# Northwestern---Round 3 vs. Samford EG

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### DA---1NC

Infrastructure DA

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

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

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

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

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

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

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

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

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

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

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

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

#### 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.

#### Catastrophic blackouts are inevitable without grid investment

Jennifer A. Dlouhy 21, Energy and Environmental Reporter at Bloomberg News, BA in Journalism and Political Science from the University of Missouri, and Ari Natter, Reporter at Bloomberg LP, BA in Journalism from American University, “Biden’s Plea to Remake Grid Gets a Boost on Texas Power Crisis”, Bloomberg Green, 2/17/2021, https://www.bloomberg.com/news/articles/2021-02-17/biden-s-plea-to-remake-grid-gets-a-boost-on-texas-power-crisis

The icy weather that left millions without power in Texas has critics of the Biden administration’s fight against climate change blaming renewable energy, but the failures have more to do with an ill-prepared power grid and shortfalls in traditional electricity sources.

Energy analysts and experts said the blackouts in Texas underscore the U.S. electric system’s need for more of almost everything, from additional power lines criss-crossing the country to large-scale storage systems that can supply electricity when demand spikes or renewable generation declines.

That could give at least a rhetorical boost to President Joe Biden’s plans for a “historic investment” in the nation’s electric grid, including better transmission systems and battery storage that would make the system more resilient amid extreme weather spurred by climate change. The investments broadly touted by Biden could help satisfy his 2035 goal of an emissions-free power system and help meet increased demand nationwide as more electric vehicles hit the roads and more buildings rely on power instead of natural gas for heat.

The administration is set to unveil a blueprint for infrastructure spending, including investments in the nation’s electrical grid, within weeks.

“There are parts of the country right now that have excess power, that have low prices, that are not struggling, where it’s a normal Tuesday, and yet in Texas, 4 million people are without power,” said Joshua Rhodes, a research associate at the University of Texas at Austin’s Webber Energy Group. “This should reignite a debate about some kind of connection between our disparate grids where we can move energy to places like Texas that are desperate for it right now.”

The nation’s grid evolved from a patchwork of local power systems that weren’t meant to serve distant customers. “So cities and even some times neighborhoods have their own systems,” Rhodes said.

The downside of that approach became apparent in Texas as temperatures plunged into single digits. Regional power sources weren’t able to meet the demand as residents cranked up thermostats, straining supplies of electricity in the state known as the energy capital of the U.S. Grid operators were forced to implement rolling blackouts as wind turbines in West Texas froze up and natural gas, coal and nuclear power plants went offline.

“No technologies were spared in this storm of the century,” said Suzanne Bertin, who heads the Texas Advanced Energy Business Alliance. The solution involves “not putting all of our eggs in one technology basket.”

It’s not the first time the nation’s grid has failed to provide energy where it’s needed. A heat wave across California last August caused a spike in energy demand as residents cranked up air conditioners, forcing rolling blackouts.

And in 2011, after a cold snap forced scores of Texas power plants offline federal regulators recommended installing insulation and heated pipes

Larry Gasteiger, executive director of WIRES, a trade group that advocates for more construction of high-voltage transmission, said the latest crisis in Texas shows the urgent need to build a more resilient grid.

“Climate change is continuing to have a serious impact on the electric system,” Gasteiger said in a phone interview. “We are seeing more and more frequent extreme weather events.”

#### 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

### T---1NC

T Subsets

#### ‘Antitrust’ applies to the entire economy---targeting single industries isn’t topical

Dr. Babette Boliek 11, Associate Professor of Law at Pepperdine University School of Law, J.D. from the Columbia University School of Law, and Ph.D. in Economics from the University of California, Davis, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011, Lexis

Although the two regimes share a commonality of purpose--to protect consumers and to promote allocative efficiencies in production--the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving [\*1629] as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws "typically aim at similar goals--i.e., low and economically efficient prices, innovation, and efficient production methods"--regulation looks to achieve these goals directly "through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about." The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets--regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures. Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly. In the vast majority [\*1630] of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

### CP---1NC

States CP

#### The 50 state governments and relevant sub-federal territories should substantially increase prohibitions on anticompetitive business practices by increasing anti-trust investigations and prohibitions of cross-border mergers and acquisitions.

#### 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]

### CP---1NC

Memo CP

#### The United States federal government should issue a policy memorandum that the FTC should increase anti-trust investigations and prohibitions of cross-border mergers and acquisitions.

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

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III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

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

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

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

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

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

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

#### It avoids politics

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

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

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

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

A. Mandates for Cost--Benefit Analysis

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

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

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

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

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

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

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

C. Taking Comments in Itself

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

D. Drafting Challenges

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

E. Dealing with Mobilized Stakeholders

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

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#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy---it’s impossible to distinguish specific industries because, unlike regulation, it’s enforced in generalist common law

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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.

### DA---1NC

FTC Tradeoff DA

#### The FTC is prioritizing right to repair now

Betty **Joita 21**, Editor of TechTheLead, specializing in technology and society, “FTC Adopts New Policy In Support Of The Right To Repair,” TechTheLead, 07/25/2021, https://techthelead.com/ftc-adopts-new-policy-in-support-of-the-right-to-repair/

The discussion on the right to repair has evolved a lot lately and the movement, which initially began as an uphill battle, seems to have now reached more even terrain, thanks to support from the Federal Trade Commission (FTC).

The FTC released a report earlier this year aimed at shedding light on “anti-competitive restraint restrictions” in the United States. Not long after, President Biden instructed the FTC to draft new rules for the right to repair.

Now, this initiative is moving forward. The commission voted **unanimously**, in a 5-0 decision, to approve the new policy that will restore the right to redress not only for small businesses, but also for workers, government agencies and consumers.

The FTC’s press release stated that the “policy statement adopted today is aimed at manufacturers’ practices that make it extremely difficult for purchasers to repair their products or shop around for other service providers to do it for them. By enforcing against restrictions that violate antitrust or consumer protection laws, the Commission is taking important steps to restore the right to repair.”

While the new laws still need to be set in place, FTC’s policy has set up five things it plans to improve from here on: first and foremost, the FTC will **prioritize** any investigations related to unlawful repair restrictions. The FTC will also encourage the public to submit complaints and info about companies that might not adhere to the relevant laws.

The commission will be scrutinizing “repair restrictions for violations of the antitrust laws” or otherwise promote monopolistic practices and will be closely monitoring unfair repair restrictions, as the FTC concluded that “manufacturers use a variety of methods—such as using adhesives that make parts difficult to replace, limiting the availability of parts and tools, or making diagnostic software unavailable—that have made consumer products harder to fix and maintain. The policy statement notes that such restrictions on repairs of devices, equipment, and other products have increased the burden on consumers and businesses. In addition, manufacturers and sellers may be restricting competition for repairs in a number of ways that might violate the law.”

FTC Chair Lina Khan has commented on the discussions stating that “These types of restrictions can significantly raise costs for consumers, stifle innovation, close off business opportunity for independent repair shops, create unnecessary electronic waste, delay timely repairs, and undermine resiliency. The FTC has a range of tools it can use to root out unlawful repair restrictions, and today’s policy statement would commit us to move forward on this issue with new vigor.”

#### The plan’s binding prohibition burns agency resources and trades-off with other enforcement

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

D. Costs: Expenditure of Time and Resources

Notice-and-comment on guidance will take agency resources and cause some delay, compared with narrower and less-formal means of taking input. Public comment on guidance, said a former agency general counsel, was "usually a good investment," but came at "some cost." Samuels, counsel to the Association of Home Appliance Manufacturers, noted that it takes "[hu]manpower." According to an EPA official, one of the EPA's criteria for whether to take public comment on guidance was the need for speed: if the guidance was needed right away, that was a reason to forego comment. A former senior EPA official with cross-office responsibilities said a drawback of notice-and-comment on guidance was the processing time. An interviewee who held senior posts at CFPB and other federal agencies said the targeted outreach to industry trade associations, public interest groups, and consumer advocates that was common for banking agencies [\*100] formulating guidance was "much faster" than the process that banking agencies would typically undertake when they did voluntary notice-and-comment on guidance (that is, administering a public notice-and-comment period, making an appropriate record of the comments received, and publishing the outcome). A former senior Federal Reserve official who has counseled financial institutions said she thought CFPB ought to undertake notice-and-comment on guidance more often, estimating it would add three to five months to the process for a given document.

The cost of notice-and-comment in time and money presents a tradeoff: it will delay issuance of the guidance at issue and possibly also burn up agency resources that could be used to produce guidance on yet other subjects. Since much guidance responds to industry demand for clarity, this is a tradeoff for industry, as well. A former CFBP official who represents CFPB-regulated entities described the "tradeoff" as thus: "industry wants input," but it also "wants guidance," and more input means less guidance. An executive at a drug manufacturer warned that adding more process for FDA guidance would make the agency less inclined to issue it and slow things down; industry needed to know what the agency was thinking. John Newquist, the former assistant administrator of OSHA's Region V, said the agency would benefit from more stakeholder input on guidance, but he said this risked making the issuance of guidance more like legislative rulemaking, which at OSHA is notoriously slow and onerous, and if that happened, you would never have any guidance. Celeste Monforton, an academic and safety advocate and former OSHA legislative analyst, said that OSHA guidance was high in volume, diverse, and often based on local conditions, meaning that putting most of it out for comment was not feasible: "industry just wants the answer." An official at a non-profit public policy research organization, formerly a consultant and product manager in the consumer finance industry, said that a well-run banking regulatory agency should be interested in seeking a broad range of outside viewpoints, but you cannot really force an agency to care about such input. [\*101] She further stated that adding process burdens to the issuance of guidance risked taking away the value of guidance, that is, the capacity to change industry behavior for the better through informal nudging based on agency judgment. A former HHS Office of General Counsel official, while urging that CMS do notice-and-comment for more of its guidance, said she recognized that this had to be traded off against the fact that more process would slow things down, especially since it was already hard to get guidance out of CMS to begin with.

When it comes to the time and resources spent on notice-and-comment, a key variable is whether the agency opts to issue a written response to the comments (the written response, in the context of legislative rulemaking, being one of the costliest elements of the process). A former agency general counsel, while declaring notice-and-comment usually a good investment for guidance, said it was "key" that there was no obligation to respond to the comments--a point she said kept down process costs more than any other factor, including the absence of OMB review. Consider the FDA, which does not obligate itself to give any response to comments on guidance and generally gives none. When the FDA first adopted its policy in favor of notice-and-comment on guidance in the 1990s, recalled a former senior official there, personnel were "often unhappy" with the policy, and it was "key" for obtaining their "buy-in" that the policy did not require a response to comments like that required for legislative rulemaking. William Schultz, who served as FDA Deputy Commissioner for Policy in 1994-1998, recalled that the agency's centers were "upset" about the new policy, and the staff feared that the new policy would "really impede" their work; the absence of a response requirement, he said, was important for "selling" the policy to the staff. Meanwhile, at the EPA, officials usually do give a response to comments on guidance, though much less in-depth than for legislative rulemaking. DOT and the USDA NOP also give responses when they do take notice-and-comment on guidance.

#### Right to repair is *specifically* key to solving e-waste

Benjamin **Guez 19**, Masters in IT from the European Institute of Technology (2007-2012), Masters in IT from California State University – Long Beach (2011-2012), Full- time partner and CTO of Adepem, a French news source, “Right to Repair: E-Waste by the Numbers,” Adepem, 4/10/2019, https://www.adepem.com/blog/e-waste-by-the-numbers/

The United Nations calls it a “tsunami.” Fifty million tons per year and growing.

That’s the global scale of electronic waste, also called e-waste. It’s one part of the rapid growth in the municipal solid waste stream. Virtually 100% of e-waste is recyclable, yet many countries are only recycling a fraction of their e-waste. Roughly 20% of e-waste is being effectively recycled worldwide.

From smartphones and tablets to laptops and LCD screens, the economics of electronics encourages disposal rather than reuse. Often, it’s cheaper to buy new than to recycle. With the increase in consumption, mining for materials and the large quantities of e-waste spell ecological challenges.

Few electronic devices last more than a few years these days. A report from the ENDS Europe agency demonstrated that electronic units sold to replace faulty appliances rose from 3.5% in 2004 to 8.3% in 2012. Large appliances in the home were replaced within their first five years of operations at a rate of 13% in 2013, up from 7% in 2004.

With the rate of e-waste production growing 4-5% per year, there are increasing calls to address the issue through a mix of government reforms and industry efforts. Before we discuss those efforts, it’s important to understand the scope of the e-waste crisis by looking at the numbers that make it a real and urgent challenge.

Reduce And Reuse

Produce less. Pollute less.

These are the two key ways to effectively address the e-waste issue. A big part of that is extending the lives of devices which keeps them out of landfills and in the hands of people. Electronic device users are often unable to replace parts in their devices which drives them to buy a new device as older devices become less valuable pretty quickly.

Nothing short of a global movement to generate less waste and recycle electronics in new ways will adequately address the e-waste challenge. That’s why “right to repair” legislation is on the rise. Massachusetts passed a right to repair law in 2013 that focused on the automotive industry. This led the industry to change policies around repairing advanced software and automotive components nationwide rather than deal with patchwork regulations across multiple states.

Following Massachusetts example, other states are catching on and introducing their own right to repair legislation from South Dakota and Nebraska to New York and Minnesota. As in the example of Massachusetts and the automotive industry, it may only take a few states to tip the balance when it comes to how e-waste is managed.

A similar trend could be coming to the electronics recycling industry. Here are two key data points that show why “right to repair” is a good idea when it comes to reducing e-waste: 200 repair jobs created for every 1000 tons of reused electronics (iFixit), 3,657 U.S. homes could be powered for a year by recycling one million laptop computers

From job creation to energy conservation (and much more), right to repair efforts are one of the many tools in our toolbox when it comes to tackling electronic waste.

#### Extinction.

Kristi Gartner 16, Executive Director of the Non-Profit Electronics Recycling Association, “Consumerism, Mass Extinction and our Throw-Away Society”, The Art Of, 10/13/2016, <https://www.theartof.com/articles/consumerism-mass-extinction-and-our-throw-away-society>

Needless to say, affordability for tech items has increased considerably. This example is just for computers, but think about all of the other equipment we rely on that was once out of reach for the average person. Vehicles, televisions, phones, electronic appliances – in developed nations these things are staples, we all have them – multiples of them even, and we upgrade them at an alarming rate. Drawn in by advertising that boasts leading fuel economy, high efficiency, faster processing speed, better graphics, we buy things we think will improve our quality of life, and often even be better for the environment. And don’t get me wrong, sometimes they are. But only if we find a better way to manage the stuff we get rid of to make room for the new, improved versions. If you’re taking your used items to the dump, you probably need to re-evaluate how much better for the environment that new item is. The environmental cost of these toxic items when carelessly discarded is staggering in comparison to the environmental (or other) benefits of that new equipment. Accounting for a comparatively small percentage of the total waste in our landfills, roughly 2%, e-waste represents nearly 70% of the toxic waste in landfills. Our tech addiction is literally poisoning the planet. The non-profit organization I represent, the Electronic Recycling Association (ERA) is focused specifically on reducing the waste produced by personal electronics like computers, laptops, phones and other tech you’d find in your average office. We take advantage of the short primary use cycle for this equipment, which more often than not means that there is a remarkable amount of productive life remaining in equipment when it arrives at our facilities. So we wipe it, fix it up, and prepare it for secondary use. Equipment is either provided to deserving charities and NPOs through our Canada-wide technology donation programs or sold at a low cost to individuals and companies not qualified for our donation programs but unable to afford brand new equipment. We’ll also often get equipment in that we can’t fix, so these items are sent over to our recycling partners, who responsibly dismantle and separate materials for recycling, ensuring a negligible landfill contribution. All donations are conditional upon signing an agreement binding the recipient to return the equipment to ERA when they no longer want it or it stops working for responsible processing. This option is a win-win. Few virgin natural resources are required to refurbish equipment, and often it has years of productive life remaining. Thousands of charitable organizations receive and use this equipment and are able to direct funds to program development as opposed to purchasing expensive new tech gear. Keeping operational tech in use longer reduces the demand for new equipment and lessens the strain on resources. When, inevitably, equipment reaches end of life, it’s processed in the most environmentally responsible manner currently available. There is room for improvement there too though, while recycling is a significantly better option than trashing, it is still a resource consuming process. We’re doing what we can, but we can’t reuse or recycle equipment we aren’t receiving. So why aren’t people utilizing reuse and recycling programs instead of trashing their stuff? Maybe it’s because society isn’t aware of the impact their waste is actually having on our planet, or maybe the process to reuse or recycle household items isn’t simple enough, or maybe individuals don’t think their personal choices will have a measurable impact so they opt out of green practices all together. Or maybe fear or denial make it impossible to imagine our planet without 75% of the species that make it such a beautiful and diverse place. A place where we can actually live. But it’s a reality, one that has already begun and will directly affect our generation and the generation of our children. This is in each of our back yards.

### T---1NC

T Only Congress

#### ‘Law’ requires legislative action

Dr. Mohammed Saif-Alden Wattad 8, Post-Doctoral Minerva Fellow at the Max-Planck Institute for Foreign and International Criminal Law Studies in Freiburg, “The Torturing Debate on Torture”, Northern Illinois University Law Review, 29 N. Ill. U. L. Rev. 1, Fall 2008, Lexis

6 See MOHAMMED SAIF-ALDEN WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 44 (2008) (explaining that the term "law" refers to the laws enacted by legislative bodies [i.e. statutes, constitutions, and treaties] and is to be distinguished from the term "Law," which refers to the higher concept of the "good and just law" binding on all human beings [i.e. the moral or religious law]; if the "law" contradicts the "Law," the latter must prevail).

### ADV 1---1NC

#### Broadening extraterritoriality causes global retaliation that shreds free trade AND five eyes

Samuel F. Kava 19, JD/MBA Candidate @ JHU/UofM, "The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity," Journal of Business and Technology Law 15, no. 1 (2019): 135-164

Before the FTAIA was enacted, in 1982, many of the United States' closest allies were disgruntled by the U.S. courts' expansive extraterritorial application of the Sherman Anti-Trust Act. 152 These nations confided in the territorial principle, and believed it "axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."153 The United Kingdom, one of the most outspoken allies against the United States' "attempt[] to impose [its] domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the United States," viewed the extraterritorial application of the Sherman Anti-Trust Act as ironic given the fact "the United States was founded by those who took exception to little matters of taxation being imposed extraterritorially." 154 Thus, in an attempt to "protect their nationals from criminal [and civil] proceedings in foreign courts where the claims to jurisdiction [were] excessive and constitute[d] an invasion of sovereignty," foreign nations enacted blocking statutes to resist the extraterritorial application of the Sherman Act.155

The blocking statutes of each nation varied, but all served to "block the discovery of documents located in their countries and bar the enforcement of foreign judgements."156 The United Kingdom achieved these goals with the Protection of Trading Interests Act, France with the French Blocking Law, Canada with the Foreign Extraterritorial Measures Act, and Australia with the Foreign Proceedings Act.157 The conflicting laws between the United States and its foreign counterparts created tremendous uncertainty regarding what nation's laws would be applied in the event of a cross-border dispute. According to Nuno Lim o and Giovanni Maggi, economists from the University of Maryland and Yale University, "as the world becomes more integrated, the gains from decreasing trade-policy uncertainty should tend to become more important relative to the gains from reducing the levels of trade barriers."158

Essentially, for trade to prosper, it is more important to provide producers and consumers with predictability and certainty (regarding the rule of law) rather than enacting laws that focus on free trade economics. Accordingly, it is in the best interest of governments to focus on unifying its laws before negotiating for the elimination of tariffs or quotas. This is not to say that eliminating trade barriers is not vital to the health of the economy-in fact, tariffs, quotas, and other trade barriers are proven to adversely affect all parties involved in the chain of distribution-however, it is more important to unify laws before focusing on the elimination of any trade barriers.159

As mentioned in Part I.C., the complaints of U.S. exporters and foreign governments were heard, and the United States Congress enacted the FTAIA "to address the concerns of foreign governments that the effects test established in the Alcoa case had not made clear the magnitude of the U.S. effects required to support a claim under the Sherman Act." 160 Thus, the FTAIA was implemented to bring certainty to consumers and producers by requiring that "conduct must have a 'direct, substantial, and reasonably foreseeable effect"' for the Sherman Anti-Trust Act to apply extraterritorially. 161 This language provided the foreign community with temporary relief, and gave producers and consumers the certainty and predictability needed to establish confidence in the markets and continue trading. However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a "direct, substantial, and reasonably foreseeable effect" 162 on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies-i.e. the U.S. Department of Justice and the Federal Trade Commission-have taken an aggressive approach to pursuing international antitrust claims. In 2017, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published the International Guidelines-a publication "explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States." 163 The International Guidelines have taken the broadest approach in determining if conduct is "direct"-finding if there is a "reasonably proximate causal nexus between the conduct and the effect" conduct is "direct"-and the narrowest view that international comity bars enforcement of U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation's law.164 Thus, because the FTAIA has become ineffective and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act with Apple v. Pepper, foreign nations will almost certainly strive to adopt modern and effective blocking statutes. These blocking statutes will revitalize uncertainty in the markets, and the global economy will be adversely affected.

In addition, because our world is more integrated, compared to the time when the FTAIA was implemented, the adverse economic effects may be worse if foreign nations pursue modern blocking statutes. To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations' laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and innovative products (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than research and development with the new blocking statutes, consumers, producers, distributors, and the economy as a whole will be adversely affected.

Overall, there is a significant risk that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the global economy. Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer's ability to purchase low cost goods, and the overall health of the global economy. The only certainty is that trade will slow down as a result of trade policy uncertainty. To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act by expressly providing courts with a robust international comity analysis.

#### But it’s resilient---day-to-day collaboration over other intel

Michael **Evans 18**. Former Defence Editor of The London Times, 1998 to 2010, and Pentagon Correspondent in Washington 2010-2013. 2-2-2018. "Five Eyes Wide Shut: Australia Sold Years of Secret Documents in an Old Piece of Furniture." Daily Beast. https://www.thedailybeast.com/australia-sold-years-of-secret-documents-in-an-old-piece-of-furniture

Whether it compromises British techniques or not, the political context surrounding the House Intelligence Committee memo raises serious issues for the Five Eyes organization. The club has experienced its fair share of embarrassing episodes in the last few years, the most devastating of which was the exposure by Edward Snowden of thousands of top secret files copied and removed from the U.S. National Security Agency (NSA) where he had been working as a contractor. The Five Eyes members have clung to each like lovers despite a rapidly changing world in which intelligence-sharing between nations can make the difference between life and death, so grave is the threat from international terrorists and rogue states. Why then is Five Eyes still so exclusively limited to the English-speaking powers? Is there not a case for the club to invite in more members from Europe and from trusted nations in the Middle East? Would the world be a safer place if Five Eyes was now Ten Eyes or Twenty Eyes? The answer is complex. There are already numerous arrangements under which “third-party” countries can benefit from intelligence acquired by the Five Eyes partners. Countries such as France, Norway, The Netherlands, Denmark, Germany, Spain, Italy, Belgium and Sweden have all at some point been allowed into the club as unofficial members when their national security interests are at stake. But only for intelligence relevant to their concerns. Cooperation between the Five Eyes members and other intelligence services has increased markedly since 9/11. European intelligence agencies are also more coordinated than ever, and NATO’s intelligence-gathering set-up has improved. Trust is the absolute gold standard for intelligence sharing. Most people in the intelligence community would say that the more countries you share intelligence with on a regular basis the greater the risk of a leak or a security breach. So, the Five Eyes is likely to remain Five Eyes for that very reason. The arrival of Donald Trump in the White House was met with some trepidation, although never openly or officially. He had railed against the CIA in his election campaign and he openly admired Russian President Vladimir Putin. To the British government’s dismay, he also appeared to back an American media commentator’s accusation that GCHQ had been asked by President Barack Obama to eavesdrop on his suite of rooms at Trump Tower in New York. The allegation was dismissed by GCHQ as “utterly ridiculous”. One of the tenets of the Five Eyes is that intelligence gleaned within the club can never be shared to third parties without the approval of the nation which specifically collected the information. It’s a general rule for most intelligence services. Trump seemed to have broken that rule when he revealed details of an Islamic State terrorist plot when talking to Sergei Lavrov, the Russian foreign minister, during a meeting in the White House in May last year. It was later reported that the intelligence had come from the Israelis, and had not even been passed to U.S. allies. “The Five Eyes members have clung to each like lovers despite a rapidly changing world.” British Prime Minister Theresa May had to intervene with President Trump when secret operational details about the Manchester bombing in May last year were leaked to the U.S. media. The bomber was identified before the Manchester police were ready to publish that information, and pictures appeared of the bomb remains. The police were so angry they temporarily suspended sharing information with U.S. counterparts. The Obama administration was also involved in a breach of the intelligence-sharing rules. In 2012, details of a plot by Nigerian Umar Farouk Abdulmutallab to detonate an explosive device in his underwear on a passenger plane flying from Amsterdam to Detroit were released to the American press. It exposed the involvement of a British intelligence source who played a vital role in foiling the plot. It caused outrage in the British intelligence community. With the latest intelligence spat over the Russia collusion memo, what expectation can there be that the historic Five Eyes arrangement, which lies at the heart of the so-called “special relationship” between the U.S. and U.K., can survive in its current format? The answer lies in the unbreakable bond that exists between the intelligence services of the five countries. Irrespective of who is in government, the operational heads of the agencies themselves work so closely together that they can maintain the flow of intelligence whatever is going on in the political world. The trust between them is built on decades of cooperation and the forging of personal relationships. “I wouldn’t expect this to rock the boat. The Five Eyes agreement is based on day-to-day cooperation which makes it much more important than any of these individual instances [such as the publication of the memo],” Sir David said.

#### 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.

#### No cyber war or retaliation

Jasmine Rodet 18, Master’s Degree in Cyber Security, Strategy, and Diplomacy from the University of New South Wales, Cyber Security Program Manager at Fortescue Metals Group, “The Threat of Cyber War is Exaggerated”, 11/11/2018, linkedin.com/pulse/threat-cyber-war-exaggerated-jasmine-rodet/

For the regular person on the street, the term ‘cyber war’ is more likely to bring to mind the 1983 movie “WarGames” and the doomsday articles that appear regularly in the media about the ‘cyber battlefield’ and an impending World War III. This essay argues that the threat of cyber war is exaggerated and although it can, by definition, be stated that we are already in a state of cyber war, the impact on states is negligible compared to conventional war domains.

The argument is presented in 3 steps. The first step is to define cyber war and cyber weapons, referencing scholars and experts in the area of conventional war and the cyber domain. The second step is to explore who has been exaggerating the threat of cyber war and what their motivations might be. The third is to explore the evidence and quantify the probability and impact that cyberwar has had on states to date.

‘Cyber war’ is a term often used interchangeably in media with cyber-crime, cyber-attacks, cyber-conflict and cyber-incidents, creating confusion amongst the public and scholars alike. Clausewitz (1989, 75), in his book, On War, defines war as ‘an act of force to compel the enemy to do our will’. Rid (2012, 7) on the other interprets Clausewitz use of ‘force’ as meaning ‘violent’ force. According to Rid, if an act is not potentially violent, it is not an act of war. However, Stone (2013, 107) describes ‘cyber war’ as a politically motivated act of force, not necessarily lethal and not necessarily attributable. The definition by Powers and Jablonski states more simply that cyber war is the utilisation of digital networks for geopolitical purposes (Nocetti 2016, 464). Neither of the latter two definitions requires violence to qualify as cyber war. Under these definitions, the Stuxnet cyber-incident in 2010 and the Estonia incident in 2007 would constitute an act of cyber war, and as such we could say that nations have been at cyber war in the past and are likely to continue to engage in cyber war in years to come.

For this essay, I will use Stones definition to argue that even though states may engage in cyber war, the concept of cyber war is exaggerated. It seems that cyber war is deliberately exaggerated in the media and by politicians for financial and political gains. There are countless examples in the media and in politics of the exaggeration of the threat of cyber war and the language used plays a big factor in creating a sense of fear in the community.

The Four Corners report, Hacked, is a classic example where the reporter, Andrew Fowler describes the current situation in Australia as ‘… a secret war where the body count is climbing every day’ (Fowler 2013). The documentary reveals nothing violent or lethal about cyber incidents. The documentary is actually about hackers working from locations overseas, having targeted key Federal Government departments and major corporations in Australia.

In another example, NATO may be interpreted as exaggerating the threat of Cyber War when they invited Charlie Millar to present at their Conference for Cyber Conflict at the NATO Cooperative Cyber Defence Centre of Excellence in 2017. Millar is an independent security evaluator, and his presentation was titled ‘Kim Jong-il and me: How to build a cyber army to attack the US’. He later presented similar content at Def Con 2018. His presentation described the steps he would take to mount a cyber war, including the types of people he would engage, how much he would pay them, what his strategy would be and how much it would cost in total.

Who stands to gain from the exaggeration and hype? Logically, one group would be those that gain financially from the sale of cyber protective services and software. According to Valerino, 57% of technical experts surveyed said that we are currently in a cyber arms race and 43% said that the worst-case scenarios are inevitable (Valeriano and Ryan 2015). Translate this into sales and Gartner projects worldwide security spending will reach $96 Billion in 2018, up 8 Percent from 2017 and to top $113 billion by 2020 (Gartner 2017).

Additionally, there may be political motivations to exaggerate the threat of cyber war. Cyberspace is not well understood by the general public and fear is natural. In the US’s cyber security debate, observers have noted there is a tendency for policymakers, military leaders, and media, among others, to use frightening ‘cyber-doom scenarios’ when making a case for action on cyber security (Dunn 2008, 2).

There is some evidence to suggest that more recently in the political arena; we may be maturing in our understanding of the real threat of cyber war. The Tallinn Manual, an academic, non-binding study on how international law applies to cyber conflicts and cyber warfare, was written at the invitation of the Tallinn-based NATO Cooperative Cyber Defence Centre of Excellence. It was first published in 2013 with the title ‘The Tallinn Manual on the International Law of Cyber War’. In 2017, it was re-released with the revised title ‘Tallinn Manual 2.0 on the International Law of Cyber Operations’. The change in title from ‘war’ to ‘operations’ signifies a more moderate use of language from NATO and is an acknowledgement that cyber incidents generally fall below the threshold at which International Law would declare them to be a formal act of war. Experience over the 4 short years from 2013 to 2017 has demonstrated that cyber incidents tend to have a low-level impact on the target state. As the book’s authors put it ‘the focus of the original Manual was on the most severe cyber operations, those that violate the prohibition of the use of force in international relations, entitle states to exercise the right of self-defence, and/or occur during armed conflict’ while the new version ‘adds a legal analysis of the more common cyber incidents that states encounter on a day-to-day basis and that fall below the thresholds of the use of force or armed conflict’ (Leetaru 2017).

To get a better sense if cyber war is exaggerated, we must also consider the probability of cyber war in the future. The probability of cyber war should be weighed up against the probability of conventional war. Where tensions are already high, for example, between North Korea and the US or Russia and Estonia, I would argue that cyber war is more likely than conventional war. This is due to factors including; cyber warfare is less costly than conventional warfare, states are less rational in their decision space in the cyber realm, states find cyber attribution very difficult to achieve so attacks can be undertaken covertly and cyber war is considered ‘a challenge’ and central to the hackers’ ethos (Junio 2013, 128). Further, Sanger describes in his book, The Perfect Weapon, cyber weapons (such as cyber vandalism, Distributed Denial of Service (DDOS), intrusions and advanced persistent threat (APT)) as the ‘perfect weapons’ for the following reasons;

They are cheap: When compared to Nuclear weapons, there are only a handful of nations globally that can afford the technology to create a nuclear weapon.

They are easily accessible: Unlike a Nuclear bomb that requires uranium, a highly protected metal, in the production process, a cyber weapon can be created with minimal investment and highly available IT infrastructure.

They can be dialled-up or dialled-down relatively easily. A ballistic missile, the force of the explosion cannot be adjusted as easily as a DDOS attack. A DDOS attack can be adjusted to last an hour, a few days or a few weeks.

They have a huge range in how they are used: Sabotage as with Stuxnet, Espionage as with the Chinese industrial spying on the US, North Korea’s infiltration of Sony, the Iranians attack on Las Vegas Sands Corp. casino operators.

The significant factor is that cyber weapons can and are being used every day for discrete, low-level cyber conflicts to undermine and disrupt rivals, but historically it has not progressed to open conflict, nor has it warranted a military response (Sanger 2018). Additionally, massive cyber operations would necessarily impact the civilian population and violate the immunity of non-combatants. The conditions of war dictate that this is “taboo” and to date, rival states have shown restraint in their use of cyber weapons for this reason (Valeriano and Ryan 2015). It appears that the threat that cyber weapons represent to national security is overstated and the threat of cyber war is overstated.

The US and likely other highly networked nations appear reticent about using cyber weapons for significant cyber conflict given their vulnerabilities. Ironically, NSA programs such as PRISM have made the US more of a target given the sheer volume of sensitive information stored in one place. Regardless of US defences, there is no way to make this information completely secure from intrusion, and as such, the very act of storing the information makes them more vulnerable.

Rid (2012) is among some academics who argue that cyber war has never and will likely never eventuate. The benefits of being on this side of the debate mean that public funding can be allocated away from offensive cyber security initiatives to other, potentially more important initiatives, such as public health and housing. The government is constantly under pressure to prioritise public spending and it is imperative that they have realistic, accurate projections regarding the risk of cyber war, the probability and the impact, to allow them to focus spending on the most important areas.

### ADV 2---1NC

#### No environmental collapse or extinction

Peter Kareiva 18 and Valerie Carranza, Institute of the Environment and Sustainability, University of California, Los Angeles, “Existential Risk Due To Ecosystem Collapse: Nature Strikes Back,” Futures, 1/5/2018, ScienceDirect

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than 0.001% per year (Rockström et al., 2009). There is little evidence that this particular 0.001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook, Ellis, Perring, Mackay, & Blomqvist, 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species numbers decline locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al., 2013, 2017). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility of our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

#### No nuke terror NOR retal

---Technical barriers, op costs, organizational schisms, deterrence

Christopher **McIntosh &** Ian **Storey 18**. McIntosh is visiting assistant professor of political studies at Bard College; Storey is a fellow at the Hannah Arendt Center for Politics and Humanities at Bard College. 06/01/2018. “Between Acquisition and Use: Assessing the Likelihood of Nuclear Terrorism.” International Studies Quarterly, vol. 62, no. 2, pp. 289–300.

When looked at in isolation, each of the three areas of potential loss presents significant disincentives for immediate attack. In combination—as they would be considered in practice—the higher strategic value of available alternatives appears decisive. In other words, even if one reads our analysis as affirming the importance of nuclear acquisition, when considering competing options and the dangers that attach to any detonation attempt, nuclear attack is highly unlikely. Strategic Opportunity Costs Future opportunities available for “using” a nuclear weapon are effectively foreclosed depending on the aggressiveness of the option a group chooses. The two-by-two matrix of nuclear strategies in Figure 1 is only a rough guide encompassing many possible permutations in the nuclear sphere. The organization always retains non-nuclear options, even once they acquire nuclear weapons. As evidenced by the Cold War and in Kargil, the stability-instability paradox holds empirical weight. Nuclear acquisition by two opposing actors does not necessarily foreclose conventional and/or asymmetric attacks (Cohen 2013; Kapur 2005). Given the unique relationship between a state and terrorist organization, we can expect similar and even exacerbated levels of instability. This can expand even beyond aggression. Remaining options range all the way from the pacific—pursuing negotiations, cooption, entrance into the legitimate political arena (for example, Sinn Fein)—to heightened conventional attacks and the usage of non-nuclear forms of WMDs. This last point is worth emphasizing. Even in the remote case where an actor successfully acquires a nuclear weapon and primarily seeks raw numbers of casualties—whether due to outbidding or audience costs—other forms of WMDs are likely to be more appealing. As Aum Shinrikyo indicates, this is particularly the case for the group that overcomes the inevitable political and technological hurdles (Nehorayoff et al. 2016, 36–37). For these groups, chemical, biological, and radiological weapons (CBRW) are considerably easier to acquire, use, and stockpile. This is especially true when considered over time, rather than a single operation.18 While there are certainly downsides to CBRWs vis-à-vis nuclear weapons (delivery may paradoxically be easier and the maintenance risks comparatively smaller), they are undoubtedly easier to procure and produce (Zanders 1999). More importantly, CBRWs are perceived as easier to produce and thus likely to be viewed by targets as iterable. Unlike a nuclear attack, CBRW threats are more credible because a single CBRW attack can likely precipitate an indefinite number of follow-ups. In addition to the problem of iterability, a terrorist organization must always worry about the possible ratchet effect of an attack—a problem Neumann and Smith (2005, 588– 90) refer to as the “escalation trap.” A terrorist organization is different than a state at war because it manipulates other actors primarily through punishment. Campaigns are a communicative activity designed to convince the public and the leaders that the status quo is unsustainable. The message is that the costs of continuing the target state’s policy (such as the United States in Lebanon, France in Algeria, or the United Kingdom in Northern Ireland) will eventually outweigh the benefits. Once an organization conducts a nuclear attack, it lacks options for an encore. Not even the most nightmarish scenarios involve an indefinite supply of weapons. If a single attack plus the threat of one or two others does not induce capitulation, the organization might unwittingly harden the target state’s resolve. The attack could raise the bar such that any future non-nuclear attack constitutes a lessening of costs vis-à-vis the status quo. There are also heavy opportunity costs involved in pursuing, developing, and maintaining a nuclear capacity, let alone actually deploying and delivering it. As Weiss puts it, “even if a terror group were to achieve technical nuclear proficiency, the time, money, and infrastructure needed to build nuclear weapons creates significant risks of discovery that would put the group at risk of attack. Given the ease of obtaining conventional explosives and the ability to deploy them, a terrorist group is unlikely to exchange a big part of its operational program to engage in a risky nuclear development effort with such doubtful prospects” (Weiss 2015, 82). Organizational Survival Terrorist organizations are not monolithic entities, nor are they wholly self-sufficient actors. Historically speaking, these groups consider the public reception of their attacks in a complex manner. As Al Qaeda, the Palestine Liberation Organization (PLO) of the 1970s, the IRA, and anarchist groups of the nineteenth and twentieth centuries all demonstrate, these groups’ thinking about public reception is nuanced and complex, regardless of time or place. We focus on two types of audiences that would be affected by decisions to attack: those internal to the group itself, and their own broader public. While many claim that terrorists are undeterrable, the argument misconstrues the relational dynamics between a terrorist organization, target state, international community, and the internal dynamics of the organization itself (Talmadge 2007). It is undoubtedly the case that deterring a terrorist organization in the traditional sense is difficult (Whiteneck 2005; Mearsheimer and Walt 2003). Many lack a recognized territorial base, work on the fringes of the global economy, and are internally structured to be difficult to combat directly. Nearly all possess some permutation of these factors. Combined with the symbolic importance of even relatively small terror attacks—especially given the role of international media—physically denying a group the ability to conduct attacks is uniquely challenging. It is minimally a vastly different proposition than precluding a state’s ability to successfully invade its neighbor or conduct ongoing missile strikes.19 Despite these concerns, there are important reasons deterrence can and empirically does work in the case of terrorist organizations. This is especially possible when the state-terrorist relationship is not zero-sum and the target retains some influence over the realization of the group’s eventual goals (e.g., by denying the group access to territory or withholding international recognition) (Trager and Zagorcheva 2006, 88–89). Nuclear attack presents two significant threats to the organization’s continued existence: internal threats of disintegration and external threats to their continued operations and survival. Terrorist organizations are not unitary, homogenous organizations. This is especially true for groups possessing the size and competence likely necessary for operational nuclear capacity. As many have noted, the terrorist organizations of the present are vastly different from those Marxist- Leninist groups that terrorized Europe and the United States in the 1970s and early 1980s. There is a well theorized psychological value of the organization to individual terrorists themselves (Post 1998), but there is more to the organizational valuation of survival than captured in this atomistic picture. Modern, large-scale terrorist organizations are typically heavily intertwined with the social fabric of the groups from which they originate (Cronin 2006; Hoffman 2013). Beyond significant networks of financial connections, accounts, and moguls (Hamas, for example, draws funding from a massive international system of mosque-centered charities, while the IRA’s extensive connections to the Irish diaspora in the United States were well documented), many terrorist organizations build extensive networks of sub-organizations that tie them to the communities in which they are based. Hezbollah, like the IRA, is internally divided between a military arm and a political arm and has run an extensive network of community schools, medical care centers, and religious outreach groups. Together they are designed to embed the organization in the social life of (predominantly southern) Lebanon’s Muslim population and provide Hezbollah with fresh recruits (Parkinson 2013). The group’s persistence as a dominant political force in southern Lebanon nearly two decades after the initial Israeli decision to withdraw demonstrates terrorist organizations grow to exceed their initial military objectives. The spread of Al Qaeda and its affiliates has followed a similar path. Maintaining the continued support of these multiple audiences is therefore a crucial consideration for these organizations. While these audiences could conceivably be more casualty-acceptant than the individuals deciding the group’s operations, the broader public will usually moderate extreme behavior. The literature assessing so-called “radical- ization” and violence by individual actors emphasizes that there isn’t a one-to-one relationship between ideological extremism and acceptance of extraordinary violence in pursuit of those goals (McCauley and Moskalenko 2014; Jurecic and Wittes 2016). It is important to resist the assumption that a politically extreme ideology automatically corresponds to shared assumptions regarding casualty-acceptance. Some argue that the move toward “mass-casualty” terrorism obviates these concerns. Aside from the fact that the trend line is either flat or receding in terms of the death toll of individual attacks (even if campaigns themselves might be becoming deadlier), there is an orders of magnitude distinction in casualties between a nuclear attack and even the 2001 attack in the United States. While the psychological restraints on nuclear use among states do not translate precisely to this context, there is good reason to believe that transgressing the longstanding nuclear taboo would have dramatic and negative effects on broader public support. In an urban environment, the media would inevitably capture the attack and its gruesome after-effects in photography or video. This imagery would be inconceivable, ubiquitous, and inescapable. Even if supporters accept a highly retributive mentality, or as Hamid (2015) argues about the Islamic State, actively accept the potential of death, this would pose a severe problem for all but the most extreme supporters.20 Beyond these supporters, a nuclear attack affects the internal dynamics of the terrorist organization in multiple ways. There could be divisiveness regarding the most effective use of the weapon. This would be magnified by the scale of the opportunities and perceived opportunity costs. Such debates have the potential to splinter the organization as a whole (Cronin 2009, 100–02). Factional conflict in terrorist organizations appears frequently over questions of goals and tactics (Crenshaw 1981; Chai 1993). A decision to attack with a nuclear weapon risks considerable internal alienation over a variety of issues—targeting decisions, method of attack, campaign goals, potential deaths of supporters, and the domestic and international response (Mathew and Shambaugh 2005, 621–22). Finally, a nuclear attack would exponentially raise the threat to each individual who composes the extended organization. Post-nuclear attack, the greatest strengths of a terrorist organization—its lack of material territory, economy, or overt institutions and reliance on individuals—could turn into its greatest weaknesses (Eilstrup-Sangiovanni and Jones 2008). Currently, a wealthy financier found to have ties to a terrorist group would be monitored for intelligence, arrested, and brought up on criminal charges. Post-nuclear attack, the consequences would be immediate and rather worse. Externally, in a world post-nuclear attack, international cooperation would be instant and deep. One of the only international treaties to even define a terrorist in international law post-2001 has been the Nuclear Terrorism Convention (Edwards 2005). A nuclear attack would be far outside the norm of international politics. It would disrupt the dominance of state-actors and likely stimulate unparalleled cooperation to apprehend the responsible parties to prevent future attacks. Moreover, many large terrorist organizations require (some) tacit acquiescence by a host state. Even those with hostile host states have territory where they remain relatively unaffected by local governments (Korteweg 2008). Post-nuclear attack, these host states face an enormous incentive to find the actors responsible before the target state does. After an attack, regimes would find it difficult to claim that they “didn’t know” or “couldn’t stop them.” Claims of corruption or ineffective institutions would be unlikely to find much sympathy. Faced with potential organizational extinction itself, a host state/government will likely be much less committed to the survival of the terrorist group. This is likely to vary significantly from how they might otherwise behave after a more conventional attack. For these states, there would be a real fear of “Talibanization” and ruthless attempts at regime change post-attack. From the perspective of the group, it would know that it could be facing a unified international community and the removal of tacit state support. It would take a particularly confident leadership to presume it could continue to function post-attack without massive disruptions. Most strategic actors are risk-averse when facing the potential of complete elimination. There is little reason to believe terrorist groups would act any differently.

#### No food wars

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It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

### ADV 3---1NC

#### China can’t overtake the US

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### U.S. leadership is locked in---the material base of primacy is overwhelming

Carlo Catapano 21, PhD Candidate in International Studies at the University of Roma Tre, MSc in International Relations of the Americas at UCL, “Book Reviews: Unrivaled: Why America will Remain the World’s Sole Super-power, by Michael Beckley. Ithaca: Cornell University Press, 2021, pp. 231.”, Interdisciplinary Political Studies, Volume 7, Number 1, p. 249-252

Moving on to the emerging rivalry between China and the United States, Beckley acknowledges that the Asian giant is its most likely challenger. However, his detailed evaluation of Beijing’s economic and military resources leaves no room for doubts: China lags behind the US on almost every net indicator, and the gap between the two is unlikely to vanish any time soon. This conclusion is surprising if one considers the constant references – in academia and the media – to China’s rise and the Asian century. Beckley points out the weaknesses of the Chinese economy (Chapter 3), the hidden costs for a large, populous and developing country that are not included in gross estimates, and the various advantages that the US economic system still owns despite the limited growth of the post-2008 period.

Similarly, he compares (Chapter 4) the net military capabilities of the two powers by subtracting, for example, the costs to maintain security at home from their overall military assets. Also, he addresses the geopolitical factors that separate the US and Chinese ability to project their military power abroad. From this analysis, it emerges that China’s position is severely constrained by the high costs paid to assure its internal security and the defense of its national borders as well as by the welfare costs associated to the large number of troops composing the People’s Liberation Army. Beckley argues that China’s rising military capabilities are also constrained by the continued presence of US outposts in the region and the improvements made by China’s neighbors to their own military forces. Overall, this assessment leaves few chances for Beijing to obtain the regional hegemony that it would need to challenge the US on a global scale.

Beckley’s analysis also indicates the path forward (Chapter 5), starting from the rejection of the theories usually employed to predict the fate of US power (balance-of-power theory and “convergence” theory). All indicators suggest that the US will retain its role of leading global power in the coming years, notwithstanding China’s uninterrupted rise. Beckley is eager to point out, however, that this conclusion should not be confused with the praise of American superiority or invincibility. At no point, does his analysis suggest that Washington’s primacy is uncontestable or destined to last forever. Instability with weaker countries, unnecessary wars, internal polarization and disunity, can all produce unpredicted losses and undermine the position of the most powerful country in the world (Chapter 6). Beckley’s argument, therefore, consists in a re-evaluation of the sources of power that have guaranteed the US primacy since the end of the Cold War. Those same sources still place the United States in a category of its own, apart from the other great powers of the system. This book’s claim, in the end, is about the duration of the unipolar era, which it predicts will last more than usually expected, not about the infallibility or moral virtues of US power.

A few years later on the publication of this book, its central tenets are even more relevant. Events such as Trump’s nationalist policies, the trade war with China, the COVID-19 outbreak seem to have accelerated history and the shift away from the post-Cold War unipolar configuration. Beckley’s work, however, invites to reject simplistic predictions about the dismissal of US primacy. The decline in Washington’s global influence as well as the retrenchment from its international responsibilities do not necessarily mean that its net position in terms of material capabilities has collapsed or that a condition of power parity with China has finally emerged. Even if outcomes are not favorable to US interests, it does not mean that US power has vanished. This is a relevant reminder for policymakers in both Washington and Beijing.

#### Heg fails

Dr. Andrew Bacevich 20, Professor of History and International Relations at Boston University, Ph.D. in American Diplomatic History from Princeton University, and Graduate of the U.S. Military Academy, “The Endless Fantasy of American Power”, Foreign Affairs, 9/18/2020, https://www.foreignaffairs.com/articles/united-states/2020-09-18/endless-fantasy-american-power

Unfortunately, this frenetic pace of military activity has seldom produced positive outcomes. As measured against their stated aims, the “long wars” in Afghanistan and Iraq have clearly failed, as have the lesser campaigns intended to impart some approximation of peace and stability to Libya, Somalia, and Syria. An equally unfavorable judgment applies to the nebulous enterprise once grandly referred to as the “global war on terrorism,” which continues with no end in sight.

And yet there seems to be little curiosity in U.S. politics today about why recent military exertions, undertaken at great cost in blood and treasure, have yielded so little in the way of durable success. It is widely conceded that “mistakes were made”—preeminent among them the Iraq war initiated in 2003. Yet within establishment circles, the larger implications of such catastrophic missteps remain unexplored. Indeed, the country’s interventionist foreign policy is largely taken for granted and the public pays scant attention. The police killing of Black people provokes outrage—and rightly so. Unsuccessful wars induce only shrugs.

THE CHIMERA OF “AMERICAN LEADERSHIP”

With something approaching unanimity, Americans “support the troops.” Yet they refrain from inquiring too deeply into what putting the troops in harm’s way has achieved in recent decades. Deference to the military has become a rote piety of American life. In accepting the Democratic Party’s nomination for the presidency, for example, Joe Biden closed his remarks with an appeal to the Divine on behalf of the nation’s soldiers: “And may God protect our troops.” Yet nowhere in his 24-minute address did Biden make any reference to what U.S. troops were currently doing or why in particular they needed God’s protection. Nor did he offer any thoughts on how a Biden administration might do things differently.

Americans don’t particularly want to hear about war or the possibility of war in the present season of overlapping and mutually reinforcing crises. And Biden obliged them in the most important speech of his career. The famously garrulous politician mentioned recent U.S. wars only in passing, briefly referring to his late son, who served in Iraq, and excoriating U.S. President Donald Trump for not responding more aggressively to revelations that Russia put bounties on U.S. soldiers in Afghanistan.

This aversion to taking stock of recent U.S. wars is by no means unique to Biden or confined to the Democratic Party. It is a bipartisan tendency. It also inhibits a long overdue reexamination of basic national security policy.

Between the fall of the Berlin Wall and the 2016 presidential election, leaders of both political parties collaborated in trying to demonstrate the efficacy and necessity of what they habitually referred to as “American global leadership.” Embedded in that seemingly benign phrase was a grand strategy of militarized primacy. Unfortunately, the results achieved by this assertion of global leadership proved to be anything but benign, as turmoil in Afghanistan and Iraq attest. Although the defense industry and its allies have profited from American wars, the American people have done less well. Protracted wars are not making Americans freer or more prosperous. They have instead saddled the nation with enormous debt and diverted attention and resources from neglected domestic priorities.

In 2020, further occasions for bristling, militarized U.S. leadership beckon. China offers the most obvious example for hawks, with demands that the United States confront the People’s Republic growing more insistent by the day. Many in Washington appear to welcome the prospect of a Sino-American cold war. Other prospective venues for demonstrating assertive U.S. leadership include in operations against Iran, Russia, and even poor benighted Venezuela, with prominent figures in the Beltway eager to have a go at regime change in Caracas.

To cling to this paradigm of U.S. global leadership is to perpetuate the assumptions and habits defining post–Cold War U.S. national security policy—and above all the emphasis on amassing and employing military might. The United States grants itself prerogatives allowed to no other country to remain, in its own estimation, history’s “indispensable nation.” To judge by the results achieved in Afghanistan, Iraq, and other recent theaters of war, this imperative will only continue to wreak havoc in the name of freedom, democracy, and humane values.

## 2NC

#### The CP is advice of agency intent with no binding force

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

For individuals and firms regulated by federal agencies, actual regulations are just the beginning of the story. Despite being voluminous and complex, regulations leave numerous important decisions to the agency's discretion or interpretation. Individuals and firms want to know how the agency will use its discretion and how it will read the regulations' ambiguous provisions. And agency officials want individuals and firms to have that knowledge in order to facilitate compliance. So officials provide the public with lots of "guidance," that is, general statements advising the public on how the agency proposes to exercise discretion or interpret law. Guidance comes in an endless variety of labels and formats, depending on the agency: advisories, circulars, bulletins, memos, interpretive letters, enforcement manuals, fact sheets, FAQs, highlights, you name it. Nobody knows exactly how much guidance there is, because it is not comprehensively collected anywhere, but its page count for any given agency is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even [\*168] two hundred. Guidance is "the bread and butter of agency practice," declares a veteran EPA lawyer. "I cannot imagine a world without guidance," says a former senior FDA official.

Though guidance is a ubiquitous and essential feature of the administrative state, it is also controversial. Full-blown regulations that officially bind the agency and the public--known as "legislative rules"--can be enacted by an agency only through a costly, time-consuming set of procedures imposed by the Administrative Procedure Act (APA), including notice and comment, in which the parties who will be bound by a policy can participate in its formulation before it is set in stone. By contrast, agencies can issue guidance without any such process, because of the APA's exemptions for "general statements of policy" and "interpretative rules," which together cover guidance in all its varieties. Thus guidance can be produced and altered much faster, in higher volume, and with less accountability than legislative rules can. What justifies this disparity, in the familiar telling, is that guidance, unlike a legislative rule, is not binding on the agency or the public. It is only a suggestion--a mere tentative announcement of [\*169] the agency's current thinking about what to do in individual adjudicatory or enforcement proceedings, not something the agency will follow in an automatic, ironclad manner as it would a legislative rule. Guidance is supposed to leave space for the agency's case-by-case discretion. If a particular individual or firm wants to do something (or wants the agency to do something) that is different than what the guidance suggests, the agency is supposed to give fair consideration to that alternative approach. If officials treat guidance with this kind of flexibility, it doesn't seem so bad for the agency to be unconstrained in issuing guidance to begin with.

The great fear is that agency officials, in real life, are not tentative or flexible when it comes to guidance but instead follow guidance as if it were a binding legislative rule, and regulated parties are under coercive pressure to do the same. If true, this complaint reveals a giant loophole in the APA: agencies can issue de facto regulations at will, simply by calling them "guidance," with no say from individuals and firms who will be effectively bound. The fear and the controversy have burned for decades, and most hotly in the last few years, giving rise to expos-s, congressional hearings, bills, a 4-4 Supreme Court [\*170] deadlock, and a directive from then-Attorney General Sessions condemning "improper guidance documents."

#### It leaves antitrust law unchanged

Julia Kapchinskiy 18, JD Candidate at the University of San Diego School of Law, MBA from the University of San Diego, “The Duality of Provider and Payer in the Current Healthcare Landscape and Related Antitrust Implications”, San Diego Law Review, Volume 55, Issue 3, 55 San Diego L. Rev. 617, Lexis

B. The Enforcers of the Antitrust Laws and Regulatory Framework

Two separate government agencies, the FTC and the Antitrust Division of the DOJ, enforce federal antitrust laws. Their authority in some instances is shared and in other instances is exclusive to a single agency. For [\*631] example, both agencies enforce Section 7 of the Clayton Act. On the other hand, the DOJ enforces the Sherman Act, while the FTC enforces the FTCA. Historically, the "agencies complement each other [and develop] expertise in particular industries or markets." Following the divide and conquer approach, the FTC has become the leading agency on matters involving providers, and the DOJ has acted as the leading agency on matters involving insurers. Primarily, the two agencies ensure antitrust compliance of mergers and major developments in healthcare that have the potential to impact consumers and result in increased "market power," or the ability to raise prices unilaterally.

Both agencies provided significant input in the area of healthcare antitrust regulation in the years immediately preceding or directly following the enactment of the ACA. They view their role as "help[ing to] maintain competition in the healthcare financing and delivery markets, and ensuring that market participants can compete to satisfy consumer demand." Importantly, the input by the agencies in the form of guidelines does not [\*632] constitute binding legal authority, and therefore, is merely persuasive. Still, the agencies provide guidance to healthcare organizations so that antitrust violations do not arise; they take a proactive rather than retroactive approach. The agencies first jointly issued the Statements of Antitrust Enforcement Policy in Healthcare (Statements) in 1993, amended them in 1994, and further revised in 1996; they have remained unchanged since. The Statements explain the agencies' rationale in antitrust analysis and contain examples of its application, along with outlining "antitrust safety zones." The "safety zones" mean that unless there are obvious violations, the FTC and the DOJ will not challenge the transaction.

#### ‘Prohibitions’ are strictly mandatory

Rodney King Potter 83, Judge on the California Court of Appeal, 2nd District, J.D. from the University of California, Berkeley, BA from the University of California, Los Angeles, Former Partner at O’Melveny & Myers, “People v. Superior Court (Spencer)”, Court of Appeal of California, Second Appellate District, Division Three, 189 Cal. Rptr. 669, 677-678, 1983 Cal. App. LEXIS 1434, 2/25/1983, Lexis

However, the framer's use of the term “prohibited” manifests their intent to make the “Limitation of Plea Bargaining” mandatory. In Bright v. Los Angeles Unified Sch. Dist. (1976) 18 Cal.3d 450, 462 [134 Cal.Rptr. 639, 556 P.2d 1090], the court stated: “We observe that the word ‘prohibit’ is defined as follows: ‘(1) to forbid by authority or command: … 2.a: to prevent from doing or accomplishing something….’ (Webster's Third New Internat. Dict. (1963 ed.) p. 1813.) [\*678] ” It would be difficult to conceive of more mandatory language than that which is employed in section [\*\*21] 1192.7.

#### The must be binding

Dr. Francis Jacobs 90, Member of the European Court of Justice, DPhil from the University of Oxford, Former Professor of European Law at the University of London and Director of the Centre of European Law for King's College London School of Law, “Commission of the European Communities v French Republic – Opinion of Mr Advocate General Roberts”, European Court Reports 1990 I-00925, Case C-62/89, 2/20/1990, p. 942

20. In my view, those arguments cannot be accepted. It is plain from the wording of Article 10(2) of Regulation No 2057/82 and from the scheme and objectives of the Community legislation that Member States are required to anticipate the exhaustion of the quota and to act to prohibit fishing provisionally before the quota is exhausted . That the exhaustion of the quota must be anticipated is indicated by the requirement in Article 10(2) that each Member State shall determine the date from which its vessels "shall be *deemed to have exhausted* the quota ..." ( emphasis added ). The use of the word "prohibit" in Article 10(2) and the mandatory wording of the second subparagraph of Article 10(3) (" Fishing vessels ... shall cease fishing ...") indicate that the measures taken to halt fishing provisionally must be of a binding nature. It is moreover apparent from the scheme of the legislation that the obligation imposed on Member States by Article 10(2) is of crucial importance for ensuring respect for quotas: the obligation must therefore be construed strictly. An interpretation of Article 10(2) which would permit Member States to wait until after the quota was exhausted before taking action, or to adopt measures of a non-binding nature, would be inconsistent with the binding character of the quotas. It would also undermine the underlying objective of quotas, i.e. the conservation of scarce fishing resources.

#### That must be binding

Jennifer Lumley-Hluska 5, J.D. Candidate at the Quinnipiac University School of Law, “The Contest Over "Contested Cases": A Study on How the Connecticut Legislature's Reading of Two Words May be Depriving You of Your Right to Judicial Review and Due Process of the Law”, Quinnipiac Law Review, 23 Quinnipiac L. Rev. 1239, Lexis

The operative word in the definition is statute. The term "statute" is defined as "an act of the legislature declaring, commanding, or prohibiting something." Conversely, the word "law" means "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force." "Law" may embrace body of principles, standards and rules promulgated by government; statutes or enactments [\*1242] of a legislative body; administrative agency rules and regulations; judicial decisions, judgments, or decrees; municipal ordinances; science or system of principles or rules of human conduct. The word "statute" limits the availability of judicial review because it does not encompass the other sources of law that the word "law" does.

#### ‘Increase’

Dr. Howard Newby 4, BA and PhD from the University of Essex, Chair of the Higher Education Funding Council for England, Former Vice-Chancellor of the University of Liverpool, “Joint Committee on the Draft Charities Bill - Written Evidence”, Memorandum from the Higher Education Funding Council for England, 9/30/2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[ 46]

9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself.

9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

#### ‘Resolved’

Words and Phrases 64 (Permanent Edition)

Definition of the word “resolve,” given by Webster is “to express an opinion or determination by resolution or vote; as ‘it was resolved by the legislature;” It is of similar force to the word “enact,” which is defined by Bouvier as meaning “to establish by law”.

#### ‘Should’

David H. Sawyer 17, Judge on the Michigan Court of Appeals, J.D. from Valparaiso School of Law, “Spartan Specialties, Ltd. v. Senior Servs.”, Court of Appeals of Michigan, 2017 Mich. App. LEXIS 1178, 7/20/2017, Lexis

The specifications in the drawings for the mini-piles stated that the capacity for the mini-piles was "to be" 6,000 or 8,000 pounds and that the length of the mini-piles was "to be" adequate to get into undisturbed soil to a depth adequate for obtaining the required capacity. The specifications in the project manual stated that the mini-piles "should" have a capacity of 4 tons and 3 tons, that the mini-piles "should" be driven to minimum depth of 25 feet, and that a grout bulb "should" be formed at the base of a mini-pile. Kenneth Winters, an expert in structural engineering, and Richard Anderson, an expert in geotechnical engineering, agreed with Steve Maranowski, plaintiff's president, that the specifications in the project manual, because those specifications used the word "should," were permissive and suggestions of what plaintiff could do to achieve the required capacity. However, the trial court, when it instructed the jury on how to interpret the contract, instructed the jury that it was to interpret the words of the contract by giving them their ordinary and common meaning. An ordinary and common meaning of the word "should" is that it denotes a mandatory obligation. [\*9] See People v Fosnaugh, 248 Mich App 444, 455; 639 NW2d 587 (2001) (stating that "the word 'should' can, in certain contexts, connote an obligatory effect"); Merriam-Webster's College Dictionary (11th ed) (defining "should," in pertinent part, as "used in auxiliary function to express obligation, propriety, or expediency"). Accordingly, viewing the evidence in a light most favorable to defendant, reasonable jurors could have honestly reached different conclusions on whether the specifications in the project manual were mandatory and, because Maranowski admitted that plaintiff did not use grout bulbs and did not drive all the mini-piles at least 25 feet into the ground, whether plaintiff breached the contract. Morinelli, 242 Mich App at 260-261.

#### ‘Substantial’

Words and Phrases 64 (40W&P 759)

The words" outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain: absolute: real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive.

#### Solves the AFF

1AC Kapur and Shin ’20 (Anchal Kapur, Paul Shin, “The Five Eyes look to enhance antitrust sharing and co-operation”, <https://www.claytonutz.com/knowledge/2020/september/the-five-eyes-look-to-enhance-antitrust-sharing-and-co-operation>, September 17, 2020)

The agreement signals greater transparency in the sharing of information between competition agencies about companies doing business across borders. Competition agencies already co-operate in investigations and merger cases – but how they co-operate can vary and the lived experience in one matter can be different in the next. The newly signed co-operation agreement between the Five Eyes signals an intention on the part of competition agencies to co-operate more, and in a more transparent way, about companies in relation to cross-border antitrust investigations and merger control. As a step toward recording publicly existing co-operation practices, the principles outlined between the competition agencies signal an effort toward more transparent co-operation in a globalised economy. An understanding of the framework set by the agreement will be helpful in giving companies more certainty when making decisions in response to co-operation requests and understanding the implications of that co-operation. Overview The competition agencies of Australia (Australian Competition and Consumer Commission), the United States (Department of Justice/Federal Trade Commission), the United Kingdom (Competition and Markets Authority), Canada (Competition Bureau) and New Zealand (Commerce Commission) (Parties) have signed the Multilateral Mutual Assistance and Co-operation Framework for Competition Authorities (MMAC). The MMAC is a memorandum of understanding which provides a framework for co-operation as well as the entry into bilateral or multilateral arrangements between the Parties based on the Model Agreement at Annexure A to the MMAC. What this means for corporates and individuals doing business in Australia The MMAC signals increased and more seamless co-operation between the Parties on areas including antitrust investigations, merger control, areas of future enforcement and competition policy. As shown by the proposed acquisition of Fitbit by Google resulting in concurrent reviews by the ACCC, the European Commission and the US Department of Justice, companies should be aware that competition agencies around the world share information between each other, especially in connection with merger clearance or market studies, and perhaps to a lesser extent, cartel investigations, with a global reach. This means that companies must ensure adopting a careful balancing exercise between: responding to a local competition agency's requests for waivers as each agency will have idiosyncratic issues to consider or prioritise for its own domestic market; and ensuring broader consistency – for example in a joint cartel defence or merger clearance review – taking into account the fact that interactions with an agency in a particular jurisdiction in one way may affect investigations in another jurisdiction. An additional consequence of interagency co-operation and concurrent reviews is that agencies may hold off from publishing a decision or agreeing on a remedy until all agencies in each relevant jurisdiction have made a decision on that particular issue, further adding uncertainty to companies involved. What remains to be seen is how much co-operation between the Parties will reflect what is in the Model Agreement, or diverge from current practice. For example, while the MMAC notes that the Parties intend to deliver the maximum co-operation possible, it also acknowledges that the Parties may not be able to meet every element of the co-operation framework set out in the Model Agreement; and that the Parties may enter into bilateral or multilateral agreements to co-operate. Key provisions of the MMAC and the Model Agreement Information to be shared between Parties is defined in the MMAC as: Agency Confidential Information. Information that is in the possession of a Party that it is not prohibited from disclosing by law, but normally treats as non-public. Investigative Information. Information related to an investigation that is not in the public domain, which has been either compulsorily acquired by, or provided voluntarily to, a Party and that the Party is required to protect from disclosure. Some types of co-operation contemplated under the MMAC by the Parties include: exchanging information and experience on competition issues, policies, laws, and advocacy and outreach; increasing agency capacity and effectiveness by way of mutual sharing of training and best practices; collaborating on projects of mutual interest through working groups; and providing assistance and co-operation on investigations by: sharing confidential information subject to certain protections, limitations on use and privilege); coordinating investigations; facilitating voluntary witness interviews; and other co-operation as requested. As noted above, the Parties have also developed the Model Agreement in order to assist the Parties to enter into a more detailed agreement for reciprocal investigative assistance, either bilaterally or multilaterally. Examples of such investigative assistance contemplated by the Model Agreement include: disclosing, providing or discussing Investigative Information to the extent possible under each Party's laws; and obtaining Investigative Information at the request of a Party by: (i) facilitating witness interviews; (ii) obtaining Investigative Information; (iii) locating witnesses or things; and (iv) executing searches and seizures. The Model Agreement broadly provides that the requesting Party provides, in writing, a description of the assistance it seeks and to the extent necessary, any procedural or evidentiary requirements which need to be observed (for example, recording of witness statements, process for obtaining oaths, retention of privilege and confidentiality issues, records authentication, obligation of the requesting Party to retain Investigative Information). The Parties are to also generally discuss the procedures in executing the request and whether there are any legal requirements and processes for obtaining and handling any Investigative Information. There are also protections and protocols in place in the Model Agreement pertaining to the handling of information shared between the Parties under the Model Agreement. These include provisions relating to the following: Return or destruction of documents. Parties are to return or destroy all Investigative Information at the request of the Party which provided that Investigative Information, at the conclusion of a matter. Privileged communications. If information shared by a Party pursuant to a request for investigative assistance is later found to be privileged, then the Party which receives that privileged information is to not use it for the purposes of enforcement and use all appropriate procedures to limit the disclosure of such information in other contexts (unless it is determined after discussions with the Party which provided that information, that any such privilege has been waived or otherwise lost). Denying or postponing assistance. A Party responding to a request for investigative assistance may deny or postpone the assistance in whole or in part if, among other things, the request would: (i) exceed its reasonably available resources; (ii) be contrary to its law or other important interests; or (iii) the requesting Party is unable to give assurances with regard to confidentiality or the purposes for which the information will be used. Confidentiality. The Parties will, to the fullest extent possible and consistently with its laws, maintain confidentiality of any Investigative Information including the fact that a request for Investigative Information has been communicated or received. Limitation of use. Subject to certain exceptions, Investigative Information received by way of a request for assistance must only be used for the purposes enforcing competition laws (whether for the matter for which the information was sought, or for another competition enforcement matter). Building on existing practices The MMAC complements the other forms of mutual assistance already in place, for example: Treaties. Australia and the United States have treaties in place to exchange evidence and assist each other in relation to matters involving competition law enforcement activities. Memoranda. The memorandum of understanding recently entered into between the ACCC and the Australian Prudential Regulation Authority (APRA) the purpose of which is to promote a competitive, well-regulated and stable financial system in Australia by way of the two agencies coordinating, co-operating and sharing information on the back of a transparent and collaborative relationship. Also, the ACCC signed a memorandum of co-operation in 2019 with the United States' Federal Bureau of Investigation with a view to enhance the two agencies' capabilities in investigating criminal antitrust conduct by way of mutual training and exchange of information. Other frameworks. The Organisation for Economic Co-operation and Development, and the International Competition Network provides a forum for competition agencies to engage on policy and provide recommendations to one another about matters including international co-operation between competition agencies.

#### Guidance reshapes antitrust policy AND creates near force of law

-- it’s uniquely powerful on antitrust because so few cases are actually litigated---agency positions are everything

-- courts will apply the new standard because it is clear that agencies support it

-- businesses and lawyers perceive the CP and will treat it as law

-- the combination of factors creates ‘something close to force of law’

David A. Zimmerman 99, JD from the Emory University Law School, Attorney at Eversheds Sutherland (US) LLP, BA from Vanderbilt University, “Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers”, Emory Law Journal, Volume 39, Issue 1, 48 Emory L.J. 337, Winter 1999, Lexis

B. The Differing Approaches of the NAAG and Federal Guidelines

The idea behind the original promulgation of the Federal Horizontal Merger Guidelines was to provide for greater consistency and easier planning for businesses by allowing them to know what merger actions would and would not be challenged. Although lacking any binding effect on the courts, the Federal Guidelines have had a remarkable impact. Not only have they [\*350] been used to help interpret the Clayton Act in federal courts, but they have greatly impacted antitrust counseling for mergers by giving businesses and their lawyers some guidance on enforcement policy. The FTC and DOJ do not have the resources to challenge more than a small percentage of all mergers. Therefore, the Federal Guidelines represent something close to the force of law because it is clear that certain types of transactions simply will not be challenged. Somewhat ironically, the NAAG Guidelines state a similar purpose to that of the Federal Guidelines: to "help businesses to assess the legality of potential transactions," and to provide a "useful … planning tool." As will be demonstrated, however, the promulgation of a different set of horizontal merger guidelines by NAAG has had the opposite effect: businesses have more trouble knowing when transactions will be challenged, and planning has become much more difficult.

Both sets of guidelines use an approach to analyze the competitive effects of mergers that has been accepted for some time: they define the relevant product and geographic markets, calculate the concentration levels within that market, and then analyze any defenses or efficiencies which may weigh in favor of approving an otherwise questionable merger. However, there are substantive differences in the two sets of guidelines at each of these phases which may affect the final determination of the federal agency or state attorney general as to whether the merger will be challenged.

#### The effect is identical---business will behave as if it were binding and comply—solves competitiveness

Roberta Romano 19, Sterling Professor of Law at Yale Law School and Director of the Yale Law School Center for the Study of Corporate Law, JD from Yale Law School, MA from the University of Chicago, BA from the University of Rochester, Research Associate of the National Bureau for Economic Research, Fellow of the American Academy of Arts and Sciences and the European Corporate Governance Institute, Recipient of William & Mary Law School’s Marshall-Wythe Medallion, “Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance”, Yale Journal on Regulation, Volume 36, Issue 1, 36 Yale J. on Reg. 273, Lexis

The choice between notice-and-comment rulemaking and guidance is also frequently presented as a tradeoff between regulatory flexibility and effectiveness, on the view that the greater flexibility of guidance compared to notice-and-comment rules is offset by guidance not being legally binding. Although the formal distinction is technically accurate, as numerous commentators have noted, the reality is otherwise, rendering the ostensible distinction quite misleading. As one leading casebook puts it well:

If you are a regulated party, and the agency issues an interpretive rule or policy statement indicating its present view of the law, you will probably make serious efforts to comply with that rule even if it is not formally binding. At a minimum, the rule alerts you to the kind of conduct that the agency regards as worthy of prosecution; at a maximum, the rule may effectively dictate how the agency will [\*283] conduct its prosecutorial adjudications. The *practical effect* of such rules on regulated parties may be hard to distinguish from the practical effect of legislative rules.

The unvarnished reality that firms will behave as though guidance pronouncements are, in fact, binding rules is particularly applicable to financial institutions, the focus of this Article's analysis, given the repeated interaction between financial firms and regulators. This interaction facilitates regulators' ability to retaliate on numerous dimensions through supervision and examination, in addition to their ability to bring enforcement actions for noncompliance with a specific policy. Moreover, the licensing feature of financial regulation (i.e., regulators can shut down a bank's lines of business, as well as a bank itself) is a powerful inducement for financial institutions to comply with, rather than challenge, guidance pronouncements.

As a consequence, by using guidance strategically instead of notice-and-comment rulemaking, particularly in the financial-entity regulatory context, an agency can obtain the benefit of a rule (regulated entities' compliance), without incurring the procedural costs that are legally supposed to accompany the imposition of obligations on private parties under requirements imposed on regulatory decisionmaking by Congress and courts in order to protect the public and regulated entities from arbitrary and capricious decisions. A critical issue, then, is an empirical one: to what extent can an agency shape its agenda to impose rule-like constraints on conduct while avoiding the procedural protections that are supposed to accompany such activity? But consideration of that inquiry is [\*284] not independent of another feature of administrative governance--namely, agency design, the degree to which an agency's structure is insulated from political accountability.

#### It'll be codified later as legally binding

Urja Mittal 18, JD from Yale Law School, Former Executive Editor of the Yale Law Journal, Associate at Jenner & Block, Former Legal Fellow at the Campaign Legal Center, BA in Economics and Political Science and BS in Economics from the University of Pennsylvania, “Litigation Rulemaking”, Yale Law Journal, Volume 127, Issue 4, 127 Yale L.J. 1010, February 2018, https://digitalcommons.law.yale.edu/ylj/vol127/iss4/4/

Litigation rulemaking in this context differs from the previous examples because guidance is not final agency action and is legally nonbinding. In practice, however, guidance can have binding effect, much like rulemaking and adjudication. For instance, if private parties reasonably believe that failure to follow the guidance will have adverse consequences, then guidance can have practically binding effect. This is particularly the case when parties are repeat players before agencies, interacting with or appearing before them multiple times. Additionally, even though the agencies may disclaim the legally binding nature of the document, it can effectively harden into a fixed rule with binding effect if the agencies choose to apply or enforce it consistently.

For instance, although neither NHTSA nor the CPSC have avowed an intention to enforce their guidance, if, in the future, the agencies were to make final agency action contingent upon the parties adopting these new provisions, then [\*1041] this guidance may appear to have the legally binding characteristics of a legislative rule. Take, for instance, the CPSC, which regularly conducts investigations of potential violations of federal consumer product safety laws. If the agency were to make decisions in the course of its investigations--such as whether to issue subpoenas for information from manufacturers or whether to threaten certain civil penalties--on the basis of whether the manufacturers under investigation had complied with the best-practices guidance, the effect would be to make the guidance practically binding.

Guidance can also be a way for agencies to conduct "trial runs" of litigation rulemaking before crystallizing these changes to the Federal Rules through notice-and-comment rulemaking or adjudication. For instance, if guidance proves effective, then an agency may formalize it into a rule through notice and comment. The agency can then justify the new rule by referencing the effectiveness of the nonbinding guidance. On the other hand, if the guidance is effective in certain instances but not sufficiently widely adopted, then an agency can implement the same rule through notice-and-comment rulemaking or adjudication in order to oblige greater compliance.

By issuing this novel guidance, these agencies have responded to concerns about federal court secrecy and transparency by imposing additional rules atop Rule 26's existing procedural requirements. Through litigation rulemaking, these agencies have effectively amended the Federal Rules regime, tailoring the procedural rules that govern certain federal cases in furtherance of the agencies' goals of promoting public health and safety.

#### Guidance can effectively revise merger law

Krista Brown 21, Senior Policy Analyst at the American Economic Liberties Project, Former Research Associate at Open Markets Institute, B.A. in Economics with a Concentration in Mathematics from Colby College, et al., “The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach”, American Economic Liberties Project, January 2021, p. 142-144

Shaping Antitrust Law Through Antimonopoly Guidance and Policy Statements

DOJ and the FTC have significant authority to shape antitrust law by issuing guidance and policy statements. They should use this authority to arrest and reverse monopoly power, including by:

• Instituting New Merger Guidelines: The antitrust agencies should begin drafting new merger guidelines covering all types of mergers and acquisitions, using the 1968 Merger Guidelines as a template.717 Specifically, agencies should announce strict market share, size, or actual competitor thresholds beyond which companies may not consolidate. The agencies should also consider guidelines and enforcement policies toward mergers with a heightened scrutiny toward corporate size, and challenge additional mergers that may entrench corporate power despite not fitting neatly into horizontal, vertical, or conglomerate merger categories. Purported efficiencies should not factor into merger review decisions. Agencies should also think creatively about new ways to address the bargaining power elements of mergers. For example, the DOJ and FTC may clear a merger that may reduce labor bargaining power on the condition that the merged company allow workers to unionize through a “card-check” process rather than a private vote.718 The 2020 Trump Vertical Merger Guidelines, which improperly laud corporate concentration, should be rescinded.719

• Increasing Transparency and Scrutiny of the Merger Review Process: When an agency brings a challenge, it offers a complaint and public trial, creating a useful public record. A refusal to bring a challenge brings no such public accounting, though such a decision can be equally meaningful, if not more so. The antitrust agencies should begin issuing closing statements on all mergers that they review, or at the very least those that trigger the Hart- Scott-Rodino filing requirement. They should also solicit and respond to public comments for all forthcoming merger reviews.

• Reversing or Repealing Agency Initiatives That Hamper Enforcement: Under the Trump administration, the DOJ changed its policy to credit companies at both the charging and sentencing stage for having preexisting antitrust compliance programs in place.720 This policy change makes it easier for lawbreaking companies to avoid prosecution and should be rescinded through speeches, briefs, filings, or other official statements. Similarly, the Trump DOJ hamstrung itself by seeking to expedite merger review timelines by “aim[ing] to resolve most [merger] investigations within six months of filing.”721 The DOJ should clarify in speeches, press releases, or other official statements that it will not attempt to make investigations fit arbitrary, predetermined timetables. The FTC should disband initiatives like its Economic Liberty Task Force, which is used to peddle anti-worker policies such as occupational licensing reform, as well as its Working Groups on Agency Reform and Efficiency that weaken or fail to promote assertive enforcement against corporate monopoly power.

• Issuing Stronger Bank Merger Guidelines: The DOJ is currently reviewing its bank merger guidelines with a goal of facilitating bank mergers.722 The Justice Department should reverse course. Instead of exacerbating the damage caused by deregulation and lax merger enforcement, the division should enact stricter limits on banking activities and ownership.723

• Endorsing the House Antitrust Subcommittee Report: The antitrust agencies should formally adopt and endorse the findings in the House Antitrust Subcommittee’s October 2020 digital markets report. Agency leadership should commit to using all of their authorities to implement the report’s recommendations.

• Adopting Antimonopoly Legal Interpretations: The DOJ and FTC have adopted numerous pro-corporate and pro-employer legal interpretations in recent decades. The agencies should halt ongoing amicus briefs and reorient their efforts to replacing these interpretations and challenging unfavorable court decisions that limit their enforcement power. This includes:

• No-poach agreements: DOJ leadership should argue that worker no-poach agreements, even when initiated by a franchisor in contracts with franchisees, should be judged as a per se offense, not under the rule of reason as DOJ argued in 2019.724 DOJ should formally declare its new position in legal briefs that repudiate past filings and expand on this position in speeches, testimony, or other public declarations.

• Standard essential patents: DOJ should clarify through speeches, briefs, testimony, or official guidance that antitrust law can and should be used to police standard essential patentholders’ abuse of dominance, rescinding the Trump administration’s “New Madison” interpretation.725

• Unfair methods of competition: The FTC should withdraw its 2015 Statement of Principles unnecessarily limiting its ability to address “unfair methods of competition” under Section 5 of the FTC Act.726

• Cancel pending amicus briefs: The FTC and DOJ should immediately review all planned, pending, or draft amicus briefs. The agencies should cancel all briefs that do not advance antimonopoly or pro-worker legal interpretations and, where necessary, file motions to withdraw as amicus curiae from ongoing cases.

#### The coercion-based model of compliance is wrong AND the CP is viewed as modifying previously-existing binding obligations

-- the ‘internal point of view’ of law is more accurate; private entities respond to normative aspects of law, not just rote coercion

-- even those driven by strict cost/benefit calculations comply because adherence to guidance is the yardstick for evaluating compliance

-- this is especially true for private sector businesses; the professional class in compliance departments adhere to the internal view

-- the CP is seen as binding because it applies guidance to previously existing statute which is binding

Dr. Blake Emerson 19, Assistant Professor of Law at the UCLA School of Law, JD from Yale Law School, PhD in Political Science from Yale University, MPhil from Yale University, MA from Yale University, BA from Williams College, and Special Counsel to the Administrative Conference of the United States, “The Claims of Official Reason: Administrative Guidance on Social Inclusion”, Yale Law Journal, Volume 128, Number 8, 128 Yale L.J. 2122, June 2019, p. 2156-2161

II. EXTERNAL EFFECTS OF GUIDANCE

Thus far I have focused primarily on how guidance operates as law inside the state. This analysis, on its own, might give the appearance that guidance is merely talk between officials and not something that persons outside the government need to concern themselves with. As the implementation of DACA makes clear, however, guidance is often much more than an intramural affair. Through the DACA program, DHS granted deferred action to over seven hundred thousand people, and DAPA might have done the same for over four million. These deferred-action statuses would, by the operation of independent statutory authority and regulatory provisions, enable recipients to apply for other legal benefits. The internal circulation of nonbinding directives thus [\*2157] yields major social and legal consequences. These consequences arise in part because of the coercive powers that guidance conditions, channels, or holds in check. But I aim to situate this coercive potential in a broader, intrinsically communicative power: guidance can properly specify, or even alter, the normative commitments of private parties without carrying the mandate of binding law.

To explain guidance's normative status for private parties, I turn to the jurisprudence of H.L.A. Hart, whose landmark work, The Concept of Law, has set the stage for contemporary debate concerning the relationship between "law, coercion, and morality." In Part I above, Raz's concept of authority helped to distinguish binding legislative rules from guidance. While the former excludes certain reasons and courses of conduct from official consideration, the latter provides reasons for official action but does not exclude any other reasons or courses of conduct. Hart's concept of the "internal point of view" of law clarifies what it means for guidance to serve as a reason for action of this sort. For Hart, law is normative in the sense that it not only predicts government behavior but is treated as obligatory or evaluative. Agency officials hold this point of view by virtue of the duties of their office. They issue guidance to explain to others what they take these obligations to mean. Private parties may in some cases adopt this point of view so that they too take an internal perspective on regulatory norms. They may treat the existence of the guidance as a reason to act or not to act in their businesses or in their relations with others. And they may do so even though the guidance lays no claim to binding authority.

Guidance therefore has consequences for private parties' practical reasoning. Nonbinding policies can alter private persons' conceptions of their legal interests and liabilities such that they adjust their conduct to conform to the position stated in the guidance. Guidance thus helps shape public legal discourse and practice beyond the walls of the state without committing the agency or the public to any obligatory standard of conduct. As we will see in Part IV, this conclusion has implications for the durability of guidance and the terms on which it may be rescinded.

I lay the groundwork for that discussion by introducing Hart's idea of the internal point of view in Section II.A. In Section II.B, I explain how guidance's effects on private practical reasoning relate to the finality and ripeness doctrines [\*2158] of pre-enforcement judicial review. "Legal consequences" may "flow" from guidance without generating a determinate right or obligation. The legal consequences consist of alterations in official legal reasoning that trigger alterations in private practical reasoning. But these consequences fall well short of binding alterations in legal obligations. Guidance can thus be "final agency action" and yet fall within the APA's exemption from notice-and-comment rulemaking. However, guidance is often not "ripe" for judicial evaluation where the agency's application of it to a particular party would turn on unresolved factual issues. The more guidance takes the form of an open-ended list of factors to be considered in handling particular cases and the less it lays down categorical principles that apply to frontline officials, the less appropriate it is to evaluate its merits prior to enforcement.

A. Externalizing the "Internal Point of View"

H.L.A. Hart famously argued that a theory of law focused solely on its coercive power--"orders backed by threats"--misses something important about legal practice. "[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying such sanctions." Law speaks in the language of "shall," "right," "duty," and "wrong," because of this normative content. Those who recognize this evaluative dimension of legal rules have an attitude that Hart calls the "internal point of view." Where a legal system exists, at least some persons treat its rules as norms to guide and judge conduct. This does not necessarily mean that they must be motivated to use the law in this way by a belief [\*2159] that its norms are morally obligatory. But it does require a "critical reflective attitude to certain patterns of behavior as a common standard."

According to Hart, the internal point of view need not be accepted by all persons to whom the rules apply. People might simply obey the law because of fear of sanction, autonomous moral judgments, or for some other reason. The internal point of view, however, "must be effectively accepted as common public standards of official behavior by its officials." At a minimum, the people who interpret and apply the law must reason on the basis of the rules. Otherwise, those rules will not govern their conduct and their coercive powers will operate without law. In a "healthy society," where the people believe the law is legitimate, they too will adopt the internal point of view and conclude that they ought to act a certain way because the law says so, not merely because someone in a uniform with a gun might make them.

Hart's observations help make sense of the expressive function guidance can play. Especially where guidance is directed to private parties, rather than solely to persons within the agency, it can extend the internal point of view to a wider circle of persons. Some private actors would then share with officials the sense that regulatory requirements are obligatory, rather than mere notice of when the state will use its coercive power. In this way, guidance can link the discourse of the state with the discourse of civil society, increasing the evaluative interchange between the public and its government. As noted in Part I, all administrative officials take an oath that they will "well and faithfully discharge the duties of [their] office." An office that issues guidance is often an office whose duties [\*2160] are specifically legal: to interpret, implement, and enforce statutory law and the regulations that flow from it, with an eye to the purposes the underlying law is meant to accomplish. Therefore, these officials must treat the law they enforce as a norm to guide their conduct, and not merely as a threat to be avoided. When they issue guidance that reaches a public audience, they can convey this point of view to that audience.

Private persons may simply treat the guidance as a prediction about how the agency is likely to use its enforcement powers and plan accordingly. In that case, the internal, official point of view has been communicated but not accepted. But it is also possible that guidance will have more normative purchase. First, a private party might fundamentally seek to avoid regulatory sanctions, but their way of doing so is to adopt a general norm: follow the guidance. In that case, they have "accepted" the norm in Hart's sense. If they determine on their own that the best way to go forward is to conform to the guidance, then the guidance becomes a norm for them, even if their reasons for adopting that norm are purely instrumental. Even in cases where coercive pressures motivate behavior, guidance can take on normative characteristics. Once people respond to that coercive pressure by using the guidance as an evaluative yardstick for their own or others' conduct, the nonbinding norm has been internalized as a standard of conduct.

A second possibility is that some people may have professional and organizational commitments to the guidance. As Nicholas Parrillo has observed in a detailed empirical study on the use of guidance, "[p]ractical day-to-day decisions on a firm's adherence to guidance often fall to employees whose backgrounds, socialization, or career incentives may motivate them to follow guidance." The growth of corporate compliance departments has created a professional cadre who must usually treat guidance as a norm with which to evaluate the conduct of other persons within their firms, rather than only as a prediction about how the government will act if the firm behaves in a certain way. A compliance officer's obligations and powers as an employee of the firm [\*2161] are intrinsically linked to the officer's ability to communicate and instill the content of guidance as a standard to which corporate behavior ought to conform.

Finally, some people may consider the underlying statute to be worthy of obedience, either because they believe they have a general duty to obey the law, or because the content of that particular statute is consonant with their personal obligations. When an agency whose duty is to implement a law expresses what it thinks the law means, these persons are likely to treat such guidance as clarifying their existing obligations. Knowing less about the content and mechanics of the law than the agency but still committed to the law's general principles, such persons may understand the guidance to have concretized some of their abstract rights and duties. Because of the general terms in which regulatory laws are drafted, this normative clarification may go so far as to alter the substance of individuals' normative commitments from what they were before.

#### FTC and DOJ officials will interpret it rigidly, enforcing it as de facto binding

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

While ubiquitous and essential, guidance also entails a certain danger. To the extent that officials follow guidance rigidly--and they sometimes do--guidance documents become de facto binding regulations, but ones that the agency issues at will, with the public having no say. One might think the solution is to get agencies to use guidance less rigidly, but that is easier said than done, since it is inherently difficult for large cross-pressured organizations like the federal government to be flexible.

An alternative solution is to beef up the procedure by which agencies issue guidance in the first place to make it more participatory. This solution has recently been proposed by academics, members of Congress, and presidential administrations. But the literature on the proposal is mainly theoretical, without much empirical understanding of how these participatory arrangements work when they are tried, or what their consequences are. To fill the gap, this Article draws upon interviews with 135 individuals who had firsthand experience with guidance as employees of agencies, industry, or non-governmental organizations (NGOs). While the interviews indicate that public participation in the issuance of guidance is sometimes worthwhile, they also provide a body of new evidence that the benefits of such participation are uncertain, and the pitfalls complex and potentially severe, in ways that are unknown or underexplored in the literature. In analyzing the interviews, this Article aims to provide a realistic and concrete assessment of participation's value and a guide for what factors an agency needs to evaluate (and what pitfalls it must anticipate) in deciding when and how to invite participation--factors and pitfalls that vary substantially across agencies and even across documents. In light of this variation, I conclude that decisions about whether and how to invite participation should normally be made on a relatively local basis: document by document, or, at most, agency by agency. I caution against hard government-wide mandates of the kind proposed by some lawmakers and scholars.

[\*59] INTRODUCTION

As voluminous and complicated as federal agency regulations are, they leave a great many important matters to the agency's discretion or interpretation. Individuals and firms naturally want to know how the agency regulating them will exercise this discretion and how it will read the regulations' ambiguous words. Agencies respond by issuing huge amounts of "guidance," that is, statements to advise the public on how the agency proposes to exercise discretion or interpret law. Guidance documents--advisories, circulars, bulletins, memos, interpretive letters, manuals, FAQs, and the like--occupy a large portion of the typical agency's website and of the typical regulatory lawyer's day-to-day reading. The total page count of guidance issued by any given agency is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even two-hundred.

Omnipresent and essential though it is, guidance sparks fiery controversy. When agencies impose actual regulations that officially bind the agency and the public (known as "legislative rules"), there are safeguards in place for how they do it: the costly, time-consuming process mandated by the Administrative Procedure Act (APA), including notice-and-comment, in which the parties who will be bound by a policy have input into its formulation. By contrast, agencies can issue guidance without any such process [\*60] because the APA's exemptions for "general statements of policy" and "interpretative rules" combine to cover guidance in all its forms. This means that guidance can be produced and altered at greater speed, in higher volume, and with less accountability than legislative rules can. The justification for this procedural looseness is that guidance, unlike a legislative rule, is not supposed to be binding on the agency or the public. It is merely a tentative suggestion of the agency's current thinking about how to proceed in individual proceedings for adjudication or enforcement, unlike a legislative rule that the agency would follow automatically. Guidance is supposed to leave latitude, in each individual case, for the regulated party to argue for flexible treatment, and for officials to be open to that argument. If officials use guidance flexibly, it does not seem terribly worrisome for the agency to [\*61] be unconstrained in issuing guidance from the beginning.

Yet many observers worry that guidance's official promise of flexibility may not be borne out in reality. One hears complaints that agency officials are not tentative or flexible when it comes to guidance, but instead follow it as they would a binding legislative rule, and regulated parties are under coercive pressure to do the same. The more these complaints are true, the more the APA approaches the status of a dead letter, with agencies free to issue de facto regulations at will, just by couching them as "guidance," without the participation of individuals and firms who will be effectively bound. Invoking this fear, recent exposés on guidance documents have condemned them as "underground regulations" whose escape from APA safeguards reflects "Washington's lawlessness." In 2017, former Attorney General Sessions initiated a campaign to root out "improper guidance documents" and to stop the government from "circumventing the rulemaking process."

#### Courts will uphold it---that formally codifies the rule

Robert A. Anthony 1, GMU Foundation Professor of Law at the George Mason University School of Law, BA from Yale University, Rhodes Scholar, BA from Oxford University, JD from Stanford Law School, “Three Settings in Which Nonlegislative Rules Should Not Bind”, Administrative Law Review, Volume 53, Number 4, 53 ADMIN. L. REV. 1313, Fall 2001, Lexis

A guidance that genuinely interprets existing law does not have to go through notice-and-comment rulemaking procedures. It comes within the APA's section 553's exemption for interpretative rules. So, unlike some guidances that do not interpret anything, an interpretive guidance is procedurally valid without notice and comment. This is true even if the agency makes the guidance binding in a practical sense on private persons, by mechanically relying on it in enforcement or in determining eligibility for approvals or benefits. Now, I hasten to add that that does not necessarily mean that the interpretation is substantively valid; a court may arrive at a different interpretation. And it does not mean that the guidance is legally binding. By definition it is not.

But, recognizing that a guidance is not legally binding, how far can it be binding as a practical matter, so that private parties must observe it? As I have just indicated, the agency can make it practically binding by routinely applying it as a fixed criterion for decisions. Beyond that, the practical binding effect of an interpretive guidance is a function of the likelihood that it will be challenged in court, and then of the likelihood that the court will uphold the guidance. If guidances will automatically be validated and applied by the courts, they gain prodigious practical binding effect because, obviously, the law that the courts apply is the law that the public must obey.

That brings me to the first of the three situations that I am going to examine: [\*1315] where the guidance interprets a statute that the agency administers. How should its substantive validity be tested? At first glance, this may look like a job for *Chevron*. *Chevron* deference to an agency interpretation has the practical effect in most cases of giving the agency's position binding force, since the court reviewing under *Chevron* must accept the agency interpretation unless it finds it to be contrary to statute or to be unreasonable, which is quite unusual.

Should interpretations set forth in nonlegislatively issued guidances get *Chevron* deference from the courts? The Supreme Court's May 2000 decision in *Christensen v. Harris County* said no. *Christensen* held:

Interpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.,* but only to the extent that those interpretations have the "power to persuade."

This is an eminently sound position. The *Christensen* Court contrasted agency interpretations arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Those would get the strong *Chevron* deference, rather than the weak deference of Skidmore. Although the Court did not spell out its reasoning, its rationale is clear. *Chevron* deference confers on the agency's interpretation a binding practical effect comparable to the force of law. (A court can set aside the interpretation only if it is unreasonable, which is essentially the same basis on which a court can set aside a legislative rule, which has the force of law.) Therefore, *Chevron* deference should be granted only when the agency has exercised a congressionally authorized power to make law, and has promulgated its interpretation through procedures authorized for making law. The Court emphatically affirmed this analysis in its landmark June 2001 decision in *United States v. Mead Corp*. There the Court stated, "we hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise [\*1316] of that authority."

Thus, it is appropriate to give *Chevron* deference to an interpretation set forth in a regulation, adopted after notice-and-comment rulemaking, because there the agency has followed statutory rulemaking procedures and has exercised delegated statutory authority to make regulations having the force of law. But where the agency just issues a guidance, without observing notice and comment or other statutory procedure, the agency is not exercising any power that Congress has given it to make law, and *Chevron* deference is inappropriate. If agency personnel could simply issue interpretations informally and still get the strong *Chevron* deference, affected private parties would for practical purposes be bound by those informal interpretations, because they would know that the courts would almost certainly enforce them. The agencies would not need to bother with the APA's notice-and-comment requirements.

The weak deference of *Skidmore* is appropriate to the review of guidances. Under *Skidmore*, it is the court that does the interpreting. The court must give consideration to the agency's interpretation, but only as part of the court's process of determining the correct interpretation. In many cases, probably the great majority of cases, the court will agree with the agency's position. But it is not required to accept it just because it is reasonable, as it would have to do if the *Chevron* doctrine governed. The *Skidmore* formula, thus, respects the agency's expertise and assures that its views get fair consideration, without having to give its interpretation binding effect.

My second situation arises when an agency official issues a guidance that interprets not a statute, but a regulation. That is, it interprets a legislative rule, which has the force of law because it was issued through notice and comment. What force should the courts give to guidances that interpret regulations? Here, unfortunately, the Supreme Court has taken an illogical and highly anti-democratic position. It has stated that "the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Plainly erroneous or inconsistent with the regulation! Not even an express reasonableness requirement! The Court formulated this standard back in the days of the New Deal, before the APA, in the 1945 *Seminole Rock* case.

[\*1317] This formula makes it exceedingly hard to overturn an agency's interpretation of its own regulations, even where, as is usually the case, the interpretation is only a very informal one. This abject mode of judicial deference gives agency officials the practically-binding power to tell people what they can and cannot do, provided only that the agency folks can claim to be interpreting the agency's regulations. Moreover, it encourages agencies to promulgate vague regulations and then wait to spell out details later in informally issued "interpretations." Where the regulation is vague, with possible meanings spanning a broad and indeterminate range, strong *Seminole Rock* deference enables the agency informally to create new requirements, without public participation and free of meaningful judicial review. This style of deference is inconsistent with that of *Christensen*, which subjects informal interpretations of statutes to the more searching *Skidmore* standard.

#### Guidance is equally binding because parties think it’ll be backed up with prohibitions

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It might be tempting to conclude that the primary distinction between hard and soft law comes down to whether the governance actions in question are binding or enforceable. This view [\*45] characterizes hard law as possessing the full force of the government's power to sanction those in violation of the legal rule in question. Soft law, by contrast, seemingly lacks equivalent sanctions.

However, while it is technically correct that soft law lacks precisely the same binding force of hard law, the problem with applying bindingness as the distinguishing factor is that "soft law rarely - if ever - operates absent support from hard law." Indeed, parties subject to soft law often fall in line with its less binding norms and prescriptions precisely because such soft law is being formulated in "the shadow of the state." [FOOTNOTE] Kenneth W. Abbott et al., Soft Law Oversight Mechanisms for Nanotechnology, 52 Jurimetrics J. 279, 303 (2012); see also Dudley & Brito, supra note 20, at 38-39 (noting that although nonlegislative rules and guidance documents "do not carry the force of law and are not legally binding, they are often binding in practical effect"). [END FOOTNOTE] In other words, the threat of hard law is like the proverbial Sword of Damocles that hangs in the room while soft law is being formulated. The hard-law sword need not fall in order to achieve control through soft law processes.

#### High school topic card—not about antitrust its about guidance with the EPA which doesn’t apply—prefer our ev—it s hyper spec to antitrust

**Parillo 19** (Nicholas R. Parillo, Professor of Law @ Yale Law School, 1/16/19, Yale Journal on Regulation, Vol. 36, No. 1, "Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries", pages 229-231, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3311743)//veronica

Thus, there are two contexts in which owners may interact with regulators: (a) the jurisdictional determination process, in which the owner seeks out the regulator in order to obtain what is essentially a pre-approval, and (b) the ex post enforcement process, in which the EPA roves the countryside in search of owners who are taking the risk of developing property without seeking assurances. The EPA and the Corps have repeatedly issued guidance on the general question of what property constitutes “waters of the United States,” which simultaneously governs both the Corps’ pre-approval decisions (jurisdictional determinations) and the EPA’s decisions about what discharges to enforce against ex post. One such guidance document was issued in 2003.281 Then, in 2006, the Supreme Court handed down a splintered decision in Rapanos v. United States that threw the meaning of “waters of the United States” into even greater uncertainty.282 The EPA and the Corps reacted by issuing guidance in June 2007 (modified in December 2008) that identified large categories of property as falling into a grey area for which officials would have to apply a fact-intensive test on whether the property’s waters had a “significant nexus” with “traditional navigable water.”283 During the Obama administration, the EPA proposed a modification to the guidance but withdrew it, then went through a full legislative rulemaking to clarify the matter, only to have the rule blocked in court as the administration was near its end. As explained by an attorney at an environmental NGO, the impact of guidance on CWA administration, relative to what a legislative rule could do, depends on whether the context is pre-approval or ex post enforcement. The “day to day administration” of the Act “in the back-and-forth between owners and the Corps”—that being jurisdiction determinations and permitting—“might not be all too different” if the policies to be implemented by the Corps appeared in guidance or in a legislative rule. But in ex post enforcement—when an owner has decided to make discharges without seeking the prior assurance of a jurisdictional determination—“then the absence of a [legislative] rule has a real effect.” According to the attorney, there had been “a lot of indication” during both the Bush and Obama administrations that the EPA and the Corps were focusing enforcement suits on property not in the grey area. But a legislative rule could have eliminated the grey area: it could be “categorical and guaranteed,” and it would often be the exclusive focus of the judge deciding the enforcement suit (whereas guidance would have at most persuasive power, and then only “maybe”) In other words, guidance can be about as impactful as a legislative rule when the context is pre-approval, since there the regulated party has sought out the agency and is seeking to get the agency’s assent. But in ex post enforcement, the agency bears the burden of building its case from the ground up. That case is already built automatically if the agency has a legislative rule to rely upon, thereby allowing a large number of easy suits to be brought rapidly, increasing the probability of detection and deterrence. But this is not possible if the agency has only guidance in hand, since then it must work up each case individually, reducing the number of cases it can bring overall. This can mean a low probability of detection for regulated parties if they are numerous, as they are in the CWA context, thus reducing incentives to comply. (It also seems reasonable to assume that the target class for enforcement—owners who opt against seeking jurisdictional determinations from the Corps—constitutes a self-selected group whose members tend not to have repeated interactions with or strong relationships to the Corps or the EPA.)

#### Binding law is slow, litigated, and inconsistently enforced---guidance is key to clarity

David L. Franklin 10, Associate Professor at the DePaul University College of Law, J.D. from the University of Chicago Law School, BA from Yale University, “Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut”, The Yale Law Journal, Volume 120, Number 2, November 2010, 120 Yale L.J. 276, Lexis  
The use of nonlegislative rules generates three fundamental benefits for agencies and the regulated public. First, it provides relatively swift and accurate notice to the public of how the agency interprets the statutes or rules that it administers and how it intends to carry out its statutory mandate. [146](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=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n146) In particular, the use of interpretive rules allows agencies to clarify their  [\*304]  understanding of ambiguous statutes or rules without initiating a new round of notice and comment. [147](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=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n147) As Nina Mendelson notes, agencies could use legislative rules for this purpose, but this route would be time-consuming and might expose the agency to subsequent lawsuits alleging noncompliance with the rule. [148](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=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n148) Second, nonlegislative rulemaking allows agency heads to inform lower-level employees promptly about changes in agency policy (through such means as staff manuals, guidance documents, advice letters, and the like) in order to ensure bureaucratic uniformity and regularity. [149](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=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n149) [FOOTNOTE] n149. See, e.g., Kalen, supra note 71, at 671 ("Absent such [nonlegislative] documents, agency personnel could interpret or apply a particular regulation or statute inconsistently in various regional or field offices."); Manning, supra note 66, at 914-15 ("Nonlegislative rules potentially allow agencies to supply often far-flung staffs with needed direction ... ."); Mendelson, supra note 41, at 409 ("Agencies rely on handbooks, directives, and other similar guidance documents to ensure that lower-level employees complete forms correctly and make consistent (and thus more predictable) decisions."); Strauss, supra note 70, at 1482 ("Staff instructions, manuals, and other forms of publication rules are essential tools of bureaucratic management, by which the expertise of an agency is shared throughout its structure, and staff operatives are kept under the discipline necessary to the efficient accomplishment of agency mission."). [END FOOTNOTE] Third, nonlegislative rules avoid opportunity costs by freeing up agencies to redirect resources - resources that would otherwise be expended in the cumbersome process of notice-and-comment rulemaking - toward potentially more important priorities. [150](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=a329f4d92da9f59fa95b0dd5c6e4818b&docnum=140&_fmtstr=FULL&_startdoc=101&wchp=dGLbVlW-zSkAW&_md5=fe00d8d38030a6a3814296f52874e3d2&focBudTerms=Nonlegislative+Rules&focBudSel=all#n150)

#### It’s viewed as certain and predictable

Dr. Pedro Caro de Sousa 21, Advisor at the EUI Florence School of Regulation, Competition Expert with the OECD, DPhil from the University of Oxford, “Competition Enforcement and Regulatory Alternatives”, OECD, 6/7/2021, <https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf>

The OECD Competition Committee recommended in the past that competition authorities should be mindful of the benefits and risks of negotiated procedures when deciding whether to adopt them. One of the ways in which competition authorities have tried to achieve such a balance is through the publication of self-binding guidelines or guidance to enhance transparency and predictability of such procedures (OECD, 2016, p. 4[63]).

However, such guidance instruments raise concerns of their own. The publication by competition authorities of guidelines can have a significant impact on the general understanding of competition rules. Firms often tailor their behaviour to act in conformity with such guidance because compliance may avoid public enforcement or provide plausible defences (Spencer Weber Waller, 1998, pp. 1404-1408[60]) (Dunne, 2015, p. 81[5]). As a result, guidance instruments have been said to change the nature of enforcement from ex post to ex ante (Cave and Crowther, 2004, p. 25[64]).

Ultimately, however, guidance instruments provide significant advantages. They help clarify the law and procedures, significantly increasing legal certainty. They are useful as a means of obtaining clarity regarding competition authorities’ priorities and administrative behaviour, and often restrain their discretion. Further, guidance instruments are typically not binding on courts, which remain competent to interpret competition law – i.e. guidance instruments cannot on their own change the content of competition law. In effect, courts have jurisdiction to scrutinise competition enforcement actions even when these actions follow published guidance.

#### No one will see the difference. The real-world consequence is identical.

Tom J. Boer 99, Attorney at the U.S. Environmental Protection Agency and JD from George Washington University Law School, “Review Of Interpretive Rules And Policy Statements Under Judicial Review Provisions Such As Rcra Section 7006(A)(1)”, Boston College Environmental Affairs Law Review, Spring 1999, 26 B.C. Envtl. Aff. L. Rev. 519, Lexis

n43 See, e.g., Asimow, supra note 19, at 383-84.

Although the theoretical difference between the legal effect of legislative and nonlegislative rules is clear, the practical line-drawing problem has proved difficult for a number of reasons. The most important reason for the haziness of the distinction is that the practical impact of either type of rule on the members of the public is the same. Most members of the public assume that all agency rules are valid, correct, and unalterable. Consequently, most people attempt to conform to them rather than to mount costly, time consuming, and usually futile challenges. Although legislative and nonlegislative rules are conceptually distinct and although their legal effect is profoundly different, the real-world consequences are usually identical.

#### Antitrust prohibitions require notice-and-comment under the APA---the CP doesn’t because it’s only advisory

HLR 20 – Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law”, Harvard Law Review, 133 Harv. L. Rev. 2557, June 2020, Lexis

Just like the length of the statute, the degree of executive delegation affects the true degree of judicial delegation. Whereas agencies help fill in the gaps of ERISA, thus replacing some judicial delegation with executive delegation, agencies leave all antitrust delegation to the courts. While preemption by agency-made law has some of the same federalism and separation of powers concerns as preemption by judge-made law, agencies are more democratically accountable than are courts and are [\*2577] better equipped to make policy. Notwithstanding the influence of the Merger Guidelines, antitrust executive action has not compensated for the deficiencies of preemption by statutory common law to the same extent as have DOL's regulations. Promulgated regulations, like DOL's, must go through notice and comment under the Administrative Procedure Act. Notice and comment promotes democratic accountability: it "compels the agency to consult each of its stakeholder 'constituents,' ensuring that the ultimate agency action will in some way be responsive to the concerns of all interested parties." Additionally, some scholars argue that notice and comment might lead to better policymaking: it could be "a forum for democratic deliberation, in which agencies and citizens alike will change their views in response to reasoning of others." As such, notice and comment can help executive branch action overcome both the (un)democratic and policymaking critiques of judge-made law. The Merger Guidelines, on the other hand, nonbinding as they are, may be created without any public engagement, and often have been. So, even where federal antitrust law does have executive branch participation, that participation does not provide as meaningful a democratic check as does DOL participation for ERISA.

#### That negates backlash

Jill E. Family 13, Associate Professor of Law and Director of the Law & Government Institute at Widener University School of Law, “Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules”, University of Michigan Journal of Law Reform, Volume 47, Issue 1, 47 U. Mich. J.L. Reform 1, Fall 2013, Lexis

Internal and external political concerns may also influence USCIS to use guidance-based rules. USCIS is located within the Department of Homeland Security (DHS), and DHS holds rulemaking authority over USCIS. To engage in notice and comment rulemaking, USCIS must therefore garner the attention of the much bigger Department of Homeland Security. DHS must agree to raise USCIS's rulemaking agenda to the top of the department's priorities. Rulemaking within the Department of Homeland Security also requires coordination with other immigration agencies within DHS, such as Immigration and Customs Enforcement (ICE). The outlook of USCIS, as the only benefits-granting entity within DHS, may clash with the positions of an enforcement entity like ICE. In addition, avoiding notice and comment rulemaking may lessen the need to solicit input from other agencies or the Office of Management and Budget (OMB). Externally, USCIS may believe that proceeding by guidance document lessens visibility to Congress, the public, and to other executive branch entities, thus decreasing the risk of political backlash.

#### It sets a new status quo, defusing opposition AND backlash will be delayed, after the DA

Connor N. Raso 10, JD Candidate at Yale Law School and PhD Candidate at the Stanford University Department of Political Science, MA in Political Science from Victoria University of Wellington, BA in Finance from Washington University in St. Louis, “Strategic or Sincere? Analyzing Agency Use of Guidance Documents”, Yale Law Journal, Volume 119, 119 Yale L.J. 782, January 2010, p. 799-800

A. Congressional and Presidential Preferences

Guidance documents generally attract less attention from Congress and the President, giving agency leaders greater latitude to impose their preferred policy choices. Guidance is not subject to the many procedural requirements devised to alert the political branches to agency rulemaking activity. In addition, guidance documents arouse less attention and opposition. Agencies can generally issue a guidance document without attracting advance publicity. The agency therefore has the opportunity to set a new status quo before opponents mobilize. This status quo may generate self-reinforcing feedbacks that strengthen the agency's position. By contrast, agencies must solicit comments on legislative rules. This process generates political activity that may be noticed by Capitol Hill and the White House; some important legislative rulemakings gain political salience as interest group conflict escalates during [\*800] the notice and comment process. This comparison is not intended to suggest that interest groups are unaware of guidance documents. Rather, at the margin, legislative rules arouse more interest group attention and opposition, which results in greater congressional interest. Guidance documents, therefore, are relatively more attractive in cases where Congress and the President are likely to intervene against the agency.

## Case

#### Leadership is locked in---every indicator is dominated by the US, alliance commitments prevent regional heg, and primacy isn’t the same as predominance---that’s Catapano.

#### It’s sustainable---the fundamentals of power are intact

Dr. Robert Kagan 21, Stephen and Barbara Friedman Senior Fellow at the Brookings Institution, PhD in American History from American University, MPP from the Kennedy School of Government at Harvard University, BA from Yale University, “A Superpower, Like It or Not: Why Americans Must Accept Their Global Role”, Foreign Affairs, March / April 2021, https://www.foreignaffairs.com/articles/united-states/2021-02-16/superpower-it-or-not

Yet if the United States were as weak as so many people claim, it wouldn’t have to practice restraint. It is precisely because the country is still capable of pursuing a world-order strategy that critics need to explain why it should not. The fact is that the basic configuration of international power has not changed as much as many imagine. The earth is still round; the United States still sits on its vast, isolated continent, surrounded by oceans and weaker powers; the other great powers still live in regions crowded with other great powers; and when one power in those regions grows too strong for the others to balance against, the would-be victims still look to the distant United States for help.

Although Russia possesses a huge nuclear arsenal, it is even more an “Upper Volta with rockets” today than when that wisecrack was coined, in the early Cold War. The Soviets at least controlled half of Europe. China has taken the place of Japan, stronger in terms of wealth and population but with unproven military capabilities and a much less favorable strategic position. When imperial Japan expanded in the 1930s, it faced no formidable regional competitors, and the Western powers were preoccupied with the German threat. Today, Asia is crowded with other great powers, including three whose militaries are among the top ten in the world—India, Japan, and South Korea—all of which are either allies or partners of the United States. Should Beijing, believing in Washington’s weakness, use its own growing power to try to alter the East Asian strategic situation, it might have to cope not only with the United States but also with a global coalition of advanced industrial nations, much as the Soviets discovered.

The Trump years were a stress test for the American world order, and the order, remarkably, passed. Confronted by the nightmare of a rogue superpower tearing up trade and other agreements, U.S. allies appeased and cajoled, bringing offerings to the angry volcano and waiting hopefully for better times. Adversaries also trod carefully. When Trump ordered the killing of the Iranian commander Qasem Soleimani, it was reasonable to expect Iran to retaliate, and it may still, but not with Trump as president. The Chinese suffered through a long tariff war that hurt them more than it hurt the United States, but they tried to avoid a complete breakdown of the economic relationship on which they depend. Obama worried that providing offensive weapons to Ukraine could lead to war with Russia, but when the Trump administration went ahead with the weapons deliveries, Moscow acquiesced with barely a murmur. Many of Trump’s policies were erratic and ill conceived, but they did show how much excess, unused power the United States has, if a president chooses to deploy it. In the Obama years, officials measured 50 times before deciding not to cut, ever fearful that other powers would escalate a confrontation. In the Trump years, it was other countries that worried about where a confrontation with the United States might lead.

## 1NR

#### Turns food scarcity

Laurence Hecht 11, Editor in Chief at 21st Century Magazine, “Solar Storm Threatening Power Grids – Yet no Action Taken to Implement Defences”, <http://oilprice.com/Energy/Energy-General/Solar-Storm-Threatening-Power-Grids-%E2%80%93-Yet-no-Action-Taken-to-Implement-Defences.html> [language modified]

A prolonged lack of electricity in any of these areas would reduce the population to Dark Age-like conditions. Drinking water supply would break down for lack of pumping, and sewage service would cease shortly thereafter. For lack of refrigeration, the food chain would collapse, and medical supplies would be lost. Fuel could not be pumped, and thus transportation would break down. Heating and air conditioning systems would cease functioning. Communication would be [undermined] ~~crippled~~ by the lack of electricity as well as from the direct damage to satellites and sensitive electronics which a solar storm produces—perhaps no Internet and no cell phones. Modern life would come to an end, and a population and economic infrastructure unprepared for a return to pre-electricity conditions could descend into chaos.

#### Collapses heg AND deterrence

Dr. Richard Andres 11 and Hanna Breetz, Professor of National Security Strategy at the National War College and a Senior Fellow and Energy and Environmental Security and Policy Chair in the Center for Strategic Research, Institute for National Strategic Studies, at the National Defense University, doctoral candidate in the Department of Political Science at The Massachusetts Institute of Technology, “Small Nuclear Reactors for Military Installations: Capabilities, Costs, and Technological Implications”, [www.ndu.edu/press/lib/pdf/StrForum/SF-262.pdf](http://www.ndu.edu/press/lib/pdf/StrForum/SF-262.pdf) [language modified]

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

#### Turns Five Eyes AND alliances broadly

Dr. Stephen Walt 13, Professor of International Relations at Harvard University, “The Eclipse of American (Electrical) Power", Foreign Policy, 2/4/2013, <http://walt.foreignpolicy.com/posts/2013/02/04/the_eclipse_of_american_electrical_power>

I've made this point before -- here and here -- and I suspect I'll have to make it again. But whatever you think of the outcome of yesterday's Super Bowl, the unexpected second half power outage was a small blow against U.S. power and influence. Why? Because one of the reasons states are willing to follow the U.S. lead is their belief that we are competent: that we know what we are doing, have good judgment, and aren't going to screw up. When the power goes out in such a visible and embarrassing fashion, and in a country that still regards itself as technologically sophisticated, the rest of the world is entitled to nod and say: "Hmmm ... maybe those Americans aren't so skillful after all." Or maybe we've just spent too much money building airbases in far-flung corners of the world, and not enough on infrastructure -- like power grids -- here at home.

#### Moderates are on board---Biden’s push this week was a game changer

Alexander Bolton 9-15, Senior Reporter at The Hill, AB from Princeton University, “Democrats Hope Biden Can Flip Manchin and Sinema”, The Hill, 9/15/2021, https://thehill.com/policy/energy-environment/572506-democrats-hope-biden-can-flip-manchin-and-sinema

President Biden met face to face with Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on Wednesday, stepping up his involvement in the effort to unify congressional Democrats behind a $3.5 trillion spending package.

Democratic lawmakers are hailing Biden’s personal attention as a game-changing development at a critical moment.

“The ones who are negotiating publicly, I think it is fair to say, they’re the toughest votes to get,” Sen. Tim Kaine (D-Va.) said of Manchin and Sinema.

“This is really important for the Biden administration, and so it’s all on deck,” he added of the efforts to get the two holdouts to support the reconciliation package.

Kaine noted that Biden “has a strong personal relationship with Manchin.”

“Both Joe and Kyrsten really want [Biden] to be a successful president. (A) It’s good for the country. (B) It’s good for their states. (C) It’s good for their own politics,” Kaine added.

While the White House has been involved in negotiations with Senate Majority Leader Charles Schumer (D-N.Y.) and Speaker Nancy Pelosi (D-Calif.) over the size and scope of the spending package, Biden’s recent public appearances have focused more on the U.S. withdrawal from Afghanistan, the rise in COVID-19 cases, and wildfires and floods in various parts of the country.

White House press secretary Jen Psaki on Wednesday said the president knows the Manchin and Sinema meetings were only the start of negotiations with moderate Democrats.

“The president certainly believes they’ll be ongoing discussions, not that there’s necessarily going to be a conclusion out of those today,” she told reporters at the White House.

John LaBombard, a spokesman for Sinema, called Wednesday’s meeting “productive.”

“Kyrsten is continuing to work in good faith with her colleagues and President Biden as this legislation develops,” he said.

Biden, who spent decades in the Senate before becoming vice president, met separately with each senator in an apparent effort to maximize the effect of his personal involvement.

He sat down with Sinema around 10 a.m. and met with Manchin several hours later.

Manchin was spotted walking into the White House at 5:30 p.m. wearing a blue blazer, gray slacks and rubber-soled boat shoes.

The prospects of passing the entire $3.5 trillion human infrastructure package suffered several setbacks in recent weeks, largely because of Manchin and Sinema.

The two senators raised red flags about the bill’s price tag, and Manchin has criticized specific provisions such as the Clean Electricity Performance Program, which would provide $150 billion to steer electric utilities away from coal to renewable energy sources.

Manchin called for a “strategic pause” on the bill in a Wall Street Journal op-ed with the headline “Why I won’t support spending another $3.5 trillion.”

“Ignoring the fiscal consequences of our policy choices will create a disastrous future for the next generation of Americans,” he warned.

Sinema has also threatened to vote against a $3.5 trillion spending bill, although she has pledged to “work in good faith to develop this legislation with my colleagues and the administration.”

On the other side of the Capitol, Democrats suffered a blow with the drafting of their reconciliation bill Wednesday when three Democrats on the House Energy and Commerce Committee — Reps. Kurt Schrader (Ore.), Scott Peters (Calif.) and Kathleen Rice (N.Y.) — voted against legislation to lower drug prices, which Democratic leaders are counting on as a key pay-for in the larger package.

Separately, Rep. Stephanie Murphy (D-Fla.) sided with Republicans in the House Ways and Means Committee vote Wednesday to advance that panel's portion of the reconciliation package, citing concerns about tax provisions.

Manchin reiterated his concerns with the massive reconciliation bill at a Senate Democratic caucus lunch meeting on Tuesday. The remarks, however, fell flat with colleagues.

“We’re frustrated with Manchin,” said one Democratic senator who attended the meeting. “It’s not like the president has shunned him. He’s reached out to Manchin before. Nobody’s gotten more attention from the White House.”

The lawmaker said Manchin reprised some of the arguments he made in The Wall Street Journal and during appearances on CNN’s “State of the Union” and NBC’s “Meet the Press” over the weekend.

“The $64,000 question is, what’s his endgame? We don’t know,” said the lawmaker. “Part of what Biden is trying to figure out is, where does Manchin want to go?”

On Tuesday, Manchin questioned the need to spend $150 billion on weaning power plants away from coal when there are already plenty of private sector incentives to do so.

“Why should we be paying utilities to do what they’re already doing? We’re transitioning. Fifty percent of our power came from coal in the year 2000. Twenty years later, [it’s] 19 percent,” he told reporters.

Manchin also said he’s concerned about the reliability of depending entirely on renewable energy sources.

Senate Democrats have grown frustrated over what they view as Manchin’s “vague” demands for what the reconciliation bill should look like.

They also didn’t appreciate the double-barreled criticism in his Wall Street Journal op-ed that caught them off guard during the August recess.

“I was on a [congressional delegation trip] overseas with several colleagues when we read the op-ed, and we were aghast,” said another Democratic senator, who requested anonymity to discuss the internal dynamics of the Democratic caucus.

Manchin said fellow Democrats were “rushing” to spend another $3.5 trillion without fully understanding the potential ramifications of their actions. He warned that the bill could leave the federal government short of resources to respond to the pandemic if it gets worse because of viral mutations or if there’s another financial crisis like the Great Recession.

While some Democratic strategists have privately complained that Biden has not made more of a public sales pitch on behalf of his human infrastructure proposal, Democratic senators say they’re happy the president has let the talks play out on Capitol Hill without much interference.

Kaine said “it’s really important” that Biden is now getting personally involved in trying to persuade Manchin and Sinema get on board with the reconciliation bill.

“There’s a time when you get involved, and now is that time,” he said.

Kaine said Biden’s intervention in negotiations over the bipartisan $1 trillion infrastructure bill that passed the Senate last month was “very critical” to keeping it on track.

Senate Majority Whip Dick Durbin (D-Ill.) said Wednesday that he hopes Biden’s personal involvement will be a difference-maker with Manchin and Sinema.

“That conversation is important,” he said.

#### There’s a deal that’ll thread the needle

Robert Kuttner 9-15, Co-Founder and Co-Editor of The American Prospect Magazine, Longtime Columnist for BusinessWeek and The Boston Globe, “A Grand Bargain on Infrastructure and Saving Democracy?”, American Prospect, 9/15/2021, https://prospect.org/blogs/tap/grand-bargain-on-infrastructure-and-saving-democracy/

Due to the interesting timing, there may be an even grander bargain here. As I reported Monday, there also seems to be a deal in the making whereby the spending part of Biden’s Build Back Better program is cut by at least a trillion dollars in budget reconciliation; but in return, a lot of de facto spending is done through what are described as “middle-class tax cuts,” most notably the Child Tax Credit.

So progressives get their $3.5 trillion total package, and fiscal conservatives get their spending cuts. This deal is also tailor-made to get Joe Manchin’s support.

#### Disputes will be resolved

Louis Jacobson 9-14, Senior Correspondent at PolitiFact, Innovator-in-Residence at West Virginia University's Reed College of Media, Visiting Scholar at St. Bonaventure University's Jandoli School of Communication, “The Democrats’ Reconciliation Bill: What You Need To Know”, Tampa Bay Times, 9/14/2021, https://www.tampabay.com/news/nation-world/2021/09/14/the-democrats-reconciliation-bill-what-you-need-to-know/How united are Democrats?

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

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

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

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

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

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

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

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

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

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

#### Ignore snapshots of temporary disagreement

Alexander Bolton 9-8, Senior Reporter at The Hill, AB from Princeton University, “Biden's Muscle Questioned Amid Falling Polls”, The Hill, 9/8/2021, https://thehill.com/homenews/senate/571190-bidens-muscle-questioned-amid-falling-polls

Getting all Democrats back on the same page once both the House and Senate are back may leave Biden relying heavily on Schumer and Pelosi.

“The package is going to have its own long and winding road to the president’s desk,” Kessler predicted.

Kessler said he thinks Biden will be able to get the bill passed along with a separate $1.2 trillion infrastructure package already approved by the Senate. Liberals in the House want the larger $3.5 trillion measure to move before the smaller infrastructure bill.

“Along the way it’s going to look like it’s going to fail dozens of times. We’re now entering the bleak period of reconciliation dynamics in which it just looks like it’s going to come apart and red lines are being drawn and different factions of the party are at each other’s throats, but through it all you’ve got three of the most skilled politicians at the helm,” Kessler said.

“You’ve got Biden, Pelosi and Schumer and they’ve proven very adept at landing the planes. They’re going to land these planes, [but] I don’t know at which airport,” he added.

#### Passage is likely

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

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

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

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

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

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

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

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

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

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

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

#### 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.

#### Even if they like the plan, 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.

#### The plan explicitly contravenes previous Congressional acts---allies have retaliated to extraterritorial application before which proves Congress backlashes to the plan

Samuel F. Kava 19, JD/MBA Candidate @ JHU/UofM, "The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity," Journal of Business and Technology Law 15, no. 1 (2019): 135-164

The broad application of the Sherman Anti-Trust Act, and the narrow exception to barring the Act through international comity, led many foreign nations to enact blocking statutes to "protect their nationals from criminal [and civil] proceedings in [the United States] where the claims to jurisdiction by those courts [were] excessive and constitute[d] an invasion of sovereignty." 60 Many of the United States' closest allies-the United Kingdom, Australia, Canada, France, Italy, South Africa, the Netherlands-enacted blocking statutes that:

[T]riggered the issuing of conflicting injunctions, [] given rise to a spate of foreign statutes designed to thwart discovery in the United States proceedings...[and] the most extreme example of outrage at the extraterritorial application of our anti-trust law is the United Kingdom's 'Clawback Act.' This statute goes far beyond simply denying recognition to the United States decrees and permits suits in the United Kingdom to recover any part of the judgement already paid that exceeds compensatory damages. 61

In addition, even U.S. companies opposed the broad application of the Act because they felt it "handicapped [them] in competing for off-shore business against foreign firms that were not subject to the strict antitrust constraints imposed by U.S. law." 2

To quell the concerns of both foreign nations and domestic companies, the United States Congress enacted the FTAIA. The FTAIA, which went into effect in 1982, provided protection for export transactions by "imposing additional requirements for establishing a Sherman Act claim involving foreign commerce that is not import trade or import commerce." 3 Specifically, in order to bring an antitrust claim, the FTAIA required "the conduct to have a direct, substantial, and reasonably foreseeable effect on commerce in the United States." 64 In other words, a foreign exporter would not be subject to prosecution under the Sherman Anti- Trust Act if it engaged in an anticompetitive act (i.e. price fixing) that did not "have a direct, substantial, and reasonably foreseeable effect on commerce in the United States." 65 As is apparent by the FTAIA statute, corporations that are engaged in import commerce are "unaffected by the FTAIA and remain[] subject to the Sherman Act." 66 Nevertheless, the FTAIA was a good faith effort by the legislative branch to: (1) improve the nation's international relations, (2) ensure U.S. domestic companies were not disadvantaged, and (3) provide "a unified legal standard to determine whether the U.S. antitrust law applies to foreign transactions." 67

#### The only parts of their ev about Biden is about agency action, NOT his persuasion of Congress, which is the link

* Kentucky reads yellow

Ballard Spahr 7/1 (Ballard Spahr LLP, “Congress, White House Signal Increased Antitrust Enforcement”, <https://www.jdsupra.com/legalnews/congress-white-house-signal-increased-3294645/>, July 1, 2021)

Summary Increased antitrust enforcement is a hot topic in the nation’s capital this summer, with the House Judiciary Committee approving a package of legislation that would reshape the antitrust laws last week and an executive order aimed at more aggressive enforcement expected from the White House in the coming weeks. The Upshot The package of antitrust legislation, which advanced out of the Judiciary Committee with support from most Democrats and a few Republicans, broadly targets “Big Tech” with a series of changes to the legal landscape in order to curb their perceived power. Given the cross-partisan mix of support and opposition in committee, the fate of the legislation in the House and the Senate remains uncertain. On a separate track, the White House is considering an executive order that would direct various federal agencies to update their antitrust guidance, suggesting specific actions that the agencies could take to ramp up efforts to increase competition in a wide variety of markets. The Bottom Line While any antitrust legislation faces a long road through Congress, the Executive Branch has signaled its intent to change the regulatory landscape and ramp up antitrust enforcement in a wide range of markets. Attorneys in Ballard Spahr’s Antitrust and Competition and Government Relations and Public Policy group are available to advise businesses on the effects of these changes on their current practices and competitive arrangements. Increased antitrust enforcement is a hot topic in the nation’s capital this summer, with the House Judiciary Committee approving a package of legislation last week that would reshape the antitrust laws and an executive order aimed at more aggressive enforcement expected from the White House in coming weeks. The package of antitrust legislation, which advanced out of the Judiciary Committee with support from most Democrats and a few Republicans, broadly targets “Big Tech”—companies such as Apple, Amazon, Facebook, and Google that legislators contend have substantial market power—with a series of changes to the legal landscape which would curb their power. The six bills include: H.R. 3826, which aims to prevent large online platforms from completing mergers that would enhance monopoly power; H.R. 3825, which aims to prevent such platforms from using their market position to distort competition in markets relying on that platform; H.R. 3816, which would create a nondiscrimination regime for such platforms—i.e., barring conduct that advantages the platform operator’s products over other businesses; H.R. 3849, which gives the Federal Trade Commission new authority to promulgate rules to promote interoperability—the extent to which systems and devices can share and interpret data—and data portability; H.R. 3843, which would increase filing fees on large mergers in order to provide resources to the Department of Justice and Federal Trade Commission; and H.R. 3460, which would include antitrust actions filed by state attorneys general in the provision excepting antitrust actions filed by the United States from the multidistrict litigation venue provision, 28 U.S.C. § 1407(g). The package of bills now heads to the full House for debate and consideration. Given the cross-partisan mix of support and opposition, the fate of the legislation there remains uncertain—let alone in the Senate, where 60 votes would be needed to overcome a potential filibuster. While those bills await consideration, Politico reports that the White House is considering an executive order that would direct various federal agencies to update their antitrust guidance, suggesting specific actions that the agencies could take to ramp up efforts to increase competition in a wide variety of markets. Specifically, reports indicate that the order would suggest that the Department of Justice and FTC adopt revised guidance on corporate mergers, including for vertical mergers—mergers between companies that are not direct competitors. The order also would target deals between financial institutions and competition at airports, among other areas. However, the executive order is yet to be presented to President Biden, and a spokesperson said in a statement that he has not made any final decisions. The move is part of a broader pattern of a more aggressive approach to antitrust taken by the Biden administration, alongside the appointment of antitrust scholar Lina Khan as FTC chair. President Biden is yet to appoint a new head of DOJ’s Antitrust Division, which would send a further signal of the administration’s intentions in the area. While any antitrust legislation faces a long road through Congress, through its appointments and an anticipated executive order, the Executive Branch has signaled its intent to change the regulatory landscape and ramp up antitrust enforcement in a wide range of markets.

#### All Biden’s PC is going to infrastructure

Andy Meek 21, Contributor at Fast Company and The Guardian, Tech Reporter at BGR, “There’s No Fourth Stimulus Check From The IRS – Here’s How You Might Get One Anyway”, BGR, 8/30/2021, https://bgr.com/politics/theres-no-fourth-stimulus-check-from-the-irs-heres-how-you-might-get-one-anyway/

The federal government is bogged down with a number of catastrophes and politically thorny legislative priorities at the moment. The Biden administration, for example, is trying to call on every drop of political capital it can to push an infrastructure bill over the finish line. Meanwhile, unrelated crises in Afghanistan as well as damage stemming from Hurricane Ida are demanding immediate attention. All of which is to say, finding enough votes in Congress to pass some sort of new stimulus legislation that funds an all-new round of checks anytime soon seems like a mountain that no one has the stomach to climb right now.

#### It’s top of the docket---vote’s this month

George Cahlink 9-9, Congressional Reporter at Energy & Environment News, Former Editor and Budget Tracker at CQ Roll Call, BA from Saint Joseph’s University, “4 Deadlines to Watch on Capitol Hill This Fall”, E&E Daily, 9/9/2021, https://www.eenews.net/articles/4-deadlines-to-watch-on-capitol-hill-this-fall/

Here are the dates to watch in coming weeks on Capitol Hill as both chambers enter a high-stakes legislative period that could set the course for the administration’s handling of energy and environmental issues over the next three-plus years.

1. Sept. 15 — Reconciliation bills due

House and Senate Democratic leaders are pressing to have their $3.5 trillion plan for carrying out Biden’s domestic goals ready to move to the floor by mid-September.

Both chambers are planning to assemble various bills into a single budget reconciliation package that would be able to pass the Senate with only 50 votes, meaning it could not be filibustered. It’s expected to contain a clean energy payment program, invest heavily in electric vehicles, create a Civilian Climate Corps and overhaul the energy tax code (E&E Daily, Aug. 12).

House Democrats are marking up their versions of the bill this week and next in committee — including the Natural Resources and Ways and Means committees today (see related story). The Senate is expected to compile its version mostly behind closed doors.

The sequencing and composition of the legislation on the floors will be crucial, even as there is no near-term deadline for passing reconciliation. Leaders would like to move it this fall rather than risk pushing votes on the partisan plan into an election year.

House Democratic leaders will need to balance competing progressive and moderate interests, while in the Senate a single Democratic defection could sink the package.

Senate Energy and Natural Resources Chair Joe Manchin (D-W.Va.), a fossil fuel ally, rattled Democrats last week when he called a “strategic pause” in reconciliation, saying he does not support the $3.5 trillion spending goal and warned against setting artificial deadlines (Greenwire, Sept. 3). He’s raised similar concerns in the past, often to position himself as a dealmaker.

Majority Leader Chuck Schumer (D-N.Y.) took the latest warning from Manchin in stride, saying yesterday “we’re moving full speed ahead,” though adding, “Without unity, we’re not going to get anything.”

2. Sept. 27 — House infrastructure vote

Speaker Nancy Pelosi (D-Calif.) meanwhile, only got House Democrats on board with the budget framework last month by agreeing to a demand from moderates that the chamber vote on a bipartisan infrastructure bill no later than Sept. 27.

Centrist Democrats are anxious to get the Senate’s $1.2 trillion infrastructure bill — backed by many Republicans — signed into law. But House progressives have said for months they won’t support the bipartisan funding for road, bridges and other assorted infrastructure until they first are assured that the Senate will back the far larger $3.5 trillion reconciliation effort.

#### It's the #1 priority

Eli Stokols 21, White House Reporter for the Los Angeles Times, and Noah Bierman, National Desk and White House Reporter for the Los Angeles Times, “Biden Focuses on Domestic Agenda, Even as Hot Spots Flare Up Elsewhere”, Los Angeles Times, 8/21/2021, https://www.latimes.com/politics/story/2021-08-21/la-na-pol-biden-priorities

Every morning this week at 8:45, a newly established “war room” has convened at the White House, with about 20 staffers logging onto a Zoom call to coordinate messaging and deployment of critical resources.

The operation has nothing to do with the crisis in Afghanistan — it’s about keeping President Biden’s big infrastructure push on track. Even amid the fall of Kabul to the Taliban and the frantic, last-minute military operation to rescue thousands of Americans and vulnerable Afghans, the White House has maintained its overarching focus on the domestic matters it has prioritized for the last eight months.

“The No. 1 priority for our cabinet overall, from our perspective here, is to build support throughout the [August] recess process for the legislative agenda,” said Neera Tanden, a senior advisor to the president who has overseen the war room since July. Tasked with building support for a $1.2-trillion bipartisan infrastructure measure and the Democrats’ $3.5-trillion budget proposal, Tanden is dispatching cabinet members to key states, monitoring lawmakers’ town halls and arranging hundreds of local TV interviews with administration officials.

#### The GOP will reflexively oppose anything Biden pushes AND the plan’s narrow scope makes its support weak and fragile

David Dayen 21, Executive Editor of The American Prospect, Work Appeared in The Intercept, The New Republic, HuffPost, The Washington Post, the Los Angeles Times, “Congressmembers Roll Out an Anti–Big Tech Agenda”, The American Prospect, 6/15/2021, https://prospect.org/power/congressmembers-roll-out-an-anti-big-tech-agenda/

What began in the House Antitrust Subcommittee as an open-ended investigation into the power of the large tech platforms has culminated over two years later in a package of five bipartisan bills informed by that investigation. Each targets a specific aspect of Big Tech’s power, from platform websites self-preferencing their own products, to serial acquisitions that entrench market dominance, to vertical integration across multiple business lines, to network effects that lock in customers. Each bill has multiple Republican co-sponsors, and one has already passed through the Senate.

But Congress is an inhospitable place these days for lawmakers who want to make things happen. Ideological distancing could still frustrate efforts on this legislation, regardless of their level of support. The relative narrowness of the package, despite a concentration problem that spans industries throughout the economy, could also present a challenge. This battle is more likely to be waged at the state level, in the courts, and inside the federal antitrust agencies than in precarious coalitions for somewhat myopic bills.

In any other context throughout U.S. history, a legislative agenda offered in tandem by the chair and ranking member of a committee would have good prospects for success. And if the “Opportunity, Innovation, Choice” agenda were to pass, it would have positive effects for the country.

The bills include the American Choice and Innovation Online Act, which would ban online platforms from giving their own services advantages over rivals, through for example placing their links at the top of the page. It would also prohibit conditioning access to platforms on buying services from them (a seeming reference to Amazon’s dangling of fulfillment services for third-party sellers as the only way to win the “buy box” where most products are sold); using nonpublic data to inform a platform’s competing goods or services (a reference to Amazon Basics informing their product line from seller data); or requiring pricing ranges from third-party sellers (something being litigated right now in D.C.’s lawsuit against Amazon).

The Platform Competition and Opportunity Act prohibits platforms of a certain size from making mergers or acquisitions. The Ending Platform Monopolies Act would structurally separate platforms that host sellers or partners from business lines they own that compete with them, by allowing enforcement agencies to force divestiture of anything that creates a “conflict of interest.” (Rep. David Cicilline has in the past compared this to a “Glass-Steagall” act for Big Tech.) The ACCESS Act would require platform sites to make their data portable and their network interoperable with competing services, the way texting services ICQ and AOL Instant Messenger and iMessage were all interoperable in the late 1990s and early 2000s. The idea here is to lower barriers to entry for building a new social media site by allowing Facebook or Instagram data and friends to freely move over.

Finally, the Merger Filing Fee Modernization Act increases payments for large corporations engaging in mergers, which would allow for more funding to the Justice Department Antitrust Division and the Federal Trade Commission without new federal outlays. This bill, which applies to all mergers and not just Big Tech, has already passed the Senate, inside the so-called “China bill” that now awaits House action.

House Antitrust Subcommittee chair Rep. David Cicilline (D-RI) and ranking member Rep. Ken Buck (R-CO) endorsed the package, and several Republicans co-sponsored some or all of the bills, including Reps. Lance Gooden (R-TX), Burgess Owens (R-UT), Chip Roy (R-TX), and even far-right members like Madison Cawthorn (R-NC) and Matt Gaetz (R-FL).

However, as the Prospect has reported, there’s an ideological split among Republicans on the House Judiciary Committee. Buck has become convinced that Big Tech has too much power and steps must be taken to weaken that, while the ranking member of the committee, Rep. Jim Jordan (R-OH), has been far more receptive to traditional pro-corporate, libertarian antitrust policy. When Jordan responded to former President Trump’s continued ban from Facebook by tweeting, “Break them up,” it was thought that he was perhaps moving to Buck’s interpretation of the issue. But upon release of this package, Jordan responded with the same old partisan bomb-throwing about Big Tech censoring conservatives and Democrats just wanting big government to solve the problem. A Jordan spokesperson expressed skepticism to Politico that any bill written by “impeachment manager David Cicilline and other progressives” would pass conservative muster.

Jordan simply has more juice among Republicans than Buck. When the House Judiciary Committee adopted the Big Tech antitrust report, they did it on a party-line vote, because Jordan rejected it wholesale. Many of the Republicans who co-sponsored these bills, including Ken Buck, voted no. If Jordan is not on board, most Republicans won’t be either, and it’s doubtful that the House would be able to pass much of this agenda, given that some tech-friendly Democrats would probably drop off as well. You can see how muddled Republican aims are by a Senate GOP antitrust bill introduced on Monday, which while claiming to strengthen enforcement would actually harm it by codifying the consumer welfare standard that artificially narrows harms arising from concentration down merely to price.

There’s an ideological split among Republicans on the House Judiciary Committee.

We’ve already seen Big Tech’s lobbying skill at fending off scrutiny in the China bill, when a measure that would have forced Amazon to confirm the identity of their third-party sellers to prevent largely Chinese counterfeits got stripped at the last minute. Lobbying would clearly be fierce here, given that the most powerful and free-spending companies in the world are on the opposite side.

The filing fee legislation, which doesn’t cost any money, is not really targeted at Big Tech, and already has Senate support, would be the likeliest candidate of the five to get out of Congress. It’s also the least impactful; more money for merger enforcement means little without the will and creativity to act.

The Biden administration has left key positions in those enforcement agencies vacant, nearly five months into his presidency. But other agencies with anti-monopoly capabilities have begun to act. The U.S. Department of Agriculture commenced work on a rewrite of enforcement of the century-old Packers and Stockyards Act. Among other things, the new rules would clarify that farmers and ranchers do not have to show sector-wide impediments to competition to bring action for individualized harm. This was one of the biggest barriers to enforcing this law. But the agency responsible for enforcement, the Grain Inspection, Packers and Stockyards Administration (GIPSA), was dissolved under the Trump administration and folded into an agricultural marketing service.

Two Republican senators, Chuck Grassley (R-IA) and Mike Rounds (R-SD), have introduced a bill that would add a specific anti-competition watchdog at USDA to monitor meatpacking industry concentration. That legislation didn’t get the fanfare of the suite of Big Tech bills, with their high-profile subject covered incessantly by coastal media. But it probably has a better chance of becoming law, and it indicates how the competition issue goes well beyond Silicon Valley, and could attract bipartisan support if it addressed other areas important to conservatives.

Meanwhile, outside Washington, anti-monopoly movement continues. In Ohio, Republican Attorney General Dave Yost last week asked a state judge to declare Google a public utility, following on the logic of conservative Supreme Court Justice Clarence Thomas. This would achieve what the antitrust bills banning self-preferencing want through court action, and since robust antitrust laws exist on the books, changing legal precedent would encompass much of what antitrust reformers seek.

At the state level, New York has shown the possibilities of real action. SB 933, which passed the state Senate last week, would upend the Empire State’s antitrust law, clarifying that an “abuse of dominance” standard predominates for antitrust enforcement, rather than a standard that narrowly focuses on consumer welfare. As Matt Stoller notes, this transformative change in how the state approaches monopoly was supplemented by two other bills. One passed by the state Senate allows a right to repair for users who buy electronics or other products; companies like Apple and John Deere often block third-party and consumer repairs, citing proprietary information. The other would regulate pharmacy benefit managers, obscure middlemen that lead to rising prescription drug prices.

PBM regulation and right to repair bills have been sweeping through red and blue states in the past few years. It reinforces that the action on anti-monopoly policy has been everywhere but Congress. Despite the promising array of Big Tech bills, that’s probably still the case.

#### Republican support for curtailing corporate power is entirely cynical and fake---they’ll oppose actual restrictions on corporations at every turn

Adam Serwer 21, Staff Writer at The Atlantic Covering Politics, 4/6/2021, “‘Woke Capital’ Doesn’t Exist”, The Atlantic, https://www.theatlantic.com/ideas/archive/2021/04/dont-buy-conservative-rebellion-against-corporations/618519/

As such, the Republican anti-corporate turn is entirely superficial. That’s a shame, because the concentration of corporate power has had a negative effect on American governance, leading to an age of inequality in which economic gains are mostly enjoyed by those in the highest income brackets. Since the 1970s, despite massive gains in productivity, most Americans have seen their wages rise very slowly, while the wealthiest have reaped almost all the gains of economic growth. That outcome was a policy choice, not an inevitability.

“Starting in the 1970s, the people in charge of designing and implementing the tax code increasingly favored those at the very top,” the political scientists Jacob Hacker and Paul Pierson wrote in Winner-Take-All Politics. “The rich are getting fabulously richer while the rest of Americans are basically holding steady or worse.” Notably, they argued, this trend “is not obviously related to either the business cycle or the shifting partisan occupancy of the White House.”

Economists on the left have concluded that this is because the extremely wealthy have a stranglehold on American politics that prevents policy changes that would more fairly distribute economic gains. And that, in turn, helps explain the seemingly high stakes of the culture war over corporate-branding decisions: The concentration of corporate power means that large companies wield outsize cultural influence, and their policy priorities are more often translated into law than those with broader public support.

“One thing that is clear from the emerging evidence is that economic inequality reinforces differences in political and social power, and these in turn affect market outcomes,” the economist Heather Boushey, now a member of President Joe Biden’s Council of Economic Advisers, wrote in Unbound.

This diagnosis lends itself to certain solutions, some of which are apparent in the Biden administration’s agenda. Although in the past, Democratic Party policies have exacerbated the problem, in recent years, much of the party has moved left on economic issues and now appears to recognize the threat that extreme inequality represents. The obvious Republican insincerity on deficits, and the depth of the coronavirus crisis, expanded the horizon for Democrats as they contemplated policy changes. The design of generous unemployment provisions, direct-aid payments, and the recently passed child allowance, all of which disproportionately benefit the low-wage workers who have borne the brunt of the pandemic, reflected that new ambition, and Biden has already proposed modestly raising corporate tax rates in his infrastructure plan.

But reducing corporate power, and with it the grip of the wealthy on government, will require more than that. Strengthening organized labor through the PRO Act, which would make it easier to unionize, would provide a needed counterbalance to corporations. The Biden administration has also indicated a willingness to use antitrust regulations against tech firms that have amassed a stunning amount of power over Americans’ daily lives in the past few decades. Proposals from the left wing of the party to reestablish postal banking and mandate worker representation on corporate boards would further diminish the influence of the extremely wealthy.

Perhaps Republicans don’t like these ideas. They are, after all, liberal and left-wing ideas. But when it comes to breaking the concentration of political and economic power in the hands of the very wealthy, Republicans have no ideas of their own to speak of, beyond issuing colorful threats to employ state coercion against firms that fail to do their bidding.

The GOP is unbothered by the concentration of wealth or power as such, which is not only why it opposes all of these measures, but also why the centerpiece of its agenda the last time it controlled both Congress and the White House was a massive and regressive tax cut. What vexes Republicans is the sight of corporations responding to market incentives by making public displays of support for egalitarianism and nondiscrimination, which is not the same as corporations actually supporting those things.

Putting out statements supporting Black Lives Matter or adorning their logos with pride colors is very easy for big corporations, but such gestures do not signal a commitment to fair wages, safe working conditions, or a willingness to pay their share in taxes, let alone racial egalitarianism in all but the most cosmetic sense. They are merely brand management. “Woke capital” does not actually exist, only capital—and its interests remain the same as they have always been.

Like the Republican turn against democracy, the newfound opposition to the market fundamentalism that conservatives once espoused and the free-speech principles they pretended to revere is superficial and contingent. Free speech, democracy, and free-market capitalism were fine as long as Republicans could expect victory in these arenas. But with public opinion shifting against them on key priorities, their focus has now turned to rigging the rules of the game to their advantage rather than winning over a larger share of the public. They do not seek to achieve a more equitable distribution of either money or power, but to ensure that the present inequities work to their political advantage.

An irony is that the era with which the right is enraptured was in part a product of a set of mid-century economic arrangements—higher taxes on the wealthy, greater union density, stronger regulations—that the left is attempting to restore, in some form, while including a novel commitment to racial and gender equality. Republicans have no interest in curtailing corporate power in this fashion—not when they believe that power could be used to reimpose a diminished cultural hegemony. These so-called populist Republicans do not wish to throw the one ring into Mount Doom; they simply want to wield it on their own behalf.

#### PC is finite---controversies elsewhere drain Biden’s effectiveness

Niall Stanage 21, Associate Editor and White House Columnist at The Hill, Former Editor of Magill Magazine, Author of Redemption Song: An Irish Reporter Inside the Obama Campaign, “The Memo: Biden Gambles That He Can Do It All”, The Hill, 1/24/2021, https://thehill.com/homenews/the-memo/535502-the-memo-biden-gambles-that-he-can-do-it-all

There’s an argument for taking such a multipronged approach. Every president tends to have the greatest leverage at the start of their term, and momentum can be harder to generate as time goes on.

But there is also the question of political capital, which tends to be finite. If Biden proves to have less heft than he thinks to pass legislation, he will disappoint key constituencies.

“We’re going to need ... to be able to act on multiple fronts,” Brian Deese, director of the National Economic Council, said in the White House briefing room Friday.

Deese was making that point in the context of the president’s proposed $1.9 trillion COVID-19 relief package advancing even as the Senate conducts former President Trump’s impeachment trial next month. But the same principle applies to other issues.

Some Democrats are optimistic that across-the-board progress is possible. They suggest the pressure is on their Republican counterparts not to appear obstructionist.

“If Biden does well, then people will be very upset if it looks like the Republicans are obstructing, particularly on the economy and on health — that will be very bad for them,” said Democratic strategist Tad Devine.

“I’m not predicting that we are going to have immigration reform and all this stuff right at once,” Devine added. “But I do believe he has a very strong hand right now. There are a lot of votes out there for what Democrats want.”

The issue of political capital and how best to deploy it is always a vexing one for new presidents.

Former President Obama stuck to his commitment to enact health care reform even amid an economic catastrophe, persevering past the point when some advisers counseled him to settle for a more modest goal. He signed the Affordable Care Act into law in March 2010, only to see his party suffer crushing losses in the midterm elections later that year.

Former President Clinton fared worse. His 1993 effort at health care reform ran aground, and other controversies also slowed his progress. Clinton early on sought to end the ban on LGBT people serving in the military and then backed off to the “Don’t Ask Don’t Tell” compromise policy that didn’t really satisfy anyone.

Republicans suggest Biden could be vulnerable to comparable missteps.

“He has got a very slim majority in the House and no real majority in the Senate,” said John Feehery, a Republican strategist and former GOP leadership aide who is also a columnist for The Hill. “I think the problem is when you throw a punch of spaghetti up on the wall and hope something sticks. You really want to be more targeted. Biden is going to be disappointing a lot of people if he is making promises he can’t keep.”

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

Perry Bacon 21 Jr., Senior Writer for FiveThirtyEight, “Why Republicans Don’t Fear An Electoral Backlash For Opposing Really Popular Parts Of Biden’s Agenda”, FiveThirtyEight, 3/2/2021, https://fivethirtyeight.com/features/why-republicans-dont-fear-an-electoral-backlash-for-opposing-really-popular-parts-of-bidens-agenda/

Republicans in the U.S. House last week unanimously opposed President Biden’s economic stimulus bill, even though polls show that the legislation is popular with the public. The U.S. Senate will consider the bill soon — and it looks like the overwhelming majority of Republicans in that chamber will oppose it as well. And it’s not just the stimulus. House Republicans also last week overwhelmingly opposed a bill to ban discrimination on the basis of sexual orientation and gender identity. And the GOP seems poised to oppose upcoming Democratic bills to make it easier to vote and spend hundreds of billions to improve the nation’s infrastructure. All of those ideas are popular with the public, too.

“Duh,” you might say. Of course, the party out of power opposes the agenda of the party in power. Democrats did that during former President Donald Trump’s four years. Republicans did it during former President Barack Obama’s two terms. The parties just disagree on a lot of major issues.

You’ve seen this movie before, right?

This sequel is a little different, actually. Obama’s health care bill was only hovering around majority support as it moved through Congress. Trump’s proposals to repeal Obamacare and cut corporate taxes were downright unpopular. In contrast, Biden and the major elements of his agenda are popular. And the Republican Party isn’t, which helps explain why it was swept out of power in the 2018 and 2020 elections.

So if an unpopular party uniformly opposes popular policies in the run-up to 2022 and 2024, is it buying itself a ticket further into the political wilderness?

Not necessarily.

There are several reasons to think that opposing popular policies won’t hurt Republicans electorally, and conversely, that implementing a popular agenda won’t necessarily boost Biden that much.

The first reason that congressional Republicans can afford to oppose popular ideas is one that you have probably read a lot about over the last several years: The GOP has several big structural advantages in America’s electoral system. Because of the Electoral College, Trump would have won the presidency with around 257,000 more votes in Michigan, Pennsylvania and Wisconsin, even though he lost nationally by more than 7 million votes. The Senate gives equal weight to sparsely populated states like Wyoming and huge ones like California, so the chamber’s 50 Democratic senators effectively represent about 185 million Americans, while its 50 Republican senators represent about 143 million, as Vox’s Ian Millhiser recently calculated. Gerrymandering by Republicans, as well as the weakness of Democrats in rural areas, makes it harder for Democrats to win and keep control of the House even when most voters back Democratic House candidates. That’s what happened in 2020.

Put all that together, and congressional Republicans are somewhat insulated from the public will. In turn, the advantage for Biden and congressional Democrats of being closer to the public’s opinions is blunted.

Second, electoral politics and policy are increasingly disconnected. More and more Americans vote along party lines and are unlikely to break from their side no matter what it does. Some scholars argue that voters’ attachments to the parties are not that closely linked to the parties’ policy platforms but rather more akin to loyalty to a team or brand. And partisanship and voting are increasingly linked to racial attitudes, as opposed to policy. So GOP-leaning voters may support some Democratic policies but still vote for Republican politicians who oppose those policies.

Third, the last several midterm elections have all been defined by backlashes against the incumbent president. You could argue that there’s nothing inevitable about this, and that former President George W. Bush (Social Security reform, Iraq War), Obama (Obamacare in 2010 and its flawed rollout in 2014) and Trump (Obamacare repeal) all did or proposed controversial things that irritated voters. Maybe if Biden sticks to popular stuff he’ll buck the trend. But it could instead be the case that voters from the president’s party tend to be kind of fat and happy in midterms, while the opposition is inspired to turn out. So even if Biden does popular things, GOP voters could be more motivated to vote in November 2022.

Fourth, voters may like a president’s policies in the abstract but still think he isn’t doing a good job or that his policies aren’t that effective if those policies aren’t bipartisan. Think of this as the Mitch McConnell theory.

Early in Obama’s first term, the last time Democrats had control of the House, Senate and the presidency, the Kentucky senator and others in the GOP leadership came up with a strategy of trying to get as few congressional Republicans as possible to back then-President Obama’s ideas. As McConnell said publicly back then, he viewed voters as not especially attuned to the day-to-day happenings in Washington. Instead, he said, they evaluate a president in part based on whether his agenda seems divisive, particularly a president who campaigns on unifying the country (as both Obama and Biden did). That allows the opposition party to create the perception of division simply by voting against the president’s agenda.

Put another way: The opposition party can guarantee a lack of bipartisan support — and then criticize the president for lacking bipartisan support.

#### Biden can only lose

Courtney Subramanian 21 and Joey Garrison, citing William Howell, Political Scientist at the University of Chicago Harris School of Public Policy, USA Today Online, “'Dinner Table' Politics: Why Joe Biden Ditched Bipartisan Dealmaking to Pass His COVID-19 Relief Bill,” Factiva database, 3/17/2021, Document USATONL020210307eh370005l

The price of going it alone

Despite the relief plan's popularity outside the Beltway, it is unlikely that momentum from its passage will hurtle Biden into future legislative wins, Howell said.

“The idea that a legislative win begets a subsequent legislative win in this environment is probably asking for too much,” he said, noting the prospect of passing COVID-19 relief was higher than more hot-button issues like immigration or health care.

A legislative defeat would have raised questions about Biden’s ability to pass any meaningful legislation, but its passage won’t be a “springboard to the production of all kinds of landmark legislation---far from it," Howell said.

#### Partisan backlash wrecks the effectiveness of antitrust

William E. Kovacic 14, George Mason University Foundation Professor at the George Mason University School of Law, “Politics and Partisanship in U.S. Federal Antitrust Enforcement”, Antitrust Law Journal, Volume 79, Number 2, p. 688-690

What accounts for these and other notable variations in federal enforcement activity? One common explanation is “politics”9—a shorthand expression for the capacity of elections and elected officials to bend the antitrust enforcement system to serve a set of policy preferences or constituent desires. By this view, the political process affects enforcement through presidential elections, the selection of agency leadership, the intervention of executive branch and congressional officials in routine agency decision making, and the appointment of federal judges who hear antitrust cases.

It is unsurprising that a regulatory system rich in power and prosecutorial discretion would have some connection to the political process. The substantial economic significance of the statutes whose enforcement is entrusted to the DOJ and the FTC ensures that elected officials will study what these agencies do and sometimes seek to influence the exercise of their prosecutorial authority. It is also difficult to imagine that a nation would give significant responsibility to law enforcement bodies without some means for elected officials to hold agency officials to account for their policy choices. Expansive grants of authority tend to come with accountability strings attached.10

For academics, practitioners, and public officials, the question is not whether political forces surround the DOJ and the FTC, or whether decisions by elected officials sometimes influence agency behavior. They assuredly do.11 The relevant queries are how, and how much? This Article addresses these questions by examining one dimension of the relationship between the federal antitrust agencies and the political process. It discusses how electoral politics can increase the influence of partisanship in the operation of the DOJ and the FTC. As used in this Article, partisanship is a determined commitment to party goals and causes. It manifests itself in a tendency to exaggerate the virtues of the party and to disregard or devalue the accomplishments of political rivals. Through the political appointment of the DOJ and FTC leadership, partisanship can spill over into the formulation and presentation of agency policy.

As will be shown, partisanship can have destructive effects. Among other consequences, partisan attitudes can lead officials to act in ways that serve party goals at the expense of the agency’s programs and reputation. The partisan tends to overlook how continuity of policy and incremental improvements have strengthened the DOJ and FTC antitrust programs regardless of which party controls the White House.12 Partisanship impedes the development of a norm that recognizes the importance of cumulative improvements, respects past contributions to agency effectiveness regardless of party origin, and encourages long-term investments that enhance the agency’s capability and reputation. 13 The striving for electoral success can beget partisanship, and, by eroding support for a norm that encourages cumulative investments for improvement over the long term, partisan attitudes can diminish agency effectiveness. In this sense, politics can influence federal antitrust enforcement, and influence it negatively.

#### It causes the plan to be ignored AND external war

Jennifer Sensiba 20, Author at Clean Technica, Long Time Efficient Vehicle Enthusiast, Writer, and Photographer, “It’s All About Political Capital”, Clean Technica, 11/6/2020, https://cleantechnica.com/2020/11/06/dont-encourage-biden-to-waste-political-capital/

In short, political capital is a way to think about political power in democratic countries. Yes, winning elections does give some political power, but you can’t effectively use it unless you have coalitions, alliances, trust, goodwill, and influence. Your earned trust and connections are like money (capital). You can work hard to earn it and build it up, but it’s easy to spend it and even waste it, just like money.

If you get power from an election and then quickly spend all of the political capital impressing loyalists, you’ll get to the point where you can’t win future elections (Trump is a great example of this), can’t get votes together for legislation, and can’t get people to help you in a variety of other ways. At worst, a political leader who has run completely out of political capital might not even be able to get normal citizens to follow laws. As the consent of the governed is withdrawn, you see protests, riots, violence, terrorism, and even war.