### CP – States

#### The 50 states and relevant territories should engage in multistate antitrust action and enforcement over imported products incorporating price-fixed components.

#### States solve best---multistate organizations, expanded jurisdiction, and can “fill the gap”

Rauch 20 Daniel E. Rauch J.D. Yale Law School. (2020 ). ARTICLE: SHERMAN'S MISSING "SUPPLEMENT": PROSECUTORIAL CAPACITY, AGENCY INCENTIVES, AND THE FALSE DAWN OF ANTITRUST FEDERALISM. *Cleveland State Law Review*, 68, 172. <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn:contentItem:5YDM-6NS1-FCK4-G4MV-00000-00&context=1516831>. {DK}

In 2020, as in 1890, states attorneys general have much to offer antitrust enforcement. Illegal anticompetitive conduct is often concentrated locally, rather than nationally, making state-level enforcement especially appropriate. 202Link to the text of the noteMany states have antitrust statutes (or bodies of state law) that allow for prosecutions that the federal laws do not. 203Link to the text of the noteState governments often will have better knowledge of local economic conditions than distant agencies in Washington, making them natural choices for [\*210] antitrust enforcement. 204Link to the text of the noteAnd if the federal government fails to enforce the antitrust laws, state attorneys general often have the ability and political incentives "step up" to "fill the void." 205Link to the text of the note

Yet, if the early failure of antitrust federalism holds a single lesson, it is that even such compelling political, historical, and economic imperatives are, without more, insufficient to spur state antitrust action. Unless state prosecutors have the capacity and incentives to take on the antitrust challenge, they will not act.

What does this mean for today's state antitrust enforcers? On one hand, the years since 1890 have seen several innovations that substantially mitigate the problem of prosecutorial capacity. Multistate organizations like the National Association of Attorneys General (NAAG) have allowed for coordination and information sharing between attorneys general on antitrust matters, thus reducing the costs and burden of such cases. 206Link to the text of the noteLikewise, the rise of multistate antitrust suits brought jointly by dozens of states allows for cost-and-capacity-sharing. 207Link to the text of the noteChanges in federal law, like the Hart-Scott-Rodino Act of 1976, created an economic incentive for states to pursue antitrust cases by codifying the ability of state attorneys general to sue as parens patriae and by offering states treble damages when they prevail (a strong economic incentive if ever there was one). 208Link to the text of the note

Going further, the federal government has sometimes expressly subsidized state antitrust efforts, as with the supplemental funding offered in the Crime Control Act of 1976. 209Link to the text of the noteAnd in some states, the capacity of the attorney general's office has increased to levels inconceivable at the turn of the century: New York's Attorney General, for instance, supervises over 1,800 employees, 210Link to the text of the notewhile California employs a staggering [\*211] 4,500. 211Link to the text of the notePerhaps because of these shifts, it is unsurprising that in recent times at least some state attorneys general have heeded the call to enforce state and federal antitrust laws, from local investigations of healthcare consolidation 212Link to the text of the noteto multistate actions against Silicon Valley behemoths like Apple and Amazon. 213Link to the text of the note

### CP – Section 5

#### The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes imported products incorporating price-fixed components. . (don’t read this part in you speech, but do insert the underlying conduct the Aff addresses here). The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

#### The cplan solves. It also competes – the FTC interprets current authority, instead of creating new prohibitions.

Kahn ‘21

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

### CP – Con Con

#### Pursuant to Article V of the Constitution, at least two-thirds of the States should call a limited constitutional convention and at least three-fourths of the States should ratify a constitutional amendment that imported products incorporating price-fixed components are anti-competitive business practices.

#### Solves the AFF and avoids the DAs.

Thomas H. Neale 16, Specialist in American National Government, 03-29-2016 (“The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress,” Congressional Research Service, <https://fas.org/sgp/crs/misc/R42589.pdf>)

The Limited Convention

The concept of a limited convention has commanded considerable support in the debate over the Article V alternative. A range of constitutional scholars maintains that, contrary to Charles Black’s assertion, quoted earlier, a convention may be limited to a specific issue or issues contained in state applications; in fact, some observers maintain that it must be so limited. A fundamental assumption from their viewpoint is that the framers did not contemplate a general or large-scale revision of the Constitution when they drafted Article V. The late Senator Sam Ervin, who supported the Article V alternative and championed advance congressional planning for a convention, expounded this point of view: ... there is strong evidence that what the members of the [original constitutional] convention were concerned with ... was the power to make specific amendments.... [The] provision in article V for two exceptions to the amendment power42 underlines the notion that the convention anticipated a specific amendment or amendments rather than general revision.43 Another commentator, championing state authority in the convention issue, asserted that the founders’ intention in establishing the alternative amendment process was to check the ability of Congress to impede proposal of an amendment that enjoyed widespread support. He claimed that a convention limited to an issue specified by the states in their applications would be constitutional, but that a convention could be limited by the states, but not by Congress: Congress may not impose its will on the convention.... The purpose of the Convention Clause is to allow the States to circumvent a recalcitrant Congress. The Convention Clause, therefore, must allow the States [but not Congress] to limit a convention in order to accomplish this purpose.44 The primacy of the states in this viewpoint thus suggests that a convention could be open and general, or limited, depending on the applications of the legislatures. For its part, Congress has historically embraced the limited convention. When considering this question in the past, it has claimed the authority to call the convention, but also asserted a constitutional duty to respect the state application process, and to limit the subject of amendments to the subject areas cited therein. For instance, in 1984, the Senate Judiciary Committee claimed Congress’s power both to set and to enforce limits on the subject or subjects considered by an Article V Convention to those included in the state petitions. The committee’s report on the Constitutional Convention Implementation Act of 1984 (S. 119, 98th Congress), stated: Under this legislation, it is the States themselves, operating through the Congress, which are ultimately responsible for imposing subject-matter limitations upon the Article V Convention.... the States are authorized to apply for a convention “for the purpose of proposing one or more specific amendments.” Indeed, that is the only kind of convention within the scope of the present legislation, although there is no intention to preclude a call for a “general” or “unlimited” convention.45

### DA – INFRA

#### PC is likely to drive Dem unity sufficient to pass a multi-trillion reconciliation bill

Wasson and Dorning 9-7-21 (Erik Wasson, Capitol Hill reporter at Bloomberg LP, former staff writer at The Hill, MS Journalism, Columbia University, BA Philosophy, English, Amherst College; and Mike Dorning, Deputy Editor: White House at Bloomberg LP; **internally citing a senior House Democratic aide, and Jim Manley, former top aide to former Senate Majority Leader Harry Reid, now corporate communications adviser at APCO**; “Biden Bets on Economic-Plan Win as Democrats Struggle to Deliver,” Bloomberg, 9-7-2021, <https://www.bloomberg.com/news/articles/2021-09-07/biden-bets-on-economic-plan-win-as-democrats-struggle-to-deliver>)

President Joe Biden needs Democrats in Congress to give him a political boost by passing his $4 trillion economic agenda, but deepening divisions in the party threaten the chances of that happening any time soon.

Lawmakers are attempting to craft one of the most complex tax and spending bills ever contemplated, with virtually no area of the budget or tax code left untouched, during just a handful of work days this month.

The tax-writing House Ways and Means Committee is set to start working on its portion of Biden’s $3.5 trillion plan this week as other committees plow through their components, including education, health care and climate.

Democratic leaders’ goal is to have the tax and spending package wrapped up by the end of the month, so that the House can give final passage to a separate $550 billion bipartisan infrastructure bill.

That schedule risks getting sidetracked, though, by a widening rift between Democratic progressives and moderates over the size of the tax and spending package -- known as reconciliation -- and a looming battle with Republicans over raising the federal debt limit.

“Right now there is no way I can see Congress meeting the September deadline,” said Jim Manley, who was top aide to former Senate Majority Leader Harry Reid. “This reconciliation bill is far more difficult than anything else I have seen.”

The Democratic Party infighting adds to Biden’s woes. A hugely disappointing August jobs report on Friday capped weeks of bad news for the president.

August nonfarm payrolls increased by just 235,000 last month compared with a Bloomberg survey prediction of 733,000 in job gains. The huge miss came after Biden’s poll numbers plummeted amid the chaotic U.S. withdrawal from Afghanistan and resurgent Covid-19 pandemic. A Washington Post/ABC News poll out Friday found Biden’s approval rating had dipped to 44%, down from 50% in June.

Biden urged Congress on Friday to get on with it.

September is the time for the House and Senate “to finish the job of passing my economic agenda so that we can keep up the historic momentum we’ve been building these last seven months,” he said before leaving the White House to view damage from Hurricane Ida.

That timeline depends on Democratic unity. Senate Majority Leader Chuck Schumer needs every Democratic vote in the 50-50 chamber to pass the tax and spending package in the face of solid Republican opposition. In the House, Speaker Nancy Pelosi can afford to lose no more than three Democratic votes.

Moderate Senator Joe Manchin of West Virginia last week said his fellow Democrats should “hit the pause button” on the $3.5 trillion tax and spending plan.

Manchin should be “very persuadable” by the argument that the package as envisaged “adds nothing to the debt,” White House Chief of Staff Ron Klain said on CNN’s “State of the Union.”

“We’ve worked with Senator Manchin every step of the way,” Klain said. “We’re going to work together to find a way to put together a package that can pass the House, that can pass the Senate, that can be put on the president’s desk and signed into law.”

Some House moderates also balk at the price tag, which itself represents a compromise with Senate Budget Committee Chairman Bernie Sanders, a Vermont independent, who initially sought $6 trillion.

After spending trillions on Covid relief, “we cannot afford to continue with this borrowing,” Representative Ed Case, a Democrat from Hawaii, said during the Natural Resources Committee vote on its portion of the bill.

‘Absolutely Not’

But House progressives, such as Representatives Pramila Jayapal of Washington and Alexandria Ocasio-Cortez of New York, have threatened to block the infrastructure package if the reconciliation bill stalls. After Manchin urged a pause, Jayapal tweeted “Absolutely not.”

“Right now we have a massive game of hostage-taking as members protect their positions,” Manley, now a corporate communications adviser at APCO, said. “But at some point I have to believe they are going to realize the Biden administration is riding on getting this stuff done.”

David Axelrod, who was former President Barack Obama’s top political strategist, said many congressional Democrats also have to consider the impact on their own re-election bids next year.

“If they tank his domestic program, then what are they running on?” Axelrod said. “It’s not just Joe Biden that will suffer. They will suffer. And he’s got time to recover. They don’t.”

Hard Decisions

A senior House Democratic aide said party leaders remain optimistic about getting internal agreement on the bill by the end of the month, while acknowledging there are still a lot of hard policy decisions to make. Tax increases on the wealthy and corporations are popular with the public, the aide said.

#### Backlash to Court scope expansion triggers a legislative battle

Jones and Kovacic 20 (Alison Jones, Professor of Law, King’s College London; and William E. Kovacic, Global Competition Professor of Law and Policy, Professor of Law, and Director of the Competition Law Center, at George Washington University Law School, former General Counsel, Commissioner, and Chairman of the Federal Trade Commission; “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, 65(2), 3-20-2020, DOI: 10.1177/0003603X20912884)

The discussion in this section identifies likely impediments to the implementation of ambitious reforms, either through litigation (under the present-day regime) or legislation. These include judicial resistance to broader applications of the Sherman, Clayton, and FTC Acts, the complexities of designing effective remedies, the uncertainty of long-term political support for ambitious reforms and the possibilities for political backlash once agencies begin prosecuting major new cases, and the complications, and resistance, that confronts any effort in the United States to make legislative change.

A. Judicial Resistance to Extensions of Existing Antitrust Doctrine

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

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

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

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

#### PC key to a multi-trillion bill – Biden’s all in

Golden 8-13-21 (Carl Golden, senior contributing analyst with the William J. Hughes Center for Public Policy at Stockton University, “Infrastructure bill: Biden, nearly grasping victory, may still have to compromise,” Special to the USA TODAY Network, North Jersey, 8-13-2021, <https://www.northjersey.com/story/opinion/2021/08/13/infrastructure-bill-2021-biden-grasps-victory/8108068002/>)

The largest government-sponsored public works program since the New Deal of the 1930s — a $4.5 trillion two-bill package to address the nation’s crumbling infrastructure — lies tantalizingly within President Joe Biden’s grasp, a signature accomplishment for his seven-month-old presidency.

It is, though, more than roads and bridges — far more.

If the package reaches his desk, it will validate Biden's career-long conviction that negotiation, compromise when necessary and good faith efforts to achieve elusive bipartisanship are no longer pipe dreams fraught with polarization and insurmountable ideological divisions.

Standing in the way of such a monumental achievement, however, is a cadre of a dozen or so House Democrats, far left self-styled progressives who’ve threatened to either vote against or withhold their votes for the package out of a collective pique that it is short of their demands.

Unless their minds are changed by the administration or the Congressional leadership, they stand ready, if not eager, to destroy the entire effort.

House Democrats have exceedingly little room to maneuver — four defectors would doom the program — or to reach accommodations to permit a negative vote so long as it doesn’t impact the outcome.

While 19 Senate Republicans, including Minority Leader Mitch McConnell, supported the bipartisan $1 trillion program, they are expected to put up unanimous opposition to the $3.5 trillion Administration proposal, forcing Democrats to invoke a reconciliation process which permits approval with a simple majority of 50 votes (the tiebreaker provided by the vice president) rather than the 60-vote threshold to head off a filibuster.

This is a contest the president cannot afford to lose — a test of wills from which he cannot flinch.

Biden's administration has gone all in on the infrastructure program. He has thrown the weight and prestige of his office behind it and has personally taken part in negotiating sessions to reach agreement on its many components and the cost.

He even took the unusual step of standing in the White House driveway surrounded by the 10-member bipartisan coalition to announce an agreement had been reached. He appeared to agree that the two bills should be tied together but quickly backed off any potential veto threat if they were not.

Whatever political capital he’s accrued — reaching back to his pre-presidency career in the Senate and vice president’s office — has been shoved into the middle of the table.

A defeat engineered by members of his own party would be devastating.

Not only would it deny him a monumental achievement, one his party’s congressional candidates can campaign on next year but would deal a mortal blow to his governing philosophy of bipartisan cooperation as the most effective path to problem solving.

Why, for instance, would Republicans as the minority party be receptive to across the aisle advances only to see the end result brought crashing down by a group of breakaway Democrats?

Many Republicans are understandably wary of offending their partisan base by casting a vote to hand a legislative victory to Biden. They will certainly not do so if they’re convinced Democrats will ultimately sink the idea, consigning them to the worst of both worlds.

New York Congresswoman Alexandria Ocasio-Cortez, putative leader of the progressive bloc, has been vocal in her criticism of the bipartisan bill and warned that she and her like-minded colleagues are sufficiently strong to “tank” the bill in the House unless the Senate passed the significantly larger administration bill.

For months, Ocasio-Cortez and the progressives have filled their Twitter accounts and media interviews with sharp criticisms of the bipartisan effort. They urged Democrats to abandon any attempt at cooperation with Republicans and act unilaterally, for instance, insisting that the proposal fell far short of the dollar amount they felt necessary to fund a wide array of programs.

Speaker Nancy Pelosi, feeling the pressure, warned that she would not schedule a vote on the bipartisan proposal unless it was accompanied by the more expansive and expensive proposal.

She dug in deeper on her position, even in the face of a group of moderate House Democrats who urged a vote on the bipartisan program as a demonstration of support for the president and, equally as significant, to bask in the accomplishment during their campaigns.

The outlook in the Senate, however, is dicey, at best. Needing all 50 Democrats to sign on became somewhat problematic when West Virginia Sen. Joe Manchin and Arizona Sen. Krysten Sinema expressed misgivings about the $3.5 trillion cost.

Without the unanimous support — not a sure thing at this stage — the bill will fail, leaving a thoroughly embarrassed president holding an empty bag.

Moreover, if the progressives follow through on the threat to “tank” the bipartisan bill in the House in the absence of Senate approval of the more ambitious plan, the entire effort will collapse and provide Republicans with a political gift opportunity to question the ability of the Administration and Democrats in Congress to govern.

It would also embolden the progressive faction to work its will on other Administration initiatives with which it disagrees by simply bloc voting in the negative unless their demands were met.

The pressure is clearly on Pelosi and Senate Majority Leader Charles Schumer to deliver; Pelosi to tame the maverick progressives and Schumer to bring into the fold those Democrats nervous over the multi-trillion-dollar cost at a time when the economy seems to be recovering but risks a slowdown with the surge in COVID-19 cases and the possibility of a lockdown.

With the House due back in session this month and final Senate action tentatively set for September, Biden can spy the finish line from his vantage point. Reaching it will require his full participation and a willingness to possibly back away from the overall cost.

Victory, though, is victory.

#### Multi-trillion key to prevent extinction from climate change

Sirota 8-27-21 (David Sirota, journalist, columnist at The Guardian, Editor at Large of Jacobin, senior advisor and speechwriter on the Bernie Sanders 2020 presidential campaign, “Will They Hold Out?” Daily Poster, 8-27-2021, <https://www.dailyposter.com/will-they-hold-out/>)

There is now a House- and Senate-approved $3.5 trillion reconciliation framework for a final climate/budget bill - but the granular details of the final legislation are only now being written, and progressive legislators have not clearly defined their non-negotiables.

Yes, they have made some important general statements. For instance, Democratic Rep. Cori Bush said “We won't support the infrastructure package without first passing a reconciliation bill that delivers lower prescription drug prices, comprehensive climate action, universal pre-K, and expanded Medicare.”

But these progressives have not made clear in a line-by-line way what specifically must be in that reconciliation bill for them to support it. In fact, a letter from three members of the Congressional Progressive Caucus suggest they are studiously avoiding specifics. That letter says most caucus members are committing to withholding their votes on the bipartisan infrastructure bill “until the Senate adopted a robust reconciliation package” — but the concept of “robust” remained noticeably undefined.

This is a problem because while words like “lower” and “comprehensive” and “expanded” and “robust” sound nice, they are also fungible — and fungibility is how seemingly good legislation can get watered down to nothing. It’s how a $3.5 trillion spending plan that represents the absolute least we must do to save the planet can be whittled down to a fraction of that, dooming us to climate incineration.

Pelosi already seems to be zeroing in on this vagueness. As she said earlier this week: “We must keep the 51-vote privilege by passing the budget and work with House and Senate Democrats to reach agreement in order for the House to vote on a Build Back Better Act that will pass the Senate.”

When you translate that from incomprehensible Washington-ese into understandable vernacular, what she’s saying is the climate/budget bill is not set in stone — and that rather than having a standoff in defense of the $3.5 trillion bill, she may end up pushing to pare it back or gut it if Sinema, Manchin, or any other craven Democratic senator decides to object and imperil the “51-vote privilege.”

In that scenario, progressive lawmakers who promised “no climate, no deal” but who did not clearly define what “climate” or “robust” meant could find themselves being ordered by Pelosi and Biden to vote for the infrastructure bill coupled with a Manchin-gutted climate/budget bill. They’ll be told that this is a victory that honors their deal, because they at least got something they can pretend is a real climate bill, regardless of how eviscerated and inadequate it proves to be.

The best way to avert this scenario is for progressives to be on record and crystal clear about their demands. That way, if those demands aren’t met, their votes aren’t negotiable when the Democratic Party establishment and its corporate donors put real pressure on them to cave.

Considering all these moving parts, there are legitimate reasons to be pessimistic about the chances for the kind of historic climate/budget bill envisioned by the reconciliation framework. But there are also reasons to be optimistic.

On the pessimistic side, there is precedent and recent history.

In the last few decades, there are few examples of progressive legislators ever holding the line on policy demands, especially in the face of pressure from their own party’s leadership. Only a few months ago, progressive lawmakers in the current Congress refused to even hold out for a $15 minimum wage. Rather than doing what corporate Democrats do and using their considerable leverage, progressives instead just accepted the ruling of an unelected, fireable Senate adviser, allowing Democratic leaders to pretend they couldn’t do anything about the parliamentarian - even though they most certainly could.

Meanwhile, even if progressives do hold out, peeling off a few Republicans to negate them is a well-trodden path in Congress. From the passage of NAFTA to the gutting of Dodd-Frank, we’ve seen Democratic presidencies in which business-backed coalitions come together to pass corporatist legislation, negating tactical opposition of progressives and ideological opposition from the far-right.

But on a more optimistic note, there is the very real potential for a new congressional dynamic.

For example, Sen. Bernie Sanders is not some junior legislator anymore. He’s the chairman of the Budget Committee, with a national following that — if he chooses — he can activate in a legislative conflict.

Likewise, the narrowly divided House offers a cohesive Congressional Progressive Caucus the rare chance to go beyond tweeting and actually wield power by threatening to withhold their votes. Their leverage is further enhanced by the random good fortune of Trump and his MAGA nihilists trying to deny Pelosi the GOP votes she would need to override those progressive holdouts.

And perhaps most encouraging (and surprising) of all, Senate Majority Leader Chuck Schumer has suddenly seemed to draw a line in the sand with a new letter demanding that his caucus accept the full $3.5 trillion climate/budget plan in order to save the planet from the unfolding environmental cataclysm. Unlike Pelosi’s parsed language designed to hold out the possibility of gutting that plan, Schumer is unequivocal.

“I want to reiterate how critical this moment is for our country and our world,” he writes. “At the same moment that historic drought and wildfire threaten the West and powerful floods and hurricanes impact large swaths of our country, we are on the precipice of the most significant climate action in our country’s history. I do not believe we have the luxury of failure if we are to provide a good future for ourselves and our children.”

There’s a lot of byzantine congressional process and legislative contortions ahead. But Schumer is right — the stakes couldn’t be higher. How these three aforementioned questions are answered in the coming weeks could determine the fate of America — and the world.

### DA – FTC Independence

***Next off is FTC independence:***

**FTC independence in the US key to *global norms* that support agency independence. Vital for *free trade* and *GLO*.**

* United States’ FTC practices are modeled *by several nations* – including South Korea – and *will continue to be modeled* by nations that are still amid transitions towards industrialization;
* Global attentiveness to the United States’ FTC practices *remains ongoing* and - “*to this day*” - are a *central obstacle* to aspired free trade norms;
* The root of the loss of the global public’s confidence in free trade stems from the success of zero-sum strategies. *The root of that* is an interpretation of the FTCA that permits politicized intervention;
* Ambiguity in the United States’ FTCA permit the Act to be exercised *EITHER with a great deal of agency discretion* – *OR* alternatively, *with the perceived influence of external political branches*;
* Current US FTC practices lean away agency independence – and that’s *a central obstacle* to international agencies countering the growth of protectionist mercantilist norms
* More broadly, this hampers *general support for internationalism/GLO*

**Nam ‘18**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

ABSTRACT:

The Federal Trade Commission Act of 1914 (“**FTC A**ct”), **a model** for **many other countries** that set up their **own** competition agencies, combines the **control** afforded by presidential appointment and removal powers over FTC commissioners with an **exceedingly discretionary** mandate. This Article contends that the FTC Act’s outmoded openness to **strong presidential direction**, **where adapted abroad**, has helped detract from **antitrust regulator independence.** Even advanced players in the liberal international economic order **such as South Korea** have made use of the United States’ original blueprint for unitary **executive-stamped** **antitrust** enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction **in antitrust enforcement** is particularly suited to capitalist economies helmed by administrations with mercantilist policies, **given their belief that the state and big business must coop**erate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces **preventing global convergence** in antitrust enforcement, and of their **roots.**

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. **as a role model** while developing their **competition** regimes.6 It is ironic, **then,** that **to this day** a **central obstacle** to the aspired international “culture of competition” **can be found in none other than the influence of the U.S.’s own FTC A**ct.7

American **antitrust** priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that **would reemerge abroad** in **many** later-developing countries.

The deepening global retreat from **internationalism** ***and*** free market principles in the present day, with the specter of **trade wars looming**, is exacerbated by nationalist competition regimes that **are derivative of a U.S. model** predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

**Globally, independence of antitrust agencies will prove key – checks spiraling economic nationalisms that’ll crush liberal peace.**

**Nam ‘18**

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National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a **creeping** loss of public confidence in open markets—**coupled with** the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, **as illustrated in this Article**—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of **protectionist** silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even **perennial norms** and conventions of **the U.S. competition regime** which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that **carried over abroad** to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent **liberal peace**156 **often taken for granted**. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s **formative influence** is not above scrutiny or reproach. **Still-elusive** realization of the liberal economic international order’s intended form will **require** an expanded constellation of **independent competition regulators** empowered to enforce antitrust laws consistently.

**Global free trade reversals will cause *multiple existential impacts*.**

* Arctic conflict
* Space conflict;
* Global nuclear prolif;
* Structural wars;
* Climate;
* Geo-engineering;

**Langan-Riekhof ‘21**

et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - #E&F - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

With the trade **and financial** connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to **develop nuclear weapons**, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like **the Arctic** and **space**. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, **conflicts became endemic**, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address **climate changes**, little was done to slow greenhouse gas emissions, and some states experimented with **geoengineering with disastrous consequences**.

### DA – Court Cap DA

#### Conservative justices will uphold Roe V Wade to appear bi-partisan, but the aff forces them to reverse course

Cohen & Lithwick 7/28 – [David S. Cohen - associate professor at the Drexel University School of Law, Dahlia Lithwick – courts and law writer at Slate, July 28th 2021, “Roe v. Wade Is Now in the Hands of the Three Trump Justices”, <https://slate.com/news-and-politics/2021/07/mississippi-roe-challenge-barrett-kavanaugh-gorsuch.html>, eph]

One of the most interesting fissures that has opened up within the conservative legal movement in recent years has been between mainstream conservative lawyers and the growing performance artist faction of the lawyers for the Trump base. Soon, the conservative justices themselves will have to pick which side of the battle they are on: With the filing last week of a brief that explicitly asks the Supreme Court to overturn Roe v. Wade, the state of Mississippi is forcing the court’s three newest Trump-appointed justices to choose between institutional stability and law that channels right-wing internet memes. Examples of the latter abound in the past year. Rudy Giuliani has seen his license to practice law temporarily suspended—twice!—as a result of his star turns as all-purpose lawyer for crazy stuff. Last December, 17 Republican attorneys general signed a brief supporting a suit filed by Texas Attorney General Ken Paxton seeking to set aside the 2020 election based on false claims of “unconstitutional irregularities.” The chief law enforcement officers of those 17 states actually asked the Supreme Court to throw out every vote in the four consequential states in which Joe Biden had prevailed—Georgia, Michigan, Pennsylvania, and Wisconsin—and then have each state’s legislature declare Donald Trump the winner. Another exhibit might be the various lawsuits filed by Trump’s “Kraken” lawyers Lin Wood and Sidney Powell, who currently face the prospect of legal sanctions for their work advancing his bogus claims of a stolen election. Fitch’s brief represents an astoundingly maximalist theory of ignoring precedent, claiming that “the stare decisis case for overruling Roe and Casey is overwhelming.” Calling Roe v. Wade “egregiously wrong” (five times!), the brief asks the court to simply overturn every abortion rights decision made over the course of half a century. The casual trolling is indeed epic. Justice Ruth Bader Ginsburg, who dedicated her life to protecting women’s reproductive rights, is invoked to support the proposition that Roe and Casey “have inflicted significant damage” upon the country. The brief blames Roe for creating a national culture war that was in fact produced almost singlehandedly by Pat Buchanan, Phyllis Schlafly, and Nixon strategist Kevin Phillips. It contends that Roe and Casey and their progeny are not really precedent because they were fractured opinions. It argues that “abortion jurisprudence has harmed the Nation.” The brief even cites one of us (Lithwick) to support its claim that abortion is so contentious that it must be returned to the states to decide, without interference from the federal government. Trolly. Just over one year ago, the Supreme Court struck down a Louisiana law that would have reduced the number of clinics in the state to one, and five years ago, the court struck down a Texas law that would have cut the number of clinics in the state by three-quarters. In neither of those cases did the state attorneys general, both outspoken, politically motivated, anti-abortion conservatives, urge the court to use the lawsuit to overturn Roe. So what changed? Several things. For one, the Mississippi law at issue in this case is one of a new breed of extreme anti-abortion laws that have swept the nation in the past two years. Despite the fact that fetal viability is currently set at between 23 and 24 weeks, states have been banning abortion at 15 weeks (Mississippi, in this case), 12 weeks (Arkansas), 8 weeks (Missouri), 6 weeks (Ohio, Georgia, and seven others), and at conception (Alabama, Louisiana, Utah). In other words, these new laws are rooted not in state solicitude for public health, but in a desire to end legal abortion. Dobbs is the first case to arrive at the Supreme Court addressing these direct attacks on Roe. Beyond that, the most essential change here is that Trump struck Republican gold during his presidency and was able to appoint three new Justices to the court. All three—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—were established conservative jurists at the time they were elevated to the court, but by being appointed by Trump, and sometimes with some discomfort, their reputations and careers became reoriented as Trump loyalists. Since Trump stated that one of his chief goals in his court appointments was to appoint justices who would overturn Roe, Fitch received the precise message a loyal Trump soldier was sent loud and clear—send these justices a Trump-inspired brief that will appeal to the Trump moment. And that she did. What she may have missed is how hard the three Trump justices have labored to show the country that they are not partisans, not shoddy hacks, and not the brazen political actors their party promised. Just as the last term showed that, in some areas, minimalism and moderation were to be the lodestars of, at minimum, Barrett and Kavanaugh, Fitch served up a giant partisan fireworks display that would benefit her own image and career more than the Trump justices’. But perhaps that was the intended purpose. Her Trump-stylized arguments certainly garnered immense attention for Fitch last week. Whether it further inclined the Supreme Court to grant the relief she sought is a much harder question. So far on the court, the Trump three have been reliable conservative votes, but they have not completely walked the party line. Gorsuch wrote the pivotal decision in 2020 giving LGBTQ people equal rights in the workplace; Kavanaugh is now the court’s median justice and cited something akin to the public perception of critical race theory in his opinion supporting college athletes against the NCAA; and Barrett stopped short of overturning a precedent about religious liberty that has been in conservative crosshairs for decades. These three are conservatives, there’s no two ways about it. But, are they bomb-thrower justices, like Samuel Alito and Clarence Thomas? Or are they justices prone to taking less visible, headline-eluding smaller steps to accomplish larger conservative goals while still paying some respect to half a century of precedent? That’s the choice before them now that Mississippi has so clearly thrown down the gauntlet. Abortion rights activists who seek to see Roe ended outright celebrated the in-your-face-ness of the AG’s filing. Several argued that there was no other avenue for Mississippi and applauded the candor of a brief that no longer covered itself in fabrications about the real goals of the anti-choice movement. But, there is at least some reason to doubt that there are five, let alone four, or even three votes, at the high court for an in-your-face reversal of Roe just weeks before the 2022 midterm elections. It will be up to the Trump justices to decide just how much they side with the church of Trump, instead of the institution of the Supreme Court.

#### Judicial interpretation of market regulation & anti-trust is split along political lines – the aff’s regulation makes them look too liberal.

Ventoruzzo 15 – [Marco Ventoruzzo - Full Professor of Business Law at Bocconi University in Milan and Full Professor of Law at Penn State Law School, 2015, “Do Conservative Justices Favor Wall Street: Ideology and the Supreme Court's Securities Regulation Decisions”, <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1277&context=fac_works>, eph]

Probably the best evidence that political ideology can play a role in the area of securities regulation is the set of rules concerning the composition of the Securities and Exchange Commission (SEC). Section 4(a) of the 1934 Exchange Act sets forth that the SEC should be composed of five members appointed by the President with the "advice and consent" of the Senate, but also requires that "[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as may be practicable."8 ° The statutory call for a bipartisan SEC indicates that regulation and enforcement activities concerning the financial markets can be subject to diverging philosophies along political lines.8 1 It is obviously impossible here to fully discuss the general economic tenets of conservative and liberal policies with respect to the regulation of financial markets. General intuition, noted above, is that ''conservative" views of economic policy emphasize the efficacy of markets over government intervention and regulation, while for liberals the position is reversed. The consequence is that conservatives tend toward deregulation based on the conviction that market failures rarely justify protections for perceived weaker parties in a private transaction. Liberals, on the other hand, are more skeptical about the virtues of free markets and believe that regulation should curb the possible inefficient and inequitable outcomes of laissez-faire market operation.8 2 In short, the former tend to be more "pro-business," the latter more "pro-investor." 83 An illustration of this possible political divide is the legislative history of the so-called Private Securities Litigation Reform Act of 1995.84 In the 1990s, there was a growing concern that frivolous securities lawsuits could arise as attorney-driven class actions, in particular invoking section 10(b) and Rule lOb-5 of the Exchange Act, forcing defendants to settle in light of the potential costs of discovery.8 5 Congress created this piece of legislation to curb such a phenomenon through different measures like raising the pleading standards.86 In order to survive a motion to dismiss, a plaintiff had to plead false statements "with particularity," and that pleading had to create a "strong inference" of scienter, one of the elements of a Rule lOb-5 cause of action; in addition, the court granted a "stay of discovery" before the decision on the motion to dismiss. 87 Congress enacted the bill into law over a veto by President Bill Clinton.88 Numerous Democratic representatives voted in favor of the law,89 but the diverging views of President Clinton and Congress evoke the traditional dividing line between liberals and conservatives in this area. This Section briefly addresses the room for policy consideration- politics-in the enforcement of the securities laws. The intent is not to offer a comprehensive account of the degree of freedom that courts have in the interpretation of all the provisions of the securities laws, but more simply to give a flavor of the possible different interpretations of the relevant statutes that a particular set of beliefs concerning the proper scope of the regulation might influence. To begin, note that the U.S. securities laws enacted in the 1930s were among the first modem regulations of the financial industry, and they have served as a model for several foreign jurisdictions.90 These laws, however, apply to one of the most dynamic and innovative industries. Inevitably, enforcing the existing rules to the ever-evolving factual circumstances that characterize this sector leaves wiggle room for different policy considerations. A good starting point is the scope of the securities laws. The definition of "security" that triggers the obligation to register and disclose information, as well as the availability of specific private causes of action designed to protect investors, is broad but also vague. For example, consider the notion of what constitutes an "investment contract" set forth in section 2 of the Securities Act (and section 3 of the Exchange Act) that the Supreme Court had to define on various occasions. 91 Another crucial area concerns the availability of private causes of action to plaintiff-investors allegedly harmed by false, misleading, or incomplete statements in the purchase or sale of securities and the burden of proof that they must satisfy to prevail.92 Furthermore, in several cases, the remedies granted to plaintiffs are based on private causes of action implied by the courts and not explicitly regulated by the legislature, most notably section 10(b) and Rule lOb-5 of the Exchange Act. In these instances, significant interpretative latitude exists. Consider, for example, problems such as the need to prove reliance vis-h-vis the fraud-on-the- market theory, the scienter requirement, or the extension of liability to aiders and abettors.93 The extension of the insider-trading prohibition, a rule largely created by courts, is another area in which different ideological perspectives might affect the decision-making process.94 Conservatives and liberals also often have divergent views about the powers of the government (i.e., the SEC) to enforce the law, particularly the securities laws. For example, some interesting cases in this respect deal with the burden of proof that the SEC must satisfy to establish a violation of the securities laws.95 Rulings on takeover regulation also might indicate different policy preferences of the Justices. These cases, however, show the difficulty of properly coding certain decisions as pro-business or pro-investor, a problem that more generally affects the analysis undertaken later in this Article.96 On one hand, it is possible to argue that takeovers, and more specifically hostile tender offers, favor investors by allowing them to sell their shares at a premium over market prices. On the other hand, some tender offers may not be value-maximizing, and in this case to allow the target corporation, as well as its controlling shareholders and managers, to resist an inadequate or coercive offer could be in the best interest of shareholders. In any case, the proper role of the market for corporate control and how to create a level playing field for bidders and targets in the takeover context are also areas where there is room for competing policy considerations. 97 In addition, litigation concerning the constitutionality of state antitakeover statutes is instructive as to the position of the Supreme Court on issues relating to the relative powers of the federal government and the states in regulating commerce, an area that implicates the politically charged question of the role of the federal government.9" The legislature resolved some of the controversies mentioned above, and the Court unanimously finds this, easy solution. Even assuming that ideological preference might be embedded in their decision-making, judges and, to a lesser but not unsubstantial extent, Supreme Court Justices face several constraints while speaking from the bench: Sometimes statutes and regulations are fairly straightforward and do not leave room for policy considerations; Lower judges might desire not to be reversed on appeal; 99 Fear of "government retaliation" might play a role (in the sense, for example, that striking down a statute might lead the legislature to introduce other measures that the Justice opposes); And public opinion might unconsciously influence them. There are, however, several "hard cases" where the solution does not seem to appear in either the Constitution or in statutory or case law. These hard cases leave room for the different policy approaches of the decision maker, as also indicated by the practice of dissenting opinions. This Article proposes that by examining a significant number of cases, it is possible to detect economic policies preferred by the Justices. In short, there are problems in the area of securities regulation in which ideology can play a role, considering the indeterminacy of the applicable laws.

#### Fetal tissue research solves diseases & upholding roe is key

Boonstra 16 – [Heather D. Boonstra - Vice President for Public Policy at the Guttmacher Institute, February 9th 2016, “Fetal Tissue Research: A Weapon and a Casualty in the War Against Abortion”, [https://www.guttmacher.org/gpr/2016/fetal-tissue-research-weapon-and-casualty-war-against-abortion#](https://www.guttmacher.org/gpr/2016/fetal-tissue-research-weapon-and-casualty-war-against-abortion), eph]

Fetal Tissue Research: A Weapon and a Casualty in the War Against Abortion

The debate over using human fetal tissue in medical research came roaring back on the national policy agenda last summer when a group of antiabortion activists began releasing deceptively edited videos about Planned Parenthood’s handling of fetal tissue donations for this purpose. Fetal tissue research dates back to the 1930s, and has led to major advances in human health, including the virtual elimination of such childhood scourges as polio, measles and rubella in the United States. 1,2 Today, fetal tissue is being used in the development of vaccines against Ebola and HIV, the study of human development, and efforts to treat and cure conditions and diseases that afflict millions of Americans.

To ensure it meets the highest ethical standards, fetal tissue research has been subject to stringent laws and regulations for decades. Abortion foes are now accusing health care providers and researchers of violating these laws and ethical standards, in hopes of undermining the right to abortion and ending fetal tissue research. These attacks not only threaten sexual and reproductive health and rights, but also pose a threat to the large numbers of people who could benefit from fetal tissue research, given the wide range of conditions that such research might ameliorate. Any impediment to ongoing scientific inquiry in the field caused by the current controversy would have substantial consequences.

IMPORTANCE OF FETAL TISSUE RESEARCH

Unlike embryonic stem cell research, which uses cells from days-old embryos created through in vitro fertilization, fetal tissue research uses tissue derived from induced abortion of pregnancies at or after the ninth week. 1,3 (Fetal tissue obtained from a miscarriage is often not suitable for research purposes because of concerns about potential chromosomal abnormalities that led to the miscarriage. 3) Researchers most often acquire fetal tissue from a tissue bank or, sometimes, directly from a hospital or abortion clinic. 4

Because it is not as developed as adult tissue and is able to adapt to new environments, fetal tissue is critical to the study of a wide variety of diseases and medical conditions, according to the American Society for Cell Biology. 1 Researchers use fetal tissue—and cell cultures derived from such tissue, which can be maintained in a laboratory environment for decades—to study fundamental biological processes and fetal development. According to the U.S. Department of Health and Human Services, fetal tissue continues to be an important resource for researchers studying degenerative eye disease, human development disorders such as Down syndrome, and early brain development (relevant to understanding the causes of autism and schizophrenia). 2

Fetal tissue has also been used to develop vaccines that have saved and improved the lives of billions of people worldwide. 1,2,5 The 1954 Nobel Prize in Medicine was awarded for work using cell cultures originating from fetal tissue that led to the development of the polio vaccine. Vaccines for diseases such as measles, mumps, rubella, chickenpox, whooping cough, tetanus, hepatitis A and rabies were also created using fetal cell cultures, and researchers are now using fetal cells to develop vaccines against other diseases, including Ebola, HIV and dengue fever.

In addition, researchers use fetal tissue in transplantation research. Fetal tissue has several unique properties that make it particularly suitable for transplantation. Not only do fetal cells grow at a much faster rate than adult cells, they also elicit less of an immune response, which lowers the risk of tissue rejection. 6 Clinical trials transplanting fetal cells are currently underway for people with spinal cord injury, stroke and ALS (Lou Gehrig’s disease), and may soon begin for those with Alzheimer’s disease, Parkinson’s disease and multiple sclerosis. 1

The National Institutes of Health (NIH) has been supporting research using fetal tissue since the 1950s, and in FY 2014, NIH provided roughly $76 million for this work. 3 According to an analysis of NIH research grants published in Nature, NIH funded 164 projects using fetal tissue in 2014, most often for research on infectious diseases, eye function and disease, and developmental biology (see chart). 7,8

Many of the nation’s leading academic medical centers are involved in fetal tissue research. 7,9,10 Researchers at the University of North Carolina at Chapel Hill are using cell cultures derived from fetal tissue for their work on hepatitis B and C—specifically, on how the viruses evade the human immune system and cause chronic liver diseases. At the University of Wisconsin-Madison, fetal cell cultures are used to study heart disease, including sudden cardiac arrest. At Stanford University, fetal tissue has been used to study Huntington’s disease, juvenile diabetes, autism and schizophrenia. And scientists at Colorado State University are conducting HIV research using fetal tissue.

FEDERAL LAW AND REGULATION

Soon after the U.S. Supreme Court’s Roe v. Wade decision in 1973 legalizing abortion nationwide, antiabortion leaders in Congress seized on fetal tissue research as a weapon in the war against abortion. Fetal tissue research was perhaps an inevitable target: It provided an aura of legitimacy to abortion itself and, at the same time, could be easily exploited to show how abortion “dehumanizes” the fetus. 11 Accordingly, antiabortion activists employed graphic visuals to shock members of Congress, try to personify the fetus, and demonize abortion providers and the procedure itself.

This first incarnation of the controversy coincided with public revelations about the infamous Tuskegee syphilis study—a study that enrolled black men living in Alabama to investigate the long-term effects of syphilis. In 1973, an ad hoc advisory panel convened by the Department of Health, Education and Welfare (now the Department of Health and Human Services) concluded that, in retrospect, the study was “scientifically unsound” and “ethically unjustified.”12 In response to the Tuskegee revelations, Congress felt pressure to create protections for human research subjects, and by 1974, Congress passed the National Research Act. The law created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research to develop guidelines on the ethical principles that apply to research on all human subjects, as well as on particular principles that apply to research involving fetuses and using fetal tissue. The commission’s report on research on the fetus, issued in 1975, led to the creation of regulations during the Ford administration that set out the rules of the road for federally funded fetal tissue research. The regulations—which are still in effect—specify that “no inducements, monetary or otherwise, will be offered to terminate a pregnancy.” They also provide that “individuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.” Fetal tissue research receded as a political issue until the late 1980s, when a group of NIH scientists sought approval from the Reagan administration for a proposed project involving the transplantation of fetal tissue. After deliberating on the request, the administration appointed an advisory panel—which included a chair and several members who were well-known opponents of abortion rights—to examine the ethical, legal and scientific questions raised by this type of research. In 1988, the panel issued its report and, despite its mixed composition, it concluded that “in light of the fact that abortion is legal and that the research in question is intended to achieve significant medical goals…the use of such tissue [for research] is acceptable public policy.”13 Key recommendations of the panel were later codified into law with the passage of the NIH Revitalization Act of 1993. The legislation won broad bipartisan support in Congress, including from several prominent senators with solid antiabortion records. Among them were Sens. Robert Dole (R-KS), a longtime advocate for people with disabilities, and Strom Thurmond (R-SC), who had a daughter with juvenile diabetes. 14,15 The NIH Revitalization Act of 1993 added several provisions to the existing regulations governing fetal tissue research. One such provision prohibits anyone from accepting payment for human fetal tissue other than “reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” Thus, although individuals may be compensated for any costs they incur in the acquisition, receipt or transfer of fetal tissue, they are prohibited from making a profit from these activities, regardless of whether the project is federally funded or not. The law also imposes additional requirements when the donated tissue is used in federally funded research involving the transplantation of fetal tissue for therapeutic purposes. Among these are provisions for informed consent and prohibiting physicians and researchers from altering the timing or method used to terminate the pregnancy solely for the purposes of obtaining the tissue. Although all of these requirements technically apply only to federally funded transplantation research, as a practical matter, they set the standard for all research using fetal tissue. For example, the policies and procedures for fetal tissue donation issued by Planned Parenthood Federation of America and by the National Abortion Federation incorporate the substance of these federal requirements. 16,17 STATE POLICIES At the state level, fetal tissue donation is regulated by the Uniform Anatomical Gift Act (UAGA), versions of which are in effect in every state. 13,18 According to an analysis by the Guttmacher Institute, 38 states and the District of Columbia have UAGA laws that explicitly treat fetal tissue the same way as other human tissue, permitting it to be donated by the woman for research, therapy or education. The remaining 12 states have laws that are silent, neither allowing nor disallowing the donation of fetal tissue (see map). UAGA also prohibits profiting from the sale or purchase of anatomical gifts for transplantation or therapy. Fetal tissue donation and research are also regulated in some states by specific statutes. Often, these statutes incorporate many of the same standards set by federal law and regulations. For example, 12 states prohibit making a profit from the donation or transfer of fetal tissue for research purposes, and eight states require the woman’s consent for research.

Five states have laws that ban research using fetal tissue obtained from abortions throughout pregnancy. (Four other states also ban research using postabortion fetal tissue, but these laws have been struck down by the courts.) One of these states with a ban in effect, Indiana, also has a law that requires the disposal of postabortion fetal tissue in an established cemetery or by cremation, presumably precluding any possibility of donation for research.

POLITICAL FIRESTORM

The current furor over the use of fetal tissue in research ignited last summer, after the release of heavily edited videos purporting to capture undercover sting operations targeted at Planned Parenthood. The series of videos—released in close cooperation with members of Congress who want to ban abortion19—show an antiabortion activist posing as a representative of what turned out to be a sham biomedical research company, in frank discussions with various Planned Parenthood officials about tissue donation policies and reimbursement.

The fallout from the videos has been swift, severe and wide-ranging. The stated targets are Planned Parenthood, abortion providers and the legitimacy of abortion. The videos also threaten to undermine fetal tissue research itself, however, by sowing confusion, and by using graphic descriptions and images to turn the public against this research.

The primary goal of this current campaign has been to portray Planned Parenthood as callous and its providers as possibly criminal. Antiabortion policymakers have accused Planned Parenthood of violating several provisions of the NIH Revitalization Act of 1993, such as profiting from the sale of fetal tissue and altering the abortion procedure solely for the purpose of obtaining tissue. Opponents of abortion have also accused providers of using a procedure that violates the so-called “partial birth” abortion ban. As an instigator of the videos, David Daleiden explained in an interview with Politico, “For me, the goal was to document and illustrate for the public really, really clearly how Planned Parenthood harvests and sells the body parts of the babies that they abort.”20

Antiabortion elected officials ran with this narrative and immediately called for investigations of the organization. In October 2015, congressional leaders formed a special committee to carry out an official inquiry into Planned Parenthood—bringing the total number of investigations into Planned Parenthood in the House and Senate to five since the first video was released. In January 2016, the House’s first substantive piece of business was yet another attempt to cut off funding for Planned Parenthood, one of several such efforts recently to scale back abortion rights and women’s health care. Also, officials in 11 states have concluded investigations into claims that Planned Parenthood profited from fetal tissue donation, and each one of these investigations has cleared the organization of wrongdoing. 21

Nonetheless, the grandstanding has continued unabated. Antiabortion leaders, lawmakers and all the Republican presidential candidates have used the opportunity to demonize abortion and paint a ghoulish picture of organ harvesting, all in an effort to gin up public disgust and attract public support for themselves and against abortion and Planned Parenthood. Indeed, the videos and the hype around them appear to have provoked at least four arson attacks on Planned Parenthood clinics since July 2015 and set the stage for yet another extreme act of violence in Colorado Springs over Thanksgiving weekend. 10 It was there that Robert Lewis Dear Jr. allegedly killed three people and injured nine others at a Planned Parenthood health center. During his arrest, Dear shouted “no more baby parts,” suggesting that the constant barrage of inflammatory rhetoric around the fetal tissue issue over the prior months played a role in triggering his actions. 22

HIGH STAKES

Beyond the attacks on Planned Parenthood, however, the use of fetal tissue in research also is under direct attack. Since July, bills have been introduced in Congress and in several states that would make it more difficult to donate tissue or use fetal tissue in research. Other bills would ban fetal tissue research outright. This trend is almost certain to continue through 2016 as the issue is sure to be exploited in state and federal elections.

Meanwhile, the videos appear to have had a chilling effect on science. According to Theresa Naluai-Cecchini, a scientist at the Birth Defects Research Laboratory at the University of Washington (a federally funded entity that has served as a source of donated fetal tissue to researchers nationwide for more than 50 years), tissue donations have dropped dramatically since July 2015. 10 Naluai-Cecchini told Mother Jones that if this trend continues, research that may save lives would take considerably longer.

Some scientists involved in fetal tissue research have been afraid to speak out. 7 They have seen how abortion providers have been targeted, and now they too fear for their personal safety. Others have spoken out strongly to defend the importance of their work, pointing out that tissue that would otherwise be discarded has played a vital role in lifesaving medical advances and holds great promise for new breakthroughs. In an October 2015 open letter to Congress, 41 scientists called for the end to political interference with science and research: “Fetal tissue research has already saved and improved the lives of countless people. [We] cannot allow political agendas to undermine our nation’s legacy of leadership in medical and scientific innovation.”23 In another action, the Association of American Medical Colleges released a statement on January 6, 2016 signed by 59 academic medical centers, scientific societies and allied groups—from the University of Alabama School of Medicine to Duke University School of Medicine, from the University of Wisconsin-Madison to Tulane University School of Medicine. 24 The statement expresses “grave concerns” about the numerous legislative proposals now in play in Congress and in many states, and it calls on lawmakers to reject any proposals that restrict access to fetal tissue for research.

Ironically, in the wake of all the heightened focus on fetal tissue donation, Planned Parenthood officials report they have seen an uptick in the number of women obtaining abortion who request that the fetal tissue be donated to research. The role that Planned Parenthood plays in providing postabortion tissue to researchers, however, is small: Just 1% of the approximately 700 health centers that are part of the Planned Parenthood network are equipped for fetal tissue donation. And in another response to the disinformation campaign and to try to quell some of the controversy, Planned Parenthood announced in October 2015 that its clinics will no longer seek reimbursement for their costs related to fetal tissue donation, even though the practice is perfectly legal and commonplace.

Bioethicist R. Alta Charo has argued that enabling the use of fetal tissue to advance scientific research for the benefit of humankind must be seen as something of a moral imperative. “Virtually every person in this country has benefited from research using fetal tissue,” she wrote in the New England Journal of Medicine. “Every child who’s been spared the risks and misery of chickenpox, rubella, or polio can thank the Nobel Prize recipients and other scientists who used such tissue in research yielding the vaccines that protect us….Any discussion of the ethics of fetal tissue research must begin with its unimpeachable claim to have saved the lives and health of millions of people.”25

As the full impact of the current firestorm surrounding fetal tissue research is still unfolding, it remains to be seen how much this research will continue be used as a weapon against abortion or become a serious target itself—or both. To be sure, the current controversy threatens not just access to safe and legal abortion and the providers who care for the women who seek this essential health service. It also threatens the millions of people globally who could benefit from fetal tissue research—and that includes nearly all of us, whatever our views on abortion rights may be.

#### Cross app their Larsen 20, diseases cause extinction

### ADV – Manu

#### No China rise and no war if it happens – economic interdependence and MAD because of innovations

Heath 17 ---- Timothy, senior international defense researcher (RAND Corporation), former senior analyst for the USPACOM China Strategic Focus Group, M.A. in Asian studies (George Washington University), B.A. in philosophy (College of William and Mary), Ph.D. candidate in Political Science (George Mason University), written with William R. Thompson who is a Professor of Political Science (Indiana University), “U.S.-China Tensions Are Unlikely to Lead to War,” National Interest, 4/30, <http://nationalinterest.org/feature/us-china-tensions-are-unlikely-lead-war-20411?page=2>

The most important driver, as Allison recognizes, would be a growing parity between China and the United States as economic, technological and geostrategic leaders of the international system. The United States and China feature an increasing parity in the size of their economies, but the United States retains a considerable lead in virtually every other dimension of national power. The current U.S.-China rivalry is a regional one centered on the Asia-Pacific region, but it retains the considerable potential of escalating into a global, systemic competition down the road. A second important driver would be the mobilization of public opinion behind the view that the other country is a primary source of threat, thereby providing a stronger constituency for escalatory policies. A related development would be the formal designation by leaders in both capitals of the other country as a primary hostile threat and likely foe. These developments would most likely be fueled by a growing array of intractable disputes, and further accelerated by a serious militarized crisis. The cumulative effect would be the exacerbation of an antagonistic competitive rivalry, repeated and volatile militarized crisis, and heightened risk that any flashpoint could escalate rapidly to war—a relationship that would resemble the U.S.-Soviet relationship in the early 1960s.

Yet even if the relationship evolved towards a more hostile form of rivalry, unique features of the contemporary world suggest lessons drawn from the past may have limited applicability. Economic interdependence in the twenty-first century is much different and far more complex than in it was in the past. So is the lethality of weaponry available to the major powers. In the sixteenth century, armies fought with pikes, swords and primitive guns. In the twenty-first century, it is possible to eliminate all life on the planet in a full-bore nuclear exchange. These features likely affect the willingness of leaders to escalate in a crisis in a manner far differently than in past rivalries.

### ADV – cartel

#### Inewuality is 100% inevitable

Prins 14 [Nomi Prins Contributor at Truth Dig, 3-11-2014 <http://www.truthdig.com/report/item/the_inevitability_of_income_inequality_20140311>]

There’s been a lot of discussion about the historically high levels of income and wealth inequality lately—mostly from people on the shorter end of that stick—with good reason: There’s no end in sight. In his new book, “Capital in the Twenty-First Century,” economist Thomas Piketty argues that worsening inequality is inevitable in a mature capitalist system, based on his analysis of 200 years of data. But inequality isn’t just an evolving condition like a ~~crippling~~ allergy that comes and goes, or just grows, enumerated by horrifying statistics. Nor is it just the result of a capitalist-utopian idea of free markets in which everyone gets a fair shot armed with equal information (which simply don’t exist in the real world, where markets are routinely gamed by the biggest players). Inequality is endemic to the core structure of an America that operates more as a plutocracy than a democracy. It is an inherent result of the consolidation of a substantial amount of both financial power and political influence in the hands of a few families. In my upcoming book, “All the Presidents’ Bankers,” I trace the lineage of the banking and political families and their associates who have had the most combined influence on American policy. Inequality of income or wealth is a byproduct of the predisposition and genealogy of this coterie of America’s power elite. True, being born into wealth means having a greater chance of accumulating more of it—but take it a step further. Expanding on the adage of “it takes money to make money,” we get a much better idea of why inequality is so rampant: Because aside from income and wealth issues, it takes power to keep power. By nature of the construct and self-reinforcing behavior of a small circle of American families and their enterprises—particularly over the past century since financial capitalism replaced productive capitalism as the means to expand power, wealth and influence—a comparative handful of families and their connections run Wall Street and Washington collectively. They run America as two sides of one political-financial coin, not as divided factions but as co-influencers of policy through public and private office.

#### No i/l to broad nationalism

#### International actors solve

KFF 17

1-23-17 A leader in health policy analysis and health journalism, the Kaiser Family Foundation is dedicated to filling the need for trusted information on national health issues. Kaiser is a non-profit organization focusing on national health issues, as well as the U.S. role in global health policy. “The U.S. Government Engagement in Global Health: A Primer” http://files.kff.org/attachment/report-the-u-s-government-engagement-in-global-health-a-primer

Attention to global health by governments, policymakers, media, business leaders, and other institutions has increased markedly in recent decades. Over the past two decades, donor funding to address health challenges in low- and middle-income countries has grown substantially, new institutions and global goals have been established, and a burgeoning community of stakeholders has emerged around global health. The U.S. government has long supported overseas health programs as an element of foreign aid and development assistance. In recent years, these programs have grown in size and prominence. In particular, under President George W. Bush, the U.S. government launched several large global health foreign assistance programs, most notably, the President’s Emergency Plan for AIDS Relief (PEPFAR), as well as the President’s Malaria Initiative (PMI), and was an initial supporter and funder of the creation of the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund). During the Obama Administration, support for these main pillars of the U.S. global health effort continued, and there was increased focus on other areas of global health, including maternal and child health and family planning and reproductive health. Most recently, the Administration and Congress have enhanced the U.S. response to emerging infectious diseases following the 2014 Ebola and 2015 Zika outbreaks. The U.S. government is the largest funder and implementer of global health programs worldwide, although U.S. funding for global health has plateaued in recent years in the wake of the financial crisis and continuing fiscal constraint. Presently, U.S. support for global health involves many different U.S. government departments and agencies, congressional committees, initiatives, and funding streams.1 As a multi-pronged, multi-billion dollar investment that targets a myriad of global health challenges, countries, and stakeholders, the U.S. global health response is complex. This primer provides basic information about global health and U.S. government’s response thus far. Although this document focuses primarily on the U.S. government, it is important to acknowledge the role played by other countries, multilateral organizations, and private sector actors such as non-governmental organizations (NGOs), foundations, corporations, and others, in the global health response.

#### No nuclear terrorism – reject their fear-mongering evidence – no motive, lack of means to build, and barriers

Weiss 15 ---- Leonard, visiting scholar at Stanford University’s Center for International Security and Cooperation, former staff director on the Governmental Affairs Committee for the US Senate, former tenured professor of applied mathematics and engineering (Brown and Maryland), Ph.D. (Johns Hopkins University), “On Fear and Nuclear Terrorism,” Bulletin of the Atomic Scientists, 71.2, 3/3, [http://thebulletin.org/2015/march/fear-and-nuclear-terrorism8072](http://thebulletin.org/2015/march/fear-and-nuclear-terrorism8072#THUR)

Fear of nuclear weapons is rational, but its extension to terrorism has been a vehicle for fear-mongering that is unjustified by available data. The debate on nuclear terrorism tends to distract from events that raise the risk of nuclear war, the consequences of which would far exceed the results of terrorist attacks. And the historical record shows that the war risk is real. The Cuban Missile Crisis and other confrontations have demonstrated that miscalculation, misinterpretation, and misinformation could lead to a "close call" regarding nuclear war. Although there has been much commentary on the interest that Osama bin Laden, when he was alive, reportedly expressed in obtaining nuclear weapons, evidence of any terrorist group working seriously toward the theft of nuclear weapons or the acquisition of such weapons by other means is virtually nonexistent. The acquisition of nuclear weapons by terrorists requires significant time, planning, resources, and expertise, with no guarantees that an acquired device would work. It requires putting aside at least some aspects of a group’s more immediate activities and goals for an attempted operation that no terrorist group has accomplished. While absence of evidence does not mean evidence of absence, it is reasonable to conclude that the fear of nuclear terrorism has swamped realistic consideration of the threat.

# 2NC

## FTC CP

### o/v

### Pdb

#### Involvement of external actors *that are political appointees* creates *perceptions* of external influence. That erodes the signal of FTC independence.

* The article outlines a difference between political appointees subject to *at-will* removal by POTUS (serve at the pleasure of the President – i.e. Solicitor General, AG, DOJ, etc) **VIS-A-VIS** *for-cause* agency Committee members. FTC Commissioners – an example in the article - operate on 7 year terms, spanning Administrations, and can solely be removed for-cause.

Kovacic ‘15

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

On March 16, 1915, the Federal Trade Commission (“FTC”) opened for business and began what has proven to be a uniquely compelling experiment in economic regulation. The FTC was the first law enforcement agency to be designed “from the keel up” as a competition agency. One vital consideration in forming the new institution was to define its relationship to the political process. Among other features in the original FTC Act, Congress provided that the agency’s commissioners would have fixed, seven-year terms and that a commissioner could be removed during his or her term only for cause.

Through these and other design choices, Congress created what would come to be known as the world’s first “independent” competition agency. The FTC’s degree of insulation from direct political control supplied an influential model of institutional design and contributed to the acceptance of a norm, evident in modern commentary about competition law, that public enforcement agencies should be politically independent. This Essay examines the relationship of competition agencies to the political process. We use the experience of the FTC to address three major issues. First, what does it mean to say that a competition agency is “independent”? Second, how much insulation from political control can a competition agency achieve in practice? Third, how is the pursuit of political independence properly reconciled with demands that a competition agency be accountable for its decisions—an important determinant of legitimacy—and with the need to engage with elected officials to be effective in performing functions such as advocacy?

In addressing these questions, we seek to develop themes we have addressed in earlier work involving the establishment and operations of the FTC. We approach the topic in the spirit of Professor Herbert Hovenkamp, whose work shows how historical research can improve our understanding of a competition system. Professor Hovenkamp’s scholarship has deeply influenced our approach to this field, and we are honored to participate in a symposium that celebrates his extraordinary contributions to competition law and policy.

II. The Relationship of the Competition Agency to the Political Process: Design Tradeoffs

The suggestion that competition agencies be independent reflects a desire to enable enforcement officials to make decisions without destructive intervention by elected officials or by political appointees who head other government departments. One method of providing the desired independence from these forms of interference is for the law to state that competition agency leaders can be removed by elected officials only for good cause. Political intervention undermines sound policy making when it causes the agency to bend the application of competition law to serve special interests at the expense of the larger society’s well being. As discussed below, because antitrust-relevant behavior (e.g., a merger) can involve large commercial stakes and affect the economic fortunes of individual firms and communities, the decisions of a competition agency can attract close scrutiny by heads of state, legislators, and cabinet officials.

The need for independence arguably varies according to the function that the competition agency is performing. In carrying out some functions, particularly certain law enforcement functions, the agency requires greater insulation from political pressure. For other functions, broader involvement by elected officials in setting the agency’s agenda and determining its choice of projects may be appropriate.

The utmost degree of independence is warranted when a competition agency functions as an adjudicative decisionmaker. Congress gave the FTC authority to use administrative adjudication to develop norms of business conduct. After the agency initiates a formal prosecution and functions as a trade court, the legitimacy of its decisions requires the highest degree of assurance that sound technical analysis, not political intervention, determined the outcome.

#### Aff solvency is a net benefit – CP alone has *better solvency* than the perm.

Hittinger ‘19

et al; Carl W. Hittinger is a senior partner and serves as BakerHostetler’s Antitrust and Competition Practice National Team Leader and the litigation group coordinator for the firm’s Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. “Antitrust Agency Turf War Over Big Tech Investigations” – The Temple 10-Q - This article is reprinted with permission from the Oct. 4, 2019, edition of The Legal Intelligencer. #E&F - https://www2.law.temple.edu/10q/antitrust-agency-turf-war-over-big-tech-investigations/

As we discussed in June 2018, because the FTC and DOJ have concurrent civil antitrust jurisdiction, they rely on a clearance agreement to coordinate their authority. The current agreement’s Appendix A seeks to prevent disputes by assigning particular industries to each agency. The quasi-independent, consumer-protection-focused FTC generally monitors industries that, as Simons recently put it, “most directly affect consumers and their wallets.” By contrast, the DOJ, an executive branch law enforcement agency, generally oversees less consumer-facing industries and sectors impacting national defense. Because Appendix A is perfunctory, however, disputes frequently arise when a company targeted for investigation falls between Appendix A’s cracks or, more commonly, straddles more than one industry. The clearance agreement lists criteria for resolving these disputes. Emphasizing specialization and conservation of resources, it grants priority to the agency “with expertise in the product or similar products … gained through a substantial antitrust investigation … within the last seven years.” The agreement also enumerates a list of tie-breaking factors; for example, an agency gets more “expertise” credit if a case was litigated to verdict than if it was filed and later settled. While the vast majority of disputes are settled with Appendix A and the tie-breaking criteria, disagreements may also be settled through a neutral evaluator and, ultimately, upon elevation to direct discussion by the FTC chairperson and the assistant attorney general for the Antitrust Division of the DOJ.

Conflicts Over Investigations Into Big Tech:

The agencies’ turf war over Big Tech suggests they may be struggling to apply the aging clearance agreement to companies and business models that were somewhat embryonic when it was drafted in 2002. For example, social media is not explicitly addressed in the agreement, and there appears to be no obvious analogue to it in Appendix A. Although there are reports that the FTC and DOJ struck a new clearance deal concerning Big Tech, there are bound to be hiccups. U.S. Sen. Mike Lee, chairman of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, said last month: “What’s evident from this latest institutional tug of war is that the Antitrust Division of the DOJ and the FTC are now actively battling each other to take the lead in pursuing Big Tech.”

However, the emergence of Big Tech does not fully explain the discord. This summer, the DOJ and FTC publicly clashed in the FTC’s monopolization case against cellular chipmaker Qualcomm—a quarter-century-old enterprise whose product seems to fit neatly within Appendix A’s framework. The case was filed by a divided FTC commission in the waning days of the Obama administration, alleging the company licensed standard essential patents in an anticompetitive fashion. The district court ruled in the FTC’s favor, but, on Qualcomm’s appeal, the DOJ filed an amicus brief siding with Qualcomm’s request for a stay of the lower court’s ruling. It argued: “Immediate implementation of the remedy could put our nation’s security at risk, which is vital to military readiness and other critical national interests.”

More importantly, because the standard for a stay requires a peek at the merits of Qualcomm’s appeal, the DOJ found itself in the unusual position of undermining the FTC’s case: “Qualcomm is likely to succeed on the merits because the district court’s decision ignores established antitrust principles and imposes an overly broad remedy.” The FTC responded in its opposition brief that the DOJ “mischaracterized” the district court’s analysis, that it offered “unsubstantiated concerns” about R&D, and that it essentially asserted that Qualcomm should be immune from antitrust scrutiny.

Given the current political emphasis on a variety of real or perceived controversial competition issues, it is no wonder the FTC and DOJ have prioritized investigatory action over fidelity to the clearance process. As Sen. Amy Klobuchar, ranking member of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, said in a September hearing, “I’d rather have a split investigation between the DOJ and FTC than no investigation.” The clearance agreement itself says: “Each agency nevertheless retains full responsibility and authority for the discharge of its statutory duties.”

September’s Senate Antitrust Oversight Hearing:

As has been widely reported, Big Tech clearance disputes played a role in a Sept. 17 Senate oversight hearing held by the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, which was attended by Simons and Delrahim. In opening remarks, Sen. Mike Lee chastised the agencies: “In the past, the agencies have avoided too much mischief because they’ve generally played well together. Recently, this appears quite regrettably to have changed. From what I can tell, clearance disputes have become more frequent, more pronounced, and more prolonged.”

Lee asked Delrahim and Simons whether the FTC and DOJ were still operating under the “clearance system to avoid duplicative efforts or have things broken down on this front?” Simons responded, “for the vast majority of matters, we continue to operate under the existing clearance agreement,” but, upon further questioning, agreed with Lee that “things have broken down at least in part.” Delrahim added: “I cannot deny that there are instances where Chairman Simons’ and my time is wasted on those types of squabbles.”

Lee also quizzed the agency heads whether, hypothetically, if they were asked to provide “advice on setting up an antitrust regime in another country … that didn’t already have one, would you under any circumstances recommend that they follow the U.S. model and that they have two separate agencies responsible for civil antitrust enforcement?” Simons responded flatly: “No, I wouldn’t.” Delrahim remarked, “it would be hard to imagine a system being designed at the first instance like we have today.” He conceded: “It’s not the best model of efficiency.”

The Hazards of Clearance Disputes:

Disputes over clearance can have tangible adverse effects on enforcement. First, some have commented that delays caused by clearance disputes can narrow the efficacy of remedial options, particularly with mergers. As Sen. Richard Blumenthal has commented, “The Big Tech companies are not waiting for the agencies to finish their cases. They are structuring their companies so that you can’t unscramble the egg.” Structural remedies are favored by Delrahim, who has commented that alternative, behavioral remedies should be used sparingly: “The division has a strong preference for structural remedies over behavioral ones. … The Antitrust Division is a law enforcer and, even where regulation is appropriate, it is not equipped to be the ongoing regulator.”

Second, disputes over clearance and, more so, duplicative investigations waste agency resources, threaten to blunt their effectiveness, and can lead to inconsistent and confusing governmental positions. In the Sept. 17 oversight hearing, Simons and Delrahim were both criticized for requesting an increase in funding: “As you both acknowledged, both of you could use, and desperately need, more resources. That being the case, it makes no sense to me that we should have duplication of effort, when that has a tendency inevitably to undermine the effectiveness of what you’re doing.” Duplicative investigations dilute the specialization that is a principal goal of the agencies’ clearance agreement and raise the risk that one agency will take legal positions that undercut the other. No doubt the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

#### Turf wars also cause imposed re-structuring - crushing FTC independence.

Birnbaum ‘19

Internally quoting William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. Emily Birnbaum is a Tech lobbying Reporter at Politico - “Antitrust enforcers in turf war over Big Tech” - The Hill - 09/17/19 - #E&F - https://thehill.com/policy/technology/461829-antitrust-enforcers-in-turf-war-over-big-tech

Typically during investigations, the FTC and DOJ will check in with each other and share resources to ensure there is no duplication. But experts are warning their disagreements could make the process more difficult.

Kovacic cautioned that both agencies had an interest in resolving those tensions.

“These kinds of tensions ... create an environment in which public officials begin to consider a basic restructuring of the U.S. system,” Kovacic said.

He said in that case, “Neither agency can be assured that it would be the survivor.”

### Pdcp

#### First, Aff severs *“Law”*

#### We aren’t prohibiting or expanding anything (below);

#### But *if we were*, it’s NOT an expansion of the LAW:

P.O.G.O. ‘15

Project On Government Oversight *- Internally quoting Chief Justice Roberts’ Majority Opinion in US Supreme Court’s 7-2 decision in Department of Homeland Security v. MacLean* (2015) - which dealt largely with statutory interpretation. The Project On Government Oversight (POGO). POGO’s investigators are experts in working with whistleblowers and other sources inside the government who come forward with information that we then verify using the Freedom of Information Act, interviews, and other fact-finding strategies. We publish these findings and release them to the media, Members of Congress and their constituents, executive branch agencies and offices, public interest groups, and our supporters. In addition to quoting the Majority Opinion from the Chief Justice, this article was authored by POGO’s Phillip Shaverdian – who is currently a Judicial Law Clerk within the U.S. District Court System and, at the time of the writing, was an intern within and correspondent on behalf of the Project On Government Oversight - “Agency Rules and Regulations Are Not Laws” - FEBRUARY 10, 2015 - #E&F – modified for language that may offend - https://www.pogo.org/analysis/2015/02/agency-rules-and-regulations-are-not-laws/

Agency Rules and Regulations Are Not Laws

In January, in one of the most riveting cases of the current session, the Supreme Court ruled 7-2 in favor of Transportation Security Administration (TSA) whistleblower Robert MacLean, holding that agency rules and regulations do not equate to laws. Chief Justice John Roberts wrote the majority opinion for the Court. And now that we’ve had time to celebrate the victory for MacLean, it’s time to turn our focus to what Department of Homeland Security v. MacLean may mean for whistleblowers in general.

Current federal whistleblower protection law—the Whistleblower Protection Act (WPA)—protects individuals against backlash from employers for disclosing information about “any violation of any law, rule or regulation” or “a substantial and specific danger to public health or safety” by a federal agency. However, in the same statute there exists an exception for disclosures that are “specifically prohibited by *law*.”

The question the Court sought to answer was whether MacLean’s disclosures were “specifically prohibited by *law*.”

The Homeland Security Act of 2002 states that the TSA’s “Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security” if they decide that the disclosure of that information would “be detrimental to the security of transportation.” The resultant regulations thus prohibit the disclosure of “sensitive security information” (SSI) without the proper authorization. Among the various types of information that could be designated SSI is “information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.”

The government argued that MacLean’s disclosures were “specifically prohibited by law” and that the WPA did not offer protection for two reasons: 1) the disclosure was prohibited by specific TSA regulations on SSI; and 2) the Homeland Security Act authorizes the TSA to promulgate the regulations.

The Court addressed and subsequently rejected both arguments, affirming the judgment in favor of MacLean by the U.S. Court of Appeals for the Federal Circuit.

The Court rejected the government’s argument that a disclosure that is prohibited by regulation is also “specifically prohibited by law,” as prescribed by federal whistleblower statute.

The Court elaborates that in the WPA Congress repeatedly used the phrase “law, rule, or regulation,” but did not use the same phrase in the statutory language at question in this case. Instead, Congress used the word “law” alone, suggesting that it meant to exclude rules and regulations from the specific stipulation. Congress’s omission of “rule, or regulation” must be ~~viewed~~ (considered) as deliberate because of the use of “law” and “law, rule, or regulation” in the same sentence, as well as the frequent use of the latter phrase throughout the statute. These “two aspects of the whistleblower statute make Congress’s choice to use the narrower word “law” seem quite deliberate,” opined the Court.

After creating an exception for disclosures “specifically prohibited by law,” the WPA also creates a second exception for information “specifically required by Executive order to be kept secret.” The second exception is limited to actions taken by the President, and thus suggests that the first exception and the use of “law” is limited to actions by Congress.

The Court also reasons that “If ‘law’ included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that ‘specifically prohibited’ whistleblowing.” Instead, “Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.” The Court concluded that “it is unlikely that Congress meant to include rules and regulations within the word ‘law’” and that the specificity of the phrase “specifically prohibited by law” was meant to deliberately exclude rules and regulations.

#### Second, Increase prohibition and expand scope---the conduct is already prohibited---that’s 1NC Khan that we’ll include for clarity.

**NOTE**: All highlighted portions (green and blue) of this card were read in the 1NC. The 1NC card made solvency and competition claims – and, to offer context, we’ve used blue highlighting to outline the parts of the ev that augment our perm/competition claims.

Kahn ‘21

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

#### Theoretically, Section 5 could already challenge the practice outlined by the Aff.

Federal Register: Rules and Regulations - ‘9

Federal Trade Commission - *16 Code of Federal Regulations*- 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; *Final Rule* - “Rules and Regulations” - Federal Register - Vol. 74, No. 198 - Thursday, October 15, 2009 - #E&F - https://www.ftc.gov/sites/default/files/documents/federal\_register\_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf

b. Examples 7-9 – New Media Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.91 Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission’s prior commitment to address word of mouth marketing issues on a case-by-case basis.92 Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.93 Two commenters said that industry self-regulation is sufficient.94

The Commission’s inclusion of examples using these new media is not inconsistent with the staff’s 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ‘‘buzz marketing’’ were appropriate.95 All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides do not expand the scope of liability under Section 5; they simply provide guidance as to how the Commission intends to apply governing law to various facts. In other words, the Commission *could* challenge the dissemination of deceptive representations made via these media regardless of whether the Guides contain these examples; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.96

#### The CP has an agency alter its enforcement discretion related to an existing statutory prohibition. That’s not an increase in prohibitions.

Kusserow ‘91

R.P. Kusserow, Inspector General, Department of Health and Human Services - 42 Code of Federal Regulations - Part 1001, RIN 0991-AA49 – “Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions” - Monday, July 29, 1991 (56 FR 35952) - AGENCY: Office of Inspector General (OIG), HHS. ACTION: Final rule - #E&F - https://oig.hhs.gov/fraud/docs/safeharborregulations/072991.htm

I. Background

A. The Medicare Anti-Kickback Statute

Section 1128B(b) of the Social Security Act (42 U.S.C. 1320a-7b(b)), previously codified at sections 1877 and 1909 of the Act, provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit or receive remuneration in order to induce business reimbursed under the Medicare or State health care programs. The offense is classified as a felony, and is punishable by fines of up to $25,000 and imprisonment for up to 5 years.

This provision is extremely broad. The types of remuneration covered specifically include kickbacks, bribes, and rebates made directly or indirectly, overtly or covertly, or in cash or in kind. In addition, prohibited conduct includes not only remuneration intended to induce referrals of patients, but remuneration also intended to induce the purchasing, leasing, ordering, or arranging for any good, facility, service, or item paid for by Medicare or State health care programs.

Since the statute on its face is so broad, concern has arisen among a number of health care providers that many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and are, therefore, subject to criminal prosecution.

B. Public Law 100-93

Public Law 100-93, the Medicare and Medicaid Patient and Program Protection Act of 1987, added two new provisions addressing the anti-kickback statute. Section 2 specifically provided new authority to the Office of Inspector General (OIG) to exclude an individual or entity from participation in the Medicare and State health care programs if it is determined that the party has engaged in a prohibited remuneration scheme. (Section 1128(b)(7) of the Act, 42 U.S.C. 1320a-7(b)(7)) This new sanction authority is intended to provide an alternative civil remedy, short of criminal prosecution, that will be a more effective way of regulating abusive business practices than is the case under criminal law.

In addition, section 14 of Public Law 100-93 requires the promulgation of regulations specifying those payment practices that will not be subject to criminal prosecution under section 1128B of the Act and that will not provide a basis for exclusion from the Medicare program or from the State health care programs under section 1128(b)(7) of the Act.

C. Notice of Intent

The legislative history of section 14 of Public Law 100-93 indicates that Congress expected the Department of Health and Human Services to consult with affected provider, practitioner, supplier and beneficiary representatives before promulgating regulations. In order to most effectively address issues related to this provision, we published a notice of intent to develop regulations (52 FR 38794, October 19, 1987) soliciting comments from interested parties prior to developing a proposed regulation. As a result of that notice, the OIG received a number of public comments, recommendations and suggestions on generic criteria that can be applied to particular types of business arrangements in order to determine if such arrangements are inappropriate for civil or criminal sanctions.

D. Notice of Proposed Rulemaking

The proposed regulation designed to implement section 14 of Public Law 100-93 was developed by the OIG and published in the Federal Register on January 23, 1989 (54 FR 3088). The regulation sets forth various proposed business and payment practices, or "safe harbors," that would not be treated as criminal offenses under section 1128B(b) of the Act and would not serve as a basis for a program exclusion under section 1128(b)(7) of the Act. As a result of that proposed rulemaking, we received a total of 754 public comments for consideration.

II. Summary of the Proposed Rule

A. Business Arrangements Not Exempt

The proposed regulation indicated that in order for a business arrangement to comply with one of the ten safe harbors, each standard of that safe harbor provision would have to be met. The proposed rule stated that if the business arrangement involves payments for different purposes (for example a single payment for personal services and for equipment rental) then each payment purpose would be analyzed to determine if all the standards of each applicable safe harbor provision have been fulfilled. The proposed rule *further* specified that where individuals and entities have entered into arrangements that are covered by the statute and where they have chosen not to fully comply with one of the exemptions proposed in these regulations, they would risk scrutiny by the OIG and may be subject to civil or criminal enforcement action.

B. Need for Continuing Guidance

Since there may be a need for the Department to respond to changes in health care delivery or business arrangements more quickly and informally than through the regulatory process to keep the industry abreast of our enforcement policy, the proposed rule invited public comment on how we can best achieve the dual goals of keeping the industry aware of our views of particular business practices, and assuring that our regulations remain current with new developments.

C. Notice to Beneficiaries

While we considered including in several of the proposed safe harbor provisions a requirement that a person notify each Medicare or Medicaid patient he or she refers to a related entity of the financial relationship that exists, we indicated that such notice requirements may be unduly burdensome compared with the potential benefits and, therefore, did not include the requirement in the safe harbors in the proposed regulation. Instead, we invited public comments on this issue.

D. Preferred Provider Organizations

We cited the increasing variety of arrangements among entities grouped under the generic headings "preferred provider organizations" (PPOs) or "managed care," and that unlike HMOs, there is often no single entity that is recognized as the "health care provider." The proposed regulations did not specifically delineate a safe harbor provision for these arrangements since we believed that one or more of the other proposed safe harbors would often cover relationships in preferred provider and managed care networks. We invited comments from the public, however, on the idea of adding additional safe harbors that would provide further protection to HMOs, PPOs, and other managed care plans.

E. Waiver of Coinsurance and Deductible Amounts for Inpatient Hospital Care

We noted that with the advent in 1983 of the prospective payment system for paying hospitals for inpatient care, some hospitals have advertised the routine waiver of Medicare coinsurance and deductible amounts as a means of attracting patients to their facilities. We solicited comments on defining a safe harbor for waiving coinsurance and deductible amounts that would be limited to inpatient hospital care, be available to all Medicare beneficiaries without regard to diagnosis or length of stay, and assure that any costs to the hospital of waiving the coinsurance and deductible amounts would not be passed on to any Federal program as a bad debt or in any other way.

F. Proposed Safe Harbors

The regulation published on January 23, 1989, proposing to amend 42 CFR part 1001 by adding a new § 1001.952, set forth "safe harbors" in ten broad areas:

1. Investment Interests

To reflect the view that Congress did not intend to bar all investments by physicians in other health care entities to which they refer patients, a safe harbor provision was proposed for investment interests in large public corporations where such investments are available to the general public. This safe harbor described a minimum number of shareholders and a minimum number of assets the company must have in order to qualify under this provision

Safe harbors for limited and managing partnerships were considered under the proposed regulation, but were not included. These areas were discussed in the preamble of the proposed rule, and we specifically requested public comments on adopting these practices as safe harbors.

2. Space Rental

While many rental arrangements are legitimate, many situations exist where rental payments are simply a device used to mask illegal payments intended to induce referrals. Accordingly, a safe harbor provision was proposed for rental arrangements if: (a) Access to the space is for periodic intervals and such intervals are set in advance in the lease, rather than based on the number of referred patients; (b) the lease is for at least one year so it cannot be readjusted on too frequent a basis to reflect prior referrals; and (c) the charges reflect fair market value.

3. Equipment Rental

With the understanding that the payment for the use of diagnostic and other medical equipment may simply be a vehicle to provide reimbursement for referrals, a safe harbor was proposed for certain situations involving equipment rentals similar to those applied to real estate rentals cited above.

4. Personal Services and Management Contracts

While health care providers often have arrangements to perform services for each other on a mutually beneficial basis, some of these arrangements may vary the payment with the volume of referrals. The proposed regulation set forth a safe harbor provision for joint ventures and other arrangements involving payments for personal services or management contracts, but only if certain standards are met that limit the opportunity to provide financial incentives in exchange for referrals. This proposed provision required the services to be paid at fair market value, and was predicated on requirements similar to those set forth in the provisions for space and equipment rental.

5. Sale of Practice

Unlike the traditional sale of a practice by a retiring physician, a physician may sell, or appear to sell, a practice to a hospital while continuing to practice on its staff. A safe harbor provision was proposed for the sale of physician practices when occurring as the result of retirement or some other event that removes the physician from the practice of medicine or from the service area in which he or she was practicing, but not when the sale is for the purpose of obtaining an ongoing source of patient referrals.

6. Referral Services

Professional societies and other consumer-oriented groups often operate referral services for a fee. Because such a service fee could be construed as a payment in order to obtain a referral, we concluded that it was appropriate to establish a specific safe harbor for this type of practice. In order to safeguard against abuse, however, the provision is only available when several standards are met.

7. Warranties

It is in the public interest to have companies offer warranties as an inducement to the consumer to purchase a product. A safe harbor was proposed for such purposes.

8. Discounts

Safe harbors relating to discounts, employees and group purchasing organizations are specifically required by statute. The discount exception was intended to encourage price competition that benefits the Medicare and Medicaid programs. The proposed discount provision was limited in application to reductions in the amount a seller charges for a good or service to the buyer. The discount could take the form of a specified price break, or the inclusion of an extra quantity of the item purchased "at no extra charge." We did not propose to protect many kinds of marketing incentive programs such as cash rebates, free goods or services, redeemable coupons, or credits.

9. Employees

The proposed exception for employees permitted an employer to pay an employee in whatever manner he or she chose for having that employee assist in the solicitation of program business and applied only to bona fide employee- employer relationships.

10. Group Purchasing Organizations

The proposed group purchasing organization (GPO) exception was designed to apply to payments from vendors to entities authorized to act as a GPO for individuals or entities who are furnishing Medicare or Medicaid services. The proposed exception required a written agreement between the GPO and the individual or entity that specifies the amounts vendors will pay the GPO.

III. Response to Comments and Summary of Revisions

As indicated above, in response to the proposed rulemaking we received 754 public comments from various provider groups, medical facilities, professional and business organizations and associations, medical societies, State and local government entities, private (35954) practitioners and concerned citizens. The comments included both general and broadreaching concerns regarding the impact of this regulation, and specific comments on those areas and safe harbor provisions about which we requested public input. A summary of the comments received and our responses to those comments follows.

A. General Comments

Comment: A large number of commenters expressed concern about the implication of engaging in a business arrangement that does not comply fully with a provision of this regulation. Some of these commenters expressed the view that the safe harbor provisions are narrowly drawn and leave many lawful business arrangements unprotected. Moreover, the preamble to the proposed rule warns: "[W]here individuals and entities have entered into arrangements that are covered by the statute, where they have chosen not to comply fully with one of the exemptions in these regulations, they would risk scrutiny by the OIG \* \* \*." These commenters urged the OIG to make clear that the failure to comply fully with a safe harbor provision is not per se illegal, and does not mean that prosecution will automatically follow. In addition, they requested safe harbor protection for business arrangements where there has only been a "technical violation" of the statute, where there has been "substantial compliance" with this regulation, or where the remuneration in question is "de minimis."

Response: This regulation covers many categories of business arrangements, providing standards to be met within each safe harbor provision. If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of that provision.

This regulation does not expand the scope of activities that the statute prohibits. The statute itself describes the scope of illegal activities. The legality of a particular business arrangement must be determined by comparing the particular facts to the proscriptions of the statute.

The failure to comply with a safe harbor can mean one of three things. First, as we stated in the preamble to the proposed rule, it may mean that the arrangement does not fall within the ambit of the statute. In other words, the arrangement is not intended to induce the referral of business reimbursable under Medicare or Medicaid; so there is no reason to comply with the safe harbor standards, and no risk of prosecution.

Second, at the other end of the spectrum, the arrangement could be a clear statutory violation and also not qualify for safe harbor protection. In that case, assuming the arrangement is obviously abusive, prosecution would be very likely.

Third, the arrangement may violate the statute in a less serious manner, although not be in compliance with a safe harbor provision. Here there is no way to predict the degree of risk. Rather, the degree of the risk depends on an evaluation of the many factors which are part of the decision-making process regarding case selection for investigation and prosecution. Certainly, in many (but not necessarily all) instances, prosecutorial discretion would be exercised not to pursue cases where the participants appear to have acted in a genuine good-faith attempt to comply with the terms of a safe harbor, but for reasons beyond their control are not in compliance with the terms of that safe harbor. In other instances, there may not even be an applicable safe harbor, but the arrangement may appear innocuous. But in other instances, we will want to take appropriate action.

We do not believe the Medicare and Medicaid programs would be properly served if we assured protection in all instances of "substantial compliance," "technical violations," or "de minimis" payments. Unfortunately, these are vague concepts, subject to differing interpretations. In this regulation, we have attempted to provide bright lines, to the extent possible, for safe harbors in order to provide clarity and predictability as to what conduct is immune from government action. Our endorsement of the concepts mentioned above would only serve to blur these lines and produce litigation as to what "substantial," "technical" and "de minimis" really mean. The OIG therefore declines to adopt these concepts.

#### The counterplan solves and avoids rollback.

* Invokes the standard SCOTUS advanced in FTC v. Sperry & Hutchinson Co. – which greenlights the FTC – when making determinations – to name-drop a “public values criteria” that permits the FTC to go beyond the letter and spirit of the antitrust laws.

Creighton ‘8

et al; Susan Creighton - attorney with the Wilson Sonsini Goodrich & Rosati law firm. Susan leads the firm's regulatory department. Susan's practice focuses on merger review, government conduct investigations, and antitrust litigation and counseling. Representative matters include serving as co-lead outside counsel for Google in the U.S. Antitrust Division’s recently filed conduct case; serving as lead counsel in the Federal Trade Commission's search investigation of Google, “Some Thoughts About the Scope of Section 5 Workshop on Section 5 of the FTC Act” - October 17, 2008 - #E&F – modified for language that may offend - available at: https://www.ftc.gov/sites/default/files/documents/public\_events/section-5-ftc-act-competition-statute/screighton.pdf

This panel has been asked to consider just how broadly or narrowly Section 5 might reach in relation to the other similar antitrust laws, by which we mean the Sherman Act, sections one and two and the Clayton Act, section three. This is not an easy question. So, although both of us have thought about the issue for some time, we want to say at the outset that the views expressed here are still somewhat preliminary. This remains a work in progress.

We ~~see~~ (have) two very different issues embedded in the question of the scope of Section 5. The first is: how broadly can the FTC reach under Section 5? The second, very different question is: how broadly should the FTC reach in the exercise of its statutory mandate?

We have focused our remarks here on the second (and to our mind, perhaps more interesting) of these questions. As to the first – how broadly can the FTC act under Section 5 -- the simplest approach would be to say that, insofar as its proscriptions on unfairness and deception reach conduct that should be condemned because it is anticompetitive, those proscriptions were intended to be the same as (neither broader nor narrower than) the conduct proscriptions of the Sherman and Clayton Acts. As attractive as this might be from a policy perspective, however, as a matter of statutory interpretation, it seems evident that this is not what the 1914 Congress that enacted Section 5 (and the 1938 Congress that amended it) intended. In a recent pronouncement on this issue, the Supreme Court examined all the legislative history underlying Section 5, and its amendment by the Wheeler-Lea Act, and concluded in no uncertain terms that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.” See FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

Even if the FTC can reach conduct not otherwise proscribed by other antitrust laws, the question remains, should it? As an initial limiting principle, we would argue that in its implementation of Section 5, the FTC should leave fully intact the current bipartisan antitrust consensus that antitrust is designed to protect competition, not competitors; that it protects against the use of market power, not efficient conduct; and that it seeks to prevent diminution of consumer welfare, and to do no more than that. This consensus is, we think, embodied in such otherwise disparate key decisions and documents as the Supreme Court’s decision in Leegin, 1 the D.C. Circuit’s Microsoft decision,2 the agencies’ Horizontal Merger Guidelines, and the Commission’s opinion, affirmed by the D.C. Circuit, in Three Tenors. 3 Section 5 should not, we submit, be allowed to impose antitrust liability for conduct that does not threaten these fundamental principles of antitrust – that is, the latitude that Congress built into Section 5 should not be used to sacrifice efficient behavior for insignificant or illusory increases in consumer welfare or to shield competitors from the rigors of efficient competition.

Such a limiting principle is not only right as a matter of competition policy, but we think it is an inescapable requirement of the trilogy of cases, decided in the 1980s, that rejected somewhat extravagant views of Section 5.4 At a minimum, reviewing judges are likely to hold the Commission’s feet to the fire by requiring that competition cases be competition cases – that is, they must rest on proof of probable actual competitive effects, measured by the consumer welfare standard. So, even if the Commission wanted to extend Section 5 to reach conduct not within the ambit of current antitrust policy, we doubt that reviewing courts would permit this, notwithstanding some of the more elastic phrases in cases like Sperry & Hutchinson.

As an initial screen, therefore, we would ask: Does the conduct at issue have the same effect, from an economic perspective, as the types of conduct that are subject to liability under the Sherman Act? If the economic effect of the conduct is the same, the second step of the inquiry is to ask: Is there nonetheless some legal reason to bring the challenge under Section 5 rather than the Sherman Act? We have imagined three different scenarios that might fit these criteria, and believe that they raise different issues and so might usefully be considered separately. We have labeled them “frontier” cases, “gap-filling” cases, and “yes, but” cases.

A “frontier” case is one that meets all of the legal requirements for a Sherman Act claim, but involves new forms of anticompetitive conduct that fall outside traditional categories of antitrust analysis. Former FTC Commissioner Tom Leary has made strong arguments for the application of Section 5 in this context. A “gap-filling” case, by contrast, is one that may satisfy the economic requirements of antitrust, but fails one of the legal elements of Section 1 (usually the “agreement” requirement) or Section 2 (usually the “monopoly power” element). Finally, “yes, but” cases are ones that meet all the economic and legal requirements of a Sherman Act claim, but cannot be brought under the Sherman Act because of legal limitations imposed for reasons unrelated to antitrust

Depending on the facts, each of these different potential rationales for the invocation of Section 5 may come into play with respect to any particular type of anticompetitive conduct. Consider, for example, an action challenging unilateral conduct in the standard-setting area. Former Commissioner Leary has noted that because Rambus involved a type of conduct that has only recently received careful antitrust scrutiny, it might have been better to have brought the case exclusively under Section 5 – a “frontier” rationale. In Unocal, another case involving standard-setting, a “yes, but” rationale might have been considered in deciding whether to invoke a stand-alone Section 5, because Noerr was an important defense asserted in that case. Finally, N-Data appears to have been supported by the majority under a “gap-filling” rationale, inasmuch as the majority Commissioners acknowledged that the facts in that case did not support a claim under the Sherman Act.

In our view, the “frontier” and “yes, but” cases seem to be the safest applications of a separate Section 5, at least so long as these rationales are not used to skip over a rigorous analysis of whether the legal elements of a Sherman Act claim otherwise are met. The “gapfilling” cases may provide the greatest potential for mischief, if the scope of such cases is not narrowly and rigorously circumscribed. One of the matters to which the Commission may want to give considered attention are the legal limits that should be imposed on Section 5 in these “gap-filling” circumstances, if important elements such as an “agreement” or “monopoly power” are not present.

In the balance of this paper, we discuss some additional potential examples of each of the types of cases that we have identified.

A. Cases Addressing New Forms of Anticompetitive Behavior

Perhaps the least controversial application of a stand-alone Section 5 claim should be its use in “frontier” settings, where it is as an avenue for redressing anticompetitive acts or practices that have newly emerged and have not yet been fully absorbed into the fabric of the Sherman or Clayton acts. Whether it be the elaborate information dissemination schemes of the 1920s or the unwarranted Orange Book listings of the 1990s, we know from experience that new forms of anticompetitive behavior will arise from time to time. It would appear to be a clear opportunity to take advantage of the FTC’s experience as an expert body to bring its analytic resources to bear on such new forms of anticompetitive behavior.

Because courts may be reluctant to impose liability where behavior is new and unfamiliar, Section 5 may have advantages in these “frontier” cases because of its prospective application and lack of damages (much less treble damages). Commissioner Leary gives Schering5 and Rambus6 as examples of cases that might have been better brought exclusively under Section 5, because the Commission “was primarily interested in the establishment of some ground rules applicable to settlement of patent disputes between pioneer and generic drug manufacturers (Schering), or to the conduct of companies who participate in standard-setting bodies (Rambus).”7

Perhaps the principal risk from a stand-alone Section 5 in this context is that, precisely because the conduct is new, the “frontier” rationale might too easily become a means for the Commission to short-circuit asking the hard analytical questions imposed by the rigorous standards of the Sherman Act – questions that become all the more important when considering new forms of conduct. There is also the risk that, by bringing the case exclusively under Section 5, the Commission ironically might weaken its influence as an expert voice in the antitrust debate regarding the proper application of the Sherman Act. To guard against this tendency, the Commission in “frontier” cases would need to analyze and litigate the case precisely as it would under the Sherman Act, with the only exception being that it would explicitly limit the relief sought because of the novelty of the conduct challenged. Otherwise the Commission might find that even if it is more likely to “win” a pure Section 5 claim, it might come at the cost of having failed to develop a broader consensus that the conduct is anticompetitive.

B. Gap Filling Cases

Unlike “frontier” cases, where the conduct is novel but otherwise satisfies traditional Sherman Act requirements, “gap filling” cases are ones where the conduct at issue does not meet one of the elements of the Sherman Act – most likely the “agreement” element of Section 1, or the “monopoly power” element of Section 2.

Perhaps the paradigmatic example of a “gap filling” case are invitations to collude, such as the FTC’s consent order in Valassis. 8 That case involved an alleged invitation to collude in a market that constituted a durable duopoly with high barriers to entry. Invitations to collude do not fit easily within the language of either Section 1 or Section 2, yet there is little doubt that it is conduct that fits comfortably within the ambit of antitrust analysis. The conduct, if consummated, would be illegal per se; and even unaccepted, it may facilitate coordinated interaction by disclosing the solicitor’s preferences. Meanwhile a simple, naked invitation to collude serves no procompetitive, efficient purpose.

Although invitations to collude are not generally viewed as controversial, the risk of an unbounded application of Section 5 is greatest in these “gap-filling” cases, and the Commission should give careful thought to the imposition of stringent requirements where “gap-filling” is the rationale for the stand-alone use of Section 5. We limit ourselves here to two fact patterns where these issues might be thought to arise.

First, the FTC’s Ethyl case might have been a candidate, under the right circumstances, for gap filling. Certain kinds of behavior may facilitate oligopolistic price stickiness, without generating any potential cost-saving efficiencies, yet still leave unmet the Sherman Act requirement for an agreement or concerted action. For example, consider refusals to quote other than delivered prices in the absence of any reason to explain why delivered pricing reduces transaction costs or contractually committing with all buyers to announce publicly any price increase before the price increase goes into effect. Under certain conditions, this kind of behavior – if engaged in by most firms in the market – can have serious anticompetitive consequences, even if there is no evidence of agreement on these terms among competing sellers. It would appear completely consistent with the policies underlying the Sherman Act to analyze such behavior under Section 5, although that raises the question of what limits should be imposed if Section 5 were to be used in this way. 9

Another potential candidate for “gap filling” adjudication under Section 5 would be what is often referred to as “patent fishing.” When firms acquire patents and then demand payments from probable non-infringers, but where the payments are much less than the costs of litigation, this behavior -- especially where repeated many times -- can significantly raise the costs of the producing firms. These increased costs are inefficiencies and will also likely yield higher prices and a diminution in consumer surplus. Depending on how the cost increases are spread, the fishing may also create entry barriers and give some firms market power. Yet, because the patent fisher does not itself gain from the market power that its fishing can create (or because the practice may reduce consumer welfare but without yielding monopoly profits to any market participant), it is not obvious that conventional antitrust would speak to this behavior. Section 5 might be an appropriate tool for investigating allegations of such conduct, but again it is important to answer the question what elements must be satisfied to bound this application of the statute.

C. “Yes, but” Cases

A final group of cases that might warrant challenge under Section 5 are what might be called the “yes, but” cases. These are cases where, strictly on the antitrust merits and law, the conduct would be condemned, but legal concerns extrinsic to the Sherman cause courts to pull back from recognizing a Sherman Act claim. Such cases are close cousins to the “gap filling” cases, in that they address anticompetitive conduct that escapes Sherman Act condemnation because of a legal shortcoming. The “yes, but” cases, however, involve legal constraints imposed for reasons having nothing to do with antitrust law or policy, and for that reason pose less risk of an unbounded extension of Section. Indeed, for some of these cases, we think, Section 5 might sensibly permit the Commission to take advantage of unique aspects of Section 5 (prospective relief only; limited to government enforcement) to reach conduct that, but for the invocation of non-antitrust policy considerations, would be condemned as anticompetitive and harmful to consumer welfare. Drawing on recent history, here are some potential examples:

1. Anticompetitive conduct protected by antitrust immunities

The FTC has devoted considerable resources to seeking to restrict the growing scope of doctrines such as Noerr, which is a classic “yes but” defense: the conduct is anticompetitive, but non-antitrust concerns are invoked to shield it from Sherman Act scrutiny. Given the substantial differences between the Sherman Act and Section 5, however, might it not be the case that some of the anticompetitive conduct protected by Noerr against Sherman Act liability might nonetheless be subject to prospective relief under Section 5?

The Noerr doctrine is neither an antitrust principle (note that one of its most recent applications was to the National Labor Relations Act) nor a rule of constitutional law (we know of no one who has ever suggested that all conduct immunized by Noerr was already independently shielded from antitrust scrutiny by the First Amendment). Noerr is a principle of statutory interpretation, and at least some of the concerns that drove the Noerr Court are not applicable to Section 5. For example, to the extent that the Noerr doctrine is driven by the fear that antitrust liability will “chill” protected speech, Section 5 cases – limited to prospective cease and desist remedies – should prove much less threatening than Sherman Act litigation.

So, although ultimately the Commission prevailed in the Orange Book listing cases on straightforward Sherman Act grounds, might it not also have made sense to say that there was no reason to prevent the FTC from examining such conduct under Section 5? For another example, several courts have held that threats to litigate can be shielded from antitrust proscription by Noerr, and some litigants have even argued that settlements might be Noerr-protected. But there can be little question that litigation threats and settlements can, under the wrong circumstances, as we explain below, cause material anticompetitive injury. Such acts are not, in any way shape or form, constitutionally protected petitioning conduct. Whatever the merits of seeking to protect such conduct from the chill of private enforcement, wouldn’t the FTC be on firm ground in ordering a firm to cease and desist from threats to litigate if those threats produce only anticompetitive consequences or from settlement of litigation that merely creates, and then distributes the rewards from, market power? Particularly where the anticompetitive consequences are clear, the lack of any justification is evident, and the risk of unlimited liability is avoided, it seems to us that challenging anticompetitive conduct protected by Noerr – but not the First Amendment – could be a salutary use for Section 5.

Similarly, the state action doctrine reflects the very sound principle that the antitrust laws should not be read to impose on the states the laissez faire regime of Lochner v. NY. 10 If states want to displace competition and actively supervise the resulting regulated markets, then the Sherman Act will not be read to forbid that. Again, however, I wonder whether Section 5 must have a reach in this area that is only precisely coterminous with that of Section 1. For example, what about the state supervision that is in practice -- for want of a better word -- a sham? In truth, this is what the FTC confronted in the Kentucky Movers case.11 What if the Commission examined into the application, on very specific facts and on a case-by-case basis, of states’ certificate of need statutes? Why could the FTC not be permitted to void a specific application of such a statute in order to protect against what turned out to be, upon inspection, nothing more than a raw extension of market power? Particularly where the remedy is a simple cease and desist order, such a case seems to us potentially compelling. Further, providing the FTC – and only the FTC – with authority to examine with greater care the justification for a state’s decision to displace competition as a disciplinary force, and effects of that displacement, should avoid fears of permitting anyone aggrieved by a regulatory regime anywhere in the economy to challenge that regime as a violation of the Sherman Act.

We are not experts with regard to statutory antitrust immunities. When enforcing the antitrust laws, if one encounters an immunity, one just moves on. Nevertheless, we do think it might be worthwhile to examine a series of statutory immunities or exemptions to ~~see~~ (determine) if they were enacted, for example, because of a fear that private, treble damages actions, perhaps including class actions, would be excessively harmful to the industry, harmful out of all proportion to any harm done. In circumstances where the immunity does not expressly extend to the FTC Act, it might constitute a responsible and modest use of Section 5 to put these otherwise shielded practices under the antitrust microscope for the limited purposes of FTC investigation and potential cease and desist remedies.

#### Setting Section 5 guidelines for “unfair competition” boosts clarity and refines FTC legal standards.

Salop ‘13

Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center - “Guiding Section 5: Comments on the Commissioners” -Scholarship @ Georgetown Law - #E&F - https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2284&context=facpub

FTC Commissioners Joshua Wright and Maureen Ohlhausen have proposed that the Commission adopt Guidelines for the application of Section 5 to Unfair Methods of Competition (“UMC”).2 These UMC Guidelines would apply to non-merger conduct that may not violate the Sherman Act. Agency Guidelines can provide a useful role in defining the scope of agency enforcement intentions and providing guidance to the business community, outside counsel, and agency staff.3 They also can lead to more refined legal standards. This short note will comment on the role of Section 5 distinct from the Sherman Act and how this relates to the Commissioners’ proposed Guidelines.

#### The Aff falsely assumes Court action create stable precedent. It’s no more than a singular ruling atop a bunch of other judicial noise. The CP solves at least as well.

Khan ‘20

et al; At the time of this writing, Lina Khan was an Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; and former Legal Fellow, Federal Trade Commission. Now, Lina Khan serves as the head of the FTC. The co-author for this piece is Rohit Chopra, who was previously The Assistant Director of the Consumer Financial Protection Bureau and currently sits on the FTC. “The Case for “Unfair Methods of Competition” Rulemaking”, 87 U. CHI. L. REV. 357, 359-63 - #E&F – 2020 - https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\_Rulemaking\_87UCLR357.pdf

Former Commissioner Wright and Jan Rybnicek have observed that relying exclusively upon adjudication has “thus far proved incapable of generating any meaningful guidance as to what constitutes an unfair method of competition,” resulting in a “boundless standard.”36 They have described this “failure to identify what precisely comprises an unfair method of competition” as “an unfortunate and persistent black mark on the Commission’s record.”37

We agree that relying solely on adjudication to define the substance of § 5 has generated persistent ambiguity. However, relying on courtroom battles to create precedents that set expectations for the marketplace is not the only vehicle through which the Commission can establish what conduct constitutes an “unfair method of competition.” The Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent and participatory process: rulemaking. Through engaging in rulemaking, the Commission could define “unfair methods of competition” through processes established by the Administrative Procedure Act38 (APA).39

There is an enormous body of literature on the choice between adjudication and rulemaking, and this Essay does not seek to fully address the various trade-offs.40 Instead, our goal is to reflect on the current state of antitrust enforcement and consider ways to address the ambiguity, burdens, and democratic deficiency that we discuss above.

“Rulemaking” often evokes the idea of government imposing some inflexible prescription upon the marketplace. This is not what we are suggesting. As former Commissioner Elman rightly noted, rulemaking can also be related to “standards, guidelines, pointers, criteria, or presumptions.”41 Rules come from courts, legislative bodies, and agencies. While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve as rules once courts adopted them.42 The merger guidelines stipulate the analytical framework that the agencies rely on to enforce the merger law. Agency rulemaking could do the same for “unfair methods of competition.”

We ~~see~~ (outline) three major benefits to the FTC engaging in rulemaking under “unfair methods of competition,” even if the conduct could be condemned under other aspects of antitrust laws. As we describe above, the current approach generates ambiguity, is unduly burdensome, and suffers from a democratic participation deficit. Rulemaking can benefit the marketplace and the public on all of these fronts.

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable.43 The APA requires agencies engaging in rulemaking to provide the public with adequate notice of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.44 An agency must publish the final rule in the Federal Register at least thirty days before the rule becomes effective.45

These procedural requirements promote clear rules and provide clear notice. As the Supreme Court has stated, a “fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”46 Clear rules also help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively and will allow market entrants and entrepreneurs to compete on more of a level playing field.

## Uncertainty

#### No impact – strategic dominance deters

Kim, 18 **–** Patricia M Kim (Ph.D. in politics from Princeton, Stanton nuclear security fellow, 06-21-18, “Chinese perceptions on nuclear weapons, arms control, and nonproliferation,” Council on Foreign Relations, https://cfrd8-files.cfr.org/sites/default/files/report\_pdf/Patricia%20Kim%20-%20Testimony%20at%20HFAC%20TNT%20-%20June%2021%202018.pdf)

It is important, however, not to overstate China’s nuclear capabilities and to place its nuclear modernization in the broader comparative context. The United States and Russia still possess an overwhelming majority—over 90 percent—of the world’s nuclear weapons and are in the midst of their own nuclear modernization programs.9 Furthermore, China lags far behind the United States in terms of nuclear delivery capabilities. For instance, the PLA Air Force still does not have a nuclear mission although a strategic bomber with a nuclear delivery capability is currently under development. As a result, China is limited to a land and sea-based nuclear force structure, unlike the United States which also has strategic aircraft capabilities.10 Barring fundamental changes in China’s internal or external environment that wholly transform China’s nuclear calculus, it is unlikely China will abandon its emphasis on minimum deterrence and strive to reach parity with the United States’ nuclear capabilities in the foreseeable future.11

#### No increased Chinese aggression – just political posturing

Friedberg 12 (Professor Politics Princeton University, ’12 (Aaron, Fall, “The Next Phase of the “Contest for Supremacy” in Asia” Asia Policy, ProjectMuse)

The next phase in the escalating geopolitical rivalry between the United States and China will depend in part on the forces driving Beijing’s apparent increase in assertiveness. There is a significant body of opinion among professional China watchers that regards the country’s recent behavior as the result of transitory factors that have already begun to recede in significance. In this view, Beijing may have overreacted to a number of unanticipated events, but this does not imply that China has adopted a fundamentally new course. The inclination to take tougher positions on a number of issues perhaps had something to do with jockeying among candidates for elevation in the run-up to the impending leadership transition, a protracted and opaque process whose results will be formally announced at the 18th Communist Party Congress this autumn. Finally, some adherents to this view argue that the perception that China has adopted a more confrontational stance is largely due to the unauthorized effusions of a few rogue military officers. According to this interpretation, China will learn from its mistakes— just as it did in the mid-1990s when it backed away from an earlier series of clashes with its Southeast Asian neighbors—adjusting its policies and toning down its rhetoric so as not to provoke undue anxiety and hostility. Obama’s tough stand will persuade Beijing to back away from its recent belligerence. In retrospect, **the assertiveness of the past few years will appear to have been an aberration rather than the wave of the future.**

## Cartel

#### It’s technically impossible

Michael, 12 (Professor Nuclear Counterprolif and Deterrence at Air Force Counterprolif Center, ’12 (George, March, “Strategic Nuclear Terrorism and the Risk of State Decapitation” Defence Studies, Vol 12 Issue 1, p 67-105, T&F Online)

Despite the alarming prospect of nuclear terrorism, the obstacles to obtaining such capabilities are formidable. There are several pathways that terrorists could take to acquire a nuclear device. Seizing an intact nuclear weapon would be the most direct method. However, neither nuclear weapons nor nuclear technology has proliferated to the degree that some observers once feared. Although nuclear weapons have been around for over 65 years, the so-called nuclear club stands at only nine members. 72 Terrorists could attempt to purloin a weapon from a nuclear stockpile; however, absconding with a nuclear weapon would be problematical because of tight security measures at installations.¶ Alternatively, a terrorist group could attempt to acquire a bomb through an illicit transaction, but there is no real well-developed black market for illicit nuclear materials. Still, the deployment of tactical nuclear weapons around the world presents the risk of theft and diversion. 73 In 1997, the Russian General, Alexander Lebed, alleged that 84 ‘suitcase’ bombs were missing from the Russian military arsenal, but later recanted his statements. 74 American officials generally remain unconvinced of Lebed’s story insofar as they were never mentioned in any Soviet war plans. 75 Presumably, the financial requirements for a transaction involving nuclear weapons would be very high, as states have spent millions and billions of dollars to obtain their arsenals. 76 Furthermore, transferring such sums of money could raise red flags, which would present opportunities for authorities to uncover the plot. When pursuing nuclear transactions, terrorist groups would be vulnerable to sting operations. 77¶ Even if terrorists acquired an intact nuclear weapon, the group would still have to bypass or defeat various safeguards, such as permissive action links (PALs), and safing, arming, fusing, and firing (SAFF) procedures. Both US and Russian nuclear weapons are outfitted with complicated physical and electronic locking mechanisms. 78 Nuclear weapons in other countries are usually stored partially disassembled, which would make purloining a fully functional weapon very challenging. 79¶ Failing to acquire a nuclear weapon, a terrorist group could endeavor to fabricate its own Improvised Nuclear Device (IND). For years, the US government has explored the possibility of a clandestine group fabricating a nuclear weapon. The so-called Nth Country Experiment examined the technical problems facing a nation that endeavored to build a small stockpile of nuclear weapons. Launched in 1964, the experiment sought to determine whether a minimal team –in this case, two young American physicists with PhDs and without nuclear-weapons design knowledge –could design a workable nuclear weapon with a militarily significant yield. After three man-years of effort, the two novices succeeded in a hypothetical test of their device. 80 In 1977, the US Office of Technology Assessment concluded that a small terrorist group could develop and detonate a crude nuclear device without access to classified material and without access to a great deal of technological equipment. Modest machine shop facilities could be contracted for purposes of constructing the device. 81¶ Numerous experts have weighed in on the workability of constructing an IND. Hans Bethe, the Nobel laureate who worked on the Manhattan Project, once calculated that a minimum of six highly-trained persons representing the right expertise would be required to fabricate a nuclear device. 82 A hypothetical scenario developed by Peter Zimmerman, a former chief scientist for the Arms Control and Disarmament Agency, and Jeffrey G. Lewis, the former executive director of the Managing the Atom Project at Harvard University’s Belfer Center for Science and International Affairs, concluded that a team of 19 persons could build a nuclear device in the United States for about $10 million. 83¶ The most crucial step in the IND pathway is acquiring enough fissile material for the weapon. According to some estimates, roughly 25 kilograms of weapons-grade uranium or 8 kilograms of weapons-grade plutonium would be required to support a self-sustaining fission chain reaction. 84 It would be virtually impossible for a terrorist group to create its own fissile material. Enriching uranium, or producing plutonium in a nuclear reactor, is far beyond the scope of any terrorist organization. 85 However, the International Atomic Energy Agency (IAEA), which maintains a database, confirmed 1,562 incidents of smuggling encompassing trade in nuclear materials or radioactive sources. Fifteen incidents involved HEU or plutonium. 86 Be that as it may, according to the IAEA, the total of all known thefts of HEU around the world between 1993 and 2006 amounted to less than eight kilograms, far short of the estimated minimum 25 kilograms necessary for a crude improvised nuclear device. 87 An amount of fissile material adequate for a workable nuclear device would be difficult to procure from one source or in one transaction. However, terrorists could settle on less demanding standards. According to an article in Scientific American, a nuclear device could be fabricated with as little as 60 kilograms of HEU (defined as concentrated to levels of 20 percent for more of the uranium 235 isotope). 88 Although enriching uranium is well nigh impossible for terrorist groups, approximately 1,800 tons of HEU was created during the Cold War, mostly by the United States and the Soviet Union. 89 Collective efforts, such as the Cooperative Threat Reduction program, the G-8 Partnership against the Spread of Weapons of Mass Destruction, and the Nuclear Suppliers Group, have done much to secure nuclear weapons and fissile materials, but the job is far from complete. 90 And other problems are on the horizon. For instance, the number of nuclear reactors is projected to double by the end of the century, though many, if not most, will be fueled with low-enriched uranium (LEU). With this development, comes the risk of diversion as HEU and plutonium stockpiles will be plentiful in civilian sectors. 91¶ Plutonium is more available around the world than HEU and smuggling plutonium would be relatively easy insofar as it commonly comes in two-pound bars or gravel-like pellets. 92 Constructing an IND from plutonium, though, would be much more challenging insofar as it would require the more sophisticated implosion-style design that would require highly trained engineers working in well-equipped labs. 93 But, if an implosion device does not detonate precisely as intended, then it would probably be more akin to a radiological dispersion device, rather than a mushroom. Theoretically, plutonium could be used in a gun-assembly weapon, but the detonation would probably result in an unimpressive fizzle, rather than a substantial explosion with a yield no greater than 10 to 20 tons of TNT, which would still be much greater than one from a conventional explosive. 94¶ But even assuming that fissile material could be acquired, the terrorist group would still need the technical expertise to complete the required steps to assemble a nuclear device. Most experts believe that constructing a gun-assembly weapon would pose no significant technological barriers. 95 Luis Alvarez once asserted that a fairly high-level nuclear explosion could be occasioned just by dropping one piece of weapons-grade uranium onto another. He may, however, have exaggerated the ease with which terrorists could fabricate a nuclear device. 96¶ In sum, the hurdles that a terrorist group would have to overcome to build or acquire a nuclear bomb are very high. If states that aspire to obtain nuclear capability face serious difficulties, it would follow that it would be even more challenging for terrorist groups with far fewer resources and a without a secure geographic area in which to undertake such a project. The difficulty of developing a viable nuclear weapon is illustrated by the case of Saddam Hussein’s Iraq, which after 20 years of effort and over ten billion dollars spent, failed to produce a functional bomb by the time the country was defeated in the 1991 Gulf War. 97 Nevertheless, the quality of a nuclear device for a non-state entity would presumably be much lower as it would not be necessary to meet the same quality standards of states when fabricating their nuclear weapons. Nor would the device have to be weaponized and mated with a delivery system.¶ In order to be successful, terrorists must succeed at each stage of the plot. With clandestine activities, the probability of security leaks increases with the number of persons involved. 98 The plot would require not only highly competent technicians, but also unflinching loyalty and discipline from the participants. A strong central authority would be necessary to coordinate the numerous operatives involved in the acquisition and delivery of the weapon. Substantial funding to procure the materials with which to build a bomb would be necessary, unless a weapon was conveyed to the group by a state or some criminal entity. 99 Finally, a network of competent and dedicated operatives would be required to arrange the transport of the weapon across national borders without detection, which could be challenging considering heightened security measures, including gamma ray detectors. 100 Such a combination of steps spread throughout each stage of the plot would be daunting. 101¶ As Matthew Bunn and Anthony Wier once pointed out, in setting the parameters of nuclear terrorism, the laws of physics are both kind and cruel. In a sense, they are kind insofar as the essential ingredients for a bomb are very difficult to produce. However, they are also cruel in the sense that while it is not easy to make a nuclear bomb, it is not as difficult as believed once the essential ingredients are in hand. 102 Furthermore, as more and more countries undergo industrialization concomitant with the diffusion of technology and expertise, the hurdles for acquiring these ingredients are now more likely to be surmounted, though HEU is still hard to procure illicitly. In a global economy, dual-use technologies circulate around the world along with the scientific personnel who design and use them. 103 And although both the US and Russian governments have substantially reduced their arsenals since the end of the Cold War, many warheads remain. 104 Consequently, there are still many nuclear weapons that could fall into the wrong hands.

# 1NR

### CP

#### CPlan solves legal unpredictability. Section 5 predictability is already low – Cplan brings more cases to resolution, turning uncertainty.

Rosch ‘10

Remarks of J. Thomas Rosch - Commissioner, Federal Trade Commission before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA - March 23, 2010 - #E&F - https://www.ftc.gov/sites/default/files/documents/public\_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

To be clear, I do not mean to say that the Commission should simply throw its hands up anytime it faces a hard question of law under Section 2 and retreat to Section 5. We do no one a service if that is our practice.35 What I do mean to say, however, is that there may be instances where ordinarily courts might find that a rule of Sherman Act law would not impose liability, but where the particular facts of a case nevertheless suggest that liability should attach because a firm’s conduct is having anticompetitive effects that are not outweighed by a pro-competitive business justification. In these cases, if we force the case into a Sherman Act framework we run the risk of either making bad law (to bring an unusual case within the ambit of existing precedent) or, alternatively, losing the case even though the firm’s conduct is causing anticompetitive effects because of binding precedent that is ill suited to judge the conduct at hand.36 In my view, the Commission does a greater service by declaring the practice to be an “unfair method of competition,” provided that we clearly articulate – be it in a consent decree or a decision – what that unfair method of competition is and why the conduct constitutes an unfair method of competition so that future parties are on notice. Moreover, the more of these Section 5 cases we actually litigate, the more clarity and finality we can get once and for all on the scope of our Section 5 authority. That certainty ultimately has to be better than the endless debating that the antitrust bar is now engaged in.

# 1NR

#### ( ) geoengineering overcompensates – fails and causes extinction.

Baum ‘13

Et al; Dr. Seth Baum is an American researcher involved in the field of risk research. He is the executive director of the Global Catastrophic Risk Institute (GCRI), a think tank focused on existential risk. He is also affiliated with the Blue Marble Space Institute of Science and the Columbia University Center for Research on Environmental Decisions. He holds a PhD in Geography and authored his dissertation on climate change policy: “Double catastrophe: intermittent stratospheric geoengineering induced by societal collapse” - Source: Environment Systems & Decisions - vol.33, no.1 pp. 168-180 - #E&F – available via: https://pubag.nal.usda.gov/catalog/122717

Perceived failure to reduce greenhouse gas emissions has prompted interest in avoiding the harms of climate change via geoengineering, that is, the intentional manipulation of Earth system processes. Perhaps the most promising geoengineering technique is stratospheric aerosol injection (SAI), which reflects incoming solar radiation, thereby lowering surface temperatures. This paper analyzes a scenario in which SAI brings great harm on its own. The scenario is based on the issue of SAI intermittency, in which aerosol injection is halted, sending temperatures rapidly back toward where they would have been without SAI. The rapid temperature increase could be quite damaging, which in turn creates a strong incentive to avoid intermittency. In the scenario, a catastrophic societal collapse eliminates society’s ability to continue SAI, despite the incentive. The collapse could be caused by a pandemic, nuclear war, or other global catastrophe. The ensuing intermittency hits a population that is already vulnerable from the initial collapse, making for a double catastrophe. While the outcomes of the double catastrophe are difficult to predict, plausible worst-case scenarios include human extinction. The decision to implement SAI is found to depend on whether global catastrophe is more likely from double catastrophe or from climate change alone. The SAI double catastrophe scenario also strengthens arguments for greenhouse gas emissions reductions and against SAI, as well as for building communities that could be self-sufficient during global catastrophes. Finally, the paper demonstrates the value of integrative, systems-based global catastrophic risk analysis.

#### ( ) *Prolif* and *climate* each independently cause extinction

* Climate change is true and real bad
* Prolif = probable scenario for extinction bc of *miscalc*, *user error*, or *unauthorized use*.

Thakur ‘15

Ramesh Thakur, Director of the Centre for Nuclear Non-Proliferation and Disarmament in the Crawford School of Public Policy, The Australian National University. 2015. “Nuclear Weapons and International Security.” Routledge

The world faces two existential threats: climate change and nuclear Armageddon. Those who reject the first are derided as denialists; those dismissive of the second are praised as realists. Nuclear weapons may or may not have kept the peace among various groups of rival states; they could be catastrophic for the world if ever used by both sides in a war between nuclear-armed rivals; and the prospects for their use have grown since the end of the Cold War. Even a limited regional nuclear war in which India and Pakistan used 50 Hiroshima-size (15kt) bombs each could lead to a famine that kills up to a billion people. 1 Having learnt to live with nuclear weapons for 70 years (1945–2015), we have become desensitized to the gravity and immediacy of the threat. The tyranny of complacency could yet exact a fearful price with nuclear Armageddon. The nuclear peace has held so far owing as much to good luck as sound stewardship. Deterrence stability depends on rational decision-makers being always in office on all sides: a dubious and not very. reassuring precondition It depends equally critically on there being no rogue launch, human error or system malfunction: an impossibly high bar. For nuclear peace to hold, deterrence and fail-safe mechanisms must work every single time. For nuclear Armageddon, deterrence or fail-safe mechanisms need to break down only once. This is not a comforting equation. It also explains why, unlike most situations where risk can be mitigated after disaster strikes, with nuclear weapons all risks must be mitigated before any disaster. 2 As more states acquire nuclear weapons, the risks multiply exponentially with the requirements for rationality in all decision-makers; robust command-and-control systems in all states; 100 percent reliable fail-safe mechanisms and procedures against accidental and unauthorized launch of nuclear weapons; and totally unbreachable security measures against terrorists acquiring nuclear weapons by being able to penetrate one or more of the growing nuclear facilities or access some of the wider spread of nuclear material and technology.

#### ( ) Arctic war means extinction

outweighs on probability and magnitude – war exits the region, goes nuclear, and can be instigated by miscalc.

Chrisinger ‘20

Internally quoting Niklas Granholm – who is Deputy Director of Studies at FOI, the Swedish Defence Research Agency, Division for Defence Analysis. Mr Granholm currently heads a study project on behalf of the Swedish Foreign Ministry studying the strategic developments in the Arctic. He was seconded to the Swedish Ministry of Defence in 2007 and during 2006 was a Visiting Fellow to RUSI. He has been an Associate Fellow of the Institute since 2007. Between 1999-2006, he headed the project for international peace support and crisis management operations on behalf of the Swedish Ministry of Defence. From 1997-99 he was seconded to the Swedish Ministry for Foreign Affairs, Division for European Security Policy. David Chrisinger is a Logan Nonfiction Fellow and a contributing writer to The New York Times Magazine and The War Horse, an award-winning nonprofit newsroom educating the public on military service, war, and its impact. Prior to this, David worked at the U.S. Government Accountability Office as a Strategic Planning and Foresight Analyst. For nearly nine years, he taught public policy writing, consulted with researchers on the design and execution of governmental audits and evaluations, facilitated message development exercises, and wrote and edited reports and testimonies for the U.S. Congress. For six years, he also taught public policy writing at Johns Hopkins University. “It Would Be a Mistake to Underestimate Russia”: The New Cold War That’s Emerging in the Arctic” – The War Horse – Nov 19th - #E&F - https://thewarhorse.org/military-arctic-new-cold-war-with-russia-and-climate-change/

One of the greatest risks, according to Niklas Granholm, is that the Arctic region will undergo a “Balkanization” like what occurred in Eastern Europe after the fall of the Soviet Union. Granholm is the deputy director of studies at the Swedish Defence Research Agency, and he points to the Faroe Islands calling for self-rule from Denmark, Scotland clamoring for independence from the United Kingdom after Brexit, and the resurgence of troubles in Northern Ireland as indicators that more fragmentation and political division in the Arctic could lead to less cooperation or even hostility. Paired with the great-power competition among the United States, Russia, and China, any Balkanization of the region would, in Granholm’s words, be a “double whammy” and could make the Arctic much more combustible.

“Whatever happens in the Arctic won’t stay there,” he said. “It will escalate.”

Is this the beginning of a new Cold War?

The new Norwegian radar system undermines Russia’s ability to launch a retaliatory nuclear strike from its submarine fleet in the Arctic, New York Times reported, and that bothers Russia, according to Lt. Col. Tormod Heier, a faculty adviser at the Norwegian Defense University College. Because it upsets the strategic nuclear balance between the United States and Russia, the new radar system establishes a blow to Russia’s last indisputable claim to great-power status.

“There is a new Cold War,” Heier told the Times, adding that the risk of nuclear war was much higher now than in the old Cold War “because Russia is so much weaker, and because of that much more dangerous and unpredictable.”

In recognition of the threats posed by a new Cold War, the Pentagon released an updated National Defense Strategy in January 2018. While the document makes no specific mention of the Arctic, it recognizes the threats posed by great-power competition (especially as it relates to America’s eroding competitive edge) and clarifies that potential conflict with Russia and China had supplanted terrorism as the biggest threat to American national security.

To achieve this end state, the United States must confront three risks that, if they materialized, would stand in the way. First, bad actors could use the Arctic as a staging ground for an attack on the U.S. homeland. Second, states like Russia and China could challenge the rules-based international order in the Arctic in ways that could lead to conflict. Third, but not least, tensions, competition, and conflict in other parts of the world could spill over into the Arctic.

Three months later, the U.S. Coast Guard released its own strategy for the Arctic, which called for funding to upgrade ships, aircraft, and unmanned systems operating in the region. Admiral Karl Schultz, the Coast Guard’s commandant, told the Washington Post that the goal should be to return the Arctic to a “peaceful place where we work to cross international lines here with partner nations that share interests in a transparent fashion.” Projecting sovereignty, he continued, will help expedite that return.

But all these plans have failed to persuade decision makers to establish new organizational structures designed to address changes in the Arctic wrought by climate change and the rush to exploit the region’s natural resources. The plans do not include any substantive plans to guide the construction of infrastructure needed in the region, nor do they detail how resources will need to be reallocated to mitigate risks and help the United States reach its desired end state. They provide a vision for the future, but they do not provide a road map on how to get there.

Russia won’t back down

In late August 2019, a Russian submarine emerged from the icy waters near the North Pole and fired a Sineva-type intercontinental ballistic missile capable of carrying a nuclear warhead. That same day, another Russian submarine in the Arctic Circle launched a Bulava-type intercontinental ballistic missile from beneath the surface of the Barents Sea. One missile hit a remote corner of Russia’s Pacific coast, and the other landed on the Kanin Peninsula. Twelve years after Russia planted its flag on the seabed below the North Pole, this demonstration of its military capabilities in the Arctic can be seen as its latest attempt to assert its sovereignty in the region. Against a broader backdrop of distrust and diminished communication across the U.S.-Russia divide, there exists a risk that relatively minor miscalculations or misinterpretations could escalate into broader conflict.

#### ( ) Space conflict causes extinction

* creates “use it or lose it” pressures bc an attack on a satellite creates communication and (subsequently) warfighting vulnerabilities;
* outweighs on probability

Marshall ‘21

Timothy John Marshall is a British journalist, author and broadcaster, specialising in foreign affairs and international diplomacy. He is a guest commentator on world events for the BBC. Marshall's blog, 'Foreign Matters', was short-listed for the Orwell Prize 2010.[8] In 2004 he was a finalist in the Royal Television Society's News Event category for his Iraq War coverage. He won finalist certificates in 2007, for a report on the Mujahideen, and in 2004 for his documentary 'The Desert Kingdom' which featured exclusive access to Crown Prince Abdullah and his palaces. “War in space is a growing threat – with hypersonic missiles and lasers to shoot down satellites” - This is an edited excerpt from the book: The Power of Geography: Ten Maps That Reveal the Future of Our World by Tim Marshall - April 20, 2021 - #E&F – modified for language that may offend - https://inews.co.uk/news/long-reads/space-war-lasers-missiles-satellites-conflict-tim-marshall-963439

Without binding treaties, low Earth orbit is a probable battlefield for military weapons aimed firstly at rivals within the belt, and then below it.

Russia and China have made organisational changes in their military, as have the Americans with the formation of the US Space Force in 2019. There are concerns that this activity violates the Outer Space Treaty, but it only states that weapons of mass destruction such as nuclear missiles should not be placed “in orbit or on celestial bodies or [stationed] in outer space in any other manner”. There’s nothing in international law to prevent the stationing of laser-armed satellites. And every page of history suggests that if one country does it, so will another, and then another. This is why the US Department of Defence has a mantra: “Space is a war-fighting domain.”

Britain’s space force

The UK Space Command was officially formed on 1 April, staffed from the Royal Navy (RN), British Army and Royal Air Force (RAF), the Civil Service and key members of the commercial sector. Its commander is a former Harrier jump jet pilot, Air Vice-Marshal Paul Godfrey.

The defence think-tank Rusi said after the British announcement that “questions remain as to what a space command means in practice, particularly for a medium-sized space power with few sovereign assets”. It added that “major decisions shaping the future of the UK’s military space capabilities and activities are likely to be taken this year”.

The head of the RAF, Air Chief Marshal Sir Mike Wigston, warned in November that Russia and China were developing anti-satellite weaponry and that the UK must be prepared.

“A future conflict may not start in space, but I am in no doubt it will transition very quickly to space, and it may even be won or lost in space, so we have to be ready and, if necessary, defend our critical national interests.”

In the previous century the possibility of nuclear war threatened to destroy our way of life; now the weaponisation of space ~~looks~~ (seems) as if it will pose a similar danger.

At the inauguration of Space Force, the then US President Donald Trump said: “American superiority in space is absolutely vital… The Space Force will help us deter aggression and control the ultimate high ground.”

The Chinese and Russians view space in the same way. We saw an early attempt to gain this advantage with the American Strategic Defence Initiative in the 80s, trying to develop a missile-defence system that could protect the US from nuclear attack. One of the options it investigated was space-based weaponry, earning it the name “Star Wars”.

Now the development of hypersonic missiles, which can fly at more than 20 times the speed of sound, is also focusing attention on this area. Unlike conventional intercontinental ballistic missiles, hypersonic missiles do not fly in an arc and can change direction and altitude. Therefore, at launch the potentially targeted country cannot work out where they are heading and co-ordinate their defences. Hitting a missile with a missile is hard enough; hypersonic missiles make it much more difficult.

Governments are examining the possibility of positioning anti-hypersonic laser systems in space to fire downwards. But machines capable of firing on the laser systems would then be developed, and then defensive systems for them – a space arms race.

The situation will only become more complicated as we continue to turn science fiction into reality. An example of that came in July 2020. Russia’s Kosmos 2542 military satellite had been “stalking” an American satellite, USA 245, at times coming within 150km of it, a distance regarded as close. It then released a mini satellite from within it – Kosmos 2543. The US military calls these “Russian dolls”. This “baby” Kosmos also shadowed the American spacecraft before manoeuvring towards a third Russian satellite. It then appeared to fire a projectile travelling at more than 400mph.

The Kremlin says it was simply inspecting the condition of its satellites, but the British and Americans both believe it was a weapons test. The US also shadows foreign satellites and is researching its own space weapons, but it was furious about what it believes was a breach of conventional behaviour. Such protocols and understandings are not codified in ratified law. But the threat to satellites is one that all countries must take seriously.

Dangers in orbit

Satellites are vital for modern warfare. All advanced countries rely on satellites for intelligence and surveillance. If a series of military satellites were hit, the high command would immediately worry that this was a precursor to being attacked on the ground. Early-warning systems of a nuclear launch might go down, triggering a decision on whether to launch first. Even if a conflict remained non-nuclear, the other side would have the advantage of precision-targeting its enemy and moving its own forces without being “seen”, while its opponent’s ability to send encrypted communications would also be limited.

This is all a very real threat. Already Russia, China, the US, India and Israel have developed “satellite-killer” systems. Techniques are being invented to shoot down satellites with lasers, to “dazzle” them so they cannot communicate, to spray them with chemicals, and even to ram them. And with no laws about who can be where, how close they can be and what activity is allowed, there is the growing danger of an exercise, or even faulty navigating, being mistaken for an impending attack.

#### Independent FTC action means fewer of them. Plan and perm can’t solve - they permit *private causes of action* and *boost error rates* via court reviews OR non-FTC investigations.

Crane ‘10

Daniel A. Crane - Professor of Law, University of Michigan. “Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel” - The CPI Antitrust Journal (Competition Policy International) – February, 2010, (2) - #E&F - https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles

The FTC Act gives the Commission a seemingly simple mandate: Detect and prohibit “unfair methods of competition . . . and unfair or deceptive [trade] practices.”4 The Commission’s powers under Section 5 are at least co-extensive with the substantive reach of the Sherman Act—in other words, that anything that is illegal under the Sherman Act is also illegal under the FTC Act.5 But the Supreme Court has also held that the FTC may go further than the Sherman Act and “stop in their incipiency acts and practices which, *when full blown*, would violate those Acts.”6 Thus, “the standard of unfairness under the FTC Act . . . encompass[es] not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons.”7

There are compelling reasons to allow the FTC an independent norm-creation role in antitrust.8 Over the past several decades, the courts have sharply constricted antitrust liability norms under the Sherman Act largely out of a reaction to the dangers and abuses of private antitrust litigation, which outnumbers public antitrust enforcement (at both the FTC and Department of Justice) by a 10-1 ratio.9 Among these real or perceived dangers and abuses are the chilling effects of automatic treble damages and one-way fee-shifting, the damagescompounding effects of easy class certification, strategically-minded competitor plaintiffs, discovery run amok, and generalist judges and unsophisticated juries who create inconsistent and incoherent industrial policy.10 Reacting to these perceived infirmities in the institutional structure of private antitrust litigation, the federal courts (led by the Supreme Court) have contracted the Sherman Act’s substantive liability norms. While such contraction may be justified to mitigate the systemic risks of private litigation, to the extent that the government sues under the same statute a perhaps unintended side effect has been to stymie public litigation.

The Justice Department has no means of avoiding this difficulty—it can only enforce the Sherman and Clayton Acts. The FTC, however, need not tie itself to the Sherman Act. Indeed, it has no power to enforce the Sherman Act, but only the FTC and Clayton Acts. If it so chooses, it may declare that it is enforcing the Sherman Act as incorporated into the FTC Act through judicial decision, but then it appropriates all of the baggage of private litigation as expressed in contracted liability norms.

#### Exclusive FTC means *they investigate* AND address t*hrough non-judicial Administrative proceedings*. Avoids risks from *private causes of action*.

Rosch ‘10

Remarks of J. Thomas Rosch - Commissioner, Federal Trade Commission before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA - March 23, 2010 - #E&F – modified for language that may offend - https://www.ftc.gov/sites/default/files/documents/public\_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

More broadly, however, I want to suggest that Section 5 may supply an optimal vehicle for challenging conduct that weakens innovation. The common law that has grown up around Section 2 over the last several decades is deeply ingrained in price theory; that static framework, however good it may be for evaluating short-run harm and quantifiable conduct such as price and output restraints, does not easily lend itself to looking at (considering) whether a party’s conduct has or will dampen innovation or prevent product improvement. Compounding matters is the fact that the difficult line drawing and weighing involved in comparing the likelihood of innovation against the likelihood of quantifiable anticompetitive harm is not something that generalist judges and lay juries are well suited for. Indeed, even the metric for measuring innovation itself remains elusive.

If the Commission proceeds under Section 5, these concerns largely fall away. Judging harm to competition against a consumer choice standard not only follows from Section 5’s text and the FTC’s unique institutional architecture, but provides a readymade vehicle for evaluating anticompetitive harm from a dynamic perspective. Moreover, by proceeding under Section 5 and suing in our Part 3 administrative process, the FTC (and only the FTC) can have the first crack at the hard line drawing and balancing that must occur when one weighs price competition against other forms of more dynamic competition. Arguably by leaving this critical task to the FTC and its prosecutorial discretion in the first instance, Section 5 allows the Commission to minimize the threat of false positives and shake down lawsuits that have animated many of the Supreme Court’s more recent decisions. For all of these reasons, I would not be surprised if the Commission decided to pursue claims based on dynamic concerns under Section 5 in the coming years, provided we can provide clear guidance to parties about when their conduct will trigger Section 5 review.

#### Exclusive FTC key – avoids false positives *AND* false negatives.

Salop ‘13

Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center - “Guiding Section 5: Comments on the Commissioners” -Scholarship @ Georgetown Law - #E&F - https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2284&context=facpub

Commissioner Wright apparently is most concerned with over-deterrence from the FTC’s administrative process, where the FTC acts as prosecutor and judge and is not subject to the constraints from an independent court deciding motions to dismiss and summary judgment.25 However, there also are forces tipping in the other direction. First, the FTC is an expert body with significant economics resources available, resources that presumably can be used to avoid false negatives *and* overdeterrence.26 Second, the Commission’s bipartisan nature and the use of majority rule also have provided significant constraints over most of its history. Finally, if this is the main concern, his remedy proposal instead might be that the FTC be forced to all litigate its complaints in District Court.27

#### Independence is key to effective of anti-competition agencies *in other nations*.

I.C.N. ‘9

“ICN” stands for the “International Competition Network” – The ICN provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue about sound competition policy principles across the global antitrust community. The ICN is unique as it is the only global body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. Report on the Agency Effectiveness Project Second Phase – Effectiveness of Decisions Prepared by The Competition Policy Implementation Working Group - #E&F – June - https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\_AEReportDecisions22009.pdf

E. Independence of decision making body

With the exception of Chile, all agency responses indicate that the independence of the decision making body affects the effectiveness of agency decisions. Many agencies 82 cited this as one of the most important factors in reaching effective agency decisions. Several responses83 stated that agency independence is important in order to avoid pressures on the agency that could weaken its legitimacy and the soundness of its decision making and enforcement policy.

F. Additional factors

The Spanish agency mentions the level of fines and publicity of decisions as important to achieving deterrence, while Romanian agency points out that transparency in decision-making triggers the accountability of the agency.

2. The Most Important Determinative Factors on Agency Effectiveness

Of the factors that were identified on the questionnaire, ten agencies84 declined to identify any as the single most important, indicating that they were all important. Of the remainder, agency independence was most often listed among their top priorities. Some 85 indicated that quality, proper implementation and monitoring of the decisions was most important. For others,86 adequate powers to ensure compliance with the decisions were the most important factor. Six 87 agencies considered the quality of professional staff as the most important factor.

#### Here’s a list of the nations involved in this report.

I.C.N. ‘9

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In 2008-2009 ICN year, the Competition Policy Implementation (CPI) Working Group began the second phase of its effectiveness work (as provided in the Work Plan) on the analysis of the relation between the definition of priorities and resource allocation, and the effectiveness of competition agencies’ decisions with a focus on the compliance with agency decisions (e.g. payment of fines, compliance with behavioral and structural remedies imposed (such as divestitures, amendments to contracts, etc.). This work is the continuation of CPI’s 2007-2008 Effectiveness Project (Project), which is premised on the idea that the effectiveness of competition policies depends not only on the quality of agency decisions and knowledge of best practice but also on the enforcer’s ability to address cases and effectively manage its workflow. As observed in that report1 of the Project, effectiveness depends on a variety of factors, including the quality of decisions and the availability of human and financial resources.

The definition of ‘effectiveness’ in this year’s work is limited to the case decisions taken by the agencies and does not take into account whether the agencies’ strategic planning, communication capacity, competition advocacy, and/or organizational capabilities have an overall impact. Instead, this phase of the Project examines authorities’ institutional powers to obtain compliance with decisions imposing remedies and sanctions. To collect this information, the CPI Working Group prepared a questionnaire, which was sent to all members. Therefore, the questionnaires focused on decision making procedures and on the monitoring and implementation stages of decisions.

The increase in the number of ICN members that responded to the questionnaire, rising from 20 agencies in 2007-2008 to 37 agencies in 2008-2009, likely indicates the growing recognition of the importance of this subject. It is hoped that this work will form a useful tool for competition agencies in their efforts to deal with compliance and the long term effects of agency decisions.

II. METHODOLOGY

This report on effectiveness of decisions is based on questionnaire responses from agencies 2 in 36 jurisdictions. In addition, this year non-governmental advisors (NGAs) were asked to complete questionnaires separate from those submitted to agencies, in order to get their perspective on the subject. This report is a summary of the responses to agency questionnaires, and will constitute a key input for the discussion panel and breakout sessions at the ICN Annual Conference in Zurich. The agencies that participated in the project represent both newer and more mature agencies from various regions, and thus the responses reflect differing experiences. Despite the difference in perspective among jurisdictions, numerous points of convergence also emerged.

2 Bosnia and Herzegovina (Council of Competition), Brazil (Council for Economic Defense - CADE), Bulgaria (Commission on Protection of Competition), Chile (Fiscalia Nacional Economica - FNE), Colombia (Competition Promotion, Superintendencia de Industria y Comercio - SIC), Croatia (Croatian Competition Agency), Czech Republic (Office for the Protection of Competition), Cyprus (Commission for the Protection of Competition), El Salvador (Superintendencia de Competencia), Estonia (Estonian Competition Authority), European Commission (Directorate General for Competition - DG-Comp), Finland (Finnish Competition Authority), France (Autorité de la concurrence), Germany (Bundeskartellamt), Greece (Hellenic Competition Commission), Honduras (Commission Competition), Hungary (Gazdasági Versenyhivatal), Ireland (Irish Competition Authority), Japan (Japan Fair Trade Commission - JFTC), Kazakhstan (Agency of the Republic of Kazakhstan for Protection of Competition), Korea (Korean Fair Trade Commission-KFTC), Lithuania (Competition Council), New Zealand (New Zealand Commerce Commission) Panama (Autoridad de Proteccion al Consumidor y Defensa de la Competencia), Poland (Office of Competition and Consumer Protection – OCCP), Romania (Romanian Competition Council), Russia (Federal Antimonopoly Service - FAS), Serbia (Commission for Protection of Competition), Slovak Republic (Antimonopoly Office of the Slovak Republic), Spain (Comisión Nacional de la Competencia -CNC), Switzerland (Competition Commission - Comco), Taiwan (Fair Trade Commission), Turkey (Rekabet Kurumu), Tunisia (Competition Council), United Kingdom (Office of Fair Trade - OFT), United States of America ((Department of Justice, Antitrust Division (DOJ), and Federal Trade Commission (FTC))