# 1AC

Same as r3

# 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.

#### Size only locks the US in at a competitive disadvantage – only small companies can solve AI competitiveness

Wheeler 20 [Tom, visiting fellow in Governance Studies at The Brookings Institution, former FTC chairman. “DIGITAL COMPETITION WITH CHINA STARTS WITH COMPETITION AT HOME”. April, https://www.brookings.edu/wp-content/uploads/2020/04/FP\_20200427\_digital\_competition\_china\_wheeler\_v3.pdf]

China’s population — approaching a billion and a half people — and its reliance on digital technology have resulted in an unrivaled data creation ecosystem and a competitive advantage. It is not just the quantity of data that creates a competitive opportunity for the Chinese, but also the qualitative difference between data produced in China and data produced in the United States. When China’s digital activities were not much more than clones of U.S. apps, the quality of the data on both sides of the Pacific was essentially equivalent. Around 2013, however, China’s relative lack of economic infrastructure suddenly became an advantage. The reality that few Chinese carried credit cards, for instance, meant that mobile payment systems developed and grew faster than in the U.S., creating a flood of new — and different — data. “Backwardness” had become a boon, as when the absence of automated patient management systems in Chinese hospitals stimulated mobile apps for scheduling medical appointments — and, again, created new data. The data from the Chinese smartphone app WeChat — a kind of mélange of Facebook, Amazon, PayPal, Open Table, and other U.S. apps all integrated into a single platform — combined to create even different, and richer, data. Chinese data harvesting is about both consumer and enterprise information. In many local governments, district managers are measured based on the results from digital sensors throughout their area of responsibility. Shanghai, for instance, measures police activity based on the location and activity reports generated by radio chips worn by officers, while chip-equipped bikes and parking enforcement are similarly tracked digitally. Chips are even placed in wheelchairs to (among other things) identify points where individuals with disabilities have a hard time getting around. Shanghai even monitors manhole covers to track utility work and its resulting risks to pedestrians and auto traffic. The Chinese data advantage, therefore, is not just the amount of data, but also the diverse quality of that data. It is a diversity that helps AI algorithms “learn.” While using such a term anthropomorphizes computer algorithms, it is nonetheless appropriate since those algorithms seek to produce results similar to the neural networks that govern human learning. The mysterious interconnection of rules, pattern recognition, feedback, and external input and output results in what we call thinking in humans. Throw enough data at a powerful computer and ask it to find patterns based on basic rules, and the computer appears to “think.” The more diverse that data, the greater the algorithm’s ability to “learn.”34 Because of China’s huge population and high digital usage, it will probably always beat the United States on the availability of raw data. If the United States cannot overcome those basic advantages, it is time to change the rules of the engagement. In a December 2019 article titled “Is China Beating America to AI Supremacy?,” Graham Allison and a mystery tech collaborator suggested such a new construction.35 We need to define the challenge not so much in terms of implementation where China’s vast data gives it an advantage, but by an American advantage: innovation. Centralization may aid implementation, but it will ~~retard~~ impede innovation. To think we can out-bulk China’s data supply is to deny demographics and usage patterns. What we can do, however, is out-entrepreneur China. The centralized control of China creates an antientrepreneurial force. While the Chinese culture has historically been quite entrepreneurial, the Chinese government’s current control of the population works against that tradition. Because hierarchical operations have little room for creativity, a popular Chinese expression is: “The more you try, the more you fail.” The “more you try” to think creatively outside the hierarchy-dictated orthodoxy, the greater the personal risks, a China-based digital consultant explained to me. The attitude of Thomas Edison’s “I have not failed 10,000 times, I’ve successfully found 10,000 ways that won’t work” does not find a home in the top-down environment of China.36 We need to take advantage of the American entrepreneurial spirit. The freedom to try and fail and to try again is as American as baseball. The beacon of opportunity this represents to the world is a national asset. But we need to have the digital tools to take advantage of those opportunities. If America is going to out-innovate China, then American innovators need access to the essential capital asset of the 21st century: data. The large digital companies are wildly powerful and profitable not only because they have siphoned great amounts of personal data from consumers, but also because they then assume the role of gatekeeper to block access to that data. “Even well-intentioned gatekeepers slow innovation,” Amazon founder and CEO Jeff Bezos wrote in his 2011 letter to shareholders.37 He was describing the benefits of openness in the fledgling Amazon Web Services, yet it is an important message if America is to out-innovate China. Competition with China is advanced by picking the lock of gatekeepers and opening the flow of digital assets to competition-driven innovation in the U.S.

#### 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.

#### Courts have experience determining rates and the risk of bad determinations is low empirically

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]

While we recognize that, when a court is asked to determine a FRAND royalty, one form of “false positive” is that the court could require a patent owner to license its technology at less than a FRAND rate (if it incorrectly finds that the patent owner failed to offer a license on FRAND terms), we believe this risk is limited. Courts are routinely asked to calculate royalty rates in a variety of disputes. They are also routinely asked to calculate the “but for” world competitive price in assessing damages in most antitrust litigation. There is no reason to believe that evaluating such rates in the context of a FRAND commitment would be any more difficult.84 We also note that patent owners can (and do) mitigate their risk in this regard if, prior to the adoption of a standard, they provide transparency into the rates that they consider FRAND. With such ex ante disclosures, patent owners can reduce the risk of being accused of deception, which is generally at the core of antitrust claims arising out of abuses of the standard-setting process.

## T

### 2AC – Prohibit per se v NW

#### Prohibit means hinder or preclude – prefer court interps

Prelogar 20 [Elizabeth, Acting Solicitor General of United States. “ZIMMIAN TABB, PETITIONER v. UNITED STATES OF AMERICA”. https://www.supremecourt.gov/DocketPDF/20/20-579/169149/20210216195252075\_20-579%20Tabb.pdf]

Application Note 1’s interpretation of the career offender guideline as including drug conspiracies is firmly grounded in the guideline’s text. The key term is “prohibits.” Unlike an adjacent provision stating that a “crime of violence \* \* \* is murder” or a list of other specified offenses, Sentencing Guidelines § 4B1.2(a)(2) (emphasis added), the definition of “controlled substance offense” extends to any felony offense that “prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance,” id. § 4B1.2(b) (emphasis added). Although the term “prohibit” can mean “forbid by authority or command,” it can also mean “prevent from doing or accomplishing something.” Webster’s Third New International Dictionary of the English Language Unabridged 1813 (1986). In that sense, the term is synonymous with “hinder” or “preclude.” See, e.g., Black’s Law Dictionary 1465 (11th ed. 2019) (defining “prohibit” to mean “forbid by xlaw” or “prevent, preclude, or severely hinder”). Application Note 1 confirms that Section 4B1.2(b) uses the term “prohibit” in the latter sense. As the Eleventh Circuit recognized in United States v. Lange, 11 862 F.3d 1290, cert. denied, 138 S. Ct. 488 (2017), after reviewing the two accepted senses of “prohibit” noted above, see id. at 1295, Application Note 1 indicates that “‘[c]ontrolled substance offense’ cannot mean only offenses that forbid conduct outright, but must also include related inchoate offenses that aim toward that conduct.” Ibid. The court observed that “a ban on conspiring to manufacture drugs hinders manufacture even though it will ban conduct that is not itself manufacturing.” Ibid.; cf. United States v. Vea-Gonzales, 999 F.2d 1326, 1330 (9th Cir. 1993) (“The guideline refers to violations of laws prohibiting the manufacture, import, export, distribution, or dispensing of drugs. Aiding and abetting, conspiracy, and attempt are all violations of those laws.”).

#### Rule of reason expands the scope of antitrust law AND per se requirement kills aff writing

Arthur 2K [Thomas, Professor of Law, Emory University. “A WORKABLE RULE OF REASON: A LESS AMBITIOUS ANTITRUST ROLE FOR THE FEDERAL COURTS”. https://www-jstor-org.libproxy.berkeley.edu/stable/pdf/40843475.pdf?refreqid=excelsior%3A25f0b9cb22d54ee602c500267d180aff]

Apparently, judges and juries were free to bless any restraint that struck them as "reasonable." Not surprisingly, plaintiffs, especially private ones, sought to force their claims into the per se pigeonholes. If they suc- ceeded, they won; if not, in most cases they gave up. As a result, the per se rules dominated antitrust litigation for over three decades and almostcompletely eclipsed the rule of reason.68

The third development was the most significant. The New Deal and Warren Courts used Justice Hughes's "constitutional" approach69 to extend the scope of the Sherman Act far beyond the evils that provoked its passage and that dominated the cases of the first fifty years. Antitrust changed fundamentally in this period from the original "negative (liter- ally 'anti-trust') approach," to a far more ambitious "positive ('maintain- ing competition')" role.70 The New Deal and Warren Courts wrote a mixture of populist sentiments and structuralist industrial organizationtheory into the law.

Reasonable scholars still dispute the merits of the particular rules adopted by those Courts. My point is that the issues raised by the new regulation, especially of mergers and vertical restraints, were too complex to be resolved effectively and consistently by bright-line rules and, consid- ering the institutional limits of courts,72 perhaps by any legal standard. This was a task which, if it undertaken at all, should have been left to an administrative body, such as the FTC.73

The per se rules for horizontal price fixing and market division enabled the Justice Department to prosecute cartels effectively and removed the most significant threat of false negatives. In the rest of antitrust, however, application of the "first generation" of per se rules produced an increasingly intolerable level of false positives, i.e., mistaken condemnations of productive transactions, especially in private litigation unregulated by prosecutorial discretion. This, in turn, provoked stringent criticism of antitrust rules in the academy, the profession, and the business commu- nity.74 Toward the end of this period, lower courts increasingly engaged in a formalistic characterization process to avoid what these criticisms were revealing to be false positives, with the ironic result that the per se rules, designed to bring certainty to the law, resulted in more uncertainty.

#### Floor/ceiling---‘expanding the scope’ automatically meets the floor.

Prewitt ’2k [James K., Phillip R. Garrison, Robert S. Barney; July 27; Judges on the Missouri Court of Appeals, writing Per Curiam; Westlaw, “Little Portion Franciscan Sisters, Inc. v. Boatright,” 26 S.W.3d 443]

In so concluding, we note that the preposition “by” is defined as “[w]ith the use of; through,” “[t]o the extent of,” or “[t]hrough the agency or action of.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978). The same source states that a synonym for “by” is “through” and that the preposition “by” indicates the agency or means by which something is accomplished. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) defines “by” as “through the means or instrumentality of,” “through the direct agency of,” “through the medium of,” or “through the work or operation of,” and that it is “used as a function word to indicate something that forms an accompanying setting or condition ... or that constitutes a manner ... often with an added sense of means.” For the ballot proposition to have had the meaning espoused by Defendants, the voter would have had to ignore the important word “by.” To do so is to ignore the plain and ordinary reading of the words used.

#### **Anticompetitive practices are strategies that have anticompetitive effects**

Wells 16 – Executive Notes Editor, Washington University Global Studies Law Review, J.D., Washington University in St. Louis

Todd Wells, “Exploring the Space for Antitrust Law in the Race for Space Exploration,” Washington University Global Studies Law Review, Vol. 15, 2016, LexisNexis

Antitrust law attempts to fight anti-competitive actions. "Anticompetitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality." The Organization for Economic Cooperation and Development, Glossary of Statistical Terms, Anticompetitive Practices http://stats.oecd.org.proxy.library.georgetown.edu/glossary/detail.asp?ID=3145. Obviously, with such a broad definition of anticompetitive practices, many types of actions can fall under the regulation of anticompetitive law. This can cover forms of collusion, price fixing, bid rigging, bid suppression, complementary bidding, bid rotation, subcontracting, and market divisions. Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For, U.S. Dep't of Justice, http://www.justice.gov/atr/ public/guidelines/211578.htm. An even broader approach would put patents under antitrust law. "All of these developments, in Congress and the Courts, are in the spirit of harmonizing patent and antitrust law, generally in the direction of subsuming patent law under antitrust law. From the perspective of providing clarity and certainty for those who are the targets of patent and antitrust suits, harmonization has much appeal." Robin Feldman, Patent and Antitrust: Differing Shades of Meaning,13 Va. J.L. & Tech. 1, 7 (2008).

#### Business practices are actions to complete business objectives – no time or org restriction – prefer intent to define

JGD ND [Just Great Database, “Business Practice”. https://jgdb.com/dictionary/business-practice]

Definition: is a specific method, action, regulation, operation or rule introduced or followed by an organization in order to meet or surpass its business objectives. Additionally, this term can refer to a group of related methods or processes. The introduction of basic business practices is essential for the company’s maintenance of a correct accountability structure. The most popular business practice types include a) developing business plans and strategies, b) defining the boundaries of accountability for each employee, c) determining company-wide and individual performance objectives, d) implementing open-ended communication channels, and e) providing the company’s employees with regular and relevant training.

#### Per se doesn’t meet – leaves open exemptions for every practice it is currently applied

Bona Law ND [Bona Law, Antitrust & Competition Law Firm. “Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests”. https://www.bonalaw.com/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quic.html]

Business practices considered per se illegal under antitrust laws include: (a) horizontal agreements to fix prices, (b) horizontal market allocation agreements, (c) bid rigging among competitors; (d) certain horizontal group boycotts by competitors; and (e) sometimes tying arrangements.

There is, however, a significant exception to per se application, even with these restraints. When parties create a joint venture or other pro-competitive structure and such restraints are necessary to the existence of that venture or structure, there are instances in which a court will deem the suspect restraints ancillary and apply a lessor standard, like the rule of reason.

## Reg CP

### 2AC – Reg CP

#### “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)

#### AND, Creating a new agency to enforce antitrust law expands its scope.

Nolan E. Clark 87, Director, Office of Policy Development, Federal Trade Commission, “Bright lines versus case-by-case assessment in antitrust analysis – an overview,” The Antitrust Bulletin, Fall 1987.

In its early decisions, however, the Supreme Court failed to articulate an interpretation of the Sherman Act grounded in the language of the statute. Misperceiving that every commercial contract could be characterized as a combination in restraint of trade, the Supreme Court in its famous Standard Oil decision9 declared that combinations do not violate the Sherman Act unless they unreasonably restrain trade. Thus was born the rule of reason-a phrase and a concept that has vitally affected the development of antitrust law.

The announcement of the rule of reason had two major effects. One effect was to induce a congressional reaction. Fearing that the rule of reason would allow courts to sustain cartels that they deemed reasonable, Congress began to consider legislation to clarify or expand the scope of the Sherman Act. The end result was the enactment of the Clayton and the Federal Trade Commission Acts. The Clayton Act arguably provided more bright-line guidance by identifying specific practices that Congress thought could yield monopolistic results but which might not be covered by the Sherman Act. Thus, the Clayton Act contained bans against certain types of discriminatory pricing, distributional arrangements, mergers, and interlocking directorates. Illegality was defined in terms of likely effect of reducing competition. The Federal Trade Commission Act took an opposite approach. The FTC Act set forth a vague standard of illegality (unfair methods of competition) and created an administrative agency with the discretion to engage in case-by-case interpretation of the law.

#### Regulators underenforce – FTC and DOJ expertise is key

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

I. The Relative Efficiency of Antitrust and Regulation

The growing antitrust deference to regulation is cause for concern. Both antitrust and regulation are economic responses to market failures.46 Implemented correctly, both are designed to serve the ends of economic efficiency.47 It is therefore reasonable to judge the relative efficacy of antitrust and regulation by economic criteria. And judged by those criteria, virtually all economists would agree that antitrust-overseen market competition is superior to industry regulation. In particular, none of the arguments the Court has offered as a reason to prefer regulation to antitrust withstand scrutiny.

Relative expertise.

It is true, as the Court emphasized in Trinko and Credit Suisse, that antitrust courts are generalist courts, while regulatory agencies tend to specialize in a particular industry and its problems. That specialization should, all other things being equal, mean that expert regulators will do a better job than judges or juries of reaching the right result. But other things are far from being equal. Antitrust courts have two significant advantages over regulatory agencies when it comes to promoting competition.

First, antitrust courts are trying to promote economic efficiency, while regulators often aren’t. For decades, efficiency has served as the sole criterion on which to judge antitrust rules. And courts have had over a century in which to hone those rules to achieve that end. Without question, courts have made mistakes in the past. But there is a strong consensus among antitrust scholars that the wave of cases in the last 30 years has largely moved antitrust in the right direction, eliminating any significant risk that antitrust enforcement will do more harm than good.48 Scholars may fight over whether a Chicago School or a post-Chicago School approach will achieve the right result in specific cases,49 but for the most part they are tinkering at the margins: the law and the scholarship have converged with respect to both the proper goals of antitrust and the general rules that will achieve those goals.

Regulation, by contrast, is frequently not even intended to achieve economic efficiency through competition. Occasionally that is because of a legislative judgment that competition is impossible, though the number of industries thought to be natural monopolies for which markets won’t work has shrunk dramatically in the past four decades.50 Industry regulation that excludes entry in order to promote a natural monopoly, as telephone regulation did before 1984, is not likely to achieve a competitive outcome.

More often, the goals of the legislators who establish regulatory agencies, or the goals of the regulators who run those agencies, are to achieve something other than competition. Indeed, many regulations are aimed precisely at eliminating competition, as was the government- sponsored raisin cartel in Parker v. Brown51 or any of its modern descendent crop-support programs administered by the Department of Agriculture. It should be obvious that regulations intended to reduce competition will not promote it. But even if the regulation is not directly inimical to competition, competition is frequently irrelevant to, or at best a minor consideration in, a regulator’s agenda. Regulators may care about the safety and efficacy of a drug, for example, and only incidentally about whether there is competition in the sale of that drug. They may seek to reduce traffic deaths or air pollution by mandating technology, regardless of the effect that mandate has on the price manufacturers can charge or the number of products they sell. These are laudable goals, to be sure, but they are not competition-related goals. An agency tasked with achieving these goals is likely to ignore threats to competition from the industry it regulates so long as those threats do not compromise its core mission. Thus, the state and local governments that enacted the privately-drafted National Fire Protection Code at issue in Allied Tube into law were interested in stopping fires; doubtless they thought little if at all about the competitive effects of the code, even though it turned out that the code was drafted by interested private parties with the purpose of impeding competition rather than promoting fire safety.52

Even those agencies whose mission expressly involves consideration of competition issues will not necessarily make it their first among potentially conflicting priorities. The SEC, for example, which as Justice Breyer pointed out is dedicated to improving market information and expressly considers competition among other issues in setting regulation,53 is first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices. It is unlikely to devote much in the way of time or resources to such issues, because even if it is tasked to consider such issues they do not reflect the agency’s primary purpose. Similarly, even an agency like the Federal Communications Commission that is directly focused on competitive conditions in a particular market may naturally pay attention primarily to that market, and give less if any attention to the effect its rules might have on competition in adjacent markets or competition from unanticipated new businesses. This arguably explains the FCC’s willingness to largely ignore the effects of its decisions on the Internet, for example: it is telecommunications, not the Internet, that the FCC is tasked to regulate.

Agencies that view competition as secondary, or view it through the lens of a particular industry’s characteristics and interests, are less likely to create and enforce rules

that optimally encourage competition.54 At a bare minimum, therefore, the industry-specific expertise of an agency must be balanced against the competition-specific expertise of the specialist antitrust agencies: the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division.

## States

### 2AC – 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.

## Trade Off DA

### 2AC – FL

#### And the aff is done by the FTC

Christian Carlson 14 – Vanderbilt University, J.D.; University of Oxford, M.Sc. (forthcoming). “ARTICLE: Antitrusting the Federal Trade Commission: Why Courts Should Defer to Federal Trade Commission Antitrust Decision Making,” 12 DePaul Bus. & Comm. L.J. 361, Nexis.

Twenty-four years after the Sherman Act was passed in 1890, Congress acted to correct the haphazard way that antitrust law was being enforced and created the FTC. 8 Congress found judges insufficient as both experts and as policy makers. 9 Legislators created an administrative agency that has grown to include rulemaking authority and a mature technocratic structure.

A. FTC Founding Principles

In 1911, one Senator remarked before the Senate that "trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown [] so interwoven with the general business of the country as to make men tremble at the consequence of their disruption." 10 The Sherman Act had failed to free the market and some lawmakers found the problem to be institutional. 11 Legislators were concerned that "the opinion of any given man in any given case … whether he be judge or not, must depend largely, not upon his learning in the law but upon his training and bent in the economy of commerce." 12 A commission of "trained, skillful, men" was needed for [\*364] "the better administration of the law and to aid in its enforcement." 13 Enforcing the Sherman Act required more than general knowledge. 14

Antitrust's expertise problem was further compounded by legal ambiguities that gave an unmoored judiciary free rein to determine economic policy. 15 The Sherman Act § 1 prohibited "every contract, combination … or conspiracy in restraint of trade." 16 Read literally, the statute's sweeping language could prohibit fundamental business relationships and the establishment of business hours. But the Supreme Court found in Sinclair Oil that Congress could not have intended such a result and read a reasonableness exemption into § 1. 17 While this was no doubt the correct result, what restraints were reasonable and what restraints were not? 18

The rule of reason left the antitrust landscape uncertain. 19 Worse in Congressional eyes, unaccountable courts were wielding an ambiguous reasonableness standard to determine antitrust legality. 20 Courts were "employing the functions of the legislator rather than the lawyer." 21 Whenever the rule of reason was "invoked, the court did not administer the law, but made the law." 22 Courts not versed in commerce's niceties were left to make policy decisions based on their own political bent.

B. FTC Powers and Structure

Thus, the need for an independent expert agency forced Congressional hands. Congress and President Woodrow Wilson took action in 1914 to pass the Federal Trade Commission Act and establish the Federal Trade Commission. Today, the Act empowers the Commission to prohibit "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices." 23 The FTC Act's broad language [\*365] permits the FTC to enforce the Sherman Act and condemn "conduct that violates 'the spirit' of the Sherman [Act] … and even conduct that is otherwise 'unfair.'" 24

#### White-collar challenges fail – we’re blue

Loop 1/4 - Emma Loop is a Washington, D.C.-based freelance reporter focusing on national security, federal law enforcement, and politics. She has worked at BuzzFeed News, the Ottawa Citizen, and the Windsor Star, and has appeared in Vice Canada and on CBC News

[Emma, “The Biden administration is well positioned to fight white-collar crime as trillions of dollars in dirty money courses through the US financial system,” Business Insider, January 4th, 2021, https://www.businessinsider.com/biden-yellen-white-collar-crime-money-laundering-treasury-fincen-doj-2020-12]

The incoming Biden administration is poised to crack down on wealthy and well-connected lawbreakers, **reversing years of decline in** the federal government's **enforcement of white-collar crime.** That would mark a sweeping shift for the Department of Justice compared to both recent Democratic and Republican presidents who have [allowed](https://trac.syr.edu/tracreports/crim/514/) prosecutions of white-collar crime to drop to an all-time low. But as President-elect Joe Biden takes the reins in January, former federal prosecutors, academics, and lawmakers told Insider that there are two key reasons the new administration is well positioned to start reversing that trend. They cite foremost Biden's **Cabinet picks as a strong sign** that the Democratic-led executive branch will more aggressively fight white-collar crime — in particular, financial crimes like **money laundering and fraud** that can rob everyday people of their savings and handicap entire cities by draining public funds. One expert dubbed Janet Yellen, Biden's choice for the crucial post of Treasury secretary, "an incorruptible schoolmarm" who will take a tougher stance on overseeing the financial industry. Two of Biden's top contenders to lead the Department of Justice — outgoing Alabama Sen. Doug Jones and former Deputy Attorney General Sally Yates — are also experienced former federal prosecutors with long records of going after white-collar criminals. Biden's administration also will have a **powerful new law** at its disposal to go after people like Paul Manafort, the former Donald Trump campaign chair who admitted to using shell companies to hide the proceeds of his crimes in a 2018 [plea deal](https://assets.documentcloud.org/documents/4883343/D-D-C-1-17-Cr-00201-ABJ-422-0.pdf) with the special counsel Robert Mueller. **In December, Congress** passed t**he biggest reforms to the US anti-money-laundering regime since the post-9/11 Patriot Act**, including a rule forcing new shell companies to reveal their true owners to regulators. Lawmakers tucked the legislation inside a massive defense policy [bill](https://docs.house.gov/billsthisweek/20201207/CRPT-116hrpt617.pdf) that Trump vetoed, though the House and Senate later voted for the first time during the president's four-year term to override him. With the financial-crime language becoming law, **the Biden administration "will have a once-in-a-generation chance to put an end to U.S. corporations with hidden owners** — the U.S. shell companies being misused by criminals around the world," said Elise Bean, a former senior Senate staffer who investigated financial crime. "The whole world will be watching what the Biden administration does to implement the long-awaited beneficial ownership law, so it's going to be a high-profile issue from day one," she said. Journalists reveal a 'breathtaking amount of money laundering' Biden has yet to name an attorney general pick or say how his administration will approach white-collar crime, and money laundering in particular. But the new Democratic president will take office at a pivotal moment. In September, hundreds of media organizations published **the** [**FinCEN Files**](https://www.buzzfeednews.com/fincen-files), a global investigative project that laid bare how **the US fails to stop the flow of dirty money** through its financial system, **allowing drug cartels, terrorists, and kleptocrats** to use American banks to clean their ill-gotten gains. "The breathtaking amount of money laundering facilitated by major financial institutions across the globe that was exposed by the FinCEN Files, to me, evidenced the lack of political will and commitment of regulators and law enforcers to tackle the enormous problem," said Paul Pelletier, a former federal prosecutor who now teaches courses in international money laundering at George Washington University. The FinCEN Files, led by BuzzFeed News and the International Consortium of Investigative Journalists, was based on thousands of pages of secret government documents known as suspicious-activity reports, or SARs. Financial institutions must file SARs to an agency within the Treasury called the Financial Crimes Enforcement Network, or FinCEN, when they spot possible evidence of wrongdoing in their accounts. Those SARs can then serve as critical clues in investigations by law-enforcement agencies across the country, including federal ones. Whatever the new Biden administration's exact approach, **it will be crucial to determining whether the US can finally turn the tide on the** [**trillions of dollars**](https://www.icij.org/investigations/fincen-files/dirty-money-has-metastasized-within-global-banking-system-top-regulator-says/) **in dirty money coursing** through its financial institutions and corrupting the global economy — all while enriching the banks. Despite its slick name, white-collar crime can also be just as dangerous — if not more dangerous — than violent crime. As the FinCEN Files [showed](https://www.icij.org/investigations/fincen-files/with-deutsche-banks-help-an-oligarchs-buying-spree-trails-ruin-across-the-us-heartland/), factory workers were severely injured and others lost their jobs after a Ukrainian oligarch bought up expensive Cleveland real estate that prosecutors say was used to launder funds. That oligarch — Ihor Kolomoisky — is [under investigation](https://apple.news/Ay845U9vUQRuCPQiKKmbPUA) by a federal grand jury and, depending on the outcome, could face prosecution from the Department of Justice under Biden. Deutsche Bank, the [troubled](https://apple.news/AsorLSFPiTSKI-hoc2l-MPg) German lender with deep ties to Trump, has also [reportedly](https://www.nytimes.com/2019/06/19/business/deutsche-bank-money-laundering-trump.html) been under federal investigation for possible failures in its money-laundering defenses. Biden's long history with the financial industry Biden has faced [criticism](https://www.motherjones.com/politics/2019/11/biden-bankruptcy-president/) for helping the financial sector during his 36 years in the Senate representing Delaware, a state notorious for its anonymous shell companies and corporate secrecy. Wall Street also was [generous](https://apple.news/ASFFm_EhHTauw_EsKU6MOLw) to his Senate and most recent presidential campaigns, and his transition team [includes](https://www.politico.com/newsletters/transition-playbook/2020/12/14/goldman-sachs-vets-quietly-added-to-biden-transition-491143) two former Goldman Sachs employees, Eric Goldstein and Monica Maher, among other banking-industry veterans. But that team also [includes figures](https://www.nytimes.com/2020/11/13/us/politics/bidens-financial-transition-teams.html?action=click&module=RelatedLinks&pgtype=Article) like Gary Gensler, the former Commodity Futures Trading Commission chief who has called for stricter industry oversight. Biden himself has also appeared to shift his attitude since his days on Capitol Hill. He [told](https://www.newyorker.com/news/daily-comment/will-joe-bidens-history-lift-him-up-or-weigh-him-down) The New Yorker in 2014 that he regretted supporting the repeal of a banking law during the final year of the Clinton administration that would go on to help pave the way to the 2008 financial crisis. And in a 2020 Democratic presidential primary influenced by populists like Sens. Elizabeth Warren and Bernie Sanders — who've long advocated for tougher oversight of corporate crime — Biden [called](https://apple.news/ALLkPouGXTfGxgrnz98gzrQ) Wall Street "greedy as hell." Meanwhile, Vice President-elect Kamala Harris touted her record of taking on financial institutions back when she was California attorney general in the fallout of the 2008 housing crisis, despite critics who [have said](https://apple.news/AnAALs1n6RXewy5GSJwxu6g) she didn't go far enough. "I am the only one on this stage who has prosecuted the big banks for taking advantage of America's homeowners," Harris [told](https://twitter.com/CBSEveningNews/status/1314034506463096832) Vice President Mike Pence during a debate in October. 'The cases aren't strong enough' Lawmakers like Warren and Sanders have [called for](https://www.icij.org/investigations/fincen-files/fincen-files-bernie-sanders-and-elizabeth-warren-join-watchdog-groups-in-calling-for-banking-reforms/) [more](https://www.icij.org/investigations/fincen-files/jail-bankers-who-allow-money-laundering-top-democrat-in-u-s-senate-banking-committee-says-in-wake-of-fincen-files/) prosecutions of bank executives in response to the FinCEN Files, while others have urged the Department of Justice to reduce the increasing number of deals it strikes with financial institutions caught breaking the law. Those deals, known as deferred prosecution agreements, allow banks to dodge criminal charges by paying a fine and promising to clean up their act — which they often [fail to do](https://apple.news/ApHWk3uvOTEWPTAeqjRBD9g). The growing use of those agreements in major financial crime cases has, unsurprisingly, coincided with a drop in prosecutions. Though the Department of Justice has [defended](https://apple.news/PA-PxG1D0ixtyCSNlKJtC1l) its record, white-collar-crime prosecutions have been declining since President Barack Obama's second term, according to the [Transactional Records Access Clearinghouse](https://trac.syr.edu/tracreports/crim/514/) at Syracuse University, which analyzes Justice Department data. Despite a spike in the years following the financial crisis**, prosecutions have dropped more than 31% since 2008,** the analysis shows. "**The reason that they're doing the deferred prosecution agreements instead of something that has more teeth is because the cases aren't strong enough,"** said Pamela Pierson, a former federal prosecutor who worked on dozens of white-collar crime cases in the 1980s. Pierson, now a law professor at the University of Alabama, said **the cases require a lot of resources**, and that other priorities like terrorism take up a lot of those resources. **On top of that**, she said, **white-collar cases are incredibly difficult to win with juries because of their complex nature. "**That burden of proof, beyond a reasonable doubt, is quite challenging to meet when you are talking about spreadsheets and numbers," she said. Congress passes reforms years in the making Over the past decade, as newsrooms published a series of [investigations](https://www.icij.org/investigations/panama-papers/panama-papers-faq-all-you-need-to-know-about-the-2016-investigation/) about dirty money, members of Congress and their staff were slowly pushing anti-money-laundering legislation closer to the finish line. Their challenge required working to build the needed coalition of support from key stakeholders like banks and law enforcement. The first [version](https://www.congress.gov/bill/110th-congress/senate-bill/2956/cosponsors?searchResultViewType=expanded) of the bill was introduced in 2008, so long ago that it was cosponsored by then-Sen. Obama of Illinois. "Congress has been working on updating [money-laundering] regulations on a bipartisan basis for years," said Missouri Rep. Blaine Luetkemeyer, a Republican member of the House Financial Services Committee. "Personally, I have been working on this for nearly five years." Then, in December, the legislative push finally reached the home stretch when a bipartisan group of lawmakers secured its inclusion in the must-pass yearly defense bill. Seeing another public reporting project "revealing the extent of the abuse of anonymous shell companies over the years" helped, according to a congressional staffer familiar with the process. "The FinCEN Files came at a time when we were still involved in ongoing negotiations," said the staffer, who requested anonymity to discuss internal deliberations. "I think it did provide some additional impetus to getting it done." The bill forces the Department of Justice to submit yearly accountings of their deferred prosecution agreements to Congress, and orders the Treasury to write new regulations to further crack down on illicit finance. 'They recognize that they have to move in a timely way' The **Biden** transition team is **already preparing** for Treasury's new obligations, the congressional source said. "We have been talking with them about the need to do the rulemakings that will be required, and implementation, enforcement that would be required by the new law, and to have strong and clear rules," the person said. "And they're quite amenable to that. They recognize that they have to move in a timely way and are seized of it." The person also said they're confident that the Biden administration "will be more assertive" in tackling financial crime, citing the president-elect's Cabinet picks so far. "Many of them have long served in government," the source said, "and have a record of more assertive enforcement and implementation of laws in this space." Bean, the aforementioned former Senate aide, also said she has faith that the new administration possesses the "skills and savvy" to use the new law "to combat a long list of wrongdoing, from corruption to terrorism to tax evasion." Virginia Sen. Mark Warner, one of the authors of the Illicit Cash Act — a more recent version of the anti-money-laundering bill — is "very pleased so far" with the nominations of Yellen to lead Treasury and Wally Adeyemo to be deputy secretary, a spokesperson said. Adeyemo, who has occupied senior positions at Treasury, also served as a deputy national security advisor to Obama. "He will be a great person to oversee implementation of the Illicit Cash Act reforms," the spokesperson said. Jones and Yates are seasoned in white-collar cases Warner's bill also counts Jones as a cosponsor. The Alabama Democratic senator, who lost in November to Republican Tom Tuberville, now is seen as a top candidate to serve under Biden as attorney general. Jones is a former longtime federal prosecutor with extensive experience pursuing white-collar-crime cases. Pelletier, whose work as a federal prosecutor focused on fraud, said Jones "has the experience and, as US attorney in Alabama, courageously tackled the tough cases" — essential qualities, he said, for anyone charged with reinvigorating white-collar prosecutions at the Justice Department. Pierson, who says she has known Jones for more than 30 years, also cited his willingness to take on difficult cases as evidence of his abilities as an attorney general. She referenced Jones' work [prosecuting](https://apple.news/PgGf4-ZXxpxF2LRLEvlMDWY) two of the Ku Klux Klan members involved in the 16th Street Baptist Church bombing in Birmingham in 1963. Though it wasn't a white-collar case, it took a "true act of courage" for Jones to take it on more than three decades later, in 2001, Pierson said. "It was not at all clear that he was going to be able to prevail," she said. And he was "unbelievable," she added. Even her young son and his friends, whom she took out of school to watch the trial at the courthouse, thought so. "I don't know if you've been around 11- or 12-year-old boys, but they are incapable of sitting still," Pierson said. "And they were as still as stone. They were captivated by that trial." She said **Jones "is a white-collar specialist" and "knows from the ground up how to pursue these cases,**" making him well qualified to beef up the Department of Justice's prosecutions in that area. Jones knows that using insiders and whistleblowers is key to strengthening cases, and he would also know how to propose more legislative fixes to make that work easier, Pierson said. Another front-runner to lead the Justice Department is Yates, who served as deputy attorney general for two years until the early days of the Trump administration, when she was fired after refusing to enforce the president's travel ban against majority-Muslim countries. She's known for having written a [memo](https://www.justice.gov/archives/dag/file/769036/download) in 2015 encouraging prosecutors to pursue charges against individuals when tackling corporate crime. But Yates is [unpopular](https://apple.news/AKeJyHj4wTsiojVEcrYna_w) with Senate Republicans for her role in the FBI's investigation into Russian interference in the 2016 presidential election, and she likely would need their support to be confirmed if the GOP retains control of the chamber after the Georgia runoff elections. Either way, Moyara Ruehsen, an expert in investigating money laundering, says she hopes the new administration will re-embrace "the attitude that was developed in the 2015 Yates memo, holding actual individuals accountable."

#### SEC solves

Wiggin & Dana 2014, (A full service law firm -- clients are publicly traded companies, entrepreneurs and emerging growth companies, real estate developers, financial institutions,   
“TIME TO FOCUS ON COMPLIANCE PROGRAMS AGAIN: SEC ENFORCEMENT ACTIONS AND SANCTIONS ARE ON THE RISE”, 10/31/2014, <http://www.wiggin.com/15507>) BBer

Probably to no one's surprise, given the SEC's much publicized enforcement efforts, the Commission has announced that it filed a record number of enforcement actions over the last three fiscal years and secured record payouts in penalties and disgorgements.[1] Over this period, the SEC has taken aim at a broad spectrum of conduct in the securities markets and targeted a diverse range of market actors. Although the SEC has divided its focus across a range of different areas, three themes have emerged from its increased enforcement activity. First, the SEC has aggressively targeted lapses in regulatory compliance and risk controls over a broad spectrum of conduct and industries. Second, the SEC has increasingly relied on technology to detect such misconduct. And third, the SEC has made substantial awards to whistleblowers for providing information that has led to successful enforcement actions. Considering this increase in enforcement activity, companies and individuals engaged in business relating to the financial industry need to be prepared to meet the SEC's heightened scrutiny. With this in mind, it is a good time to revisit compliance programs, policies and procedures to assure they are up-to-date and focus on the concerns of the SEC and requirements of the securities laws. According to a recent press release, the Commission reported that it had filed a record high of 755 enforcement actions in Fiscal Year ("FY") 2014. Along with those actions was another high mark: orders for penalties and disgorgement in the amount of $4.16 billion. That reflects a 22% increase in penalties and disgorgement as a result of SEC enforcement actions over last year. In FY 2013, the Commission filed 686 enforcement actions and obtained orders totaling $3.4 billion in disgorgement and penalties. In FY 2012, the Commission filed 734 enforcement actions and obtained orders totaling $3.1 billion in disgorgement and penalties. The SEC continued to crack down on traditional financial fraud, charging more than 135 parties with violations relating to reporting and disclosure. At the same time, it continued its focus on misconduct relating to complex financial instruments such as mortgage-backed securities and collateralized debt obligations, and it brought several novel actions targeting deficient compliance and control practices. For example, the SEC successfully held global investment bank and brokerage firm Jefferies LLC responsible for its failure to properly supervise trading on its mortgage-backed securities desk. The SEC also brought actions, for the first time, under a rule requiring firms to establish adequate risk controls before providing customers with market access. It imposed the largest penalty ever for net capital rule violations in a case against a high frequency trading firm and a former senior executive. And it also filed enforcement actions against the New York Stock Exchange and brokerage subsidiaries for their failure to comply with exchange rules, and Wells Fargo Advisors LLC in the Commission's first case against a broker-dealer for failing to protect a customer's material nonpublic information. The compliance and control practices and procedures of private equity firms, investment advisers and investment companies were also in the SEC's line of sight. According to the Commission, it brought its first-ever action under the investment adviser "pay-to-play" rule. The SEC also filed its first action arising from a focus on fees and expenses charged by private equity firms. It also instituted an action against a private equity firm and its president, alleging fraud in the allocation of expenses to the firm's funds. Finally, the Commission charged three investment advisory firms with failure to maintain adequate controls on the custody of customer accounts. Accountants, attorneys and compliance professionals also found themselves contending with SEC enforcement actions this past year. In one matter, the SEC filed an action against Ernst & Young LLP relating to auditor independence rules. In another, the SEC filed an action against an audit firm and four of its auditors for their roles in the failed audits of three China-based companies. The Commission charged two Florida-based attorneys, a transfer agent and its CEO for their roles in an offering fraud involving improper distributions of billions of shares of unregistered stock. Finally, in a fraud case, the Commission charged a company's audit committee chair, who learned of the misconduct in question and failed to take meaningful action to investigate it or disclose it to investors. The SEC also touted its success in using new technologies to detect market misconduct over the last three years. SEC Chair Mary Jo White stated that "[t]he innovative use of technology – enhanced use of data and quantitative analysis – was instrumental in detecting misconduct and contributed to the Enforcement Division's success in bringing quality actions that resulted in stiff monetary sanctions." The SEC successfully used quantitative analytics to identify especially high rates of filing deficiencies and brought coordinated charges against 34 individuals and companies for violating laws requiring them to promptly report information about their holdings and transactions in company stock. The SEC pursued wrongdoing by asset managers through proprietary analytics that identify hedge funds with suspicious returns. It also employed "next generation analytical tools to help identify patterns of suspicious trading" in its continued efforts to eliminate trading on the basis of inside information. Over the last three years, the SEC charged 80 people in connection with insider trading and, among those charged are a former hedge fund trader, a portfolio manager, the co-chairman of a board, an investment banker, an investor relations executive, an accountant, husbands who traded on information they learned from their wives, and a group of golf buddies and other friends. There is every reason to expect that the continued use of these techniques will lead to more enforcement actions across a broad spectrum of market conduct. Lastly, the SEC's record payout of awards to whistleblowers is bound to incentivize whistleblowers to come forward and may lead to more prosecutions of individuals. In FY 2014, nine whistleblowers received awards totaling approximately $35 million, including one that was more than $30 million for a whistleblower who provided key original information that led to a successful enforcement action. That award was the largest-ever whistleblower award. The Commission also demonstrated its commitment to protect whistleblowers in that it brought its first charges under new authority to bring anti-retaliation enforcement actions. In that case, the SEC charged a hedge fund advisory firm with engaging in prohibited principal transactions and then retaliating against the employee who reported the trading activity to the Commission. It also charged the firm's owner in connection with the principal transactions. In terms of actions against individuals in addition to companies, as U.S. Attorney General Eric Holder recently remarked, cases against individuals are more easily brought when there is a witness who is able to provide evidence of a corporate executive's knowledge of and intent to participate in wrongdoing.[2] Those witnesses are more incentivized to come forward when there is a robust whistleblower program. Undoubtedly, the recent provision of substantial awards to whistleblowers will provide such incentive for people to come forward when they are aware of possible illegal conduct and may lead to increasingly vigorous investigation and enforcement activity against not only companies but also individuals. According to Chair White over the last three years, "aggressive enforcement against wrongdoers who harm investors and threaten our financial markets remains a top priority, and we brought and will continue to bring creative and important enforcement actions across a broad range of the securities markets." As Chair White's and the Commission's statements reflect, the SEC is committed to using modern data analytics and investigative techniques to monitor the securities markets and enforce the securities laws. Further, whistleblower awards and legal mechanisms designed to protect whistleblowers from retaliation by their employers have made it more likely that people in possession of information relating to possible wrongdoing will report it to law enforcement authorities and both corporations and individuals will be prosecuted on the basis of that information. Moreover, the SEC continues to hone in on firms' deficient compliance and control practices through bringing novel actions charging companies with violating various laws and rules. Thus, companies and individuals engaged in business relating to the financial industry should expect to encounter even more aggressive enforcement of the securities laws from the SEC. Going forward, a company's compliance programs, policies and procedures will likely be subject to heightened scrutiny by the SEC. With this in mind, now is a good time to re-evaluate compliance programs and internal controls to assure that they are up-to-date, that best practices have been adopted and are being followed, and that, importantly, they adequately address the SEC's concerns.

#### 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.

#### No nuke terror – people like Allison are hacks

* Two decades of threats haven’t panned out
* Too many things can go wrong:

Getting trusted collaborators

Stealing and transporting guarded material

Getting the top technicians in the world

No ability to test

Skilled detonation crew

All that while attracting zero attention

* Weapons have safety devices, are stored in pieces in different places
* Terrorists are like Bond villains that scheme instead of accomplishing anything
* Most attacks are bombs which don’t even work

Mueller and Stewart 10/29/18 [John Mueller is Woody Hayes Senior Research Scientist, Mershon Center for International Security Studies, and adjunct professor of Political Science, at Ohio State University. He is also a Senior Fellow at the Cato Institute in Washington. Mark G. Stewart is Professor of Civil Engineering and Director of the Centre for Infrastructure Performance and Reliability at The University of Newcastle in Australia. Terrorism and Bathtubs: Comparing and Assessing the Risks. October 29, 2018. https://www.tandfonline.com/doi/abs/10.1080/09546553.2018.1530662?journalCode=ftpv20]

However, there is of course no guarantee that things will remain that way, and the 9/11 attacks inspired the remarkable extrapolation that, because the terrorists were successful with box cutters, they might soon be able to turn out weapons of mass destruction— particularly nuclear ones—and then detonate them in an American city. For example, in his influential 2004 book, Nuclear Terrorism, Harvard’s Graham Allison relayed his “considered judgment” that “on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not.”11 Allison has had a great deal of company in his alarming pronouncements. In 2007, the distinguished physicist Richard Garwin put the likelihood of a nuclear explosion on an American or European city by terrorist or other means at 20 percent per year, which would work out to 91 percent over the eleven-year period to 2018.12

Allison’s time is up, and so is Garwin’s. These off-repeated warnings have proven to be empty. And it is important to point out that not only have terrorists failed to go nuclear, but as William Langewiesche, who has assessed the process in detail, put it in 2007, “The best information is that no one has gotten anywhere near this. I mean, if you look carefully and practically at this process, you see that it is an enormous undertaking full of risks for the would-be terrorists.”13 That process requires trusting corrupted foreign collaborators and other criminals, obtaining and transporting highly guarded material, setting up a machine shop staffed with top scientists and technicians, and rolling the heavy, cumbersome, and untested finished product into position to be detonated by a skilled crew, all the while attracting no attention from outsiders.

Nor have terrorist groups been able to steal existing nuclear weapons—characteristically burdened with multiple safety devices and often stored in pieces at separate secure locales—

from existing arsenals as was once much feared. And they certainly have not been able to cajole leaders in nuclear states to palm one off to them—though a war inflicting more death than Hiroshima and Nagasaki combined was launched against Iraq in 2003 in major part under the spell of fantasies about such a handover.14

More generally, the actual terrorist “adversaries” in the West scarcely deserve accolades for either dedication or prowess. It is true, of course, that sometimes even incompetents can get lucky, but such instances, however tragic, are rare. For the most part, terrorists in the United States are a confused, inadequate, incompetent, blundering, and gullible bunch, only occasionally able to get their act together. Most seem to be far better at frenetic and often self-deluded scheming than at actual execution. A summary assessment by RAND’s Brian Jenkins is apt: “their numbers remain small, their determination limp, and their competence poor.”15 And much the same holds for Europe and the rest of the developed world.16 Also working against terrorist success in the West is the fact that almost all are amateurs: they have never before tried to do something like this. Unlike criminals they have not been able to develop street smarts.

Except perhaps for the use of vehicles to deliver mayhem (though this idea is by no means new in the history of terrorism), there has been remarkably little innovation in terrorist weaponry or methodology since 9/11.17 Like their predecessors, they have continued to rely on bombs (many of which fail to detonate or do much damage) and bullets.18

## Biz con

### 2AC – Biz Con

#### 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%).

#### Monopoly pricing and selective licensing undermines 5G innovation---FRAND enforcement is key.

Actonline 20, the App Association represents more than 5,000 app companies and information technology firms across the mobile economy; (August 26th, 2020, “Save Our Standards: The Ninth Circuit Court of Appeals Reverses Decision in FTC v. Qualcomm”, <https://actonline.org/2020/08/26/save-our-standards-the-ninth-circuit-court-of-appeals-reverses-decision-in-ftc-v-qualcomm/>), ability edited

Moreover, the FRAND agreement is a critical tool used by standard setting organizations to ensure the process enhances competition and does not run afoul of antitrust laws. Generally, a collaboration between competitors to choose market winners or set prices raises significant questions for competition regulators. Royalty free and FRAND licensing requirements were created by standards bodies to avoid potential antitrust scrutiny by limiting the market power and the potential for abuse by those involved in developing a standard. This is why the American National Standards Institute (ANSI) will not accredit any standards developing organization (SDO) that does not require standard-essential patent holders to provide licensing terms at least as favorable as FRAND.

The most important beneficiary of open interoperability standards and FRAND licensing requirements are the entrepreneurs and small businesses that have long fueled America’s innovation engine. They don’t have giant patent portfolios, market power, or the resources to hire legions of lawyers and spend years battling SEP abusers in civil court. Without some level of certainty about their ability to obtain licenses—let alone what they may cost—entrepreneurs will have trouble justifying the pursuit of any innovation that uses a standard and will certainly struggle to raise money from investors for such innovation. And Qualcomm’s vague and toothless promise simply “not to sue” smaller companies and component makers is no substitute for a license.

The adoption of 5G technology is expected to open unprecedented opportunities for innovation and economic growth as we move toward a world where everything from cars to tractors to buildings will connect to wireless networks. At every stage of the information technology revolution, America has been the undisputed leader because of the unparalleled entrepreneurial innovation ecosystem that we have built. If 5G SEP holders are able to arbitrarily refuse licenses to smaller firms, it would ~~cripple~~ undermine America’s innovation ecosystem at the start of the next big wave of innovation. As economic tensions continue to rise with China, Chinese-based companies could use their 5G SEPs as international economic weapons to thwart U.S. competitors.

The 5G standard is supposed to be a platform for competition, innovation, and entrepreneurship, but if the Ninth Circuit decision is allowed to stand, it will become a chokepoint for snuffing out competitors and demanding monopoly rents. Open standards and FRAND licensing commitments are fundamental to competition in the modern economy, and the idea that they aren’t a subject for antitrust enforcement is patently absurd.

### 2AC – AT: Keating

#### Keating isn’t a link – ab changing CWS which we don’t do

Keating 21 (Raymond J. Keating – Small Business & Entrepreneurship Council chief economist, February 24 2021, “The Treacherous Turn on Antitrust Regulation of U.S. Tech Companies”, https://sbecouncil.org/2021/02/24/the-treacherous-turn-on-antitrust-regulation-of-u-s-tech-companies/, accessed 8/16/21, DL)

• Proposal: “Reasserting the anti-monopoly goals of the antitrust laws and their centrality to ensuring a healthy and vibrant democracy.” – “[T]he Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.” Response: This proposal would toss out the consumer welfare standard, and replace it with a broad basis for undermining businesses that have earned considerable market share. Antitrust actions would return to a period in which politics, special interest influences, rent-seekers, and uncertainty held even greater sway over the realm of antitrust – even more so than it does today. By effectively giving more control over business decisions and models to a political class that often fails to understand current business and market conditions, never mind where industries and markets are headed in the future, there inevitably will be losses in terms of innovation, investment, efficiency, and growth. • Proposal: “Structural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” – “Structural separations prohibit a dominant intermediary from operating in markets that place the intermediary in competition with the firms dependent on its infrastructure. Line of business restrictions, meanwhile, generally limit the markets in which a dominant firm can engage.” Response: Again, having government determine and dictate business decisions, rather than having decisions made by businesses and entrepreneurs subject to market competition and consumer sovereignty would mean lost innovation, productivity and consumer benefits.

### Econ d

#### 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.

## 1AR

### Reg CP

#### International patent law goes faster – means the perm shields the link

Long 16 [David, over twenty-years’ experience litigating complex patent cases in the telecommunications industry. He founded The Essential Patent Blog that focuses on litigating standard essential patents and other important patent law issues. “Litigating Standard Essential Patents at the U.S. International Trade Commission”. https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2012/12/2016.01.28-SEP-Litigation-in-ITC-D.-Long.pdf]

The ITC can be an appealing forum for patent litigation over federal district courts for a variety of reasons: it offers rapid decisions (investigations can be completed within 12 to 16 months) and boasts administrative law judges who are well-versed in the nuances of complex patent cases and technology.

4

The bulk of Section 337 investigations involve technology-related industries, such as patents dealing with wireless communications, electronics and computers.5 In addition to its quick timetable for reaching decisions on cases, the ITC has in rem jurisdiction over the actual infringing products, meaning that its decision can impact foreign companies that otherwise may be beyond the purview of federal courts, because the ITC’s jurisdiction covers the products of such companies as they seek entry at the U.S. border. The ITC also has robust discovery similar to what is available in U.S. district courts.

## DA

### 1AR – Other Factors

#### Other factors weaken business confidence.

Eric Rosenbaum 21. Senior Editor. “Politics, inflation pinch as small business confidence rises slower than markets and economy” CNBC. 05-03-21. <https://www.cnbc.com/2021/05/03/politics-inflation-pinch-as-small-business-confidence-trails-economy.html>

**Confidence** among small business owners has barely risen as fears about **inflation, hiring costs, tax hikes and partisan politics** weigh on Main Street as it shows some signs of returning to pre-pandemic levels. According to a CNBC|SurveyMonkey Small Business Survey conducted last month, **64% of entrepreneurs say their business can survive** more than a year under current business conditions as the wave of shutdowns and bankruptcies that crushed many Main Street enterprises eases and the country emerges from Covid-19. That’s up from 55% in the first quarter. The survey also found that 34% of business owners think current business conditions are good. The survey’s Small Business Confidence Index ticked higher to 45 in the current quarter from a record low of 43 in the first quarter. To be sure, that’s still a negative sentiment reading. “In the middle, confidence wise, is appropriate, because there are still lots of unknowns as far as the recovery,” Small Business & Entrepreneurship Council President Karen Kerrigan said. “Many are still digging out ... paying back-rent, getting back to a normal level of revenue.” The percentage of business owners forecasting a revenue decrease over the next year dropped to 18% from 27% last quarter. Less than half, 46%, expect revenue to grow. Biden’s infrastructure plan and Main Street The U.S. economy is staging a sharp recovery as several rounds of stimulus checks have buoyed consumers. President Joe Biden’s infrastructure plan and spending priorities are also expected to provide an economic boost. But **views about the president’s ambitions are mixed on Main Street.** While just over half of small business owners support Biden’s infrastructure legislation, there is a divide on Main Street driven by party affiliation. According to the survey, 97% of small business owners who identify as Democrats and Democratic leaners support The American Jobs Plan. That drops to 55% among independents and to 23% among Republicans and GOP leaners. The tax policy needed to fund the infrastructure plan **divides small business owners**, with 39% of entrepreneurs in favor of paying for the measures by raising the corporate tax rate to 28% from 21%, while **59% disapprove**. The partisan split here is also wide: 85% of Democrats and Democratic leaners approve of a corporate tax hike, along with just 38% of independents and a mere 13% of Republicans and GOP leaners “We view this as a fragile recovery and these proposals certainly infuse a little more uncertainty into that,” said Kevin Kuhlman, vice president of federal government relations at the National Federation of Independent Business. The NFIB’s most-recent survey found small business confidence is back at its historical average after being below that level for nearly a year. Certain industries within the small business community should benefit from infrastructure spending, such as construction and internet services. But Biden’s alignment with labor unions could dampen expectations among small business owners over the plan’s potential benefits. “Most companies are not union companies,” Kerrigan said, though she added most do view infrastructure spending positively. Fears about inflation, hiring As businesses attempt to get back to normal, finding workers and supply chain issues are **still headwinds for operating at full capacity.**

#### Growth’s slowing AND future COVID shocks thump biz con

Howard Schneider 21, Reporter for Federal Reserve with Thomson Reuters, and Trevor Hunnicutt, Investment Reporter at Staff Writer at Reuters, “U.S. Economy's Hot Vax Summer Ends in Cool COVID Fall as Delta Rises”, Reuters, 9/3/2021, https://www.reuters.com/business/us-economys-hot-vax-summer-ends-cool-covid-fall-delta-rises-2021-09-03/

The promise of a "normal" U.S. economy this summer, which kicked off with the June revival of restaurants, air travel and baseball games, is transforming into an uncertain fall of rising health and economic risks.

Labor Day weekend, the traditional end of the U.S. summer season, was pegged as the moment when the economy would finally transition out of the pandemic slump, with private sector jobs and wages replacing unemployment benefits.

Instead, the summer is closing with rising COVID-19 case counts, hospitals bulging with patients, a sharp slowdown in jobs and dark predictions. Most startling - the University of Washington's Institute for Health Metrics and Evaluation projects that between now and Dec. 1 there will be 100,000 COVID deaths, more than in the same period last year, when a wave of winter infections took hold and vaccines were not yet available.

"I don't think fall 2021 is going to give us the catharsis we were waiting for," said Nick Bunker, economic research director for hiring site Indeed, or provide a clear view of how fast U.S. job markets can recover the 5.3 million jobs missing from before the pandemic. "The transition is going to be longer than expected. The issue is, is it a stumble or does the baton get dropped?"

Nonfarm payrolls increased by 235,000 jobs last month after surging 1.053 million in July, the Labor Department said Friday. Economists had expected 728,000 new jobs. read more

Special $300-per-week unemployment benefits end on Saturday. While employers hope that will usher new job applicants into a labor-starved market, there are signs the pandemic may have begun to curb their hiring plans instead. read more

The reopening of schools, far from smoothing the way for parents to return to full-time jobs, has been marked by erratic outbreaks, quarantines and closures, as school boards battle over masking students.

The manager at The Irish Whisper, a pub near the Gaylord National Resort and Convention Center in Oxon Hill, Maryland, said that business has fallen off since an initial summertime rush.

"It's not as great as pre-COVID, but it's better than not having anything," said the manager, who only gave his first name Andrew. "I thought we were in the clear and then this variant emerged."

After a strong start early this summer, attendance is dropping in baseball stadiums.

BIDEN'S VIRUS OVERSHADOWED

It is a particularly sensitive moment for U.S. President Joe Biden.

The Democratic president has taken a hit in the polls from the resurgent virus, faces criticism over the Afghanistan withdrawal and must deal with the aftermath of Hurricane Ida and a gauntlet of deadlines in Congress in coming weeks to keep the government funded and his economic agenda on track.

"There's a lot more work to do," to fix the U.S economy, Biden said Friday, addressing the weak jobs numbers. ""We need to make more progress in fighting the Delta variant," he said, repeating that it was a pandemic of the unvaccinated.

Biden's strategy of wiping out COVID by getting all of the United States vaccinated was hindered by a politically charged anti-vaccination movement this summer, and the pace of vaccinations has slowed since peaking in April.

A run of higher-than-expected inflation due to supply chain woes and labor shortages consumed what would otherwise have been healthy wage gains. A closely watched index of consumer confidence, which can influence spending, tumbled in August to a six-month low.

Progress on the virus "is (Biden's) No. 1 advantage, but people are discouraged and frustrated and it's also interacting with the economy," said one Biden adviser not authorized to speak on the record.

Administration officials believe the recovery largely remains on track, and infrastructure and spending plans may partly make up for the lapsed weekly unemployment insurance payments.

Democrats are hoping to finalize a $1 trillion bipartisan infrastructure bill as soon as this month while also working on a $3.5 trillion bill that could only secure party-line support.

"This bill is going to end years of gridlock," Biden said of the smaller infrastructure bill. "Both literally and figuratively it's going to change things," he said.

Republicans are fighting the administration's most ambitious spending plans. Goldman Sachs economists now estimate the "fiscal cliff," as spending rotates away from the record government transfers of the past 18 months, will be a noticeable drag on growth by late 2022.

Oxford Economics economists expect to trim their outlook for 2021 gross domestic product growth to 5.5%, down from 7% in early August.

The reduction reflects "the deteriorating health situation weighing on optimism and spending, lingering capital and labor supply constraints and a slower inventory rebuild," Oxford chief U.S. economist Gregory Daco said in an email.

DELTA WEIGHS ON HIRING

The August jobs data released Friday showed the current surge of infections, which drove the number of new cases from around 11,000 a day in mid-June to almost 150,000 daily this week, slowed hiring and the broader recovery.

"Today’s report has the Delta variant written all over it," Indeed's Bunker said. "It is clear that the recent surge in COVID-19 cases is a strong headwind to the labor market."

Economists are not expecting the sort of collapse in demand for restaurants, travel and other services seen in earlier virus waves. Many Federal Reserve officials feel businesses and families have learned to navigate the situation, either finding ways to lower the risk of infection as they resume work and business, or worrying less about infection because they're vaccinated.

The disappointing 235,000 in new jobs comes as the unemployment rate fell to 5.2% from 5.4% in July. It has, however, been understated by people misclassifying themselves as being "employed but absent from work."

Some employers argue that job growth figures could be much higher, given the record number of openings, if they had not had to compete with unemployment benefits. That hasn't been borne out in states that ended the federal benefits early over the summer, where there's little evidence more people went back to work.

Instead, employers seem to be pulling back on hiring themselves.

### 1AR – Slow Growth

#### No impact to slow growth.

Dr. Christopher J. Fettweis 17, Associate Professor of Political Science at Tulane University, PhD in Government and Politics from the University of Maryland, “Unipolarity, Hegemony, and the New Peace”, Security Studies, Vol. 26, No. 3, p. 434-442 [language modified]

Others are more skeptical of institutions’ potential to shape behavior, and believe instead that stability is dependent upon the active application of the hegemon’s military power.51

The second version of the hegemonic-stability explanation is based upon a different view of human nature than is the liberal, one less sanguine about the potential for voluntary cooperation. Actors respond to concrete incentives, according to this outlook, and will ignore rules or law if transgressions are not punished. The would-be hegemon must enforce stability, therefore, not merely establish it. Policing metaphors are common in this literature, with the United States playing the role of sheriff or globocop charged with keeping the peace.52

[FOOTNOTE]

52 Richard N. Haass, The Reluctant Sheriff: The United States after the Cold War (New York: Council on Foreign Relations Press, 1997); Colin S. Gray, The Sheriff: America's Defense of the New World Order (Lexington: University Press of Kentucky, 2004).

View all notes

[END FOOTNOTE]

Take away the police, or damage their credibility, and instability would soon return. “The present world order,” according to Robert Kagan, “is as fragile as it is unique,” and would collapse without sustained US efforts.53 “In many instances,” add Lawrence Kaplan and William Kristol, “all that stands between civility and genocide, order and mayhem, is American power.”54 Though this argument is commonly associated with neoconservatism55—and will be referred to as the neoconservative explanation from here on in—it is also accepted by a number of scholars and observers generally considered outside of that ideological approach.56

The two versions are united on this point: it is not unipolarity in general that accounts for the New Peace, but American unipolarity in particular. US hegemony is essentially benevolent, according to both liberals and neoconservatives. The United States has constructed an order that takes the interests of other states into account, which decreases revisionist impulses. At the very least, it is nonthreatening, and does not generate the kind of balancing behavior that might be expected to bring it to an end.57 In the liberal version, the order constructed by the United States is beneficial to all its members, who have a stake in its maintenance. Adherents of the more muscular version, whether neoconservative or not, assume that the default position of smaller states in a unipolar system is to bandwagon with the center.58 No one seems to suggest that there is an irenic structural logic of unipolarity independent of US behavior. The question is therefore not so much about the connection between unipolarity and the New Peace as much as it is whether US behavior, in one form or another, has brought it about.

Hegemonic stability is in some ways more theoretically elegant than the other possible explanations for the New Peace. For one thing, it does not suffer from questions regarding its causal direction. While it may be reasonable to suggest that peace produced the expansion of democracy and/or economic development rather than the other way around, peace did not produce unipolarity. In fact, if the United States is indeed supplying the global public good of security, it might be able to take credit for a number of these positive trends. Not just peace but democracy, economic stability, and development all might be beneficial side effects of unipolarity. 59 “A world without U.S. primacy,” argued Samuel P. Huntington, “would be a world with more violence and disorder and less democracy and economic growth.”60

There is a great deal at stake here, for both scholarship and practice. If hegemony is responsible for the New Peace, then its peaceful trends are unlikely to last much beyond the unipolar moment. The other proposed explanations described above are essentially irreversible: nuclear weapons cannot be uninvented, and no defense against their use is ever going to be completely foolproof; the pace of globalization and economic interdependence shows no sign of slowing; democracy seems to be firmly embedded in the cultural fabric of many of the places it currently exists, and may well be in the process of spreading to the few places where it does not. The UN, while oft criticized, shows no signs of disappearing. And finally, history contains precious few examples of the return of institutions deemed by society to be outmoded, barbaric, and/or futile.61 In other words, liberal normative evolution is typically unidirectional. Few would argue, for instance, that either slavery or dueling is likely to reappear in this century; illiberal normative recidivism is exceptionally rare.62 If the neoconservatives are correct and US hard power is primarily responsible for the New Peace, however, then it cannot be expected to last long after US hegemonic decline, or adjustment in its grand strategy toward retrenchment. If liberal internationalists are right and the New Peace is largely a product of the world order that the United States has forged, then it may have a bit more staying power beyond unipolarity, but not necessarily much.

Determining the relationship between hegemony and the New Peace has importance that goes beyond the academy. Whether or not decline is on the immediate horizon, unipolarity is unlikely to last forever. If the New Peace is essentially an American creation, that post-unipolar future is likely to be quite a bit more violent than the present.

Evidence for and against Pax Americana

Since the world had never experienced system-wide unipolarity prior to the end of the Cold War, judgments about its relative stability and likely duration are necessarily speculative.63 Extrapolations can be made from regional unipolar systems, like the Roman Mediterranean, but definitive system-wide statements cannot be made from one case. Still, if US power were primarily responsible for the New Peace, one would expect that it would leave some clues about its effects. This section reviews three kinds of evidence regarding Pax Americana in order to determine whether an empirical relationship can be said to exist between various kinds of US activity and global stability.

Conflict and Hegemony by Region

Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic- stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear.

Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions.

If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 1990s, the United States cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 The world grew dramatically more peaceful

**[CUT HERE.]**

while the United States cut its forces, however, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same nonrelationship exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between warfare and fluctuations in US GDP, alliance commitments, and forward military presence. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there does not seem to be much correlation between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.”71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat extreme versions of a

central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.”73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the United States can retrench without fear of negative consequences. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.”77 In no case did the various anticipated disorders materialize. As Table 2 demonstrates, armed conflict levels fell steadily, irrespective of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had much effect on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving no trace in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem.

As it stands, the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated. The rest of the world appears quite capable and willing to operate effectively without the presence of a global police~~man~~. Those who think otherwise have precious little empirical support upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.