it." And then, then that thread kind of got lost for a variety of reasons. But that's, you know, what we're... One of the things we're doing now is we'll be building on that- that, that case from 20 years ago. There, there actually was one reference within the order to something that's happened in the last 40 years, that was a major step forward. Which was the Open Internet Order, Net Neutrality, in, in 2015, by, you know Tom Wheeler who was then the chair of the FCC, the Federal Communications Commission.

You know t... That was a, you know, that... What that order said is that all of the ISPs, the internet providers, they have to treat... they, they can't discriminate willy-nilly sort of arbitrarily in, in, in the provision of their services. You know, they, they, they can't pick winners and losers. And then that was actually then overturned or thrown out by the FCC of the the Trump administration. So, so that's actually, that's another good thing that happened back in 2015, that was actually part of this. But you know, there's another you know...

I think that there's another point here, which I think is, is im- important is, is, you which, which Bill also you know, was getting at. Which is that Congress has been often part of the problem. You know, and you know, it's, congress has been schizophrenic in, in a lot of what its done. You know, I mean an example would be group purchasing organizations in, in, in healthcare and, and for the, the purchasing of, of healthcare devices, you know, o- of syringes and, and stents and, and stents and, and other sort of you know, scalpels and, and bed-pans.

And it's like the... There's actually been studies that have shown that the GPS system that Congress set up in the eighties and nineties has been an absolute disaster and has led to many billions of dollars in in sort of sort of misappropriation of money, you know, the... And so that, and that was... You know, that's not because of you know, and that was not because of Robert Bork, that was because of Congress actually sort of following a certain thinking of progressive thinkers from the late seventies. So there's, there's a lot of blame here to go around for the last 40 years.

And you know, it's not just... It wasn't just Reagan by any means. It was, it was a lot of progressives that had their hands on this Congress certainly had its hands on it. And there's actually a lot of good lessons positive lessons to learn from the last 40 years.

Jeffrey Rosen: [00:21:03] Thank you so much for that. Bill, back to the executive order the White House fact sheet describing what it does highlights the following changes it. It... Well, the White House says that the executive order will make it easier to change jobs and help wages by banning or limiting non-compete agreements and unnecessary cumbersome, occupational licensing requirements. Lower prescription drug prices, save Americans with hearing loss, thousands of dollars, by allowing hearing aids to be sold over the counter. Save Americans money on their internet bills by banning excessive, early termination fees among other things. Make it easier for people to get refunds from airlines and the comparison shop.

There are a few more items which I'll stop reading. Are these in fact, all goals that the executive order will achieve? And what are the legal instruments by which it will achieve them? And, and might they be blocked by the courts, Congress or other you know, bodies?

Bill Kovacic: [00:21:53] I would say, could achieve. You know, it's possible. A number of the items included on the list are feasible, but notice long the list is. This is what I find daunting and looking at it. This is where I come back to the thought that implementation becomes so important. There are a number of steps that can be taken to do all of these things and a number of the steps for example, are, invalidating non-competition covenants in employment agreements could have a powerful effect in increasing worker mobility. And perhaps increasing the ability of individual workers to achieve higher wages. So a number of the steps are, are possible, they could be done. My only admonition is to carry them out, to bring this to the finish line will require a lot of effort.

And when you note, as Barry said, the, the amalgam of policy instructions or recommendations well into the seventies. A, a difficult issue that you face if you're say the head of the Federal Trade Commission the, the very capable, remarkable new head of the Federal Trade Commission is to think which of these do I do first? What are my top five?" If you try to do everything in the order at once, you probably won't be very successful. I think when you look at management challenges in a variety of settings, nothing is more important than determining what your handful or most important priorities are, both for your own people and for the outside world.

So a, a difficult challenge that is posed by the ambitious list of possibilities here is to focus on what you can do well, how many you can do at one time, and to proceed on that basis, given the capability that you have. Because as your question suggests, Jeff a- an important consideration is that in many areas, implementation of some of these policies will ultimately w- work their way through a judicial process that can be described in many respects as economic intervention skepticism, doubts, not nihilism but doubts. So a, a key question that you face in seeking to implement some of the policy commands or recommendations is, how do you armor them to withstand scrutiny that they will face as they go through the courts?

And that's a, that's a, that's a formidable challenge. It's not impossible, but I, I guess that what I'd say is, is if you tried... if all of these agencies tried to do everything that was being

asked at them... of them at once I'm not sure that it would work. I'm not sure they have the capacity to do it. If you see this as a more longterm process, where we're going to get to all of this, we will work in good faith. You know, notice that the order says you will issue reports on some of these items within a set period of time.

I think that I, I, I think that you have a program that is feasible it's, it's... In implementation, the question is, m- mixing effectively the required elements of ambition that is to achieve the aims with realism about how to carry them out and how to do them. And part of the realism is recognizing that the gauntlet of the federal judiciary will be, will be a demanding one, not impossible but demanding.

Jeffrey Rosen: [00:25:10] Thanks so much for that. Barry, can you identify the parts of the executive order that are most vulnerable to being questioned by the courts, to what they'll call it, economic implementation skepticism by judges. And help our listeners understand how this will work itself up to the courts. Some will be implemented by the Federal Trade Commission whose new head is Lina Khan, others by the Justice Department through antitrust suits whose new head is Jonathan Kanter. So give us some specific examples of policies that will be implemented by DOJ and, and the Federal Trade Commission. And, and which ones do you think are vulnerable in the courts?

Barry Lynn: [00:25:44] Yeah, I mean, it's, it's a great question. You know, it's, it's... You know, we don't know. I mean, actually this is sort of what, what Bill, you know, wha- what they're doing right now, this is gonna be true, both in, in... I mean, you know, Jonathan Kanter was just named, he's... Lord knows when he's actually gonna actually be able to take office. It could be months before, you know actually gets to sit down. And so in terms of when this stuff starts we don't know. You know, the FTC could be hobbled actually pretty soon. You know, one of the commissioners Rohit Chopra has been named to head the CFPB, the c... And would... A different agency, a consumer financial protection agency.

And so if he moves over there, then certainly they'll find themselves two, two, so so we don't know actually how even how much power, ability that either of these agencies will have to move quickly. And then as Bill pointed out, it's like, they really have to spend a lot of time thinking about, "What is our... "What are our priorities?" So will they do a good job of that? I certainly trust they will. But you know, and, and you know, but they're under... There's... They're, they're being pulled in a lot of different directions.

You know, I think, you know, in some ways it's like there's the... You know, w- we focus so much on what the antitrust law and what DOJ and FTC do and, you know, and how that plays out in the courts. I mean, I think, what's really amazing about the... Or, or what's, what's, what's, what's really encouraging about this is that the Biden... President Biden is saying to Janet Yellen, "You have an immense amount of anti-monopoly power, authority over in Treasury." You know Treasury secretary, Janet Yellen. "You have an immense amount of ability to fight concentration."

You know, this is true in banking, it's true in financial services, it's true even with, you know, Treasury like in, in beer and alcohol which kind of comes under their... As parts of that regulatory regime coming under their sweat, under their control. You know, they're saying

to the secretary of defense, "You need to be part of this, you need to use your power to do this." They have said very clearly to agriculture secretary Vilsack. They said, "Here's what you're gonna do. This is what you're gonna fix right now, because you...." Well, in the case of Tom Vilsack, "You should have fixed this 10 years ago when you were there last time around."

So in some ways what they're doing is, they're taking the pressure, this executive order takes the the, the incredible pressure that has... you know would otherwise sort of be on DOJ and FTC. It takes some of that pressure off, and it puts the pressure on other agencies to sort of get into this game. And you know, and there's a lot of overlapping authority in the US system. There's a lot of, of inefficiency in the regulatory system in United States, which means that a lot of different people can come with the same problem from different angles using different authorities.

So I think, you know what we're gonna see is a the, the likelihood of the, the courts being able to block this, the way some hope and some fear may be less than we think, that danger may be less of a danger than we think.

Jeffrey Rosen: [00:28:44] Bill, tell us about the FTC under Lina Khan. At the age of 32, she's the youngest Federal Trade Commission chair ever appointed. She was hired by Barry in Open Markets in 2011 when she was a year out of college, went on to Yale Law School where she wrote an important paper called Amazon's Antitrust Paradox. Amazon has asked for her to, for her to be recused from cases involving Amazon. And you've called that an unwanted distraction. And so the agency is likely to examine the issue carefully. Her critics derided her as leading a movement they call hipster antitrust. Progressives praise it as the new Brandeis movement. Y- you were the head of the FTC, now, now Lina Khan is. H- how big a deal is her appointment and how will the FTC look different under her than it was under you?

Bill Kovacic: [00:29:31] Her, her appointment's very important you know, in part, because she brings an extraordinary amount of thought and attention to what she wants to do. I, I think the term hipster is precisely useless as a description. I don't know what it means. And with, I think, respect to those who created it, I find it generally idiotic. I think a much more informative description is, transformation. I would describe the movement as transformationalist in its aim, not simply to nibble at the edges of the system, but to change its very core, starting with a restatement of its purposes, with everything that it does flowing from that restatement of purposes.

I also don't think populist is very helpful. That's an epithet that tends to have little meaning in my mind. So what's the point of this change transformation? And she's one of its leading architects. She didn't do it by herself. Barry and his extended family of researchers had a lot to do with that. But she is one of its principal exponents. And the paper that you referred to is maybe the earliest and most important manifesto of the transformation movement. So she brings a point of view to the process and you cannot be an effective chair without a program in mind. There's a great difference in Washington appointments between those on

one hand who are simply happy to have the job, and those who want to do something with the job.

She unmistakably wants to do something with the job. I suspect what she is learning in a hurry is how hard the job is and how difficult it is to mobilize resources inside the agency to carry out the program that you regard to be vital. And back to the theme of setting priorities, to identify priorities in a way that enables you to mass resources to carry out projects effectively. So especially for a number of the things that are requested of the FTC. Fascinating, by the way, to look at the executive order to see the president straddling the line between saying, "I'm telling you to do this, but oh, I can't tell you to do that. So I, I recommend that you do it."

Now the photograph of a smiling FTC chair standing behind the president suggests that she got the message and she finds this in a compatible program. I would say paranthetically, we've seen another step in the direction of the unitary executive and the blurring of the line between so-called independent agencies and executive agencies becoming more hazy all the time. I, I, I'm not suggesting that's an undesirable development, but there was not a great deal of independence reflected in that photograph. And perhaps there should not be but in carrying out the program there, there are, there are again, daunting, practical challenges in putting together the teams to do the job.

I would say one thing that's different is that she will have a, a greater appetite for risk than I did. And my point of view was shaped very much from my time in starting at the FTC in the late 1970s and early 1980s and watching the roof cave in well before Ronald Reagan came to Washington. Watching two chambers of Congress controlled by Democrats and a Democrat in the White House attack many of the programs that we were carrying out. They were extremely ambitious. That was a scarring experience for many of us who were there. Made us wary of using the more expensive tools arguably within the agency's portfolio. That can create a sort of path dependency that sticks with you for a lifetime.

I think we did do some things that were pretty ambitious even within that state of mind, but I suspected a major difference you'll see is that Lina Khan has a greater preference for risk, a greater willingness for the sake of achieving broader goals to take more chances. Losing cases, maybe even upsetting a legislator now and then, or another executive branch agency at different times. So that greater risk preference I think will be manifested in her program. But what she's going to find is that it's very hard when you're facing tremendous opposition in the bar, opposition in individual cases. Closing the gap between what Graham Allison, also at the Kennedy School 50 years ago, described as building the path between the policy aspiration and its realization and practice.

And that path is very hard to construct and it's often a treacherous process. Now, she has the ambition, the drive, the energy to do remarkable things. But it's very sad, with a commission that has a board of five, the magic number is three, and the Biden administration will not allow her... Well, let's put it more positively. The Biden administration must appoint a replacement for Rohit Chopra who sees her program in the same light that she does, because if you do not have three reliable votes, your own and two

others, you can not carry out this program. So that appointment in the coming months is crucial to the effective implementation of the agenda that the new chair of the agency hopes to carry it out. She can't do it by herself.

Jeffrey Rosen: [00:34:52] Barry, one of the first tasks that the commission will take up under Lina Khan's leadership is a new effort in the Facebook case. Not long ago Judge Boasberg of the US District Court in Columbia dismissed the Federal Trade Commission's complaint against Facebook filed in December. He agreed with Facebook saying the prosecutors failed to show evidence supporting their claim. The company has a 60% market share in social networking. He asked the FTC to file an amended complaint today actually. We- we're recording on July 29th, so we'll, we'll see what they do. But tell us about what you expect from Lina Khan in the Facebook case, and more broadly, what future actions you expect from both the Federal Trade Commission and the Justice Department when it comes to the platforms and how you think the courts will respond?

Barry Lynn: [00:35:42] Yeah. So, I mean, these are big questions and that's a good and that's a good question. And the... You know, on the Facebook, I mean, what we saw was the, you know, the judge you know, and part of what happened with the, the judge when he threw out the original version of the FTC's Facebook case, he was saying, "Hey you left a big blank here. Can you fill in this blank? You know, this is a really imp... From my point of view, this is an important blank, you fill it in." you know, and you know, he's... You know, they've now... He gave them 30 days and I guess he- he's now extended that. So, you know, that's not a, you know, I think actually some of the coverage of what the judge did was a bit breathless.

You know, a- actually the, the front page stories in New York Times and the Washington Post were sort of kind of extravagantly wrong. You know, this was a... This is a glitch, it's a normal glitch. It's, these are complicated issues. We're you know, we're, we're actually, we're... As a people we're coming together and educating ourselves about this brand new technology that reaches into every part of our lives. And, you know, we're figuring out like, what's dan... what's good about it? What's dangerous about it? And you know, the judiciary is very much part of that. So it's this, this conversation that's going on within our society, among a bunch of reasonable human beings.

And so, so I think, you know, on that issue, I, you know, I don't see that as a major problem at all. That was just a little glitch. You know, I think what we're gonna see with the DOJ and FTC is we're gonna see them... Well, one of the things that the FTC is gonna do is they're actually gonna start to try and create, you know, sort of a rule of... Kind of the, the beginning of the process of creating a coherent rule of law for online commerce, online communications, to the extent that they can. They have a hand in this. You know, kind of a rule of law for the 21st century, for the digital age.

You know, and that's it's a big deal, but they're actually under... You know, a- as, as Bill noted the, you know, the, the president can't tell them what to do, but he's kind of strongly urged them to come up with a rule of law for the digital age. That's a really big deal, that's actually something we want to support them in doing. And so it's not just a matter of merger enforcement, it's actually thinking proactively about what we wanna see online. What kind

of structures do we wanna see? What kind of behaviors do we wanna see? We haven't actually ever thought... We haven't thought this out. We've just kind of had this revolution take place in our society, in our, in our you know, in our democracy, in our, in our culture, this technological revolution.

And we've just been passive spectators, passive, you know people... We're, you know, we're subjects of this massive experiment. And now we're kind of saying, "Hey, you know what? We wanna be in control." so so that's... You know, the FTC actually has the more, more of an ability to kind of take that kind of proactive approach. And it's- it ain't gonna be easy as, as, Bill, Bill said, but it's gonna be fascinating. And I think, you know, I, I pray and I hope, and I trust that it's actually gonna come out well. You know, on a more practical level, I think that the DOJ...

I think what we're gonna see is the DOJ is gonna, you know, federalize perhaps some of the more important of the state antitrust cases, you know, like the Texas case against you know against Google for monopolization of advertising. So you know, and I think that the there- there's gonna be a very strate... I think Jonathan Kanter will sort of choose a very strategic set of actions that he can pursue to establish, you know, do what he can with the, somewhat, different tools of the DOJ to help in this process of establishing a rule of law for the digi... For online commerce and communications in the digital age.

Jeffrey Rosen: [00:39:04] Bill, help us understand the difference between the roles of the Justice Department and the Federal Trade Commission. President Biden announced Johnathan Kanter to have the Antitrust Division at Justice... Jonathan Kanter is a well-known legal opponent of Google and other major tech companies, who's argued that regulators have failed to enforce anti-monopoly, antitrust laws against the tech sector. What can Jonathan Kanter do as head of the Department of Justice? How do his responsibilities interact with those of Lina Khan? And what sort of enforcement actions do you expect to see against the tech companies under Jonathan Kanter?

Bill Kovacic: [00:39:44] I guess Jeff, to answer the last question in short terms, I think there is a political imperative for the FTC and the Department of Justice, not simply to continue and succeed with the major cases they're already litigating, namely, Facebook and the FTC's case and Google in the case of the Department of Justice, but to launch new major cases involving big tech. I think the scorecard that has been developed for both of them says, "You will do this." It will not be politically sufficient for them at the end of their tenure to say, "I brought home successfully the cases that were launched during the Trump administration." That's not gonna be enough, they'll have to do more.

I don't know what that critical mass of additional cases are, but what both Jonathan Kanter, if he's fortunate to be confirmed, and Lina Khan, if she is fortunate to have a supportive coalition to back her up will be doing is bringing new, additional, significant cases involving tech. So that's one thing that I expect would be coming along. But a second is an interesting suggestion in the executive order, that the FTC and DOJ work more closely together to recognize complementarities that were part of the original design of c- of creating The FTC has extraordinary information gathering and reporting powers that DOJ does not.

It has the ability to basically perform the role of basic micro economic policy analysis on an economy-wide basis, as well as looking at individual sectors. That vision has rarely been realized in practice. The FTC also has a more elastic provision called Section 5 of the FTC Act that enables it to prohibit unfair methods of competition to prescribe behavior, not captured by the Sherman Act or Clayton Act, the other principle federal antitrust statutes. So the FTC has more flexible tools. It has the capacity to try cases through its own administrative process and ultimately write opinions that reflect the wisdom of the college of five commissioners.

So it has tools that DOJ does not have. That collaborative joint venture vision has been realized on a small number of occasions in US history, maybe most important in the thirties, forties and early fifties, where the FTC did formative economic studies that fed directly into the development of important DOJ cases. Indeed, and in his testimony before the temporary National Economic Commission, in 1942, this was a blue-ribbon commission established at the request of Franklin Roosevelt. Thurman Arnold, who is the head of the Antitrust Division tells Congress, "One of the things I want you to do is give the FTC more money so they can do more studies and more work to support us in the work we do. And to bring cases that we're not able to bring. Because that will make the US system effective as a whole."

The executive order has that vision of creating a more effective collaboration between the two agencies, which would make the two of them much better as partners in developing policy to recognize their complimentary skills and practice that vision because of, institutional parochialism has been exceedingly difficult to achieve over time. Lina Khan and Jonathan Kanter know each other, they respect each other's accomplishments. You could imagine them looking at the executive order and saying, "Acting alone in isolation, we cannot realize this vision. In fact, we're gonna have to work together on rewriting merger guidelines, for example. One of the aims of the executive order.

But the only way we can come close to achieving the larger ambitions of this executive order is to achieve the genuine collaboration and worry less about who gets credit for success. Because if this works, there'll be glory enough to go around for all of us. And that's what we should be trying to do."

Jeffrey Rosen: [00:43:51] Thank you so much for that. Barry, you are an antitrust visionary whose, whose vision has inspired that of Lina Khan and Jonathan Kanter. You wrote a piece for the Washington Monthly, that the Biden administration noted, in which you staked out a bold vision of Brandeis in antitrust, which called for transformational change on areas ranging from falling real wages, to the climate, to the collapse of entrepreneurship and community, to failing rural economies, to international trade, to arts and literature. And you ended by talking about disinformation and censorship. And you said that president Biden could use non-discrimination rules to force Google and Facebook to abandon the business models that reward them for spreading information to divide and radicalize voters.

And he can use anti-monopoly laws to stop these corporations from diverting into their own vaults, the advertising dollars, that for the past 250 years have helped to support trustworthy local journalism. What... A- as a visionary, what would you call on Lina Khan and

Jonathan Kanter to do? And if they're successful, what... when it comes to the platforms, again, specifically, would you hope they would achieve at the end of their terms?

Barry Lynn: [00:45:02] Yeah, I think Lina Khan, you know, and Jonathan Kanter, I mean, what I would... You know, what, what, what we'd like to see... Actually there's someone who asked me this actually in the White House the other day. And it was like, "What, what would you like to see?" And it is, I'd like to see like, you know, that we actually are not talking about Jeff Bezos every day. You know, it's just like, it's like we end up in a situation in which these people are not important. You know, they're, they're corporations are neutralized. They're not sort of in our face and in our lives. And, and just sort of you know in our minds all the time.

You know, it's like we, we need to get back on, you know, to a world in which you know, we're in control and we think about ourselves and our communities. And so you know, there's a variety of ways to get there. It's not my job to actually figure out their strategy for them. You know, I mean, one thing I will add, and this is actually one of the, one of the things that I put into that, that note, that, that article, which, you know, I know the White House did read, is trade, you know, trade policy. This is, you know, so I think there's... You know, if I were to like send a memo right now, it would actually be to USTR, it would be to Katherine Tai.

It would be to the White House itself, to... You know, in, in terms of thinking about the way that we can use competition policy to restructure the, the international system. In ways that sort of make us more safe. In ways that a- allow us to cooperate with our fellow democracies in dealing with Google, Facebook and Amazon. Because this would be a lot easier if we actually have a pretty close coordination with the Europeans and South Africa and, and, and Australia. Certainly a closer cooperation than we have had in recent years.

But also sort of dealing with supply chain risk, which is you know, another part of the problem that we are, sort of, we're dealing with in this country right now, which is just that we've seen so much concentration of capacity for vital goods in, in places like China and, and, you know, in ways that sort of threaten our national security. So the same principles of, of competition you know, can be applied to the int... We can use these, these principles to actually esta... To shape our thinking and, and our understanding of what to do internationally in a way that, you know, will allow us to rebuild the liberal international system.

You know, kind of like this spectacularly successful liberal international system that we first built at the end of the, the Second World War, you know, Bretton Woods. And really, that was just one of the great su- successes in human history until it was undone in the mid nineties by, by Bill Clinton, you know, with, with the WTO system, which was the extension of the monopolization vision into the world arena. So, you know, so that's actually... If I was gonna write a single memo, it would actually be to the White House and to USTR, to you know, really sort of start to use the same tools, the same vision, the same principles to rethink how we think about our international industrial system and how we interact with other nations and how we build a world community.

Jeffrey Rosen: [00:48:14] Thank you so much for that. Bill We the People is a weekly show of constitutional debate, and I want our listeners to hear the case against Barry's neo-Brandeis in vision. Can you tell us what Chicago School anti-trust thinkers would say to the vision that Barry has sketched out of the Biden... Some of which the Biden administration has embraced. What would, what would the Chicago School's emphasis on consumer welfare rather than democracy and liberty say about all this? And then after telling us what Chicago School people would think, tell us what you think?

Bill Kovacic: [00:48:51] Yeah. I'm, yeah, in in law school, Jeff, both of us were told not to fight the hypothetical. So I'm gonna, I'm gonna try to answer the instructors questions, they're the one I'd rather answer. But I- I'm, I'm gonna quarrel with the instructor in one way. That is you know, when, when I, when I was a young person getting into this field there were two voices that sketched out a view of competition law that said, "Focus on consumers first." almost single-mindedly. One was Robert Bork. But the other was a guy named Phil Areeda. And my guess is in the, in the in the current generation, I, I doubt that most people could pick Phil Areeda out of a lineup. I suspect they couldn't do it.

Bork and, Bork and Areeda gave somewhat different answers to the question of why the consumer focus? Bork argued in a way that historians find completely unsupportable. The Congress in 1890 and 1914, meant for the consumer interest to be at the forefront of competition law enforcement. Areeda had a different argument. Areeda said the egalitarian vision that Congress had and that courts have spoken a- about it cannot be effectively administered in practice. That is, if you seek to achieve the wider collection of aims. And for example, tell judges, individual judges, your aim ultimately is to protect democracy and prevent levels of concentration that undermine democracy, how do I do that in practice?

What kind of mergers should be allowed or disallowed? Don't all additions to concentration pose an incrementally greater threat? And, and Areeda's view was that program is not administrable and Areeda argued it's faintly unconstitutional to tell individual judges that that's your job, to sort all of that out. So I think the, I, I think the core objection of what I would call the Harvard and Chicago perspectives from the period of time... I bring in Harvard, because if Bork alone had been the only voice, it wouldn't have worked. You needed a more centrist perspective to bring people in the middle, middle left, a little bit middle right to join the party. They did join.

their their core objection is that if you bring in the broader array of objectives, protecting worker interests, protecting local community interests, protecting small business, individual entrepreneurs and ultimately protect democracy itself, how do I go about doing that? So they said, "What other policies take care of is wider array of interests. Your job in antitrust is to focus on the consumer interests." I think that would be their main, their main objection. You know, how do I... What do I feel about this? I, I think a proper definition of the consumer interest embodies a wider range of values. That is, are consumers interested as workers in getting good wages? Of course, they are.

Are they interested in preventing excessive concentration that undermines innovation? Yes, they are. So I, I think, I think the notion that, that the, the policy in the last 40 years or so

focuses only on price effects is is, is a, is, is an unfortunate distortion, it's done more than that. I would say the hard issue to address for the broader egalitarian vision, and I think this remains a challenge, is how do you implement the broader vision in practice? And I think for Lina Khan, for Jonathan Kanter, in rewriting merger guidelines, in rewriting guidelines about how the FTC exercises its authority that's a discussion I'm gonna look for most carefully, is how do you do it? How do you do it in an individual merger? How do you draw the lines? How do you reconcile competing interests?

Including the point that, in many respects, I'm not sure consumers always like competition. Competition is scary and you can have completely benign forces of innovation that just blow away existing industries. And competition can be scary. Consumers like competition when it provides them something better in the shop when they buy. They're not so sure in their capacity as workers or as inhabitants of local communities. So there are ambiguities here that are hard to sort out, but I think that's the big challenge. And I suspect that the FTC and DOJ are gonna spend a lot of time reformulating how they expect to do that in individual cases.

Jeffrey Rosen: [00:53:18] Thank you so much for that and for helping us understand the difference between the Chicago and Harvard Schools and for inspiring me and We the People listeners to learn more. Well, it's time for closing arguments in this extremely rich and illuminating discussion. And Barry, the first one is to you. Sum up please, for our avid, We the People listeners, why President Biden's executive order on competition is transformatively important in your view and what you hope and expect it to achieve?

Barry Lynn: [00:53:52] Yeah. A- and thank you, Jeff, for hosting this conversation. It's, it's, it's really important and it's to take... you know, unravel what has been taking place because it... And it really is revolutionary. And I, I guess, you know, the key thing here is just to, you know, understand first that we, in the United States are in crisis. You know, we, we have the greatest concentration of power that we have seen in the hands of private actors, perhaps in our history. You know, I mean, we've... we grew up learning about the power of standard oil or the power of the railroads or the power of Carnegie Steel. You know, maybe in more recent times, the power of IBM or AT&T. And it's like Google, Facebook, and Amazon, and a couple of others, perhaps.

I mean, the power that they have is far beyond what any of those previous giants have possessed. And even, you know, what's even more scary is the fact that Google, Facebook and Amazon control the... our communications. They, they, you know, they, they stand, they, you know, they occupy the space in between the, the author and the reporter and the, the reader and the voter, you know on, on the other, on the other side of the the platform. And they manipulate how people share information with each other. They manipulate how people share news with each other. They manipulate how people speak with each other.

So the crisis that we face today both have just concentrated wealth, concentrated control and a concen- you know, concentration of, of, of power over our communications is unprecedented. And the threat is to our democracy in a way that we have not faced. So that's number one. So number two, you know, is the, the executive order demonstrates, in

other actions that the Biden administration have taken, such as, such as appointing Lina Khan to head the FTC and to... You know, Jonathan Kanter to run the Antitrust Division within the Justice Department, demonstrate that they understand this threat, this, this multiplicity of threats, this, this wide array of, of threats to our democracy and to our economic and political wellbeing.

So, and they you know, are, are striking at the root of the concentration of power that we have seen over the last 40 years. You know, so, so that's, you know, you know, so w- we should, every day, all of us, focus on the threat and we should every day do what we can to work with this administration, which really understands the threat and has demonstrated intents to break this power and re-establish a new democracy here in America, in some ways, a, a third American democracy.

That we should work with this administration to help them make this happen because Lina Khan, as much power as she has as chair of the FTC, Johnathan Kanter, as much power as he has, even President Biden, as much power as he, as he has and sitting in the oval office, they cannot do it alone. They need our support every day. And in some ways, what the executive order has done is it's, it's an invitation for all of us to participate in this rebuilding of American democracy for the digital 21st century.

Jeffrey Rosen: [00:57:33] Thank you so much for that. Bill, the last word is to you. In this wonderful conversation please share with We the People listeners your view about the potential significance of President Biden's executive order and what its practical effects may be.

Bill Kovacic: [00:57:49] You choose the word potential significance wisely, I think Jeff. And I will focus on what I think is essential to having the potential become a reality. And what is the vulnerability of policymaking in so many instances, and that is, the question of implementation. There's some fascinating things in the executive order that are designed to encourage the accomplishment of the ambition set out in the order. One is the creation of a White House Competition Council. The White House Competition Council was designed to join up a whole variety of public institutions at the federal level together in coming up with what the executive order calls a coordinated response.

I think, in many respects, this council is designed to encourage conversations across agencies that will enable them collectively to achieve more than they could do through individual effort. That's healthy. But second, to provide a mechanism for keeping score on how the government is doing in this government or wide approach. A crucial question is, is this going to stick? Will this become a vibrant element of policy-making over time? The simple fact that these are all federal agencies does not mean it as one big happy family. Never underestimate the forces of parochialism and narrow institutional prerogative in defeating broader ambitions.

President Biden is not the first president to exhort agencies to work more collectively and collaboratively on these kinds of projects. So will the White House throw themselves into making this work over time? Will they dedicate the effort to it, day in and day out? Will individual agencies dedicate themselves to this process? I'd simply point out that the Biden

administration has taken a while to get going. The fact that Jonathan Kanter has just now been nominated and probably will not take office until I'm guessing September, means that eight precious months have gone by. And one thing that you notice when you're the head of the agency is how fast the time goes by.

And the clock ticks quickly to the end of President Biden's first term, maybe he has a second term. We can't predict that with with, with, with great accuracy. But it is going to be the sustained effort over time that makes it work and the attention to implementation that makes this effective. In a sense, this is a nice start, but in another sense, nothing has happened yet. None of the concrete steps to put all of this in place have come to pass. And that will be a question, not of the physics of what competition policy should be, but our skillet engineering and making things work in time. And in general we tend to ignore the, the, the engineering of policymaking. The physics fascinates us.

Academics write about the physics all the time, the question of how you actually do it and put it in place is a much harder task. And to quote again Ernest May and Richard Neustadt, they point out that the main problems with reform are in the zone of what they call feasibility. And the feasibility they're talking about is the commitment and dedication of effort to make it work over time. So this has potential, but many reforms in the history of our country have had potential. Success depends a lot on whether you're in for the long run, whether you're willing to learn what worked well in the past, because you'll need all the help you can get and studying earlier examples to make that work well in the future.

And it will not just be Kanter and Khan, it will be Kanter's successor, Khan's successor. It will be a host of other policymakers who'll determine whether this works over time. So if you're not in it for the long run, this doesn't succeed in the way one hopes.

Jeffrey Rosen: [01:01:59] Thank you so much, Barry Lynn and Bill Kovacic for a deep, illuminating and extremely educational discussion about the crucial topic of the future of antitrust policy in America. Barry, Bill, thank you so much for joining. Today's show was produced by Jackie McDermott and engineered by Greg Sheckler. Research was provided by Mac Taylor, Olivia Gross and Lana Ulrich. Please rate, review and subscribe to We the People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate.

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