

10 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Barr—and Office of Professional Responsibility’s Opinion

by Ryan Goodman

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On Wednesday, the House Judiciary Committee heard from a whistleblower inside the Department of Justice’s Antitrust Division alleging serious abuses committed by Attorney General William Barr. To blunt the force of the whistleblower’s complaint, Rep. Doug Collins (R-Ga) entered into the record a [letter](#) from the Office of Professional Responsibility (OPR), which investigates allegations of misconduct by employees and which, in this case, rejected the whistleblower’s complaint. The letter had been circulated just the evening before, according to the testimony by the whistleblower, John Elias.

But OPR’s explanation for why it rejected the complaint is “not an exoneration; it’s an indictment,” a former Antitrust Division attorney told *Just Security*. That assessment is consistent with other leading antitrust experts who responded to an inquiry I sent them. Indeed, I was surprised to find that *every one of the ten* experts was alarmed by the underlying allegations and several were highly critical of the OPR’s handling of the matter. Bill Baer, who served as assistant attorney general in charge of the Antitrust Division, wrote that the OPR memo is “neither persuasive nor conclusive.” Douglas Melamed, professor of law at Stanford Law School, wrote, “The short and conclusory OPR opinion, signed by an official appointed by Mr. Barr, does not come close to justifying the alleged conduct.” Jonathan Baker, professor of law at American University, Washington College of Law, detailed why “OPR’s cursory analysis and conclusions threaten to undermine merger enforcement specifically and antitrust enforcement more broadly.”

In addition to the congressional inquiry, the Department of Justice’s Inspector General and the Office of Special Counsel are engaged in [ongoing investigations](#) into Elias’s allegations.

Here is the basic prompt I sent to each expert whose answers are provided in full below.

The prompt:

A career employee of the Justice Department John Elias, in a whistleblower complaint and in testimony to Congress, [alleges](#) that the Antitrust Division (ATR) opened investigations against the cannabis industry at the direction of Attorney General William Barr without a sufficient factual basis and “centered not on an antitrust analysis,” but instead due to the attorney general’s “personal dislike of the industry.”

During the House Judiciary Committee hearings on Wednesday, Rep. Doug Collins (R-Ga) entered into the record a 2-page [letter](#) from the Justice Department’s Office of Professional Responsibility (OPR) which rejected the complaints by Mr. Elias and another unnamed whistleblower.

The OPR described the factual allegations to include:

“Specifically, two anonymous whistleblowers made allegations that the Antitrust Division (ATR) ... conduct[ed] pretextual investigations of, and placing onerous demands on, merging companies in the cannabis industry through the issuance of Second Requests, even though such mergers presented no competitive concerns.”

“The submissions added an allegation that ATR, at the direction of the Attorney General’s Office, placed these demands on merging cannabis companies in order to slow the growth of the cannabis industry due to DOJ leadership’s animosity towards the industry.”

The OPR and Antitrust Division concluded that even if the allegations were all true, those alleged facts would not violate any relevant laws, regulations, rules, policies, or guidelines. The OPR letter states:

“ATR responded with a categorical denial of the allegations, and argued that even if those allegations were true, there would be no violation of any laws, regulations, rules, policies, or guidelines.”

“OPR agrees with ATR’s interpretation of the latitude it has in issuing Second Requests. Accordingly, even if the whistleblowers’ allegations were true, OPR finds that ATR’s Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines.”

On the substance of the allegations, the OPR writes:

“[1] it was reasonable for ATR to seek additional information from the industry through its Second Request process. [2] In addition, contrary to the whistleblowers’ allegations, the documents provided by ATR reflect significant, and successful, negotiations among ATR and the cannabis companies concerning narrowing the scope of the Second Requests. [3] Furthermore, the internal memoranda recommending the closure of the investigations reflect that ATR staff conducted a significant amount of analysis regarding the competitive impact of the proposed mergers, and often explained how the actions of state regulators offset any competitive concerns.”

I asked some of the most highly respected antitrust law experts across the country for their views on Mr. Elias’s allegations compared to the OPR letter. Here’s what they said.

Former Antitrust Division attorney:

The OPR letter falls far short of exonerating Department of Justice leaders from the whistleblowers' claims that they opened antitrust investigations for political, as opposed to legitimate law enforcement, reasons. First, John Elias testified about political interference into investigations concerning the cannabis and automotive industries, but the OPR letter does not even mention the automotive investigation, much less conclude that it was handled properly. Second, the letter describes an OPR investigation that appears to have been limited to reviewing written submissions from the whistleblowers and the Antitrust Division, without any interviews of the witnesses who could best explain why the antitrust investigations were opened, namely Attorney General Barr and Assistant Attorney General Delrahim, or other officials who participated in the decision-making process. Third, while the Antitrust Division's stated reason for conducting in depth investigations into the cannabis industry – a need to become more familiar with a part of the economy with which it had no prior experience – might justify opening a few of the investigations, Mr. Elias claims that Second Requests were issued in ten different investigations, and it is hard to understand why the Antitrust Division would not have gained enough experience from reviewing the first few transactions to recognize quickly that the later ones raised no serious competitive concerns, especially if the early investigations involved “a significant amount of analysis regarding the competitive impact of the proposed mergers,” as the OPR asserts. Fourth, OPR's conclusion that “even if the whistleblowers' allegations were true,” the cannabis investigations would not have violated any relevant policies ignores the parts of the Antitrust Division Manual instructing that Second Requests should be issued only when “a transaction might raise competitive problems and more information is needed to evaluate it” and then should be “tailor[ed] . . . to the transaction and its possible anticompetitive consequences.” Finally, and most troubling of all, the OPR's reasoning gives the Antitrust Division carte blanche to investigate any future transaction for political reasons, essentially green-lighting the weaponization of Second Requests for political purposes. That's not an exoneration; it's an indictment.

Bill Baer (@billbaer50), visiting fellow at the Brookings Institution, served as assistant attorney general in charge of the Antitrust Division of the Justice Department from 2013 to 2016 and as director of the Bureau of Competition at the Federal Trade Commission from 1995 to 1999:

I found the Office of Professional Responsibility memo to the Deputy Attorney General's office about the John Elias whistleblower allegations less than satisfying. Here are a few of my concerns and questions. First, OPR states that the Antitrust Division had wide latitude to use the Second Request merger review process to understand an industry – cannabis – about which it knew little. But as I recall, the Division's operating manual demands that before opening even a preliminary investigation the staff must determine whether there is reason to believe there is an antitrust violation worth looking at. Indeed, in my years at DOJ and FTC I never saw a Second Request recommended, much less issued, without some demonstration of an underlying antitrust risk. OPR doesn't tell us whether that front-end standard was met here. Did they even ask? Second, even if "understanding an industry" might justify the first detailed investigation, what about the next nine, each of which consumed significant Antitrust Division resources and reportedly found no legitimate antitrust concern with any of the proposed transactions? Doesn't that fact pattern reinforce the whistleblower's evidence that DOJ leadership's animus toward the cannabis industry motivated this unprecedented series of investigations? Third, how can you evaluate Elias' claims of improper motive without talking to the people involved? The OPR two-page memo doesn't address that issue at all. It is, sad to say, neither persuasive nor conclusive.

Jonathan B. Baker (@jbbecon), Research Professor of Law, American University, Washington College of Law:

Whistleblower John Elias alleged that DOJ's Antitrust Division launched ten in-depth investigations (nine second requests and one civil investigative demand) into proposed cannabis industry mergers—not because the Division had concerns about a potential reduction in competition in the industry (in other words, concerns that prices would go up and output would go down) but because Attorney General Barr does not like the industry and wanted to impede its growth. DOJ's Office of Professional Responsibility says that even if the allegations are true, doing so was justified because the Antitrust Division has wide (apparently almost limitless) latitude to issue second requests under the HSR Act. OPR's conclusion that launching second request investigations solely on the basis of an Attorney General's animus toward an industry is somehow consistent with the rules of professional responsibility cannot be correct. Even if it were, the Antitrust Division's actions are indefensible and embarrassing as a matter of public policy.

DOJ leadership defended the in-depth investigations in part by claiming that they needed to learn more about the cannabis industry. Yet the Antitrust Division staff frequently is called upon to investigate new industries without issuing burdensome second requests. In fact, Division policy requires staff to identify potential theories of competitive harm from a merger, based on a preliminary investigation, before recommending a second request. Here, though, DOJ political leadership insisted upon in-depth investigations of not one but ten proposed mergers of firms with trivial market shares, apparently without any plausible theory of competitive harm. In two cases, the merging firms did not even compete.

If what Elias alleges is correct, these second requests were not good faith efforts to enforce the antitrust laws. Rather, they inappropriately imposed substantial burdens on firms simply because of the Attorney General's personal animus, and the Attorney General and Assistant Attorney General did not fulfill the executive branch's constitutional responsibility to faithfully execute the law. OPR's two-page memo steers clear of these issues.

OPR's cursory analysis and conclusions threaten to undermine merger enforcement specifically and antitrust enforcement more broadly. If the Antitrust Division can misuse its compulsory process authority by targeting firms for reasons other than a good faith belief that the antitrust laws may have been violated, firms are more likely to force the Division to defend second requests in court instead of

complying voluntarily. If the Attorney General can instruct the Antitrust Division to issue second requests to target disfavored firms in this case, what is to stop the Justice Department from issuing abusive second requests simply because their CEOs contributed to the campaigns of the president's political rivals or the merger threatened his financial interests? And if it is acceptable that the cannabis merger decisions were made in bad faith, how can the public trust that any of the Antitrust Division's enforcement actions serve the public interest?

Michael A. Carrier (@[profmikecarrier](#)), Distinguished Professor, Rutgers Law School:

This is not the first time that claims of politics in antitrust have been raised. But the breadth of cases implicated seems to be unique. Until now, the most concerning mergers—those receiving “second requests”—have raised the greatest competitive concern, typically reflected in high market shares. Issuing a disproportionate number of second requests to mergers that, based on longstanding bipartisan antitrust principles, do not threaten competitive harm (like one resulting in a market share of 0.35 percent!) but that are in an industry the Attorney General “did not like” is concerning. (And the same goes for an investigation into automakers that entered into an arrangement with California on emissions standards).

The acknowledgment of political interference raises questions about past decisions like the [challenge](#) of the AT&T/Time Warner merger and [refusal to challenge](#) the Disney/Fox merger. And, looking to the future, it raises questions about “[mature investigations](#)” of Google and Amazon, as contrasted with an inquiry into Facebook that “[is not real at all.](#)”

Andrew Chin, Paul B. Eaton Distinguished Professor of Law, University of North Carolina School of Law:

The DOJ's merger guidelines ensure that the scarce time and attention of its staff attorneys are focused on the industry consolidations that most threaten the efficient functioning of the nation's economy. They also allow business leaders to predict and plan for the range of structural changes they may face in the marketplace. As John Elias's testimony demonstrates, the President's tweeting of winners and losers has progressed from destabilizing short-term stock prices to drowning out the the DOJ's deliberations about how companies grow through competition and acquisition, and creating crises of confidence among those business leaders who just want to play by the rules.

Harry First, Charles L. Denison Professor of Law, NYU School of Law:

In his written statement, John Elias, a former acting Chief of Staff to the head of the Antitrust Division, Makan Delrahim, described two actions by the Antitrust Division that are both unusual and disturbing. One involved the use of the Division's authority to pursue costly investigations of mergers in the cannabis industry; the other, an investigation of a group of automakers with less than 30% of the market for an agreement with California on a framework to reduce vehicle greenhouse gas emissions. The former got rolling (sorry!) because Attorney General Barr doesn't like the marijuana industry; the latter, because President Trump didn't like what the auto companies were doing (they were undercutting his own plan to allow for increased emissions).

As is well known, the Antitrust Division makes "second requests" for merger information in very few cases, just about 2% of all notified mergers in 2018—45 in all. Once it makes a request, it will likely challenge the merger. A recent study shows that in 2018, the Division challenged 82% of the 45 mergers that received a second request. But in the cannabis merger investigations, the Division made 10 second requests and challenged not a one. The OPR report does not mention these data and provides no explanation for this aberrant enforcement behavior except to say that the behavior broke no "laws, regulations, rules, policies, or guidelines." The fact that the Division has the legal discretion to investigate a target, though, does not tell us that this discretion has been properly exercised.

Not included in the OPR report is any investigation of the auto emissions agreement. But the timing of the investigation was obvious, coming a day after the President tweeted his displeasure, and the lack of legal merit in the investigation was as well. Even if the auto makers acted together (which it turned out they didn't), the conduct was most likely protected because it was part of an approach to a government regulator; even if not protected, there would likely have been an efficiency argument; and even if that argument were not availing, the parties likely lacked sufficient market power to cause a rise in price, the touchstone for antitrust liability. Predictably, the investigation was finally terminated, nearly five months after it started, but not before Delrahim wrote an [op-ed](#) in USA Today trumpeting his investigation.

I was an attorney in the Antitrust Division during the Nixon Administration's investigation of a series of acquisitions that ITT made in the late 1960s. On orders from President Nixon, the Division dismissed its pending Supreme Court petitions in those cases. Part of Nixon's motivation seemed to be a disagreement on policy, but part apparently stemmed from a contribution that ITT made to the Republican National Committee. When this conduct became public it was widely condemned and formed part of the argument for Nixon's impeachment.

Elias's story is worse. This is not the normal politics that sometimes crops up in antitrust enforcement. It's the politics of grudge and personal preference. In the ITT case, the head of the Antitrust Division did not willingly bend to the president's whim; in these cases, it looks like the head of the Antitrust Division has. Unfortunately, the cost of this conduct—beyond the cost to the parties and the diversion from needed enforcement efforts—is to cast doubt on all the Antitrust Division has done or will do in this administration.

Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law:

The testimony of John W. Elias before the US House Committee on the Judiciary revealed two matters in which the Justice Department's Antitrust Division opened and conducted lengthy antitrust investigations against firms that apparently did not violate the antitrust laws. In both matters the staff reportedly opposed the investigation or had no time to consider its merits, and the Chief Executive of the United States had political reasons to bully the targets. In the one case, the Antitrust Division undertook full scale reviews of 10 proposed mergers in the cannabis industry, although the mergers were of very small firms in a very fragmented market and there was no way they could create market power. These investigations comprised 29% of all full scale reviews in year 2019 and were so extensive that the Division had to pull in staff from other vital areas. The other matter concerns California's announcement that four automakers had agreed with it to meet emission standards stricter than the EPA was expected to adopt. President Trump was enraged by the deal, as he tweeted. The next day the Antitrust Division opened an investigation without a staff recommendation. After investigations the cases were dropped.

These incidents are a facial affront to the rule of law and to the integrity of our judicial system. The Department of Justice is literally supposed to be a department of justice. That means that litigation decisions are expected to be made on their merits and not to serve the personal political ends of politicians. The United States has prided itself on due process values. It preaches the values to the rest of the world. The Antitrust Division preaches the values to the antitrust community of the world. Bringing litigation for political ends tarnishes reputations.

Politically-motivated investigations not only amount to harassment of innocent targets and disguised surveillance of them. It undermines trust going forward even when there is a good case against the defendant. When the Trump Justice Department sued to stop AT&T's acquisition of Time Warner, many progressives heralded the lawsuit as one that should be brought; yet a cloud hung over the lawsuit, for the decision to sue did not align with the administration's business-friendly philosophy and President Trump seemingly had a vendetta against CNN for its unfavorable coverage of him, and CNN was owned by Time Warner. The Trump Justice Department is now investigating big tech platforms. Trump has condemned certain of the platforms, and one in particular whose owner runs major media. If antitrust lawsuits are brought the firms are sure to cry: Foul politics —

even if experts find the antitrust concerns real and urgent. Politicization and its appearance can turn a department of highest repute into one of questionable legitimacy.

Douglas Melamed (@dougmelamed), Professor of the Practice of Law, Stanford Law School:

Mr. Elias' allegations regarding investigations of proposed mergers in the cannabis industry at the behest of Attorney General Barr, if correct, describe conduct that constitutes a corrupt and impermissible use of the power of the US Government. Law enforcement agencies may properly use their powers to investigate only if there is a reasonable basis to believe that the investigation will uncover violations of the laws the agencies are authorized to enforce, and the scope and burdens of the investigation should be limited to the those reasonably necessary for that purpose. The short and conclusory OPR opinion, signed by an official appointed by Mr. Barr, does not come close to justifying the alleged conduct.

Christopher Sprigman (@CJSprigman), Professor of Law, New York University School of Law:

Used properly, antitrust law can help maintain fair, competitive markets. But antitrust can also be misused as a political cudgel, with governments launching investigations of politically-disfavored companies and even industries. John Elias's testimony yesterday alleges that the Trump Administration has misused antitrust law to mete out political retribution. Specifically, Elias alleges that Attorney General William Barr directed the Antitrust Division to launch investigations of a series of mergers in the cannabis industry. Because the cannabis industry was known to be de-concentrated and competitive, these investigations were not expected to turn up evidence that any of the mergers would create the kind of market power that could lead to competitive harm. Elias says that the real reason for the investigations was to penalize and distract firms in an industry William Barr personally dislikes.

I've read Elias's testimony and a letter from the DOJ Office of Professional Responsibility (OPR) finding that no wrongdoing had occurred. Given the esteem in which both the Antitrust Division and the OPR has previously been held within the DOJ—and I am a former DOJ Antitrust Division lawyer myself—I would ordinarily be inclined to discount Elias's allegations. But here, I am forced to admit that there is at least some black smoke and possibly a fire. Let me try to explain why.

First is the fact that the Antitrust Division launched *ten* merger investigations in the cannabis industry over just a couple of years. The Division suggests that one reason it was investigating these mergers was to learn about the industry. That does not ring true. You don't do ten investigations, and issue burdensome "Second Requests" for information to the merging firms in almost all of them, just to get your bearings. Perhaps I would not be too surprised if the Division issued a narrow Second Request in one cannabis industry merger, confirmed the understanding of the Division staff that the industry was unconcentrated, and then stopped there. But all these investigations in a short time, and all of them apparently initiated by Antitrust Division political appointees and without either initiative or buy-in from the Division's career antitrust lawyers, smells really fishy.

Second is the fact that the Antitrust Division does not appear at any time to have formulated a possible theory of how these mergers would harm competition. Complying with Second Requests is burdensome, and the Division as I knew it

would *never* issue one without some significant competitive concern already in mind. Note that during my time at the Division (during the Clinton and G.W. Bush administrations), we initiated many more merger investigations, and issued a significantly larger number of Second Requests, compared with Trump’s Antitrust Division. But we did not send Second Requests until we’d satisfied ourselves that a merger created the potential for competitive harm, and that our account of how that harm might occur was at least plausible.

Finally, I’m also confused, and a bit alarmed, by OPR’s conclusion that “[e]ven if the whistleblowers’ allegations were true, OPR finds that ATR’s Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines.” That conclusion is at odds with everything I know about how merger investigations, and, in particular, the Second Request process, is supposed to work. And it’s not just me saying this. Look at the [Antitrust Division Manual](#), page III-39. That page is where the description of the Second Request process begins. You’ll see that the entire thing is premised on the idea that *staff* drives the Second Request process, and that Second Requests are issued only where there is some chance that a proposed merger would cause competitive harm in a well-defined antitrust market.

When I worked at the Division that is how I understood the process. And, as the Manual suggests, before we would issue a Second Request *we would develop a theory—at least a working theory—of possible competitive harm*. I should say that I was an appellate lawyer, and not directly responsible for issuing Second Requests. But I worked for the Division’s “front office” and was assigned on a number of occasions to investigative teams to help them work out their initial theories of possible competitive harm that would precede issuing a Second Request, so I have direct experience with this process.

I fear that OPR’s letter might be yet another example of what we’re seeing a lot these days: the use of narrow legalism to excuse serious violations of the norms of governance. Even in a place as rule-bound as the Department of Justice, you just cannot distill every important norm into a rule. But if Elias’s allegations are true, then the Antitrust Division’s conduct in the cannabis investigations has been exactly the opposite of what every Antitrust Division staff lawyer would understand an honest antitrust investigation to be.

I hope Congress will conduct a thorough investigation of Elias’s allegations. One thing they might look at is the Antitrust Division/Federal Trade Commission “clearance process”—i.e., the process that decides whether the Antitrust Division or FTC is going to take the wheel for a particular merger investigation. There is no mention in either Elias’s testimony or the OPM letter of how the cannabis investigations were routed to DOJ, but, it would be helpful to know if the Federal Trade Commission saw any real competitive concern with the mergers. It would be telling if the FTC staff, like the Antitrust Division staff in Elias’s account, felt that the mergers posed no real antitrust concern.

Randy M. Stutz ([@randallstutz](#)), Vice President of Legal Advocacy, American Antitrust Institute:

The rabbit goes into the hat when the OPR memo applies the proper standard for issuing Second Requests to the whistleblower's allegations of pretextualism. It is true, and critically important, that the agencies must have wide latitude in issuing Second Requests, including (and sometimes especially) when a competitive threat is still nascent or incipient. But obviously this latitude does not extend to issuing pretextual Second Requests. When pretextual antitrust enforcement has been uncovered in the past, it has always been greeted as a scandal.

The most infamous example of this is the Nixon DOJ's antitrust case against the International Telephone & Telegraph Corporation (IT&T), which was resolved with a notoriously weak settlement that looked more like a giveaway than a serious effort to address competitive problems. It later came to light that, shortly before the settlement, IT&T donated \$400,000 to the Republican National Committee that helped reelect Nixon in 1972. The episode wasn't written off as an exercise of agency discretion; instead Congress passed the Tunney Act, which, to this day, requires the DOJ to submit to federal judicial review when it files an antitrust complaint in federal court and opts to settle instead of litigate.

When the OPR memo concludes that no policies would be violated even if the whistleblower allegations are true, it is best read as speaking to the issuance of Second Requests in circumstances where competitive concerns may appear to be remote. If the memo were read to suggest that *pretextual* Second Requests are perfectly okay, that would be antithetical to the agency's basic mission. As Assistant Attorney General Delrahim put it in a [2018 speech](#), "the Department of Justice is the only the only agency in the federal government with a moral imperative in its name."

Image: John Elias, a career official in the Justice Department's antitrust division, is sworn in before the House Judiciary committee hearing on "Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence", on Capitol Hill on June 24, 2020 in Washington DC. (Photo by SUSAN WALSH/POOL/AFP via Getty Images)

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