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Interference or fair play? Congressional investigation into alleged politically motivated DOJ antitrust enforcement

By Gordon Lang and Alycia Ziarno

On June 24, 2020, John Elias, a long-time prosecutor in the U.S. Department of Justice's Antitrust Division, testified before the House Judiciary Committee about what he alleged was politically driven pressure from Attorney General William P. Barr to conduct baseless antitrust investigations in the marijuana and automaker industries. According to Elias, at the direction of Attorney General Barr, DOJ investigated ten mergers in the cannabis business despite the lack of any competitive issue and over the objections of career staff; the reason, he contends, was that Barr does not like the product. Elias also alleged that DOJ's investigation of emissions agreements between four automakers and the State of California were politically driven. None of the investigations resulted in a DOJ case. You can read Elias's prepared remarks here: (Testimony of John W. Elias, U.S. House Committee on the Judiciary, June 24, 2020, https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519). In his oral testimony, he mentioned the existence of a second, unnamed Antitrust Division whistleblower.

The Justice Department has disputed Elias's account, with spokeswoman Brianna Herlihy saying it "strongly disagrees with (his) claim that the Antitrust Division acted inappropriately in any investigation." The two whistleblower complaints were reviewed by the DOJ's Office of Professional Responsibility (OPR), and the night before Elias's testimony, OPR issued a memo absolving the Antitrust Division of any wrongdoing. (<https://www.politico.com/f/?id=00000172-e82d-d7d3-afff-f8bdb2ba0000>). Elias testified that he found the decision "perplexing."

During the hearing, Rep. Jim Jordan asked for and received names of certain individuals Elias asserted had told him the DOJ decisions at issue were politically motivated. Time will tell if those individuals are asked to appear before the Committee. We do know that Attorney General William P. Barr has agreed to appear before the House Judiciary Committee on July 28, 2020.

After the House Judiciary Committee hearing, Senator Amy Klobuchar, Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, and other

Senate democrats¹ called for an immediate hearing on political interference in antitrust enforcement decisions at the DOJ. (<https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=DEFDF8F6-184A-4689-B098-7D2D3E2873FA>). According to the letter, “Mr. Elias’s testimony before the House Judiciary Committee [wa]s damning. It eviscerate[d] the notion that investigations and enforcement decisions at today’s Antitrust Division are based on impartial assessments of law and fact.” The Senators have requested testimony from Elias and Antitrust Division head Makan Delrahim.

We will continue to track these events as they unfold. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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¹ Klobuchar was joined by Senators Patrick Leahy (D-VT), Sheldon Whitehouse (D-RI), Chris Coons (D-DE), Richard Blumenthal (D-CT), Cory Booker (D-NJ), and Kamala Harris (D-CA).