

STATE OF THE NET



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Amy Klobuchar

Hello, everyone in State of the Net. Thank you to Joe Alessi and Tim Lordan for inviting me to speak at your conference, and thank you for everyone who is part of it.

We all know that this has been an eventful year, and we're not even through January yet. We're living through one of the most challenging periods in our nation's history, more than 400,000 Americans have lost their lives to coronavirus, and millions more are suffering from the economic destruction of the pandemic. This moment in our nation's history calls for serious reflection and national resolve. So, I also hope that you see it, as much as it's so difficult that you're all watching this on Zoom, and that there's so much isolation and, you know, we're teaching -- talk about Internet -- we're teaching first graders how to read while learning to use the mute button. There's a lot of challenges, but I also hope you see this particular time as a moment of hope.

Last week I was honored to speak at the inauguration of President Biden and Vice President Harris, and as I said on that beautiful sunny morning: This is the day our democracy picks itself up, brushes off the dust, and does what America always does, goes forward as one nation. Now it falls on all of us to take up the torch of our democracy, not as a weapon of political arson, but as an instrument for good. And by the way, it was so chilling up on that stage when I first saw it, the windows were broken, there was still spray paint at the bottom of the columns, but we went

forward, we went forward because we knew that we must usher in a new era of healing, of unifying, and of coming together to get through this crisis and begin building a better future. And when it comes to competition and privacy and Internet issues, the topics that you're discussing today, which are so very timely, our government should do all it can to be an instrument of good.

Now the one of the key issues before us is how we as a society deals with the unprecedented and growing power of large technology companies. Well, I would love to come back one day soon to talk about privacy, what I'm doing on, you know, fitbits and things like that, with my work on the Commerce Committee. My focus today is going to be on competition policy. We have huge companies that have been very successful, and they've gotten us a lot of cool things, and created powerful digital tools that let us do things every day that would seem extraordinary, to even us, a decade or two decades ago, much less our parents. We can connect with friends easily around the world, consult with our doctors, work remotely, get news in real time, and 1000s of other things. These technologies, yes, have transformed our lives, in many cases for the better. But we all know there's also a downside, and that downside -- and those are the things that government should be the instrument of good to do something about -- is that they are controlled by a handful of companies that have amassed unprecedented power, gateways -- if you read the House Report -- gateways over our personal data, power over what ads we see, and what news we watch, and monopoly power in key digital markets. This concentration of powers raised troubling questions about personal privacy, the security of our elections, the spread of toxic disinformation, the type of disinformation that helped convince a violent and deeply misinformed mob to storm our Capitol and desecrate the temple of our democracy. Yes, they were incited to do it. Yes, we're going to find out a lot more, in the weeks and months to come, about the planning that went into it. But we all know that a few companies are controlling some of the information that people get, and it's on us to make sure that it strengthens our democracy and not weakens it.

At the root of this power lies the ability of these companies to dominate markets, to buy out their competitors, even potential future competitors, and to exclude their rivals, and as a result of the pandemic, these companies are only growing stronger. And, as you know, as you see from like the food delivery services, online delivery, we're also seeing potential mergers, we're seeing over 100,000 small businesses close to receive it, even more consolidation, raising the very real risks that we could emerge from this pandemic with markets that are more concentrated and less competitive than before this crisis. But even before the pandemic, it was clear that America has a major monopoly power. It's a problem that threatens the strength and dynamism of our economy, and it's without a doubt a problem that plagues our tech market.

America's monopoly problem, as I said, isn't just limited to digital. It's part of this broader problem. We've always been defined by economic prosperity, that prosperity is a key pillar of our way of life and our national security. Since the end of the Great Depression to the end of the last century, it raised American standards of living, allowing our culture and values to be spread around the world. But it didn't just happen, it was built on a foundation of open markets and fair competition. It's a foundation that was built over the course of our history, you go back to those who founded our country, many of them fled England because of the power of monopolies, and the way things worked for people with independent spirits who wanted to start their own businesses and get ahead. Under colonial rule, they had big time monopolies, and when they got to America, that started happening here. The Boston Tea Party wasn't just about taxation without representation, it was also about not wanting to deal with one monopoly tea company, the British East India Tea Company. Well, we got through that, started our own country, but then as you know through the industrial age we began to see the consolidation of power and trust in the railroad industry, the beef industry, the sugar industry, the rise of Standard Oil, and after a while you began to see a national movement grow up against that consolidation. As you all know, it was called antitrust because of the power of those industrial trusts at the time, but at its core it was about competition. The movement had a heavy footprint in the Midwest, where you saw the farmers, the Granger's, which movement started in Minnesota and Iowa and other Midwestern states, literally standing there with pitch forks. You saw the growth of the union movement, the Haymarket, right? Pullman strike, strike by workers against monopolies across the board.

Now, the results? Well, state and federal politicians started to see that they weren't going to survive without doing something about monopolies, they actually tried to outdo each other on how strong they could be on monopolies. Woodrow Wilson had a campaign song about antitrust. Teddy Roosevelt rode his crusade against monopoly power into the White House. The Sherman act was sponsored by a Republican senator, Senator Sherman from Ohio. People all over the country, from across the political spectrum, came together to take on the issue of monopolies. We need that new pro- competition movement now, because it's competition between companies that gives consumers lower prices and forces manufacturers to constantly innovate to improve their products. Competitive markets force companies as well to pay workers fair wages and improve working conditions. If it's just one big monopoly, or a monopoly that have 90%, or two companies that share 50/50, that's not going to happen. Antitrust, as you all know, is the primary tool for protecting competition. Those laws, that went in effect back then, have been updated over the years, but not over the last few decades, while we've seen this enormous change in our economy. We really are not as sophisticated as the companies that we should be regulating.

So, we need to start by working to strengthen antitrust enforcement and making it more effective, but antitrust law isn't the only potential tool we have to foster the kind of competition we need. I think we need to call this not antitrust law, even though Antitrust is the title of the book I'm coming out with, but we should be calling it Competition Policy. That envelops more things, as you look at how we can get more innovation in our country. And that distinction is particularly important in digital markets, which are relatively new and largely unregulated. With a new administration, new leadership at the antitrust agencies, and democratic majorities in the Senate and the House, we're well positioned to make competition policy a priority for the first time in decades.

It's hard to talk, of course, about competition policy without a major focus on the big digital platforms. I've been hearing complaints about the big tech platforms using their dominance to undermine rivals, and limit competition, for a long time. As you know, the last time I was before you I talked about my Honest Ads Act. I've still gotten pushback on that, while they say they're now for it, we weren't able to get it done. I hope I can do it this year. But, we also need antitrust agencies to get serious about enforcement in the tech sector and, despite urging from me and others, that hasn't really happened, except at the very end of the Trump administration, where Chairman Simons and Makan Delrahim over at DOJ brought some major cases, that I think need to be obviously continued and expanded on, and I'm glad that they were joined by Attorney General's throughout the country. Apple, Microsoft, Amazon, Google and Facebook combined have completed more than 700 acquisitions since 1987. Some of these deals raised significant concerns. But it's easy to say that these deals are only troubling in hindsight, and that the agencies could not have predicted what would have happened. For many of these acquisitions, industry observers raised concerns right away. That was true for Facebook - Instagram, Google - AdMob, and others. When Google bought DoubleClick, former Commissioner Pamela Jones Harbour dissented from the FTC decision to close its investigation without taking action, laying out alternative predictions about how that acquisition would harm competition. Seeing how Google now dominates digital advertising, it looks like she was right.

Unfortunately, it took years for the antitrust agencies to get serious about enforcement in the tech center. Now we have begun to see enforcement action. There's the Justice Department search monopolization lawsuit against Google, there's the FTC monopolization case against Facebook, and there are a number of significant actions against these companies from large coalitions of State enforcers, as well as other investigations reportedly going on. An important feature of these cases, that they include calls for structural relief, that may sound scary. Well, look what happened with AT&T, that actually ended up, some would argue, making the company even more competitive, just that they had to compete. And we just aren't seeing that right now in the tech

industry. As I've said before, in a series monopolization action, it's important that a breakup remedy be on the table. You can separate assets and let them compete as separate businesses. WhatsApp and Instagram are great examples. I can see how this can work, and I saw it when I was a young lawyer at a law firm where my big client was MCI, at the time a young innovative company that was being held back by local monopoly carriers. MCI took on Bell Operating Company and AT&T, and ultimately helped break up that monopoly, lowering long distance rates, and starting a burgeoning cell phone industry. Many have said, including a former AT&T President, as I noted, that AT&T is a stronger company, because it was forced to compete. Ma Bell was both a horizontal and a vertical monopoly at the time, literally controlling the hardware under them.

So, when you look at that, breakups aren't radical, they're one way to deal with a competition issue. That includes a potential Justice Department lawsuit related to Google's conduct and acquisitions in ad technology markets. We held an Antitrust Committee hearing in September on Google's ad tech issues, it's clear that Google dominates the markets for services to both buyers and sellers of online display ads, while also controlling the Ad Exchange, on which most transactions are executed, giving it the power to exclude its rivals and maintain its market power. The States have already filed the lawsuit challenging this conduct, and I hope the Justice Department does as well. As I noted there are also investigations going on, some related to competition concerns raised by online app stores.

Cause of the problem? What's causing this monopoly problem? It's no secret that our increasingly conservative federal judiciary has been more antagonistic to antitrust enforcement, raising the procedural and evidentiary bar for government and private enforcement. Recent Supreme Court cases, like *Ohio v. American Express*, have raised fears that the Court's decisions could cripple the effectiveness of the current antitrust laws to protect competition in digital platform markets. In 2008, a former Justice Department official observed that it had been more than 15 years since a plaintiff had won antitrust cases before the Supreme Court, and it really hasn't gotten better. There was a recent Apple case, which the siding was on the side of the plaintiffs, but I think we know that, if you're going to wait 100 years for the court to fix it, that's probably how long it will take. We're not going to solve our monopoly problem.

That's why I have introduced a package of bills to strengthen antitrust enforcement. First we need to fund more effective enforcement. I introduced the Merger Filing Fee Modernization Act, with Senator Grassley, to renew the federal government's commitment to antitrust enforcement, by updating merger filing fees for the first time since 2001, and increasing appropriations. The reductions in enforcement agency staffing over time are jarring. If you remember one thing from what I talk about, remember this. In 1980, when the Justice Department's antitrust division was

working to break up AT&T, the Division had 453 lawyers, by 2017 it had just 330 lawyers. The FTC is also a shadow of its former self. It's 1719 employees in 1980 fell to, in 2018, 1102. How are you going to be able to take on these big tech companies, much less others, if you don't have the resources?

Relative to 1980, the last decade has seen increasing demands on the antitrust agency, with steady increases in merger filings, and new enforcement challenges in complex industries. We should have more enforcement staff, not less. Under Senator Grassley and my bill, mega mergers -- those worth more than 5 billion -- would have to increase the filing fees. Let me tell you, it is a drop in the bucket, compared to the value of those deals, but it would bring in an estimated 135 million in new fee revenues that would allow the agencies to maintain their current levels of activity. If we want our enforcers to be able to go toe to toe with the largest most sophisticated trillion dollar companies in the world, we shouldn't force them to operate on a shoestring. I did push, at the end of last year, to help the departments, we got some modest increases, it was a bipartisan level. And, as you know, there's growing bipartisan consensus that the agencies are underfunded, and this is a big priority for me and Congress.

Then there's the laws. We also need to update our laws to help stop harmful consolidation. In my bill, the Consolidation Prevention and Competition Promotion Act, would strengthen the current legal standards in the Clayton Act. This bill updates for legal standard to prohibit anti-competitive mergers, it would basically change the standard. Right now, you have to show that it substantially lessens competition, a merger -- it's a high threshold -- change it to that it materially lessens competition, which means more than a de minimis amount. The bill would also shift the burden of proof for mega mergers, those valued at over 5 billion, and codify the structural presumption for transaction, so that the merging parties would have to establish, they would have the burden of showing that it doesn't materially lessen competition. The bill also clarifies that mergers that create a monopsony are illegal, prohibiting acquisitions that give the merged company power to suppress the prices it pays, or wages it offers, due to a lack of competition. And it mandates that the parties to a merger consent decree provide post-merger market data, to allow enforcers to look back at the actual competitive effects of the merger.

Another way that we can do this is by outlawing exclusionary conduct. This gives us a new tool to address this kind of anti-competitive conduct. A bill that I introduced prohibits exclusionary conduct that presents an appreciable risk of harming competition, it would reinvigorate enforcement, and enable enforcers to protect competition across our common economy, it would make big tech platforms and other dominant companies think twice before engaging in anti-competitive conduct. The bill shifts the burden to those dominant firms, to prove that their

exclusionary conduct doesn't risk harming competition. It also imposes substantial civil penalties. Finally, I introduced the Monopolization Deterrence Act that would enable the FTC and the Justice Department to seek serious civil fines for monopolization offenses.

So, those are just a few of the ideas. But, one of the things I think is going to make a big difference, is the new administration. I worked well with the Trump Justice people that did antitrust. I appreciated the big complaint that they brought, as well as the FTC, but their work was constantly being undermined by the political comments of the President, who would go after companies simply because of their political views. I think we need to look at this in a much bigger way, and that's why I look forward to working with the administration. I'm excited about Merrick Garland coming in, he's someone that's actually, as a judge, reviewed antitrust cases, he understands the law. I'm also excited about the people that he will put in place to work on this. When President Biden introduced him to the country as his nominee for attorney general, Merrick Garland actually mentioned antitrust. So, I view those as good signs, because I think you all know, we're going to not only have to enforce the laws, fund the enforcement of the laws, but also in Congress finally do something. I've had a good working relationship with my colleague Mike Lee, but I'm looking forward to finally having the gavel, to be able to mark up bills, to be able to send them to the floor. I'm looking forward to not just looking at what we need to do when it comes to mergers going forward, but how we're going to look back at the industry consolidation we know is happening now. When Teddy Roosevelt took on this issue, he didn't just say, Oh, I'm just going to look at what happens 10 years from now, he actually took on what was happening now. So, there's a lot of excitement, it's going to matter for all the things you care about with the Internet, with an open Internet, it's going to matter with competition.

And I just want to remind everyone that this isn't just a Democratic issue. Throughout history, it's been a Republican one as well. Throughout history it has been about pro- competition, pro-business, and competition and entrepreneurship. It was Adam Smith who warned us, centuries ago, about the growing army of monopolies, and we can't let history repeat itself again, we have to take it on now.

So please, give me your thoughts, and my staff, our thoughts as we go forward, but I'm excited about what's ahead, and all we can do to encourage competition and a free and open Internet in our country. Thanks everyone.