# 1AC

Same as r2

# 2AC

### Adv 1

#### Much of holdup evidence is hidden from the public eye – thousands of deals are made behind closed doors

Wood 13 [Chris Wood and Joseph Kattan, partners in the Antitrust and Trade Regulation practice of Gibson, Dunn & Crutcher LLP. “Standard-Essential Patents and the Problem of Hold-Up”. 12/13/13. http://awa2014.concurrences.com/IMG/pdf/standard\_essential\_patent\_kattan-wood.pdf]

It is notable that the standard implementers in the cases discussed above were large multinational corporations, with the resources to engage in protracted litigation. Less known are the financial settlements extracted by holders of FRAND-encumbered SEPs, which are subject to confidentiality agreements that shield them from the public eye. For example, before having to defend its royalty demands in a declaratory judgment action, Innovatio had sent 8,000 demand letters to businesses such as coffee shops and hotels that used Wi-Fi equipment.46 The terms of its settlements with these businesses are not known. Nor are the terms of the confidential settlements of infringement cases brought by SEP holders known. The size of the demands made by the SEP holders in the cases discussed above certainly supports the view that implementers of industry standards face a genuine risk of post-adoption patent hold-up. Particularly in the case of Wi-Fi patents, which were at issue in each of these cases, the demands are extraordinary not only because of the royalty stack that they imply but because each involved a small sliver of the universe of SEPs for a standard for which the “central elements” were based on publicly available technologies.

#### It’s real.

Pierre Régibeau et al 16. Raphaël De Coninck and Hans Zenger. Charles River Associates. “Transparency, Predictability, and Efficiency of SSO-based Standardization and SEP Licensing” June 2016. European Commission.

We do not think that this would be a correct conclusion to draw from the literature. First, the **formal empirical literature** - supported by a large number of case studies – shows quite unambiguously that, in the absence of contractual or organisational solutions, **hold-up would be a significant issue.** Second, it is generally hard to write complete contracts about innovations, since it is hard to write down an ex-ante contract about a solution that still has to be found. If we would ever expect un-remedied hold-up to occur, this would concern investment and exploitation of intellectual property rights. Third, the usual solutions to the hold-up problem are **further made difficult** by the current SSO process. There is essentially **no attempt** to force participants to sign reasonably complete contractual agreements at the beginning of the process. Very few SSOs require participants to make **explicit commitments on the prices and conditions** at which their IPRs would be made available to implementers. Traditional contractual solutions to potential hold-up are therefore not used. Common “organisational” solutions such as the formation of joint ventures or vertical integration between IP- owners and implementers are also not used in the SSO-based standardisation process. As we discuss later, when we talk about transactions costs of standardization processes, these features of the standardization process may have good economic reasons that make some contractual incompleteness unavoidable. Fourth, in some sectors like ICT, recent technological evolution has destabilised some of the mechanisms that might have greatly reduced the hold-up problem in the past. In particular, the emergence of new actors such as computer-oriented companies and non-practicing entities has decreased the degree of vertical integration between SEP- owners and implementers and has disrupted a culture of repeated collaboration between more traditional SSO participants. Our own assessment on the basis of these observations is that, if left unchecked, hold- up, in the sense defined, is an **issue in the context of SEPs.** Moreover, as recent changes have weakened some of the mechanisms that have likely limited opportunistic behaviour by SEP-holders in the past, renewed attention to hold-up minimising regulatory mechanisms seems warranted. It is therefore important to contemplate policy measures aimed at reducing hold-up and its negative impact on prices and, possibly, investments. However, we should also expect the relevance of hold-up to vary considerably across industries. Intense competition between users to be first to market, complex, uncertain and **fast-moving technologies** and the emergence of new, non-integrated players are all factors that would **magnify concerns about hold-up related costs.**

#### Actors have the means and motivations to strike critical infrastructure.

Wintch 21, \*Timothy M. Wintch, an active-duty Major in the United States Air Force. He is currently a graduate student at the Oettinger School of Science & Technology Intelligence, National Intelligence University, in Bethesda, Maryland. Mr. Wintch has over 11 years of experience in command-and-control operations as an Air Battle Manager. He holds a Bachelor of Arts in Politics from the University of California, Santa Cruz, and a Master of Arts in Military Studies from American Military University. (April 20th, 2021, “PERSPECTIVE: Cyber and Physical Threats to the U.S. Power Grid and Keeping the Lights on”, https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/)

Among critical infrastructure sectors in the U.S., energy is perhaps the most crucial of the 16 sectors defined by the Department of Homeland Security. This sector is so vital because it provides the energy necessary to run every other critical infrastructure sector. However, the U.S. power grid, the backbone of the energy sector, is built upon an aging skeleton that is becoming increasingly vulnerable every day. Whether from terrorists or nation-states like Russia and China, the power grid is susceptible to not just physical attacks, but also to cyber intrusion as well. However, much of this threat can be mitigated if the U.S. takes the appropriate steps to safeguard the power grid and avoid a potential catastrophe in the future.

Since Sept. 11, 2001, terrorism on U.S. soil has been at the forefront of American consciousness. Critical infrastructure provides an appealing target because of the disproportionally large impact even a small attack can have on the sectors. In particular, the power grid represents a particularly lucrative target, both in terms of the ease of access and the large impact it can make. The National Research Council stated that the U.S. power grid is “vulnerable to intelligent multi-site attacks by knowledgeable attackers intent on causing maximum physical damage to key components on a wide geographical scale.”[[1]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn1) Additionally, the physical security of transmission and distribution systems is difficult due to the dispersed nature of these key components, which in turn is advantageous to attackers as it reduces the likelihood of their capture.[[2]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn2) From 2002-2012, approximately 2,500 physical attacks occurred against transmission lines and towers worldwide and approximately 500 attacks against transformer substations.[[3]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn3) Terrorists have the motivation to attack the U.S. power grid but the very nature of the grid makes it highly vulnerable. The power grid is not only at risk from physical attacks, but also nation-state cyberattacks.

One nation that has shown both the capability and intent to use attacks against critical energy infrastructure is Russia, as demonstrated in their 2015 annexation of Crimea from Ukraine. A Russian cyber threat group known as Sandworm, which used its BlackEnergy malware, attacked Ukrainian computer systems that provide remote control of the Ukraine power grid.[[4]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn4) This attack, and another in 2016, each left the capital Kiev without power, prompting cyber experts to raise concern about the same malware already existing in NATO and the U.S. power grids.[[5]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn5) In any conflict between Russia and NATO, not only would similar cyberattacks pose a threat, but so would potential physical attacks severing fuel oil and natural gas lines to Western Europe. Russia has both the capability and intent to attack critical infrastructure, particularly power grids, during future conflicts in their “hybrid warfare” approach.

Another nation that has the capability to attack critical energy infrastructure is China, representing a threat to not just the U.S. energy infrastructure but also that of our allies whose support would be vital in a major conflict. A recent NATO report highlighted this threat from China’s Belt and Road Initiative, stating that “[China’s] foreign direct investment in strategic sectors [such as energy generation and distribution] …raises questions about whether access and control over such infrastructure can be maintained, particularly in crisis when it would be required to support the military.”[[6]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn6) Like Russia, China has been active with cyber intrusions in U.S. energy infrastructure. The Mission Support Center at Idaho National Laboratory characterized these as attacks as “multiple intrusions into US ICS/SCADA [Industrial Control Systems/Supervisory Control and Data Acquisition] and smart grid tools [that] may be aimed more at intellectual property theft and gathering intelligence to bolster their own infrastructure, but it is likely that they are also using these intrusions to develop capabilities to attack the [bulk electric system], as well.”[[7]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn7) China, therefore, has both the capability and intent to conduct cyber intrusions and attacks for myriad reasons.

Another arm of this threat is the reliance the U.S. energy industry has on imports from China, especially transformers. In early 2020, federal officials seized a transformer in the port of Houston that had been imported by the Jiangsu Huapeng Transformer Company before sending it to Sandia National Laboratory in Albuquerque. Sandia is contracted by the U.S. Department of Energy for mitigating national security threats.[[8]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn8) The Wall Street Journal reported that “Mike Howard, chief executive of the Electric Power Research Institute, a utility-funded technical organization, said that the diversion of a huge, expensive transformer is so unusual – in his experience, unprecedented – that it suggests officials had significant security concerns.”[[9]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn9) Previously destined for the Washington Area Power Administration’s Ault, Colo., substation, the transformer is believed to have been seized due to “backdoor” exploitable hardware emplaced by the Chinese prior to shipment.[[10]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn10) Shortly after these events, President Trump issued Executive Order 13920, “[Securing the United States Bulk-Power System](https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-securing-united-states-bulk-power-system/),” essentially limiting the import of Chinese-built critical energy infrastructure components due to concerns about cybersecurity.[[11]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn11) Interestingly, Jiangsu Huapeng “boasted that it supported 10 percent of New York City’s electricity load.”[[12]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn12)

Franklin Kramer, the former Assistant Secretary of Defense for International Security Affairs, testified before a U.S. House of Representatives Energy and Commerce subcommittee during an energy and power hearing in 2011 and said that a “highly-coordinated and structured cyber, physical, or blended attack on the bulk power system, however, could result in long-term (irreparable) damage to key system components in multiple simultaneous or near-simultaneous strikes.” He added that “an outage could result with the potential to affect a wide geographic area and cause large population centers to lose power for extended periods.”[[13]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn13) Even the inclusion of features such as smart grids to the overall grid structure poses new vulnerabilities through their connectivity. Kramer stated that “such connectivity means that the distribution system could be a key vector for a national security attack on the grid.”[[14]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn14)

#### Applying antitrust to FRAND doesn’t deter innovation since investments happen before rate changes

Cary 11 [George Cary, Mark Nelson, Steven Kaiser, Alex Sistla. Cary and Sistla are members of the California and District of Columbia Bars. Mr. Nelson is a member of the New York and District of Columbia Bars. Mr. Kaiser is a member of the New Jersey and District of Columbia Bars. “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM IN STANDARD SETTING”. Antitrust Law Journal No 3. (2011). https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf]

Finally, measuring FRAND based on the ex ante value of a technology is unlikely to have any negative impact on incentives to innovate. Geradin’s hypothesized discovery of incremental ex post value was unanticipated, by definition, and would generally come to light only after investments in innovation were made. Under these circumstances, we doubt that the inability to capture such windfall gains later would deter a company from investing in innovation. Indeed, the existing practice of many essential patent holders to negotiate royalty rates early on, and in many cases before a standard is adopted, belies the concern about inadequate incentives to innovate. If firms believed it was important to be able to capture unanticipated future benefits of a technology, they would not so readily enter into long-term licensing agreements that locked them into established royalty rates. Indeed, in our experience firms typically consider the trade-off between the FRAND rate at which they license their technology (even assuming this rate is lower than some hypothetical ex post rate) and the additional sales volume they are likely to achieve by having their technology incorporated into a standard. Moreover, our experience with industry practice suggests that royalty rates for a particular technology do not increase, and often decrease, over time, suggesting that the concern that ex ante royalties will be too low is more theoretical than real.

#### Studies prove even full patent invalidation triggers innovation increases - ICT and biotech are distinct

Galasso 14 [Alberto Galasso, Professor of Strategic Management at the University of Toronto. Mark Schankerman, Professor of Economics @ London School of Economics, Research Fellow at the Centre for Economic Policy Research. “PATENTS AND CUMULATIVE INNOVATION: CAUSAL EVIDENCE FROM THE COURTS”. June 2014. https://www.nber.org/system/files/working\_papers/w20269/w20269.pdf]

Second, we find that the impact of patent invalidation on subsequent innovation is highly heterogeneous. For most patents, the marginal treatment effect of invalidation is not statistically different from zero. The positive impact of invalidation on citations is concentrated on a small subset of patents which have unobservable characteristics that are associated with a lower probability of invalidity (i.e., stronger patents). There is also large variation across broad technology fields in the impact of patent invalidation and the effect is concentrated in fields that are characterized by two features: complex technology and high fragmentation of patent ownership. This finding is consistent with predictions of the theoretical models that emphasize bargaining failure in licensing as the source of blockage. Patent invalidation has a significant impact on cumulative innovation only in the fields of computers and communications, electronics, and medical instruments (including biotechnology). We find no effect for drugs, chemicals, 4 or mechanical technologies. Moreover, for two of the technology fields we study — medical instruments and drugs — we are able to construct alternative measures of cumulative innovation that exploit data on publicly-disclosed new product developments. The results confirm our findings using citations: patent invalidation has a significant effect on later innovation in medical instruments but no effect in pharmaceuticals.

### Reg CP

#### Only antitrust can remedy DOJ overstep in Qualcomm because of standing and new SSO incentives

Shapiro 18 [Carl Shapiro is the Transamerica Professor of Business Strategy Emeritus at the Haas School of Business, University of California at Berkeley (go bears), Mark A. † Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP, "THE ROLE OF ANTITRUST IN PREVENTING PATENT HOLDUP", 2018, https://faculty.haas.berkeley.edu/shapiro/patentholdup.pdf]

The FTC’s case against Qualcomm provides a good example of why antitrust is needed. In that case, the District Court found that Qualcomm had breached its FRAND commitment and used its monopoly power over modem chips to pressure its customers (Original Equipment Manufacturers, or “OEMs”) to pay a royalty surcharge for Qualcomm’s SEPs on top of the reasonable royalty rates that Qualcomm would otherwise have been able to obtain. Qualcomm imposed this surcharge when Qualcomm’s customers purchased modem chips from Qualcomm’s rivals.135 The District Court correctly found that Qualcomm’s royalty surcharge acted like a tax when Qualcomm’s customers purchased modem chips from Qualcomm’s rivals.136 Based on this reasoning, the District Court correctly found that Qualcomm’s “no-license/no-chips” policy harmed competition by raising rivals’ costs and thereby excluding them, and that this same conduct also harmed Qualcomm’s customers.137 The Ninth Circuit reversed, making basic errors of both economics and law.

138 On the economics, the Ninth Circuit mistakenly concluded that “Qualcomm’s royalties are ‘chip-supplier neutral’ because Qualcomm collects them from all OEMs that license its patents, not just ‘rival’s customers.’”139 This is flatly incorrect, because the royalty surcharge reduces the gains from trade between an OEM and a rival modem-chip supplier but does not reduce the gains from trade between the OEM and Qualcomm.140 Based on this error, the Ninth Circuit states incorrectly: “The FTC identifies no such harm to competition.”141

On the law, the Ninth Circuit rejects the well-established principle that harming customers can be a way of harming competition: “[T]he primary harms the district court identified here were to the OEMs who agree to pay Qualcomm’s royalty rates—that is, Qualcomm’s customers, not its competitors. These harms were thus located outside the ‘areas of effective competition’—the markets for CDMA and premium LTE modem chips.”142 The notion that harms to customers in the relevant market are outside the scope of the antitrust laws is simply bizarre.

In any event, as noted above, the District Court also found harm to Qualcomm’s rivals in both of the relevant markets it identified. The Ninth Circuit further erred by stating that “the district court’s ‘anticompetitive surcharge’ theory fails to state a cogent theory of anticompetitive harm.”143 The Ninth Circuit’s logic at this point assumes that Qualcomm’s royalties reflect the value of its SEPs, but that is directly contrary to the District Court’s finding that Qualcomm used its monopoly over modem chips to obtain a royalty surcharge, above and beyond the royalties Qualcomm could obtain based on its SEPs.144 One cannot dismiss findings regarding the effects of a royalty surcharge by assuming away that very surcharge. Hopefully the Supreme Court will correct these blatant errors.

Qualcomm’s use of its separate monopoly power over modem chips to evade its FRAND commitment couldn’t be remedied in contract, making antitrust enforcement a necessity for reasons beyond simply enforcing the FRAND deal.145 In the standard-setting context, if a SEP owner breaches its FRAND commitment and is thereby able to charge unreasonably high royalties to device manufacturers, those royalties are likely to be passed through in large part to final consumers. Antitrust enforcement can protect consumers from these overcharges.146

But to the extent that antitrust can step back in some settings, that is only possible because the market participants have recognized and responded effectively to the patent holdup problem by requiring reasonable licensing terms, and because the courts have enforced that requirement in contract or patent law. The second prong of the Antitrust Division’s attack on FRAND commitments therefore undermines whatever merit there might be to the first prong. While on the one hand Delrahim says that we don’t need antitrust because contract and equity will solve the patent holdup problem, on the other hand he is advocating policies that make it harder for contract and patent law to solve that very problem. Threatening SSOs with liability—maybe even per se liability—for trying to stop SEP holdup undermines the very contractual solution on which Delrahim purports to rely. So too do Delrahim’s periodic claims that holdup is a good thing, or at least something we should accept,147 his incorrect claim that patent holdout is a bigger problem than patent holdup,148 and his advocacy for undoing or avoiding eBay and giving a patent owner the right to an automatic injunction.149 Indeed, under Delrahim, the Antitrust Division evidently objects even to voluntary commitments by patent owners not to seek an injunction as part of the standard-setting process.150 Ironically, this assault on SSOs and FRAND policies may actually necessitate more antitrust intervention in standard-setting. If the DOJ encourages companies like Qualcomm to ignore their FRAND commitments, and if the DOJ discourages SSOs from trying to solve the SEP holdup problem, or impedes their efforts to do so, antitrust may ultimately have to step in to protect a functioning market from SEP holdup.

#### Antitrust laws” consider competition.

William D. Rohlf Jr. 11, Professor of Economics at Drury University, “Workbook for Introduction to Economic Reasoning: Solutions,” Chegg, 2011, <https://www.chegg.com/homework-help/workbook-for-introduction-to-economic-reasoning-8th-edition-chapter-8-problem-9mc-solution-9780131368576>

(1) Option (a): Antitrust enforcement promotes competition and industry regulation does not, is the primary difference between antitrust enforcement and industry regulation. Antitrust laws ban price fixing, tying contracts and mergers to promote competition. The basic assumption of the industry regulation is that certain industries should not be made competitive.

#### Core is a basic part.

Merriam-Webster ND, Publishing Company, “core noun (1), often attributive,” https://www.merriam-webster.com/dictionary/core

2a: a basic, essential, or enduring part (as of an individual, a class, or an entity)

### Patent CP

#### Government R&D can’t solve growth or innovation

Terence Kealey 21. Professor of clinical biochemistry at the University of Buckingham. "Federal Science Funding Won't Accomplish Anything the Private Sector Can't Do Better". Cato Institute. 6-16-2021. https://www.cato.org/commentary/federal-science-funding-wont-accomplish-anything-private-sector-cant-do-better

A bipartisan group led by Senate Majority Leader Chuck Schumer (D-N.Y.) wants to counter China with legislation to dramatically increase government funding of pure science (science that is mainly concerned with theory rather than practical applications). They call their bill the U.S. Innovation and Competition Act. But if they really want to spur innovation and competition, they should be trying to slash science subsidies, not increase them.

The most potent criticisms of the government funding of science have come from government agencies themselves. The first came in 1969 when the Office of the Director of Defense Research and Engineering analyzed 700 research “events” that had led to the development of 20 weapons systems—finding that only two of those events were in pure science.

Then the Congressional Budget Office (in both 1991 and 1998) and the Bureau of Labor Statistics (2007) reviewed the entire academic literature, finding that study after study showed that the research projects that governments funded had failed, on average, to generate profits: in contrast, the research projects that the private sector funded were, overall, highly profitable.

Finally, in 2003 the Organisation of Economic Cooperation and Development, on studying the growth rates of the 21 leading world economies between 1971 and 1998, found that whereas levels of privately funded R&D correlated strongly with national rates of economic growth, there was no positive impact on GDP per capita from publicly‐​funded research and development.

Government funding of science isn’t just ineffective; it crowds out private sector success. When the government subsidizes a company’s science, or when the government pays for a research program, that company or that program will benefit. But the economy at large will suffer, because scientists have been pulled out of the projects the market was trying to fund.

Many view government funding of science as a foregone conclusion. But while the federal government has long funded so‐​called “mission research,” such as the Coast Survey (1807), it didn’t start to fund pure science until 1950, when it established the National Science Foundation (NSF).

The blueprint for the NSF was provided by American engineer Vannevar Bush. In his “linear” or “pipeline” model, he proposed there were both military and market failures in pure science: Only if the government funded pure science would U.S. technology flourish. In the ensuing years, much federally funded research has proven him wrong.

This is a tough story to propagate because the vested interests are aligned. The universities and the scientists lobby for governments to give them money on their own terms; industry lobbies for subsidies; and governments enjoy distributing research money, as the Medicis once did to Galileo. But the data show that these schemes will not benefit the economy.

Advocates for government funding of science will point to the many good things it has helped produce, including the internet. Vast funds for research will indeed yield good things, but the government studies cited above show that the costs of that research merely equal the benefits. In stark contrast, the costs of private research are dwarfed by their benefits. The plural of anecdote is not data; and if we are to get policy right, we should look to systematic cost‐​benefit studies, not anecdotes.

After the Soviets launched Sputnik in 1957, the federal government hugely increased its funding of research. Yet rates of growth in U.S. GDP per capita did not rise, and rates of productivity growth actually fell. That implies that government funding of research crowded out more useful work

### States CP

#### Standard setting is global and SSOs are outside of US jurisdiction

Kasdan 19 [Abraham and Michael. Partners in IP Law @ Wiggins and Dana LLP. “Recent Developments In The Licensing Of Standards Essential Patents”. 8/30/19. https://www.natlawreview.com/article/recent-developments-licensing-standards-essential-patents-0]

Technologies that operate across many different devices and geographical regions are all around us. As one example, today's mobile telephones can connect to 3G/4G/LTE and WiFi networks and communicate with other devices virtually anywhere in the world. This is made possible because all of these devices comply with highly specific technical standards that are promulgated by national and/or international standards setting organizations (SSOs), made up of companies involved in developing and building these global technologies.

When aspects of technical standards are protected by patents, the patent owners are generally obligated by the pertinent SSO to offer licenses to their patented technology under "fair, reasonable and non-discriminatory" (FRAND) terms, as the quid pro quo for having their patented technology included in the standard. The purpose behind the FRAND requirement is to prevent patent owners from gaining an unfair advantage over companies who must make devices that practice the standard in order to participate in the market; and are therefore necessarily “locked in” to standard-compliant designs.

Over the past several years, the licensing and litigation landscape involving standard essential patents (SEPs) and FRAND has become a matter of intense focus. Numerous technology industries, as well as courts around the world have begun to grapple with key issues such as “How do you determine what a FRAND licensing rate should be?” and whether a licensor’s offer is FRAND or not. This article summarizes several recent developments in the transnational licensing of SEP portfolios.

The Overall Landscape

Not surprisingly, most of the recent licensing disputes over SEPs involve the worldwide telecommunications industry. A host of multinational companies have been involved in developing the 2G, 3G, 4G and soon-to-be-commercialized 5G standards (aspects of which are also described by a bewildering array of acronyms, such as "LTE" and "LTE Advanced" ) These standards specify the technical features included in mobile phones and their networks.

The European Telecommunications Standards Institute (ETSI) is an SSO charged with developing worldwide standards for these technologies. Early on, SSOs recognized that the incorporation of patented technology into a standard could give the patent holder significant leverage when negotiating licenses. SSOs therefore required the patent holder to agree to make its SEPs available on FRAND licensing terms. However, ETSI, like other SSOs, does not provide guidance on how to structure licensing terms that meet the FRAND requirement. Indeed, doing so or setting price or royalty rates among entities in a given industry may raise antitrust issues. This leaves it to others to work out the specifics of how SEP owners can comply with the FRAND requirement.

#### State international regulation gets preempted, kills foreign investment and triggers massive economic uncertainty

O’Rourke 10 [Ken, Senior Partner @ O'Melveny & Myers LLP. “United States: The FTAIA In State Court: A Defense Perspective”. 3/3/10. https://www.mondaq.com/unitedstates/trade-regulation-practices/95030/the-ftaia-in-state-court-a-defense-perspective]

A threshold question is whether these limitations similarly restrict the extraterritorial application of state antitrust laws. Defendants will argue that the state antitrust laws cannot permissibly extend to reach conduct or give rise to damages that Congress has placed beyond the reach of federal antitrust law under the FTAIA.

The defendants' argument goes like this. First, under the Supremacy Clause of the U.S. Constitution,4 federal law preempts state law even in the absence of an express preemption provision when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."5

Second, the FTAIA's legislative history establishes that Congress had multiple objectives when enacting the statute. One objective was to ensure that the risk of Sherman Act liability did not prevent American exporters and other firms doing business abroad from entering into advantageous "business arrangements (such as joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."6

Another objective was to eliminate "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."7

Congress sought to adopt a "clear benchmark ... for businessmen, attorneys and judges as well as [U.S.] trading partners"8 with the "ultimate purpose" of "promot[ing] certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions."9

A third objective was to promote international comity by acknowledging and respecting the prerogatives of other nations to establish and apply their own standards for regulating and remediating alleged restraints of trade in their own markets.10

Congress believed that respecting such foreign sovereign regulatory prerogatives would ultimately best serve U.S. interests by "encourage[ing] our trading partners to take more effective steps to protect competition in their markets."11

Applying state antitrust laws to regulate foreign trade or commerce excluded from federal antitrust jurisdiction by the FTAIA arguably would frustrate every one of these objectives.

American exporters and other businesses engaged in foreign trade or commerce could have no confidence that restraints exempted from federal antitrust attack would not be subject to alternative antitrust attack under the laws of one or more U.S. states. Businesses, therefore, would be deterred from entering into arrangements that Congress intended to enable.

Likewise, ambiguity in the "standard to be employed" for assessing the extraterritorial application of "American antitrust law" would not only persist, but would be multiplied fifty times.

And the imposition of as many as 50 states' antitrust laws on foreign trade or commerce clearly would negate the federal objectives of international comity and respect for foreign regulation of foreign markets.

At every level then, the application of state antitrust laws to foreign trade or commerce exempted by the FTAIA from federal antitrust regulation would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FTAIA.12

Plaintiffs likely will counter these preemption arguments by pointing out that there is a presumption against preemption and that Congress did not expressly overrule any state antitrust law when enacting the FTAIA.

True, Congress did not address the reach of state antitrust laws, one way or the other, when it enacted the FTAIA. However, the Sherman Act has always extended to "commerce with foreign nations,"13 and was subject to a large body of pre-FTAIA case law addressing the limitations on its extraterritorial reach.14

By contrast, state antitrust laws such as California's Cartwright Act do not expressly reference foreign commerce and have no comparable history of being applied to it.

Congress, therefore, had no cause to be concerned that states would attempt to apply state antitrust laws to foreign trade or commerce exempted from federal regulation by the FTAIA.

Even if there had been such a concern, Congress would have been amply justified in anticipating that the doctrine of implied obstacle preemption — well established when the FTAIA was enacted in 198215 — would resolve any conflict.16

Take California as a specific example. There is a "strong presumption" against preemption, particularly in fields that have been the subject of California's "historic police powers."17 Antitrust plaintiffs would argue that California's "historic police powers" include the authority to regulate competition in California.

On the other hand, the U.S. Supreme Court has consistently held that the power of states to regulate commercial activity outside their borders is necessarily circumscribed.18 That principle applies a fortiori when states attempt to regulate foreign trade or commerce.19

Even in cases involving traditional regulation of conduct within state borders, the California Supreme Court has declined to apply a presumption against preemption where the regulation in question also implicates foreign affairs.20

When the area of regulation encompasses not only foreign trade and commerce but also international relations — that is to say, areas in which federal rather than state interests traditionally predominate — the case for preemption is even stronger.21

Extending the foreign extraterritorial reach of state antitrust laws beyond the limits of the Sherman Act would infringe not only the Supremacy Clause but several additional constitutional provisions establishing federal primacy in the areas of foreign trade, foreign commerce and international relations.22

This allocation of power is intended to ensure that only one entity — the federal government — represents American interests in foreign trade and commerce and foreign affairs.23

In recognition of these principles, courts have repeatedly invalidated state laws that undermine, or threaten to undermine, federal policies and prerogatives in the areas of foreign trade and commerce or foreign affairs.24

These decisions support a conclusion that states cannot constitutionally apply state antitrust laws such as the Cartwright Act to remediate alleged harm from restraints of trade in foreign markets having no direct, substantial and foreseeable anti-competitive effects on trade or commerce in the United States (as would be required for federal antitrust jurisdiction under the FTAIA).

There are policy reasons for this result as well. Claims arising from international cartel conduct or overseas monopolistic behavior arguably seek to apply state antitrust law to decide the legality of foreign conduct (e.g., communications between English and Japanese manufacturers about industry standards, or discussions between Chinese and Korean buyers, or joint ventures in Singapore investing in South America) regardless of whether such conduct was legal when and where it occurred.

Such claims threaten much more than an "incidental or indirect effect" on foreign trade and the internal affairs of foreign countries exercising their sovereign rights to regulate their own markets.25

To assert a state's antitrust law as an all-encompassing international antitrust statute available to police alleged restraints of trade in every country would contravene the federal policy, reflected in the FTAIA, of promoting international comity in this area.26

And allowing one state to apply its antitrust laws to foreign transactions paves the way for every other state to apply its antitrust statutes beyond the limits of the FTAIA.27

Exposure to a thicket of state antitrust regimes would drive foreign companies to avoid doing business that even tangentially affects U.S. commerce.

Finally, such an outcome would conflict with the reported decisions considering this specific issue. One federal court, in In re Intel Corp. Microprocessor Antitrust Litig. ("Intel II"),28 held that California Cartwright Act claims are "limited by the reach of their applicable federal counterparts."29

Intel II analyzed the question as follows:

"Plaintiffs have ... not demonstrated that their state law claims should be applied beyond the boundaries set by the FTAIA ... As the Supreme Court has recognized, '[f]oreign commerce is pre-eminently a matter of national concern,' and therefore, it is important for the Federal Government to speak with a single, unified voice.

"Here, Congress has spoken under the FTAIA with the 'direct, substantial and reasonably foreseeable effects' test, and the Court is persuaded that Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not."30

The only published California appellate decision on the issue, Amarel v. Connell, similarly holds that the Cartwright Act should not be construed to allow prosecution of extraterritorial antitrust claims that the FTAIA would not.31

The Amarel court observed that "[t]he legislative history of [the FTAIA] discloses it was intended to establish a uniform standard, in the face of conflicting judicial formulations, of the domestic effects necessary to trigger the jurisdiction of American antitrust laws,"32 and that "the proper approach to a preemption analysis is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"33

The court concluded that the plaintiffs' state law antitrust claims were "not preempted" because, as pleaded, the claims did not seek to apply state antitrust laws in a manner inconsistent with the FTAIA.

Rather, they sought damages for anti-competitive practices "alleged to have had an adverse effect on the relevant markets in this state ..."34

According to the court:

"So long as the anticompetitive conduct in question has a direct, substantial and reasonably foreseeable effect within the state, prosecution of the conduct under state law is not precluded."35

In sum, there are strong reasons for a state court evaluating a state law antitrust claim involving foreign trade or commerce to limit the reach of that state law co-extensively with the reach of the Sherman Act as defined by the FTAIA.

To do otherwise contravenes constitutional clauses, rules of statutory construction and federal policies.

### FTC DA

#### FTC just stated intent to bring antitrust cases against unfairly high royalty rates. That thumps the da but doesn’t solve large corporations

Decker 10/29 [Susan Decker, "Patent Rights Should Be Limited on Standards: FTC Commissioner", 10/29/21, https://www.bgov.com/core/news/#!/articles/R1R7KODWRGG1]

The Federal Trade Commission should bring antitrust cases against owners of patents on industry standards that demand unfairly high royalty rates and who use their position to “obtain or enhance monopoly power,” FTC Commissioner Rebecca Kelly Slaughter said Friday.

“When patent holders obtain market power by virtue of being included in standards, the way they exercise that market power is not immunized from the antitrust laws merely because patents are involved,” Slaughter said at a meeting of the American National Standards Institute

Slaughter’s comments, along with ones made by top DOJ officials including Jennifer Dixton of the antitrust division at the same meeting, mark a more aggressive push against holders of standard-essential patents

Slaughter said the agency will focus on disputes “where the market power abuse harms small and medium enterprise implementers” and will avoid getting embroiled in cross-licensing disputes between large, wealthy companies

That would likely keep the agency out of fights like the one the FTC brought against Qualcomm during the chipmaker’s royalty fight with Apple; or the new battle between Apple and Ericsson

The FTC case, which would have forced Qualcomm into a new licensing model, was thrown out on appeal and the Trump administration’s DOJ sided with Qualcomm, arguing that any dispute should be handled through contract lawsuits

“Contract law may not be enough and we should not foreclose an entire body of law-— antitrust law —- when we find conduct that results in competitive harm,” Slaughter said

The App Association, a trade group for app developers, said Friday’s comments by Slaughter and Dixton “are welcome signals that reaffirm the role antitrust law has in standards setting”

**No spillover between parts of the FTC**

Spencer Weber **Waller 5**, Professor of Law and Director of the Institute for Consumer Antitrust Studies at the Loyola University Chicago School of Law, “In Search of Economic Justice: Considering Competition and Consumer Protection Law”, Loyola University Chicago Law Journal, 36 Loy. U. Chi. L.J. 631, Winter 2005, Lexis

Despite this more comprehensive mission, the FTC is organized in a way that **tends to emphasize the separation of these fields,** rather than the common elements of the agency's mission. The FTC has a Bureau of Competition and a separate Bureau of Consumer Protection, with a Bureau of Economics to support the work of both endeavors. The Bureau of Competition ("BC") primarily engages in the investigation and enforcement of mergers and complex civil antitrust cases with a recent emphasis on intellectual property and health care issues. The Bureau of Consumer Protection ("BCP") primarily investigates and challenges outright fraudulent conduct. 9 The FTC website details recent BCP activity involving Internet sales, telemarketing, false health and fitness claims, identity theft and similar issues. 10 These are **all very different issues** from the day-to-day focus of the competition staff. This basic split is further mirrored in the Bureau of Economics ("BE"), where the staff tends to specialize in either competition or consumer protection. **Any crossover** of staff and cooperation **occurs primarily in competition advocacy** before legislatures or regulatory agencies, and not **in case selection and investigation.**

#### FTC overload now.

Burke ’21 [Henry and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>]

Even if the will to stop it exists, the FTC doesn’t have the funding to stop this boom. In fact, it hasn’t had the funding to keep up with a steady uptick in mergers in years. Aside from the recent spike, the total number of premerger filings [increased](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by 80 percent over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost doubled to 2089.

While the number of transactions the FTC is charged with regulating has increased steadily, the number of enforcement actions — challenges to anticompetitive mergers or conduct — has stagnated.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw 22 enforcement actions for 1166 reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for 2089 mergers, meaning there was only one FTC enforcement action for every 99 mergers.

Overall funding and staffing levels at the FTC have similarly stagnated. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[indisputable](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has not kept up with market demands; according to Slaughter, the FTC budget has only increased by 13% since 2010 and the employee headcount decreased. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

#### Turn—the aff resolves FTC-DOJ turf wars over SEPs—the aff harmonizes enforcement. The aff’s certain enforcement encourages more resources down the line and frees wasted resources.

McGinnis and Sun, 21 – John O. McGinnis, Professor at Northwestern University and Linda Sun, Associate at Wilmer Pickering Hale & Dorr LLP and J.D. 2020 at Northwestern Pritzker School of Law, Winter, “Unifying Antitrust Enforcement for the Digital Age,” *78 Wash. & Lee L. Rev. 305*, p. Nexis

1. Standard-Essential Patents: A Case Study in Incoherence

Turf battles aside, the FTC and the DOJ have promoted directly opposing policies regarding the application of antitrust law to technology.138 The contentious disagreement on the important issue of standard-essential patents shows the divergent treatment and uncertainty already generated by dual enforcement. The FTC believes violation of a SEP licensing agreement is potentially an antitrust violation.139 Standard-setting organizations often require patent holders to license SEPs for free or on fair, reasonable, and non-discriminatory (FRAND) terms.140 The FTC argues that a violation of these licensing terms can violate antitrust laws by enabling a patent holder to “parlay the standardization of its technology into a monopoly in standard-compliant products.”141 The DOJ disagrees, because it believes “it is not the duty or the proper role of antitrust law to referee what unilateral behavior is reasonable for patent holders in this context.”142 The DOJ argues that patent holders enjoy a government-granted monopoly over the item under patent.143 Thus, a violation of a SEP licensing agreement may raise an issue of contract law or other common law right, but not antitrust.144

SEPs are vital to technological innovation and economic growth, with billions of dollars at stake.145 To understand the importance of SEPs to technology, one must first understand the importance of a standard. A standard is a uniform practice around which a technology develops.146 For example, a standard could describe a specific design of a charging port. Once the standard is set, multiple devices, from cell phones to speakers, can be designed to work with that standard charging port. Standards enable uniformity and operability across manufacturers, devices, or platforms.147 We interact with and depend on countless technology standards such as USB, Bluetooth, HTML, and 3G in our everyday life. Their importance cannot be overstated: they provide the foundation for the development and implementation of technology.148

Despite their benefits, standards also present a dilemma: they are most beneficial when there is widespread adoption.149 But most entities, from companies to countries, want to have their own individual designs become standard so as to gain a competitive advantage.150 Thus, there must be some process that encourages collaboration and consensus even among competitors.151

Such collaboration is facilitated by a standards development organization (SDO) or standard setting organization (SSO), which creates, revises, and coordinates technical standards.152 Standards development organizations have rules and criteria to prevent a single interest from dominating the definition of a standard.153 Their rules govern how they approach patented technologies.154 For example, an SDO may require that only unpatented technologies can be adopted as standard. Thus, in deciding what charging port will be the industry standard, the SDO would reject any charging ports that were patented. While this is, in a sense, a procompetitive solution—no entity would have a monopoly over the standard technology that was decided upon—it is largely unrealistic in today’s world where most useful and current inventions are patented. Adopting an unpatented technology that is outdated as standard defeats the purpose of a standard, which is to facilitate the development and adoption of innovative technology.155

As a result, SDOs must contend with standard-essential patents (SEPs), patents that are necessary for the implementation of a standardized technology.156 SDOs typically require that if a proposed standard is encumbered by patents, those patents must be licensed on “fair, reasonable, and non-discriminatory” (FRAND) terms to those seeking to utilize the technology.157 This requirement is thought to facilitate the adoption of the standard in the industry while providing fair terms to all parties involved.158 Because standards are critical to almost everything that touches technology, standard-essential patents are as well. When a patent is essential to a standard, there is no way to comply with the standard without infringing or licensing the patent.159 A dispute over a single SEP can prevent a company from making its product compatible with the internet, computers, or mobile devices.160 For example, a typical cellphone charging port has SEPs that cover every part of its design, from the electronic circuitry to communication protocols. Methods that enable a mobile phone to stay connected to a 4G/LTE network are covered by a multitude of SEPs that are essential to the 4G/LTE standard.161 Qualcomm owns SEPs essential to widely adopted cellular communication standards such as CDMA and LTE.162

A competition problem arises when, despite any agreement made at the time a standard was chosen, SEPs are later not licensed at fair, reasonable, and non-discriminatory terms. When the owner of a SEP bars a competitor from utilizing a SEP and therefore a standard technology, this decision deals a huge blow to the competitor. The FTC believes that when a SEP-owner violates an agreement to license the SEP on fair, reasonable, and non-discriminatory terms, this is an anticompetitive action in violation of antitrust laws.163 In FTC v. Qualcomm,164 the FTC pursued action against Qualcomm under Section 5 of the FTC Act for refusing to license its SEPs to competitors.165

In contrast, the DOJ has taken the stance that SEP owners refusing to license on FRAND terms is not an anticompetitive antitrust violation.166 It is simply a patent owner exercising his or her earned right to exclude competitors. As dictated under patent law doctrine, a patent owner has the right to prevent anyone from utilizing his or her patented technology.167 Going forward, it is uncertain whether the government will pursue antitrust enforcement actions related to the licensing of SEPs.168

This disagreement between the DOJ and the FTC rippled out to cause concern in the legislative branch. Because of the DOJ’s disagreement with the FTC, Senators wrote to the DOJ urging the agency to clarify its policy and provide guidance to stakeholders.169 The uncertainty created by this bifurcated approach creates dissatisfaction in Congress and so undermines support for these agencies among those who control their funding.170

The disagreement between the DOJ and FTC has international implications as well. Divergence in treatment of FRAND agreements among countries already causes difficulties for companies operating under different national standards in the global economy.171 These international challenges are further exacerbated by the different policies of the two domestic antitrust enforcement agencies of the United States, still the most important commercial nation in the world.172 Companies are subject to potentially conflicting standards depending not only on the national identity of the enforcement agency but also on the identity of the agency with the United States. International harmonization becomes more difficult if the United States has internal disagreements. Therefore, the case of SEPs shows how dual enforcement has created uncertainty in the industry, in Congress, and internationally.

B. Dual Enforcement Causes Inefficiencies and Inconsistent Outcomes

Technology did not create, but only exacerbates long-standing problems of dual antitrust enforcement. In this subpart we briefly offer more general arguments against joint enforcement by the FTC and Antitrust Division. It wastes resources, and even in non-technological areas, it creates uncertainty. 173 Both waste and uncertainty are compounded by turf wars, as exemplified by conflicts over mergers. 174

Moreover, Congress never intended for a system of full dual enforcement. 175 Thus, eliminating it would not undermine a fully deliberated scheme. Single enforcement would additionally bring the United States in conformity with industrialized nations worldwide, which generally have a single antitrust enforcer. 176 Finally, we respond to the argument that single agency enforcement would not improve matters much because private actors can enforce antitrust. 177 Private enforcers are subject to heavy restrictions and do not have the same ability to direct antitrust policy as the agencies do.

### Politics

#### Senate’s focused on nominations

Raymond 10/27 [Nate Raymond, "U.S. Senate confirms 2 more Biden judicial picks in biggest week yet", 10/27/21, https://www.reuters.com/legal/litigation/us-senate-confirms-2-more-biden-judicial-picks-biggest-week-yet-2021-10-27/]

The U.S. Senate on Wednesday confirmed two more of President Joe Biden's judicial picks in the biggest week yet for his nominees winning approval, as Democrats race to put their stamp on the bench while they maintain their narrow control of the chamber.

The Senate voted 52-46 to make Sarala Vidya Nagala the first federal judge of South Asian descent in Connecticut and 52-46 to elevate Michael Nachmanoff, a magistrate judge and former public defender, to become a judge in the Eastern District of Virginia.

Nachmanoff declined comment. Nagala did not immediately respond to a request for comment.

The votes came after the Senate earlier this week voted to confirm four other judicial nominees, including voting rights advocate Myrna Pérez to serve on the 2nd U.S. Circuit Court of Appeals, the most in a single week during Biden's term.

The Senate on Tuesday confirmed Jia Cobb, Karen McGlashan Williams and Patricia Tolliver Giles to district court judgeships in Washington, D.C., New Jersey and the Eastern District of Virginia, respectively.

A seventh nominee, Connecticut federal district court pick Omar Williams, is expected to receive a vote on Thursday, after the Senate on Wednesday voted 52-46 to cut off debate on his nomination.

The Senate has now voted to confirm 25 of Biden's 51 district and circuit court picks, a rate not seen since the Nixon administration.

Republican President Donald Trump by this point in his tenure had only won confirmation for seven judges, according to data collected by Russell Wheeler, a visiting fellow at the Brookings Institution.

The Democrats' goal is to counter the influence of Trump's near-record 234 confirmed judicial nominees. With their 50-50 control of the Senate an election away from being lost, Democrats have every incentive to keep up the quick pace.

Brian Fallon, the executive director of the progressive advocacy group Demand Justice, credited Senator Majority Leader Chuck Schumer, who in addition to scheduling rapid votes has recommended several nominees in his home state of New York.

"Leader Schumer is doing everything you could want in terms of using floor time to quickly confirm President Biden's nominees, as well as in recommending professionally diverse nominees for New York-based judgeships," Fallon said.

The latest confirmations were in keeping with Biden's goal of putting more women and minorities on the bench and promoting lawyers with civil rights and public defender backgrounds, rather than just former prosecutors and law firm alums.

#### Won’t pass—impossible to get unity among progressives and Sinemanchin

Glasser 10/28 [Susan B. Glasser is a staff writer at The New Yorker, "Biden Can’t Quite Close the Deal—with His Own Party", 10/28/21, https://www.newyorker.com/news/letter-from-bidens-washington/biden-cant-quite-close-the-deal-with-his-own-party]

Biden needed Democratic unity in both chambers not only to support the social-spending bill but to finally allow the House to vote on a nearly trillion-dollar bipartisan infrastructure bill that passed the Senate earlier this year with the support of nineteen Republicans. The House vote has been held up since then because his party’s progressives refused to proceed with it until they got an agreement on the bigger social-spending package. At the House Democrats’ meeting Thursday morning, Speaker Nancy Pelosi told the caucus that they should take the infrastructure vote that very afternoon rather than “embarrass” Biden by forcing him to show up in Europe empty-handed.

The problem, as it has been for months, is that absolute party unanimity is almost impossible to achieve, and yet that unanimity is necessary for a Democratic President without congressional majorities large enough to enact transformational legislation. Kyrsten Sinema, one of the two Democratic holdouts in the Senate, released a statement soon after Biden’s, praising the “significant progress,” which was not the robust endorsement that the White House had been hoping for. “I look forward to getting this done,” she added. Whatever that means. The statement from Joe Manchin, the West Virginia Democrat and the other Senate holdout, was also less than unequivocal. “This is all in the hands of the House right now,” he said. “I’ve worked in good faith, and I look forward to continuing to work in good faith. And that is all I have to say today.” This, needless to say, did not go over well among House Democrats. Representative Dan Kildee, of Michigan, complained that it was just more “hieroglyphics” from Manchinema—or was that Sinemanchin? Either way, the statements weren’t enough to get progressives to relinquish their hold on the infrastructure bill. One leading progressive, Rashida Tlaib, asked whether she would vote to pass the infrastructure bill, said that she wasn’t just a no, she was a “hell no.” So was much of the rest of the hundred-member-strong Progressive Caucus. By midday Thursday, the framework agreement was looking less and less like an agreement and more and more like a squeeze play to finally get the deal done.

**Lawmakers will compartmentalize**

\*about infrastructure

**Pergram 18** (Chad Pergram, Congressional reporter. “Amid Kavanaugh cacophony, Congress forges bipartisan agreements on key issues”. October 13, 2018. <https://www.foxnews.com/politics/amid-kavanaugh-cacophony-congress-forges-bipartisan-agreements-on-key-issues>)

Step back from the Kavanaugh cacophony. Examine what lawmakers from both parties in both chambers accomplished in September and early October, with virtually zero fanfare. **Amid** the **turmoil**, Congress approved the first revamp of national aviation policy in years. The Senate approved the final version of the legislation 93-6. This came after a staggering six extensions due to bickering and disagreement. Then, Congress approved a sweeping, bipartisan measure to combat opioid abuse. The House okayed the package 393-8. The Senate adopted the measure 98-1. And, there was no government shutdown. The House and Senate came to terms on two bipartisan bills which funded five of the 12 annual spending bills which operate the government. The sides agreed to latch an additional measure to one of the spending plans to fund the remaining seven areas of federal spending through December 7. President Trump briefly threatened to force a government shutdown if lawmakers didn’t include money for his border wall in the plan. But the President ultimately punted that battle until December. Democrats praised Republicans for keeping conservative “poison pill” riders out of the appropriations bills. That decision drew Democratic support for the measures. The Senate approved a bipartisan **water and infrastructure** package. McConnell hailed the **bipartisanship** which descended upon the Senate – **even as the senators fought over Kavanaugh**. Nearly **in the same breath**, McConnell derided boisterous, anti-Kavanaugh protesters outside the Capitol as a “mob.” McConnell insisted this week he needed the Senate to clear a slate of 15 conservative judges to lower courts before he could cut senators loose for the midterm elections. McConnell and Schumer appeared at loggerheads. McConnell’s goal was clear: extract the confirmation of these nominees – or tether to Washington vulnerable Democratic senators from battleground states to keep them off the campaign trail. Schumer knew McConnell would ultimately prevail on the nominees after the midterms. So the New York Democrat accepted McConnell’s ransom, permitting the Senate vote on a slate of nominees on Thursday night. Schumer also extracted a concession from McConnell: send senators home until November 13th. One may wonder how lawmakers can find themselves in an **imbroglio** over a major issue like Kavanaugh – **yet forge major bipartisan accords on other**. Frankly, that’s just politics. Politics always elicits strange bedfellows. Successful lawmakers know they should **compartmentalize their disputes**. The enemy today may be your best ally tomorrow.

#### Climate models are wrong- we can adapt

* peer-reviewed journal shows IPCC exaggeration
* social cost estimates are overblown
* historical records are wrong- using physically realistic measures proves decreased impact
* climate cost estimates are inflated by neglecting adaptation

Lau 18 [Matthew Lau, contributing writer to Canadians for Affordable Energy, citing peer reviewed studies from journal nature climate change and Journal of Climate, “Climate change data is wildly overestimated”, 8/14, https://torontosun.com/opinion/columnists/guest-column-climate-change-data-is-wildly-over-estimated]

A study last year by Thorsten Mauritsen and Robert Pincus in the journal Nature Climate Change and another one this year by Nicholas Lewis and Judith Curry in the Journal of Climate, produced median estimates suggesting that a doubling in atmospheric carbon dioxide would increase global temperatures by only about half of what Intergovernmental Panel on Climate Change (IPCC) models predict.

Recently, two Heritage Foundation scholars and Canadian economist Ross McKitrick re-estimated the social cost of carbon dioxide emissions using earlier empirical estimates from Lewis and Curry, instead of relying on simulated estimates of the sensitivity of temperature to carbon dioxide concentration in the atmosphere. In one model, the social cost of carbon fell 40-50% and in another the costs dropped a staggering 80%.

In addition to future warming and its associated costs likely being over-predicted by climate models, historical warming might also be less than what most temperature records suggest. That is because some techniques for producing temperature records systematically display more warming than actually occurred.

According to Patrick J. Michaels and Ryan Maue, scientists with the Cato Institute, one of the most reliable temperature data sets is from the Japan Meteorological Office. This record also shows the least amount of warming. “The fact of the matter is,” the Cato researchers write, “that what should be the most physically realistic measure of global average surface temperature is also our coolest.”

Not only is the amount of warming often exaggerated, but climate cost estimates are often inflated by assuming that humans will not adapt to the warmer climate. This assumption makes no sense when we consider how long the warming is supposed to take and how creative our society is when it comes to solving complex problems.

Adding all this up suggests that climate change probably won’t be anywhere near as disastrous as many people imagine. This has profound policy implications – it means that the drastic and expensive tax and regulatory actions taken by governments in the name of saving the climate are increasingly difficult to justify.

### Biz Con

#### Supply chain weaknesses and the pandemic undermine confidence now

Crush 10/28 [Peter Crush, "Business leaders admit over confidence in dealing with disruptions", 10/28/21, https://www.cips.org/supply-management/news/2021/october/business-leaders-admit-over-confidence-in-dealing-with-supply-chain-challenges/]

Business heads have admitted being over confident about their ability to deal with supply chain disruptions, according to a new report

The research, by DuPont Sustainable Solutions, surveyed attitudes to managing unexpected supply chain events before and after the Covid-19 pandemic.

It revealed more than eight in 10 of the 203 leaders surveyed in 2019 thought they had a plan capable of addressing any unexpected business disruption.

However, this level of confidence fell dramatically when they were asked again in 2021, with just 43% of those polled claiming they were prepared.

According to the survey, 77% of those questioned now feel risks to their business have increased since the pandemic began (just 5% thought they had decreased), with 18% saying it is the same.

Although the survey reveals leaders were overly bullish about their ability to respond to sudden events, the data did, however, reveal learnings had been made.

Some 70% of leaders questioned said the pandemic had a positive impact on their digital strategies; more than 50% said communication had improved, and nearly 60% agreed their attitude to risk management had been positively impacted.

Commenting on the research, CEO of DuPont Sustainable Solutions, Davide Vassallo, said: “By placing a premium on achieving cost efficiencies by minimising inventories, streamlining supply chains, sourcing from low-cost labour markets, and implementing just-in-time manufacturing, it left companies with little flexibility to absorb the supply, sourcing, operating, and commercial shocks caused by the pandemic.”

According to the report, some 64% of respondents said the pandemic had negatively impacted their supply chain, with 36% saying it had negatively impacted operations.

## 1AR

### Reg CP

#### Patent law fails because of standing – conceded melamed means its game over because the CP doesn’t establish outside standing

Cary 11 [George Cary, Mark Nelson, Steven Kaiser, Alex Sistla. Cary and Sistla are members of the California and District of Columbia Bars. Mr. Nelson is a member of the New York and District of Columbia Bars. Mr. Kaiser is a member of the New Jersey and District of Columbia Bars. “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM IN STANDARD SETTING”. Antitrust Law Journal No 3. (2011). https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf]

One final point about patent remedies concerns standing: it is not just the type of harm that matters to antitrust, but whether anyone has a remedy to address it. Antitrust fills the gap left open by patent law by providing a remedy to those “outsiders”—consumers, competitors and others—who lack standing to seek relief under the patent laws. Consider Qualcomm: The use of equitable estoppel there was only available as a defense asserted by the alleged infringer. The elements of the defense discussed above, moreover, require that the infringer either be involved in the SSO process or have a specific basis for claiming that it was affirmatively misled by the patentee. No consumer injured by the wrongful acquisition of monopoly power in this context would meet these criteria, nor would other firms that have been excluded from the market due to the deception at issue. There is no government enforcement agency to protect such plaintiffs, because patent law has no provision for government enforcement intended to protect consumers from harm to competition.

In sum, the limitations of patent law would exclude many of the categories of potential plaintiffs suffering antitrust injury as a result of standard-setting abuse. We conclude that equitable estoppel is unequal to the task of policing monopolization through fraudulent conduct in the standard-setting process.

### Adv 1

**US innovation is falling behind.**

**Kersten ’21** [Alexander; 4/14/21; Director of the Renewing American Innovation Project @ Center for Strategic and International Studies; Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy @ Tufts University; “Why Renewing American Innovation? The “Endless Frontier Act” and Biden’s Bid for Maintaining U.S. Global Competitiveness”; https://www.csis.org/analysis/why-renewing-american-innovation-endless-frontier-act-and-bidens-bid-maintaining-us-global; AS]

The China Challenge

China today poses both a technological and security threat to the United States that no country has in modern history. U.S. companies operating under free market rules struggle to compete against state-backed Chinese firms that can ignore a poor quarter while enjoying one of the largest, most-protected markets in the world. With the support of the central government, key Chinese firms are free to **innovate** and compete in the global market without **financial worries** while Chinese scientists can focus on **r**esearch a**n**d **d**evelopment instead of seeking grants for their university or research institution. According to Tulane University professor and former Aspen Institute CEO Walter Isaacson in 2019, China has modeled its approach along the lines of U.S. scientist Vannevar Bush’s 1945 report Science: The Endless Frontier, which, besides being the inspiration behind the name of the proposed legislative package, promoted government funding of basic research together with universities and industry—a priority of the Franklin D. Roosevelt administration. As the Chinese government sets long-term **strategic goals** like **Made in China 2025**, which was part of China’s 13th Five-Year Plan of 2016-2020, the United States needs to return to its post-World War II values of equating leadership in science and **tech**nology with **national security** and prosperity.

Today, U.S. companies locked in close competition **lack the incentives** to maintain in-house capabilities for **innovation**, like they did in the mid-century era of AT&T’s Bell Labs, DuPont’s central R&D unit, Xerox PARC, and others. Heightened competition, shareholder pressures, and new incentives pushed firms to cut these in-house research units back in the 1980s. Since then, the share of **applied research** in total corporate R&D expenditures fell from **30 percent** in 1985 to **below 20 percent** in 2015—all well below the peak of almost 40 percent in the 1950s. Of course, the Harvard Business Review in 2014 famously suggested that, despite being the source of great inventions throughout history, China today is a “land of rule-bound rote learners” where breakthroughs are rare. Because of this, some argue the Chinese are not great innovators and China’s state-backed system could itself breed complacency and come back to bite it in the near future. However, even by then, experts warn, the United States will have **missed the train** on many important technologies and will be **struggling** to catch up.

Despite **Silicon Valley** and the millennial generation**’s** supposed penchant for innovative disruption, U.S. total factor productivity has been **slowing** since the 1970s. **Productivity** today is the lowest in more than a century. **Innovation**, historically a **clear driver** of U.S. productivity, means the creation of ideas and inventions that are translated into practical value and improve the quality of people’s lives directly or via their ability to grow the economy. Whether measured in terms of triadic **patents** (patents filed in the United States, Europe, and Japan), most available measures of **productivity**, or even **startup** company **creation**, the United States’ trademark innovative spirit has been **gradually dampening** for decades. And if not for China’s meteoric rise this century, the United States might still be sleepwalking—optimistically but without a serious plan—instead of waking up to the need for a coherent national strategy.

U.S. Complacency, and How We Got There

Noted George Mason University economist Tyler Cowen and other **experts** have recognized a growing “complacency” in American life as the indicator of a **societal shift** from the United States’ early dynamism. From the turn of the twentieth century until roughly the moon landing of 1969, the breakneck pace of groundbreaking technologies that directly affected the quality of life and the structure of U.S. society was simply astounding. Yet, since the first moon landing in 1969, only the **internet** and its application to more and more parts of our lives can claim to have made any meaningful impact—meaning that **physically** the world of 1969 is much more like that of **2021** than 1969 was of the early twentieth century. This, of course, is not meant to discredit the great advances in medicine and human genomics made in the last few decades, for example, but to show how the rate of society-changing innovations has **not maintained** the pace that existed from the mid-nineteenth century until roughly 1969.

In the developed world, this slowdown has unfortunately contributed to **wage stagnation**, the shrinking of the **middle class**, and greater political **polarization** domestically. Coinciding with the waning days of the Soviet Union’s power in the 1980s, the U.S. **innovation decline** was masked at home. Further, the Soviets of that period no longer posed a technological threat to the United States. Japan on the other hand, posed a great technological threat in the 1980s but was and is a staunch U.S. ally, and not a security threat. Unchallenged abroad and riding the dual-edged optimism of the internet boom of the 1990s and the victory over communism, the United States **missed the ways** in which it was giving up the advantages that made it such a powerhouse in the mid-twentieth century.

**Industry experts** have also suggested that the **U**nited **S**tates put its position up for grabs when it began to **outsource** important production—which President Biden alluded to during the signing of a February 2021 executive order aimed at reducing supply chain bottlenecks. Starting in the 1970s and 1980s, the United States began to outsource production of **semiconductors** and **displays** mostly to Taiwan and South Korea, which today account for almost half of all semiconductor manufacturing capacity in the world. Further, adding in mainland China and Japan shows that a whopping **three-quarters** of all semiconductor manufacturing capacity comes from East Asia—a **sharp departure** from 1990, when the United States still provided about **50 percent** of all global manufacturing capacity. Removing itself from the production process means the United States misses out on important chances for innovating as well as for developing a strong high-tech manufacturing workforce.

#### Here’s another card

Wood 13 [Chris Wood and Joseph Kattan, partners in the Antitrust and Trade Regulation practice of Gibson, Dunn & Crutcher LLP. “Standard-Essential Patents and the Problem of Hold-Up”. 12/13/13. http://awa2014.concurrences.com/IMG/pdf/standard\_essential\_patent\_kattan-wood.pdf]

FRAND commitments fulfill an essential role in cooperative standard-setting by ensuring that the market power conferred on SEP holders by the adoption of standards will not be used to hold-up implementers for excessive royalties. Breaches of FRAND commitments, particularly when accompanied by threats of injunctions, risk harms including higher prices, reduced participation in standard-setting, and a decrease in innovation. An increasing number of reported cases indicate that these threats are real and provide empirical evidence refuting claims that hold-up is inconsequential or theoretical. As shown above, arguments disputing the existence of hold-up are inconsistent with the evidence and generally incompatible with the fundamental goals of standard-setting and the FRAND regime in promoting widespread adoption of standards by making necessary technologies available at reasonable costs.

#### It’s zero’d now

Quinn 19 [Gene, Patent Attorney and Editor and President & CEO ofIPWatchdog. “‘It Is a Mess’: Recapping the U.S. Patent System’s Race Toward Uncertainty”. 11/7/19. https://www.ipwatchdog.com/2019/11/07/mess-recapping-us-patent-system-race-toward-uncertainty/id=115657/]

This gives you some perspective of what’s going on in the United States—you have the FTC off in one direction, you have the DOJ in another direction. The ITC, meanwhile, has signaled potential willingness in certain circumstances to issue an exclusion order. Now the ITC is becoming a much bigger forum—it has always been a big part, but it’s a much bigger part of patent litigation in America now because you can get an exclusion order, which is essentially an injunction. Due to procedural machinations I don’t need to go into, the ITC does not have to adhere legally to the same rule that makes getting an injunction in federal district court impossible.

With all of these different people and agencies and courts going in different directions in the United States, we’re looking to all of you in the UK and in Germany to hopefully provide certainty. In the United States, there is no certainty, which continues to make it very difficult for businesses.

#### Spills over globally

John O. McGinnis 21, the George C. Dix Professor, Northwestern University; and Linda Sun, Associate, Wilmer Pickering Hale & Dorr LLP; Northwestern Pritzker School of Law, J.D., 2020, Winter 2021, “Unifying Antitrust Enforcement for the Digital Age,” Washington & Lee Law Review, 78 Wash & Lee L. Rev. 305, p. lexis

The disagreement between the DOJ and FTC has international implications as well. Divergence in treatment of FRAND agreements among countries already causes difficulties for companies operating under different national standards in the global economy. 171 These international challenges are further exacerbated by the different policies of the two domestic antitrust enforcement agencies of the United States, still the most important commercial nation in the world. 172 Companies are subject to potentially conflicting standards depending not only on the national identity of the enforcement agency but also on the identity of the agency with the United States. International harmonization becomes more difficult if the United States has internal disagreements. Therefore, the case [\*341] of SEPs shows how dual enforcement has created uncertainty in the industry, in Congress, and internationally.

#### IoT

FTC 18 [Federal Trade Commission, Signed by ACT, Auto Alliance, CCIA, HTIA, NRF, SIIA Organizations. “Standards, Licensing, and Innovation: A Response to DOJ AAG’s Comments on Antitrust Law and Standard-Setting”. 08/2018. https://www.ftc.gov/system/files/documents/public\_comments/2018/08/ftc-2018-0055-d-0031-155033.pdf]

Antitrust law has an important role to play in addressing the problem of hold-up by SEP holders. Breaches of FRAND commitments allow SEP holders to exercise unearned market power to the detriment of entire industries and our economy. Competition enforcement agencies, including the Department, therefore can and should continue down the path established by their predecessors in addressing cases of significant FRAND violations that harm competition and the consumers. And SSOs should be allowed to continue to craft rules and policies that ensure the benefits of standardization while reducing the risks of patent hold-up. Without a balanced SEP licensing environment, countless stakeholders from across sectors including small businesses will be locked out of new markets emerging through convergence, jeopardizing the growth of the IoT and its ability to introduce new efficiencies across consumer and enterprise contexts.

### Reg cp

#### ‘Core’ is not a term of art. It means essential.

Crawford ’89 [James D, James J Leyden, Frank C Sabatino, and Jack G Mancuso; October; J.D. at the University of Pennsylvania; J.D. at the University of Pennsylvania; J.D. at Notre Dame; J.D. at Pennsylvania State University; Westlaw, Brief on Writ of Certiorari to the United States Court of Appeals for the Third Circuit, “Fmc Corporation, Petitioner, v. Cynthia Ann Holliday, Respondent.,” No. 89-1048, WL 1128234]

The Third Circuit's decision springs from the conclusion that the deemer clause only shields “core” ERISA concerns. Perhaps the most vivid defect in this fallacy is the fact that the Third Circuit had to invent the term “core,” which is not used in ERISA, has no textual basis \*24 in the relevant legislative history, and does not even have an apparent definition in this context. Yet whatever “core” may mean, the Third Circuit certainly intended it to involve matters of critical importance. Any other definition would do violence to the English language.43 Judged by this standard, Pennsylvania's constraints upon subrogation clearly impair “core” ERISA concerns, arising from fiduciary obligations at the heart of the statute.’

Footnote 43.

The definitions of the adjective “core” are: “a: a basic, essential, or enduring part (as of an individual, a class, or an entity) b: the essential meaning: GIST ... c: the inmost or most intimate part.” Webster's New Collegiate Dictionary, 250 (1973).

#### ‘Antitrust laws’ are laws that prohibit unfair practices.

CMR ’21 [Code of Maine Rules; current through the March 31, 2021; Maine Weekly Rule Notice, “Section 1. Definitions,” Code Me. R. tit. 10-144 Ch. 500, § 1]

1.1 ANTITRUST LAW means federal or state laws that prohibit contracts, combinations or conspiracies in restraint of trade; monopolies; mergers and acquisitions which tend to substantially reduce competition; and unfair methods of competition, as well as unfair acts and practices in the conduct of trade or commerce. See 10 M.R.S.A. Chapter 2

### Biz Con DA

#### COVID induced restructuring that prevents catastrophic future fallouts

Sneader & Singhal 20 [Kevin, degree in law with first-class honors from his hometown University of Glasgow. He went on to graduate from Harvard Business School, where he received a master of business administration degree with highest distinction, and Shubham, leads McKinsey’s healthcare, public sector and social sector work globally. He serves leading healthcare and social institutions and governments on all top-management agenda issues. “Beyond Coronavirus: The Path to the Next Normal” https://www.mckinsey.com/~/media/McKinsey/Industries/Healthcare%20Systems%20and%20Services/Our%20Insights/Beyond%20coronavirus%20The%20path%20to%20the%20next%20normal/Beyond-coronavirus-The-path-to-the-next-normal.ashx]

Reimagination A shock of this scale will create a discontinuous shift in the preferences and expectations of individuals as citizens, as employees, and as consumers. These shifts and their impact on how we live, how we work, and how we use technology will emerge more clearly over the coming weeks and months. Institutions that reinvent themselves to make the most of better insight and foresight, as preferences evolve, will disproportionally succeed. Clearly, the online world of contactless commerce could be bolstered in ways that reshape consumer behavior forever. But other effects could prove even more significant as the pursuit of efficiency gives way to the requirement of resilience—the end of supply-chain globalization, for example, if production and sourcing move closer to the end user. The crisis will reveal not just vulnerabilities but opportunities to improve the performance of businesses. Leaders will need to reconsider which costs are truly fixed versus variable, as the shutting down of huge swaths of production sheds light on what is ultimately required versus nice to have. Decisions about how far to flex operations without loss of efficiency will likewise be informed by the experience of closing down much of global production. Opportunities to push the envelope of technology adoption will be accelerated by rapid learning about what it takes to drive productivity when labor is unavailable. The result: a stronger sense of what makes business more resilient to shocks, more productive, and better able to deliver to customers. Reform The world now has a much sharper definition of what constitutes a black-swan event. This shock will likely give way to a desire to restrict some factors that helped make the coronavirus a global challenge, rather than a local issue to be managed. Governments are likely to feel emboldened and supported by their citizens to take a more active role in shaping economic activity. Business leaders need to anticipate popularly supported changes to policies and regulations as society seeks to avoid, mitigate, and preempt a future health crisis of the kind we are experiencing today. In most economies, a healthcare system little changed since its creation post–World War II will need to determine how to meet such a rapid surge in patient volume, managing seamlessly across in-person and virtual care. Public health approaches, in an interconnected and highly mobile world, must rethink the speed and global coordination with which they need to react. Policies on critical healthcare infrastructure, strategic reserves of key supplies, and contingency production facilities for critical medical equipment will all need to be addressed. Managers of the financial system and the economy, having learned from the economically induced failures of the last global financial crisis, must now contend with strengthening the system to withstand acute and global exogenous shocks, such as this pandemic’s impact. Educational institutions will need to consider modernizing to integrate classroom and distance learning. The list goes on. The aftermath of the pandemic will also provide an opportunity to learn from a plethora of social innovations and experiments, ranging from working from home to large-scale surveillance. With this will come an understanding of which innovations, if adopted permanently, might provide substantial uplift to economic and social welfare— and which would ultimately inhibit the broader betterment of society, even if helpful in halting or limiting the spread of the virus.

#### No econ war impact

Liao 19 [Jianan Liao, Shenzhen Nanshan Foreign Language School, China. Business Cycle and War: A Literature Review and Evaluation. Advances in Economics, Business and Management Research, volume 68. Copyright 2019]

Academic researches on the relationship between business cycle and war are particularly rich, all of which can be divided into two major categories. One is the relationship between economic rise and war, and the other is the relationship between economic recession and war. Through the simple description and comparison of the two types of standpoints, the author divides economic upturn into recovery phase and expansion phase, and economic recession into recession phase and crisis phase, all of which have motivations as well as conditions enabling wars to break out. Therefore, the outbreak of war shall never be simply attributed to either economic rise or recession.

#### Delta variant undermined confidence

AP 9/29 [Associated Press, "Small and Midsize Business Confidence Falls Amid Rising COVID-19 Cases", 9/29/21, https://apnews.com/press-release/pr-newswire/coronavirus-pandemic-business-health-business-confidence-5057bbef8ca984868c78075871d7baf2]

Confidence among small and midsize business (SMB) CEOs fell in the third quarter of 2021, erasing all gains recorded in the first half of the year, according to the latest CEO Confidence Index from Vistage, a CEO coaching and peer advisory organization. The Confidence Index, which measures sentiment on various economic and business topics among SMB leaders, was 97.1, down from 108.8 in Q2, with 40% of CEOs of small and midsize businesses reporting the increase in cases related to the Delta variant has impacted their businesses. In addition, 41% have made changes to their masking policies as a result, but 56% say they will never mandate vaccines for employees.

“The Delta variant, combined with the economic headwinds of inflation, supply chain challenges and talent scarcity has not fully reversed the economic surge that occurred as restrictions lessened; however, it has slowed growth expectations. Small business owners are still trying to navigate how to keep their businesses running while keeping their employees safe,” said Joe Galvin, Vistage’s chief research officer. “Economic growth will continue through the second half of the year, just not at the unsustainable pace of the first half.”

For now, the pandemic continues to impact employment with 67% of leaders saying they are struggling to operate at full capacity given staffing challenges, and 66% reporting they are planning on hiring in the next year. To combat these challenges, businesses are using a variety of incentives: boosting wages (69%), expanding benefits (28%), offering hiring bonuses (27%) and allowing remote working (41%). Current employees are also being offered skill development programs (56%) and increased overtime (26%).