## 1

***Next off – Section 5:***

**Text:**

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 private sector business practices that violate an antitrust worker welfare standard.

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 **F**ederal **T**rade **C**ommission **A**ct **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 **F**ederal **T**rade **C**ommission **A**ct 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 A**ct, 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.

## 2

**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**.

## 3

**The USFG should ban expanding the scope of antitrust law when collusion is for environmental benefits or sustainability.**

The USFG should prohibit private sector business practices that violate an antitrust worker welfare standard in other instances where the exemptions doesn’t apply.

**Creating an exemption for collusion solves warming**

**Koga 20** Dailey C. Koga J.D. Candidate, University of Washington School of Law, Class of 2021. “Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change,” 95 *Wash. L. Rev*. 1989 (2020). Available at: <https://digitalcommons.law.uw.edu/wlr/vol95/iss4/8> {DK}

Congress has the ability to codify exemptions to antitrust laws and has done so numerous times in the past.297 **Congress should pass an exemption to antitrust law for sustainability agreements using the Dutch Guidelines as a model**. This would allow companies to enter into agreements addressing climate change without fear of antitrust litigation. While this type of exemption may increase the risk of cartel behavior, keeping the exemption narrowly tailored and requiring quantitative evidence of sustainability benefits can mitigate those anticompetitive concerns. In the meantime, litigants should frame sustainability agreements in economic terms to survive antitrust scrutiny and can use past precedent as a model to do so. A. Congress Should Pass a Sustainability Exemption Congress should adopt an antitrust exemption for sustainability agreements similar to that proposed in the Netherlands.298 For agreements that have anticompetitive effects, Congress can require companies to meet the four main requirements suggested by the Dutch: (1) the agreement must have sustainability benefits, (2) the ultimate consumer must receive “a fair share of those benefits,” (3) the restraint on competition must not be greater than necessary to achieve those benefits, and (4) the agreement must not eliminate “a substantial part of the products/services in question.”299 While the broad proposal from the Netherlands represents the most ideal solution, Congress could change the exemption in two ways that would be more consistent with current precedent and also limit the risk of cartel behavior. First, the exception could require companies to always have quantitative data showing a certain threshold of environmental benefits, regardless of market share. Requiring quantitative data that shows benefits to a certain threshold could reduce arbitrary results. It could also help to partially ensure that the agreement is not a cover for a cartel in that the environmental impacts would have to be real, not just suggested or purported. Second, Congress could limit the sustainability benefits analysis to the industry in question. This type of limitation may severely limit the types of agreements companies are permitted to enter into because the agreements would have to have an impact on the specific industry. But it would be closer in line with Supreme Court precedent disallowing procompetitive justifications outside of the industry in question.300 Take the automakers’ agreement as an example of how this kind of analysis could work. Imagine that the four car manufacturers had agreed amongst themselves to increase emissions standards rather than each independently conferring with California. Under current antitrust law, it is unlikely that this agreement would be illegal per se because it does not explicitly fix prices or reduce quantity. But under a rule of reason or quick look analysis, the agreement would almost certainly fail. Courts would first examine whether the automakers have market power and whether the agreement has anticompetitive effects. The four automakers at issue here likely have market power,301 and it would be fairly simple for the government to argue that the agreement would have anticompetitive effects—the agreement could increase the price of automobiles and reduce the number of options on the market. Assuming the court found anticompetitive effects, the automakers would then have the opportunity to put forth procompetitive justifications. Under current antitrust law, it is hard to imagine what those procompetitive justifications could be. Increased innovation may represent the most effective argument, but because the automakers would not actually add a new type of product to the market, that argument would likely be unsuccessful. In contrast, if Congress granted an exemption similar to the Dutch guidelines, such an agreement could survive antitrust scrutiny if it met the four requirements. First, the companies would have to show, quantitatively, that the agreement would result in lower CO2 emissions. Given the evidence of vehicles’ sizeable contribution to CO2 emissions,302 that data likely exists. Second, the automakers would have to show that their consumers would equitably share in the benefits. Consumers would certainly stand to benefit from this agreement. Not only could reduced auto emissions improve air quality and help slow climate change,303 but car consumers could save money on gas.304 Third, as in current rule of reason analysis, the companies would have to show that the agreement was no more restrictive than necessary to achieve the benefits in question. This may be a fact-specific inquiry, but with some further guidance, companies could narrowly tailor their agreements to satisfy the third factor. The fourth factor—whether a substantial number of products would be eliminated—would likely be the most difficult for the automakers to meet. Analyzing this factor may depend on the specific terms of the agreement. But, again, companies may be able to craft agreements to satisfy this factor. For example, if the concern was that increasing auto emissions standards would eliminate nearly all pickup trucks from the market, the agreement could be crafted with different emission standards for sedans, SUVs, vans, and pickup trucks. Having guidelines like those proposed in the Netherlands would allow companies to craft their agreements to meet the four required factors while still allowing them to work together to address climate change. The most complicated part of implementing this exemption would be the way in which courts could weigh “public interest” factors with economic ones. The benefit of the Dutch model is that it builds in less arbitrary standards than those in the South African and Australian models because of its focus on quantitative data. In fact, the Dutch model fits quite well within the rule of reason analysis currently used by American courts because it could function as a burden-shifting analysis just like the rule of reason. To further address the arbitrariness problem, the exemption could require the sustainability benefits to meet a certain threshold, such as reducing carbon emissions by a certain percentage. In contrast, a simple public interest test would force judges to weigh sustainability against one of the main purposes of antitrust law—preventing unfair competition. Using the Dutch model avoids some of the arbitrariness inherent in the public interest test analysis. Not only could this exemption fit cleanly into current antitrust law, but it also could be crafted to comply with the American Bar Association’s guidelines for creating antitrust exemptions.305 First, Congress could effectively consider the potential impact of the exemption on consumer welfare given the wealth of information on the effects of carbon emissions.306 Second, by including the two alterations mentioned above, Congress could craft a narrow exemption to provide that “competition is reduced only to the minimum extent necessary.”307 Third, the goals of the exemption—curbing climate change—almost certainly outweigh the goals of antitrust law because climate change amounts to an existential crisis that will annihilate the planet if left unaddressed. And finally, Congress could easily include a sunset provision in the exemption. Although addressing climate change is vital to the future of the world as we know it, some will likely argue that antitrust law is not the appropriate avenue for tackling the problem. While companies could plausibly make substantial progress in the climate crisis if allowed to enter into agreements such as the one entered into by the automakers in California, permitting agreements among competitors comes with a risk of increased cartel behavior.308 But if we fail to curb climate change, industry will cease to exist altogether, along with the rest of our planet. It could also be politically challenging for Congress to pass such an exemption. However, a bill aimed at protecting climate change agreements from the reaches of antitrust law may be more plausible than an omnibus climate change initiative. The bill would not involve spending money or additional restrictions on businesses, which could make it easier to pass than other climate change laws. Thus, even if antitrust law was not originally intended to encompass moral or social considerations, the dire need for action on carbon emissions, and the greater feasibility of an antitrust exemption, indicate that antitrust law may, in fact, be a fitting avenue for combatting climate change.

**Warming is existential — causes humanitarian crises, geopolitical conflict, ecosystem collapse, and disease.**

**Melton 19** — Michelle Melton, former fellow in the Energy and National Security Program focusing on climate change at the Center for Strategic and International Studies, journalist at the Environmental Law Institute, J.D. from Harvard University, 2019 (“Climate Change and National Security, Part II: How Big a Threat is the Climate?,” *Lawfare,* January 7th, Available Online at <https://www.lawfareblog.com/climate-change-and-national-security-part-ii-how-big-threat-climate>, Accessed 06-18-2020)

At least until 2050, and possibly for decades after, climate change will remain a **creeping threat** that will exacerbate and amplify existing, structural global inequalities. While the developed world will be negatively affected by climate change through 2050, the consequences of climate change will be felt most acutely in the developing world. The national security threats posed by climate change to 2050 are likely to differ in degree, not kind, from the kinds of threats already posed by climate change. For the next few decades, climate change will exacerbate **humanitarian crises**—some of which will result in the deployment of military personnel, as well as material and financial assistance. It will also aggravate natural resource constraints, potentially contributing to **political and economic conflict** over water, food and energy.

The question for the next 30 years is not “can humanity survive as a species with 1.5°C or 2°C of warming,” but, “how much will the existing disparities between the developed and developing world widen, and how long (and how successfully) can these widening political/economic disparities be sustained?” The urgency of the climate threat in the next few decades will depend, to a large degree, on whether and how much the U.S. government perceives a widening of these global inequities as a threat to U.S. national security.

By contrast, if emissions continue to creep upward (or if they do not decline rapidly), by 2100 climate-related national security threats could be **existential**. The question for the next hundred years is not, “are disparities politically and economically manageable?” but, “can the global order, premised on the nation-state system, itself based on territorial sovereignty, survive in a world in which substantial swathes of territory are potentially uninhabitable?”

National Security Consequences of Climate Change to 2050 Scientists can predict the consequences of climate change to 2050 with some measure of certainty. (Beyond that date, the pace and magnitude of climate change—and therefore, the national security threat posed by it—depend heavily on the level of emissions in the coming years, as I have explained.) There is relative agreement across modeled climate scenarios that the world will likely warm, on average, at least 1.5°C above pre-industrial levels by about 2050—but perhaps as soon as 2030. This level of warming is likely to occur even if the world succeeds in dramatically reducing greenhouse gas emissions, as even the recent Intergovernmental Panel on Climate Change (IPCC) report implicitly admits. In other words, a certain amount of additional warming—at least 1.5°C, and probably more than that—is presumptively unavoidable.

Looking ahead to 2050, it can be said with relative confidence that the national security consequences of climate change will vary in degree, not in kind, from the national security threats already facing the United States. This is hardly good news. **Even small differences** in global average temperatures result in significant environmental changes, with attendant social, economic and political consequences. By 2050, climate change will wreak increasing havoc on human and natural systems—predominantly, but not exclusively, in the developing world—with attenuated but profound consequences for national security.

In particular, changes in temperature, the hydrological cycle and the ranges of insects will impact food availability and food access in much of the world, increasing **food insecurity**. Storms, flooding, changes in ocean pH and other climate-linked changes will damage infrastructure and negatively impact labor productivity and economic growth in much of the world. **Vector-borne diseases** will also become more prevalent, as climate change will expand the geographic range and intensity of transmission of diseases like malaria, West Nile, Zika and dengue fever, and cholera. Rising public health challenges, economic devastation and food insecurity will translate into an increased demand for humanitarian assistance provided by the military, increased migration—especially from tropical and subtropical regions—and **geopolitical conflict**.

Long-term trends such as declining food security, coupled with short-term events like hurricanes, could sustain unprecedented levels of migration. The 2015 refugee crisis in Europe portends the kinds of population movements that will only accelerate in the coming decades: people from Africa, Southwest and South Asia and elsewhere crossing land and water to reach Europe. For the United States, this likely means greater numbers of people seeking entry from both Central America and the Caribbean. Such influxes are not unprecedented, but they are unlikely to abate and could increase in volume over the next few decades, driven in part by climate change-related food insecurity, climate change-related storms and also by economic and political instability. Food insecurity, economic losses and loss of human life are also likely to **exacerbate existing political tensions** in the developing world, especially in regions with poor governance and/or where the climate is particularly vulnerable to warming (e.g., the Mediterranean basin). While the Arab Spring had many underlying causes, it also coincided with a period of high food prices, which arguably contributed to the protests. In some situations, food insecurity, economic losses and public health crises, combined with weak and ineffectual governance, could precipitate future conflicts of this kind—although it will be difficult to know where and when without more precise local studies of both underlying political dynamics and the regionally-specific impacts of climate change.

2100 and Beyond While the national security impacts of climate change to 2050 are likely to be costly and disruptive for the U.S. military—and devastating for many people around the world—at some point after 2050, if warming continues at its current pace, changes to the climate could fundamentally reshape geopolitics and possibly even the current nation-state basis of the current global order.

To be clear, both the ultimate level of warming and its attendant political consequences is highly speculative, for the reasons I explained in my last post. Nonetheless, we do know that the planet is currently on track for at least 3-4°C of warming by 2100. The “known knowns” of higher levels of warming—say, 3°C—are frightening. At that 3°C of warming, for example, scientists project that there will be a nearly 70 percent decline in wheat production in Central America and the Caribbean, 75 percent of the land area in the Middle East and more than 50 percent in South Asia will be affected by highly unusual heat, and sea level rise could displace and imperil the lives hundreds of millions of people, among other consequences.

But even higher levels of warming are physically possible within this century. At these levels of warming, some regions of the world would be literally uninhabitable, likely resulting in the depopulation of the tropics, to say nothing of the consequences of sea-level rise for economically important cities such as Amsterdam and New York. Even if newly warmed regions of the far north could theoretically accommodate the resulting migrants, this presumes that the political response to this unprecedented global displacement would be orderly and conflict-free borders on fantasy.

The geopolitical consequences of significant levels of warming are severe, but if these changes occur in a linear way, **at least there will be time for human systems to adjust.** Perhaps more challenging for national security is the possibility that the until-now linear changes give way to abrupt and irreversible ones. Scientists forecast that, at higher levels of warming—precisely what level is speculative—humanity could trigger **catastrophic**, abrupt and unavoidable consequences to the ecosystem. The IPCC has considered nine such abrupt changes; one example is the potential shutting down of the Indian summer monsoon. Over a billion people are dependent upon the Indian monsoon, which provides parts of South Asia with about 80 percent of its annual rainfall; relatively minor changes in the monsoon in either direction can cause disasters. In 2010, a wetter monsoon led to the catastrophic flooding in Pakistan, which directly affected 20 million people; a drier monsoon in 2002 led to devastating drought. Studies suggest that the Indian summer monsoon has two stable states: wet (i.e., the current state) and dry (characterized by low precipitation over the subcontinent). At some point, if warming continues, the monsoon could abruptly shift into the second, “dry” state, with catastrophic consequences for over a billion people dependent on monsoon-fed agriculture. The IPCC suggests that such a state-shift is “unlikely”—that is, there is a 10 to 33 percent chance that a state-shift will happen in the 21st century—but scientists also have relatively low confidence in their understanding of the underlying mechanisms in this and other large-scale natural systems.

The consequences of abrupt, severe warming for national security are obvious in general, if unclear in the specifics. In 2003, the Defense Department asked a contractor to explore such a scenario. The resulting report outlined the offensive and defensive national security strategies countries may adopt if faced with abrupt climate change, and highlighted the increased risk of inter- and intra-state conflict over natural resources and immigration. Although the report may be off in its imagined timeframe (positing abrupt climate change by 2020), the world it conjures is improbable but not outlandish. If the Indian monsoon were to switch to dry state, and a billion people were suddenly without reliable food sources, for example, it is not clear how the Indian government would react, assuming it would survive in its current form. **Major wars or low-intensity proxy conflicts seem likely, if not inevitable**, in such a scenario.

## 4

#### Biden’s PC is key to swing 10 Reps to pass debt ceiling in the CR

Everett et al 9-16-21 (John Burgess Everett, co-congressional bureau chief for POLITICO, specializing in the Senate, BA journalism, University of Maryland College Park; and Laura Barrón-López, White House Correspondent for POLITICO, formerly covered Democrats for the Washington Examiner, Congress for HuffPost, and energy and environment policy for The Hill, BA political science, California State University, Fullerton; “Dems call in big gun as they face huge Hill tests,” POLITICO, 9-16-2021, https://www.politico.com/news/2021/09/16/biden-influence-capitol-democrats-511952)

The next few months will push President Joe Biden to wield every drop of his influence over Congress.

Democrats are plunging into messy internal debates over social programs from child care to drug pricing as they try to beat back GOP resistance on voting rights while steering the United States away from economic catastrophe. And in order to avert a government shutdown, avoid a debt default and fight ballot access restrictions passed in some GOP states, Democratic lawmakers are urging Biden to get more directly involved.

Senate Majority Whip Dick Durbin said that Biden, “more than anyone,” maintains sway over his caucus’s 50 members: “There is no comparable political force to a president, and specifically Joe Biden at this moment.”

Biden appears to be answering the call. The president is getting increasingly involved in Congress’ chaotic fall session as he battles sagging approval ratings, heightened concerns around the pandemic and some internal criticism over his withdrawal from Afghanistan.

Rebounding as the midterms draw nearer will depend on whether his big social spending ambitions are realized and if his party can dodge a government shutdown and credit default. But even if he has success on those fronts, he still needs to maintain momentum on Democrats’ elections legislation, which Republicans look certain to torpedo.

“I have full faith and confidence in Joe Biden in all of this,” said House Majority Whip Jim Clyburn, who's pressed Biden to endorse a filibuster carve out for voting rights legislation. “He is working this … and that’s how it should be.”

Biden met with two key Democratic holdouts on his domestic spending agenda on Wednesday, part of a sustained push to keep Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on board with his legislative program. Biden’s met with Sinema four times this year, in addition to telephone calls made between the two, and has spoken to Manchin a similar number of times.

“Now is the time” for Biden to jump full-force into the reconciliation conversation, said Sen. Tim Kaine (D-Va.). And the White House made clear that Biden is diving into the series of tricky issues.

Andrew Bates, a spokesperson for Biden, said that Biden and his administration "are in frequent touch with Congress about each key priority: protecting the sacred right to vote, ensuring our economy delivers for the middle class and not just those at the top, and preventing needless damage to the recovery from the second-worst economic downturn in American history.”

To help corral all 50 Senate Democrats for the social spending bill, the president and his party need to create an “echo chamber” around its substance, said Celinda Lake, a pollster on Biden’s campaign. But that won't be easy. Manchin has told colleagues he’s worried about whether the bill’s safety net, climate action and tax reforms will be popular in his state, according to one Senate Democrat. He's also said he won't support a measure at the current spending level: $3.5 trillion.

If Biden can hammer home the popular aspects of the spending plan, it may help assuage Manchin and improve his whip count in Congress. Underscoring the degree to which he's become the face of the multi-trillion dollar reconciliation bill, a Democratic aide said the party is increasingly seeking to frame it as Biden’s agenda, not that of Sen. Bernie Sanders (I-Vt.) or any single Democrat.

“People think they like the reconciliation package, but they really don't know what's in it,” said Lake, who added that her polling shows popularity for the measure, particularly among women and seniors.

The coming months will also challenge Biden’s relationship with Republicans, who are threatening to block a debt limit hike after many of them supported a suspension or increase three times under former President Donald Trump. Biden campaigned as a Democrat who could work with Republicans, and he succeeded this summer by rounding up 19 Senate GOP votes for a $550 billion infrastructure bill.

Yet he’s running into a brick wall in convincing Senate Minority Leader Mitch McConnell to provide at least 10 GOP votes to lift the nation's borrowing limit. Republicans say Biden’s dip in the polls isn’t driving their strategy on the debt ceiling. But it’s not helping either.

“I don’t think anything in the last month has increased the likelihood that he can now create an atmosphere of: Let’s work together,” said Sen. Roy Blunt (R-Mo.), who voted for the infrastructure bill and debt ceiling increases under Trump.

The White House is, so far, sticking by its plan to try and call McConnell’s bluff. Aides in the West Wing consider attaching a debt ceiling suspension or increase to a government funding measure the best way to pressure Republicans on the routine step required by law. Should that approach fail, they may be forced to separate the two fiscal measures to avert a shutdown.

On the debt limit, congressional Democrats are in lockstep with the administration's strategy. But they're looking for Biden to exhibit more of his arm-twisting and back-slapping skills on their social spending plan and their bid to shore up voting rights protections.

Biden “knows better than anyone the power of the United States [presidency] in persuading and sometimes cajoling the key members of Congress, when push comes to shove,” said Sen. Richard Blumenthal (D-Conn.).

#### Plan necessarily drains PC – trading off with unrelated agenda items.

Carstensen ‘21

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

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

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

#### Collapses global finance

Hanlon 9-13-21 (Seth Hanlon, senior fellow for Economic Policy at the Center for American Progress, former special assistant to the president for economic policy at the White House National Economic Council, where he coordinated the Obama administration’s tax policy, JD Yale Law School, BA Harvard University, “Congressional Republicans Must Not Play Political Games With the Debt Limit,” Center for American Progress, 9-13-2021, https://www.americanprogress.org/issues/economy/news/2021/09/13/503720/congressional-republicans-must-not-play-political-games-debt-limit/)

Ten years ago, the Republican leaders of the U.S. House of Representatives risked an unthinkable economic catastrophe in a reckless attempt to gain leverage in budget negotiations. They threatened to block an increase in the U.S. debt limit—a routine and necessary step that enables the government to make ongoing payments required by law without defaulting. The crisis was averted, but the episode caused significant harm to the economy.

The debt limit needs to be raised again this fall, most likely in October. But in recent weeks, 106 Republican House members and 46 Republican senators, including Senate Minority Leader Mitch McConnell (R-KY), have said they will not vote for a debt limit increase. They claim that President Joe Biden and the congressional majority bear sole responsibility for taking the necessary action to avoid default. These members of Congress’ position is deeply hypocritical: As this column explains and Figure 1 helps illustrate, many of their own actions and policies have made the debt limit increase necessary. Their position is also terribly irresponsible because failing to raise the debt limit would cause catastrophic harm to the entire country.

Figure 1

[FIGURE 1 OMITTED]

Raising the debt limit is needed to preserve the full faith and credit of the United States

One of the bedrocks of the U.S. and world economy is the full faith and credit of the United States: the secure expectation that the U.S. government will pay its obligations in full and on time. The United States’ rock-solid credit allows financial markets to function and the country to pay low interest, or even negative real interest, to bondholders based on the certainty that they will be paid interest and principal on time. It also gives Americans, such as Social Security beneficiaries, veterans, military and federal civilian employees, beneficiaries of federal programs, and countless others, the security of knowing that they will receive the payments they rely on and are entitled to.

The United States has never defaulted on its obligations. The closest thing was a minor technical snafu in 1979 that was quickly fixed.

From time to time, Congress must raise the debt limit to prevent the country from defaulting. The debt limit is a 104-year-old provision that places a dollar cap on the total amount of outstanding debt that the Treasury Department can have to finance the government’s ongoing legal obligations. The debt limit is an unnecessary historical relic; almost no other comparable countries have one. The actual public debt is determined not by the debt limit but by the substantive spending and revenue laws that Congress passes.

In practice, the debt limit serves little function other than to potentially enable factions in Congress to force the United States to default on obligations it has already incurred—if they are reckless enough to do so.

The debt limit debacle of 2011 must not be repeated

Before 2011, parties in Congress never seriously threatened to force the United States into default to extract concessions. But then, the House Republicans’ reckless gambit brought the country to the brink of disaster. Even though the United States narrowly avoided default, the episode raised costs of borrowing for the government, private businesses, and homebuyers, and it slowed the already struggling economic recovery by undermining consumer and business confidence.

No good came out of the 2011 crisis. The resulting agreement produced an ill-conceived budget “sequester” that further slowed the economic recovery and resulted in chronic underfunding of key priorities.

Since 2011, every time the debt limit has needed to be raised, Congress has raised or suspended it without incident and on a bipartisan basis. Congress did so on a bipartisan basis seven times since that year: in 2013 (twice), 2014, 2015, 2017, 2018, and 2019.\* Then-President Barack Obama took the position after 2011 that he would never again negotiate over the debt limit. Similarly, the Trump administration repeatedly urged Congress to pass “clean” debt limit increases—that is, debt limit increases without conditions.

A majority of Senate Republicans, including then-Majority Leader McConnell, supported suspending the debt limit all three times it was needed under Trump.\* The most recent time, in 2019, McConnell explained:

[The debt limit suspension] ensures our federal government will not approach any kind of short-term debt crisis in the coming weeks or months. It secures our nation’s full-faith and credit and ensures that Congress will not throw this kind of unnecessary wrench into the gears of our job growth and thriving economy.

Raising the debt limit is just as imperative now as it was in 2019. The only difference in 2021 is that a Democrat sits in the White House.

A U.S. default would be catastrophic

When the United States reaches the debt limit, the Treasury Department cannot issue additional debt and therefore risks running out of cash. With the debt at the limit, the Treasury is now buying time through previously used accounting moves known as “extraordinary measures.” Unfortunately, those measures will probably only last into October, according to Treasury Secretary Janet Yellen. At that point, the government will not be able to meet its ongoing legal obligations. It would default. And while no one knows precisely what that could mean, the consequences could entail:

* Social Security checks stopping, putting the livelihoods of millions at risk
* The military and federal workers not receiving their paychecks
* Providers such as hospitals and doctors not being paid for services provided under Medicare and Medicaid
* People filing taxes on extension this fall not getting the refunds they are owed, and monthly child tax credit payments ceasing
* Countless families and businesses being thrown into turmoil as they are stiffed on many other kinds of payments
* Critical government services shutting down

In addition, a U.S. default would cause chaos in global financial markets. Treasury bonds set the benchmark for the risk-free interest rate—and if the government suddenly defaults on the payments on those bonds, the financial system would be fundamentally uprooted. The financial system could melt down even worse than it did in 2008, drying up credit and grinding commerce to a halt.

As Treasury Secretary Yellen told Congress in June:

Failing to increase the debt limit would have absolutely catastrophic economic consequences. It would be utterly unprecedented in American history for the United States government to default on its legal obligations. I believe it would precipitate a financial crisis. It would threaten the jobs and savings of Americans, and at a time when we are still recovering from the COVID pandemic.

Mark Zandi, chief economist at Moody’s Analytics, said: “It would be financial Armageddon. It’s complete craziness to even contemplate the idea of not paying our debt on time.” And JPMorgan Chase CEO Jamie Dimon said that a U.S. default “could cause an immediate, literally cascading catastrophe of unbelievable proportions and damage America for 100 years.” The American Enterprise Institute’s Michael Strain emphasized, “Even edging close to defaulting is dangerous,” and with as much as a temporary default, the “unthinkable might happen.”

#### Cascades to multiple intersecting existential risks – including nuclear wars, environmental destruction, and critical infrastructure – AND turns case – including implementation and enforcement capacity, alliances and authoritarianism

--VUCA = volatility, uncertainty, complexity, and ambiguity

--JIT = just in time

Maavak 21 (Mathew Maavak, consultant at Risk Foresight, specializing in Strategic Foresight, Contingency Planning, Perception/Crisis Management, Energy and Resource Geopolitics, Defense and Security Analysis, PhD policy studies, Universiti Teknologi Malaysia, MA International Communication, University of Leeds, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?” Salus Journal, 9(1), 2021, https://salusjournal.com/wp-content/uploads/2021/04/Maavak\_Salus\_Journal\_Volume\_9\_Number\_1\_2021\_pp\_2\_17.pdf)

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

[FIGURE 1 OMITTED]

Figure 1: Systemic Emergence of Global Risks

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

Geopolitics will still be dictated by major powers. However, how will the vast majority of nations fare during this VUCA decade? Many “emerging nations” have produced neither the intelligentsia nor industries required to be future-resilient. Raw materials and cheap labour cannot sustain anaemic societies in a volatile world. Advances in material sciences and robotic automation as well as technological “ephemeralization” (Fuller, 1938; Heylighen, 2002) may shift manufacturing back to the Developed World.

In an attempt to mask the looming redundancy of these nations, untold billions have been wasted on vanity studies, conferences and technological initiatives drawn up by an army of neoliberal experts and native proxies. Risks were rarely part of the planning calculus. National and regional blueprints ranging from Malaysia’s Vision 2020, Saudi Vision 2030, ASEAN 2025 to Africa 2030, amongst others, will fail just as their innumerable precursors did.

The author defines a redundant nation as one which persistently lacks a comprehensive brain bank and an adaptive governance structure in order to be future-resilient. Redundant nations are preludes to failed states. They will lack native ideations and coherent policies that are critically needed in a VUCA decade. While policies intended to “promote growth in developing countries” had traditionally acted “as agents for conflict prevention” (Humphreys, 2003), the trade-off was often bureaucratic overgrowth, corruption, ethnoreligious discrimination and resource wastages.

Attempts to re-use these nations as geopolitical proxies a la the Cold War may prove too costly for potential sponsors. The Fat Leonard scandal (Whitlock, 2016) in Southeast Asia – which entrapped senior US naval officers in a web of sleaze – may be a harbinger of similar breaches on friendly territory, particularly as China’s Belt and Road Initiative (BRI) challenges US geopolitical hegemony worldwide. The BRI however snakes through many potentially redundant nations and may expose China to a “death by a thousand cuts” via geo-economic extortion. Beijing’s recent attempts to portray itself as a humanitarian superpower has somewhat backfired after numerous defects were discovered in its “medical aid” exports (Kern, 2020).

Ultimately, one should not underestimate the possibility, however remote, of national boundaries being redrawn before the Great Reset period is over. The global map was different only 100 years back. The once-mighty Soviet Union no longer exists while its former nemesis, the United States, faces social clefts of ominous proportions. Alarming parallels are now being drawn between the inauguration of President Abraham Lincoln on March 4, 1861 – which led to the US civil war – and the swearing in of Joe Biden as 46th President of United States on Jan 20 2021 (Waxman, 2021). How will a weakened United States affect NATO and the larger Western-led global alliance?

SOCIETAL

The WEF (2017) had pencilled “global social instability” as the biggest threat facing our collective future. A similar outcome was gamed out in a 2007 study by the Development, Concepts and Doctrine Centre at the United Kingdom Ministry of Defence (DCDC, 2007).

According to Peter Turchin (2016), a professor of Evolutionary Biology at the University of Connecticut, the United States may experience “a period of heightened social and political instability during the 2020s” – marked by governmental dysfunction, societal gridlock and rampant political polarization. To blame this phenomenon on the presidency of Donald J. Trump is to wilfully ignore the gradual build-up of various fissiparous forces over decades.

The social media plays a force multiplier role here. While risks metastasize at the bedrock levels of society, policymakers are constantly distracted from the task of governance by a daily barrage of recriminations, fake news and social media agitprops. As a result, longterm policy imperatives are routinely sacrificed for immediate political gains. The importunate presidential impeachment sagas and electoral fraud accusations in the United States are reflective of wider social fissures, state fragilities and policy paralyses worldwide.

There is nothing new in this panem et circenses (bread and circuses) phenomenon. Juvenal had noted a similar trend during Rome’s imperial decline circa 100 A.D. Recently, despite clear signals that the world was facing an economic catastrophe, the United Nations seemed more focused on the discovery of gender bias in virtual assistant software like Siri and Alexa (UNESCO, 2019). How will this revelation benefit the bottom 99% of humanity in dire economic conditions; one where the victims will be preponderantly women and children?

Just like in Imperial Rome, bread and circuses are symptomatic of an economic system that relentlessly benefits the elite. The mountain is ignored and the molehill is prioritized through controlled public narratives. The issue of “stolen childhoods”, for example, is now couched in terms of climate change rather than on sexual exploitation. Few take note that nearly “100,000 children – girls and boys – are bought and sold for sex in the U.S. every year, with as many as 300,000 children in danger of being trafficked each year.” Child rape, as John Whitehead (2020) further notes, has become “Big Business in America.” Not surprisingly, human trafficking has emerged as a $150 billion global industry (Niethammer, 2020).

Such shocking human rights failures do not figure prominently in the calculus of various “social justice” movements. The Top 1% needs their “useful idiots” – a phrase misattributed to Lenin – to generate a constant supply of distractions. Activist-billionaire George Soros, for example, is pumping $1 billion into a global university network to “fight climate change” and “dictators” which curiously include elected leaders such as former US President Donald J. Trump and India’s Prime Minister Narendra Modi. These “academically excellent but politically endangered scholars” (Open Society, 2020), as Soros calls them, may turn out to be the very disruptors who will “undermine scientific progress” in the West – just as Turchin (2016) predicted in his seminal study. Soros’ pledge was coincidentally made when COVID19 began to decimate the global economy and healthcare systems. Elite philanthropy is now an avenue for global subversion. An assortment of scholars, government officials and NGOs are already channelling the agendas of their well-pocketed patrons, backed by Big Tech’s control of the mainstream and social media (Maavak, 2020c). Their narratives are reminiscent of giddy sophistries which fuelled a variety of communist and anarchist movements during the build-up to WWII.

Under these circumstances, some nations may eventually seal their borders and initiate authoritarian measures in order to maintain internal stability. This is no longer an unthinkable proposition as dissatisfaction with democracy has peaked worldwide (Foa et al, 2020). Measures perfected by COVID-19 lockdowns may have inadvertently served as a test run in this regard.

## 5

**Tech innovation high --- expanding the scope of antitrust laws stifles it --- Causes China tech dominance**

**Packard 6-22** --- Clark Packard, Trade Policy Counsel, Finance Insurance & Trade, R-Street, “Hamstringing America’s most innovative firms is no way to compete with China”, JUN 22, 2021, https://www.rstreet.org/2021/06/22/hamstringing-americas-most-innovative-firms-is-no-way-to-compete-with-china/

The United States is locked into a **geopolitical competition with China** over the commanding heights of the 21st century economy. Much of the competition revolves around the nexus of international trade and investment and technology. **Washington has very legitimate concerns about China’s pursuit of indigenous innovation through high tech industrial policy**, but the situation warrants a smart response. At a time when policymakers are signaling their desire to outcompete China economically, **why are they also rushing to** ~~hobble~~ **[stifle] private sector American tech**nology **and innovation?**

Over the last several weeks, lawmakers have introduced five separate bills in United States House of Representatives aimed at cracking down on “Big Tech.” I’m not an antitrust scholar, but as my colleague Dr. Wayne Brough has written, the bills would, if enacted, “impose the most significant overhaul of the nation’s antitrust laws in our country’s history.” Rather than broad and durable antitrust principles that apply to all sectors of the economy, which have guided our competition policy for more than a century, the legislation under consideration is aimed squarely at large tech companies in the United States.

It is worth considering the **geopolitical and international economic ramifications of such a radical departure from existing law.**

In 2018, the United States released a report documenting China’s predatory commercial practices, which served as an indictment of sorts. The overarching theme of the report is that Beijing uses a number of unfair and pernicious methods to acquire American technology with the ultimate goal of supplanting the United States as the global leader in high tech innovation. Specifically, the report alleges that China pressures American firms into transferring technology to Chinese joint-venture partners as the cost of doing business—reaching the 1.4 billion potential consumers—in the country; China abuses intellectual property; engages in targeted foreign investment to acquire strategic American firms and assets; and with pervasive state support, hacks into commercial networks to steal trade secrets. On top of that, China provides massive subsidies to its leading technology firms to pursue research and development in critical areas. **These are very serious problems**, and demand a thoughtful and targeted response.

Instead, the United States has flailed at China. The Trump administration imposed tariffs, which triggered predictable retaliation against American exporters, imposed significant costs onto American consumers—both families and firms—and will almost certainly fail to change Beijing’s predatory commercial practices. It is estimated that the tariffs cost about 300,000 American jobs and lowered market capitalization by about $1.7 trillion through diminished investment, according to the New York Federal Reserve. In other words, the tariffs made the United States weaker and less competitive. Now, some in Congress want to pursue misguided antitrust policies that will unintentionally undermine the United States’ global competitiveness.

The firms targeted by the proposed legislation are among America’s **most globally competitive and innovative.** They drive **significant investment in cutting-edge tech**nologies like robotics and artificial intelligence, the types of research China is pursuing through its Made in China 2025 indigenous innovation industrial policy. A recent report from the Progressive Policy Institute (PPI) highlights how many of the largest American tech firms—Amazon, Alphabet (Google’s parent company), Intel, Facebook, Microsoft and Apple—were among the top 15 nonfinancial firms driving U.S. capital expenditures in 2020. Together, PPI estimates that these six firms made nearly $90 billion worth of private investment in 2020—up 6 percent from 2019, which is remarkable considering that the U.S. economy was lagging in 2020 due to the outbreak of COVID-19. Cracking down on these firms will mean less investment in research and development.

These American firms already must compete with heavily subsidized foreign competitors and face discriminatory foreign practices, particularly in China. Despite these hurdles, the American tech industry pushes the envelope on exactly the type of research and development that policymakers in the United States should welcome. These firms lead the world in current and next-generation technologies. Instead of embracing this type of American global commercial and technological leadership, or at least staying neutral toward it, the legislation under consideration would **favor foreign competitors** by [stifling] ~~kneecapping~~ our domestic technology firms with **heavy-handed regulation**, which will almost certainly benefit their foreign competitors.

The American tech industry is the envy of the world. That’s why China, the European Union and others are trying to mimic it through subsidies and discriminatory practices against foreign competition. Yet those policies are no match for a relatively free and dynamic economy fostered by existing competition policies. It simply **belies common sense** that the way to outcompete Beijing is by making the United States **weaker, less efficient and less dynamic through misguided efforts to single out** our most **globally competitive and successful firms**.

#### Causes US-China war --- Only private tech development solves

Talent & Work 19 --- Prepared by Taskforce co-chairs The Honorable Jim Talent Senior Fellow, Bipartisan Policy Center Former U.S. Senator (R-MO) and The Honorable Robert O. Work Distinguished Senior Fellow, Center for a New American Security Former Deputy Secretary of Defense, et al, “The Contest for Innovation: Strengthening America’s National Security Innovation Base in an Era of Strategic Competition”, Ronald Raegan Institute, Dec 2019, https://www.reaganfoundation.org/media/355297/the\_contest\_for\_innovation\_report.pdf

The United States has entered an era of long-term competition with revisionist powers. A key aspect of this competition will revolve around a contest for technological superiority waged between the national innovation bases of the respective competitors. The outcome of this competition will determine not just American national security but also how the nations of the world interact—and whether a free and open political and economic system will remain the foundation of those interactions.

After a long post-Cold War focus on rogue regional powers and nearly two decades of continuous warfare in the Middle East and a focus on rogue regional powers, the United States now faces a new defining national security challenge: a long-term strategic competition with a resurgent Russia and a rising China.

Russia seeks to reestablish itself as a global power. While Russia is able to compete with the United States militarily in certain domains, its economic outlook and long-term demographic prospects are grim. Accordingly, it is unlikely to develop and nurture a true national innovation ecosystem. Given these disadvantages, Russia is limited to acting as a geostrategic spoiler seeking to undermine and weaken the United States, its alliances, and its global interests.

China, on the other hand, is already challenging the United States economically, militarily, and politically. China’s economy has surpassed that of the United States in terms of purchasing power parity and could, under some scenarios, pass the U.S. GDP in absolute terms in the mid- to late 2020s. Under the leadership of the Chinese Communist Party, China defines its vital national interests in ways that are irreconcilable with both the interests of the United States and the values of self-determination and individual freedom to which we and our allies are committed. China’s global expansion, from both a trade and military perspective, is challenging the United States in virtually every region of the world.

In pursuit of its goal of reshaping the world order, China aims to supplant the United States as the world’s leading technological power by 2030. China has articulated a distinct strategy of state-driven innovation, defined by its concept of “military-civil fusion,” to lead the world in cutting-edge technologies that might allow it to leapfrog the United States both economically and militarily.

That strategy presents a two-fold challenge for the United States. Economically, the challenge is to sustain American prosperity and access to markets on equal terms with other nations against China’s ambition to control the economic sectors that will determine national primacy in the decades ahead.

Militarily, the fundamental mission of the U.S. government (USG) is to deter a great-power war and, if deterrence fails, to prevent escalation of the conflict and end the war on terms favorable to the United States and its allies. An important key to this mission is achieving and maintaining military-technical superiority. However, over the last several decades, China—and, to a lesser extent, Russia—has invested heavily in advanced military capabilities specifically aimed at overcoming the technological lead of America’s armed forces.

As a result, the conventional overmatch that the United States has relied upon to undergird its deterrence posture since the end of the Cold War is eroding. The balance of power in East Asia has already shifted substantially in China’s direction. If this trend continues, effective deterrence in that region will likely fail, leaving the United States to face the unattractive alternatives of accepting aggression against its interests or its allies or triggering armed conflict with the People’s Liberation Army (PLA), with all the attendant risks of escalation.

The National Security Strategy recognized the importance of technological innovation to every domain of the competition with China. Consistent with that, a key theme of the 2018 National Defense Strategy is that the U.S. military must move rapidly to arrest further erosion of its technical advantage and then restore and maintain a comfortable conventional overmatch.

Unfortunately, the technological development relevant to national security is no longer exclusively or even primarily in the control of the Department of Defense (DOD) and its prime contractors.

In the past, cutting-edge technology was usually developed by the government sector for military use and then migrated into the civilian sector. Today, the direction of innovation has reversed. Many of the technologies most important to national security are being developed and produced for civilian purposes by civilian actors who have no history with or connection to the national security community. China is aware of this new reality. Its policy of military-civil fusion seeks to better exploit dual-use technologies originating from the commercial sector. To avoid a ~~crippling~~ [devastating] competitive disadvantage, the United States must adopt means to accomplish the same end.

## Inequality

### Proper

#### Antitrust can’t solve wealth inequality

Crane 16 – Daniel Crane, Associate Dean for Faculty and Research and Frederick Paul Furth, Sr. Professor of Law, University of Michigan, “Antitrust and Wealth Inequality,” *Cornell Law Review*, Volume 101, Number 5, 2016, pp. 1171-1228

Amid this broad debate, a particular claim has emerged regarding the relationship between market competition and inequality. A wide array of scholars and public intellectuals, including such notable figures as Nobel Laureates Joseph Stiglitz4 and Paul Krugman5 and former Labor Secretary Robert Reich,6 among others, have claimed that monopoly and anticompetitive market conditions are among the root causes of wealth inequality.7 Some of these commentators blame the rising tide of wealth inequality on a weak record of antitrust enforcement in the United States.8 All seem to propose that enhancing antitrust enforcement against mergers, monopolies, and anticompetitive agreements could contribute to creating a more equal society.

This Article challenges this emerging monopoly regressivity claim in two ways. First, it shows that the relationship between enforcement of the antitrust laws and wealth inequality is far more complex than monopoly regressivity critics recognize. The relationship between market power (the subject of antitrust law) and income distribution is subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize. Whatever their other faults, it is far from certain that antitrust violations (including cartels, anticompetitive mergers, and abuses of dominance) systematically redirect wealth from the poor to the rich. To sustain a showing that they do, one would need information about a large number of factors, including the relative wealth of producers and consumers, overcharge pass-on rates, the effects of market power on employees of the firm, the distribution of rents between managers and shareholders, the progressive or regressive effects of antitrust violations where government entities are the purchasers, and the distribution of rents among classes of managers. Although there are undoubtedly cases where antitrust violations have regressive effects, there are also undoubtedly many cases where their effects are progressive or distributively neutral. It is virtually impossible to calculate the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement.

The second response this Article makes to the monopoly regressivity claim is that a significant set of antitrust interventions actually impede voluntary efforts to secure a more equitable and just society. In a set of important cases, application of conventional antitrust principles frustrated private actors seeking to promote social justice by diverting market forces from their ordinary paths.9 Hence, an undifferentiated increase in antitrust enforcement could, in many instances, exacerbate rather than diminish inequality and related forms of social justice.

To motivate this angle, consider some glimpses of the kinds of cases in which antitrust has posed an obstacle to private actors pursuing wealth redistribution goals. Examples include an antitrust challenge to an agreement by the Ivy League universities on a financial aid system designed to increase educational diversity;10 antitrust concerns preventing garment manufacturers in the United States from joining forces to pressure foreign suppliers to conform to minimal labor and employment standards;11 and antitrust challenges to National Collegiate Athletic Association (NCAA) rules prohibiting its members from paying student athletes, which could disrupt the cross subsidization of women’s athletic programs and other less popular sporting programs.12 In each of these cases, discussed in greater detail below, there is a plausible argument that application of unqualified antitrust principles would increase the welfare of consumers but also impair the ability of private actors to pursue solutions to serious equality problems.

In tandem, these twin objections throw a wrench into the growing progressive claim that more antitrust enforcement would lead to a more just distribution of wealth. Not only could an undifferentiated increase in antitrust enforcement exacerbate wealth inequality in various ways but it could also impede private, voluntary pursuit of related social justice objectives.

Thus far, this introduction has considered the effect of an undifferentiated increase in antitrust enforcement—actions to augment and strengthen enforcement as a general matter, such as by providing more funding to the antitrust agencies, liberalizing rules for private enforcement, increasing fines and penalties, or adopting rules making antitrust claims easier to win. Changes in the level of antitrust enforcement have no clear effect on the regressivity or progressivity of wealth distribution and social justice more generally, but one could try to tailor antitrust policy to maximize wealth redistribution and social justice in particular cases. Although it might sometimes be prudent as a matter of prosecutorial discretion to prioritize resource allocation in the direction of fighting antitrust violations with highly regressive effects, it would be a mistake to recalibrate antitrust doctrine in an effort to combat wealth inequality. Even putting aside the likely deleterious effects on productive and allocative efficiency such doctrinal shifts might entail, it is impossible to craft a distributively-oriented body of antitrust law that would reliably increase wealth equality by clamping down on regressive forms of market power exploitation.

#### Trump thumped soft power --- no recovery

Kokas 21 --- Aynne Kokas, Oriana Skylar Mastro, “The Soft War That America Is Losing”,Stanford University, Jan 15th 2021, https://fsi.stanford.edu/news/soft-war-america-losing

Meanwhile, the Trump administration has undermined the historical sources of US soft power. It has shuttered visa lines, investigated international students on campus, and driven the rise of a culture of nationalism. The cancellation of the Fulbright US Student Program and the Peace Corps program in China are prime examples. And the COVID-19 decreased US media production, educational exchange and tourism, which shrank opportunities for promoting its democratic values on the global stage.

A bird’s-eye view of America's relative soft power may seem to offer cause for optimism. Even after four years of Trump's buffoonery and "America First", the US is still far ahead of China, ranking fifth in overall soft power, while China ranks 24th. And isn’t this what matters in competition?

Yes and no. The problem is two-fold. First, the US relies more on its political values as a soft power source than Beijing does. Ironically, this has especially been the case during the Trump administration. National Security Adviser Robert O’Brien has argued that democracies and authoritarian countries such as China “are offering a different approach to the world”. Secretary of State Mike Pompeo has argued to international audiences that democracy is “what we’ve got right”.

Second, Beijing has tried to leverage its comparative advantages to build soft power through pathways other than political values, especially where a top-down government approach is effective. China set up COVID-19 testing labs in Palestine in agreement with Israeli and Palestinian authorities. It extended its hand in Africa by building more than 70 percent of its 4G infrastructure.

Depending on need, useful solutions can be as compelling as political principles.The future of the US as a world leader is at stake. American military base access worldwide depends on perceived political alignment between the US and its allies. In the tech sector, the widespread adoption of US platforms relies on other countries finding that benefits to allowing in foreign platforms outweigh the potential political risks.

Successful multilateral treaty negotiations on issues such as global trade and climate change rely on the perception of a dependable US political system.

Strengthening democracy at home and moving away from "America First" policies will go a long way in reconstructing the trust and relationships central to soft power. But the United States will always be seen as a country in which the election of Donald Trump to the presidency, and now the storming of the Capitol, were possible.

President-elect Joe Biden will soon learn that soft power, once lost, may be difficult to revive.

#### Multilat fails

**Gray 7** (Colin S. Gray, Director of the Centre for Strategic Studies within the Department of Politics and International Relations at the University of Reading, 6/11/07, War, Peace, and International Relations, p. 277, JH)

What is known with confidence about this most vital, yet variable, condition known as peace? Strategic history suggests strongly that **peace cannot be constructed by means of institutional engineering**. Such construction can be useful to polities that wish to use it. Institutions and procedures that facilitate communication, perhaps improve mutual understanding, and provide mechanisms for interstate arbitration have roles to play on behalf of order. But **those roles will be fulfilled only when the political players are prepared to negotiate and compromise**. There is nothing magically transformative about participation in international institutions. States, as well as other security communities that generally are not represented in the UN, frequently prefer to act unilaterally, or with allies, in defence of their vital interests. In most of those situations, international political architecture and its norms and procedures can be of only limited value for international order. The existence of the UN facilitates multinational efforts to contain, limit and even halt a war, should the belligerent parties agree to be contained, limited and prevented from fighting to a finish. The story was the same for the Concert System in the nineteenth century and the League of Nations in the twentieth. The functioning of such institutions must reflect their political contexts. They have been as helpful for international order as their leading members would permit. An international institution constructed to advance the prospects for good order and peace can be used or abused on behalf of disorder and war. States can behave in the UN in such a way as to block decisions for collective action to suppress disorderly behaviour. **International institutions**, with the UN as the prime example, **cannot themselves contribute in a vital way to a more orderly world.** Rather, they should be viewed as the faithful products of world order and disorder. States determined to cooperate will use the good offices and fora of those institutions. States determined upon conflict will use them as an arena for propaganda and coalition-building and, if need be, will employ their rules to paralyse the international community. Michael Howard explains why world peace cannot be constructed by the invention, or reform, of institutions: The establishment of a global peaceful order thus depends on the creation of a world community sharing the characteristics that make possible domestic order, and this will require the widest possible diffusion of those characteristics by the societies that already possess them. World order cannot be created simply by building international institutions and organizations that do not arise naturally out of the cultural disposition and historical experience of their members. Their creation and operation require at the very least the existence of a transnational elite that not only shares the same cultural norms but can render those norms acceptable within their own societies and can where necessary persuade their colleagues to agree to the modifications necessary to make them acceptable. (Howard, 2001: 105) This is a fair summary of historical experience. Just as peace cannot be constructed by ingenious institution-building, nor can it be mandated by law, custom or norms. When obedience to those restraints is predicted to work towards results sharply contrary to states’ national interests, they will be ignored.

## Modeling

#### AT cant challenge corporate power concentration

**Khan ’20** [Lina, Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The End of Antitrust History Revisited,” *Harvard Law Review* 133(5), p. 1655-1683; AS]

Fully realizing the **antimonopoly** values that Wu seeks to recover, however, will require **more than antitrust**. One cost of placing antitrust at the center of an antimonopoly agenda is that doing so can **risk suggesting** that competition or decentralization are **ends in themselves**, rather than means for checking private domination and securing freedom.32 When faced with natural monopolies, for example, **public utility regulations** provide a way to preserve **economies of scale** while preventing the exploitative practices that monopolistic control enables.33 In the context of workers or small enterprises, meanwhile, permitting coordination through **labor laws** or antitrust exemptions can enable forms of organizing that are critical for rebalancing power.34 Given current challenges — including the dominance of a small number of technology platforms, certain aspects of which seem to exhibit natural monopoly features, and the revival of antitrust as an antiworker tool — recognizing competition as one among several mechanisms for checking concentrated private power is especially critical.35 Doing so will also help renew antimonopoly principles for a twenty-first-century paradigm, one that builds on — rather than replicates — the Brandeisian era.

#### Phillipine econ will recover – despite setbacks

ABS-CBN 9/08 (Phillipines based news source, focuses on national economics, ABS-CBN 9/08/21 “Philippines’ growth for 2021-22 ‘encouraging’: NEDA” https://news.abs-cbn.com/business/09/08/21/philippines-growth-for-2021-22-encouraging-neda)

MANILA - The Philippine economy’s performance this year and next year remains 'encouraging’, the country’s top economist said on Wednesday in a report to President Rodrigo Duterte. “Yung ating economic growth sa 2021 and 2022 remain encouraging,” said Socioeconomic Planning Secretary Karl Chua. Chua, who also heads the National Economic and Development Authority, said the country can avoid the pandemic’s “long term scarring effects” if the economy grows 4 to 5 percent this year, and 7 to 9 percent in 2022. He said if the country achieves these growth rates, the economy can return to its pre-pandemic level by 2022 or 2023. Chua also said that the country was able to create 2.5 million jobs since the start of the COVID-19 pandemic before the virus’ Delta variant hit the country. Pandemic leading to lower quality jobs: ADB official Government economic managers lowered the growth target for the Philippines twice this year. At the start of the year, the government projected that the country would grow between 6.5 to 7.5 percent. In May, this target was lowered to between 6 to 7 percent, following the lockdowns imposed in late March to April to curb a second wave of COVID-19 infections. In August, the government further lowered this to 4 to 5 percent following a third surge of cases amid the spread of the Delta variant and another lockdown of Metro Manila, the country's most economically important region. PH economic managers again lower 2021 growth target to 4-5 pct amid Delta lockdowns The Philippines posted its worst economic contraction since World War 2 in 2020 as the government imposed one of the strictest and longest lockdowns in the world to control the virus. The economy emerged from recession in the second quarter this year, but analysts warn that the country’s slow vaccination effort amid the spread of the Delta variant can significantly impact recovery.

**Pirates getting nukes in Asia is not a threat**

**Porter 14**

Dr. Patrick Porter is a reader in War and International Security and Leverhulme Research Fellow at the University of Reading, and a fellow of the UK Chief of the Defence Staff’s Strategic Forum, War on the Rocks, January 28, 2014, "IT’S TIME TO ABANDON THE GLOBAL VILLAGE MYTH", http://warontherocks.com/2014/01/its-time-to-abandon-the-global-village-myth/

Militant jihadists of Southeast Asia have a similar story. The likes of Jemaah Islamiyah thrived during periods of relative openness. But their terror aroused adversaries like the government of Indonesia, which tightened its control of the infrastructure of seaports, highways and railroads that guerrillas rely upon to shift their guns, explosives, and contraband. As Justin Hastings argues, **its fighters were forced into the forbidding terrain of jungles, islands and mountains.**

## Democracy

#### Rule of law is just theoretical—doesn’t solve anything

Diescho 8 (Joseph B., independent executive consultant to Eskom on the African Leadership Development Project, “The paradigm of an independent judiciary: Its history, implications and limitations in Africa”, 11-13-08, http://www.kas.de/upload/auslandshomepages/namibia/Independence\_Judiciary/diescho.pdf)

It has to be emphasised that absolute deference to the rule of law in any given society is more of a theoretical concept than a practical reality, even in systems that can claim to be advanced in democratic practice and economic development. In fact, all systems, even those that are not in a position to boast of real democracy and development, have some semblance of respect for human rights and the rule of law. The degrees of this respect vary with time and administrative circumstance: mature democracies usually show greater respect for the rule of law than newly emerging democracies, a category in which most African countries find themselves. However, violations of human rights exist even within mature democracies, since abiding by the rule of law is never comprehensive, and there will always be the possibility of violations, to varying degrees.

# 2NC

## Section 5

#### 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.”

#### 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.

#### Cplan solves Affs related to “employee non-compete clauses”

Rozga ‘21

et al; Kaj Rozga is a former Federal Trade Commission attorney with a breadth of antitrust experience representing clients in litigation, cartel, and transactional matters. While with the FTC's Bureau of Competition, Kaj was a member of trial teams that brought a pair of successful hospital merger challenges and was involved in the review of various healthcare, consumer products, and technology deals. He is now an attorney in the private sector. “Major Leadership and Policy Changes at the FTC—What They Mean for Antitrust and Consumer Protection Enforcement in Technology Markets” – Davis, Wright, Tremaine, LLP - 07.14.21 - #E&F - https://www.dwt.com/insights/2021/07/biden-ftc-antitrust-initiatives

The Commission also voted to rescind a 2015 policy statement setting out the contours for the agency's reliance on Section 5 of the FTC Act, which bars "unfair methods of competition." Section 5 has been at the center of much controversy. Its critics say the use of Section 5 "unfair competition" claims should be constrained in order to avoid overbroad and arbitrary enforcement by the FTC.

Its proponents in academic and policy circles, on the other hand, argue that Congress intended an expansive use of the provision that would reach conduct that has proven difficult for enforcers when relying on traditional antitrust laws—the Sherman Act and the Clayton Act—such as invitations to collude, so-called "pay-for-delay" pharmaceutical deals, exclusive dealing, and employee non-competes.6

The 2015 policy statement signaled that the FTC had conceded to a more restrictive view of Section 5. It declared the "consumer welfare standard" the predominant rubric for adjudging whether competition has been harmed in Section 5 cases; promoted the use of a "rule of reason" balancing test for proving competitive effects; and backed off relying on standalone Section 5 claims where enforcement of traditional antitrust laws would suffice.7

These positions have been targeted by reformers, who viewed them as barriers to broader enforcement of competition laws. The July 1, 2021, decision by the FTC to rescind the 2015 policy statement could signal an expansion of agency powers to target novel claims under Section 5:

For antitrust reformers, going beyond "consumer welfare" would mean expanding protections for rivals and enabling theories of harm based on innovation, choice, access, and other aims not directly tied to consumer pricing and supplier output.

Backing off the "rule of reason," where an antitrust violation may only be found after a careful balancing of pro- and anti-competitive effects demonstrates a net harmful effect on competition, would likely mean more reliance on rebuttable presumptions (based on market shares, etc.) that try to establish what is more akin to a bright-line rule against certain conduct.

Loosening restrictions on bringing standalone claims for "unfair methods of competition" would provide an opening for the FTC to police conduct that is not unlawful under prevailing judicial interpretations of traditional antitrust laws.

#### Yes modeling – lists six specific nations.

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 - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

There is little evidence to suggest that either presidents or their legislative allies in the early twentieth century could have foreseen the ramifications of their formative roles in shaping competition regimes worldwide. American competition laws, including the FTC Act, came to serve as a template for foreign governments that freely transplanted many elements while modifying others. A cognizant DOJ and FTC issued their Antitrust Enforcement Guidelines for International Operations in 1995, stating: “Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent.”18 But these guidelines do not paint the full picture. Inspired foreign states modeled their regulatory regimes after foundations originally shaped under the auspices of Roosevelt and Wilson, both powerful executives with aforementioned hands-on preferences in matters of antitrust. At the FTC’s launch, “Wilson emphasized assistance to business rather than the investigative functions highlighted in the House or the prosecutorial functions highlighted in the Senate.”19 The language of the U.S. antitrust laws inevitably allowed leeway for presidential influence on industry-level economic direction.

All the same, the enforcers of old were watchmen for a U.S. economy which, then as now, operated within a market economy framework. Many countries that followed the United States’ regulatory lead have been less beholden. As the prominent international relations scholar Michael W. Doyle confirms:

The most striking rates of growth of the post-war period appear to have been achieved by the semi-planned capitalist economies of East Asia—Taiwan, South Korea, Singapore, Japan, and now China and India. Indicative planning, capital rationing by parastatal development banks and ministries of finance, managed trade, and incorporated unions—capitalist syndicalism, not capitalist libertarianism—seemed to describe the wave of the capitalist future.20

The close coordination between government and big business common to state-sponsored capitalist economies is also conducive to mercantilist thinking and dependent on the incumbent administration’s economic worldview. Originating from a “historical association with the desire of nation-states for a trade surplus. . . whether it is labeled economic nationalism, protectionism,”21 or the like today, mercantilism is characterized by the subservience of economy to the state and its interests, and a willingness to give home-grown business enterprises an extra competitive advantage.22 Thus-inclined governments view international economic relations as conflicting, zero-sum, and better overseen through state-private sector coordination than left to wholly free markets.23 Nor is the mercantilist phenomenon limited to illiberal states that feature stateowned enterprises and other such overtly hybrid forms of corporate governance. As political leaders continue to promote economic growth and highlight personal expertise to justify and fortify their democratic legitimacy, an expansion of governments’ coordination with the private sector has followed.24 When their major industries face dismal market conditions, countries inured to “capitalist syndicalism” per Doyle are not above protectionist adjustments at the expense of their neighbors. Together with the standard mercantilist strategies of prioritizing exports and frequent use of various non-tariff barriers to thwart competitive imports,25 selective antitrust enforcement offers another tool.

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 its long historical evolution of counterbalancing regulatory norms. 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 cooperate in the face of zero-sum international competition. South Korean President Lee Myung-Bak’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.

**Aff authors endorse the CP – their lone warrant against it is bc the agencies aren’t acting now.**

**Steinbaum &** **Stucke ‘18**

Marshall Steinbaum - Assistant Professor of Economics, University of Utah. Maurice E. Stucke - Douglas A. Blaze Distinguished Professor of Law, University of Tennessee College of Law. “THE EFFECTIVE COMPETITION STANDARD: A New Standard for Antitrust” – Sept - #E&F - https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Effective-Competition-Standard-201809.pdf

**Executive Summary**

The economy faces a market power crisis. Rampant consolidation and vertical integration leave consumers, workers, suppliers, and competitors powerless and disadvantaged. In highly consolidated markets, consumers have limited choice and little power to pick their price, quality, or provider for the goods and services they need. Workers are met with massive employers and have little agency to shop around for competitive wages and benefits. Suppliers can’t reach the market without paying powerful intermediaries for the privilege or succumbing to acquisition.

This market power imbalance is due, in large part, to lax antitrust law and enforcement. The Federal Trade

Commission and Department of Justice are intended to monitor and prevent monopolies with market power from forming “in their incipiency.” But of late, they have failed. This is due to the consumer welfare standard, which identifies and judges harm to competition only by its potential effect on consumers—and rarely with respect to anything other than prices. The consumer welfare standard fails to define “welfare” and ignores adverse effects on workers, suppliers, quality, and innovation. It is not only ambiguous, but it is also inadequate to the task of preserving competition throughout the supply chain, in the labor market, and in the economy as a whole.

This trend is reversible. It is imperative that the consumer welfare standard be replaced, and in this paper, we present an alternative: the effective competition standard. This framework restores the primary aim of antitrust laws, namely to protect competition wherever in the economy it has been compromised, including throughout supply chains and in the labor market. The new standard we propose articulates several essential goals: 1) to protect individuals, purchasers, consumers, and producers; 2) to preserve opportunities for competitors; 3) to promote individual autonomy and well-being; and 4) to disperse and de-concentrate private power.

Concretely, we call for amendments to Sections 1 and 2 of the Sherman Act and Sections 2 and 7 of the Clayton Act in order to prioritize enforcement against vertical integration and to create bright-line indicators for anticompetitive behavior. These measures are essential to track and understand how best to halt and reverse the economy’s market power crisis.

Most importantly, we must keep in mind that the consumer welfare standard that has predominated for the past 40 years is not statutory. As such, it can be easily lifted; nothing prevents courts and the federal antitrust agencies from enforcing the federal antitrust laws as Congress intended them. On the other hand, if the agencies and courts won’t fix the economy’s market power problem**, Congress must**. What has been lacking in the past is an alternative way forward, now clearly laid out in the pages below. The changes we call for are essential to protect our competitive markets, as well as individuals and the economy at large. To stop harmful market consolidation, the antitrust rules must be updated and strongly enforced.

**Their authors outline the viability of the CP. In doing so, they outline four solvency deficits – two of which are solved by fiat (purple) AND two of which beg the question of rollback (yellow and blue)**

Marshall **Steinbaum &** Maurice E. **Stucke 19**. Assistant Professor of Economics, University of Utah. Douglas A. Blaze Distinguished Professor of Law, University of Tennessee College of Law. “The Effective Competition Standard: A New Standard for Antitrust.” <https://marshallsteinbaum.org/assets/steinbaum-and-stucke-2020-effective-competition-standard-uchicago-law-review-.pdf>.

IV. What **Needs to Happen** to Implement the Effective Competition Standard into Federal Antitrust Policy?

The existing consumer welfare standard is not statutory. It represents the industrial policy favoring consolidation and vertical integration promoted by the Chicago, post-Chicago, and Harvard School adherents. Given the mounting evidence that the consumer welfare standard has failed to protect competition and consumers, as well as the standard's operational difficulties, the standard should be scrapped.

Thus, we can rectify the market power problem through five different avenues:

• First, courts and agencies, **without any legislative action**, can enforce the federal antitrust laws **as Congress intended them**. Nothing prevents them from actually doing this. The effective competition standard, **while new**, is actually consistent with the legislative aim of the Sherman and Clayton Acts.

• Second, the FTC can use its authority under the FTC Act,81 as Congress intended, to reach these anticompetitive **practices and mergers** through rulemaking.82

• Third, Congress could amend the Sherman and Clayton Acts to clearly prescribe the effective competition standard and delineate legal presumptions for common anticompetitive restraints to effectuate the standard.

• Fourth, Congress could enact a new civil antitrust statute and also delegate power to the FTC to make regulations for specific per se illegal rules and presumptions under the new standard.

• Finally, Congress could choose not to pass the effective competition legal standard itself but instead pass other specific measures that would effectuate the standard (as outlined above in Part III).

The first two options are possible. The FTC Act is intended to broaden the agency's mandate beyond the Clayton and Sherman Acts. **But** the composition of the federal judiciary, the time and expense to undo the damage caused by the Supreme Court's excursions in economic theory, the disincentives of the antitrust agencies to undertake this change, and the continuing harm to the public in the interim all call for legislative action. Given the failure of the more elitist branches of government to protect competition, it is appropriate for the democratically accountable branch to step in.

#### 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.

#### Cplan is better for legal and business predictability

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

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

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of even the most capable institutional actors.1 Generalist judges struggle to identify anticompetitive behavior2 and to apply complex economic criteria in consistent ways.3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.4 And if a standard isn’t administrable, it won’t yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions.5 Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.6

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

#### And, their args don’t assume the 1NC distinctions in our CP Text. Our planks about *policy statements* and *data sets* mean CP avoids politics and rollback.

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

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/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. More Transparency, Including Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful barrier to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of complete data sets that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, the Commission strengthened external perceptions (within the business community and within Congress) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban unfair methods of competition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, the FTC’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use section 5 of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. By issuing a policy statement before commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely increase confidence within industry and within Congress that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

#### Aff Rollback args don’t assume the FTC’s recent recission of 2015 guidance *OR* our Cplan plank that sets a clear interpretation.

Salop ‘21

et al; Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center “A New Section 5 Policy Statement Can Help the FTC Defend Competition” – Public Knowledge – July 19th - #E&F - https://publicknowledge.medium.com/a-new-section-5-policy-statement-can-help-the-ftc-defend-competition-a76451eacb39

We generally agree with the Federal Trade Commission’s decision to rescind its 2015 Section 5 Policy Statement. Just as the Department of Justice and Federal Trade Commission Merger Guidelines are regularly updated on the basis of agency experience, legal and economic developments, so should this type of policy statement. Rescinding the old statement is particularly relevant in light of the growing recognition of the hurdles preventing effective antitrust enforcement.

Calls for reform have not come solely from Neo-Brandeisian commentators (including both FTC Chair, Lina Khan, and Tim Wu, now a member of the National Economic Council). The need for reform and a varied set of proposals has also been expressed by economics-oriented commentators, including this group of former Justice Department enforcers, Jonathan Baker and Herbert Hovenkamp, among others. Chair Khan in her statement suggested that the Commission would next consider replacing the Policy Statement with a new statement explaining how they plan to use Section 5 to increase competition. We think this would be a valuable way to show parties and courts what is coming. This article provides several suggestions that would be useful to consider and possibly include in the revised Section 5 Policy Statement. It should not be taken as an exhaustive list; there certainly may be other approaches to a revised statement that could also be effective.

A revised Policy Statement should make it clear that Section 5 is not identical to the Sherman and Clayton Act and that conduct can be challenged as an unfair method of competition under Section 5 even if it would not violate these other antitrust laws. In fact, even the original 2015 Policy Statement explicitly made this point. But the distinction between Section 5 and these other statutes is often ignored or suppressed by commentators who object to more vigorous antitrust enforcement by the FTC. Eventually, the FTC’s cases and rules under Section 5 will likely face the scrutiny of the courts. At that time, it may be particularly helpful to have a clear Policy Statement of how the FTC is interpreting Section 5. This can help maximize the impact the FTC can have, while assuaging concerns of detractors who say there is no limiting principle.

#### Our *Guidance distinction* means no rollback

* Agencies can issue *“Guidance”* (and enforce) – or they can create *“Rulemaking”* – both have legal force, but the latter tends to encounter more judicial review/resistance.

Raso ‘10

CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

5. Judicial Challenge

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use guidance documents more frequently relative to legislative rules. Guidance documents are advantageous because they are less likely to be challenged. Even if challenged, agencies have a reasonable probability of winning on ripeness or finality grounds.

#### Prefer SCOTUS *precedent* AND *empirics dipped from when the Court’s ideology was most aligned with the Chicago School*.

Dagen ‘10

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

The FTC enforces Section 5, which makes unlawful “unfair methods of competition.”118 In FTC v. Sperry & Hutchinson Co., the Supreme Court held that Section 5 “empower[s] the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws.”119 Many believe that the interpretation of Section 5 as broader than the Sherman Act is a remnant of a bygone era. But even during the Chicago School era, the Supreme Court reaffirmed its understanding that Section 2 and Section 5 differed. For example, in Copperweld Corp. v. Independence Tube Corp., while attempting to limit the reach of the Sherman Act, the Reagan antitrust team, led by Assistant Attorney General William Baxter, and FTC Chairman James Miller, submitted an amicus brief highlighting that “[t]he courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act.”120 The Court thereafter explained that single firm conduct was governed not only by Section 2 but also by Section 5.121 In 1986, the Court more specifically and directly referenced the “spirit” of Section 5, stating that Section 5 “encompass[es] not only practices that violate the Sherman Act and other antitrust laws, . . . but also practices that the Commission determines are against public policy for other reasons.”122

#### Rollback assumes Core Antitrust *at present* – it’s less likely precisely because the Aff *expands beyond* current core understandings.

Dagen ‘10

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

In Part III, I provide a more comprehensive analysis of Section 5. I begin with a general discussion of the breadth of Section 5 and then address the concern that using Section 5 to fill in gaps in the antitrust laws will cause mayhem. Although some maintain that the FTC should not use Section 5 because three different appellate courts chastised the FTC in the 1980s for trying to expand the antitrust laws, those defeats involved core competition practices that the courts protect the most. As the conduct moves away from either the core or the essential, authority under both the Sherman Act and the FTC Act is broader.

### A-to “Congress/POTUS = get mad/strip the agency”

#### This is uber empirically false

Our 1NC Khan ev is from the FTC Chair – who EXPLICITLY SAID she intends to be more aggressive with Section 5. There’s been no agency stripping or political retal.

#### AND - Clear standards solve

Salop ‘21

et al; Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center “A New Section 5 Policy Statement Can Help the FTC Defend Competition” – Public Knowledge – July 19th - #E&F - https://publicknowledge.medium.com/a-new-section-5-policy-statement-can-help-the-ftc-defend-competition-a76451eacb39

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## Independence NB

#### [ ] 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 causes 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.

#### 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))

## Inequality ADV

## Dem Adv

#### Democracy resilient – overwhelming public backing supports gains

Wollack 16 ---- Kenneth, president of the National Democratic Institute, former co-editor of the Middle East Policy Survey, former senior fellow at UCLA’s School for Public Affairs, “How Resilient is Democracy?” This text is the transcript from an interview with Alexander Heffner, PBS – The Open Mind, 10/15, <http://www.thirteen.org/openmind/government/how-resilient-is-democracy/5553/>

Well I think we’re seeing a number of phenomena that take place. Um, first of all you have new democracies around the world, that are struggling to deliver for its people. New institutions, political institutions that for the first time have legitimacy among the people, but in order to succeed and sustain their democratic system, they have to deliver on quality of life issues for, for the entire population. And if those institutions don’t deliver in many of these new democracies that have emerged over the last forty years, uh, then you’re gonna see backsliding and people will either go to the streets or vote for a populist demagogue who promises to bring sort of instant solutions to their problems. And then in non-democratic countries, you have what is called authoritarian learning, and that is autocrats today that are smarter than they were before, uh, that are fearful of diffusion of political power, uh, fearful of losing power themselves. Um, and they are using uh, traditional means and new legal means in which to repress the population, prevent the emergence of civil society, and not to speak of opposition political parties. And then you have a situation that you see in a number of countries in the Middle East where you have a sectarian strife and conflict. Uh, but in all of these situations, what you find is democratic resilience. That people around the world basically want the same thing. They want to put food on their table, uh, they want to have jobs and shelter and they want a political voice. And that, those aspirations and those hopes, uh, and those desires as I said are universal, and if you look at public opinion polls around the world, uh, people do want to have democratic systems that allow them to participate in the political life of their country. And that is, we are in the optimism business, and we believe in people and I think that ultimately those efforts, um, will, will succeed. But they need a lot of support, they need backing, um, uh, in order for uh, some very brave and courageous people to, to move the democratic for—uh, process forward in some of the most unlikely places in the world.

# 1NR

## Innovation

#### Even the perception of US losing the tech race causes US-China war

Johnson 19 --- James Johnson, James Martin Center for Nonproliferation Studies, Middlebury Institute of International Studies, Monterey, CA, “The end of military-techno Pax Americana? Washington’s strategic responses to Chinese AI-enabled military technology”, Oct 2019, https://www.tandfonline.com/doi/full/10.1080/09512748.2019.1676299?casa\_token=BpNhD9rHAxsAAAAA%3A5zlnsL3OxSNCnNLovOWFKtc-GqpJGmT1PAxLFrbM6NtNgrU9w2hSAls5Xf7jC3Ncj9anK1uplr4#

As the literature on the diffusion of military technology demonstrates: how states react to and assimilate innovations can have profound implications for strategic stability, and in turn, the likelihood of war (Koblentz, 2014). Specifically, the pace military actors diffuse technology can influence the relative advantages derived by states from being the first-mover, which tends to be reversely correlated to the speed innovations are adopted (Singer, 2009). As the costs and availability of computing power (an essential ingredient for AI machine learning systems) decrease, therefore, so technically advanced military powers will likely pull away from those actors who are more (or entirely) reliant on mimicry and espionage (Gilli & Gilli, 2019, pp. 141–189). Moreover, this trend will likely be compounded if either the cost or complexity of AI algorithms increases; allowing AI first-movers to maximize their competitive advantages (Hof, 2013).

Despite the growing sense the proliferation AI technologies driven by powerful commercial forces, will inevitably accompany (and even accelerate) the shift towards multipolarity, important caveats need to accompany prognostications about the pace and nature of this transformation: the risks associated with the proliferation and diffusion of dual-use AI technologies across multiple sectors and expanding knowledge-bases is a very different prospect compared to arms-racing between great power military rivals. Thus, the development of military AI applications based on military-centric R&D would make it much more difficult and costly for smaller (and especially less technically advanced) states to successfully emulate and assimilate (Brooks, 2006; Caverley, 2007, pp. 598–614).

Moreover, military organization, norms, and strategic cultural interests and traditions will also effect how AI systems are integrated into militaries, potentially altering the balance of military power (Johnston, 1995, pp. 65–93; Kier, 1995, pp. 65-93). In short, military technologies in isolation will unlikely alter how militaries prepare for warfare, deter and coerce their adversaries, and fight wars. Instead, the interplay of technology and military power will continue to be a complex outcome of human cognition, institutions, strategic cultures, judgment, and politics (Biddle, 2006).

Exponential advances in the complexity of weapon systems have raised the technical know-how (or so-called ‘tacit knowledge’) barriers for militaries to imitate and diffuse these capabilities (Hamburger, Miskimens, & Truver, 2011, pp. 41–50). In particular, the development of autonomous weapons systems where the platform is required to both operate in cluttered and multi-domain contested environments (i.e. anti-access/area-denial zones), and interact with humans ergonomically, physiologically, and cognitively (Office of the Secretary of Defense, U.S. Department of Defense, 2012, pp. 46–49). Consequently, special-purpose AI applications that do not have clear commercial drivers or utility, or that require military-grade software development and assimilation (i.e. for classified use), the first-mover advantages of these capabilities will likely be substantial, and potentially unassailable. Moreover, the successful development and deployment of advanced weapon systems requires in-depth knowledge of an adversary’s military doctrine, counter capabilities, tactical options, intentions, and combat environments these capabilities will likely be exposed to (Gholz, 2007, pp. 615-636). Recent studies suggest AI machine learning techniques cannot compensate for human knowledge, innovation, and intuition; only complement them (Daugherty & Wilson, 2018, p. 76).

Despite the substantial benefits China has derived from a combination of globalization, acquisition of foreign high-tech companies and technology, massive foreign direct investments inflows, and active cyber espionage, it has struggled to close the military-technological gap with the U.S. (and Russia) and achieve new forms of conventional deterrence, in several fields including (Zhang, 2015, pp. 210–212): stealth and submarine technology, fifth-generation jet fighters, precision targeting, and missile defense, GPS, satellite imagery (for data-collection and surveillance), and AI machine-learning. Thus, computer-assisted design, engineering, and manufacturing have not compensated for the difficulties of mastering new technologies, necessary to design modern weapon systems.

The pace of military-use AI diffusion to smaller-medium powers (and nonstate actors) could also be constrained by three pivotal features of this emerging phenomenon: (1) hardware constraints (e.g. physical processors), and integrating increasingly complex software and hardware with internal correctness; (2) the algorithmic complexity inherent to AI machine learning approaches; and (3) the resources and know-how to effectively deploy AI code (Ayoub & Payne, 2016, p. 809; Tomayko, 2000). These features mean that military organizations will need to invest vast amounts of capital and resources in a broad range of disciplines (i.e. psychology, cognitive science, communication, human-computer interaction, computer-supporter workgroups, and sociology) gaining experience through trial and error; to fuse AI with advanced weapon systems such as, autonomous vehicles, hypersonic weapons, and missile defense systems (Office of the Secretary of Defense, U.S. Department of Defense, 2012, pp. 46–49). In sum, states will find it very difficult to develop and deploy military-use AI applications from technology derived from general ancillary dual-use applications alone.

As a corollary, the advantages China derives from its commercial lead in the adoption of AI and dataset ecosystem will not necessarily be easily directly translated into special-purpose military AI applications (Castro et al., 2019). China’s strengths in commercial-use AI (e.g. 5G networks, e-commerce, e-finance, facial recognition, and various consumer and mobile payment applications) will, therefore, need to be combined with specialized R&D and dedicated hardware; to unlock their potential dual-use military applications and augment advanced weapon systems.

Absent the requisite level of resources, know-how, datasets, and technological infrastructure, therefore, these constraints could make it very difficult for a new entrant to develop and deploy modular AI with the same speed, power, and force as the U.S. or China (Gray, 2015, pp. 1–6). For example, China and the United States are in close competition to develop the supercomputers needed to collect, process, and disseminate the vast amounts of data that traditional computers can handle. While the United States possesses more powerful systems, China trumps the U.S. in terms of the number of supercomputers. Thus, military-led innovations could potentially concentrate and consolidate leadership in this nascent field amongst current military superpowers (i.e. China, the U.S., and to a lesser extent Russia), and revive the prospect of bipolar competition (Bostrom, 2014). For now, it remains unclear how specific AI applications might influence military power, or whether, and in what form these innovations will translate into operational concepts and doctrine (Cummings, 2017).

In sum, the degree to which AI alters the military balance of power, and in turn, how its effects nuclear stability, will depend on large part the speed of the diffusion this technology; as a functions of human innovation, political agendas, and strategic calculation and judgment, against the backdrop of a multipolar world (and nuclear) order, and heuristic decision making (or the propensity for compensatory cognitive short-cuts) associated with decisions taken under compressed timeframes in uncertain and complex environments (Beverchen, 2007, pp. 45–56).

Conclusion

This article has made the following central arguments. First, while disagreement exists on the likely pace, trajectory, and scope of AI defense innovations, a consensus is building within the U.S. defense community intimating that the potential impact of AI-related technology on the future distribution of power and the military balance will likely be transformational, if not revolutionary. These assessments have in large part been framed in the context of the perceived challenges posed by revisionist and dissatisfied great military powers (i.e. China and Russia) to the current U.S.-led international order – rules, norms, governing institutions – and military-technological hegemony. Today, the United States has an unassailable first-mover advantage in a range of AI applications with direct (and in some cases singular) relevance in a military context.

Second, the rapid proliferation of AI-related military-technology exists concomitant with a growing sense that the United States has dropped the ball in the development of these disruptive technologies. Even the perception that America’s first-mover advantage in a range of dual-use enabling strategic technologies (i.e. semiconductors, 5G networks, and IoT’s) was at risk from rising (especially nuclear-armed) military powers such as China, the implications for international security and strategic stability could be severe. In response to a growing sense of alacrity within the U.S. defense community cognizant of this prospect, the Pentagon has authored several AI-related programs and initiatives designed to protect U.S. dominance on the future digitized battlefield (e.g. the Third Offset, Project Maven, the JAIC, and the DoD’s debut AI strategy). Further, broader U.S. national security concerns relating to Chinese efforts to catch up (and even surpass) the U.S. in several critical AI-related enabling technologies, has prompted Washington to take increasingly wide-ranging and draconian steps to counter this perceived national security threat.

Third, and related, in the development of AI evocations of the Cold War-era space race does not accurately capture the nature of the evolving global AI phenomena. Instead, compared to the bipolar features of the U.S.-Soviet struggle, this innovation arms race intimates more multipolar characteristics. Above all, the dual-use and commercial drivers of the advances in AI-related technology will likely narrow the technological gap separating great military powers (chiefly the U.S. and China) and other technically advanced small-medium powers. These rising powers will become critical influencers in shaping future security, economics, and global norms in dual-use AI.

In the case of military-use AI applications, however, several coalescing features of this emerging phenomena (i.e. hardware constraints, machine-learning algorithmic complexity, and the resources and know-how to deploy military-centric AI code), will likely constrain the proliferation and diffusion of AI with militaries’ advanced weapon systems for the foreseeable future. In turn, these constraints could further concentrate and consolidate the leadership in the development of these critical technological enablers amongst the current AI military superpowers (i.e. China and the United States), which could cement a bipolar balance of power and the prospect of resurgent bi-polar strategic competition.

Today, the United States has an unassailable first mover advantage in a range of AI applications with direct (and in some cases singular) relevance in a military context. However, as China approaches parity, and possibly surpasses the U.S. in several AI-related (and dual-use) domains, so the U.S. will increasingly view future technological incremental progress in emerging technologies – and especially unexpected technological breakthroughs or surprises – through a national security lens. Thus, responses to these perceived threats will be shaped and informed by broader U.S.-China geopolitical tensions (Waltz, 1979). These concerns resonated in the 2018 U.S. Nuclear Posture Review (NPR). The NPR emphasized that the coalescence of geopolitical tensions and emerging technology in the nuclear domain, in particular, how unanticipated technological breakthroughs in ‘new and existing innovations,’ might change the nature of the threats faced by the United States and the ‘capabilities needed to counter them.’ (NPR, 2018, p.14). In sum, against the backdrop of U.S.-China geopolitical tensions, and irrespective of whether China’s dual-use applications can be imminently converted into deployable military-use AI, U.S. perceptions of this possibility will be enough to justify draconian countermeasures.

#### Nothing will pass

**Adam 7/30** --- Kevin C. Adam et al, Litigation associate “Technology Industry Should Watch Closely as the Executive Branch and Lawmakers Set Their Sights on Antitrust”, White & Case, Jul 30th 2021, https://www.whitecase.com/publications/alert/technology-industry-should-watch-closely-executive-branch-and-lawmakers-set

While the proposed bills have made considerable progress in short order, they **still have a long way to go.** To advance through the legislative process, it is likely that significant changes to the bills will be necessary to garner bipartisan support.

Despite the bipartisan interest, **Democrats and Republicans disagree on many of the key proposals.** There is a growing divide within the Republican party about whether the legislation goes too far in some places and not far enough in others. Detractors are arguing that the bills would undermine innovation, block mergers and acquisitions that are otherwise procompetitive and beneficial for consumers, and place too much power in the hands of government without addressing the specific competition concerns underlying the calls for this legislation in the first place.10 Relatedly, on July 7, 2021, the House Judiciary Committee Republicans, led by Ranking Member Jim Jordan (R-OH), announced their own version of a "Big Tech" regulation agenda, advancing a number of new proposals designed to speed up and strengthen antitrust enforcement while at the same time addressing concerns about censorship of conservative views.11

Despite this uncertainty, there is little doubt that calls for changes to existing antitrust laws are the loudest they have been in decades. We have already begun to see movement from the Agencies in implementing the directives and recommendations in the Executive Order, and we may see more movement well before we see new law—but the effects may be similar due to the overlapping nature of the concerns being addressed and philosophies on how to address those concerns.

That said, aggressive proposals like these five bills and many of the Executive Order’s initiatives, which could upend decades of established antitrust law and possibly discourage or outright block important innovation in the tech industry, must be analyzed closely and should not be rushed. White & Case's Global Competition/Antitrust Group and Technology Industry Group are tracking these developments closely.

**Innovation surging --- but expanding the scope of antitrust law emboldens regulators --- causes a chilling effect on innovation**

**Brough 21** --- Wayne Brough, Policy Director, Technology & Innovation, PhD in economics from George Mason University, “Washington wants to weaponize antitrust law to attack “Big Tech” and it is going to backfire horribly”, JUN 15, 2021, https://www.rstreet.org/2021/06/15/washington-wants-to-weaponize-antitrust-law-to-attack-big-tech-and-it-is-going-to-backfire-horribly/

Just as concerning, “The Platform Competition and Opportunity Act” targets mergers and acquisitions by covered platforms, flipping the burden of proof by requiring the acquiring firm to demonstrate that the merger does not eliminate any competitors or potential competitors. While the goal of the legislation may be to prevent platforms from absorbing potential rivals, this view ignores the fact that smaller startups often **want to be acquired** by their larger counterparts. An acquisition is a way to cash out without having to build out business and marketing strategies, among other things, which some startups may prefer not to do. Limiting opportunities for an acquisition will make it more difficult to attract the venture capital that fuels the startup ecosystem, ultimately **harming innovation and economic growth.** In fact, **right now,** venture capital firms have been “raising new funds at a pace” that could **set a record this year,** and many go-to digital products including Uber, Lyft and Airbnb **received venture capital injections**. Similar investments might be **less likely under these bills and** even **more problematic for smaller startups.**

Additionally, the Access Act would impose broad **data portability and interoperability mandates**, while “The Merger Filing Fee and Modernization Act of 2021” would increase filing fees for larger mergers as well as boost funding levels for both the DOJ and the FTC. These bills would expand federal oversight and give the FTC **a more prominent role** in rewiring the internet.

The bills introduced in the House **are an assault on** digital commerce, one of the bright spots in **the U.S. economy**. At best, these new laws are **a direct threat to** permissionless **innovation**, with the approval of federal regulators becoming a **prominent roadblock when trying to do business** in a dynamic and rapidly changing marketplace. At worst, this would turn covered platforms into little more than public utilities—platforms for others to do business. Any efforts to utilize economies of scale or scope may trigger **enforcement actions**, giving platform operators **fewer incentives to invest** in new technologies **that drive innovation.**

At the broadest level, these bills are **an attempt to abandon the consumer welfare standard** in favor of a more interventionist approach along the lines of antitrust practices in the EU. Rather than focusing on demonstrable harms to consumers, this altered enforcement would aggressively define and shape markets, with an eye toward protecting competitors, often at the expense of consumers. For example, Adam Kovacevich at the Chamber of Progress finds that the new laws would prohibit cross-posting between Facebook and Instagram, ban Apple from recommending apps in the AppStore and a host of other activities that are a common part of a user’s online experience. In fact, the AppStore itself may not survive if these bills become law. Good luck finding and updating your favorite apps—and ensuring they work with friends and family—if it disappears.

Solutions in Search of a Problem

As with many other regulatory incursions into the digital world, **the renewed push for tougher antitrust laws is a solution in search of a problem**. Both Republican and Democratic criticisms of Big Tech raise a litany of issues—from an anti-conservative bias to fake news and hate speech—none of which fall within the purview of antitrust law and anticompetitive behavior. Instead, the new regulatory regime under consideration is a punitive and political attack on politically disfavored corporations. Ultimately, that is the larger battle—abandoning the consumer welfare standard and its focus on demonstrable consumer harm in favor of a politicized regime that allows those in Congress **greater control over private companies.**

And while tech companies may be the exclusive focus of the current reforms, the scope of the proposed legislation could easily be expanded by a future Congress. Even today, many lawmakers are openly hostile toward a growing list of American businesses. Republicans have been vocal in calling for retaliatory measures against “woke” corporations deemed too progressive in their public stances. If policymakers continue to abandon economic principles, it would not be surprising to see calls for additional antitrust enforcement for any company that makes political waves.

Prior to the adoption of the consumer welfare standard almost 50 years ago, antitrust law was often confusing, economically suspect and even contradictory. In one notorious case, the Supreme Court blocked a merger where the merged company would have had a market share of merely 7.5 percent—hardly an example of market dominance. And economists examining antitrust enforcement prior to the consumer welfare standard found no correlation between antitrust enforcement and a reduction in the welfare losses from monopoly. Further research found congressional influence to be a better predictor of enforcement activity.

The consumer welfare standard helped rationalize antitrust enforcement and the case law that has emerged since its adoption has helped curb the political abuse of antitrust policies. Abandoning the need to identify demonstrable consumer harm would return antitrust law to an era characterized by arbitrary enforcement actions that many in today’s Congress seem to have forgotten. But the increased political oversight that comes with adopting more aggressive tools for antitrust enforcement poses a real threat to consumers, to innovation and to economic growth.

Abandoning the American Way in Favor of a European One

The bills introduced in the House can be interpreted as a turn toward a European approach to competition policy. Last year, the EU passed the Digital Markets Act, and the House proposals sound **eerily similar.** The EU started by defining “gatekeepers,” something similar to the “covered platforms” in the House bills. Restrictions on self-preferencing, interoperability requirements and other elements introduced in the House all have direct counterparts in the EU’s law.

The EU adopted its laws with a clear target in mind—American tech companies that were dominating markets in Europe and outperforming their European rivals. Politically, it made sense to rewrite the rules of the game in favor of homegrown talent. Among other things, this meant the EU could collect billion-dollar fines from American companies, all in the name of “fair competition.”

But the **performance of European companies** is probably **the best reason** not to follow the EU’s lead in redefining how we regulate competition. By virtually **every measure,** U.S. companies have been **more innovative, more dynamic and more profitable** than their European counterparts. There are more start-ups in the United States and they have **greater access to capital**. While the United States and the EU have economies of similar magnitudes, in 2019, U.S. startups had a valuation of $1.37 trillion compared to EU startups with an evaluation of $240 billion.

The rise of Silicon Valley is an American success story. Today the top five companies in the United States based on market capitalization are tech companies. They have led the digital revolution, providing consumers a virtually endless stream of new products at low or even zero cost in many cases. These are signs of a robust market that serves consumers well. **It is important to remember that big does not equate to bad**—sometimes a firm is large because it is **efficient at serving its customers** what they want. The tech sector supports 12 million jobs and more than $2 trillion in economic output. Current antitrust laws grounded in the consumer welfare standard are part of the institutional framework that make this possible. Congress should ensure antitrust laws fit **best into the modern U.S. economy,** but the House proposals are a radical departure that shifts the focus to protecting competitors rather than consumers. **They would weaponize antitrust law**, provide politicians a greater say in America’s boardrooms and replace economic efficiency with political expediency and preference.

#### Moving away from the CWS crushes innovation --- lets China set global tech norms

**Springboard 21** --- Springboard provides data, insights, and perspectives on the benefits that competition among leading tech services delivers for consumers, businesses, and communities -- advancing ideas that keep tech empowering people, “Setting The Record Straight: The Consumer Welfare Standard Powers U.S. Tech Leadership” Jan 28th 2021, https://springboardccia.com/2021/01/28/setting-the-record-straight-the-consumer-welfare-standard-powers-u-s-tech-leadership/

Yesterday’s Public Knowledge event calling to undercut the consumer welfare standard and to shift standards governing mergers and acquisitions (M&A) does not acknowledge the **damage** such an approach would have on U**.S. leadership in global tech**. In fact, the U.S. tech sector **sets an example for the rest of the world in competition and innovation** thanks to the **long-standing, pro-consumer antitrust and competition laws.** For the U.S. to continue as a global tech leader, and for consumers and small businesses to continue as the major beneficiaries of tech innovation, **policymakers should keep in mind:**

— The U.S. is home to **the most innovative companies,** and provides the **best regulatory and cultural environment for t**he **next gen**eration of **innovators**.

— **The consumer welfare standard should continue to be upheld as the beacon of antitrust laws** in the U.S. because it is objective, pro-innovation, and pro-consumer.

— Shifting the burden of proof in antitrust and M&A cases **distorts the innovation economy.**

The U.S. is home to **the most innovative companies**, and provides the best regulatory and cultural environment for the next generation of innovators.

BCG’s Most Innovative Companies 2020 rankings shows that American companies comprise 14 of the top 20 companies and half of the top 50. “Overall, U.S. companies represent 25 of the top 50 companies (50%). Only 14 of the top 50 companies (28%) are European-based, and they enter the ranks at 21. None of these [European] companies fall within what generally is considered the tech sector, but rather represent industries such as automobile manufacturing, retail, pharmaceuticals, and consumer goods.”

The U.S. is home to nearly half of the world’s “unicorn” firms, proving that the next generation of innovators value the tech climate in the U.S. Jan Rybnicek, Senior Fellow at the Global Antitrust Institute: “This data shows that entrepreneurs seek to innovate and grow their businesses in the United States more so than in any other country further, **further supporting the notion that the United States has fostered a superior climate for innovation** than has Europe—one in which innovators and entrepreneurs can attain the funding they need to grow and have ample opportunity [to] vigorously compete against old and new rivals.”

**American venture capital investing has grown by nearly 400%**, with deals rising by 140% in the last 10 years, long leading Europe. Jan Rybnicek, Senior Fellow at the Global Antitrust Institute: “The disparity between the United States and European venture capital markets is one reason why the U.S. has consistently been home to the most innovative companies and technological development. But it also is evidence that investors view the United States as a better place to invest, in part because of its more favorable innovation climate.”

The U.S. leads the rest of the world in research & development spending, a key indicator of dynamic competition and innovation. “Among individual countries, the United States was the largest R&D performer in 2017, followed by China, whose R&D spending now exceeds that of the EU. Together, the United States (25%) and China (23%) accounted for nearly half of the estimated global R&D total in 2017.”

**The consumer welfare standard should continue to be upheld as the beacon of antitrust laws** in the U.S. because it is objective, pro-innovation, and pro-consumer.

The consumer welfare standard gives antitrust enforcers a **clear mission, immune from political weaponization**. Joshua D. Wright and Aurelien Portuese, antitrust experts: “The adoption of the consumer welfare standard gave antitrust enforcers a coherent mission: protect the benefits of the competitive process by preventing activities likely to raise market prices, lower market output, or otherwise harm competition. When antitrust focuses upon socio-political goals**, it detracts from this mission**, likely **slowing economic growth and depriving consumers of goods and services.”**

Moving away from an innovation-based consumer welfare standard **puts U.S. tech leadership at risk,** enabling “**regulatory imperialism” and bad-actor nations.** Robert D. Atkinson, President of the Information Technology and Innovation Foundation: “In this scenario, the United States either by commission or omission allows the EU model of digital governance to prevail in most parts of the world, **other than China and digital bad-actor nations**. By commission, the United States would support the right of the EU to enact **stifling regulations** and encourage companies around the world to adopt them, **so they become the de facto rules.** By omission, the United States does little to actively work with other nations to educate and pressure them to adopt the U.S. innovation-based model of digital regulation. Either way, **the United States is isolated, and its firms face a global digital economy—one that isn’t based on open, rules-based competition and innovation,** but rather on who can best manage multiple conflicting compliance regimes.”

The consumer welfare standard enables antitrust regulators to **effectively promote innovation** in the technology industry. Joe Kennedy, Senior Fellow at the Information Technology and Innovation Foundation: “[Consumer welfare standard] allows regulators to focus on the long-term trajectory of value and price, and take innovation effects directly into consideration. As UC Berkeley professor Carl Shapiro points out, the consumer welfare standard defines welfare broadly and encompasses nonprice aspects such as improved product variety and more rapid innovation. This is also clear from the merger guidelines themselves, which explain that potential effects are put in terms of price changes ‘[f]or simplicity of exposition,’ and that non price terms and conditions that adversely affect customers also matter, including ‘reduced product quality, reduced product variety, reduced service, or diminished innovation.'”

The claims that consumers are better off with higher prices and more competitors **are not grounded in evidence.** Herbert J. Hovenkamp, Professor of the University of Pennsylvania Law School: “To date, the strongest and most central claim of the neo-Brandeis movement remains **untested**; that is its assumption that individuals in our society would really be better off in a world characterized by **higher prices but smaller firms**. Everyone in society is a consumer and consumers vote mainly with their purchasing choices. The neo-Brandeisians still face the formidable task of providing evidence that most citizens believe they would be better off in a world of higher cost smaller firms selling at higher prices, their market behavior notwithstanding.”

Shifting the burden of proof in antitrust and M&A cases distorts the innovation economy.

Digital platforms only account for 0.06 percent of M&A activities worldwide since 1998. “According to the Institute for Mergers, Acquisitions, and Alliances, there have been 894,669 worldwide acquisitions since 1998, an average of 40,667 annually, which means the four digital platforms accounted for .06 percent of total acquisitions.”

Imposing a burden of proof on antitrust defendants would risk **increasing false-positives, impeding innovation**. Geoffrey A. Manne, President of the International Center for Law & Economics: “The combination of the anti-market bias in favor of monopoly explanations for innovative conduct that courts, enforcers, and economists do not understand, the unwarranted fear of new technologies leading to ‘technopanics,’ and the increased, economy-wide stakes of antitrust intervention against innovative technologies and business practices, increases both the likelihood that antitrust errors surrounding digital markets will be Type I, false-positive errors, as well as increasing their cost.”

Misguided proposals to change antitrust presumptions **undermines the pro-consumer focus of antitrust laws and burdens the innovative players**. Ben Sperry, Associate Director of the International Center for Law & Economics: “The HJC report’s recommendations on changing antitrust presumptions should be rejected. The harms will be felt not only by antitrust defendants, who will be much more likely to lose regardless of whether they have violated the law, but by consumers whose welfare is no longer the focus. The result is inconsistent with the American tradition that presumes innocence and the ability of people to dispose of their property as they see fit.”

# 2NR

#### The CP 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 **F**ederal **T**rade **C**ommission 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 A**ct, 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.

#### Section 5 has teeth. It effectively enforces without wave one damages.

**Melamed ‘16**

A. Douglas Melamed - Professor of the Practice of Law, Stanford Law School – “PREPARED STATEMENT For the SENATE COMMITTEE ON THE JUDICIARY SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS on SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT” - April 5, 2016 #E&F - <https://www.judiciary.senate.gov/imo/media/doc/04-05-16%20Melamed%20Testimony.pdf>

(2) Some have emphasized that **only the FTC** **can enforce Section 5** and that the only remedy for Section 5 is a “cease and desist” order issued by the FTC. Because there are no treble damages for Section 5 violations, it is suggested, there should be no fear that businesses will be unfairly punished for engaging in conduct that they did not understand to be unlawful or that businesses will be deterred from engaging in procompetitive conduct for fear of violating an ambiguous Section 5. Of course, if that were true, the prospect of standalone Section 5 enforcement would also not deter anticompetitive conduct.

There are two problems with this argument. First, the premise that remedies for violating Section 5 are inconsequential is incorrect. The FTC has for decades taken the position that its authority to issue “cease and desist” orders permits it to enter broad injunction orders that require parties to take a wide range of actions to rectify alleged harm and to ensure that they will not engage in the future in what the FTC regards as conduct similar to that alleged to have violated Section 5. Businesses sometimes find the prospect of such intrusive or sweeping restrictions on how they conduct their business to be far more worrisome than the prospect of treble damage liability.