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#### The plan spills over, decimating business confidence and overall economic recovery

Trace Mitchell 21, Policy Counsel at NetChoice, JD from the George Mason University, Antonin Scalia Law School, Former Research Associate at the Mercatus Center at George Mason University, BA in Political Science and Government from Florida Gulf Coast University, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea”, Morning Consult, 3/3/2021, https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Decline cascades---nuclear war

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

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States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should increase prohibitions on false advertising by applying a presumption that monopolists engaging in false advertising violate antitrust law and are subject to Penalty Offense Authority enforcement by the Federal Trade Commission.

#### 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]

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T-Core

#### The ‘core’ antitrust laws are Sherman, Clayton, and FTC

Michael A. Rataj 21, PC, Law Degree from the Detroit College of Law, “Consequences for Breaking Antitrust Laws”, 5/12/2021, https://www.michaelrataj.com/blog/2021/05/consequences-for-breaking-antitrust-laws/

The core antitrust laws are…

The three core antitrust laws are the Sherman Act, the Federal Trade Commission Act and the Clayton Act. The Sherman Act primarily prohibits unreasonable restraint of trade and monopolization. Those who are in violation of the Sherman Act may face hefty fines, up to $100 million, and up to 10 years behind bars.

The FTC Act prohibits unfair practices or acts and unfair approaches to harming competition. Only the FTC can file cases under this act. The Clayton Act is a catch-all that covers every practice not covered by the Sherman and FTC Acts. Then consequences for violations of both of these acts are usually civil in nature.

#### The aff is the Lanham Act.

Shubha Ghosh 18, Crandall Melvin Professor of Law and Director of the Syracuse Intellectual Property Law Institute at the Syracuse University College of Law, “The Antitrust Logic of Biologics,” University of Illinois Law Review, 2018, accessed via HeinOnline

In a typical case involving biologics, one company has created biosimilars on several innovative means of medical diagnosis or treatment. The innovative company, however, seeks antitrust review of several disparaging statements about the inventions that were found to be acts of false advertising under the Lanham Act. Instead of seeking shelter under a settlement agreement, a disparaging company seeks immunity from antitrust review on the grounds that product disparagement cannot be anticompetitive. The Fifth Circuit would affirm this erroneous argument by ruling that "absent a demonstration that a competitor's false advertisements had the potential to eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie."" In Becton Dickinson, the RTI case, the Fifth Circuit further concluded: "a business that is maligned by a competitor's false advertising may counter with its own advertising to expose the dishonest competitor and turn the tables competitively against the malefactor. Far from restricting competition, then, false or misleading advertising generally sets competition into motion." 2 () Thus, the Fifth Circuit has adopted a shelter from antitrust scrutiny based in the Lanham Act analogous to the shelter created under patent law overturned by the Supreme Court in Actavis.

#### Vote neg:

#### Limits---the Big 3 sets a manageable, predictable case list, without devolving into countless secondary laws. Those overstretch research, making in-depth preparation impossible.

#### Ground---it locks in DAs about the FTC and DOJ, plus core literature about the primary antitrust law.

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Antitrust PIC

#### The United States federal government should

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#### ---prohibit monopolists engaging in false advertising;

#### ---increase its funding for the research and development of biosimilar drugs

[Plank 2]

#### ---establish a federal permitting scheme for biosimilars;

#### ---prohibit the use of suffixes for biosimilars;

#### ---prohibit preferences for biosimilars;

#### ---reform Medicare Part B to establish a shared savings model for biologics;

[Plank 3]

#### ---amend Section 13(b) of the FTC Act to allow recovery of monetary damages for unfairness and deception claims.

#### Regulation solves without ‘antitrust’

Dr. Howard Shelanski 18, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust and Deregulation”, The Yale Law Journal, Volume 127, Issue 7, 127 Yale L.J., May 2018, https://digitalcommons.law.yale.edu/ylj/vol127/iss7/5/

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

#### Regulation incentivizes the use of biosimilars AND overcomes false advertising.

Cynthia M. Ho 21, Clifford E. Vickrey Research Professor, Loyola University Chicago School of Law, "Biosimilar Bias: A Barrier to Addressing American Drug Costs," SSRN, 08/20/2021, pg. 44-52.

This section begins with suggesting reversal of the most significant structural changes that are unduly perpetuating bias as likely most significant to achieving change. This includes both changing existing oddities in US law that unduly suggest skepticism against biosimilars. Even if this is not possible immediately, a critical component to minimize bias against biosimilars and increase usage is appropriate education of doctors to hopefully reduce illogical biases against biosimilars that they can then help to reduce in patients. Lastly, this section recommends financial incentives promote biosimilar usage. Although financial incentives have had a major impact with promoting generic use, this is considered last because the nocebo (negative) effects are likely stronger with generics such that financial incentives alone will not necessarily have desired outcomes without educating doctors on the existence of nocebo effects and how to reduce them.

1. Removing Structural Biases and Barriers in Existing Laws

Two unusual structural impediments to biosimilar use lie with unique US regulatory approaches to treatment of biosimilars. The US has taken a different approach from all other nations by creating a separate designation to permit biosimilars to be automatically substituted by pharmacists, and even with the nonproprietary naming of biosimilars. Given that countries like the EU have broader acceptance and adoption of biosimilars, removing these impediments seems like a helpful first step.295 This section acknowledges that changing the status quo is challenging, especially since pharmaceutical manufacturers were a key stakeholder in negotiating the current laws and have shown substantial lobbying power in creating restrictive state laws limiting substitution. Nonetheless understanding what would be ideal can still be valuable in recognizing that the current structure is promoting bias and could be harnessed in education efforts as discussed in the next section.

a. Addressing Interchangeability

An important issue is to ensure the interchangeability designation functions as it was originally intended to do in promoting biosimilar use, rather than current misperceptions that any biosimilar that is not interchangeable is suspect. Although there are few countries that have laws to promote pharmacy substitution of lower cost biosimilars, most other countries have more effective mechanisms to promote biosimilar use. For example, some countries impose quotas on doctors to promote biosimilar as well as generic use. Other countries may require biosimilar use because the national health care system elected to purchase the cheaper biosimilar. Given these other levers, pharmacy substitution may not be as important in other countries but is important in the US where these levers do not exist and are unlikely to exist.

There are two possible ways to address systemic barriers to use of interchangeable biosimilars, one of which would be faster, although more challenging to implement. The ideal way to dismantle current barriers to biosimilar substitution is to create a federal mechanism for permitting substitution of biosimilars that would override state laws, including rules that would promote, rather than limit usage, such as barring patients from the right to object to substitution. 296 A federal system for substitution would not replace the existing scheme for evaluating what is interchangeable at the pharmacy level. However, it would importantly avoid the current hurdles that brand biologic companies have helped enact in state laws. Brand biologic companies are of course likely to object to anything that would dismantle laws they created. Accordingly, the second approach is a piecemeal one. As the history of generic state substitution laws show, it is also possible to change such laws over time on a piecemeal basis. Notably, that history indicates that a strong coalition of competing forces may be necessary to prompt change, along with financial imperative. A financial imperative should be obvious given that biologics comprise a disproportionate part of expenses while constituting a minority of drugs – especially since more biologics are likely to enter the market and further increase financial strains. Perhaps with appropriate education of doctors as well as consumer groups with aligned interests, state laws to better promote substitution of interchangeable biosimilars would be possible.

b. Suffixes for Biosimilars

Whereas the interchangeability designation is difficult to change, it should be easier to modify the existing US regulation concerning distinct suffixes for the nonproprietary name of all biosimilars given no need for Congressional action and the lack of a robust reason for this procedure. The origin of distinct names is tied to industry lobbying asserting that this helps ensure safety.297 Subsequent FDA guidance similarly alleged suffixes could improve pharmacovigilance. However, this is contrary to real life data. The EU, for example, does not use suffixes and has not had any trouble with tracking of biosimilars by using brand names in conjunction with other identifiers such as batch number.298 Moreover, despite the FDA claim that unique suffixes help with tracking adverse reactions, less than one percent of reported adverse reactions actually use the suffix; rather, virtually all reports are based on the brand name, as is the case in Europe.299 The FDA seemed to see the fallacy of different names when it briefly suggested suffixes for all biologics, including retroactively applying them to originator biologics.300 However, current FDA guidance now reflects brand manufacturer claims that there is an undue burden to retroactive suffixes.301 This argument is not compelling. Even if there is a financial cost to changing suffixes, the overall economic cost of bias against biosimilars should be more strongly weighted considering that annual savings of two to seven billion from greater use of biosimilars would dwarf the one-time cost of changing product names.302

Jettisoning use of suffixes for all biologics would seem ideal. If this is not possible, having suffixes associated with the manufacturer would better parallel the system with generics where the generic has the same nonproprietary name, but pharmacists can distinguish between generics of different manufacturers. Indeed, pharmacists currently have trouble associating the random suffixes that the FDA requires with specific biosimilars, which is likely because the meaningless suffix makes it hard to remember. 303

At a minimum, it would be desirable for at least interchangeable biosimilars to share the same identical proprietary name, including the same suffix.304 Since the FDA only grants an interchangeable designation to a biosimilar that can be substituted by a pharmacist due to extensive data on safety of multiple switches, the same name would underscore that such biosimilars can be substituted in the same manner as generics. Admittedly, this would require that a biosimilar’s nonproprietary name would change once the biosimilar is deemed interchangeable. The FDA asserts that it might cause unnecessary confusion if a biosimilar was later deemed interchangeable and needed a name change.305 However, this ignores the fact that distinct nonproprietary names already cause undue confusion and bias against biosimilars. Moreover, a name change for an interchangeable biosimilar would serve an important signaling function to all about its changed status.

2. Enlightened Education in View of Bias and Nocebo effect

Even if existing US structural barriers to biosimilar use are not eliminated, biosimilars can nonetheless be promoted with appropriate education that is cognizant of bias against biosimilars. Notably, although many have suggested that education of doctors and patients is important, the type of education is critical. As discussed earlier, accurate facts do not necessarily change views since cognitive biases can distort how facts are perceived. Moreover, there is an additional layer of complication with biosimilar bias. Considering that biosimilars treat more serious conditions, patients who are switched to a biosimilar could likely experience a nocebo (negative) effect.306 So, patient education must be carefully tailored to reduce this effect. In addition, before patients are educated, doctors must be disabused of concerns about biosimilars.

Doctors are the starting place for improving knowledge about biosimilars to reduce illogical bias. Although there can be misperceptions among patients and payors, doctors are influential with both groups. Many patients are willing to switch from a brand to biosimilar if advised by a physician.307 Even payors are sensitive to doctor preferences; some have suggested that insurers thus far have been resistant to preferring biosimilars because of strong doctor aversion to switching stable patients.308 In addition, once doctors are familiar with biosimilars, they may adopt subsequent ones more easily.309

The first thing to educate doctors on is that all biosimilars – even if not designated interchangeable – are safe and effective. It may be helpful to educate doctors on the long history of biosimilar use in Europe, as well as rigorous clinical trials establishing safety and efficacy. Moreover, doctors should be informed that the “interchangeable” designation is a unique US designation to promote greater use of biosimilars, rather than signaling a problem and that this designation does not exist in other countries because they have other levers to promote biosimilar use inapplicable to the US, such as government purchasing of lower cost biosimilars for all. In other words, the apparently effective campaigns of companies that the interchangeability designation is critical must be countered.

Another important component for doctor education is that it is safe to switch patients currently on a brand biologic to a biosimilar. Studies have repeatedly noted that it is impossible to substantially reduce overall costs if only new patients are switched to biosimilars who will be the minority of total patients; existing patients must also be switched.310 However, current bias against biosimilars coupled with advertisements that repeatedly caution against “nonmedical switching” are likely contributing to hesitancy along with cognitive bias in favor of maintaining the status quo for fear that anything new will be worse. Indeed, one study revealed that including the term nonmedical switching in a survey question changed doctor willingness to switch patients. This is not surprising since the term suggests that a biosimilar would be used when it is not medically appropriate, as opposed to using a biosimilar that is just as medically appropriate, but more cost effective than the originator biologic.311 In fact, some have commented that the term is improperly used in the context of biosimilars since it traditionally has referred to when insurers require a change to a drug that is therapeutically equivalent, but different in its structure; in other words, switches from brand to equivalent generic have never been considered nonmedical switching.312 In addition, although marketing and materials from some patient advocate groups emphasize a list of problems that could happen from switching from brand to biosimilar, those same problems could happen without any switch, but, rather, due to the fact that each batch of biologics, even if from the same manufacturer, is not identical. Moreover, there is both empirical evidence of safe switching, as well as real life data from other countries showing that switching is safe that has persuaded some countries to mandate switching to biosimilars to maximize access to expensive biologics.313 This fact needs to be impressed upon doctors, as well as that recent guidance from many doctor groups in Europe trends towards greater biosimilar use, even for patients that are currently stable on a biologic. In addition, perhaps a different term should be used such as “safe switching” to promote the idea that switching is safe, or at least neutrally referring to it simply as “switching,” which some academic articles do.314

A critical component to doctor education that has not been acknowledged by the FDA or most commentators is that doctors need to be educated on the nocebo effect to minimize it.315 Most fundamentally, doctors need to know that this phenomenon takes place, as well as how doctor-patient communications and even nonverbal gestures can prompt a nocebo effect. Importantly, even just one occasion of negative information can have long-lasting effects in terms of nocebo effects.316Of course, informing doctors about the nocebo effect and how to eliminate it will only be effective if doctors in fact do not have undue bias against biosimilars themselves. However, assuming this is true, doctors should be informed of specific strategies that can help reduce nocebo effect generally, as well as with biosimilars. 317

How information is disclosed – or not disclosed– to patients seems to have an important impact on perceptions, and subsequent nocebo effects. One Dutch study indicated that improved communication, including clearly informing patients about the reason for a switch to a biosimilar, together with “soft skills” such as training to address patient concerns and openly discussing possible nocebo effects, can result in higher patient acceptance and persistence.318 Beyond the nascent biosimilar context, there is evidence showing that negative framing may prompt nocebo effects319 whereas positive framing can have positive effects. A balanced approach seems to be to focus on a positive framing rather than just lists of all adverse effects.320 Positive framing would focus on similarities in safety and efficacy, rather than simply lower cost; this is important since patients sometimes improperly assume lower cost is associated with inferior products. 321 Indeed, one study found those in a positive framing group were more than two times more likely to switch to a biosimilar, as well as an increased perception that biosimilar would be effective. 322 In addition, educating patients on the fact that differences between a biologic and biosimilar is essentially similar to differences between different batches of brand biologics is also suggested as helpful to promoting patient acceptance.323 Moreover, providing education orally, as well as in writing, is recommended. 324

In terms of how to educate doctors, a broad-based effort is important. To address the availability bias that has been promoting brand biologic views, the education effort must be substantial enough to make it equally available. This would require far more than FDA guidance which is not as available as advertisements. However, the same techniques that work to promote brand name drugs can be used to properly educate doctors. As one example, studies have shown success with so-called “academic detailing” of generic drugs where doctors are visited and provided information on generics to counteract advertising of brand drugs.325 In addition, just as European groups of doctors in particular areas have adopted consensus statements promoting use of biosimilars, so too US doctors could establish similar statements, and before those statements take effect, at least promote existing statements from their European peers with more experience.326

In addition, just as a coalition of interest groups helped to promote generic usage, incorporating groups beyond the FDA interesting in promoting biosimilar use would also be valuable. It would be ideal if patient advocacy groups could provide similar education. Not only could patient advocacy groups make information promoting biosimilars more available to counteract marketing from brand biosimilars, but these groups are often especially trusted by patients. Studies focused on debunking misinformation indicate more success when information is presented in a way that aligns with personal beliefs or partisan identity.327 Patients may feel such groups represent their interests and thus be more amenable to their positions like partisan identity. 328 Admittedly, it may be challenging to persuade patient advocacy groups to promote biosimilars since many of them are aligned with brand biologic interests. Even if patient advocacy groups are not readily amenable, there could be other entities with an interest in promoting biosimilars such as AARP which did also help to promote generic use.

A financial issue to help promote availability of messages concerning biosimilar use would be to simultaneously reduce availability of inaccurate messages from brand biologic manufacturers. Beyond the FDA taking more direct action to immediately correct messages, additional steps could be taken to further eliminate some current structural oddities that seem to incentivize corporate mismarketing. As just one example, Congress could remove tax deductions that currently apply to direct-to-consumer advertising, and instead apply taxes on spending on direct to consumer broadcast advertising.329

3. Financial Incentives

Last, but not least, financial incentives should promote biosimilar use in a manner similar to what has worked with generics, rather than the current situation which promotes the originator.330 Of course, how to do so is much more complex than generic drugs given that biologics are provided not only by pharmacists, but doctors as well. However, there are three different and complementary ways to realign incentives that include disincentivizing rebates that favor the originator biologic, providing financial incentives to doctors and patients to use biosimilars.

a. Incentivize Biosimilar Coverage

One of the most obvious steps is to prevent payors from requiring patients to fail first on the brand biologic before access to a biosimilar.331 Just as generic drug use has been promoted with tiered formularies that provide substantially reduced and even zero co-pays for generics, a similar framework would be helpful to promote use of biosimilars. At a minimum, it would be desirable to bar preference for brand biologics in formularies. While contrary to most existing practice in the US, one proposed state bill aims to do this.332

There is also a need to address the rebate trap that results in insurers preferring brands to increase their profits. Addressing rebates is likely complex since a Trump administration rule to bar rebates for Medicare, 333 currently on hold, 334 was suggested to actually increase premiums since insurers could allegedly provide lower premiums due to the rebates.335 Although exploring the details of how to minimize rebate use is beyond the scope of this Article, it seems clear that banning rebates as anticompetitive would be desirable.336

Given the diversity of private payors, starting with Medicare reform first makes sense since some private insurers take cues concerning coverage from Medicare. In addition, the need to amend Medicare to better align incentives is something that is already recognized by some policy makers as helpful; 337 indeed, Congress has already modified some Medicare benefits to promote biosimilars dispensed at pharmacies.338 Although beyond the scope of this Article, states could also seek waivers from typical Medicaid coverage to try different strategies, including the suggestions below, or alternatively, something akin to what has worked for Kaiser and/or in Europe.339

b. Promoting Biosimilars through Medicare Modification

Biosimilars could be promoted by modifying Part B of Medicare that addresses the many biologics administered in health care provider offices. There are proposals to modify the law.340 Based on structural changes that have been effective globally, permitting a shared savings model for physicians whereby they receive a portion of the difference between the average sales price of the brand biologic and biosimilar – in addition to standard payments – could be helpful. After all, shared savings have been effective in other countries. One wrinkle is that there are no rebates in other countries. However, this issue could also be addressed by excluding discounts from brand biologics when considering reimbursement.

Medicare Part D could be modified to promote biosimilars. Just as formulary tiers helped promote usage of generics, a formulary tier could financially preference the biosimilar over brand biologic.341 In addition, requiring plans to add biosimilars to formularies as soon as they come on the market and removing step therapy requirements would also promote biosimilar use. Medicare could follow Kaiser’s success in promoting biosimilars by only covering one biosimilar for every biologic, although this may require a change in the law since it currently requires two drugs per class, with biosimilars not considered a different drug.342 This would likely be most successful if coupled with a patient incentive, such as zero patient copay for biosimilars.343 Another possibility would be a specialty tier for generics as well as biosimilars to promote cost sharing.

Conclusion

The successful and safe use of more cost-effective biosimilars to treat more patients is an important, yet, thus far, elusive goal. This Article provides an important contribution to the literature by identifying the extent of existing bias against biosimilars, as well as how structures in US law, policy, and even private insurers are unduly perpetuating this bias and thus barring broader US adoption of biosimilars. Minimizing bias is likely difficult and especially so given that the current status quo favors brand biologic manufacturers. Nonetheless, this Article provides multiple mechanisms to modify bias and to change existing structures to effectively nudge desired action.

### 1NC

Aerojet DA

#### The Lockheed-Aerojet merger will be approved soon because of existing antitrust precedent, but it’s a politicized test of the FTC

Marcus Weisgerber 21, Global Business Editor at Defense One, “Lockheed’s Proposed Aerojet Rocketdyne Purchase Sets Early M&A Test for Biden”, Defense One, 3/21/2021, https://seniordownsizingsolutions.com/rs1kstuq/frank-kendall-northrop-grumman

The Biden administration’s approval — or disapproval — of Lockheed Martin’s planned $4.4 billion acquisition of rocket engine maker Aerojet Rocketdyne could shape defense industry consolidation for years to come.

If approved, the deal would mean the absorption of the last independent American weapons-grade rocket maker. All U.S. rockets would be produced by Northrop, which bought Orbital ATK in 2018, and Lockheed, the world’s largest defense contractor. It would also turn Lockheed into a key supplier of Raytheon Technologies, its major rival in the missiles sector.

Lockheed executives told investors on a Monday morning call that the acquisition would allow the company to deliver weapons to the military faster and cheaper than it can today.

“This helps position us for even greater growth, in hypersonics, missile defense and space, which are key elements of the national defense strategy,” Lockheed CEO Jim Taiclet said.

Taiclet, who became Lockheed’s CEO in June, also cited flat U.S. defense spending projections as a reason for the sale.

“They're going to be asked to do more in these areas with a flattening budget,” Taiclet said. “Having a more efficient supplier and a more robust supplier ... in uncertain economic times is a positive for the Department of Defense and for NASA.”

The proposed deal — which is expected to close in late 2021 — comes two years after Northrop Grumman acquired rocket maker Orbital ATK, a deal stoked industry consolidation fears. The Federal Trade Commission put conditions on the deal that Northrop had to supply solid rocket motors to competitors.

“Our overall expectation is that that may be the same lens through which this particular transaction is viewed because of the similarities there,” Taiclet said.

Still, Boeing claimed Northrop’s buying Orbital ATK prevented it from entering a bid for an $85 billion contract to build new intercontinental ballistic missiles. That left Northrop as the only bidder.

Orbital ATK, now part of Northrop, and Aerojet Rocketdyne are the only two U.S. makers of the solid rocket motors used in ICBMs and missile interceptors.

“The proposed purchase of Aerojet Rocketdyne (AJRD) by Lockheed Martin (LMT) is the first test of the Biden Administration and its views on defense sector consolidation and structure,” Capital Alpha Partners analyst Byron Callan said in a Monday note to clients. “It may take weeks and months before those views are known.”

Loren Thompson, a consultant and defense industry analyst with the Lexington Institute, said Lockheed’s acquisition of Aerojet would create more competition for solid rocket motors.

“Aerojet Rocketdyne will now have the same kind of financial resources to draw on as Orbital did when it joined Northrop, assuring that both domestic suppliers of large solids can remain active in military and civilian markets,” Thompson wrote Monday in Forbes.

A number of government organizations — including the Defense Department — are involved in the regulatory approval process. When Lockheed acquired helicopter-maker Sikorsky in 2015, Frank Kendall, who served as the Pentagon’s top weapons buyer during the Obama administration, expressed concerns that the deal would reduce competition. Kendall is reportedly under consideration to become Biden’s deputy defense secretary.

#### The plan causes compensating denial of the deal

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Fordoohar, a journalist who covers the tech sector, stated: "But monopoly policy in America is currently driven by "Chicago School" thinking, which espouses the idea that as long as consumers aren't paying too much for a good or service, all is well." In August 2020, Joshua Brustein, a business journalist, said: "For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action."

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases. Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors and transactions [\*92] in the health care sector.

[FOOTNOTE] See, e.g., Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry (Apr. 12, 2016) ("In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security. . . ."); Daniel L. Rubinfeld & John Haven, Innovation and Antitrust Enforcement, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department's challenge to Lockheed Martin's effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX, 27 GEO. MASON L. REV. 863, 867-68, 899-900 (2020) [hereinafter Competition Policy Retrospective] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers). [END FOOTNOTE]

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that "during the Reagan years, there was no enforcement whatsoever" against attempts to monopolize and monopolization. At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency "there has been no enforcement" of Section 2 of the Sherman Act.

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.

In May 2018, Senator Richard Blumenthal and Professor Tim Wu [\*93] authored an op-ed piece that recited similar statistics: "Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three."

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called "no enforcement whatsoever". The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called "no enforcement." From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year - a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu ("about 15 cases each year") and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).

[\*94] INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that "U.S. federal merger enforcement ground to a halt." In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration "did not block any major mergers."

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt. The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the "no enforcement at all" amount claimed by Professor Pitofsky, Professor [\*95] Goldschmid, and Judge Wood. During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production) and United Airlines/US Airways (airline transportation services). Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as "major" mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that "antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally." The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement [\*96] policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp. The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service. The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity." Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed [\*97] the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the Calvani Hospital Corp. decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases - the first time the Commission had won three straight cases before the high court since the 1960s - or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008. An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytyc and Digene. The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored [\*98] innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors. The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.

Diagnosing the Obstacles to Litigation Success and Overcoming Them. A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful Rambus case, the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision ( NYNEX Corp. v. Discon, Inc. ) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits. The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build [\*99] upon litigation successes such as McWane, Inc. v. FTC, where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases. If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study McWane - to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions. It is doubtful that what Professor Melamed calls two largely disconnected "conversations" can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student's work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive [\*100] Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails. The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority. Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes - for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes. In short, one loses the ability to develop a [\*101] better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

#### Blocking the merger obliterates containment of hypersonic threats from Russia and China

Don Nickles 21, Chairman and CEO of The Nickles Group LLC, Former United States Senator, Former Director of Chesapeake Energy and Valero Energy, Degree in Business Administration from Oklahoma State University, “Why Lockheed's Acquisition of Aerojet Will Be A 'Boon for U.S. Innovation'”, Politico, 3/22/2021, https://www.politico.com/news/2021/03/22/lockheed-aerojet-acquisition-477491

The proposed acquisition by defense prime contractor Lockheed Martin of propulsion provider Aerojet Rocketdyne is facing some criticism due to alleged concerns that it would give Lockheed an unfair competitive advantage on missile and missile defense contracts.

Raytheon Technologies in particular has publicly complained that the combination would leave it dependent on a direct competitor for much of the propulsion in its missile offerings. Indeed, Aerojet Rocketdyne is a supplier of solid rocket motors and also is a source of defense technologies including hypersonic engines and the propulsive Divert and Attitude Control System that steers missile defense kill vehicles.

Such concerns ignore the important benefits, including the increased competition, which will result from this merger. And, Lockheed Martin has made it clear that Aerojet Rocketdyne will remain a merchant supplier, so these benefits will flow to all customers, including the U.S. government.

More importantly, the Lockheed-Aerojet merger will be a boon for U.S. innovation and competitiveness at a time when it faces growing threats from increasingly capable adversaries like China and Russia.

There are significant national advantages to bringing Aerojet Rocketdyne under the corporate roof of a prime contractor with $65 billion in annual revenue. Broadly speaking, it will provide financial stability for the propulsion provider while making more resources available for research and development in key technology areas.

As a stand-alone company with $2 billion in annual revenue, Aerojet Rocketdyne’s financial fortunes are tied to a few large programs that are subject to shifting political winds and the whims of prime contractors. A large program cancellation or a prime’s decision to change suppliers could substantially weaken the company, leaving it vulnerable to a takeover on unfavorable terms.

A well-resourced defense contractor like Lockheed Martin, by contrast, could be expected to invest in Aerojet Rocketdyne’s core propulsion capabilities. One area likely to see substantial investment is hypersonic weaponry, where the nation by some estimates has fallen behind Russia and China.

Moreover, by bringing a key link of its supply chain in house, Lockheed Martin will be positioned to offer better prices to its government customers and the transaction also will lead to efficiencies and innovation that will benefit the whole industry.

Such national benefits are not unique to the proposed Lockheed Martin-Aerojet Rocketdyne deal. Consider, for example, what United Technologies Corp. said in announcing its planned merger with none other than Raytheon, a deal which closed last year:

"By joining forces, we will have unsurpassed technology and expanded R&D capabilities that will allow us to invest through business cycles and address our customers' highest priorities,” said then-UTC chair and CEO Greg Hayes, who now sits at the helm of the combined company. “Merging our portfolios will also deliver cost and revenue synergies that will create long-term value for our customers and shareowners."

One of the public comments about the Lockheed Martin-Aerojet Rocketdyne deal is rooted in a commonly held assumption that vertical integration, in which primes take ownership of supply chains, stifles competition by giving these companies excessive marketplace clout. That view is myopic, especially in industries that are highly dynamic such as the defense industry.

Consider the case of United Launch Alliance, the Boeing-Lockheed Martin joint venture that until about a decade ago had a de facto monopoly on the business of launching operational U.S. government satellites. That monopoly was toppled by SpaceX, which builds some 85 percent of the components for its Falcon rockets, notably the engines, in house.

Experts have long cited SpaceX’s vertically integrated structure as the source of the company’s competitive strength, in large part because it eliminates supply chain profit margins. SpaceX founder Elon Musk has applied the same in-sourcing strategy in building up his Tesla electric car company, which has put U.S. industry at the forefront of a global trend in automobile manufacturing.

Vertical integration has been a fact of life in the aerospace and defense industry since the early 1990s, when the end of the Cold War triggered a wave of consolidation that continues today. On the propulsion side, a flurry of activity over a three-year period starting in 2001 reduced the number of U.S. solid rocket motor providers from five to just two: Aerojet Rocketdyne (then known as Aerojet); and ATK.

That situation lasted until 2014, when ATK merged with rocket and satellite maker Orbital Sciences Corp. to create the vertically integrated Orbital ATK. Less than five years later, Orbital ATK was acquired by aerospace and defense giant Northrop Grumman, a direct competitor to Lockheed Martin with nearly $37 billion in annual revenue.

Already the dominant supplier of large-diameter solid rocket motors, ATK can now draw on the resources of Northrop Grumman to advance its capabilities and boost competitiveness. Northrop Grumman recently won the prime contract for the nation’s next-generation ICBM, the Ground Based Strategic Deterrent, ensuring a healthy workload for its solid rocket motor business for years to come and ratcheting up the competitive pressure on Aerojet Rocketdyne.

As it happens, Northrop Grumman tapped Aerojet Rocketdyne for a smaller but significant role on its GBSD team, demonstrating that primes will join forces with competitors when it makes business sense.

Perhaps a better example — one that directly refutes assertions that competition requires subcontractor independence — is Northrop Grumman’s role in the Space Force’s all-important launch services program, where it supplied solid rocket motors for ULA’s Vulcan rocket even as it vied for that business with its own OmegA vehicle. In a similar vein, Blue Origin’s entry into that competition with its New Glenn vehicle didn’t stop it from supplying the main engine for Vulcan, which ultimately won the biggest share of launches.

The defense industry is replete with examples of companies supplying hardware and technology to rivals, even for programs where they compete head-to-head. Another relevant example: Raytheon in 1998 won a lucrative contract to supply missile defense kill vehicles incorporating DACS technology that at the time was supplied by Boeing — a competitor for that same contract.

For acquisitions that raise questions about access to critical capabilities, government regulators sometimes require consent decrees that commit the buyer to make these technologies available to competitors at market rates and to wall off proprietary information they might obtain in the process. In recent years, antitrust agencies have not shied away from investigating and enforcing compliance with consent decrees, including in the defense industry. There is no reason to think that would change in the future.

Some observers view the Lockheed Martin-Aerojet Rocketdyne merger as an early test of the Biden administration’s antitrust enforcement policies, and regulators will no doubt scrutinize it thoroughly to ensure competition is preserved. But there’s much more at stake here: This is about how the administration intends to deal with growing threats posed by peer and near-peer adversaries, who have eroded many of the technological advantages this nation has long taken for granted.

If the U.S. is to retake, and maintain, the lead in areas like hypersonic weaponry, a healthy and vibrant propulsion industry featuring players competing on a level playing field is essential. Regulators and policymakers should view this merger through that lens and render their decision accordingly.

#### Nuclear war

Dr. Richard H. Speier 17, Adjunct Staff with the RAND Corp, Founded the Office of Non- Proliferation Policy at the DOD, Recipient of the Meritorious Civilian Service Medal as the “Father of the MTCR,” now Consults in the Washington DC area; George Nacouzi, Senior Engineer at the RAND Corporation, Supports Projects within PAF (Project Air Force) and NSRD (National Security Research Division), Carrie A. Lee, Researcher at RAND, and Richard M. Moore, Researcher at RAND. 2017. “Hypersonic Missile Nonproliferation: Hindering the Spread of a New Class of Weapons.” RAND. https://www.rand.org/pubs/research\_reports/RR2137.html

Strategic Implications of Hypersonic Weapons Compressed Timelines The U.S. military uses an acronym to describe the decisionmaking and action process cycle: OODA (Observe, Orient, Decide, Act). These four steps take time, and hypersonic missiles compress available response time to the point that a lesser nation’s strategic forces might be disarmed before acting. As an illustration of the time required to act with respect to an existential missile threat, the Nuclear Threat Initiative organization estimated a timeline for a U.S. response to a massive Russian intercontinental ballistic missile (ICBM) attack, as follows:9 • 0 minutes—Russia launches missiles • 1 minute—U.S. satellite detects missiles • 2 minutes—U.S. radar detects missiles • 3 minutes—North American Aerospace Defense Command (NORAD) assesses information (2 minutes max) • 4 minutes—NORAD alerts White House • 5 minutes—first detonations of submarine-launched ballistic missiles • 7 minutes—locate president and advisers, assemble them, brief them, get decision (8 minutes max) • 13 minutes—decision • 15 minutes—transmit orders to start launch sequence • 20 minutes—launch officers receive, decode, and authenticate orders • 23 minutes—complete launch sequence (2 minutes max) • 25 minutes—Russian ICBM detonations. This timeline is not, of course, representative of two hostile parties in closer proximity or with less effective warning systems than Russia and the United States. Nor is it representative of less-than-Armageddon possibilities. However, for adjacent enemies within a 1,000-km range, a hypersonic missile traveling at ten times the speed of sound could cover that distance and reduce response times to about six minutes.10 Targets As discussed earlier, hypersonic missiles increase the threat over current generations of missiles in cases where the target nation has missile defenses. The targets in such nations would primarily be high value and heavily defended. Prime targets could include destroying a nation’s leadership and command and control, referred to as “decapitation,” to prevent the target nation from responding with an effective follow-on attack. Other key targets could be carrier strike groups, with the objective of striking a key blow or pushing the naval formation further from the coast. And, because of their time sensitivity, strategic forces and storage facilities for weapons of mass destruction (WMDs) could warrant hypersonic attack. Implications for Targeted Nations Any government faced with the possibility that hypersonic missiles would be employed against it—particularly in a decapitating attack— would plan countermeasures, many of which could be destabilizing. For example, countermeasures could include devolution of strategic forces’ command and control so that lower levels of authority could execute a strategic strike, which would obviously increase the risk of accidental strategic war; or strategic forces could be more widely dispersed— a tactic risking greater exposure to subnational capture. An obvious measure would be a launch-on-warning posture—a hair-trigger tactic that would increase crisis instability. Or the target nation could adopt a policy of preemption during a crisis—guaranteeing highly destructive military action. To be sure, such measures could be invoked against threats from current types of missiles.11 But, for nations with effective ballistic mis- sile and/or cruise missile defenses in the time frame when hypersonic missiles might proliferate, the hard choices would be forced when facing hypersonic threats. Advanced nations with adequate resources could take other steps against hypersonic threats. They could strengthen the resilience of their command and control, harden the siting of their strategic forces, and make a deterrent force mobile or sea-based. These tactics may or may not be effective, especially for lesser nations. And they certainly will be expensive—putting them out of reach of some. Even for major powers, the proliferation of hypersonic missiles will create new threats by allowing lesser powers to hold them at risk of effective missile attacks especially against “unhardened” targets, e.g., cities. Over the coming decades, the ability of a lesser nation with a handful of ICBMs to threaten major powers will continue to decrease as wide area missile defenses continue to improve. However, HGVs and HCMs will be more difficult to defend against. Implications for Major Powers The ability of hypersonic missiles to penetrate advanced missile defenses will increase the risks for nations with such defenses. Lesser powers with hypersonic weapons may see these weapons as a deterrent against greater power intervention, and feel free to pursue potentially destabilizing regional agendas. Moreover, lesser nations with hypersonic missiles could affect the force deployments of major powers. As noted above, carrier strike groups might be pushed further out to sea or an intervening power’s regional military bases might become exposed to more effective attacks. The Broader Picture of Increased Risk The ability of hypersonic forces to penetrate defenses and compress decision time could aggravate the instabilities in regions that are already tense—for example, Iran-Israel and North Korea–Japan. Conflicts in these regions could evolve to include major powers aligned on opposite sides. An Israel-Iran conflict, with the United States and much of Europe aligned with Israel and Russia and perhaps China aligned with Iran, would create new paths for escalation to an even-larger conflict. The basic roles of external actors would not necessarily change—the alignments would stay the same—but external powers might suddenly find themselves in a more-unstable situation in which their patron states are increasingly trigger-happy. As noted previously, lesser powers could gain influence over major powers by threatening a hypersonic attack. At the least, lesser powers might be emboldened if they saw themselves as possessing a deterrent against major power intervention. Finally, because hypersonic weapons increase the expectation of a disarming attack, they lower the threshold for military action.

### 1NC

T-Expand Scope

#### ‘Expanding’ requires bringing new areas into the domain of antitrust law

Dr. Janet McIntyre-Mills 14, Associate Professor at Flinders University, Honourary Professor at the University of South Africa and Adjunct Professor at the University of Indonesia, Systemic Ethics and Non-Anthropocentric Stewardship: Implications for Transdisciplinarity and Cosmopolitan Politics, p. 25

Giddens (2009) points out that social movements will not be sufficient to bring about change. Nation states together with international organizations will need to implement international laws to protect the environment:

Decentralisation contributes to democratic deepening if and when it expands the scope and depth of citizen participation in public decision making. Expanding the depth means incorporating previously marginalised or disadvantaged groups into public politics. Expanding the scope means bringing in a wider range of social and economic issues into the authoritative domain of politics (shifting the boundary from the market to the demos. Democratic decentralisation in other words means redistributing power (the authority to make binding decisions about the allocation of public resources) both vertically (incorporating citizens) and horizontally (expanding the domain of collective decision making). Empowered local governments deepen democracy on both counts because they foster a better alignment of decision making centres with local preferences and local sources of knowledge and infor- mation, and because it creates loci of participation that reduce the costs and unevenness of collective action (Heller 2001, p. 140).

#### ‘Scope’ refers to authority of law, not actions

Kenneth H. Kato 99, Judge on the Washington Appeals Court, Division Three, JD and BA from the University of Washington, “Spokane v. Civil Serv. Comm'n”, Court of Appeals of Washington, Division Three, Panel Four, 98 Wn. App. 574, 576, 989 P.2d 1245, 1246, 1999 Wash. App. LEXIS 2158, 12/21/1999, Lexis

For purposes of RCW 41.56.100, which provides that a public employer is not required to collectively bargain with its employees when the subject matter involved has been "delegated to any civil service commission or personnel board similar in scope, structure and authority" to the state personnel board, "scope" refers to the body's jurisdiction or authority to take various actions.

#### Violation---the plan enforces existing antitrust law, it doesn’t increase its range of authority

#### Vote neg:

#### Limits---there are thousands of enforcement decisions: they could deny current mergers, reverse previous ones, launch new DOJ investigations, levy fines, or prosecute individuals. ‘Enforcement action-of-the-week’ cases massively overstretch research.

#### Ground---there are no overarching DAs or precedent-based effects since enforcement decisions do not change the contours of law.

### 1NC

Politics DA

#### Infrastructure will pass but continued “good faith” negotiations over the social spending bill are key

Burgess Everett et. Al 10/27, Burgess Everett is the co-congressional bureau chief for POLITICO, specializing in the Senate since 2013, Heather Caygle is a Congress reporter for POLITICO, Sarah Ferris covers the House for POLITICO’s Congress team, focusing on the Democratic caucus, “Liberal frustration imperils quick Dem social spending deal”, <https://www.politico.com/news/2021/10/27/top-dems-social-spending-deal-manchin-sinema-517332>, October 27th, 2021

Manchin argued that "good faith" negotiations about a forthcoming climate and social spending bill are enough to unstick the Senate’s infrastructure bill. Sinema said she's "doing great, making progress."

“The president has made that very clear: He wants to move forward. And we owe it to the president to move forward, take a vote on the infrastructure bill,” Manchin told reporters on Wednesday morning. “He believes 100 percent of nothing is nothing.”

Where are Democrats in the tax hike fight?

Manchin explained that when a deal is cut, Biden will “go over to the House, and he’ll basically explain to the House: ‘I have a framework, but there's still an awful lot of work to be done,’” Manchin said.

Speaker Nancy Pelosi told House Democrats on Wednesday morning that her party is “in pretty good shape.” Even so, Pelosi continues to face an intense push-pull from liberals — who want to see a full social spending bill before voting on the Senate's bipartisan infrastructure deal — and moderates who want to get the infrastructure vote finally set, as soon as possible.

“It’s lamb eat lamb. There is no bad decision. We have to choose,” Pelosi told her members, according to a source familiar with her remarks. Senate Democrats say it’s highly unlikely bill text will be totally finalized this week, however.

Progressives have also blanched at Sinema’s efforts to avoid raising tax rates and Manchin’s move to cut the bill's top line. Those moves have prompted a deal on a corporate minimum tax and tenuous negotiations on a billionaires tax, as well as potential cuts to plans for Medicare expansion, Medicaid expansion and paid leave. Efforts to lower drug prices through Medicare negotiations are headed toward a more limited approach, Democrats said.

By midday Wednesday, the billionaire tax was out of the mix, according to multiple sources familiar with the talks. Manchin said the tax on billionaire’s assets is “convoluted” and instead pitched a “patriotic” 15 percent tax on wealthy people. He said he did not want to target a certain class of people through the tax code.

His comments complicated negotiations, some Democrats said.

"I continue to be optimistic that on the spending side, there are pathways toward closing the remaining gaps," said Sen. Chris Coons (D-Del.). "But I recognize that Sen. Manchin's just made a comment that made some of the revenue side" more complex.

With the billionaires tax out, Democrats are now taking another look at a surtax on people making more than $5 million a year that the House Ways and Means Committee passed last month.

Manchin also continued to throw cold water on health care proposals, which Sanders said was not negotiable and “must” be in the bill. His colleague, Sen. Raphael Warnock (D-Ga.), said he’d spoken to Manchin and is “encouraged” that Democrats can find a way to cover Georgians and other Americans who live in states that have not expanded Medicaid but would otherwise be eligible.

Democrats are more confident about climate subsidies and universal pre-K making it into in the package, along with an extension of the Child Tax Credit. But it all comes down to where Manchin and Sinema fall — and whether the rest of the party’s thin majorities go along with Biden's dealmaking. Chairmen of the Senate's climate-related committees met again on Wednesday afternoon, according to Democratic sources.

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Key to grid modernization AND cybersecurity

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

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

What’s In the Bipartisan Package

Resiliency

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

Hydrogen

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

Nuclear

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

Carbon Capture

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

What’s In There but Only Somewhat

Modernization

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

Electric Vehicles

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

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

Bryce Yonker, executive director, Grid Forward

Energy Storage

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

Buildings and Efficiency

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

Transmission

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

Cybersecurity

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

What’s Not In The Package

Demand-Side Flexibility

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

Building Automation

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

Distributed Resource Integration

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

Analytics & Digital Infrastructure

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

Renewable Energy

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

What’s Next

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

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

More significant support for electrified transportation

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

Deeper support for efficiency, connected building and related areas

In Summary: Pass This Package

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

#### Extinction

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

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

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

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

1.2. Turning the power back on in a powerless world

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

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

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

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

### 1NC

T-Subsets

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

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

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

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

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

#### 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

## Innovation ADV

### Innovation---1NC

#### Companies circumvent---antitrust is too slow to adapt.

Uri Y. Hacohen 20, Research Fellow in the Law, Economics, and Politics Center at the University of California, Berkeley School of Law, LL.M. from Columbia Law School, LL.B. from Tel Aviv University, “Evergreening at Risk,” Harvard Journal of Law & Technology, Vol, 33, Spring 2020, accessed via Lexis

Antitrust laws are the primary tool for dealing with an unlawful extension of monopolies and thus are viewed as the natural way to curb patent abuses and misuses. 260Alas, the blunt antitrust remedy -- treble damages based on the amount of competitive injury -- simultaneously creates over- as well as under-deterrence concerns and thus fails to strike a proper balance between innovation and overreaching incentives. 261The fear of over-deterrence is well founded in patent cases, given the risk of undermining precious innovation incentives. 262As the Supreme Court stated in Walker Process:

[T]o hold, as we do not, that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent, might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble damage suits. 263

Thus, in an attempt to avoid over-deterrence, the reach of antitrust scrutiny is slow to evolve, and the legal standards for imposing liability are notoriously demanding. 264

The sluggish development in antitrust scrutiny leaves significant leeway for pharmaceutical manufacturers to adopt opportunistic practices with limited risk of attracting liability. For example, it took years of zealous advocacy by academics, practitioners, and regulatory authorities for the Supreme Court to finally expand the reach of antitrust scrutiny to the practice of pay-for-delay settlement agreements in its [\*527] landmark 2013 Actavis decision. 265However, instead of ceasing to collude, many brand-name and generic manufacturers clung to the fact that the Actavis decision involved cash payments and moved to devise complex noncash side deals in the hope of evading antitrust scrutiny. 266The courts gradually came to realize that "the economic logic articulated by the Court applies regardless of the payment's form," 267and many more settlements became subject to antitrust scrutiny, but these legal developments took years to fashion. 268

A similar development is seen with respect to the practice of product hopping. As courts expanded the reach of antitrust scrutiny to hard-switch product-hopping strategies (e.g., taking old formulation products off the market before generic entry), companies gradually moved toward soft-switching practices (e.g., cannibalization without product removal). 269Again commenters warned that "[t]he anticompetitive effect of both types of conduct is the same," but courts have not yet taken heed. 270

Sluggish development in the law is not the only undesirable side effect of avoiding over-deterrence; exceedingly stringent liability standards is another. 271For example, patent owners who initiate sham patent infringement lawsuits that are "no more than an attempt to interfere with a competitor's business relationship" could potentially curtail [\*528] many of the patent abuses discussed in Part II. 272Nevertheless, the standard for proving sham litigation -- showing by the heightened evidentiary standard of "clear and convincing" evidence that the legal action alleged to be a sham is both objectively baseless and was filed by the patent owner with subjective bad faith 273-- is so demanding that this theory was proven successful only once, in 2018, two and a half decades after the legal theory was first established by the Supreme Court in 1993. 274

Finally, and somewhat paradoxically, by emphasizing the damages to the plaintiff instead of the benefits to the patent owner, the antitrust remedy might sometimes lead to under-deterrence despite its punitive nature. For example, under the well-established Supreme Court precedent in the case of Walker Process, an assertion of a patent that is fraudulently procured in an attempt to monopolize a market is subject to antitrust liability. 275Nevertheless, because the most likely plaintiffs to prevail in a Walker Process action are generic competitors, not consumers, brand-name manufacturers could potentially silence Walker Process charges by paying prospective generic challengers to drop their charges. Because brand-name manufacturers' profits dwarf generic manufacturers' damages (even after trebling), such agreements are attractive and hardly detectable. 276

#### Pharma innovation is high because of a lack of antitrust.

Aurelien Portuese 21, Director of The Schumpeter Project at the Information Technology & Innovation Foundation, Adjunct Professor at the Global Antitrust Institute of George Mason University, Ph.D. in Law and Economics from Université Panthéon Assas (Paris II), “Pharmaceutical Consolidation & Competition: A Prescription for Innovation,” Information Technology & Innovation Foundation, 06-25-2021, <https://www2.itif.org/2021-pharmaceutical-task-force.pdf>

Allegedly, drug prices are too high. The view is nothing new. Drug prices “shocked” President Clinton in the early 1990s.19 A commentator notes:

In recent years, worldwide mergers have achieved record highs, and antitrust enforcement authorities are facing new challenges involving high-technology industries. Much consolidation activity has taken place in the research-based prescription drug industry...” (references omitted)

Although this situation might be thought to portray today’s situation, it was actually published 20 years ago in the Journal of Legal Medicine. 20 Citing the 1998-2000 “megamergers” between Astra and Zeneca, Hoechst and Rhone-Poulenc, SmithKline Beecham and Glaxo Wellcome, and Pfizer and Warner Lambert, the author aptly emphasizes that “the significance of innovation as a source of competition in the pharmaceutical sector suggests that merger analysis in that sector should focus not only on existing product market but also on competition over research and development.”21 Pharma mergers regularly sweep through the U.S. economy.22 And antitrust authorities have traditionally scrutinized pharma mergers with great vigor.23 Nevertheless, fears of uncontrolled pharma mergers have historically emerged on an occasional basis.24

Contrary to conventional wisdom, the U.S. pharmaceutical industry may deconcentrate, and historically remains as concentrated as its global rivals. Richman et al. demonstrate that the concentration level (i.e., the HHI index) of the U.S. pharmaceutical industry follows similar concentration patterns to those of its international counterparts. The large-scale mergers of the 1990s and early 2000s were justified by required integration at multiple levels.26 Nowadays, similar justifications lead to similar outcomes. Indeed, what was true 20 years ago remains true today.27 Atkinson and Ezell recently demonstrated that the 10 leading drug producers in 2019 accounted for 43 percent of global industry sales—a sharp decline from the 56 percent they accounted for in 2006.28

The concerns that pharma mergers will lead to fewer drug discoveries or higher drug prices are largely unsubstantiated.29 Recent empirical evidence demonstrates that “the predominant concerns over megamergers among pharmaceutical giants might be misplaced. Changes in scientific landscape of competitive innovation generated a vibrant marketplace for discovery, which megamergers do not necessarily threaten and instead might actually invigorate.”30

Pharmaceutical companies compete via innovation. Rather than competing over prices in a neck-and-neck competition, pharmaceutical companies innovate to have a viable competitive edge vis-à-vis rivals.31 Pharma markets inherently exhibit dynamic competition given the high reliance of drug companies on patents. A temporary “monopoly” right over a new drug constitutes the main driver for R&D expenditures. In fact, the U.S. biopharma industry is the most R&D-intensive in the world.

And these sunk costs are high and increasing in part because the failure rate is high. For every 10,000 pharmaceuticals patented, about 100 may go through human trials, and less than 10 may ultimately be marketed.32 Drug development now often takes an average time of 12-14 years to bring an innovative new drug to market. These rising costs and uncertainties associated with drug innovation lead pharmaceutical companies to diversify their drug portfolios. Consequently, such diversification requires different lines of products with different patents. Mergers and acquisitions can provide a viable path toward such diversification—a crucial element for drug innovation.33

Because of the massive R&D investments required for pharmaceutical companies to compete in the marketplace effectively, size is critical, or as Omta states: “size can be considered to be by far the most important contingency concerning performance.”34 Mergers may be explained by the desire to submit more patents since “the larger firms clearly submit more patent per invested dollar than the smaller ones. This could be a clear indication of their higher innovative effectiveness. Another explanation could be that larger companies submit their patents relatively earlier than smaller ones.”35

Therefore, pharma mergers can yield considerable cost efficiencies and innovation potential. But they can also lead to inferior performance. In general, “mergers reveal a pessimistic [picture]: widespread failure, considerable mediocrity, and occasional success.”36 While emphasizing that correlation does not equal causality, Ornaghi found that pharma mergers between 1988 and 2004 have not necessarily increased the companies’ performance.37 One possible explanation is that pharma consolidation occurs among firms with similar technology: Companies merge as a defensive move in anticipation of negative shocks or increased market competition.

The more innovative the purchased company is, the more the merger may raise more innovation concerns. Indeed, “the effects on innovation of a merger or acquisition depend on the relative capabilities of the merging partners.”38 However, the removal of an innovation laggard should not generate antitrust concerns.39 Without the organizational capabilities with the minimum efficient scale, the innovative firm will not reap the full benefits of the patent and consumers may not enjoy such benefits.

Indeed, Chandler wrote that, as an historical pattern, “the critical entrepreneurial act was not the invention— or even the initial commercialization—of a new or greatly improved product or process. Instead, it was the construction of a plant of the optimal size required to exploit the economies of scale or those of scope, or both fully.”40 Larger pharmaceutical companies tend to introduce innovative drugs compared to smaller ones.41 However, this does not imply that smaller firms may not be optimally investing in a particular niche within the pharmaceutical industry.42

The need to innovate and improve the quality of drugs in the face of the harsh price competition exerted by generic manufacturers also justifies pharma mergers. Generic competition brings new competitors in the pharmaceutical industry. Aggressive price competition exerted by generics challenges the traditional pharmaceutical companies’ market positions.43 As a defensive move, mergers proved to be necessary to reduce costs and cope with an incredibly fierce price competition. Hence, generic competition can also justify mergers since strong price competition and high production costs justify reorganizing a consolidated entity to enhance scale and scope economies.

Generic competition spurs pharma mergers to generate cost efficiencies. For instance, Pfizer’s acquisition of Hospira was driven by the company “facing serious revenue and profit declines in the next four years as a result of generic competition and that Hospira revenues plus project $800 million in cost savings will make the business much more attractive.”44 The FTC should be strong advocates for mergers that generate cost savings, since this by definition, increases U.S. GDP and competitiveness.

Thanks to the Hatch-Waxman Act of 1984 (also known as the “Drug Price Competition and Patent Term Restoration Act”), a torrent of generic drug approvals followed: this Act radically simplified the procedures for approving generic substitutes for drugs without patent protection.

Before the Hatch-Waxman Act, generics represented only 19 percent of prescriptions filled in the United States. After the Act, nearly 90 percent of drug applications filled were generics. 45 Before the Act’s passing, only 35 percent of top-selling pharmaceuticals had generic competitors after their patents expired. More than 80 percent of approved pharmaceuticals have generic versions available on the market. With the Act, generics no longer wait three to five years. They enter the market immediately. Consequently, today’s drug price competition is fiercer than ever. Some legislative proposals may seek to spur generic competition, as illustrated by the three bills on the topic:

1. The Hatch-Waxman Integrity Act of 2019: This Act would support brand-name manufacturers by preventing new drug or biosimilar applicants from challenging a drug patent using the Patent Trial and Appeal Board, which has a lower standard of review and more relaxed procedural rules than traditional federal court proceedings;

2. The Blocking Act: This act would increase the number of generics on the market by preventing a generic drug manufacturer with the first approved generic from delaying the start of their 180-day exclusivity period;

3. The Creates Act: This act would allow a biosimilar or generic manufacturer to sue a brand-name drug company that refuses to make samples of a product available for testing.

To be sure, generic competition plays a role in reducing drug prices for consumers. But we cannot assume that generic competition, with the new entrants and strong competitive constraints it generates, may not lead to further consolidation by acquisitions.

Regardless, Hatch-Waxman does more to ensure low drug prices than antitrust lawsuits.47 Indeed, the FTC regularly enforces antitrust laws under the Hatch-Waxman Act and advocates for courts not to renege on doing so. The recent FTC Amicus Brief illustrates this in the Takeda Pharmaceutical Co. v Zydus Pharmaceuticals (USA) case. The FTC legitimately urged the federal district court not to exempt lawsuits under the Act to be subject to antitrust scrutiny as potential sham litigations.48 Not only should the Hatch-Waxman Act be appropriately enforced, but antitrust laws enforced alongside the Act should be too.

#### The aff stops pharma innovation.

Joanna M. Shepherd 20, Vice Dean and Thomas Simmons Professor of Law at Emory Law School, Ph.D. in Law and Economics and Econometrics from Emory University, “The Legal and Industry Framework of Pharmaceutical Product Hopping and Considerations for Future Legislation,” Center for the Protection of Intellectual Property, December 2020, <https://cip2.gmu.edu/wp-content/uploads/sites/31/2020/12/Shepherd-Product-Hopping.pdf>

Legislation defining anticompetitive product hopping should aim to facilitate generic entry and lower drug prices. However, if the enacted legislation is too broad or overly vague, it could instead harm consumers by reducing innovation and increasing health care spending.

First, overly broad legislation would deter important future innovations. Most innovation in the pharmaceutical industry involves development of next-generation improvements, such as creating new products that expand therapeutic classes, increase available dosing options, remedy physiological interactions of known medicines, or improve other properties of existing medicines.35 According to FDA data, two-thirds of new drug approvals are for these incremental innovations.36 The World Health Organization has found that over 60 percent of the drugs needed to combat prevalent diseases have resulted from incremental innovation.37 Overly broad legislation would deter these important incremental innovations that are critical to improving health outcomes.

Second, legislation that fails to provide clear guidance will create uncertainty for brand innovators. This uncertainty can deter innovation in the pharmaceutical industry. Brand drug companies are the ones largely responsible for pharmaceutical innovations; in the last decade, they have spent over half a trillion dollars on R&D, and they currently account for over 90 percent of the spending on the clinical trials relied on by brands and generics alike.38 But if brand companies cannot reliably predict when their conduct will be considered anticompetitive, they will have less incentive to engage in costly R&D in the first place. The companies will not spend the billions of dollars39 it typically costs to bring a new drug to market when they cannot be certain that, years down the road, introducing that new drug will not expose them to damaging litigation, market-stopping injunctions, or penalties. If product-hopping legislation increases the uncertainty around the introduction of new products, innovation will suffer.40

The consequences of this reduced innovation will be felt by consumers. Research shows that pharmaceutical innovation has greatly benefitted consumer health. Empirical estimates indicate that, on average, each new drug brought to market saves 11,200 life-years each year. 41 Another study finds that the health improvements from each new drug can save $19 billion in illness-related wage loss.42 Moreover, because new effective drugs reduce medical spending on doctor visits, hospitalizations, and other medical procedures, data show that for every incremental $1 spent on new drugs, total medical spending decreases by more than $7.43 Brand companies are largely responsible for pharmaceutical innovation. Thus, actions that reduce brand innovation will have dramatic effects on consumer health and health care spending in the long term.

#### Disease can’t cause extinction

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

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

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

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

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

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

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

[FOONOTE]

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

[END FOOTNOTE]

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

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

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

#### Other countries innovate---solves the internal link.

#### The LIO is resilient and adaptable

Jake Sullivan 18, Senior Fellow at the Carnegie Endowment for International Peace, Former National Security Adviser to Vice President Joe Biden and Director of Policy Planning at the U.S. Department of State, J.D. from Yale Law School, March/April 2018, “The World After Trump: How the System Can Endure,” https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump

But the existing order is more resilient than this assessment suggests. There is no doubt that Trump represents a meaningful threat to the health of both American democracy and the international system. And there is a nonnegligible risk that he could drag the country into a constitutional crisis, or the world into a crippling trade war or even an all-out nuclear war. Yet despite these risks, rumors of the international order’s demise have been greatly exaggerated. The system is built to last through significant shifts in global politics and economics and strong enough to survive a term of President Trump.

This more optimistic view is offered not as comfort but as a call to action. The present moment demands resolve and affirmative thinking from the foreign policy community about how to sustain and reinforce the international order, not just lamentations about Trump’s destructiveness or resignation about the order’s fate. No one knows for certain how things will turn out. But fatalism will become a self-fulfilling prophecy.

The order can endure only if its defenders step up. It may be durable, but it also needs an update to account for new realities and new challenges. Between fatalism and complacency lies urgency. Champions of the order must start working now to protect its key elements, to build a new consensus at home and abroad about needed adjustments, and to set the stage for a better approach, before it’s too late.

A RESILIENT ORDER

In a world where the major trends seem to spell chaos, it is fair to place the burden of proof on those who claim that the current order can continue. Yet well before Trump, it had already demonstrated its capacity to adapt to changes in the nature and distribution of power. Three basic factors account for such resilience—and demonstrate why the emphasis now should be on protecting and improving the order rather than planning for the aftermath of its demise.

First, most of the world remains invested in major aspects of the order and still counts on the United States to operate at its center. The passing of U.S. dominance need not mean the end of U.S. leadership. That is, the United States may not be able to direct outcomes from a position of preeminent economic, political, and military influence, but it can still mobilize cooperation on shared challenges and shape consensus on key rules. In the years ahead, although Washington will not be the only destination for countries seeking capital, resources, or influence, it will remain the most important agenda-setter.

Some context is important. The U.S.-led order was built at a unique moment, at the end of World War II. Europe’s and Asia’s erstwhile great powers were reduced to rubble, and a combination of dominance abroad and shared economic prosperity at home allowed the United States to serve as the architect and guarantor of a new order fashioned in its own image. It had not just the material power to shape rules and drive outcomes but also a model many other countries wanted to emulate. It used the opportunity to build an order that benefited itself as well as others, with clear advantages for populations at home and abroad. As the international relations scholar G. John Ikenberry has put it in this magazine, the resulting system was “hard to overturn and easy to join.” The end of the Cold War and the fall of the Soviet Union served to reinforce and extend American preeminence.

This precise state of affairs was never going to last forever. Other powers would eventually rise, and the basic bargain would one day need to be revisited. That day has arrived, and the question now is, do other countries want a fundamentally different bargain or simply some adjustments? A comprehensive 2016 rand analysis found that few powers display an appetite for dismantling the international order or transforming it into something unrecognizable. And while Trump’s election has forced countries to contemplate a world without a central role for the United States, many still view the president as an aberration and not a new American normal, especially given that the United States has bounced back before.

Even China has concluded that it largely benefits from the order’s continued operation. Around the time of Trump’s inauguration, breathless reports interpreted Chinese President Xi Jinping’s comments on an open international economy and climate change as indicators that China planned to somehow take over for the United States. But what Xi was really signaling was that China does not want near-term radical change in the global system, even as it seeks to gain more influence by taking advantage of the vacuu

## FTC ADV

### FTC---1NC

#### Section 19 and other disgorgement authority has been expanded---that fills in

Bezalel Stern 10-11, Partner at Kelley Drye & Warren LLP, JD from Columbia Law School, BA from Brandeis University, “Pushing the Boundaries of Existing Authority: Section 19 Post-AMG Capital Management”, JD Supra – Newstex Blogs, 10/11/2021, Lexis

On Friday, the Commission, making good on promises to creatively explore all of its options for enforcement, announced by a 3-2 vote[1] that it had reached a settlement pursuant to Section 19 of the FTC Act with Resident Home LLC and its owner Ran Reske. At issue were allegedly false claims that the company's imported mattresses are made from materials fully manufactured in the United States. As part of the settlement, Resident Home and Reske agreed to pay $753,000.

This action follows the FTC's announcement earlier in the week that it had notified[2]70 for-profit higher educational institutions that it intends to make use of its long dormant Penalty Offense Authority. As contemplated by the FTC[3], the Penalty Offense Authority would allow the Agency to obtain civil penalties when institutions make misrepresentations about their programs, and job and earnings prospects.

And of course, within the past few months, we have seen the FTC pursue a variety of theories in an attempt to position itself to recover monetary penalties in matters pending in federal court. For example, the FTC has attempted to:

Amend complaints to allege ROSCA violations (unsuccessfully, in FTC v. Cardiff, No. 18-2104 (C.D. Cal.)); File an administrative complaint while moving to stay or dismiss without prejudice a federal court complaint (motion pending in FTC v. FleetCor Technologies, Inc., No. 19-cv-05727 (N.D. Ga.)); Bring a complaint in California federal court along with Attorneys General from six states (claims made by five states based on pendent jurisdiction dismissed in FTC v. v. Frontier Comm. Corp., No. 21-cv-04155 (C.D. Cal.)); Urge federal judges to exercise 'discretion' and not rule on motions to dismiss pending what is hoped will be passage of a bill by Congress that would authorize the FTC to obtain monetary relief to redress consumer injury (unsuccessfully, in a number of cases, including FTC v. Neora, No. 20-cv-01979 (N.D. Tex.)); and Amend complaints to newly allege violations pursuant to Section 5(a) of the FTC Act (FTC v. SPM Thermo-Shield, Inc., No. 20-cv-542 (M.D. Fla.)).

Given all this, Friday's announcement would have been unsurprising, if it weren't for the separate statements filed by the four sitting commissioners, demonstrating significant disagreement regarding the reach of FTC authority, as well as a departure from the comity that has characterized public discourse between commissioners from rival parties.

Redress and Damages Under Section 19

At issue in the competing commissioner statements was the statutory basis for the settlement's monetary payment. In simple terms, Chairwoman Khan, along with Commissioners Chopra and Slaughter, asserted that Section 19 expressly authorizes payment of redress and damages, including consequential damages to consumers and 'honest businesses that lose out on sales.' The Commission did not deem proof of injury to be a necessary predicate for monetary penalties, stating[4],

In settlements, parties can save time and resources by making the best estimates - adjusted for risk - on the right resolution. It would have been costly to specifically identify each harmed consumer and business, but it is clear the proposed monetary relief is reasonable, given our legal authority.

Commissioners Wilson and Phillips disagreed with the majority's position. In dissent[5], the two Commissioners contended that Section 19 does not permit the Commission to accept monetary remedies in an administrative settlement.

More specifically, according to Commissioners Wilson and Phillips, the settlement amount 'exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages.' The dissenting commissioners highlighted the absence of evidence of injury to 'other persons,' rendering the payment a penalty or disgorgement of ill-gotten gains, which the Commission has no authority to obtain under the applicable statute ('The Commission makes clear in its statement that the purpose of the monetary relief in question is to penalize, not to make consumers whole.').

Here, one hears echoes of the admonition provided during oral argument in AMG by Justice Kavanaugh:

I worked in the Executive Branch for many years, so I understand how this happens. When you are in the Executive Branch or an independent agency, you want to do good things and prevent or punish bad things, and sometimes your statutory authority is borderline. And it could be war policy or immigration or environmental or what have you, but with good intentions the agency pushes the envelope and stretches the statutory language to do the good or prevent the bad. The problem is this results in a transfer of power from Congress to the Executive Branch to decide whether to exercise this new authority. That's a particular concern, at least for me, with independent agencies.

Things Get Hot

If this discussion among Commissioners were occurring at the FTC dinner table, as opposed to in competing statements, it would be easy to imagine a loud argument and stiff finger-pointing, before someone kicked over a chair and stormed off.

Echoing Commissioner Wilson's warning in her concurring opinion in MoviePass ('[following AMG], the temptation to test the limits of our remaining sources of authority is likely to be strong'), the Wilson/Phillips statement started sharply and continued in the same tone:

That didn't take long. Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act — remedies that, in fairness to the agency, were blessed by appellate courts for decades—the Commission now votes to accept monetary remedies not permitted by Section 19.

#### Terrorists adapt---cutting funding makes them stronger

Major David N Santos 11, Active Duty Army Intelligence Officer Currently Attending the U.S. Army Command & General Staff College, “What Constitutes Terrorist Network Resiliency?”, Small Wars Journal, 5/31/2011, http://smallwarsjournal.com/jrnl/art/what-constitutes-terrorist-network-resiliency

As important as ideology and social networking are, their benefits will only carry a terrorist organization to a certain extent. As with virtually any other organization or activity around the world, money, is the lifeblood of any organization or movement. Without a reliable source of funding a terrorist organization loses its ability to be proactive in conducting operations as well as procure needed support services and material items. Since acquiring and maintaining sources of financing is vital to the existence of a terrorist organization, security for those sources of funding along with the methods of transferring and storing funds is equally vital. As a result, terrorist organizations have proved to be exceptionally agile in identifying and implementing numerous methods of funding and transferring money in order to prevent effective countermeasures by state governments (Williams, 2005).

The process of globalization has created unprecedented levels of interconnectivity among not only state governments but also among domestic and international financial institutions. As such, vast sums of money can be transferred from one part of the world to another nearly instantaneously. The sheer pace and vastness of the globalization process with developments in information and telecommunications technology has created a nearly impossible task to monitor effectively daily financial transactions to ensure there is no link to terrorist activity. Previous attempts to counter terrorist financing, such as in the wake of the 9/11 attacks, has been to freeze known or suspected terrorist financial assets. Yet this countermeasure has only yielded limited success. As Williams (2005) notes, current attempts to identify and attack terrorist financing has only served to increase the “capacity of terrorist organizations to adapt quickly

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to new regulations by adopting novel methods of circumventing rules and regulations” (pp. 6).

If Williams (2005) is correct in his analysis that current efforts to target terrorist funding are only resulting in making smarter and more efficient fiscally minded terrorist organizations than what is enabling this trend? One of the key issues is current international law is lacking in specificity and applicability to the nature of the threat posed by transnational terrorist organizations like al Qaeda. One of the main deficiencies with international law is with the Financial Action Task Force (FATF) which had been created in 1989 by the G-7 states to counter money laundering activities conducted by international criminal and drug trafficking organizations (Williams, 2005). The FATF identified 40 recommendations to be implemented to counter money laundering activities. However, no formal binding convention or treaty was created therefore consistent implementation of the FATF recommendations did not occur thus leaving loop holes in international law for use by terrorist organizations to circumvent the FATF. Efforts like the FATF can only be successful if they receive the full support of the international community. Limited or no support provides opportunities for terrorist organizations to continue their financing operations relatively unmolested. The FATF was a lackluster effort to combat terrorist financing due to inefficiency in the manner in which it operated resulting in money laundering not being truly deterred but rather shifted to other areas around the globe where these activities could be conducted more freely (Williams, 2005). The FATF is only one example of inconsistencies in international economic law (as well as with state domestic law) which have inhibited effective terrorist financing countermeasures. The ineffectiveness of the FATF and other counter drug and organized crime measures which have been used to target terrorist financing has only served to actually create more experienced and smarter terrorist financing practices. Instead of preventing terrorist financing, efforts such as the FATF have only facilitated it to expand.

# 2NC

## Antitrust PIC

### Solvency---Plank 2---2NC

#### It tailors specific solutions to specific problems

D. Daniel Sokol 20, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “Antitrust's "Curse of Bigness" Problem, The Curse of Bigness: Antitrust in the New Gilded Age”, Michigan Law Review, Volume 118, Issue 6, 118 Mich. L. Rev. 1259, April 2020, Lexis

CONCLUSION

Antitrust works well because it is technocratic in that a singular (but flexible within its economics) goal is administrable institutionally. To introduce the world of political imperfections into a technical process that examines markets would create further distortions affecting consumers. 152Antitrust does well dealing with antitrust problems. To the extent that there are other related problems, the right answer is not to create an antitrust that lacks democratic accountability (because antitrust becomes regulation via the backdoor) and exceeds its mandate of the past forty years. Rather, the better solution is to identify the underlying problem and solve it with more effective tools. If the problem is one of redistribution, tax is a better choice than antitrust. 153 If the problem is one of privacy, strengthen privacy laws. 154 If the problem is one of financial institutions or sector regulators not doing what they need to do, correct structural problems with sector regulators. Antitrust has increasingly moved out of sector regulation 155 and toward advocacy. 156The advocacy budget of the antitrust agencies is tiny, and to the extent that the problem is the rules of the game for particular industry sectors, Wu falls short by not suggesting greater competition advocacy.

Wu's concern with big tech companies because they are big (p. 126) is as misplaced now as it was earlier in antitrust history. Antitrust has gone through various moments in which it had reevaluated whether it has the proper tools to combat anticompetitive behavior in technology-related markets. 157It does have such tools and can bring important cases in these markets. 158 [\*1281] It was just a decade ago that we were told that Walmart was taking over shopping, that eBay was the largest online marketplace, or that Facebook was the primary way in which users shared information. Today, Uber competes with Lyft, Amazon has eclipsed eBay, Facebook is a legacy service, and younger people use any other set of applications to share information--such as Pinterest, Twitter, or Snapchat. In a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics. To ask antitrust to go beyond its institutional capacity sets up antitrust to fail, because Wu's deeper concern is with how society is structured. That structure can be changed through elections to the presidency and Congress and through changes as to the makeup of the Supreme Court. Antitrust history shows that it is the Supreme Court that changes antitrust law and policy the most because of antitrust's common law-like nature. 159

#### Regulation is more effective than antitrust because it directly targets the desired conduct

Dr. Pedro Caro de Sousa 21, Advisor at the European University Institute Florence School of Regulation, Competition Expert with the OECD, DPhil from the University of Oxford, Former Visiting Scholar at the European University Institute and Associate Research Fellow at New York University’s School of Law, Qualified Lawyer in Portugal and Barrister of England and Wales, Lecturer of Law at the University of Reading, Former Graduate Teaching Assistant in Competition Law and a Visiting Tutor in Competition Law and European Law at the University of Oxford, Former Visiting Tutor in European Law at King's College, Former Visiting Lecturer at Universidade Catolica de Lisboa's LLM, Former Judicial Assistant in the Portuguese Constitutional Court, “Competition Enforcement and Regulatory Alternatives”, OECD, 6/7/2021, https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf

Nonetheless, competition law cannot be preferred to regulation in all instances. First, as we saw above, regulation can pursue goals other than pure market efficiency, and can tackle challenges other than market power, such as health concerns and safety standards (OECD, 2011, p. 22[6]) (Competition and Markets Authority, 2020, p. 2[4]). Second, even within concerns about market power, regulation may be better placed than competition law to address the relevant problems. Competition law has limited effectiveness against structural market issues, including those that involve the mere existence of a monopoly or oligopoly, exploitative behaviour, or issues that require ongoing implementation or monitoring (Breyer, 1984[1]) (OECD, 2011, p. 23[6]). Proceeding directly via specifically enacted regulation may provide a more comprehensive and effective means by which to remedy ongoing market failures than episodic antitrust enforcement (Hellwig, 2009, p. 212[26]) (Dunne, 2015, p. 176[5])

#### It catalyzes competition---the result is antitrust by effect

Tim Wu 17, Isidor and Seville Sulzbacher Professor at Columbia Law School, JD from Harvard Law School, BSc from McGill University, Former Law Clerk for Justice Stephen Breyer of the U.S. Supreme Court and Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit, “Antitrust Via Rulemaking: Competition Catalysts”, Colorado Technology Law Journal, Volume 16, Issue 1, 16 Colo. Tech. L.J. 33, Lexis

Introduction

In its March 26, 2016 issue, The Economist magazine announced that "America needs a giant dose of competition." 1 Its study of industry concentration and profits suggested that, after decades of consolidation, competition had decreased across a broad range of the [\*34] American economy. 2 An April 2016 issue brief by the Council of Economic Advisors reached similar conclusions, stating that "competition appears to be declining" due to "increasing industry concentration, increasing rents accruing to a few firms, and lower levels of firm entry and labor market mobility." 3

The promotion of competition in the American economy is a task that has traditionally fallen to the enforcement agencies at the federal and state level, relying on the main antitrust statutes. 4 However, the challenge of declining competition has also prompted interest in the use of regulatory alternatives to antitrust to "catalyze" competition. 5 The strategy involves using industry-specific statutes, rulemakings, or other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws. 6 Hence, "antitrust via rulemaking."

While conducting competition policy outside of the main antitrust laws is not entirely new, it came into some prominence through an April 15, 2016 Executive Order issued by the White House. 7 In that order, the President charged the executive agencies as follows:

Executive departments and agencies with authorities that could be used to enhance competition (agencies) shall, where consistent with other laws, use those authorities to promote competition, arm consumers and workers with the information they need to make informed choices, and eliminate regulations that restrict competition without corresponding benefits to the American public. 8

In the field of administrative law, there is a longstanding debate over the relative merits of rulemaking and adjudication. 9 Beginning in the 1960s there was a decisive shift among most agencies toward [\*35] rulemaking. 10 However, with exceptions (most of which are described here), the promotion of competition - the antitrust regime - remains rooted in an adjudication model, and might even be described as stuck there. More effective and widespread promotion of competition may require more widespread and effective use of pro-competitive rulemaking by a broader variety of agencies.

### Solvency---AT: Deterrence

#### Business will self-regulate out of fear of prosecution AND to conserve reputational capital, so enforcement is not required

Dr. Adi Ayal 15, Professor at Bar Ilan University, PhD in Economics from the University of California, Berkeley, and PhD in Law from Bar Ilan University, with Highest Distinction, “Anti-Anti Regulation: The Supplanting of Industry Regulators with Competition Agencies and How Antitrust Suffers as a Result”, in Competition Law as Regulation, Ed. Drexl and Di Porto, p. 28-30

The broad definition of regulation encompasses the idea that the state controls private actions through a myriad of means, some direct and some indirect. This formulation may be useful to avoid biases inherent in examining only specific types of rules, while other norms influence the same behaviour. In order to overcome such biases, some prefer to use terms such as ‘regulatory regime’ or ‘regulatory space’ to denote the environment which influences both the formation and enforcement of such legal norms.3

For the purposes of this chapter, I focus on specific regulatory regimes, i.e. those dealing with industries subject to direct agency review, and contrast them with a general regime enforced by competition agencies based on antitrust law. Industry-specific regulation is associated with the rise of the ‘administrative state’, increasing governmental intervention in the economy and reducing judicial oversight by focusing on expert institutions using ‘command and control’ methods.4 While current consensus might be that such regulation was excessive and is in the process of reduction, it should be noted that such cycles of increasing and then decreasing state intervention have been occurring periodically, usually with economic booms increasing trust in markets (and inducing calls for less regulation), and with downturns and depressions pushing in the opposite direction.5 Deregulation is often associated with an increased role for competition agencies, many citing antitrust as a substitute for industry-specific regulation, a claim that will be assessed in more detail below.6

Most studies of regulatory agencies focus on three main types of activities such agencies employ: information gathering, standard setting and behaviour modification.7 Information gathering is necessary for an understanding of the industry and problems plaguing it; standard setting is the formation of legal norms and guidelines which firms and individuals subject to the regulatory agency must follow; and behaviour modification refers to enforcement measures aimed at those failing to follow said rules.

Despite the current focus on regulatory enforcement, it is important to note that much of the effect of regulation stems from self-regulation. This is due to businesses’ eagerness to avoid later prosecution, or the importance of public perception and the reputational capital associated with the appearance (or reality) of ‘good citizenship’. Thus, literature abounds on hybrid forms of regulation, such as requiring firms to form internal codes of conduct or enforcement mechanisms.8 In these situations, the public agency monitors only the exterior contours of internal regulation, such as the existence of such a code or the appointment of an internal compliance officer. Such measures create a legally binding contract (e.g., if encoded in a firm’s bylaws) or the public perception of such (e.g., if declared as company policy). Internal compliance measures can thus be self-enforcing and a regulatory agency requiring them, but not enforcing them, can still make a large difference in eventual behaviour.

### Solvency---AT: Effects

#### Antitrust agencies will share expertise with regulators, ensuring proper design

Dr. Chris Pike 19, MS and PhD in Economics from the University of East Anglia, Competition Expert at the OECD, Leader of Working Party 2 of the OECD Competition Committee, Associate at the Centre for Competition Policy, BA in Economics from the University of East Anglia, “Independent Sector Regulators – Note by the United States”, OECD Working Party No. 2 on Competition and Regulation, 12/2/2019, p. 8-9

4. Competition Advocacy

23. Where sectoral regulators have a lead or shared role in promoting or preserving competition in a sector, the Antitrust Agencies regularly share their expertise with the relevant regulator through competition advocacy. The Antitrust Agencies generally seek to promote reliance on competition rather than on government regulation, unless there is compelling evidence that regulation is necessary to achieve an important social objective. They also seek to ensure that when regulation is necessary, it is properly designed to accomplish its objectives as efficiently as possible, for example, through market-based solutions and structural, rather than behavioral, remedies. The Antitrust Agencies also seek to inform regulators of the costs associated with restrictive regulation. The FTC and DOJ have sought to inform sectoral regulators about the impact of regulation on efficiency and consumer welfare and potential benefits of deregulation in various sectors of the economy, including electricity, natural gas, telecommunications, broadcasting, cable television, and electricity generation and distribution. They communicate their views to other agencies through informal consultations, or more formally, through letters or regulatory filings.

24. In one recent example, the Antitrust Agencies submitted public comments to the U.S. Federal Energy Regulatory Commission (“FERC”) regarding how the FERC assesses market power in the agency’s review of mergers and electricity sales rates under the Federal Power Act. The Antitrust Agencies encouraged the FERC to look beyond market share and concentration statistics in this analysis, which should ultimately be aimed at understanding the competitive effects of proposed transactions. Due to features specific to electricity markets, even firms with relatively small market shares may be able to exercise market power, and so other evidence should be considered in determining whether, for example, a proposed combination of assets would enhance the ability and incentive of a firm to raise prices.25

25. The Antitrust Agencies also opine on specific transactions, or aspects of them. For example, in April 2016 the DOJ formally opposed the structure the Canadian Pacific Railway proposed for its merger with Norfolk Southern Corp. The Canadian Pacific Railway had proposed to create an “independent voting trust” that would hold the shares of Canadian Pacific for the pendency of the Surface Transportation Board’s (“STB”) substantive analysis of the merger.26 The DOJ argued that this ownership arrangement would undermine the independence of the two companies and effectively combine the two companies before a regulatory review could be completed. In the face of the opposition to the voting trust arrangement by the DOJ and by other parties that submitted their views at the STB, the companies abandoned the deal before the STB had the opportunity to rule either on the voting trust or on the merger itself.

## Innovation ADV

### Innovation---Circumvention---2NC

#### Courts ignore plain meaning and water down the plan to favor business

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

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

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

#### Even precise statutes get ignored and Congress will back down

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

This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation?

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

Even where reform statutes are textually honored in their immediate aftermath, history shows a creeping judicial tendency to begin integrating the reform statutes into the mainstream of antitrust jurisprudence within a few decades. This has been the fate of the four major antitrust reform statutes— the FTC, Clayton, Robinson-Patman, and Celler-Kefauver Acts—each of which was meant to rein in capital in ways that the Sherman Act did not. In all four instances, however, the courts incrementally began mainstreaming the statutes into Sherman Act precedent, creating a homogenous antitrust jurisprudence that read the textual distinctiveness out of the reform statutes. Thus, today, cases under the FTC Act, section 3 of the Clayton Act, and the Robinson-Patman Act are largely indistinct from Sherman Act cases,256 and merger cases have been rolled into the same modes of price-theoretic analysis that would be employed in a Sherman Act case.257 Given that neither statutory text nor legislative history seems to have deterred the courts from this process within a few decades after the passage of the statutes, there is little reason to believe that a “this time we mean it” statutory reform would not meet the same fate. If the courts continue to understand aspects of the antitrust statutes as aspirationally motivated and operationally impracticable, the previously observed pattern is likely to continue.

#### Antitrust courts lack expertise to make correct decisions

Herbert Hovenkamp 18, James G. Dinan University Professor at Penn Law and Wharton School of Business at the University of Pennsylvania, “The Rule of Reason”, Florida Law Review, 70 Fla. L. Rev. 81, January 2018, Lexis

II. BURDENS OF PROOF, QUALITY OF EVIDENCE, AND THE "QUICK LOOK"

A. Cost Savings from the Per Se Rule?

Antitrust policy should strive to reduce the social costs of anticompetitive behavior, which has two distinct components. One is the net social costs of anticompetitive price increasing or output reducing conduct and the private measures taken to defend against it, offset by any economic benefits. Second are administrative costs, including error costs, of operating the enforcement system.

One must assume that a full-blown rule of reason inquiry is much costlier than analysis under the per se rule. Applying the rule of reason typically requires expert testimony identifying a relevant market or alternative mechanisms for estimating market power, as well as some evidence that purports to measure actual anticompetitive effects. 103 By contrast, the per se rule requires only proof that a particular type of conduct has occurred. Thus, the rule of reason is justifiable only to the extent that it provides superior outcomes.

Administrative costs include not only the costs of litigation, whether terminated by settlement, dispositive motion, or trial, including appeals, but also the cost of detecting violations, of determining whether to sue, as well as of antitrust compliance with whatever the rule happens to be. Error costs are particularly relevant to compliance costs. For example, an unduly harsh tying rule may influence firms to avoid socially beneficial tying. By contrast, an overly lenient predatory-pricing rule may yield excessive anticompetitive predation. 104

[\*99] Excessive complexity can increase error costs just as much as excessive simplicity. Antitrust cases in the United States are decided by generalist judges, many of whom lack economics training. Further, facts are often determined by juries, who frequently lack any relevant training whatsoever. In such cases increased complexity can produce poorer rather than better outcomes. 105 As a result, a per se rule that is easily administered but right only 80 percent of the time may actually be preferable to an open-ended rule of reason query with an arbitrary and indeterminate error rate.

#### 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

### Innovation---Turn---AT: Not Unique---2NC

#### Innovation is skyrocketing.

Peter Young 21, CEO and President of Young & Partners, MBA from the Harvard Business School, “Doubling Down On Innovation, Recovery,” Pharmaceutical Executive, Vol. 41, No. 9, 09-01-2021, https://www.pharmexec.com/view/doubling-down-on-innovation-recovery

Dialing forward to the picture over the last two years or so and the situation is far more positive. A flurry of new and innovative drugs has shown a global audience that the biopharma industry serves a critical role in fighting diseases. This has been highlighted by new, high-profile discoveries and effective solutions to the current coronavirus crisis, whether it is vaccines or drugs that reduce the severity of the disease for those who are infected. The hugely important development of vaccines to combat COVID-19 has saved millions of lives and, at the same time, changed the attitude of the general public in a more positive direction. Innovation has exploded in all parts of the ecosystem: large pharma, biotech, and collaborations between large pharma and biotech companies, research organizations, and universities. Many of the innovations have been revolutionary (mRNA, immuno-oncology, CRISPR, stem cells, etc.) and others have been evolutionary advances. Drugs and drug delivery systems are being approved in numbers that are very strong. The shift into orphan drugs has created opportunities for biopharma companies of all sizes and has changed the relationship between biotechs and big pharma. Funding for biotech organizations via private investors and institutions and the public markets has been robust, including record numbers of IPOs.

#### High R&D spending proves.

Robert D. Atkinson & Stephen Ezell 21, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill; Vice President of Global Innovation Policy at the Information Technology & Innovation Foundation, “Five Fatal Flaws in Rep. Katie Porter’s Indictment of the U.S. Drug Industry,” Information Technology & Innovation Foundation, 05-20-2021, https://itif.org/publications/2021/05/20/five-fatal-flaws-rep-katie-porters-indictment-us-drug-industry

The report goes on to assert that drug companies have little incentive to invest in R&D and new drug development. This is an odd assertion given that in 2020, an estimated 66 drugs went off-patent and were available to be produced by generic companies.8 Without new drugs to replace those going off-patent, non-generic drug companies would soon be out of business.

Yet, the report argues, “Pharmaceutical companies have little incentive to invest in innovative new medicine without the threat of competition. Instead, they are free to devote their considerable resources to merging with or acquiring companies that might otherwise force them to compete.”9 As noted, competition has not materially diminished in the last 15 years; if anything, it has gotten more intense, with new biologics producers challenging traditional small molecule drug producers.

The report also cites a Roosevelt Institute report that states, “Yet, as prices have skyrocketed over the last few decades, these same companies’ investments in research and development have failed to match this same pace.”10 The report argues that “R&D has not matched price increases.” In reality, from 2012 to 2016, drug sales increased $5.8 billion a year, while R&D actually increased $6.8 billion a year.11

Drug companies in America are incredibly R&D intensive and have become even more so, with their R&D-to-sales ratio increasing from 11 percent in 2006 to 20 percent in 2018.12 The ratio for the top 20 U.S. companies increased from 15 percent in 2006 to 23.6 percent.13 Further, while drug revenues increased 56 percent from 2006 to 2018 (in nominal dollars), R&D increased by 85 percent.14

The report asserts that small firms invest more in R&D and that big firms use their revenue for other purposes, such as paying excessive CEO compensation. Actually, in 2016, the top 20 firms globally accounted for 66.5 percent of global sales yet made 64 percent of R&D investment.15 In 2018, the R&D intensity of the largest 4 firms was 26 percent, of the top 8 was 25 percent, and of the top 20 was 22 percent, with the entire industry at 20 percent.16 In reality, it is the largest firms, not the smallest, that are the most R&D intensive.

The Porter report complains that “the fraction of pharmaceutical sales revenue devoted to total R&D is generally under 20 percent.”17 Is 20 percent a lot, or a little? It turns out, a lot. The U.S biopharmaceutical industry is the world’s most R&D-intensive industry, with firms in the United States investing over 21 percent of sales in R&D, while accounting for 23 percent of total domestic R&D funded by U.S. businesses—more than any other sector.18 Over the last decade, biopharmaceutical companies in the United States have invested over half a trillion dollars in R&D, while more than 350 new medicines have been approved by the FDA.19 The industry reinvested 43.8 percent of value added (value sales minus purchased inputs) into research in 2014, more than any other industry in any country. (See figure 1.)

The Porter report asserts that “the share spent on the basic research that often generates truly innovative new compounds is estimated to be far smaller [than total R&D].” In fact, companies’ share of R&D classified as basic (14.3 percent) is higher than any other U.S. industry—and more than twice as high as the U.S. industry average (6.4 percent).20

Even though the U.S. industry invests more in R&D than any other industry in the world, the report implies that the industry is still too profitable. It cites a study that claims, “Pharma would still be the most profitable industry sector—even if it lost $1 trillion in sales,” implying that the industry could lose $1 trillion in sales a year through price controls and still be very profitable.22 This would be difficult, given global sales were around $1.3 trillion in 2019, and the top 10 pharma companies earned $392.5 billion.23

Actually, the study referenced refers to $1 trillion over nine years, or $110 billion per year. But even this amount is misleading. First, the authors use return on invested (ROI)capital as their measure of profitability. However, there are numerous metrics that can measure profitability, and this one poorly reflects the profitability of R&D-intensive industries since R&D is not capitalized but expensed.24 As a result, this measure overstates the industry’s profit advantage over less-R&D intensive industries. Data from New York University Professor Aswath Damodaran shows that in 2015, pharmaceutical return on equity (ROE) was 15.2 percent, while biotechnology ROI was 22.3 percent, compared with overall market profits of 10.8 percent.25 But when this measure is adjusted for R&D spending, the delta is significantly less, with pharmaceutical ROE being 11.1 percent and biotechnology ROI 13.9 percent, compared with overall market-adjusted ROE of 9.9 percent.26 Updated industry ROE data from Damodaran in 2021 finds that the traditional pharmaceutical industry ranks in the lower one-third of profitable U.S. industries.27

But these figures are only for survivors, and do not include all the biopharma companies that went bankrupt because their discoveries did not pan out.28 In 2016, of the top 659 companies globally, only one-third (259) even made a profit.29

Moreover, even these modestly higher returns should not be cause for concern. As a study from the former Congressional Office of Technology Assessment finds, “Pharmaceutical R&D is a risky investment; therefore, high financial returns are necessary to induce companies to invest in researching new chemical entities.”30 Likewise, as Harvard economist Frederick M. Scherer wrote, “Had the returns to pharmaceutical R&D investment not been attractive, it seems implausible that drug-makers would have expanded their R&D so much more rapidly than their industrial peers.”31

Further, the report attacks the industry for engaging in stock buybacks, writing, “In 2018, the year that Donald Trump’s tax giveaway to the wealthy went into effect, 12 of the biggest pharmaceutical companies spent more money on stock buybacks than on research and development.”32 But stock buybacks were high that year because tax changes enabled companies to bring back repatriated profits from overseas to the United States, which is what many industries did. In fact, as one study notes, “In the United States, massive distributions of cash to shareholders are not unique to pharmaceutical companies.”33

The Porter report also argues that drug price controls would not retard innovation because profits are so large. Not only are drug industry profits not excessive but most academic studies find that drug price controls will harm drug development.34 In large part, this is because, as the Organization for Economic Cooperation and Development (OECD) noted, “There exists a high degree of correlation between pharmaceutical sales revenues and R&D expenditures.”35 In addition, the Congressional Budget Office (CBO) examined the potential impact of the proposed House legislation H.R.3, which among other provisions would require drug companies to negotiate lower prices with the government. It concluded that reducing manufacturers’ revenues by between $500 billion and $1 trillion over the next decade could result in 8 to 15 fewer new drugs coming to market.36

False Claim #3: The Industry Is Not Producing Enough Breakthrough Drugs

To press the case for dismantling the U.S. drug development system, opponents must argue that the system is not effectively performing its core function: producing effective treatments and cures. Given that leading drug companies have come up with COVID-19 vaccines in record time, using breakthrough technologies to literally save the world, this case is harder now. But undeterred, the report states, “Rather than producing breakthrough, lifesaving drugs for diseases with few or no cures, most companies focus on small, incremental changes to existing drugs in order to kill off generic threats to their government-granted monopoly patents.”37

It notes that “the discovery of new molecular entities or novel drugs in the last decade (2000–2010) were in line with or slightly above those rates observed in the 1980s, despite technological improvements that should have catapulted new cures forward.”38

But in reality, new drug approvals have significantly accelerated. The FDA’s Center for Drug Evaluation and Research’s five-year rolling approval average stood at 44 new drugs per year in 2019, double the lowest five-year rolling average of 22 drugs approved, realized in 2009. (See figure 2.) And the number of drugs in development globally increased from 5,995 in 2001 to 13,718 in 2016.39

Yet, the Porter report states, “Instead of taking risks to find new, critically needed drugs, large pharmaceutical companies are just repackaging the same products over and over: In 2018, only 1 in 3 new brand-name drugs that drug companies launched were ‘first in class’ drugs.”41

Is 1 in 3 low? In the 1940s and 1950s, when there were few drugs on the market and almost all were first in class, 1 in 3 would have been low. But as more drugs hit the market, the share of first-in-class drugs declined as it became harder to discover new treatments and also because of the importance of producing multiple drugs to address the same disease. Nonetheless, the share of drugs that are new has risen since the 1970s, not fallen.42

The report criticizes the industry for investing in “me-too” drugs. But this fails to recognize the significant clinical benefits of new drugs complementing existing drugs. Sometimes an existing drug does not perform as well as the new drug. Sometimes certain individuals have adverse reactions to an existing drug but not the new drug.43 In addition, follow-on drugs can be better in efficacy or methodology and convenience of use and administration. DiMasi and Faden found that 32 percent of follow-on drugs have received a priority rating from the U.S. FDA, indicating that these drugs are likely to provide an important improvement over the first-to-market drug.44 They concluded, “Overall, these results indicate that new drug development is better characterized as a race to market among drugs in a new therapeutic class, rather than a lower risk imitation of a proven breakthrough.”45 Moreover, GAO found that the introduction of additional drugs lowers prices.46

The report also implies that discovering new drugs is easier now because of “technological improvements.” To be sure, technological improvements, such as big data analytics, genomics, nanotechnology, and others are improving drug development. But rather than becoming easier, as the need for personalized medicines grows, developing new drugs is harder, especially for cancer, Alzheimer’s, and thus-far intractable diseases.

The scholarly literature confirms this. In a study of productivity, research economists Bloom, Jones, Van Reenen, and Web found that over the last 20 years, in many industries, including biopharmaceuticals, it takes more R&D effort to get the same results.47 This is reflected in a 2014 study by Tufts Center for the Study of Drug Development that estimates that the average cost of developing a new drug was $2.56 billion up from $1.1 billion in 2000 (in 2015 dollars).48

Similarly, according to a 2018 report “Unlocking R&D Productivity: Measuring the Return From Pharmaceutical Innovation 2018” by the Deloitte Center for Health Solutions, “The average cost to develop an asset, including the cost of failure, has increased in six out of eight years.”49 The report estimates that the cost of developing a new drug almost doubled from an average cost of $1.19 billion in 2010 to $2.17 billion in 2018. The 2019 version of the report concludes that the average cost of bringing a new drug to market has increased by 67 percent since 2010 alone.50

### Innovation---Turn---2NC

#### That’s key---outweighs their offense.

Dickey et al. 19, Bret Dickey, Executive Vice President at Compass Lexecon, Ph.D. in Economics from Stanford University; Ken Huang, Senior Vice President at Compass Lexecon, Ph.D. in Economics from the University of Wisconsin-Madison; Daniel L. Rubinfeld, Professor of Law at the NYU School of Law, Robert L. Bridges Professor of Law Emeritus and Professor of Economics Emeritus at the University of California, Berkeley, Ph.D. in Economics from the Massachusetts Institute of Technology, “Pharmaceutical Product Hopping: Is There a Role for Antitrust Scrutiny?”, Antitrust Law Journal, Vol. 82, No. 2, January 2019, https://www.researchgate.net/publication/334376755\_Pharmaceutical\_Product\_Hopping\_Is\_There\_a\_Role\_for\_Antitrust\_Scrutiny

Innovation is a critical driver of consumer benefits, especially in the pharmaceutical industry. Pharmaceutical research and development is not only time consuming and expensive, but also only rarely leads to a successful new product.19 It is not surprising, therefore, that the majority of pharmaceutical innovation takes the form not of new molecules, but rather of modifications of existing products. These incremental innovations can, for example, change the form of the medication (e.g., from capsules to tablets), reduce the frequency with which patients need to take the medication (e.g., from twice per day to once per day), reduce the amount of active ingredient required to deliver a particular dosage, extend the time during which the drug is active (e.g., from immediate release to extended release), or combine with another existing, complementary medication into a single pill. Pharmaceutical innovation in general, incremental innovation included, has led to substantial health benefits.20

Incremental innovation is important in the pharmaceutical industry. Most incremental innovations generate some procompetitive benefits. A seemingly modest improvement (e.g., a move from a twice-daily dose to a once-daily dose) can substantially improve the effectiveness of medication through increased compliance, reduced adverse effects, and/or the ability to treat new patient populations.21 Small incremental changes can fill unmet needs in the market. In addition, incremental innovation can help to reduce the overall risk portfolio of a manufacturer’s R&D projects (which may also include riskier R&D on potential “breakthrough” drugs). And profits from incremental innovation can help to fund overall R&D activities.

It is important to encourage innovation (including incremental innovation) by protecting the fruits of research and development through patents and other intellectual property protection. In doing so, society properly rewards successful innovators for their investment and preserves their innovation incentives. The policy implication is clear—it is, therefore, essential that competition policy does not chill the incentive to innovate, even incrementally, in the pharmaceutical industry.22 This, however, needs to be balanced against the benefits of price competition from generic drug manufacturers.

## FTC ADV

### FTC---AT: Terror ---Money Controls Fail---2NC

#### Terrorists adapt---cutting funding makes them stronger

Major David N Santos 11, Active Duty Army Intelligence Officer Currently Attending the U.S. Army Command & General Staff College, “What Constitutes Terrorist Network Resiliency?”, Small Wars Journal, 5/31/2011, http://smallwarsjournal.com/jrnl/art/what-constitutes-terrorist-network-resiliency

As important as ideology and social networking are, their benefits will only carry a terrorist organization to a certain extent. As with virtually any other organization or activity around the world, money, is the lifeblood of any organization or movement. Without a reliable source of funding a terrorist organization loses its ability to be proactive in conducting operations as well as procure needed support services and material items. Since acquiring and maintaining sources of financing is vital to the existence of a terrorist organization, security for those sources of funding along with the methods of transferring and storing funds is equally vital. As a result, terrorist organizations have proved to be exceptionally agile in identifying and implementing numerous methods of funding and transferring money in order to prevent effective countermeasures by state governments (Williams, 2005).

The process of globalization has created unprecedented levels of interconnectivity among not only state governments but also among domestic and international financial institutions. As such, vast sums of money can be transferred from one part of the world to another nearly instantaneously. The sheer pace and vastness of the globalization process with developments in information and telecommunications technology has created a nearly impossible task to monitor effectively daily financial transactions to ensure there is no link to terrorist activity. Previous attempts to counter terrorist financing, such as in the wake of the 9/11 attacks, has been to freeze known or suspected terrorist financial assets. Yet this countermeasure has only yielded limited success. As Williams (2005) notes, current attempts to identify and attack terrorist financing has only served to increase the “capacity of terrorist organizations to adapt quickly

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to new regulations by adopting novel methods of circumventing rules and regulations” (pp. 6).

If Williams (2005) is correct in his analysis that current efforts to target terrorist funding are only resulting in making smarter and more efficient fiscally minded terrorist organizations than what is enabling this trend? One of the key issues is current international law is lacking in specificity and applicability to the nature of the threat posed by transnational terrorist organizations like al Qaeda. One of the main deficiencies with international law is with the Financial Action Task Force (FATF) which had been created in 1989 by the G-7 states to counter money laundering activities conducted by international criminal and drug trafficking organizations (Williams, 2005). The FATF identified 40 recommendations to be implemented to counter money laundering activities. However, no formal binding convention or treaty was created therefore consistent implementation of the FATF recommendations did not occur thus leaving loop holes in international law for use by terrorist organizations to circumvent the FATF. Efforts like the FATF can only be successful if they receive the full support of the international community. Limited or no support provides opportunities for terrorist organizations to continue their financing operations relatively unmolested. The FATF was a lackluster effort to combat terrorist financing due to inefficiency in the manner in which it operated resulting in money laundering not being truly deterred but rather shifted to other areas around the globe where these activities could be conducted more freely (Williams, 2005). The FATF is only one example of inconsistencies in international economic law (as well as with state domestic law) which have inhibited effective terrorist financing countermeasures. The ineffectiveness of the FATF and other counter drug and organized crime measures which have been used to target terrorist financing has only served to actually create more experienced and smarter terrorist financing practices. Instead of preventing terrorist financing, efforts such as the FATF have only facilitated it to expand.

#### They’ll move to other areas

Sam Vaknin 5, Ph.D., Editor in Chief of Global Politician and Investment Politics, “Money Laundering in A Changed World”, May, http://samvak.tripod.com/pp96.html

Quo Vadis, Money Laundering?

Crime is resilient and fast adapting to new realities. Organized crime is in the process of establishing an alternative banking system, only tangentially connected to the West's, in the fringes, and by proxy. This is done by purchasing defunct banks or banking licences in territories with lax regulation, cash economies, corrupt politicians, no tax collection, but reasonable infrastructure.

The countries of Eastern Europe - Yugoslavia (Montenegro and Serbia), Macedonia, Ukraine, Moldova, Belarus, Albania, to mention a few - are natural targets. In some cases, organized crime is so all-pervasive and local politicians so corrupt that the distinction between criminal and politician is spurious.

Gradually, money laundering rings move their operations to these new, accommodating territories. The laundered funds are used to purchase assets in intentionally botched privatizations, real estate, existing businesses, and to finance trading operations. The wasteland that is Eastern Europe craves private capital and no questions are asked by investor and recipient alike.

The next frontier is cyberspace. Internet banking, Internet gambling, day trading, foreign exchange cyber transactions, e-cash, e-commerce, fictitious invoicing of the launderer's genuine credit cards - hold the promise of the future. Impossible to track and monitor, ex-territorial, totally digital, amenable to identity theft and fake identities - this is the ideal vehicle for money launderers. This nascent platform is way too small to accommodate the enormous amounts of cash laundered daily - but in ten years time, it may. The problem is likely to be exacerbated by the introduction of smart cards, electronic purses, and payment-enabled mobile phones.

#### Terror funding’s resilient and adaptable

Major David N Santos 11, Active Duty Army Intelligence Officer Currently Attending the U.S. Army Command & General Staff College, “What Constitutes Terrorist Network Resiliency?”, Small Wars Journal, 5/31/2011, http://smallwarsjournal.com/jrnl/art/what-constitutes-terrorist-network-resiliency

Since the devastating attacks of September 11, 2001 there have been numerous discussions on the issue of terrorism and terrorist networks, such as al Qaeda, within the media and the intelligence community. At times these discussions have created an image of the terrorist phenomenon as one of a monolithic and unstoppable menace continuing to spread around the world unabated. Lost in these discussions is a basic understanding of what any organization needs to continue to exist. What are its basic needs? What are its sources of strength and resiliency? Most organizations, whether terrorist or not, rely on some basic essential elements that are used to help define, guide and maintain the organization. These elements allow an organization to develop strength in its structure as well as its cause in order to maintain a resilient mindset. These elements of strength and resiliency enable the organization to experience periods of adversity, look critically at the outcomes of those experiences and take the lessons learned to improve the organization’s performance.

Every successful organization, to include terrorist organizations, has to identify what their most essential elements for survival are. These basic elements will vary to some degree based on an organization’s unique qualities. However, there are some elements that are almost universal to all organizations and those identified as terrorist organizations in particular.

Some of the more universal elements that can contribute to a terrorist network’s strength, longevity and resiliency involve the organization’s ideology, social network apparatus and capability as well as the ability to maintain a source of funding for its operations. These are the key basic elements needed by any terrorist network to maintain and further a viable long lasting organization. If a terrorist organization were to fail to maintain a high level of proficiency in each of these elements, either individually or collectively, the organization could experience a degraded ability to achieve its desired objectives.

#### They’ll use clean money

Rebecca S. Hekman 7, Fletcher MALD 2010, UCLA Law School JD 2010, citing Ibrahim Warde, Adjunct Professor of International Business at the Fletcher School, “Review of The Price of Fear: The Truth Behind the Financial War on Terror by Ibrahim Warde,” Al Nakhlah Fall 2007, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=48027>

The fixation on money as the “mother of intent”18 for acts of terror has also caused financial warriors to approach terrorist funding in the much same way as money laundering. Warde finds this use of an inapplicable framework to be at the root of many of the financial war’s dysfunctions. Indeed, money laundering’s motive (crime-for-profit); procedures (disguising the origins of huge amounts of “dirty” money and injecting them back into the formal economy); and actors (small numbers of drug lords or crime families) are fundamentally different than those of new terrorist financing. The most prevalent form of terrorism today is politically and ideologically motivated. Relying on a broad and largely amorphous support system, it uses small, unnoticeable amounts of “clean” money to fund criminal acts.

### Defense---2NC

#### No nuke terror

Dr. John Mueller 20, Professor of Political Science and Senior Research Scientist with the Mershon Center for International Security Studies at Ohio State University, Senior Fellow at the Cato Institute, PhD from the University of California, Los Angeles, “Assessing International Threats During and After the Cold War”, Cato Institute, 5/6/2020, https://www.cato.org/publications/study/assessing-international-threats-during-after-cold-war

In the decade after the Cold War, a similar process of threat identification took place as problems previously considered to be of minor, or at least of secondary, concern were promoted. Anxieties about international terrorism substantially increased during the 1990s and were set into highest relief with the terrorist attacks of September 11, 2001. Extrapolating wildly from 9/11, a terrorist event ten times more destructive than any other in history, terrorism of that sort has repeatedly been taken to present a direct, even existential, threat to the United States or to the West — or even to the world system or to civilization as we know it.6 Wild extrapolations have precipitated costly antiterrorism and antiproliferation wars and huge increases in security spending. In these ventures, trillions of dollars have been squandered and well over two hundred thousand people have perished, including more than twice as many Americans as were killed on 9/11.7 There has been a tendency to see these exercises as misguided elements of a coherent plan to establish a “liberal world order” or to apply “liberal hegemony.“8 However, the overwhelming impetus was far more banal: to get the bastards responsible for 9/11.

Islamist terrorism in the United States has killed some six people per year since 9/11, and far more people in Europe perished yearly at the hands of terrorists in most years in the 1970s and 1980s.9 But there has nonetheless been a tendency to continue to inflate al-Qaeda’s importance and effectiveness.

In fact, al‐​Qaeda Central has done remarkably little since it got horribly lucky in 2001. It has served as something of an inspiration to some Muslim extremists, has done some training, seems to have contributed a bit to the Taliban’s far larger insurgency in Afghanistan, and may have participated in a few terrorist acts in Pakistan. It has also issued a considerable number of videos filled with empty, self‐​infatuated, and essentially delusional threats.10 Even isolated and under siege, it is difficult to see why al‐​Qaeda could not have perpetrated attacks at least as costly and shocking as the shooting rampages (organized by others) that took place in Mumbai in 2008, in Paris in 2015, or in Orlando and Berlin in 2016. And, although billions of foreigners have entered legally into the United States since 2001, not one of these, it appears, has been an agent smuggled in by al‐​Qaeda. The exaggeration of terrorist capacities has been greatest in the many overstated assessments of their ability to develop nuclear weapons. In this, it has been envisioned that, because al‐​Qaeda operatives used box cutters so effectively on 9/11, they would, although under siege, soon apply equal talents in science and engineering to fabricate nuclear weapons and then detonate them on American cities.11

It is possible to argue, of course, that the damage committed by jihadists in the United States since 9/11 is so low because “American defensive measures are working,” as Peter Bergen puts it.12 However, although security measures should be given some credit, it is not at all clear that they have reduced the amount of terrorism significantly. There have been scores of terrorist plots rolled up in the US by authorities but, looked at carefully, the culprits left on their own do not seem to have had the capacity to increase the death toll very much.13 As Brian Jenkins puts it, “Their numbers remain small, their determination limp, and their competence poor.“14 Nor can security measures have deterred terrorism. Some targets, such as airliners, may have been taken off the list, but potential terrorist targets remain legion.15 To a considerable degree, terrorism is rare because as Bruce Schneier puts it bluntly, “there isn’t much of a threat of terrorism to defend against.“16

#### No crypto internal link---their card says people use fake Twitter accounts to scam people---that’s disconnected from the operation of crypto key to the internal link.

#### No food wars

Jonas Vestby 18, Doctoral Researcher at the Peace Research Institute Oslo, Ida Rudolfsen, doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO, and Halvard Buhaug, Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography, “Does hunger cause conflict?”, 5/18/18, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/]

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

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

#### Global food supply is high and resilient

Indur Goklany 15, PhD from Michigan State, Assistant Director of Programs, Science and Technology Policy at the DOI, represented the United States at the Intergovernmental Panel on Climate Change (IPCC) and during the negotiations that led to the United Nations Framework Convention on Climate Change, “CARBON DIOXIDE: The good news”, The Global Warming Policy Foundation, GWPF Report 18

Crop yields have increased (see Figure 3) and global food production, far from declining, has actually increased in recent decades. Between 1990–92 and 2011–13, although global population increased by 31% to 7.1 billion, available food supplies increased by 44%. Consequently, the population suffering from chronic hunger declined by 173 million despite a population increase of 1.7 billion.112 This occurred despite the diversion of land and crops from production of food to the production of biofuels. According to one estimate, in 2008 such activities helped push 130–155 million people into absolute poverty, exacerbating hunger in this most marginal of populations. This may in turn have led to 190,000 premature deaths worldwide in 2010 alone.113 Thus, ironically, a policy purporting to reduce AGW in order to reduce future poverty and hunger only magnified these problems in the present day.

### Authority High---2NC

#### They’ll use Penalty Offense Authority---it’s already been resurrected in response to AMG

John Culhane 10-8 Jr., Partner at Ballard Spahr LLP, JD from the University of Virginia School of Law, BA from Notre Dame University, “FTC Looks to Section 5 Penalty Offense Authority in Sending Notices to For-Profit Schools that Outline Practices Found to be Unfair or Deceptive”, JD Supra, 10/8/2021,

The FTC announced yesterday that it has sent a “Notice of Penalty Offenses” to 70 for-profit higher education institutions that outlines a number of practices that the FTC has previously found to be unfair or deceptive.

The seven practices outlined in the Notice generally relate to claims made by schools about their graduates’ job and earnings prospects. The Notice warns that engaging in these practices could subject a school to civil penalties and cites a number of administrative cases brought by the FTC against for-profit institutions in which the FTC found these practices to be a UDAP violation. The Notice indicates however that it does reflect any assessment as to whether the school has engaged in deceptive or unfair conduct.

In its announcement regarding the Notices, the FTC stated that it “is resurrecting its Penalty Offense Authority, found in Section 5 of the FTC Act.” 15 U.S.C. § 45(m)(1)(B) provides:

If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 [currently adjusted to $43,792] for each violation.

The FTC’s cover letter accompanying the Notices advises schools that receipt of a Notice “puts your company on notice that engaging in [any of the seven practices outlined in the Notice] could subject the company to civil penalties of up to $43,792 per violation.” As indicated in a blog post about the Notices, the FTC’s position is that “[t]he receipt of a Notice will help the FTC establish that [a school that engages in any of the outlined practices] had ‘actual knowledge’ [that it was engaging in an unfair or deceptive practice]” and allow the FTC to sue in federal court and seek civil penalties. The blog post also notes that the FTC’s Penalty Offense Authority is not limited to companies involved in the education marketplace and warns other companies “that the FTC will use every tool at its disposal to protect consumers from deceptive and unfair practices.”

The FTC’s “resurrection” of its Penalty Offense Authority would appear to be part of its efforts to blunt the impact of the U.S. Supreme Court’s AMG decision in which the Court ruled that Section 13(b) of the FTC Act does not authorize the FTC to seek monetary relief such as restitution or disgorgement. In a recent memo to FTC Commissioners and staff outlining her “vision and priorities” for the agency, FTC Chair Lina Khan indicated that in light of AMG, it is particularly critical for the FTC to use its “full set of tools and authorities.”

In his prepared remarks about the FTC’s use of its Penalty Offense Authority to target for-profit school, FTC Commissioner Rohit Chopra, recently-confirmed as CFPB Director, also stated that “[t]his legal tool is particularly important, given the Supreme Court’s recent ruling in AMG Capital Management.” In 2020, Mr. Chopra co-authored a paper that discussed why the FTC should resurrect its Penalty Offense Authority. (Mr. Chopra wrote the paper with Samuel Levine who was recently named Director of the FTC’s Bureau of Consumer Protection.)

#### Section 19 is enough

Kirk R. Arner 20, Legal Fellow at the Hudson Institute, and Harold Furchtgott-Roth, Senior Fellow at the Hudson Institute, “Congress Shouldn't Encourage the FTC's Section 13(b) Abuses”, RealClearMarkets, 12/3/2020, https://www.realclearmarkets.com/articles/2020/12/03/congress\_shouldnt\_encourage\_the\_ftcs\_section\_13b\_abuses\_651772.html

Seemingly reading the writing on the wall, the FTC recently sent a rare letter to Congress. In it, the FTC asked Congress to amend Section 13(b) explicitly to allow it to seek monetary damages in federal court. A proposed Senate bill, the SAFE DATA Act would do just that if enacted. It would also establish a ten-year statute of limitation for any damages the FTC sought, even for violations that are no longer ongoing.

But Congress shouldn’t and needn’t do this. Indeed, the FTC doesn’t need Section 13(b) to seek monetary damages for unfairness or deception claims at all.

This is because Section 19 of the FTC Act already empowers the FTC to seek monetary damages for unfairness and deception claims. Unlike Section 13(b), it does so explicitly in its text. And perhaps most importantly, it requires the FTC to provide actual notice to prospective defendants of their alleged illegal conduct via an administrative proceeding and issuance of a “cease and desist” order before seeking monetary damages in federal court.

Notice and due process are unambiguously good, even necessary, for the protection of legal rights of all Americans. Prior FTC practice fell short of both notice and due process. Congress should encourage and uphold better practices and not amend Section 13(b).

#### FTC will shift to alternative routes---13(b) isn’t key

Charles W. Niemann 21, Associate and Litigation Lawyer with Foley & Lardner LLP, JD from the University of Minnesota Law School, and Erik K. Swanholt, Partner at Foley & Lardner LLP, JD from the University of California, Hastings College of the Law, “Questioning Disgorgement Remedies in Light of the U.S. Supreme Court’s AMG Capital Management, LLC v. FTC Decision”, Foley & Lardner LLP, 8/13/2021, https://www.foley.com/en/insights/publications/2021/08/questioning-disgorgement-remedies-supreme-court

Writing for a unanimous bench, Justice Breyer explained that Section 13(b) does not authorize the FTC to obtain monetary relief. While acknowledging the 'policy-related importance of allowing the Commission to use 13(b) to obtain monetary relief,' the unanimous Court held that Section 13(b)'s reference to 'injunctions' did not encompass monetary relief. Although other FTC Act sections allow the FTC to pursue relief 'necessary to redress injury to consumers,' including the 'refund of money,' those sections contemplate the FTC will 'file a complaint against the claimed violator,' 'adjudicate its claim,' and 'issue an order requiring the party to cease and desist from engaging in the unlawful conduct.' Because Section 13(b) lacks these requirements, the Court recognized the potential for misuse. The Court noted it was 'highly unlikely' that Congress intended Section 13(b) to include monetary relief when compared with Section 19, which only provides for monetary relief when particular circumstances and limitations have been satisfied. (e.g., after issuance of a cease and desist order under Section 5 of the FTC Act). The opinion also highlighted that the FTC issued nearly four times as many permanent injunctions under Section 13(b) as cease-and-desist orders under Section 5.

While the decision eliminates one arrow from the FTC's arsenal, the quiver is far from empty; the FTC's range of enforcement options remains broad. As former acting Chairwoman Rebecca Kelly Slaughter noted, following the AMG Capital Management decision: '[A] word about the FTC's other authorities: we will use them all — administrative proceedings, penalty offense authority, more rule-violation cases, more rulemaking, more civil penalty cases where we have specific statutory authority.' Absent Congressional action, FTC targets are likely to encounter more administrative proceedings and alternative routes for pursuing monetary relief no longer available under Section 13(b).

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## Aerojet DA

### Impact---2NC

#### Each scenario goes global AND it’s most probable

Michael Richardson 13, Visiting Senior Research Fellow at the Institute of South East Asian Studies in Singapore, Former South-East Asia Correspondent of The Age, “Cruise Missile Threat in Asia”, Japan Times, 6/18/2013, https://www.japantimes.co.jp/opinion/2013/06/18/commentary/world-commentary/cruise-missile-threat-in-asia/#.XYY4IkZJFwB

Cruise missiles that are difficult to detect, increasingly fast and capable of carrying nuclear warheads are spreading, especially in Asia, complicating arms control and raising the risk of catastrophic conflict.

Until recently, most concerns have focused on the actual or potential spread of nuclear-tipped ballistic missiles in China, North Korea, India and Pakistan — the four Asian states known to have atomic arms. Ballistic missiles, launched by rocket engines, follow an arc-like trajectory, attaining hypersonic speeds on the downward leg of their guided journey towards a target.

Until now and probably for some time yet, all long-range ballistic missiles, with atomic warheads small enough to fit on them, are deployed exclusively for strategic nuclear deterrence. The five official nuclear weapon states — United States, Russia, China, Britain and France — use their long-range ballistic missiles, whether launched from land, air or sea, to deter possible attacks by other nuclear-armed nations.

Arms control treaties and agreements have tended to focus chiefly on ballistic missiles. However, another type of weapon, the cruise missile, is multiplying. It is proving to be even more difficult to control, partly because in many cases the same highly accurate missile is designed to carry either a conventional high explosive warhead or a nuclear warhead.

This dual role makes it impossible for a nuclear-armed nation facing a cruise missile attack against its territory or warships to know whether the incoming weapons are conventional or nuclear, an uncertainty that could trigger a nuclear response. Dual-role ballistic missiles of less than intercontinental range pose a similar problem.

The U.S. Air Force Global Strike Command reported last month that both China and North Korea were developing nuclear-capable cruise missiles. The U.S. and Russia lead the world with nuclear-capable cruise missiles, weapons launched from long-range bombers or submarines. But India and Pakistan are also developing such missiles. They each have several different types, with different ranges, in service or being flight tested.

Cruise missiles, powered by jet engines, travel low and fast over land or water, making them difficult to detect. They are also relatively small, compared to long-range ballistic missiles.

There are about 1,140 of the nuclear version of the U.S. AGM-86 air-launched cruise missile in America’s nuclear arsenal. In addition, there are about 460 nuclear-capable AGM-129A advanced cruise missiles. The U.S. Air Force says that the streamlined design of the AGM-129A, combined with radar-absorbing material and several other features, make it virtually impossible to detect on radar.

The range of the U.S. AGM-129 A is officially put at almost 3,220 km. However, the nuclear-ready version of Russia’s Raduga Kh-101 air-launched cruise missile, which is due to become operational this year, is designed to have a maximum flight distance of just over 9,650 km, which puts it in the range category of an intercontinental ballistic missile.

The new Chinese and North Korean cruise missiles appeared on a slide of an unclassified briefing given by Lt. Gen. James Kowalski, head of the U.S. Air Force Global Strike Command, on May 7. The slide shows nuclear weapon modernizations in eight of the world’s nine states known to have atomic arms. Only Israel is not shown.

The Chinese cruise missile is the CJ-20 carried by the long-range H-6 bomber. Hans Kristensen, a nuclear weapons specialist with the Federation of American Scientists, said the listing was the first he had seen in an official U.S. publication crediting a Chinese air-launched cruise missile with nuclear capability.

U.S. defense officials say that a Chinese extended range H-6 bomber using the CJ-20 in a land-attack operation could strike targets all over Asia and eastern Russia as well as the U.S. military base hub on Guam island, in the western Pacific. Two-thirds of Russian territory, east of the Ural mountains, is in Asia.

The nuclear-capable North Korean cruise missile listed on the briefing slide is the KN-09 for coastal defense. It reportedly has a range of just 100 to 120 km.

America’s AGM-86 nuclear-tipped cruise missiles travel at just over two-thirds the speed of sound.

Meanwhile, India is looking to its supersonic Brahmos cruise missile, a joint venture with Russia, as the key new weapon that will give it a strategic advantage over its neighbor and long-time rival, Pakistan. The Brahmos is the only known supersonic cruise missile system in service. Its designer, BrahMos Aerospace of Russia, says it travels at two to three times the speed of sound, or approximately one kilometer per second.

In October, India and Russia agreed to produce more than 1,000 Brahmos missiles for the Indian Air Force, Navy and Army. The two sides also decided to jointly develop a hypersonic version of the missile that would fly more than five times the speed of sound.

The Indian missile, which can be launched from the sea, air or land, has a range of about 300 km. It can carry a conventional or nuclear warhead. The high speed of India’s Brahmos cruise missile means it has the potential to carry out prompt strikes on extremist camps inside Pakistan, to be followed by a punitive invasion by the Indian armed forces.

Because India is so much bigger and stronger than Pakistan, the latter has developed short-range ballistic missiles with low-yield nuclear warheads to deter such attacks. Although still to be verified, Pakistan claims it has miniaturized nuclear warheads so that they will also fit on cruise missiles. India also says that its cruise missiles are nuclear-capable.

The short-warning time should either country use such weapons against the other means that escalation into an all-out nuclear exchange could result.

Shyam Saran, convener of India’s National Security Advisory Board, said in April that in a crisis with Pakistan, India would not be the first to use nuclear weapons. He warned that even if India was attacked with relatively small, or tactical, nuclear arms, it would “engage in nuclear retaliation that will be massive and designed to inflict unacceptable damage on its adversary.”

There is a wider warning here for Asian countries with tactical nuclear-tipped cruise or ballistic missiles in operation or planned. If ever used, such weapons could open a Pandora’s Box of horrendous consequences, proving that a limited nuclear war is a contradiction in terms.

#### Lack of effective defense causes automated early-warning---extinction

Nicolò Miotto 21, MA Candidate at the Erasmus Mundus Security, Intelligence & Strategic Studies Program at the University of Glasgow, “Artificial Intelligence and Nuclear Warfare. Is Doomsday Closer? - Cyber Security and AI Series”, The Security Distillery, 7/7/2021, https://thesecuritydistillery.org/all-articles/artificial-intelligence-and-nuclear-warfare-is-doomsday-closer

AI AND NUCLEAR DETERRENCE: ONE STEP FORWARD, TWO STEPS BACK

With the development of state-of-the-art weapons such as hypersonic missiles, the nuclear balance between countries might shift, leading to potential escalation. As deterrence is likely to be undermined, states are considering the deployment of AI-based weapon systems to repristinate the balance.

As of now, no defensive weapon system is capable of intercepting hypersonic missiles. Current designs are capable of striking a target in an average time of 6 minutes as they greatly exceed the speed of sound, reaching speeds at Mach 5 or above with unpredictable trajectories [3]. Hypersonic technology is being tested by global powers such as the U.S., China and Russia [4]. If equipped with nuclear warheads, hypersonic missiles would significantly change nuclear stability between countries, causing tensions between nuclear powers. Analysts agree that only AI-based predictive analysis, combined with cutting-edge technologies such as quantum computing, might provide effective defence systems against hypersonic missiles [5]. If developed, these technologies would constitute the technological tool necessary to re-balance the instability caused by hypersonic missiles.

However, AI-based missile defence systems might bring about more insecurity than the stability they aim to achieve. Indeed, artificial intelligence offensive capabilities might have a disruptive impact on nuclear deterrence. Partially based on the concept of mutual assured destruction (MAD), nuclear deterrence is preserved when no country can conduct a nuclear attack without suffering a second nuclear strike from the enemy [6]. However, this psychological and technical equilibrium might be undermined by the belief that artificial intelligence can provide the capability of targeting and destroying all enemies’ offensive nuclear weapons before carrying out the first attack. Although this can be proved to be technically implausible, if a government believes that enemies’ AI-based offensive systems can destroy the country’s nuclear weapons, decision-makers may be psychologically encouraged to strike first in case of high-level tensions [7].

THE THREAT POSED BY AI-BASED NUCLEAR C2 SYSTEMS

In most countries, responses to threats are based on the OODA-LOOP model, which consists of four steps: observe, orient, decide, act [8]. However, due to the most recent advancements in military technology, the timeframe to go through the OODA-LOOP decision-making process is more limited, thus requiring faster decisions to respond to the threats. If hypersonic missiles, potentially carrying nuclear warheads, strike the target in a maximum of 6 minutes, actions must be taken promptly. However, immediacy may come at the expense of attentive human judgment, a key factor that has already prevented nuclear war in the 20th century.

Both machines and humans might be driven by misjudgement due to partial or inaccurate information. However, individuals involved in nuclear C2 systems have already avoided nuclear catastrophes during the Cold War. Notorious is the case of Stanislav Petrov who, when in 1983 a Soviet early-warning satellite allegedly detected the launch of five US missiles, decided to declare the incident as a false alarm, assuming that the U.S. would have never conducted a surprise attack with only five missiles [9]. He made the right decision; the Soviet satellite wrongly analysed sunlight bouncing off the clouds as a missile launch [10]. This historical fact demonstrates how machine error might lead to disastrous choices if the human judgment is excluded from the decision-making process.

In the context of modern disinformation campaigns, the negative influence of machine misjudgement on nuclear stability is even greater. The International Institute for Strategic Studies (IISS), in collaboration with the Carnegie Corporation of New York, has conducted tabletop exercises to investigate the vulnerabilities of AI-based nuclear command and control to disinformation [11]. The results are worrying and show how non-state actors’ disinformation operations may bring about a rapid nuclear escalation. In one scenario, fake images of the deaths of three American soldiers by Russian-employed nerve gas in Syria led U.S. officials to build a legal case for the potential use of tactical nuclear weapons. Subsequently, fake news about the families of high-ranking U.S. officials quickly moving to Washington, D.C. and of missile silos going on high-alert worried Russian officials. In response, Russian AI-based early warning systems warned the leadership that a U.S. strike was imminent. The scenario ended with both governments realising the false alarm and disabling the online activity of the non-state actor.

While in the scenario the false alarm was realised, decision-making results might largely differ in the context of the hypersonic missile race. How would governments act in such a tense context? Would officials be able to go through the OODA-LOOP model in less than 6 minutes? To what extent would they rely on AI-based decision-making processes?

#### And, global preemption that goes nuclear

Omar **Lamrani 16**, Senior Military Analyst at Stratfor, M.A. from the Diplomatic Academy of Vienna, B.A. in International Relations from Clark University, “What the Next Arms Race Will Look Like”, Stratfor, 3/21/2016, <https://www.stratfor.com/analysis/what-next-arms-race-will-look>

A new arms race is unfolding between the world's great powers. Hypersonic missiles, which are both accurate and extremely fast, stand to change the face of modern warfare by rendering the current generation of missile defense systems ineffective. As competition heats up among Russia, China and the United States to be the first to deploy hypersonic missiles, each will become more vulnerable to attack by the others. If tensions rise, so will the risk of pre-emptive strikes among the longtime rivals. Hypersonic missiles travel at least five times the speed of sound. Only a few other manmade devices are capable of reaching hypersonic speeds, including ballistic missiles, space launch vehicles and unmanned spacecraft such as the Boeing X-37. The only manned aircraft to achieve hypersonic speed is the rocket-powered North American X-15, which broke speed and altitude records when it was introduced in the 1960s. Recently, the focus of research in hypersonic technologies has shifted toward missile development, but several challenges must be overcome to make hypersonic missiles a reality. First, it is difficult to create a weapon that can reach hypersonic speeds while enduring the stress and extreme temperatures of hypersonic flight. It is harder still to ensure that the weapon can maintain those speeds for an extended period — enough time to reach its target. Second, high velocities can make a hypersonic vehicle sensitive to changes in flight conditions, resulting in instability in the missile's airframe during flight. Coupled with the fact that high speeds leave less time to course correct, this instability can make guidance of hypersonic missiles problematic. Finally, hypersonic vehicles' actual flight paths often do not match the predictions researchers derive from ground tests and theoretical models, lengthening the process of development. Despite these obstacles, hypersonic missiles have some considerable advantages. Their speed enables them to reach their targets much more quickly than other missiles and to better penetrate enemy defense systems. Those with gliding capabilities can also cover great distances, enabling one country to strike at another from farther away. Guided hypersonic missiles would be more accurate than traditional ballistic missiles, and they could conceivably be armed with nuclear warheads, becoming a strike asset or a deterrent in nuclear warfare. From Theory to Reality It will not be long before hypersonic missiles find their way out of the lab and onto the battlefield. In late February, U.S. Maj. Gen. Thomas Masiello announced that the U.S. Air Force plans to have operational prototypes ready for testing by 2020. The U.S. Air Force already conducted four flights of the experimental X-51 hypersonic cruise missile from 2010 to 2013, two of which were considered successes. Meanwhile, Lockheed Martin has made substantial progress on its Hypersonic Air-breathing Weapon Concept and Tactical Boost Glide vehicle. China is close behind, and it appears to be on track for deployment by 2020 as well. In 2014, China conducted three tests of its DF-ZF hypersonic strike vehicle, followed by three more in 2015. The U.S. military deemed all but one of the tests successful. Russia is developing its own hypersonic glide vehicle, the Yu-71, though its ambitions of fielding the vehicle in the next four years may be overly optimistic. (Moscow's sole test of the Yu-71, in 2015, was a failure.) But one of Russia's relatively short-range hypersonic missiles, the 3M22 Zircon, underwent its first test on March 18, and a second model (the BrahMos-II) will be ready for testing around 2017. As the world's biggest powers race to build up their hypersonic arsenals, the nature of battle will fundamentally change. Missile defense systems will struggle to counter hypersonic flight, making targets — especially large naval warships — more vulnerable to attack. In time, this could drive the development of directed-energy weapons (such as high-powered lasers or microwaves) as a possible way of countering hypersonic missiles. But as has been the case for revolutionary military technologies in the past, the best defense will be to destroy the missiles before they can launch, increasing war planners' emphasis on offensive action. Countries will have an incentive to launch pre-emptive strikes against their enemies to knock out hypersonic missile caches before the missiles can be deployed. Moreover, guidance systems, along with command, control, intelligence, surveillance and reconnaissance networks — the weakest components of hypersonic missile capabilities — will become critical targets. At the same time, states with hypersonic missiles (and the bigger offensive advantage they bring) will have less need for stealth technology to penetrate enemy defenses. Nuclear warfare — and strategies to deter nuclear conflict — will be altered as well. Though increasingly effective anti-ballistic missile technologies will continue to be important against opponents that lack hypersonic weapons, they will be of little use in countering hypersonic missiles equipped with nuclear warheads. Because hypersonic missiles are so difficult to detect and counter, countries could be motivated to pre-emptively strike at an enemy developing a hypersonic capability. As hypersonic missiles undermine the fragile balance among global nuclear powers more and more, many countries will be forced to re-examine their deterrence and national security strategies, potentially contributing to greater uncertainty and instability in the long run.

#### Externally---1NC Weisgerber says denial collapses missile defense. Nuclear war from North Korean and Iranian strikes.

Punch Moulton 21, Retired U.S. Air Force Major General, Vice President for Defense Support and Cyber Strategies at Stellar Solutions, and Francis Mahon, Former Director for Strategy, Policy and Plans at North American Aerospace Defense Command and U.S. Northern Command, Independent Aerospace Defense Contractor and Advisor for Stellar Solutions, “Robust, Credible and Layered Missile Defense is the Foundation of Deterrence”, 6/16/2021, https://www.defensenews.com/opinion/commentary/2021/06/16/robust-credible-and-layered-missile-defense-is-the-foundation-of-deterrence/

In 2005, an anticipated missile threat to the homeland prompted the expeditious fielding of a missile defense capability to defend the United States. Today, that threat is real, expanding, and most likely nuclear. Our defense needs to also be real and effective for today and into the future.

A recent report by the think tank Rand estimates North Korea has 50 nuclear weapons in its arsenal and, by 2027, will have in excess of 200 and several dozen intercontinental ballistic missiles to complement its several hundred theater ballistic missiles. The director of national intelligence’s 2021 Annual Threat Assessment clearly states: “North Korea will be a [weapons of mass destruction] threat for the foreseeable future, [and] the country is actively engaged in ballistic missile research and development.”

While we must not cast diplomacy aside, we should recognize deterrence is an essential element in any strategy for dealing with the North Korean nuclear missile threat. Deterrence matters, and Adm. Charles Richard, commander of U.S. Strategic Command, framed the point well when he said: “A robust and credible layered missile defense system paired with our conventional and nuclear force capabilities provide the ability to deter strategic attacks, deny benefits, and impose costs against any potential adversary.”

Deterrence discourages an adversary by instilling doubt and anxiety in their decision calculus. Our Ballistic Missile Defense System “denies benefit” by planting that seed of doubt in North Korea’s decision calculus; the doubt that an attack on the United States will succeed.

Today, our defense rests on the Ground-based Midcourse Defense system, or GMD, and its 44 interceptors. But that alone is not going to be adequate to deal with the threats of 2027. Defending our homeland is vital. Looking to the next decade, we need to stay ahead of our threats. Our concerns are four-fold: technology, numbers, layers and sensors.

Technology: Advancing the effectiveness of our missile defense capabilities is extremely important. The Missile Defense Agency recently awarded two contracts, to two teams, to competitively develop a Next Generation Interceptor, or NGI, to overcome the shortcomings in the current interceptor fleet and provide a path to outpace future threats. This competitive development cycle will add up to 20 new interceptors to the inventory. As long as the program enjoys support and an adequate budget from the Department of Defense and Congress, we are on solid ground for the technology.

Numbers: A point of concern, though, is the math: 20 new intercepts plus the current 44 will give us 64. If Rand is anywhere close, we could be outnumbered by the end of the decade. More important, we certainly cannot accept a 1-to-1 exchange ratio when we are dealing with nuclear missiles coming toward the homeland.

Layers: No single defensive system is successful 100 percent of the time, and we cannot base the defense of America solely on the hope of success for every GMD intercept. We need the opportunity for a second engagement in the event GMD’s interceptors do not destroy the in-bound threat. Developing a layered defense is a vital strategy for our nation. We have the technology. MDA recently demonstrated the SM-3 Block 2A missile could intercept an ICBM. All we need now is an aggressive plan to truly build our layered approach for homeland missile defense.

Sensors: Lastly, our future missile defense architecture needs to have the right capabilities to “see the threat” and enable successful defenses. As Gen. John Hyten, vice chairman of the Joint Chiefs of Staff, has stated: “If you can’t see it, you can’t shoot it. And if you can’t see it, you can’t deter it either.” Today’s sensor suite — a handful of terrestrial sensors — needs to advance to the next generation: space-based sensors. Our defenses need to be able to pick out the lethal objects in a cluster of countermeasures. Further, our sensors need to provide “fire control quality” information to the defensive interceptors. While a space-based sensor architecture will be expensive, it will cost far less — in both dollars and operational risk — than relying solely on a terrestrial network.

We cannot take our foot off the pedal. While it will likely take six to seven years to field our NGI, rest assured our adversaries are not standing still. The threat is real: in North Korea today, and potentially Iran tomorrow.

### Link---2NC

#### The plan depletes the FTC’s PC, preventing risky action in other areas

Filippo Maria Lancieri 19, Master’s Degree in Economics from Insper, Research Fellow at the Stigler Center, J.S.D. and LLM Candidate at the University of Chicago Law School, BA in Law from FGV - Fundação Getulio Vargas, “Digital Protectionism? Antitrust, Data Protection, and the EU/US Transatlantic Rift”, Journal of Antitrust Enforcement, Volume 7, Number 1, 8/19/2019, Lexis

This is better seen as a regulator’s endogenous decision that reflects both the political climate in which he operates and the toolkit at his disposal-leading different regulators to opt for different solutions. As a result, it is feasible that European anti-trust policymakers’ actions partially reflect concerns regarding the economic power of companies that handle large amounts of personal data. In the US, the response may be different, as local preferences and available tools are different. In other words, if agencies are *‘continually engaged in a process of accumulating and spending political capital’* when taking enforcement decisions, European regulators have incentives to increasingly act to reign-in, through all means available (antitrust being an important one), on the power of data companies. In doing so, they demonstrate their alignment to political priorities and accumulate political capital to spend in other areas. The same does not hold true for American regulators operating in a political environment where similar actions entail an expenditure of political capital that may be better allocated elsewhere.

#### The FTC is a political actor, acutely aware of its finite PC---it’ll avoid repeatedly confronting Congress by altering antitrust enforcement in other cases

D. Daniel Sokol 10, Assistant Professor at the University of Florida Levin College of Law, Senior Research Fellow at the George Washington University Law School Competition Law Center, LLM from the University of Wisconsin Law School, JD from the University of Chicago, MS in History from the University of Oxford, AB from Amherst College, “Antitrust, Institutions, and Merger Control”, George Mason Law Review, 17 Geo. Mason L. Rev. 1055, Summer 2010, Lexis

Both antitrust's statutory authority and each country's current policy outlook are functions of policy choice discretion. Antitrust agencies must take into account their political capital and how to expend it vis-a-vis other government actors, states, and privately-owned enterprises that wield significant political power. These public choice calculations color how agencies order their enforcement priorities. Agency discretion through agency inaction illustrates the limits of competition advocacy and other forms of antitrust enforcement against public restraints.

The history of U.S. antitrust enforcement illustrates public choice concerns. In 1890, Congress enacted antitrust legislation at the federal level. At its very roots, antitrust emerged in part as a result of political bargaining. Some of the rationale behind the Sherman Act was to protect producer interests against more efficient large-scale operations. To think that antitrust is not influenced by political interests naively suggests that public choice theory applies in other regulatory settings but not antitrust.

In some instances, antitrust enforcers may be subject to capture. Antitrust agencies may act politically in a number of ways. Agencies are political players that attempt to increase their size and power. Agencies may [\*1074] act politically in case selection. The more high profile the case successfully brought, the greater the potential rewards are for antitrust lawyers going forward as they advance within government or exit government for private practice. Cases not brought are equally important. Agencies may choose not to bring difficult cases because they could result in a defeat. A decision against the agency may affect the future budget of the agency and the quality of its staff. Antitrust agencies also may be chilled from bringing a case, if in doing so they threaten the interests of government officials that have budgetary or oversight authority over the agency. For example, when an enforcer rules the "wrong" way because she looks to efficiency rather than industrial policy concerns, political repercussions may ensue.

Both the executive and the legislative branches may push the antitrust agencies toward certain goals. Antitrust agencies face potential cuts in funding if their enforcement and non-enforcement priorities are inconsistent with Congressional wishes. Such threats limit the potential scope of agency decision making. Similarly, the executive branch may try to influence the DOJ Antitrust Division to push an enforcement agenda based on its own policy agenda. The antitrust bar may also influence the antitrust agencies. Prestige in the eyes of the practitioner community and potential private firm opportunities after government service may shape some agency decision making at both staff and leadership levels of the antitrust agencies.

#### Even if not reality, the agency thinks this way---they’ll pick their spots to avoid a critical mass of opposition

William E. Kovacic 15, Global Competition Professor of Law and Policy, George Washington University Law School and Non-executive Director, United Kingdom Competition and Markets Authority, JD from Columbia University Law School, BA from Princeton University, and Marc Winerman, Formerly of the Federal Trade Commission, “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness”, Iowa Law Review, 100 Iowa L. Rev. 2085, https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

H. Summary: Significance of the Pressure Points

The political branches of government have a variety of measures to influence competition agencies to consider and respond to their preferences, even when the competition agency is established as an administration body that stands outside any government ministry and is headed by a board whose members have fixed terms and can be removed only for good cause. In many jurisdictions, executive bodies and legislatures have shown their willingness to use these techniques.

Actual or threatened recourse to pressure points has major implications for the operations of a competition agency. No agency can prosper unless it takes account of these pressure points and considers how to maneuver through the external political environment. The formulation of an agency’s strategy requires it to consider the political consequences of its actions. Every day, an agency acquires or spends political capital. The agency should consider new projects in light of their political costs in several respects. The agency should identify how it can amass political support—for example, through the media—for projects that are certain to arouse political opposition. The agency also should be careful to avoid choosing so many politically sensitive targets at any one time that a critical mass of opposition will form and overwhelm the agency, as happened to the FTC from the late 1970s until restrictive legislation was adopted in 1980.

### Link---AT: Plan = Popular

#### It’s entwined in broader cultural battles

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

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

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

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

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

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

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

#### Pharmaceutical antitrust is uniquely controversial.

Megan Browdie 20, Jacqueline Grise, Howard Morse and Elizabeth Giordano, Lawyers at Cooley LLP, “United States: Technology Mergers”, Global Competition Review, 10/19/2020, https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-technology-mergers

Recent partisan divisions impacting antitrust enforcement in high-tech industries

Political divisions, which some believe have become more extreme across the US in recent years, appear to be influencing antitrust enforcement at both the DOJ and FTC.

At the DOJ, recent congressional testimony has accused the DOJ of opening merger and non-merger investigations for political reasons rather than on sound antitrust theories, directing issuance of burdensome second requests, over the objection of career staff, to mergers posing few competitive risks, and there have been long-standing rumours reported of White House direction to challenge the AT&T/Time Warner merger, though the Trump administration has denied all allegations.25 Senior Trump administration antitrust officials have countered the accusations,26 but the partisan divide remains.

Meanwhile, at the FTC, the Democrats issued dissents to the issuance of the Vertical Merger Guidelines, casting doubt on their persuasive power in court. The Democrats are also issuing dissents that call for changes to the analytical framework currently used for pharmaceutical mergers, with Commissioner Rebecca Slaughter calling for more focus on innovation competition and Commissioner Rohit Chopra calling for a more extensive overhaul of the agency’s approach to merger investigations.

In AbbVie/Allergan, the FTC cleared AbbVie’s US$63 billion acquisition of Allergan, with the three Republican commissioners voting in favour and two Democrats dissenting. The majority required divestitures to two buyers: (i) Allergan’s assets related to exocrine pancreatic insufficiency (EPI) drugs Zenpep and Viokace to Nestlé and (ii) the transfer of Allergan’s rights and assets related to brazikumab to AstraZeneca.

Slaughter said she was ‘concerned about the Commission’s approach to pharmaceutical mergers’, arguing that ‘in light of AbbVie’s public representations about its plans to curtail Allergan’s ongoing research programs, [she] cannot share the majority’s confidence that the innovation effects of this merger are competitively benign’.27 Chopra went further, questioning the Commission’s history of requiring divestitures in overlapping products, attacking it as ‘narrow, flawed, and ineffective’, ‘miss[ing] the big picture, [and] allowing pharmaceutical companies to further exploit their dominance’. 28

Regarding the divestiture buyers, Chopra expressed concern about Nestlé’s ability to replace lost competition for EPI drugs, referring to it as ‘the maker of KitKats and Tidy Cats’, and questioned AstraZeneca’s commitment to aggressively market the brazikumab assets, referring to the structure of the divestiture as a ‘windfall’ to the company. 29

The majority responded, expressing concern that Chopra’s dissent reflected ‘disregard for facts and law’.30 The statement went on to defend the divestitures, both based on identity of buyer and in structure, as well as the FTC’s divestiture process, and argued that history demonstrated the success of pharmaceutical remedies such as the ones proposed (ie, ‘remedies [that] entailed the divestiture of an on-market pharmaceuticals produced by a contract manufacturer and did not require transferring manufacturing capability’). 31

Similarly, in BMS/Celgene, the Democrats dissented, with Chopra ‘skeptical that the status quo approach will uncover the range of potential harms to American patients’ and Slaughter ‘concerned that [the FTC’s] analytical approach is too narrow’ insofar as it focused on overlaps between the parties.32 Slaughter advocated that ‘the Commission should more broadly consider whether any pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation’. 33

Republican Commissioners Christine Wilson and Noah Phillips issued statements in response. Wilson agreed ‘that pharmaceutical price levels in the United States today are cause for concern’, but argued that the ‘causes . . . fall outside the jurisdiction and legal authority of the [FTC]’.34 She defended the Commission’s track record in pursuing enforcement actions ‘within its limited authority as a competition agency’, pointing to merger enforcement as well as pharmaceutical conduct enforcement efforts, and other advocacy.35 Phillips took a harsher tone, criticising the dissents for failing to identify theories of harm missed by the FTC and seeming to conflate the goals of antitrust enforcement with other potential harms posed by mergers. 36

### Link---Precedent

#### The plan creates a new standard that’ll force the FTC to be more aggressive in antitrust enforcement

Daniel J. Solove 14, John Marshall Harlan Research Professor of Law at the George Washington University Law School, Founder of TeachPrivacy, JD from Yale University, BA from Washington University, and Dr. Woodrow Hartzog, Assistant Professor at Samford University's Cumberland School of Law, B.A. from Samford University, J.D. from Cumberland School of Law, LL.M. from The George Washington University Law School and Ph.D. from The University of North Carolina at Chapel Hill, “The FTC and the New Common Law of Privacy”, Columbia Law Review, 114 Colum. L. Rev. 583, April 2014, Lexis

1. FTC Settlements. -- Although the FTC has specific rulemaking authority under COPPA and GLBA, for Section 5 enforcement--one of the largest areas of its jurisprudence--the FTC has only Magnuson-Moss rulemaking authority, which is so procedurally burdensome that it is largely ineffective. The FTC must rely heavily on its settlements to [\*621] signal the basic rules that it wants companies to follow. Indeed, this is how courts create rules in the common law. Because courts cannot legislate, they craft rules in judicial decisions, which remain in effect for future cases by way of precedent. When the FTC issues a settlement, it typically issues a complaint and settlement document simultaneously, and these are publicized on the FTC's website. Among privacy law practitioners, FTC settlements are major news and generate significant attention.

Why are these settlements akin to common law? First, they are publicized, and the FTC follows them. Accordingly, they have a kind of precedential value, and they serve as a useful way to predict future FTC activity. Chris Wolf notes that "consent orders have immediate nationwide impact (to the extent they affect behavior) unlike in the litigation context, where there can be a split of authority on what is or is not prohibited conduct." Additionally, every state has adopted some form of a consumer protection statute, often called "[L]ittle FTC Acts," many of which explicitly look to FTC interpretations of overlapping concepts to guide enforcement.

Second, FTC settlements are viewed by the community of privacy practitioners as having precedential weight. Privacy lawyers routinely use FTC settlements to advise companies about how to avoid triggering FTC enforcement. For example, Wolf notes that when counseling clients, he frequently references activities that triggered FTC actions. Many firms that counsel clients on privacy matters routinely post and disseminate [\*622] information about recent FTC settlements on their blogs. Addressing the precedential value of FTC settlements, David Vladeck states:

It is not uncommon for lawyers representing respondents in agency proceedings--investigations and then formal complaints--to cite prior complaints or orders (consent or litigated) as "precedent" as to what constitutes an unfair or deceptive trade practice. And I think that practice makes sense. Complaints do signal the agency's view of the applicable law, and do inform regulated parties as to the agency's view of how the law applies to a discrete and identified set of facts. So it seems entirely appropriate that counsel would rely on them to draw inferences about the correctness, or fairness, of the agency's position in an investigation and contested action.

Wolf notes that "[i]t is indeed fair to say that FTC settlements are followed like cases interpreting a statute would be followed."

Indeed, this seems to be the precise intent of the FTC. Toby Levin, a senior attorney with the FTC from 1984 to 2005, states that "[t]he audience for consent orders is very broad--every similarly situated company, whether in that market or engaging in a similar practice." Levin further explains:

Given its limited resources, the FTC intends for consent orders to send a clear message that the practices identified in the complaint violate the FTC Act. It may wait to bring additional cases involving the same practice to see if the order is receiving the national attention it intends. If not, it may bring additional actions or send "warning letters" to a number of companies engaged in the same practice, putting them on notice that the practice, if continued, will put the company at risk of an FTC action.

According to Levin, "[T]he more responsible companies--the ones that rely on their reputation as industry leaders--will take steps to address the practices outlined in an FTC settlement."

FTC settlements are thus like the common law because they are treated in practice like the common law. The orders are publicized with the intent that practitioners rely upon them, and practitioners do so. The FTC's intent is just part of the equation, for the common law effect of [\*623] FTC settlements rests heavily upon how they are received by the companies they regulate and the community of practitioners that advises these companies.

Of course, settlements are not equal to judicial decisions. Unlike judicial decisions, where other stakeholders are able to be heard through amicus briefs, FTC settlements have no such process. FTC investigations of companies are often secret and only announced when the settlement has been issued. As Wolf observes, "Unlike in litigation, the adversarial process and . . . role of the tribunal is quite limited as companies frequently enter into consent orders to avoid publicity, and thus agree that there has been enough of a case made to settle (even though in litigation, they might be able to prove otherwise)." Nevertheless, the FTC does have a comment period where other stakeholders can be heard before the settlements are finalized. Commissioners vote on settlement orders and often write concurring and dissenting statements to reflect their view on an action. The Commission also sends direct letters to those who comment on the proposed orders addressing their concerns. This is similar in effect to an appellate court's handling of particular issues in a case and the ability of interested parties to voice support and concern, and highlight various interests through amicus briefs.

Settlements need not be as binding on future cases as judicial decisions to reflect aspects of the common law. While there is no well established doctrine of precedent for settlements, the FTC has been relatively consistent in its privacy jurisprudence. Although the FTC rarely explicitly cites settlement orders in later, separate settlement orders, Levin states that while she was at the FTC, "[i]n a new action, internal memoranda accompanying proposed pleadings would typically cite to the Bureau and the Commission prior complaints or consent orders as precedent for bringing the action against a proposed respondent." [\*624] The FTC has referenced previous consent orders in statements that accompany final orders. For example, in a letter to commenter Sidley Austin, LLP as part of In re Sears Holdings Management Corp., the FTC referenced two prior consent orders that were similar to the current one to demonstrate consistency. Indeed, the FTC settlements are rarely inconsistent with each other. There have been hardly any noted instances of inconsistency, despite a sizeable number of practitioner commentators who have analyzed FTC cases.

#### That derails Aerojet---it can only overcome opposition because of prior FTC precedent

Matt Korda 21, Research Associate for the Nuclear Information Project at the Federation of American Scientists, MA in International Peace & Security from the Department of War Studies at King’s College London, Ploughshares Fund 2020 Olum Fellow and an Associate Member of the Canadian Pugwash Group, “The Flawed Assumptions Behind the GBSD Program”, Federation of American Scientists Report, p. 81-82

This may soon change, however, as Lockheed Martin announced its intention to purchase Aerojet Rocketdyne for $4.4 billion in December 2020.63 Raytheon Technologies––one of Lockheed Martin’s largest competitors––has since announced its intention to formally oppose the deal on the grounds that if the merger goes through, “you don’t have an independent supplier on the solid-rocket-motor side.”64

However, despite the FTC taking a close look at the acquisition, Lockheed Martin is confident that the deal will be approved, specifically because of how it mirrors Northrop Grumman’s acquisition of Orbital ATK during the GBSD competition: “There’s already an example of how DoD handled a prime contractor in the space domain taking in a propulsion supplier,” stated Lockheed Martin CEO Jim Taiclet, “Our overall expectation is that this may be the same lens through which this transaction is viewed.”65

As a result, not only did Northrop Grumman’s acquisition of Orbital ATK undermine the health of the LRSM industrial base, but it provided a template for Lockheed Martin to erode it even further two years later. Therefore, despite the Air Force’s argument that pursuing GBSD would help the LRSM industry, it has done the opposite: after Lockheed Martin's acquisition goes through, there effectively will be no more independent LRSM industry.

### Link---Unfriendly Amendments

#### Congress will use the plan as a political opening to push through unrelated antitrust measures

Mark Whitener 21, Adjunct Professor at Georgetown University's McDonough School of Business and Senior Fellow at the Georgetown Center for Business and Public Policy, JD from the University of Chicago School of Law, AB in Political Science from the Washington University in St. Louis, Former Global Executive Counsel for Competition Law & Policy at the General Electric Company, “The Future of Antitrust: Ideology, Alternative Facts, and the Rule of Law”, ABA Antitrust Law Section - American Bar Association, 35 Antitrust ABA 3, Spring 2021, Lexis

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

### Link---AT: No Aerojet Spillover

#### It’s high profile AND ‘top of the docket’---closure is this year

Amanda Huffman 21, Veteran Who Served in the Air Force for Six Years as a Civil Engineer, Author of Women of the Military, “Mergers and Acquisitions: Strengthening or Threatening Defense Capabilities?”, Clearance Jobs, 5/26/2021, https://news.clearancejobs.com/2021/05/26/mergers-and-acquisitions-strengthening-or-threatening-defense-capabilities/

KEY PENDING ACQUISITION

Another acquisition is pending within the defense industry. Lockheed Martin announced their plans in December 2020 to acquire Aerojet Rocketdyne, the last remaining American company that makes solid rocket motors.

Why is this merger such a big deal? Many of the U.S. arms manufacturers have partnered with Aerojet for missile propulsion systems. If Lockheed Martin acquires Aerojet, they will have a competitive advantage locking out the rest of the defense industry from using Aerojet and instead pushing them to look overseas to solicit bids from foreign suppliers just to compete.

The estimated transaction closure is in the second half of 2021. Both the DoD and FTC will have to give approval for the merger. Given the risks of creating another defense industry monopoly and pushing manufacturers into bed with Russia and China to compete, this acquisition joins the list of significant changes and challenges affecting the defense industrial base.

#### It’s a likely target for compensation because of high Congressional interest AND politicized nature of defense reviews

Matt Korda 21, Research Associate for the Nuclear Information Project at the Federation of American Scientists, MA in International Peace & Security from the Department of War Studies at King’s College London, Ploughshares Fund 2020 Olum Fellow and an Associate Member of the Canadian Pugwash Group, “The Flawed Assumptions Behind the GBSD Program”, Federation of American Scientists Report, p. 75-77

Does GBSD actually maintain the large solid rocket motor industrial base?

For years, internal and external analysts have sounded alarm bells about corporate consolidation in the defense industry. In its FY2017 Annual Industrial Capabilities Report to Congress, the Pentagon noted that “the trend toward fewer and larger prime contractors has the potential to affect innovation; narrow industrial capabilities and technology; limit the supply base; pose entry barriers to small, medium, and large businesses; and ultimately reduce competition that may otherwise not be in the Department’s or the public’s interests.” Additionally, t 28 he report’s authors concluded, “The Department is mindful of past loss of competition at the prime level, resulting from significant industry consolidations over the past 20-plus years.”29

With specific regard to the GBSD, both Congress and the Pentagon have been particularly concerned about the effect of these mergers on the domestic large solid rocket motor (LSRM) industry: in 1990, there were five LSRM manufacturers in the United States; now there are only two.30

Having fewer providers of big-ticket systems like LSRMs means that the Pentagon has less ability to control costs through competition, generally resulting in increased costs. Additionally, the presence of system monopolies can create chokepoints in the defense acquisition process, since the entire supply chain can be affected by the conduct of a single corporation. This could easily result in delays to the weapon system coming online.31

In its justification for the GBSD program, the Air Force has continuously emphasized that a brand-new missile program would protect the ailing LSRM industry better than a simple refurbishment. However, after Northrop Grumman purchased on 32 e of the two remaining LSRM manufacturers and subsequently won the GBSD’s unprecedented sole-source engineering contract in 2020, the state of the industrial base today is significantly less healthy than it was just a couple of years ago. As is catalogued in the following paragraphs, despite the concerns of Congress and civil society watchdogs, the Pentagon’s nonchalant reaction indicates that the department may not be as concerned with preserving the industrial baseline as was previously advertised in its justifications for pursuing GBSD.33

In September 2017, immediately after the Air Force awarded Northrop Grumman and Boeing contracts to begin the Technological Maturation and Risk Reduction phase of the GBSD acquisition process, Northrop Grumman announced its intention to acquire Orbital ATK––one of two remaining LSRM providers left in the United States.34

If Northrop Grumman’s acquisition was successful, and if the company ultimately won the contract for the Engineering, Manufacturing and Development (EMD) phase of the GBSD program, it could theoretically exclude the only other LSRM provider––Aerojet Rocketdyne–– from its production team, thus probably putting its new competitor out of business.35 Aerojet Rocketdyne was already on precarious footing, and in April 2017, the company had announced that it would shutter its operations at its complex in Sacramento as a cost-saving measure.36 The new prospect of a LSRM monopoly dominated by Northrop Grumman was therefore a significant concern for Aerojet Rocketdyne, who urged the Pentagon to step in.37

Legal mechanisms are available for the Pentagon to object to such an acquisition and make relevant recommendations to the Federation Trade Commission and the Department of Justice “to ensure that mergers and acquisitions do not reduce competition or cause market distortions that are not in the Department’s ultimate best interest.” However, despite 38 Aerojet Rocketdyne’s concerns over a LSRM monopoly, the Pentagon did not make a public objection of this kind, and it remains unclear whether such an objection was made in private.39

### U---2NC

#### It’s weathering scrutiny, requires deviating from Congressional preference

Valerie Insinna 10-26, Senior Reporter, Air Warfare and OSD at Breaking Defense, “Lockheed’s Acquisition of Aerojet Rocketdyne Delayed”, Breaking Defense 10/26/2021, https://breakingdefense.com/2021/10/lockheeds-acquisition-of-aerojet-rocketdyne-delayed-to-2022/

Lockheed Martin’s proposed $4.4 billion acquisition of Aerojet Rocketdyne is now set to take place during the first quarter of 2022, Lockheed’s chief executive announced today, dashing plans for the deal to close this year.

“The Aerojet Rocketdyne transaction continues moving through the regulatory approval process, and we now anticipate closing in the first quarter of 2022,” said Lockheed CEO James Taiclet during an earnings call with investors.

Despite the delay, Taiclet sounded a confident note that the deal would be permitted to go through.

“Our strong balance sheet provides us with the capability to close on the Aerojet Rocketdyne transaction, provide robust returns to shareholders and continue to invest in our portfolio to support our customers and drive future growth,” he said.

Although the Defense Department has not stated a position on the proposed acquisition, the deal has weathered scrutiny from regulators and members of Congress who question whether the largest US defense prime should be allowed to acquire the nation’s only remaining independent supplier of solid-fuel rocket motors.

Lockheed has maintained that, under the company’s ownership, Aerojet would continue to be a fair “merchant-supplier” to defense primes.

However, Raytheon has come out in opposition to the deal, with its CEO Greg Hayes stating that the acquisition would force the company to buy 70% of its rocket motors from its biggest rival in the missile business, according to Space News.

Federal Trade Commission Chair Lina Khan has also raised eyebrows at the deal, writing in an August letter [PDF] to Sen. Elizabeth Warren, D-Mass., that she was “skeptical that behavioral remedies alone are sufficient to prevent a vertical merger from causing harm.”

### AT: Thumper---T/L

#### FTC’s firmly committed not to push statutory limits

Cathy Anne McMorris Rodgers 21, American politician who is the U.S. Representative for Washington's 5th congressional district; Janice Danoff Schakowsky is an American politician who has served as the U.S. Representative from Illinois's 9th congressional district since 1999; Lori Ann Loureiro Trahan is an American businesswoman and politician who serves as the U.S. Representative for Massachusetts's 3rd congressional district; Lina Khan is Chair of the FTC; Rebecca Slaughter is Commissioner at the FTC, “Transforming the FTC: Legislation to Modernize Consumer Protection,” Committee on Energy and Commerce, 6/28/21, https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer

Cathy Anne McMorris Rogers (4:00:11): I look forward to further conversations with you because I am concerned about rumors of the FTC acting outside of Congress and issuing a rule on privacy. And with that, I'll yield back.

Jan Schakowsky (4:00:25): Congresswoman Trahan. It's your five minutes.

Lori Trahan (4:00:32): Thank you Madam Chair, and Chair Khan, and fellow commissioners, thank you for your patience and for being here today discuss how this essential agency can better protect our consumers. President Biden's most recent executive order promoting competition in the American economy encouraged the commission to exercise the FTC's statutory rulemaking authority in regards to, and I quote, unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy. Now, in October 2020, Google Ads updated its policy to restrict the serving of high fat sugar, salt, food, and/or non alcoholic beverages advertising for minors under 18 in the United Kingdom, and in the European Union, but has refused to make similar changes here in the United States. A recent policy change by Facebook is a step in the right direction, but it's far from perfect when you consider that a May 2021 study by the Tech Transparency Project found that Facebook allows advertisers to target ads for electronic cigarettes, pill parties, and extreme weight loss product products to children as young as 13 across the US. Plainly, Facebook and Google are using troves of personal data belonging to teens and adults to target harmful advertisements in ways that are not transparent to users. So Chair Khan, would you consider these examples of the types of surveillance practices that may damage consumer autonomy and consumer privacy?

Lina Khan (4:02:05): Absolutely, Congresswoman.

Lori Trahan (4:02:06): Thank you for that. And Commissioner Slaughter. If the commission were to begin rulemaking today to protect consumers, including our children, from surveillance advertising, what would be the process under the Commission's existing Mag-Moss authority? And would the commission face difficulties? If you could speak to that it would be great.

Rebecca Kelly Slaughter (4:02:30): Thank you, Congressman. It's a great question. And I want to start by responding to suggestion from the ranking member of the committee that the Commission might act without Congress or outside of congressionally delegated authority. I want to be very clear: the commission cannot, should not, and will not, with my support, act outside of congressionally delegated authority. But we absolutely should look at the authority Congress has delegated to us, and it has specifically delegated to us rulemaking authority under Section 18 of the FTC Act, which is referred to as Mag-Moss, to promulgate rules to address unfair and deceptive acts or practices that are prevalent in interstate commerce. And so data abuses could fall very much into that category. Rulemaking under Section 18, to answer your question briefly, looks like APA rulemaking, but with much, much more process. So we can't begin with a notice of proposed rulemaking - we have to begin with an advance notice of proposed rulemaking that asks questions about the issues that we will consider. We have to notify Congress before we do that. We have to do then in a notice of proposed rulemaking identify any issues of material fact that are disputed, and again, notify Congress. And if there are issues of material fact, the statute requires us to have an informal hearing to adjudicate them. So it is a very process-intensive statute that requires lots of, and provides opportunity, for lots of participation. It is absolutely burdensome to the commission to do it. I think it's worth it for us to try. But we should make no mistake that it would not be a quick or fast effort.

#### There’s no significant antitrust enforcement

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

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

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

Two to go

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

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

#### Nothing will get past GOP opposition

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

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

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

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

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

Those expecting — or fearing — more ambitious outcomes likely won’t see them

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enacted. So until America’s November 2022 election, scratch from the list of high probabilities reforms such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company.

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

### AT: Thumper---POA

#### The FTC won’t significantly expand the scope of antitrust because it’s politically cautious

Megan Browdie 21, Jacqueline Grise, and Howard Morse, Partners at Cooley, Washington, DC, “Biden/Harris Expected to Double Down on Antitrust Enforcement: No “Trump Card” in the Deck”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

38. Current leadership at the agencies appear to agree with the Republicans’ more cautious approach. For example, Chairman Joe Simons, while having touted himself as “responsible for overseeing the re-invigoration of the FTC’s non-merger enforcement program” during his tenure as director of the FTC Bureau of Competition under Bush, has pushed back on these “expanded” theories of antitrust harm. For example, he argued in January 2020 that “U.S. antitrust laws are sufficiently robust to handle competition problems as they arise. Over the years, antitrust laws have proven to be very flexible and resilient in enabling enforcers to challenge conduct that harms competition in a broad range of markets. These laws have proved themselves effective even as the economy evolved with technological progress.” [42]

39. Given this disagreement, and that the Democrats, at best, will have a very thin majority in the Senate, we anticipate some modest modifications to the antitrust laws but expect serious pushback to substantial overhauls of the system or laws.

### AT: Thumper---Paul

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

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

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

#### It's non-binding AND will be blocked by the court and Congress

Lewis Brisbois 21, Lewis Brisbois Bisgaard & Smith LLP, “President Biden Signs Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://lewisbrisbois.com/newsroom/legal-alerts/president-biden-signs-executive-order-on-promoting-competition-in-the-american-economy

On July 9, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.” According to a Fact Sheet released in advance of the signing, the Executive Order takes “decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Among other things, the Executive Order encourages the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) to focus enforcement efforts on problems in key markets and coordinate other federal agencies’ responses to corporate consolidation. Further, the Executive Order calls on the FTC and DOJ to “enforce the antitrust laws vigorously.” The Executive Order would also make it easier for high tech workers to change jobs by banning or limiting non-compete agreements, lower prescription drug prices by supporting programs to import cheaper prescription drugs from Canada, make it less expensive to repair products by limiting manufacturers from barring self-repairs or third-party repairs of their products, and increase opportunities for small businesses by directing all federal agencies to promote greater competition through procurement and spending decisions. In all, the Executive Order outlines 72 initiatives that attempt to rein in corporate powerhouses that control markets.

In the Fact Sheet, the Biden Administration compared its Executive Order to the responses of previous Administrations to “growing corporate power,” expressly citing the trust-busting efforts of the Theodore Roosevelt and FDR Administrations’ “supercharged antitrust enforcement” agendas.

Although Democratic lawmakers and union leaders have cheered the Executive Order, some business advocacy groups have reportedly warned that such measures as those in the Executive Order could slow the economy.

Executive Orders are expressions of policy intent that have no actual binding legal force. Their ability to change the law lies in follow-up implementation by federal agencies that act to implement presidential initiatives. Those changes are limited by the extent of underlying statutory authority, and the courts in recent years have appeared reluctant to expand the scope of what is considered anticompetitive activity under the antitrust laws. Business interests should keep a close eye on the regulatory proposals that result from this Executive Order and consider engaging on those that affect their business operations.

#### It’s far off.

[Kentucky in green].

2AC Paul, Weiss, Rifkind, Wharton & Garrison Llp, 9-27-2021, "Recent FTC Announcements Shed Light on Competition Enforcement Agenda," Lexology, https://www.lexology.com/library/detail.aspx?g=6150ea1d-5532-4a7d-bca3-92989e136d1a

Recent FTC documents outline several areas of particular focus for the Commission’s enforcement agenda, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership. Firms within the areas of FTC focus may receive investigative demands, and investigations could lead to the FTC seeking to promulgate industry-wide rules. A recent memo from Chair Lina Khan to the Federal Trade Commission (FTC) Staff and Commissioners and a series of investigatory resolutions recently approved by the FTC shed some light on the Commission’s enforcement agenda. Taken together, these documents outline several areas of particular focus, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership. In her memo, Chair Khan said that the FTC would seek to use its “full set of tools and authorities—including rulemaking and research in addition to adjudication,” and would take a “holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers.” She also wrote that the Commission’s focus would be “on the most significant actors, where our enforcement actions can have the greatest impact on the everyday lives of Americans.” Areas of Focus Mergers With respect to mergers, Chair Khan wrote in her memo that the FTC “needs to address rampant consolidation and the dominance that it has enabled across markets” and needs “to find ways to deter unlawful transactions.” She said that the “rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives.” She wrote that she is seeking to identify “ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers.” The FTC has noted the burden of an increase in merger filings several times in recent months. Earlier this year (before Chair Khan joined the FTC) the Commission suspended the practice of granting early terminations of the waiting period required for deals notified under the HSR Act, and this suspension remains in effect. More recently, the FTC has been sending warning letters to parties when it does not finish merger reviews within the statutory timeline. Apart from investigations of individual proposed mergers, in July the FTC authorized an investigation into consummated mergers, acquisitions or transactions. Chair Khan also wrote that revising merger guidelines will be a “key project” and described prior guidelines as representing “a somewhat narrow and outdated framework for assessing mergers.” Indeed, following the issuance of President Biden’s Executive Order on Competition in the American Economy in early July – which called for the FTC and Department of Justice (DOJ) to review the then-existing horizontal and vertical guidelines – the agencies said that they would examine whether the merger guidelines should be updated “to reflect a rigorous analytical approach consistent with applicable law.” The FTC recently rescinded the Vertical Merger Guidelines, though, at least for now, they remain in place at the DOJ. In her memo, Chair Khan said that “revising the guidelines is an opportunity to close gaps between theory and practice, setting the foundation for more effective and empirically grounded enforcement work.” Dominant-Firm Conduct and Market Power Abuses Chair Khan also outlined a focus on conduct by “dominant” firms and “power asymmetries and the unlawful practices those imbalances enable.” While she did not posit a metric to determine if a firm is “dominant,” the memo did suggest a focus on firms acting as “gatekeepers.” In particular, Chair Khan wrote, “gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power.” She also wrote that “[b]usiness models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse.” She wrote that the FTC should be “especially attentive to next-generation technologies, innovations, and nascent industries across sectors,” and that “[t]imely intervention—be it checking anticompetitive conduct that would lead markets to tip, or targeting unfair practices before they become widely adopted—can help us tackle problems at their inception, both limiting harms and saving resources over the long term.” Chair Khan also urged “taking aim at the ways in which certain contract terms, particularly those that are imposed in take-it-or-leave-it contracts, constitute unfair methods of competition or unfair or deceptive practices” and that “market power abuses and consumer protection concerns can emerge when one-sided contract provisions are imposed by dominant firms.” She specifically pointed to “non-competes, repair restrictions, and exclusionary clauses.” Relatedly, the FTC has broadly authorized Staff to “investigate whether any persons, partnerships, corporations, or others have monopolized or are monopolizing, have attempted to monopolize or are attempting to monopolize, or have conspired or are conspiring to monopolize.” According to the FTC, “digital markets” will be a focus. The FTC also authorized staff to investigate “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices . . . relating to abuse of intellectual property.” The press release accompanying this resolution specifically mentioned the effect of alleged “abuse of intellectual property rights” on competition in “pharmaceuticals, technology and gasoline refining.” Private Equity In her memo, Chair Khan also wrote about what she termed “extractive business models.” She asserted that “the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations,” and that “[e]vidence suggests that many of these abuses target marginalized communities, and combatting practices that prey on these communities will be a key priority.” In addition to Chair Khan, others at the FTC have taken a skeptical view of private equity. For example, Commissioner Chopra – who may soon leave the Commission to become head of the Consumer Financial Protection Bureau – dissented from the FTC’s acceptance of a proposed consent order which involved, among other things, a divestiture to a private equity sponsored purchaser. He wrote that he believed there are “special considerations with financial buyers” and that “private equity participation is . . . associated with . . . firm behavior that can reduce long-term competition, including opportunistic asset sales.” This view of private equity can be seen to contrast with a view taken by the DOJ in the prior administration that private equity may support competition in certain instances, for example by funding a divestiture buyer in a merger remedy. In September 2020, the DOJ published a Mergers Remedy Manual which recognized that “in some cases a private equity purchaser may be [a] preferred” purchaser of divestiture assets. At the very least, according to the manual, the DOJ Antitrust Division “will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms.” Common Ownership and Interlocking Directorates In its recent set of resolutions, the FTC authorized staff to investigate “whether any persons, partnerships, corporations, or others simultaneously have served, or are serving, as an officer or director of two or more competing corporations or partnerships or simultaneously have had, or have, financial interests of any kind in two or more competing corporations or partnerships.” With respect to interlocking directorates, Section 8 of the Clayton Act, 15 USC §19, states that, if the corporations are above a certain size, “[n]o person shall, at the same time, serve as a director or [board-appointed] officer in any two corporations . . . that are . . . by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.” The law has certain safe harbor exceptions based on the magnitude of the “competitive sales” of the corporations – i.e., “all products and services sold by one corporation in competition with the other.” Section 8 does not prohibit interlocking directorates below these thresholds. Section 8 has been interpreted to cover both “direct” interlocks – i.e., when the same individual serves as a director or officer of competing corporations – and on occasion “indirect” interlocks – i.e., where different individuals serve as directors or officers of competing corporations, but both have been “deputized” to act on behalf of the same third entity (e.g., a private equity fund). Earlier this year, the DOJ expressed concerns that interlocking directorates between two companies involved in promoting and selling tickets to live entertainment and sports events violated Section 8 of the Clayton Act. Here, according to the DOJ, two individuals served as directors of one company; and, at the same time, one of the individuals served as a director and the other individual served as an officer of another company involved in the same business as the first. The two individuals resigned their positions on the Board of the first company in order to address the DOJ’s concerns. Common ownership – specifically, whether a firm’s simultaneous ownership of the stock of competing firms can have competitive effects – has been the subject of academic debate for several years. It also featured as a topic at one of former Chairman Simons’ Hearings on Competition and Consumer Protection in the 21st Century. Other Areas of Focus In addition to the compulsory process resolutions discussed above, the FTC also authorized an investigation into unfair or anticompetitive acts or practices affecting children and an investigation into unfair or anticompetitive acts or practices affecting armed forces service members and veterans. Algorithmic and biometric bias, deceptive and manipulative conduct in the internet, and repair restrictions are also the subjects of authorized investigations. Earlier resolutions authorized investigations into “healthcare markets, including those regarding pharmaceuticals, pharmacies, pharmacy benefit managers, medical devices, hospitals, or other healthcare facilities or services”; “markets with participants that provide technology platform services, including platforms that connect users, buyers, sellers, or other market actors”; and unfair or deceptive acts or practices “targeting current or prospective workers or small business operators.” Significance The authorizations of compulsory process contained in the FTC’s recent investigatory resolutions will allow the Commission’s Staff, over the signature of any one Commissioner, to compel companies to produce documents and provide testimony pursuant to civil investigative demands (CIDs). In the near term, companies within the target areas of focus could receive CIDs (and indeed some may already have). It should also be noted that, while we would expect these priorities to receive near-term attention, the investigations have been authorized for a period of ten years. Beyond the possibility of receiving compulsory process from the FTC, companies in the targeted areas may be affected by future FTC rulemaking. While the outcome of any individual investigation of course remains to be seen, Chair Khan’s reference to rulemaking in her memo – and her prior support of the FTC engaging in rulemaking – suggests that in the future the FTC may seek to promulgate industry-wide rules governing certain conduct and industries under investigation. If the FTC does indeed promulgate such rules, they would be enforceable by Commission action, and violators could face FTC-imposed fines. For example, while interlocking directorates have historically been an enforcement focus, they are typically resolved by having the parties resign a position to get rid of the interlock. While no such rule has yet been proposed, if the FTC does promulgate a rule against interlocking directorates, this may signal a desire by the FTC to assess fines in those situations.

### Impact---Turns Case---1NR

#### War rolls back antitrust reform AND enforcement

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

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

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

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I. Antitrust Law: History and Development

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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