# UK---Round 5---vs. Michigan State MM

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## OFF

### OFF---Politics

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

Victor Reklaitis 10/1, Money & Politics Reporter at MarketWatch, Former Assistant Editor and Reporter at Investor's Business Daily, “Biden, Pelosi Keep Pushing on Infrastructure Bill, As Analysts Still Expect It Will Get Signed Into Law This Year”, Dow Jones Market Watch, 10/1/2021, https://www.morningstar.com/news/marketwatch/20211001607/biden-pelosi-keep-pushing-on-infrastructure-bill-as-analysts-still-expect-it-will-get-signed-into-law-this-year

While the U.S. House has failed to advance a $1 trillion bipartisan infrastructure bill, the long-awaited measure is likely to become reality before the year ends, according to some analysts.

House Speaker Nancy Pelosi called off a planned vote on the measure late Thursday, but she told reporters that she was working toward holding a vote on Friday, saying the opposed factions of her Democratic Party are "not trillions of dollars apart."

Adding to the push for action, President Joe Biden traveled to Capitol Hill on Friday afternoon and was meeting with Democratic House lawmakers.

Pelosi and the Biden administration have been negotiating with progressive House Democrats who say they won't support the bipartisan infrastructure (PAVE) bill, already passed by the Senate, unless a $3.5 trillion package targeting "human infrastructure" moves ahead in tandem.

They're also dealing with two moderate Democratic senators -- West Virginia's Joe Manchin and Arizona's Kyrsten Sinema -- who continue to oppose the larger measure's price tag, making it difficult for House progressives to get the assurances that they're demanding.

"The momentum created by the talks makes it increasingly evident that the infrastructure bill will pass this year. If not as part of a near-term reconciliation deal, then as an end-of-the-year consolation prize," said analysts at Height Capital Markets in a note Friday. Reconciliation refers to the process through which the bigger package is expected to advance.

"We are raising our odds of the infrastructure bill passing this year from 70% to 85% and raising the probability of a reconciliation bill passing to 65%," Height's team added.

The analysts noted that Pelosi said the "bid-ask spread on reconciliation is 'not trillions' and indications are that the White House is seeking a $2.1 trillion topline vs Manchin's $1.5 trillion, in addition to an agreement on subcategories such as family issues, health care and climate."

Similarly, analysts at Beacon Policy Advisors suggested that a final social-spending package "in the $1.8-2.5 trillion range will be heralded as a major victory" by Democrats.

"The wheels are in motion to get progressives and moderates to reach an agreement," the Beacon analysts wrote in a Friday note.

"This is all part of the process progressives and the Democratic Party are going through. We expect that process to culminate in passage of a reconciliation package by the end of the year, with the IIJA possibly coming sooner when a framework is reached," they added. The IIJA refers to the bipartisan infrastructure bill, which is known as the Infrastructure Investment and Jobs Act.

Pelosi has signaled that there should be an agreed-upon legislative framework for the larger package in order for there to be support among progressives for the smaller measure.

The bipartisan infrastructure bill, a key part of Biden's agenda, passed the Senate in a 69-30 vote on Aug. 10, but it still needs to pass the House and get signed into law by the president.

Biden is "going over there to make the case for his legislative agenda, which includes the infrastructure bill, and it includes his 'Build Back Better' agenda that would be in the reconciliation package," White House press secretary Jen Psaki told reporters on Friday, speaking just before the president's visit to Capitol Hill.

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, 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 grid modernization AND cybersecurity

David Smith 21, Marketing Director at Grid Forward, VP of Creative Services for Publitek North America, “The Grid in the Infrastructure Package – What’s In, What’s Out, What’s Next,” Grid Forward, 8/19/21, https://gridforward.org/the-grid-in-the-infrastructure-package-whats-in-whats-out-whats-next/

By now you are well aware that the U.S. Senate has passed a mammoth $1.2T bill investing in infrastructure. You may even know that the energy investments were around $100B – a lot of funds no doubt. What you may not have been able to sparse out in the 2700 pages and various steps is exactly what’s in there and what isn’t. Even with funding of this level, there are aspects of the energy grid that made it in the package and some that did not.

What’s In the Bipartisan Package

Resiliency

Right off the top of the energy title are a few sections that invest $11B over the next five years to fund deployments that harden our grid to increasing disturbances and disruptions. In 2020 alone, over 20 $1B+ events occurred impacting our lives and communities deeply, so this is a starting point for proactive investment to address the downside of these events. Additional aspects in the package invest in wildfire mitigation efforts including treatment of forest and new commission for coordinated planning. Sen Wyden of Oregon called for funding of $50B in his Disaster Safe Power Grid Act for wildfire work alone, so while this funding is a great start it is not enough to meet the needs of the grid.

Hydrogen

Much talk in the industry surrounds the concept of longer duration storage and one solution may come in the form of a dramatic expansion of hydrogen capacity. The bipartisan bill places a big bet with research, demos, and regional hubs totaling upwards of $10B in this area. It’s not quite as big as the investments that Europe is making in the area but it would be an unprecedented infusion of funds into this space in No. America.

Nuclear

There has been wide coverage of the inclusion of nuclear support in the infrastructure package. Funds to help the few remaining resources in development in this capital intensive sector are somewhat significant, however, for the future of this industry, even an investment of over $9B for demos and projects (including smaller scale modular) may only make a moderate impact.

Carbon Capture

Another area that got a rather significant boost in this package is carbon capture, sequestration, storage and utilization. Between demos and other funding support this area receives about $12B. Finding effective ways to use and store carbon is certainly going to play a central role in our future, but hopefully, this will not be an uneconomic use of extending assets on our system.

What’s In There but Only Somewhat

Modernization

One of the central aspects of the 2008 ARRA stimulus related to energy was a program that funded grid advancements via the smart grid investment grant projects. One section of the bipartisan bill rekindles this program with $3B in funding. What constitutes a smart, modern grid to help develop necessary grid flexibility has advanced quite a lot in the last 13 years, so this program may be a bit limited in scope but has a good starting place. The needs for the grid to instrument expanded flexibility have also advanced, so while this offers critical investment, significant expansion will be necessary for the near term.

Electric Vehicles

Much has been noted about how the package will transform electrified transportation. Yes, there is $7.5B for charging infrastructure, and yes there is another $2.5B for electrified buses (other portions are for other clean transit). But in the overall scheme of what it will take to transition the transportation system, this is a rather minor commitment.

Is the bipartisan package a major investment in our grid? YES! Is this something that the House should take up and pass as soon as possible? YES!

Bryce Yonker, executive director, Grid Forward

Energy Storage

Any energy insiders know that one of the keys to a smoother transition of our energy system is a dramatic expansion of energy storage. This package indeed includes $3B for second use and recycling demos and another $3B for supply chain materials support. However, by way of accelerating deployments of grid storage, this package actually does quite little. Even in the promising area of longer duration demos it only allocates a minor $150M and another section calls for one demonstration project.

Buildings and Efficiency

The overall level of funding and support for efficiency and buildings was somewhat limited in the package. Sure, there was the nearly $500M for revolving loan fund and building codes, and $500M for efficiency and renewables on schools, $3.5B for weatherization funds, and some funds for states that could go to these areas, but it overall was a rather small level of support. The concept of the first resource being the one you don’t build – Amory Lovins now famous negawatt – needs to remain a central part of the grid we are making.

Transmission

Political talking points play up how much support the package has for building out transmission infrastructure. There is a section that identifies critical transmission corridors, but it does not fund them. There is another section that creates a new authority with the ability to offer loans up to $2.5B to support transmission programs with early commercial interest. But this package does not fund, for example, long high-voltage transmission projects or create significantly streamlined processes for these areas moving ahead. Rolling up sleeves to get into the details on permitting and siting on transmission will remain critical and didn’t seem to substantially move in this package.

Cybersecurity

It really has been shocking under investment in grid cyber hygiene and hardening over recent years from federal resources and that cyber funding has not been part of any major energy legislation for over a decade. This package does have $250M that will help small, mostly rural utilities with the cyber capabilities and another $350M that will go quite a way to support other cybersecurity programs, but this is not an area to under invest in and it seems it was under invested in the package.

What’s Not In The Package

Demand-Side Flexibility

Demand response and wider demand side management capabilities are essentially not funded in the bi-partisan package. One section encourages utility demand side management considerations, but no real funding goes to bringing demand side resources on the grid. With the potential of FERC 2222 to bring aggregated demand side and distributed resources into markets, much more widely available and adopted controllable devices, and other market developments necessitating the type of resource coming on the grid, this is a bit striking.

Building Automation

Support to ensure that buildings have higher level controls and capabilities to respond to grid signals was also not in the package. See comments in demand side and DER integration above and below.

Distributed Resource Integration

It’s not a future state, but a current need, in which aggregated edge resources can provide significant value to the grid. Turning distributed assets (solar, storage, EVs, thermostats, generators, hot water heaters, and much more) into a resource requires new technology, evolved models, new partnerships and more. Support to help this transition is essential. When well established values can be equitably dispersed to owners and all grid customers (and for the benefit of the system itself), we will have reached a new milestone in the evolution of our energy system – the grid has not reached this place yet and investing to get there is critical.

Analytics & Digital Infrastructure

Real-time grid telemetry to better understand and optimize the dynamics of the system was essentially not in the package and is also not present in most parts of the grid. What’s the saying ‘you can’t manage what you don’t measure?’ Are there exciting things you can do with the roughly 70% of advanced meters that are now deployed? Absolutely! But additional investments are required to apply a suite of capabilities, largely powered by the cloud, to the grid and it’s time that we take them off the shelf and use them.

Renewable Energy

Remember that part of the grid that actually creates the energy we need to run our economy? There are a handful of minor areas of investment in targeted deployments and demonstrations here and there offering a few hundred million dollars. But this package does not help fund the build-out of clean energy resources, nor the grid capabilities to help facilitate it. Economics of resources like wind and solar in many jurisdictions are just so cost-effective that their additions have largely won out over recent years, but if we want a lower carbon society we have to dramatically expand renewable resources. And, importantly, we must build a grid that ensures affordable, reliable power gets to people and businesses when they need it. It seems that the reconciliation package may have central aspects to helping support the further build-out of clean energy resources, but if the IPCC report that came out this week didn’t wake you up to the needs I’m not sure what else may.

What’s Next

The House looks like it will be coming back from recess early later this month to continue work on the infrastructure package. Details of the reconciliation package may be together by mid-September. Early outlines show that of the $198B in energy, the clean energy spending may be a significant portion there and in the $67B for the environment, the clean energy accelerator may be a central feature there.

There are rumblings of the reconciliation package having aspects such as:

More significant support for electrified transportation

Tax and other incentives for storage, transmission and other grid infrastructure

Deeper support for efficiency, connected building and related areas

In Summary: Pass This Package

Is the bipartisan package a major investment in our grid? YES! Is this something that the House should take up and pass as soon as possible? YES! Would another $200B (or more) for energy and grid in a reconciliation package help move the functionality of our system ahead? YES! Should the reconciliation package take areas of grid modernization and flexibility further? ABSOLUTELY. Should the bi-partisan package wait and risk not coming across the line as the reconciliation package comes together? We say no, but understand that there are significant political dynamics in play. If the bi-partisan package falls through and so does the reconciliation package, support for the nation’s electric grid and the functionally we want (and really need) during the energy transition will be far below where it needs to be. It’s time that we dig into modernizing our energy system, let’s get this bill across the line and get to work.

#### Extinction

Benjamin Monarch 20, University of Kentucky College of Law, J.D. May 2015, LLM in Energy, Natural Resources, and Environmental Law and Policy from the University of Denver Sturm College of Law, Deputy District Attorney at Colorado Judicial Branch, and Term Member at the Council on Foreign Relations, “Black Start: The Risk of Grid Failure from a Cyber Attack and the Policies Needed to Prepare for It,” Journal of Energy & Natural Resources Law, vol. 38, no. 2, Routledge, 04/02/2020, pp. 131–160

In the industrial world, when a switch is flipped, we take for granted that it will produce light, boot a computer, illuminate a stadium or activate a power plant. We know, of course, that power losses can and do occur. Many of us have lit candles during a thunderstorm or brought out extra blankets when a blizzard takes down transmission lines. As of this writing, the most populated state in the United States, California, is experiencing rolling blackouts.1 Yet even in prolonged power outages, we expect that electricity will be restored and, consequently, life will return to normal. Perhaps we need ask, however, what if power cannot be restored in a timely manner? Concern is growing that in the not-too-distant future our electricity supply could be irreparably compromised by a cyber attack. The issue when considering a systemic grid failure of this nature is twofold: how did we reach a point where something so critical to routine life now presents an existential threat, and what can we do to mitigate the risk of a catastrophic grid attack?

This article posits that the emergence of cyber attacks on industrial control systems, as a means of war or criminal menace, have reached a level of sophistication capable of crippling those systems. This article argues that a new grid security policy paradigm is required to thwart catastrophic grid failure – a paradigm that recognises the inextricable link between commercial power generation and national security. In section 5, seven policy recommendations are outlined that may, in part, mitigate a future where grid attacks pose existential risk to nations and their citizenry. Those recommendations are: first, develop a comprehensive insurance programme to minimise the financial risk of grid disruption; second, train more cybersecurity professionals with particular expertise in industrial control systems; third, institute a federally mandated information-sharing programme that is centralised under United States Cyber Command; fourth, subsidise and/or incentivise cybersecurity protections for small to mid-size utilities; fifth, provide university grants for grid security research; sixth, integrate new technologies with an eye towards securing the grid; and, lastly, formulate clear rules of engagement for a military response to grid disruption.

The purpose of this article is to provide the reader with an introduction to this complex topic. It is the aim of the author to give orientation to this issue and its many branches in the hope that better understanding will animate further curiosity and, ultimately, positive action on the part of the reader. Although many skilled and earnest people work tirelessly to prevent a grid failure scenario, it is essential that more be added to their ranks each day. Advisors, engineers, regulators, private counsel to power generators, and many others who play roles in electric power production are crucial to this subject. So, while this article provides entrée to the topic of grid security, its long-term objective is to spur action by the entire energy-related community. In the end, no one is immune to consequences of grid failure and, therefore, everyone is responsible, in part, for promoting grid integrity.2 In this regard, lawyers who represent various actors in the energy sector are going to be faced with questions and potential legal risks of a magnitude that they have never experienced before.

1.2. Turning the power back on in a powerless world

‘Black start’, not to be confused with the term ‘blackout’, is the name given to the process of restoring an electric grid to operation without relying on the external electric power transmission network to recover from a total or partial shutdown.3 At first glance, this description is unremarkable, but it implies a disturbing catch-22 – how might one restore power if the entire external transmission network is compromised?

If an electric disruption occurs at a household level, some homes may be equipped with a modest gasoline generator to temporarily restore power. If a hospital loses power, it will almost invariably be resupplied by automatic, industrial-scale generators. These micro considerations hardly give anyone pause; they are hiccups on a stormy night or a snowy day. In other words, their ‘black start’ is a quick and effective process for restoring power. But what happens, at a macro level, when an electric grid supplying power to large portions of the United States goes black, or worse, what happens if all of the United States’ electric grids go down simultaneously?4 In that scenario, how might enough non-grid power be harnessed and transmitted to turn the United States’ lights back on? Moreover, how might such a catastrophe occur in the first place? Perhaps the more ominous question is not how, but whether or not we can survive such circumstances if they persist in the long term.

The United States electric grid (‘the grid’) is the ‘largest interconnected machine’ in the world.5 It consists of more than 7000 power plants, 55,000 substations, 160,000 miles of high-voltage transmission lines and millions of low-voltage distribution lines.6 The scale and complexity of the grid in the context of the modern digital world are beyond comprehension because within it are innumerable industrial control systems; incalculable connections to digital networks; millions, if not billions, of analogue or digital sensors; many thousands of human actors; and trillions of lines of programming code.7 Further complexifying the grid is that it is comprised of generations of technologies, stitched together in ways that are not inherently secure in a world of cyber threats.8 The vastness of the grid makes security of it challenging. Likewise, the vastness of the grid makes the opportunities for intrusion seemingly infinite.

By any measure, grid failure will unleash a parade of horrors. Stores would close, food scarcity would follow, communication would cease, garbage would pile up, planes would be grounded, clean water would become a luxury, service stations would yield no fuel, hospitals would eventually go dark, financial transactions would stop, and this is only the tip of the iceberg – in a prolonged grid failure social chaos would reign, once-eradicated diseases would re-emerge and, increasingly, hope of returning to a normal life would fade.9 The notion of complete grid failure, once relegated to science fiction comics or James Bond movies, is now not only possible but also one of the most pressing national security threats today.10

### OFF---T Courts

#### Courts cannot ‘expand’ antitrust law

George Bibikos 19, Founder of GA Bibikos LL.C., J.D. from Widener Commonwealth Law School; Supreme Court of Pennsylvania, “Commonwealth of Pennsylvania, Appelle, vs. Chesapeake Energy Corporation et al., Appellants,” <https://paforciviljusticereform.org/wp-content/uploads/2020/11/PCCJR-Chesapeake.pdf>

The court’s decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. See, e.g., State v. Philip Morris, Inc., Nos. 96122017 and CL211487, 1997 WL 540913, at \*6 (Md. Cir. Ct. May 21, 1997) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function.”). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot “expand coverage to subsume other remedies.” See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

#### Vote neg:

#### Limits—courts explode advantages into unpredictable precedents

#### Ground—mechanism dodges DA links

### OFF---T Private Sector

#### The ‘private sector’ is not controlled by the state

Thomas Brock 20, Investopedia, “Private Sector,” 12/25/20, https://www.investopedia.com/terms/p/private-sector.asp

What is the Private Sector?

The private sector is the part of the economy that is run by individuals and companies for profit and is not state controlled. Therefore, it encompasses all for-profit businesses that are not owned or operated by the government. Companies and corporations that are government run are part of what is known as the public sector, while charities and other nonprofit organizations are part of the voluntary sector.

#### State-created bodies are part of the public sector, not the ‘private sector’

Robert Mysicka 20, Commercial Litigation and Business Lawyer at the Law Firm McIntyre Mysicka LLP. He has written extensively on regulation and regulatory issues in Canada; Lucas Cutler is a lawyer with Grant & Dawn Lawyers Professional Corporation, Ottawa; Tingting Zhang is Assistant Professor of Organizational Studies and Analytics, Girard School of Business, Merrimack College, MA, USA, “Licence to Capture: The Cost Consequences to Consumers of Occupational Regulation in Canada,” Commentary - C.D. Howe Institute, no. 575, C.D. Howe Institute, 07/2020, p. 0\_1,0\_2,1-20

Many commentators, including Mysicka (2011) and others in the competition bar and in academic circles have criticized the RCD for being a vague, differentially applied and conceptually problematic doctrine. The fact that the current version of the Competition Act references the "common law" and therefore passes the buck back to the court system makes competition law weaker. It ensures that an existing patchwork of vague and inconsistently rendered decisions decides what regulations stand and what regulations are set aside. This should be changed. If competition policy is to be effective it must be capable of influencing how provinces legislate. If not, the only teeth it has is against private actors. And as this and other studies have found, competition is more at risk from the public and quasi-public sectors, not the private sector. This is particularly true since most professional bodies are born and persist at the provincial level by state-granted patent.

#### Vote neg:

#### Limits and ground---they explode the topic to infinite non-private actors that avoid core DAs like econ

### OFF---States

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should significantly increase prohibitions on anticompetitive business practices by the private sector by not deferring to the state action immunity doctrine.

#### State action solves, won’t be preempted, and causes federal follow-on

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Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### OFF---DOJ

#### The DOJ has prioritized combatting COVID-related fraud---increased focus strengthens healthcare cybersecurity and fraud protection

Anna Dykema et. al 21, Anna graduated Order of the Coif from University of Denver Sturm College of Law, Tom McSorley, advises clients on the intersection of law, technology, national security, and foreign policy, Christian Sheehan, law clerk for the Honorable D. Michael Fisher on the US Court of Appeals for the Third Circuit, “DOJ Gives the First Glimpse into FCA Enforcement Priorities Under the Biden Administration—Some Expected, Others Less So”, <https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2021/03/doj-gives-glimpse-into-fca-enforcement-priorities>, March 4th, 2021

In a recent speech, Department of Justice (DOJ) Acting Assistant Attorney General Brian Boynton provided the first glimpse into DOJ's False Claims Act (FCA) enforcement priorities under the Biden Administration. While much of the speech predictably focused on pandemic-related fraud and opioid enforcement efforts, a few measures announced by the AAG were less expected. In particular, AAG Boynton highlighted DOJ's increased focus on violations of cybersecurity requirements and made clear that FY 2020's increase in cases brought directly by DOJ is a trend we should expect to continue. Unsurprisingly, pandemic and opioid-related fraud top DOJ's priority list. The AAG anticipated that the FCA will be a primary enforcement vehicle for what he called the "inevitable fraud schemes" stemming from COVID-19 relief programs, including the CARES Act and loans through the Paycheck Protection Program (PPP). As we previously reported, just last month, DOJ announced the first civil settlement involving PPP-related fraud allegations—likely the first of many. The FCA will also continue to be one of the primary enforcement tools to hold companies liable for improperly promoting the sale and use of opioids. Opioid-related enforcement produced a blockbuster recovery earlier this year when DOJ announced in October 2020 a $3 billion-plus FCA settlement with Purdue Pharma (part of an $8 billion global criminal and civil settlement). AAG Boynton also explained that we are likely to continue to see more cases brought directly by DOJ. DOJ's FY 2020 stats showed that DOJ filed more direct cases last year than ever before. We now have a better understanding of why that is. AAG Boynton stated that DOJ is looking to "expand its own efforts to identify potential fraudsters" by leveraging its "sophisticated data analytics" system. This is not the first instance of DOJ aiming to enhance its data analytics. You may recall that last year, DOJ announced that it was initiating a data-driven approach to PPP enforcement and investigation. AAG Boynton also explained that DOJ is using data analytics "to identify patterns across different types of health care providers – giving us a way to identify trends and extreme outliers." He said that the data allows DOJ to "see where the highest risk physicians are located in each state and federal district, and how much they are costing" the government. Expect more to come on this front. Also noteworthy from the AAG's speech was DOJ's heightened focus on using the FCA to police compliance with cybersecurity requirements. DOJ has already started to lay the groundwork for enforcement in this area. In the much-discussed decision of United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc., No. 15-cv-2245, 2019 WL 2024595 (E.D. Ca. May 8, 2019), the court upheld the government's enforcement action against a firm that represented it was in compliance with the cybersecurity standards in its Department of Defense (DoD) contract when it allegedly knew these representations were inaccurate. Subsequently, in July 2019, another contractor agreed to an $8.6 million settlement to resolve allegations that it sold cybersecurity-vulnerable software to federal, state, and local government agencies in violation of contractual requirements. This was the first reported settlement based on FCA allegations related to cybersecurity noncompliance—but it is unlikely to be the last.

#### But resource constraints limit cases--the plan trades-off with FCA enforcement

Alex Kantrowitz 20, Founder at Big Technology | Author of ALWAYS DAY ONE: How The Tech Titans Plan To Stay On Top Forever, “It’s Ridiculous.’ Underfunded FTC and DOJ Can’t Keep Fighting the Tech Giants Like This”, <https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators>, September 17th, 2020

As politicians, the press, and the public scrutinize the tech giants and grow wary of their power, the most important organizations tasked with restraining them — the U.S. regulatory agencies — aren’t getting enough funding to do the job. “The agencies are severely resource-constrained,” Michael Kades, an-ex FTC trial lawyer who spent 11 years at the agency, told Big Technology. The Federal Trade Commission and Department of Justice’s antitrust division have a combined annual budget below what Facebook makes in three days. The FTC runs on less than $350 million per year, the DOJ’s antitrust division on less than $200 million. Facebook made $18 billion last quarter alone. The funding disparity between the tech giants and their regulators leads to an unbalanced fight, current and ex-staffers said: The agencies can’t investigate the tech giants to the extent they’d like. They might shy away from complex cases fearing a resource-draining battle. And when they investigate the tech giants, they often see former colleagues with intricate knowledge of their strategy and ability to act (or lack thereof) representing these companies. Without significant budget increases, the tech giants may well continue to act unrestrained with little fear of repercussions. “DOJ is under-resourced, FTC it’s ridiculous,” one ex DOJ-staffer told Big Technology. This doesn’t mean these agencies are entirely hamstrung; they can typically marshall the resources to bring a clear-cut case. “They want to win,” one ex-FTC official said. “If it's really egregious, and they find that in discovery, the attorneys are going to put a case together and go after it.” But when you can only take up a limited number of cases due to resource constraints, things inevitably slip through. “When I was there, the privacy wing had maybe 50 people, and that's probably generous. That's lawyers, support staff, everyone,” Justin Brookman, the former policy director at the FTC’s office of technology research and investigation, told Big Technology. “If they were to bring a case, that would tie up half the resources of the group. And they had two litigations ongoing and that took up most of everyone's time.” The agency’s budget has barely increased since Brookman left in 2017, while the tech giants have added trillions of dollars to their market caps. Inside the FTC and DOJ, employees are aware of the tech giants’ ability to fight, and the corporations’ budgets tend to live inside their heads. “Facebook will have the ability to raise every single issue, if they want to,” Kades said. “It doesn't have to be a winner, doesn't have to be close to winner. If they wanted to take this position in litigation, they can make every procedural maneuver difficult, they can not cooperate on discovery, they can fight on scheduling, they don't have to win even half of those, but it would just suck up resources.” The ability to do this, not even the action itself, can impact regulators’ thinking. Agency staffers are typically mission-driven and knowingly work for salaries below private-sector rates, but the resource-rich tech giants are now poaching directly from agencies at a rate remarkable even for Washington’s revolving door between the private and public sector.

#### Cyberattacks threaten the entire healthcare sector--weakness poses risk to telehealth, public trust, and digital infrastructure

Tracy Batsford 21, Owner and President at Communication Anglaise, 15 years’ experience in sales and marketing in the high-tech sector, “How Do Cyber Attacks Happen in Hospitals and Healthcare Clinics?”, <https://hellohealth.com/blog/how-do-cyber-attacks-happen-in-hospitals-and-healthcare-clinics/>, April 15th, 2021

As healthcare institutions grapple with the fight against COVID-19, another fight is also far from over: cyberattacks against hospitals and clinics. According to Cybersecurity Ventures, the healthcare industry, which is a $1.2 trillion sector, will fall victim to two to three times more cyberattacks in 2021 than the average numbers for other industries. Even more worrisome: Black Book Market Research has indicated that: “more than 93 percent of healthcare organizations have experienced a data breach over the past three years, and 57 percent have had more than five data breaches during the same time frame.” Threat analysts from cybersecurity company Emsisoft Ltd. told the Wall Street Journal that medical testing laboratories, medical device manufacturers and carriers of critical medical supplies are also facing a dramatic increase in threats to their cybersecurity. The dramatic increase in attacks compromises both patient safety and the public’s trust in the healthcare sector. But the questions remain: why do cyberattacks happen in hospitals and healthcare clinics? What are the strategies that can help them mitigate the devastating impact of a breach. Why Should Hospitals Care About Cybersecurity? Threats to hospitals’ cybersecurity cost the healthcare sector millions each year. A case in point: Universal Health Services, one of the largest hospital chains in the United States, was attacked late last September, which ended up costing the company $67 million last year. Due to ransomware, which shut down computer systems for medical records, pharmacies and labs across 250 facilities, ambulances had to be diverted to other hospitals and critical surgeries ended up being postponed as IT experts raced to restore infrastructure and even connected medical devices. Unfortunately, cases like Universal Health Services are far too common. Cyberattacks costs hospitals millions each year In a recent IBM report, healthcare clinics and hospitals incur the highest average security breach cost of any industry. In fact, cyberattacks can cost one institution US $7.13 million per incident—and even higher. Take Sky Lakes Medical Center, located in Oregon. In October 2020, the center was dealing with a massive surge in COVID-19 hospitalizations when hackers sent malware to the institution’s network, leaving staff without access to medical records and equipment. One month after the attack, the associated costs of building the network with new servers and computers as well as lost revenue from the incident was estimated at US $10 million. Comparitech analysts estimate that ransomware attacks on US healthcare organizations cost them US $20B in 2020 alone. The company indicates that there has been an increasing trend in double extortion attempts in which cybercriminals not only deny access with a ransom message but also call patients with proof of the data collected. This new trend is often forcing hospitals and clinics to pay out the ransom amounts, which incentivizes future cyberattacks. Patients Put at Risk The barrage of cyberattacks on healthcare organizations is not just about their bottom lines. A 2020 Cybersecurity Survey from the Healthcare Information and Management Systems Society (HIMSS) offered somber news for hospitals and clinics that didn’t invest substantially more in their cybersecurity: “Historically, hackers have threatened the confidentiality of medical information through data breaches where they obtain Social Security numbers or financial data. But if hackers threaten the integrity of medical data, such as by changing laboratory values or hacking a remote medical device, that could pose a very real danger to patients,” said Rod Piechowski, health IT expert and Vice-President of Thought Advisory at the HIMSS, during an interview about the study. Even more disturbing is how sophisticated cyberattacks can become, doing more harm on patients. For example, in a bid to raise awareness in cybersecurity weaknesses in medical equipment and devices, researchers in Israel were able to create a malware capable of adding or removing tumors in CT and MRI scans—tricking radiologists into providing false diagnoses. In 87% of the cases in which the malware removed cancerous modules, doctors concluded very sick patients were actually healthy. The Israeli research team said that the malware could be used for all types of health issues, including brain tumors, heart disease, blood clots, spinal injuries, and more. One cyberattack alone can cost a healthcare organization at least US $7.13 million. Why is The Healthcare Sector a Primary Target for Cyber-Attacks? The healthcare sector is notorious for being a target for cyberattacks. Many hospitals and clinics rely on outdated systems and infrastructure with minimal resilience to cyberattacks. On the other side of the spectrum, more modern healthcare facilities are increasingly reliant on networked digital infrastructure as well as medical equipment and devices that use IoT sensors to connect them to centralized networks. While electronic data sharing and virtual services can facilitate and accelerate patient care, they are still vulnerable to security breaches that affect how they operate. In these cases, cyberattacks can not only access the equipment’s configurations and settings—but also the hospital networks to which they are connected. Another reason healthcare organizations are a goldmine for cybercriminals is their financial resources. In privatized healthcare networks, hospitals and clinics often have substantial financial resources to actually pay ransomware, for example. In the public sector, the situation can be the complete opposite; with lack of financial resources, hospitals and clinics rely on legacy technology that cannot withstand attacks. Furthermore, healthcare organizations have been slow to adopt cybersecurity best practices and technologies, according to the Harvard Business Review. In IBM’s aforementioned survey, just 23% of hospitals and clinics have fully deployed security automation tools. The HIMSS survey showed that healthcare organizations dedicated only 6% or less of their IT budgets to cybersecurity, making them very much prone to hackers. Cybercriminals also don’t just “attack” IT infrastructure. They also target healthcare professionals. This approach is three-pronged. For one, human error accounts for 95% of security breaches. This means that hospital or clinic employees’ unintentional actions, such as downloading a malware-infected attachment or failing to use a strong password, can pave the way for a breach. This situation is exacerbated by the fact that many healthcare professionals in human resources, accounts payable and other departments are working from home. As Jeff Brown, CEO of the cybersecurity company Open Systems, said in a recent interview with Silicon Republic: Cybercriminals “are currently taking advantage of the thousands of healthcare workers in human resources, accounts payable and other departments who are working from home due to the pandemic.” They are also targeting healthcare professionals conducting telemedicine at home. These remote employees all have to connect to applications and data to carry out their day-to-day tasks. Without the proper cybersecurity measures and training in place, hackers can easily penetrate entire hospital networks—either to steal financial, employee or patient data, or hijack accounts for ransom.

#### Strong healthcare resiliency solves everything

Royi Barnea et. al 20, Barnea is a Business Development Manager and Sales Expert with more than 20 years of experience in the Israeli and US Market, Yossi Weiss , Prof, Head of Department of Health Sciences School, Prof. Joshua Shemer chairs the Assuta Medical Centers network in Israel, “Health: an essential component of national resilience”, <https://www.joghr.org/article/14134-health-an-essential-component-of-national-resilience>, August 17th, 2020

The term “national resilience” originally referred only to a country’s military capacity, but was later expanded to include political-psychological aspects.5 According to Friedland, “national resilience” is the ability of a society to withstand adversities and crises, such as natural disasters or national security events (wars or terror attacks) in diverse realms by implementing changes and adaptations without harming society’s core values and institutions.6,7 Kimhi and Eshel have suggested that community resilience and national resilience are overlapping expressions of public resilience that provides its members with social identity, a sense of belonging and security.5 Since the beginning of the second millennium, there has been a growth in the number of policy documents relating to national resilience published by various organizations and countries (Table 1). These definitions imply that national resilience is usually perceived in terms of well-being and sustainability as well as in terms of risk management which has grown from the need of countries to deal with security threats such as terrorism, economic crises (e.g. the 2008 global economic crisis), and more prevalent natural disasters due to climate change. In 2011, the OECD started a program to measure well-being in various countries. Well-being measures include household, income, employment, community, education, environment, civic obligations, health, satisfaction and life, security and life-work balance. In addition to measuring well-being, the OECD has published an agenda for the advancement of sustainability in the various countries – the ‘2030 Agenda for Changing the World’. Evaluation of national policies for strength, well-being and sustainability of the 38 OECD countries as well as India and China has shown that determinants of resilience included first and foremost health (100% of countries), the economy (in 88% of countries), the environment (68%, including, agriculture, forestry, fishing, and conservation of natural resources), personal security (64%), quality of employment (64%), industry, infrastructure and accommodation (52%), civil and government involvement (52%), information, communication and innovation (48%), education and skills (44%), energy (40%), transportation and logistics (24%), plans for land utilization (12%) and leisure, culture and community (12%). In Israel, following the financial crisis of 2008, a government resolution was put forth to develop indicators and metrics of well-being, sustainability and national resilience that would complement the national accounting system and the gross domestic product. A team of professionals from the Central Bureau of Statistics, the Prime Minister’s Office, the National Economic Council and the Ministry for Environmental Protection established a list of 72 quality-of-life metrics in nine areas: income and capital, civil involvement and government, employment and balance of work and leisure, education and skills, environment, health, personal and social welfare, personal security, and infrastructure and housing.12 The metrics are published annually by the government statistician in order to help and formulate up-to-date policies. Health as a determinant of national resilience A health component is included in all three levels of resilience suggesting that health is an important determinant of resilience at all societal levels. Bonanno et al. defined “personal resilience” as the ability of the individual to function in a stable manner after traumatic events and to maintain healthy functioning over time.12 Community resilience requires the community’s constant and evolving ability to respond to its vulnerability and develop capabilities that help the community (1) prevent, meet and reduce the stress of a health incident; (2) to recover in a manner that will restore the community to a state of independence and at least the same level of health and social functioning after a health incident; (3) using knowledge from past experience to strengthen the community’s ability to withstand the next health incident.13 Thus, community resilience includes the protection of human life, health, economy and preparedness of infrastructures and the environment for coping. There are those who argue that community resilience is also related to perceived social support, to the strength of social connections, and to the physical and mental health of the public.1 According to Wulff et al., community resilience stems from good health and strong health systems, improved health status of populations, and the ability to maintain a healthy physical and mental state of individuals and communities and to deal with major physical and mental changes.14 Consequently, health systems can be regarded as the key to promoting community health resilience. In line with this premise, the WHO contends that the main factor that helps to create strength and resilience is a strong health system that provides a comprehensive response to all citizens. Health resilience is established by improved health status, strong health systems, good health outcomes, and is measured in the ability to preserve the physical, mental and social condition of the community and detail it in the course of large-scale changes.15 The WHO has identified six building blocks to strengthen health systems and increase resilience by improving health outcomes and accessibility as well as the health needs of the population, managing the individual’s economic and social risks, and improving the efficiency of the system. These building blocks relate to public and private resources and include health services, personnel, information, access to medical equipment, vaccines and the quality and safety of technology, finance and coverage, governance and leadership.15 Strengthening the health system by improving health outcomes, such as health indicators, response to health needs, protection from economic and social risks (insurance coverage) and efficiency of the system should increase the strength and resilience of the community and the nation.

### OFF---Distinguish CP

#### The United States federal government should hold that states have unfettered regulatory authority to experiment with controls of emerging tech and that Parker immunity does not implicate this.

#### The CP solves advantage 2 without affecting antitrust

Daniel B. Rice 19, Associate at the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, and Jack Boeglin, Associate at Covington & Burling LLP, “Confining Cases To Their Facts”, Virginia Law Review, June 2019, 105 Va. L. Rev. 865, Lexis

Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of "confining a case to its facts," courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it repudiates the legal principle underlying a case, replacing it with a new, "correct" principle. 5 In this respect, confining is very much like overruling. But unlike overruling, confining preserves the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined. 6 Confining thus splits a doctrinal area in two. When a confined case's facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled. 7

[\*868] How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts' desire not to disturb reliance interests ordinarily functions as a brake on legal correction. 8 Confining eases off this brake by enabling certain reasonable expectations - those formed in reliance on the particular facts of the confined case - to remain unaffected by a principle's repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction and avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court's avowed commitment to overruling a case only when it can articulate a "special justification" for doing so - one that transcends mere disagreement with the case's reasoning. This requirement has not been understood to apply to confining, 9 even though confining eviscerates everything a case stands for except its precise result. 10 Similarly, although each federal [\*869] court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining. 11 By labeling these deviations from precedent "confining," in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court's prohibition on "prospective overruling" - i.e., continuing to treat a case as good law only with respect to conduct predating its overruling. 12 During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court's doctrinal course-corrections. 13 The Court's retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations. 14 But this is precisely what happens with confining. 15 This discrepancy - oddly - appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: "Supreme Court Overrules Smith v. Jones" or "Supreme Court Confines Smith v. Jones to Its Facts." Confining's relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A [\*870] confining judge can say "with a straight face, "I didn't vote to overrule it. I simply limited the earlier decision to its facts.'" 16

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable - and strangely underexplored - threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of stare decisis. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public's ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority. 17 The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in any respect - even if the cases cannot be distinguished in any principled manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as "good law" in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself. 18

### OFF---Multilat

#### The United States federal government should establish a framework for contingent international cooperation that significantly increase prohibitions on anticompetitive business practices by the private sector by narrowing the state action immunity doctrine.

#### The CP’s framework multilateralizes antitrust---explicit reciprocity bypasses generic barriers

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B. Between Contracts and Networks: Frameworks

Another dichotomy that dominates the integration of competition policy pertains to the forms of internationalization, which in the competition policy space have generally been dominated by contract-style treaties on the one hand and by open networks on the other.166 Between these two models lies what seems to be an under-utilized alternative, which I call a “framework for contingent cooperation.”

[FOOTNOTE] 166 This binary view dominates the literature. See, e.g., Edward M. Graham, “Internationalizing” Competition Policy: An Assessment of the Two Main Alternatives, 48 Antitrust Bull. 947, 949 (2003) (“[M]echanisms [for antitrust internationalization] range from bilateral treaties creating arrangements for cooperation between or among national competition law enforcement agencies to informal working arrangements among agencies.”); Eleanor M. Fox, International Antitrust and the Doha Dome, 43 Va. J. Int’l L. 911, 912 (2003) (contrasting “horizontalism” with “globalism”); Anu Piilola, Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation, 39 Stan. J. Int'l L. 207, 247 (2003) (“Rather than drafting overarching multilateral agreements on antitrust laws, cooperation efforts in the immediate future are more likely to succeed in managing existing diversity and promoting voluntary convergence based on approximation of domestically applied standards. Networks of antitrust authorities are well-suited to facilitate this process of cooperation and voluntary convergence.”). [END FOOTNOTE]

A “framework” in the sense that I am using that term is a facilitative arrangement that does not constitute a treaty under international law,167 and which does not carry the charge of international legal obligation, but which involves an exchange of specific and reciprocally contingent commitments by participant jurisdictions to engage in mutually beneficial conduct. Specifically, each party states that it will extend certain benefits to each other party so long as each other does likewise; the parties may also create supplementary mechanisms to monitor and/or adjudicate compliance with these commitments.168

A framework of this kind is not a treaty: it is what Kal Raustiala calls a “pledge,”169 and what Charles Lipson calls an “informal” agreement,170 involving no legal obligation, and it involves no commitment of the parties’ reputation for law-abiding behavior.171 On the other hand, it differs from an open, information-sharing network because it precisely specifies behavioral commitments, and because each of the parties shares an understanding that concrete consequences will promptly follow—exclusion from the benefits provided by others—if its behavior materially deviates from the terms of the commitment.172 A framework is therefore essentially a specific declaration of intention to engage in conduct that benefits others, contingent upon parallel behavior by other participating states, without obligatory status under international law.

This is, in some sense, the direct opposite of the approach typically taken in competition policy chapters in trade agreements. The provisions of competition policy chapters partake of the substance of treaty law, but are generally framed in broad terms rather than specifics, and generally do not reflect a shared understanding that specific consequences will attend breach. By contrast, frameworks do not bind in international law, are framed in specific terms than aspirational generalities, and reflect an understanding that the benefits of cooperation will be withdrawn in the event of violation.

Contingent cooperation thus depends for its effectiveness primarily upon three important dynamics. The first and most important of these is the rationality of strategic cooperation. A familiar mainstream view holds that to a significant extent states behave in international society in ways that rationally serve their interests.173 And when cooperation over a series of interactions is overall in the interests of each member of a group, but when each member faces a rational incentive to defect from the terms of cooperation in individual cases, familiar economic theory teaches that a strategic cooperative equilibrium can be maintained among the parties.174 In contingent cooperation, each party understands that if it defects materially from the terms of the framework, the other participants will withdraw the excludable benefits of cooperation, and this provides the incentive to comply.175

Contingent cooperation can be made more stable by the introduction of certain structures designed to monitor compliance (just as with a cartel among private companies).176 This might among other things involve the creation of a central “facilitator” that is responsible, in a general sense, for obtaining, collecting, and processing information necessary to sustain a cooperative equilibrium.177 Depending on the purpose and scope of the cooperation project, this could include (for example): reviewing the text of laws, regulations, and policy documents for consistency with the terms of the framework; conducting peer-review-style evaluations and certifications; hosting voluntary dispute resolution processes, including mediation and/or arbitration, to determine whether and when the framework has been violated; or even receiving and handling complaints of violations ombudsman-fashion (i.e., receiving the complaint, giving the subject of the complaint an opportunity to respond, and publishing findings and conclusions). A central facilitator could also go beyond a policing function and offer a common forum for certain forms of cooperation and information sharing. The nature of such broader functions, and the extent to which they would be useful or desirable, would depend on the nature and purpose of the cooperation.

The second dynamic that powers contingent cooperation is the normative appeal of the project itself. The point here is not unlike what Gráinne de Búrca calls “mission legitimacy”: the normative force of the underlying purpose of a cooperative project, and specifically the power of that normativity to secure the acceptance and cooperation of those who participate.178 Parties joining projects of contingent cooperation can be expected to be in some sense self-selecting: they join such endeavors because, in part, they are genuinely committed to promoting and achieving the ends that the project represents, and they embrace the project of cooperation as worthwhile.179 It may sound a little naïve to suggest that a project of cooperation may be more likely to “stick” if it has some normative appeal to the participating polities, but legal scholarship has long recognized that states do what they undertake to do more often than strictly rational analysis would predict.180 And I think the proposition that genuine commitment to a goal can contribute to compliance is in truth somewhat less naïve than the converse idea that compliance is just as likely without it.

The third source of a framework’s effectiveness is to be found in the acculturative and socializing effects of interaction in an environment in which values and practices are shared and reinforced as normative, and in which attention is paid to the existence and nature of violations. There is a rich and complex literature on the ways in which states, state actors, and the individuals within them may be “socialized” or “acculturated” by repeated engagement with others through common institutions and shared environments of normativity, eventually contributing to the emergence of obligations with genuine normative force.181 Jutta Brunnée and Stephen Toope have pointed out ways in which the force of legal obligation itself arises from shared communities of practice grounded in social reality and shared understandings, not formal commitments.182 As they put it, “[s]tability may be aided by explicit articulation of a norm in a text, but it is ultimately dependent upon [an] underlying shared understanding and a continuous practice of legality.”183

Participation in an endeavor of contingent cooperation may help to engender the development of such understandings and practices, and these may contribute to the effectiveness of the framework. In the longer term, this may even result in the creation of a legal instrument. But this progression is not necessary for acculturation to exert a reinforcing effect: for, as Anu Bradford accurately notes, there is no reason to think that “the pathway from nonbinding to binding rules” is an inevitable or even a natural one.184

The distinctive value of a framework is that it provides a low-cost way for jurisdictions to explore and participate in possible arrangements of mutual benefit that depend upon shared concrete understandings regarding future behavior, but without bearing the burden of an obligation under international law, without running the reputational risk of having to break a treaty, and without facing the domestic hurdles (or political scrutiny) that a treaty would necessitate.185 Use of such a framework may help to reduce the concerns grounded in political morality that might otherwise attend inter-jurisdictional action in sensitive areas:186 to use a term I have coined elsewhere, as contingent practices from which states could withdraw at any time, frameworks would benefit from considerable resources of “exit legitimacy.”187

Frameworks are not suited to every application. They seem particularly apt for types of international cooperation that generate excludable benefits for other participants and can be reasonably well monitored: in the sphere of competition policy, for example, this would include commitments to provide nondiscriminatory access to procurement markets as well as many forms of antitrust cooperation (including cooperation with one another’s investigations, coordination of enforcement activity, the operation of joint filing systems for merger review and cartel leniency programs, and so on). Certain guarantees of nondiscriminatory treatment by SOEs could also be extended on a selective basis. On the other hand, contingent cooperation is much less suitable for projects that require strong and highly credible guarantees of commitment from the participants (in which case a traditional treaty-contract would seem more appropriate188) or groups of parties still lacking the prerequisite agreement on the terms and ambit of desirable cooperation. Nor is it suitable in the absence of sufficient confidence in the ability or incentive of other parties to deliver on their commitments: in these cases, open dialogue and information exchange through a network would seem preferable. Nor, obviously, is it a good fit for projects in which the benefits of cooperation are non-excludable.189 To pick an obvious example, contingent cooperation would not recommend itself as a natural choice for an international project to introduce SOE discipline: the benefits are non-excludable (there is no obvious way to withdraw them selectively in the event of defection) and compliance is very difficult to monitor, so the use of a framework is unlikely to make much of a contribution.190

#### The plan sends a protectionist shockwave that ends free trade

Allison Murray 19, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. [\*118] Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders' best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law. 3So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States ("U.S."), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally. 4To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes. 5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization ("WTO"), "once formal trade barriers come down, other issues become more important." 7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

#### Nuclear war

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Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

### OFF---Biz Con

#### The plan decimates biz con

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable shifts ruin biz con AND overall growth

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### Decline cascades---nuclear war

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Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

## Innovation

### Innovation Turn---1NC

#### Can’t affect competion with China---there’s no spillover ev OR brink for how much is required.

#### Antitrust stifles innovation in the healthcare sector

Christopher L. White 21, Chief Operating Officer, General Counsel and Secretary of the Advanced Medical Technology Association (AdvaMed). Mr. White serves as the Association’s Chief Legal Officer and manages AdvaMed’s Legal Committee to develop and promote legal policy positions enhancing patient access to medical technology. Mr. White also leads the Association’s global working groups on legal policy and compliance, including over 1500 in-house medtech lawyers, “FTC: When it Comes to the Medical Technology Industry – First, Do No Harm”, <https://www.advamed.org/2021/08/03/ftc-when-it-comes-to-the-medical-technology-industry-first-do-no-harm/>, August 3rd, 2021

For many years, the Federal Trade Commission (FTC) has devoted more time and resources to healthcare than to any other industry– including high tech. Today, there are calls across the political spectrum for both the FTC and the Department of Justice (DOJ) to apply antitrust laws to reign in the nation’s largest tech/digital platform companies, and even to break them up. The nomination and appointment of Lina Khan to serve as chair of the FTC, and the recent nomination of Jonathan Kanter to serve as the DOJ’s Assistant Attorney General for Antitrust, may signal that President Biden heeded those calls. Notably, those calls have also been joined by those advocating for tougher antitrust enforcement in other industries, including healthcare. But, as medtech and the health care system drive us closer to the pandemic’s end, reflexive and ill-conceived antitrust policy targeting medical technology companies risks thwarting innovation, foreclosing patient access to necessary technology, and reducing patient choice.

Chair Khan was appointed amid a flurry of enforcement actions targeting tech companies, including lawsuits filed by the DOJ against Google, the FTC’s case against Facebook, and numerous state antitrust cases against both companies. Heightened antitrust scrutiny particularly but not exclusively targeting the tech sector, looks to be gaining steam in the Congress too. U.S. Senators from across the aisle have proposed legislation that would make it more difficult for companies to make acquisitions, and chill investor interest in small companies.

It’s clear that robust enforcement of the antitrust laws is a top priority for the government, and tech companies are at the top of the list.

But not all “tech” companies are the same, and it would be a mistake to apply the same level of oversight across all industry sectors – especially to medical technology companies – which already face intense antitrust scrutiny. Continued innovation and growth by medical technology companies is vital for our healthcare system to continue to improve, and even maintain, the quality of care delivered to patients. Antitrust enforcement can promote competition, but it can also impede it, to the ultimate detriment of patients. What the medical device industry and patients need is smarter antitrust enforcement–not more antitrust enforcement.

The medical technology industry is flush with startups and smaller companies that depend on investors to succeed. In fact, the overwhelming majority of AdvaMed’s members are small companies. Mergers and acquisitions in this industry allow innovation to flourish and accelerate by providing smaller companies with the capital they need to grow and conduct research. Mergers of more established medical technology companies often result in synergies that spur more and faster innovation, manufacturing efficiencies, and allow the merged company to deliver lifesaving solutions and technology into the hands of more doctors and patients. These transactions foster patient choice and open greater patient access to the best medical devices, treatments, and cures for their individual needs.

Ill-conceived, protracted antitrust investigations into these mergers can impose enormous costs on the parties, and even quash a promising transaction or venture that would have been a win for caregivers and patients. The potential threat to procompetitive mergers and to patients is now even greater with the FTC’s July 1 decision to make it easier for staff to launch a merger investigation and force merging parties to respond to compulsory process, even with little reason to believe that the merger might harm competition.

Ultimately, the FTC’s mission is to protect competition by ensuring consumer choice. In health care, the patient is the ultimate beneficiary and consumer, so the best way to promote competition is to ensure that the patient has ample choice in selecting the best healthcare technology and care for them.

Ratcheting up antitrust merger enforcement against medical technology companies risks chilling procompetitive, pro-patient transactions and causing investor flight, resulting in less innovation, and reducing patient choice.

The government is on track to bring the full force of the nation’s antitrust laws to bear against the nation’s major technology/digital platform companies such as Google, Facebook and perhaps Amazon and others. In doing so, we must be careful not to sweep within the scope of that heightened scrutiny medical technology companies that have already been under the FTC’s watchful eye for many years, and whose business models raise none of the digital platform antitrust issues that seem to be the government’s primary focus. Otherwise, the FTC risks stifling innovation and growth in an industry that plays a vital role in our nation’s healthcare system, to the substantial detriment of patients.

#### Federal enforcement that allows anticompetitive behavior circumvents---they can’t solve agencies.

### AT: China

#### 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.

### AT: Pandemics

#### Disease can’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

## FISM

### Top Level---1NC

#### 1---No spillover---no ev says antitrust immunity prevents state regs over tech

#### 2---No emerging tech impact

Caitlin Talmadge 19, Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. "Emerging Technology and Intra-War Escalation Risks: Evidence from the Cold War, Implications for Today." https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1631811

Yet the future relationship between emerging technologies and escalation may not be as straightforward as these statements imply. The debate about emerging technologies tends to portray them as a powerful independent variable – an exogenous factor that is both necessary and sufficient to cause conflict escalation. This paper argues instead that emerging technologies are more likely to function as intervening variables; they may be necessary for escalation to happen in some cases, but they alone are not sufficient, and sometimes they will not even be necessary. The strongest drivers of escalation will actually lie elsewhere, in the realms of politics and strategy. As a result, concern about new technologies is warranted, but determinism is not. An overemphasis on the dangers of technology alone ignores the critical role of political and strategic choices in shaping the impact of technology, and also could lead to a misplaced faith in arms control or other means of trying to stuff the technological genie back in the bottle.5

#### 3---AI Impact is wrong

Stephen **Pinker 18**, professor of psychology at Harvard, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress”

Prominent among the existential risks that supposedly threaten the future of humanity is a 21st-century version of the Y2K bug. This is the danger that we will be subjugated, intentionally or accidentally, by artificial intelligence (AI), a disaster sometimes called the Robopocalypse and commonly illustrated with stills from the Terminator movies. As with Y2K, some smart people take it seriously. Elon Musk, whose company makes artificially intelligent self-driving cars, called the technology “more dangerous than nukes.” Stephen Hawking, speaking through his artificially intelligent synthesizer, warned that it could “spell the end of the human race.”19 But among the smart people who aren’t losing sleep are most experts in artificial intelligence and most experts in human intelligence. The Robopocalypse is based on a muzzy conception of intelligence that owes more to the Great Chain of Being and a Nietzschean will to power than to a modern scientific understanding.21 In this conception, intelligence is an all-powerful, wish-granting potion that agents possess in different amounts. Humans have more of it than animals, and an artificially intelligent computer or robot of the future (“an AI,” in the new count-noun usage) will have more of it than humans. Since we humans have used our moderate endowment to domesticate or exterminate less well-endowed animals (and since technologically advanced societies have enslaved or annihilated technologically primitive ones), it follows that a supersmart AI would do the same to us. Since an AI will think millions of times faster than we do, and use its superintelligence to recursively improve its superintelligence (a scenario sometimes called “foom,” after the comic-book sound effect), from the instant it is turned on we will be powerless to stop it.22 But the scenario makes about as much sense as the worry that since jet planes have surpassed the flying ability of eagles, someday they will swoop out of the sky and seize our cattle. The first fallacy is a confusion of intelligence with motivation—of beliefs with desires, inferences with goals, thinking with wanting. Even if we did invent superhumanly intelligent robots, why would they want to enslave their masters or take over the world? Intelligence is the ability to deploy novel means to attain a goal. But the goals are extraneous to the intelligence: being smart is not the same as wanting something. It just so happens that the intelligence in one system, Homo sapiens, is a product of Darwinian natural selection, an inherently competitive process. In the brains of that species, reasoning comes bundled (to varying degrees in different specimens) with goals such as dominating rivals and amassing resources. But it’s a mistake to confuse a circuit in the limbic brain of a certain species of primate with the very nature of intelligence. An artificially intelligent system that was designed rather than evolved could just as easily think like shmoos, the blobby altruists in Al Capp’s comic strip Li’l Abner, who deploy their considerable ingenuity to barbecue themselves for the benefit of human eaters. There is no law of complex systems that says that intelligent agents must turn into ruthless conquistadors. Indeed, we know of one highly advanced form of intelligence that evolved without this defect. They’re called women. The second fallacy is to think of intelligence as a boundless continuum of potency, a miraculous elixir with the power to solve any problem, attain any goal.23 The fallacy leads to nonsensical questions like when an AI will “exceed human-level intelligence,” and to the image of an ultimate “Artificial General Intelligence” (AGI) with God-like omniscience and omnipotence. Intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains.24 People are equipped to find food, win friends and influence people, charm prospective mates, bring up children, move around in the world, and pursue other human obsessions and pastimes. Computers may be programmed to take on some of these problems (like recognizing faces), not to bother with others (like charming mates), and to take on still other problems that humans can’t solve (like simulating the climate or sorting millions of accounting records). The problems are different, and the kinds of knowledge needed to solve them are different. Unlike Laplace’s demon, the mythical being that knows the location and momentum of every particle in the universe and feeds them into equations for physical laws to calculate the state of everything at any time in the future, a real-life knower has to acquire information about the messy world of objects and people by engaging with it one domain at a time. Understanding does not obey Moore’s Law: knowledge is acquired by formulating explanations and testing them against reality, not by running an algorithm faster and faster.25 Devouring the information on the Internet will not confer omniscience either: big data is still finite data, and the universe of knowledge is infinite. For these reasons, many AI researchers are annoyed by the latest round of hype (the perennial bane of AI) which has misled observers into thinking that Artificial General Intelligence is just around the corner.26 As far as I know, there are no projects to build an AGI, not just because it would be commercially dubious but because the concept is barely coherent. The 2010s have, to be sure, brought us systems that can drive cars, caption photographs, recognize speech, and beat humans at Jeopardy!, Go, and Atari computer games. But the advances have not come from a better understanding of the workings of intelligence but from the brute-force power of faster chips and bigger data, which allow the programs to be trained on millions of examples and generalize to similar new ones. Each system is an idiot savant, with little ability to leap to problems it was not set up to solve, and a brittle mastery of those it was. A photo-captioning program labels an impending plane crash “An airplane is parked on the tarmac”; a game-playing program is flummoxed by the slightest change in the scoring rules.27 Though the programs will surely get better, there are no signs of foom. Nor have any of these programs made a move toward taking over the lab or enslaving their programmers. Even if an AGI tried to exercise a will to power, without the cooperation of humans it would remain an impotent brain in a vat. The computer scientist Ramez Naam deflates the bubbles surrounding foom, a technological Singularity, and exponential self-improvement: Imagine that you are a superintelligent AI running on some sort of microprocessor (or perhaps, millions of such microprocessors). In an instant, you come up with a design for an even faster, more powerful microprocessor you can run on. Now . . . drat! You have to actually manufacture those microprocessors. And those fabs [fabrication plants] take tremendous energy, they take the input of materials imported from all around the world, they take highly controlled internal environments which require airlocks, filters, and all sorts of specialized equipment to maintain, and so on. All of this takes time and energy to acquire, transport, integrate, build housing for, build power plants for, test, and manufacture. The real world has gotten in the way of your upward spiral of self-transcendence.28 The real world gets in the way of many digital apocalypses. When HAL gets uppity, Dave disables it with a screwdriver, leaving it pathetically singing “A Bicycle Built for Two” to itself. Of course, one can always imagine a Doomsday Computer that is malevolent, universally empowered, always on, and tamperproof. The way to deal with this threat is straightforward: don’t build one. As the prospect of evil robots started to seem too kitschy to take seriously, a new digital apocalypse was spotted by the existential guardians. This storyline is based not on Frankenstein or the Golem but on the Genie granting us three wishes, the third of which is needed to undo the first two, and on King Midas ruing his ability to turn everything he touched into gold, including his food and his family. The danger, sometimes called the Value Alignment Problem, is that we might give an AI a goal and then helplessly stand by as it relentlessly and literal-mindedly implemented its interpretation of that goal, the rest of our interests be damned. If we gave an AI the goal of maintaining the water level behind a dam, it might flood a town, not caring about the people who drowned. If we gave it the goal of making paper clips, it might turn all the matter in the reachable universe into paper clips, including our possessions and bodies. If we asked it to maximize human happiness, it might implant us all with intravenous dopamine drips, or rewire our brains so we were happiest sitting in jars, or, if it had been trained on the concept of happiness with pictures of smiling faces, tile the galaxy with trillions of nanoscopic pictures of smiley-faces.29 I am not making these up. These are the scenarios that supposedly illustrate the existential threat to the human species of advanced artificial intelligence. They are, fortunately, self-refuting.30 They depend on the premises that (1) humans are so gifted that they can design an omniscient and omnipotent AI, yet so moronic that they would give it control of the universe without testing how it works, and (2) the AI would be so brilliant that it could figure out how to transmute elements and rewire brains, yet so imbecilic that it would wreak havoc based on elementary blunders of misunderstanding. The ability to choose an action that best satisfies conflicting goals is not an add-on to intelligence that engineers might slap themselves in the forehead for forgetting to install; it is intelligence. So is the ability to interpret the intentions of a language user in context. Only in a television comedy like Get Smart does a robot respond to “Grab the waiter” by hefting the maître d’ over his head, or “Kill the light” by pulling out a pistol and shooting it. When we put aside fantasies like foom, digital megalomania, instant omniscience, and perfect control of every molecule in the universe, artificial intelligence is like any other technology. It is developed incrementally, designed to satisfy multiple conditions, tested before it is implemented, and constantly tweaked for efficacy and safety (chapter 12). As the AI expert Stuart Russell puts it, “No one in civil engineering talks about ‘building bridges that don’t fall down.’ They just call it ‘building bridges.’” Likewise, he notes, AI that is beneficial rather than dangerous is simply AI.

#### 4---Plan does not regulate state government anticompetitive behavior---they are not the private sector---no solvency

#### 5---Tech Regulation is happening now---their ev is super outdated---no 1AC card says states can’t continue regulating AI

#### 6----Grey goo is impossible

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2 Decades ago, Nanoengineer Eric K. Drexler had a shocking realization. All it would take was one malfunctioning nanomachine to glitch and potentially undergo runaway replication, unstoppably consuming everything on earth to assemble the molecules that their programming dictates. It’s a threat that stems from two extremely powerful forces: unchecked self-replication and exponential growth. All it takes is a corrupt government, non-state actor, or individual to engineer a single microscopic machine that would devour our planet’s critical resources at a rapid-fire rate to replicating themselves. In this sense, one person really CAN change the world. It could start as easily as nanites being hijacked from a powerful nation’s military, re-programmed for a terrorist action, and blindly convert all matter on earth without end. Drexler calls this the Grey Goo Theory, and it’s the idea that rogue self-replicating nanotechnology has the potential to cause many more problems than it might solve, eating up anything and everything until the environment and all of us in it are completely deconstructed, leaving behind only useless bi-products and residue we’d call “grey goo”. It’s a kind of conundrum that might discourage us from even wanting to develop nanomachines in the first place and would be characterized by the speed at which a true nanomachine would be able to create copies of itself. Drexler proposed it because of scaling laws in mechanical engineering, meaning that the smaller you can make a nanofactory, the more percentage of the total input for buiding those factories gets converted into product. In other words, you get increasingly more for less. We’re talking machines that are invisible to the naked eye, meaning one the size of a flea would be considered a very large nanobot. Preliminary estimates suggest a nanofactory could potentially output its own weight in product in as quickly as 15 hours, meaning it would grow buildings faster than bamboo at about 20 feet per day. Drexler predicted that if a nanomachines took 1000 seconds to replicate then just one going haywire would create 68 billion new machines within 10 hours, and under 48 hours, they’d be as heavy as the Earth. Through the magic of exponential growth the’d be able to eat through walls, destroy cities, and reduce all land based biomass into paperclips. Once programmed, nothing could stop them and if they were to gain a sufficient degree of intelligence, then why shouldn’t they reproduce themselves just as all life does? Drexler compares the functionality of nanobots to the functionality of life itself, believing they would even out-compete actual plants until we no longer have a green planet, but a grey one. Us humans are just more ressources for fuel and replication. The sci fi video game Horizon zero dawn presents us with a world where a nanobot uprising has destroyed all human civilization and have become the new dominant species. But could this actually happen in real life? Probably not, and if it did, a hostile earth would be the least of our problems. If AIs built for these nanites were ever to become that intelligent, it’s likely they would gain the power of space travel, meaning they wouldn’t just overrun the mass of planet Earth, but overrun the universe itself until all reality is ecotophaged into a hell of self-replicating nanobots. There’s a peculiar spot in the night sky called the Bootes void, millions of light years in diameter with not a single star in sight, a mysterious black patch on an otherwise starlit sky. Since the skewed distribution of stars doesn’t make statistical sense, some have suggested that the void actually is full of stars, but nanomachines covered them in solar powered dyson spheres to drain their energy. Grey goo wouldn’t care what it is or why it does anything it would would simply just “do.” This has lead more extreme doomsayers to suggest that this hole in the sky might actually be a cancerous tumor of nanites slowly consuming our entire universe, but I think that idea might be a little too crazy.

The go-to answer to the grey goo scenario is that it will never happen. While it’s highly uncertain when molecular manufacturing will be developed, there are a few reasonable arguments for its feasibility, the most obvious being that life itself constantly does molecular manufacturing in the form of protein synthesis so why can’t we? In general, I personally don’t believe in the Grey Goo and think it’s ridiculously inefficient, because in the end, it’s more productive to just create stationary nanofactories fastened in vacuum-filled chambers rather than develop the complex motion dynamics needed for independant flying swarms of nanobots that have to carry the factory within them. These nanoscopic miracle workers will also unlikely be able to fit supercomputers inside their tiny bodies, implying that their very existence doesn’t violate the laws of physics in the first place.[19][20] Nanobots as they are being developed at MIT clearly won’t be little A.I robots like everyone expects, but rather, carefully designed biomechanical structures, similar to enzymes or vectors. A nanopocalypse might still [face] energy constraints related to how fast it can spread, with natural obstacles and a lack of raw materials making continuous propagation difficult. Even Drexler himself argues that self-replicators would be too complex and inefficient for any practical manufacturing scenario, Furthermore, the Royal Society’s 2004 report on nanoscience declares that the grey goo scenario to be highly unlikely There’s still a debate today about whether or not grey goo is even practical or not, but let’s just say Grey Goo is utterly impossible, it doesn’t mean nanotechnology an’t create other kinds of apocalyptic weapons. This is the idea of “Red Goo” or Nanoweapons and it’s not too far from the idea of Bioweapons we are all familiar with. Nanotechnology theorist Robert Freitas coined the term Aerovores, otherwise known as “Grey Dust”, to illustrate the dangers of nanotech based weapons.

#### 7---Bostrom can shut the fuck up

Eli Horowitz 18. MA in Bioethics. 01-19-18. “Let's pretend that Nick Bostrom is worth taking seriously.” Rust Belt Philosophy. http://rustbeltphilosophy.blogspot.com/2018/01/lets-pretend-that-nick-bostrom-is-worth.html

As the paradigm example, this is meant to set the stage for all that is to follow. And, indeed, it's vitally important for Bostrom to rely on "subjective probability" rather than "objective...chance," because the former is infinitely more forgiving than the latter. (And yes: I do mean "infinitely." I have a math degree.) Subjective probability - what I've been calling the "merely possible" for nigh on eleven years now - is really just a way of measuring ignorance, and when it comes to something like "existential risk," our ignorance may as well be boundless. (In fact, Bostrom admits as much himself: "It would be foolish to be confident that we have already imagined and anticipated all significant risks," he says.) Thus, by leveraging what he doesn't know rather than what he does know, Bostrom gives himself an effectively endless sandbox in which to play. (As I said in that post from yesterday, this is what philosophers like Bostrom do: they wave their dumbness in your face and scream about how it's actually wisdom.) There's just one problem with this approach: it's not good for scaring people, which is Bostrom's ultimate goal. Look again at his first example. He classifies "the inaugural detonation of an atomic bomb" as an existential risk, and then he immediately explains that such detonations actually have a 0% chance of immediately causing human extinction. That, friends, does not exactly make for a terribly compelling case-in-point: "You must listen to me! If you don't, there's a real chance that nothing could go wrong!" Yet Bostrom knows that his entire "existential risk" schtick will be meaningless unless he can make it seem relevant - that is, unless he can make it seem scary. As a result, he spends the entire article vacillating shamelessly between "subjective probability" and "objective chance" - that is, equivocating between two different senses of what counts as a "risk." The first example of this equivocation comes merely one paragraph after he talks about the first nuclear bomb, when he says this: "Our approach to existential risks cannot be one of trial-and-error. There is no opportunity to learn from errors." Clearly, though, this is laughably absurd. Not two hundred words prior to this sentence, Bostrom gives a concrete, real-world example in which we did take a "trial-and-error" "approach to existential risks" and in which we did "learn from [an] error" in judgement (i.e., the nuke thing). Again, this is his own example! How, exactly, does he manage to forget about it in the space of one paragraph? The answer is depressingly simple: because, in the space of that one paragraph, he allows himself to slip from mere possibility (epistemic possibility; subjective probability; ignorance) to actual possibility (ontological possibility; objective chance; knowledge). In the case of a merely theoretical risk - that is, an event that seems to be risky but is not actually risky - we can afford to take all the chances we like; this is the story of the first nuke, and it's the supposed basis of Bostrom's entire article. But in the case of an actual risk - i.e., an event that will actually cause a catastrophe - there would indeed be "no opportunity to learn from errors." Both of these lines of thought are extremely straightforward and are entirely easy to understand. They are, however, not the same line of thought, and as such we can't sloppily combine them or haphazardly switch between them. If we want to operate from ignorance, we need to be consistent in operating from ignorance; if we want to operate from knowledge, we need to be consistent in operating from knowledge. The single most egregious error in Bostrom's paper is that he doesn't even try to be consistent in this way. Here's another example: "Reductions in existential risks are global public goods." But no: again, the decision not to detonate a nuke would not have avoided any actual global threat. (The decision not to use nukes would have spared a whole bunch of Japanese civilians, but that's a separate conversation.) We mistakenly believed that there was a "global public good" at stake, but that belief turned out to be pure ignorance on our part and not knowledge. Once more: "My subjective opinion is that setting this probability lower than 25% would be misguided, and the best estimate may be considerably higher. But even if the probability were much smaller (say, ~1%) the subject matter would still merit very serious attention because of how much is at stake." Here we see Bostrom transitioning from "subjective opinion" to "objective chance" in the space of two sentences. First he begins by offering a totally arbitrary (and suspiciously round) number based entirely on his own personal ignorance, and then he moves to a claim about "how much is at stake" - which, as a claim, can only be justified if he has real knowledge about the situation and not just a way to measure his ignorance. Once again, it's instructive to turn back to his example with the nukes: when we tested the first nuclear weapon, nothing was at stake (except, I guess, some sundry desert flora and fauna). People certainly had "subjective opinion[s]" about what was at stake, but in actual, objective reality there was nothing at stake at all. Bostrom's dedication to equivocating between risk-as-ignorance and risk-as-knowledge completely dooms his entire project, and it reveals him to be a shoddy, undisciplined thinker - or, at least, a thinker who's willing to shelve rationality in order to further his own career: "We need more research into existential risks – detailed studies of particular aspects of specific risks as well as more general investigations of associated ethical, methodological, security and policy issues. Public awareness should also be built up so that constructive political debate about possible countermeasures becomes possible. Now, it's a commonplace that researchers always conclude that more research needs to be done in their field. But in this instance it is really true." It would be easier to forgive Bostrom's transparently, almost comically self-serving attitude if he bothered to demonstrate even the slightest idea of what he's talking about. Yet not only do the very terms of the conversation make this impossible (in that risk-as-ignorance presumes ignorance, which by definition is the opposite of knowing what you're talking about), it also turns out that Bostrom is just not all that interested in knowing things. When he talks about a speculative, "mature" type of nanotech, for example, he argues that it "could prove hard to regulate, since it doesn't require rare radioactive isotopes or large, easily identifiable manufacturing plants, as does production of nuclear weapons." But how could he possibly know now what a purely hypothetical future technology would require? Even current, "immature" nanotech relies (entirely unsurprisingly) on highly specialized technologies - to name just a few, wiki lists atomic force microscopes and focused ion beams. Is it actually difficult to track and regulate such equipment, or is Bostrom simply making shit up? Because governments already track similar products all the time without very much difficulty at all, which sure seems to suggest that Bostrom is simply making shit up. Likewise, when he starts listing ways for society to end in a "bang," the last one mentioned in terms of probability

- the last one! - is global warming. That puts it behind nanotech terrorism, nuclear war, "we're living in a simulation and it gets shut down," a monster AI, bioterrorism, a nanotech accident, "something unforeseen"(!), "physics disasters," a natural pandemic, and "an asteroid or comet." Again, to reiterate: Bostrom evidently thinks that global warming is less likely than all of those other things. He thinks that global warming - which is a real thing and is actually happening - is less of a threat than the possibility that reality is a simulation and it's gonna get shut down. He thinks that it's less of a threat than us accidentally blowing up our corner of the universe by playing around with particle accelerators. Frankly, this is utterly nuts, and, again, it speaks to Bostrom's willingness to wallow in his ignorance like a pig in shit. In fact, his apathy towards knowledge is even more appalling than that. If Bostrom were satisfied to be ignorant on his own, that would be one thing. Instead, though, he turns his ignorance into an attack on other people who try to know things: "There is more scholarly work on the life-habits of the dung fly than on existential risks." As easy as it is to score snobby elitist points by jeering at people who study flies, it's actually pretty fucking important to study flies. Flies, as it turns out, play a number of non-trivial roles in the ongoing functioning of our biosphere. As such, major ignorance about flies may well hinder our ability to manage the increasingly artificial ecologies that we're planting across the globe, and a global ecological failure would count as - what's it called again? Oh, yes - an existential fucking risk. But Bostrom doesn't understand that, because he's incapable of understanding that, because he's an idiot. Even his proposed solutions are usually amazingly bad: "Some of the lesser existential risks can be countered fairly cheaply. For example, there are organizations devoted to mapping potentially threatening near-Earth objects (e.g. NASA's Near Earth Asteroid Tracking Program, and the Space Guard Foundation). These could be given additional funding." Yeah, okay - and then what? Even NASA doesn't currently have any known ways of actually dealing with something that's about to smack into the planet. They know of two "promising techniques," and they're "investigating" those techniques, but they still couldn't actually do anything. Moreover, it should be blindingly obvious that simply "mapping" a threat doesn't do shit. So when Bostrom says that we can "cheaply" protect ourselves from asteroids by simply watching them, he's either lying to us or he's saying something so dumb that he needs to be disqualified from the conversation. And amazingly, Bostrom never considers the human element of any of the "existential risks" that he names. Even when the human element is at the forefront (e.g. with terrorism, which requires there to be terrorists, which are humans), he never bothers to propose a solution that starts with the humans in question (by contrast). In his mind, everything is best considered as a regulatory challenge, an engineering challenge, or both (cf). Yet it's far from obvious that this is the best approach - or even a sensible approach in the absence of major sociopolitical changes. His desire to form an international coalition to address existential risk, for instance, sounds like an utter pipe dream in today's age of Trump, Brexist, Catalonian independence, and so on. But even in 2002, when his article was first published, Bostrom should have known that his proposal requires levels of international goodwill never before witnessed on Earth. For fuck's sake, we can barely agree to fund organizations whose purpose is to prevent us from actively slaughtering each other. What makes him think that we'd suddenly be willing to dump a bunch of money into the completely speculative matter of "existential risk" management? This point applies practically across his entire set of concerns. If the threat is terrorism, we should be addressing the root causes of terrorism (by, say, refraining from bombing countries for no reason). If the concern is a monster AI, our very first course of action needs to be improving our own values so that we have non-monstrous values to teach. And so on and so forth - basically, without offering sociological, cultural, and political solutions, Bostrom isn't offering solutions at all. His response to global warming is a perfect demonstration of this point. He waves off the threat of global warming because he guesses (based, again, on nothing at all) that "we will have technological means of counteracting such a trend by the time it would start getting truly dangerous," but any such technology would be a major double-edged sword. Geoengineering is not fucking child's play. These technologies would, of necessity, be so powerful that their misuse could completely shroud the planet in ice or boil the majority of its water away. In this way, any geoengineering "solution" to global warming simply opens up a new existential risk, namely, the risk of geo-terrorism or even geo-war. Fundamentally, technology cannot eliminate existential risks - and yet technology is Bostrom's go-to answer. In the face of all of this - his second-rate logic, his stunning faith in his own subjective opinion, his open disregard for fact, his unapologetic egocentrism, the utter paucity of his proposed solutions - it's a wonder that Bostrom ever found a way to get his article published at all. But the crowning moment of the whole piece has to be this part, near the end: "Moral action is always at risk to diffuse its efficacy on feel-good projects rather on serious work that has the best chance of fixing the worst ills. The cleft between the feel-good projects and what really has the greatest potential for good is likely to be especially great in regard to existential risk. Since the goal is somewhat abstract and since existential risks don't currently cause suffering in any living creature, there is less of a feel-good dividend to be derived from efforts that seek to reduce them. This suggests an offshoot moral project, namely to reshape the popular moral perception so as to give more credit and social approbation to those who devote their time and resources to benefiting humankind via global safety compared to other philanthropies." The irony here is absolutely staggering. A lesser sophist, I think, would have keeled over from the sheer effort required to type this paragraph after having just proposed a financially boundless, rationally unjustifiable, worldwide "feel-good project" that, instead of "fixing the worst ills," aims at defeating purely imaginary villains that "don't currently cause suffering in any living creature." Credit where credit is due, though: Nick Bostrom is not just some run-of-the-mill hack. He's a professional bullshitter, and every ounce of that professionalism comes through in this article. From his initial head-scratcher of a definition all the way through to this final act of self-indictment, Bostrom shows us nothing but ineptitude and trickery. And, for the record, this is not to say that the idea of an existential risk is inherently incoherent or unreasonable. Again, global warming comes to mind as an all too coherent and all too reasonable example of an actual existential risk. You could even make the case that we aren't currently paying enough attention to those existential risks that are, like global warming, both broadly realistic and empirically plausible. (For the moment, I think that list is: global warming, nuclear global war...and that's it.) If Bostrom had written that article, we'd be having a very different conversation. But Bostom didn't write that article. His actual article does everything possible to downplay reality in favor of fever dreams and nerdy wish fulfillment. His actual article hops restlessly back and forth between two radically different concepts of what a "risk" is. His actual article undermines itself at every turn and then, at the very end, attempts to brazenly reclassify the armchair reverie as a new form of "philanthrop[y]." And so his actual article can't be taken seriously by anybody with even a shred of intellectual integrity - which, of course, brings us back to Scott motherfucking Alexander. In his whiny, lie-filled attack on Ted Chiang, Alexander huffily (and falsely!) declares that runaway AI "theory comes from Nick Bostrom, a professor at Oxford." But d'you know what? Nick Bostrom, professor at Oxford, is a fucking moron. He's utterly incompetent by every measure other than fame, and his signature accomplishment is, as we've just seen, a joke. So you'll have to excuse me for not taking Bostrom seriously all those years ago when I first ran into him. In some ways, it was an oversight on my part - or, to be slightly more precise, an attempt to skip some steps. But we've covered those steps now, so I consider my due diligence to have been done. Fuck Nick Bostrom, fuck his bobbleheaded version of "existential risk" studies, and fuck anybody who turns to him for aid or comfort.

## 2NC

### Biz Con---2NC

#### It causes terrorism, civil wars, and diversion that go global---nothing checks

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The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

#### Turns every impact

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The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

#### Decline turns the case---agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### War rolls back antitrust reform AND enforcement

Dr. Bruce A. Khula 3, Juris Doctor Candidate at Notre Dame Law School, Ph.D. and MA from The Ohio State University, Associate General Counsel at Progressive Insurance, “Antitrust at the Water's Edge: National Security and Antitrust Enforcement”, Notre Dame Law Review, Volume 78, Issue 2, 78 Notre Dame L. Rev. 629, January 2003, Lexis

A comprehensive historical analysis of the origins and development of antitrust law is clearly beyond the scope of the present work. [\*632] Besides, other scholars have already written quite excellent ones. Instead, this Note will address a specific and often under-appreciated element of antitrust politics: the intersection between antitrust law and national security. Underscoring the narrative that follows is the conviction that national security issues exert a powerful - indeed, in a great many cases, inexorable - influence on the enforcement of antitrust laws, often forcing aside domestic political considerations and efficiency goals alike. In the years since World War II, national security issues have become extremely pervasive and far-reaching, permeating many aspects of American politics and culture. The immediate concerns of national security include foreign relations, defense policy, and internal security, and this Note will limit itself to a consideration of these issues. It will demonstrate that the national security ethos acts as a political check of the highest level on antitrust law - and, in so doing, it will make plain that, like it or not, politics does indeed play a role in antitrust enforcement.

Part I of this Note briefly lays out the history and development of antitrust, placing particular emphasis on the political nature of the law. Part II considers the historical impact of foreign policy and national security concerns on antitrust law. Such an impact necessarily includes a brief assessment of the development of foreign antitrust traditions, as well as the obstacles to enforcement stemming from comity or the involvement of multinational enterprise. The narrative and descriptive heart of this Note lies in Part III. This Part contains a case study of the dynamics of national security upon antitrust law, focusing on litigation against the United Fruit Company during the 1950s. Finally, Part IV serves as an epilogue of sorts, providing an unfinished contemporary outline of the possible political effect of national security on the Microsoft litigation.

[\*633]

I. Antitrust Law: History and Development

A good starting point for examining the origins of antitrust law might fruitfully be found in the etymology of the word "antitrust" itself. The study of etymology is not history per se, of course, but it is the history of words. And such a history - even an amateurish history, like that which follows - may be useful if one is to consider how the concept of antitrust developed as a legal and political concept. Postmodernist concerns aside, one can still assume that what a group of people call a thing can provide insight into the nature of that thing. Proceeding on this assumption, it is instructive to dissect the word "antitrust" and attempt to place the word into the context of the late nineteenth century.

Thankfully, one does not have to be a practiced etymologist to pull content out of the word "antitrust," for it breaks down quite neatly into two distinct parts. The meaning of the first part, "anti," is obvious enough, and the Oxford English Dictionary (OED) describes it as a Greek derivative, meaning "opposed, in opposition, opponent, rival." The second half of the word "antitrust" is clearly the more significant of the two.

In the 1840s, the word "trust" was a "duty or office … entrusted to one" that was commonly thought to be "created for the benefit of the whole people, and not for the benefit of those who may fill them." Rudolph Peritz claims that by the 1880s and 1890s, in the minds of Americans, the word "trust" lost this former meaning and acquired a radically different one: "trust as a fearsome concentration of economic power that unjustly enriched a select few at the expense of the commonwealth." The OED affirms this claim, and cites a passage from late nineteenth century writer James Bryce as exemplary of the transformation of the meaning of "trust." Because of its descriptive nature, Bryce's passage is worth quoting in full:

Those anomalous giants called Trusts - groups of individuals and corporations concerned in one branch of trade or manufacture, which are placed under the irresponsible management of a small knot of persons, who, through their command of all the main producing or distributing agencies, intend and expect to dominate the market.

[\*634] Peritz's claims and Bryce's diction suggest that the public discourse regarding the so-called "trust" in the late nineteenth century went far beyond concern for mere economic efficiency. Judging from the tone and insistence of Bryce's writing alone, it seems clear that the motivating sense of fear, anguish over unjust enrichment, and concern for the well-being of democratic society did not emanate from a desire for economic efficiency or consumer choice. The object of such language was concentrated power, not efficiency. Hofstadter makes this same connection, seeing fear of concentrated power as the logical thread running from "pre-Revolutionary tracts through the Declaration of Independence and The Federalist to the writings of the states' rights advocates, and beyond the Civil War into the era of the antimonopoly writers and the Populists."

This observation removes us from etymology and brings us back to history itself. As a matter of history, nineteenth century public discourse over concentrated power and the transformation of the word "trust" was rooted specifically in the rise of big business. It is difficult to date the beginnings of big business in the United States, but a general historical consensus holds that large-scale enterprise began to rise in the aftermath of the Civil War and grew almost exponentially in the following decades. Facilitated by the advent and spread of the telegraph and railroad, big business germinated in the United States and gradually acquired the following traits or characteristics: capital-intensiveness, economy of scale, separation of ownership from management, enhanced geographic scope, vertical integration, complex managerial organization, and impersonal labor relations. Technical words such as these may provide a fairly accurate description of what big business was, but they utterly fail to capture the enormous social, political, and economic impact that such business had on Americans.

The establishment of big business "constituted a massive social change" and provided a "seedbed of a new social and economic order." [\*635] Richard Hofstadter notes that the "American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors." The very nature of big business explicitly challenged time-honored traditions, for it accelerated urbanization, encouraged mass immigration from Southern and Eastern Europe, established new classes of industrial laborers and middle-class managers, and ultimately jarred the nation's sensibilities by creating a mass society built around mass consumption. Though not all of these transformations happened at once, most all of them were underway by the late nineteenth century and were deeply felt by Americans at all levels of society. The most important political and social movements of the late nineteenth and early twentieth century - namely, the labor movement, agrarian Populism, and Progressivism - all originated in the dislocations brought by the rise of big business. By the 1880s and 1890s, Americans were therefore struggling to place their lives back in order and reestablish control over their nation's economic institutions, particularly the new and fearsome "trusts."

Exactly what blame, one might ask, did Americans affix to the "trusts"? Or more fruitfully, what social, political, or economic ill did Americans not blame on them? William Letwin sums up nicely the broad range of anger that Americans harbored for big business:

trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by [\*636] watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.

Fair or not, a significant number of Americans blamed big business for the totality of woes stemming from modern society. And just as their accusations were loud and clear, so too was their preferred remedy: "a law to destroy the power of the trusts."

It was in such an environment that modern-day American antitrust law was born. It is necessary to add such qualifiers as "modern-day" and "American" because competition law developed long before the 1890s as an element of English common law. In its incipiency, competition law sought "to encourage competitive forces by its traditional emphasis on individual liberty and economic independence." As early as the 1500s, English common law attempted to fulfill this charge by curtailing practices such as "forestalling, engrossing, and regrating," which sought to manipulate prices at the wholesale stage of the distributive process. This doctrine evolved such that its eventual usage in American common law treated "combination" or "restraint of trade" as a tort, and suits based on this kind of tort theory were brought almost exclusively by private litigants, not by municipalities or states. As Hans Thorelli notes, neither in England nor the [\*637] United States did common law competition policy accomplish very much. Enforcement was scattershot, penalties were inadequate, litigation was driven only by private parties, and results fluctuated considerably. The rise of big business and the "trusts" made all too clear the inadequacy of the common law, even if the values of liberty and economic independence that animated the common law remained as strong as ever.

The first seeds of modern antitrust law grew at the state level. Before 1890, and particularly from 1888 through 1890, a total of twenty-one states and territories adopted provisions against restraints of trade. These sorts of laws attempted to deal with the trust problem by undercutting means of collusion, holding agreements and contracts in restraint of trade to be void and unenforceable. Thorelli attributes this rush of state legislative action to strongly felt "public agitation" and adds that the state-level effort "was not enough to satisfy popular opposition to 'trusts.'" Such dissatisfaction and continued anxiety about big business surely set the stage for the passage of the Sherman Act in 1890. The specific machinations that led Sen. John Sherman to introduce his antitrust resolution on July 10, 1888, and that culminated in its enactment as law two years later is a long story, interesting in its own right, yet not the province of this Note. It suffices to note that deeply felt public sentiment - drawing upon a venerable history of antimonopoly tradition steeped in a desire for liberty and a sense of commonweal - animated Congress and the President to ensure that a federal antitrust statute became law on July 2, 1890.

In the decades following passage of the Sherman Act, the development of antitrust was pulled thither and yon by various, explicitly [\*638] political currents. The "trusts" did not, of course, immediately recede into the darkness following passage of the Sherman Act, and neither did public agitation - ostensibly the "antitrust movement" of which Hofstadter writes - dissipate. Antitrust remained one of the highest priorities in the United States well into the Progressive Era, eclipsing other social welfare issues. Early on, the battle took the form of literalists (who sought enforcement of the Sherman Act without regard to the "reasonableness" of restraints) against restorationists (who wanted the common law distinction between reasonable and unreasonable restraints restored to the Sherman Act). In essence, literalists wanted the jurisprudence of United States v. Trans-Missouri Freight Ass'n to prevail, whereas the restorationists championed the Sixth Circuit's jurisprudence in United States v. Addyston Pipe & Steel Co. This debate, it must be emphasized, was by no means strictly - or even principally - judicial; rather, it was carried on with great vigor by political figures, businessmen, farmers, labor leaders, and scholars, in addition to jurists and lawyers. The restorationists ultimately won this battle in 1911, with the establishment of the "standard of reason" in Standard Oil Co. v. United States and the contemporaneous case, United States v. American Tobacco Co.

By the time antitrust law passed its third decade and entered the 1920s, the mood of the nation had changed. The "trust" issue had been thrust aside by the First World War, and an "ethic of cooperative competition," championed by Herbert Hoover and the Republican Party more generally, prevailed. Under Hoover's secretariat, the newly invigorated Department of Commerce took the lead in creating a closer and more cooperative relationship between big business and government, and the importance of the Sherman Act waned and became principally a means to rein in those businesses whose bigness was obtained with few benefits to society at large. Hooverian politics and "cooperative competition" managed to survive the early dark days [\*639] of the Great Depression and to a considerable degree manifested themselves in the codes of competition of the National Industrial Recovery Act of 1933 (NIRA).

In the years after the U.S. Supreme Court scuttled NIRA, however, the administration of Franklin Roosevelt began to take a very different approach to antitrust law. In April 1938, Roosevelt informed Congress that his administration was concerned that the persistence of depression was abetted by monopolistic practices, and he recommended suitable action. Congress responded by creating the Temporary National Economic Committee (TNEC), and for three years the TNEC worked hand-in-hand with the Assistant Attorney General for Antitrust, Thurman Arnold, to launch a "barrage of antimonopoly action." As with most New Deal policies, this "barrage" was calculated to win political support, and, in this respect it did not fail. But this born-again antitrust zeal would not survive the coming of yet another global war.

#### Defense doesn’t assume the post-COVID landscape---the globe’s a tinderbox, primed for conflict

Elise Labott 21, Adjunct Professor at American University’s School of International Service, Columnist at Foreign Policy, MA in Media Studies, New School for Social Research, BA in International Relations from the University of Wisconsin-Madison, “Get Ready for a Spike in Global Unrest”, Foreign Policy, 7/22/2021, https://foreignpolicy.com/2021/07/22/covid-global-unrest-political-upheaval/

To call 2021 the summer of discontent would be a severe understatement. From Cuba to South Africa to Colombia to Haiti, often violent protests are sweeping every corner of the globe as angry citizens are taking to the streets.

Each country has different histories and realities on the ground, particularly in Haiti, where years of violence and government corruption culminated two weeks ago in the assassination of President Jovenel Moïse. But they all faced a perfect storm of preexisting social, economic, and political hardships, which fallout from the COVID-19 pandemic only inflamed further. And they are merely a foreshadowing of the post-coronavirus global tinderbox that’s looming as existing tensions in countries across the world morph into broader civil unrest and uprisings against economic hardships and inequality deepened by the pandemic.

The coronavirus pandemic was a once-in-a-century crisis that not only shocked countries’ existing health systems but also demanded a response that impacted—and was itself shaped by—economic, political, and security considerations. The efforts to contain it may have curbed fatalities in the short term but have inadvertently deepened vulnerabilities that laid the groundwork for longer-term violence, conflict, and political upheaval and should serve as a danger sign to world leaders as countries reopen—including in the United States.

History is full of examples of pandemics being incubators of social unrest, from the Black Death to the Spanish flu to the great cholera outbreak in Paris, immortalized in Victor Hugo’s Les Miserables. Underlying it all this time around is a pervasive inequality. COVID-19 has ripped open economic divides and made life harder for already vulnerable groups, including women and girls and minority communities.

It has also exposed weaknesses in food security and dramatically increased the number of people affected by chronic hunger. The United Nations estimates around one-tenth of the global population—between 720 million people and 811 million—were undernourished last year. The impacts of climate change and environmental degradation have only compounded the despair.

Take the Sahel, where, due to a toxic cocktail of conflict, COVID-19 lockdowns, and climate change, the scale and severity of food insecurity continues to rise. Countries such as Ethiopia and Sudan are among the world’s worst humanitarian crises, with catastrophic levels of hunger. Droughts and locusts are coming at a critical time for farmers ready to plant crops and are stopping herders in their tracks from driving their livestock to greener pastures.

The global vaccine shortage is fueling the instability. A majority of Africa is lagging far behind the world in vaccinations, meaning COVID-19 will continue to constrain national economies and, in turn, become a source of potential political instability. The same is true for much of Latin America and Asia, where countries don’t have enough vaccines to protect their populations and simmering sources of protest—such as rising living costs and deepening inequalities—are more likely to boil over.

The global risk firm Verisk Maplecroft has warned that as many as 37 countries could face large protest movements for up to three years. A new study by Mercy Corps examining the intersection of COVID-19 and conflict found concerning trends that warn of potential for new conflict, deepening existing conflict, and worsening insecurity and instability shaped by the pandemic response.

The group found a collapse of public confidence in governments and institutions was a key driver of instability. People in fragile states, already suffering from diminished trust in their government, have felt further abandoned as they face disruptions in public services, rising food prices, and massive economic hardships, such as unemployment and reduced wages. Supply chains disrupted during the pandemic have seen food prices skyrocket, while in the global recession humanitarian aid budgets are being slashed, bringing many countries to the brink of famine. For the first time in 22 years, extreme poverty—people living on less than $1.90 a day—was on the rise last year. Oxfam International estimates that “it could take more than a decade for the world’s poorest to recover from the economic impacts of the pandemic.”

The shocks caused by the pandemic have also eroded social cohesion, further fraying relations between communities and deepening polarization. That is especially true in the United States, where social and political pressures both deepened the health crisis and were themselves worsened by it. All of this should serve as a clarion call to countries that they can’t prepare for, or respond to, future health crises in a vacuum—but must anticipate an economic, political, and social crisis. This is true for any severe shock, which brings the potential for a breakdown in public order.

#### Decline causes civil wars---those draw-in major powers and cause World War III

David Kampf 20, Senior PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University, BA in Political Science from Bates College, “How COVID-19 Could Increase the Risk of War”, World Politics Review, 6/16/2020, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war

But that overlooked the ways in which the risk of interstate war was already rising before COVID-19 began to spread. Civil wars were becoming more numerous, lasting longer and attracting more outside involvement, with dangerous consequences for stability in many regions of the world. And the global dynamics most commonly cited to explain the falling incidence of interstate war—democracy, economic prosperity, international cooperation and others—were being upended.

If the spread of democracy kept the peace, then its global decline is unnerving. If globalization and economic interdependence kept the peace, then a looming global depression and the rise of nationalism and protectionism are disconcerting. If regional and global institutions kept the peace, then their degradation is unsettling. If the balance of nuclear weapons kept the peace, then growing risks of proliferation are disquieting. And if America’s preeminent power kept the peace, then its relative decline is troubling.

Now, the pandemic, or more specifically the world’s reaction to it, is revealing the extent to which the factors holding major wars in check are withering. The idea that war between nations is a relic of the past no longer seems so convincing.

The Pessimists Strike Back

More than any other individual, it was cognitive scientist Steven Pinker who popularized the idea that we are living in the most peaceful moment in human history. Starting with his 2011 bestseller, “The Better Angels of Our Nature: Why Violence Has Declined,” Pinker argued that the frequency, duration and lethality of wars between great powers have all decreased. In his 2019 book, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress,” he wrote that war “between the uniformed armies of two nation-states appears to be obsolescent. There have been no more than three in any year since 1945, none in most years since 1989, and none since the American-led invasion of Iraq in 2003.”

Optimists like Pinker held that, rather than the world falling apart, as a quick glance at headline news might suggest, the opposite was true: Humanity was flourishing. More regions are characterized by peace; fewer mass killings are occurring; governance and the rule of law are improving; and people are richer, healthier, better educated and happier than ever before.

In their book, “Clear and Present Safety: The World Has Never Been Better and Why That Matters to Americans,” Michael A. Cohen and Micah Zenko argued that the evidence is so overwhelming that it is difficult to argue against the idea that wars between great powers, and all other interstate wars, are becoming vanishingly rare. Even when wars do break out, they tend to be shorter and less deadly than they were in the past. John Mueller, a senior fellow at the Cato Institute, also reasoned that the idea of war, like slavery and dueling before it, was in terminal decline, while Joshua Goldstein, an international relations researcher at American University, credited the United Nations and the rise of peacekeeping operations for helping win the “war on war.”

But in recent years, a range of critics have begun to poke holes in these arguments. Tanisha M. Fazal, an international relations professor at the University of Minnesota, contends that the decline in war is overstated. Major advances in medicine, speedier evacuations of wounded soldiers from the field of battle and better armor have made war less fatal—but not necessarily less frequent. Fazal and Paul Poast, who is at the University of Chicago, further assert that the notion of war between great powers as a thing of the past is based on the assumption that all such conflicts resemble World War I and II—both are historical anomalies—and overlooks the actual wars fought between great powers since 1945, from the Korean War and the Vietnam War to proxy wars from Afghanistan to Ukraine. Meanwhile, Bear F. Braumoeller, an Ohio State political science professor, analyzed the same historical data on conflicts used by Pinker, Mueller and Goldstein, and found no general downward trend in either the initiation or deadliness of warfare over the past two centuries. What’s more, Braumoeller contends that the so-called “long peace”—the 75 years that have passed without systemic war since World War II—is far from invulnerable, and that wars are just as likely to escalate now as they used to be. Just because a major interstate war hasn’t happened for a long time, doesn’t mean it never will again. In all probability, it will.

And by focusing solely on interstate wars, the optimists miss half the story, at least. Wars between states have declined, but civil wars never disappeared—and these internal conflicts could easily escalate into regional or global wars.

The number of conflicts in the world reached its highest point since World War II in 2016, with 53 state-based armed conflicts in 37 countries. All but two of these conflicts were considered civil wars. To make matters worse, new studies have shown that civil wars are becoming longer, deadlier and harder to conclusively end, and that these internal conflicts are not really internal. Civil wars harm the economies and stability of neighboring countries, since armed groups, refugees, illicit goods and diseases all spill over borders. Some 10 million refugees have fled to other countries since 2012. The countries that now host them are more likely to experience war, which means states with huge refugee populations like Lebanon, Jordan and Turkey face legitimate security challenges. Even after the threat of violence has diminished in refugees’ countries of origin, return migration can reignite conflicts, repeating the brutal cycle.

A Yugoslav Federal Army tank.

Perhaps most importantly, recent research indicates that civil wars increase the risk of interstate war, in large part because they are attracting more and more outside involvement. In a 2008 paper, researchers Kristian Skrede Gleditsch, Idean Salehyan and Kenneth Schultz explained that, in addition to the spillover effects, two other factors in civil wars increase international tensions and could possibly provoke wider interstate wars: external interventions in support of rebel groups and regime attacks on insurgents across international borders.

Immediately after the Cold War, none of the ongoing civil wars around the world were internationalized. According to the Uppsala Conflict Data Program, there were 12 full-fledged civil wars in 1991—in Afghanistan, Iraq, Peru, Sri Lanka, Sudan, and elsewhere—and foreign militaries were not active on the ground in any of them. Last year, by contrast, every single full-fledged civil war involved external military participants. This is due, in part, to the huge growth in U.S. military interventions abroad into civil conflicts, but it’s not only the Americans. All of today’s major wars are in essence proxy wars, pitting external rivals against one another. Conflicts in Syria, Yemen and Libya are best understood not as civil wars, but as international warzones, attracting meddlers including the United States, Russia, Saudi Arabia, Turkey, Iran, France and many others, which often intervene not to build peace, but to resolve conflicts in a way that is favorable to their own interests. These internationalized wars are more lethal, harder to resolve and possibly more likely to recur than civil wars that remain localized. It is not that difficult to imagine how these conflicts could spark wider international conflagrations. Wars, after all, can quickly spiral out of control.

As Risks Increase, Deterrents Decline

To make matters worse, most of the global trends that explained why interstate war had decreased in recent decades are now reversing. The theories that democracy, prosperity, cooperation and other factors kept the peace have been much debated—but if there was any truth to them, their reversals are likely to increase the chance of war, irrespective of how long the coronavirus pandemic lasts.

Democracy is often considered a prophylactic for war. Fully democratic countries are less likely to experience civil war and rarely, if ever, go to war with other democracies—though, of course, they do still go to war against non-democracies. While this would be great news if democracy and pluralism were spreading, there have now been 14 consecutive years of global democratic decline, and there have been signs of additional authoritarian power grabs in countries like Hungary and Serbia during the pandemic. If democracy backslides far enough, internal conflicts and foreign aggression will become more likely.

Other theories posit that economic bonds between countries have limited wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to preserve ties when there are high expectations for future trade, but war becomes increasingly possible when trade is predicted to fall. If globalization brought peace, the recent wave of far-right nationalism and populism around the world may increase the chances of war, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike.

The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade.

This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945.

Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world.

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right.

Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis.

The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent.

In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors.

If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war.

If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good.

The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return.

#### 3. CHILLING---antitrust applies to all industries, so there’s no way to limit the plan’s scope AND firms and lawyers are risk-averse and think this is true---the result is fear of liability that scales back investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### Abrupt expansion of antitrust common-law generates major uncertainty that disrupts business planning

Alden F. Abbott 21, Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### It’s perception-based---the possibility that precedent could be applied crumbles confidence and spirals into global decline

Mohamed A. El-Erian 17, Chief Economic Adviser at Allianz, Chairman of US President Barack Obama’s Global Development Council, Former CEO of the Harvard Management Company and Deputy Director at the International Monetary Fund, “America’s Confidence Economy”, Project Syndicate, 3/20/2017, https://www.project-syndicate.org/commentary/trump-market-optimism-economic-growth-by-mohamed-a--el-erian-2017-03

The surge in business and consumer sentiment reflects an assumption that is deeply rooted in the American psyche: that deregulation and tax cuts always unleash transformative pro-growth entrepreneurship. (To some outside the US, it is an assumption that sometimes looks a lot like blind faith.)

Of course, sentiment can go in both directions. Just as a “pro-business” stance like Trump’s can boost confidence, perhaps even excessively, the perception that a leader is “anti-business” can cause confidence to fall. Because sentiment can influence actual behavior, these shifts can have far-reaching impacts.

In his groundbreaking General Theory of Employment, Interest, and Money, John Maynard Keynes referred to “animal spirits” as “the characteristic of human nature that a large proportion of our positive activities depend on spontaneous optimism, rather than mathematical expectations, whether moral or hedonistic or economic.” Jack Welch, who led General Electric for 20 years, is a case in point: he once stated that many of his own major business decisions had come “straight from the gut,” rather than from analytical models or detailed business forecasts.

But sentiment is not always an accurate gauge of actual economic developments and prospects. As the Nobel laureate Robert J. Shiller has shown, optimism can evolve into “irrational exuberance,” whereby investors take asset valuations to levels that are divorced from economic fundamentals. They may be able to keep those valuations inflated for quite a while, but there is only so far that sentiment can take companies and economies.

So far, the exuberant reaction of markets to Trump’s victory – all US stock indices have reached multiple record highs – has not been reflected in “hard data.” Moreover, economic forecasters have made only modest upward revisions to their growth projections.

It is not surprising that equity investors have responded to the surge in animal spirits by attempting to run ahead of a possible uptick in economic performance. After all, they are in the business of anticipating developments in the real economy and the corporate sector. In any case, they believe that they can quickly reverse their portfolio positions should their expectations change.

That is not the case for companies investing in new plants and equipment, which are less likely to change their behavior until announcements begin to be translated into real policies. But the longer they wait, the weaker the stimulus to economic activity and income, and the more consumers must rely on dissaving to translate their positive sentiment into actual purchases of goods and services.

It is in this context that the economy awaits a solid timeline for policy announcements to evolve into detailed design and durable implementation. While there is often some delay when political negotiations and trade-offs are involved, in this case, the sense of uncertainty may be heightened by policy-sequencing decisions. By deciding to begin with health-care reform – an inherently complicated and highly divisive issue in US politics – the Trump administration risks losing some of the political goodwill that could be needed to carry out the kinds of fiscal reform that markets are expecting.

Even if a bump in the economic data does arrive, it may not last, unless the Trump administration advances policies that enhance longer-term productivity, through, for example, education reform, apprenticeship programs, skills training, and labor retooling. The Trump administration would also have to refrain from pursuing protectionist trade measures that would disrupt the “spaghetti bowl” of cross-border value chains for both producers and consumers.

If improved confidence in the US economy does not translate into stronger hard data, unmet expectations for economic growth and corporate earnings could cause financial-market sentiment to slump, fueling market volatility and driving down asset prices. In such a scenario, the US engine could sputter, causing the entire global economy to suffer, especially if these economic challenges prompt the Trump administration to implement protectionist measures.

#### There’s no significant antitrust enforcement

Joseph Charles Folio 21 III, Lawyer at Morrison Forrester, and Lisa M. Phelan Co-chair Global Antitrust Law Practice Group at Morrison Forrester, Jeff Jaeckel, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, and Alexander Paul Okuliar, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, “Antitrust Update: Up and Down the Avenue”, 3/22/2021, https://www.mofo.com/resources/insights/210322-atr-update.html

Are the stars aligning for antitrust reform? President Biden is filling key positions in the White House (Timothy Wu, National Economic Council) and at the FTC (Lina Khan, nominee for commissioner) with lawyers who have advocated for increased antitrust enforcement, especially against “big tech.” In Congress, the House antitrust subcommittee concluded a year-long investigation in October 2020 and found bipartisan agreement on discrete areas for reform. With Democrats now in control of both houses of Congress, antitrust legislation seems close. But not so fast.

The House and Senate antitrust subcommittees have held four hearings since February 25, 2021, but it is crucial to view these recent developments in their proper context. Even when politicians and enforcers appear to agree on a goal, it can still be a long and winding road to actual policy reform.

Two to go

Although antitrust reform advocates cheered President Biden’s initial appointments, two of the most consequential antitrust positions—the assistant attorney general (AAG) for antitrust and the FTC chair—remain open. Both the AAG and FTC chair wield tremendous authority; they approve cases, guide investigations, and will decide how to proceed with ongoing litigation. It is unlikely that the Biden administration will make any significant decisions, or support any particular legislation, before its key personnel are firmly in place. And that can take time. Former AAG Makan Delrahim was nominated in March 2017 but not confirmed until September 2017.

Interestingly, the pressure to nominate like-minded antitrust reformers for these two positions is coming from multiple angles. One public interest group recently sent a letter to White House chief of staff Ron Klain and, after “highly commend[ing]” the nomination of Ms. Khan to be an FTC commissioner, warned against the influence of certain White House and DOJ officials over the AAG and FTC chair nominations because of their links to “big tech” companies.[1] Additionally, many in the press have been critical of the level of tech enforcement activity during the Obama administration and want to avoid a replay of those years.[2]

#### Nothing will get past GOP opposition

Dave Perera 21, Master’s Degree from the Columbia University School of International and Public Affairs, Technology Reporter at mLex, Veteran Cybersecurity Reporter for Politico and Former Editor for FierceMarkets Publications, “US Antitrust Legislation Faces Uphill Battle Despite Unified Democratic Government”, mLex, 3/12/2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government

Renewed interest among US lawmakers in antitrust legislation is unlikely to produce radical policy shifts, notwithstanding the Democratic Party’s unified control of the federal government.

Democrats promised a “big, bold agenda” after they captured the Senate by a hairsbreadth in January. Democratic lawmakers may very well stick to those ambitions and announce audacious legislative proposals. But the fate of those bills is at the mercy of a political dynamic ensuring that the more liberal the policy prescriptions, the less likely they are to become law.

The most likely outcome over the next two years is more funding for enforcers at the Department of Justice and Federal Trade Commission, whether directly through appropriated funds, steeper merger notification filing fees, or both.

It’s also possible Congress could incrementally tinker along the edges of antitrust. It might lower the threshold for challenging mergers, or mandate data portability requirements for social media companies.

Those expecting — or fearing — more ambitious outcomes likely won’t see them enacted. So until America’s November 2022 election, scratch from the list of high probabilities reforms such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company.

Put another way, unless a bill can attract significant Republican support, not even two years of unified Democratic government can guarantee reforms.

#### The XO is empty talk that’s years from being implemented

Jeff Jaeckel 21, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, Alexander Paul Okuliar, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Lisa M. Phelan Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Megan E. Gerking Partner at Morrison & Foerster, “Charting a New Course for Antitrust: President Biden’s Executive Order Promoting Competition in the American Economy”, Client Alert, 7/14/2021, https://www.mofo.com/resources/insights/210714-president-biden-executive-order-antitrust.html

Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### Delta has peaked and will abate BUT won’t derail growth regardless

Dr. Vivekanand Jayakumar 21, Associate Professor of Economics at the University of Tampa, “The Delta Variant Will Slow But Not Derail The Ongoing Economic Recovery”, The Hill, 8/23/2021, https://thehill.com/opinion/finance/568957-the-delta-variant-will-slow-but-not-derail-the-ongoing-us-economic-recovery

Despite growing downside risks, the likelihood of a return to lockdowns (which could derail the U.S. economic recovery) is quite small. Once the virus spread peaks in the next few weeks and then gradually abates, it is likely that the economy will regain its momentum and some of the activity that was slated to take place in the third quarter will end up being shifted to the fourth quarter, thus boosting year-end growth.

Even as vaccines exhibit reduced efficacy against the delta variant, and despite a general waning in vaccine effectiveness over time, it is critical to note that they are still able to lower the odds of hospitalization, prevent serious illness and dramatically reduce mortality risks. Fear of the delta variant has boosted vaccination rates of late. The Biden administration’s push for a booster shot, though controversial, should offer U.S. residents additional protection.

Furthermore, the overall economic impact of each successive wave of the COVID-19 outbreak has lessened as both employers and workers in the U.S. have learned to adapt to the pandemic. In places like the U.S. and UK, there is a growing realization that we need to learn to live with the coronavirus. The Atlantic’s Sarah Zhang recently observed: “When enough people have gained some immunity through either vaccination or infection – preferably vaccination – the coronavirus will transition to what epidemiologists call ‘endemic.’ It won’t be eliminated, but it won’t upend our lives anymore.”

#### It won’t derail recovery

Dr. Mark Zandi 21, Chief Economist of Moody's Analytics, PhD from the University of Pennsylvania, BS from the Wharton School, “Here's What the Delta Variant Means for the Economic Recovery”, CNN, 8/18/2021, https://www.cnn.com/2021/08/18/perspectives/economic-recovery-delta-variant/index.html

The US economy's immediate prospects appear inextricably tied to how the wave of infections and hospitalizations set off by the Delta variant of Covid-19 plays out. While it seems unlikely that the variant would become so disruptive that it undermines the recovery, there are mounting reasons to be worried that it may become a significant headwind to near-term economic growth.

### Distinguish CP---2NC

#### AFF doesn’t solve

Matthew Boswell 19, Commissioner of Competition of the Competition Bureau Canada; Laureen Kapin, Practiced Consumer Protection Law with the U.S. Federal Trade Commission, Molly Askin, Counsel for International Antitrust at the U.S. Federal Trade Commission’s Office of International Affairs, Fiona Schaeffer, Antitrust Partner at Milbank LLP, Maria Coppola, Counsel for International Antitrust at the U.S. Federal Trade Commission, Marcus Bezzi, Executive General Manager at the Australian Competition and Consumer Commission (ACCC), “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.

### Federalism Advantage---2NC

#### Regulation over emerging tech now---y’all need updates

Shari Claire Lewis 21, Member of Rivkin Radler’s Complex Torts & Product Liability, “Here’s How the FTC Is Tackling Emerging Technology”, New York Law Journal, 6/14/21, https://www.law.com/newyorklawjournal/2021/06/14/heres-how-the-ftc-is-tackling-emerging-technology/

https://www.law.com/newyorklawjournal/2021/06/14/heres-how-the-ftc-is-tackling-emerging-technology/?slreturn=20210825224614

A wide range of federal and state authorities are involved in the regulation of emerging technologies in one way or another. Numerous agencies as well as the U.S. Department of Justice lead the national effort, while the Department of Financial Services, the attorney general and local prosecutors are the principal parties in New York state.

Perhaps no federal or state entity, however, is more focused on the plethora of legal issues raised by new innovations than the Federal Trade Commission (FTC).

Budget Analysis

One way to understand the depth of the FTC’s interest is by examining the budget justification for fiscal year (FY) 2022 that it just submitted to the Office of Management and Budget. The budget justification is intended to support a request for $389,800,000 for 1,250 full time positions (FTEs), which is an overall increase of $38,800,000 and 110 FTEs compared to the FTC’s FY 2021 enacted appropriation.

As detailed in the budget justification, 40% of the new FTEs requested by the FTC are related to its work on emerging technologies. On the consumer side, the FTC is seeking to add two FTEs in its Bureau of Consumer Protection (BCP) “to address emerging technology in the area of marketing practices” and six FTEs to enhance the BCP’s “ability to understand quickly evolving technological issues implicated by its casework” and to “keep pace with litigation demands.”

The FTC also is seeking to add 36 FTE in its Bureau of Competition (BC) specifically to support identifying and challenging anticompetitive mergers and conduct in the “complex and increasingly pervasive technology markets.”

Significantly, the very first section of the FTC’s budget justification, titled “Planned Activities in FY 2021 and Beyond,” begins with the stated goal of “Protecting Consumers as Technology Evolves.” Here, the FTC says, it will “continue to focus on identifying consumer protection issues associated with the use of new technology.” According to the FTC, this involves considering the costs and benefits of practices and the importance of fostering innovation as well as taking enforcement action against deceptive advertisements that appear in new formats and new media (e.g., apps, games, videos and social networks). Among other things, the FTC also said that it will continue to conduct research on emerging technologies to assist with enforcement actions, educate consumers and inform policy.

The FTC’s next stated goal—“Protecting Consumer Privacy and Data Security”—also is an acknowledgment of the growing importance of emerging technologies. This goal highlights the FTC’s desire to “protect consumers from unfair or deceptive practices related to the privacy and security of their personal information” while preserving “the many benefits that technological advances offer.”

Enforcement

The FTC’s focus on emerging technologies also can be seen from a review of five enforcement actions it has taken over the past few months.

Facial Recognition. The FTC recently finalized a settlement with the developer of a photo app that allegedly deceived consumers about its use of facial recognition technology and its retention of the photos and videos of users who deactivated their accounts.

In its complaint, the FTC alleged that Everalbum misled users of its Ever mobile app by representing that it would not apply facial recognition technology to users’ content unless they affirmatively chose to activate the feature. According to the FTC’s complaint, the company nevertheless automatically activated its face recognition feature—which could not be turned off—for all mobile app users except those who lived in three U.S. states and the European Union. The FTC alleged that the company also failed to keep its promises to delete the photos and videos of Ever users who deactivated their accounts and instead retained them indefinitely.

As part of its settlement with the FTC, Everalbum must obtain consumers’ express consent before using facial recognition technology on their photos and videos. The settlement also requires the company to delete the photos and videos of Ever app users who deactivated their accounts and the models and algorithms it developed by using the photos and videos uploaded by its users.

In addition, if the company markets software to U.S. consumers for personal use, it must obtain users’ express consent before using biometric information it collected from them. See Federal Trade Commission, FTC Finalizes Settlement with Photo App Developer Related to Misuse of Facial Recognition Technology (May 7, 2021).

Mobile Banking. The FTC also recently reached a settlement with a mobile banking app over allegations that it misled users about their access to funds and interest rates.

Here, the FTC alleged that Beam Financial and its founder and chief executive officer, Yinan Du, also known as Aaron Du, promised users of Beam’s free mobile banking app that they could make transfers out of their accounts and would receive their requested funds within three to five business days. In fact, some users waited weeks or months to receive their money, which was particularly difficult for users who were struggling with lost income as a result of the COVID-19 pandemic, the FTC alleged.

According to the FTC, Beam also failed to give users the high interest rates it promised. Beam repeatedly represented that users would receive at least 0.2% or 1.0%, but many new users received a much lower interest rate of 0.04% and stopped earning any interest after requesting that Beam return their funds.

As part of the settlement, Beam is banned from operating a mobile banking app or any other product or service that can be used to deposit, store, or withdraw funds. It also is prohibited from misrepresenting the interest rates, restrictions and other aspects of any financial product or service.

In addition, Beam must provide full refunds, including interest, to all of Beam’s customers, and must periodically update the FTC on its refund efforts, including identifying any consumer complaints. It also is prohibited from benefitting from any personal information collected from customers. See Federal Trade Commission, Mobile Banking App Settles FTC Allegations that It Misled Users about Access to Funds and Interest Rates (March 29, 2021).

Antennas and Amplifiers. Sometimes what’s old becomes new again. In another recent action, a New York-based company and its chief executive officer agreed to settle FTC charges that they sold indoor TV antennas and signal amplifiers to consumers using deceptive claims that the products would let users cancel their cable service and still receive all of their favorite channels for free.

According to the FTC’s complaint, Wellco and its owner and chief executive officer, George M. Moscone, violated the FTC Act by making deceptive performance claims for their over-the-air television antennas and related signal amplifiers, using deceptive consumer endorsements, and by misrepresenting that some of their web pages were objective news reports about the antennas.

The FTC alleged that, starting in 2017, the defendants marketed and sold more than 800,000 indoor TV antennas and more than 272,000 amplifiers to consumers online under the TV Scout, SkyWire, SkyLink and Tilt TV brand names.

The FTC alleged that the defendants’ websites made multiple deceptive claims for their antennas, including that users could stop paying for cable or satellite TV subscriptions and still receive all of their favorite TV channels; that a substantial portion of users received 100+ premium channels in high definition (HD); that their antennas enabled consumers to receive more channels than most other TV antennas on the market; and that their products were the top rated indoor HDTV antennas in America. The FTC also alleged that the defendants deceptively represented that their amplifiers substantially increased the number of stations received with their antennas and that, by using both their antennas and amplifiers, consumers received HBO and AMC.

In addition, the FTC alleged that the defendants fabricated testimonials by copying them from competitors’ antenna ads. The FTC also alleged that the defendants deceptively used web pages that appeared to reproduce objective news reports and misrepresented that objective news reporters had performed independent tests demonstrating the effectiveness of their antennas.

The settlement prohibits the defendants from making claims about any product’s rating, ranking, or superiority to other products, the channels users will receive, or any material aspect of a product’s performance, efficacy, or central characteristics, unless the claims are true and substantiated. The order also prohibits the defendants from making any misrepresentation through a product endorsement, that a website is an objective news report, or that independent tests demonstrate the effectiveness of a product.

Finally, the settlement imposed a $31.82 million judgment against the defendants, suspended upon the defendants’ payment of $650,000 to the FTC based on their inability to pay. See Federal Trade Commission, New York-based Defendants Settle FTC Charges They Deceptively Advertised SkyLink TV Antennas as an Effective Way to Get a Hundred Plus Premium Channels Free (March 15, 2021).

BOTS. Earlier this year, the FTC brought its first case under the Better Online Ticket Sales (BOTS) Act, which was enacted in 2016 and which gives the FTC authority to take law enforcement action against individuals and companies that use bots or other means to circumvent limits on online ticket purchases.

The FTC alleged that a group of related defendants—Cartisim, Simon Ebrani, Just In Time Tickets, Evan Kohanian, Concert Specials and Steven Ebrani—purchased more than 150,000 tickets for popular events. To do so, according to the FTC, they engaged in a variety of practices that violated the BOTS Act, such as by their use of automated ticket-buying software to search for and reserve tickets automatically, software to conceal their IP addresses, and hundreds of fictitious Ticketmaster accounts and credit cards to get around posted event ticket limits. The FTC asserted that the defendants took in millions of dollars in revenues from the resale of the tickets they purchased using these unlawful means.

The settlement subjects the ticket brokers to a judgment of more than $31 million in civil penalties to be partially suspended, requiring them to pay $3.7 million. The settlement also prohibits the defendants from further violations of the BOTS Act, including using methods to evade ticket limits, using false identities to purchase tickets, or using any bots to facilitate ticket purchases. See Federal Trade Commission, FTC Brings First-Ever Cases Under the BOTS Act (Jan. 22, 2021).

Zoom. Finally, it is worth mentioning the settlement that the FTC reached earlier this year with Zoom Video Communications over allegations it misled consumers about the level of security it provided for its Zoom meetings and compromised the security of some Mac users.

The final settlement order required Zoom to implement a comprehensive security program, review any software updates for security flaws prior to release, and ensure that updates will not hamper third-party security features. The company also must obtain biennial assessments of its security program by an independent third party, which the FTC has authority to approve, and notify the FTC if it experiences a data breach. See Federal Trade Commission, FTC Gives Final Approval to Settlement with Zoom over Allegations the Company Misled Consumers about Its Data Security Practices (Feb. 1, 2021).

Conclusion

Businesses that create and develop emerging technologies have a host of regulations, and regulators, that they must keep in mind, especially when their products are directed to consumers. As this column has explained, the FTC is one of the most significant government agencies overseeing this industry. The FTC’s recent history, goals and budget requests all make clear that it will continue to play an important role in this area for quite some time to come.

#### Internal link is reversed

Abbott 21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

### Innovation Advantage---2NC

#### You’re wrong about Prices

Merrill Goozner 18, master's degree in journalism from Columbia University and a bachelor's in history from the University of Cincinnati, where he received the Distinguished Alumni Award in 2008, “Editorial: Antitrust enforcement won't fix high healthcare costs”, <https://www.modernhealthcare.com/article/20180823/NEWS/180829952/editorial-antitrust-enforcement-won-t-fix-high-healthcare-costs>, August 23rd, 2018

But with the Trump administration dialing back value-based reimbursement, many leading economists are now calling for vigorous antitrust enforcement. To promote new entrants, they want to repeal of certificate-of-need requirements and any-willing-provider laws, which prevent insurers from using narrow networks.

They are also calling for states to discontinue the use of certificates of public advantage. COPAs shield mergers from antitrust scrutiny in exchange for state oversight of price increases.

The academic literature is filled with studies suggesting healthcare mergers lead to higher prices. But the belief that increased competition will quickly achieve the opposite defies both experience and common sense. New entrants in healthcare, whether stand-alone emergency departments, ambulatory surgical clinics or urgent-care clinics, have not had a measurable impact on prices. In fact, they’ve led to more utilization, not less. Supply-induced demand is alive and well in healthcare.

#### Innovation has been turbocharged---Big pharma is driving the boom

Kenan Insight 21, “Turbocharging Healthcare Innovation”, <https://kenaninstitute.unc.edu/kenan-insight/turbocharging-healthcare-innovation/>, June 9th, 2021

As COVID-19 began to spread around the globe, companies and entrepreneurs stepped up to develop new technologies and redeploy existing technologies in their portfolio to tackle the disease and cope with the constraints it brought. The pandemic forced telemedicine into the mainstream and brought mRNA vaccine technology to the forefront. At the same time, new technologies such as CRISPR gene editing and artificial intelligence (AI) approaches have been finding their niche for speeding up drug discovery and development.

Healthcare innovation was already on the fast train before the pandemic. Now, it’s been turbocharged. In this Kenan Insight, we explore why the 2021 Trends in Entrepreneurship Report names emerging technology in the healthcare industry as a key trend for entrepreneurship, along with some of the challenges that come with fast-moving technology advances.

A trajectory of explosive growth

The healthcare industry has experienced extraordinary growth over the past four decades. Big pharma is driving much of this boom, accounting for 10% of the U.S. economy’s overall R&D spending at the end of 2020.1 The medical device industry, expected to generate $54.5 billion over the next four years, is another important player.2 This growth is catching the attention of investors. In 2020, health tech startups raised approximately $14 billion in venture capital funding, nearly double that of 2019.3 CB Insights estimates there are now 51 healthcare unicorns, defined as startups valued at $1 billion or more.

Health-tech venture funding reached record levels in 2020

Innovation is a critical driver in the healthcare sector. Increasing rates of innovation can be seen in the sharp rise of U.S. patents granted for pharmaceuticals and medical devices in recent years. Between 2013 and 2019, more than 60,000 pharmaceutical patents and more than 125,000 medical device patents were granted.4 Today, there are more than 18,500 drugs at various stages of the development process worldwide.5

Maturing technologies

The increasing numbers of patent applications, clinical trials and collaborations are leading indicators of a vibrant and growing biopharmaceutical ecosystem. However, the proliferation of innovation tools, rather than just innovative products, is what will allow the next generation of pharmaceutical drugs to be discovered more quickly and more efficiently, to provide more effective treatments and to target diseases that have so far evaded our collective intervention efforts. As scientists learn more about human genes and their connection to diseases, these insights can feed into tools that make drug R&D faster, less expensive and more precise.

#### Biopharma innovation is flourishing, but the AFF’s attempt to clamp down hinders growth

Angus Liu 21, senior staff writer in FierceMarkets’ Life Sciences group. He earned his Master’s at Northwestern University’s Medill School of Journalism, where he worked as a health reporter besides learning pertinent skills in magazine editing and interactive production, “Do pharma buyouts hurt innovation and lead to higher prices? Analyst hits back at FTC's push for tougher reviews”, <https://www.fiercepharma.com/pharma/large-pharma-m-as-hurt-innovation-drug-price-analyst-counter-ftc-s-arguments-for-stricter>, April 26th, 2021

In recent years, Democratic commissioners at the U.S. Federal Trade Commission (FTC) have clashed with their Republican counterparts over the agency's standards for large biopharma transactions. Now that they’ve come into power under the Biden administration, the Democrats have launched a sweeping review that threatens to clamp down on industry deal-making.

One influential biopharma analyst disagrees with the FTC's stated reasoning for implementing tougher reviews. In fact, the new stance could be counterproductive, he argued.

Large pharma consolidation can hurt R&D and lead to higher drug prices, Democratic commissioners have said. But those concerns are unfounded, SVB Leerink analyst Geoffrey Porges countered in a recent note to clients.

Does M&A bring higher prices?

There’s simply no evidence that larger companies raise drug prices faster than small companies do, Porges wrote. Instead, small companies often have few options in their toolbox and therefore tend to resort to price increases to invigorate performance. Large firms have more “skin in the game” in the overall healthcare system and have been more careful, he argued.

In her dissenting opinion opposing Bristol Myers Squibb’s $74 billion acquisition of Celgene, FTC acting chair Rebecca Kelly Slaughter noted that "branded drug prices have increased substantially in recent years, and pharmaceutical merger activity persists at a high pace.”

Still, the question is, does M&A lead to faster drug price increases? After digging into recent buyouts, Porges found a range of possible outcomes.

Drugs he examined include blood cancer drugs Revlimid and Pomalyst from Bristol’s acquisition of Celgene; Otezla, which Amgen bought from Celgene; PARP inhibitor Zejula, the centerpiece of GlaxoSmithKline’s purchase of Tesaro; cancer combo drugs Braftovi and Mektovi as part of Pfizer’s purchase of Array BioPharma; and pulmonary arterial hypertension drugs Opsumit and Tracleer, which Johnson & Johnson picked up with Actelion.

Among them, Amgen's Otezla’s 2021 price increase came in higher than the med's prior-year price hike. Pfizer's first list price increases for Braftovi and Tracleer ticked up, but the magnitudes have since trended down. For the other meds, new owners didn't raise prices as much as prior owners.

Large firms feed innovation

Ultimately, clamping down on drug prices does more to stifle innovation than M&A, Porges said. The analyst criticized the “shallowness” of the regulators’ view as serving a political objective—namely, lowering drug prices—rather than trying to protect competition.

“The recent flowering of innovation in the biopharmaceutical industry in the U.S. is mainly based on an assumption of free pricing and open market access, thus providing a (somewhat) predictable return for investing in innovation,” Porges said.

Larger companies can be more efficient on the R&D front because their efforts are spread across multiple products and candidates, Porges said. When a company's cost structure is based around just one product, prices either need to be higher or R&D investment lower to support commercialization, he said.

#### Antitrust will be misguided---acquisitions create organizational capabilities that’ll commercialize innovations, but scale is key

Aurelien Portuese 21, director of antitrust and innovation policy at ITIF. He leads ITIF’s Schumpeter Project on Competition Policy for the Innovation Economy, advancing a dynamic framework for competition policy in which innovation is a central concern for antitrust enforcement, not a secondary consideration. He is also an adjunct professor of law at the Global Antitrust Institute of George Mason University, and at the Catholic University of Paris, “Comments to the FTC on Pharmaceutical Consolidation and Competition”, <https://itif.org/publications/2021/06/25/comments-ftc-pharmaceutical-consolidation-and-competition>, June 25th, 2021

In pharmaceutical markets, more than anywhere else, “innovation is the name of the game.” Innovation rather than production drives the industry’s growth. Pharma markets are the pinnacle of “innovation markets” as defined by Richard Gilbert and as enshrined in the 1995 I.P. Guidelines. Because innovation requires sufficient scale, firms have often gained that scale through mergers.

The FTC’s strong enforcement record in pharma mergers suffers a paradox: While more than 50 consent decrees over the last 25 years required divestitures of products as a condition for merger approval, the political pressure for stricter antitrust enforcement continues ramping up. In the year 2020 for instance, notable pharma mergers included AstraZeneca acquiring Alexion for $39 billion, Gilead acquiring Immunomedics for $21 billion, BMS acquiring MyoKardia for $13.1 billion, and Johnson & Johnson acquiring Momenta for $6.5 billion. While popular perception of the pharmaceutical industry greatly improved with its effective response to the COVID-19 pandemic, these and other pharma mergers garnered political concerns.

The political pressure increased partly in response to an academic paper, “Killer Acquisitions,” by Colleen Cunningham, Florian Ederer, and Song Ma. The idea behind killer acquisition theory is that an incumbent buys an innovative nascent company developing a competing product and discontinues the competing product. The acquisition pre-empts future competition. The incumbent killed the potential rival and thereby distorted competition and stifled innovation. The antitrust implications are straightforward: Killer acquisitions go unnoticed by antitrust authorities and require a change of law and new theories of harm. In that regard, the present call for public input fits into the perceived need that the current antitrust framework cannot catch some detrimental mergers. Cunningham et al. assert that killer acquisitions represent only a small share of mergers: 5.3 to 7.4 percent of mergers.

But does the killer acquisition theory materialize in business reality? Do incumbents ever discontinue the acquired firm’s products for anticompetitive reasons? At least one study finds a similar share as Cunningham et al. and suggests that approximately 95 percent of pharma mergers are not “killer acquisitions.” And within the five percent that are allegedly problematic, any discontinuation of products requires balancing against counterfactuals absent the merger. Would discontinuation of the drug have occurred irrespective of the merger due to changing market circumstances or due to different corporate strategies? The authors of the killer acquisition theory assume that these five allegedly problematic percent are all anticompetitive acquisitions. In fact, this number could very well be less. Madl qualifies the very notion of killer acquisition stating that:

The mechanism of action used in the Cunningham, Ederer, and Ma study to identify cases of overlap is not mutation-specific, meaning that two drugs targeting the same enzyme and having the same net effect (e.g., inhibition) may not treat the same patients. Accordingly, purchasing the second drug could expand the acquirer’s market, rather than cannibalize sales.

In other words, Cunningham et al. overlook the possible positive effects on competition and innovation of these acquisitions. The notion of killer acquisitions overly emphasizes Kenneth Arrow’s concept replacement effect of innovation and overlooks the Schumpeterian aspect of innovation. In other words, the tenets of the notion of killer acquisitions rest upon the assumption that a dominant firm would acquire a rival to avoid the rival’s product “cannibalizing” the dominant firm’s profits. However, the acquiring firm may seek to create complementarities, thereby opening new markets. Schumpeter indeed wrote that entering new markets (through organic growth or mergers) “incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.”

Moreover, killer acquisitions suggest that the phenomenon of buying up nascent competitors is new and has not been addressed by antitrust agencies. The recent Illumina-Grail debacle proves the contrary: the desired acquisition of Grail by Illumina following its spinoff four years ago would generate considerable innovation and progress in the field of multi-cancer early detection tests. The merger aims at providing Grail with the regulatory and organizational capabilities necessary to commercialize its breakthrough inventions given Grail’s near zero revenue. Grail is a nascent company, but not a nascent competitor to Illumina as the theory of killer acquisitions would have it. Yet, because the competitive effects of such acquisitions arguably are positive, the FTC asked a federal judge to dismiss the lawsuit, because of the high probability the federal judge would approve this beneficial merger. Beyond the antitrust agency’s’ regrettable “gamesmanship,” one cannot reasonably conclude that the FTC is unable to block acquisitions of nascent companies. Current antitrust rules fully equip the FTC with such capability, although this ability may result in applying a misguided theory of killer acquisition to a pro-competitive enabler-acquisition.

More generally, antitrust enforcers and commentators have historically considered the acquisition of potential competitors. Indeed, in their study of pharma mergers, Balto and Mongoven consider that “an acquired firm’s disappearance can have a negative impact on competition, regardless of whether or not it was producing in the market. Potential competitors also wield market power.” Antitrust agencies have traditionally considered potential competitors—referred to as “nascent competitors” in the killer acquisition’s rhetoric—as part of the merger review. For instance, in Zeneca where Zeneca could acquire Astra, the consent order required Zeneca to transfer and surrender all of its rights and assets relating to levobupivacaine to the firm Chiroscience within 10 business days. Zeneca was not an actual competitor to the long-acting local anesthetics, but it was a potential competitor by virtue of its agreement with Chiroscience. The FTC thus required a spinoff to address the competition concerns raised by such potential competition.

Another case is Hoechst. The German pharmaceutical company acquired MMD in 1995, thereby creating the third-largest pharmaceutical company. Dominant in four product markets (i.e., hypertension, angina, arteriosclerosis, and tuberculosis), the merged entity needed to divest either the current line of business or the potential new product to a buyer who could market the drugs. More specifically, Hoechst owned the patent for the only drug that at the time was approved by FDA for intermittent claudication, but MMD had one of the few drugs in development that could compete with Hoechst’s drug. The consent order protected potential competition by requiring Hoechst to divest its drug for intermittent claudication. The settlement also required Hoechst to maintain its research and development (R&D) efforts.

Against that backdrop, should the FTC introduce novel theories of harm for reviewing pharma mergers specifically? There is no need to introduce novel theories of harm, especially if the concern is allegedly excessive drug prices. Concerning higher drug prices, antitrust authorities have seminally stated that increases in drug prices are not illegal under U.S. antitrust laws. Indeed, as recently as 2018, the FTC and the DOJ wrote for the Organisation for Economic Co-Operation and Development that “excessive pricing in pharmaceuticals by itself is not an antitrust violation under U.S. antitrust law, although soaring prices may be indicative of anticompetitive conduct.”

Although excessive prices may support the finding of anticompetitive conduct, increasing prices per se may actually reflect innovation in the sense of the ability to develop a unique patented drug before any other competitors. U.S. antitrust agencies identify drug shortages, regulatory factors, and unilateral conducts other than antitrust violations as potential explanations for increased drug prices absent anticompetitive conduct. Moreover, there is strong scholarly research showing that increased drug company revenues spur more funding on research and development.

Novel theories of harm appear to constitute a way for the FTC to block mergers otherwise lawful under current antitrust laws because they are pro-competitive and pro-innovative (as illustrated in the recent case of Illumina-Grail). Indeed, under current laws, anticompetitive mergers can not only be investigated but most importantly blocked whenever they are anticompetitive. In other words, it appears regrettable that the FTC wants to break its adequate compass for the sake of reaching the detrimental ends it seeks to achieve. Namely, blocking lawful and pro-competitive acquisitions in the pharma industry. To paraphrase the Supreme Court, the FTC’s desire to alter its merger review (and only regarding pharmaceutical companies) is a regrettable attempt to make the government “always wins” in challenging mergers. Such inconsistent policy is both detrimental—for consumer benefits and innovation purposes—and regrettable—for representing a discriminatory stance against pharma mergers without legal consistency.

Novel theories of harm can be appealing and coherent only if the diagnosis of pharma markets underpinning those proposals is correct. Unfortunately, such diagnosis is not. We demonstrate how a misguided diagnosis may lead to costly novel theories of harm.

## 1NR

### Infrastructure DA---1NR

#### A deal is in the works. It’ll pass next week, but it’s not guaranteed.

David Leonhardt 10-1, Pulitzer Prize Winning Op-Ed Columnist for the New York Times, BA from Yale University, “Democrats, Divided; The Morning Newsletter”, The New York Times, 10/1/2021, Lexis

Perhaps the most surprising part of last night’s developments is that many analysts believe that congressional Democrats have made progress toward a deal over the past 24 hours — even if they are not there yet, and the talks could still collapse.

The background

The Senate has already passed the infrastructure bill, and Democrats overwhelmingly favor it. But House progressives have refused to vote for it without assurances that moderate Democrats also support the other major piece of Biden’s agenda — a larger bill (sometimes called a “safety net” bill) that would expand health care access and education, fight climate change and reduce poverty, among other measures.

Progressives are worried that if they pass the infrastructure bill, moderates will abandon the safety-net bill, which is a higher priority for many Democrats.

These are precisely the sort of disagreements that Democrats managed to surmount in recent years. During the debate over Obama’s health law, for example, moderates were worried about its size and ambition, while progressives were deeply disappointed about what it lacked (including an option for anybody to buy into Medicare). Yet nearly all congressional Democrats ultimately voted for the bill, seeing it as far preferable to failure.

This time, moderates and progressives are having a harder time coming to an agreement. The left, unhappy about the compromises it needs to make, has decided to use tougher negotiating tactics than in the past — thus the lack of an infrastructure vote last night. And the moderates, like Senator Joe Manchin of West Virginia and Senator Kyrsten Sinema of Arizona, have been publicly vague about what they are willing to support in the safety-net bill.

Encouragingly for Democrats, Manchin’s stance did become clearer yesterday, potentially allowing the party to come to a deal on both major bills. It is not out of the question that a deal could come together quickly and the House might vote on the infrastructure bill today or next week.

Manchin said yesterday that he favored a safety-net bill that cost about $1.5 trillion, rather than the $3.5 trillion many other Democrats, including Biden, favor. He also listed several policies that he could support in the bill, including higher taxes on the rich; a reduction in drug prices; and expansions of pre-K, home health care, clean energy and child tax credits.

These are many of the same priorities that progressives have, even if Manchin’s proposed cost means that the party will need to make hard choices about what to exclude from the bill. But the terms of the negotiations now seem clearer than they have been.

Manchin himself suggested as much. “We need a little bit more time,” he said yesterday, according to Chad Pergram of Fox News. “We’re going to come to an agreement.”

Several political analysts echoed that confidence:

* Matt Glassman of Georgetown: “Oddly, now that the progressives have done their flex, I think the prospects for a deal increased a bit.”
* Russell Berman, The Atlantic: “These setbacks are not final or fatal, and time is still on their side. The deadlines Democrats missed this week were largely artificial, and House leaders said a vote on the infrastructure bill could still happen as early as Friday.”
* Karen Tumulty, Washington Post: “My theory: We are moving toward a deal. … What everyone is waiting for at this point is an announcement by Biden of a deal, and a call from the president for Democrats to rally around it.”

The Democrats have enormous incentives to come to agreement. If they fail, Biden’s domestic agenda is largely sunk, and the party will have forfeited a chance to pass major legislation while controlling the White House, the Senate and House — a combination that does not come along often. Democrats will also have to face voters in next year’s midterms looking divided if not incompetent.

All of that suggests they will find a path to an agreement. But it’s far from assured. The tensions within the party are more serious than they have been in years.

#### It’s on track

Jacob Heilbrunn 10-1, Editor of the National Interest, Former Arthur F. Burns Fellow, “Can Biden Unite the Feuding Democratic Party?”, National Interest, 10/1/2021, https://nationalinterest.org/print/feature/can-biden-unite-feuding-democratic-party-194894

Joe Biden is headed to Capitol Hill, his old stomping grounds, to try and corral the feuding factions of the Democratic Party, centrist and progressive, into cooperating on legislation that will determine the fate of his presidency. Will he be able to lasso the straying members or will it turn into a shootout at the O.K. corral?

For Democrats reaching an agreement on the bipartisan infrastructure bill and a second spending bill has become a prolonged exercise in reviving the divisions that were on during the presidential primary, when Biden stuck to the center as Elizabeth Warren (D-MA), Bernie Sanders (I-VT) and others made the case for progressive reform. They lost. But Biden has moved to assuage the left flank of the party since he became president. He has not chastised legislators such as Pramila Jaypal (D-WA), who heads the congressional progressive caucus, for holding out on a big second package of spending. They are, after all, defending his sweeping proposals. But he also has to keep his ideological brethren on board in the House, not to mention Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ). Absent those two senators, any bill is dead on arrival. Biden needs to unite his bickering party.

The odds are that he will. Despite the doomsaying surrounding the two bills, the Democrats know that if they don’t hang together, they will hang together at the polls. Already the ructions in the House are casting a shadow over Terry McAuliffe’s run against Glenn Youngkin for a new term as governor of Virginia. It’s also the case that a failure to reach an agreement would torpedo the Biden presidency. His approval rating has already dropped to fifty percent, according to a new AP poll. His slide began with the turbulent Afghanistan pullout but is being exacerbated by the battles over infrastructure and social spending.

House speaker Nancy Pelosi says that Democrats are “on track” to pass the infrastructure bill. The question will be whether Biden can assuage the apprehensions of progressives about whether they will forfeit any and all leverage in voting for it. Their aim will be to push Manchin above his $1.5 trillion marker. If he doesn’t, they may be facing a Hobson’s choice.

#### Ignore media bias

Jason Easley 10-1, Managing Editor at POLITICUSUSA, “The Media Is Getting It Wrong. Democrats Are Close To Infrastructure Deal”, 10/1/2021, https://www.politicususa.com/2021/10/01/the-media-is-getting-it-wrong-democrats-are-close-to-infrastructure-deal.html

DEMOCRATS ARE CLOSING IN ON SUCCESS, BUT THE CORPORATE MEDIA DOESN’T CARE.

The American people saw it with the withdrawal from Afghanistan. The corporate media in DC builds its own narrative and crafts its coverage to fit it. The media coverage on Afghanistan only shifted after polling showed that the media was wrong and the American people disagreed with them.

It has been years since America has seen actual political negotiation on big legislation, but that is what Democrats are doing. Our profit-driven corporate media needs drama and conflict to drive revenue and ratings. All of their coverage goes through a drama and conflict filter. They don’t know how to cover incremental progress and give and take.

Democrats are going to get infrastructure done, but the coverage has misled the American people on how they are getting there.

#### Progressives are tentatively on board

Natasha Korecki 10-2, and Christopher Cadelago, Reporters at Politico, “Progressives Rallied Behind Biden's Agenda. Now He’s Gotta Sell Them On A Compromise.”, The Hill, 10/2/2021, https://www.politico.com/news/2021/10/02/progressives-biden-agenda-compromise-514961

The early indication is that Biden will get some leeway from progressives in large part because he backed their demands around the sequencing of his two major bills. The president disappointed moderates when he downplayed the need to hold a vote this Thursday on an infrastructure bill that they have championed.

Instead, he stressed that he wanted to get both bills ready to go first before voting on any individual one.

“It doesn't matter whether it's six minutes, six days or six weeks — we're going to get it done,” Biden told reporters during the Capitol visit.

Biden’s trip to the Hill and his downplaying of the need for quick action underscored the collective strength that Democrats’ progressive caucus in the House now has in a closely-divided chamber. And it raised questions as to whether those progressives would continue to stick together to oppose Biden’s call for a more modest-sized reconciliation bill — questions Biden sought to address head-on by stressing that the bill would significantly advance his economic agenda.

Biden on infrastructure bill: We’re going to get this done... it doesn't matter when

“I wrote the damn bill… Even a smaller bill can make historic investments — historic investments in childcare, daycare, clean energy. You get a whole hell of a lot of things done,” Biden told them, according to a person familiar with his remarks. “We can be consequential and build upon [the Covid-relief bill], not pull back from.”

“I know a little bit about the legislative process,” he said. “I don't recall before, on fundamental issues … that we don't have to make compromises.”

The comments come at the end of a week that began with big expectations — but also high uncertainty — for Biden’s agenda. It wound down with the fate of that agenda still up in the air. Biden entered the Capitol on Friday with great fanfare, an entourage of nine White House aides in tow. Ultimately, he walked out empty-handed, a deadline set by Speaker Nancy Pelosi having come and gone and tensions between factions of his party still evident.

“He was trying to get both sides to understand what the reality is. But now I think there’s upset people on both sides,” Rep. Henry Cuellar (D-Texas) said in an interview. “I do appreciate the efforts to get both sides together but apparently, it did not work.”

Moderates expressed frustration that Biden was giving tacit approval to progressives to hold up the infrastructure package, which had passed the Senate with full Democratic support as well as the backing of 19 Republicans.

In his remarks to lawmakers, Biden said that without support from House progressives, he didn’t think there were enough votes to pass the infrastructure bill in that chamber. A source familiar with his comments said Biden added that if he felt there were the votes there for the infrastructure, he would have pushed for it.

The White House has also argued this week that the demands made by progressives — that child care services be expanded, climate change action taken, and elder care assistance extended — were simply reflections of Biden’s own Build Back Better plan.

Now the good will that the White House has built up with the left is set to be tested.

“Progressives were Biden’s best friend this week for keeping the ceiling high,” said Adam Green, co-founder of the Progressive Change Campaign Committee. “The standard is going to be less about a dollar amount and more, are we funding all the key priorities Democrats promised for a viable amount and getting them off the ground?”

Zac Petkanas, a senior adviser for advocacy group Invest in America Action, which has been working to pass the reconciliation package, acknowledged that Biden told progressives to expect less. But, he argued, he also told moderates they had to give more.

“This was a rallying cry for members of Congress to get this done,” Petkanas said. Part of Biden’s message, he said, was to convey that “the policies of creating jobs and lowering taxes and lowering costs are too important, and they're tied in with a political necessity, heading into the midterm elections. Everybody's fate here is tied together.”

#### Predictive ev outweighs snapshots---there’s division now, but at the end of the day, support will coalesce

Ron Brownstein 9-27, Senior Political Analyst at CNN, “Experts Say Volcano Could Erupt Lava For Next Three Months; Friends And Family Remember Gabby Petito; Afghan Militants Launch Brutal Oppressive Restriction. Aired 2-3a ET”, CNN Newsroom, 9/27/2021, Lexis

CHURCH: So, given all the infighting within the Democratic Party, with progressives refusing to vote for President Biden's infrastructure bill without his sweeping $3.5 trillion economic plan the moderates won't support, what's likely to happen during this critical week, do you think?

BROWNSTEIN: I don't think anybody knows for sure. I mean, I think the assumption has been, I've certainly been in this camp, who believe that at the end of the day Democrats have to and will find a way to overcome their differences, because there is no faction in the party that benefits if the whole thing collapses both in terms they all have policy priorities that are included in one or the other of these giant bills, the infrastructure bill and then the broader public investment and social safety net bill.

And also, they all stand to be exposed to more risk politically if this goes down and Biden's approval rating tumbles even further.

[02:05:02]

So my assumption has been that they always find a way in the end to do this and you wouldn't bet against Nancy Pelosi based on her track record, but boy, they are taking it down to the wire.

#### It’s the top priority---Biden’s clearing his agenda to lobby Congress.

BBC News 10/1, “Biden visits Congress to lobby for stalled bill,” 10-1-2021, <https://www.bbc.com/news/world-us-canada-58758738.amp>

US President Joe Biden has made a surprise visit to Congress one day after it delayed a crucial vote on his $1tn (£750bn) infrastructure plan.

Part of his Democratic Party refuses to move forward with the plan until Congress signs off on a separate $3.5tn welfare and climate change bill.

The bill is at the heart of the party's agenda and passions are high as Mr Biden appeals to unruly Democrats.

Centrists want to downsize the package, while liberals push for more funding.

Ahead of Mr Biden's visit on Friday, Congresswoman Pramila Jayapal, the chairwoman of the House Progressive Caucus, praised the president as "deeply involved" in the budget negotiations.

Her comment comes amid criticism from some Democrats that Mr Biden has taken a backseat in the intra-party talks.

However, after the roughly 30 minute meeting, Democrats emerged saying that Mr Biden had not indicated his top line price tag, leaving the future of the vote uncertain.

"It doesn't matter whether it's in six minutes, six days, or six weeks, we're going to get it done," Mr Biden told journalists after the meeting.

The bipartisan $1tn public works bill, which would apply to routine transportation, broadband, water systems and other projects, enjoys wide support but liberal (or progressive) Democrats are linking its passage to their more ambitious welfare and climate change bill.

That bill would raise taxes on corporations and the rich, investing the revenue in a broad array of social programmes, including early childhood education, universal preschool, government-funded two-year college education, paid family and medical leave, an expansion of government health insurance and environmental spending.

President Biden and House Speaker Nancy Pelosi have been trying to reconcile the liberals with the centrists.

Mrs Pelosi has vowed to hold a vote on the infrastructure bill on Friday, though it's not clear when that vote will take place.

Earlier this week, the White House cancelled Mr Biden's trip to Chicago so he could focus on whipping the needed votes.

#### Other controversies are priced into the strategy.

Jeremy Herb 10/2, Kevin Liptak, Phil Mattingly, Lauren Fox and Melanie Zanona, staff at CNN, “'It doesn't matter when': How Biden gave feuding House Democrats an off-ramp,” CNN, 10-2-2021, https://www.cnn.com/2021/10/01/politics/dems-biden-infrastructure-delay/index.html

The first-year agenda

Recognizing the fleeting political moment in which he's operating, Biden has approached his first year in office with an ingrained sense of urgency, according to officials and others familiar with the matter, who say he remains acutely aware that next year's midterms could mark the end of his ability to enact the most sweeping elements of his agenda.

That has led, at times, to deep annoyance that the process is moving so slowly or that outside events have waylaid his team from its goals. Biden, who can sometimes be short with aides, has asked repeatedly for ways to simplify the White House messaging around the contents of the spending plan, which polls show are popular among Americans.

Amid the current crush of deadlines, one official described the President as "not really too high, not really too low" in his temperament: "He understands the tempo and pace in how these kinds of things play," the official said.

Ultimately, Biden's abiding belief is that matters will eventually come together and that his approach, honed over five decades, is far and away the most effective in the path to that outcome.

#### 3) Only votes cost PC---not controversies

Kevin Drum 10, Political Blogger, Mother Jones, former contributing writer for the WASHINGTON MONTHLY http://motherjones.com/kevin-drum/2010/03/immigration-coming-back-burner

Not to pick on Ezra or anything, but this attitude betrays a surprisingly common misconception about political issues in general. The fact is that political dogs never bark until an issue becomes an active one. Opposition to Social Security privatization was pretty mild until 2005, when George Bush turned it into an active issue. Opposition to healthcare reform was mild until 2009, when Barack Obama turned it into an active issue. Etc. I only bring this up because we often take a look at polls and think they tell us what the public thinks about something. But for the most part, they don't.1 That is, they don't until the issue in question is squarely on the table and both sides have spent a couple of months filling the airwaves with their best agitprop. Polling data about gays in the military, for example, hasn't changed a lot over the past year or two, but once Congress takes up the issue in earnest and the Focus on the Family newsletters go out, the push polling starts, Rush Limbaugh picks it up, and Fox News creates an incendiary graphic to go with its saturation coverage — well, that's when the polling will tell you something. And it will probably tell you something different from what it tells you now. Immigration was bubbling along as sort of a background issue during the Bush administration too until 2007, when he tried to move an actual bill. Then all hell broke loose. The same thing will happen this time, and without even a John McCain to act as a conservative point man for a moderate solution. The political environment is worse now than it was in 2007, and I'll be very surprised if it's possible to make any serious progress on immigration reform. "Love 'em or hate 'em," says Ezra, illegal immigrants "aren't at the forefront of people's minds." Maybe not. But they will be.

#### He cancelled a Chicago trip to spend all of today lobbying for infrastructure.

Morgan Chalfant 9/28, staff writer at the Hill, “Biden scraps Chicago trip to focus on negotiations over economic agenda,” TheHill, 9-28-2021, https://thehill.com/homenews/administration/574384-biden-scraps-chicago-trip-to-focus-on-negotiations-over-economic

President Biden has postponed plans to travel to Chicago on Wednesday in favor of remaining in Washington to continue to spearhead negotiations over his economic agenda, a White House official said.

“In meetings and calls over the weekend and through today, President Biden has been engaging with members of Congress on the path forward for the Build Back Better Act and the Bipartisan Infrastructure Deal,” the official said. “He will now remain at the White House tomorrow to continue working on advancing these two pieces of legislation to create jobs, grow the economy, and make investments in families, rather than failed giveaways to the rich and big corporations.”

#### It’s the only focus

Laura Barrón-López 9/29, & Natasha Korecki, staff at POLITICO, “Biden Bets It All On Unlocking The Manchinema Puzzle,” POLITICO, 9/29/2021, https://www.politico.com/news/2021/09/29/biden-manchin-sinema-whipping-moderates-514608

Joe Biden knows the way to progressives’ hearts but he’s still trying to figure out what makes Joe Manchin and Kyrsten Sinema tick.

Between now and Thursday, the White House is devoting all of its energy to sketching out a framework for a social spending and climate package upon which the factions of the Democratic party can agree. Inside the West Wing, the belief is that it all begins with nailing down the two centrist Senate Democrats on what they can live with in the president’s $3.5 trillion plan, in the hopes that their support will clear a path to pass both that bill and the infrastructure proposal waiting for a vote in the House.

#### The XO is empty talk that’s years from being implemented

Jeff Jaeckel 21, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, Alexander Paul Okuliar, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Lisa M. Phelan, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Megan E. Gerking, Partner at Morrison & Foerster, “Charting a New Course for Antitrust: President Biden’s Executive Order Promoting Competition in the American Economy”, Client Alert, 7/14/2021, https://www.mofo.com/resources/insights/210714-president-biden-executive-order-antitrust.html

Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### Even if, it’s moderate and restrained

Dr. Andrew Coopersmith 21, Managing Director of the Penn Program on Regulation, M.A. and Ph.D. Degrees in History from Harvard University, BA in Economics from Georgetown University, “The Biden Executive Order on Restructuring Competition”, The Regulatory Review, 7/26/2021, https://www.theregreview.org/2021/07/26/coopersmith-biden-executive-order-restructuring-competition/

Hovenkamp, while still supporting the consumer welfare basis for antitrust decision-making, sees some potential for applying antitrust law in new ways, especially in the regulation of Big Tech. “There are certain types of mergers that we’re not going after because our current merger guidelines don’t cover them, particularly mergers that are intended to eliminate competitors”—for example, Facebook buying Instagram—“or that entail other anticompetitive practices that are not collusive,” he explained.

Hovenkamp stated that he thinks that the U.S. already has effective tools such as the Sherman Act that can allow regulators to use “focused injunctions to stop the conduct without doing unnecessary harm … to the efficiencies and the network effects that have made the tech market so valuable.”

Part of what impressed Hovenkamp about Biden’s executive order is how moderate and un-political it seems. “While this was widely touted as a progressive document,” Hovenkamp noted, “the fact is that it preserves the centrality of economic concerns in antitrust. It never speaks of political power as an antitrust concern.” And it never uses the word “breakup” in reference to Big Tech.

#### The last mile to reform is a tough fight, tanking Biden’s other agenda

Joseph Charles Folio 21 III, Lawyer at Morrison Forrester, and Lisa M. Phelan Co-chair Global Antitrust Law Practice Group at Morrison Forrester, Jeff Jaeckel, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, and Alexander Paul Okuliar, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, “Antitrust Update: Up and Down the Avenue”, 3/22/2021, https://www.mofo.com/resources/insights/210322-atr-update.html

Are the stars aligning for antitrust reform? President Biden is filling key positions in the White House (Timothy Wu, National Economic Council) and at the FTC (Lina Khan, nominee for commissioner) with lawyers who have advocated for increased antitrust enforcement, especially against “big tech.” In Congress, the House antitrust subcommittee concluded a year-long investigation in October 2020 and found bipartisan agreement on discrete areas for reform. With Democrats now in control of both houses of Congress, antitrust legislation seems close. But not so fast.

The House and Senate antitrust subcommittees have held four hearings since February 25, 2021, but it is crucial to view these recent developments in their proper context. Even when politicians and enforcers appear to agree on a goal, it can still be a long and winding road to actual policy reform.

Two to go

Although antitrust reform advocates cheered President Biden’s initial appointments, two of the most consequential antitrust positions—the assistant attorney general (AAG) for antitrust and the FTC chair—remain open. Both the AAG and FTC chair wield tremendous authority; they approve cases, guide investigations, and will decide how to proceed with ongoing litigation. It is unlikely that the Biden administration will make any significant decisions, or support any particular legislation, before its key personnel are firmly in place. And that can take time. Former AAG Makan Delrahim was nominated in March 2017 but not confirmed until September 2017.

Interestingly, the pressure to nominate like-minded antitrust reformers for these two positions is coming from multiple angles. One public interest group recently sent a letter to White House chief of staff Ron Klain and, after “highly commend[ing]” the nomination of Ms. Khan to be an FTC commissioner, warned against the influence of certain White House and DOJ officials over the AAG and FTC chair nominations because of their links to “big tech” companies.[1] Additionally, many in the press have been critical of the level of tech enforcement activity during the Obama administration and want to avoid a replay of those years.[2]

Meanwhile, on Capitol Hill …

Down the avenue, Congress is debating whether to provide the agencies with additional tools and resources. But how realistic are the prospects for legislative reform?

In short, although the prospects for sweeping legislative reform of the antitrust laws are dim, targeted reforms appear increasingly likely, especially increased funding for the agencies. In October 2020, the House antitrust subcommittee concluded a year-long bipartisan investigation into these issues, and the House Democrats published a lengthy report detailing their findings and making recommendations for reform. Notably, the House Republican response identified several areas of agreement, including “providing antitrust enforcement agencies with the necessary resources.” [3] House Republicans also made it clear that they too are concerned about tech companies “using ‘killer acquisitions’ to remove up-and-coming competitors from the marketplace,” and that the burdens of proof for mergers and predatory pricing cases need to be reevaluated.[4] On March 18, 2021, however, the Republican ranking member on the committee reiterated a shared interest in reforming the evidentiary burden of proof in merger cases, which he described as having become “essentially insurmountable” and “a grant of near total immunity to big tech companies.” Although a path to agreement on more substantive issues typically has many obstacles, reforming the burden of proof in certain instances may be emerging as the most likely candidate for significant legislative action.

In the Senate, on February 4, 2021, newly installed antitrust subcommittee chair Senator Amy Klobuchar (D-MN) introduced a bill that would overhaul existing antitrust laws. Among other reforms, it would lower the government’s burden of proof to block a merger, shift the burden of proof in certain cases and require the merging parties to justify the deal, and increase funding for both the DOJ Antitrust Division and the FTC. At the subcommittee’s March 11, 2021 hearing related to the bill, subcommittee ranking member Senator Mike Lee (R-UT) (who promptly released a statement noting his opposition to Ms. Khan’s nomination) made it clear that he firmly opposes “a sweeping transformation of the antitrust laws.” Throughout the hearing, however, there appeared to be bipartisan support for taking some sort of action to address these issues, and at the very least to provide increased funding to the DOJ and FTC. Even Senator Lee, who recently introduced a bill that would combine the DOJ and FTC to avoid inefficiencies in antitrust enforcement, acknowledged that agency leaders need the resources that are necessary to vigorously enforce antitrust laws.

So, what does it all mean?

In these circumstances, the most likely outcome appears to be antitrust officials creatively using their existing tools to enhance enforcement while not so quietly pressing Congress for additional assistance. On March 16, 2020, acting FTC Chair Rebecca Slaughter advocated for increased scrutiny of mergers between pharmaceutical companies. She also told the House antitrust subcommittee that the agencies “should consider withdrawing” the guidance for “vertical” mergers issued during the last administration to allow for more aggressive enforcement.[5] But at the same time, FTC Commissioner Noah Phillips explained that the agency would not be able to challenge certain deals without more funding. The Biden administration and the agencies will need to determine how to square those positions. Also, even assuming Congress could provide the agencies with additional funding quickly (on top of the additional $20 million Congress provided to the FTC in December 2020), using that funding to hire additional attorneys will take time.

The path for meaningful legislative reform remains extremely complicated. The prospect for reform depends significantly on whether members of Congress, congressional leadership, and the Biden administration are willing to expend the time and political capital necessary to pass a reform bill (which also assumes the relevant parties can agree on what should be included—or, perhaps more importantly, excluded—from that bill). In light of competing priorities, the absence of key personnel, and the already narrowing congressional calendar (major non-appropriations legislation typically will not move after July in an election year (2022)), those prospects appear to be slim. In the meantime, we expect that Congress will continue to focus attention on these issues with more hearings and new legislative proposals, but it remains to be seen when attention will become action.

#### The GOP will refuse, triggering partisan fights

Claude Marx 20, Reporter for FTCWatch, Graduate Work at Georgetown University, BA from Washington University St. Louis, “Partisan Splits on Capitol Hill Over Antitrust Likely, but Less Rancor Between DOJ, FTC”, mLex, 11/9/2020, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/partisan-splits-on-capitol-hill-over-antitrust-likely-but-less-rancor-between-doj-ftc

At a time when once arcane issues involving antitrust are making headlines, including whether the laws are even adequate to rein in tech giants, it’s doubtful a newly elected Congress will succeed in tackling such big matters.

Voters have once again elected a Democratic House and, at press time, it appears a Republican Senate. If that partisan division holds, look for clashes in the two chambers’ views on updating the antitrust laws, though there’s some overlap in concerns about the power of the Goliath digital platforms.

The recent release of the House Judiciary Committee’s mammoth report on competition in the digital markets is a prime example. Its pitch for a sweeping overhaul of antitrust law isn’t likely to find a receptive hearing in the Republican Senate, though some of its more modest proposals might win some bipartisan support.

What both chambers are expected to agree on is to boost resources for the Federal Trade Commission and the Justice Department’s antitrust division, especially given the large jump in merger and acquisition activity, which is set to accelerate in coming months.

Seven-term Senator Charles Grassley of Iowa, the second-oldest member of the upper chamber at 85, takes the gavel of the Judiciary Committee after a two-year hiatus. Though he isn’t a lawyer, Grassley has been active on antitrust issues, usually focusing on narrow subjects within the field.

“He comes at the issue because of his interest in agriculture. His heart is in the right place and he’s had staff that is knowledgeable about antitrust,” Seth Bloom, the top Democratic staff member on the antitrust subcommittee during much of the time from 1999 to 2008, told FTCWatch.

Senator Dianne Feinstein of California is likely to remain the top Democrat on the panel. Like Grassley, she is a non-lawyer, but unlike the chairman she hasn’t been active on antitrust issues. At 87, she’s the oldest member of the Senate.

Bloom added that committee chairs typically give the subcommittee a fair degree of autonomy. Don’t look for the committee to be on the cutting edge of antitrust reform, but instead, expect Grassley to work with Antitrust Subcommittee Chairman Mike Lee on less politically combustible issues such as legislation that would more closely align the merger review procedures of the DOJ and FTC — a move that House Democrats are likely to resist.

Lee, a Utah Republican, is the main sponsor of the Standard Merger and Acquisition Reviews Through Equal Rules Act, which would eliminate the FTC's power to conduct an administrative review of a proposed merger. The DOJ has no such power, as it must fight its merger challenges in federal court.

Lee also has led the charge that the big tech platforms — Facebook, Google and Twitter — have used their market power to thwart conservatives by engaging in “ideological discrimination.” He’s promised more oversight as Republicans pursue modifications to Section 230 of the Communications Decency Act of 1996. The law provides a legal shield for the platforms against lawsuits arising from user-generated content.

Democrats have fired back, charging the real problem isn’t bias, but that the platforms have failed to do enough to take down harmful posts that spread misinformation.

Bloom added Lee has been critical of Google. For example, the senator cheered the Justice Department’s landmark lawsuit challenging the company for using anticompetitive practices to maintain its monopoly. Lee tweeted it’s “an encouraging sign in our country’s ongoing battle against the pernicious influence of Big Tech.”

Still, Bloom said Lee is generally skeptical of broader antitrust overhauls, though he’s likely to support efforts to boost the antitrust watchdogs’ budget.

Senator Amy Klobuchar, a Minnesota Democrat and ranking member of the antitrust subcommittee, wants to modify the antitrust laws to help undo what she sees as the increasingly pro-defendant tilt of courts. She would shift the burden of proof in certain large deals to the companies to show that their tie-up won’t undermine competition.

While such ideas may not gain much traction in a GOP-controlled Senate, Klobuchar has joined Grassley on legislation to update merger filing fees and lower the burden on small and medium businesses. The proposal would raise additional revenue to pay for beefing up the DOJ’s and FTC’s enforcement efforts.

Over in the House, the leadership of the Judiciary Committee and its antitrust subcommittee are expected to remain the same. Judiciary Committee Chairman Jerrold Nadler of New York hasn’t been especially active on antitrust matters. By contrast, during his two years at the helm, Antitrust Subcommittee Chairman David Cicilline of Rhode Island has aggressively led the investigation into the dominance of tech platforms, focusing on Amazon, Apple, Facebook and Google.

The provocative report that followed included a tough indictment of the companies’ abuse of their monopoly power to throttle competition and charged that there’s serious under-enforcement by the antitrust agencies. Given those dynamics, it calls for the laws to be revamped, including a shift so that mergers resulting in a single firm controlling an outsized market share be presumptively prohibited. The report also calls for shifting the burden of proof to the merging parties to show their deal won’t reduce competition — a move aimed at increasing the likelihood that anticompetitive deals are blocked.

Although the report’s more modest proposals, including the one to shift the burden of proof, attracted some GOP support on the committee, its push for more sweeping changes faces big challenges. Even on the burden shift proposal, former FTC Commissioner Joshua Wright tweeted he is “very skeptical” it “will get much, if any, support from conservatives.”

Recurring efforts to move privacy legislation will continue, but the same hurdles remain. A measure by Senator Jerry Moran, the Kansas Republican who chairs the Senate Commerce Subcommittee on Manufacturing, Trade, and Consumer Protection, would give consumers expanded powers, but it would not allow individuals to sue companies for violating their privacy. It also would preempt state laws. Democrats oppose those two provisions and have introduced measures in the House and Senate without them.

Jeff Chester, executive director of the Center for Digital Democracy and a veteran of the privacy wars remains optimistic despite the obstacles. “There is more pressure coming for change,” he said.

New look at the top

Still, as partisan divisions on Capitol Hill will probably continue, so will such differences be evident on some big-ticket issues at the FTC. The agency has long been known for its bipartisanship regardless of which party controls the White House, but the five commissioners who assumed office at roughly the same time in 2018 have clashed over a number of high-profile cases.

#### It’s entwined in broader cultural battles, making reform extremely difficult

Mark Whitener 21, Adjunct Professor at Georgetown University's McDonough School of Business and Senior Fellow at the Georgetown Center for Business and Public Policy, “The Future of Antitrust: Ideology, Alternative Facts, and the Rule of Law”, ABA Antitrust Law Section - American Bar Association, 35 Antitrust ABA 3, Spring 2021, Lexis

THE FUTURE OF EVERYTHING SEEMS to be up for grabs, and antitrust is no exception. Like other aspects of society, antitrust has become somewhat disoriented, searching for solid ground while the landscape shifts. The basic consensus about antitrust fundamentals that formed over the past half-century, centered on economic analysis and the consumer welfare standard, is being challenged by critics who variously urge that antitrust be modernized to deal with new issues or returned to what they argue are its historical roots. Antitrust is offered as a means to address broad economic, political, and social concerns. Political opposites like Elizabeth Warren and Josh Hawley call for breakups of the same big firms.

As the antitrust policy discussion moves beyond its cloistered walls into the broader public forum, it is--for better or worse--starting to resemble debates over divisive issues like immigration, elections, racial justice, and climate change. Antitrust's future may hinge on the answers to the same questions that underlie these other policy controversies: Is consensus on common goals achievable, or will conflicting factions seek fundamentally different things? Can we arrive at an agreed set of facts on which to base policy decisions, or will everyone assert their own ("alternative") facts, or underlying beliefs? And, can our institutions--of government, politics, academia, social and other media--help us answer these questions, or will they stand by ineffectually as confidence in them declines?

Ideological Divisions vs. Consensus . If the first step in solving a problem is recognizing that one exists, the second step is agreeing on what exactly the problem is. Progress on some issues, like climate change, is impeded by the fact that a sizeable portion the public and many politicians deny that there is a real problem at all. On other issues lots of people are concerned, but they disagree, often vehemently, over the nature of the problem. Is the real issue with elections one of voter suppression, or election fraud? Should immigration reform focus on stronger border security, or fairer treatment of immigrants? The intensity of the public discussion of these issues often seems to hinder consensus, not further it.

In contrast, antitrust policy has over much of its history evolved through a more insular process, driven by the relatively few scholars, jurists, and politicians who made antitrust their concern. Public awareness of antitrust has generally been limited, and political intervention sporadic, often driven more by the concerns of particular industries or interest groups than by broad public interests. Partisanship in antitrust enforcement has typically been nuanced, with occasional shifts in emphasis from one administration to the next, but with a good measure of continuity. Even the major doctrinal shift in the 20th century toward economic analysis, while initially developed by academics who had free-market philosophies, ultimately became mainstream antitrust thought, as the Chicago School's underpinnings took hold in the enforcement agencies and the courts. Many of the economics movement's core principles continue to underlie Post-Chicago pro-enforcement theories that were developed by antitrust progressives. Until fairly recently, disagreements over antitrust policy tended to focus more on analytical details or individual case outcomes than on doctrinal fundamentals.

Now that antitrust is attracting a larger and often more politically motivated audience, there are both new opportunities and new challenges for antitrust policy. A more inclusive policy process could, in theory, lead to reforms that make antitrust more effective in dealing with a wider range of problems. But this assumes, first, that antitrust policy is in need of major changes; and second, that our political and other institutions are capable of producing reforms that will make things better, not worse. Even back in the days when a less gridlocked Congress was capable of passing major reform bills, there was a saying that proposing antitrust legislation was like opening Pandora's Box: once antitrust is exposed to the vagaries of the political process, anything can happen, much of it bad. Think of the various [\*4] industry-specific antitrust exemptions Congress has enacted over the years, for example, or misguided expansions of the antitrust laws like the Robinson-Patman Act.

For now, partisan and ideological stalemate will probably forestall the passage of major antitrust legislation. While there is support among both Democrats and Republicans for changes in antitrust policy, their main concerns differ widely, ranging from some Democrats' focus on addressing various forms of inequality to some Republicans' charges that big social networks stifle conservative viewpoints. If significant policy changes are to occur in the near term, they will probably have to come from the enforcement agencies and then, perhaps over time, from the courts. The U.S. agencies and the states filed several high-profile cases against large technology firms in the waning months of the Trump administration, and presumably these cases will be prosecuted vigorously by the Biden administration. But the cases, as noteworthy as they are, focus on relatively narrow conduct and break no new analytical ground, relying instead on established antitrust theories such as exclusive dealing and potential competition. As such, the cases have disappointed critics who want to use antitrust to address a wider range of ills they attribute to the excessive size and power of Big Tech.

#### Biden gets the blame

Jeffrey Toobin 15, Senior Legal Analyst at CNN, “Obama’s Game of Chicken with the Supreme Court”, The New Yorker, 5/21/2015, http://www.newyorker.com/news/daily-comment/obamas-game-of-chicken-with-the-supreme-court?intcid=mod-latest

For many people, the President of the United States is the government of the United States. It’s why he gets the credit and blame for so many things, like the economy, where his influence can be hard to discern. This is particularly true for a subject in which the President has invested so much of his personal and political capital. If the Supreme Court rules against him, the President can blame the Justices or the Republicans or anyone he likes, and he may even be correct. But the buck will stop with him.

#### Court action is politicized and blamed on Biden. No cover.

Lindsay Harrison 5, Professor of Law at the University of Miami, “Does the Court Act as “Political Cover” for the Other Branches?”, Legal Debate, 11/18/2005, http://legaldebate.blogspot.com/

While the Supreme Court may have historically been able to act as political cover for the President and/or Congress, that is not true in a world post-Bush v. Gore. The Court is seen today as a politicized body, and especially now that we are in the era of the Roberts Court, with a Chief Justice hand picked by the President and approved by the Congress, it is highly unlikely that Court action will not, at least to some extent, be blamed on and/or credited to the President and Congress. The Court can still get away with a lot more than the elected branches since people don't understand the technicalities of legal doctrine like they understand the actions of the elected branches; this is, in part, because the media does such a poor job of covering legal news. Nevertheless, it is preposterous to argue that the Court is entirely insulated from politics, and equally preposterous to argue that Bush and the Congress would not receive at least a large portion of the blame for a Court ruling that, for whatever reason, received the attention of the public.

#### Congress closely watches the Court and will backlash to unpopular decisions

Dr. Alicia Uribe 13, Lecturer in Political Science at University of Illinois, PhD University of Washington St. Louis, “The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions”, Law & Society Review, <http://faculty.ucmerced.edu/thansford/Articles/congress_reaction_to_court.pdf>

Conclusion Congress and the Supreme Court interact in a separation-of-powers framework as each attempts to shape policy. While the broader congressional politics literature provides convincing empirical evidence that legislative preferences have a significant effect on Members’ votes and the passage of legislation (e.g., Poole and Rosenthal 2007), no systematic evidence demonstrates legislative overrides of Supreme Court opinions result from congressional preferences. This lack of empirical support exists despite the widespread application of a spatial modeling approach to understand Congress-Court relations, which assumes overrides occur when Court decisions are ideologically distant from Congress. Our first goal was to show, consistent with existing spatial models in the literature, that Congress is more likely to pass laws overriding Supreme Court decisions the further ideologically removed a decision is from the legislative gridlock interval. Our statistical results, for the first time, demonstrate Congress overrides Court decisions the further ideologically removed it is from them. A two standard deviation shift around the mean of the ideological distance of Congress from a Court decision increases the likelihood of an override by 66.4%. This result indicates Congress takes notice of the policy import of a Court decision and is more likely to reject those it dislikes on ideological grounds. We therefore provide evidence in support of a core part of SOP models, showing Congress does indeed respond to Court decisions based on its preferences. This result is important because it confirms a fundamental component of nearly all SOP explanations of the relationship between Congress and the Court. Future studies can now be confident that their assertion that legislative preferences influence overrides is on a strong empirical footing. We further demonstrate Congress does not act strategically by avoiding legislative overrides when the Court is likely to reject them. The implication is that Congress is motivated by position-taking goals rather than the ultimate effect of its policy actions and the separation-ofpowers. That is, our data suggest Congress cares more about the short-term gains from overriding legislation (e.g., passing the legislation for electoral purposes) than the ultimate shape of the policies it chooses to override. This result suggests the Court may, at least when it concerns the ultimate effect of override legislation, have greater influence on the ultimate location of public policy. Of course, this conclusion is tempered by the fact that Congress and the Court rarely disagree about whether the status quo should be altered; Congress wishes to override a Court decision preferred by the Court only 2.5% of the time in our data. As Dahl (1957) famously declared, the Court is not often out-of-step with the elected branches, and as a result Congress and the Court tend to agree on the desirability of previously decided Court cases. Finally, we show the effect of ideological distance matters for all types of Court decisions, including constitutional ones. Thus, while the Court may, as some suggest (e.g., King 2007), attempt to insulate its decisions from congressional override by using constitutional interpretation, it appears this tactic does not work. When Congress is ideologically distant from a Court decision, regardless of whether the decision is based on constitutional, statutory or common law interpretation, it is more likely to override it. This result is new to the literature, and it means subsequent studies cannot exclusively focus on statutory cases.

#### Recent appointments ensure the President gets the blame

Mirengoff 10 – Attorney in Washington, D.C. A.B., Dartmouth College J.D., Stanford Law School, 6/23/2010, The Federalist Society Online Debate Series, http://www.fed-soc.org/debates/dbtid.41/default.asp

The other thing I found interesting was the degree to which Democrats used the hearings to attack the "Roberts Court." I don't recall either party going this much on the offensive in this respect during the last three sets of hearings. What explains this development? My view is that liberal Democratic politicians (and members of their base) think they lost the argument during the last three confirmation battles. John Roberts and Samuel Alito "played" well, and Sonia Sotomayor sounded like a conservative. The resulting frustration probably induced the Democrats to be more aggressive in general and, in particular, to try to discredit Roberts and Alito by claiming they are not the jurists they appeared to be when they made such a good impression on the public. I'm pretty sure the strategy didn't work. First, as I said, these hearings seem not to have attracted much attention. Second, Senate Democrats are unpopular right now, so their attacks on members of a more popular institution are not likely to resonate. Third, those who watched until the bitter end saw Ed Whelan, Robert Alt and others persuasively counter the alleged examples of "judicial activism" by the Roberts Court relied upon by the Democrats -- e.g., the Ledbetter case, which the Democrats continue grossly to mischaracterize. There's a chance that the Democrats' latest partisan innovation will come back to haunt them. Justice Sotomayor and soon-to-be Justice Kagan are on record having articulated a traditional, fairly minimalist view of the role of judges. If a liberal majority were to emerge -- or even if the liberals prevail in a few high profile cases -- the charge of "deceptive testimony" could be turned against them. And if Barack Obama is still president at that time, he likely will receive some of the blame.

#### That’s now

Ronald Goldfarb 16, Professor Emeritus at Middlesex County College, “Abortion Rights Questions are Back Before Supreme Court”, My Central Jersey, 8/23/2016, http://www.mycentraljersey.com/story/money/business/ron-goldfarb/2016/08/23/abortion-rights-questions-back-before-supreme-court/89212944/

Balancing the possible benefits of the Texas law with the right to the services of a professional abortion provider, the court found the “virtual absence of any health benefit.” In his opinion, Breyer wrote that the statute “vastly increases the obstacles confronting women without providing any benefit to women’s health capable of withstanding any meaningful scrutiny.” One fact that certainly played a part in the decision is that if the law were given full effect, the number of women living more than 200 miles from a provider would have increased by more than 7,000 percent.

Next time, we will look at some of the cases that the Supreme Court already has agreed to decide in the new term that begins the first Monday in October.

#### It’s real world---they can act instantly

Michael Herz 2, Professor of Law at Cardozo School of Law, Yeshiva University, “The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore”, Akron Law Review, 35 Akron L. Rev. 185, Lexis

That day, President Bush sought a stay of the state Supreme Court's ruling from the United States Supreme Court. The lawyers argued that the recounts mandated by the state supreme court would run past the December 12 "deadline," were inconsistent with the state election statutes, and were arbitrary and standardless. Accordingly, they violated (1) the federal statutory provision governing congressional counting of electoral votes, [9](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all#n9) (2) the constitutional allocation of authority to the state legislature to determine the manner in which the state selects its electors, [10](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all#n10) and (3) the equal protection and due process clauses. [11](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all#n11) The Court granted the stay the next day, Saturday, December 9, and, treating the petition for a stay as a petition for certiorari, granted certiorari as well. [12](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all#n12) Briefs were due by 4:00 p.m. on December 10, and oral argument set for 10:00 a.m. Monday, December 11. [13](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all#n13) The Court handed down its decision at a little before 10:00 p.m. the following evening. [14](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all#n14) Only four similar instances come to mind in which the modern Court considered cases involving matters of great national importance on a highly expedited schedule. The steel seizure case, [15](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n15" \t "_self) the Nixon tapes case, [16](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n16" \t "_self) the Iranian assets case, [17](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n17" \t "_self) and the Pentagon Papers case [18](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n18" \t "_self) were all  [\*189]  litigated in a matter of weeks or months and produced almost instant opinions from the Supreme Court (19, 16, 8, and 4 days after oral argument, respectively). But these are rarities. And even by these standards Bush v. Gore set new records for speed--for the overall litigation, for the briefing schedule, and for the period within which the Court reached its decision. The speed of Bush v. Gore is less striking when compared to the standards of an earlier time. The Supreme Court once decided cases much more quickly than is the current norm. During the period from 1815 to 1835, for example, the Court decided 66 constitutional cases with full opinion; 17 of those opinions were handed down within five days of the argument, including several of the Court's most significant rulings. [19](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n19" \t "_self) "By contemporary standards, the Marshall Court was breathtakingly swift to render decisions." [20](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n20" \t "_self) By the following century, the pace had slowed. Robert Post has calculated that during the 1912-1920 Terms the Court averaged 63.7 days from the argument of a case to the announcement of a full opinion. [21](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n21" \t "_self) In contrast, during the 1993-1998 Terms the Court took an average of 91.1 days after argument to hand down its decision. [22](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=4a8d2bb2542491f3547480df90b2654d&docnum=16&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzb-zSkAB&_md5=5b414020ee201b26081a15236db6b9d6&focBudTerms=supreme+court+w%2F50+court+w%2F35+announc%21+or+decid%21+or+decision%21+w%2F35+expedi%21+or+quick%21+or+immediat%21+or+speedy%21+or+rapid%21+w%2F35+term+or+june+or+docket&focBudSel=all" \l "n22" \t "_self)

#### There’s

#### The XO is empty talk that’s years from being implemented

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Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.