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## Off

### 1NC

T-Remedy

#### Affirmatives must increase prohibitions on anticompetitive practices, not shift the remedies for violations

#### Antitrust remedies are not increasing prohibitions

Geradin and Sidak, 2003 (Damien, University of Liege/College of Europe, and J. Gregory, American Enterprise Institute, "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications," Criterion Economics, Inc., <https://www.criterioneconomics.com/antitrust-remedies-institutional-telecommunications-regulation.html>, DoA 5/31/2021, DVOG)

This paper presents a perspective on remedies in network industries that is informed by American and European experiences with antitrust law and sector-specific regulation. In the United States and the European Union, the topic of remedies in network industries cuts across antitrust law and sector-specific regulation, including telecommunications. The legal and economic understandings of a remedy are not always synonymous. In both legal systems, a remedy is the corrective measure that a court or an administrative agency orders following a finding that one or several companies had either engaged in an illegal abuse of market power (monopolization in the US and abuse of dominance in the EC) or are about to create market power (in the case of mergers). With the exception of merger control where remedies seek to prevent a situation from occurring, legal remedies are retrospective in their orientation. They seek to right some past wrong. They may do so through the payment of money (whether that is characterized as the payment of damages, fines, or something else). Or they may seek to do so through a mandated change in market structure (structural remedies), as in the case of divestiture, or in the imposition of affirmative or negative duties (behavioral remedies). The economic meaning of a remedy emphasizes market failure. The market failure may result from the unchecked exercise of market power, or from the uncompensated generation of an external cost or benefit, or from an insufficiency of information with which to make efficient choices concerning consumption, production, or investment. Whereas lawyers think of a remedy as what to do after a finding of illegal conduct, economists think of a remedy as what to do after a finding of market failure. The two approaches overlap perfectly if legislators and courts make liability rules that are triggered only after a finding of market failure.

#### Structural separation does not prohibit anticompetitive business practices

Khan 19[Lina M. Khan, Academic Fellow, Columbia Law School, May, 2019, “THE SEPARATION OF PLATFORMS AND COMMERCE,” 119 Colum. L. Rev. 973, 980-983, lexis]

This Article argues that these combined problems of discrimination and information appropriation invite recovering common carriage's forgotten cousin: structural separations. Structural separations place clear limits on the lines of business in which a firm can engage. Rather than prohibit particular business practices, separations proscribe certain organizational structures. In antitrust, structural remedies are contrasted with behavioral ones: Whereas behavioral remedies seek to prevent firms from engaging in specific types of conduct, structural remedies seek to eliminate the incentives that would make that conduct possible or likely in the first place.

Structural prohibitions have been a traditional element of American economic regulation. They have been applied as a standard regulatory tool and key antitrust remedy in network industries, often to prohibit a dominant intermediary from competing with the businesses that depend on it to get to market. While common carriage regimes prevent a firm from discriminating--requiring equal service on equal terms--structural prohibitions eliminate one source of the incentive to discriminate. In this way, common carriage and structural separations often functioned as complements in the service of nondiscrimination.

#### Vote neg

#### Ground---justifies affs that don’t change what activities are governable---but rather how big the punishment is---makes links for disads impossible

#### Predictable limits---opens the floodgates to mechs based on every lawyer’s opinion of how a type of antitrust violation should be remedied---explodes research burden

### 1NC

Memo CP

#### The United States federal government should issue a policy memorandum that platforms from commerce be separated for platforms in the private sector.

#### The CP competes because it’s not legally binding BUT solves by shifting antitrust policy

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Where there are uncertainties in the Agencies' enforcement policies or priorities, it is often essential for the Agencies to provide guidance. The formal guidance can take the form of formal guidance documents (such as the Horizontal Merger Guidelines of 2010) or FTC opinions. Informal guidance can take the form of agency reports, speeches by key agency personnel, amicus briefs, decisions to litigate, or closing statements. Agency guidance is important and beneficial for multiple reasons, such as providing clarity for businesses, moving competition policy in the right direction, and ensuring a U.S. perspective on the international arena. Agency guidance is also particularly useful to communicate a shift in enforcement policy or practice.3

[FOOTNOTE] 3 The recent guidance issued by the Division and the FTC communicating the decision to treat wage-fixing and no-poaching agreements as criminal violations going forward provides an excellent example of this. See DEP’T OF JUSTICE, ANTITRUST DIV., FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), available at www.ftc.gov/system/files/documents/ public\_statements/992623/ftc-doj\_hr\_guidance\_final\_10-20-16.pdf. [END FOOTNOTE]

Furthermore, uncertainty as to the boundaries of antitrust laws may chill potentially procompetitive conduct or enable potentially anticompetitive behavior to continue unchecked. Businesses may be less willing to engage in novel business activities that could benefit consumers. Moreover, agency guidance and enforcement not only define the boundaries of how the Agencies view and enforce the law, but may also impact how courts rule in litigation.

Guidance also ensures a place for the U.S. perspective on the international stage. Because so many foreign antitrust authorities look to the Agencies for leadership and study U.S. enforcement decisions and cases, clearly articulated guidance helps achieve uniformity across jurisdictions. Moreover, an international presence and influence as to antitrust policy is particularly critical in an era in which some foreign competition agencies use the pretense of antitrust enforcement as a cover to mask decisions that are actually based on industrial policy or protectionism.

Speeches, while not binding on the Agencies or as long-lasting as more formal agency documents, can give advance notice of enforcement priorities and the views of agency leadership regarding how best to analyze certain forms of conduct. For instance, in her first speech as Acting Assistant Attorney General, Renata Hesse offered important insights into the use of bargaining models in analyzing vertical mergers and the Division's skepticism of procompetitive claims in horizontal mergers. Indeed, for changes in agency thinking, an agency speech or other non-enforcement guidance can be the fairer approach, at least in the first instance, than initially embarking on litigation.

Business review letters from the Division and advisory opinions from the FTC serve as another avenue for providing guidance on novel conduct. More important, by setting forth the respective agency's reasoning for how it views proposed conduct, these documents in effect make a policy statement as to what characteristics of the conduct are considered to be beneficial or harmful for consumers.

#### It avoids politics and trade-off DAs

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, Volume 71, Issue 1, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

II. BURDEN OF PUBLIC COMMENT ON GUIDANCE LESS THAN LEGISLATIVE RULEMAKING

If the agency is going to solicit public comment on guidance, why not just go the whole nine yards and proceed by legislative rulemaking, which unlike guidance is genuine binding law? The reason is that the actual taking of public comment is only a fraction of the burden that legislative rulemaking imposes, and even if one focuses on the taking of comment alone, it is often less burdensome for guidance than for rulemaking. Thus, for most agencies at least, "notice-and-comment guidance" is considerably faster and less expensive than notice-and-comment rulemaking.

In discussing why legislative rulemaking takes the amount of time and resources that it does, interviewees prominently cited five aspects of the process, all of which are either absent or less costly when the process is voluntary notice-and-comment for guidance. I discuss these in roughly descending order of prominence.

A. Mandates for Cost--Benefit Analysis

Before significant legislative rules can be proposed or finalized by executive agencies, they are reviewed by the President's Office of Management and Budget to ensure, inter alia, that the agency engaged in appropriate cost--benefit analysis. OMB also reviews executive agencies' "significant" guidance documents. The relevant Executive Order's definition of "significant" is, in many ways, open-ended. According to an official at the [\*80] EPA's Office of General Counsel, the decision on which guidance documents to submit to OMB for review is made at the senior management level of the agency, by political appointees, and the handling of the question changes depending on who is in the relevant agency-manager and OMB positions.

Generally, interviewees thought OMB review was less likely for guidance than for legislative rules and, when it occurred, less time-consuming. A former senior official at the EPA's Air Program office said he thought OMB review of guidance took less time than that of legislative rules. Lynn Thorp of Clean Water Action observed that OMB scrutiny of the EPA guidance was less than that for legislative rules. A former senior FDA official noted that OMB was not much engaged with the agency's day-to-day scientific guidance, while a former senior FDA career official said many FDA guidance documents did not go through OMB at all. William Schultz, former HHS General Counsel, in discussing differences between the notice-and-comment process for rulemaking and the notice-and-comment process for guidance, cited OMB delays, which he said can be severe. Daniel Troy, general counsel of GlaxoSmithKline and former chief counsel of the FDA, said one reason for FDA personnel's preference for guidance over legislative rulemaking was that it avoided OMB review. At [\*81] USDA NOP, which does notice-and-comment on "most" of its guidance, the head of the program cited OMB review as one of a few factors that makes legislative rulemaking generally slower than guidance. Richardson, the former chair of the NOSB, said legislative rulemaking was greatly delayed by agency economic analysis in contemplation of OMB review, which was not done for guidance; and whereas OMB was a focal point for private lobbying regarding legislative rules, causing further delay, this was not true of guidance. The result was that legislative rulemaking took "much longer" than guidance even when the latter went through public comment. At the Department of Transportation (DOT), said the former general counsel Kathryn Thomson, guidance, even with public comment, was "much faster" than legislative rulemaking, mainly because it was not necessary to do cost--benefit analysis in contemplation of OMB review; OMB would accept a fast process for guidance more than it would for a legislative rule. At the DOE appliance standards program, recalled a former Department division director, OMB could delay or accelerate legislative rulemaking depending on the administration's calendar and politics, but guidance was not subjected to OMB review.

In banking regulation, where most of the agencies are independent and therefore not subject to OMB review, economic analysis can still cause legislative rulemaking to take longer than guidance, as such analysis may be required on some matters by statute or agency practice. An interviewee who held senior posts at CFPB and other federal agencies said that at the independent banking agencies (i.e., those not funded with tax revenues and not subject to OMB review), where cost--benefit analysis may be required by statute, that analysis would be done for legislative rulemaking but not for guidance, which helped explain why the former took longer. A former senior Federal Reserve official noted that, while the Federal Reserve's legislative-rulemaking-specific cost--benefit analysis was "sometimes a bit skippy," [\*82] the CFPB did voluminous cost--benefit analysis because of its fear of D.C. Circuit case law striking down SEC action for violating cost--benefit requirements.

B. Building a Record and Responding to Comments in Anticipation of Judicial Review

The advent of "hard look" judicial review in the 1970s, ratified by the Supreme Court in Motor Vehicles Manufactures Ass'n v. State Farm, pushed agencies to develop voluminous administrative records to support their legislative rules and to devote countless hours to writing long preambles responding minutely to public comments. An EPA official--in comparing legislative rulemaking (which he said took an "excruciatingly" long time) with guidance (on which he said the agency was "much more nimble")--said that a "huge" difference between the two was the time spent developing the administrative record and replying to comments, both of which he placed under the heading of "judicial review accountability," that is, the agency's "fear" of investing in a legislative rule only to have it struck down in court. EPA lawyers, he explained, were "vigilant" about ensuring that the administrative record was "all there," including the development of supporting documents, with all data gathered and analyzed, which took a "ton of time." Likewise, lawyers were vigilant in making sure the agency accounted for all comments. By contrast, "very little" of this was required for EPA guidance. There might be some accompanying materials, but it was "very rare" to do a full supporting foundation, in part because much of the necessary information would already have been gathered for a prior relevant legislative rulemaking, or would have bubbled up from the implementation process for that prior legislative rule. And even if the EPA took public comment on a guidance document and responded (which it sometimes did), "we're coasting along the surface" compared to what is done for a legislative rulemaking preamble. A former senior official at the EPA Air Program Office concurred that, for guidance, supporting material did not need to be gathered because it had already been assembled in prior legislative rulemakings, and public comments did not need to be addressed [\*83] at the same level of detail as for legislative rulemaking.

There is a similar dynamic at the FDA, which, per the GGPs, takes public comment on a very large proportion of its guidance documents. A former senior FDA official explained the difference. Legislative rulemaking required support for everything in the record and a time-consuming response to comments, and the costs of this process had been part of the agency's drive since the 1990s to rely more upon guidance, for which the process, even with public comment, was much more "abbreviated." Whereas legislative rules were "law" and had to be supported, the agency in issuing guidance felt freer not to develop a voluminous record, and the comments on guidance did not require the kind of response that was required on legislative rules. The fact that the FDA was sued much more on legislative rules than on guidance, he said, was surely part of this. Similarly, a congressional staffer observed that, although the FDA took public comment on guidance, it generally did not give any response to comments, meaning there was not the same kind of " State Farm obligation" as for legislative rulemaking, and so the process did not ensure the same careful consideration of stakeholder views. A former senior FDA official thought the lack of a requirement to respond to comments was a crucial and salutary feature of the FDA's process for guidance: if you required a preamble, you might as well do legislative rulemaking, and the whole thing would become "unworkable." A former senior FDA career official, discussing the difference between legislative rulemaking and guidance, said responding to all substantive comments in a rulemaking in writing for publication added "significantly" to the time spent. Overall, said an FDA Office of Chief Counsel official, whereas legislative rulemaking was criticized for being "ossified," it was possible to issue guidance "pretty quickly."

[\*84] Elsewhere, too, the research and analytic demands are less for guidance than for legislative rulemaking. At OSHA, said the former deputy solicitor of the Department of Labor (DOL), guidance was faster than legislative rulemaking in part because of judicial decisions requiring that the agency in each rulemaking make a showing of significant risk and technological and economic feasibility. By contrast, headquarters might have a regional office draft a guidance document, noted John Newquist, a former assistant administrator of OSHA's Region V (headquartered in Chicago).

C. Taking Comments in Itself

The actual publication of the draft rule/guidance and the taking of comments on it (as distinct from the work of responding to those comments) takes time and effort in itself, but this time and effort did not figure nearly as prominently in the interviews as did cost--benefit analysis, record-building, or responding to comments. And in any event, the burden of taking comment per se tends to be less for guidance documents than for legislative rules. At the banking agencies, said an interviewee who held senior posts at the CFPB and other federal agencies, the comment period tends to be shorter for guidance, and the comments fewer. The comment period was also said to be shorter for guidance at the USDA NOP, and in EPA clean water regulation. Comments were said to be less voluminous on guidance compared to legislative rules at the FDA.

D. Drafting Challenges

Legislative rules are typically harder to draft than guidance, which adds further to the time and resources they demand. Because legislative rules are mandatory, said an EPA official, you "sweat each detail," seeking to account for all factors and contingencies, since once the rule is promulgated, "we can't go back to it for 15 years." Guidance, he said, does not involve the same sweating of details. As to the FDA, a former senior career official [\*85] there said that, in writing guidance, you need not be as careful on wording as on a legislative rule because the language is not binding and is described as reflecting the current thinking of the agency; you are therefore more free to put in details, use narrative form, Q&A form, and plain language, since the document is not "set in stone." He recalled one subject on which he and his colleagues initially sat down to write a legislative rule and found it impossible to start with "codified language," given the complexity of the matter; he therefore suggested handling the problem by writing guidance, as a "dry run," before drawing up binding requirements. In banking regulation, an interviewee who held senior posts at the CFPB and other federal agencies said that guidance was "easier" to write and could be written "faster" than a legislative rule because "you don't need to nail everything down," as the aim is to warn regulated parties to pay attention to certain risks, not prescribe mandatory requirements.

E. Dealing with Mobilized Stakeholders

The length, officially-binding status, and public salience of legislative rulemaking make it a focal point for the mobilization of interest groups to pressure the agency and enlist political allies in Congress, the White House, and elsewhere. This, in turn, makes legislative rulemaking expensive to the agency in terms of political capital. An official at a public interest organization working on immigrants' rights said that, in his experience seeking favorable policies from DHS, he had found that legislative rulemaking tended to "exhaust all [the agency's] political capital," more than issuing guidance did. Legislative rulemaking allowed time for the opponents of an initiative to marshal their forces. If an agency and its stakeholder allies sought to proceed by legislative rulemaking, he said, they were "declaring a grand war" and had to be prepared for greater opposition. A former DOE division director, explaining why there was "no comparison" between the processes for legislative rulemaking and guidance, emphasized that the "politics" of the former process "slowed it down," for whenever the proceeding seemed to veer in a direction that one interest group did not like, [\*86] that group would marshal evidence and political support to stop the process, enlisting friendly members of Congress or the White House. With respect to the USDA NOP, the president of an organic certifier, in discussing factors that slowed legislative rulemaking, immediately cited the agency's internal process for economic analysis (not applicable to guidance), which he said could become a "pawn" in political clashes between different parts of the industry, in which members of Congress might be involved.

### 1NC

States CP

#### The fifty states and all relevant territories should adopt the principle of separating platforms from commerce for platforms in the private sector.

#### State action is effective in every type of antitrust action

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What State Attorneys General Can Do to Fix America’s Monopoly Problem

State attorneys general can play a crucial role in reversing the rise of concentrated corporate power and its impact on our economy and democracy. They can investigate corporations for abusing their market power, and they have the power to stop harmful actions or break up companies. They can sue to stop corporate mergers that would undermine competition, harming workers, suppliers, rivals, or consumers. But it is more important than ever that they have the tools and resources they need to do that crucial job. The following enumerates both the specific antitrust powers that state attorneys general currently hold and the resources they need to leverage that power more aggressively.

Initiate More Investigations and Actions to Stop Monopoly Conduct

States have the power to win a myriad of concessions from corporations that break the law and hurt competition. They can recover damages suffered on behalf of their residents. They can also use their power to stop anticompetitive conduct and even break up monopolies that harm residents and competition in their state, using both state and federal antitrust laws.

State enforcers can also band together to carry out broad investigations of monopolies nationwide.[12] This has been crucial work, historically and today. In the monopoly case against Microsoft, state enforcers maintained their case long after the federal agencies dropped theirs, effectively opening markets to new, innovative companies. And today, dozens of state AGs are using their investigative powers to examine whether tech monopolies Google and Facebook have abused their monopoly power over online search and the flow of news and information.[13]

State attorneys general have also used the antitrust laws to protect the rights of workers. More than a dozen states joined forces to stop fast-food chains, including Arby’s and Dunkin’ Donuts, from imposing no-poach and non-compete contracts on their low-wage employees. These clauses prevented workers from starting a competing business, or from quitting their jobs to work for a rival chain.[14] And a group of state attorneys general have organized to push the federal enforcers to follow their lead and protect workers from the unfair practices of their bosses.[15]

Block Mergers that Threaten Local Markets

Historically and today, a core role of the states in antitrust enforcement has been to stop harmful mergers. Under state and federal antitrust laws, state attorneys general can sue to block a merger if they believe it will undermine competition to the detriment of producers, workers, or consumers. Over the past 40 years, they’ve done so — sometimes alongside the federal antitrust agencies, and sometimes on their own. While some state-level merger challenges have entailed broad, multi-state coalitions, most involve one or two state attorneys general stepping in to protect competition.[16]

Evidence of states’ importance in merger cases is abundant. Three years ago, the California Attorney General sued to stop the takeover of two oil terminals by Valero Energy, the world’s largest independent petroleum refiner, after finding Valero would be able to raise prices for oil after the merger. The FTC had reviewed the deal and declined to intervene. The companies abandoned it in the face of state scrutiny.[17] And in Colorado, the attorney general moved to alter a health care merger that would have stopped local Medicare patients from accessing doctors — a concern the federal antitrust agencies did nothing to address in their review of the deal.[18]

#### Double bind: either A) the aff has to pre-empt state laws crushing federalism OR B) the aff doesn’t and can’t solve because states circumvent.

Abbott 14 [Alden F. Abbott is Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies and the John, Barbara, and Victoria Rumpel Senior Legal Fellow at The Heritage Foundation, “Constitutional Constraints on Federal Antitrust Law”, December 11, 2014, https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law] IanM

Nevertheless, various constitutionally based interests—such as federalism, freedom to petition the government, freedom of the press, freedom of speech, and freedom of religion—at times may be in tension with the economic-based goals of the antitrust laws. The **courts** have **taken into account** such **interests** in limiting the reach of antitrust. Whether they have struck an appropriate balance, however, is a matter of significant debate.

Fundamental Antitrust Principles

The U.S. antitrust laws seek to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies. As Professor Herbert Hovenkamp, author of the leading antitrust treatise, points out, the antitrust statutes’ language is “vague and malleable.”[[2]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn2) For example, over a century of federal case law has been required to make sense of and cabin the Sherman Antitrust Act’s literal prohibition on “every contract, combination … or conspiracy in restraint of trade.”[[3]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn3) Even today, uncertainty about the likely antitrust treatment of many corporate contracts or mergers creates a continuing demand for antitrust counseling.

Until the past 50 years or so, antitrust was viewed by certain commentators as promoting a variety of goals—such as protecting small businesses and reducing the influence of large enterprises—in addition to improving the functioning of free markets. Such views, which also crept into case law, were not unreasonable. The antitrust statutes were enacted in the wake of populist and Progressive Movement concerns about “the trusts” and “big business” abuses, and given their lack of detail, it was natural that these laws might be interpreted in light of such a history. Since the 1970s, however, American federal courts have substituted economic reasoning for this “historical” approach, influenced by economics-based “Chicago School” and “Harvard School” scholarship.[[4]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn4)

Today, American antitrust law generally is aimed at promoting consumer welfare and “economic efficiency.” It pursues this goal by forbidding business behavior that harms the competitive process and that lacks countervailing efficiency justifications. Concern typically focuses on “bad” actions—business behavior that is not “competition on the merits”[[5]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn5)—that reduce output and raise prices. Certain conduct—“naked” cartel activity lacking any efficiency justification, such as secret price fixing or bid rigging—is deemed categorically illegal, or unlawful “per se.” Conduct that is not per se illegal is assessed under a “rule of reason,” which requires detailed and often intrusive analysis of particular practices.

American antitrust law, however, does not prohibit the mere exercise of legitimately obtained market power—that is, the mere charging of “high” prices by firms that succeed through merits-based competition. As the Supreme Court emphasized in Verizon v. Trinko:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[[6]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn6)

The antitrust laws cannot, of course, be applied in a manner that offends the Constitution. **Two** types of **constitutionally influenced** limitations on the federal antitrust laws are especially well established: limitations derived from federalism and limitations derived from the First Amendment right to petition the government for the redress of grievances. As we will see, both sorts of **limitations** are **in tension** with the **purely materialist** goals of **antitrust.** We will consider them in turn before addressing a few additional constitutional considerations.

The Antitrust State Action Doctrine

First, **state laws** or **regulations** that **foster anticompetitive behavior** are nevertheless exempt from **federal antitrust scrutiny** as long as the state law displacement of competitive activity is clearly articulated and actively supervised by the state.[[7]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn7) This “**state action**” exemption was first pronounced in **Parker v. Brown**,[[8]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn8) in which the Supreme Court upheld a California statute that limited the production of raisins by California farmers.

In Parker, private industry participants set raisin allocations, supervised by state officials. This was **classic cartel behavior** that **raised prices**, **reduced output**, and substantially **harmed raisin consumers** throughout the country. Such **behavior** **would have been** per se illegal absent the state law. Nevertheless, the Supreme Court found in Parker that federalism concerns trumped antitrust. The Court **reasoned** that in enacting the antitrust laws, **Congress** had **never intended** to undermine sovereign state decisions to **displace competition**. In short, federalism principles allow states to immunize grossly anticompetitive schemes from antitrust review.

Over the past 70-plus years, the state action doctrine has taken many a twist and turn. One interesting aspect of this rather complex set of judge-made principles is that this doctrine could be rendered irrelevant by a simple act of Congress that subjected all state regulatory enactments to the federal antitrust laws, consistent with the power of Congress to legislate under the Commerce Clause of the Constitution.[[9]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn9) Given the breadth of Congress’s Commerce Clause powers under modern Supreme Court jurisprudence,[[10]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn10) very few state and local regulatory schemes would be antitrust-immune following the passage of such a law. Yet Congress has never seriously considered such legislation, nor is it likely to do so.

Such a **sweeping federal law** undoubtedly would give rise to objections that the threat of antitrust challenge would undermine state efforts to **promote** a host of regulatory goals unrelated to competition—and even efforts to carry out **routine regulatory actions** that are an inherent aspect of state sovereignty. Moreover, debate over such a law could well highlight the embarrassing fact that various antitrust-exempt federal regulatory schemes—schemes such as a federally sponsored raisin cartel similar to the one upheld in Parker v. Brown—are themselves highly anticompetitive.[[11]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn11)

In a time of concern about federal overreach, it would appear to be unusual for Congress to condemn state regulatory restrictions while shielding analogous federal restrictions from legal scrutiny. Moreover, while federal preemption of state cartel-like schemes and congressional repeal of analogous federal regulatory restrictions would promote consumer welfare in the short term,[[12]](https://www.heritage.org/report/constitutional-constraints-federal-antitrust-law" \l "_ftn12) **concerns** about the long-term **effects** of such an unprecedented federal intrusion into **traditional areas** of **state sovereignty** would have to be addressed.

#### Federalism key to prevent blackouts.

Edward MERTA, 13 third year law student at the University of New Mexico in Albuquerque, M.A. in U.S. History from Harvard [“A Climate of Gridlock: Climate Change Adaptation, Federalism, and Expansion of the National Electric Transmission Grid,” August 25, 2013, University of New Mexico School of Law Legal Studies Research Paper Series, Paper No. 2014-07]

The new legal framework for transmission siting sketched here would aim to accommodate national interests in electric transmission expansion while still allowing local and state interests to play a significant role in the new siting regime. This new framework, if implemented, will have to operate in the face of increasingly extreme climate change impacts, but those impacts will not alter today's need for cooperation between state and federal authorities on safeguarding the nation's electric power infrastructure. Historical experience with environmental and natural resources law suggests that the most feasible path to such cooperation is genuine partnership and power sharing, rather than sweeping imposition of federal authority. In the realm of electric transmission, not even the Second World War justified such intervention. Nevertheless, change in the nation's legal framework for transmission siting appears inevitable. Accelerating climate change, and the need to adapt U.S. infrastructure to its physical impact, appears virtually certain to increase political pressure for expansion of the national electric transmission grid in coming decades. The demands of economic and population growth have generated such pressures already, but escalating climate disaster will likely tip the balance decisively in favor of large-scale grid expansion. Other measures will be necessary as well, of course, and many of these alternatives can enhance supplies of electricity without the need for massive new long-distance transmission lines. These options include demand side management, which reduces wasteful end-use of electricity in homes and businesses; improved energy efficiency in commercial homes, buildings, and equipment; distributed energy technologies like household solar panels or rooftop wind turbines;226 and improved storage technologies such as batteries and flywheels to retain electricity from wind and solar generation when wind or sunlight are less available.227 However, even optimistic forecasts for market expansion of such technologies still foresee the need for major new construction of transmission facilities.228 Consequently, the nation will need a new legal framework governing mat construction to address the deficiencies and risks of the current system without inflicting excessive, unjust environmental and economic burdens on local communities. Striking that balance will require transmission law responsive to local, state, regional, and national interests simultaneously, rather than unduly tilted toward one end of the scale or the other. Successful examples of similar power sharing, regarding air and water pollution as well as wartime electric grid expansion, argue against preemptive federal control in the service of primarily national needs. So, too does a history of federal authority tending to sacrifice environmental protection of local communities to interstate commerce or national security. Expanding the transmission grid to promote adaptation to climate change will be an urgent national priority in years to come, but so too will the preservation of local and state interests in a federalist constitutional order. That order has confronted transformative upheavals before, each time adapting and evolving as a result. Adaptation to alien climate conditions on a devastated planet will pose a new challenge, but the ancient dilemma of reconciling central authority with local autonomy, and order with liberty, will remain.

#### Blackouts go nuclear.

Richard Andres and Hanna Breetz, 2011. Professor of National Security Strategy at the National War College and a Senior Fellow and Energy and Environmental Security and Policy Chair in the Center for Strategic Research, Institute for National Strategic Studies, at the National Defense University, doctoral candidate in the Department of Political Science at The Massachusetts Institute of Technology. “Small Nuclear Reactors for Military Installations: Capabilities, Costs, and Technological Implications”, [www.ndu.edu/press/lib/pdf/StrForum/SF-262.pdf](http://www.ndu.edu/press/lib/pdf/StrForum/SF-262.pdf)

The DOD interest in small reactors derives largely from problems with base and logistics vulnerability. Over the last few years, the Services have begun to reexamine virtually every aspect of how they generate and use energy with an eye toward cutting costs, decreasing carbon emissions, and reducing energy-related vulnerabilities. These actions have resulted in programs that have significantly reduced DOD energy consumption and greenhouse gas emissions at domestic bases. Despite strong efforts, however, two critical security issues have thus far proven resistant to existing solutions: bases’ vulnerability to civilian power outages, and the need to transport large quantities of fuel via convoys through hostile territory to forward locations. Each of these is explored below. Grid Vulnerability. DOD is unable to provide its bases with electricity when the civilian electrical grid is offline for an extended period of time. Currently, domestic military installations receive 99 percent of their electricity from the civilian power grid. As explained in a recent study from the Defense Science Board: DOD’s key problem with electricity is that critical missions, such as national strategic awareness and national command authorities, are almost entirely dependent on the national transmission grid . . . [which] is fragile, vulnerable, near its capacity limit, and outside of DOD control. In most cases, neither the grid nor on-base backup power provides sufficient reliability to ensure continuity of critical national priority functions and oversight of strategic missions in the face of a long term (several months) outage.7 The grid’s fragility was demonstrated during the 2003 Northeast blackout in which 50 million people in the United States and Canada lost power, some for up to a week, when one Ohio utility failed to properly trim trees. The blackout created cascading disruptions in sewage systems, gas station pumping, cellular communications, border check systems, and so forth, and demonstrated the interdependence of modern infrastructural systems.8 More recently, awareness has been growing that the grid is also vulnerable to purposive attacks. A report sponsored by the Department of Homeland Security suggests that a coordinated cyberattack on the grid could result in a third of the country losing power for a period of weeks or months.9 Cyberattacks on critical infrastructure are not well understood. It is not clear, for instance, whether existing terrorist groups might be able to develop the capability to conduct this type of attack. It is likely, however, that some nation-states either have or are working on developing the ability to take down the U.S. grid. In the event of a war with one of these states, it is possible, if not likely, that parts of the civilian grid would cease to function, taking with them military bases located in affected regions. Government and private organizations are currently working to secure the grid against attacks; however, it is not clear that they will be successful. Most military bases currently have backup power that allows them to function for a period of hours or, at most, a few days on their own. If power were not restored after this amount of time, the results could be disastrous. First, military assets taken offline by the crisis would not be available to help with disaster relief. Second, during an extended blackout, global military operations could be seriously compromised; this disruption would be particularly serious if the blackout was induced during major combat operations. During the Cold War, this type of event was far less likely because the United States and Soviet Union shared the common understanding that blinding an opponent with a grid blackout could escalate to nuclear war. America’s current opponents, however, may not share this fear or be deterred by this possibility. In 2008, the Defense Science Board stressed that DOD should mitigate the electrical grid’s vulnerabilities by turning military installations into “islands” of energy self-sufficiency. The department has made efforts to do so by promoting efficiency programs that lower power consumption on bases and by constructing renewable power generation facilities on selected bases. Unfortunately, these programs will not come close to reaching the goal of islanding the vast majority of bases. Even with massive investment in efficiency and renewables, most bases would not be able to function for more than a few days after the civilian grid went offline Unlike other alternative sources of energy, small reactors have the potential to solve DOD’s vulnerability to grid outages. Most bases have relatively light power demands when compared to civilian towns or cities. Small reactors could easily support bases’ power demands separate from the civilian grid during crises. In some cases, the reactors could be designed to produce enough power not only to supply the base, but also to provide critical services in surrounding towns during long-term outages. Strategically, islanding bases with small reactors has another benefit. One of the main reasons an enemy might be willing to risk reprisals by taking down the U.S. grid during a period of military hostilities would be to affect ongoing military operations. Without the lifeline of intelligence, communication, and logistics provided by U.S. domestic bases, American military operations would be compromised in almost any conceivable contingency. Making bases more resilient to civilian power outages would reduce the incentive for an opponent to attack the grid. An opponent might still attempt to take down the grid for the sake of disrupting civilian systems, but the powerful incentive to do so in order to win an ongoing battle or war would be greatly reduced.

### 1NC

Politics

#### Biden’s PC will push reconciliation through a jam-packed agenda but there’s no room for error

BURGESS EVERETT and LAURA BARRÓN-LÓPEZ 9-16 [POLITICO, "Dems call in big gun as they face huge Hill tests," https://www.politico.com/news/2021/09/16/biden-influence-capitol-democrats-511952, hec]

The next few months will push President Joe Biden to wield every drop of his influence over Congress. Democrats are plunging into messy internal debates over social programs from child care to drug pricing as they try to beat back GOP resistance on voting rights while steering the United States away from economic catastrophe. And in order to avert a government shutdown, avoid a debt default and fight ballot access restrictions passed in some GOP states, Democratic lawmakers are urging Biden to get more directly involved. Senate Majority Whip Dick Durbin said that Biden, “more than anyone,” maintains sway over his caucus’s 50 members: “There is no comparable political force to a president, and specifically Joe Biden at this moment.” Biden appears to be answering the call. The president is getting increasingly involved in Congress’ chaotic fall session as he battles sagging approval ratings, heightened concerns around the pandemic and some internal criticism over his withdrawal from Afghanistan. Rebounding as the midterms draw nearer will depend on whether his big social spending ambitions are realized and if his party can dodge a government shutdown and credit default. But even if he has success on those fronts, he still needs to maintain momentum on Democrats’ elections legislation, which Republicans look certain to torpedo. “I have full faith and confidence in Joe Biden in all of this,” said House Majority Whip Jim Clyburn, who's pressed Biden to endorse a filibuster carve out for voting rights legislation. “He is working this … and that’s how it should be.” Biden met with two key Democratic holdouts on his domestic spending agenda on Wednesday, part of a sustained push to keep Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on board with his legislative program. Biden’s met with Sinema four times this year, in addition to telephone calls made between the two, and has spoken to Manchin a similar number of times. “Now is the time” for Biden to jump full-force into the reconciliation conversation, said Sen. Tim Kaine (D-Va.). And the White House made clear that Biden is diving into the series of tricky issues. Andrew Bates, a spokesperson for Biden, said that Biden and his administration "are in frequent touch with Congress about each key priority: protecting the sacred right to vote, ensuring our economy delivers for the middle class and not just those at the top, and preventing needless damage to the recovery from the second-worst economic downturn in American history.” To help corral all 50 Senate Democrats for the social spending bill, the president and his party need to create an “echo chamber” around its substance, said Celinda Lake, a pollster on Biden’s campaign. But that won't be easy. Manchin has told colleagues he’s worried about whether the bill’s safety net, climate action and tax reforms will be popular in his state, according to one Senate Democrat. He's also said he won't support a measure at the current spending level: $3.5 trillion. If Biden can hammer home the popular aspects of the spending plan, it may help assuage Manchin and improve his whip count in Congress. Underscoring the degree to which he's become the face of the multi-trillion dollar reconciliation bill, a Democratic aide said the party is increasingly seeking to frame it as Biden’s agenda, not that of Sen. Bernie Sanders (I-Vt.) or any single Democrat.

#### Antitrust reform requires PC and trades off with other legislative priorities

Peter C. Carstensen 21, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Key to cyber security

Cat Zakrzewski, 8-14-2021, "The Senate’s $1 trillion infrastructure bill includes funding to secure Americans’ water systems and power grids from cyberattacks," https://www.washingtonpost.com/technology/2021/08/14/cybersecurity-infrastructure-senate-legislation/

A Senate bill intended to shore up the nation’s roads, pipes and electric grid includes billions to protect that aging infrastructure from cyberattacks. With a series of high-profile ransomware attacks fresh in their minds, U.S. Senate negotiators wove cybersecurity investments throughout the bipartisan $1 trillion infrastructure proposal, which passed the Senate in a 69-to-30 vote on Tuesday and now moves to the House for a vote. The allocations are a reflection of the growing realization in Congress that a computer attack could leave Americans without water, power or other essentials. “This is an incredibly serious threat to this country that’s only growing more serious,” said Sen. Angus King (I-Maine). The Colonial Pipeline ransomware attack in May was a wake-up call that gave lawmakers and the public “a taste of what is potentially in store,” King said. The attack disrupted fuel supplies in the eastern United States, prompting gasoline shortages and panicked buying that affected millions for days. The Colonial hack was just one in a series of attacks on lawmakers’ minds. King said he is particularly wary of attacks on the more than 100,000 public water systems in the United States, especially after a hacker in February took control of a water treatment facility in Oldsmar, Fla. The intruder raised the levels of sodium hydroxide to a hazardous point that could have sickened residents. An operator noticed the rising levels and was able to quickly intervene, but the incident highlighted the broader weaknesses at the facilities responsible for ensuring Americans have clean drinking water. To King, one of the Senate negotiators, these incidents underlined that cybersecurity has to be a part of any work the government does on infrastructure, from broadband to power grids. The bill directs the Federal Highway Administration to create a new tool to help transportation authorities better detect and respond to cyber attacks, which could range from ransomware attacks on transportation departments or hacks of traffic lights and road signs. It makes emergency funding available to respond to digital attacks on public water systems and makes grants available that can be used to help some water systems increase their ability to deal with cyberattacks as well as natural hazards and extreme weather. It also calls on the Federal Energy Regulatory Commission to develop incentives to ensure that electric utilities are investing in cybersecurity and sharing data about potential threats. The bill also authorizes nearly $2 billion in spending for specific cybersecurity initiatives, such as the creation of a $1 billion grant program to provide federal cybersecurity assistance to state and local governments, which experts say are among the most vulnerable institutions to ransomware attacks. The bill also would fund a new cyber director office, so that the federal government can better coordinate its response to major hacks, and would create a $100 million response and recovery fund, which the Department of Homeland Security could use to support both private companies and governments’ recoveries from cyberattacks.

#### Cyberattacks go nuclear

Michael T. Klare 19. Professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association. “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation.” https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation

Another initiative incorporated in the strategy document also aroused concern: the claim that an enemy cyberattack on U.S. nuclear command, control, and communications (NC3) facilities would constitute a “non-nuclear strategic attack” of sufficient magnitude to justify the use of nuclear weapons in response.

Under the Obama administration’s NPR report, released in April 2010, the circumstances under which the United States would consider responding to non-nuclear attacks with nuclear weapons were said to be few. “The United States will continue to…reduce the role of nuclear weapons in deterring non-nuclear attacks,” the report stated. Although little was said about what sort of non-nuclear attacks might be deemed severe enough to justify a nuclear response, cyberstrikes were not identified as one of these. The 2018 NPR report, however, portrayed a very different environment, one in which nuclear combat is seen as increasingly possible and in which non-nuclear strategic threats, especially in cyberspace, were viewed as sufficiently menacing to justify a nuclear response. Speaking of Russian technological progress, for example, the draft version of the Trump administration’s NPR report stated, “To…correct any Russian misperceptions of advantage, the president will have an expanding range of limited and graduated [nuclear] options to credibly deter Russian nuclear or non-nuclear strategic attacks, which could now include attacks against U.S. NC3, in space and cyberspace.”1

The notion that a cyberattack on U.S. digital systems, even those used for nuclear weapons, would constitute sufficient grounds to launch a nuclear attack was seen by many observers as a dangerous shift in policy, greatly increasing the risk of accidental or inadvertent nuclear escalation in a crisis. “The entire broadening of the landscape for nuclear deterrence is a very fundamental step in the wrong direction,” said former Secretary of Energy Ernest Moniz. “I think the idea of nuclear deterrence of cyberattacks, broadly, certainly does not make any sense.”2

Despite such admonitions, the Pentagon reaffirmed its views on the links between cyberattacks and nuclear weapons use when it released the final version of the NPR report in February 2018. The official text now states that the president must possess a spectrum of nuclear weapons with which to respond to “attacks against U.S. NC3,” and it identifies cyberattacks as one form of non-nuclear strategic warfare that could trigger a nuclear response.

That cyberwarfare had risen to this level of threat, the 2018 NPR report indicated, was a product of the enhanced cybercapabilities of potential adversaries and of the creeping obsolescence of many existing U.S. NC3 systems. To overcome these vulnerabilities, it called for substantial investment in an upgraded NC3 infrastructure. Not mentioned, however, were extensive U.S. efforts to employ cybertools to infiltrate and potentially incapacitate the NC3 systems of likely adversaries, including Russia, China, and North Korea.

For the past several years, the U.S. Department of Defense has been exploring how it could employ its own very robust cyberattack capabilities to compromise or destroy enemy missiles from such states as North Korea before they can be fired, a strategy sometimes called “left of launch.”3 Russia and China can assume, on this basis, that their own launch facilities are being probed for such vulnerabilities, presumably leading them to adopt escalatory policies such as those espoused in the 2018 NPR report. Wherever one looks, therefore, the links between cyberwar and nuclear war are growing.

The Nuclear-Cyber Connection

These links exist because the NC3 systems of the United States and other nuclear-armed states are heavily dependent on computers and other digital processors for virtually every aspect of their operation and because those systems are highly vulnerable to cyberattack. Every nuclear force is composed, most basically, of weapons, early-warning radars, launch facilities, and the top officials, usually presidents or prime ministers, empowered to initiate a nuclear exchange. Connecting them all, however, is an extended network of communications and data-processing systems, all reliant on cyberspace. Warning systems, ground- and space-based, must constantly watch for and analyze possible enemy missile launches. Data on actual threats must rapidly be communicated to decision-makers, who must then weigh possible responses and communicate chosen outcomes to launch facilities, which in turn must provide attack vectors to delivery systems. All of this involves operations in cyberspace, and it is in this domain that great power rivals seek vulnerabilities to exploit in a constant struggle for advantage.

The use of cyberspace to gain an advantage over adversaries takes many forms and is not always aimed at nuclear systems. China has been accused of engaging in widespread cyberespionage to steal technical secrets from U.S. firms for economic and military advantages. Russia has been accused, most extensively in the Robert Mueller report, of exploiting cyberspace to interfere in the 2016 U.S. presidential election. Nonstate actors, including terrorist groups such as al Qaeda and the Islamic State group, have used the internet for recruiting combatants and spreading fear. Criminal groups, including some thought to be allied with state actors, such as North Korea, have used cyberspace to extort money from banks, municipalities, and individuals.4 Attacks such as these occupy most of the time and attention of civilian and military cybersecurity organizations that attempt to thwart such attacks. Yet for those who worry about strategic stability and the risks of nuclear escalation, it is the threat of cyberattacks on NC3 systems that provokes the greatest concern.

This concern stems from the fact that, despite the immense effort devoted to protecting NC3 systems from cyberattack, no enterprise that relies so extensively on computers and cyberspace can be made 100 percent invulnerable to attack. This is so because such systems employ many devices and operating systems of various origins and vintages, most incorporating numerous software updates and “patches” over time, offering multiple vectors for attack. Electronic components can also be modified by hostile actors during production, transit, or insertion; and the whole system itself is dependent to a considerable degree on the electrical grid, which itself is vulnerable to cyberattack and is far less protected. Experienced “cyberwarriors” of every major power have been working for years to probe for weaknesses in these systems and in many cases have devised cyberweapons, typically, malicious software (malware) and computer viruses, to exploit those weaknesses for military advantage.5

Although activity in cyberspace is much more difficult to detect and track than conventional military operations, enough information has become public to indicate that the major nuclear powers, notably China, Russia, and the United States, along with such secondary powers as Iran and North Korea, have established extensive cyberwarfare capabilities and engage in offensive cyberoperations on a regular basis, often aimed at critical military infrastructure. “Cyberspace is a contested environment where we are in constant contact with adversaries,” General Paul M. Nakasone, commander of the U.S. Cyber Command (Cybercom), told the Senate Armed Services Committee in February 2019. “We see near-peer competitors [China and Russia] conducting sustained campaigns below the level of armed conflict to erode American strength and gain strategic advantage.”

Although eager to speak of adversary threats to U.S. interests, Nakasone was noticeably but not surprisingly reluctant to say much about U.S. offensive operations in cyberspace. He acknowledged, however, that Cybercom took such action to disrupt possible Russian interference in the 2018 midterm elections. “We created a persistent presence in cyberspace to monitor adversary actions and crafted tools and tactics to frustrate their efforts,” he testified in February. According to press accounts, this included a cyberattack aimed at paralyzing the Internet Research Agency, a “troll farm” in St. Petersburg said to have been deeply involved in generating disruptive propaganda during the 2016 presidential elections.6

Other press investigations have disclosed two other offensive operations undertaken by the United States. One called “Olympic Games” was intended to disrupt Iran’s drive to increase its uranium-enrichment capacity by sabotaging the centrifuges used in the process by infecting them with the so-called Stuxnet virus. Another left of launch effort was intended to cause malfunctions in North Korean missile tests.7 Although not aimed at either of the U.S. principal nuclear adversaries, those two attacks demonstrated a willingness and capacity to conduct cyberattacks on the nuclear infrastructure of other states.

Efforts by strategic rivals of the United States to infiltrate and eventually degrade U.S. nuclear infrastructure are far less documented but thought to be no less prevalent. Russia, for example, is believed to have planted malware in the U.S. electrical utility grid, possibly with the intent of cutting off the flow of electricity to critical NC3 facilities in the event of a major crisis.8 Indeed, every major power, including the United States, is believed to have crafted cyberweapons aimed at critical NC3 components and to have implanted malware in enemy systems for potential use in some future confrontation.

Pathways to Escalation

Knowing that the NC3 systems of the major powers are constantly being probed for weaknesses and probably infested with malware designed to be activated in a crisis, what does this say about the risks of escalation from a nonkinetic battle, that is, one fought without traditional weaponry, to a kinetic one, at first using conventional weapons and then, potentially, nuclear ones? None of this can be predicted in advance, but those analysts who have studied the subject worry about the emergence of dangerous new pathways for escalation. Indeed, several such scenarios have been identified.9

The first and possibly most dangerous path to escalation would arise from the early use of cyberweapons in a great power crisis to paralyze the vital command, control, and communications capabilities of an adversary, many of which serve nuclear and conventional forces. In the “fog of war” that would naturally ensue from such an encounter, the recipient of such an attack might fear more punishing follow-up kinetic attacks, possibly including the use of nuclear weapons, and, fearing the loss of its own arsenal, launch its weapons immediately. This might occur, for example, in a confrontation between NATO and Russian forces in east and central Europe or between U.S. and Chinese forces in the Asia-Pacific region.

Speaking of a possible confrontation in Europe, for example, James N. Miller Jr. and Richard Fontaine wrote that “both sides would have overwhelming incentives to go early with offensive cyber and counter-space capabilities to negate the other side’s military capabilities or advantages.” If these early attacks succeeded, “it could result in huge military and coercive advantage for the attacker.” This might induce the recipient of such attacks to back down, affording its rival a major victory at very low cost. Alternatively, however, the recipient might view the attacks on its critical command, control, and communications infrastructure as the prelude to a full-scale attack aimed at neutralizing its nuclear capabilities and choose to strike first. “It is worth considering,” Miller and Fontaine concluded, “how even a very limited attack or incident could set both sides on a slippery slope to rapid escalation.”10

What makes the insertion of latent malware in an adversary’s NC3 systems so dangerous is that it may not even need to be activated to increase the risk of nuclear escalation. If a nuclear-armed state comes to believe that its critical systems are infested with enemy malware, its leaders might not trust the information provided by its early-warning systems in a crisis and might misconstrue the nature of an enemy attack, leading them to overreact and possibly launch their nuclear weapons out of fear they are at risk of a preemptive strike.

“The uncertainty caused by the unique character of a cyber threat could jeopardize the credibility of the nuclear deterrent and undermine strategic stability in ways that advances in nuclear and conventional weapons do not,” Page O. Stoutland and Samantha Pitts-Kiefer wrote in 2018 paper for the Nuclear Threat Initiative. “[T]he introduction of a flaw or malicious code into nuclear weapons through the supply chain that compromises the effectiveness of those weapons could lead to a lack of confidence in the nuclear deterrent,” undermining strategic stability.11 Without confidence in the reliability of its nuclear weapons infrastructure, a nuclear-armed state may misinterpret confusing signals from its early-warning systems and, fearing the worst, launch its own nuclear weapons rather than lose them to an enemy’s first strike. This makes the scenario proffered in the 2018 NPR report, of a nuclear response to an enemy cyberattack, that much more alarming.

### 1NC

FTC T/O

#### FTC’s increasing enforcement in privacy now---it’s focused on algorithmic bias.

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The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

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Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### 1NC

T-Scope

#### Expansion of scope of antitrust laws requires removing a current exemption---antitrust law’s scope is broad

Sagers 15 [Christopher L. Sagers, Editorial Chair, Handbook on the Scope of Antitrust, ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE SCOPE OF ANTITRUST (2015), poapst]

The Supreme Court’s many **emphatic** generalizations over several decades suggest that **antitrust applies very broadly**. “[A]ntitrust,” the Court has said, “[is] a fundamental national economic policy.” It is no less than a “**charter of freedom**” and our very “**Magna Carta of free enterprise**.”3 When describing the scope of antitrust law in the abstract, therefore, courts commonly speak in very broad terms. Because “Congress intended to strike as broadly as it could” in enacting the antitrust laws, “[l]anguage more comprehensive” than those statutes contain “is difficult to conceive.” The breadth accorded the antitrust laws by the courts “reflects the felt indispensable role of antitrust policy in the maintenance of a free economy….” One might then have thought that the scope of antitrust would be a simple affair. If the law applies so broadly, then cases raising serious issues of applicability would be rare. But in fact it is not simple at all. The scope of antitrust is governed by dozens of federal statutes and by a variety of elaborate caselaw doctrines. Numerous cases every year raise difficult scope issues, and many hundreds or thousands of reported opinions now address them, often in meticulous, complex detail. The scope of antitrust has morphed into a large, distinct, and complex body of law. No prior work appears to have considered the entire law of the scope of antitrust as one body, in any comprehensive and integrated way. Integrated treatment poses certain benefits. A primary goal of this book is to aid practitioners, because several of the scope doctrines have become complex and uncertain, and their interrelationships can be especially challenging. Integrated treatment might also be useful for public policy purposes, given that scope issues have generated frequent reform efforts and debate. While this Handbook takes no position on normative matters, a problem in those debates has been their oftentimes great complexity. As one example, commentators have criticized results in which different doctrines are applied in different ways to similar facts, and the Supreme Court, too, has occasionally indicated that scope doctrines applicable to different circumstances should nevertheless be theoretically consistent. Addressing questions of that nature, however, has been difficult simply because doctrinal scope issues are ordinarily considered in isolation, a fact that in itself reflects the complexity and scale of the issues. In those rare cases in which conflicts among scope doctrines are considered, courts have felt unable or unauthorized to resolve them.

#### Limits to its scope are codified exemptions---you have to get rid of one

Sagers 15 [Christopher L. Sagers, Editorial Chair, Handbook on the Scope of Antitrust, ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE SCOPE OF ANTITRUST (2015), poapst]

On the other hand, **scope limits** of various kinds have always existed. Congress explicitly limited antitrust by statute as early as 1914,19 and did so many more times during the rise of organized labor20 and the price-and-entry regulatory regimes of the Progressive and New Deal eras.21 Judge-made limits were likewise recognized as early as 1922, again mainly as a consequence of the new regulatory regimes.22 As new waves of health and safety regulation emerged during the 1960s and 1970s,23 defendants sought antitrust clemency with some increasing success.24 Courts have also long sought to protect the political process from antitrust, even though businesses have frequently turned to that arena for advantage within the marketplace.25 Interestingly, most other nations with competition laws have similar histories of complex scope limits. The European Union (EU), for example, built a process for exemption into the very first treaty creating its competition law,26 and much of the work of its competition authority has involved administration of that process. The national laws of several EU member states likewise included various exclusions before creation of the EU,27 and exemptions exist in Australia, Canada, Japan, and South Korea.28 This long history, in which the generally broad applicability of the antitrust laws has been fraught with controversial disputes, can be seen as a struggle between the general and the specific. For the most part, substantive antitrust insists on generality and purports to oppose special treatment for the idiosyncrasies of particular markets.29 Antitrust presumes, in other words, that in respects important to antitrust, markets are mostly the same. Thus, in the absence of an **exemption**, the U.S. antitrust laws apply to all exchanges of goods or services for consideration, anywhere within the domestic reach of Congress’s interstate commerce power, and quite broadly to overseas conduct as well, where anticompetitive effects are felt in the United States.30 Yet, that broad application, especially during periods in which antitrust laws were applied more strictly and many kinds of conduct were held per se illegal, invites arguments that some contexts simply cannot be subject to one-size-fits-all policies.31 There have been times, as during the heyday of “destructive competition” reasoning during the first part of the 20th century, when industries like transportation, communications, and insurance were quite successful in arguing that special economic problems prevented them from performing well under the rules of competition that antitrust imposed elsewhere.32 Similar arguments have found some traction in more recent times, even as during this purportedly deregulatory age we generally claim to have disposed of the long-standing fear of destructive competition. For example, recent, **explicit antitrust exemptions** now protect standard setting organizations,33 the placement program for medical residents,34 and charitable gift annuities. Accordingly, despite the strong commitment to generality often stated, **we do in fact see limits on scope**. For the most part, the courts and Congress have followed one consistent instinct in moderating these struggles between the general and the specific. They typically will relax the preference for antitrust only where there is some other public, politically accountable oversight of a particular market. In effect, **antitrust exemptions** usually reflect the instinct that we should have **either regulation** **or** **antitrust** in any given context, which is to say that any context should be regulated either by direct government oversight or by competition kept healthy through antitrust.36 Thus, at least traditionally, Congress rarely displaced antitrust without setting up an administrative agency to take its place. Likewise, where courts fashioned scope limitations, they generally did so only where a regulatory agency oversaw rates or conduct (as with the filed rate doctrine) or where the challenged conduct was actually the conduct of a government entity itself (as with the state action doctrine).

#### Vote neg:

#### Limits explosion---antitrust law can potentially cover anything, only defining expand scope as removing an exemption to antitrust law on the books prevents ‘tweak of the week’ affs

#### Ground---Forcing affs to remove exemptions centers the debate on core areas of antitrust that were controversial enough to warrant an exemption.

## Competitiveness

### Circumvention---1NC

#### Plan fails---lobbyists block and water down enforcement

Jones and Kovacic 20 [Alison Jones and William E. Kovacic, Alison Jones is Professor of Law at King’s and a solicitor at Freshfields Bruckhaus Deringer LLP; William Evan Kovacic is an American lawyer and legal scholar who was a commissioner of the U.S. Federal Trade Commission from 2006 to 2011. Kovacic is a professor at George Washington University Law School and the director of their Competition Law Center, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy", The Antitrust Bulletin 2020, Vol. 65(2) 227-255 [https://journals.sagepub.com/doi/pdf/10.1177/0003603X20912884]LPAL](https://journals.sagepub.com/doi/pdf/10.1177/0003603X20912884%5dLPAL)

\*this card has been modified for ableist language

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125 The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or ~~muted~~ [silenced] if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder. Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

#### Court circumvention---they ignore intent and plain meaning

Crane ‘21 [Daniel A Crane. Frederick Paul Furth, Sr. Professor of Law, University of Michigan. I am very grateful for many helpful comments from Tom Arthur, Jonathan Baker, Steve Calkins, Dale Collins, Eleanor Fox, Rebecca Haw, Hiba Hafiz, Jack Kirkwood, Bob Lande, Christopher Leslie, Alan Meese, Steve Ross, Danny Sokol, and other participants at the University of Florida Summer Antitrust Workshop. "ANTITRUST ANTITEXTUALISM." https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr]

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

### A2: China Tech Lead---1NC

#### U.S. tech leadership is high and resilient---China can’t overtake us

Gad Levanon 20. Forbes manufacturing contributor. “Reports Of US Decline Are Greatly Exaggerated.” 08/27/20. <https://www.forbes.com/sites/gadlevanon/2020/08/27/reports-of-us-decline-are-greatly-exaggerated/?sh=6253227b26f8>

Despite what many suspect is an eroding US global standing, 2020 may be remembered as the year when the US became even more globally dominant economically.

Why? The tech sector’s share of the US economy is much larger than in most countries. And the pandemic-driven recession has greatly accelerated the shift to online activity and digital transformation by businesses and consumers, which would otherwise have taken years. That lead to faster growth in the global demand for technology. In addition, the US is especially dominant in the tech industries that are likely to grow the fastest in the coming years.

Stock prices certainly support this story. The S&P 500 is already above pre-pandemic highs despite the deepest recession in 80 years, and most of the stock prices’ strength comes from tech sector. The companies that have seen the strongest gains since the pandemic focus on online shopping and payments, cloud computing services, cyber security, business related software, social media, online advertisement, and on-demand entertainment content.

Stock prices are volatile and so are a treacherous guide for predicting the future, but there is a plausible explanation for the large tech gains – and why they might last.

[Chart omitted]

There are several objective and subjective reasons for why the US is so successful in technology compared with other countries. It has:

1The best universities, which attract many of the best students from all over the world – most of whom tend to stay in the US after completing their studies

2A large inflow of experienced talent from other countries

3 Unrivaled access to venture capital

4 Fluency in English, the global language in both business-dealing and content

5 An economy big enough to make achieving scale relatively easy

6 Silicon Valley, the home and heart of the tech revolution

7 A culture that welcomes innovation and disruption and strongly encourages entrepreneurial behavior

Given these factors, US tech leadership should continue.

What about the competition? One factor helping the US stand out is the weakness of the European tech sector. The market cap of the largest European tech company, SAP SAP -0.3%, is about one-tenth of Apple AAPL +1.6%’s. In other sophisticated industries like pharmaceuticals, motor vehicles and aircraft, European companies are strong competitors to their US counterparts. Europe’s relative technology weakness is perhaps as unusual as the US strength in the sector, and is only reinforced by the fact that US technology companies are already big players in European economies.

Most of the top tech companies from East Asia – places like Japan, Taiwan and South Korea – are in hardware and semiconductors manufacturing. They are serious competitors in these areas, but these technology sectors are not growing as quickly.

No discussion of the future of technology is complete without China. The Chinese internet companies are huge and growing rapidly, but their ability to expand beyond China and its periphery is questionable. In almost all sophisticated industries, Chinese companies are not yet major players in Western economies. Also, recent events suggest that Western countries will be more cautious in dealing with China, perhaps limiting its expansion. The latest developments with Huawei and TikTok are good examples. In addition, US companies are slowly moving their supply chain elsewhere, further weakening China.

So, the technology sector will perform well in the next several years, benefiting countries that are strong in that area. The US, more than any other country, has a large and successful tech sector that seems to be especially concentrated in the fastest-growing tech industries.

What does this mean for the US economy overall? First, it is important to mention that the boost the US is getting from its tech sector has been larger than what most other advanced economies have gotten for quite a while, and is one of the reasons the US has been growing faster than them in recent years. But now, this trend is likely to accelerate.

Here is some back of the envelope math for the difference between the technology sector’s contribution to GDP growth in the US versus a typical advanced economy: Suppose in the US the tech sector is 12 percent of GDP and is growing at 10 percent a year. In another typical advanced economy the tech sector is 7 percent of GDP and is growing at 5 percent a year. That means that the annual contribution to GDP from the tech sector is 1.2 percent for the US versus 0.35 percent for the other country. That is 0.85 percent faster growth for the US every year. The net effect may be smaller because some of the growth in tech companies come at the expanse of companies from other sectors. But when the average annual GDP growth rate is 1.5-2 percent in advanced economies, even a 0.5 percent a year difference is meaningful.

The gains from the rapid growth in technology would disproportionately go to tech companies’ owners and workers. As most of these are high earners, this trend is likely to increase income inequality. But some of the gains will spread more widely. After all, owners and workers, and the companies themselves, spend a large share of their income in the communities they live and operate in. It will also increase geographic inequalities. Not surprisingly, within the US, areas close to Silicon Valley benefited the most from the technology demand-surge. Between 2013-2018, among the 382 metro areas in the US, San Jose and San Francisco metro areas had the fastest growth in personal income per-capita. During that time, personal income per-capita in the San Jose Metro area rose by 48 percent, more than twice as fast as the national rate (22 percent). The surrounding metro areas, Napa, Santa Rosa-Petaluma, Santa Cruz-Watsonville, Stockton, Vallejo, were all ranked in the top 40. Seattle, another technology Hub, is ranked 13.

All of these data points add up to an enduring strength. Despite concerns about US’s standing in the world, its tech sector may keep it at the forefront of the global economy in the foreseeable future.

#### China won’t attack Taiwan, and *if anything*, they’d do a peaceful non-violent reunification

Lee and Kleinhans 12-15 [John Lee is a senior analyst at the Mercator Institute for China Studies (MERICS). Jan-Peter Kleinhans is the project director for technology and geopolitics at Stiftung Neue Verantwortung (SNV), “Would China Invade Taiwan for TSMC?”, 12-15-2020, https://thediplomat.com/2020/12/would-china-invade-taiwan-for-tsmc/] IanM

Widening the lens, however, it becomes apparent that TSMC is in fact unlikely to tip the balance. First, invasion likely remains at the bottom of the list for **China’s leaders** when sizing up solutions to the “Taiwan problem.” **Beijing’s military options** are components of a **long-term political strategy** predicated on **basic stability** across the Taiwan Strait and relying upon **China’s growing economic gravity** to create the conditions for peaceful unification. This situation has favored China’s economic and technological rise, in which Taiwanese firms including TSMC [have played a significant part](https://www.eastasiaforum.org/2016/09/14/the-chinese-diasporas-role-in-the-rise-of-china/).

While this strategy is likely being adjusted in response to rising hostility among Taiwan’s younger generations toward China, Beijing retains enough levers of influence within Taiwanese society that it will still see a politics-first approach as viable. The continuing **importance to Chinese industry** of skilled **Taiwanese labor**, especially in the semiconductor sector, **means outright hostilities** with Taiwan would have serious economic consequences, amplifying the effects of U.S. decoupling measures.

Some experts claim that **China** now has the **military capacity** to quickly overwhelm Taiwan. **Even if** this is correct, invasion remains a high-risk endeavor that, even if successful, would still entail major negative ramifications for China. It can be expected only in conditions under which China’s leaders see the immediate political stakes [outweighing the military risks](https://warontherocks.com/2020/11/getting-the-fait-accompli-problem-right-in-u-s-strategy/), implying a narrow range of scenarios.

If the Chinese government resorts to armed conflict, there are various measures short of invasion that would offer a credible pathway toward an acceptable political outcome for Beijing. For China’s leaders, the imperative would not be for quick resolution but rather to create the conditions for an eventual victory, [defined in political terms](https://www.lowyinstitute.org/the-interpreter/unfinished-chinese-civil-war) and not necessarily by direct military occupation. In this context, seizing TSMC’s foundries would be a collateral benefit following from choices made for other reasons.

Second, **Beijing cannot presume access** to TSMC’s cutting-edge capabilities even after a successful invasion. TSMC’s workforce is increasingly being recruited abroad, [as Taiwan’s education system struggles](https://english.cw.com.tw/article/article.action?id=2719) to supply adequate numbers of specialists. Workers with foreign citizenship are unlikely to remain by choice in a Chinese-occupied Taiwan, while keeping them by force would impose even more political costs on China. And even discounting the sabotage of TSMC’s foundries by Taiwanese authorities in the face of Chinese occupation, Beijing must allow for the facilities being damaged in fighting.

Even if a critical mass of TSMC’s workforce and installations was captured intact, the firm’s ability to stay at the cutting-edge under post-invasion conditions would likely be compromised. Foundries depend on intellectual property, machinery, and chemicals that are [almost entirely supplied](https://www.stiftung-nv.de/sites/default/files/the_global_semiconductor_value_chain.pdf) by firms in the United States and U.S.-allied countries, with TSMC’s market leadership dependent on continually upgrading processes and equipment in close cooperation with these suppliers. Such cooperation would likely be drastically curtailed following a Chinese invasion, not just for a hypothetical Chinese-controlled TSMC but for mainland Chinese firms like SMIC, which are already struggling to upgrade their foundry capabilities.

This leads to the most important reason why TSMC is unlikely to be a critical factor in Beijing’s calculations toward Taiwan. The Chinese Communist Party under Xi Jinping has made it clear that [achieving independence in “core technologies”](https://www.globaltimes.cn/content/1205099.shtml) like semiconductors is strategically vital for China’s future. This means escaping dependence on a transnational supply chain dominated by firms from the U.S. or allied nations. Taking control of TSMC would not achieve this goal, as TSMC’s role in the global value chain depends on inputs from U.S., European, and Japanese firms.

The whole thrust of China’s industrial and technology policy is now toward [achieving greater self-reliance](https://www.scmp.com/news/china/politics/article/3110885/technological-self-reliance-heart-chinas-economic-plans-says). This includes a broad-based approach to climbing up the semiconductor value chain, by [supporting Chinese firms](https://www.cnbc.com/2020/08/11/china-policies-to-boost-chipmakers-as-tensions-with-us-rise.html) to upgrade their own capabilities. In response to U.S. export control measures, Huawei and SMIC are both [working to establish chip-manufacturing lines](https://www.ft.com/content/84eb666e-0af3-48eb-8b60-3f53b19435cb) free from U.S.-origin technology. Although the obstacles are immense, the massive resources being applied by the Chinese state and concentration of key industries in China means that over the long term, Chinese chip design companies can expect to depend progressively less on TSMC.

At this stage however, China’s leaders openly acknowledge that the nation’s high-tech industries still depend on foreign inputs, and hence prioritize keeping open international channels in order to obtain them. With these channels already under pressure from U.S. decoupling measures and [increasingly adverse attitudes](https://www.ft.com/content/e8e5cf90-7448-459e-8b9f-6f34f03ab77a) in other advanced economies, Beijing is unlikely to jeopardize them further through high-risk gambles that would at best yield only short-term advantages.

For third states calibrating their Taiwan policy, **long-term considerations** are also likely to outweigh the immediate imperative to maintain access to TSMC’s foundries. From the viewpoint of U.S. policymakers, the continuing shift of the cross-strait military balance in China’s favor means that a defense guarantee to Taiwan cannot substitute as a risk mitigation strategy for re-shoring leading-edge foundry work.

#### The plan means we lose to China.

Robert D. Atkinson and Michael Lind 18. president of the Information Technology and Innovation Foundation. visiting professor at the University of Texas Johnson School of Public Affairs. Commentary: Who Wins After U.S. Antitrust Regulators Attack? China. Fortune. 3-29-2018. https://fortune.com/2018/03/29/commentary-who-wins-after-u-s-antitrust-regulators-attack-china/

Unfortunately, this kind of reverse industrial policy in the name of antitrust continues. In 2016, the Federal Trade Commission required that the semiconductor maker NXP divest its RF (radio frequency) power business as a condition for its $11.8 billion acquisition of U.S.-based Freescale Semiconductor Ltd. While this was done with a focus on the consumer, it opened up the business for acquisition by the Chinese investment company Jianguang Asset Management Co. Ltd., which has financial backing from the Chinese government. Just like that, thanks to an action undertaken by the U.S. government, critical U.S. technology capabilities went to China.

The lesson from this tale of unintended consequences for current antitrust enforcement is clear: It is time to stop ignoring potential adverse consequences of U.S. antitrust policy for America’s international competitiveness. Antitrust policies may be justified in terms of limiting anti-competitive behavior that hurts other firms in the U.S. economy. But when antitrust judgments weaken U.S. firms, allowing foreign firms and nations to free-ride on American R&D in order to catch up with and sometimes eliminate entire U.S. firms and industries, the result is to enrich other countries at America’s expense.

Maintaining American technological primacy in key industries should be a key consideration of U.S. antitrust policy—not just reducing concentration ratios in particular industries. The Justice Department and FTC appear to have little interest or capacity to consider the effects of their actions on U.S. international competitiveness. Going forward, when they decide to take action affecting a leading U.S. innovation-based firm, experts on the broader national interest in maintaining global competitiveness should have a seat at the table.

It is time for antitrust policy regarding firms in advanced technology industries to be carried out in coordination with the Commerce Department. The alternative is to allow antitrust actions, which are supposed to benefit all Americans, to backfire by helping foreign rivals bring American firms and industries down.

### A2: Kill Zones---1NC

#### Kill zones motivate innovation---aff limits it

Joe Kennedy 20 [Senior Fellow, Information Technology and Innovation Foundation, "Monopoly Myths: Is Big Tech Creating “Kill Zones”?," 11-9-2020, https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones, hec]

One argument made against large technology companies is that they limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in these areas (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation. In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firm to benefit from economies of scale or network effects, and enable the smaller firm to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell might make it harder for promising firms to find funding. And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler, guiding entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate usually mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities. Although the areas of investment have shifted in response to market developments, this reflects the natural evolution of Internet platforms, rather than a pernicious attempt to stifle competition or innovation. In either case, regulators already have sufficient powers to protect competition. The current focus on consumer welfare adequately incorporates concerns about innovation. While antitrust authorities going forward probably should broaden their review of acquisitions by dominant companies, there is no need to significantly change antitrust statutes or embrace structural remedies such as structural separation or breakups, as these would likely slow innovation and harm consumers.

### Big Tech Good---1NC

#### Breaking up big tech kills the economy, innovation and turns case.

Bell 21 [Jeff Bell is the CEO of LegalShield, “The Heartache of Big Tech Breakups: Should We, or Shouldn’t We?”, 2-2-2021, https://www.linkedin.com/pulse/heartache-big-tech-breakups-should-we-shouldnt-jeff-bell] IanM

Arguments against breaking up Big Tech

Government regulation negatively impacts the free market economy: The **free market** is an **unparalleled wealth engine** that has driven innovation and lifted more people out of poverty than any other economic system in history. Some **economists argue** that too much government regulation stifles this growth by **protecting inefficient business** **practices** that would not survive true competition. Regulation also spawns more lobbying.

Consumers benefit from the size and scale of FAANG: In today’s global economy, it takes a company of a **certain size** to produce some kinds of goods and services. Mark Zuckerberg famously made this argument in reference to **Facebook’s** unique **ability** to hire **30,000 people** to police inappropriate content on the platform. Similarly, consumers **want same-day delivery** of products bought online, especially during the COVID pandemic. **Amazon** is **able to deliver** due to its robust infrastructure and massive size in ways that smaller companies cannot.

Big Tech leads the world in spending on research and development: **Alphabet** (Google’s parent company) **and Amazon** are **numbers 1 and 2** when it comes to R&D spending, Apple comes in fifth, and Facebook is number 13. **If these companies were broken up**, those R&D budgets would certainly be cut, along with the **innovative projects** they are currently working on.

Scale of network: Like the telephone of earlier generations, a **single phone is useless**, but a network of phones has tremendous value. **Breaking up FAANG** could also fragment the networks, **generating** even **more silos** and **echo chambers**.

## Dependency Trap

### A2: LIO---1NC

#### No impact to the LIO.

Graham Allison 18. Professor of Government at Harvard. “The Myth of the Liberal Order.” Foreign Affairs 97.4: 124-133

Among the debates that have swept the U.S. foreign policy community since the beginning of the Trump administration, alarm about the fate of the liberal international rules-based order has emerged as one of the few fixed points. From the international relations scholar G. John Ikenberry's claim that "for seven decades the world has been dominated by a western liberal order" to U.S. Vice President Joe Biden's call in the final days of the Obama administration to "act urgently to defend the liberal international order," this banner waves atop most discussions of the United States' role in the world. About this order, the reigning consensus makes three core claims. First, that the liberal order has been the principal cause of the so-called long peace among great powers for the past seven decades. Second, that constructing this order has been the main driver of U.S. engagement in the world over that period. And third, that U.S. President Donald Trump is the primary threat to the liberal order-and thus to world peace. The political scientist Joseph Nye, for example, has written, "The demonstrable success of the order in helping secure and stabilize the world over the past seven decades has led to a strong consensus that defending, deepening, and extending this system has been and continues to be the central task of U.S. foreign policy." Nye has gone so far as to assert: "I am not worried by the rise of China. I am more worried by the rise of Trump." Although all these propositions contain some truth, each is more wrong than right. The "long peace" was the not the result of a liberal order but the byproduct of the dangerous balance of power between the Soviet Union and the United States during the four and a half decades of the Cold War and then of a brief period of U.S. dominance. U.S. engagement in the world has been driven not by the desire to advance liberalism abroad or to build an international order but by the need to do what was necessary to preserve liberal democracy at home. And although Trump is undermining key elements of the current order, he is far from the biggest threat to global stability. These misconceptions about the liberal order's causes and consequences lead its advocates to call for the United States to strengthen the order by clinging to pillars from the past and rolling back authoritarianism around the globe. Yet rather than seek to return to an imagined past in which the United States molded the world in its image, Washington should limit its efforts to ensuring sufficient order abroad to allow it to concentrate on reconstructing a viable liberal democracy at home. CONCEPTUAL JELL-O The ambiguity of each of the terms in the phrase "liberal international rules-based order" creates a slipperiness that allows the concept to be applied to almost any situation. When, in 2017, members of the World Economic Forum in Davos crowned Chinese President Xi Jinping the leader of the liberal economic order-even though he heads the most protectionist, mercantilist, and predatory major economy in the world-they revealed that, at least in this context, the word "liberal" has come unhinged.

### A2: Next Gen Tech---1NC

#### No emerging tech impact

Todd S. Sechser 19, the Pamela Feinour Edmonds and Franklin S. Edmonds, Jr. Discovery Professor of Politics and Public Policy at the University of Virginia and Senior Fellow at the Miller Center of Public Affairs, Neil Narang is an Associate Professor of Political Science at the University of California, Santa Barbara, Caitlin Talmadge is Associate Professor of Security Studies in the School of Foreign at Georgetown University, “Emerging technologies and strategic stability in peacetime, crisis, and war”, Journal of Strategic Studies, 42:6; pg. 728-729

Yet the history of technological revolutions counsels against alarmism. Extrapolating from current technological trends is problematic, both because technologies often do not live up to their promise, and because technologies often have countervailing or conditional effects that can temper their negative consequences. Thus, the fear that emerging technologies will necessarily cause sudden and spectacular changes to international politics should be treated with caution. There are at least two reasons to be circumspect.

First, very few technologies fundamentally reshape the dynamics of international conflict. Historically, most technological innovations have amounted to incremental advancements, and some have disappeared into irrelevance despite widespread hype about their promise. For example, the introduction of chemical weapons was widely expected to immediately change the nature of warfare and deterrence after the British army first used poison gas on the battlefield during World War I. Yet chemical weapons quickly turned out to be less practical, easier to counter, and less effective than conventional high-explosives in inflicting damage and disrupting enemy operations.6 Other technologies have become important only after advancements in other areas allowed them to reach their full potential: until armies developed tactics for effectively employing firearms, for instance, these weapons had little effect on the balance of power. And even when technologies do have significant strategic consequences, they often take decades to emerge, as the invention of airplanes and tanks illustrates. In short, it is easy to exaggerate the strategic effects of nascent technologies.7

Second, even if today’s emerging technologies are poised to drive important changes in the international system, they are likely to have variegated and even contradictory effects. Technologies may be destabilising under some conditions, but stabilising in others. Furthermore, other factors are likely to mediate the effects of new technologies on the international system, including geography, the distribution of material power, military strategy, domestic and organisational politics, and social and cultural variables, to name only a few.8 Consequently, the strategic effects of new technologies often defy simple classification. Indeed, more than 70 years after nuclear weapons emerged as a new technology, their consequences for stability continue to be debated.9

# 2NC

## PTX

#### infrastructure is a pre-req to FTC enforcement

Tony Romm and Cat Zakrzewski 9-9, 2021, “Democrats eye new $1 billion effort to crack down on Big Tech in sprawling economic package,” WASHINGTON POST, online

One of the top federal agencies overseeing Apple, Facebook, Google and other Silicon Valley tech giants could see a boost to its budget as part of congressional Democrats’ sprawling $3.5 trillion economic package. The proposal, unveiled by a panel of House Democrats on Thursday, would set aside $1 billion for the Federal Trade Commission to create a new digital-focused division that would police privacy violations, cybersecurity incidents and other online abuses. The new spending could represent a roughly 30 percent increase in the commission’s total projected appropriations over the next decade — money that could add more legal firepower to an agency whose resources are badly outmatched by many of the companies it regulates. Democrats announced their plan as part of a broader effort to craft a roughly $3.5 trillion economic package that encompasses President Biden’s fuller economic agenda. Party lawmakers envision the package as a sweeping overhaul of the country’s health care, education and tax laws, fulfilling promises they made during the 2020 elections. Once the total spending plan is finalized, Democrats hope to pass it using a legislative maneuver known as reconciliation. The move allows the measure to be enacted without risk of a Republican filibuster in the narrowly divided Senate, provided that Democrats stay united in their cause. While much of the proposal remains unsettled, the process for now has opened the door for Democratic lawmakers to seek to advance some of their long-stalled policy priorities — including their repeated commitments to take aim at Big Tech. Democrats for years have criticized Amazon, Apple, Facebook and Google, arguing that some of the country’s most profitable companies have become too powerful — sometimes at the expense of their users. On Capitol Hill, Democrats have spearheaded sprawling antitrust investigations into the tech giants and called on top federal agencies to take a more aggressive stance against the industry. But Democrats at times have found agencies including the FTC ill-equipped for the digital age. The roughly century-old watchdog’s laws predate Silicon Valley, and its $351 million appropriation in 2021 amounts to a fraction of the billions of dollars earned annually by the corporate giants it oversees.

#### Tech race

Norman Anderson 21 [Forbes Contributor, "Biden’s Infrastructure Plan," Forbes, 1-15-2021, https://www.forbes.com/sites/normananderson/2021/01/15/bidens-infrastructure-planthinking-beyond-the-19-trillion-covid-recovery-battle/?sh=6d968781fe1a, hec]

This failure to understand the magnitude of the challenge we face in our bifurcated struggle with China is confounding - one thing is certain, unless we get moving it will be traumatic for Main Street, and so doubly traumatic for the country. Again, Roubini: “As the race to control the industries of the future intensifies, there will be even more decoupling [from China] of data, information, and financial flows, currencies, payment platforms, and trade in goods and services that rely on 5G, AI/ML, big data, the Internet of Things, computer chips, operating systems, and other frontier technologies.” And there will be worker displacement on a scale that we have not seen since the Great Depression. Here the AGC member’s pessimism on manufacturing (-17%) is concerning, because those are the supply chain jobs that we thought we were bringing home, and that we have to bring back home. Divergence of U.S. Investment and Non-discretionary Spending Divergence of U.S. Investment and Non-discretionary Spending, 1970-2020 OFFICE OF MANAGEMENT AND BUDGET Thinking Long - Building the Roads for Henry Ford’s Automobiles. Entrepreneurs around the country are responding aggressively to the opportunity presented by the 5G ecosystem, but their response cannot be effective if the infrastructure for those new companies and their inventions - mobility as a service, autonomous trucks, seamless machine to machine logistics - aren’t created, innovated, supported and quickly put in place. Unless we do that the technology freight train barreling our way will have a Chinese conductor at the wheel. A more positive message: with the right infrastructure investment we could create over 1 million infrastructure jobs within 6 months, and set the stage - in terms of a pipeline of projects, trained workers, deep-pockets firms, and long-term vision - to drive a Main Street recovery for the next 30-40 years. The ability of our public sector to invest is greatly diminished, but - more good news - virtually all of the investment required, and all of the electric and green investment, is driven from the private sector (including, of course, pension and institutional funds). The Vehicles for our Infrastructure Long Game - Great Companies. The decline in Main Street infrastructure investment has created a significant asymmetry between the U.S. and China in the size, reach and risk-taking ability of the companies that organize critical infrastructure projects. Make no mistake, this is a real problem that must be recognized - and rectified. The investment decline, and hence the room for our companies to succeed, has been intensified by Covid: the AGC’s report goes on to highlight that “Fifty-nine percent of firms report they had projects scheduled to start in 2020 but postponed until 2021. In addition, 44 percent of firms report they had projects canceled in 2020 and not rescheduled. Eighteen percent of firms also report that owners have already postponed projects scheduled to start between January and June of 2021.” The largest construction companies in the world are all Chinese, and by any measure they are massive - the largest may have as many as 2.2 million employees! These companies dwarf the firms that we would rely on to build our world-class infrastructure - and that of our market democracy partners. Adding to the reality of the challenge, these companies - along with the Spanish giant ACS - have a recent track record of extraordinary success, having built great projects for a decade or more, while we struggle to build a single high speed rail project, a single MagLev project, or even the critical Gateway tunnel. One of the priorities of the coming Biden infrastructure initiative, thinking long-term, will be to partner with, and create, great U.S. infrastructure firms. The largest U.S. construction companies - I have left out Aecom because they are no longer in construction - is between one seventh and 1/20th the size of the largest Chinese construction firms, and only about 1/4 of Spain’s largest firm. Somehow this reminds me of the tiny size - 174,000 in total numbers - of the U.S. military before World War II. Main Street - The Key to the Infrastructure Renaissance. Three points. First, infrastructure is no longer the second or third-level issue that politicians see in their mind’s eye - no longer the physical underpinning of our economy, it is fast becoming the digital backbone, and increasingly the brain, driving productivity, entrepreneurial opportunity and labor demand. Second, we have become horrible at executing on the blocking and tackling of building projects, and we have to reverse that immediately. If a MagLev project is going to remove 2 million tons of greenhouse gases from the automobile pollution ledger each year, then why not fast track the approval process? Let’s get back to basics: empower the states and state infrastructure banks; reenergize national laboratories to lead the way on basic research; mobilize pension funds and private capital to invest in visionary projects; and transform bureaucratic inertia into support for innovation and the creation of visionary projects from wind and solar, to high voltage transmission, to cleaner water and more efficient means of moving people and goods. Again in the words of the Midwestern entrepreneur, “the public sector needs to impose itself.” Ron Klain, President-elect Biden’s chief of staff, said it well in a recent interview: “My work on the Recovery Act… was a great learning experience in how to coordinate among federal agencies, how to increase the pace at which government responds, how to break down bureaucratic conflict in the agencies and how to deliver results for the American people.” We need a group of people like that, in the White House, identifying projects and driving our infrastructure build. Third, and most important of all, we need a vision that is long-term, generous, uplifting, inspiring - because that is how we will come together, get through the battle against Covid, and successfully engage in the many infrastructure battles to come as we build our economy over the next decade.

#### Passage depends on Manchin---failure on infra makes it too late to solve warming and crushes international climate credibility

Greg Sargent 9-3 [WaPo, “Opinion: Joe Manchin’s new threat to destroy Biden’s agenda is worse than it seems,” <https://www.washingtonpost.com/opinions/2021/09/03/manchin-oped-threat-biden-reconciliation-bill/>, hec]

Unfortunately, Sen. Joe Manchin III is going to great lengths to dramatically undermine Biden’s ability to deliver this message — and to act on it. And this could have dire long term consequences, in all kinds of hidden ways. The West Virginia Democrat is threatening to withdraw support for Biden’s $3.5 trillion “human infrastructure” package. In a Wall Street Journal piece, Manchin urges a “pause” on the bill and calls for “significantly reducing” its size “to only what America can afford and needs to spend.” Most obviously, this could upend the “two track” strategy, under which progressives support the $1 trillion bipartisan “hard” infrastructure bill on the understanding that centrists such as Manchin will back the reconciliation measure. That could implode Biden’s whole agenda. But this is deeply dangerous in another, less obvious way, one that turns on the reconciliation bill’s provisions to combat climate change. Those are not just critical to Biden’s global warming agenda — which is central to the long-term success of his presidency — but would also propel us into this fall’s global climate conference while showing that the United States is leading by example. Manchin’s threat puts this in peril. A galling omission It’s galling that the word “climate” appears nowhere in Manchin’s piece, even as he piously suggests he has a divinely inspired reading of what America truly “needs to spend.” This is doubly absurd, given that he sternly lectures us about how this spending will imperil our ability to meet “future crises.” Newsflash, senator: The climate crisis is already upon us. As an alarming New York Times piece details, it isn’t just that these extreme weather events are revealing how unprepared we are to handle the short-term consequences (storms, floods, heat waves, wrecked infrastructure, deaths) of global warming. Worse, the longer we delay, the harder it will become to get a handle on global warming itself: There are limits to how much the country, and the world, can adapt. And if nations don’t do more to cut greenhouse gas emissions that are driving climate change, they may soon run up against the outer edges of resilience. So the stakes for the reconciliation bill are extremely high. The two main pillars of its climate agenda are its Clean Energy Standard, which would phase down production of greenhouse gas emissions in electricity generation, and its massive subsidies for renewable energy sources. These two reinforce each other, as David Roberts explains: The first boosts demand for renewable energy sources to produce electricity, and the second increases supply of renewable sources. Paul Krugman frames the need for this starkly: The bad news is that if these proposals aren’t enacted, it will probably be a very long time — quite possibly a decade or more — before we get another chance at significant climate policy. That’s terrible enough. But let’s also note that failure could spill over into the U.N. climate conference in Glasgow this fall. “This is pivotal,” Alice Hill, a senior fellow at the Council on Foreign Relations, told me. If the United States gets knocked off the track to passing that climate agenda, we will have “little to show” in terms of real “ambition to reduce harmful carbon pollution.” That would send “a signal to the world” that the United States “isn’t taking this seriously,” Hill said, which would “embolden other nations to choose not to engage.” This fall’s conference represents an opportunity for countries “to change the course of history” by showing “great ambition on climate change,” Hill said. “Without the reconciliation bill, the opportunity presented is likely missed.”

#### They spotted us the impact in the 1AC---warming causes extinction and outweighs other impacts

#### PC is key to reconciliation---it’s laser-thin but will pass now

Elliot 9-16 (PHILIP ELLIOTT, Staff writer @ Times, Democrats Face a Grueling Two Weeks as Infighting Erupts Over Infrastructure, <https://time.com/6098810/house-democrats-reconciliation/>, y2k)

House Democrats yesterday finished penning a 2,600-page bill that finally outlines the specifics of their ambitious “soft” infrastructure plan that won’t attract a single Republican vote. But no one was really rushing to Schneider’s for bottles of bubbly. For a party ready to spend $3.5 trillion to fund its social policy agenda, there were plenty of glum faces on Capitol Hill. In fact, one key piece of the legislation—a deal that would finally let Medicare negotiate lower prices with drug companies—fell apart in the Energy and Commerce Committee when three Democrats voted against it. It found resurrection a short time later when Leadership aides literally plucked it from the Energy and Commerce team and delivered it to the Ways and Means Committee for its approval instead. Even there, though, one Democrat voted against it, saying the threat it posed to pharmaceutical companies’ profits would doom it in the Senate. “Every moment we spend debating provisions that will never become law is a moment wasted and will delay much-needed assistance to the American people,” Rep. Stephanie Murphy of Florida later argued. Put another way? Brace for some nasty politics over the next two weeks as House Speaker Nancy Pelosi tries to get this bill to a vote before the budget year ends on Sept. 30. And those 2,600 pages had better be recyclable. Democrats can only afford three defectors if they want to usher this bill into law, and they’re perilously close to failure. So far, five centrist Democrats in the House have said they prefer a scaled-back version of the Medicare component. But if Pelosi gives the five centrists that win, she risks losing the support of progressives who are already sour that things like a punitive wealth tax and the end to tax loopholes aren’t present in the current version of the bill. As it stands now, letting Medicare negotiate drug prices would save the government about $500 billion over the next decade. The scaled-back version doesn’t have an official cost, but a very similar version got its score in the Senate last year: roughly $100 billion in savings. Because Democrats are using a budgeting loophole to help them avoid a filibuster and pass this with bare majorities, that $400 billion gap matters a lot more than on most bills. Scaling back the Medicare savings means they would also have to scale back their overall spending on the bill—a big line in the sand for progressives who say they’ve already compromised too much. All of this, of course, comes as President Joe Biden and his top aides in the White House have been trying to get Senate centrists onboard. Just yesterday, he met separately with Sens. Kyrsten Sinema and Joe Manchin, fellow Democrats who have expressed worries about the $3.5 trillion price tag but have been vague about what exactly they want to cut back on. With the Senate evenly divided at 50-50, and Vice President Kamala Harris in position to break the ties to Democrats’ victories, any shenanigans from those two independent thinkers scrambles the whole package. Oh, and that other bipartisan infrastructure plan that carries $550 billion in new spending? It’s still sitting on the shelf in the House. Pelosi said she’d bring it to the floor only when the bigger—and entirely partisan—bill was ready. And there’s plenty of grumbling about that package, too. If this is all beginning to sound like a scratched record that keeps repeating, it’s because this has become something of a pattern here in Washington. Things look pretty grim for legislation in town these days, despite Democrats controlling the House, the Senate and the White House. Their margin for error is literally zero, and so hiccups from a half-dozen centrists can forewarn a doomed agenda. So far, Pelosi has been a master of holding the line on crucial votes and has managed to maneuver her team to victories, including on an earlier pandemic relief package that passed with only Democratic votes. Now she’s trying again, but the clock is ticking, and $3.5 trillion is an eye-popping sum of money that rivals the spending the United States unleashed to close out World War II.

#### Both sides will make minor concessions---that’s sufficient

Kevin Liptak et al, Jeff Zeleny and Phil Mattingly, 9-18 [Kevin Liptak, Jeff Zeleny and Phil Mattingly, Cnn, "How Biden hopes to recapture his momentum after a week of unexpected setbacks," CNN, 9-18-2021, https://www.cnn.com/2021/09/18/politics/joe-biden-political-momentum/index.html, hec]

This week, before leaving for his vacation home in Rehoboth Beach, Biden began meeting in-person with moderate Democratic Sens. Kyrsten Sinema of Arizona and Joe Manchin of West Virginia, hearing out their concerns about the amount of spending. With Manchin, he listened patiently to a proposal that would more than halve the size of the final bill. Biden has not endorsed that plan, but also hasn't yet had luck in convincing the skeptical Democrat to come along with his. In public, Biden has begun signaling the final bill could come in below $3.5 trillion, the figure proposed in an initial blueprint. White House officials acknowledge that's a near certainty at this point in order to secure the votes of Manchin and Sinema. The ever-present balancing act between moderates and progressives has become even more acute as a result. But Biden is pressuring Democrats to avoid stripping out what he believes will prove to be the bill's most salient selling points.

#### Timing is everything---delays risk package failure---it’s the top priority and the House vote is Sept 27

David Morgan 21 [Reuters, "Pelosi sets Oct 1 target for infrastructure, Biden spending bill," 8-21-2021, https://www.reuters.com/world/us/pelosi-sets-oct-1-target-infrastructure-biden-spending-bill-2021-08-22/, hec]

WASHINGTON, Aug 21 (Reuters) - U.S. House of Representatives Speaker Nancy Pelosi on Saturday set an Oct. 1 target date for passing President Joe Biden's multitrillion-dollar infrastructure and social spending agenda. In a "Dear Colleague" letter to her fellow Democrats, Pelosi also warned against delaying next week's expected vote on a $3.5 trillion budget resolution that some party centrists have threatened not to support. "Any delay to passing the budget resolution threatens the timetable for delivering the historic progress and the transformative vision that Democrats share," the top House Democrat said in the letter. The Senate has already passed both a $1 trillion bipartisan infrastructure bill to rebuild America's roads, bridges, airports and waterways, and the budget resolution, which includes spending instructions for Biden's Build Back Better Plan on education, childcare, healthcare and climate measures. "The House is hard at work to enact both the Build Back Better Plan and the bipartisan infrastructure bill before October 1st, when the (infrastructure bill) would go into effect," Pelosi said in the letter. The infrastructure bill and the more sweeping social spending package are top domestic priorities for Biden.

#### Biden’s personally holding the deal together

Christina Wilkie 9-16, White House Reporter at CNBC, Political Reporter at The Huffington Post, “His Economic Agenda on the Line, Biden Prepares to Fight for Tax Increases on the Wealthy”, CNBC, 9/16/2021, https://www.cnbc.com/2021/09/16/biden-prepares-to-fight-for-tax-increases-on-wealthy-families-corporations.html

Central to this mammoth effort will be Biden himself, both as the leader of his party and as a skilled congressional negotiator in his own right.

Any doubt about how involved the president intends to be in the nitty gritty of the legislative battle were put to rest on Wednesday, when Biden hosted separate private meetings at the White House with the Senate’s two most centrist Democrats, Arizona Sen. Krysten Sinema and West Virginia Sen. Joe Manchin.

Both Manchin and Sinema have both expressed skepticism about the size and scope of the social safety net bill. Specifically, Sinema has questioned the size of the bill and Manchin has expressed concerns over some of the tax hikes.

Biden was set to continue his outreach on Thursday, holding phone calls with Senate Majority Leader Chuck Schumer and House Speaker Nancy Pelosi.

Not a done deal

Biden will need the vote of every Democratic senator in order to pass the bill along party lines through the 50-50 split Senate, with a tie-breaking vote cast by Vice President Kamala Harris.

One factor working in Biden’s favor so far is public opinion. Americans by-and-large support raising taxes on the wealthy and corporations in order to fund infrastructure and expand benefits for working families.

#### And he is super confident

Bose 9-16 (Nandita Bose, Biden expects Congress to approve spending, infrastructure bills, <https://www.reuters.com/world/us/biden-says-he-expects-congress-deliver-spending-infrastructure-bills-2021-09-16/>, y2k)

U.S. President Joe Biden on Thursday expressed confidence that Congress will pass both a bill funding infrastructure investments and a supplementary spending bill as Democrats seek to infuse trillions of dollars into the U.S. economy.

#### Thumpers are priced in---sudden changes to the agenda involving big-ticket items cause political havoc

Jacob Pramuk 9-15 [Jacob Pramuk, “Biden meets with Sens. Manchin, Sinema as Democrats try to build support for $3.5 trillion bill,” CNBC, 6-10-2021, https://www.cnbc.com/2021/09/15/joe-biden-to-meet-with-joe-manchin-kyrsten-sinema-about-3point5-trillion-bill.html, hec]

President Joe Biden was set to meet Wednesday with Sens. Joe Manchin and Kyrsten Sinema as he tries to nudge the skeptical Democrats to back his sprawling $3.5 trillion economic plan. The president spoke with Sinema, who represents Arizona, at the White House in the morning. He was expected to meet with Manchin, a West Virginia lawmaker, later in the day. Both centrists have criticized the proposed $3.5 trillion price tag, and Manchin has called on party leaders to delay votes on the legislation. The meetings come at a pivotal point for an agenda that Democrats hope will offer a lifeline to households and stymie Republican efforts to win control of Congress next year. Party leaders gave congressional committees a Wednesday deadline to write their portions of the bill, and they hope to send it to Biden’s desk in the coming weeks. Democrats have to navigate a political maze before they can pass what they call the biggest investment in the social safety net in decades. While the party does not need a GOP vote to approve the bill through budget reconciliation, a single Democratic defection can sink it in the Senate, giving Manchin and Sinema massive leverage to shape the plan. House Speaker Nancy Pelosi, D-Calif., can lose only three votes in her caucus and pass the legislation. She has to balance the often competing interests of centrists wary of $3.5 trillion in spending and progressives who see the sum as a minimum investment. The plan’s success has huge stakes for Biden, who has seen his approval ratings dip amid a chaotic U.S. withdrawal from Afghanistan and a coronavirus resurgence fueled by the delta variant. The president has cast his economic plan as a jolt to the working class and an overdue effort to mitigate climate change.

#### Infrastructure will pass but PC’s key

Matt Reese 9-14, Columnist for Ohio’s Country Journal, BA from Ohio State University, and Dale Minyo, General Manager for Ag Net Communications, LLC, Farm Broadcaster for the Ohio Ag Net, BA from Ohio State University, “Infrastructure Bill Moving Forward”, Ohio’s Country Journal, 9/14/2021, https://ocj.com/2021/09/infrastructure-bill-moving-forward/

From the local bridge just around the corner to the locks and dams on the nation’s river system, agricultural viability depends heavily on infrastructure. After months of across-the-aisle negotiations, the Senate voted to pass the bipartisan infrastructure package (H.R. 3684) in August.

“This is a very notable move forward. It passed through the Senate with a very bi-partisan vote of 69-30, 19 Republican Senators voted for the legislation. Early on this year, the topic of infrastructure was really expansive. There were a lot of things being discussed that really don’t have a lot to do with what most Americans regard as infrastructure. It has tightened up and we think that is a good thing,” said Mike Steenhoek, executive director of the Soy Transportation Coalition. “We appreciate there are a number of categories within this legislation that, if they come to fruition, would be beneficial to agriculture. There is funding directed at roads and bridges, many in rural areas. There is some funding for our inland waterways and ports. For an industry like soybeans, we rely on robust exports and we have got to have the multi-modal transportation system that can connect our supply with that demand. We think there are some very favorable things in this legislation.”

With Senate passage, attention now shifts to the House on this legislation.

“Very little proceeds on time in Washington, D.C., but it is moving forward. The big question is: does the House adhere to Speaker Pelosi’s stated desire that this bill only gets passed if that $3.5 trillion reconciliation package which involves much more social spending also gets passed? There is still a lot of uncertainty related to this. Clearly there are Democrats and Republicans who support this legislation and it is clearly a priority of the president. It is a big bill. Hopefully it won’t get polluted by some of these more controversial topics.”

If the infrastructure package does get passed, it will hopefully build on existing progress.

“This bill would amplify what is already happening. We have a 5-year Highway Bill that was passed in 2015 and is scheduled to be re-authorized this year,” Steenhoek said. “Last year we had the Water Resources Development Act that paved the way for more funding for the inland waterway system. This is not our only shot for moving the needle on infrastructure. Things are getting done. You could argue that more needs to be done and that is what this bill aspires to do.”

Along with the big picture infrastructure items, there are also some smaller provisions in the legislation that could benefit agriculture, including support for biobased products.

“There is a provision that calls attention to biobased products that have infrastructure implications,” Steenhoek said.“Soy-based asphalt sealants and soy-based concrete sealants that are made largely from soil oil are a sustainable way to elongate the life of roads and bridges and provide another market opportunity for soybeans.”

There is plenty to watch as this continues to move forward.

“This is not a perfect piece of legislation, but we do think when you look at the links in the supply chain that are important to farmers, there are certain investment levels and actions that will improve the supply chain. Overall we look at this legislation favorably,” Steenhoek said. “I think there is a good chance that this does get passed, but as the days progress toward an election year, then the probability of anything getting passed goes down.”

#### Democrats released the funding plan this week---plenty of ways to do it

Jacob Pramuk 9-13 [Jacob Pramuk, “House Democrats propose new tax hikes to pay for their $3.5 trillion bill: Here are the details,” CNBC, https://www.cnbc.com/2021/09/13/house-democrats-propose-tax-increases-in-3point5-trillion-budget-bill.html, hec]

House Democrats on Monday outlined a bevy of tax hikes on corporations and wealthy people to fund an investment in the social safety net and climate policy that could reach $3.5 trillion. The plan calls for top corporate and individual tax rates of 26.5% and 39.6%, respectively, according to a summary released by the tax-writing Ways and Means Committee. The proposal includes a 3% surcharge on individual income above $5 million and a capital gains tax of 25%. It’s unclear how much the tax increases would raise and if the new revenue would offset the full investment in social programs. Democrats could ultimately cut the legislation’s price tag as centrists balk at a $3.5 trillion total. The tax proposals may change before Democrats craft the final bill they hope to pass in coming weeks. The Ways and Means Committee will debate tax policy when it resumes its markup of the mammoth spending package this week. Senate Democrats will also have their say in the tax proposals. Sen. Joe Manchin, D-W.V., has called for a corporate rate of 25%, lower than the one favored by House Democrats. He has also expressed concerns about the plan adding to budget deficits. The party will need votes from every member of the Senate Democratic caucus and all but three House Democrats. Senate Majority Leader Chuck Schumer, D-N.Y., and House Speaker Nancy Pelosi, D-Calif., aim to pass the legislation through the budget reconciliation process without Republican support. The House tax plan would not go as far as President Joe Biden initially hoped. The president had called for a 28% corporate tax and a 39.6% capital gains rate. Biden has promised not to raise taxes on anyone who make less than $400,000 per year. The House proposal would take huge steps to reverse the 2017 Republican tax cuts. It would hike the corporate rate to 26.5%, after the GOP slashed it to 21% from 35%. Democrats would also restore the top individual rate to 39.6% after Republicans cut it to 37%.

#### Biden is pushing economic policies to ensure his agenda---he can get a big win from reconciliation

Alexander Nazaryan 9-8 [Alexander Nazaryan, Senior White House Correspondent, "The two mistakes that ruined Biden's summer," 9-8-2021, https://news.yahoo.com/the-two-mistakes-that-ruined-bidens-summer-090057360.html, hec]

In the weeks to come, Congress will decide the fate of Biden’s $3.5 trillion human infrastructure proposal, as well as that of a smaller, bipartisan $1.2 trillion proposal focused on traditional infrastructure. If those measures pass, the White House believes, the summer’s challenges will quickly be relegated to a distant memory. “Our heads are down to get that across the finish line,” the senior administration official said, citing some 130 calls between the White House legislative office and members of Congress and their staffs. He described the mood in the White House as “pretty upbeat” but “sober” about the challenges that remain. Biden’s predecessor, Donald Trump, was frequently occupied with day-to-day coverage of his administration, which often had the effect of turning problems into crises. The new president is taking the opposite approach, trying to stay focused on policy while keeping frustrations about media coverage largely private. “There are times when events are larger than any president,” says Eric Dezenhall, a leading crisis communications expert in Washington who worked in the Reagan administration. “It’s not the messaging that’s the big problem; with Afghanistan, it’s the events and the notion that they could have been handled differently. We all know Afghanistan was a no-win situation, but there are core questions that are not being answered.” Biden has struck a defiant tone on the withdrawal and has declined to fire officials like national security adviser Jake Sullivan, whom many hold responsible for the chaotic operation. Only 33 percent of Americans agree that Biden has handled the withdrawal well, with far more (55 percent) disapproving, according to a recent Yahoo News/YouGov poll. “With Delta, Biden has greater moral authority,” Dezenhall told Yahoo News. But that authority, too, could slip as the pandemic looks to continue into the fall and, very likely, beyond. Unemployment benefits are expiring. Evictions loom. Offices remain closed and schools could close too. Last week’s lackluster employment report (only 235,000 new jobs added in August) only underscored the precariousness of the recovery. Already, public approval of Biden’s pandemic response has dropped 10 percentage points since late June. Even though the Delta surge appears to have peaked, new variants are on the way. As in the earliest days of the pandemic, Americans are stockpiling toilet paper in fear of looming shortages. Republicans who have struggled to define Biden now see an opening, pressing a case that is not entirely coherent but could prove politically effective all the same. Gov. Greg Abbott of Texas and Gov. Ron DeSantis of Florida have been fighting him on mask mandates in school, igniting a culture war that seemed to have died down in late spring. And former President Donald Trump has issued a dozen press releases in the last two weeks calling on Biden to resign over his handling of Afghanistan, a breach of post-presidential decorum that is nevertheless indicative of where conservatives stand. Despite the right-wing caricature of a senescent president controlled by his advisers, Biden is well known to be impatient and to favor his own counsel over that of advisers, eager to show Ivy League-trained experts that they were wrong to dismiss him when he was vice president to the more erudite Obama. And he is acutely aware of the historical moment and the opportunities it presents, openly courting comparisons to transformational presidents like Franklin Roosevelt and Lyndon Johnson. But the moment is also rife with dangers, as Biden has discovered in the last two months. In early July, he made two promises that would come undone in the weeks to come, leaving him in a weakened position. On July 4, the White House had a party on the South Lawn. Some had advised against the affair, since the coronavirus pandemic was not over. Having hundreds of people gathering in the presidential backyard for burgers and blues music might make it seem like it was. Biden went ahead with the party, because that was exactly the image he wanted to project, that the pandemic was being brought to its conclusion as a result of his determined leadership. The event was billed as “America’s Back Together,” maskless, vaccinated and no longer 6 feet apart. “Today, we’re closer than ever to declaring our independence from a deadly virus,” the president said, making clear that victory was not yet complete, but coming ever closer, with fewer than 10,000 daily cases being recorded daily by the end of June, a precipitous drop from only six months before. “We’ve gained the upper hand against this virus,” he added a few moments later. The pandemic, he said, “no longer controls our lives.” Then music began to play and the party began. Four days later, Biden made another promise, this one on a very different topic. Trump had made an agreement with the Taliban in 2020 to pull U.S. military forces out of Afghanistan by 2021; but Biden, a longtime critic of the conflict, not only embraced that goal but accelerated the timeline. Now he was defending that decision, vowing that when the last American troops left, the government of Ashraf Ghani would assert his rule, with the help of the U.S.-trained Afghan National Army. “The likelihood there’s going to be the Taliban overrunning everything and owning the whole country is highly unlikely,” the president said. There would be no airlifts of the kind Americans had seen at the dispiriting conclusion of the Vietnam War in 1975, he asserted. Two months later, Biden appears to have made fateful miscalculations on both fronts. The Delta variant has reversed the progress the nation had made throughout the winter and spring, leading to a summer surge that has seen deaths and hospitalizations rise to levels not seen in months. Schools across the Southeast have shuttered. Corporations are telling people to stay home. Bars and restaurants are facing the crushing prospect of yet another pandemic winter. In the White House, masks are back on, as they are in Los Angeles and many other parts of the country. Last month, Oregon became the first state in the country to reimpose an outdoor mask mandate, even for vaccinated people. Seattle recently followed suit. “President Biden absolutely declared a victory too soon,” Dr. Leana Wen, the former Baltimore health commissioner, told Yahoo News last month. Since then, his administration has struggled to formulate a coherent approach — and message — on vaccine booster shots, the necessity of which is in dispute. Dr. Kavita Patel, a Brookings Institution fellow who served as a health policy expert in the Obama administration, thinks that Biden made no “obvious mistakes” but adds that his administration could have provided clearer guidance to schools in July. She also thinks the Biden administration could be doing more to gather data on breakthrough infections and long-haul COVID while also creating a nationwide vaccine registry. “He’s trying to convey that we’re not out of this pandemic without terrifying the country,” says Dezenhall, the D.C.-based crisis manager. Biden could only do so much to control the spread of the Delta variant. He and his top advisers knew that it was coming, and that it would lead to a surge similar to the one that the United Kingdom experienced through the spring. Nor did they have any obvious means to temper the weariness of an American public eager to get on with ordinary life. The same could be said for Afghanistan, a two-decade war of which the American public had grown unambiguously tired. As vice president to Barack Obama, Biden had opposed surging troops there. He and Trump may agree on little else, but they share an antipathy to military intervention without end. Little seemed to prepare the White House for the swiftness with which the Afghan military collapsed in the face of a determined Taliban advance. Ghani, the president, fled Kabul, leading to the rapid collapse of the central government. The images of Afghans clinging to the wheels of American aircraft were exactly what Biden had promised to avoid. “The Afghanistan story will have legs,” Bremmer believes. “It is much bigger than Benghazi,” he adds, referencing the 2012 attack by militants on a U.S. consulate in Libya that left four Americans dead. Investigations into the attack hobbled the presidential prospects of Hillary Clinton, who was then the secretary of state. The twin crises pummeled the White House at a vulnerable moment, as 61 percent of those polled said the country was headed down the wrong track. On both issues, the White House believes it remains on firm footing. Polls are snapshots, and narratives change quickly in Washington. Biden would have liked to head into the fall with a stronger standing, and an infrastructure deal could have him riding high once more. “President Biden has an enormous reserve of credibility,” says Celinda Lake, who conducted polling for Biden’s presidential campaign. “People agree with him on Afghanistan, and the images only convince American voters that the decision to withdraw and bring our troops and money home was the right one.” Lake added that “voters still trust Biden on COVID more than anyone else. And voters see that COVID and the economy are strongly linked.” The economy will be Biden’s top issue as members of Congress return to Washington and Afghanistan subsides, if only as a daily news story for U.S. outlets. Even as the president pushes for new spending, he has to be mindful of existing pandemic-related safety net programs now set to expire. On Tuesday, 7.5 million Americans stood to lose $300 unemployment payments. The federal eviction ban has also expired.

#### Dems not focusing on anti-trust now---no thumper AND it requires significant PC---we control link UQ

Sagers 21[Christopher, “AMERICAN ANTITRUST AND THE NEAR TERM: CONSISTENCY, ONE IMAGINES, AND SOME REASONS WHY,” accessed 5-21-21, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>]

15. And so I reach the same conclusion being reached by many other Americans who care about antitrust and think it has been wrecked, and hoping for action that even five years ago I would have said was crazy. The only hope left is legislative reform of statutory antitrust. I think Congress should amend the law to reaffirm its own intention that the law be enforced proactively, aggressively, prophylactically, and for real, without giving every defendant the benefit of every conceivable doubt. Congress should do that in a way that keeps the courts from thwarting its intent through nullifying interpretations, as they have done many times before. Obviously, Senate control is again quite relevant. Under those Senate norms that still remain—in which we retain a filibuster rule for ordinary legislation—a party with fewer than 60 seats can typically do little. The two parties do not apparently work together in hardly any fashion. The party that holds the majority, even if only by one vote, controls the institution and its actions outright, but the minority can typically keep it from taking meaningful substantive action. Where the opposing party holds the White House, Senate minorities have filibustered essentially all legislation, apparently just to deny the opposing President any opportunity for campaign-trail self-congratulation. When the majority party can take effective action, it will only be in extraordinary circumstances or by using a filibuster exception, like the budget reconciliation procedure that was used in connection with the Obamacare legislation in 2010, and in subsequent Republican efforts to repeal it. [304] But antitrust, however important and however much it has returned to popular consciousness, seems unlikely to be so high on the Democratic agenda that it is chosen as one of the extraordinary matters Democrats prioritize in this way, even if they win Senate control. 16. And on top of all of that, it does not help that in this world, in which we dwell on ideas and not institutions—perhaps because institutions seem boring, and do not invite intellectual abstraction or Manichean dreams of good and evil—we see sharp divisions even within our factions. Only liberals and progressives in America favor more antitrust enforcement, but among us we have several hotly disputed disagreements, and some difficulties getting along. It reflects in microcosm the struggle of left and center of the election of 2016. So in 2021 and thereafter, it seems like it will be a fair bit of work to build any effective reform coalition. [305]

#### Empirically---it causes intra-party fights

Scher 7-19 (Bill Scher, the host of the history podcast "When America Worked" and the co-host of bipartisan online show and podcast, A Short History of Democrats and Antitrust

Biden’s war against corporate gigantism is good policy and better politics. <https://washingtonmonthly.com/2021/07/19/a-short-history-of-democrats-and-antitrust/>, y2k)

Biden’s revival of antitrust isn’t just good policy; it’s also good politics. That’s because it can bridge ideological tensions between the party’s younger left flank and its older centrists. Antitrust has appeal to both factions. Talk of restoring competition may upset a handful of giant corporations, but not the wider swath of smaller businesses and entrepreneurs. Socialists may not love capitalism but it’s hard to see them getting too mad at moderate Democrats who draw real corporate blood in the name of repairing capitalism. Yet intra-party tensions remain. During a recent Congressional Progressive Caucus conference call, a heated dispute broke out as Congresswoman Zoe Lofgren criticized the authors of aggressive antitrust legislation for hasty work, and Congressman David Cicilline accused Lofgren of shilling for Silicon Valley. If Biden is to succeed where his predecessors fell short, he will need to be mindful of his party’s history.

#### FTC rulemaking in tech sector causes backlash from Congress

Speegle 12 (Adam Speegle, J.D. Candidate, May 2012, Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process, 110 Mich. L. Rev. 847, y2k)

Another concern regards the political implications of the FTC invoking its antitrust rulemaking authority. One of the benefits often cited by proponents of rulemaking is that the rulemaking process, through notice and comment procedures, often brings important topics to Congress's attention. 159 There is, however, a corresponding risk that Congress may grow concerned about the FTC's increasing intervention in the technology sector. In the 1970s and 1980s, the FTC experienced backlash from Congress due to its activism in the consumer protection arena. 160 As a result, the FTC's authority and resources were curtailed, and procedures for promulgating rules under the consumer protection prong of Section 5 became so burdensome that they rendered FTC-initiated consumer protection rulemaking an impractical and rarely used tool. 161 With an approach based on the "unfair methods of competition" prong, there may be a concern that FTC intervention in the technology sector could trigger a similar response from Congress.

#### Tech antitrust fights kill dem unity and bipart---fights are pushed to the side for top priorities but the plan re-ignites them

Nylen and Lima 21[Leah and Christiano, “Progressives, moderate Democrats tussle over tech antitrust package,” <https://www.politico.com/news/2021/06/23/democrats-tech-antitrust-package-495644>, hec]

A package of antitrust bills to rein in the biggest U.S. tech companies is proving divisive not just for Republican lawmakers, but also for Democrats who are split on whether the legislation goes too far. The six bills being marked up Wednesday by the House Judiciary Committee speak to an oft-repeated goal of many Democrats: curbing the power of Silicon Valley. Four of the bills would zero in on Apple, Amazon, Facebook, Google and Microsoft for greater regulation, limiting their ability to buy up promising startups that could grow into rivals and prohibiting them from using their platforms to discriminate against competitors. The push to crack down on those tech giants has drawn support from a broad coalition of lawmakers fed up with Silicon Valley, from progressive leaders like Reps. Pramila Jayapal (D-Wash.) and David Cicilline (D-R.I.) to outspoken allies of former President Donald Trump like Reps. Ken Buck (R-Colo.) and Matt Gaetz (R-Fla.). On the Republican side, it has also prompted public rebukes by party detractors who call the legislation an affront to conservative values. But a growing number of moderate Democrats are also voicing concern about the proposals under consideration this week, which they warn could have a vast impact on the U.S. economy. That includes at least two key California Democrats that sit on Judiciary, Zoe Lofgren and Lou Correa, who will have a say Wednesday on which bills make it out of the panel and which don’t. “My concern is that this legislation will essentially push away investment in this area, it will stifle the economics behind it, the job creation,” Correa, whose district includes parts of Orange County, said in an interview Tuesday. Correa said he plans to back one of the proposals under consideration Wednesday that would increase the amount of money federal regulators get from companies filing for mergers (H.R. 3843 (117)). But he said he has concerns about the other bills and has not yet decided how he’ll vote on them. Lofgren, whose district includes the San Jose area, has “major concerns” about the measures, a Democratic staffer said. While Lofgren agrees with the goals of bills to make it easier for users to switch between platforms (H.R. 3849 (117)) and prevent the tech giants from preferring their own products (H.R. 3816 (117)), she has some proposals to improve the legislation, said the staffer, who spoke on condition of anonymity to discuss internal deliberations. But the merger ban (H.R. 3826 (117)) and a measure that would force the companies to sell-off lines of business (H.R. 3825 (117)) would, in her view, “unnecessarily rip apart these companies, not responsibly regulate them,” the staffer said. “It is a concern within the California delegation,” Correa said. But Democratic apprehension isn’t limited to California, which is home to three of the five tech giants. Last week, Rep. Suzan DelBene (D-Wash.) and seven other moderate Democrats urged House leaders and the panel to delay the markup, warning that the legislation could weaken privacy protections, increase cybersecurity risks and further the spread of misinformation, as first reported by Bloomberg.

#### Popular policies don’t generate further support---*Biden can only go down---not up*

Perry Bacon Jr. 21, a senior writer for FiveThirtyEight, “Why Republicans Don’t Fear An Electoral Backlash For Opposing Really Popular Parts Of Biden’s Agenda,” <https://fivethirtyeight.com/features/why-republicans-dont-fear-an-electoral-backlash-for-opposing-really-popular-parts-of-bidens-agenda/>

Republicans in the U.S. House last week unanimously opposed President Biden’s economic stimulus bill, even though polls show that the legislation is popular with the public. The U.S. Senate will consider the bill soon — and it looks like the overwhelming majority of Republicans in that chamber will oppose it as well. And it’s not just the stimulus. House Republicans also last week overwhelmingly opposed a bill to ban discrimination on the basis of sexual orientation and gender identity. And the GOP seems poised to oppose upcoming Democratic bills to make it easier to vote and spend hundreds of billions to improve the nation’s infrastructure. All of those ideas are popular with the public, too. “Duh,” you might say. Of course, the party out of power opposes the agenda of the party in power. Democrats did that during former President Donald Trump’s four years. Republicans did it during former President Barack Obama’s two terms. The parties just disagree on a lot of major issues. You’ve seen this movie before, right? This sequel is a little different, actually. Obama’s health care bill was only hovering around majority support as it moved through Congress. Trump’s proposals to repeal Obamacare and cut corporate taxes were downright unpopular. In contrast, Biden and the major elements of his agenda are popular. And the Republican Party isn’t, which helps explain why it was swept out of power in the 2018 and 2020 elections. So if an unpopular party uniformly opposes popular policies in the run-up to 2022 and 2024, is it buying itself a ticket further into the political wilderness? Not necessarily. There are several reasons to think that opposing popular policies won’t hurt Republicans electorally, and conversely, that implementing a popular agenda won’t necessarily boost Biden that much. The first reason that congressional Republicans can afford to oppose popular ideas is one that you have probably read a lot about over the last several years: The GOP has several big structural advantages in America’s electoral system. Because of the Electoral College, Trump would have won the presidency with around 257,000 more votes in Michigan, Pennsylvania and Wisconsin, even though he lost nationally by more than 7 million votes. The Senate gives equal weight to sparsely populated states like Wyoming and huge ones like California, so the chamber’s 50 Democratic senators effectively represent about 185 million Americans, while its 50 Republican senators represent about 143 million, as Vox’s Ian Millhiser recently calculated. Gerrymandering by Republicans, as well as the weakness of Democrats in rural areas, makes it harder for Democrats to win and keep control of the House even when most voters back Democratic House candidates. That’s what happened in 2020. Put all that together, and congressional Republicans are somewhat insulated from the public will. In turn, the advantage for Biden and congressional Democrats of being closer to the public’s opinions is blunted. Second, electoral politics and policy are increasingly disconnected. More and more Americans vote along party lines and are unlikely to break from their side no matter what it does. Some scholars argue that voters’ attachments to the parties are not that closely linked to the parties’ policy platforms but rather more akin to loyalty to a team or brand. And partisanship and voting are increasingly linked to racial attitudes, as opposed to policy. So GOP-leaning voters may support some Democratic policies but still vote for Republican politicians who oppose those policies. Third, the last several midterm elections have all been defined by backlashes against the incumbent president. You could argue that there’s nothing inevitable about this, and that former President George W. Bush (Social Security reform, Iraq War), Obama (Obamacare in 2010 and its flawed rollout in 2014) and Trump (Obamacare repeal) all did or proposed controversial things that irritated voters. Maybe if Biden sticks to popular stuff he’ll buck the trend. But it could instead be the case that voters from the president’s party tend to be kind of fat and happy in midterms, while the opposition is inspired to turn out. So even if Biden does popular things, GOP voters could be more motivated to vote in November 2022. Fourth, voters may like a president’s policies in the abstract but still think he isn’t doing a good job or that his policies aren’t that effective if those policies aren’t bipartisan. Think of this as the Mitch McConnell theory. Early in Obama’s first term, the last time Democrats had control of the House, Senate and the presidency, the Kentucky senator and others in the GOP leadership came up with a strategy of trying to get as few congressional Republicans as possible to back then-President Obama’s ideas. As McConnell said publicly back then, he viewed voters as not especially attuned to the day-to-day happenings in Washington. Instead, he said, they evaluate a president in part based on whether his agenda seems divisive, particularly a president who campaigns on unifying the country (as both Obama and Biden did). That allows the opposition party to create the perception of division simply by voting against the president’s agenda. Put another way: The opposition party can guarantee a lack of bipartisan support — and then criticize the president for lacking bipartisan support.

#### Biden PC will get climate to the finish line

MATTHEW CHOI September 16, 2021, “The rocky road to reconciliation,” POLITICO, <https://www.politico.com/newsletters/morning-energy/2021/09/16/the-rocky-road-to-reconciliation-797638>

THE DEMS PARTY'S NOT OVER YET: House Democrats have been busy in committee these past few weeks going over and advancing some of their biggest climate priorities — from a measure to fund a Civilian Climate Corps out of House Natural Resources to a Clean Electricity Performance Program and methane fees in Energy and Commerce. And on Wednesday, the House Ways and Means Committee pushed through a number of tax credits to spur renewable energy, estimated to cost $235 billion over 10 years, going through on a near party-line vote. The tax proposal includes extending both production and investment tax credits, and offers a direct-pay option of several tax breaks.

In total, Democrats’ proposals pushed out of committee would be the federal government’s most aggressive steps ever taken to address climate change, Pro’s Kelsey Tamborrino reports. But what happens in the Senate is still unknown, with Sens. Joe Manchin and Kyrsten Sinema maintaining their disdain for a $3.5 trillion reconciliation price tag, and what could get cut on the chopping block remains anyone's guess.

President Joe Biden met with both on Wednesday and has been increasingly involved in Democrats’ legislative affairs as crunch time comes down and intra-party fighting heats up, POLITICO’s Burgess Everett and Laura Barrón-López report. Biden “knows better than anyone the power of the United States [presidency] in persuading and sometimes cajoling the key members of Congress, when push comes to shove,” said Sen. Richard Blumenthal (D-Conn.).

Senate Finance Chair Ron Wyden is also pushing a markedly different approach from the House Ways and Means green title, proposing moving the current 44 separate energy tax breaks — which Wyden called "a monument of doing business as usual" — into three emissions-based incentives for clean electricity, clean transportation and energy efficiency. "We are setting up a tech-neutral, free market, no mandates approach with one lodestar: The more you reduce carbon emissions, the bigger your tax savings," he said during an Evergreen Action event Wednesday.

The Ways and Means panel is not tying its tax savings to reducing carbon emissions, nor has it proposed nixing fossil fuel subsidies. Wyden said he continues to be in discussion with Chair Richard Neal and congressional leadership, adding: "Make no mistake about it, Democrats on the Ways and Means Committee and Democrats on the Finance Committee, we're rowing in the same direction."

Even in the House, the game isn’t over. Moderate Democrat Stephanie Murphy (D-Fla.) voted against her party’s Ways and Means legislation, Pro’s Brian Faler reports — an ominous omen for Democrats who can only afford to lose three votes on the House floor.

Wyden emphasized that Congress' budget reconciliation plan offers the best chance to effectively combat climate change, if lawmakers can get it across the finishing line. "If you look at the history, the last time we had anything resembling this opportunity was at the beginning of the Obama administration in 2009," Wyden said during the Evergreen Action event. "They couldn't pass comprehensive climate legislation. We never thought it would take us 12 years to have another opportunity and I just don't want to miss that shot. I don't want to squander it."

#### Biden will preserve dem unity behind reconciliation including climate provisions

Louis Jacobson September 10, 2021, “The Democrats’ reconciliation bill: What you need to know,” POLITIFACT, https://www.politifact.com/article/2021/sep/10/democrats-reconciliation-bill-what-you-need-know/

What does Biden want to pass through Congress?

Some of Biden’s policy priorities were included in the bipartisan infrastructure bill, mainly "hard" infrastructure investments in transportation and energy systems. But some spending Biden wanted didn’t make it into that bill — such as money for upgrading veterans’ hospitals, American manufacturing competitiveness, and job training — and these have been combined with "softer" human infrastructure initiatives proposed in Biden’s American Families Plan for possible inclusion in the reconciliation bill now being put together.

Some of the proposals that might be included in the bill are

universal preschool for 3- and 4-year-olds;

two years of free community college;

a national paid family and medical leave program;

extensions of the child tax credit, the earned income tax credit, and the child and dependent care tax credit;

adding dental, vision and hearing benefits to Medicare;

allowing Medicare officials to negotiate drug prices; and

investments to support reductions in carbon emissions to address climate change.

To partly pay for such outlays, the bill might include an increase in the top tax rate to 39.6% and an end to certain capital gains tax breaks.

But these are goals. None of these are certain to be in the reconciliation bill currently being negotiated, and some could be cut back in scope or duration.

How large could the reconciliation bill be?

While the budget resolution permits an increase of $1.75 trillion, House Democrats have been discussing a measure that includes up to $3.5 trillion in new outlays. The reason that figure is higher is that it would be partially paid for through tax increases that reduce the net cost to the $1.75 trillion cap set by the budget resolution.

While the broad outlines of Biden’s proposal are known, the specific elements of the reconciliation bill are not known as of early September. House Democratic leaders are working behind closed doors with committee chairs and other key lawmakers to find something that can gain near-universal support within the progressive House Democratic caucus, while also keeping in mind what more centrist Senate Democrats would be able to support.

How united are Democrats?

Progress on hammering out the details of a reconciliation bill has been hampered by internal sparring among Democrats.

The Democrats’ narrow margins in the House mean that factions within the caucus potentially have a lot of leverage to shape the final bill. The two most important factions so far have been progressives and centrists.

Progressives, including Rep. Alexandria Ocasio-Cortez, D-N.Y., see even the maximum $3.5 trillion amount as a downward concession from what they were initially seeking. Meanwhile, centrist Democrats, including those who could face tough reelection bids in 2022, are wary of spending that much and are seeking to shrink the reconciliation bill’s bottom line.

This intra-party conflict forced House Speaker Nancy Pelosi, D-Calif., to draw on her legislative experience just to secure passage of the budget resolution that needed to precede any reconciliation bill. Progressives want to vote on the reconciliation bill first, before the bipartisan infrastructure bill; centrists want to do the opposite.

Ultimately, a "rule" governing a floor vote on the budget had to be debated and renegotiated three separate times in about 24 hours before progressives and centrists would agree to proceed to the vote. Centrists settled for an agreement from Democratic leaders to hold a vote on the infrastructure bill no later than Sept. 27.

Democrats "need virtually unanimous support" to pass the reconciliation bill, said Marc Goldwein, senior vice president at the Committee for a Responsible Federal Budget. "They need enough policies to make people satisfied. It’s a delicate tightrope."

And that’s just for House consideration. Over in the Senate, the challenges are equally steep.

Democratic Sen. Joe Manchin of West Virginia, whose state strongly backed Donald Trump for president in 2016 and 2020, has said he won’t support a reconciliation bill as big as $3.5 trillion. Other Democrats may join him.

Since every Democratic vote in the Senate will be needed to pass the reconciliation bill, Manchin’s opposition, and the possible opposition of others, means that a reconciliation measure with a chance of making it to Biden’s desk may have to end up well below $3.5 trillion in spending.

"There is zero chance of a reconciliation bill getting a party-line vote in the Senate and the House without major concessions to moderate Democrats on the price tag and how it’s paid for," said Donald R. Wolfensberger, director of the Congress Project at the Woodrow Wilson International Center for Scholars.

What could be done to trim the reconciliation bill?

Democrats could cut specific spending programs entirely, or they could cut a whole lot of initiatives by the same percentage, perhaps by authorizing programs for a shorter period of time. They could also propose more tax increases on high-income taxpayers or corporations than they were initially considering. These options are likely part of the closed-door negotiations now under way.

Of course, cutting the reach of the bill risks losing the support of progressive Democrats, and that would torpedo the entire effort unless Democrats can pick up enough moderate Republicans to balance out the progressive losses.

How serious are the centrists and progressives about derailing the process if they don’t get their way?

Experts said it’s certainly possible that either centrists or progressives would tank the bill if they can’t get everything they want, though such a course would be risky since the Democrats are at risk of losing their slim majorities in the 2022 midterm elections.

"It may be too early to be talking about a snowball’s chance in Hades, but the intraparty heat in the Democratic caucuses has already set off the pre-melt warning sirens," Wolfensberger said.

Goldwein said that while the factions’ positioning is deeply felt, he added that there’s a good chance that Democrats want to get to yes. "I think the leadership and the administration will lead them to a deal," he said.

## Dependency Trap

### AT: LIO---2NC

#### LIO doesn’t prevent war

Paul Staniland 18, Associate Professor of Political Science and Chair of the Committee on International Relations at the University of Chicago, 7/29/18, “Misreading the “Liberal Order”: Why We Need New Thinking in American Foreign Policy”, *Lawfare*; https://www.lawfareblog.com/misreading-liberal-order-why-we-need-new-thinking-american-foreign-policy

Pushing back against Trump’s foreign policy is an important goal. But moving forward requires a more serious analysis than claiming that the “liberal international order” was the centerpiece of past U.S. foreign-policy successes, and thus should be again. Both claims are flawed. We need to understand the limits of the liberal international order, where it previously failed to deliver benefits, and why it offers little guidance for many contemporary questions.

First, advocates of the order tend to skim past the policies pursued under the liberal order that have not worked. These mistakes need to be directly confronted to do better in the future.

Proponents of the order, however, often present a narrow and highly selective reading of history that ignores much of the coercion, violence, and instability that accompanied post-war history. Problematic outcomes are treated as either aberrant exceptions or as not truly characterizing the order. One recent defense of the liberal order by prominent liberal institutionalists Daniel Deudney and G. John Ikenberry, for instance, does not mention Iraq, Afghanistan, Vietnam, or Libya. Professors Stephen Chaudoin, Helen Milner, and Dustin Tingley herald the order’s “support for freedom, democracy, human rights, a free press.” Kori Schake writes that Western democracies’ wars are “about enlarging the perimeter of security and prosperity, expanding and consolidating the liberal order.” Historian Hal Brands argues that the order has advocated “political liberalism in the form of representative government and human rights; and other liberal concepts, such as nonaggression, self-determination, and the peaceful settlement of disputes.”

Other analysts have persuasively argued that these accounts create an “imagined” picture of post-World War II history. Patrick Porter outlines in detail how coercive, violent, and hypocritical U.S. foreign policy has often been. To the extent an international liberal order ever actually existed beyond a small cluster of countries, writes Nick Danforth, it was recent and short-lived. Thomas Meaney and Stephen Wertheim further argue that “critics exaggerate Mr. Trump’s abnormality,” situating him within a long history of the pursuit of American self-interest. Graham Allison—no bomb-throwing radical—has recently written that the order was a “myth” and that credit for the lack of great power war should instead go to nuclear deterrence. Coercion and disregard for both allies and political liberalism have been entirely compatible with the “liberal” order.

The last two decades have been a bumpy ride for U.S. foreign policy. Since 9/11, we have seen the disintegration of Syria, Yemen, and Libya, a war without end in Afghanistan, the collapse of the Arab Spring, the rise and resurgence of the Islamic State, and the distinctly mixed success of strategies aimed at managing China’s rise. At home, the growth of a national-security state has placed remarkable power in the hands of Donald Trump. Simply returning to the old order is no guarantee of good results. Grappling openly with failure and self-inflicted wounds—while also acknowledging clear benefits of the order—is essential for moving beyond self-congratulatory platitudes.

## Competitiveness Adv

### A2: Start-ups/Small Businesses---2NC

#### Big tech is vital for small businesses---*any* anti-trust action destroys them.

Szabo 18 [Carl Szabo is vice president and general counsel at NetChoice, an association of e-commerce businesses and online consumers, “Commentary: Don't damage our democracy by breaking up big tech”, 7-6-2018, TCA News Service; Chicago] IanM

Regardless of the mechanism used against **big businesses**, we must also recognize the harm to small businesses from antitrust actions against **large** online **platforms.**

**Anti-tech** advocates **claim** that "**big is bad**," but for **America's small** and **midsize businesses**, the bigger the platform the better for small businesses trying to reach a **big audience.**

**Consider** the **local greeting-card** and **stationery store**. A **decade ago** this **business** could **barely afford** to **place an ad** in a **local newspaper**, let alone on **TV** or **radio.** But for less than $10 spent **with online platforms**, this **small business** can **reach thousands** of **potential customers**, and **target them** more accurately than ever too.

Risking small businesses and giving government agencies new political powers are risks not justified by benefits promised by critics who want to break up big tech. Let's retain our consumer welfare standard until anti-tech advocates can show the genuine benefits in their approach.

Critics of big tech should put down their pitchforks before all of us get hurt.

#### Big tech is crucial for startups and small businesses across all industries.

Moore 20 [Stephen Moore is the Distinguished Visiting Fellow at the Project for Economic Growth at the Heritage Foundation, “Don't break up Big Tech”, Washington Examiner, June 11, 2020, https://www.washingtonexaminer.com/opinion/dont-break-up-big-tech] IanM

It is reassuring. From the start of the internet age, conservatives such as me and Grover Norquist and **many** more have **argued** the best way for America **to dominate** the **digital age** of **online commerce** was to **keep** the **internet tax**- and **regulation-free**. That is what we have **mostly done** in America, and the **rewards have been bountiful**. Millions of jobs and the spurt of innovation and entrepreneurship has the top six American tech companies with a **higher production capacity** than the entire GDP of **most other** nations in the **world.**

We have seen first-hand how the **gig economy** **saved our nation** from plunging into a **Great Depression** over the past three months. These were terrible times, with as many as 40 million people losing their jobs. But thanks to our multitrillion-dollar tech sector, and not just Big Tech but **hundreds** of **new** **entrepreneurial online services**, **commerce kept flowing**, **food was available** on the shelves, **gas was in the tanks**, **packages were delivered**, and **paychecks were processed.** They saved America from utter chaos and severe deprivation.

It was **the services**, **know-how**, and **infrastructure built** by our pioneering tech giants that **enabled** the tens of **thousands** of **small tech firms** to sprout up from nowhere, and these firms will be essential to securing the next phase of recovery. **Our construction firms**, **steel**, **oil**, and **gas industries**, as well as **hospitals**, **media**, **food processing**, and **manufacturers**, are all dependent on the kinds of **just-in-time inventory** and **supply chain** **management** **made possible** by the **tech sector**. In many ways, **the success** and the **array of business-to-business** **services** provided at little cost (often for free) **from companies** such as Google, Facebook, Amazon, and **the like** are what makes the next generation of tech firms possible **through free market competition**. Innovation stops monopolies, **not government lawyers**.

High tech isn't swallowing up small businesses. It is saving them. A **new report** from the Connected Commerce Council, which **analyzed** the **impact of internet platforms** and **digital tools** on **small companies** in the COVID-19 crisis, **found** almost 1 in 3 (31%) business **owners said** that **without digital tools**, they would have **had** to close part or all of **their business**. Nearly **70%** said digital tools have **been useful** during the COVID crisis.

There is **now a call** from both parties for multitrillion-dollar government "infrastructure bills." Wait a minute. Our **most critical infrastructure** today is the **gig economy** connectivity through **satellites**, **internet platforms**, **clouds**, **fiber optic cables**, the sophisticated nationwide **electric grid** system, and the like that was almost all built out by the very tech and telecommunications companies that are now coming under fire for being too successful and making too much money.

### AT: Tech Leadership

#### They can’t catch up.

Fred Hu 18, economist and chairman of Primavera Capital Group, 8-22-2018, "The U.S. Is Overly Paranoid About China’S Tech Rise," Washington Post, https://www.washingtonpost.com/news/theworldpost/wp/2018/08/22/us-china-3/?utm\_term=.ed8dd0d27f82

But much of the fear over China’s technological rise is unfounded. Fundamentally, China is like most emerging economies around the world: still trying hard to close the enormous technological gap with advanced economies led by America. China has undoubtedly made more progress than many of its developing peers in that race. Its tech industries have grown at a faster pace and achieved a global scale beyond those of most developing countries. In a broad range of manufacturing sectors — notably consumer electronics, steel, ship building, high-speed rail systems and solar panels — China has established itself as the world’s leading producer. In areas such as consumer Internet and financial technology, it has arguably overtaken even the United States and now leads the rest of the world. Yet China hawks such as Robert Lighthizer and Peter Navarro charge that whatever progress China has made on the tech front is due to the country’s blatant theft of U.S. technology. Considering the enormous investments China has made in science and technology over recent decades, such claims do not hold water. China has devoted vast resources to research and development — $409 billion in 2015 (21 percent of the global total), according to the U.S. National Science Foundation. China’s investment in research and development grew over 20 percent annually between 2000 and 2010 and almost 14 percent from 2010-2015. U.S. research and development hovered around 4 percent over the same period. For a country with an average per capita income a mere one-sixth of America’s, China’s research and development investments reflect a real and sustained national commitment. At the same time, China has vastly expanded and improved STEM education and has one of the largest pools of STEM graduates in the world. The devotion of significant resources to research and development and human capital has in turn enabled China to reap some of the early fruits of innovation. China now tops the world in new patent filings. As the first country to receive more than 1 million patent applications in a single year — a record the World Intellectual Property Organization said reflected “extraordinary” levels of innovation — China accounts for almost 40 percent of the global total and more than that of the United States, Japan and South Korea combined. China has also significantly boosted venture capital investment, which supports the commercialization of emerging technologies. While the United States attracts the most investment worldwide (nearly $70 billion), venture capital investment in China rose from approximately $3 billion in 2013 to $34 billion in 2016, climbing from 5 percent to 27 percent of the global share — the fastest increase of any economy. China’s start-up ecosystem is both vast and vibrant; it has successfully incubated more tech unicorns than any other country except the United States. Too often, U.S. critics claim that Chinese industrial policies like Made in China 2025 are behind the country’s ascendancy in tech. In fact, virtually none of China’s leading tech firms, such as Alibaba, Baidu and Tencent, are state-owned or meaningful beneficiaries of state support. They are all founded and led by smart and risk-taking private entrepreneurs, just like their Silicon Valley brethren. Tellingly, many Chinese tech start-ups have received U.S. venture financing. And Chinese technology companies and venture firms have made significant investments in U.S. start-ups. Sadly, the virtuous two-way venture capital flows are now in jeopardy because of Washington’s growing paranoia about China. As impressive as China’s innovation and progress may be, however, it is premature to declare that China has caught up with the U.S. tech industry. Interventionist government bureaucracy, stodgy state-owned enterprises, a rigid school system and — above all — harsh restrictions on individual freedoms continue to stifle independent thinking and creativity and constrain China from realizing its full innovation potential. While China is well positioned to succeed in “strategic” industries such as semiconductors, pharmaceuticals and commercial aircraft due to its vast pool of engineering talent and the size of its domestic market, so far it has remained a laggard. China has failed to develop an indigenous chip industry despite a state-led drive to do so, with tens of billions spent over the past four decades. Despite its status as the “world’s factory,” making everything from cell phones and laptops to numerous other devices, China continues to import 90 percent of its microchips from foreign countries, predominantly from the United States. That is why the U.S. threat to cut off critical chip supply to ZTE, a Chinese telecom equipment firm, has been dubbed the “Sputnik moment” in China: a sober reminder of China’s continued weaknesses in critical technologies. While China has made spectacular progress on the tech front, the United States remains the undisputed global leader in science and technology. The United States holds most of the world’s leading research universities; it deploys the highest amounts of both public and private funding in research and development; attracts the most venture capital; awards the most advanced degrees; provides the most advanced business, financial and information services and is the largest producer in knowledge-intensive, high-tech sectors, from pharmaceuticals to semiconductors. The fear that China will displace the United States as the global tech superpower is grossly exaggerated. Unfortunately, such paranoia dominates the minds of protectionist U.S. politicians and China hawks and has already amplified a destructive trade war between the world’s two largest economies. For China’s part, its soul-searching is overdue. Beijing should resist the prevalent yet ill-justified self-complacency and triumphalism that contributed to the fear in Washington in the first place, and it should make serious efforts to reform and open its domestic economy. Unless Beijing amends its heavy-handed statist approach to economic development, China’s potential as a leading nation in science and technology could be seriously curtailed.

#### China can’t overtake the US

Lingling Wei 21, Chief China correspondent for The Wall Street Journal, “China’s Economic Recovery Belies a Lingering Productivity Challenge”, The Wall Street Journal, 1/17/21, https://www.wsj.com/articles/chinas-economic-recovery-belies-a-lingering-productivity-challenge-11610884800

A surge in state investments has helped lift the Chinese economy from the effects of Covid-19, but likely has worsened one of its deepest weaknesses: low productivity.

Beijing has pulled off a robust economic recovery since early last year, when authorities locked down much of the country to combat the coronavirus epidemic. But the rebound has been unbalanced. It relied heavily on government expenditures and state-sector investments, while private spending remained weak.

That is amplifying a trend of declining growth in productivity—or output per worker and unit of capital—in the world’s second-largest economy, according to a new report by the International Monetary Fund. By the measure of average productivity across sectors, a gauge of overall economic efficiency, China’s economy is only 30% as productive as the world’s best-performing economies like the U.S., Japan or Germany, the report shows.

This poses a challenge to the leadership’s goal of elevating China into the ranks of rich nations and lifting its living standards.

“China has done most of the traditional public investment it can. It’s facing a shrinking labor force. So, where will lasting income growth come from?” said Helge Berger, the IMF’s mission chief for China. “Productivity.”

Since former leader Deng Xiaoping heralded an era of “reform and opening up” in the late 1970s, China’s economy grew by double-digit percentages most years for decades. Factories and workers also produced more efficiently, thanks to a gradual introduction of market-oriented policies and technological advancement.

However, productivity growth has declined markedly in recent years as the state sector gets bigger, crowding out private firms that tend to be nimbler and more profitable.

“The pandemic has added to the many interconnected financial vulnerabilities already present before the crisis,” the IMF report said, adding that the state’s support is prolonging the economic life of nonviable and low-productivity state-owned companies.

The IMF estimates productivity at Chinese state firms at about 80% of private firms.

The productivity slowdown traced back to the 2008 global financial crisis, when the government initiated a massive stimulus program to prop up economic growth, and got worse under President Xi Jinping.

The IMF estimates that annual productivity growth averaged just 0.6% between 2012 and 2017, a sharp decline from an average of 3.5% in the previous five years. The downward trend likely has continued, according to the fund, as China’s economic growth has weakened further.

State firms operate in all sectors of the Chinese economy, and they have seen their share of the economy grow. In 2018, total assets at those firms were valued at 194% of China’s gross domestic product—higher than in the early 2000s and “several orders of magnitude larger than in any other country,” the IMF said, based on the latest data available.

These state firms can often obtain loans at low interest rates, while private companies usually have a hard time getting banks to lend to them—despite the government’s repeated pledges to make financing more available. Still, state firms remain less profitable than private ones, and a higher share of state companies lose money, according to the IMF.

### AT: Taiwan War

#### China won’t invade---failure is more likely AND would crush the CCP so core interests don’t matter

Ryan Hass 19, The Michael H. Armacost ChairFellow - Foreign Policy, Center for East Asia Policy Studies, John L. Thornton China Center, 7-1-2019, "Rightsizing fears about Taiwan’s future," Brookings, https://www.brookings.edu/opinions/rightsizing-fears-about-taiwans-future/

Should Beijing ever initiate military action against Taiwan, it would have to contend with the risk of the United States and others entering the conflict. It would have to factor in the risk of having its energy supply lines cut off, its economy crippled, and its international status tarnished. It also would have to weigh the risk that anything short of quick and absolute surrender by the people of Taiwan could call into question the continued rule of the Chinese Communist Party. Beijing is keenly aware that it imports roughly half of its energy from the Middle East, and that it does not have the naval capacity to protect its sea lanes of communication along the entire route. It actively is seeking to reduce this vulnerability, but this will be a multi-decade effort. And as astute observers of history, Chinese leaders surely also have examined the lessons of the Soviet invasion of Afghanistan, and the role that failed adventurism there played in seeding conditions for the ultimate collapse of the USSR. Even as these factors should offer relief against fears of bolt from the blue military attacks, it would be dangerous for them to lead to complacency. There is much work to be done to strengthen Taiwan’s ability to chart a peaceful future for itself.

### AT: US-China War

#### No US-China war

Charles C. Krulak & Alex Friedman 21, former President of Birmingham-Southern College, former Commandant of the US Marine Corps, M.S. from George Washington University; former Chief Financial Officer of the Bill & Melinda Gates Foundation, J.D. from Columbia University, “The US and China Are Not Destined for War,” Project Syndicate, 08-17-2021, https://www.project-syndicate.org/commentary/us-china-not-destined-for-war-by-charles-c-krulak-and-alex-friedman-1-2021-08

True, throughout history, when a rising power has challenged a ruling one, war has often been the result. But there are notable exceptions. A war between the US and China today is no more inevitable than was war between the rising US and the declining United Kingdom a century ago. And in today’s context, there are four compelling reasons to believe that war between the US and China can be avoided.

First and foremost, any military conflict between the two would quickly turn nuclear. The US thus finds itself in the same situation that it was in vis-à-vis the Soviet Union. Taiwan could easily become this century’s tripwire, just as the “Fulda Gap” in Germany was during the Cold War. But the same dynamic of “mutual assured destruction” that limited US-Soviet conflict applies to the US and China. And the international community would do everything in its power to ensure that a potential nuclear conflict did not materialize, given that the consequences would be fundamentally transnational and – unlike climate change – immediate.

A US-China conflict would almost certainly take the form of a proxy war, rather than a major-power confrontation. Each superpower might take a different side in a domestic conflict in a country such as Pakistan, Venezuela, Iran, or North Korea, and deploy some combination of economic, cyber, and diplomatic instruments. We have seen this type of conflict many times before: from Vietnam to Bosnia, the US faced surrogates rather than its principal foe.

Second, it is important to remember that, historically, China plays a long game

. Although Chinese military power has grown dramatically, it still lags behind the US on almost every measure that matters. And while China is investing heavily in asymmetric equalizers (long-range anti-ship and hypersonic missiles, military applications of cyber, and more), it will not match the US in conventional means such as aircraft and large ships for decades, if ever.

A head-to-head conflict with the US would thus be too dangerous for China

to countenance at its current stage of development. If such a conflict did occur, China would have few options but to let the nuclear genie out of the bottle. In thinking about baseline scenarios, therefore, we should give less weight to any scenario in which the Chinese consciously precipitate a military confrontation with America. The US military, however, tends to plan for worst-case scenarios and is currently focused on a potential direct conflict with China – a fixation with overtones of the US-Soviet dynamic.

This raises the risk of being blindsided by other threats. Time and again since the Korean War, asymmetric threats have proven the most problematic to national security. Building a force that can handle the worst-case scenario does not guarantee success across the spectrum of warfare.

The third reason to think that a Sino-American conflict can be avoided is that China is already chalking up victories in the global soft-power war. Notwithstanding accusations that COVID-19 escaped from a virology lab in Wuhan, China has emerged from the pandemic looking much better than the US. And with its Belt and Road Initiative to finance infrastructure development around the world, it has aggressively stepped into the void left by US retrenchment during Donald Trump’s four-year presidency. China’s leaders may very well look at the current status quo and conclude that they are on the right strategic path.

Finally, China and the US are deeply intertwined economically. Despite Trump’s trade war, Sino-American bilateral trade in 2020 was around $650 billion, and China was America’s largest trade partner. The two countries’ supply-chain linkages are vast, and China holds more than $1 trillion in US Treasuries, most of which it cannot easily unload, lest it reduce their value and incur massive losses.

To be sure, logic can be undermined by a single act and its unintended consequences. Something as simple as a miscommunication can escalate a proxy war into an interstate conflagration. And as the situations in Afghanistan and Iraq show, America’s track record in war-torn countries is not encouraging. China, meanwhile, has dramatically stepped up its foreign interventions. Between its expansionist mentality, its growing foreign-aid program, and rising nationalism at home, China could all too easily launch a foreign intervention that might threaten US interests.

Cyber mischief, in particular, could undercut conventional military command-and-control systems, forcing leaders into bad decisions if more traditional options are no longer on the table. And Sino-American economic ties may come to matter less than they used to, especially as China moves from an export-led growth model to one based on domestic consumption, and as two-way investment flows decline amid escalating bilateral tensions.

A “mistake” on the part of either country is always possible. That is why diplomacy is essential. Each country needs to determine its vital national interests vis-à-vis the other, and both need to consider the same question from the other’s perspective. For example, it may be hard to accept (and unpopular to say), but civil rights within China might not be a vital US national interest. By the same token, China should understand that the US does indeed have vital interests in Taiwan.

The US and China are destined to clash in many ways. But a direct, interstate war need not be one of them.

#### Economics come first---China doesn’t escalate.

Yan Xuetong 19. Distinguished Professor and Dean of the Institute of International Relations at Tsinghua University. “The Age of Uneasy Peace.” <https://www.foreignaffairs.com/articles/china/2018-12-11/age-uneasy-peace>

What kind of world order will this bring? Contrary to what more alarmist voices have suggested, **a bipolar U.S.-Chinese world will** not be a world on the brink of apocalyptic war. This is in large part because China’s ambitions for the coming years are much narrower than many in the Western foreign policy establishment tend to assume. Rather than unseating the United States as the world’s premier superpower, Chinese foreign policy in the coming decade will largely focus on maintaining the conditions necessary for the country’s continued economic growth—a focus that will likely push leaders in Beijing to **steer clear of open confrontation** with the United States or its primary allies. Instead, the coming bipolarity will be an era of uneasy peace between the two superpowers. Both sides will build up their militaries but remain careful to manage tensions before they boil over into outright conflict. And rather than vie for global supremacy through opposing alliances, **Beijing and Washington will largely carry out their competition in the** [**economic**](https://www.foreignaffairs.com/articles/china/2018-11-27/there-no-grand-bargain-china) **and** [**technological**](https://www.foreignaffairs.com/articles/united-states/2018-10-19/can-pentagon-win-ai-arms-race) **realms**. At the same time, U.S.-Chinese bipolarity will likely spell the end of sustained multilateralism outside strictly economic realms, as the combination of nationalist populism in the West and China’s commitment to national sovereignty will leave little space for the kind of political integration and norm setting that was once the hallmark of liberal internationalism. WHAT CHINA WANTS China’s growing influence on the world stage has as much to do with the United States’ abdication of its global leadership under President Donald Trump as with China’s own economic rise. In material terms, the gap between the two countries has [not narrowed by much](https://www.foreignaffairs.com/articles/china/2018-09-21/stop-obsessing-about-china) in recent years: since 2015, China’s GDP growth has slowed to less than seven percent a year, and recent estimates put U.S. growth above the three percent mark. In the same period, the value of the renminbi has decreased by about ten percent against the U.S. dollar, undercutting China’s import capacity and its currency’s global strength. What has changed a great deal, however, is the expectation that the United States will continue to promote—through diplomacy and, if necessary, military power—an international order built for the most part around liberal internationalist principles. Under Trump, the country has broken with this tradition, questioning the value of free trade and embracing a virulent, no-holds-barred nationalism. The Trump administration is modernizing the U.S. nuclear arsenal, attempting to strong-arm friends and foes alike, and withdrawing from several international accords and institutions. In 2018 alone, it ditched the Intermediate-Range Nuclear Forces Treaty, the [nuclear deal with Iran](https://www.foreignaffairs.com/articles/2018-08-13/how-we-got-iran-deal), and the UN Human Rights Council. It is still unclear if this retrenchment is just a momentary lapse—a short-lived aberration from the norm—or a new U.S. foreign policy paradigm that could out-live Trump’s tenure. But the global fallout of Trumpism has already pushed some countries toward China in ways that would have seemed inconceivable a few years ago. Take Japanese Prime Minister Shinzo Abe, who effectively reversed Japan’s relations with China, from barely hidden hostility to [cooperation](https://www.scmp.com/news/china/diplomacy/article/2170436/china-japan-moving-competition-cooperation-leaders-say), during a state visit to Beijing in October 2018, when China and Japan signed over 50 agreements on economic cooperation. Meanwhile, structural factors keep widening the gap between the two global front-runners, China and the United States, and the rest of the world. Already, the two countries’ military spending dwarfs everybody else’s. By 2023, the U.S. defense budget may reach $800 billion, and the Chinese one may exceed $300 billion, whereas no other global power will spend more than $80 billion on its forces. The question, then, is not whether a bipolar U.S.-Chinese order will come to be but what this order will look like. At the top of Beijing’s priorities **is a liberal economic order built on free trade**. China’s economic transformation over the past decades from an agricultural society to a major global powerhouse—and the world’s second-largest economy—was built on exports. The country has slowly worked its way up the value chain, its exports beginning to compete with those of highly advanced economies. Now as then, these **exports are the lifeblood of the Chinese economy:** they ensure a consistent trade surplus, and the jobs they create are a vital engine of domestic social stability. There is no indication that **this will change** in the coming decade. Even amid escalating trade tensions between Beijing and Washington, China’s overall export volume continued to grow in 2018. **U.S. tariffs may sting**, **but they will neither change Beijing’s fundamental incentives nor portend a general turn away from global free trade on its part**. Quite to the contrary: because China’s exports are vital to its economic and political success, one should expect Beijing to double down **on its attempts to gain and maintain access to foreign markets**. This strategic impetus is at the heart of the much-touted [Belt and Road Initiative](https://www.foreignaffairs.com/articles/china/2018-10-24/why-democracies-are-turning-against-belt-and-road), through which China hopes to develop a vast network of land and sea routes that will connect its export hubs to far-flung markets. As of August 2018, some 70 countries and organizations had signed contracts with China for projects related to the initiative, and this number is set to increase in the coming years. At its 2017 National Congress, the Chinese Communist Party went so far as to enshrine a commitment to the initiative in its constitution—a signal that the party views the infrastructure project as more than a regular foreign policy. China is also willing to further open its domestic markets to foreign goods in exchange for greater access abroad. Just in time for a major trade fair in Shanghai in November 2018—designed to showcase the country’s potential as a destination for foreign goods—China lowered its general tariff from 10.5 percent to 7.8 percent. Given this enthusiasm for the global economy, the image of a revisionist China that has gained traction in many Western capitals is misleading. **Beijing relies on a global network of trade ties**, so it is loath to court direct confrontation **with the United State**s. Chinese leaders fear—not without reason—that such a confrontation might cut off its access to U.S. markets and lead U.S. allies to band together against China rather than stay neutral, stripping it of important economic partnerships and valuable diplomatic connections. As a result, **caution**, not assertiveness or aggressiveness, will be the order of the day **in Beijing’s foreign policy in the coming years**. Even as it continues to modernize and expand its military, **China will** carefully avoid pressing issues **that might lead to war with the United States, such as those related to the South China Sea, cybersecurity, and the weaponization of space**. NEW RULES? Indeed, much as Chinese leaders hope to be on par with their counterparts in Washington, they worry about the strategic implications of a bipolar U.S.-Chinese order. American leaders balk at the idea of relinquishing their position at the top of the global food chain and will likely go to great lengths to avoid having to accommodate China. Officials in Beijing, in no hurry to become the sole object of Washington’s [apprehension](https://www.foreignaffairs.com/articles/united-states/2018-02-13/china-reckoning) and scorn, would much rather see a multipolar world in which other challenges—and challengers—force the United States to cooperate with China. Chinese leaders worry about the strategic implications of a bipolar U.S.-Chinese order. In fact, the United States’ own rise in the nineteenth and early twentieth centuries provides something of a model for how the coming power transition may take place. Because the United Kingdom, the world’s undisputed hegemon at the time, was preoccupied with fending off a challenger in its vicinity—Germany—it did not bother much to contain the rise of a much bigger rival across the pond. China is hoping for a similar dynamic now, and recent history suggests it could indeed play out. In the early months of George W. Bush’s presidency, for instance, relations between Beijing and Washington were souring over regional disputes in the South China Sea, reaching a boiling point when a Chinese air force pilot died in a midair collision with a U.S. surveillance plane in April 2001. Following the 9/11 attacks a few months later, however, Washington came to see China as a useful strategic partner in its global fight against terrorism, and relations improved significantly over the rest of Bush’s two terms. Today, unfortunately, the list of common threats that could force the two countries to cooperate is short. After 17 years of counterterrorism campaigns, the sense of urgency that once surrounded the issue has faded. Climate change is just as unlikely to make the list of top threats anytime soon. The most plausible scenario is that a new global economic crisis in the coming years will push U.S. and Chinese leaders to shelve their disagreements for a moment to avoid economic calamity—but this, too, remains a hypothetical. To make matters worse, some points of potential conflict are here to stay—chief among them [Taiwan](https://www.foreignaffairs.com/articles/asia/2018-07-27/storm-brewing-taiwan-strait). Relations between Beijing and Taipei, already tense, have taken a turn for the worse in recent years. Taiwan’s current government, elected in 2016, has questioned the notion that mainland China and Taiwan form a single country, also known as the “one China” principle. A future government in Taipei might well push for de jure independence. Yet a Taiwanese independence referendum likely constitutes a redline for Beijing and may prompt it to take military action. If the United States were to respond by coming to Taiwan’s aid, a military intervention by Beijing could easily spiral into a full-fledged U.S.-Chinese war. To avoid such a crisis, Beijing is determined to nip any Taiwanese independence aspirations in the bud by political and economic means. As a result, it is likely to continue lobbying third countries to cut off their diplomatic ties with Taipei, an approach it has already taken with several Latin American countries. Cautious or not, China set somewhat different emphases in its approach to norms that undergird the international order. In particular, a more powerful China will push for a stronger emphasis on national sovereignty in international law. In recent years, some have [interpreted](https://www.ft.com/content/67ec2ec0-dca2-11e6-9d7c-be108f1c1dce) public statements by Chinese leaders in support of globalization as a sign that Beijing seeks to fashion itself as the global liberal order’s new custodian, yet such sweeping interpretations are wishful thinking: China is merely signaling its support for a liberal economic order, not for ever-increasing political integration. Beijing remains fearful of outside interference, particularly relating to Hong Kong, Taiwan, Tibet, and [Xinjiang](https://www.foreignaffairs.com/articles/china/2018-06-20/reeducation-returns-china), as well as on matters of press freedom and online regulations. As a result, it views national sovereignty, rather than international responsibilities and norms, as the fundamental principle on which the international order should rest. Even as a new superpower in the coming decade, China will therefore pursue a less interventionist foreign policy than the United States did at the apex of its power. Consider the case of Afghanistan: even though it is an open secret that the United States expects the Chinese military to shoulder some of the burden of maintaining stability there after U.S. troops leave the country, the Chinese government has shown no interest in this idea. Increased Chinese clout may also bring attempts to promote a vision of world order that draws on ancient Chinese philosophical traditions and theories of statecraft. One term in particular has been making the rounds in Beijing: wangdao, or “humane authority.” The word represents a view of China as an enlightened, benevolent hegemon whose power and legitimacy derive from its ability to fulfill other countries’ security and economic needs—in exchange for their acquiescence to Chinese leadership. BIPOLARITY IN PRACTICE Given the long shadow of nuclear escalation, **the** [**risk of a direct war**](https://www.foreignaffairs.com/articles/china/2018-10-15/beijings-nuclear-option) **between China and the United States will** remain minimal, even as military, technological, and economic competition between them intensifies. Efforts on both sides to build ever more effective antimissile shields are unlikely to change this, since neither China nor the United States can improve its antimissile systems to the point of making the country completely impervious to a nuclear counterattack. If anything, the United States’ withdrawal from the Intermediate-Range Nuclear Forces Treaty will encourage both sides to build up their nuclear forces and improve their second-strike capabilities, ensuring that neither side will be confident it can launch a nuclear attack on the other without suffering a devastating retaliation. The threat of nuclear war will also keep Chinese tensions with other nuclear-armed powers, such as India, from escalating into outright war. Proxy wars, however, cannot be ruled out, nor can military skirmishes among lesser states. In fact, the latter are likely to become more frequent, as the two superpowers’ restraint may embolden some smaller states to resolve local conflicts by force. Russia, in particular, may not shy away from war as it tries to regain its superpower status and maintain its influence in eastern Europe and the Middle East. Faced with calls to reform the UN Security Council, fraying powers such as France and the United Kingdom may seek to buttress their claim to permanent membership in the council through military interventions abroad. In the Middle East, meanwhile, the struggle for regional dominance among Iran, Turkey, and Saudi Arabia shows no signs of abating. Across the globe, secessionist conflicts and terrorist attacks will continue to occur, the latter especially if competition between China and the United States reduces their cooperation on counterterrorism measures. China’s emphasis on national sovereignty, together with Western societies’ turn away from globalism, will deal an additional blow to multilateralism. In the economic realm, export-driven economies, such as China, Germany, and Japan, will ensure the survival of a global liberal trade regime built on free-trade agreements and membership in the World Trade Organization—no matter what path the United States takes. On other matters of global governance, however, cooperation is likely to stall. Even if a future U.S. administration led a renewed push toward multilateralism and international norm setting, China’s status as a junior superpower would make it difficult for the United States to sustain the strong leadership that has traditionally spurred such initiatives in the past. Differences in ideology and clashing security interests will prevent Beijing and Washington from leading jointly, but neither will have enough economic or military clout to lead on its own. To the extent that multilateral initiatives persist in such a world, they will be limited to either side’s respective sphere of influence. China’s emphasis on national sovereignty, together with Western societies’ turn away from globalism, will deal an additional blow to multilateralism. The European Union is already fraying, and a number of European countries have reintroduced border controls. In the coming decade, similar developments will come to pass in other domains. As technological innovation becomes the primary source of wealth, countries will become ever more protective of their intellectual property. Many countries are also tightening control of capital flows as they brace for a global economic slump in the near future. And as concerns over immigration and unemployment threaten to undermine Western governments’ legitimacy, more and more countries will increase visa restrictions for foreign workers. Unlike the order that prevailed during the Cold War, a bipolar U.S.-Chinese order will be shaped by fluid, issue-specific alliances **rather than rigid opposing blocs** divided along clear ideological lines. Since the immediate risk of a U.S.-Chinese war is vanishingly small, **neither side appears willing to build or maintain an extensive**—and expensive—**network of alliances**. China still avoids forming explicit alliances, and the United States regularly complains about free-riding allies. Moreover, neither side is currently able to offer a grand narrative or global vision appealing to large majorities at home, let alone to a large number of states. For some time to come, then, **U.S.-Chinese bipolarity will not be an ideologically driven, existential conflict over the fundamental nature of the global order**; rather, it will be a competition over consumer markets and technological advantages, playing out in disputes about the norms and rules governing trade, investment, employment, exchange rates, and intellectual property. And rather than form clearly defined military-economic blocs, most states will adopt a two-track foreign policy, siding with the United States on some issues and China on others. Western allies, for instance, are still closely aligned with the United States on traditional security matters inside NATO, and Australia, India, and Japan have supported the U.S. strategy in the Indo-Pacific. At the same time, these states still maintain close trade and investment relations with China, and several of them have sided with Beijing in trying to reform the World Trade Organization. This two-track strategy shows just how far down the road to bipolarity the world has already advanced. And the fundamental driver of this process—the raw economic and military clout on which American and, increasingly, Chinese dominance rests—will further cement Beijing’s and Washington’s status as the two global heavyweights in the coming decade. **Whether or not the United States recovers from its Trumpian fever and leads a renewed push for global liberalism is**, ultimately, of little consequence to the outcome: **opposed in their strategic interests but evenly matched in their power, China and the United States will be unable to challenge each other directly and settle the struggle for supremacy definitively**. As during the Cold War, each side’s nuclear warheads will prevent proxy conflicts from easily escalating into a direct confrontation between the two superpowers. More important still, **China’s leadership is** acutely aware of the benefits **its country derives from the status quo**, for now—**it is chief among the conditions for China’s continued economic and soft-power expansion**—**and will** avoid **putting these** benefits on the line anytime soon, unless China’s core interests are in the balance. Chinese leaders will therefore work hard to avoid setting off alarm bells in already jittery Western capitals, and their foreign policy in the coming years will reflect this objective. **Expect recurring tensions and fierce competition, yes, but** not a descent into global chaos.

# 1NR

## FTC DA

### Top Level---2NC

#### Unchecked AI causes mass inequality and extinction. That’s Thomas.

Turns the aff on the impact level

#### Turns the aff on the impact level – only the FTC focus on investigations solves AI – Aff guarantees FTC resources are spread thin – which forces the FTC to forgo investigations all together

#### Algorithmic bias risks nuke war.

Elsa B. Kania 17. Adjunct fellow with the Technology and National Security Program at the Center for a New American Security, 11/15/17. “The critical human element in the machine age of warfare.” https://thebulletin.org/2017/11/the-critical-human-element-in-the-machine-age-of-warfare/

Today, however, the human in question might be considerably less willing to question the machine. The known human tendency towards greater reliance on computer-generated or automated recommendations from intelligent decision-support systems can result in compromised decision-making. This dynamic—known as automation bias or the overreliance on automation that results in complacency—may become more pervasive, as humans accustom themselves to relying more and more upon algorithmic judgment in day-to-day life.

In some cases, the introduction of algorithms could reveal and mitigate human cognitive biases. However, the risks of algorithmic bias have become increasingly apparent. In a societal context, “biased” algorithms have resulted in discrimination; in military applications, the effects could be lethal. In this regard, the use of autonomous weapons necessarily conveys operational risk. Even greater degrees of automation—such as with the introduction of machine learning in systems not directly involved in decisions of lethal force (e.g., early warning and intelligence)—could contribute to a range of risks.

Friendly fire—and worse. As multiple militaries have begun to use AI to enhance their capabilities on the battlefield, several deadly mistakes have shown the risks of automation and semi-autonomous systems, even when human operators are notionally in the loop. In 1988, the USS Vincennes shot down an Iranian passenger jet in the Persian Gulf after the ship’s Aegis radar-and-fire-control system incorrectly identified the civilian airplane as a military fighter jet. In this case, the crew responsible for decision-making failed to recognize this inaccuracy in the system—in part because of the complexities of the user interface—and trusted the Aegis targeting system too much to challenge its determination. Similarly, in 2003, the US Army’s Patriot air defense system, which is highly automated with high levels of complexity, was involved in two incidents of fratricide. In these stances, “naïve” trust in the system and the lack of adequate preparation for its operators resulted in fatal, unintended engagements.

As the US, Chinese, and other militaries seek to leverage AI to support applications that include early warning, automatic target recognition, intelligence analysis, and command decision-making, it is critical that they learn from such prior errors, close calls, and tragedies. In Petrov’s successful intervention, his intuition and willingness to question the system averted a nuclear war. In the case of the USS Vincennes and the Patriot system, human operators placed too much trust in and relied too heavily on complex, automated systems. It is clear that the mitigation of errors associated with highly automated and autonomous systems requires a greater focus on this human dimension.

#### Unlike AI, nuke war’s not existential

Karina Vold & Daniel R. Harris 21, Vold is a philosopher of cognitive science and artificial intelligence & an assistant professor at the University of Toronto's Institute for the History and Philosophy of Science and Technology; Harris is a retired lawyer and Foreign Service Officer at the US Department of State, “How Does Artificial Intelligence Pose an Existential Risk?,” Oxford Handbook of Digital Ethics, Ed. C. Veliz., pp 1-34

The idea that AI might one day threaten humanity has been around for some time. In 1863, the novelist Samuel Butler (1863 ,185) suggested that machines may one day hold “supremacy over the world and its inhabitants”. By the mid-twentieth century, these concerns had left the realm of science fiction, as thinkers like Alan Turing (1951, 260) began to warn the public that we should expect intelligent machines to eventually “take control”. Still, for many years, academics did not spill much ink over these concerns, even while Hollywood filmmakers ran with them, producing countless blockbusters based on this “AI takeover” scenario (think: The Terminator or Battlestar Galactica). Over the last decade or so, however, many leading academics and entrepreneurs have notably increased their attention to existential risks from AI. These concerns are, as we will see, more subtle than those depicted in crude Hollywood-produced AI takeover scenarios. Indeed, those depictions have largely misrepresented the concrete issues scholars are concerned with by overly focusing on anthropomorphic concerns of conscious AI systems deciding to destroy humans.

This renewed scholarly interest in AI safety has been spurred on in part by the recent deep learning revolution. This period is defined by major advances in the accomplishments of deep neural networks— artificial neural networks with multiple layers between the input and output layers—across a wide range of areas, including game-playing, speech and facial recognition, and image generation. Even with these breakthroughs though, the cognitive capabilities of current AI systems remain limited to domain-specific applications. Nevertheless, many researchers are alarmed by the speed of progress in AI and worry that future systems, if not managed correctly, could present an existential threat.

Despite the renewed interest in this concern, there remains substantial disagreement over both the nature and the likelihood of the existential threats posed by AI. Hence, our aim in this chapter is to explicate the main arguments that have been given for thinking that AI does pose an existential risk, and to point out where there are disagreements and weakness in these arguments. The chapter has the following structure: in §2, we will introduce the concept of existential risk, the sources of such risks, and how these risks are typically assessed. In §3–5, we will critically examine three commonly cited reasons for thinking that AI poses an existential threat to humanity: the control problem, global disruption from an AI “arms race”, and the weaponization of AI. Our focus is on the first of these three, because it represents a kind of existential risk that is novel to AI as technology. While the latter two are equally important, they have commonalities with other kinds of technologies (e.g., nuclear weapons) discussed in the literature on existential risk, and so we will dedicate less time to them.

2. What Is an Existential Risk?

Many people believe that existential risks (henceforth, Xrisks) are the greatest threats facing humanity. And whilst there is much common ground amongst scholars about which scenarios constitute an Xrisk—the most commonly cited example is extinction risks1—there is not as much consensus on the precise definition of the concept (Beard et al., 2020; Torres, 2019). While most Xrisk scholars agree that a risk is existential if an adverse outcome would bring about human extinction, few endorse the narrower view that a risk is existential only if it would cause this outcome.2 Most definitions of Xrisk are broader, including at times the risk of global civilizational collapse (Rees, 2003; Ó hÉigeartaigh, 2017); scenarios in which the technological and moral potential of humanity is “permanently and drastically” curtailed (Bostrom, 2002, 2013); and suffering risks, defined as cases in which “an adverse outcome would bring about severe suffering on an astronomical scale, vastly exceeding all suffering that has existed on Earth so far” (Sotala & Gloor, 2017, 389).

Xrisks are typically distinguished from the broader category of global catastrophic risks. Bostrom (2013), for example, uses two dimensions—scope and severity—to make this distinction. Scope refers to the number of people at risk, while severity refers to how badly the population in question would be affected (ibid, 16). Xrisks are at the most extreme end of both of these spectrums: they are pan-generational in scope (i.e., “affecting humanity over all, or almost all, future generations”), and they are the severest kinds of threats, causing either “death or a permanent and drastic reduction of quality of life” (ibid, 17). Perhaps the clearest example of an Xrisk is an asteroid impact on the scale of that which hit the Earth 66 million years ago, wiping out the dinosaurs (Schulte et al., 2010; Ó hÉigeartaigh, 2017). Global catastrophic risks, by way of contrast, could be either just as severe but narrower in scope, or just as broad but less severe. Some examples include the destruction of cultural heritage, thinning of the ozone layer, or even a large-scale pandemic outbreak (Bostrom, 2013). In this chapter, we will focus mostly on the least controversial category of Xrisks— extinction risks—but will also at times discuss some of the other scenarios mentioned.

2.1 Sources of Xrisk

For most of human history, the only source of Xrisks facing humanity were natural causes, such as an asteroid hitting Earth or a global pandemic (Bostrom, 2002). But the creation of the first atomic bomb in 1945 introduced a new source of existential threat to humanity, one that was anthropogenic in nature. But since then, humanity has created numerous other kinds of threats to our own existence, including human- caused climate change, global biodiversity loss, biological warfare, and threats from artificial intelligence, for example. In fact, it is widely thought that most Xrisks today are anthropogenic and that, as a result of these new threats, this current century is the riskiest one that humanity has ever faced (Rees, 2003; Bostrom, 2013; Ó hÉigeartaigh, 2017; Ord, 2020).

Not all of these threats pose straightforward Xrisks. Let’s consider an extinction scenario to be the existential outcome in question, and then take nuclear fallout as an example. Today, the worldwide arsenal of nuclear weapons could lead to unprecedented death tolls and habitat destruction and, hence, it poses a clear global catastrophic risk. Still, experts assign a relatively low probability to human extinction from nuclear warfare (Martin, 1982; Sandberg & Bostrom, 2008; Shulman, 2012). This is in part because it seems more likely that extinction, if it follows at all, would occur indirectly from the effects of the war, rather than directly. This distinction has appeared in several discussions on Xrisks (e.g., Matheny, 2007, Liu et al., 2018; Zwetsloot & Dafoe, 2019), but it is made most explicitly in Cotton-Barratt et al. (2020, 6), who explain that a global catastrophe that causes human extinction can do so either directly by “killing everyone”, or indirectly, by “removing our ability to continue flourishing over a longer period.” A nuclear explosion itself is unlikely to kill everyone directly, but the resulting effects it has on the Earth could lead to lands becoming uninhabitable, in turn leading to a scarcity of essential resources, which could (over a number of years) lead to human extinction. Some of the simplest examples of direct risks of human extinction, by way of contrast, are “[i]f the entire planet is struck by a deadly gamma ray burst, or enough of a deadly toxin is dispersed through the atmosphere” (ibid, 6). What’s critical here is that for an Xrisk to be direct it has to be able to reach everyone.

#### AI’s millions of times more powerful

Alexey **Turchin &** David **Denkenberger 18**, Turchin is a researcher at the Science for Life Extension Foundation; Denkenberger is with the Global Catastrophic Risk Institute (GCRI) @ Tennessee State University, Alliance to Feed the Earth in Disasters (ALLFED), “Classification of Global Catastrophic Risks Connected with Artificial Intelligence,” AI & SOCIETY, 05/03/2018, pp. 1–17

According to Yampolskiy and Spellchecker (2016), the probability and seriousness of AI failures will increase with time. We estimate that they will reach their peak between the appearance of the first self-improving AI and the moment that an AI or group of AIs reach global power, and will later diminish, as late-stage AI halting seems to be a low-probability event.

AI is an extremely powerful and completely unpredictable technology, millions of times more powerful than nuclear weapons. Its existence could create multiple individual global risks, most of which we can not currently imagine. We present several dozen separate global risk scenarios connected with AI in this article, but it is likely that some of the most serious are not included. The sheer number of possible failure modes suggests that there are more to come.

### A2: Adv 2 Turns

#### No risk second advantage turns when they have no contestation of our Internal Link scenarios-

#### The FTC’s focusing on international outreach to globally coordinate investigations---new authorities and burdens trade off, crushing cooperative controls over AI---no agency is a magic pudding!

--ICN = international competition network

Boswell et al. 19, Matthew Boswell is the Commissioner of Competition of the Competition Bureau Canada; Laureen Kapin (moderator) has practiced consumer protection law with the U.S. Federal Trade Commission for the past 18 years; Molly Askin (moderator) is Counsel for International Antitrust at the U.S. Federal Trade Commission’s Office of International Affairs; Fiona Schaeffer is an antitrust partner at Milbank LLP; Maria Coppola (moderator) is counsel for international antitrust at the U.S. Federal Trade Commission, where she is responsible for the agency’s enforcement and policy work with Europe; Marcus Bezzi has been Executive General Manager at the Australian Competition and Consumer Commission (ACCC) since early 2009, “FTC Hearing #11: The FTC’s Role in a Changing World,” 3/26/19, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century

MR. BOSWELL: Oh, okay. Well, I'll go back to what has been a common theme, which is supporting the ongoing personal relationships between people around the world. You know, people move in and out of jobs. You have to keep those relationships, and it can be expensive. And it can be to certain outside parties hard to justify to expend those resources on having people attend, for example, ICN workshops so that they know people around the world, they're sharing best practices, we’re not reinventing the wheel. Somebody has come up with a good way to do something, we should have those relationships where we can learn it, but it costs money to invest and to always invest in relationships.

MS. KAPIN: Well, I want to thank everyone. I think we heard a recognition that we should recognize the value of infrastructure, some common protocols and definitions and best practices can also help us overcome the challenges for international cooperation. But first and foremost, what I heard echoed was the recognition that this human glue really is the stuff that lets us stick together and accomplish our common goals. So, Molly?

MS. ASKIN: I think one thing I've also heard is the importance of the networks that we have seen evolve over, if we’re looking at the past 25 years, either be founded in the first instance or have changed in their mission to really be able to be nimble enough to address some of these important issues and give agencies a forum for interaction that can facilitate both the tools and the relationships. So thank you all very much for participating. And we are now going to go into a 15- minute break and return for the next panel at 11:30. Thank you.

MS. KAPIN: Thank you.

CONSUMER PROTECTION AND PRIVACY ENFORCEMENT COOPERATION

MS. FEUER: Okay, it’s about one minute early, but we’d like to get started. I’m Stacy Feuer. I’m the Assistant Director for International Consumer Protection and Privacy here at the FTC’s Office of International Affairs. This entire morning we’ve heard about a number of very interesting enforcement developments and challenges all over the world. Now we’re going to take a deeper dive into enforcement cooperation in the area of consumer protection and privacy. One of the most interesting aspects of our work here at the FTC on international consumer protection and privacy matters is the very wide range of issues we cooperate on, everything from telemarketing scams to online subscription traps to cross-border data transfer mechanisms, and to other privacy law violations. Equally remarkable to me is the incredibly wide range of authorities that we cooperate. So, for example, we cooperate with not only consumer protection agencies but data protection authorities, criminal regulators, and sometimes telecommunications and financial regulators. Our panelists that we have here today represent these different strands of our enforcement cooperation activities. They will highlight the issues involved in some of these different cooperation strands, and I will introduce them individually as we move through this panel. I do want to remind you at the outset that we have comment cards available, and please do send up questions. We’ll try and be a little interactive and ask some of your questions during the panel and not just wait until the end. So please ask away. So we’ve segmented our panelists into mini- groups so as to better draw out some of the cooperation strands. I’ll turn first to James Dipple- Johnstone who is the Deputy Commissioner at the UK’s Information Commissioner’s Office and ask him, and then followed by Deputy Assistant Secretary Jim Sullivan from the Department of Commerce’s International Trade Administration for their thoughts about cooperation and particularly focusing on the privacy sphere. We are so pleased that you are both here. So, Commissioner Dipple-Johnstone, can you begin?

MR. DIPPLE-JOHNSTONE: Yes, and thank you, Stacy, and thank you to FTC colleagues for your invite and the opportunity to speak with you today. I’m looking forward to our discussion of these important issues, and it was interesting to hear the different perspectives from the previous panel. A little bit about the Information Commissioner’s Office first, given there’s a range of different types of organizations on the panel, in case it helps with my comments later on. With the implementation of the GDPR, which has already been referenced this morning, I’m pleased to hear, and the new equivalent legislation in the UK, the ICO has been through a significant growth process over the past 12 to 18 months. We’ve taken on new powers, and as has been mentioned this morning, as many other organizations, we’ve been through a capability growth over the past few months, which has begun to see us work more internationally and deal with more complex and challenging caseload. This reflects in part the importance the UK Government places on data protection and consumer protection, but also the seriousness of some of the recent scandals we’ve seen, for example, that involving Cambridge Analytica recently. In granting powers, the UK Parliament has gone further than many other EU legislatures to ensure that the ICO has both the funding through its funding regime to give us the financial resources, but also the new powers to do its work in the digital age. There was significant national debate in the UK about these new powers, many of which are actually quite intrusive and are more common in law enforcement agencies than in a traditional data protection authority and the balances in checks and balances being put in place to go with those powers through the UK’s Information Rights Tribunal who oversee our work and our individual case judgments. I couldn’t come here and talk to you without recognizing there’s quite a lot of difference within the ICO as well. As well as our data protection remit, we have a remit for access to information. So one part of the office is working very hard around keeping privacy concerns and how data can be safeguarded and secured and only disclosed where appropriate; another side of the office is hearing appeals about how to make public information more widely available. We have around 700 officers and new powers to seize equipment, search premises, examine algorithms in situ for bias to make sure that they are working effectively, and audit company systems and processes. We also have powers which were touched upon this morning as well, around the power to compel provision of information from wherever and whomever holds it, which is quite a wide remit for an office of our type. We deal with around 50,000 citizen complaints each year and undertake around 3,500 investigations across different parts of our office. And we cover both the commercial sector, but also the public and law enforcement sector. In many ways, as colleagues are, we're learning as we go with these powers and these new resources. And one of those key areas of learning has been that which has been touched upon this morning. And that’s the importance of working collaboratively with others internationally. Many of the most significant files on my desk -- and I have responsibility for the enforcement and investigation arms of the office -- in the last 12 months, we’ve engaged with 50 international colleagues on various different files. And most of the major cases we have on at the moment are involving international colleagues, either as joint investigations, seconding staff to and from other offices, or sharing information and intelligence about the work we're doing. As our citizens become more aware and concerned about the use of data and as the digital economy becomes the economy, people expect this kind of international engagement. And with this in mind, we value hugely the UK's positive relationship with its colleagues on this side of the Atlantic, the FTC, but also our colleagues in Canada who have been speaking this morning. We value the different networks we're involved in. There have been mention of some of those networks already, but in particularly GPEN, the Global Privacy Enforcement Network, but also those networks which involve looking at unsolicited communications, which continues to be a significant part of my office's work. We learn a huge amount from these relationships, as well as the sort of human glue that was described this morning, just the opportunity to discuss tactics, approaches, to understand how each other work is a real positive that comes out of that work and allows us to do our jobs more effectively. To support this, we have a number of legal gateways to share and receive information. These are backed by strict protections within UK domestic law, which bite both collectively on the organization but also the individual officials within that. They are backed by criminal sanctions, and nothing focuses the mind like those. In the course of our investigation, we could use one or any of MOUs, MLATs, and we’ve heard about the challenges with the time scales that MLATs take. Membership arrangements, such as GPEN or the International Conference of Data and Privacy Commissioner arrangements or, indeed, Convention 108. This very much depends on the exchange of information, what's involved, who it’s going to, who’s asked for it, and what we need to do our work. Of particular note are the DPA 2018, which is the Data Protection Act in the UK. That contains formal information gateways. That allows us to share information for law enforcement purposes or for regulatory purposes where there’s an overlap and there’s a public interest. Of relevance to the FTC in particular is Schedule 2 of the DPA. That sets out the conditions for public interest and information- sharing within the UK law. And I understand the UK has been working through these for a number of years from the 1998 act and now into the 2019 act and working with colleagues at the FTC through the SAFE WEB Act provisions and the criteria for sharing information there with foreign enforcers. And that's been a huge positive. Just in the short time I've been with the Office over the last two years, there have been a number of cases that we've been working on, on sharing information and understanding. And, of course, this goes alongside our EU work. We mustn’t forget that. We are a competent authority under the GDPR, the EU provisions for the one-stop-shop mechanism. And around a fifth of those cases in the mechanism over the past year have involved the UK as either a lead supervisory authority or a concerned supervisory authority. Many of the big issues we are grappling with is privacy authorities, algorithmic transparency, adtech, microtargeting and profiling of citizens, part of the bread and butter of those cases we're working through. And our ability to work with international colleagues, in particular the FTC, has been really helpful in us discharging our role, notably on the Ashley Madison file, but also on other confidential matters more recently, where we found the insight afforded by our bilateral arrangements with the FTC help us fill in the missing pieces. They help us make better investigations. We know that the FTC has helped us by using its SAFE WEB powers to obtain information for us, in particular with some of the -- I think you call them robocalls here, but unsolicited communications in the UK, and that information has been hugely beneficial in protecting UK citizens. And we hope the reciprocal has been helpful to the FTC and colleagues here. And I’m mindful of time, but in closing, I'd just like to say we're very keen in the ICO to continue to use these positive engagements and continue to build them, particularly as you come to look at the renewal of the SAFE WEB Act. Thank you. MS. FEUER: Thank you very much. Deputy Assistant Secretary Sullivan, how does the issue of privacy enforcement cooperation come within your purview at the Department of Commerce?

MR. SULLIVAN: So in my role, I'm in the International Trade Administration, which is one of the agencies at the Commerce Department, and one of the offices that I oversee is responsible -- they are the US Government Administrator for and our interagency lead on different privacy frameworks -- international privacy frameworks, including both privacy shield frameworks, the EU and US Privacy Shield and the Swiss-US Privacy Shield. We're also very actively engaged in promoting the expansion of the Asia-Pacific Economic Cooperation and Cross-Border Privacy Rule system, APEC CBPR as it’s called. And we work extremely closely with the FTC on those issues around the world as we see a growing number of countries grappling with privacy while trying to balance innovation at the same time, which as everyone here knows, I'm sure it's not always the easiest formula. So that's a quick summary of what we do at Commerce. I'll leave it at that for now.

MS. FEUER: Great, great. Well, it's interesting to hear you both speak about the importance of enforcement cooperation in the privacy area, James, for your agency on many, many individual files and Jim as the sort of overarching systemic systems for cross-border transfers. So I want to follow up with a few questions. So, James, sort of the elephant in the room, we've heard a lot this morning in the first panel about privacy as a "barrier" to regulatory enforcement cooperation. And I’m wondering what your view is of that statement or assertion and what kinds of tools do agencies need to cooperate effectively given some of these limitations and, of course, in privacy enforcement investigations?

MR. DIPPLE-JOHNSTONE: Yes, yes. And it's not something we've -- you know, which is uncommon to us. We get that call often. I mean, we want to be clear, we're not the “ministry of no.” But, actually, what’s really important in this space is to do that groundwork and that thinking about what information do you need, how is it going to be transmitted, how is it going to be secured, what purpose is it going to be used for. And we often find there are many avenues and routes to be able to share information. We also get the -- interesting when we ask for information, we sometimes get from colleagues internationally, we can't because of privacy. And, oh, that's an interesting concept. How do we work through that? We've often found there is a way through. Sometimes where these arrangements are being agreed internationally and where, for example, it was mentioned this morning about the challenge with the advent of the GDPR, IOSCO working with colleagues at the EDPB and needing to sort of tease through that, it can sometimes be tough to be the first going through that process, but once those processes are in place, people understand how they work, those relationships are built, that common understanding is built. Things do flow a lot quicker and a lot easier in subsequent cases. And so very much it’s that sort of keep talking, keep engaging. And, importantly, I've recently come back from an international conference working group, where one of the key challenges has been that with the scale and pace of change internationally with enforcement agencies and enforcement bodies, some of which, again, was referenced this morning, just keeping pace of who can do what where and with what data is really important. So if those international networks can really help their members understanding where the right levers are and how their respective national laws work, that can only be a good thing.

MS. FEUER: Thank you. Well, Secretary Sullivan, in your experience, how important has the issue of enforcement cooperation been with the foreign governments and stakeholders that you have negotiated these international data transfer mechanisms with, and how important are the powers that the FTC has in those discussions?

MR. SULLIVAN: So, again, I'm going to refer to the three frameworks that I cited just a moment ago. And both the enforcement power and the international cooperation authority granted to the FTC under the SAFE WEB Act are both integral to the functioning of those frameworks, I think. Without them, they would lack legitimacy or credibility. You have to have some teeth behind these frameworks so that folks know that companies are going to be held accountable for the pledges and the promises and commitments they're going to make to comply with the principles or the practices that they have pledged to comply with in accordance with these frameworks. I don't know how that would be possible without what we just cited to, both the powers to enforce but also to coordinate with other enforcement agencies cross-border.

MS. FEUER: Thanks. As a follow-up, I asked you about how important this is for foreign governments, but I'm wondering what you hear from your industry stakeholders here in the US.

MR. SULLIVAN: I don't want to generalize. We certainly hear a lot. I think there's a strong recognition among most of the stakeholders that we engage with, sort of along the lines of what I just said. I mean, first of all, what would be the incentive to comply with something that really didn't have any teeth? I think they know increasingly how important it is to align their practices with these frameworks, given a lot of the developments. We’ve seen recently, and it's I think -- they generally -- and I am generalizing -- they do want to see strong frameworks that are actually enforceable and, they do want to see, as I think James just alluded to, greater collaboration because that’s going to lead to more consistent best practices or principles and approaches to a lot of these issues as opposed to just this fragmented, diverse, ad hoc approach to a lot of these same dilemmas that we're all facing.

MS. FEUER: Thank you. I want to ask my fellow panelists, while we're talking about privacy, whether there was anything that they want to add in sort of response to what Commissioner Dibble-Johnstone and Secretary Sullivan were talking about. So does anyone want to -- it looks like Marie-Paule wants to hop in.

MS. BENASSI: Yes. What I would like to say is that we should make a difference between issues related to privacy and to the confidentiality of investigations. And very often, indeed, it is quite a common answer to refuse cooperation, to say, oh, no, we cannot share information because of problems of privacy. But in the European Union, first of all, I think we have solved this, and I think that our GDPR itself helps a lot to clarify that authorities can exchange information, including information which contains personal data. And so this enables, in principle, very seamless type of cooperation in the European Union, because for law enforcement purposes, we can exchange this information between authorities in one member state or in other member states. And this -- I think in this way, the GDPR is an enabler. And when we look into the implementation of the GDPR for international cooperation, we should also look at it in the same way as an abler and enabler, because if it is respected; then exchange of information for law enforcement purposes should be facilitated. And, for example, we are also doing adequacy decisions, for example, with some other countries in order to also create the seamless facilities, including for law enforcement purposes.

MS. FEUER: Thank you. Anyone else? Kurt.

MR. GRESENZ: So I agree with Marie-Paule's sentiments there. You know, the issue that we encountered at the SEC as a civil agency with administrative investigatory powers, while the Department of Justice was out in front with an umbrella agreement to facilitate cooperation in the criminal sphere under the public interest mechanism, which is something that James talked about at the beginning, it was less clear how that applies in the civil or administrative context. So the step that IOSCO took to negotiate what is the first administrative arrangement under the GDPR will enable the second step of what Marie-Paule talked about, which are transfers of personal data from the EU to jurisdictions and authorities outside the EU. And now with that process, as Jean-François in the earlier panel talked about, having been blessed by the European Data Protection Privacy Board, we in the security space are looking forward to the data protection authorities in the 28, possibly 27, EU members states adopting that and approving that and so it can be the standard with the securities authorities who are IOSCO members.

MS. FEUER: Thanks. So I want to shift us now from what has been a privacy-heavy conversation to more of a focus on consumer protection. Our second pair of panelists represent two of the different strands of the kind of consumer protection enforcement cooperation we do here. So to hear about the EU enforcement model, we'll have Marie-Paule Benassi from the European Commission’s DG Justice, and to hear about our cross-border work with our Canadian criminal counterparts, we'll hear from Jeff Thompson, Acting Superintendent in Charge of the RCMP's Canadian Anti- Fraud Centre. So, Marie-Paule, can you start us off?

MS. BENASSI: So thank you, Stacey and thank you for the FTC to invite me. So, first of all, I would like to remind you that the European Union is currently counting 28 member states, and it's very well known for being something very complicated, and I would like to try to break that myth. But unfortunately, I think, or fortunately for a better understanding of the complexity of the Union, I think that Brexit and the interest which this is bringing in the headlines is also maybe shedding some light on why it is so complicated. So we have an integration of EU-level and national laws, a model, and this is where I think it’s simple. It's based on a very simple principle. We have one EU law in a certain domain, and it tries to harmonize national laws using key high-level principles. What is not harmonized is how this law is implemented. So it is -- except in a very few cases, it is implemented nationally. It is enforced nationally, and we try to do this in a way which preserves the diversity of the enforcement model in the member states. And so in the area of consumer protection, it is how it works. And the European Commission for which I'm working has no direct enforcement power. It is the member states which have the enforcement powers. So when I speak of enforcement, it means enforcement of the law towards businesses and other possible subjects because the European Commission is in charge of checking that the member states are enforcing the laws correctly, but we are not directly involved to stamp out illegal practices. In the area of consumer protection, so we have a strong role. And this role has been strengthened in the recent past. What is our role? Our role is to facilitate the cooperation of the member states because this is a EU, I would say, a harmonized law, and we want it to be implemented in a consistent manner in all the member states. And to do this, the only solution is cooperation. So we have a long tradition of cooperation inside the European Union and now we are doing it via a law which is called the Consumer Protection Cooperation Regulation. This law is establishing the framework for cooperation. So we start by first saying even if the member states are very different, they should have similar type of powers, so investigative powers. For example, the power for mystery shopping, the power to request information on financial flows, the power to obscure illegal content online. Another thing, also, is the framework for cooperation. So we have two types of cooperation now in our new legislation. One is what we call the bilateral cooperation, the more traditional cooperation, where one member state asks -- requests enforcement cooperation from another member state. But now we have this new system which is E- level coordination. And there, the European Commission has a new role because we have a role of market surveillance. And from this role, we can ask the member states to check some practices that we think are likely to be illegal. And if the member states find that there is sufficient evidence to start an investigation, then the Commission is coordinating this investigation. We also have a new power in terms of intelligence I mentioned. And we are also doing coordination of priorities. So, in fact, the role which we have is quite strong. And the new model, which we are going to implement from January next year, in fact, is already functioning, maybe in a lighter way. And it's working. So we have in the past done some coordinated actions, which are concerning. For example, illegal practices by big companies operating at the level of the European Union. Today, we are publishing a press release on an action done in the field of car rental, for example. So with the authorities, we have been working together with the authorities to find -- to analyze bad practices of the five leaders of this sector, and we wrote a common position asking these companies to change their practices. They made commitments, and now we have been monitoring the commitments and concluding that finally these companies are implementing these commitments. This is a negotiated procedure, so this is another element I would like to stress. These EU-level actions are not based on strong enforcement means because they don't exist at the European level. They are based on a coordinated approach and the cooperation with the traders. If the traders refuse to cooperate, do not cooperate sufficiently, or do not follow their commitments, then what is going to happen is coordinated enforcement action by the member states. And we have just added something very recently which is a system of fining that can be applied for this kind of EU-level infringement and coordination of the fines. And this is a big -- it's not yet completely finalized, but it's going to be a big step forward because in certain member states, they don't even have a fining system for consumer offenses. So we are building the system. So for the future, what is -- what can we do? We can do international agreements. So there is a possibility on the basis of this framework to agree international cooperation agreements with certain countries. And the framework which I've described can be applied also with the said countries to the extent possible, of course, depending on the type of base laws that exist in the member states. And what I could say is that we would like to start discussing on the basis of this new regulation with the FTC, if we can progress such an agreement. Why an agreement would be necessary? Because it's important that the formal part is there. Because as we heard from various speakers, the formal part is an enabler also for an efficient cooperation. This system, however, has several challenges. One of the challenges, as I said, it’s based on negotiation with traders. So it doesn't work when there is fraud, fraudulent operators. This is really required to develop additional cooperation, for example, with police forces because in most of our EU member states, they don't have this possibility of going against fraudulent operators. They need the cooperation of police, so this is an area where we need to develop in the future. And then relation with competition, relation with data protection, these are the future avenues for our cooperation. Thank you.

MS. FEUER: Thank you very much, Marie- Paule. And that was the perfect segue to Jeff Thompson, who is from the RCMP's Canadian Anti-Fraud Centre. And, Jeff, maybe you can sort of talk us through a little bit about what some of the tools and challenges you face and we face in cooperating on US- Canada cross-border fraud matters.

MR. THOMPSON: Sure. Thank you, Stacy. It's a pleasure to be here today to talk about international cooperation and consumer protection. Since the start of my career, I've learned that cross- border fraud was an evolving criminal market that cannot be tackled by any one country alone and even more so today. Consumer Sentinel reporting shows more than 1.4 million reports were received in 2018, up from 433,000 in 2005. Similarly, the Canadian Anti- Fraud Centre data shows annual losses to fraud continues to increase, reaching 119 million in 2018, a 495 percent increase since 2005. So it's easy to say that mass marketing fraud and cross-border fraud continues to be a threat to the economic integrity of Canada and the US, furthermore, if you consider technology, voice-over- net protocols, social media, virtual currencies, money service businesses, and other key facilitators that continue to provide criminals and criminal organizations behind a scam opportunities to operate across multiple international jurisdictions. And as we heard this morning, while this is an evolving threat, there is good news. There are, indeed, existing strategies that do exist and tools that provide an effective approach to attack on this criminal market. In fact, as we heard this morning again, the history between Canada and the US is long. It dates back to 1997, when Former President Clinton and Prime Minister Chretien met at the first US Cross- Border Crime Forum. It was at this meeting that telemarketing fraud first got identified as a major Canada-US cross-border crime concern. And it also made a number of recommendations, including the establishment of a multiagency task force, the development of consumer reporting and information- sharing systems, enforcement actions, and better public education and prevention measures. Since then, both US and Canada cooperate to implement and refine a number of these strategies, and while all recommendations made are important, I'm going to focus my discussion on the existing multiagency task force, or in today's terms, strategic partnerships. This case and work that the partnerships have done showcase an effective enforcement approach. They highlight intelligence-led policing and integrated policing models, along with providing insight into some of the tools and approaches to consumer protection. So if we consider the cross- border fraud partnerships as an intelligence-led approach, what we see is a group of key stakeholders joining efforts to achieve a common enforcement objective, namely, reducing fraud. To give you a practical idea of this, I think back to some of my early meetings at the Toronto Strategic Partnership. I did not fully recognize or appreciate the significance of the discussions held around the table. Members from several different agencies and organizations discussed top reported scams, scam trends, top offenders, current investigations, and gaps and challenges in enforcement options. Oftentimes, this intelligence-led approach was started by members from the Federal Trade Commission or the Canadian Anti-Fraud Centre, bringing intelligence developed from their respective central databases, Consumer Sentinel and the Anti-Fraud Centre database. This dialogue helped identify the new and emerging scam trends and discussion around the key facilitators to the scams. It also helped to coordinate joint priority setting, identify lead agencies, investigative assistance, and actions required to complete the files, and in many cases helps with deconfliction amongst the agencies. Sharing information around the table was a key factor, and as long as there’s a willingness to share, there is a way to share. There is also a common trust and understanding amongst the partners to share information within the confines of law. Thus, the partnerships serve as an intelligence-led approach in as far as they create a platform to share and synthesize information from multiple perspectives. Turning now to consider the partnerships as an integrated policing approach, we begin to realize that criminals and criminal markets can be disrupted through civil, regulatory, or criminal investigations and that different agencies and different laws all play a role. If we dissect again the Toronto Partnership, we have a minimum of eight different organizations: the Federal Trade Commission, the Royal Canadian Mounted Police, the United States Postal Inspection Service, Toronto Police, the Ontario Provincial Police, the Ministry of Consumer and Government Services, the Competition Bureau of Canada, and the Ministry of Finance. The FTC alone has 70 different laws that it enforces. Who really knew that the Ministry of Consumer and Government Services enforces numerous consumer protection laws such as the Loan Brokers Act, which can be used to go after the advance-fee loan scammers? Or that, again, as we heard this morning, CASL legislation also has clauses that allow for foreign enforcement to request assistance from respective Canadian law enforcement partners? At the heart of an integrated policing model is a give-and-take approach. And in the US-Canada cross-border partnership context, this approach is formalized by MOUS. As recent as 2017, the Federal Trade Commission and the Royal Canadian Mounted Police formalized an MOU that identifies best efforts that participants can use to further the common interest of combating fraud. The language used highlights the foundation of information-sharing and cooperation. Participants shall share materials, provide assistance to obtain evidence, exchange and provide materials, coordinate enforcement, and meet at least once a year. So, again, if we take a practical view, the strategic partnership model against cross-border fraud uses intelligence-led and an integrated policing approach that allows investigators from Canada and the US to move beyond simply coming together to talk about cross-border fraud concerns to developing investigative plans that identify investigative steps and processes needed to gather that evidence. Each participant brings a range of tools that can be leveraged to ensure the effective cooperation. One such tool that we’ve heard plenty of today is the US SAFE WEB Act. From a Canadian-US perspective or from the Canadian perspective, I mean, it provides us an avenue to formally seek investigative assistance in the US from the FTC. It also formally acknowledges by name some of the regional partnerships that exist today. This act alone has assisted strategic partnerships in countless cases, at least 22 by my count since 2007, and as we’ve heard, a lot more. These cases have led to arrests -- civil arrest charges, civil forfeitures, and, most importantly, victim restitution, which in the Canadian context is often rare to see. This includes Operation Telephony, which involved more than 180 actions brought by the Federal Trade Commission, including actions in Canada and the US, and it also includes the Expense Management Case that we heard about in the last panel involving $2 million that was eventually turned over to the FTC for consumer redress. And while there's a history of success and continuing work and outcomes to look forward to, we know that the criminals adapt. Today's frauds typically involve solicitations coming from one country targeting consumers in another country and funds going to yet another one. Mass marketing fraud is truly a transnational crime. We know that in a number of cases, the criminals and criminal groups involved are deeply rooted in Canada and the US and that moreso today, the work being done by these partnerships exposes these international networks who are also providing each other an opportunity to leverage our international networks to tackle this problem collectively. And we’re already doing this to some extent. The International Mass Marketing Fraud Working Group is another example of how Canada and the US cooperation has extended beyond North America. As recently as March 7th, this group announced -- or the US Department of Justice announced the largest ever nationwide elder fraud sweep, and the International Mass Marketing Fraud Working Group played a role. At least eight different countries were engaged. At the same time, there are other challenges, such as the willingness of other countries to identify mass marketing fraud as a transnational threat, whereas in many cases fraud or financial crime is not a priority. And this even holds true today to some extent. The parties and law enforcement agencies are subject to change, and the ability of any one agency to solely lead a partnership can be impacted by this change. Albeit, there's still partnership models that work in which chairs to partnerships rotate and changing priorities are acknowledged. In May of 2018, the RMCP coordinated a national mass marketing fraud working group meeting whereby we acknowledged the changing nature of mass marketing fraud and sought to renew our efforts. We also sought input from key US stakeholders. The Federal Trade Commission and the United States Postal Inspection Service were at these meetings. And while work continues to renew this renewal, such as the emergence of a Pacific partnership to replace Project Emptor, there's still work to be done. So in concluding, there’s a long and successful history of Canada-US enforcement in consumer protection, and that demonstrates effective cooperation through integrated and intelligence-led approaches and that this continued cooperation is integral to combating this transnational crime today. Thank you.

MS. FEUER: Thank you very much, Jeff. So I think that we now have a couple of very interesting issues out on the table about consumer protection and enforcement cooperation, both the EU model of the CPC network and the FTC Canada model, which focuses on these seven strategic partnerships that exist in Canada. So I want to ask a few questions of our panelists, Marie-Paule and Jeff Thompson, and then I do want to turn back to Secretary Sullivan. But, first, Marie-Paule, I did want to ask you one thing. I know that the CPC network uses a technological tool to facilitate the cooperation among the 28 member agencies. I'm wondering your thoughts about how well that works and how it might work in a more multilateral context.

MS. BENASSI: Thank you, Stacy, for this. So, first of all, I think I would like to make two types of tools. One is the system which we use to network, and I would say this is based on technologies of collaborative websites. And we have been using them now since several years and we are quite confident that it is safe for exchanging information and including information on containing personal data, for example, on businesses or on witnesses, and also it can be adapted. But currently, the CPC system doesn't contain a lot of cases. So it's growing organically, I would say. And it's also very much used to exchange information, best practices, for example. In the future, we are building something which is going to be a case management system and it will contain several modules, including a module for our external [indiscernible]. So we are going to open this to various entities -- NGOs, entities. And so we are going to build doors, in fact, in such a way that the two systems can communicate, but without having [indiscernible] you know, for -- so that the stakeholders will only see their external areas. And I'm quite confident that we can build the same type of modules for international cooperation with our technology. But what I would like to say is that we are also developing technologies for online enforcement tools. And what we want is to create, for example, a system where we would have an internet lab that could be used by the various member states, and we are also building capacities of administration in the EU countries. We are developing training, and we think also that this kind of tools could benefit from pooling of expertise from various agencies, including in an international context.

MS. FEUER: Thank you. So I want to turn -- before I turn back to Jeff Thompson, I want to turn back to Secretary Sullivan and ask what are the tools that can be used to facilitate cooperation under the various cross-border mechanisms? And why are they important?

MR. SULLIVAN: So in terms of why they’re important, I mean, again, a lot of this is probably self-evident to those in this room, but the data explosion we've seen is only going to continue. And we now have these cross-border data flows that really do benefit stakeholders across our societies and our economies. So you’ve seen these cross-border data flows help enable consumers, for example, to access more and better services and products. They help our companies to increase the efficiency of operations and innovation, and they help nations in terms of their competitiveness and their ability to help create jobs and facilitate economic growth. So this is all great. The problem we're dealing with is that different counties now take very different approaches to how they regulate these data flows specifically on privacy. And so what I wanted to just touch on a bit was what we do, the Commerce Department, in conjunction and partnership with the FTC to deal with this issue, this dilemma. How do you continue to facilitate these cross-border data flows when you are dealing with countries that have all adopted varying approaches, legal regimes, or policy priorities. I touched on the three frameworks, and I just quickly wanted to go through some of the tools within those frameworks, if I could, which from our perspective are absolutely critical to digital trade because, again, right now, there is no single comprehensive binding multilateral approach governing these cross-border data flows. So you know, again, I'm repeating myself a bit but we have stakeholders that we meet with all the time coming in, telling us about this constantly shifting and evolving and rapidly accelerating policy landscape that they have to deal with. So in response to this challenge, one approach that we've taken, as I alluded to earlier, for example, is the APEC CBPR system. And it's basically a voluntary enforcement code of conduct based on internationally recognized data protection guidelines. It establishes principles for both governments and for businesses to follow to protect personal data and to allow the data flows between APEC economies. To join this system, an APEC economy has to designate a third party called an accountability agent. And that accountability agent is empowered to audit a company's privacy practices and take enforcement action as necessary in some instances, but if that accountability agent cannot do that, resolve a particular issue, an APEC economy, their domestic enforcement authority serves as a backstop for dispute resolution. And in the United States, the FTC is our designated regulator, obviously, and enforcement authority for the CBPR system. And they enforce the commitments that are made by the CBPR participating companies to comply with the principles that they have committed to comply with. I do want to note all CBPR participating economies also have to join the cross-border privacy enforcement arrangement, CPEA, to ensure cooperation and collaboration among their designated enforcement authorities. To date, if memory serves, I know the FTC has brought four enforcement actions against companies for making deceptive statements about their participation in CBPR, and it’s also used its authority under the SAFE WEB Act to enhance cooperation with other privacy and data protection regulators within APEC. So, again, as I noted at the outset, FTC enforcement and international cooperation are absolutely critical to the credibility, to the integrity, and the success of the CBPR system. There are currently eight economies in APEC of the 21 economies participating in the system: the US, Japan, Mexico, Canada, South Korea, Singapore, Australia, and Chinese Taipei. And the Philippines is currently working on joining the system as well. I want to underscore that if this system were to scale across APEC, the framework would help underpin over a trillion dollars in digital trade. So we regard that as a very big priority and, again, we cannot emphasize enough just how critical the FTC is to that framework. And it's also a similar dynamic with the EU. It's been, the FTC, extremely integral to the success of both privacy shield frameworks. We all know, and it’s been touched on, about a year ago, GDPR was put into effect in Europe. And like the predecessor directed before it, it imposes certain restrictions on the ability of companies to transfer certain data from Europe to other jurisdictions, so we have Privacy Shield. And, again, like CBPR, it's a voluntary enforceable mechanism that companies can use to promise certain protections for data transferred from Europe to the United States, and the FTC enforces those promises made by Privacy Shield-participating companies in its jurisdiction. Again, I talked about how big APEC was and how these data flows underpin trade there. The EU is actually the largest bilateral trade investment relationship with the US in the world. That, too, is valued at over a trillion dollars. And I know the Transatlantic economy accounts for about 46 percent of global GDP, about one-third of global goods trade, and the highest volume of cross-border data flows in the world. And the Privacy Shield program is absolutely key to underpinning this economic relationship. We have about 4,500 companies now participating in the program. They've all made these legally enforceable commitments to comply with the framework, and they range from startups and small businesses to Global 1000 and Fortune 500 companies across every sector, from manufacturing and services to agriculture and retail. And I do want to note that about 3,000 -- nearly 3,000 -- of those companies are actually SMEs, so it’s not just the big tech companies that we're talking about. So to help protect data against improper disclosure or misuse, the Commerce Department and the FTC do work together, and they move swiftly to ensure that participating businesses who join Privacy Shield and certify under Privacy Shield are complying with their obligations. And over the last two years, Commerce, for example, has implemented a buying arbitration mechanism and new processes to enhance compliance oversight and reduce false claims. And by the same token, the FTC has enforced companies’ Privacy Shield declarations and commitments by bringing several cases pursuant to Section 5 of the FTC Act, which prohibits unfair and deceptive acts. We also refer false claims participation in the program to the FTC, which have often resulted in FTC settlement agreements. And under those agreements, the FTC can obtain certain remedies such as remediation measures and compliance monitoring that are, I think, generally otherwise unavailable in an enforcement action. And to date, the FTC has brought about four false claims cases. So, again, as with CBPR and APEC, the FTC has been just an essential element in bridging the gap between the EU and the US approaches to privacy. And, again, I'll just end by saying you're not going to get buy-in legitimacy or credibility without that enforcement power and that collaboration and cooperation that we're all talking about today. So thank you.

MS. FEUER: Thank you very much. I want to turn back to Jeff for a minute. So everyone has done, I think, a really fantastic job of outlining the tools. And, Jeff, you talked about these partnerships, and I guess I'd like to know a little bit more about the partnerships in terms of their status today, whether you think that they kind of could be adapted for a more, I guess, global enforcement model and whether you have any ideas about how cross-border cooperation and consumer protection matters could be improved.

MR. THOMPSON: Sure. Thanks, Stacy. So, yeah, the status of the partnerships -- as I mentioned, the partnerships stem from a 1997 meeting. There were three partnerships created across Canada -- one in Vancouver, one in Toronto, Ontario, and one in Montreal, Quebec. At one point in time, we saw this increase to seven Canada-US cross-border partnerships, but that wasn't maintainable for a number of reasons, primarily being there wasn't a lot of enforcement work in Atlantic Canada and Saskatchewan, for instance. So, I mean, things changed. And, again, as I said, priorities change. So right now we have three partnerships, including the new Pacific partnership which replaced Project Emptor. The Montreal Canada project, Project Colt is also defunct currently, but I mentioned we're working on renewing these efforts and coordinating something there. So, right now, as it stands, there’s the Alberta Partnership and the Toronto Strategic Partnership, and the Montreal Partnership. As far as improvements go, one area for I think more global enforcement cooperation that we discuss a lot at the office is disruption. And by disruption, I'm not talking about actual enforcement action. I'm talking about cooperation with private sector partners, using the data that we capture in our central fraud databases to block, say, shut down foreign numbers, to get bank accounts blocked. In Canada, we're sharing information with banks and credit card providers to go after the subscription traps, the continuity schemes, the counterfeit sales of other goods online and nondelivery goods. So the information we house that there's other alternatives to enforcement, and those are some of the areas that need to be improved on internationally.

MS. FEUER: Thank you very much. I now turn to Kurt Gresenz, who is the Assistant Director at the SEC’s Office of International Affairs. And, Kurt, as we heard earlier from Jean-François Fortin, securities enforcement collaboration is truly global and truly impressive, I have to say. I'm interested in hearing more from your perspective to inform our thinking about the cooperation in the areas that fall within the FTC's jurisdiction.

MR. GRESENZ: Thank you, Stacey. Let me start out by giving the disclaimer I’m required to give, that these are my views, only my views, and not necessarily those of the Securities and Exchange Commission, its Commission, or its staff, which I like doing because that frees me up now to say what I would like to say, which hopefully follows what the SEC would say. Okay, so let me start out with building on some of the themes that have been talked about. One of the reasons, I think, that we have been successful in forging a pretty broad alliance of securities authorities around the world that are cooperating is by virtue of the fact that the IOSCO principles of securities regulation are part of what national economies are assessed against as part of the financial sector assessment program that is done by the IMF. So essentially when the IMF and team comes into a jurisdiction to grade you on your financial resiliency and financial regulation, they're going to look at the IOSCO principles. And the IOSCO principles say that your securities has to have certain minimum powers and also the ability to share information across borders for enforcement purposes. And I think that has been one of the key tools that has caused one of the things that Jean-François talked about from early adoption, say two dozen countries in 2002 under the MMOU to where we are now as 121, that it's an easy way to getting a failing grade by not being signed up to the MMOU. And national legislatures have, for the most part, made the amendments to their domestic law to enable them to meet the MMOU standards. So in the scale of cooperation, Jean- François talked about over 5,000 requests that were made under the MMOU last year. The SEC is, as you might expect, a big user of those, probably 600 to 800 of those were ours. So we have an incentive in that process working smoothly. And where the parallels are, I think, for me is when I talk to my colleagues at the FTC, we're talking about consumer protection. And the concept of investor protection is essentially the same concept. The investor is our consumer. And one of the focuses of our enforcement priorities is on the mom-and-pop investor, the retail investor who really is somebody that will benefit from an active securities authority acting in their stead. In the securities context, one of the things Jeff talked about was he mentioned you have people set up in one country, you have targeting of investors somewhere else and then you have sending the funds elsewhere. I would actually build on that. In an ICO case for example, the entities might be incorporated in two or three different jurisdictions. The investors might be targeted in the UK, Australia, and the US. They might be storing their documents in a fourth or fifth jurisdiction or in the cloud so it’s very difficult to, you know, figure out where those are to begin with. So those are the challenges, and building through those, and I think we've had a good discussion of the privacy challenges, but two things I want to mention that also came up in the earlier points is one is what I call regulatory arbitrage, which somebody called regulatory competition. Cooperation works very well, but we also have to be cognizant that there are competing policy concerns with how we approach our enforcement tasks. So for example, a sophisticated fraudster is going to have some basic awareness of what the regulatory scope is in a given jurisdiction. And these people may set up shop in particular places and do things in particular places for taking advantage of whatever the legal system is there, and often that legal system may be one that is less conducive to cross-border sharing. So then as we advance down the path of the investigation, either related to that or other things, regulators move at different speeds. They may have different approaches as to how they approach witnesses. Are we going to go let everybody know in advance? I will tell you that from an SEC investigative perspective, which I'm sure people around the room and at this table would share, that people acting in a manner that is entirely consistent with their own investigative processes and procedures, but that may be contrary to what somebody is doing elsewhere. Those are things that are going to almost always result in people wanting to control their own investigation, perhaps at the expense of greater coordination. And I think that's where, you know, discussion is certainly important. And I don't know if this is really privacy. Maybe this goes to confidentiality. Also, different authorities have different legal requirements when it comes to what types of information they have to disclose in a particular setting. So let's say that we transmit files to an authority who assigned assurances of confidentiality and then we read a newspaper report that talks about things that we disclosed on a confidential basis, and then we drill down and it turns out that, well, yes, they kept it confidential but not from a lawful request, and it might be a Freedom of Information Act request or something like that. So that’s obviously going to be something that maybe you don't anticipate on the front end, but it might chill information exchanges going forward. And then the case of the ambitious prosecutor, he or she who may leak to the press. I know that that’s always a source of great consternation, whether it's the SEC or DOJ or elsewhere, when you read confidential details that are unattributed by a source who’s not authorized to speak about something that you thought you transmitted in confidence. So I do want to talk about those. I think the last thing I want to talk about in challenges is one of the things that we are dealing with frequently at the SEC, and I think we sort of have a little bit of a handle on it, and I know it must be something that the FTC confronts, also, but the law has been unsettled for a number of years as it relates to the Electronic Communications Privacy Act and what type of records we can get from internet service providers, and maybe who a subscriber is, who is the identity of a particular account. Maybe that’s something that is reachable, but what about the cases where you know there's communications and you want those communications, and maybe there's impediments there. I know that the criminal authorities can go through a warrant process for things like that. What is the recourse of an administrative agency where we don't necessarily have recourse to a criminal mechanism to show just cause, due cause, probable cause, reasonable suspicion, whatever the standard is. So cooperation works, but we have to be, I think, vigilant of the challenges to that, and like we’ve already talked about in the GDPR space, how do we get to a solution that works for most people most of the time.

MS. FEUER: Thank you very much. So let me ask you one follow-up, which is about your statutory authority which underlies your ability to cooperate. I know that you have some tools that you've had since the 1970s that are somewhat similar to what we have in SAFE WEB. And I'm wondering how they actually underpin what you do and how effective you think having that statutory authority has been.

MR. GRESENZ: So there are three sections that I'll talk about. And absent these three things, we would not be able to meet the IOSCO principles, which means we wouldn't be able to sign the MMOU, which means the Treasury Department would be unhappy when we were adjudged to be noncompliant in an FSAP in these areas. The first one is what I call our access request authority, and what this says is the Commission has discretion to share confidential file materials with any person, provided that person demonstrates need and can make appropriate provisions of confidentiality. And I think more or less that tracks what the FTC can do, although maybe the Safe Web is restricted to regulatory authorities, where the SEC, in theory, has discretion to share with any person. Our Commission has delegated that authority to exercise the discretion to the staff in the area where I work with, which is cross-border enforcement cooperation. Now, typically, my office will look at any request for access for SEC files that comes from a foreign authority, and we will make a baseline determination of whether sharing is appropriate with that organization or not. Obviously, if they’re an MMOU signatory, that question is easier. So that's the first one, the ability to give access to materials and files. The second one is to use our compulsory power on behalf of a foreign authority. And I think, again, here, there's probably parallels all down the line with the FTC's existing authority, is we have to make sure that there's -- well, for us to start with, the requesting authority has to be a foreign securities authority, which means do they enforce laws that fall within their securities regulation. Number two, the authority has to be able to provide reciprocal assistance. And, again, if it’s an MMOU party, that's already written in and baked into our principal cooperation mechanism. The sharing has to be consistent with the public interest of the United States, and we go through that process of the deconfliction process with the US Department of Justice. So that's something else that is taken care of. And one interesting fact here is it's not necessary for the conduct to be a violation of US law. So, for example, if it's illegal in Country X but it may not be illegal here, we do have the authority to assist in appropriate circumstances. The third piece after the access request and the compulsory authority, you know, of course, you list three and then you forget the third one. Let me come back to that one. I should have made a note when I was thinking about this.

MS. FEUER: Okay. Well, that's great. So we have a lot here to work with to start us off on questions, and there are so many strands to the strands that we've brought out that it's hard to know where to start, but I am going to start with two questions that have come in. And the first really builds on, Kurt, what you were just talking about, that your investigative assistance power doesn't require the law violation to be a law violation in the United States if it is a law violation in another country. And we actually have a question on that. And this is, I think, to the consumer protection and privacy areas where I think laws diverge more than they do in the securities arena. But the question is this, when an act or practice would violate consumer protection law in a consumer's home country but it isn’t against the law in the seller's country, should agencies cooperate? When there is a conflict of laws, what should consumer and privacy agencies do? And I'm going to throw that out to the panel and see who hops on it. James?

MR. DIPPLE-JOHNSTONE: Is it helpful to say just in terms of our experience at the ICO's offices for that very reason is our legal gateways are framed with a public interest test? And that's a very widely drawn public interest test, so it doesn't need to be a specific offense in the UK for us to be able to cooperate and exchange information, for that very reason is there is quite a variety.

MS. FEUER: So that's helpful to know. By way of background, the FTC's -- yes, I work for the FTC -- the FTC’s authority to obtain investigative assistance for foreign counterparts relates to unfair or deceptive acts or practices, as well as violations of laws that are substantially similar to those that the FTC enforces. So we have a little bit more defined statutory language, although as you can see here, it allows to us cooperate with a wide variety of agencies. Anyone else want to opine on this first question from our audience? Marie-Paule?

MS. BENASSI: Yes, thank you. It's a very important and interesting question. So in the European Union, we have laws which are harmonized, fully harmonized, or minimum harmonization. So our system of cooperation for enforcement actions are based on the minimum harmonization, when it is minimum harmonized. So it means that you cannot take an enforcement action for a violation which goes beyond the minimum harmonization and which would not be the same in one -- in your member state where the trader is established compared to the member states of the consumer. But requests for information and other types of assistance I think can function. And what we see when we work with cooperation in an informal setting with other jurisdictions outside of the European Union is that very often the principles -- at least the principles are quite the same. And so it’s on this basis, I think, that in many cases exchange of information can be possible.

MS. FEUER: Jeff.

MR. THOMPSON: Yeah, I think this touches a little bit on what I was referring to with disruption as well. Enforcement is not the only answer where we can't enforce the law in another country or a law doesn't exist that prohibits a certain action. However, we may be able to work with, again, private sector partners or other agencies to block these services from being offered in Canada. Binary options was a great example in Canada where we worked with credit card companies, and Canadian law prohibits the sale of securities if somebody is not registered. So, therefore, there was no binary options. Companies registered in Canada, therefore, any sales to Canadians are against our laws. So we're able to work with Mastercard and Visa and the credit card companies to prevent any Canadian transactions for binary options.

MS. FEUER: So that’s very interesting. So there are really a range of options here from a very broadly defined public interest standard to the European Union's concept of minimally or maximally harmonized laws, which essentially means whether every EU country has the exact same law or whether they have more leverage and freedom to implement laws differently. To the example that Jeff has given with disruption and also being able to cooperate across the civil and criminal divide, because we obviously cooperate with the RCMP as a criminal agency, and many of our colleagues, for example, the UK ICO, has criminal authority as well as civil authority. Kurt, I saw you want to say one more thing here.

MR. GRESENZ: Yes, I was actually thinking about a topic that you and I have talked about. So one of the questions that can come up in the work that I do is there might be a hesitation on the part of some of our foreign counterparts to work with us in some cases if they are afraid that an SEC outcome will foreclose them from acting. And I think this is the result of different legal interpretations of what amounts to double jeopardy. So you know, in the US, depending, we have different sovereigns for different purposes. What some of my colleagues overseas have said that essentially should the SEC take some action, even administrative action against an actor where the conduct is based on something the foreign authority is looking at that that could potentially preclude the foreign authority from doing any action at all? So that's in one direction we have to be sensitive to that. You know, the question there is let's say we ask for help in a case and they're looking at it and they say, well, we don't want to tell you because you're going to take action and then we're going to be left with nothing. And, again, we would work through that stuff, but it's a real issue. You know, from our side, we take Foreign Corrupt Practices Act violations seriously. And from an economic perspective, my personal view is there's a really good strong reason to do that. That's not always the approach that some foreign jurisdictions take. And we have from time to time encountered hesitancy to help us on our FCPA investigations on the SEC side, not speaking for the Department of Justice, because of a view that well, you know, I don't understand how that falls into a securities violation. It could be just code for, well, we don't really look at it in that way from our country. So we don't think we can help you. Again, people have to decide are they going to step up and are they going to help.

MS. FEUER: Right. So really interesting question and really interesting responses. I want to turn to another question that sort of focuses on one of the hot topics of today, which is this. Congress is considering passage of a comprehensive data protection and privacy law. How might that change or affect the relationship between US regulators and those in Europe and elsewhere, particularly as it relates to privacy investigations and litigation? And I'm going to put James on the spot first.

MR. DIPPLE-JOHNSTONE: Okay. Well, I think in many ways, you know, we should look at the opportunities. There are many countries around the world which are looking either at their first data protection act or privacy act or enhancing the one they’ve got. And I think the key things are to make sure that, you know, as referenced by the international conference, that there are those opportunities to collaborate and cooperate to ultimately do what we’re all there to do, which is to keep our citizens safe. And this will continue to be a theme as we go forward. Countries like India are looking at the data protection bill, going through their Parliament and their legislative process. They will be significant, given the scale and size of their economies and their country. So we should look for the opportunities to work better together.

MS. FEUER: And I thought you were going to mention GPEN again.

MR. DIPPLE-JOHNSTONE: Well, GPEN provides a great opportunity to do that, both in terms of the cooperation, but also more importantly the technical challenges, the assistance. One of the great things GPEN does, if I can make a plug for it, is coordinate around sweeps, so looking at upcoming threats and risks that might affect privacy authorities and sharing that load out and sharing that learning out in terms of all of us looking consistently at threats within each of our nations and then bringing together the results of that for a common discussion.

MS. FEUER: So any other observations on the question? It focuses on whether changes in privacy laws might affect cooperation, but I think the question is really broader. As we talked about this morning, many countries are in the process of updating their laws, whether it be consumer protection laws, privacy laws, securities laws, maybe? And so I wonder how this whole issue of changing laws, changing standards affects the way or the opportunities or the challenges for cooperation. And I'll throw that out to whoever wants to go first. Secretary Sullivan.

MR. SULLIVAN: So I'll just say, we in the International Trade Administration have been working with the National Telecommunications Information Administration and the National Institute of Standards and Technology, also sister agencies at the Commerce Department, to evaluate what, if anything, the Federal Government should do to address some of the privacy concerns that have certainly captured a lot of attention in the last couple of years. I think this goes back to what I was talking about. This is my personal opinion. I think we're probably quite a long ways off from any global standard. I think -- you know, you talked about India, Brazil. A lot of countries, you know, many have been looking to GDPR as an example, but no one is replicating GDPR exactly. There are still these differences, and those are going to continue because, as I think I said earlier, different countries have different cultural norms and legal traditions and histories, and they have different policy priorities that are all going to, you know, result in differences of kind if not degree. Again, I sound like a one-trick pony, but this goes back to the APEC CPBR system because what that basically is, is it takes these internationally recognized norms that we all agree on, which came from the OECD guidelines and the fair information principles before that and said let's all agree to these baselines, because you are going to have these differences. And we have to find a way to bridge these differences between these different regimes that countries have. I think, again, you know, there are aspirations for a single global standard. I don't think that’s about to happen anytime soon, so we’ve got to figure out, you know, how these different regimes can be made to work together. The approach in APEC is this interoperability approach, which I really think has a lot of appeal, is very well developed, and has been embraced, as I said, by a lot of countries in APEC, and we’ve heard a lot of interest from other countries around the world because it really is very flexible and can be adapted. On the one hand, it definitely protects privacy, but it can deal with technology because we in government are always going to be one step behind in regulation and legislation to begin with, but in this space in particular with the technology evolving so quickly, I really think there’s great appeal there.

MS. FEUER: Thanks. Anyone else? Marie-Paule?

MS. BENASSI: I agree with what James Sullivan said. I think it's going to be really incredibly difficult to sort of have a very harmonized universal framework for that data protection but also for consumer protection. And in the European Union, we are -- we have these principle-based laws and even in case of maximum harmonizations, there remain some differences. So our reply is to work on common enforcement actions and develop these actions in a way that they have become also guidance in a way. So -- and they are less theoretical than the law because they are applied to practical problems, practical practices. And in the future, what we want to do is to do more of these actions where, in fact, we have -- we publish the common position of the CPC network in the form of a guidance that can be applied by all the different operators in a certain industry. The other point I wanted to mention is notice and action procedures. So in the European Union, we have a law which is called the E-Commerce Directive, and which provides that marketplaces and social networks do not have a duty to monitor illegal practices, but they have a duty to act upon notification against an illegal practice. And this means, for example, withdrawing the account, obscuring the information. One of the problems of these operators, because we are now discussing a lot with them, is that, first of all, the domain of laws, which should apply, which is enormous and then it's -- for them, it's very difficult in a way to have an efficient action when the domain of law is so big and also the enforcement type are very big. And so I think that also cooperation on common notice and action procedures at the international level with a certain level of recognition, so this is what Jeff is saying about this disruption, so looking into also other type of models which are more based on practical enforcement tools, systems.

MS. FEUER: Thank you. Anyone else? So in the few minutes we have remaining, what I'd like to do is turn to each of the panelists and, similar to the first panel today, ask for a one-, maybe two-minute takeaway of what you see as the most important tools for international cooperation, what you see as your main challenges, and how you might remedy them. So I'm going to put Kurt on the spot and ask our SEC colleague to start first.

MR. GRESENZ: So when you started with tools, I did remember the third tool that was so important that I forgot it, but it actually is very important. So we have two provisions of law which help us protect information we receive from foreign authorities. The first one is a statutory protection that protects from any third parties any materials that we receive from foreign securities authorities. So outside of the litigation context, that essentially gives us ironclad protection for SEC files for enforcement purposes. But more recently, we added a legal amendment, a new tool that protects in litigation any material that would be privileged in the foreign jurisdiction. So let's say, for example, we get confidential financial intelligence from a foreign authority, and as a condition of receiving that, the foreign authority makes a good faith representation that this is for intelligence purposes, and it is privileged from disclosure in our jurisdiction. Under Section 24(f) of our 34 act, that protection would carry over into US law, and there is an absolute privilege it would stand discovery, for example, that it will carry over the foreign privilege to US law. And it could be anything. It could be financial intelligence, it could priest-penitent. I mean, if there is a privilege that is recognized in the foreign jurisdiction and we receive materials pursuant to that privilege without waiver, then there's no examination behind the statute for the court to make. It just has to be the representation. So that, I think, gives us added teeth when it comes to representations that we, in fact, can protect things in our files. So, you know, the takeaway for me is the big difference that I see is it looks like what we do in the security space is much more concentrated. You know, we know exactly who the players are. We see them all the time. There's crossover to some criminal authorities and other domestic agencies, but by and large, we seem to be in a more narrow lane. And I think my takeaway would be that listening to my colleagues here is there's a lot of lanes running in parallel and overlapping and overpasses and other sides that I think that we just don't have that much of in the security space in my view.

MS. FEUER: Thanks. And that raises two interesting points. I think this afternoon we'll have a panel on competition enforcement, and I think there might be a few less lanes, although I know there are some. And, also, your mention of your statutory ability to protect information, we have an analog in the SAFE WEB context for information provided by foreign law enforcement agencies when they ask for confidentiality that gives a privilege against FOIA disclosure. So turning now to Jeff, your top takeaway.

MR. THOMPSON: At the end of the day, what I got out of this is, I mean, there's an increasing abundance of information in the world, and we need to be able to prioritize our enforcement efforts. So it's processing all that information that’s certainly a challenge, and there’s all kinds of technology tools to help us. But not only that, it’s setting the right priorities and working smarter. So the intelligence- led approach, where we’re using the central fraud databases such as Consumer Sentinel or Anti-Fraud Centre to start driving enforcement action in a more targeted and effective manner.

MS. FEUER: Thank you. So intelligence is key to international cooperation. Marie-Paule?

MS. BENASSI: So I wanted to say two things. The first thing Jeff said it already, which is about prioritization. And I think that fraud is becoming internet fraud, all the different facets of it, and its internationalization, I think, is becoming a very big problem in terms of the harm caused to consumers and collectively in the world. And also in this respect, the role of the big platforms, you know? And if we don't prioritize and don't find efficient ways, building also on what this platform can do, I think is going to become more and more difficult to prevent fraud. And we see organized crime moving into these kind of activities, which seems to be giving them the possibility to earn a lot of money very easily. But then we have a different type of problem which we didn't discuss much, because also we have a bit -- had discussions a bit in silos here, but which is how to tackle the new types of misleading practices which are developing and which are based on the data economics. So on this we need to build links between competition, data protection, and consumer protection in order to understand this and see how -- what are the impact on consumers in terms of also the possible harm and also for businesses, possible lack of competition that this type of new data models are creating.

MS. FEUER: Thank you. Secretary Sullivan.

MR. SULLIVAN: So, again, for me, my perspective, the biggest challenge we're dealing with right now is the fragmentation or the vulcanization of the internet around the globe. You're seeing rising delocalization, which, again, I think that just impoverishes everybody, those within the country that have imposed delocalization measures, those that have overly strict restrictions on data flows. I think certainly we share a legitimate and strong desire for consumer privacy with a lot of other countries. And as I noted earlier, we take different approaches. I do think we need to be very wary because these issues, the way we're headed and in the coming years, we're going to be looking at, you know, more and more connected devices that are transmitting data, and this data has to be protected on the one hand, but it can lead to such tremendous opportunities. I mean, in the public sphere, in terms of smart cities and efficiencies and health breakthroughs and precision medicine and detecting disease patterns. And we want to be very wary of going too far in one direction, I think. So I agree with you about the balancing of these interests. And, again, I'll go back to my -- I really think, you know, the EU, for example, and the US do take different approaches, but we ultimately share, at eye level, the very same goal. And I think interoperability between GDPR on the one and CBPR on the other could be a very positive development. I know there was a referential a few years ago with BCRs, binding corporate rules, which is an EU proof mechanism for data transfers and mapping it relative to CBPRs. And, again, these all derive from the same OECD guidelines, and I think there's a lot of overlap. And I know GDPR allows for certification mechanisms, and I think there's a tremendous opportunity there for us to make these systems work together and make sure that we are extending privacy protections around the globe, while at the same time making sure that we're not quashing or squashing innovation and, again, doing damage to our long-term interests. So I think interoperability would be my solution there. And as, again, I've said a couple times already, you know, the FTC is probably the preeminent privacy data protection authority, as it were, in the world going back to the 1970s, has been a great partner as we go around the world and talk to countries on this. And so we should continue to do that. And I hope we can partner with other like- minded countries to that end.

MS. FEUER: Thank you. And the clock is quickly counting down, so I’ll ask Commissioner Dipple-Johnstone to say a final word.

MR. DIPPLE-JOHNSTONE: I will be very quick, then. I mean, I can almost echo the comments of others. I think it’s that keeping updated and keeping pace with vast changes in the landscape and technology and making sure that we don't become the ministries of no, that we support innovation in a very practical sense. And as part of that, it’s making sure we make the right links both internationally with each other but also in each of our respective homes with the other agencies and authorities we have to work with so that the offer we can make internationally is the right one.

MS. FEUER: So thank you very much to the panel for some incredibly thought-provoking ideas. Before we break for lunch, I just want to mention that the Top of the Trade on the 7th floor has catering available for you to purchase. There's a handout on the table just outside with information about nearby restaurants. If you leave the building, you will have to go through security again unless you are an FTC employee. And be mindful that there is a small group of protesters outside the building, so leave ample time to get back in for our fascinating afternoon panels. Thank you. (Applause.)

AFTERNOON SESSION

COMPETITION ENFORCEMENT COOPERATION

MS. COPPOLA: Okay. I’m getting the green light from Bilal Sayyed, our head of Policy. So I think we should get started. Thank you all for coming to this afternoon’s panel. Today, we’re going to talk about enforcement cooperation on the competition side. You’ve just heard, in the break before lunch, about cooperation on the consumer side. It has a very different nature on the competition side. So we’ll be talking about that this afternoon. I’d like to introduce my panelists briefly. Starting with -- going in alphabetical order, Nick Banasevic. Nick is from the European Commission’s DG Competition where he heads the unit that covers IT, internet, and consumer electronics. So we’ve had the very good fortune to cooperate with Nick on a number of cases. Next to Nick is Marcus Bezzi. He is the Executive Director at the Australian Competition and Consumer Commission, where, among other things, he oversees all of the ACCC’s international engagements. So I also have had a great time working with him, even though very often the calls were extremely early for us and extremely late for him. We still have a terrific relationship. Then we have Fiona Schaeffer, who is an Antitrust Partner at Milbank LLP. She has practiced on both sides of the Atlantic. So she brings unique perspective in that sense and has lot of experience in multijurisdictional mergers in particular. Then just to my left -- I was a little thrown off because I thought it was alphabetical and that’s why I was -- yeah, you didn’t look like Jeanne, anyway. So Jeanne Pratt, who is Senior Deputy Commissioner from the Canadian Competition Bureau. She oversees their abuse of dominance and mergers and noncartel horizontal conduct matters. She also has experience at the ACCC. So I’m sure that she will bring that to the discussion today. So those are our panelists and you’re going to hear from them, not from me. Just by way of background, a lot of the cooperation issues that are relevant to the competition enforcement discussion were addressed in this morning’s session. So we’ll try to get into a little bit more granular level so that we don’t repeat what was discussed this morning. Just I guess to set the stage in thinking about cooperation in general, we engage in enforcement cooperation for a number of reasons. Often, we find that it will improve our own analyses. It allows us to identify issues where we have a common interest, it allows us to avoid inconsistent outcomes, and perhaps, most importantly, for the outcome to coordinate remedies. So with that in mind, I have asked the panel to start off -- we’re trying to understand strengths and weaknesses of enforcement cooperation, get some advice for the FTC. So before we delve into specific questions, I’ve asked each of the panelists to deliver the headline of their story. What is your elevator speech? Starting with Nick.

MR. BANASEVIC: Thank you, Maria. Thank you to you and to the FTC. It’s really a great pleasure to be here and, hopefully, share some interesting insights. My elevator ride is 27 floors up and it takes about half a minute. So I don’t know if that’s how long I’ve got. But I think my five-second message is don’t neglect cooperation, it can really bring benefits. Of course, I think the first instinct that we have and what we’re responsible for by definition is our own jurisdiction, and the bread and butter of that is doing individual cases and that’s what we focus on. That’s, as I say, the bread and butter of our work. Beyond that we have our policy, guidance, soft law role which is complementary to the actual case enforcement. I think my core message and, hopefully, I’ll illustrate it during the panel is, although you’re not going to necessarily spend the majority of your time, although you might spend a lot in an individual case on cooperation, I think it’s trying really -- in terms of what agencies can gain and benefit mutually. Don’t view it as add-on activity, something extra that you have to do. It can really bring organic benefits to either an individual case -- and, hopefully, I’ll give some examples -- and also to policy to avoid misunderstandings, to converge where possible. It’s really something that should be fostered over the years. I’ve known Maria and her colleagues and colleagues at the DOJ for many years, and it’s really very useful in terms of building trust, facilitating relationships, and understanding where each of us are coming from. So from my perspective, I’ve had very good experiences over the years and I will give some more insights as we go on.

MS. COPPOLA: Thanks. Marcus?

MR. BEZZI: Well, if Nick had been standing next to me in the elevator, I would say I agree with all of that. I’d also say -- make the point that was made a lot this morning, that commerce is now more global than ever and, indeed, that’s a trend that’s significantly enhanced by the digital economy. And the corollary of that is that enforcers have to respond to the pace of change and globalization by working more closely together. We have to be more joined up and timely. And we need to do this for three reasons. Firstly, because I believe that in doing so, we will facilitate more efficient commerce. It will actually be better for the commercial parties if we are more joined up. Secondly, it will make us better at our jobs. We’ll be more effectively able to police compliance with laws in our jurisdictions. And, finally, because we’ve got scarce resources and working closely together is likely to prevent us from reworking issues, from seeking to reinvent the wheel or overlapping each other’s work. It will make us more efficient. Thanks.

MS. COPPOLA: Great.

MS. SCHAEFFER: Well, hopefully, we’re not in a Dutch elevator so there’s room for me as well. I certainly agree with everything that both Nick and Marcus have just said. I particularly like the idea that cooperation is not the icing on the cake, but, hopefully, the glue, as Kovacic would say, or the icing in the middle. What does cooperation mean? It doesn’t mean achieving the same result on the same timetable in every transaction or investigation. That’s not cooperation. That’s utopia. And that’s never going to exist. But I do think it can and often does mean a greater understanding of the issues, an enhanced understanding, as you said, Maria, for your own investigation and how to address concerns. And it, hopefully, can be used to maximize all of the efficiencies in the process given the substantive constraints and the procedural limitations that each jurisdiction has to live within. So I think from a private practitioner perspective, I agree there is a lot to be gained from cooperation. And I would love to use this panel to talk about practical ways that we can enhance cooperation, again using Kovacic’s human glue analogy, more at that human level than at the formal, procedural MLAT kind of level that I think we’ve all worked with or had our frustrations with over the last decade or so, and have found that it is these informal connections and understandings that have facilitated greater cooperation more than the very formalistic process.

MS. PRATT: Well, I agree with everything that everyone said. The only thing I would add is I don’t think cooperation is only good for enforcement agencies, I think it’s good for business. It allows competition law enforcement agencies to benefit from the experience of one another, reach conclusions quicker, and with less probability of conflict and ultimately, hopefully, increased timeliness and effectiveness of the outcome. But it’s -- as all of these people have said, it’s more than about sharing information, it’s that human glue. It’s having the trust amongst agencies to be able to have productive discussions, to be able to exchange theories of harm, to talk about what they’re hearing from the marketplace, to sort of be in a united front with the businesses so that they understand that it is in their benefit and it will be more efficient for them to cooperate with all of us together. And so I think the result, hopefully, is that investigations aren’t longer, are more focused, and the probability of outcomes being conflicting outcomes is minimized, and ultimately for all of us, the predictability, consistency, and effectiveness of outcomes across jurisdictions is maximized. The Canadian Competition Bureau, as you heard from Commissioner Boswell this morning and as you heard from some of my colleagues from the RCMP, I think Canada generally is a strong advocate for international cooperation and we’re always looking for opportunities to cooperate further, including with respect to not just merger cases, but unilateral conduct cases as well.

MS. COPPOLA: Thanks, Jeanne. Okay. So there’s a lot of human glue. So we seem to all agree that there’s a lot of great things that come out of cooperation, cooperation is very important. I guess drilling down to the next level, what can parties expect for agencies, and I guess for Fiona, what can agencies expect at a more detailed level from cooperation. Why don’t we start with Marcus this time.

MR. BEZZI: Thanks, Maria. Well, there are things like sharing case theories, if waivers are given there will be sharing of information. If we use our formal processes, they can expect them to take a long time. In our experience, MLATs -- well, I’ll just relate one story. We used an MLAT in a criminal matter recently and were absolutely stunned to get a result from the process in one year or a little bit less than one year. That’s the fastest that anyone can ever think of. Mostly, they take two years, three years, four years. We’ve got 19th Century formal cooperation procedures, 19th Century timetable for our formal cooperation procedures. So really we spend most of our time on the informal. And I must say, I listened to some of the sessions this morning and heard people talking about the IOSCO MMOU. I was very envious hearing about how quickly their processes work. They really do seem to operate at a more reasonable speed given the speed of commerce today. I should say that in mergers, the informal cooperation works extremely well and we don’t have to rely upon the formal. A lot of the time in Australia, we use the processes to coordinate remedies and people can reasonably expect us to do that in a fairly efficient way. I think that is a good aspect of the current system.

MS. COPPOLA: Thanks. Jeanne, do you want to –

MS. PRATT: Sure. I mean, we cooperate very closely with the Federal Trade Commission and with the US Department of Justice and the DG Comp. Those are the three jurisdictions or three agencies that we cooperate most with. And if you’re a party either on the merger side or on the conduct side, you can expect that we would have in-depth discussions related to investigative approach, theories of harm, market definition, concerns expressed by market contexts in the various jurisdictions and, frankly, our analysis of the data and evidence that we’ve seen. In some cases, you will see us do joint market interviews of joint market context. We’ll have sometimes joint calls with the parties and we’ll coordinate that interaction with the parties to make sure that the risk of uncertain or conflicting messages is minimized. And where cross border competition concerns are identified, you can expect the Canadian Competition Bureau to engage agencies in remedy discussions, because we need to make sure that those remedy discussions are considered in the broader context, including the need for remedies in one or more jurisdictions and whether a remedy in one jurisdiction may actually be sufficient to address concerns in another, so that we may not need our own consent agreement in Canada. We also look at whether a common monitor should be appointed or looking at the consistency of the language around preservation of assets or hold separate arrangements. And in some cases that cooperation with the Canadian Competition Bureau may ultimately lead to us accepting a remedy that is proposed from a sister agency and it can, where appropriate, ensure the most efficient and least intrusive form of remedy for market participants. So we do cooperate very deeply with our agency. And that, again, is based on a strong foundation of trust that has been built over 20 years of cooperating with the counterparts with whom we cooperate most frequently.

MS. COPPOLA: Thanks, Jeanne, very much. I’m very sorry to have to ask Nick to add to that because I think you about covered the universe. But, Nick, what do you think that parties can expect from cooperation and thinking specifically about your perspective from a shop that deals with conduct matters?

MR. BANASEVIC: I agree with everything so far. So not –

MS. COPPOLA: Okay. Can we be clear? You have to disagree at some point. This would be like dreadfully boring if you –

MR. BANASEVIC: In the post-panel, perhaps. No, but I think, as Jeanne said -- and perhaps -- and this is something I think we’ll develop perhaps as a difference in terms of incentives in conduct in mergers. Most of what my experience, in terms of what parties have incentive-wise, is in conduct. I’ve worked on a few mergers where the incentives have been aligned. We’ve had issues with parties where sometimes they don’t want to give waivers in conduct cases because they feel that that would somehow not be beneficial to them. That is, of course, their prerogative. My personal view is that actually, you know if they’ve got a good story to tell, there’s no issue with giving away, but because it’s precisely those things that we can discuss openly with them and with our colleagues, our sister agencies. But I think exactly the kinds of things that -- whether or not there is a waiver, because I think even without a waiver we’re able to, from our perspective, in terms of what we can gain, talk about theories of harm in the abstract and general levels, test, test theories, test realities. So I think if we’re doing that anyway, there is an interest for parties to give us a waiver. Again, that’s my personal view. But as I say, we’ve had some cases where we haven’t had waivers. To switch, in terms of what -- because I think we do have that responsibility ourselves to parties. And, again, maybe it’s more in mergers that it happens that they have these incentives where they’re aligned in terms of timing, coordination. In terms of what we can expect as an agency, just to develop a bit what I was saying at the beginning, I think, again, it’s not that we must always dream of having the uniform solution worldwide. We all have different legal traditions, different systems. Having said that, I think where we can achieve at least a high level of convergence where possible, I think that’s something that is desirable. So I think we, in terms of both policy development -- and then when we’re doing cases, I think it is invaluable and we each have a lot to gain in terms of, again, coming back to some of the things I’ve said in terms of case specifics, theories of harm, making sure that we’ve got a reality check on whether something is correct or not, testing these theories with each other, and if appropriate, moving the cases forward in the same or similar direction. If not, at least understanding the background to where we’re each coming from and why we may take a different approach. And I found that invaluable over the years in many cases, and I’ll develop that a bit more a bit later.

MS. COPPOLA: Thanks. I think that the last point you mentioned, this idea that the effects of case cooperation are not just contained to the case itself, but to a longer-term story of deepening the understanding between agencies is really important. Fiona?

MS. SCHAEFFER: Sure. Well, I think from the parties’ perspective -- and my comments are primarily in the context of merger reviews -- the goals of what can realistically be achieved from cooperation include reducing duplicative effort, reducing the burdens of investigation, convincing the agency, through cooperation, that just because there is a hill there to climb doesn’t mean that everyone has to climb it. One can climb and report, assuming, of course, it is a similar hill. We hope to have consistent, if not identical, outcomes and that includes, where possible, hopefully convincing an agency that they don’t need to have the same remedy as everyone else just because someone else has a remedy. We don’t have to have every jurisdiction reviewing, believing that it needs to have its pound of flesh in order to believe that it’s conducted an effective review. And that, of course, involves some levels of trust between the different agencies as well, that the enforcement of a remedy in one jurisdiction is going to be sufficiently robust to protect others. And, you know, that may not always be the case and it may vary by jurisdiction. We hope, also, that through cooperation we will, if not have a shorter overall timetable, certainly not a longer one. I think that is sometimes a concern that private parties feel is that a potential cost of cooperation is that you may be put on, in essence, the timeline of the slowest jurisdiction, rather than promoting efficiency throughout the process. I guess a word on waivers just to Nick’s point. In principle, I agree that knowledge is power and I like everyone at the table to have a similar level of knowledge, if we have good substantive points and arguments and documents to share, or even if not so good. The agency can do a better job armed with that knowledge than if there is some game-playing and trying to orchestrate the process and manage who knows what. I do think that that calculus is quite different in merger versus conduct cases. And it’s not a question of giving different agencies the same level of knowledge, necessarily, although in some cases it can be. But I think for us there is a bigger concern in conduct cases that information provided to one regulator and then shared more broadly increases the risk of discovery obligations and private class action consequences that aren’t so much of a practice concern in a merger context. So it’s not the sharing within the agencies necessarily that is the biggest challenge there; it’s what can be done with the information once it is within multiple agencies. We know that we’re dealing with jurisdictions that have very different levels of confidentiality protection, and in some instances, for example, are required to give third parties due process or other government agencies access. So I think there’s a greater feeling of concern about being able to manage the flow of that information in the conduct arena.

MS. COPPOLA: Thanks, Fiona. I think we’ll come back to that point about information exchange in a moment. But I think, before that, I want to pick up on Marcus’ point about keeping pace. I don’t know that -- the 19th Century might be a bit of an exaggeration, but I think even 20th Century tools are not fit for purpose. Last night, I was watching All the President’s Men with my 12-year-old son and they were trying to find the phone number for someone and they had a room full of phone books, and he just kind of said, what’s that, what are they doing? Anyhow, what types of things, what kind of -- what would a tool look like that was fit for the 21st Century? Are these more in the realm of informal cooperation? What tools do you use? What tools do you wish you had? What can we learn from you?

MR. BEZZI: Would you like me to go first?

MS. COPPOLA: Yes. That’s why I’m looking at you. I’m sorry. (Laughter.)

MR. BEZZI: Well, where do I start. So informal -- I’ll start on the informal. And, look, I should say 95 percent of the cooperation that we’re involved in -- probably more than 95 percent is informal and it’s very effective and it involves engagement with the various agencies that we’ve got excellent relationships with. We have many counterpart agencies that we’ve got second generation cooperation agreements with or first generation cooperation agreements with. And they help to create a formal framework in which we can engage in informal cooperation. And I should actually just go back a step. The formal arrangements really do enhance the informal. We have a very formal arrangement with the United States. We have a treaty with the US. I think we’re the only country that has an antitrust cooperation treaty with the US. We rarely use it. I think the number of times it’s been formally used you could probably count on probably less than two hands. But I believe that it promotes the use of waivers, it promotes the cooperation of witnesses, the cooperation of parties with our investigations, and it really facilitates and creates the atmosphere in which informal cooperation works very, very well. So what does that actually mean? It means that we can have case teams that have regular phone calls if we’ve got a common investigation or we’re investigating common or related issues. We can talk about case theories. We can talk about practical things like when we’re going to interview common witnesses. We can talk about lines of inquiry that have not been successful that have been a waste of our time and suggest to each other perhaps don’t bother going there, it won’t lead anywhere or, actually, look here, it’s a better place to look. Those sorts of discussions happen between case teams and they are really valuable. The exchange of information when we’ve got waivers -- confidential information when we’ve got waivers is very, very useful. I should emphasize that we very, very rarely -- in fact, I can’t think of a single occasion that we’ve done it using a waiver, but we very rarely exchange evidence. I can think of two cases where we’ve done that using formal processes. If we want evidence, we will go to the source and get the evidence from the source if we possibly can. It’s much more valuable to us that way, anyway. So I think you said, what would be better? Well, some of the processes that exist under IOSCO where -- and, indeed, exist under the antitrust treaty that we have with the US -- where we can ask counterpart agencies to compel testimony, we can ask counterpart agencies to compel the production of evidence or production of information and to do so in a very timely way, to put in a request that can be responded to in days or weeks rather than months or years. Those sorts of things are things that we aspire to. We get a lot of it informally, I should emphasize that. I don’t want to understate the importance of the informal. But having a more formal framework which would enable more of that -- and I think they have in IOSCO context -- would really be a facilitator of even greater informal cooperation.

MS. COPPOLA: I think we heard on the consumer protection and privacy panel that some of that investigative assistance is already happening on that side. So it’s –

MR. BEZZI: Very much so, yes.

MS. COPPOLA: Since we’re all -- many of us have it housed in the same agency, you would hope that we can have that transfer over to the competition side. Jeanne, could you pick up a little bit on the informal cooperation point and tools?

MS. PRATT: Yeah, I’ll try not to do –

MS. COPPOLA: So we can just –

MR. PRATT: I, again, agree with everything that Marcus said. And I think what I would say is it only works -- those informal cooperation tools, again, only work if you’ve got trust in the legitimacy, the competence, the candor and, frankly, the ethics of your counterparts in the other agency. And you can’t develop that necessarily in the context of just having a case discussion. You’ve got to take the time to have the conversations to understand different frameworks, to understand how they go about doing their work. And, frankly, that in our experience has led to us getting to learn some of the lessons from our colleagues so that we don’t have to repeat the same mistakes and, hopefully, we have also shared some of those with our foreign counterparts. So some of the mechanisms that we use outside of informal cooperation on a case to try and do that are the case team leader meetings that you heard Commissioner Boswell talk about this morning, which I find incredibly useful because it is our officers who are doing the work, that are leading those cases, that will take some time out to talk about how they do their work, what issues they are facing. Sometimes it’s talking about a particular case development or a lesson learned that they have from their jurisdiction. And that builds relationships amongst our staff, it builds trust, it builds confidence in our counterpart’s abilities as economists and lawyers doing the same type of work. Exchanges are another tool. And as was mentioned this morning, I am the very lucky candidate who got to go to the ACCC for a full year and see how they do their merger work, and I benefitted greatly as an individual. But I also I think benefitted the Bureau because we got to see not just how a particular case unfolds, but how you actually manage the organization, how you do your work, what tools you use and, frankly, seeing how something can be so different in some areas, but there’s a lot of commonality in the analysis that we do in mergers.

MR. BEZZI: We loved having you, too, Jeanne. It was great having you.

MS. PRATT: It was a tough winter in Ottawa, I have to say. The other thing that we have found valuable is taking some time out, maybe more publicly, to have workshops on particular issues. The FTC and the DOJ and the Competition Bureau in 2018 had a joint workshop on competition in residential real estate brokerage. And, you know, we had eight years of litigation in the real estate industry surrounding the use and display of critical sales information through digital platforms that wasn’t resolved until years after the US. But because we had taken so long, there had been a lot of evolution in the law and the economy. And so some of the lessons that we learned along the way were also informative to update since the fight in the US. So the only other formal thing that I think I would I say, not the informal, is we have a gateway provision in the Canadian Competition Act, Section 29. So when we’re doing mergers, we don’t ask for waivers in Canada. As long as we’re working on a case and we feel that that cooperation is necessary for enforcement of the Competition Act in Canada, we feel that that gives us the ability to have that conversation with our counterparts. So if you -- and I think this would be particularly useful in the unilateral conduct side where you may be looking at different incentives. The merging parties may want to get through our process as quickly as possible. They, I think, have come to see more of the benefits of our cooperation to get them where they need to get to with less conflict and quicker results. But, you know, that kind of a gateway provision could allow us to have discussions on the unilateral conduct side because the discussion is only as good as the two-way communication allows.

MS. COPPOLA: Thanks. The senior level exchange, I think, would be a big hit here if the destination was Australia. But I guess kidding aside, it’s interesting because what you learn there, you’re coming back and you’re in charge so you can actually implement the changes. So that must have had a terrific effect. Okay, Nick, just thinking a bit more about cooperation in conduct investigations. I almost said antitrust investigations because I was looking at you. What kind of practical experience tips do you have that you would like to share?

MR. BANASEVIC: So I’m going to go back in time a bit and give you a couple of examples of very intense cooperation with the FTC and the DOJ. Actually, let me first say, to go back a step even, for us, cooperation starts at home in the sense that we’ve got the European Competition Network, which in -- I don’t know if “unique” is the word, but it’s the network of us, the European Commission with all the national member state competition authorities in the EEA, the European Economic Area, all applying European competition law. And so we first need to cooperate at home in terms of both just allocating cases and, of course, generally the European Commission does the cases that are over a broader geographic scope, whereas the national agencies tend to focus on more national ones and in terms of substance coordination as well. Beyond that, I think we have extensive international cooperation with all the major competition authorities around the world, including Canada and Australia. But to give the two examples that, for me, have been personally particularly instructive over the years, going back to the beginning of the century is first the Microsoft case with DOJ, where, as background, you remember that the D.C. Circuit Court of Appeals affirmed a monopoly maintenance finding here under Section 2. And that was while our case was still ongoing in Europe. We had an interoperability and a tying abuse, tying of Media Player. And then there was a remedy implemented in the US that changed the way that some things were done. So it had a kind of factual impact on some of the things that we were doing in our case while it was still ongoing. And the issues were also -- even though the liability case here was little bit different, through the remedy, there was an interoperability element as well. So the kinds of issues were very similar. We met, I think, for a period of a few years twice a year. We would come here once a year and the DOJ would come to see us in Brussels. And it was invaluable just to exchange theories, to understand where each side was coming from, and to develop a trust and understanding over the years. So I think it’s fair to say that even though the issues were different, there wasn’t always perfect agreement, but it was a relationship that we valued and that really brought a lot in terms of understanding where we were coming from and in my view, at least, having a solution that was not necessarily exactly the same, didn’t lead to an overt situation of conflict, which, again, in my view was greatly facilitated by these contacts. The second example is the kind of policy and case area standard essential patterns. This goes back to even Rambus with the FTC where we had a similar case ourselves in Europe. But more generally and more recently, or five, six years ago, I guess, this issue of injunctions based on standard essential patterns. The FTC -- I think it was 2013 you had the consent decree with Motorola and we had a prohibition decision against Motorola a year earlier on the same kind of issue. And, again, take a step back or try and remember, this is a very -- I don’t know if “novel” is the word, but it was a controversial area of law. And perhaps it still is. For us in Europe, at least, we adopted a prohibition decision, which said that injunctions against willing licensees, based on standard essential patterns where you’ve given a commitment to license on FRAND terms, are an abuse. That was confirmed by our Supreme Court, the European Court of Justice, in a separate case, but the principle was confirmed. But it was, and still is, a subject that attracts a great deal of attention and a great deal of controversy. There were many people -- and that debate still goes on. But there were many people saying, how can you possibly do this? There are some people saying that. But against that background of that -- again, I’m not sure if “novel” is the word, but a very complex, important issue, it was really invaluable to have both the case coordination with the FTC on Motorola, where we had regular contact in terms of meetings and calls, and then on the policy level with both the FTC and the DOJ, where essentially we were on the same page in terms of developing this policy and this approach towards how we deal with the specific issue of injunctions based on standard essential patterns. I think particularly because it was an area that was so complex and controversial, my personal view is that we all mutually benefitted from being able to really share these experiences and insight. So those are two examples and there are many more, but it’s really, for me, a manifestation of just concrete case teams talking to each other regularly, being open, exchanging ideas, evidence if appropriate, if you have the waiver, and it’s been a great benefit.

MS. COPPOLA: Yeah, I think interplay of the case level and the policy level is a really good point that really deepens greatly the discussion and understanding. Fiona, we’ve heard kind of rah-rah-rah cooperation and lots of pluses on cooperation. You’ve talked about how cooperation doesn’t mean getting to the finish line at the exact same time. What are some of the practical limitations on cooperation from a private practitioner’s perspective?

MS. SCHAEFFER: Well, I think we start out with very different procedural frameworks in different jurisdictions. We happen to have probably two of the closest jurisdictions here in Canada and the US, on process. But others look quite different in terms of the amount of prefiling work in a merger context that needs to be done, the time that that will take, the uncertainty around when you actually get on the clock in say Europe or China versus in the US. And all of that leads to, you know, in many cases, if not an impossibility, certainly, all of the stars would have to align for the timing to actually be the same. So we are working with different processes, different timetables, and I think we have to accept that the timing is not going to be the same. The question is, can we make it sufficiently compatible that we can have substantive discussions at a similar time frame, particularly on remedies. That will, you know, minimize inefficiencies and maximize the ability to have a consistent compatible remedy. And even when you’ve done all of those things and there’s been I think an earnest, concerted goodwill effort to align those discussions, you’re inevitably going to have cases where, you know, something surprising happens like one jurisdiction decides, yes, we like the remedy package that everyone else has agreed to, but lo and behold, we think there ought to be a different purchaser in our jurisdiction, which shall remained unnamed, than in the rest of the world, which as you can imagine when you’re dealing with products that are sold around the globe under one brand name can be pretty challenging. I’m not sure that cooperation could have changed that result. But you’re always going to have these unpredictable aspects of a multijurisdictional merger review that can occur right up until the end. What can we do to enhance practical day-to- day cooperation, I think your earlier question. A lot of the time when we talk about cooperation, it’s really in a bilateral context. You’ve got parties speaking with Agency A, parties speaking with Agency B, parties speaking with Agency C, and then similar conversations happening between those agencies who are essentially, you know, in some cases, playing Chinese whispers, but reporting on conversations they’ve had trying to find common approaches, common understandings. I wonder sometimes can we expedite -- streamline those conversations to have fewer bilateral conversations and more multilateral conversations in the same room. Just as when we are faced with a conduct or a merger investigation ourselves, trying to understand better the facts, what’s going on, where, we often have multijurisdictional, multicounsel calls. I don’t see why we couldn’t do more of that involving multiple agencies on the same video conference or the same phone call. There is a limit, of course, where you get these huge conversations that, you know, are impossible to schedule, and no one says anything because there’s 100 people on the line. So yes, that level of cooperation can be unwieldy, but I think we can do more to explore having simultaneous conversations. I think there’s been a mindset probably maybe more in the minds of -- well, maybe equally in the minds of the companies and counsel, as well as agencies, that everyone needs to have their kind of process, everyone needs to have their separate meeting, everyone needs to have the merger explained to them, you know, Australian or in Canadian or in -- (Laughter.)

MS. SCHAEFFER: But I don’t think that that’s necessarily the case, not for all meetings or forms of cooperation. So that’s something I think we could do more with.

MS. COPPOLA: That’s a really interesting idea. I mean, we’ve heard earlier, and on this panel, that there’s a lot of joint third party calls. I know at the FTC we have limited experience with joint party calls, but that’s a really neat idea and it’s certainly very 21st Century if it’s video. So thinking I guess -- so those are some of the practical limitations on the practitioner’s side. Thinking about some of the practical limitations on the agency’s side, it seems like the one that has appeared a few times in this discussion is confidentiality. Nick has already talked a little bit about what we can exchange when we don’t have waivers. So what falls within the realm of public or agency nonpublic information, so, as he said, theories of harm, market definition, kind of basic thinking on remedies. But, of course, those discussions are much more robust when we’re saying because of evidence of X, Y, and Z. Marcus, you had mentioned that you have an information gateway in Australia. What does that mean and what can the FTC learn from that?

MR. BEZZI: So an information gateway is a legislative provision that enables our Chairman to make a decision to release material that we’ve obtained through some confidential process either a compulsory power, exercise of a compulsory power, requiring compelled production of information, or otherwise, and it enables us to release that information without the consent of the party whose information it is. So it’s something we don’t do lightly and it’s something we don’t do often. And it’s something we’ll only do if there are -- if we’re really 100 percent confident that people are going to comply with the conditions that are imposed on the release of the information. So if we’re dealing with a trusted agency, and we are confident that they will maintain the confidentiality of the information that we disclose, then we have got the capacity to release it. As I say, it doesn’t happen very often. There will be more than just a set of conditions imposed. There’s usually a fairly rigorous process that we put in place to ensure that the conditions are complied with. So there’s reporting. And after the agency that’s received the information has finished with it, we’ll require them to give the information back. And I should say this is a very similar provision to a provision that the CMA has in the UK and that Canada has. And it, as I say can be -- it’s more useful in being there than in being used, if I could put it that way.

MS. COPPOLA: Right, right. Thanks, Marcus. I think, Jeanne, I’ll have you answer next because he’s just talked about your information gateway. Does this have an impact on kind of target parties, third parties’ willingness to provide information, and what kind of notice do they get before you share the information? What are some of the consequences?

MS. PRATT: Yeah, I mean with great -- it’s -- we have to take that very, very seriously. So when we’re using our gateway provision, we have very transparent policies to stakeholders. It’s written in a confidentiality bulletin what the conditions of sharing are. Every time we do a market contact, it is disclosed to that market contact that we do have the information gateway, that we may use it obviously in an international merger context, that we may share it with our counterpart agencies and discuss it where they have waivers. So I think the lesson for us is transparency is really important to maintain your reputation because without our reputation to maintain the confidential information, we won’t be able to do our job and the effectiveness of our agency is diminished. It’s fundamental, frankly, to how we do our job. So in our confidentiality bulletin, we do set out the conditions quite clearly and we do say that we will seek to maintain the confidentiality of information through either formal international instruments or assurances from a foreign authority. And the Bureau also requires as a condition that the foreign authority’s use of that information is limited to the specific purpose for which it was provided. So our information gateway provides that we can use it for enforcement of the Act, which, for us, means if we’re working on a common case with an agency with whom we have a foreign -- or an instrument and we’ve got those certainties that that is when we will do so. Where there is no bilateral-multilateral cooperation instrument in force, the Bureau does not communicate information protected by Section 29 unless we are fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. And this, again, is where trust becomes key for us, we’re not going to put our reputation and our effectiveness on the line if we are not certain that those conditions will be satisfied. In assessing whether to communicate the information and the circumstances, we do also consider the laws protecting confidentiality in the requesting country, the purpose of the request, and any agreements or arrangements with the country or the requesting authority. If we are not satisfied that it will remain protected, it is not shared. Likewise, when foreign authorities are typically communicating confidential information to the Bureau, they are doing so on the understanding that the information will be treated confidentiality and used for the purposes of administration and enforcement of the Act. I should mention, too, we do have another provision in our Act which ensures that all inquiries conducted by the Competition Bureau are conducted in private and that provides some legislative certainty that it will be maintained in confidence on our end. So I guess I would say the gateway for us, while similar to Australia, I think has been used a little bit different and that mostly is a result of practice, our transparency, the market having a lot of faith in our practices and procedures, to maintain confidentiality. And without it, I don’t think it would be as effective.

MS. COPPOLA: Thanks very much. Nick, turning to the European Commission, I mean, you have sort of the highest level of information sharing and investigative assistance with the ECN and you also have things like the second generation agreement that you have with Switzerland. Do you want to share a little bit of your experience with those?

MR. BANASEVIC: Sure. Again, the ECN is -- again, I don’t want to say it’s the highest level of cooperation, but everything is open there.

MS. COPPOLA: Right, right.

MR. BANASEVIC: There’s automatic transmission of everything, there is -- I mean, that’s a consequence of what the EU or the EEA is in a sense. So it’s critical that we share up front information just about who’s got what case so that we can allocate them most efficiently and to coordinate on issues of substance because we’re all applying the same law. In terms of outside the ECN and outside the EEA, I -- as a general point, I think the main issues have been outlined in terms of maybe there being different incentives -- I’m talking outside Switzerland, which I’ll mention briefly now in terms of different incentives maybe between mergers and conduct. I take Fiona’s point about -- concern about disclosure in another jurisdiction. I understand that. I think the instances that I have referred to in some conduct cases have rather been a concern about not wanting agencies to discuss theories of harm even. So that’s a different thing. And in terms of Switzerland, actually, I think it resonated. I mean, we have a second generation agreement with Switzerland, which means in practice that we can transmit evidence between us without consent. Obviously, we’re talking about where the same conduct has been investigated. And what we found -- and this resonated when Marcus was talking about it -- is actually we haven’t needed to use -- to invoke those provisions. And it’s actually encouraged that that framework, and maybe the trust or the mechanics of how things work, have encouraged information provision without needing to use the formal provisions under the agreement. So I think that’s an interesting point.

MS. COPPOLA: Right, yeah, yeah. Fiona, you’ve touched on this a tiny bit already, but what are -- can you bring out a little bit some of the concerns that agencies might have either about these types of agreements or about granting waivers in the nonmerger context? What are some of the red flags?

MS. SCHAEFFER: From a merging party’s perspective or from an investigated party’s perspective?

MS. COPPOLA: From both.

MS. SCHAEFFER: Yeah, I think there is -- certainly in terms of the exchange of confidential information as opposed to permitting agencies to discuss case theories, I think there is an understandable sense that if an agency really needs that kind of information and has a right to obtain that kind of information domestically, then they should just ask the parties for it directly rather than get it -- you know, it sounds a bit pejorative -- but through the back door. I do think, on the merger side, the incentives are greater to provide it anyway. But I think, also, at the same time, the actual exchange of confidential information is relatively rare and I think its use is overrated. I think the biggest benefit that I’ve seen from cooperation from a private party’s perspective -- and I suspect the agencies might agree with this -- is just being able to discuss the case, the theories, the investigation, the legal analysis, the basic understanding of how the products work, what third party concerns are without, you know, revealing any confidential information. And all of that dialogue I’ve found in all of the deals I’ve worked on, and maybe I’ve just been lucky, but I can’t recall a single case where we facilitated cooperation and we suddenly found that Agency C, that had been going on its normal course of business and investigating without big concerns, suddenly had a new theory of the case that was going to put them into an extended review. I’ve always had the opposite. Namely, Agency C, when we have facilitated contact with Agency A and B, typically has been relieved to know that Agency A and B is investigating these particular various areas, that it doesn’t necessarily have to cover all of the same ground. And I have found that it’s expedited, not prolonged, the review or started new lines of attack that didn’t exist before. And I think that could also hold true, although it’s less tested in conduct cases where some of the theories of harm are just more wacky or radical. And I think agencies that have been at it for a longer period of time, in that investigation or generally, may be able to help other agencies understand what are the real issues here, what are some of the false paradigms or paths that, you know, we looked at five years ago but discovered really weren’t productive.

MS. COPPOLA: Right, right. Sometimes that thinking can go the other way, too. The learning can go the other way. I think I want to circle back on your point on forbearance. But before I do that, does anyone have any reactions to what Fiona was saying about information sharing and thinking of it as a backdoor way when it’s done -- the confidential information between agencies?

MS. PRATT: Well, I think it’s -- I guess from my perspective it would -- I’ve never seen that risk become realized. Because each of our agencies are very concerned about the confidential forecast that we have, that we want to minimize the risk of that because, otherwise, it would be a reputational risk for us doing our job.

I do think a lot of the value, unless you are doing a joint investigation where there is evidence that you need in another jurisdiction, most of the value of that cooperation can come from not providing confidential, competitively-sensitive third party information. So if you have waivers or you have a gateway provision, that facilitates that cooperation quite well.

MR. BEZZI: I agree with that. I mean, parties know -- if ever we are using an information gateway, and it happens rarely, but they know. It’s not done secretly; it’s done in their knowledge; it’s done transparently.

MS. COPPOLA: Fiona, I may have misinterpreted you. When you were talking about backdoor, I think you meant even in the presence of waivers. You didn’t mean out extralegally, right?

MS. SCHAEFFER: Yeah, I meant exchange of confidential information, where there are waivers, but the agency couldn’t get the information directly.

MS. COPPOLA: Right, right. Nick, do you have anything you wanted to add here?

MR. BANASEVIC: Nothing spectacular.

MS. COPPOLA: Okay. I have one question from the audience, but before we -- and I encourage other questions. So now is the time to write them. But before we get to that, I wanted to talk, I think because at the end of the day, the immediate goal in a particular case of cooperation is making sure that you don’t have conflicting remedies, that you have remedies that are, if not identical, at least interoperable. And we’ve heard some discussion today that, you know, there’s been a lot of agencies, more agencies looking at things than there used to be. And sort of the question about should we be giving more attention to cooperation, in the form of forbearance, than coordination. And, Fiona, if you could start that discussion for us.

MS. SCHAEFFER: Sure. Well, we were having a discussion at lunch and Marcus mentioned the magic pudding story. I said to Marcus, will this audience understand the magic pudding story? And looking around the room, I see there are bemused faces. Well, it’s a story we all told our children growing up in Australia where, as a child, I really enjoyed it. The magic pudding just never stopped producing pudding until the entire town was flooded with porridge and pudding everywhere. Well, no agency is a magic pudding. Agencies have limited resources. They can’t just keep on producing. And I think from an agency perspective, as well as from the parties’ perspective, one always ought to ask what are the incremental benefits of this additional investigation we’re doing over -- you know, on top of what five other agencies are doing? What are the incremental benefits of a remedy that is the same or virtually identical to what another agency has obtained as opposed to taking our limited resources and using them for investigations and transactions that these other five agencies couldn’t review? And it’s been interesting to me just to look at how different agencies have been allocating their resources over time. Brazil is an agency that comes to mind. When I come to think about some of the cartel investigations, the merger investigations they focused on maybe ten years ago, my anecdotal perception is that there was a lot more of an international dimension to them than there is today. I think some of the larger Brazilian investigations have involved, in more recent times, transactions in the educational sector and the health care sector, in the domestic financial services sector. And their bang for their buck in those investigations I think is significantly higher than it would be if they were another me-too in a global transaction. Having said that, is it realistic to say if the US is looking at a deal or the EU is looking at a deal or Canada and they’ve got remedies, that everyone else should just back off? No, of course not. But I think at each stage of the investigation, it’s useful for the agencies to ask themselves, what is the incremental value and what are the areas of this transaction that may be specific to our jurisdiction that the other people aren’t covering? What are the holes that we need to fill potentially for our jurisdiction that the others aren’t worrying about as opposed to retreading the same ground? And as counsel to parties to transactions and conduct investigations, we ought to be asking ourselves those same questions about what are the specific impacts of this transaction or our conduct on this jurisdiction.

MS. COPPOLA: Mm-hmm, mm-hmm. That’s very interesting. Thank you, Fiona. Marcus, what did you say to the magic pudding discussion and what are your thoughts on the topic more generally?

MR. BEZZI: Well, exactly, we are not a magic pudding. We have limited resources. We’ve got to use them intelligently. So we’ve got to focus on the things that are most important within our jurisdiction.

Fiona raised the cartel issue and international cartels. We could all spend all of our time doing international cartels and nothing else. But -- and they’re important, don’t get me wrong. Many international cartels have a big impact in Australia. But we’ve explicitly said in our enforcement and compliance policy, which sets out our priorities for enforcement and is adjusted each year, that we will focus on international cartels that have an impact on Australians and Australian consumers. It’s the detriment in Australia that is the focus. If there’s no detriment in Australia, then we’ll let other agencies deal with those cartels.

Similarly, in mergers, we will focus on the detriment in Australia. We’ll focus on a remedy that can fix the problems we have identified in Australia, and if it happens that that remedy has already been devised somewhere else and the remedy somewhere else will completely fix the problem in Australia, then what we can do is accept what’s called an enforceable undertaking, which is essentially a statutory promise, which requires the parties to give effect to whatever the commitment that’s being given outside Australia is, give them -- they are required to give that commitment to us in Australia, and that essentially is -- deals with the problem that we’ve got jurisdiction to deal with.

MS. COPPOLA: Right. That allows you to have something that you can enforce of there is a –

MR. BEZZI: We’ve got something that we can enforce.

MS. COPPOLA: Right.

MR. BEZZI: And we’re recognizing that our resources will be managed in a better way.

MS. COPPOLA: Better focused. Right, right.

Jeanne?

MS. PRATT: Well, I guess speaking -- the Canadian approach in mergers in particular, we actually have accepted and gone probably one step further than what Marcus was saying and not even put a consent agreement in place in Canada because we have been satisfied that the remedy mostly in the United States addresses our concern.

The only way we get there, though, is, again, to have really close cooperation. We need to understand the scope of the issues, we need to understand the scope of the remedy, and, frankly, we also need to have trust in the agency that they are going to enforce that remedy at the end of the day, which we have full faith in the US Department of Justice and the US Federal Trade Commission to do that.

One of the primary reasons that we do use comity and forbearance is because we think it allows a more effective and streamline remedy that’s least intrusive to business, avoids conflict, and simultaneously allows us, as a very small agency north of the 49th Parallel, to focus our scarce enforcement resources.

So two examples I would give, we had one where we accepted the US FTC’s remedy in the GSK/Novartis merger in 2015. So we were satisfied there. We didn’t even need a me-too registered consent agreement. We were fully satisfied that the scope of the remedy addressed our concerns and would address the anticompetitive effects on the Canadian market.

The second one, which is more recent, was a case we cooperated on with the US Department of Justice, UTC/Rockwell last year, which was an aerospace systems review, and in that case just to underscore the importance of the cooperation to get us to the comity, we cooperated closely with the US DOJ and the DG Comp throughout the review.

There were waivers in place in both those jurisdictions by all the parties. We shared information and conducted some joint market calls. We discussed issues of market definition, presence of global effective remaining competition and remedies. And we determined that there were likely a substantial lessening of competition in two product markets for pneumatic ice protection system and trimmable horizontal stabilizers actuators, THSAs.

And Rockwell’s relevant business -- they were located primarily in the US and Mexico and these products were distributed on a global basis. So we got to a place where we didn’t have any assets relevant to the remedy in our jurisdiction and we were fully satisfied that the remedy addressed our concerns.

The other side of comity, which, you know, I’m not sure the parties appreciated at the time, Commissioner Boswell talked about our simultaneous filing of litigation in the Staples/Office Depot merger a couple of years ago. Part of that was we did not see the need to file an injunction the same day because we knew that there would be an injunction proceeding by the FTC. So the parties did actually benefit because they didn’t have to face an injunction proceeding north of the border as well as south of the border. We benefitted greatly from cooperation in that case.

Again, we had one of our Department of Justice lawyers come and was seconded and was actually part of the FTC counsel team to see how the injunctive process worked, to see the evidence go in, and at the end of the day, the injunction in the United States took care of the issues in Canada. So they still benefitted. They probably didn’t like it because it was in the form of litigation, but it could have been worse.

MS. COPPOLA: You know, in GSK/Novartis, it’s interesting, we did a lot of trilateral calls in that case with the EC, Canada, and the US. And that’s not obvious in a pharmaceutical case where you expect the markets to be very different. But, certainly, in trying to understand the markets, I think the third parties were very happy to have one call and not three. So that’s an interesting case.

Nick, we haven’t heard from you yet on remedies coordination or forbearance. Is there anything you want to add?

MR. BANASEVIC: The first thing I want to say is I’m going to look up, after this panel, what a trimmable horizontal actuator is.

(Laughter.)

MS. SCHAEFFER: I was going to say, that’s what you need cooperation for. It takes three agencies to understand that.

MS. COPPOLA: Right.

MR. BANASEVIC: And there was another adjective there as well. But, anyway, for us, I mean, if you look at mergers and conduct, of course, we have an obligatory notification system in mergers, once you reach certain thresholds. I mean, you have to reason every decision whether it’s a clearance of remedies or a prohibition. So there’s no discretion as such in that sense. But, of course, there’s great benefit in the cases that we’re looking at more closely and we’ve got many examples that have been mentioned in terms of coordinating on the substance, on the timing, and, if appropriate, the remedies and the potential impact and how that might read across. Where we have the discretion in terms of choosing which cases we do and which cases we don’t,

with scarce resources that any public body has by definition, is a number of things, but not least the impact -- the potential impact in our market, in our jurisdiction. We’re responsible for a jurisdiction of 500 million people.

So I think it’s likely if we believe that there is an issue in that market that we are going to want to look at it more closely, even if there are similar investigations going on or not around the world. So I think that’s the first thing to say.

That being said, I think I understand as well the argument, particularly in the sector for which I’m responsible, the high-tech sector, companies operate globally, so the issue is raised, well, could you have different solutions in different jurisdictions? I actually think this risk of diversion is somehow overblown in terms of just perception. It’s not that this is going around willy- nilly in every case in every sector. I think that’s slightly a perception issue and, actually, more generally illustrates my core point in the benefits of really having up front, preemptively with partner agencies, discussions about the approach to be taken.

Again, it’s not that one can or need guarantee precisely the same outcome, given the differences possibly in even conduct. I mean, some of our markets are national for some of the products even if the companies are operating globally. But I think there is a great benefit in this up-front shaping, sharing thoughts to, to the extent possible, minimize the risk of divergences.

MS. COPPOLA: We have a question from the audience about the ongoing investigations of the tech platforms. The EC, the Japan Fair Trade Commission, are already investigating these firms. What’s important to effectively investigate, including cooperation? Another question, what you can expect from the FTC, but as I’m not a speaker, but a moderator, I think I will punt that to what can you expect from the investigating agencies. And, Nick, according to this week’s Economist, you guys are the determinators. So I’m going to let you answer that question.

MR. BANASEVIC: Is that a type of actuator? A determinator?

MS. COPPOLA: There’s these like big guns and, yeah, sledgehammers.

MR. BANASEVIC: I’m not allowed to say anything about ongoing cases, so –

MS. COPPOLA: Right.

MR. BANASEVIC: So what was the –

MS. COPPOLA: The question was, how can -- I think the question is, how can those agencies effectively investigate? What kind of joint –

MR. BANASEVIC: I think I have to go back to my examples from the past. I think that’s the most instructive thing. I mentioned two. There have been others where in the US and in the -- particularly the same cases or the same issues have been looked at. In some, we’ve had waivers; in others, we haven’t. I don’t want to monopolize the last 2 minutes and 30 seconds.

MS. COPPOLA: Right.

MR. BANASEVIC: It’s really been of tremendous use. And it’s my opening statement, it’s not an add-on. It can really -- for these big cases where they’re very important, sensitive, and you want to get it right, there’s just a great benefit in sharing experiences, knowledge, with colleagues who have the same -- who want to get it right as well and get the best result. So it’s a very good thing that we shouldn’t have just as just a bolt-on.

MS. SCHAEFFER: Can I just add on to that? Maybe the Cooperation 2.0 for digital platform investigations is not necessarily between antitrust agencies, but between antitrust agencies, consumer protection, and privacy agencies. Because -- and I think the term “forbearance” might come in there as well, in that not everything involving a digital platform is necessarily an antitrust issue.

And we certainly have a lot of intermelding of privacy and consumer protection concerns, as we see with the Australian ACCC report. And how do we jointly investigate those issues or maybe have antitrust not be the primary investigation and enforcement mechanism there?

MS. COPPOLA: We are very close to the end of the session. So I guess, Marcus and Jeanne, starting with you, and if there’s time, we’ll move on to Fiona and Nick. What are your last words of advice for the FTC in the area of enforcement cooperation?

MS. PRATT: I’m not sure I have advice. I think, as you’ve heard, I have found or we have found that gateway provision in our legislation to be particularly useful and, you know, it might be interesting to consider that in your context and whether it’s appropriate.

And I would just want to lastly say thank you very much for having us here. I know the FTC can continue to rely on the Canadian Competition Bureau’s commitment to continuing to build upon the solid cooperation foundation that we have and in particularly dynamic fast-moving markets that we have today. I think the business case for cooperation is only getting stronger and will only get better from here.

MR. BEZZI: So I won’t advise the FTC, but the advice that I’ll give to the ACCC is that we need 21st Cooperation and mutual assistance frameworks.

MS. COPPOLA: Thanks.

Nick, Fiona, anything to add?

MR. BANASEVIC; I’ve said it all, I don’t want to repeat. I think it’s don’t underestimate it, use it, and benefit from the interactions and the knowledge you can have with colleagues.

MS. COPPOLA: Well, thank you all very much for your insights. These have been tremendous. Coming into the panel, I wasn’t sure I would learn anything since I spend most of my day engaged in enforcement cooperation. But I did. So bravo. Thanks so much for participating. I think we’ll move on to the next panel now.

(Applause.)

(Brief break.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY

MS. WOODS BELL: Hello, everyone. Welcome back from break. I’m Deon Woods Bell. I’m a lawyer in the Office of International Affairs at the Federal Trade Commission. I’m so excited to be here today.

It is my extreme pleasure to introduce Julie Brill. Julie is Corporate Vice President and Deputy General Counsel for Global Privacy and Regulatory Affairs at Microsoft. Of course, everybody in the building knows her as a former Commissioner and friend of the Federal Trade Commission. She’s widely recognized for her work on internet privacy and data security issues related to advertising and financial fraud.

She’s received so many awards we could not list them all in her bio, nor could I enumerate them here today. One of my favorite is the Top 50 Influencers on Big Data in 2015. And one of my favorite memories is working together with her in Brussels on these same issues. Thank you, and please welcome Julie.

(Applause.)

MS. BRILL: Thank you, Deon. I remember that event, too, and it was great to work with you there. And it’s really an honor to be here today to contribute to today’s important discussions on the FTC’s international role in a world transformed by digital technology.

I am particularly excited to begin this session today that focuses on artificial intelligence. We have a truly distinguished panel, some of whom are -- here they come -- of experts from around the world, who will explore the implications of artificial intelligence at a time when innovative technology calls for innovative thinking about policy and regulation.

Today’s discussion comes at a critical moment. During the past few years, how people work, play, and learn about the world has been transformed. Industries have been reinvented. New ways to treat diseases emerge almost every day. Driving all this change are groundbreaking technologies like cloud computing that enable us to collect and analyze data scale that has never before been possible. But what we have experienced so far is just the beginning.

Rapid progress in the field of artificial intelligence has delivered us to the threshold of a new era of computing that will transform every field of human endeavor. Already, almost without us noticing, AI has become an essential part of our day- to-day lives. It powers the apps that help us get from place to place, predict what we might want to buy, and protects our systems from malware and viruses.

This is just a hint of what’s possible. Artificial intelligence has the potential to improve productivity, drive economic growth, and help us address some of the most pressing challenges in accessibility, health care, sustainability, poverty, and much more. Yet, history teaches us that change of this magnitude has always come with deep doubts and uncertainty.

I believe that if we are to realize the promise of artificial intelligence, we must acknowledge these doubts and work to build trust, trust that technology companies are working not just to maximize profits, but to improve people’s lives; trust that we use the personal data we collect safely, responsibly, and respectfully. But as we are learning the hard way, in the technology industry, trust is fragile.

In the wake of the Cambridge Analytica scandal and the spectacle of tech industry experts being hauled before Congress to answer for their business practices, people wonder if technology and technology companies can be trusted. The truth is that technology is neither inherently good nor bad. Cloud computing and artificial intelligence are just tools that people can use to be more productive and effective, basically the equivalent of the first Industrial Revolution’s steam engine. But it is also true that because technology has never been more powerful, the potential impact, both positive and negative, has never been greater.

So where does trust come from? It begins when companies like Microsoft, that are at the forefront of the digital revolution, acknowledge that in this time of sweeping change, we must consider the impact of our work on individuals, businesses, and societies. Today, we must ask ourselves not just what computers can do, but what they should do. This means there may be times when we have to be willing to decide that there are things that they should not do as well.

To guide us as we weigh these decisions at Microsoft, we have adopted six ethical principles for our work on artificial intelligence. It starts with transparency and accountability. We know that trust requires clear information about how AI systems work, coupled with accountability for the people and companies who develop them. We believe strongly in the principles of fairness which means AI must treat everyone with dignity and respect and without bias.

Our fourth principle encompasses reliability and safety, particularly when AI makes decisions that affect people. We also are strongly committed to the principles of privacy and security, for people’s personal information. And we believe that AI solutions should be built using inclusive design practices that affect the full range of experiences of all who might use them.

Now, while these principles are at the center of every decision we made about artificial intelligence research and development, we also know that the issues at stake are simply too large and too important to be left solely to the private sector. Trust also requires a new foundation of laws.

Here in the United States, right now, one area of the law demands our attention above all others. That area is privacy. Because so much of who we are is expressed digitally and so much of how we interact with each other and the world is captured and stored in digital form, how people think about privacy has changed. For more than a century, our understanding of this most fundamental human right has been shaped by the definition set forth by the great American legal thinker and fathers of the FTC, Louis Brandeis, who defined privacy as the right to be let alone. That right will always be important. But, by itself, it is no longer sufficient.

Now, modern privacy law must embrace two essential realities of life in the digital age. The first is that people expect to use digital tools and technologies to engage freely and safely with each other and with the world.

The second is that people expect to be empowered to control how their personal information is used. Whether we protect these two things is one of the critical challenges of our time. What we need is a new generation of privacy policies that embrace engagement and control without sacrificing interoperability or stifling innovation.

This is why we were the first company to extend the rights that are at the heart of the European general protection regulation, and we extended those to our customers around the world, including the right to know what data is collected, to correct that data, and to delete it or take it somewhere else. And over the last year, we’ve seen

the rise of a global movement to adopt frameworks that enhance consumer control mechanisms modeled on those required by Europe’s GDPR.

With participants here from India, Kenya and Brazil, this panel of distinguished guests is a perfect illustration of this important trend. Brazil’s general data protection law, which goes into effect a year from now, includes provisions that extend new privacy rights to individuals and mandates new requirements for notification, transparency, and governance for organizations. All of these requirements that will be new in Brazil are tightly aligned with GDPR.

In India and Kenya, new privacy laws modeled on GDPR are also currently moving through the legislative process.

Here in the United States, the California Consumer Privacy Act includes provisions that give people more control over their data. And Washington State is considering legislation based on consumer rights protected by GDPR as well.

As part of Microsoft’s commitment to privacy, we offer a dashboard where people can manage their privacy settings. Since May of last year, more than 10 million people around the world have used this tool, with the number growing every day. I think it is telling that while millions of people around the world are using our tool, our data demonstrates that US citizens are the most active in controlling their data. All of this should serve as a wakeup call for US companies and the US Government.

At Microsoft, we believe it is time for United States to adopt a new legal framework for access and use of data that reflects our new understanding of the right to privacy. To achieve this, I believe a strong US framework -- frankly, a strong privacy framework anywhere in the world -- should incorporate four core elements, transparency through robust standards that include and appropriate privacy statements within user experiences, individual empowerment that grants people meaningful control of their data and privacy preferences, corporate responsibility that is built on rigorous assessments that weigh the benefits of processing data against the risk to individuals whose data may be processed, and strong enforcement and rule-making. And, here, that means in the United States that should be all embedded at the US Federal Trade Commission.

While updated privacy laws are essential to building trust, new uses for artificial intelligence are emerging that will require special consideration for their own specific regulations. Facial recognition is a prime example. This technology has shown that it can provide new and positive benefits when used to identify missing children or diagnose diseases. But there is a real risk that -- there is a real risk which includes the danger that it will reinforce social bias and be used as a surveillance tool that encroaches individual freedom.

This is why Microsoft has called on the US Government to regulate facial recognition with a focus on preventing bias, preserving privacy, and prohibiting government surveillance in public places without a court order. It is also one of the reasons we have testified in support of the Washington State privacy bill, which includes provisions that address many of these important concerns about facial recognition technology.

We need laws that place appropriate guardrails to ensure that companies don’t take unfair advantage of individuals or violate people’s fundamental rights. That is the essence of trust. We believe that guardrails can be designed in ways that facilitate global interoperability and promote innovation so we can all work together to continue to harness the potential of the digital revolution to improve people’s lives and drive economic growth.

This will require a commitment from all of us to engage in ongoing discussions and consultations that span governments and sectors. This means it’s essential for the US Government and its agencies, including the FTC, to engage in a broad range of discussions with other governments on digital issues like we are doing with the honored guests here today.

Just as important are gatherings like this that will bring people together from around the world to explore policy approaches to new emerging technologies like artificial intelligence. More than 100 years ago, when Brandeis defined the right to be let alone in his famous Law Review article, The Right to Privacy, he described, with great eloquence, the ongoing process by which rights evolve as humanity progresses and how the law adopts and adapts in response.

“Political, social, and economic changes entail the recognition of new rights,” Brandeis wrote, “and the law in its eternal youth grows to meet demands of society.” Brandeis was moved to write this article because of the impact of photography, mechanical printing presses, and other disruptive new technologies of his time.

Today, we stand at the beginning of a new era of disruption and change, a time of technology- driven transformation that will require the recognition of new rights and the development of new laws to meet the demands of our societies. It’s a task that will ask us to convene in hearings like this one and in forums, meetings and conferences around the world to grapple openly and honestly with a host of issues that will touch on virtually every aspect of our lives and our businesses.

We, at Microsoft, look forward to being a part of these conversations and to working in close partnership with all of you to make sure that technology moves forward within a framework of respect for human dignity and with the goal of serving the greater good. Thank you.

(Applause.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

MS. WOODS BELL: Thank you. Thank you very much, Julie, for those remarks. You outlined very well the tremendous potential of AI and that’s one of the reasons why we’re here today, to discuss them even further.

Well, I’m still Deon Woods Bell. And my co- moderator here is Ellen Connelly, an Attorney Adviser in the Office of Policy and Planning. And, together, we want to welcome you to our panel on international engagement and emerging technologies focusing on artificial intelligence.

You’re in for a treat. As Julie described, we have quite a panel assembled for you here today. This session is a follow-on to the hearings in November, which focus on the same topic. And following the November meetings, colleagues here at the FTC -- and a lot of influence from Ellen here -- said we should go deeper, we should focus on international issues. So today, we’re thrilled to have this impressive group of international officials, practitioners, and academics here and on the line from Harvard.

During this panel, we’ll touch upon a variety of issues and we’ll go deeper and let you see what these colleagues have to offer. We won’t go into great detail on their bios, but we couldn’t resist showing off a little bit for you and letting you know who they are.

On the line from Harvard is Chinmayi Arun. She’s a fellow at the Harvard Berkman Klein Center for Internet & Society, and she’s the Assistant Professor of Law at the National Law University in Delhi. Her chair is there and her picture will soon be on the line as she can hear us right now.

Next, we have, again, he’s still James Dipple-Johnstone. You saw him earlier. He’s a Deputy Commissioner from the UK’s ICO, and prior to the ICO, he was in the Solicitor’s Regulatory Authority where he had been Director of Investigation and Supervision, and he’s not from the ministry of no.

(Laughter.)

MS. WOODS BELL: Next, Francis Kariuki, Director General of the Competition Authority of Kenya. Mr. Kariuki is the founding member and the current Chairman of the African Competition Forum. He’s also an expert in FinTech.

Next over to Marcela. She’s a partner at VMCA Advogados in Brazil focusing on data protection and antitrust. She’s served as Advisor and Chief of Staff for the President of Brazil’s famous CADE.

Over to Isabelle. She’s President and Member of the Board Autorité de la Concurrence, as she was previously the President of the Sixth Chamber of the Conseil d'État, the French Supreme Administrative Court, and other governmental capacities.

And last but not least, we have Omer Tene. Omer is a Vice President and Chief Knowledge Officer at the International Association of Privacy Professionals. He wears so many hats, we couldn’t list them either. He’s an Affiliate Scholar at Stanford and Senior Fellow at the Future of Privacy Forum.

So, before we get started, we want you to be open to looking to questions. We have our colleagues here. We’re going to have short introductory comments from each colleague, and then after this, we’ll have a moderated panel discussion, and we hope that you enjoy.

MS. CONNELLY: Great. So I will start us off by giving each of our panelists a chance to make a brief introductory statement to describe for us the key competition, consumer protection and privacy issues that they see emerging around the artificial intelligence field. We will start with Chinmayi.

MS. ARUN: Thank you for having me. It’s such an honor to be a part of this panel, and I’m happy to see that the FTC is listening to voices from around the world.

If I were to give you the three or four big highlights of how I would think about AI and the right to privacy in data sets in India, it would be -- the first would be in terms of global companies, usually American companies, operating in India versus Indian companies operating both in India, as well as elsewhere in places like Kenya.

The second would be in terms of data because, as you know, it’s a very big country and it provides large and rich data sets that can be complicated in ways that I’m going to describe to you shortly.

The third is that perhaps some of you have heard that there has been a rich and, again, contentious conversation about the right to privacy in India in the context of state surveillance, but also in the context of state protection. So we’ve had a major case on the right to privacy, and we’ve also got a data protection bill, which is very interesting, so I’m going to describe the highlights of that for you.

And the final -- because we’re discussing this in such an international context is this sort of almost a clash of jurisdictions that arises from the Indians, for example, floating proposals of data localization in certain contexts, but also the ways in which India is coping with norms that are emerging from the US and from Europe.

So the first is very simple, which is that as you know the major technology platforms, like Facebook and WhatsApp and Google, are used extensively in India and they have huge user bases in India, but there are also many Indian citizens that access them and have their data on them. Although I will focus a little bit more on the information platforms, it’s good to know that Airbnb, Uber, and other technology platform companies are also offering services in India.

So our legislation, our new privacy act, our proposed amendment to our information technology act are all coping now with the very real idea that there are many Indian citizens whose lives are affected by these technologies that are designed elsewhere based on rules from elsewhere. At the same time, they’re also trying to keep Indian companies competitive because there are Indian companies offering similar services in India.

Our NITI Aayog, which is sort of our version of the planning commission, has described India as the AI garage for 40 percent of the world, and they’ve got a strategy paper on AI. As you know, the big data set question, it’s complicated because, again, India is looking at it as a way towards machine learning, but there are also concerns of data protection and privacy that arise in that context.

And the big tension really is that, on one hand, the policymakers want to leverage this and have this data and sort of learn from it and, on the other, of course, there’s the question of the privacy rights of Indian citizens and especially of marginalized citizens, people who are not able to assert their rights in the consumer forum.

And the final -- so none of this is law yet, but both in the proposed privacy legislation and in the proposed IT amendment act, the question has arisen of whether foreign companies with a sizable user base in India should be asked to localize data in India. So both these proposed legislations have suggested that these companies might be made to host their data sets in India, and I think that that also is cause for concern if they’re thinking about it from a privacy and data protection point of view.

I’m going to stop here. I just wanted to flag all of this in case anyone has questions later. Thank you so much.

MS. CONNELLY: Thank you very much for those really interesting comments.

We’ll move down the line and next up is James.

MR. DIPPLE-JOHNSTONE: Thank you very much and thank you. It’s an honor to be here on this panel with you today.

So I’ve got four issues. And I think the first, which has already been very ably covered, which is that about public trust and the risk of losing public trust in the rollout of AI systems and the role of regulators needing to work together both within country, but also internationally, which is my second theme.

This is an emerging area, one where I don’t think we still have a clear picture of what AI’s impact on our societies will be. And with that in mind, it’s important that regulators keep themselves up to date, keep relevant and work together with others. And that’s very much the approach we’ve taken in the UK. The ICO has a remit in some of the technology, but actually, we work very closely with, for example, colleagues at the Competition and Market Authority, the Financial Conduct Authority, the Center for Data Ethics and Innovation and the Alan Turing Institute to look at the common issues that face us all and how we can improve our regulation.

An important third issue is to look at not only whether the data’s held -- and when we talk about big data sets, we sometimes think of the big tech companies, but in the UK context, the state has large and valuable data sets, too. The UK National Health Service and the UK Education Service have very comprehensive data sets with millions of data points, which would be of value to a number of organizations around the world.

And we are seeing increasing use of AI in the public sector as a model of efficiency and to help us all strive to meet our budget considerations. AI is being looked at for use to decide whether UK citizens are likely to commit crimes, which crimes should be investigated, who’s likely to reoffend, who’s likely to pay their rent on time. And that is beginning to introduce issues of fairness, accountability, and transparency.

And so that’s why, as a regulator, we are really keen to keep abreast of developments. So we are putting a lot of effort into doing that. We are recruiting post-doctoral researchers to help us look at how to regulate AI. We’ve taken new powers to examine AI’s use and look at AI systems in practice and in operation and we’ve reconfigured the office to set up an entire part of the office that will just focus on innovation and technology.

I said it this morning; I’ll keep saying it. We’re not the ministry of no, but we think the GDPR provisions around data protection impact assessments and our work around, for example, regulatory sand boxes and innovation hubs with other regulators. We’re trying to encourage early dialogue to tease through some of these issues together, because I’m not sure any one of us has the perfect answer for all the scenarios.

MS. CONNELLY: Thank you.

Francis?

MR. KARIUKI: Thank you, Ellen and Deon. It’s a pleasure for me to be here and to share my thoughts in regard to AI.

And my view is as a competition and consumer protection regulator, what am I worried about? And I have about four issues, and these are transparency and information asymmetries. What I would like to say is that AI has both created positive and external -- externalities. And in terms of competition and consumer protection, there’s an argument which has been found that they bring more efficiency in terms of prices and greater transparency compared to the traditional retail sales channels, and this is an inquiry which has been conducted in Europe and it has shown that. And, also, they provide additional benefits on these platforms. For example, AI [indiscernible], such platforms could improve choice and value for consumers.

However, the other challenge of -- an encountered challenge in regard to we don’t appreciate the criteria behind the decisions of AI, they are only known to the designer of these systems, and, therefore, the merchant or the consumer may not be aware of how the system has been created and it’s allocating the prices. So there’s the risk of intentional design of the systems in favor of certain participants in the market.

And this could be quite catastrophic in the continent I come from where there’s a lot of market concentration, and, therefore, the companies which are in Africa then can expand their space by being biased against the consumers in Africa.

The other areas that’s also barriers or pathways to entry are, in Kenya, I’ve seen some positive externalities especially AI has enabled new innovations, where in Kenya we have seen recent expansion of financial services for people who are not included in the financial services. And, therefore, companies have been enabled to expand financial services through lending positions for previously people who were not captured in the financial services and also in the insurance sector.

The challenge I see also from the AI is the line between open and proprietary data. AI often creates what is called, in fair data, an individual that is not perhaps -- not factual but opinion based, and, therefore, we may not get an optimal position for the product which is being offered or the prices which are being offered in the market. And, therefore, the challenge going forward is how do we determine data which is a product and which data is an input, and this choice of where the line is will have significant competitive implications as we move.

Besides information asymmetry, I’ve seen AI can also be used in consumer protection issues, discrimination based on other social issues like the region where people come from or even race, as I had mentioned earlier, and these are some of the things where we need, as regulators, both competition and consumer, to look before we fly, because right now is that we are flying blindly and we might be flying into a storm.

MS. CONNELLY: Thank you.

Marcela?

MS. MATTIUZZO: So first of all, thank you, Deon and Ellen, for the invitation for the FTC, to you both for inviting me personally, but also Brazil to be a part of this discussion.

A lot of the points that have been raised here focus on procedural challenges of AI. What I would like to also mention is perhaps the difficulty in both attaining international convergence in these topics, not necessarily laws that are exactly the same, but that point in the same direction, and also convergence within the many fields of law that are connected to AI.

So here, at the FTC, we’re naturally discussing antitrust, consumer protection, and privacy. And even when we’re speaking only of these three areas of law, we can already see that sometimes the objectives of these policies are not always totally convergent.

So, what I would like to -- just to give an example, I guess, that is comparing privacy and antitrust that to me is very clear. What technology has enabled today is for many companies to unilaterally access information and AI has also allowed that information, this data, to be combined and used efficiently for many purposes. So now we can know who bought something, how that person bought it, and so forth, and create, for example, consumer profiles.

Perhaps from an antitrust point of view, one of the solutions to a potential problem of unilateral abuse of this information would be to share the databases with other companies. So we would have many companies that have the access to the same set of data and, therefore, of course, we can have problems of collusion. But leaving that aside, we would have a level playing field.

If, however, we look from the consumer or data protection side of the discussion, we may come to a very different conclusion. And we may come to realize that, perhaps, consumers don’t want their data shared across different platforms and shared across many companies. So, naturally, both objectives pursued by either antitrust or privacy and consumer protection agencies, in the case of Brazil specifically as I hope to make clear throughout my interventions, we are at very different development stages. When it comes to antitrust and consumer protection, we are much more developed and, as you may be aware and former Commissioner Julie Brill already mentioned, in regards to data protection legislation, our specific legislation was approved just last August, August 2018, and has not yet come into force.

So building policy that brings all of these areas of law together in a coherent fashion to address AI challenges seems to me to be a particularly important goal and a particularly important topic for us to focus on.

MS. CONNELLY: Thank you, Marcela. Isabelle?

MS. DE SILVA: Thanks a lot to the FTC for the invitation. I’m really glad to be here.

I would like to say that, for me, the main point is that we think data, artificial intelligence, algorithm, are really key to the competitive process and that is why we must look at it closely. Of course, those processes affect also the way the state is being run. They also affect and they change society, but for us, the main issue is how do they affect the competitive process and the way companies do business?

So what we see is that we really need to invest a lot more than before in understanding what is going on in the market, in the companies, and also to use all our different tools, legal tools, to gain a better understanding and also to give better vision to the market, and I will try to illustrate this with some examples.

So first of all, we use sector inquiries. That is a tool that is common among agencies. But how do we use it? We really take a lot of time to understand a specific market that we deem to be interesting or a process. So that’s what we did with online advertising last year, and, of course, we had very interesting dialogue and followup with Australia, who has finished a very interesting report on online advertising.

And in this way, we get a lot of information from companies. They are sometimes reluctant to give information, but we have the legal framework that enable us to get a lot of information.

And also we give information back to the market. I think this is really something interesting because some sectors are moving so fast that even the companies engaging in the sector don’t always have the big picture, and that is something that has been deemed very useful in the field of what we did about programmatic advertising and the way it’s being run because it’s a very complex and new ecosystem.

Another type of tool we are using very much is the joint studies with other agencies. That’s what we did with the CMA about closed ecosystem in 2014, what we did with the German agency in 2016 about big data, and what we are doing right now about algorithm still with the German agency.

So what is the interest of this? It’s really to show the impact we see that algorithms have on the competitive process and maybe I will tell about a little bit more about this later. This is really something where we draw about, of course, what the experts have written about algorithm, but also in a very practical manner how do companies use algorithm and how does it change the way they do business in the market?

And, finally, another tool that we use is the conference or hearings like you have today at the FTC, but really focusing on what is new, for example, in the field of algorithm. Last year, we had lots of meetings with scientists, sociology experts about what is new about algorithm and also about companies. For example, we had meetings with Google and Facebook to know how they use algorithm in a very precise and detailed matter to help us to understand how it’s being used.

#### Upside AND downside risks of AI are existential---effective governance is key

Themistoklis Tzimas 21, Aristotle University of Thessaloniki, Faculty of Law, “Chapter 2: The Expectations and Risks from AI,” Legal and Ethical Challenges of Artificial Intelligence from an International Law Perspective, Springer, 2021, pp. 9–32 Open WorldCat, https://doi.org/10.1007/978-3-030-78585-7

Therefore, it is only natural to be at least skeptical towards a future with entities possessing equal or superior intelligence and levels of autonomy; the prospect even of existential risk looms as possible.7 AI that will have reached or surpassed our level of intelligence make us wonder why would highly autonomous and intelligent AI want to give up control back to its original creators?8 Why remain contained in pre-deﬁned goals set for it by us, humans? Even AI in its current form and narrow intelligence poses risks because of its embedded-ness in an ever-growing number of crucial aspects of our lives. The role of AI in military, ﬁnancial,9 health, educational, environmental, governance networks-among others—are areas where risk generated by AI—even limited— autonomy can be diffused through non-linear networks, with signiﬁcant impact— even systemic.10 The answer therefore to the question whether AI brings risk with it is yes; as Eliezer Yudkowski comments the greatest of them all is that people conclude too early that they understand it11 or that they assume that they can achieve it without necessarily having acquired complete and thorough understanding of what intelli- gence means.12 Our projection of our—lack of complete—understanding of the concept of intelligence on AI is owed to our lack of complete comprehension of human intelligence too, which is partially covered by the prevalent and until now self- obvious, anthropomorphism because of which we tend to identify higher intelligence with the human mind. Yudkowski again however suggests that AI “refers to a vastly greater space of possibilities than does the term “Homo sapiens.” When we talk about “AIs” we are really talking about minds-in-general, or optimization processes in general. Imagine a map of mind design space. In one corner, a tiny little circle contains all humans; within a larger tiny circle containing all biological life; and all the rest of the huge map is the space of minds-in-general. The entire map ﬂoats in a still vaster space, the space of optimization processes.”13 Regardless of what our well-established ideas are, there are many, different intelligences and even more signiﬁcantly, there are potentially, different intelli- gences equally or even more evolved than human. From such a perspective, the unprecedented—ness of potential AI developments and the mystery surrounding them emerges as not only the outcome of pop culture but of a radical transformation of our—until recently—self—obvious identiﬁcation of humanity with highly evolved and dominant intelligence.14 The lack of understanding of intelligence and therefore of AI may be frightening but does not lead necessarily to regulation—at least to a proper one. We could even be led into making potentially catastrophic choices, on the basis of false assumptions. On top of our lack of understanding, we should add a sentiment of anxiety as well as of expectations, which intensiﬁes as an atmosphere of emergency and of expected groundbreaking developments grows. The most graphic description of this feeling is the potential of a moment of singularity, as mentioned above according to the description by Vinge and Kurzweil. As the mathematician I. J. Good–Alan Turing’s colleague in the team of the latter during World War II—has put it: “Let an ultraintelligent machine be deﬁned as a machine that can far surpass all the intellectual activities of any man however clever. Since the design of machines is one of these intellectual activities, an ultraintelligent machine could design even better machines; there would then unquestionably be an “intelligence explosion,” and the intelligence of man would be left far behind. Thus the ﬁrst ultraintelligent machine is the last invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control.”15 This is in a nutshell the moment of singularity. The estimates currently foresee the emergence of ultra or super intelligence—as it is currently labelled—or in other words of singularity, somewhere between 20 and 50 years from today, further raising the sentiment of emergency.16 We cannot even foretell with precision how singularity would look like but we know that because of its expected groundbreaking impact, both states and private entities compete towards gaining the upper hand in the prospect of the singularity.17 Despite the fact that such predictions have been proven rather optimistic in the past18 and therefore up to some extent inaccurate, there are reasons to assume that their materialization will take place and that the urgency of regulation will be proven realistic. After all, part of the disappointments from AI should be blamed on the fact that certain activities and standards, which were considered as epitomes of human intelligence have been surpassed by AI, only to indicate that they were not eventu- ally satisfactory thresholds for the surpassing of human intelligence.19 Partially because of AI progress we realize that human intelligence and its thresholds are much more complicated than assumed in the past. The vastness’s of deﬁnitions of intelligence, as well as its etymological roots are enlightening of the difﬁculties: “to gather, to collect, to assemble or to choose, and to form an impression, thus leading one to ﬁnally understand, perceive, or know”.20 As with other relevant concepts, the truth is that until recently our main way to approach intelligence for far too long was “we know it, when we see it”. AI is an additional reason for looking deeper into intelligence and the more we examine it, the most complicated it seems. The combination of lack of complete understanding of intelligence, the unpredictability of AI, its rapid evolution and the prospect of singularity explain both the fascination and the fear from AI. Once the latter emerges, we have no real knowledge about what will happen next but only speculations, which until recently belonged to the area of science ﬁction. We are for example pretty conﬁdent that the speed of AI intelligence growth will accelerate, once self—improvement will have been achieved. The expected or possible chain of events will begin from AI capacity to re-write its own algorithms and exponentially self—improve, surpassing human intelligence, which lacks the capacity of such rapid self—improvement and setting its own goals.21 We can somehow guess the speed of AGI and ASI evolution and possibly some of its initial steps but we cannot guess the directions that such AI will choose to follow and the characteristics that it will demonstrate. Practically, we credibly guess the prospects of AI beyond a certain level of development. Two existential issues could emerge: ﬁrst, an imbalance of intelligence at our expense—with us, humans becoming the inferior species—in favor of non-biological entities and secondly a lack of even fundamental conceptual communication between the two most intelligent “species”. Both of them heighten the fear of irreversible changes, once we lose the possession of the superior intelligence.22 However, we need to consider the expectations as well. The positive side focuses on the so-called friendly AI, meaning AI which will beneﬁt and not harm humans, thanks to its advanced intelligence.23 AI bears the promise of signiﬁcantly enhancing human life on various aspects, beginning from the already existing, narrow applications. The enhanced automation24 in the industry and the shift to autonomy,25 the take—over by AI of tasks even at the service sector which can be considered as “tedious”—i.e. in the banking sector—climate and weather forecasting, disaster response,26 the potentially better cooperation among different actors in complicated matters such as in matters of information, geopolitics and international relations, logistics, resources ex.27 The realization of the positive expectations depends up to some extent upon the complementarity or not, of AI with human intelligence. However, what friendly AI will bring in our societies constitutes a matter of debate, given our lack of unanimous approach on what should be considered as beneﬁcial and therefore friendly to humans—as is analyzed in the next chapter. Friendly AI for example bears the prospect of freeing us from hard labor or even further from unwanted labor; of generating further economic growth; of dealing in unbiased, speedy, effective and cheaper ways with sectors such as policing, justice, health, environmental crisis, natural disasters, education, governance, defense and several more of them which necessitate decision-making, with the involvement of sophisticated intelligence. The synergies between human intelligence and AI “promise” the enhancement of humans in most of their aspects. Such synergies may remain external—humans using AI as external to themselves, in terms of analysis, forecasts, decision—making and in general as a type of assistant-28 or may evolve into the merging of the two forms of intelligence either temporarily or permanently. The second profoundly enters humanity, existentially—speaking, into uncharted waters. Elon Musk argues in favor of “having some sort of merger of biological intelligence and machine intelligence” and his company “Neuralink” aims at implanting chips in human brain. Musk argues that through this way humans will keep artiﬁcial intelligence under control.29 The proposition is that of “mind design”, with humans playing the role that God had according to theologies.30 While the temptation is strong—exceeding human mind’s capacities, far beyond what nature “created”, by acquiring the capacity for example to connect directly to the cyberspace or to break the barriers of biology31—the risks are signiﬁcant too: what if a microchip malfunction? Will such a brain be usurped or become captive to malfunctioning AI? The merging of the two intelligences is most likely to evolve initially by invoking medical reasons, instead of human enhancement. But the merging of the two will most likely continue, as after all the limits between healing and enhancement are most often blurry. This development will give rise, as is analyzed below, to signif- icant questions and issues, the most of crucial of which is the setting of a threshold for the prevalence of the human aspect of intelligence over the artiﬁcial one. Human nature is historically improved, enhanced, healed and now, potentially even re-designed in the future.32 Can a “medical science” endorsing such a goal be ethically acceptable and if yes, under what conditions, when, for whom and by what means? The answers are more difﬁcult than it seems. As the World Health Organi- zation—WHO—provides in its constitution, “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or inﬁrmity”.33 Therefore, why discourage science which aims at human-enhancement, even reaching the levels of post-humanism?34 Or if restrictions are to be imposed on human enhancement, on what ethics and laws will they be justiﬁed? How ethically acceptable is it to prohibit or delay technological evolution, which among several other magniﬁcent achievements, promises to treat death as a disease and cure it, by reducing soul to self, self to mind, and mind to brain, which will then be preserved as a “softwarized” program in a hardware other than the human body?35 After all, “According to the strong artiﬁcial intelligence program there is no fundamental difference between computers and brains: a computer is different machinery than a person in terms of speed and memory capacity.”36 While such a scientiﬁc development and the ones leading potentially to it will be undoubtedly, groundbreaking technologically-speaking, is it actually—ethically- speaking—as ambivalent as it may sound or is it already justiﬁed by our well— rooted human-centrism?37 Secular humanism may have very well outdated religious beliefs about afterlife in the area of science but has not diminished the hope for immortality; on the contrary, science, implicitly or explicitly predicts that matter can in various ways surpass death, albeit by means which belong in the realm of scientiﬁc proof, instead of that of metaphysical belief.38 If this is the philosophical case, the quest for immortality becomes ethically acceptable; it can be considered as embedded both in the existential anxiety of humans, as well as in the human-centrism of secular philosophical and political victory over the dei-centric approach to the world and to our existence. From another perspective of course and for the not that distant philosophical reasons, the quest for immortality becomes ethically ambiguous or even unacceptable.39 By seeking endless life we may miss all these that make life worth living in the framework of ﬁniteness. As the gerontologist Paul Hayﬂick cautioned “Given the possibility that you could replace all your parts, including your brain, then you lose your self-identity, your self-recognition. You lose who you are! You are who you are because of your memory.”40 In other words, once we begin to integrate the two types of intelligence, within ourselves, until when and how we will be sure that it is human intelligence that guides us, instead of the AI? And if we are not guided completely or—even further—at all by human intelligence but on the contrary we are guided by AI which we have embodied and which is trained by our human intelligence, will we be remaining humans or we will have evolved to some type of meta-human or transhumant species, being different persons as well?41 AI promises tor threatens to offer a solution by breaking down our consciousness into small “particles” of information—simplistically speaking—which can then be “software-ized” and therefore “uploaded” into different forms of physical or non-physical existence. Diane Ackerman states that “The brain is silent, the brain is dark, the brain tastes nothing, the brain hears nothing. All it receives are electrical impulses--not the sumptuous chocolate melting sweetly, not the oboe solo like the ﬂight of a bird, not the pastel pink and lavender sunset over the coral reef--only impulses.”42 Therefore, all that is needed—although it is of course much more complicated than we can imagine—is a way to code and reproduce such impulses. Even if we consider that without death, we will no more be humans but something else, why should we remain humans once technologies allow us be something “more”, in the sense of an enhanced version of “being”? Why are we to remain bound by biological evolution if we can re-design it and our future form of existence? Why not try to achieve the major breakthrough, the anticipated or hoped digita- lization of the human mind, which promises immortality of consciousness via the cyberspace or artiﬁcial bodies: the uploading of our consciousness so that it can live on forever, turning death into an optional condition.43 Either through an artiﬁcial body or emulation-a living, conscious avatar—we hope—or fear—that the domain of immortality will be within reach. It is the prospect of a “substrate-independent minds,” in which human and machine consciousness will merge, transcending biological limits of time, space and mem- ory” that fascinates us.44 As Anders Sandberg explained “The point of brain emulation is to recreate the function of the original brain: if ‘run’ it will be able to think and act as the original,” he says. Progress has been slow but steady. “We are now able to take small brain tissue samples and map them in 3D. These are at exquisite resolution, but the blocks are just a few microns across. We can run simulations of the size of a mouse brain on supercomputers—but we do not have the total connectivity yet. As methods improve, I expect to see automatic conversion of scanned tissue into models that can be run. The different parts exist, but so far there is no pipeline from brains to emulations.”45 The emulation is different from a simulation in the sense that the former mimics not only the outward outcome but also the “internal causal dynamics”, so that the emulated system and in this particular case the human mind behaves as the original.46 Obviously, this is a challenging task: we need to understand the human brain with the help of computational neuroscience and combine simpliﬁed parts such as simulated neurons with network structures so that the patterns of the brain are comprehended. We must combine effectively “biological realism (attempting to be faithful to biology), completeness (using all available empirical data about the system), tractability (the possibility of quantitative or qualitative simulation) and understanding (producing a compressed representation of the salient aspects of the system in the mind of the experimenter)”.47 The technological challenges are vast. Technologically speaking, the whole concept is based on some assumptions which must be proven both accurate and feasible.48 We must achieve technology capable of scanning completely the human brain, of creating software on the basis of the acquired information from its scanning and of the interpretation of information and the hardware which will be capable of uploading or downloading such software.49 The steps within these procedures are equally challenging. Their detailed analysis evades the scope of this book. Some critical questions—they are further analyzed in the next chapters—emerge however: how will we interpret free will in emulation? What will be the impact of the environment and of what environment? How will be missing parts of the human brain re-constructed and emulated? What will be the status of the several emulations which will be created—i.e. failed attempts or emulations of parts of the human brain—in the course of the search for a complete and functioning emulation? Will they be considered as “persons” and therefore as having some right or will they be considered as mere objects in an experimental lab? How are we going to decode the actual subjective sentiments of these emulations? Essentially, are emulations the humans “themselves” who are emulated or a different person? Even further what will human and person mean in the era of emulation? From a different perspective, the victory over death may be seen as a danger of mass extinction, absorption or de-humanization. In this new, vast universe of emulations will there be place for humans?50 From the above—mentioned discussion, it becomes obvious that at a large extent, the prospect of risk or of expectation is a matter of perspective, for which there is no unanimous agreement in the present. This may be the greatest danger of all, for which Asimov warned us: unleashing technology while we cannot communicate among us, in the face of it. The existential prospect as well as the risks by AI may self-evidently emerge from technological advances but are determined on the basis of politico—philosophical or in the wider sense, ethical assumptions. This is where the need for legal regulation steps in. Such a need was often underestimated in the past in favor of a solely technologically oriented approach—although exceptions raising issues other than technological can be found too.51 The gradual raising of ethic—political, philosoph- ical and legal issues constitutes a rather recent development, partially because of the realization of the proximity of the risks and of the expectations. The public debate is often divided between two “contradictory” views: fear of AI or enthusiastic optimism. The opinions of the experts differ respectively. Kurzweil, who has come with a prediction for a date for the emergence of singularity—until 2045—expects such a development in a positive way: “What’s actually happening is [machines] are powering all of us,” Kurzweil said during the SXSW interview. “They’re making us smarter. They may not yet be inside our bodies, but, by the 2030s, we will connect our neocortex, the part of our brain where we do our thinking, to the cloud.”52 In a well-known article—issued on the occasion of a ﬁlm—Stephen Hawking, Max Tegmark, Stuart Russell, and Frank Wilczek shared a moderate position: “The potential beneﬁts are huge; everything that civilization has to offer is a product of human intelligence; we cannot predict what we might achieve when this intelligence is magniﬁed by the tools AI may provide, but the eradication of war, disease, and poverty would be high on anyone’s list. Success in creating AI would be the biggest event in human history. . . Unfortunately, it might also be the last, unless we learn how to avoid the risks.”53

### A2: Overstretched

#### FTC is focused on enforcement against algorithmic bias. EVEN if they win the FTC is overstretched now,

#### None of their ev disproves that the FTC’s going after AI and privacy now---our uniqueness evidence indicates that algorithmic bias is an enforcement priority.

#### 2. Focus on privacy enforcement now---strategic resource deployment is key.

Arianna Evers et al., 21 – Counsel at Wilmer Hale, with Kirk J. Nahra and Reade Jacob, 4/2. “FTC Set to Flex Its Rulemaking Authority.” https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20210402-ftc-set-to-flex-its-rulemaking-authority

Last Friday—on March 25, 2021—Acting FTC Chairwoman Rebecca Kelly Slaughter announced the creation of a new rulemaking group within the FTC’s Office of the General Counsel. With this group, the FTC is poised to create new rules as well as strengthen existing ones across its vast consumer protection and competition portfolio. This is significant because it signals that the FTC is ready to strengthen its enforcement reach and may start the rulemaking process for a comprehensive privacy rule that is not sector specific, and that could stretch beyond what we typically think of as “privacy” in order to reach related competitive harms caused by companies’ data practices.

For the past several years, FTC commissioners have vocally supported federal privacy legislation and, in its absence, have been asking Congress for civil penalty authority, something they generally do not have for first time violations of Section 5 of the FTC Act. Congressional inaction in both of these areas has resulted in the FTC actively looking for ways to maximize its enforcement reach through the strategic deployment of existing remedies and tools. To that end, the FTC has recently gotten creative with its remedies, requiring companies to delete allegedly ill-gotten data (Everalbum) and provide notice to consumers (Flo Health). It has also used its Section 6(b) authority to examine the data practices of social media and video streaming services and the privacy practices of broadband provides, and two of the commissioners have suggested stretching existing trade regulation rules—specifically the Health Breach Notification Rule—to activities where their application is not immediately obvious.

Given the continued uncertainty around whether and when we might see congressional agreement on a federal privacy bill, the creation of this new group is likely the FTC’s first step towards moving forward with privacy rulemaking under the FTC’s Section 18 authority. This authority, which is also referred to as Magnuson-Moss rulemaking, establishes the process for FTC rulemaking undertaken without direct congressional authorization. However, it is rarely used because it is more burdensome than Administrative Procedure Act notice and comment rulemaking.

This new rulemaking group is also a reaction to AMG Capital Mgmt., LLC v. FTC, a case before the Supreme Court in which the court is deciding whether or not the FTC can properly seek monetary relief under Section 13(b) of the FTC Act. Section 13(b) allows the FTC to seek an injunction to prevent unfair or deceptive acts affecting commerce, and the FTC has long relied on this authority to provide monetary redress to consumers in consumer protection cases.

The creation of this new rulemaking group should not be a surprise to anyone who has been paying attention to the commissioners’ recent focus on improving the effectiveness of the FTC’s existing remedies and using all the tools at its disposal to pursue perceived instances of consumer harm. The FTC also likely sees little downside to beginning the rulemaking process for a comprehensive privacy rule at this time. Congress does not appear close to federal privacy legislation and many states are have moved ahead with their own laws or are posed to do so. Either this is a move that, in combination with activity in the states, could galvanize Congress to finally act, or it will move the FTC closer to obtaining the clear enforcement authority that it has been seeking in the privacy space.

#### 3. Key priority is privacy and data scrutiny.

Liisa Thomas 8/12/21. Partner and Leader of the Privacy and Cybersecurity Practice Group @ Sheppard Mullin, with Kari Rollins & Charles Glover, “FTC Signals Focus on Healthcare and Technology Platforms, Among Others.” https://www.eyeonprivacy.com/2021/08/ftc-healthcare-technology-platforms/

The FTC recently voted to authorize the use of compulsory processes—the FTC’s primary investigatory tools—on what it calls “key law enforcement priorities.” The resolutions allow investigators to take actions like issuing subpoenas and civil investigations demands (commonly referred to as “CIDs”) in a variety of areas. Of note is the inclusion of both healthcare markets and technology platforms, signaling a potential FTC interest in those sectors. These resolutions compliment the agency’s existing authority to investigate deceptive or unfair acts, and comes on the heels of the blow the FTC suffered as a result of the Supreme Court’s AMG decision. For those in the healthcare and technology platform space, this may signal an increase in privacy and data security scrutiny by the FTC. Putting it Into Practice: The authorization of the use of compulsory processes suggests that the FTC will not be backing off from bringing actions to enforce against unfair and deceptive practices. We will continue to monitor to see the impact this may have on privacy and data security cases brought by the agency in the healthcare and technology platform industries.

### A2: Normal Means = Funding

#### Normal means doesn’t allocate more funding 1. No evidence 2. Even if they win this argument theres no risk of a link turn

### A2: Link Turn

#### Rulemaking doesn’t free resources; two reasons

#### 1) TURF WARS---the FTC’s power-hungry---they’ll attempt to usurp the AFF.

David A. Hyman & William E. Kovacic 20, Hyman is Professor, Georgetown University Law Center; Kovacic is Global Competition Professor of Law and Policy, George Washington University School of Law, and a Non-Executive Director of the United Kingdom’s Competition and Markets Authority, “State Enforcement in a Polycentric World,” BYU Law Review, 9/1/20, Iss. 6, https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3248&context=lawreview

A. Competition Law

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have long shared regulatory authority over certain aspects of competition law. During the 1920s, there were cases where both agencies opened files to deal with the same conduct. For obvious reasons, this dynamic created repeated conflicts—so the agencies devised informal methods of consultation to avoid duplicative parallel inquiries. This “good fences make good neighbors” approach resulted in a written liaison arrangement (commonly called “clearance”) which allowed the agencies to avoid conflicts in the exercise of their concurrent regulatory power.8 A 2002 press release describes the clearance process, as well as some of the challenges that deregulation and technological chance posed to the smooth functioning of that process:

The FTC/DOJ clearance process was formally established in 1948; refinements were implemented in 1963, 1993, and 1995. The traditional methodology for allocating matters between the agencies has emphasized historical experience in addressing specific commercial sectors. As the boundaries that separate individual sectors have blurred in the face of rapid technological change, and as deregulation measures have allowed firms to diversify, this clearance methodology has begun to break down. In a growing number of important economic sectors of mutual concern to the FTC and the DOJ, the effectiveness of the experience-based allocation methodology that has anchored past clearance agreements has diminished significantly.9

The FTC and DOJ sought to resolve this dispute by negotiating and publishing a comprehensive statement that described the division of labor the two agencies intended to follow with respect to specific market sectors, and set out how future disagreements would be resolved.10 Although the DOJ ultimately abrogated the agreement under pressure from Senator Ernest Hollings, the underlying dynamics that gave rise to these problems have not changed materially in the intervening years.11 As such, it should not come as a surprise that in 2019 the FTC and DOJ negotiated a similar agreement focusing on the tech sector. Pursuant to that agreement, the FTC agreed to focus on Facebook and Amazon, and the DOJ agreed to focus on Google and Apple.12 (The irony of two competing competition agencies repeatedly negotiating over how best to divide a market does not escape us).

Roughly two months later, a turf war broke out when the DOJ asserted it would be reviewing the behavior of “social media[] and some retail services online”—a statement that was “widely interpreted by the legal community to mean Facebook and Amazon, two companies that under the earlier agreement stood to have at least some of their conduct reviewed by the FTC.”13 Such claim-jumping heightened tensions between the two agencies, which were already inflamed by the DOJ’s recent intervention in a case the FTC brought against Qualcomm.14 Such disagreements are not new: any list would include the dispute in 2008 over the appropriate standards for enforcing Section 2 of the Sherman Act,15 the FTC’s opposition in 2007 to the granting of cert in a private antitrust case against Pacific Bell where the DOJ filed an amicus brief urging the granting of cert, the DOJ’s 2005 opposition to the granting of cert in the FTC’s case against Schering-Plough, and the DOJ’s refusal to represent the FTC before the Supreme Court in Indiana Federation of Dentists—prompting the FTC to pursue the case itself.16

#### Triggers the link

Emily Birnbaum & Issie Lapowsky 20, Birnbaum is a tech policy reporter with Protocol; Lapowsky is Protocol's chief correspondent, “Democrats just made their case against Big Tech. Here’s what comes next.,” Protocol — The people, power and politics of tech, 7-29-2020, https://www.protocol.com/big-tech-ceo-hearing-what-comes-next

The FTC's inquiries into tech giants have been complicated by simultaneous investigations of the same companies at the DOJ. The FTC and DOJ had reportedly agreed to split the workload, with the FTC overseeing Facebook and Amazon, while the DOJ took the reins on Apple and Google. But during a congressional hearing last year, Makan Delrahim, head of the DOJ's antitrust division, acknowledged "squabbles" between the two agencies over each other's jurisdictions. "It's not the best model of efficiency," Delrahim said.

In one antitrust case the FTC brought against Qualcomm, the DOJ went so far as to publicly oppose the FTC and side with Qualcomm. And despite the supposed division of labor, the DOJ is also reportedly investigating Facebook for antitrust violations, as well.

Kades calls the infighting between the DOJ and the FTC "bizarre" and unlike anything he saw during his two decades at the FTC. "You would hope they're not looking at the same thing," he said. "They're short enough on resources."

#### 2) OPTICS---DOJ exclusivity looks like the FTC abdicating its political independence---that wrecks cred

Vladeck et al. 21, David Vladeck is Professor of Law at Georgetown University Law Center; Jan Schakowsky is an American politician who has served as the U.S. Representative from Illinois's 9th congressional district since 1999; Sally Greenberg is Executive Director of the National Consumers League, “Transforming the FTC: Legislation to Modernize Consumer Protection,” Committee on Energy and Commerce, 6/28/21, https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer

David Vladeck (5:43:42): Well, it would shorten the time that the FTC has in order to get a civil penalty from a defendant that's already been found to be a violator, has violated a rule. And so the current practice is that the FTC has to make a referral to the Department of Justice, the Department of Justice must agree to take the referral, the FTC does most of the drafting of the legal documents that need to be filed in court, but ultimately, the Justice Department will do that. And so, in cases, for example, that need to go to trial, there's an enormous duplication of of work. The FTC lawyers do the first cut, then the Justice Department lawyers redo it. It's just an incredible waste of resources on both the FTC's part and the Department of Justice's part. But there's another concern I have, which is, the FTC was designed to be an independent agency, bipartisan, not beholden to the president through the executive branch. But if the FTC has to rely on the Justice Department to enforce its own orders, well, that independence sometimes can be compromised. And so I think this is an important step forward. The FTC has already asked Congress to give us that kind of authority. And I would urge the subcommittee vote this bill out.

Jan Schakowsky (5:45:13): Thank you so much. I wanted to ask the same around the same question. So we know - to Ms. Greenberg. We know that some stakeholders are critical of the idea that we're talking about, now, of giving the FTC this authority, under support of the legislation, arguing that it could lead to the FTC to overreach and unfairly harm businesses. And I'm wondering how you would respond to those concerns that have been raised. Because it seems to me that we want to empower the FTC in the ways that we just heard the professor mentioned.

Sally Greenberg (5:46:06): Yeah, and the FTC is a critically important consumer protection agency, I think it punches above its weight, we need to give it the power and the authority it needs to hold bad actors accountable. And the authority that would provide the FTC in your legislation, I think, will be ultimately more protective of consumers. And the FTC, unfortunately, is hamstrung by the processes and procedures which other agencies do not have to confront.

#### The plan certainly hurts FTC priorities---CX proves they don’t establish a per se illegality standard which makes the FTC utilize all its resources

Remy et al. 21, Donald M. Remy, Scott Bearby, National Collegiate, Athletic Association; Jeffrey A. Mishkin, Karen Hoffman Lent, Skadden, Arps, Slate, Meagher & Flom LLP; Beth A. Wilkinson, Rakesh N. Kilaru, Wilkinson Stekloff LLP; Seth P. Waxman, Counsel of Record, Leon B. Greenfield, Daniel S. Volchok, David M. Lehn, Derek A. Woodman, Ruth E. Vinson, Spencer L. Todd, Wilmer Cutler Pickering, Hale and Dorr LLP, “Brief for Petitioner,” NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner, v. Shawne ALSTON, et al., Respondents, 2021 WL 408325, Westlaw

b. By requiring the NCAA to show that “each type of challenged rule” is procompetitive, Pet. App. 39a--and invalidating each type as to which that showing supposedly was not made--the courts below also effectively imposed a requirement that a restraint be the least restrictive way of achieving the procompetitive benefits. Antitrust law, however, does not require businesses to use “the least ... restrictive provision that [they] could have.” Continental T.V, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977). As its name suggests, the rule of reason requires only that an agreement be “reasonably necessary,” United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967) (subsequent history omitted), or “fairly necessary,” Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911) (subsequent history omitted), to achieve a procompetitive benefit.

Unlike the Ninth Circuit, other courts have followed this Court’s precedent, holding that courts “should [not] calibrate degrees of reasonable necessity” such that the “lawfulness of conduct turns upon judgments of degrees of efficiency.” Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227-228 (D.C. Cir. 1986); see also id. at 229 n.11. One circuit, for example, holds that “[i]n a rule of reason case, the test is not whether the defendant deployed the least restrictive \*42 alternative” but “whether the restriction actually implemented is ‘fairly necessary’ ” to achieve the procompetitive objective. American Motor, 521 F.2d at 1248; quoted in part in Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979). Another similarly holds that businesses need not “adopt the least restrictive means of stopping [competitors] from selling abroad, but merely means reasonably suited to that purpose.” Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 860 (1st Cir. 1982). A leading antitrust commentator has made the same point in regard to the NCAA’s amateurism rules, stating that “[m]etering’ small deviations [in amateurism] is not an appropriate antitrust function.” Hovenkamp, Antitrust Balancing, 12 N.Y.U. J.L. & Bus. 369, 377 (2016).

What these authorities recognize is that a “ ‘no less restrictive alternative’ test ... would place an undue burden on the ordinary conduct of business,” with joint ventures exposed to litigation (including treble damages) based on nothing more than “the imaginations of lawyers” in “conjur[ing] up” some marginally less-restrictive alternative. American Motor, 521 F.2d at 1249. And because a “skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements,” Areeda & Hovenkamp, 11 Antitrust Law ¶1913b (5th ed. 2020), a least-restrictive standard would open the floodgates to antitrust litigation against the NCAA, other sports leagues, and joint ventures more generally, “interfer[ing] with the legitimate objectives at issue without ... adding that much to competition.” Areeda & Hovenkamp, 7 Antitrust Law ¶1505b; see also ABA Antitrust Section, Monograph No. 23, The Rule of Reason 123 (1999) (a least-restrictive test would “plac[e] the courts in the awkward position of routinely second-guessing \*43 business decisions”). It would also put antitrust courts in the role of “central planners” that this Court has warned they are “ill-suited” to perform, Trinko, 540 U.S. at 408.

#### Treading on new turf magnifies the link---the agency will take time AND money to develop new proficiencies

Seth B. Sacher & John M. Yun 19, Sacher is an Economist, Washington, DC; Yun is from the Antonin Scalia Law School, George Mason University, “TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT,” 26 Geo. Mason L. Rev. 1491, 1493, Summer 2019, Lexis

VII. Fallacy Seven: Not Recognizing That Their Proposals Will Strain Competition Agency Resources, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, will require significantly more active market supervision than is currently the case. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

#### enforcement burdens require cuts to old burdens.

Ramsi A. Woodcock 21, Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, Department of Management, University of Kentucky Gatton College of Business and Economics, “The Hidden Rules of a Modest Antitrust,” 105 Minn. L. Rev. 2095, Lexis

The failure of the Court to take enforcement costs into account has led to perhaps the most overlooked consequence of the error cost revolution in antitrust: that it has fallen to enforcers to balance budgets swelled to bursting by all the new rules of reason forged by the Court out of old per se rules of illegality. 63 Unlike the Court, which can demote a rule of reason to a per se rule of illegality to reduce enforcement costs, enforcers can only reduce their costs in one way: by reducing enforcement, which is to say, by creating de facto rules of per se legality. 64 In failing to make budget balancing rule changes to compensate for the rules of reason that it has imposed in recent decades, the Court has therefore ensured that only de facto rules of per se legality have been used to pay for those rules of reason, because enforcers cannot unilaterally impose the other low-cost approach to adjudication - rules of per se illegality - unilaterally. The Court has thereby injected a stark bias in favor of non-enforcement and de facto per se legality into antitrust through its half-baked embrace of the rule of reason presumption. The Court's conversion of the per se rule against resale price maintenance to a rule of reason, for example, imposed a burden on enforcers who, if they took their jobs seriously, were henceforth forced to scrutinize all individual instances of resale price maintenance for harm to consumers in order to find resale price maintenance cases to bring. 65In order for cash-strapped enforcers actually to carry out that task, they necessarily had to reduce the care with which they would otherwise troll the seas of antitrust-relevant conduct for cases, either with respect to the conduct subject to the rule of reason, other conduct, or some of both. 66 Enforcers might, for [\*2112] example, have relied on their prosecutorial discretion to quit enforcing the Robinson-Patman Act (which, perhaps not coincidentally, enforcers actually have quit enforcing in recent decades). 67 The resulting tradeoff - more careful scrutiny of resale price maintenance for the de facto repeal of the Robinson-Patman Act - would have been good for consumers, however, only if the harm to consumers of no longer condemning the supply-price discrimination prohibited by the Robinson-Patman Act were offset by the benefits to consumers of more accurate enforcement against firms engaged in resale price maintenance. 68

#### Only a risk the link turns the DA

#### Three independent reasons

#### 1) CREDIBILITY---expansion erodes the FTC’s global reputation---that independently wrecks modeling.

J. Howard Beales III & Timothy J. Muris 15, Beales III is a Professor of Strategic Management and Public Policy at the George Washington University School of Business; Muris is a George Mason University Foundation Professor of Law and Of Counsel Kirkland & Ellis LLP, “FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers,” George Washington Law Review, vol. 83, no. 6, 2015/2014, pp. 2157–2229

Throughout most of the Federal Trade Commission's ("FTC" or "Com- mission") history, the agency has been condemned as ineffective. Indeed, the prestigious 1969 American Bar Association Report said that the FTC should either change or be abolished. The disastrous decade of the 1970s followed, in which the FTC tried to become the second most powerful legislature in Washington. The Commission then finally developed a bipartisan regulatory program, recognizing that the FTC was not the star player in the economy but had an important role in enforcing the rules that facilitate market interactions. Following the ABA report's recommendation, the program's consumer protection foundation was a systematic and aggressive attack on consumer fraud.

This Article discusses this modern FTC, providing details on programs involving fraud, conventional advertising, and privacy. We explain how, embracing a more limited role and recognizing its past mistakes, the FTC became one of the world's most widely respected government agencies. Unfortunately, the agency has recently lost its way in regulating traditional advertising, threatening to restrict truthful information to consumers that is vital to the optimal performance of competitive markets. We also discuss the newest part of the FTC's mission, protecting consumer privacy. The heart of the program has been to prevent harmful misuse of sensitive information, most notably the National Do Not Call Registry, one of the most popular government initiatives ever. In attempting to broaden the basis for protection of privacy, the agency currently threatens to impede rapidly evolving information technology markets.

#### 2) JUDICIAL BACKLASH---enforcing new antitrust law is uniquely draining---each case is litigated heavily AND courts require extensive briefing for unfamiliar law

Alison Jones & William E. Kovacic 20, Jones is a professor at King’s College London; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255

A. Judicial Resistance to Extensions of Existing Antitrust Doctrine

As noted in Section II.A, judicial decisions since the mid-1970s have reshaped antitrust law; created more permissive substantive standards governing dominant firm conduct, mergers, and vertical restraints; and raised the bar to antitrust claims in a number of ways. This remolding has been facilitated by the Court’s conclusion that the Sherman Act constitutes “a special kind of common law offense,”81 so that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”82 This has allowed the statutory commands to be interpreted flexibly and the law to evolve with new circumstances and new wisdom;83 for example, where there is widespread agreement that the previous position is inappropriate or where the theoretical underpinnings of those decisions have been called into question.84

The proposed solutions will depend, in the short term at least, on the ability of enforcement agencies to navigate the described jurisprudence to find an antitrust infringement and, in some instances, a further rethinking, refinement, and/or development of doctrine, through softening, modification, or even a reversal of current case law. Although such an evolution could, in theory, result, as it did over the last forty years, from a steady stream of antitrust cases, judicial appointments since 2017 have arguably made such a change in direction unlikely. Rather, it seems more probable that successful prosecution of major antitrust, and especially Section 2 Sherman Act monopolization cases, will remain challenging and may even become more difficult. Cases will be litigated before judges who are ordinarily predisposed to accept the current framework, either by personal preference or by a felt compulsion to abide by forty years of jurisprudence that tells them to do so.85 A new president could gradually change the philosophy of the federal courts by appointing judges sympathetic to the aims of the proposed transformation.86 The reorientation of the courts through judicial appointments is, however, likely to take a long time.87

Until then, trial judges and the Court of Appeals will be compelled to abide by the existing jurisprudence and will only be at liberty to develop a more flexible approach in the “gaps” or spaces left by Supreme Court opinions—for example, in relation to mergers and rebates—and through creative interpretations of the law. Such cases are, however, likely to be hard fought. Indeed, Judge Lucy Koh’s finding in Federal Trade Commission v. Qualcomm, Inc. 88 that Qualcomm’s licensing practices constituted unlawful monopolization of the market for certain telecommunications chips has provoked hostile attacks, not only from practitioners and academics but also from the DOJ, the U.S. Departments of Defense and Energy, and even one of the FTC’s own members. In a scathing op-ed in the Wall Street Journal,89 Commissioner Christine Wilson attacked Judge Koh’s “startling new creation” of legal obligations that may trigger a new wave of enforcement actions and undermine intellectual property rights. Commissioner Wilson condemned the judge’s “judicial innovations,” and “alchemy,” through reviving and expanding the Supreme Court’s 1985 opinion in Aspen Skiing Co v. Aspen Highlands Skiing Corp 90 (which she stresses was described by the Supreme Court in Trinko 91 as “at or near the outer boundary” of U.S. antitrust law), turning contractual obligations into antitrust claims, and for departing from current federal agency practice, by imposing remedies requiring Qualcomm to negotiate or renegotiate contracts with customers and competitors worldwide. She has thus urged the Ninth Circuit (on appeal), and if necessary the Supreme Court, to assess the wisdom of these sweeping changes and to stay the ruling.92

It seems likely therefore that, at the same time as bringing cases seeking to develop procedural, evidential, and substantive antitrust standards under the existing regime, additional antidotes to the stringencies of existing jurisprudence will be required, including more extensive, and expansive, use of Section 5 FTC Act to plug the gaps created by the narrowing of the scope of Section 2 Sherman Act; and/or the adoption of legislation that directs courts to apply a wider goals framework.

#### 3) CONGRESSIONAL BACKLASH---businesses will lobby Congress to cut the FTC.

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Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

#### That derails broader FTC activities, even if Congress was the one who asked

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3. Blindness to Program and Political Risk

The ABA Commission set out three basic guidelines for the FTC's future antitrust work:

(1) Forsake trivia in favor of economically significant matters;123

(2) Emphasize cases involving complex, unsettled questions of competition economics and law, and leave per se cases to the DOJ;124 and

(3) Replace voluntary commitments with binding, compulsory orders. 12 5

Each of these changes certainly sounds sensible, particularly when taken one at a time. After all, who could be against the forsaking of trivia? But, each change involved a shift from a safer law enforcement strategy to a riskier one. The pursuit of economically significant matters galvanizes tougher opposition in litigation and motivates firms to seek out legislative assistance in backing down the agency. Focusing on complex and unsettled areas of the law involves greater litigation risk (because the cases are on the edges of existing doctrine) and exposes the agency more broadly to claims that it is engaged in unprecedented enforcement or sheer adventurism. The pursuit of tougher remedies arouses a stronger defense by respondents and, again, increases efforts to enlist Congress to discipline the FTC.

Although the ABA Commission noted the importance of political support and a vigorous chairman who would "resist pressures from Congress, the Executive Branch, or the business community," 1 26 it paid almost no attention to the predictable consequences of having the FTC occupy the risk-heavy end of the spectrum of all possible enforcement matters. The political science literature before 1969 had emphasized the political dangers inherent in the Commission's expansive norms-creation mandate and its broad information-gathering and reporting powers.1 27 For example, Pendleton Herring's study in the mid-1930s about the political hazards facing economic regulatory bod-ies said the agency's mandate placed it in "a precarious position" from the start:

The parties coming within [the FTC's] jurisdiction were often very powerful. The more important the business, the wider its ramifications, and the more numerous its allies and subsidiaries, the closer it came within the commission's responsibility. To review the firms with which this agency has had official contacts, especially in its early years, is to go down the roster of big business in this country. Making political enemies was soon found to be an incident in the routine of administration. The discharging of official duties meant interfering with business and often "big business."128 Had it read and absorbed the teaching of the available political science literature, the ABA panel would have had to confront deeper, harder questions about the causes of the FTC's performance. The panel missed (or underestimated) the big issue of politics. Like many blue ribbon studies of government performance, the ABA Report was long on demands for bold action and short on practical suggestions about how to cope with the crushing political backlash that boldness can breed.129

B. The Posner Dissent

Posner argued that the FTC would not be able to deliver on the ABA Commission's ambitious agenda because the FTC's leaders and staff lacked the necessary incentives to do so. 130 In his view, FTC Commissioners deliberately avoided confrontation with powerful eco- nomic interests that could frustrate reappointment or deny the board member a suitable landing place in the private sector upon leaving the agency.131 Similarly, FTC staff saw little upside (and considerable downside) to being overly aggressive in enforcing the law.1a2

Posner's assessment was certainly plausible. Government service disproportionately attracts people who plan to stay, and keeping your head down is an excellent way of doing that. "Don't make waves" becomes the default strategy of the lifers, and those who are tempera-mentally unsuited to that approach either self-select out, or are ac- tively encouraged to depart. 33

But matters are not so simple. Regulators that create or adminis- ter a program that threatens major commercial interests can leave government and monetize their expertise by guiding firms through the regulatory shoals.1 34 The prosecution of big cases attracts media at- tention and raises the prominence of the officials who set them in mo- tion. This publicity often translates into attractive offers for post- government employment. Posner also overlooked the emergence of attractive career paths for aggressive enforcement officials outside the private sector. A reputation for toughness would prove to be an asset, not a barrier, for those aspiring to join university faculties, think tanks, or advocacy groups that wanted to add high visibility officials to their ranks.

III. SOME LESSONS AND A FEW MODEST SUGGESTIONS

People like morality tales. The conventional morality tale in- spired by the ABA Report goes like this: In 1969, the FTC had a long history of existence, but almost nothing else to recommend it.1" The ABA Report accurately diagnosed the problems and laid out a clear agenda for the FTC to redeem itself.136 The FTC followed the recom- mendations in the ABA Report, and the agency was saved. All hail the ABA Commission, and the wisdom of those who served onit.13

Of course, life is more complicated. Unambiguous morality tales are more common in children's books than in real life. 38 A close reading of the record indicates that the pre-1969 FTC was not as aw-ful, and the ABA Report was not as good, as the conventional wisdom would indicate.1 39 We consider the lessons that should be drawn and offer four "modest suggestions that may make a small difference" the next time we encounter a similar situation.140

A. Be Careful What You Demand (Or Wish For)

The ABA Commission wanted the FTC to be a fierce and aggressive enforcer/regulator, and it generated a detailed list of all the things the agency had to do to justify its continued existence.141 The FTC responded aggressively to the challenge-but in so doing, it became significantly overextended.

In other work, we consider a number of factors that appear to be associated with good agency performance.14 2 One of the most important factors is whether the agency has the capacity and capability to perform the tasks that it has been given (or for which it has assumed responsibility).143 An agency that is overextended will find itself engaged in a constant process of regulatory triage-meaning it is unlikely to do a good job on any of the tasks within its portfolio of responsibilities. It is one thing to launch a single bet-the-agency case and entirely another to launch a half-dozen of those cases and an equal number of significant rulemaking projects simultaneously-let alone staff each case and rulemaking project so as to maximize the likelihood of good outcomes across the entire portfolio.144

The ABA Commission set a high bar for the FTC to clear if it was to remain in business-and the FTC responded with the enforcement equivalent of building and launching an armada of 1,000 ships.145 Little thought was given by the ABA Commission (or by top FTC management) as to whether the agency was up to the task of waging the functional equivalent of multiple land wars in Asia. 146 In particular, the ABA Commission gave no attention to the time it would take the agency to build the highly skilled teams of professionals it would need to perform the ambitious agenda it had recommended. There should have been an express caution that building this capability would take time. Instead, the ABA Report's "one last chance" admonitionl47 led the FTC to take on a daunting agenda before it had the ability to deliver. This consequence arguably is one of the ABA Commission's most unfortunate legacies. The remarkable thing is that the FTC managed to do as well as it did-notwithstanding the Herculean list of labors handed to it by the ABA Commission.

B. Leadership Incentives Matter

Posner did not think the FTC leadership would ever be able to rouse itself from its stupor.14 8 He also could not envision a set of in- centives that would motivate the FTC to become an activist presence on the regulatory scene. 149 As detailed above, Posner's assessment on both of these issues was wrong.150

But, it does not follow that the FTC's leadership (or the leader- ship of any other agency) is subject to an optimal set of incentives. Agency leadership always faces a choice between consumption and investment-and the stakes are systematically skewed toward con- sumption (in the form of launching new high-profile cases) by the short duration of any given leader's tenure.'51 As one of us noted in another article, the case-centric approach to evaluating agency per- formance-which is what the ABA Commission effectively embraced and encouraged-has a critical vice:

It accords no credit to long-term capital investments. It gives decisive weight to the initiation of new cases. This incentive system can warp the judgment of incumbent political appoin- tees who typically serve terms of only a few years. The per- ceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the si- rens of credit-claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed. It is a common aphorism in Washington that agency leaders should begin by picking the low-hanging fruit.... What is missing in the lexicon of Washington poli- cymaking is an exhortation to plant the trees that, in future years, yield the fruit.1 52 [FOOTNOTE 152 BEGINS] 152 Kovacic,supra note 144, at 922; see also Kovacic, supra note 151, at 189 ("[A] short-term perspective may incline the manager to launch headline-grabbing initiatives with inadequate regard for the matter's underlying merits or the ultimate cost to the agency, in resources and reputation, in litigating the case. If the case goes badly, the manager responsible for the take-off rarely is held to account for the crash landing. He can hope the passage of time will dim memories of his involvement, he can blame intervening agents for their poor execution of his good idea, or he can shrug his shoulders and say he was making the best of the fundamentally bad situation that policymakers encounter in the nation's capital."); Timothy J. Muris, Principlesf or a Successful Competition Agency, 72 U. CHi. L. REV. 165, 166 (2005) ("An agency head garners great attention by beginning 'bold' initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors."). [FOOTNOTE 152 ENDS]

Thus, if anything, the ABA Commission's "do something" recommendations encouraged (and hyper-charged) precisely the wrong incentives.

C. Don't Forget About Politics

Perhaps the largest failing of the ABA Commission was its failure to anticipate the political risks associated with its recommendations. Academics and do-gooders will enthusiastically lecture all and sundry about how the government exists to promote the general public interest-but decades of research on political economy make it clear that there is not much of a constituency for that mission.153 Indeed, an agency that seeks to promote the general public interest is an agency without any constituency.1 54

Thus, the ABA Commission wound up and sent into battle an agency without any real constituency or political backing, to wage war against a large and politically powerful collection of firms in every sector of the economy. There is no question that the FTC was unlucky, in that many of its most enthusiastic supporters were being voted out of office at the same time the FTC was picking fights with everyone and their brother.155 But, luck aside, if you were trying to create a "coalition of the willing" determined to clip the wings of the FTC, you would be hard-pressed to pick a better strategy than the one selected by the ABA Commission.15 6

Although the members of the ABA Commission were politically connected insiders, they completely failed to anticipate the firestorm that would engulf the FTC as a direct result of the agency's adoption of the ABA Report's recommendations. 157 Had they been more insightful about the predictable consequences, they might have been considerably more measured and circumspect in their marching orders.158