# 1NC---Round 5---NU

### 1NC

#### ‘Prohibition’ must ban all instances of anticompetitive behavior

James Lane Buckley 91, Judge on the United States Court of Appeals for the District of Columbia Court, BA and JD from Yale University, Former Undersecretary for Security Assistance at the State Department, Former United States Senator from New York, “Hazardous Waste Treatment Council v. Reilly”, United States Court of Appeals for the District of Columbia Circuit, 938 F.2d 1390, 1395-1396, 1991 U.S. App. LEXIS 16095, 7/26/1991, Lexis

Petitioners claim that the EPA considers a state law to "act as a prohibition" under the regulation only when it bans all treatment, storage, and disposal within a State, and they point to the ALJ's statement, based on his reading of the preamble to the regulations, 45 Fed. Reg. at 33,395, that the EPA "appears to have construed the phrase 'act as a prohibition' in [paragraph (b)] as equivalent to an outright ban or refusal to accept hazardous waste for treatment, storage, or disposal." ALJ Decision at 112. Petitioners contend that the regulation must embrace any law that would even indirectly, as in the instant case, prohibit any treatment facility; otherwise, a State could accomplish a total ban one facility at a time. Senate Bill 114, they charge, epitomizes the "NIMBY" syndrome: In response to the needs of the nation for treatment of hazardous waste, North Carolina has simply said, "Not in my backyard." By refusing to respond, petitioners urge, the EPA ignores its duty to monitor state programs.

Although, at oral argument, government counsel [\*\*13] attempted to defend the "ban on all treatment" position that petitioners ascribe to the EPA, that is not the basis on which the agency concluded that Senate Bill 114 did not act as a prohibition within the meaning of section 271.4(b). In explaining why the second condition of paragraph (b) had not been met, the Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act, and noted that a smaller plant could be built at the Laurinburg site. Final Decision at 2. We therefore construe the EPA's decision to mean that a state law "acts as a prohibition" on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more.

[\*1396] Such a construction is reasonable and merits deference. The language of paragraph (b), which uses the word "prohibit[]" rather than "impede[]" or "restrict[]" as in the case of paragraph (a), suggests that the former allows States greater latitude in regulating particular treatment facilities before a prohibition is found to exist. This is consistent with the preamble's expression of [\*\*14] a desire to encourage the development of state programs by avoiding the establishment of "very tight standards." See 45 Fed. Reg. at 33,385. Second, defining prohibition in terms of the ban of a particular technology falls well within the language of paragraph (b). Finally, we see nothing inconsistent between this construction and the language of the underlying statute, 42 U.S.C. § 6926(b), which merely asserts that a state program may not be authorized if "such program is not consistent with the Federal and State programs applicable in other States." This language allows the agency enormous latitude in structuring its own implementing regulations and in interpreting them.

#### That means the only topical mechanism is to apply per se illegality

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Vote:

#### 1) GROUND---key to link uniqueness and a unidirectional topic. Fringe standards dodge topic links, AND they can pick a broader but more permissive standard, making the topic bidirectional.

#### 2) LIMITS---too many possible standards, each requiring distinct answers, makes the topic unmanagbly large.

### 1NC

#### The United States federal government should issue a policy memorandum that a wholly owned or controlled subsidiary of a US parent would be considered part of the parent rather than an independent entity when applying prohibitions on anticompetitive conduct under the Foreign Trade Antitrust Improvements Act.

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

Theodore Voorhees 17, Senior Litigator and Member of the Antitrust and Competition Law Practice Group at Covington & Burling LLP, JD from the Catholic University of America, Columbus School of Law, AB from Harvard University, and Leah Brannon, Partner at Cleary Gottlieb Steen & Hamilton LLP, JD from Harvard Law School, BA with Highest Distinction from the University of Virginia, ABA 2016 Presidential Transition Task Force, “Presidential Transition Report: The State of Antitrust Enforcement”, American Bar Association Section of Antitrust Law, January 2017, http://cartelcapers.com/wp-content/uploads/2017/01/ABA-SAL-Presidential-Transition-Report-1-18-17-FINAL-2.pdf

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 AND the DOJ da

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.

### 1NC

#### The 50 state governments and relevant sub-federal territories should:

#### ---mend the Foreign Trade Antitrust Improvements Act to include a provision that in applying the statute a wholly owned or controlled subsidiary of a US parent would be considered part of the parent rather than an independent entity

#### ---increase funding and resources for antitrust enforcement

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

Juan A. Arteaga 21, Partner at Crowell & Moring LLP, Former Senior Official in the Antitrust Division of the US Department of Justice, JD from Columbia Law School, and Jordan Ludwig, Counsel in the Antitrust Group at Crowell & Moring LLP, JD from Loyola Law School, “The Role of US State Antitrust Enforcement”, Private Litigation Guide – Second Edition, Global Competition Review, 1/28/2021, https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement

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]

### 1NC

#### 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.

#### Big infrastructure’s key to climate mitigation and adaptation---extinction

Reynard Loki 9-8, Senior Writing Fellow and Chief Correspondent for Earth | Food | Life, a Project of the Independent Media Institute, Former Environment, Food and Animal Rights Editor at AlterNet and Reporter for Justmeans/3BL Media, “Extreme Weather Devastating US Raises Calls to Pass Biden’s Infrastructure Bill”, Nation of Change, 9/8/2021, https://www.nationofchange.org/2021/09/08/extreme-weather-devastating-us-raises-calls-to-pass-bidens-infrastructure-bill/

In their latest climate report published in August, the United Nations’ Intergovernmental Panel on Climate Change (IPCC) found that human activity, particularly the combustion of fossil fuels, is the likely driver behind the increase in both the frequency and intensity of hurricanes over the past four decades. “The alarm bells are deafening, and the evidence is irrefutable: greenhouse gas emissions from fossil fuel burning and deforestation are choking our planet and putting billions of people at immediate risk,” UN Secretary-General António Guterres said in a statement on the report. “Global heating is affecting every region on Earth, with many of the changes becoming irreversible.” Linda Mearns, a senior climate scientist at the U.S. National Center for Atmospheric Research and one of the report’s co-authors, meanwhile, offered a stern warning: “It’s just guaranteed that it’s going to get worse,” she said, adding that there is “[n]owhere to run, nowhere to hide.”

Adding to the concern is the fact that the end of hurricane season is still far from over, as meteorologists at the U.S. National Oceanic and Atmospheric Administration (NOAA) monitor Hurricane Larry’s path across the Atlantic Ocean. Moreover, Hurricane Ida is just one of the several extreme weather events that have caused death and destruction across the nation. Massive wildfires, fueled by extreme heat and dry conditions, are ripping through California, where more than 1 million acres have been burned in 2021. These are unprecedented times: Only twice in the history of California have wildfires raged from one side of the Sierra Nevada mountain range to the other, and both of those wildfires took place in August.

The National Interagency Fire Center has reported that more than 5 million acres have been charred this year nationwide as of September 7. Nearly half of the land area of the lower 48 states is currently experiencing drought, with the NOAA warning in August that these extremely dry conditions—with precipitation at below-average levels and temperatures at above-average levels—are likely to “continue at least into late fall,” according to the New York Times. As a whole, the United States experienced its hottest June in the 127 years since temperature records have been maintained, while July was Earth’s hottest month on record.

“Climate scientists were predicting exactly these kinds of things, that there would be an enhanced threat of these types of extreme events brought on by increased warming,” said Jonathan Martin, an atmospheric scientist at the University of Wisconsin-Madison. “It’s very distressing. These are not encouraging signs for our immediate future.”

The increase in both the frequency and intensity of extreme weather events like hurricanes, wildfires, droughts and heat waves is providing a fitting backdrop for amplified calls to pass Biden’s infrastructure bill, which would help mitigate the impacts of the climate crisis by repairing 20,000 miles of aging roads and 10 of the country’s most economically crucial bridges to make them more resilient to extreme weather. The bill also seeks to accelerate the nation’s shift toward clean energy to achieve the Paris climate agreement’s goal of reducing global greenhouse gas emissions in order to limit the planet’s surface temperature increase in this century to 2 degrees Celsius above preindustrial levels. (The agreement’s hope to limit the increase to 1.5 degrees Celsius now seems unlikely, given the findings of the new IPCC climate report.) The bill seeks to utilize a combination of federal spending and tax credits to improve transportation, broadband internet, housing and the electric grid, as well as financial support to advance the nation’s manufacturing capabilities, specifically those industries that the administration believes will help the United States compete economically with China.

The White House issued a fact sheet describing the president’s infrastructure plan, saying that it would “create a generation of good-paying union jobs and economic growth, and position the United States to win the 21st century, including on many of the key technologies needed to combat the climate crisis.” The bill would be the first to earmark spending specifically for climate resilience, including $6.8 billion for the Army Corps of Engineers to address federal flood control and ecosystem restoration projects, with an eye toward environmental justice, and calling for 40 percent of all climate-related investments to happen in disadvantaged communities.

“Mr. Biden’s pledge to tackle climate change is embedded throughout the plan,” reports Jim Tankersley for the New York Times. “Roads, bridges and airports would be made more resilient to the effects of more extreme storms, floods and fires wrought by a warming planet. Spending on research and development could help spur breakthroughs in cutting-edge clean technology, while plans to retrofit and weatherize millions of buildings would make them more energy efficient.”

In August, Schumer said that the bipartisan infrastructure bill and Democrats’ reconciliation spending package would cut the United States’ carbon dioxide emission levels by 45 percent by 2030 compared to 2005 levels. He added, “When you add administrative actions being planned by the Biden administrative and many states—like New York, California, and Hawaii—we will hit our 50 percent target by 2030.” That is the goal that Biden set for the nation after he rejoined the Paris climate accord.

“In order to avoid the worst long-term consequences of the climate crisis, we need to put the U.S. on the path to 100 percent clean energy—otherwise, this summer may just be a preview of the disasters to come,” Brooke Still, senior director of digital strategy at the nonprofit League of Conservation Voters (LCV), told Earth | Food | Life recently in an email. “We know what a transition to clean energy will take: We need to stop using oil and coal and go big on clean energy. It’s clear the public agrees—71 percent of the public supports making the investments in climate, justice, and jobs that President Biden proposed. But climate deniers, fossil fuel interests, and obstructionist members of Congress are slowing things to a crawl.” LCV has launched a public petition urging Congress to “invest in clean energy and… in people and communities who too often have been left behind.”

### 1NC

#### The DOJ has prioritized combatting COVID related fraud—key to healthcare cybersecurity

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

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

#### But resource constraints limit cases--the plan trades-off

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

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

#### Cyberattacks collapse the healthcare sector

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

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

#### Extinction

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

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

### 1NC

#### ‘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.

#### Vote neg:

#### Limits---they devolve into hundreds of specific subsets like aviation, ag, defense or rail AND allow thousands of cases that deny single mergers OR regulate individual companies like Facebook or Amazon

#### Ground---economy-wide change ensures links to core generics like biz con and politics by forcing the aff to structurally change antitrust AND be big enough to deviate from the background noise of daily enforcement actions

### 1NC

#### The United States federal government should convene binding negotiated rulemaking over whether to mend the Foreign Trade Antitrust Improvements Act to include a provision that in applying the statute a wholly owned or controlled subsidiary of a US parent would be considered part of the parent rather than an independent entity and implement the outcome.

#### The CP competes and solves by giving industry genuine input AND avoids reflexive opposition and a wave of litigation in response to mandatory prohibitions

Ira S. Rubinstein 11, Adjunct Professor of Law and Senior Fellow at the Information Law Institute at the New York University School of Law, JD from Yale Law School, BA in Philosophy from Clark University, “Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes”, I/S: A Journal of Law and Policy for the Information Society, 6 ISJLP 355, Summer 2011, Lexis

2. Negotiated Rulemaking

Negotiated rulemaking (also referred to as regulatory negotiation or "reg. neg.") is a statutorily-defined process by which agencies formally negotiate rules with regulated industry and other stakeholders as an alternative to conventional notice-and-comment rulemaking. The core insight underlying negotiated rulemaking is that conventional rulemaking discourages direct communication among the parties, often leading to misunderstanding and costly litigation over final rules. In contrast, negotiated rulemaking brings together agency personnel and representatives of the affected interested groups to negotiate the text of a proposed rule based on (more honestly presented) shared information and willingness to compromise. If the negotiations succeed by achieving a consensus on a proposed rule, the resulting final rule should be of better quality, easier to implement, enjoy greater legitimacy, and lead to fewer legal challenges.

The Negotiated Rulemaking Act of 1990 (NRA) establishes a statutory framework for negotiated rulemaking under which agencies have the discretion to bring together representatives of the affected parties in a negotiating committee (for example, industry, environmental and consumer groups, and state and local governments) for face-to-face discussions. If the committee reaches a consensus, the agency can then issue the agreement as a proposed rule subject to normal administrative review processes. Proposed rules emerging from a negotiated rulemaking process are also subject to judicial review. While the NRA augments Administrative [\*378] Procedure Act (APA) rulemaking, it does not replace it. Indeed, most of the language of the Act is permissive. If negotiations fail to reach a consensus, the agency may proceed with its own rule.

The promise of negotiated rulemaking is that by enlisting diverse stakeholders in the rulemaking process, responding to their concerns, and reaching informed compromises, better quality rules will emerge at a lower cost and with greater legitimacy. Critics counter that the process not only fails to deliver its purported benefits (and then only rarely) but that its very use undermines the foundations of administrative law by shifting the decision-making function from agencies tasked with protecting the public interest to a collection of interest groups with their own private agendas. In 2000, Jody Freeman and Laura Langbein published a comprehensive analysis and summary of an empirical study of negotiated rulemaking. The study compared participant attitudes toward negotiated versus conventional rulemaking. Based on their analysis, they concluded that "reg. neg. generates more learning, better quality rules, and higher satisfaction than conventional rulemaking" as well as increasing legitimacy, which they defined as "the acceptability of the regulation to those involved in its development." But even if this very positive analysis is taken at face value, Lubbers shows that the EPA use of negotiated rulemaking is in fact quite limited, having fallen off in recent years by almost two-thirds. Despite this decline, which Lubbers attributes to budgetary issues and the burdens of complying with federal advisory committee [\*379] requirements, Lubbers insists upon the proven value of reg. neg. in providing creative solutions to regulatory problems.

Other environmental law scholars have identified a few situations where negotiated rulemaking should provide the EPA with significant advantages. For example, Andrew Morriss and his colleagues point to situations "where the substance of the regulation requires the credible transmission of information between the regulated entities and other interest groups, and where the agency's preference for a particular substantive outcome is weak." Reg. neg. also requires "a relatively high degree of shared interest among the groups participating, the existence of gains from trade to allow parties to compromise, and a willingness by interest groups to reject the role of spoiler." These views are largely consistent with the findings of Daniel Selmi, who conducted a detailed study of the negotiation of a regional air quality rule. Selmi explained that the parties were willing to compromise for several reasons: (1) the industry believed that regulation was inevitable; (2) the environmental groups recognized that even though they preferred an outcome based on new and expensive technology, they lacked the political capital to achieve this result; and (3) the agency was not locked into a rigid, initial position, but remained open towards finding a solution that responded to information acquired during the negotiations. But the key factor in reaching a compromise was a very practical one-namely, that the facilitator had the necessary skills to assist the parties in identifying their priorities and to help them make tradeoffs in which they each achieved some of their goals.

In sum, both Project XL and negotiated rulemaking have strengths and weaknesses. Key strengths of a well-designed covenanting approach include innovation (because covenants invite firms to tap [\*380] into their own ingenuity); flexibility (in the form of tailored rules that either match the circumstances of an individual firm, as in Project XL, or the underlying conditions faced by a regulated industry based on superior expertise, as in negotiated rulemaking); greater commitment (because companies write or at least negotiate their own rules rather than having them imposed externally); more effective compliance (because internal discipline as practiced by firms that agree to rules of their own devising is likely to be more extensive and cheaper for everyone than government investigations and prosecutions); and, as a result of these benefits, lower-cost solutions. On the other hand, covenants have a number of obvious weaknesses, including higher administrative burdens associated with negotiating the rules (although this might be mitigated by lower overall costs for compliance and litigation); legal uncertainty in the case of Project XL; and a bias against small firms, which typically lack the resources necessary to negotiate facility-based standards or to participate in a negotiating committee.

C. Normative Framework for Assessing Self-Regulatory Initiatives

Having identified different types of self-regulation and their co-regulatory characteristics, and having investigated environmental covenants such as Project XL and regulatory negotiations (in keeping with Hirsch's suggestion that such covenants may provide the basis for innovative approaches to privacy regulation), this Article now presents a normative framework for evaluating the effectiveness of co-regulatory programs. Part III will apply this normative framework to four instances in which regulators have used co-regulation in the field of information privacy and assess their relative merits. The normative framework developed here melds the discussion of standard public policy criteria in Part II.A with the central features of second- generation strategies as reflected in the analysis of covenants in Part II.B. The resulting framework consists of six elements that are critical to the success of co- regulatory initiatives: efficiency, openness and transparency, completeness, strategies to address free rider problems, oversight and enforcement, and use of second-generation design features.

[\*381]

1. Efficiency

Efficiency may be defined as "achieving regulatory objectives at the lowest attainable cost." For all forms of self-regulation, efficiencies arise from harnessing industry expertise in the development of industry codes, which are inherently more flexible than legislation and may be tailored to the circumstances of individual firms, or adjusted to changes in market conditions or new technologies. In general, self-regulation costs less for government than regulatory rulemaking and enforcement because it shifts costs to industry. Whether it costs less for industry depends on the form of self-regulation and whether industry passes on its costs to consumers.

2. Openness and Transparency

Openness refers to whether the self-regulatory system allows the public to play any role in developing the underlying rules and enforcement mechanisms. Transparency, on the other hand, is a function of a system's ability "to produce and promulgate two kinds of information: (1) information about the normative standards the industry has set for itself; and (2) information about the performance of member companies in terms of those standards." In general, self-regulatory schemes publicize the existence and content of their principles (especially if their rules are determined by statute and hence publicly available). Purely voluntary codes may involve public interest groups at the discretion of member firms. When firms decide to develop codes using a consensus-based process, however, a wider range of interests is likely to be represented. Finally, performance data is not usually shared with the public and most self-regulatory organizations treat enforcement proceedings as private, but may publicly announce the outcome of any enforcement actions involving member firms.

[\*382]

3. Completeness

Completeness is the straightforward matter of whether a self-regulatory code of conduct addresses all relevant aspects of the standards governing industry practices. In privacy terms, these standards are embodied in the FIPPs, which are the benchmark against which the FTC and privacy advocates evaluate any self-regulatory privacy scheme. Unless they adhere to a pre-existing industry standard, voluntary codes often omit principles or practices that their members find too burdensome. In contrast, where government establishes default requirements on a statutory basis, incompleteness is rarely an issue.

4. Strategies to Address Free Rider Problems

Free riding occurs in voluntary programs when members enjoy the benefits of a program without having to meet its obligations. As Fiorino notes, "It reduces confidence in the reliability and quality of participants and thus affects the program's credibility." There are two main versions of the free rider problem. First, some firms may agree to join a program but merely feign compliance. And second, certain firms in the relevant sector may simply refuse to join at all. Both versions are potentially fatal to self-regulatory programs because they create a competitive disadvantage for honest participants. The first version may be counteracted by "peer group pressure, shaming, or more formal sanctions" while the second may require that "government intervenes directly to curb the activities of non-participants." Obviously, free rider problems dissipate when regulated entities are required to participate in a self-regulatory program or when codes of conduct are subject to government review and approval. Self-regulatory initiatives need to incorporate such strategies in order to prove effective.

5. Oversight and Enforcement

At an early stage of the U.S. government's support for self-regulatory privacy guidelines, the DOC commissioned a study of the [\*383] criteria for effective self-regulation. In addition to substantive criteria based on FIPPs, the DOC study identified three oversight and enforcement criteria: (1) consumer recourse, or the availability of affordable mechanisms for resolving complaints and perhaps awarding some compensation to an injured party; (2) verification, or the nature and extent of audits or more cost-effective ways to verify that a companies' assertions about its privacy practices are true and to monitor compliance with a program's requirements; and (3) consequences for failure to comply with program requirements, such as cancellation of the right to use a seal, public notice of a company's non-compliance, or suspension or expulsion from the program. Voluntary codes are often deficient in all three components. Once again, required government approval of these oversight and enforcement mechanisms ensures that baseline regulatory objectives are met.

6. Use of Second-Generation Design Features

The central features of second-generation environmental strategies are discussed at considerable length by Stewart and Fiorino. For present purposes, their insights may be boiled down (however inadequately) to the following catch phrase: self-interested mutual promises that reward good actors for superior performance. These strategies presuppose direct bargaining, information sharing, and the affected parties buying-in to cost-effective and innovative regulatory solutions. In view of these characteristics, second-generation strategies such as environmental (or privacy) covenants should achieve better outcomes than either conventional rulemaking or voluntary self-regulation.

III. Four Case Studies

This Article now presents four case studies of self-regulatory privacy schemes. The first case study focuses on the Network Advertising Initiative (NAI) Principles, a voluntary code established by an ad hoc industry advertising group that also oversees members' compliance. The second case study looks at a safe harbor solution for [\*384] U.S. firms needing to transfer data from the E.U. to the U.S. without running afoul of E.U. data protection requirements. To benefit from the safe harbor, firms have to certify that they will comply with privacy principles negotiated between the U.S. and E.U. but administered by industry seal programs. The third case study deals with FTC- approved safe harbor programs under COPPA, focusing, in particular, on that of the Children's Advertising Review Unit (CARU). Each of these three self-regulatory schemes will be classified using Priest's typology and evaluated in terms of the six factors identified above in Part II.C. The fourth and final case study begins with a brief overview of privacy covenants, both in the U.S. and abroad, and then turns to a very recent example of a voluntary covenanting approach to privacy. This last case study is less a detailed description and analysis of a specific program, and more a transitional step towards second-generation strategies.

A. The Network Advertising Initiative

On November 8, 1999, the DOC and the FTC held a public workshop on online profiling, which the FTC defined as the collection of data about consumers using cookies and web bugs to track their activities across the web. Although much of this information is anonymous in the narrow sense of not including a user's name, profiling data may include both personally identifiable information (PII) and non-personally identifiable information (non-PII). This data may also be "combined with 'demographic' and 'psychographic' data from third- party sources, data on the consumer's offline purchases, or information collected directly from consumers through surveys and registration forms." The resulting profiles often are [\*385] highly detailed and revealing yet remain largely invisible to consumers, many of whom react negatively when informed that their online activities are monitored.

The FTC recognized several benefits in the use of cookies and other technologies to create targeted ads, such as providing information about products and services in which consumers are interested and reducing the number of unwanted ads. More importantly, targeted ads increase advertising revenues, which subsidize free online content and services. On the other hand, the FTC acknowledged several major privacy concerns raised by online profiling such as the lack of consumer awareness; the scope of the monitoring activities, which occurs across multiple websites for an indefinite period of time; the potential for associating anonymous profiles with particular individuals; and the risk of companies using profiles to engage in price discrimination. Despite these concerns, the Commission, in June 2000, encouraged the network advertising industry to craft an industry-wide self-regulatory program.

Eight firms responded by announcing the formation of the NAI. Their key tenets included notice to consumers of what information network advertising firms collect and how that information is used, the ability to opt out of receiving tailored ads, and consumer outreach and education. Less than a year later, the NAI completed a [\*386] voluntary code of conduct that won the FTC's praise and informal endorsement. Under the original NAI Principles, network advertisers engaging in online preference marketing (OPM) are required to offer consumers notice and choice, both of which vary depending on whether the data collected is non-PII or a combination of PII and non-PII. The use of non-PII requires member firms to post on their websites "clear and conspicuous" notice of profiling activities, including what type of data is collected and how it is used; procedures for opting out of such uses; and the retention period for such data. The opportunity to opt-out must be accessible on the firm's or the NAI's website. Moreover, NAI firms that enter into a contract with a publisher for OPM services must require that they offer similar privacy protections to consumers. The merger of PII and non-PII for OPM purposes are subject to substantially similar notice requirements, but the choice options are more complex. Network advertisers merging PII with previously collected non-PII must first obtain a consumer's affirmative (opt-in) consent, whereas mergers of PII and non-PII collected on a going forward basis must afford consumers "robust notice" and an opt-out choice; the latter rule also applies to using PII collected offline when merged with PII collected online. Enforcement is another requirement that applies to [\*387] all NAI members, and the NAI offers several additional consumer protections as well.

For the next seven years, the NAI principles remained unchanged until two highly publicized incidents sparked renewed concerns over online profiling practices. The first incident involved a civil subpoena to Google seeking search query records. The second involved disclosure of millions of search queries by AOL. Both incidents involved leading search firms, whose business models are premised on providing free searches and a host of related services in exchange for serving targeted ads to customers based on their search queries and other data collected from users of these services. Over the next two years, consumer privacy organizations began filing complaints regarding online advertising practices and the proposed mergers between industry giants such as Google and DoubleClick. Both E.U. data protection agencies and the FTC started reviewing these activities, while the industry responded to the regulatory pressure by proposing new practices and technologies for improving search [\*388] privacy and addressing online profiling practices. Then, in 2007, the FTC held a two-day workshop focused on behavioral targeting. In connection with this workshop, the World Privacy Forum (WPF) prepared a highly critical report attacking the effectiveness of the NAI's self-regulatory scheme during the previous seven years. NAI responded to these and other criticisms by releasing a draft update to its original NAI Principles (this time soliciting public comments on the proposed changes). The newly expanded organization then published its revised code of conduct to mixed reviews.

Clearly, the NAI Principles constitute a voluntary code of conduct, exhibiting virtually all of the relevant characteristics as described in Part II.A. As such, do the original (or revised) NAI principles suffer from the shortcomings associated with voluntary codes, or do they live up to their promise of protecting consumer privacy? In other words, how do the principles fare when assessed against the six elements of the normative framework described in Part II.C?

To begin with, the principles are efficient for member firms, but less so for government (given the ongoing costs of FTC oversight) and for the public (given the negative externalities associated with behavioral profiling). Second, when the original principles were [\*389] issued in 2000, privacy advocates complained about the NAI's lack of transparency. Although the principles were posted online, the preliminary discussions between the NAI firms and the FTC were far less transparent-they took place largely behind closed doors. Third, the original principles were considered weak on notice, choice, and access; and critics were not much happier with the retrograde forms of notice, choice, and access permitted under the 2009 revised Principles. Fourth, at least in the early years, network advertising firms suffered from both versions of the free rider problem (feigned compliance and non-participation) and the NAI program did not include any mechanisms that capably addressed them. It remains to [\*390] be seen whether these issues will persist now that the FTC is again encouraging self- regulation, although current policy may change depending on whether or not Congress enacts new privacy legislation. Fifth, the NAI program is also deficient with respect to all three oversight and enforcement criteria identified in the DOC study referred to above. In terms of consumer recourse, the NAI Principles make formal provision for consumers to file complaints (which are now handled in-house) but are silent on remedies. As to verification and consequences for failure to comply, the NAI track record is extremely poor both on auditing compliance and invoking remedies (such as revocation, public suspension of membership, and referral to the FTC). Indeed, it is not clear whether such actions have occurred during its previous nine years of operation, although NAI's approach to audits seems to be changing for the better. Finally, although the more open process NAI used in revising its principles in 2009 is a good first step towards using second-generation strategies, it is still deficient in terms of direct negotiations, Coasian bargaining, and mutual buy-in.

B. The U.S.-E.U. Safe Harbor Agreement

Article 25 of the European Union Data Protection Directive (E.U. Directive) limits the transfer of personal data to a third country unless it provides an "adequate" level of privacy protection. Unlike the E.U. Directive, which is an omnibus statute protecting all personal information of European citizens, U.S. privacy protection relies on a combination of sectoral laws, FTC enforcement powers, and self-regulation. As a result of these differences, U.S. firms were uncertain about the legality of data flows from the E.U. to the U.S. under the [\*391] Article 25 adequacy standard. After several years of discussion, the European Commission (EC) and the DOC entered into a Safe Harbor Agreement (SHA) spelling out Privacy Principles that would apply to U.S. companies and other organizations receiving personal data from the E.U.

The SHA creates a voluntary mechanism enabling U.S. organizations to demonstrate their compliance with the E.U. Directive for purposes of data transfers from the E.U. They must self-certify to the DOC that they adhere to the Privacy Principles that mirror the core requirements of the E.U. Directive (i.e., notice, choice, onward transfer, security, data integrity, access, and enforcement), and repeat this assertion in their posted privacy policy. Although the FTC has agreed to treat any violation of the Privacy Principles as an unfair or deceptive practice, the SHA also defines the mechanism that firms should use to ensure compliance with these principles. These include: (1) readily available and affordable independent recourse mechanisms for investigating and resolving individual complaints and disputes; (2) verification procedures regarding the attestations and assertions businesses make about their privacy practices, which may include self- assessments (which must be signed by a corporate officer and made available upon request) or outside compliance reviews; and (3) remedies for failure to comply with the Privacy Principles, including not only correction of any problems, but also various sanctions such as publicizing violations, suspension, removal from a seal program, and compensation for any harm caused by the violation. Truste, [\*392] BBBOnline, and several other self-regulatory privacy programs already in operation when the SHA took effect then developed Safe Harbor programs specifically designed to satisfy (1) and (3). The verification requirement is satisfied by self-assessment or third-party compliance reviews.

The SHA has been described as an "uneasy compromise" between the comprehensive regulatory approach of the E.U. and the self-regulatory approach preferred by the U.S. This partly reflects the fact that in providing the Privacy Principles and related documents that form the SHA, the DOC lacked any direct statutory authority to regulate online privacy and therefore had to rely solely on its enabling statute, which only grants authority to foster, promote, and develop international commerce. Applying Priest's typology, it is clear that SHA seal programs more closely resemble regulatory self-management programs than voluntary codes of conduct. One might expect, therefore, that such programs would fare better than NAI in demonstrating greater transparency, fewer free rider issues, better coverage, and meaningful oversight and enforcement. Unfortunately, this is not borne out by the available evidence.

First, as a government initiative, the SHA Privacy Principles are highly transparent, at least in terms of DOC announcing the relevant standards that industry would need to follow. But second, as noted below, virtually no information is available regarding the performance of firms in terms of these standards. Third, SHA seal programs fare better than NAI in terms of formulating program guidelines that-at least in theory-adhere to all of the Privacy Principles. However, both the E.U. Study and the Galexia Study found that a high percentage of [\*393] participating firms did not incorporate all seven of the agreed upon Privacy Principles in their own posted privacy policies. Fourth, the SHA, like the NAI agreement, also suffers from both versions of the free rider problem- many firms self-certify their adherence to the Privacy Principles without even revising their posted privacy policies in accordance with SHA requirements and, even if one excludes firms that rely on alternative methods for demonstrating adequacy, the roughly 2,000 participants on the DOC's Safe Harbor List represent only a tiny fraction of firms that transfer data from the E.U. to the U.S. Fifth, as to oversight and enforcement, the E.C. Study noted that no complaints have been received and handled "despite frequent and even flagrant inconsistencies and violations in implementation," while according to the Galexia Study, fewer than one in four companies registered for safe harbor were in compliance with the Enforcement Principle and even fewer offered an affordable dispute resolution process. Indeed, it was not until the summer of 2009 that the FTC announced its first enforcement action against a U.S. company for violation of the SHA.

The SHA allows firms to meet the verification requirements of the Enforcement Principle either through self-assessment or outside [\*394] compliance reviews. Under the former, the firm must have in place "internal procedures for periodically conducting objective reviews" and must retain any relevant records. They must make the records available upon request in the context of an investigation or a complaint, but have no obligation to share this information with third parties. The same record-keeping requirement applies in the case of outside reviews subject to the same limitation. Thus, both internal and external compliance reviews remain opaque, making it difficult to draw any firm conclusions. Finally, while the SHA in theory fits neatly under Priest's regulatory self-management category, in practice it more closely resembles a voluntary code of conduct given the lack of accountability to government, the free rider problems, the lax monitoring of compliance by seal programs and government agencies, and until quite recently, the absence of enforcement actions or sanctions. In short, it displays none of the characteristics defining second-generation strategies.

C. The COPPA Safe Harbor

Congress enacted the Children's Online Privacy Protection Act of 1998 (COPPA) to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personal information from and about children on the Internet. The statute and Final Rule require operators of websites directed at children and of general audience websites with actual knowledge that a user is a child to meet five requirements: (1) notice; (2) parental consent prior to the collection, use, and/or disclosure of personal information from a child; (3) a right of parental review of such information; (4) proportionality; and (5) reasonable security policies.

[\*395]

COPPA provides both federal and state enforcement mechanisms and penalties against operators who violate the provisions of the implementing regulations. The statute by its terms also establishes an optional safe harbor program as an alternative means of compliance for operators that follow self-regulatory guidelines, which must be approved by the FTC under a notice and comment procedure. There are three key criteria for safe harbor approval. Self-regulatory guidelines must (1) meet or exceed the five statutory requirements identified above; (2) include an "effective, mandatory mechanism for the independent assessment of . . . compliance with the guidelines" such as random or periodic review of privacy practices conducted by a seal program or third-party; and (3) contain "effective incentives" to ensure compliance with the guidelines such as mandatory public reporting of disciplinary actions, consumer redress, voluntary payments to the government, or referral of violators to the FTC.

The avowed purpose of the COPPA safe harbor is to facilitate industry self- regulation, and it does so in two ways. First, operators that comply with approved self-regulatory guidelines are "deemed to be in compliance" with all regulatory requirements. To benefit from safe harbor treatment, operators need not individually apply for approval as long as they fully comply with approved guidelines that are applicable to their business. According to the COPPA Final Rule, such compliance serves "as a safe harbor in any enforcement action" under COPPA unless the guidelines were approved based on false or incomplete information. Second, the safe harbor allows "flexibility [\*396] in the development of self-regulatory guidelines" in a manner that "takes into account industry-specific concerns and technological developments." Industry groups interested in providing safe harbors must submit their self- regulatory guidelines to the FTC for approval. To date, the FTC has reviewed six safe harbor programs and approved four of them. With all of the approved safe harbor programs satisfying the three criteria set out in the preceding paragraph, the COPPA safe harbor exemplifies Priest's regulatory self-management category insofar as the statue sets regulatory policy and rules but assigns program sponsors the responsibility for drafting self-regulatory guidelines, implementing and operating the program, and enforcement. A brief assessment of CARU's monitoring and complaint-handling system shows the success of the safe harbor program from an enforcement standpoint.

Between 2000 and 2008, CARU reported on almost 200 cases; a few originated in consumer complaints and the rest resulted from CARU's routine monitoring of any website that may be reasonably expected to attract children or teen users. Issues ranged from inadequate privacy policies to the lack of a neutral age-screening process to collection or disclosure of PII from children without parental consent. The companies resolved all of the cases in question by agreeing to change their practices as directed by CARU. In [\*397] addition, CARU referred one case to the FTC that resulted in a $ 400,000 settlement. In a second case, the respondent entered into a consent decree with the FTC that included signing up for the CARU safe harbor. And in a third case, the FTC initiated a COPPA lawsuit based in part on CARU's determination of compliance shortcomings. This is an impressive record considering that since 2000, the FTC has brought a total of only fifteen COPPA enforcement cases. In short, CARU's compliance review and disciplinary procedures clearly have been successful in complementing the FTC's enforcement of COPPA, due in no small measure to its policy of engaging in widespread monitoring of child-oriented websites as opposed to members' sites only. This, in turn, allows the Commission to focus its resources on higher profile matters.

How well do COPPA safe harbor programs (and CARU, in particular) fare when evaluated against the now familiar normative criteria? Clearly, CARU harnesses industry expertise, but probably costs more to operate than the NAI or SHA seal programs given its extensive enforcement activities. Second, like the SHA, COPPA is very strong on producing and reporting information regarding relevant legal standards but weak on performance data. Third, as compared to both the NAI and SHA, only the COPPA safe harbor programs achieve full coverage of substantive privacy requirements as might be expected given the FTC's mandatory review of program guidelines, all of which must offer principles that "meet or exceed" statutory [\*398] requirements. Fourth, free rider problems are minimal in the COPPA safe harbor program because firms that resist joining an approved program remain subject to the statutory requirements, thereby deriving little competitive advantage from free riding. Additionally, the number of CARU investigations seems high enough to discourage feigned compliance by participating firms, especially given CARU's willingness to refer cases to the Commission, and the FTC's aggressive enforcement stance with respect to children's privacy issues. Fifth, as to oversight and enforcement, COPPA requires that approved safe harbor programs engage in ongoing monitoring of their members' practices to ensure compliance with program guidelines and the participant's own privacy notices. CARU's strong record of investigating compliance issues identified in complaints or as a result of routine monitoring (coupled with FTC's higher profile enforcement actions) rebuts the usual charge that self-regulatory programs are weak on enforcement. To the contrary, the COPPA safe harbor programs, like other well-organized and committed industry groups, "help free up scarce government regulatory resources to address the recalcitrant few rather than the compliant majority." The CARU program stands out both for publishing case reports on non-member compliance issues and for having, in fact, referred several cases to the FTC.

Finally, while the CARU program is far superior to either the NAI or SHA in terms of the preceding five criteria, it lacks many of the attributes of second- generation regulatory strategies. There is no [\*399] Coasian bargaining and too little industry buy-in. Moreover, the COPPA regulations are neither very flexible nor do they take into account "industry- specific concerns and technological developments." Although the Commission expressly characterized the assessment mechanisms and compliance incentives described in the Final Rule as "performance standards" that may be satisfied by equally effective alternatives, a review of the self-regulatory guidelines of CARU, Truste, ESRB and Privo shows relatively little differentiation by sector, technology, or innovative methods of assessment or compliance. This is at least partly the result of the safe harbor approval process, which requires a side-by-side comparison of the substantive provisions of the COPPA rule with the corresponding provisions of the guidelines. The reason firms participate in safe harbor programs is probably due less to regulatory flexibility, and more to a desire to share in the brand recognition of the program seal, to develop a closer working relationship with FTC staff, and to draw on the additional expertise of program staff.

\*\*\*\*\* [\*400]

The three preceding case studies all describe well-established self-regulatory programs and evaluates them against five public policy criteria and a sixth criteria focusing on second-generation regulatory strategies. This next section is different. It explores a few overseas cases of privacy covenants under law and then hones in on a very recent case in which U.S. firms, when threatened with prescriptive regulation, chose to engage in a multi-stakeholder process (known as the Global Network Initiative or GNI) to define privacy and free speech principles for the Internet. While it is too soon to assess the GNI against the public policy criteria, and while the GNI might fare poorly in operational terms when compared to a statutory safe harbor such as CARU, the GNI nevertheless points the way to the use of mutually self- interested bargaining to achieve superior performance by good actors.

D. Privacy Covenants

In his article discussing innovative environmental privacy tools, Hirsch's primary examples of a privacy covenant are the Dutch codes of conduct. Dutch data protection law (which is a comprehensive statute implementing the E.U. Data Directive) allows industry sectors to draw up codes for processing of personal data, which are then submitted to the Dutch Data Protection Authority (DPA) for review and approval. Specifically, organizations considered "sufficiently representative" of a sector and that are planning to draw up a code of conduct may ask the DPA for a declaration that "given the particular features of the sector or sectors of society in which these organizations are operating, the rules contained in the said code properly implement" Dutch law. Article 25(4) of the PDPA further provides that such declarations shall be "deemed to be the equivalent to" a binding administrative decision, making it similar in effect to FTC approval of COPPA safe harbor guidelines. According to Hirsch, the DPA has approved at least twelve such codes covering various industry sectors, each with its own tailored compliance plan that is nevertheless consistent with the broader requirements of the Dutch data protection law. Outside of Europe, other countries have [\*401] adopted a similar approach to privacy covenants. For example, Australian privacy law also permits organizations to develop sectoral privacy codes for the handling of personal information "designed to allow for flexibility in an organization's approach to privacy," while at the same time guaranteeing consumers "that their personal information is subject to minimum standards that are enforceable in law." Finally, New Zealand privacy law also treats approved codes of conduct as instruments of law with binding effect.

In the U.S., where comprehensive privacy law is lacking, there is no possibility of firms or industry negotiating privacy covenants with regulators, unless one wants to treat FTC consent decrees as a type of covenant. Thus, the covenanting approach in the U.S. arises only when there is a credible threat of federal privacy regulation and firms sit down with regulators to negotiate a code of conduct in lieu of regulation. In his article, Hirsch cites the OPA Guidelines as an "incomplete" step towards a covenanting approach, and gives three [\*402] reasons for this incompleteness. A more recent and telling example of a privacy covenant came about when three leading Internet firms were accused of Internet censorship in China, resulting in a very public controversy and threatened legislation.

In the winter of 2006, Yahoo!, Google and Microsoft had to contend with highly unfavorable publicity and Congressional hearings over their controversial roles in cooperating with Chinese government efforts to monitor and censor the Internet and persecute dissidents. A few months later, Rep. Chris Smith introduced a bill that would have rendered such practices illegal and forced U.S. companies to confront a Hobson's choice: disregard restrictive Chinese licensing requirements imposed on foreign companies as a condition of providing Internet services in the Chinese market or obey Chinese censorship rules in violation of U.S. law. The companies then sat down with a cross-section of human rights organizations, socially responsible investment firms, and academics, and agreed to work on voluntary guidelines for protecting freedom of expression and privacy on the Internet. After eighteen months of negotiations and defections by several NGOs, the multi-stakeholder group reached agreement and launched the GNI, jointly committing to a set of principles and implementation guidelines as well as an accountability [\*403] system based on independent, third-party assessments. More recently, a GNI member (Google) announced that it would shut down its Chinese search engine rather than continuing to censor the results, and began automatically redirecting Chinese customers to an uncensored version of Google search hosted in Hong Kong.

Why did Yahoo!, Google, and Microsoft agree to participate in a multi-stakeholder process in which a successful outcome required convening a group of actors with divergent interests (often at loggerheads with each other), engaging in difficult and protracted negotiations, and staying at the table until a consensus was forged? As described above, the GNI negotiations were an entirely voluntary effort, with no legal mandate as to process or substance. Rather, the parties proceeded on an ad hoc basis and agreed to principles that, while based on international human rights instruments, were not subject to any formal approval criteria or government oversight. Although the U.S. State Department welcomed the GNI initiative, it did not participate in any stakeholder meetings. Cynics may say that the three firms were merely responding to a public relations crisis related to their business operations in China, which forced them to pursue a covenanting approach not only to improve their public image, but to restore public faith in their company integrity and [\*404] mollify Congressional demands for government intervention. But even if GNI was initially spurred by negative publicity and a threat of government intervention, it represents a moderately successfully example of the covenanting approach at work.

#### Antitrust litigation is uniquely complex and resource-intensive---a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### That underpins patent-led innovation---Extinction

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## Case

### Advantage

#### “Ctrl F” their internal link ev---Leonardo is their only antitrust key ev and does not say the word semiconductors.

#### No Chinese 5G dominance---their claims are military lies, hyped for funding

SCMP 19 – South China Morning Post, citing a variety of experts, “China Experts: US Still Out Front In Tech Race Despite Pentagon Claim”, 11/3/2019, https://www.abacusnews.com/tech/china-experts-us-still-out-front-tech-race-despite-pentagon-claim/article/3036161

Chinese experts have rejected the claim by a senior Pentagon official that the US is lagging behind China in some key dual-use technologies.

Michael Brown, director of the US Department of Defence’s innovation unit, said at a seminar earlier this week that China was either competitive or catching up in the areas of hypersonics, artificial intelligence, quantum sciences, 5G mobile networks, genetic engineering, and space.

With the exception of hypersonics, these technologies had not only military applications but were also critical for long-term economic prosperity, making them important to the future of US-China competition, he said.

“I believe that national security and economic security are inextricably linked,” Brown told the think tank Centre for Strategic and International Studies in Washington.

China prepares to send its own astronauts to the moon 50 years after Apollo 11

But Chinese experts said China’s progress had been exaggerated and many of its achievements were only partial successes so far.

Hong Kong-based military commentator Song Zhongping said the US had been “unarguably more successful and experienced, far ahead of anyone” in space technology. “Look at Project Apollo and the Space Shuttle programme – decades later no other country has ever matched those achievements,” he said.

Despite breakthroughs in certain fields like 5G, there was more generally a clear gap between China’s digital information and electronics technologies and the world’s technological leaders, according to Beijing-based naval expert Li Jie.

In the field of hypersonics, China may have achieved milestones in glider vehicles, but in another important technology – ramjet engines – there was no evidence of any major breakthroughs, and the US was still far more experienced in the field, said Zhao Tong, senior fellow at the Carnegie-Tsinghua Centre for Global Policy.

China exhibited hypersonic missiles and drones at last month’s National Day parade, and has just launched a commercial 5G – fifth generation mobile network – service on Friday, which is the biggest in the world.

Huawei, China’s telecommunication giant has won contracts to construct the 5G infrastructures for many countries, despite the US campaign to ban Huawei equipment over security concerns.

Brown said China was “already ahead of the US in quantum sciences” – citing the Chinese launch in 2016 of Micius, the world’s first quantum communications satellite. China had also made more launches into space than the US in 2018 as it speeded up its space programme, he said.

Brown added the US had used Chinese equipment for genome sequencing, which meant China had more data on the genetic sequencing of the US population than the US itself, he said, and the US was also playing “a catch up game” with China in AI-based facial recognition.

5G is available now in China for just US$18

For the past 50 to 80 years, the US had led the way and set the standards in almost all important technologies and industries, he said. In doing so, the US had been able to build and shape a global ecosystem and enjoy its advantages since the end of World War II.

But, Brown warned, for China to set the pace for these technologies would be “game-changing”.

“Imagine what the world would look like if China was setting standards,” he said. “Over time, that means we have fewer levers to shape what the US wants to do, both from a global technology standpoint and also what are the values that are highlighted around the world as ones to be looked up to.”

Ni Lexiong, a Shanghai-based military commentator, said Brown had his own agenda in making his comments.

“The US military wants more budget, more new equipment, more new R&D projects. And the theory of a China threat is, of course, a handy excuse,” Ni said.

#### No bioweapons

Filippa Lentzos 17. Senior research fellow jointly appointed in the Departments of War Studies and of Global Health and Social Medicine at King’s College London. 07-03-17. "Ignore Bill Gates: Where bioweapons focus really belongs." Bulletin of the Atomic Scientists. http://thebulletin.org/ignore-bill-gates-where-bioweapons-focus-really-belongs10876

I disagree. At a stretch, terrorists taking advantage of advances in biology might be able to create a viable pathogen. That does not mean they could create a sophisticated biological weapon, and certainly not a weapon that could kill 30 million people. Terrorists in any event tend to be conservative. They use readily available weapons that have a proven track record—not unconventional weapons that are more difficult to develop and deploy. Available evidence shows that few terrorists have ever even contemplated using biological agents, and the extremely small number of bioterrorism incidents in the historical record shows that biological agents are difficult to use as weapons. The skills required to undertake even the most basic of bioterrorism attacks are more demanding than often assumed. These technical barriers are likely to persist in the near- and medium-term future. Gates does a disservice to the global health security community when he draws media and policy attention to amateurs such as terrorists. Where biological weapons are concerned, the focus should remain on national militaries and state-sponsored groups. These are the entities that might have the capability, now or in the near future, to develop dangerous biological weapons. The real threat is that sophisticated biological weapons will be used by state actors—or by financially, scientifically, and militarily well-resourced groups sponsored by states. So far, state-level use of biology to deliberately inflict disease or disrupt human functions has been limited by the strong international norm against biological weapons enshrined in the 1925 Geneva Protocol and the 1972 Biological and Toxin Weapons Convention. These two biological cornerstones of the rules of war uphold the international prohibition against the development, production, stockpiling, and use of biological weapons. But this norm may not survive indefinitely.

#### Naval power is resilient and there’s no impact

Gregg Easterbrook 18, Fellow in Economics, then in Government Studies, at the Brookings Institution, and a Fellow in International Affairs at the Fulbright Foundation, February 2018, It's Better Than It Looks: Reasons for Optimism in an Age of Fear, Chapter 6: Why is Violence in Decline?, p. 136-139

FROM BEFORE THE COMMON ERA until Pearl Harbor, great powers competed at sea as much as on land. Carthage, Rome, and Troy fought regularly on the waters of the Mediterranean. Enormous fleets—the 1588 Spanish Armada boasted 130 ships—plied the oceans, fighting other fleets, seizing prizes, and staking claims to territory. Even in the days of sail, warships crossed the world: early in the sixteenth century, the Chinese and Portuguese navies clashed repeatedly near what's now Hong Kong. For millennia, nations sunk into their navies amounts that might have ended want, only to behold the investments literally sink. During the modern era, Argentina, Brazil, Britain, Chile, France, Germany, Japan, Russia, and the United States have expended groaning chests of treasure on warships. Naval rivalries between Britain and Germany helped ignite both world wars. The Pacific Theater fighting of World War Il began in part because of America's 1940 decision to forward-deploy its fleet from California to Hawaii, closer to Tokyo, and in part because Japan placed an existential wager on the maritime theories of Alfred Thayer Mahan, a member of the society of famous persons who proved, following their deaths, to have been wrong about practically everything. Many centuries of an extravagant naval arms race culminated in the October 1944 Battle of Leyte Gulf, where 367 warships and 1,800 aircraft hammered at each other with cannon, bombs, torpedoes, and battleship shells weighing up to 3,000 pounds apiece. Then the naval arms race stopped. So did naval fighting. The seas have been quiet for nearly seventy- five years, perhaps the longest stretch without bloodshed on the waters since first the sail was hoisted. Some Argentine and British ships clashed during the 1982 Falklands conflict, and Iranian and Iraqi vessels scuffled around oil tankers during the mid- 1980s, but big fights at sea have come to a halt, as has the great-power naval competition. The last time a major naval battle occurred, India was not yet an independent nation, the solid-state transistor had not been invented, and the Dodgers played in Brooklyn. Century upon century of great-power competition at sea ended with a final score of 10—0. That's the number of supercarrier strike groups possessed by the United States (ten) versus the number possessed by all other nations combined (zero). World War Il left the warships of the Axis powers in Davy Jones's locker. The Soviet Union tried to step in with bucket-of-bolts vessels that craved return to port; since about 1960, the US Navy has enforced hegemony over the blue water. "Hegemony" has a bad reputation in political science, assumed always to be undesirable. In this case, the size, power, and competence of the US Navy has banished fighting from much of Earth's surface. For a half-century, no nation has even attempted to contest US naval dominion. The all-electric, stealth- hull cruisers the United States builds are so advanced —nicknamed "arsenal ships" for their firepower—that no other nation has even experimented with a vessel of this general type. The supercarrier strike groups that America deploys—full-deck, nuclear-powered carriers bearing long-range jets, protected by guided-missile destroyers and screened by nuclear submarines—are so potent, to say nothing of so expensive ( naval hegemony cost the United States $155 billion in 2017), that no other nation has tried to build one. China and Russia possess no nuclear supercarriers, and have none under construction. The limited-deck, diesel-powered carriers China began laying down in 2015 will be suitable for patrolling coastal areas but not for the open ocean, while everything the US Navy builds is intended to travel beyond the horizon. Because the US Navy operates far from the homes of Americans, many are not attuned to its size and might. Soldiers can march in Fourth of July parades, and Air Force fighters can perform Super Bowl flyovers; the Navy's boats can be observed only on the waves. Most who live in other nations are not attuned to the US Navy either. There's no compelling reason to think about a well-behaved military force stationed on the opposite side of the globe. Under US Navy hegemony, piracy still occurs, but great powers have not seized merchant ships in three generations. That cargo ships whose decks are stacked with containers of valuable goods can steam anywhere without fear of being impounded by a warship is the unseen reason global trade took off, and global trade benefits almost everyone, while reducing war. The reality that the US Navy rules the blue water both reduces a historic cause of conflict and enables the prosperity of the contemporary era. Speaking at West Point as president, Obama said that the United States does not use its might to acquire territory or seize resources. Instead, American might is employed to pursue what US leaders believe is best for the world. Such beliefs may be wrong, even tragically so. But has any other nation that possessed overwhelming military force ever refrained from using force for conquest or pursuit of riches? That is the unseen question of the oceans—unseen because fighting on the water has stopped.

#### China will decisively beat the U.S. in conflict and force a surrender---that secures their regional control.

Gregory B. Poling 20, Director of the Asia Maritime Transparency Initiative, Fellow with the Southeast Asia Program at the Center for Strategic and International Studies in Washington, D.C., “The Conventional Wisdom on China’s Island Bases is Dangerously Wrong”, War on the Rocks, 01/10/2020, https://warontherocks.com/2020/01/the-conventional-wisdom-on-chinas-island-bases-is-dangerously-wrong/

Last month, during a conference on China’s maritime ambitions, I was asked a question I often get about Beijing’s artificial island bases in the South China Sea. That question goes something like this: Couldn’t the United States easily neutralize these remote outposts in a conflict, negating their value? The assumption is understandable given how seemingly remote the facilities are and how accustomed Americans have become to uncontested dominance over the sea and air. But it is flawed. In fact, China, not the United States, would control the sea and airspace of the South China Sea at the outbreak of hostilities thanks to its artificial island bases. And given current American force posture in the region, it would be prohibitively costly for the United States to neutralize those outposts during the early stages of a conflict. That would make the South China Sea a no-man’s land for most U.S. forces (submarines excepted) during the critical early stages of any conflict — giving the islands considerable military value for Beijing.

This answer provoked enough of a stir among conference attendees that I took to Twitter to see what fellow South China Sea watchers and security experts thought. Their responses were overwhelmingly consistent with my argument and added several concerns for the United States that I had overlooked. This confirmed a worrying disconnect. Most of those who follow the South China Sea most closely see China’s artificial island bases as major gamechangers in any future Sino–U.S. conflict. Yet the conventional wisdom throughout Washington still seems to be that they can be safely dismissed as lacking strategic value. That’s wrong.

The main purpose of China’s artificial islands is not to help fight a war against the United States. Beijing’s primary strategy in the South China Sea is to use civilian and paramilitary pressure to coerce its Southeast Asian neighbors into abandoning their rights. Thanks to the facilities on its island bases, hundreds of militia vessels and a large number of coast guard ships are based hundreds of miles from the Chinese coast for months at a time. They engage in frequent harassment of civilian and law enforcement activities by neighboring states, making it prohibitively risky for Southeast Asian players to operate in the South China Sea. The threat of Chinese naval and airpower, meanwhile, dissuades neighboring states from using more forceful military responses against these illegal actions. Left unchallenged, this primarily nonmilitary strategy will secure Chinese control over the waters and airspace of the South China Sea in peacetime and undermine America’s role as a regional security provider. It will make clear to Southeast Asian partners that a security relationship with the United States cannot safeguard their interests in the face of a rising China and will thereby undercut the rationale for governments like the Philippines and Singapore to support the U.S. military presence in the region.

But China also recognizes that its strategy might fail. It could miscalculate, provoking a violent conflict with the United States. Or a fight could start in Northeast Asia and spread south. The People’s Liberation Army has therefore invested in facilities and deployments in the Spratly Islands that not only support its current peacetime coercion but also favorably shift the balance of power in any future conflict. As a result, the islands not only guarantee China air and surface dominance in the South China Sea in the opening stages of a conflict, but they are also far more difficult to neutralize than conventional wisdom suggests. The Asia Maritime Transparency Initiative at CSIS has exhaustively documented the growth of these capabilities using commercial satellite imagery and other remote sensing tools.

China has constructed 72 fighter jet hangars at its three airbases in the Spratlys — Fiery Cross, Mischief, and Subi Reefs — along with another 16 on Woody Island in the Paracels. It has so far held off on deploying combat aircraft to the Spratlys but rotates J-11 fighters frequently through Woody. Assuming it was the first mover in a conflict, it would be able to deploy combat aircraft rapidly to the airfields in the Spratlys, instantly establishing air dominance in the theater. Unless the Chinese happened to pick a fight when U.S. forces were engaged in a major exercise like Balikatan in the Philippines, the closest U.S. ground-based combat aircraft would be in Okinawa and Guam, approximately 1,300 and 1,500 nautical miles away, respectively. The only U.S. military planes in the region would be patrol aircraft in the Philippines and potentially Malaysia.

China has, meanwhile, deployed YJ-12B and YJ-62 anti-ship cruise missiles to its outposts in the Spratlys and Paracels, backed by longer-range missile capabilities from the mainland. And it has invested heavily in radar and signals intelligence capabilities on all the islands, making it a safe bet that it sees just about anything moving on or above the South China Sea. A U.S. Navy vessel sailing in those waters would be well within the range of Chinese fire when hostilities broke out. Lacking supporting ground-based fire or air cover, the only rational option would be to pull back to the Sulu and Celebes Seas, and probably beyond, as quickly as possible. This would be especially true of any U.S. aircraft carrier that happened to be in the theater, since it would be far too valuable to leave in such an indefensible position.

In the face of these Chinese advantages, could the United States still neutralize the island bases early in a fight? Probably, but not at an acceptable cost. Doing so would require expending a lot of ordnance likely desperately needed in Northeast Asia, diverting important air and naval platforms and placing them at risk out of proportion to the potential battlefield gains.

The island facilities are considerably larger than many observers seem to realize. As Thomas Shugart, then a visiting fellow at the Center for a New American Security, once pointed out, most of the District of Columbia inside the I-495 beltway could fit inside the lagoon at Mischief Reef. Pearl Harbor Naval Base could fit inside Subi Reef. The critical infrastructure that would need to be hit to seriously degrade Chinese capabilities is spread out across a considerable area. That amounts to a lot of ordnance to drop, even if the goal were just to hit critical nodes like sensors, hangars, ammunition depots, and command and control facilities.

Disabling the airstrips themselves would be an even taller order. The United States fired 59 Tomahawks at the Shayrat Air Base in Syria in 2017, all but one of which hit, yet the runway was back in operation just a few hours later. Considering that China has deployed HQ-9 surface-to-air missiles and constructed point defenses at all these bases, some percentage of missiles fired would never reach their target. And much of the infrastructure has been hardened, including China’s missile shelters, larger hangars, and buried ammunition depots. The most effective means of cratering the runways themselves would be to drop heavier ordnance from the air, but that would put high-value U.S. bombers at unacceptable risk in a secondary theater (more on that below). So a safer bet would be to just focus on hitting key information nodes with longer-range munitions. A hundred cruise missiles per outpost would not be an unreasonable estimate to effectively disable the bases. That amounts to 300 missiles just for the major bases in the Spratlys, another 100 for Woody Island, and dozens more if the United States wanted to disable smaller facilities (for instance, the heliport on Duncan Island that would likely be used for anti-submarine warfare operations).

What platforms would launch these hundreds of cruise missiles? The only thing safely operating in the theater after hostilities started would be U.S. submarines. They would find it a lot harder to remain undetected in the face of active Chinese anti-submarine operations once they started shooting. Every launch would put them at some risk. And in that environment, U.S. subs would likely be busy attacking Chinese surface ships and other high-value platforms, not trying to blanket thousands of acres of infrastructure at Mischief or Subi Reefs with valuable ordnance with no guarantee of success. Anything else sent into the theater — long-range bombers from Guam, surface ships, etc. — would be operating at high risk given Chinese dominance of the sea and air space.

No matter how the ordnance was delivered, the math would be the same. Effectively neutralizing China’s bases would require hundreds of missiles, emptying the magazines of valuable U.S. platforms that don’t have ordnance to spare. And it would do so in what is sure to be a secondary theater. It is hard to imagine a scenario in which the United States would be seriously considering kinetic strikes on Chinese bases in the South China Sea that would not also involve fighting in Northeast Asia. That would mean that anything the United States launched against the Spratlys would be something it could not use for operations in defense of U.S. and Japanese forces or for the relief of Taipei.

This punishing math could be changed, especially by the full implementation of the Enhanced Defense Cooperation Agreement to allow rotational deployments of key U.S. capabilities in the Philippines. These should include combat aircraft at Basa Air Base on Luzon and Antonio Bautista Air Base in Puerto Princesa to contest Chinese air dominance over the South China Sea. And it should include preparations to rapidly stand up U.S. fire bases at these and other facilities in case of hostilities to hold Chinese outposts and ships in the South China Sea at risk.

Barring an unexpected change of heart, these plans are unlikely while Rodrigo Duterte remains president of the Philippines through 2022. In the meantime, the United States can lay the groundwork for full implementation of the defense cooperation agreement by undertaking more ambitious infrastructure projects at agreed-upon sites and pushing the Armed Forces of the Philippines to support those upgrades. It should also push for more opportunities to deploy combat aircraft to defense cooperation sites as part of bilateral exercises, as American F-16s were for the first time at Basa last year. This would help acclimate both sides to U.S. fighters operating from these bases and, if frequent enough, could strengthen deterrence by giving the United States some rapid-response capability in the South China Sea. But these steps will not fundamentally alter the math.

Without the Enhanced Defense Cooperation Agreement, or some undiscovered (and unlikely) stand-in, U.S. forces would have little choice but to concede the waters and airspace of the South China Sea to China in the opening stages of a conflict. The logistics and maintenance hurdles China would face during wartime would likely prevent its island bases from effectively operating over the long-term. But for several weeks at least — time that would be critical in a Taiwan contingency, for instance — they would pay huge dividends for Beijing. So long as the United States lacks ground-based combat aircraft and fire bases along the South China Sea, American planning needs to acknowledge that reality.

#### South China Sea control is key to China’s coal-to-gas transition.

Chris Horton 14, Reporter, “Beijing Zeroes In on Energy Potential of South China Sea”, New York Times, 10/28/2014, https://www.nytimes.com/2014/10/29/business/energy-environment/beijing-zeroes-in-on-energy-potential-of-south-china-sea.html

There is another reason for China’s interest in the South China Sea: the large quantities of oil and natural gas that might lie below these waters. In May, Beijing made its interest in those resources clear when it sent a drilling rig called Haiyang Shiyou 981 into waters claimed by Vietnam. The rig is owned by China National Offshore Oil Corporation, or Cnooc, the country’s biggest offshore energy producer.

After the move provoked a standoff with Vietnam, the drilling rig was sent to undisputed waters near China’s island province of Hainan. In September, Cnooc said the rig had discovered a large gas field, which suggested that China had become more proficient at offshore drilling.

The United States Energy Information Administration has estimated that 11 billion barrels of oil and 190 trillion cubic feet of natural gas lie below the seabed, including both proven and probable reserves. If those estimates prove correct, the South China Sea would be in the same league as Mexico, a midsize producer, and in the global top 10 in terms of gas.

The South China Sea is far from virgin territory. But so far, exploration and production of oil and gas have been confined mainly to waters off the coasts of China, Vietnam, Malaysia, Brunei and the Philippines, which form the sea’s perimeter along with Taiwan. The Energy Information Administration estimates that in 2011, South China Sea production by these countries amounted to 1.2 million barrels a day of oil and 3,200 billion cubic feet of natural gas. These numbers are roughly similar to the current crude production of North Dakota and to Saudi Arabia’s annual gas production in 2012.

Oil and gas exploration has been limited not only by territorial claims but also by typhoons and technological challenges, including limited local ability to drill in deep water. Cnooc has tried to improve its capabilities through the purchase in 2012 of a Canadian company, Nexen, for about $15 billion. Nexen had acquired deep water experience from working in the Gulf of Mexico.

Researchers, too, are exploring deeper waters.

From Jan. 26 through March 30 of this year, the scientific vessel Joides Resolution traveled to the deeper regions in the middle of the South China Sea, where it drilled several core samples as part of the International Ocean Discovery Program’s Expedition 349.

Scientists from 12 countries, including China, the United States, Vietnam, the Philippines and Taiwan, participated. Dr. Li Chun-feng of the State Key Laboratory of Marine Geology at Tongji University in Shanghai served as a director. While emphasizing that the main goals were scientific, Dr. Li said evidence was found that there were “huge” oil and gas reserves beneath the sea.

“Our expedition discovered thick organic rich sandstone and shale at the outermost continental margin and the continent-ocean transition zone, further supporting the large potential for oil and gas reserves,” Dr. Li said.

New oil and gas pockets are being found. The Canadian oil and gas producer Husky Energy and Cnooc began commercial production at their Liwan natural gas field in the sea’s northern waters in late March.

The gas, which Husky discovered in 2006, is about 190 miles southeast of Hong Kong and is the largest to date for Husky, which is controlled by the Hong Kong businessman Li Ka-shing. The gas is destined for the Pearl River Delta region, which includes the industrial cities of Shenzhen and Guangzhou.

To reduce the choking air pollution caused by burning coal, China wants to increase the proportion of gas in its overall energy use to 10 percent by 2020 from about 5 percent in 2012.

Gas from the South China Sea would fit well with this plan.

#### Transition solves air and water pollution.

Tomoo Kikuchi 19, Visiting Senior Fellow at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University (NTU), Singapore, and Yohei Tanaka, Lead Economist and Deputy Manager at the America and Africa Project Division of INPEX, “Trade LNG More, End The US–China Trade War”, East Asia Forum, 5/23/2019, https://www.eastasiaforum.org/2019/05/23/trade-lng-more-end-the-us-china-trade-war/

Fourth, LNG could also help China mitigate the effects of climate change. Over the coming years, China will become more exposed to climate hazards. Yet China continues to rely on coal for 72 per cent of its primary energy consumption, while natural gas makes up only 6 per cent.

Various life cycle assessments indicate that LNG produces 30–40 per cent less CO2 than coal from extraction to combustion. In fact, over 95 per cent of coal’s CO2 emissions come from combustion. Burning low-quality coal also emits sulphur oxides and nitrogen oxides, which severely pollute the environment.

China is currently behind on its target to reduce coal reliance to 55 per cent by 2020. Even if Beijing cannot abolish fossil fuels entirely, China has an incentive to shift to a less carbon-intensive fuel such as LNG to reduce emissions.

#### Extinction

Naomi Clark-Shen 19, MSc in Applied Marine Science from Plymouth University, BSc in Animal Behaviour from the University of Exeter, Former Science and Policy Research Officer at the World Wildlife Foundation, Principle Investigator and Manager of the Singapore Shark and Ray Fishery Research Project, “China Can Save The Earth: Here Is Why”, Kontinentalist, 5/2/2019, https://kontinentalist.com/stories/china-can-save-the-earth-heres-why

Life on Earth is collapsing. China is often cited as the ‘bad guy’, with its polluted air, taste for endangered species, and huge fishing fleets. But experts now recognise that China has the potential to save the planet. What has this country done to sway popular opinion and prove itself?

1. Curbing climate change

China is an unstoppable force in the clean energy movement. It produces more electricity with renewable energy than any other country, and has some of the biggest solar farms on Earth—one of which is shaped like a giant panda. Additionally, in 2017 the country invested a record US$44 billion in clean energy overseas, and the Belt and Road Initiative has so far driven US$8 billion of solar equipment exports to other countries. These investments will help to reduce global greenhouse gas emissions that are causing climate change.

China also has the largest market for electric vehicles. The country buys over half of the world’s new electric cars and is the largest manufacturer of electric buses—putting around 27,000 on roads around the world. Shenzhen has a fleet of over 16,000 electric buses. Its taxis are almost completely electric too. In fact, the country has plans to completely end the sale of fossil-fuel powered cars in the near future.

#### The US will never escalate because it won’t commit presence in the SCS---ensures China can keep tensions regional.

Dr. Euan Graham 20, PhD from the Australian National University, Associate Fellow at the UK Royal United Services Institute and an Honorary Principal Research Fellow at RMIT University, Melbourne, Shangri-La Dialogue Senior Fellow for Asia-Pacific Security, previously Executive Director of La Trobe Asia, at La Trobe University, “U.S. Naval Standoff With China Fails to Reassure Regional Allies”, Foreign Policy, 05/04/2020, https://foreignpolicy.com/2020/05/04/malaysia-south-china-sea-us-navy-drillship-standoff/

Once the West Capella finishes its current round of drilling, Malaysia could well be tempted to accept joint offshore energy development on China’s terms. Granted, the Philippines and Vietnam have protested China’s recent actions in the South China Sea, which have seen their own vessels targeted. But the Trump administration is unlikely to win new regional converts given its shambolic domestic handling of the pandemic while trading shrill accusations and counter-accusations with Beijing.

To be fair, the U.S. Navy’s decision not to dwell around the West Capella may say more about basic arithmetic than Washington’s attitude. It has fewer than 300 warships with which to maintain a worldwide presence. For the 7th Fleet, which is responsible for covering a massive area in the Indo-Pacific, this task is toughest given the great distances it must cover and the fact that China’s navy is already the world’s largest in hull numbers. U.S. submarines are active around the Western Pacific. But their presence brings little reassurance for allies and partners seeking a visible U.S. commitment to regional security. Operating in the South China Sea is particularly challenging for the U.S. Navy, as its closest bases are in Japan and Guam, plus a logistics command and berthing facilities for littoral combat ships in Singapore. The old American base at Subic Bay in the Philippines, shuttered in 1992, must be sorely missed. The base at Vietnam’s Cam Ranh Bay, too. Meanwhile, China has vastly upgraded its bases in the Spratly Islands, giving it the ability to rapidly surge naval and paramilitary forces to the southern extremities of the South China Sea.

Competition in the South China Sea is an endurance game. Like counterinsurgency, it requires stamina and benefits from the “indirect approach.” Presence is more important than firepower. The USS America amphibious ready group was a show of strength, but such fleeting muscular demonstrations are largely ineffective at countering China’s suffocation strategy directed at Southeast Asian claimants. The USS Barry, having since transited the Taiwan Strait and conducted a freedom of navigation patrol in the Paracel Islands, reveals how hard the 7th Fleet is being worked. But trying to be everywhere at once can mean going around in circles.

#### Arctic biod is resilient---their studies are flawed

Bodil A. Bluhm et al 11, Research Associate Professor, School of Fisheries and Ocean Sciences, Institute of Marine Science, University of Alaska Fairbanks, Andrey V. Gebruk is Head of Laboratory, P.P. Shirshov Institute of Oceanology, Russian Academy of Sciences, Rolf Gradinger is Professor, School of Fisheries and Ocean Sciences, Institute of Marine Science, University of Alaska Fairbanks, "Arctic marine biodiversity: An update of species richness and examples of biodiversity change", Oceanography, Vol. 24, No. 3, September 2011, tos.org/oceanography/assets/docs/24-3\_bluhm.pdf

Knowledge Gaps Arctic regions contain a complex variety of habitats, most of which are difficult to access. Despite a recent increase in overall interest and research effort, observational gaps still remain for some geographic areas (Figure 1a), taxa, and habitats. The decades-long lack of interest and the logistical challenges posed by filling these gaps are now leading to uncertainties about the biodiversity patterns (Figure 1b) and the extent of ongoing changes. Compiling information on the status quo and making informed predictions into the future require open data sharing in online data systems, as, for example, outlined in the data policy of the International Polar Year 2007–2009 and followed by some of its projects (e.g., Bluhm et al., 2010b), with regrettably overall weak compliance to date (Carlson, 2011). Incomplete species/OTU lists are clearly largest in the microbial realm, including fungi. For the bacteria and archaea, diversity estimates are largely based on the scaling of a limited number of observations (Lovejoy et al., 2011). The recent inventory of marine pelagic and sea ice unicellular eukaryotes (Poulin et al., 2011) demonstrated the largest gap in knowledge to be in the diversity of small cells (< 20 μm), which represented less than 20% of their assessment; however, their effort did not include lesser-known groups such as pelagic ciliates or benthic microalgae. On higher trophic levels, including seabirds and marine mammals, gaps still exist in the knowledge of species distributions and population numbers, as well as their temporal trends, sensitivities, and reasons for change (other than a human role per se) (Huettmann et al. 2011; Kovacs et al., 2011). Regional gaps still exist in the deep sea, in particular at depths over 1,000 m, despite considerable sampling effort in the past decade (e.g., Soltwedel et al., 2005; Bluhm et al., 2011). Of the shelf seas, the East Siberian Sea is probably the most understudied in terms of biodiversity, although an intense study by the Zoological Institute in St. Petersburg is ongoing. Large gaps also exist in the vast area of the Canadian Arctic Archipelago (Carr, 2011) and northern Greenland, both of which still remain heavily ice-covered. Examples of underexplored habitats include the deep-sea ridge systems spanning thousands of kilometers across the Arctic as well as special features such as pockmarks and seamounts. In the sea ice realm, pressure ridge biodiversity studies are only now starting to emerge (Hop and Pavlova, 2008; Gradinger et al., 2010b), although this habitat may play an increasingly important role in light of the diminishing ice cover. Ironically, while nearshore habitats have been extensively studied, they are typically only well investigated in the vicinity of field stations and not at broader scales that capture the full range of habitat types and heterogeneities. Outlook Recent updates of Arctic species inventories across all taxonomic levels demonstrate the presence of close to 8,000 eukaryotic species (i.e., excluding Eubacteria and Archaea). Cautious estimates predict that several thousand benthic invertebrate species still remain to be recorded (Bluhm et al., 2011; Carr, 2011; Piepenburg et al., 2011). It is clear that Arctic ecosystems will be subjected to a variety of pressures in the future (e.g., ACIA, 2005; Johnsen et al., 2010), and prediction of future Arctic “species richness” in time and space is complicated by an interplay of factors capable of either increasing or decreasing the overall species richness in the coming decades (Weslawski et al., 2011). Species richness can increase, for example, when northward-advected boreal species mix with Arctic residents, and when perennial algae and associated fauna replace seasonal communities in previously icescoured nearshore areas (Vermeij and Roopnarine, 2008; Weslawski et al., 2008, 2011). Species richness can decrease through habitat homogenization and increasing sedimentation associated with glacial melt and increased river runoff, and when biota associated with multiyear ice loses its habitat (e.g., Kędra et al., 2010; Weslawski et al., 2011). Species richness might even stay stable if, for example, southern species replace functionally similar Arctic species, or because existing adaptations to seasonally low food availability, variable temperatures, and other factors might buffer Arctic biota against some degree of change (Pertsova and Kosobokova, 2010; Weslawski et al., 2011). Species richness, therefore, may not be the most desirable single metric with which to evaluate biodiversity changes, and should be considered along with many other metrics. The competition of Arctic endemics and primarily Arctic-distributed biota with temperate taxa is inevitable, and is expected (if not already observed; see above) to lead to the reduction of “typical” Arctic populations, species, communities, and/ or habitat (e.g., Weslawski et al., 2008; CAFF, 2010). The examples of ongoing changes on species and communities levels demonstrate the value and necessity of related surveys that are systematic and methodologically comparable in nature. Such surveys are required on both regional and pan-Arctic scales to detect change and inform both shortterm and long-term conservation and management plans. As stressed also by CAFF (2010) and UNEP, these plans should include identifying and protecting biologically important marine areas (Johnsen et al., 2010; Huettmann and Hazlett, 2010).

#### Antitrust is developed by adjudication---that creates an ineffective, unpredictable, and unenforceable patchwork

Rohit Chopra 20, Commissioner of the Federal Trade Commission, and Lina M. Khan, Academic Fellow at Columbia Law School, Counsel to the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary and Former Legal Fellow at the Federal Trade Commission, “The Case for "Unfair Methods of Competition" Rulemaking”, University of Chicago Law Review, 87 U. Chi. L. Rev. 357, March 2020, Lexis

I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms [\*360] into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades. 8

#### Widespread rollout is years away

Dr. Mohanbir Sawhney 19, McCormick Tribune Professor of Technology at the Kellogg School of Management, “Perspectives: Don't Hold Your Breath For 5G. Most Of Us Won't Be Using It Until 2025”, CNN, 12/10/2019, https://www.cnn.com/2019/12/10/perspectives/5g-technology-t-mobile-att-verizon/index.html

But for now, 5G in 2020 is mostly a hype fest. Slowly, 5G networks in the next few years will expand coverage, as a wider range of affordable 5G smartphones hit the market. Only then will the consumer adoption of 5G start to take off, which could take until 2025 as service gradually expands. Back when 4G was the new frontier, there were still pockets of 3G even though carriers were promoting "nationwide" coverage.

# 2NC

## CP---Memo

#### 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.

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

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.

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

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 reshapes antitrust policy AND creates near 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.

#### 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.

#### Court won’t review it

Emily Parsons 20, J.D. Candidate at the University of Washington School of Law, Summer Intern at Morrison & Foerester LLP, BA from the University of Washington, Judicial Law Clerk on the US Court of Appeals, “The Substantial Impact Approach: Reviewing Policy Statements in Light of APA Finality”, Washington Law Review, Volume 95, Number 1, 95 Wash. L. Rev. 495, March 2020, Lexis

Federal agencies engage in a wide range of non-binding action, issuing guidance documents such as policy statements and interpretive rules. Although these guidance documents may have a substantial impact on industries or members of the public, courts often refuse to review their substance. The Administrative Procedure Act requires agency action to be "final" before courts can review it. The D.C. Circuit and the Ninth Circuit have taken conflicting and often messy approaches in determining whether interpretive rules and policy statements are final and thus reviewable. This Comment proposes a new approach: the substantial impact approach. Under this approach - repurposed from a rejected test for procedural sufficiency of guidance documents - courts could review a guidance document that has a substantial impact on affected parties. This Comment analyzes the 2017 Department of Homeland Security memorandum rescinding Deferred Action for Childhood Arrivals, highlighting it as an example of a subset of policy statements that should be reviewable under the proposed substantial impact approach.

#### If they rule, they’ll side with agencies on antitrust

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, 55 San Diego L. Rev. 617, Lexis

Antitrust laws are static and not easily changed; therefore, the first step to recognize its uniqueness is for the regulatory agencies to provide an adequate framework specifically for healthcare to acknowledge the concerns discussed in this Comment, and to provide the uniform approach for agencies to follow in reviewing healthcare transactions in the future. The agencies' policies are not binding on the courts; however, judicial reaction will follow as courts find the agencies' guidance persuasive. 328 Courts are not always experienced in the economic analysis of antitrust principles, and the regulating agencies must take the lead in offering a comprehensive "translation" of the antitrust principles, especially in the context of healthcare that balances traditional economic well-being with the consumer's social welfare.

[FOOTNOTE] 328 See supra note 85. [END FOOTNOTE]

[REFERENCE FOOTNOTE] 85 The guidelines are the agencies' interpretation of the antitrust law. Courts often rely on them without being required to follow them. See, e.g., Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015) ("Although the Merger Guidelines are "not binding on the courts' … they "are often used as persuasive authority.'" (citations omitted)); United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect … courts commonly cite them as a benchmark of legality." (citation omitted)). [END FOOTNOTE]

#### No one will file suit

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, November 2010, 120 Yale L.J. 276, Lexis

If permissive or threshold-setting rules were the only context in which we could reliably predict that the trade-off would not take place, the remedy would be simple - apply the short cut but make an exception for these types of rules. This, however, is not the case: even in instances where agencies issue "traditional" nonlegislative rules concerning positive criteria for enforcement action, the trade-off often fails to take place. This is because many regulated entities choose, as a practical matter, to comply with nonlegislative rules rather than incur the expense and uncertainty associated with pre-enforcement challenges or the risks associated with noncompliance. [180](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#n180) As Peter Strauss notes, although regulated entities may theoretically retain the option of challenging the substantive validity of nonlegislative rules during licensing, ratemaking, or other enforcement proceedings, "in practice ... these options entail risks and impose costs that many will be unwilling or even unable to accept." [181](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#n181) The risks of noncompliance might decrease somewhat under a short  [\*312]  cut regime (if enforcement actions became more vulnerable to successful challenge because nonlegislative rules lacked the force of law), but there is no reason to believe that they would drop to zero - and good reason to doubt that they would drop substantially. [182](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#n182) The trade-off, simply put, makes more sense in theory than in practice.

#### 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.

## Adv---Semiconductors

#### Even when they intend to comply, disunity makes it impossible

Heidi Sada Correa 16, OECD Competition Expert, Executive Director for International Affairs at the Mexican Federal Economic Competition Commission, “The Resolution of Competition Cases by Specialised and Generalist Courts: Stocktaking of International Experiences”, OECD Ministry of Economy of Mexico, https://www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf

*Uniformity* refers to minimising conflicts in the interpretations of the law. To the extent that specialisation produces uniformity, that effect results from reducing the number of judges or courts who decide cases in a field of law rather than from reducing the range of specific cases heard (Baum, 2009). Moreover, uniformity can be the result of other effective mechanisms to solve discrepancies among courts (specialised or of general jurisdiction), such as the creation of circuit plenums in order to avoid thesis contradictions.70

*Predictability* of court decisions is a function of uniformity. Predictability refers to the possibility to predict ex ante how the law will be applied by the court in an ex post manner. Predictability is extremely important from an economic point of view. It guarantees legal certainty of the law and enables economic agents to anticipate the potential legal consequences of their actions. The latter in turn is crucial for making correct decisions ex ante. The predictability of court decisions is influenced by uniformity in the application of the law (Baum, 2010).

#### No US draw-in---ASEAN alliance commitments are weak, economic costs are too high and China has a formidable military.

Dr. Xue Li 15, Research Fellow at Department of International Strategy in the Institute of World Economics and Politics, Chinese Academy of Social Sciences, PhD from the School of Government and International Affairs at Durham University, UK, “The US and China Won’t See Military Conflict Over the South China Sea”, 06/19/2015, The Diplomat, https://thediplomat.com/2015/06/the-us-and-china-wont-see-military-conflict-over-the-south-china-sea/

However, if we look at the practical significance of the remarks, there are several limiting factors. The interests at stake in the South China Sea are not core national interests for the United States. Meanwhile, the U.S.-Philippine alliance is not as important as the U.S.-Japan alliance, and U.S. ties with other ASEAN countries are even weaker. Given U.S.-China mutual economic dependence and China’s comprehensive national strength, the United States is unlikely to go so far as having a military confrontation with China over the South China Sea. Barack Obama, the ‘peace president’ who withdrew the U.S. military from Iraq and Afghanistan, is even less likely to fight with China for the South China Sea.

#### Past collisions prove nobody will escalate.

Dr. Paul Dibb 14, Emeritus Professor of Strategic Studies at the Strategic & Defence Studies Centre of the Australian National University, PhD in Philosophy from the Australian National University, “Why A Major War In Asia Is Unlikely”, Economy Watch, 03/31/2014, <http://www.economywatch.com/features/why-a-major-war-in-asia-is-unlikely.31-03.html>

The rising tensions between China and Japan over the Senkaku/Diaoyu islands has led some experts to draw parallels with the Sarajevo incident, which sparked off World War I in Europe. Yet while is a significant risk that the conflict will result in a military confrontation, an all-out war is unlikely given economic reasons.

The Jeremiah prophets are coming out of the woodwork to predict that there will be an outbreak of war between the major powers in Asia, just like in Europe 100 years ago. The idea is that a rising China will inevitably go to war with the United States, either directly or through conflict with Japan.

Some commentators are even suggesting that the Sarajevo incident that provoked World War I will be replicated between China and Japan over the Senkaku/Diaoyu islands in the East China Sea. Former Australian Prime Minister Kevin Rudd has likened this situation to what he calls ‘a 21st-century maritime redux of the Balkans a century ago — a tinderbox on water’. My colleague Hugh White recently proclaimed that the risk of war between China and Japan is now very real.

There is undoubtedly a significant risk that China’s increasing aggressiveness in the East China Sea and the South China Sea over its territorial claims will result in a military confrontation, either by miscalculation or design. But a sunk warship or military aircraft collision is a long way from all-out war. These sorts of incidents have occurred in the past and have not escalated — for example, the North Korean sinking in 2010 of a South Korean warship, and the collision in 2001 by a Chinese fighter plane with a US reconnaissance aircraft. Unfortunately, however, a military incident between China and Japan might be more serious.

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## Ptx

#### It’s the only existential risk

Samuel Miller-McDonald 19, PhD Candidate in Geography and the Environment at the University of Oxford, “Deathly Salvation”, The Trouble, 1/4/2019, https://www.the-trouble.com/content/2019/1/4/deathly-salvation

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices.

An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive.

In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less suicidal civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows?

What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

#### It’s fast---extinction within 5 years

Dr. Jim Garrison 21, PhD from the University of Cambridge, MA from Harvard University, BA from the University of Santa Clara, Founder/President of Ubiquity University, “Human Extinction by 2026? Scientists Speak Out”, UbiVerse, 7/1/2021, https://ubiverse.org/posts/human-extinction-by-2026-scientists-speak-out

This may be the most important article you will ever read, from Arctic News June 13, 2021. It is a presentation of current climate data around planet earth with the assertion that if present trends continue, rising temperatures and CO2 emissions could make human life impossible by 2026. That's how bad our situation is. We are not talking about what might happen over the next decades. We are talking about what is happening NOW. We are entering a time of escalating turbulence due to our governments' refusal to take any kind of real action to reduce global warming. We must immediately and with every ounce of awareness and strength that we can muster take concerted action to REGENERATE human community and the planetary ecology. We must all become REGENERATION FIRST RESPONDERS, which is the focus of our Masters in Regenerative Action.

#### It makes nuclear war inevitable in every region

Dr. Michael T. Klare 20, Five Colleges Professor of Peace and World Security Studies at Hampshire College, Ph.D. from the Graduate School of the Union Institute, BA and MA from Columbia University, Member of the Board of Director at the Arms Control Association, Defense Correspondent for The Nation, “How Rising Temperatures Increase the Likelihood of Nuclear War”, The Nation, 1/13/2020, https://www.thenation.com/article/archive/nuclear-defense-climate-change/

Climbing world temperatures and rising sea levels will diminish the supply of food and water in many resource-deprived areas, increasing the risk of widespread starvation, social unrest, and human flight. Global corn production, for example, is projected to fall by as much as 14 percent in a 2°C warmer world, according to research cited in a 2018 special report by the UN’s Intergovernmental Panel on Climate Change (IPCC). Food scarcity and crop failures risk pushing hundreds of millions of people into overcrowded cities, where the likelihood of pandemics, ethnic strife, and severe storm damage is bound to increase. All of this will impose an immense burden on human institutions. Some states may collapse or break up into a collection of warring chiefdoms—all fighting over sources of water and other vital resources.

A similar momentum is now evident in the emerging nuclear arms race, with all three major powers—China, Russia, and the United States—rushing to deploy a host of new munitions. This dangerous process commenced a decade ago, when Russian and Chinese leaders sought improvements to their nuclear arsenals and President Barack Obama, in order to secure Senate approval of the New Strategic Arms Reduction Treaty of 2010, agreed to initial funding for the modernization of all three legs of America’s strategic triad, which encompasses submarines, intercontinental ballistic missiles, and bombers. (New START, which mandated significant reductions in US and Russian arsenals, will expire in February 2021 unless renewed by the two countries.) Although Obama initiated the modernization of the nuclear triad, the Trump administration has sought funds to proceed with their full-scale production, at an estimated initial installment of $500 billion over 10 years.

Even during the initial modernization program of the Obama era, Russian and Chinese leaders were sufficiently alarmed to hasten their own nuclear acquisitions. Both countries were already in the process of modernizing their stockpiles—Russia to replace Cold War–era systems that had become unreliable, China to provide its relatively small arsenal with enhanced capabilities. Trump’s decision to acquire a whole new suite of ICBMs, nuclear-armed submarines, and bombers has added momentum to these efforts. And with all three major powers upgrading their arsenals, the other nuclear-weapon states—led by India, Pakistan, and North Korea—have been expanding their stockpiles as well. Moreover, with Trump’s recent decision to abandon the Intermediate-Range Nuclear Forces (INF) Treaty, all major powers are developing missile delivery systems for a regional nuclear war such as might erupt in Europe, South Asia, or the western Pacific.

#### The combination of green infrastructure AND incentives in the broader reconciliation package cuts emissions by 50% and ignites U.S. global leadership---that sufficient to avoid the worst impacts of warming

Dan Lashof 21, Director of the World Resources Institute, and Lori Bird, Director of the U.S. Energy Program and Polsky Chair for Renewable Energy at the World Resources Institute, “How Congress Can Ensure the US Meets the Moment on Climate Change”, The Hill, 9/9/2021, https://thehill.com/opinion/energy-environment/571331-how-congress-can-ensure-the-us-meets-the-moment-on-climate-change

September will be a critical month for climate action. This month represents the best chance during the Biden administration, and perhaps the best chance this decade, to pass major climate legislation through Congress. Extreme weather events this year — including Hurricane Ida, fires in the West, the Texas ice storm, and the Pacific Northwest heatwave — demonstrate the need for urgent action on climate. Passing ambitious federal legislation now is essential to address the devastating effects of climate change at home and to re-establish U.S. leadership on the global stage.

Power plants are no longer America’s largest source of heat-trapping pollution (cars, trucks, buses and airplanes are), but clean electricity is nonetheless the cornerstone of our climate action agenda. Achieving 80 percent clean electricity by 2030 would be the most effective way to reduce emissions this decade and is also essential for powering pollution-free vehicles and buildings. The investments in power generation and grid infrastructure made over the next decade will determine our path for years to come.

Of the climate-related items included in the budget reconciliation package, the Clean Electricity Payment Program (CEPP) and clean energy tax credits provide the biggest emissions reductions. These are key provisions that will be needed to achieve 80 percent clean electricity in the next decade, as called for in the budget resolution that passed in both the House and Senate. These two policies can work in tandem: clean energy tax credits would continue to drive down the cost of clean energy technologies, while the CEPP would create demand for clean energy from utilities and other electricity providers across the country.

While we are still awaiting the legislative text for the CEPP, the broad contours of the policy are known. The CEPP is an investment-based program that incentivizes electricity providers to increase the amount of clean electricity within their territory, reaching a national average of 80 percent clean electricity by 2030. This general approach is not new — it’s a proven policy. The CEPP builds upon existing, popular clean electricity standards adopted by 30 states that have been around for two decades and have grown in ambition over time. These policies have been important drivers of renewable energy installations and have resulted in substantial cost declines in clean energy. While the CEPP proposed for inclusion in the budget reconciliation package is not a regulatory standard, it would drive the same kind of action and investments.

A well-designed CEPP would enable faster clean energy deployment over the next decade. It would provide greater investment certainty for electricity providers by establishing a target for clean energy generation, allowing for different starting points, and driving clean energy installations across all parts of the country. It would also be technology-neutral, enabling the most cost-effective technologies to be used to decarbonize the power sector. Independent modeling has found that an 80 percent clean grid could achieve substantial public health benefits — one study found it would help avoid more than 300,000 premature deaths by 2050 and save approximately $1.13 trillion in health costs, in addition to providing $637 billion in climate benefits.

To ensure that the CEPP is successful, Congress should include provisions to make sure that it applies to electricity providers across the country and covers any above-market costs of clean energy not already addressed by the tax incentives.

The CEPP should include penalties for electricity providers that fall far short of their clean electricity targets to ensure that electricity providers in all parts of the country invest in new clean energy sources while maintaining their existing clean energy portfolios. A clean energy target without a penalty could result in a shell game: Some electricity providers could choose not to try to meet their clean energy target and instead reshuffle existing clean energy generation to other companies.

In addition, the CEPP should be designed to provide incentive payments to electricity providers for the above-market costs of clean energy, so that the policy can cost-effectively work in tandem with clean energy tax credits. As the costs of clean electricity technologies continue to fall, it is difficult to anticipate how much of an incentive will be needed to meet clean electricity targets (in conjunction with clean energy tax credits). The amount will also vary on a regional basis and depend on the existing resource base of each provider. Paying only for the above-market costs will ensure that the funding devoted to the CEPP achieves the most emissions reductions possible.

While policy details may only come with a future agency rulemaking, including key provisions of the program in binding legislation will be critical for the CEPP to be durable and effective.

Congress must pass strong, ambitious climate action this fall. The string of extreme weather events we are experiencing this year in the U.S. and around the world are only the beginning if we fail to tackle the climate crisis. Climate-smart infrastructure investments and tax credits will be even more effective if combined with a methane emissions fee and a carbon tax, which is now under consideration by the Senate Finance Committee. The climate provisions of the budget reconciliation package, combined with the Infrastructure Investment and Jobs Act which passed the Senate in August, must put the United States firmly on course to cut greenhouse gas emissions at least 50 percent from 2005 levels by 2030. Doing so is essential to build the clean and resilient energy system we need to avoid the most devastating effects of climate change and to power sustainable, equitable and prosperous communities in the 21st century.

#### It stops transportation and point source emissions and accelerates the renewable transition---that creates global momentum

Kristen DelGuzzi 21, Opinion Editor and Managing Editor for Politics and The World at USA Today, Pulitzer Prize Winner, et al., “Climate Change is at 'Code Red' Status for The Planet, and Inaction is No Longer an Option”, USA Today, 8/9/2021, <https://www.usatoday.com/story/opinion/todaysdebate/2021/07/20/climate-change-biden-infrastructure-bill-good-start/7877118002/> [grammar edit]

Congress must act

Joe Biden won the presidency promising broad new policies to cut America's greenhouse gas emissions. But Congress needs to act on those ideas this year. Democrats cannot risk losing narrow control of one or both chambers of Congress in the 2022 elections to a Republican Party too long resistant to meaningful action on the climate.

So what's at issue?

A trillion dollar infrastructure bill negotiated between Biden and a group of centrist senators (including 10 Republicans) is a start. In addition to repairing bridges, roads and rails, it would improve access by the nation's power infrastructure to renewable energy sources, cap millions of abandoned oil and gas wells spewing greenhouse gases, and harden structures against climate change.

It also offers tax credits for the purchase of electric vehicles and funds the construction of charging stations. (The nation's largest source of climate pollution are gas-powered vehicles.)

Senate approval could come very soon.

Much more is needed if the nation is going to reach Biden's necessary goal of cutting U.S. climate pollution in half from 2005 levels by 2030. His ideas worth considering include a federal clean electricity standard for utilities, federal investments and tax credits to promote renewable energy, and tens of billions of dollars in clean energy research and development, including into ways of extracting greenhouse gases from the skies.

Another idea worth considering is a fully refundable carbon tax.

The vehicle for these additional proposals would be a second infrastructure bill. And if Republicans balk at the cost of such vital investment, Biden is rightly proposing to pass this package through a process known as budget reconciliation, which allows bills to clear the Senate with a simple majority vote.

These are drastic legislative steps. But drastic times call for them.

And when Biden attends a U.N. climate conference in November, he can use American progress on climate change as a mean[s] of persuading others to follow our lead. Further delay is not an option.

#### It’s a stepping stone to deeper future action

Lili Pike 21, Climate and Energy Writer for Vox, Former Reporter at Inside Climate News and China Dialogue, “3 Popular Policies Democrats Can Use To Fight Climate Change And Boost The Economy”, Vox, 2/24/2021, <https://www.vox.com/22278998/biden-stimulus-jobs-climate-change-energy-electric-cars-conservation>

Future climate action could hinge on the results of this bill

By March, the contours of the infrastructure bill should be emerging, revealing whether these initiatives and dozens of others will move forward and if they’ll be funded at a scale that will really make an impact. In the process, the messaging wars around climate policy are bound to intensify. Republican lawmakers and members of the fossil fuel industry have already criticized Biden’s moves to block the construction of the Keystone XL pipeline and pause oil and gas drilling on federal lands. Biden has tried to get in front of the “climate versus jobs” framing by instructing his administration to focus on creating a just transition. In his January 27 executive order, he committed to distributing 40 percent of the benefits from climate investments to disadvantaged communities. He also created a working group to support fossil fuel and power plant communities as the country transitions to renewables. The Republican critiques also underscore the political importance of designing climate policy that contributes to the economic recovery, and messaging that clearly to the country. “One lesson from the Obama experience was the need to sell investments in the energy economy as about economic prosperity and quality of life improvements, not about emissions reductions,” said Paul Bledsoe, a strategic adviser for the Progressive Policy Institute who previously served as director of communications for President Bill Clinton’s climate task force. Whether people see and feel the benefits of this new hybrid jobs-climate policy may be critical to the future of climate action, because Democrats will be judged on the results in 2022, and the party will need public support for climate action well beyond that.

#### Warming turns everything related to China

Wilson VornDick 15, Lt. Commander in the U.S. Navy Previously Assigned to the Chinese Maritime Studies Institute at the U.S. Naval War College, “Why Climate Change Could be China’s Biggest Security Threat”, The Diplomat, 8/14/2015, https://thediplomat.com/2015/08/why-climate-change-could-be-chinas-biggest-security-threat/

In preparation for the UN’s Climate Change Conference in Paris this November, the globe’s two largest emitters, China and the United States, have been pledging various actions to steer the world away from climate change-induced peril. Last year, U.S. President Barack Obama and Chinese President Xi Jinping reaffirmed their commitment to take-on climate change. In May, President Obama reiterated that it was a national security imperative to “combat and adapt to climate change” while addressing the U.S. Coast Guard’s graduating cadets. His remarks echo Department of Defense (DoD) analysts’ assessment that climate change is indeed a “threat multiplier” and a “global problem.” These remarks were central to DoD’s first climate change strategy, the Climate Change Adaptation Roadmap, released in 2014.

For Chinese authorities, however, no official pronouncement or linkage has been made between climate change and China’s national security that is on par with DoD’s threat assessment. But the Ministry of Defense and PLA should make this a top priority because China’s long-term security and sovereignty are at stake.

Climate Change in Chinese Security Governance

China first acknowledged climate change in its Initial National Communication on Climate Change in 2004. In the decade since, China has made significant strides in addressing climate change from issuing a Second National Communication on Climate Change in 2008, providing data and scientists to the United Nations International Panel on Climate Change, and incorporating and implementing various climate change initiatives throughout the country. Chinese security planners took a cue from the government’s lead and referenced climate change in the 2008 white paper, China’s National Defense.

The reference to climate change in the 2008 white paper is particularly noteworthy because the severe blizzards in southern China that January prompted military officials to respond. First, security planners included natural disasters as a national security threat and initiated natural disaster response as part of the PLA’s tasks. Second, the PLA set up a military committee to assess the impacts from climate change to China’s military and national security.

Climate change appeared again two years later in the 2010 white paper. However, the most recent white paper, 2015 China’s Military Strategy, does not mention climate change and it can be surmised from the white paper that climate change is now classified as a “non-traditional” security issue. But if climate change predictions are right, this “non-traditional” threat may be more menacing and lethal than China’s “traditional” threats.

Climate Change Impacts on Chinese National Security

Zheng Haibin, a professor at Peking University and a leading researcher on climate change securitization in China, believes China should do more because its security is at stake. His research indicates that climate change-induced impacts will endanger China’s national defense, strategic projects, and critical, defense-related infrastructure. Zheng’s identified several security vulnerabilities in each of China’s biomes and varied environments:

Desertification in the dry north and west will stretch already thin water supplies and wilt the ambitious and decades-old Three-North Shelter Forest Program (三北防护林) or “Green Great Wall.” As temperatures increase in the west, thawing permafrost will buckle hundreds of miles of the newly constructed, multi-billion dollar Qinghai-Tibet Railway jeopardizing the safety and the continuity of this strategic link to Tibet.

The increasing frequency of extreme weather conditions, such as flooding, drought, and cyclones, will degrade or compromise a variety of critical and security-related infrastructure across China. Heavy rainfall in the mountainous areas could trigger mudslides and landslides that would render useless numerous fixed missile launch sites utilized by the Second Artillery Corps (第二炮兵部队), China’s strategic missile force. Large swings in water levels and river runoff could substantially reduce the effectiveness of Three Gorges Dam, while farming capacity could fall 5 to 10% by 2030. The uptick in cyclone activity over the last decade along the Chinese coastline has caused extensive damage, restricted PLA training, and degraded combat effectiveness. Even the new Chinese-Russian oil pipelines stretching across China’s vast interior could be in jeopardy from extreme weather patterns.

With more than 11,185 miles of coastline, 6,700 islands, and China’s largest economic and population centers in littoral and maritime areas, climate change-induced sea-level rise may be China’s principal threat. Specifically, sea-level rise will cause significant coastline retreat, large-scale ecological damage, salinization of freshwater sources, and reset maritime boundaries. This will directly impact strategic energy corridors, maritime rights, and fisheries.

In response, Zheng proposed a holistic approach for climate change securitization in 2009 to include forming a national leading group to address climate change and strengthening coordination between the army, national security agencies, and local decision-making bodies.

A few Chinese military analysts share Zheng’s concerns and sounded the alarm on climate change in a 2011 study. Internally, the study determined that climate change will exacerbate current Chinese socioeconomic issues by lowering China’s quality of life, stretching limited resources, and increasing internal migrations. Externally, the study found climate change will increase geopolitical pressure and regional instability with China’s neighbors. It concluded that the cumulative effects from climate change will threaten the Chinese Communist Party (CCP) and impair Chinese sovereignty.

China Should Securitize Climate Change Now

Yet, despite these calls for action, Chinese authorities either do not see or fail to acknowledge the threat from climate change. But China should begin the process of intertwining climate change preparation and response into its broader national security framework (otherwise known as securitizing) now. If China does not act, it will not be able to prepare, respond, or adapt to the impacts from climate change as effectively as it could. This would be a disastrous choice for the CCP and the Chinese people.

#### Afghanistan won’t derail infrastructure

Thomas Gift 9-7, Associate Professor of Political Science at UCL and Director of the Centre on US Politics (CUSP), “Biden’s Mishandled Afghanistan Withdrawal is Unlikely to Have a Large Effect on the 2022 Midterms”, London School of Economics, 9/7/2021, https://blogs.lse.ac.uk/usappblog/2021/09/07/bidens-mishandled-afghanistan-withdrawal-is-unlikely-to-have-a-large-effect-on-the-2022-midterms/

Will perceptions of Biden’s botched Afghanistan withdrawal thwart his domestic agenda?

It’s possible to overstate how much recent events in Afghanistan will shape what Biden can achieve legislatively at home; any effects will be case-specific. It’s still much more likely than not that the $1 trillion infrastructure bill that’s already passed the Senate will become law, which only requires that Democrats vote along party lines in the House. But Biden’s additional $3.5 trillion spending proposal—which was already going to be a tough sell for the White House to pass through reconciliation in ideal circumstances—might become even less likely. That’s a bill that that’s jam-packed with progressive wish-list items, including on clean energy, family leave, housing, and pre-K schooling. Some Democrats, particularly from swing districts and moderate states, would’ve been reluctant to vote for that bill anyway. But Biden’s diminished political stature might give those lawmakers even more pause about toeing the party line. In fact, there’s already evidence of this hesitation, with West Virginia Senator Joe Manchin demanding a “strategic pause” on the bill, which should concern the White House.

#### 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.

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

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

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

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

Two to go

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

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

Meanwhile, on Capitol Hill …

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

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

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

So, what does it all mean?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New look at the top

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

#### Even if popular, it requires difficult battles for floor time

Paul H. Sukenik 19, JD from the University of North Carolina School of Law, BA in Government and History from the University of Virginia, “The Earth Belongs to the Living, or at Least It Should: The Troubling Difficulty of Modifying Antitrust Consent Decrees”, North Carolina Law Review, Volume 97, Number 3, 97 N.C.L. Rev. 734, March 2019, Lexis

Even if a party were to convince enough lawmakers of its proposed legislation, those lawmakers would still need to wait for the opportune time to introduce the bill to ensure that it gets passed. That timeline could be at the mercy of the current partisan makeup in Congress or many other factors. In that sense, subjecting antitrust regulation to the political process would only magnify Konczal's concerns about certainty and finality.

#### That derails the bill---it must pass by 9/27 or support will crumble

NLR 9-10 – National Law Review, “September Congressional Preview”, Volume XI, Number 253, 9/10/2021, https://www.natlawreview.com/article/september-congressional-preview

SEPTEMBER PREVIEW: September projects to be an incredibly contentious and potentially momentous month in Congress. Congress has a slew of important issues that it must address, needs to address or wants to address before September 30, which is the end of the federal government’s fiscal year. This preview focuses on health policies and associated bills, recognizing that other priorities may also take Congress’ time in September, including the recent Supreme Court decision striking down the eviction moratorium and withdrawal from Afghanistan.

Must address:

To avoid a government shutdown, Congress must pass and the president must sign some form of government funding bill, likely a continuing resolution (CR), prior to the September 30 fiscal year deadline. Otherwise, a government shutdown begins October 1.

Needs to address:

The House needs to a have floor vote on the Senate-passed bipartisan infrastructure bill by September 27, because it committed to that date as a key concession to obtain the votes of 10 moderate Democrats to pass the budget resolution. Failure to meet that deadline is likely to negatively affect Democrats’ ability to move the budget reconciliation bill, which will contain their “human infrastructure” priorities not included in the bipartisan package.

#### 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.

#### 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.