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DARK CLOUDS ON THE HORIZON FOR BIG TECH: PRESIDENT-ELECT BIDEN INHERITS A CULTURAL MOVEMENT CALLING FOR INCREASED ANTITRUST ENFORCEMENT AGAINST TECH MONOPOLISTS

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As the next president of the United States, Joe Biden will have a great deal of influence over his administration’s antitrust enforcement. Antitrust enforcement against tech companies’ perceived market power is an increasingly popular idea in the United States.¹ During the current presidency, the Department of Justice and eleven state Attorneys General have brought a civil antitrust suit against Google.² Democratic committee members on the House Judiciary Subcommittee on Antitrust recommended sweeping changes to US antitrust laws in order to prosecute Amazon, Apple, Google, and Facebook – perceived tech monopolists.³ This places the United States in a historic moment for antitrust law, with both political parties clamoring for increased antitrust enforcement against tech giants.

Despite the Obama administration’s friendly attitude towards big tech companies, President-elect Biden appears supportive of increased antitrust enforcement against big tech

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¹ Leah Nylen, *Poll: majority of Americans concerned about Big Tech’s economic, political power*, POLITICO (Sept. 17, 2020, 12:35 PM EDT) <https://www.politico.com/news/2020/09/17/big-tech-economic-political-power-poll-417024>.

² Press Release, Department of Justice, *Justice Department Sues Monopolist Google For Violating Antitrust Laws* (Oct. 20, 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

³ Shirin Ghaffary & Jason Del Rey, *The Big Tech antitrust report has one big conclusion: Amazon, Apple, Facebook, and Google are anti-competitive*, VOX (Oct. 6, 2020, 8:35 PM EDT) <https://www.vox.com/recode/2020/10/6/21505027/congress-big-tech-antitrust-report-facebook-google-amazon-apple-mark-zuckerberg-jeff-bezos-tim-cook>.

companies.⁴ Biden will likely continue the Trump Administration's antitrust litigation against Facebook while potentially expanding enforcement to the other tech giants.⁵

Enforcement against these companies has historically been tricky because current antitrust laws do not punish companies for simply being too big or having substantial market power. The company must be engaged in some specific anticompetitive conduct. For example, a new industry may only have one well developed firm. This firm would be breaking the law if it used its monopoly power to prevent competitors from entering the industry. Alternatively, a monopolist can be found in violation of US antitrust laws if they use their monopoly power in one industry to gain a monopoly in another.

Nonetheless, shifting social movements have historically spurred change or unusual outcomes in certain cases.⁶ Biden's Department of Justice and Federal Trade Commission could be situated to unleash a new wave of antitrust litigation against big tech. Additional antitrust legislation is being considered by the current DOJ and FTV, and the Biden administration will likely choose to continue targeting the big players in the tech industry.⁷

Animosity towards the tech giants came to a boiling point during the 2020 election, with people on both sides growing frustrated with certain tech companies' behavior towards misinformation.⁸ Biden is among the politicians calling for the elimination of liability protection provided through Section 230 of the Communications Decency Act.⁹ These protections allow tech companies to host content without taking on liability for the content.¹⁰

All of this popular resentment is likely to result in some big changes in antitrust enforcement over the next four years. This might come in the form of increased enforcement of current laws, or legislators may be able to pass new antitrust legislation targeting big tech monopolists. President-elect Biden will be situated to have a lasting effect on American antitrust policy for the next century.

⁴ Jon Swartz, *Here's where Biden and Trump stand on antitrust, social media and other tech issues*, MARKETWATCH (Oct. 1, 2020, 5:21 PM EDT) <https://www.marketwatch.com/story/heres-where-biden-and-trump-stand-on-antitrust-social-media-and-other-tech-issues-2020-10-01>.

⁵ Cecilia Kang, David McCabe, & Jack Nicas, *Biden is Expected to Keep Scrutiny of Tech Front and Center*, N.Y. TIMES (Nov. 10, 2020) <https://www.nytimes.com/2020/11/10/technology/biden-tech-antitrust-privacy.html>.

⁶ *See In United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

⁷ Diane Bartz, *U.S. needs tougher antitrust enforcement -Biden transition team expert*, REUTERS (Nov. 12, 2020, 11:12 AM EDT) <https://www.reuters.com/article/usa-election-antitrust-idUSL1N2HP027>.

⁸ Kang, *supra* n. 5.

⁹ *Id.*

¹⁰ *Id.*