# 1NC

### 1NC – Deadlock DA

#### Bedoya’s confirmation is likely, BUT opposition to the antitrust agenda threatens to indefinitely deadlock meatpacking enforcement – and everything else

Moran 1-6-22 (Max Moran, Research Director of the Personnel Team at the Revolving Door Project, studied International Relations and Journalism at Brandeis University, “Merrick Garland Is Undermining the Biden Antitrust Strategy,” The American Prospect, 1-6-2022, https://prospect.org/justice/merrick-garland-is-undermining-biden-antitrust-strategy/)

The Biden administration is threatening new anti-monopoly enforcement actions against the Big Four meatpacking companies, in part to counter inflation at the grocery store and in part to address decades of exploitation of small farmers. On Monday, the president dispatched Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to hear grievances from small ranchers, while the White House builds a new web portal to gather complaints. While the White House’s proposals for funding small meat processors to increase competition are rather unsatisfying, the enforcement piece could have a real impact.

This initiative has caused the usual grumbling from neoliberal economists, and the usual corrections to the usual grumbling. But no one has yet explained how Biden plans to actually follow through on his threat—a problem for which Garland is partly to blame.

As The Information’s Josh Sisco reported on Tuesday, there are currently just two deputies trying to manage the entire DOJ Antitrust Division (ATR) alongside Assistant Attorney General Jonathan Kanter, who was confirmed only two months ago. ATR typically has at least 12 deputies and top advisers in the “front office” who oversee about 700 career staffers. And that was under past administrations, which didn’t have nearly as ambitious an antitrust agenda as Biden’s. Reversing four decades of Borkian antitrust sloth requires a cohesive and energetic senior leadership team.

Meanwhile, the Federal Trade Commission, the executive branch’s other main antitrust enforcer, remains in a 2-2 partisan deadlock, as Senate Republicans blockade Biden nominee Alvaro Bedoya from being confirmed as a commissioner. He has a path to 51 Senate votes, but arcane (and unnecessary) procedural hurdles have slowed the process to a crawl, hindering the other avenue to antitrust action.

Biden can only do so much to move Bedoya’s nomination. But in theory, nothing prevents him from hiring whomever Kanter personally trusts to help execute their shared agenda. The deputies at ATR are not Senate-confirmed positions. So what’s causing the chaos?

The problem isn’t procedural; it’s political. In addition to diversity concerns, Sisco reports that “ideological divisions” about anti-monopoly enforcement within the Biden administration are causing fights over any potential selection for the ATR deputies.

These divisions should be familiar to anyone who followed the initial fight over antitrust nominees during the Biden transition last year. While Biden himself seems sold on the benefits of a strong anti-monopoly agenda, Garland testified last year that he sees no problem with hiring big corporations’ preferred defense attorneys to oversee their former firms and clients. Garland and other anonymous voices floated a slew of names to run ATR throughout last year—anyone but Kanter, whom progressives favored.

While Garland lost that initial fight, he seems content to starve Kanter of resources as a work-around, even if it means sabotaging his own president’s agenda. Garland, after all, appears to consider it core to his job to throttle the better parts of the Biden administration for the sake of an imagined apolitical comity. He rushed to the Trump administration’s defense over the objections of the White House many times over the last year, and continues to undermine environmental action wherever he can. It’s perfectly in keeping with his priorities to undermine antitrust enforcement too.

The corporate revolvers and pro-monopoly hacks Garland boosted also haven’t gone anywhere. Again according to Sisco, Sonia Pfaffenroth is now in the mix for one of those coveted jobs in the ATR “front office.” Pfaffenroth revolved from Arnold & Porter into the Obama ATR and back over the last two decades. In private practice, she’s defended pharmaceutical firms, fossil fuel companies, and mining companies from class actions, price-fixing cases, and of course antitrust lawsuits.

One should look to Pfaffenroth’s record from her past stint at ATR to get a sense of what a second go-around might look like. Under the Obama administration, Pfaffenroth blessed tie-ups between Virgin America and Alaska Airlines, as well as US Airways and American Airlines. Today, just four mega-airlines control 80 percent of U.S. air traffic.

Pfaffenroth even approved the $107 billion merger between Anheuser-Busch InBev and SABMiller, allowing 30 percent of the world’s beer market volume and 60 percent of the world’s beer market profits at the time to be controlled by one firm. Today, AB InBev has essentially hacked the multitiered regulatory system that kept the alcohol market competitive for decades. In some cases, AB InBev’s distributors only allow craft brewers to distribute their drinks to retailers if they keep overall production low. This bottlenecking, alongside the pandemic, has been devastating for craft brewers.

Pfaffenroth’s record at ATR reveals someone whose poor judgment has harmed major American industries. But her judgment is reflective of the failed antitrust status quo, and in antitrust and everything else, Garland sees maintaining the status quo as inherently salutary. Where you or I might see bad calls, Garland likely sees jurisprudence executed according to a well-worn book. Whether the book is right or wrong is immaterial, in his eyes.

To state the obvious, Biden ought to reject Pfaffenroth and empower Kanter with deputies ready to throw that book aside, or else his antitrust agenda on meatpacking and everything else will get tossed on the growing pile of broken promises that are cratering his approval ratings. Doing so, however, will require standing up to Garland.

Thus far, Biden has appeared reluctant to do so, for fear of threatening the attorney general’s independence. There’s a kernel of truth here, after the Justice Department was turned into the president’s personal law firm under Trump. But there is a big difference between deploying the DOJ’s resources to help friends and target enemies and ensuring the DOJ has the staff and leadership necessary to execute its policy agenda. One is a blatant abuse of power, the other a clear presidential prerogative.

It’s an awkward situation for a president, but Biden must recognize that achieving his goals—especially the ones that improve working people’s economic fortunes—does far more for the health of the nation than sticking to a failed principle for its own sake. The president badly needs to remember that the buck stops not at Main Justice, but the Oval Office. Biden can demonstrate his commitment to fulfilling his promises and vision by empowering those of his appointees who are showing the necessary courage.

#### It’s NOT about Bedoya – it’s a referendum on the scope of the current agenda – deadlock is the point

Murphy 21 (Kathleen Murphy, Senior Reporter at FTC Watch, former Section Research Manager, Specialist at Congressional Research Service, former Managing Editor at CQ Roll Call and Bill Analysis Editor at Congressional Quarterly, “Bedoya’s confirmation hearing draws closer,” FTC Watch, Issue 1016, 11-1-2021, <https://www.mlexwatch.com/articles/13940/print?section=ftcwatch>)

When Alvaro Bedoya, President Joe Biden’s nominee to the Federal Trade Commission, faces US senators, he will be asked about his scholarly views on privacy. But the hearing also gives senators a chance to assess the agenda of the last FTC nominee they confirmed, Chair Lina Khan.

The Senate Commerce, Science and Transportation Committee is set to consider Bedoya’s nomination, although no hearing date has been set. It’s most likely to occur the week of Nov. 15 or early December, based on the 2021 Senate calendar.

Serving on the FTC means Bedoya, a Georgetown University professor and former congressional lawyer, would end a 2-2 split and give Democrats a majority to implement the chair’s policies. Bedoya, founding director of the Center on Privacy & Technology at Georgetown Law, would replace former Commissioner Rohit Chopra who left Oct. 8 to serve as director of the Consumer Financial Protection Bureau.

Biden nominated Bedoya in mid-September. Khan, meanwhile, started serving as FTC chair in mid-June after an 83-day confirmation process. (See FTCWatch, No. 1002, March 29, 2021.)

‘99% about FTC Chair Lina Khan’

Michael Keeley, co-chair of the antitrust practice at Axinn, Veltrop & Harkrider, tweeted: “Bedoya confirmation is going to be 99% about FTC Chair Lina Khan, and 1% to do with Alvaro Bedoya. (And hopefully 0% about the Vertical Merger Guidelines.)”

Keeley said he expects the focus of the hearing to be assessing the wisdom of the policies being pursued by Khan.

#### Plan expands opposition, derailing confirmation

Kovacic 20 (William E. Kovacic, former FTC Chair, Global Competition Professor of Law and Policy, George Washington University Law School, JD Columbia University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy,” U. of Pennsylvania Journal of Business Law, 23(1), 2020, https://scholarship.law.upenn.edu/jbl/vol23/iss1/3/)

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters.107 Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. 108 Many matters involved powerful economic interests,109 and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of intellectual property. 110 In 1974, the agency also initiated a program that required certain large firms to provide “line-of-business” data concerning a range of performance indicators.111

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.112 Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements.113 The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.114

As a group, the FTC’s competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency’s actions in court and before Congress. 115 The complaints of industry resonated with a large, powerful bipartisan coalition of legislators116 who criticized the Commission’s activism, proposed various measures to curb the agency’s authority, 117 and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act). 118 In 1980, bitter opposition to elements of the FTC’s competition and consumer protection programs led Congress to allow the FTC’s funding to lapse, forcing the agency to temporarily cease operations. 119 Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency’s funding. In January 1981, David Stockman, Ronald Reagan’s first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC’s competition policy program.120

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency’s choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources.121 Many legislators complained that the agency had disregarded the legislature’s preferences and used its powers in ways that Congress never contemplated to fall within the FTC’s remit.122 As Congress considered bills in 1979 to limit the Commission’s powers, Congressman William Frenzel captured the prevailing legislative mood:

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

Ignoring Congress can be a virtue, but the FTC’s excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.123

The Commission, Frenzel concluded, was “a rogue agency gone insane.”124

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less-flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency’s unauthorized adventurism. Senator Howard Cannon explained: “The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies.”125

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency’s competition mission. Stockman said, “ . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.”126

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC’s power to order divestiture or other forms ofstructural relief in non-merger cases.127 This was a shot across the bow of the FTC’s pending “shared monopoly”128 cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition.129 Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC’s power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.130

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient (“rogue”) but crazy (“insane”), as well.131 Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, “is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.” 132 David Stockman’s initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC “is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”133

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC’s activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively.134 Leading members of Congress demanded that the agency transform its competition and consumer programs or face extinction.135

Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency’s appetite to undertake ambitious, risky projects—to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency’s elastic powers innovatively. Congress’s admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings.136 During hearings in 1970 to confirm Caspar Weinberger to be the Commission’s new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to “maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well.”137 In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash—including from Congress—that would emerge as the FTC went about “expanding” its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform “tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.”138

Weinberger’s successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission’s powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks.139 In his appearances as FTC chair before congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick’s first appearance before the Commission’s Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

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

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing. I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . . 140

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had “responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States.” 141 Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency’s back: “[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require.”142 McGee closed the proceedings with militant instructions:

“Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing.”143

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

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric. 144

With evident approval, Moss recounted how the FTC had “stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise.” 145 The members of the Senate Commerce Committee, Moss concluded, “consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal.” 146 Member after member of the Commerce Committee echoed Moss’s message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, “I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned.”147

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying “to make the most of that other resource given to us by Congress – our statutory powers.” 148 Weinberger said the Commission had “encouraged the staff to make recommendations to us which will probe the frontiers of our statutes,” had made progress in “[p]robling the outer limits” and “exploring the frontiers” of the agency’s authority, and had shown it “is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices.”149 In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was “moving into ‘high gear’ in the task of preserving and promoting competition in the American economy.”150 He said he and his fellow board members “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.”151

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal152 and petroleum refining industries.153 With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies.154 The Joint Committee’s chairman, Senator William Proxmire, told Engman “the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence.”155 Perhaps astonished to hear that cases to break up the nation’s leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, “The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition.”156

Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. 157 Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors.158 The Commission’s decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands.159 In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry.160 Here, also, the agency’s decision to prosecute the shared monopolization case against the country’s leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems.161 In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.162

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC’s activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC should do and how it should do it. As described below in Section IV.D., 163 that change in legislative temperament and the response by Congress to industry backlash against the FTC’s program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.164

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was “insane.” Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel.165 As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases).166 The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.167 In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

Another focal point for attention in assessing the FTC’s performance in the 1970s was the quality of its substantive agenda. Was the FTC’s substantive program in the 1970s “insane”? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures.168 Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC’sflaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency’s improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC’s knowledge in the 1970s of the positive record of its past enforcement experience.169

B. The Inadequate and Misdirected Enforcement Activity Narrative

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

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration – a period characterized by what one journalist described as an “almost total abandonment of antitrust policy.” 170 In 1987, in discussing Reagan-era federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced “the most lenient antitrust enforcement program in fifty years.” 171 Professor Milton Handler remarked that in the Reagan era “a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free.” 172 Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, “enforcement ceased.”173

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party’s nomination for the presidency, Barack Obama said the George W. Bush administration “has what may be the weakest record of antitrust enforcement of any administration in the last half-century.” 174 The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.175

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe.176 After noting that for most of the 20th century “antitrust enforcement waxed or waned depending on the administration in office,” Professor Robert Reich recently wrote that “after 1980 it all but disappeared.”177 He added that Presidents Bill Clinton and Barack Obama “allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated.” 178

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

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

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s.179 A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.180

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC.181 The Reagan administration is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. 182 Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.183

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. 184 The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action.185 The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School’s concern that private rights of action over-deter legitimate business conduct by dominant firms.186 This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.187

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots.188 More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC’s stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.189

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

#### Key to break the political power of Big Ag broadly – spills over to deconsolidate farming

Gustin 19 (Georgina Gustin, covers agriculture for Inside Climate News, won numerous awards, including the John B. Oakes Award for Distinguished Environmental Journalism and the Glenn Cunningham Agricultural Journalist of the Year, formerly reported for the St. Louis Post-Dispatch and CQ Roll Call, graduate of the Columbia University Graduate School of Journalism, “Industrial Agriculture, an Extraction Industry Like Fossil Fuels, a Growing Driver of Climate Change,” Inside Climate News, 1-25-2019, https://insideclimatenews.org/news/25012019/climate-change-agriculture-farming-consolidation-corn-soybeans-meat-crop-subsidies/)

Meat and Mergers

Critics say that lax enforcement of antitrust laws has enabled even more concentration in the hands of fewer companies.

That concentration has occurred not just at the farm level but throughout the food system, including in fertilizer and pesticide manufacturing, grain distribution, food processing and grocery retailing. Four companies or fewer control each of these sectors of the food industry.

Recent mega-mergers of agricultural chemical and seed companies—Monsanto and Bayer, ChinaChem and Syngenta, Dow Chemical and DuPont—have further concentrated seed technology in the hands of a few companies. Critics worry that could leave farmers with fewer choices over what to plant and how.

Nowhere has the consolidation been more pronounced than in the meat industry, a hugely profitable and influential force in American agriculture. Today, a handful of companies, led by Brazil-based JBS Holdings, dominate the global meat industry, wielding enormous economic and political might.

“It’s JBS and Smithfield,” said Joe Maxwell, a hog farmer from Missouri and executive director of the antitrust watchdog Organization for Competitive Markets. “They want the U.S. to be the cheapest place to raise meat. They drive the political power in D.C. The result is that farmers are locked into farming for government programs that are not sustainable, economically and environmentally.”

The consolidation in meat production is also what’s driving the consolidation of crop farming, Maxwell said.

Livestock is now commonly raised or fattened in confinement on a diet of soybeans and corn instead of grass or other forage.

“The decades-long removal of livestock from diversified farms and moving into industrial facilities has certainly increased corn and soybean acreage. Those two things go hand in hand,” Hoefner said. “I think it’s a very open question whether that kind of transition back to a more integrated crop and livestock system is even possible. We’ve made such major landscape changes.”

#### Key to regenerative farming

Tam 21—(writer at UCLA Undergraduate Law Journal, won the UCLA Prize for Undergraduate Research, supervised by William Boyd, Professor of Law at UCLA School of Law and Institute of the Environment and Sustainability). Kristen Tam & Olivia Bielskis. April 1, 2021. “Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement”. UCLA Library. <https://escholarship.org/uc/item/0m16g2r5#main>.

INTRODUCTION

The failures of the federal courts and agencies to adequately enact antitrust enforcement has resulted in extensive consolidation of the agricultural marketplace creating conditions in which few distributors, meatpacking firms, and farms hold disproportionate percentages of the market power. Such instances of consolidation in the market are intended to be regulated through federal policies such as the Clayton Antitrust Act. However, the influence of Robert Bork and the Chicago School, which both argue to prioritize efficiency through consolidation over small businesses and competition in the market, resulted in an era from the 1980s to the present where the federal courts and agencies have adopted a less precautionary philosophy in interpreting antitrust laws, allowing large firms to merge, and leaving the marketplace largely unregulated.

The first gatekeepers that regulate corporation consolidation are the Department of Justice’s (DOJ) Antitrust Division and the Federal Trade Commission (FTC), which are responsible for reviewing new and existing mergers. To supplement, the Courts evaluate cases that involve mergers that seek to persist despite the DOJ or FTC preventing the merge. The Courts can also hear cases in which other firms on the market claim they will be substantially threatened by a potential merger. Often, mergers are brought up to the Courts under the Clayton Act, which requires proof of antitrust injury to sue. Suffering “antitrust injury” can include acts that “may substantially lessen competition,” as stated in Section 7 of the Act.

The impacts of large mergers are especially staggering when examining the dominance of the agriculture industry’s distributors, largest meat packing firms, and largest farms, which can all be referred to as agriculture firms in this paper. In 2017, four beef packaging firms owned 83 percent of the market.1 With only four firms holding a substantial percentage of market power, smaller firms and farms were obligated to decrease their selling price in order to compete with larger firms maintaining high economies of scale. This hinders the profitability of small farms, ultimately resulting in market failure because these farms are eventually driven out by their untouchable competitors, allowing the largest agriculture firms to hold monopolistic power. In the 1980s, farmers profited 37 cents per dollar spent in production,2 while in 2018, farmers made less than 15 cents per dollar.3 Decreasing profit margins are being perpetuated by the few gargantuan distributors that control the marketplace, allowing them to pay farmers or ranchers the price they want to set, often below market rate.

Decreasing competition and profit margins threatens the existence of small farmers and poses a substantial threat to essential climate change mitigation by hindering the growth of regenerative farming. Large industrial agriculture firms mostly utilize destructive farming practices including applying toxic synthetic fertilizers, planting monoculture fields, and tilling their soil. Tilling, the practice of overturning soil for the purpose of reducing soil compaction4 and mixing nutrients, decreases water retention, destroys vital soil microbes, and results in the release of carbon dioxide, a harmful greenhouse gas contributing to climate change.5 Every year, 44.02 billion tons of chemical fertilizer are applied onto U.S. soil,6 while every minute thirty soccer fields worth of soil are lost due to tilling practices.7 This is threatening food security, ecosystems, and the climate.8 The Intergovernmental Panel on Climate Change (IPCC) prescribes that the world needs to limit global temperature rise to 1.5 degrees Celsius by 2050. Agriculture contributes to 10.5 percent of the United States’ emissions, therefore we have a significant capacity to instead decrease emissions by implementing more sustainable farming practices.9

Conversely, a majority of smaller farms avoid these harmful practices and work to combat climate change by implementing regenerative techniques such as practicing no till, applying compost as fertilizer, and planting cover crops. In addition to building soil health, increasing soil water retention, and sequestering carbon dioxide from the atmosphere, small farms are able to implement farming practices that fit the local environment and adapt quickly with flexibility to maintain production during changing environmental conditions.10 Although small farms are more likely and willing to implement regenerative practices, their ability to switch to regenerative practices is dampened because they have limited money, time, or resources to do so with low profit margins. Failure to regulate the market is hindering a transition that would benefit the industry and planet in the long run. Although there are no laws in place that limit soil degrading practices, antitrust laws were created to prevent monopolies and undue concentration of market power in the hands of a few corporations, such as the beef packing conglomerates, from forming on the marketplace. If implemented properly, these laws have the potential to protect competition in the agriculture industry, keep small farms alive, and decrease the amount of soil being destructively farmed.

The federal government’s lackluster antitrust enforcement is born from a history of jurisprudential doctrines that favor large corporations and efficiency and subsequently discourage federal agencies from striking down harmful mergers. This paper first discusses the impact of lackluster enforcement of antitrust laws on the agriculture industry, focusing specifically on the hindrance of regenerative farming practices. Antitrust laws were created to prevent and correct such consolidation, thus, I enlist a two-pronged approach that identifies the main avenues through which consolidation has increased, and recommend remedies. The first prong addresses how the merge permitted between two meat packing corporations in Cargill v. Monfort contradicts the purpose of the Clayton Act and has set substantial precedent for the court's non precautionary interpretation of antitrust laws and what constitutes as “antitrust harm” under the Clayton Act. I argue that the Courts should set a new judicial standard that allows the “threat of loss of profits due to possible price competition” to constitute “antitrust injury,” and that they must default to precautionary measures and strike down mergers that have the capacity to acquire an undue percentage of the market share. The second prong addresses how the negligence of the DOJ and FTC has yielded a significant increase in consolidation of agriculture firms in the United States. To do so, I argue that these agencies must increase the number of agriculture and meatpacking merger acquisitions they block by holistically analyzing the scope of the mergers market power. Additionally, the reinvestigation of current corporations in the market holding unruly market power is essential in remedying the adverse impacts of market consolidation in agriculture.

I. The Current Market: As Farms Consolidate, the Growth of Regenerative Farming is Hindered

A. Increased Consolidation in the Agriculture Industry as Deregulation Heightens on Farms, Meat Packing, and Other Food Corporations

As defined by the United States Department of Agriculture (USDA), a “farm” is any place from which $1,000 or more of agricultural products were produced or sold during the year.11 This section discusses the historical and current consolidation trends in the agriculture marketplace for farms, meatpacking firms, and many other food corporations. I find that the overall number of farms has decreased while the size of each farm or firm has increased, and the number of farms in higher sales classes have increased along with their subsequent share of farmland.12

Farm numbers have decreased since the onset of the 20th century, however, due to Robert Bork and the Chicago School’s influence that prioritized economic efficiency and consumer prices over small businesses,13 the number of farms in the United States started decreasing at faster rates. In 1975, there were 2.5 million farms across the country,14 which declined by an average of 2.41 percent per year.1516 Comparatively, from 1980 to 1985, the number of farms decreased by an average of 6.15 percent per year,17 alluding to increased rates of consolidation.

While farm numbers continue to decrease, output production size and the Gross Cash Farm Income (GCFI) of large farms has increased. From 2012 to 2018, the number of farms decreased from 2.11 to 2.03 million farms, while the average farm size increased from 429 to 443 acres.18 Specifically, the growth in land holdings has increased the greatest in the largest farms. In 1987, 57 percent of the United States cropland was operated by midsize farms with 100 to 999 acres of cropland while only 15 percent was operated by large farms over 2,000 acres.19 In 2012, cropland operated by midsize farms drastically decreased to 36 percent while cropland operated by large farms increased to 36 percent, more than doubling the figure from 1987.20 In addition to holding control of more land and market power, and decreasing competition in the marketplace, these larger farms hold a disproportionate majority of agricultural commodity profits. In 1991, small farms, defined as farms whose income is less than $350,000, took in 46 percent of agricultural profit, while in 2015, small farms took in only 25 percent of agricultural profit.21 Large farms, who make more than $1,000,000 held 31 percent of the GFCI in 1991, while in 2015, their share increased to 51 percent.22

The trend towards consolidation is also prevalent in the livestock, poultry and meat packing industries, seeing as the number of farms and packaging plants decrease while the number of animals raised per farm increases. From 1987 to 2017, there was a 28.50 percent decrease in the number of cow, pig and chicken farms.23 While the number of farms decreased, the midpoint numbers for the number of livestock per farm increased; where half of the livestock are above, and half are below it. In 1987, the midpoint number of cows for each livestock feeding industry was 80, while in 2012, this increased to 900, an increase of 1,025 percent.24 The number of meatpacking plants, where farmers sell their animals to be slaughtered, packaged, and distributed, also decreased which allows meatpackers to run roughshod over farmers by giving them power to pay their desired lower prices, disadvantaging farmers.

Consolidation in other food industries is increasing as well, seeing as in 2012 four firms owned 89 percent of the peanut butter industry, a staggering figure which increased to 92 percent in 2017.25 In 2015 the two largest corn seed firms owned 78 percent of the market share,26 in 2017 the four largest jelly firms owned 85 percent of the industry,27 and in 2018, two firms owned 87 percent of the mayonnaise market share, a $1.6 billion dollar industry.28 These figures showing monopolization exemplify the formidable proportions to which the agriculture and food industry is consolidated. These trends underscore how the regulation mechanisms in place to promote competition and prevent monopolization are not working.

B. Consolidation Threatens Democratic Systems

The consolidation and existence of merged corporations harms farmers and consumers and contradicts the democratic spirit of objective policy creation for the good of the people, not the corporation. Limited choices in the marketplace increases reliance on those select businesses, allowing them to have a significant influence on the government to make decisions in their favor. If any of those firms becomes economically endangered, the government is more inclined to to bail them out because they rely on their product or service. For instance, Tyson is one of America’s largest meat processing companies.29 Because they control a sizable majority of the market, when problems hindering production arise, including when multiple plants shut down during the onset of the coronavirus pandemic in 2020, a large decrease in the nation’s slaughtering capacity comes about, resulting in food shortages. Because of their essential position in the food supply, these meatpacking businesses can use their large market power to put pressure on the government to provide subsidies and bail them out of lawsuits and business failures. This dynamic harms farmers who have few or no other choices to sell their livestock to for slaughter in order to go to the market. These firms can extract these advantages even when problems such as COVID-19 outbreaks in the plants resulted from deliberate neglect to implement adequate safeguards by company heads.30 In addition to providing an unwavering safety net regardless of firm malpractice, the government often bends to the firm’s demands if they seek subsidies or exemptions from prosecution.31 In effect, when firms become so large that they cannot be allowed to fail, they begin to have disproportionate power over the political process.32

C. Consolidation Threatens the Growth of Regenerative Farming

I. Regenerative Farming is Reducing Emissions, Bolstering Biodiversity, and Increasing Food Security, a Critical Practice to create a Climate Resilient Future

The United Nations IPCC report calls for a rapid greenhouse gas reduction to limit temperature rise to 1.5 degrees celsius by 2050.33 Given that agriculture and forestry accounted for 10.5 percent of greenhouse gas emissions in 2018,34 farming practices can play a crucial role in meeting these goals. Farming the land in ways that build healthy soil, maintain biodiversity, and sequester carbon dioxide are critical measures that will help America cultivate a sustainable food system, protect the land for generations to come, and meet greenhouse gas emission reduction goals.

Currently, the practices that dominate the American agricultural landscape often till the soil, plant only one to two crops at a time, and input large sums of fertilizer, herbicides, pesticides, and other chemicals to streamline production. Industrialized agriculture values efficiency, maximizing yield, and decreasing labor input. In contrast, regenerative agriculture practices maintain soil health for long term benefit by applying compost as fertilizer, planting cover crops, implementing diverse crop rotation, rotating livestock grazing, limiting fertilizer and pesticide use, and eliminating tillage practices.35 Although opponents highlight that regenerative practices yield less products per acre and require more labor input, they neglect the significance of their energy input being 30-60 percent less than traditional methods because they do not use machines, fertilizer, and herbicides.36 This practice ultimately increases the long term productivity and stability of food production because it doesn’t rely on the continuous purchasing and application of chemicals into the soil. Instead, it builds soil health by increasing nutrient and water retention, both of which increases land productivity.37

II. Small Farms are More Likely to Implement Regenerative Fertilization Practices

One of the defining regenerative agriculture practices is applying compost and manure as fertilizer. There are three different types of fertilization methods that the USDA measures every few years, manure, organic, and commercial that help replenish soil nutrients. Manure is the application of animal bio excretions,38 organic fertilizer is the use of organic matter, compost, animal manures or green manures and does not include any chemical fertilizers,39 and commercial fertilizer is the application of chemically derived fertilizers such as nitrogen, phosphate and potash.40 For these figures, manure and organic fertilizers are categorized as “regenerative fertilizers” because they represent methods that replenish soils with naturally derived as opposed to chemically manufactured nutrients.

Small farms, 10.0 to 49.9 acres, are more likely to implement regenerative fertilizer methods than medium sized, 260 to 499 acres, and large sized, 1,000 to 1,999 acre farms. In 2017, 32.74 percent of small farms used regenerative fertilizer, compared to 27.27 percent of medium and 21.63 percent of large farms.41 Small farms are also transitioning away from commercial fertilizer to regenerative fertilizer methods at a faster rate than medium and large farms. From 2012 to 2017, small farms had the greatest percent decrease in number of farms using commercial fertilizers, 6.50 percent, and the largest percent increase for regenerative practices, 6.47 percent. Medium farms experienced a 2.28 percent decrease in the number of farms implementing commercial fertilizers, while a 2.57 percent increase in regenerative fertilizers. Large farms experienced a 2.31 percent decrease in the number of farming implementing commercial fertilizers, while a 2.32 percent increase in regenerative fertilizers.42 This demonstrates that smaller farms are more willing and better suited to implement regenerative practices.

Industrial agriculture firms, on the other hand, highly prioritize efficiencies and maximizing profit, thus, are less likely to invest the time and money into learning about and switching to regenerative fertilization practices. While small farms are making the most rapid transition to regenerative fertilization practices that would benefit the market and planet in the long run, the increased market and resource dominance of the largest farms, which have the slowest rates of transition to regenerative fertilization practices, is ultimately hindering the growth of regenerative agriculture in the United States.

#### Extinction

Friedemann 17 – Alice Friedemann, Unrelated to Nina, Systems Architect and Engineer For Over 25 Years, Science, Energy, and Agriculture Writer, Investigative Journalist and Energy Expert, Founder of Energy Skeptic, Author of When Trucks Stop Running: Energy and the Future of Transportation, “Chemical Industrial Agriculture is Unsustainable. Here’s Why”, Resilience, 5-27, http://www.resilience.org/stories/2017-03-27/chemical-industrial-farming-unsustainable-heres/

We hear a lot about how we’re running out of antibiotics. But we are also doomed to run out of pesticides, because insects inevitably develop resistance, whether toxic chemicals are sprayed directly or genetically engineered into the plants.

Worse yet, weeds, insects, and fungus develop resistance in just 5 years on average, which has caused the chemicals to grow increasingly lethal over the past 60 years. And it takes on average eight to ten years to identify, test, and develop a new pesticide, though that isn’t long enough to discover the long-term toxicity to humans and other organisms.

And this devil’s bargain hasn’t even provided most of the gains in crop yields, which is due to natural-gas and phosphate fertilizers plus soil-crushing tractors and harvesters that can do the work of millions of men and horses quickly on farms that grow only one crop on thousands of acres.

Yet before pesticides, farmers lost a third of their crops to pests, after pesticides, farmers still lose a third of their crops.

Even without pesticides, industrial agriculture is doomed to fail from extremely high rates of soil erosion and soil compaction at rates that far exceed losses in the past, since soil couldn’t wash or blow away as easily on small farms that grew many crops.

But pest killing chemicals are surely accelerating the day of reckoning sooner rather than later. Enormous amounts of toxic chemicals are dumped on land every year — over 1 billion pounds are used in the United State (US) every year and 5.6 billion pounds globally (Alavanja 2009).

This destroys the very ecosystems that used to help plants fight off pests, and is a major factor biodiversity loss and extinction.

Evidence also points to pesticides playing a key role in the loss of bees and their pollination services. Although paleo-diet fanatics won’t mind eating mostly meat when fruit, vegetable, and nut crops are gone, they will not be so happy about having to eat more carbohydrates. Wheat and other grains will still be around, since they are wind-pollinated.

Agricultural chemicals render land lifeless and toxic to beneficial creatures, also killing the food chain above — fish, amphibians, birds, and humans (from cancer, chronic disease, and suicide).

Surely a day is coming when pesticides stop working, resulting in massive famines. But who is there to speak for the grandchildren? And those that do speak for them are mowed down by the logic of libertarian capitalism, which only cares about profits today. Given that a political party is now in power in the U.S. that wants to get rid of the protections the Environmental Protection Agency (EPA) and other agencies provide, may make matters worse if agricultural chemicals are allowed to be more toxic, long-lasting, and released earlier, before being fully tested for health effects.

Meanwhile chemical and genetic engineering companies are making a fortune, because the farmers have to pay full price, since the pests develop resistance long before a product is old enough to be made generically. Except for glyphosate, but weeds have developed resistance. Predictably.

In fact, the inevitability of resistance has been known for nearly seven decades. In 1951, as the world began using synthetic chemicals, Dr. Reginald Painter at Kansas State University published “Insect Resistance in Crop Plants”. He made a case that it would be better to understand how a crop plant fought off insects, since it was inevitable that insects would develop genetic or behavioral resistance. At best, chemicals might be used as an emergency control measure.

Farmers will say that we simply must carry on like this, there’s no other choice. But that’s simply not true.

Consider the corn rootworm, that costs farmers about $2 billion a year in lost crops despite spending hundreds of millions on chemicals and the hundreds of millions of dollars chemical companies spend developing new chemicals.

To lower the chances of corn pests developing resistance, corn crops were rotated with soybeans. Predictably, a few mutated to eat soybeans plus changed their behavior. They used to only lay eggs on nearby corn plants, now they disperse to lay eggs on soybean crops as well. Worse yet, corn is more profitable than soy and many farmers began growing continuous corn. Already the corn rootworm is developing resistance to the latest and greatest chemicals.

But the corn rootworm is not causing devastation in Europe, because farms are smaller and most farmers rotate not just soy, but wheat, alfalfa, sorghum and oats with corn (Nordhaus 2017).

Before planting, farmers try to get rid of pests that survived the winter and apply fumigants to kill fungi and nematodes, and pre-emergent chemicals to reduce weed seeds from emerging. Even farmers practicing no-till farming douse the land with herbicides by using GMO herbicide-resistant crops. Then over the course of crop growth, farmers may apply several rounds of additional pesticides to control different pests. For example, cotton growers apply chemicals from 12 to 30 times before harvest.

Currently, the potential harm is only assessed for 2 to 3 years before a permit is issued, even though the damage might occur up to 20 years later.

Although these chemicals appear to be just like antibiotics, that isn’t entirely true. We develop some immunity to a disease after antibiotics help us recover, but a plant is still vulnerable to the pests and weeds with the genetics or behavior to survive and chemical assault.

Although there are thousands of chemical toxins, what matters is how they kill, their method of action (MOA). For herbicides there are only 29 MOAs, for insecticides, just 28. So if a pest develops resistance to one chemical within an MOA, it will be resistant to all of the thousands of chemicals within that MOA.

The demand for chemicals has also grown due the high level of bioinvasive species. It takes a while to find native pests and make sure they won’t do more harm than good. In the 1950s there were just three main corn pests. By 1978 there were 40, and they vary regionally. For example, California has 30 arthropods and over 14 fungal diseases to cope with.

When I was learning how to grow food organically back in the 90s, I remember how outraged organic farmers were that Monsanto was going to genetically engineer plants to have the Bt bacteria in them. This is because the only insecticide organic farmers can use is Bt bacteria, because it is found in the soil. It’s natural. Organic farmers have been careful to spray only in emergencies so that insects didn’t develop resistance to their only remedy. Since 1996, GMO plants have been engineered to have Bt in them, and predictably, insects have developed resistance. For example, in 2015, 81% of all corn was planted with genetically engineered Bt. But corn earworms have developed resistance, especially in North Carolina and Georgia, setting the stage for damage across the nation. Five other insects have developed resistance to Bt as well.

GMO plants were also going to reduce pesticide use. They did for a while, but not for long. Chemical use has increased 7% to 202,000 tons a year in the past 10 years.

Resistance can come in other ways than mutations. Behavior can change. Cockroach bait is laced with glucose, so cockroaches that developed glucose-aversion now no longer take the bait.

It is worth repeating that chemicals and other practices are ruining the long-term viability of agriculture. Here is how author Dyer explains it:

“Ultimately the practice of modern farming is not sustainable” because “the damage to the soil and natural ecosystems is so great that farming becomes dependent not on the land but on the artificial inputs into the process, such as fertilizers and pesticides. In many ways, our battle against the diverse array of pest species is a battle against the health of the system itself. As we kill pest species, we also kill related species that may be beneficial. We kill predators that could assist our efforts. We reduce the ecosystem’s ability to recover due to reduced diversity, and we interfere with the organisms that affect the biogeochemical processes that maintain the soils in which the plants grow.

Soil is a complex, multifaceted living thing that is far more than the sum of the sand, silt, clay, fungi, microbes, nematodes, and other invertebrates. All biotic components interact as an ecosystem within the soil and at the surface, and in relation to the larger components such as herbivores that move across the land. Organisms grow and dig through the soil, aerate it, reorganize it, and add and subtract organic material. Mature soil is structured and layered and, very importantly, it remains in place. Plowing of the soil turns everything upside down. What was hidden from light is exposed. What was kept at a constant temperature is now varying with the day and night and seasons. What cannot tolerate drying conditions at the surface is likely killed. And very sensitive and delicate structures within the soil are disrupted and destroyed.

Conventional tillage disrupts the entire soil ecosystem. Tractors and farm equipment are large and heavy; they compact the soil, which removes air space and water-holding capacity. Wind and water erosion remove the smallest soil particles, which typically hold most of the micronutrients needed by plants. Synthetic fertilizers are added to supplement the loss of oil nutrients but often are relatively toxic to many soil organisms. And chemicals such as pre-emergents, fumigants, herbicides, insecticides, acaricides, fungicides, and defoliants eventually kill all but the most tolerant or resistant soil organisms. It does not take long to reduce a native, living, dynamic soil to a relatively lifeless collection of inorganic particles with little of the natural structure and function of undisturbed soil”.

When I told my husband all the reasons we use agricultural chemicals and the harm done, my husband got angry and said “Farmers aren’t stupid, that can’t be right!”

I think there are a number of reasons why farmers don’t go back to sustainable organic farming.

First, there is far too much money to be made in the chemical herbicide, pesticide, and insecticide industry to stop this juggernaut. After reading Lessig’s book “Republic, Lost”, one of the best, if not the best book on campaign finance reform, I despair of campaign financing ever happening. So chemical lobbyists will continue to donate enough money to politicians to maintain the status quo. Plus the chemical industry has infiltrated regulatory agencies via the revolving door for decades and is now in a position to assassinate the EPA, with newly appointed Scott Pruitt, who would like to get rid of the EPA.

Second, about half of farmers are hired guns. They don’t own the land and care about passing it on in good health to their children. They rent the land, and their goal, and the owner’s goal is for them to make as much profit as possible.

Third, renters and farmers both would lose money, maybe go out of business in the years it would take to convert an industrial monoculture farm to multiple crops rotated, or an organic farm.

Fourth, it takes time to learn to farm organically properly. So even if the farmer survives financially, mistakes will be made. Hopefully made up for by the higher price of organic food, but as wealth grows increasingly more unevenly distributed, and the risk of another economic crash grows (not to mention lack of reforms, being in more debt now than 2008, etc).

Fifth, industrial farming is what is taught at most universities. There are only a handful of universities that offer programs in organic agriculture.

Sixth, subsidies favor large farmers, who are also the only farmers who have the money to profit from economies of scale, and buy their own giant tractors to farm a thousand acres of monoculture crops. Industrial farming has driven 5 million farmers off the land who couldn’t compete with the profits made by larger farms in the area.

But farmers will have to go organic whether they like it or not

It’s hard to say whether this will happen because we’ve run out of pesticides, whether from resistance or a financial crash reducing new chemical research, or whether peak oil, peak coal, and peak natural gas will cause the decline of chemical farming. Agriculture uses about 15 to 20% of fossil fuel energy, from natural gas fertilizer, oil-based chemicals, farm vehicle and equipment fuel, the agricultural cold chain, distribution, packaging, refrigeration, and cooking to name a few of the uses.

At some point of fossil decline, there won’t be enough fuel or pesticides to continue business as usual.

Farmers will be forced to go organic at some point. Wouldn’t it be easier to start the transition now?

### 1nc – FERC

#### Without increasing prohibitions on anticompetitive business practices, the United States federal government should:

#### --announce and implement a presumption that transmission capital expenditures by private electricity corporations are prudent only when

#### ----transmission capital expenditures are committed pursuant to an independently administered planning process,

#### ----private electricity corporations waive regulatory antitrust immunities,

#### ----private electricity corporations disclose all transmission information relevant to planning processes,

#### ----private electricity corporations invoking rights of first refusal adopt the terms and conditions proposed by the developer awarded the project by the regional transmission organization through its competitive process,

#### ----and private electricity corporations do not impose discriminatory rate structures and non-price barriers to distributed energy resources;

#### --subject all other transmission expenditures to a prudence review

#### ----including consumer advocates, generation developers, rival electricity corporations, and entities advocating for deployment of technologies that can obviate new transmission,

#### ----prioritizing << distributed energy resources and grid resilience >> in project selection;

#### --where transmission is independently planned, mandate that planners

#### ----independently verify the accuracy of disclosed transmission information,

#### ----prioritize << distributed energy resources and grid resilience >> in project selection,

#### ----engage third-party evaluators to oversee the project selection process,

#### ----and where planners use the solicitation model to select project developers, require them to hand that function to a third party;

#### --preempt state siting authority;

#### --and provide sufficient staff and appropriations to the Federal Energy Regulatory Commission to conduct this oversight.

#### Solves case without expanding the scope of antitrust laws

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

V. TO TRIGGER FURTHER PLANNING REFORMS, FERC SHOULD DISCIPLINE IOU LOCAL TRANSMISSION SPENDING

It is difficult to change the direction of large electric power systems—and perhaps that of large sociotechnical systems in general—but such systems are not autonomous. Those who seek to control and direct them must acknowledge the fact that systems are evolving cultural artifacts rather than isolated technologies. As cultural artifacts, they reflect the past as well as the present. Attempting to reform technology without systematically taking into account the shaping context and the intricacies of internal dynamics may well be futile. If only the technical components of a system are changed, they may snap back into their earlier shape like charged particles in a strong electromagnetic field. The field also must be attended to; values may need to be changed, institutions reformed, or legislation recast.385

The power sector has changed since the days when the benefits of unchecked IOU coordination outweighed the potential advantages of open competition. New technologies, market structures, operational methods, and public policy goals have since taken the industry into once unforeseeable directions. Transmission development should evolve to meet these needs. To the extent that there was ever any rationale for bestowing upon local monopolists the collective responsibility of shepherding the development of our interstate networks, those justifications are no longer valid. IOUs are creatures of the early twentieth century, designed to focus on their state-granted service territories. Their local purpose and local monopolies should not constrain the evolution of the nation’s transmission systems. Twenty-five years ago, FERC finally confronted IOU transmission dominance, ordering reforms that restructured the industry. Ten years ago, FERC attempted to unleash competitive regional transmission development, but obstructionist IOUs, claiming entitlements to perpetual local transmission monopolies, have evaded competition by changing rules and retreating to non-competitive development processes. I propose that FERC spark bottom-up reforms by targeting IOU-run local planning.

Procedural reforms in Order No. 890 require IOUs to share information about their local plans in order to facilitate public participation and scrutiny. But FERC itself fails to examine IOUs’ transmission development plans or subsequent investments. Implicitly, it relies on other parties to discipline IOU spending. This abdication of its core ratemaking authority is an unjustified giveaway to IOUs that biases them in favor of non-competitive local investments over larger scale projects or more cost-effective non-transmission technologies.386

FERC should reverse its longstanding adoption of a presumption that all transmission expenses are prudent387 and replace it with a presumption that only capital expenditures committed pursuant to an independently administered planning process are prudent. For all other transmission expenses, FERC should place the burden of proof to establish prudence back on IOUs in any section 205 filing seeking transmission rate increases.388 FERC’s prudence review is necessary to protect customers and ensure just and reasonable rates.389 A heightened standard of review is sensible where FERC’s planning oversight is less robust and the development process is controlled by the IOU seeking the rate increase.

To implement this policy change, FERC should craft a policy, embodied in a policy statement or developed through a rulemaking,390 that delineates requirements of “independently administered” planning, outlines how IOUs can demonstrate prudence, and provides limited exceptions related to reliability, the dollar value of projects, or other metrics. The policy should also address how FERC’s prudence review will apply to formula rates391 and whether FERC will end, on a prospective basis, its policy allowing state regulation of transmission rates when they are included as part of a bundled retail rate.392 Placing the burden on IOUs is clearly within FERC’s legal authority. Section 205 explicitly states that an IOU seeking to increase rates has the burden to prove that its proposal is just and reasonable.393 FERC ought to insist that IOUs meet the statute’s explicit command by proving prudence in their section 205 filings.

The specter of FERC’s prudence review could have significant effects on transmission planning. Ideally, FERC’s policy would convince IOUs to place all transmission planning — regional and local (subject to carve-outs allowed under the policy) — under the control of an independent entity.394 In transmission operations, separating ownership from operational control allowed the industry to capture benefits of both coordination and competition. Separating ownership from control over planning could have similarly significant benefits by untethering planning from IOU’s state-granted advantages. In addition, unifying local and regional planning could finally achieve the promise of Order No. 1000 by leading to more cost-effective portfolios of projects.395

**[FOOTNOTE 394]**

394. Opponents of independent planning might argue that FERC does not have authority to regulate entities in non-RTO regions because they that are not “public utilities” under the FPA. In non-RTO regions, the regional planning entities do not file tariffs with FERC. IOUs participating in those regional processes met their Order No. 1000 obligations by amending their own OATTs. See, e.g., Avista Corp., et al., 143 F.E.R.C. ¶ 61,255 (2013). These regional planning entities do not meet FERC’s “independence” criteria. Two of these six entities are governed by their member utilities. Three are run by boards with utility and stakeholder members. The remaining organization, ColumbiaGrid, has an independent board appointed by its member utilities, although each of the three current board members is a recently retired executive of a member utility. Review of Recent Regional Plans, supra note 197, at 7; https://www.columbiagrid.org/board-of-directors.cfm. FERC might take one of two approaches to regulating these entities. First, it could continue its practice of regulating regional planning through member IOU filings. While IOUs would retain section 205 rights, they could create procedures that would require them to defer to independent management of the planning entity. Should FERC find that IOUs are interfering with the planning entity, it could conclude that the planning process is not independent and therefore require IOUs to demonstrate prudence. Second, FERC could instead adopt the approach it articulated in the RTG policy statement, where it concluded that although RTGs were not public utilities, their agreements “affect or relate to jurisdictional transmission rates or services” and therefore must be filed under section 205. RTG Policy Statement, supra note 217, at 41,629.

**[/FOOTNOTE 394]**

FERC should take three additional steps to enhance the independence of transmission planners. First, FERC should reduce planners’ reliance on IOUs for information, which might free RTOs from a measure of undue influence that IOUs may currently be able to exert on the planning process. FERC should require IOUs to disclose all transmission information relevant to planning processes and, where transmission is independently planned, mandate that planners independently verify the accuracy of that information.396 Second, FERC should order planners to engage third-party evaluators to oversee the project selection process.397 Third, where planners use the solicitation model to select project developers, FERC should require them to hand that function to a third party. RTOs and other planning entities may be ill-equipped to evaluate development proposals, particularly where their IOU members are competing against other companies.

Even if FERC’s new prudence policy does not induce IOUs to cede planning decisionmaking authority, it may still mitigate IOU transmission dominance. Prudence reviews might include state regulators, consumer advocates, generation developers, rival transmission companies, and entities advocating for deployment of technologies that can obviate new transmission. Information provided by these parties and scrutinized by FERC staff may cause IOUs to propose different projects than they otherwise would. I suspect that, with money on the line, IOUs might disclose more information than they already do pursuant to Order No. 890.

FERC could reject IOU project proposals if it has evidence that consumers would be better served by more cost-effective alternatives. This more pro-active prudence policy would cast FERC as the central planner, a role that it may not be suited to play. To pull it off, it might need additional staff, perhaps housed in a new office dedicated to transmission oversight.398 The goal of the policy, however, is not to plan all transmission development in Washington, D.C., but to spur improvements to planning processes around the country administered by independent entities.

FERC’s prudence policy could also partially mitigate the effects of discriminatory state laws that impede non-IOU transmission development. Following Order No. 1000, several states in the MISO and SPP regions enacted right-of-first refusal laws.399 For example, Minnesota’s ROFR law grants IOUs and other owners of in-state transmission lines rights to build any project planned by MISO that connects to the incumbent transmission owner’s facilities within the state’s boundaries. When the incumbent utility invokes its ROFR, FERC could establish a presumption that the utility’s investment is imprudent unless the utility adopts the terms and conditions proposed by the developer awarded the project by the RTO through its competitive process. This presumption would undoubtedly benefit consumers, as it would effectively force IOUs to either adopt terms and conditions that result from a competitive process or it would lead IOUs to decline to exercise their state ROFRs when they are unwilling to adopt competitively determined terms and conditions.

If IOUs do not voluntarily cede planning to an independent entity, FERC could force IOUs to do so. To justify this move, FERC could point to its recent orders on minimum offer price rules (MOPRs) in capacity markets. In several orders, FERC claimed that to ensure just and reasonable capacity rates it must nullify advantages that states provide to particular resources that offer into the auction.400 While there are numerous factual differences between capacity auctions and transmission development, FERC has identical legal authority under section 206 to remedy unjust and unreasonable rates caused by advantages conferred on particular market participants by state law.401 Applying the MOPR logic to transmission planning, FERC could neutralize advantages that IOUs have in transmission development that are traceable to their exclusive service territories, captive ratepayers, and discriminatory siting laws.

If it chooses not to exercise its newly discovered power to nullify the economic effects of state laws (or if FERC reverses course on MOPRs), FERC could argue that the D.C. Circuit decision rejecting challenges to Order No. 1000 provides a sufficient legal basis for further reforms, including efforts to mitigate IOU advantages in local planning processes. The D.C. Circuit’s decision affirmed that FERC has broad discretion to define unduly discriminatory conduct and remedy such conduct in transmission planning processes.402 The court did not limit FERC’s broad authority to regional planning or establish any legal barrier that prevents FERC from imposing new procedures in local planning, requiring planning be independently administered, or subjugating IOUs’ local planning outcomes to the regional process.

Regardless of whether FERC mandates independent planning or IOUs voluntarily join independently run planning organizations, the efficacy of FERC’s reforms depend in part on states’ cooperation. Many states have been willing participants in IOU efforts to stifle competition.403 Using their nearly exclusive authority over transmission siting, states can effectively veto pro-competitive reforms by refusing to provide siting permission to a non-IOU or out-of-state developer. Indeed, numerous states, often with IOU support,404 have blocked non-IOU transmission development by providing IOUs with ROFRs,405 refusing to site non-IOU projects,406 and rejecting innovative merchant projects that do not align with traditional notions of the “public convenience and necessity” standard that regulators must meet in order to provide siting permission.407

Congress could preempt state siting authority or at least prevent states from enforcing their most anti-competitive laws, such as ROFRs. In 2005, in its first major energy legislation since FERC issued its Open-Access mandate, Congress provided FERC with limited authority to site transmission lines in areas designated by the Department of Energy as having transmission congestion or capacity constraints.408 FERC has never used this siting authority successfully, in part because a federal appeals court interpreted the provisions narrowly.409

In the same bill, Congress also repealed Part I of the 1935 Public Utility Act, paving the way for a wave of utility mergers and perhaps ushering in a new era of IOU transmission dominance.410 The twenty largest U.S.-based publicly traded transmission owners (as measured by miles) have a combined market capitalization of nearly $700 billion (not including Berkshire-Hathaway, the second largest transmission owner that itself is valued at more than $500 billion).411 These companies’ assets are increasingly reliant on cost-of-service ratemaking as several companies have shed competitive lines of business.412 Suffice it to say, these mega-IOUs and their counterparts413 are likely to oppose Congressional action that opens transmission to competition or in some way dilutes IOU control over local transmission development.

With states and Congress seemingly unwilling to oppose IOU dominance, FERC appears most likely to take further action. Yet, I acknowledge that IOUs will inevitably (and rationally) resist further FERC reforms designed to chip away at their transmission dominance. Efforts to dismantle the IOU transmission development “cartels”414 may be delayed through litigation and weakened through implementation. Recognizing the inevitability of IOU backlash, FERC might instead choose to rescind its competitive mandate and direct its reforms towards substantive outcomes, such as motivating more regional investment or incentivizing deployment of new technologies. In that vein, FERC might impose certain technical analyses in the planning process that will cause IOUs and RTOs to select the “right” projects415 or establish particular goals for regional plans to achieve, such as unlocking new resources or connecting regions. Rules that directly target substantive results may have the side-benefit of addressing IOU dominance by ensuring that projects that harm a particular IOU’s parochial interests are nonetheless developed, provided they meet FERC’s technical standards.

Replacing Order No. 1000’s pro-competition procedural reforms with substantive rules engineered to drive IOU investment into FERC-preferred projects may well mitigate IOU backlash and therefore lead to more regional transmission spending, at least in the short term.416 It is worth noting that RTO transmission planning efforts held up as gold standards — MISO’s Multi-Value Projects (MVP) and SPP’s Priority Projects417 — were approved by RTO boards prior to Order No. 1000 and therefore parceled out projects to IOUs without competition.418 Nonetheless, I suggest that while substantive reforms may be necessary, they will be insufficient, and FERC should continue to focus its reforms on IOU transmission dominance for three reasons.

First, FERC has never attempted to dictate substantive outcomes and has in fact explicitly disclaimed that goal.419 Any rule that aims to influence substantive outcomes would have to be robust enough that planners would be unable to subvert FERC’s goal by tailoring the analysis or filtering the results with additional studies designed to either benefit IOUs or achieve results contrary to FERC’s goals. FERC would also run the risk that its rule simply will not work and might result in unintended outcomes.

Second, addressing IOU transmission dominance through procedural reforms aligns with FERC’s expertise, experience, and legal authority. FERC derived its comparability, information transparency, and independence principles from its statutory duty to remedy unduly discriminatory IOU practices and prescribed them as antidotes to IOUs’ anticompetitive behavior. While these principles have proven adaptable, they have not yet liberated transmission development from IOU dominance. Nevertheless, I believe that procedural reforms are necessary, even if FERC also issues substantive rules designed to achieve particular planning goals.

Third, as I have documented throughout this article, IOUs have used their unearned advantages to thwart the development of competitive power markets and transmission development processes. They continue to have incentives and abilities to develop interstate networks that reflect their parochial interests. They are designed to thrive under the status quo, and are ill-suited and unmotivated to facilitate new market entrants and unleash the competitive forces that can allow the sector to realize its innovative potential. Relegating IOUs to participants in the planning process on equal footing with other companies is a necessary step.

Finally, I do not believe that independently administered planning will be a panacea that instantly unlocks innovative transmission projects. Other reforms, particularly to interconnection processes, may be necessary as well.420 FERC might also consider expanding the scope of its independence principle, in part by revisiting allocations of filing rights between RTOs and IOU members.421

**[FOOTNOTE 420]**

420. See MISO, 174 F.E.R.C. 61,084 (2021) (Commissioner Clements, concurring) (“[I] am concerned that the status quo in MISO risks discrimination by transmission owners” in the interconnection process); MISO, 172 F.E.R.C. ¶ 61,248 (2020) (Commissioner Glick, dissenting) (“I remain concerned . . . that the Commission’s determination on remand will provide an opportunity for transmission owners to favor their own generation and create an environment where similarly-situated interconnection customers pay higher network upgrade costs . . . .”); Anbaric Development Partners v. PJM, 171 F.E.R.C. ¶ 61,241 (2020) (denying complaint filed by merchant transmission developer about PJM interconnection rules and setting issues for technical conference); TranSource v. PJM, 168 F.E.R.C. ¶ 61,119 (2019) (reversing ALJ’s conclusion that PJM interconnection practices were nontransparent and unduly discriminatory but finding PJM’s tariff omits material terms on interconnection studies and that PJM made errors in processing interconnection studies); Caspary, et al, supra note 417.

**[/FOOTNOTE 420]**

VI. CONCLUSION

FERC-set rates support the development of more than $20 billion of transmission facilities each year.422 This safe investment opportunity is available primarily — in fact, nearly exclusively — to IOUs. Their incentives to protect their superior access to this lucrative arrangement drive a defensive approach to transmission development that prioritizes projects that they can build without competition and with little oversight. This development model breeds collusion among IOUs who promote transmission rules designed to shield their state-granted territories from outside developers.

FERC’s efforts to break up the IOU transmission clubs have not yet pried control over transmission development from IOUs. FERC’s comparability and transparency principles have mitigated IOU transmission dominance but, without further reforms, the IOU transmission syndicate may indeed be forever. To foster innovation and facilitate development of interstate networks that meet twenty-first century needs, FERC should disentangle transmission planning from IOUs’ financial and strategic interests.

### 1nc – estados

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should actively supervise increased prohibitions on anticompetitive business practices by private electricity corporations, require such corporations to support << distributed energy resources and grid resilience >> in retail and transmission markets, deny siting to any transmission expenditures other than those supporting << distributed energy resources and grid resilience >>, and deny rate filing to any such corporations that file rates with the Federal Energy Regulatory Commission.

### 1nc – bbb

#### Climate provisions pass but it’s close – solves warming

Steinbauer 1-20 [James Steinbauer is a contributing writer covering national environmental policy. He was an editorial fellow at Sierra, 1-20-2022 https://www.sierraclub.org/sierra/it-s-do-or-die-time-for-build-back-better]

In the year since Joe Biden was inaugurated president, environmentalists have said again and again that the combination of this administration and this Democratic-controlled Congress is the last best chance to pass a climate bill. The warning is a year old, but the urgency remains as real as ever. This is a do-or-die moment to pass federal laws to tackle the climate crisis.

Democrats are running against two clocks. One is political: With President Joe Biden’s approval rating flatlining and COVID-19 cases and inflation increasing, most political pundits say Democrats will very likely lose their thin majorities in one or both chambers of Congress this fall. The other is geologic: With global greenhouse gas emissions and temperatures continuing to rise, scientists say we are likely to lose the opportunity to salvage a livable climate without sweeping action.

The extent to which human activity has already destabilized the climate is clear. Historic December tornadoes in the Midwest. Record heat in Alaska the day after Christmas. Wildfires in Colorado months after the end of the traditional wildfire season. According to NOAA, 2021 was Earth’s sixth warmest year on record. The planet’s seven warmest years have been the past seven. And it is only going to get hotter. Without major action to reduce greenhouse gas emissions, global temperatures are on track to rise 4.5 to 8 degrees Fahrenheit (2.5 to 4.5 degrees Celsius) by 2100. If the United States doesn’t meet its commitment to reduce its emissions, the world will fail to avoid catastrophic climate change.

“These higher temperatures continue to be a blaring siren that Congress needs to take action as soon as possible,” said David Shadburn, a government affairs advocate for the League of Conservation Voters.

The bulk of Democrats’ climate policy has been woven into the $2.2 billion Build Back Better Act. But that proposed bill is stalled in the Senate. Senator Joe Manchin, the Democrat of West Virginia who has made a personal fortune from his fossil fuel investments, gave his party a big fat lump of coal for Christmas when, after months of negotiating, he said he could not vote for the legislative package as-is. “I can’t get there,” Manchin told Fox News. “This is a ‘no’ on this legislation.”

But that Christmas Eve bombshell wasn’t the end of the Build Back Better saga. At least one cause for optimism is that Manchin seems to support the climate provisions in the bill. “The climate thing is one that we probably can come to an agreement much easier than anything else,” Manchin told reporters in early January. Democrats' strategy for passing climate policy has been likened to giving medicine to a dog—you have to hide it in a spoonful of infrastructure peanut butter to get it down the legislative gullet. It’s a strategy that explains how the United Mine Workers of America, which describes its mission in life as lobbying for the interests of coal miners, has pleaded with Manchin to reconsider his opposition to the Build Back Better Act.

#### The plan trades-off

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

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

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

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

## warming

### 1NC – FERC Solves

#### FERC Regulations solve – antitrust isn’t key, post-dates each of their internal links by *at least* 3 years!

Johnston 21 (Kimberly Johnston, Partner, Power & Utilities, Ernst & Young LLP, June 15th, 2021, “Landmark FERC decision opens market for distributed energy resources” Ernst & Young, <https://www.ey.com/en_us/power-utilities/ferc-opens-market-for-distributed-energy-resources>) MULCH

Today’s regulatory framework is based on the traditional centralized energy delivery model which is becoming outdated given the uptick in carbon-free technologies. The Federal Energy Regulatory Commission (FERC) and state public utility commissions continue to focus on modernizing regulations to promote a level playing field for new market participants, approve the rate recovery of pilot programs and offer incentives for grid performance enhancements. Co-developing the regulatory framework needed for tomorrow’s carbon-free economy is critical to a successful transition to the future customer-centric, decentralized and carbon-free operating model.

There is going to be a lot more demand for electricity, both with electrification and demand for cleaner resources. We have to figure out policies that will hopefully promote a greater investment in the transmission grid to facilitate access to cleaner resources. Rick Glick, FERC Chairman

One recent monumental regulatory policy change occurred with the issuance of Order No. 2222 by FERC. This Order will essentially open the wholesale electricity markets to distributed energy resources. This is historic because the policy is ahead of the carbon-free technologies that will transform the way energy is produced and delivered across America.

FERC Order 2222

On September 17, 2020, FERC issued a landmark ruling, Order No. 2222, requiring Regional Transmission Organizations (RTOs) and Independent System Operations (ISOs) to amend their tariffs to allow distributed energy resources (DERs) to fully participate in the wholesale electricity markets and compete alongside traditional energy market players.

Order No. 2222 is intended to remove market barriers to participation of DERs in the RTO/ISO wholesale electricity markets, which represents two-thirds of customers across the US energy market. The Order enhances market competition while ensuring that RTO/ISO wholesale electricity markets produce just and reasonable rates.

Order No. 2222 presents a huge opportunity for investor-owned utilities and key stakeholders to design the future carbon-free, distributed operating model with the customer at the center.

Each RTO/ISO grid operator must submit FERC compliance filings by July 19, 2021. A filing must propose an implementation plan tailored for its region and must outline how the final rule will be implemented in a timely manner.

### 1NC – Courts Solve

#### Their Wara ev – though agreeing that there are anticompetitive practices – concludes NEG, saying courts do NOT shield them under any of the regulatory immunity doctrines now

Wara 17 (Michael Wara, Associate Professor and Justin M. Roach, Jr. Faculty Scholar, Stanford Law School. “Competition at the Grid Edge: Innovation and Antitrust Law in the Electricity Sector,” NYU Environmental Law Journal, vol.25, 10-25-2017, https://www.nyuelj.org/wp-content/uploads/2016/09/Wara\_ready\_for\_printing\_v2.pdf)

In this Article, I detail the utility industry response to the call to action in Disruptive Challenges. I present evidence for the widespread existence of potentially anticompetitive actions by utilities from a survey of rate cases. My survey shows that, from 2013 to 2015, utilities in at least 19 states sought to restructure rates to reduce competition from distributed energy resources. Some utilities are also going into direct competition with solar providers. I explore the legal implications of this response by today’s utility industry to current and anticipated competition from distributed solar generation. I examine the ambiguities that exist in the current doctrine on utility antitrust immunity. I then suggest approaches for public utility commissions that may serve to reduce the anticompetitive aspects of new rate structures and so reduce the risk of antitrust liability for electric utilities as they respond to emerging competition from distributed energy resources. Finally, I argue that in managing responses to competition by electric utilities, public utility commissions must exercise oversight of the competitive impacts of rate cases.

In this Article, I outline the key dimensions of the nascent response by regulated electric utilities to competition and then apply an antitrust filter to these responses. In Part I, I describe and provide the first synthesis and analysis of utility response to solar generation since the publication of Disruptive Challenges. Utilities in many parts of the country are moving quickly to change rates in ways that reduce the competitive threat. In Part II, I explain the traditional shields from antitrust enforcement that have been applied to state-regulated industries such as electric utilities. The most important of these are the state action immunity doctrine and the filed rate doctrine. I then assess the extent to which current utility responses to competition are likely to be shielded from antitrust liability. I find that there is substantial risk that a reviewing court would not shield the activities outlined in Part I from antitrust liability. In Part III, I describe a set of strategies that utilities and their regulators might take to reduce these risks while also increasing the transparency of their decision making in ways that will allow for greater stakeholder participation and input, including direct examination within the rate-making process of the impacts of new rate structures on competition between utilities and distributed energy resource providers.

### 1NC – Global Solves

#### BUT, it’s NOT key – the rest of the world’s already doing it

Allnutt 20 (Jason Allnutt, Conformity Assessment Program Specialist for the IEEE Standards Association, “Understanding interconnection of distributed energy resources (DERs),” Energy Storage News, 12-23-2020, https://www.energy-storage.news/understanding-interconnection-of-distributed-energy-resources-ders/)

Adoption of distributed energy resources (DERs) is surging around the world. DERs are bringing unique benefits to the global energy landscape that central-station power plants and long-distance transmission and distribution alone could not. DERs allow for power to be generated when and where it is most needed, and decentralising power production can contribute to a dramatically more secure and resilient facility for electricity delivery. DERs interconnected with the grid position a utility to better manage peak demand, avoid transmission overloads and keep electricity flowing to its customers.

### 1NC – No Climate Impact

#### Warming won’t be existential

Dr. Benjamin Zycher 21, Senior Fellow at the American Enterprise Institute, Doctorate in Economics from UCLA, Master in Public Policy from the University of California, Berkeley, and Bachelor of Arts in Political Science from UCLA, Former Senior Economist at the RAND Corporation, Former Adjunct Professor of Economics at the University of California, Los Angeles (UCLA) and at the California State University Channel Islands, and Former Senior Economist at the Jet Propulsion Laboratory, California Institute of Technology, “The Case for Climate Change Realism”, 6/21/2021, https://www.aei.org/articles/the-case-for-climate-change-realism/

CLIMATE TRENDS

Beyond exhibiting extreme overconfidence in a cherry-picked analysis of climate-change causes, politicians and activists frequently ground their alarmism in frightening predictions about consequences that are likewise far from certain. This is not only true within the very new (and still quite unreliable) field of predictive climate science; it is true even in the context of ongoing climate phenomena. Indeed, politicians and journalists frequently characterize dramatic or unusual climate phenomena as the product of anthropogenic climate change, yet there is little evidence to support those claims.

For one thing, there is no observable upward trend in the number of “hot” days between 1895 and 2017; 11 of the 12 years with the highest number of such days occurred before 1960. Since 2005, NOAA has maintained the U.S. Climate Reference Network, comprising 114 meticulously maintained temperature stations spaced more or less uniformly across the lower 48 states, along with 21 stations in Alaska and two stations in Hawaii. They are placed to avoid heat-island effects and other such distortions as much as possible. The reported data show no increase in average temperatures over the available 2005-2020 period. In addition, a recent reconstruction of global temperatures over the past 1 million years — created using data from ice-sheet formations — shows that there is nothing unusual about the current warm period.

Rising sea levels are another frequently cited example of impending climate crisis. And yet sea levels have been rising since at least the mid-19th century. This rise is tied closely with the end of the Little Ice Age that occurred not long before, which led to a rise in global temperatures, some melting of sea ice, and a thermal expansion of sea water. There is some evidence showing an acceleration in sea-level rise beginning in the early 1990s: Satellite measurements of sea levels began in 1992 and show a sea-level rise of about 3.2 millimeters per year between 1993 and 2010. Before 1992, when sea levels were measured with tidal gauges, the data showed an increase of about 1.7 millimeters per year on average from 1901 to 1990.

But because the datasets are from two different sources — satellite measurements versus tidal gauges — they are not directly comparable, and therefore they cannot be interpreted as showing an acceleration in sea-level rises. Moreover, the period beginning in 1993 is short in terms of global climate phenomena. Since sea levels have risen at a constant rate, remained constant, or even fallen during similar relatively short periods, inferences drawn from them are problematic. It is of course possible there has been an acceleration in sea-level rise, but even still, it would not be clear whether such a development stemmed primarily from anthropogenic or natural causes; clearly, both processes are relevant.

A study of changes in Arctic and Antarctic sea ice yields very different inferences. Since 1979, Arctic sea ice has declined relative to the 30-year average (again, the degree to which this is the result of anthropogenic factors is not known). Meanwhile, Antarctic sea ice has been growing relative to the 30-year average, and the global sea-ice total has remained roughly constant since 1979.

Extreme weather occurrences are likewise used as evidence of an ongoing climate crisis, but again, a study of the available data undercuts that assessment. U.S. tornado activity shows either no increase or a downward trend since 1954. Data on tropical storms, hurricanes, and accumulated cyclone energy (a wind-speed index measuring the overall strength of a given hurricane season) reveal little change since satellite measurements of the phenomena began in the early 1970s. The number of wildfires in the United States shows no upward trend since 1985, and global acreage burned has declined over past decades. The Palmer Drought Severity Index shows no trend since 1895. And the IPCC’s Fifth Assessment Report, published in 2014, displays substantial divergence between its discussion of the historical evidence on droughts and the projections on future droughts yielded by its climate models. Simply put, the available data do not support the ubiquitous assertions about the causal link between greenhouse-gas accumulation, temperature change, and extreme weather events and conditions.

Unable to demonstrate that observed climate trends are due to anthropogenic climate change — or even that these events are particularly unusual or concerning — climate catastrophists will often turn to dire predictions about prospective climate phenomena. The problem with such predictions is that they are almost always generated by climate models driven by highly complex sets of assumptions about which there is significant dispute. Worse, these models are notorious for failing to accurately predict already documented changes in climate. As climatologist Patrick Michaels of the Competitive Enterprise Institute notes:

During all periods from 10 years (2006-2015) to 65 (1951-2015) years in length, the observed temperature trend lies in the lower half of the collection of climate model simulations, and for several periods it lies very close (or even below) the 2.5th percentile of all the model runs. Over shorter periods, such as the last two decades, a plethora of mechanisms have been put forth to explain the observed/modeled divergence, but none do so completely and many of the explanations are inconsistent with each other.

Similarly, climatologist John Christy of the University of Alabama in Huntsville observes that almost all of the 102 climate models incorporated into the Coupled Model Intercomparison Project (CMIP) — a tracking effort conducted by the Lawrence Livermore National Laboratory — overstate past and current temperature trends by a factor of two to three, and at times even more. It seems axiomatic to say we should not rely on climate models that are unable to predict the past or the present to make predictions about the distant future.

The overall temperature trend is not the only parameter the models predict poorly. As an example, every CMIP climate model predicts that increases in atmospheric concentrations of greenhouse gas should create an enhanced heating effect in the mid-troposphere over the tropics — that is, at an altitude over the tropics of about 30,000-40,000 feet. The underlying climatology is simple: Most of the tropics is ocean, and as increases in greenhouse-gas concentrations warm the Earth slightly, there should be an increase in the evaporation of ocean water in this region. When the water vapor rises into the mid-troposphere, it condenses, releasing heat. And yet the satellites cannot find this heating effect — a reality suggesting that our understanding of climate and atmospheric phenomena is not as robust as many seem to assume.

The poor predictive record of mainstream climate models is exacerbated by the tendency of the IPCC and U.S. government agencies to assume highly unrealistic future increases in greenhouse-gas concentrations. The IPCC’s 2014 Fifth Assessment Report, for example, uses four alternative “representative concentration pathways” to outline scenarios of increased greenhouse-gas concentrations yielding anthropogenic warming. These scenarios are known as RCP2.6, RCP4.5, RCP6, and RCP8.5. Since 1950, the average annual increase in greenhouse-gas concentrations has been about 1.6 parts per million. The average annual increase from 1985 to 2019 was about 1.9 parts per million, and from 2000 to 2019, it was about 2.2 parts per million. The largest increase that occurred was about 3.4 parts per million in 2016. But the assumed average annual increases in greenhouse-gas concentrations through 2100 under the four RCPs are 1.1, 3.0, 5.5, and an astounding 11.9 parts per million, respectively.

The studies generating the most alarmist predictions are the IPCC’s Special Report on Global Warming of 1.5°C and the U.S. government’s Fourth National Climate Assessment, both of which were published in 2018. Both assume RCP8.5 as the scenario most relevant for policy planning. The average annual greenhouse-gas increase under RCP8.5 is over five times the annual average for 2000-2019 and almost four times the single biggest increase on record. Climatologist Judith Curry, formerly of the Georgia Institute of Technology, describes such a scenario as “borderline impossible.”

RCP6 is certainly more realistic. It predicts a temperature increase of 3 degrees Celsius by 2100 in the average of the CMIP models. But on average, those CMIP models overstate the documented temperature record by a factor of at least two. Ultimately, models with a poor record of successfully accounting for past data and highly unrealistic future greenhouse-gas concentrations should not be considered a reasonable basis for future policy formulation.

### 1NC – No grid impact

**Grid isn’t vulnerable to collapse – utilities ramping up improvements, have contingency plans in place, grid is resilient and has redundancy now**

**Geiger 16**(Rick, Executive Director Utilities and Smart Grid @ Cisco + on the Gridwise Alliance Board of Directors and an IEEE Senior Member and Member of the Power and Energy Society, "Power Grid Security: Separating Reality from Hype," 2/26, <http://blogs.cisco.com/energy/power-grid-security-separating-reality-from-hype>) {DK}

Instead of panicking, let’s fact check some claims. Myth #1: Our power system is aging and outdated. The Associated Press warns that “Many of the substations and equipment that move power across the U.S. are decrepit and were never built with network security in mind…” 460x2 It certainly is the case that many of the capital assets that comprise the United States grid infrastructure are used beyond their intended useful life of 25 years or longer. The initial operations certificates for nuclear power plants were 40 years. Of course they were never built with network security in mind because 40 years ago networks, if they existed at all, were local and limited (DECNet, Token Ring, etc.) For reference: The Hoover Dam was constructed in 1935. The San Onofre Nuclear Generating Station (SONGS) Unit 1 started operation in 1968. Cisco was founded in December of 1984. Despite their age, utilities every year spend billions of dollars maintaining and upgrading electric power infrastructure systems to maintain the level of reliability we’ve come to expect. For a closer look, watch this video of helicopter maintenance on an energized 765K Volt Line. Myth #2: We are unprepared if the grid goes down. Ted Koppel’s book primarily focuses on the potential consequences of an extended power outage, echoing the National Geographic special from 2 years earlier. Ted states that, “The Department of Homeland Security has no plans beyond those designed to deal with the aftermath of natural disasters.” And that “We are unprepared…” Both Ted Koppel and National Geographic start with the assumption that the grid has been disabled for months to establish the assumed starting conditions against which the story of preparedness for months of no power is told. 460x The North American utility industry would disagree with the impression created by these writings that nothing has been done. They have spent billions implementing ever more stringent versions of NERC-CIP and other grid reliability measures. In addition to NERC-CIP, they have taken the following actions: Developed the NIST Interagency Report 7628, Guidelines for Smart Grid Cybersecurity Conducted GridEx, GridEx II, and GridEx III to exercise crisis response and recovery Complied with Presidential Order 13636 from February 2013 on Critical Infrastructure Security Applied recommendations from SuperStorm Sandy reports for grid resilience and response actions. Followed the Critical Infrastructure Security provisions in the 2016 budget bill just passed by the House. Is it enough? Can we relax? As the famous quote goes, “Eternal vigilance is the price of liberty” and in this case, Eternal Vigilance is the price of security of our critical infrastructure. Despite what has been done to secure the grid, the industry remains too smug about the disconnected nature of many critical systems. In doing so, they overlook the fact that some of the most successful and devastating cyberattacks have been carried out against systems that were not connected to the internet, the most prominent example being Stuxnet and the damage to the Iranian centrifuge capability. Despite having rifle bullets shot into the high voltage transformers in the Metcalf substation, not a single PG&E customer lost power. That’s a result of protections and redundancy that are an integral part of the design of the grid. Experiences with wide area outages and cascade failures have led to constant improvements in control systems and design redundancy. Is it perfect? Certainly not.

 Can it be improved? Definitely. We continue to learn from each large outage or natural disaster. The analysis of the 2011 Southwest Blackout jointly issued by NERC & FERC is one example. Lessons learned from Superstorm Sandy are another. The Bottom Line While vulnerabilities in the grid remain, considerable investment, study, and effort are being expended to identify vulnerabilities and secure the grid from cyber and physical attacks. Events like Superstorm Sandy and the sabotage of the Metcalf substation have caused Federal, State, and Local governments and regulators to rethink critical power requirements and develop plans that are tested during crisis

## prices

### 1nc – bizcon

#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy.

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20 The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself. A. Case-by-Case, Fact-Specific Approach Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen. B. Slow, Usually Predictable Doctrinal Development A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26 Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts. C. Market-Driven Case Selection In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development. [\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below. D. Generalists versus Industry Experts Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39 As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges. E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics. [\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42 The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction. However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement. The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary. The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable shifts ruin biz con AND overall growth.

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery. Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook. Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak. Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show. “Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.” Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic. Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists. Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence. The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’” Businesses appear to be less risk-averse now, he said. After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital. Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit. Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first. “We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities. Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

### 1nc – no solvency

#### Even without immunity, cases still fail

Sandeep Vaheesan 13, Special Counsel at the American Antitrust Institute, J.D. from the Duke University School of Law, M.A. in Economics from Duke University, “Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity,” University of Michigan Journal of Law Reform, Vol. 46, 2013, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1010&context=mjlr

IV. WHY ELIMINATING THE FILED-RATE DOCTRINE IS NOT SUFFICIENT TO CREATE COMPETITIVE POWER MARKETS

Congress or the Supreme Court can promote competitive power markets and more affordable electricity by limiting application of the filed-rate doctrine to exclusionary conduct.221 The filed rate doctrine should not bar antitrust suits alleging collusive behavior in the industry. The distinction between collusive and exclusionary conduct offers guidance on how the filed rate doctrine should be applied in electricity markets. Courts have the ability to remedy collusive conduct through damage awards but are much less competent at addressing exclusionary conduct that involves transmission access.2 22 A sensible legal rule would recognize this distinction. On the one hand, purchasers of power should have all the usual antitrust remedies against generators accused of collusion. On the other hand, market participants that allege exclusionary conduct like discriminatory access to transmission should face the filed-rate bar or similar immunity and instead be directed to seek relief from the industry experts at FERC.

The KeySpan episode in New York City shows how private antitrust enforcement could promote competitive power markets. FERC failed to prevent or remedy a two-year period of anticompetitive behavior that likely cost ratepayers more than $100 million and did not pursue any enforcement action after it learned of the misconduct.223 Notably, in its public statements, the Department of Justice suggested that it pursued disgorgement-a rarely used remedy in public antitrust enforcement 224 -against KeySpan because the filed-rate doctrine barred private damages actions.225 Given the imperfect ability to detect collusion, even full disgorgement of gains from anticompetitive behavior inadequately deters such conduct.226 Private antitrust suits would allow direct purchasers of power to recover the overcharges they paid (and more after trebling) and strongly deter future anticompetitive behavior.

Although the present application of the filed-rate doctrine is problematic and allows some types of market misconduct to go unpunished, the actual benefits of a judicial or legislative repeal or limitation of the doctrine should not be overstated. The KeySpan episode shows how restricting the scope of the filed-rate doctrine can produce better market outcomes. The threat of private antitrust damages actions could have deterred what amounted to explicit collusion between rival generators. Express collusion between generators, however, is not the sole or even primary reason why restructuring the industry has not delivered the promised consumer benefits. Two important forms of anticompetitive market behavior-unilateral withholding and tacit collusion-are permissible and difficult to prosecute, respectively, under long-standing interpretations of the antitrust laws. In other words, the antitrust laws do not proscribe the entire universe of anticompetitive conduct that occurs in electricity markets.

A. The Exercise of Unilateral Market Power Is Not Proscribed by the Sherman Act

Today, Section 2 of the Sherman Act does not prohibit dominant firms from charging whatever price the market can bear.227 Companies with monopoly power do not violate the Sherman Act unless that power is maintained or extended through some exclusionary act. At times, Congress and the courts have considered using Section 2 to attack the mere existence of monopoly power. In 1976, Senator Philip Hart proposed expanding Section 2 to deconcentrate industries marked by durable monopoly power.228 This and similar proposals garnered significant attention but were never enacted. In his famed opinion in United States v. Aluminum Co. of America, Judge Learned Hand raised the possibility of "no-fault" monopolization.2 29 He rejected such a rule, though, stating that "[tlhe successful competitor, having been urged to compete, must not be turned upon when he wins."230 Since the mid-1960s, the Supreme Court has held that excluding rivals and possessing monopoly power are both necessary elements for establishing a monopolization claim.23

The charging of high prices is arguably an important part of the competitive dynamic. In theory, high prices in a market, while imposing short-term pain on consumers, should attract new entry and help reallocate scarce resources toward high-value uses and away from low-value ones in the long run.2 3 2 The Supreme Court has taken this idea to an extreme in recent years. In its controversial ruling in Verizon Communications v. Law Offices of Curtis V Trinko, LLP, the Supreme Court asserted in dicta that "[t] he opportunity to charge monopoly prices-at least for a short period-is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."2 33 Although this may be an empirically dubious position, the Court has thus treated the ability to charge high prices as an essential part of the market dynamic-the antithesis of the no-fault monopolization position. Even when viewing the hyperbolic dicta of Trinko with skepticism, high prices also play an important role in electricity markets. High prices signal to investors when, where, and what type of new generation needs to be constructed.23 4

Due to long-standing reading of the Sherman Act, generators that economically or physically withhold electricity from the market do not automatically violate Section 2. They can thus reduce their output to increase their own profits and effect large wealth transfers from consumers. While such conduct may run afoul of RTO rules and other state and federal laws, it does not violate Section 2 under its present judicial articulation.2 35 If, for example, power purchasers had sued TXU in the wake of its anticompetitive conduct in the summer of 2005 had overcome the filed-rate doctrine, they likely would have not obtained antitrust damages. By all appearances, TXU was only exercising its own market power, and did not engage in conduct that excluded rivals from competing against it on a level playing field.23 6 Likewise, based on the allegations in Utilimax,237 the plaintiff would not have been able to obtain damages even in the absence of the filed-rate doctrine. The plaintiff alleged that the defendant had exercised its monopoly power but had made no suggestion that this monopoly power was obtained through exclusionary or other improper conduct.2 38 Even the California crisis appears to be the result of generators unilaterally maximizing their individual profits rather than colluding.23 9 Assuming the filed-rate doctrine had not been applied, private antitrust suits likely still could not have remedied this extended period of market misconduct, which allowed producers to capture billions of dollars from consumers.

B. Tacit Collusion Is Often Beyond the Reach of the Sherman Act

Tacit collusion, also known as conscious parallelism, in oligopolistic industries has been one of the most intractable problems in antitrust law. It involves firms setting supracompetitive prices without any overt agreement or direct communication between them.24 In oligopolistic markets, the profits of firms are dependent on the expected behavior of their rivals. 24 ' Because of this strategic interaction, smaller players may, for example, recognize it is in their selfinterest to follow the prices of a market leader, all without ever directly communicating with each other.2 42 The result may be to mimic the price effects of a cartel without any overt communication-let alone agreement-between participating firms. 243

Noted antitrust scholars have debated what to do about tacit collusion in oligopolistic markets. Donald Turner, the head of the Antitrust Division at the Department of Justice in the Kennedy Administration and then-author of the leading antitrust treatise, thought that tacit collusion was a common problem in concentrated markets in the mid-twentieth century.24 He argued, however, that there is no satisfactory remedy for tacit collusion under Section 1-how could courts enjoin firms from ignoring the pricing decisions of their rivals?245 He said that courts should not impose Section 1 liability for tacit collusion "without more in the way of 'agreement' than is found in 'conscious parallelism."'2 46 Instead, he called on using Section 2 of the Sherman Act to reduce market concentration in oligopolistic markets as a means of addressing persistent tacit collusion. 247

Judge Richard Posner has presented a contrasting view, arguing that tacit collusion is not as prevalent as Turner claimed. According to Posner, tacit collusion is not an inevitable feature of oligopolistic markets; industry characteristics and practices often create strong incentives for undercutting the collusive price.248 As a consequence, Posner has said that tacit collusion is a product of "voluntary behavior" and should be addressed under Section 1.249 Thus, in his view, courts should look to market conduct and price effects in determining whether firms have colluded tacitly.2 50 Regarding appropriate remedies, Posner endorsed the use of private damages, civil and criminal penalties, and, in exceptional cases, divestitures but rejected judicial regulation of pricing behavior. 251

The courts have generally followed the Turner approach to tacit collusion. Although tacit collusion is not categorically legal under the antitrust laws, plaintiffs still face significant evidentiary hurdles in bringing a successful claim. The Supreme Court has long held that mere parallel behavior is legal under the antitrust laws.2 52 To establish an agreement under Section 1, the plaintiff must show the existence of "plus factors" in addition to the existence of parallel market conduct.2 53 The courts have not enumerated an exhaustive list of these factors, but some have been used repeatedly to establish liability in parallel conduct cases. An anticompetitive arrangement may be inferred if there is (1) proof that rivals did or could have communicated directly, (2) evidence of anticompetitive intent behind the parallel conduct, (3) behavior so complex as to be unlikely to occur without detailed communication among rivals, or (4) behavior that is unlikely to be rational in the absence of an agreement. 254 The 2007 Supreme Court decision Bell Atlantic Corp. v. Twombly raised the hurdles for plaintiffs trying to bring a successful tacit collusion claim.2 55 It held that a defendant's motion to dismiss in a conscious parallelism case must be granted unless a plaintiff can plausibly allege plus factors at the prediscovery stage in litigation.2 56

Given the present state of antitrust jurisprudence, tacit collusion in electricity markets may be persistent and yet incurable under the Sherman Act. The transparent pricing and repeated game nature of centralized wholesale power markets may simplify collusion among generators in RTO regions.2 57 The threat of quick detection and punishment make defection from such arrangements less profitable and consequently less likely than in other industries . 258 Tacit collusion in an industry conducive to it may make actual agreement on price or output unnecessary. 25 9 This is an important virtue from the perspective of suppliers. Even with the filed-rate doctrine, electricity market participants who engage in more overt forms of collusion face the risk of civil and criminal prosecution by the government.26 Generators may thus be able to engage in persistent parallel pricing above competitive levels without triggering any of the plus factors that could invite legal liability.

### 1nc – econ

#### The aff gets circumvented by courts

**Crane 21** – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital. Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that. Inquiring into the nature and implications of antitrust antitextualism is particularly salient at the present when, for the first time in a generation, there is widespread dissatisfaction with antitrust enforcement and impetus for potential reform legislation.7 As was true at each of the prior moments of reformist sentiment, the call is for statutory reforms to curb the power of big business.8 We have seen this play before, and also its sequel. In the play, Congress announces that the antitrust laws are too weak and that reforms are necessary to protect the nation from the power of big capital. In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant. Will anything be different this time around, or are the legislative reforms currently on the table predestined to a similar fate?

**Econ decline doesn’t cause conflict**

**Clary 15** – Christopher Clary, Ph.D. in Political Science from MIT, Postdoctoral Fellow, Watson Institute for International Studies, Brown University, “Economic Stress and International Cooperation: Evidence from International Rivalries,” April 22, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2597712

Do economic downturns generate pressure for diversionary conflict? Or might downturns encourage austerity and economizing behavior in foreign policy? This paper provides new evidence that economic stress is associated with **conciliatory policies between strategic rivals.** For states that view each other as military threats, the biggest step possible toward bilateral cooperation is to terminate the rivalry by taking political steps to manage the competition. Drawing on data from **109 distinct rival dyads** since 1950, **67 of which terminated,** the evidence suggests rivalries were approximately **twice as likely to terminate during economic downturns** than they were during periods of economic normalcy. This is true controlling for **all of the main alternative explanations for peaceful relations between foes** (democratic status, nuclear weapons possession, capability imbalance, common enemies, and international **systemic changes),** as well as **many** **other** possible **confounding variables**. This research **questions existing theories** claiming that economic downturns are associated with **diversionary war**, and instead argues that in certain circumstances **peace may result from economic troubles**.

# 2NC

## FERC CP

### AT: PDB

#### Perm: do both – still exposes Congress to utility backlash – only counterplan alone shields

--there’s an important perceptual difference between openly saying we’re going to go after you because you are abusively powerful and saying we’re just trying to make sure you support renewables and grid resilience, even if they have the same effect in practice – CP alone preserves initial utility hope that they might be able to continue gaming the system, which shields the link

--but there’s also a simpler link distinction between utility backlash being directed at FERC instead of FTC (even if communicated to Congress in both cases) – only the latter implicates Bedoya

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

In the same bill, Congress also repealed Part I of the 1935 Public Utility Act, paving the way for a wave of utility mergers and perhaps ushering in a new era of IOU transmission dominance.410 The twenty largest U.S.-based publicly traded transmission owners (as measured by miles) have a combined market capitalization of nearly $700 billion (not including Berkshire-Hathaway, the second largest transmission owner that itself is valued at more than $500 billion).411 These companies’ assets are increasingly reliant on cost-of-service ratemaking as several companies have shed competitive lines of business.412 Suffice it to say, these mega-IOUs and their counterparts413 are likely to oppose Congressional action that opens transmission to competition or in some way dilutes IOU control over local transmission development.

With states and Congress seemingly unwilling to oppose IOU dominance, FERC appears most likely to take further action. Yet, I acknowledge that IOUs will inevitably (and rationally) resist further FERC reforms designed to chip away at their transmission dominance. Efforts to dismantle the IOU transmission development “cartels”414 may be delayed through litigation and weakened through implementation. Recognizing the inevitability of IOU backlash, FERC might instead choose to rescind its competitive mandate and direct its reforms towards substantive outcomes, such as motivating more regional investment or incentivizing deployment of new technologies. In that vein, FERC might impose certain technical analyses in the planning process that will cause IOUs and RTOs to select the “right” projects415 or establish particular goals for regional plans to achieve, such as unlocking new resources or connecting regions. Rules that directly target substantive results may have the side-benefit of addressing IOU dominance by ensuring that projects that harm a particular IOU’s parochial interests are nonetheless developed, provided they meet FERC’s technical standards.

Replacing Order No. 1000’s pro-competition procedural reforms with substantive rules engineered to drive IOU investment into FERC-preferred projects may well mitigate IOU backlash and therefore lead to more regional transmission spending, at least in the short term.416 It is worth noting that RTO transmission planning efforts held up as gold standards — MISO’s Multi-Value Projects (MVP) and SPP’s Priority Projects417 — were approved by RTO boards prior to Order No. 1000 and therefore parceled out projects to IOUs without competition.418 Nonetheless, I suggest that while substantive reforms may be necessary, they will be insufficient, and FERC should continue to focus its reforms on IOU transmission dominance for three reasons.

### AT: PDCP

#### Perm: do counterplan – is severance – both textually and functionally:

#### 1 – prohibitions – must be mandatory

Julie E. Carnes 4, Judge, US Court of Appeals for the 11th Circuit, “Paradies Shops, Inc. v. Hartford Fire Ins. Co.,” 2004 U.S. Dist. LEXIS 30124, Lexis

Even if plaintiff could establish that an order of civil authority was issued as the direct result of the damage or loss of property at the World Trade Center, the Pentagon, or Stony Creek Township, Pennsylvania, in order to prevail on its breach of contract claim, plaintiff must be able to establish that some order of civil authority "specifically prohibited" access to plaintiff's premises. Plaintiff argues that because Order Two grounded all flights "there was no reason for the traveling public to go to the airport, and the public was discouraged from doing so," and that this **discouragement** is **tantamount** to access to plaintiff's premises being "specifically **prohibited**." (PSMF at P 12.) In order to make this argument, plaintiff **attempts** to lead this Court through a series of online [\*23] **dictionary** definitions. 4 [\*24] [FOOTNOTE 4 BEGINS] Merriam-Webster's online dictionary lists the following definitions for the term "prohibit": 1: to **forbid** by **authority or command** 2: to **prevent** from doing or accomplishing something: **effectively** stop (www.merriamwebster.com (last visited September 8, 2004)) Plaintiff relies on the **second** of these two definitions while **ignoring the first** to argue that, because prohibit may be defined to mean "to **prevent** from doing or accomplishing something," and because **prevent** may be defined to mean "to **deprive of power or hope of acting or succeeding**…to hold or keep back…to **hinder**," orders of civil authority **prohibited** the traveling public from going to plaintiff's airport shops. (Pl.'s Resp. at 5.) The Court **rejects this** argument. [FOOTNOTE 4 ENDS] In doing so plaintiff neglects to site the first definition listed by plaintiff's own source which defines prohibit to mean "to forbid by authority or command." **The Court finds this first definition to be the plain meaning of the unambiguous term "prohibit".** Indeed, the Court sees no reasonable means of construing Secretary Mineta's order to ground all aircraft as an order specifically forbidding access to plaintiff's premises. The Court notes that at least three other federal district courts who have considered claims for insurance coverage for losses sustained as a result of September 11th have held that the term "prohibit" is unambiguous. 5 [FOOTNOTE 5 BEGINS] In Abner, Herrman & Brock, Inc. v. Great N. Ins. Co., 308 F. Supp. 2d 331 (S.D.N.Y. 2004), the Civil Authority provision at issue provided that the insurer would pay "for actual business income loss you incur . . . when a civil authority prohibits access to your premises." Id. at 334. Concluding that policy language requiring a civil authority to "**prohibit** access" in order for coverage to attach was **unambiguous**, the Abner court granted insured recovery **only** for losses sustained during the period of time in which civil authorities **actually prohibited access** to insured's business premises located in lower Manhattan. At the same time, the Abner court denied recovery for losses sustained during the time period in which employees were confused about access to the premises and upper management had difficulty getting into and out of the area because during this time access was not prohibited. Id. at 336. The United States District Court for the Western District of Oklahoma has also concluded that the term "prohibit", as used in contract language requiring an "action of civil authority that prohibits access to the described premises," is **unambiguous**. Southern Hospitality, Inc. v. Zurich American Ins., 2003 U.S. Dist. LEXIS 18324, No. Civ.02-923-C, 2003 WL 23416117, at \*2, 4 (W.D. Okla. Sept. 30, 2003). [FOOTNOTE 5 ENDS]

#### Counterplan’s voluntary

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

FERC should reclaim its transmission agenda. Rather than intervene directly in IOU-controlled planning processes, I propose that FERC should induce IOUs to accept third-party controlled planning. FERC has exclusive authority to determine whether transmission spending is prudent, and in making that determination, it should consider how transmission investment is planned. FERC should issue a new policy on prudence that subjects IOU-controlled spending to scrutiny while maintaining the current presumption that independently planned transmission is prudent. My hope is that under this new approach to transmission rates, IOUs will voluntarily cede control of planning. If IOUs fail to do so, FERC retains broad authority under section 206 to police anti-competitive IOU behavior and should act decisively to separate transmission planning from IOU control.

#### 2 – expanding the scope of its core antitrust laws – counterplan doesn’t change anything about that nor how they are applied – merely changes the fact pattern

--The top of the card requires a lot of legal context to understand---if you want to be sure this card supports what we are saying, the last line we’ve highlighted is for you---BUT, here’s the background:

--Congress passed the Telecommunications Act of 1996. This act contained the following sentence, called a savings clause: “nothing in this Act … shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”

--Preexisting antitrust standards said one way to prove monopolization is being acquired and mainteained through illegitimate means is to prove another law, “extrinsic to antitrust,” is being violated. In this lawsuit, Verizon is being sued under Sherman Act Section 2 for monopolization. The plaintiffs are arguing that because Verizon violated the Telecommunications Act in order to secure a monopoly, that constitutes the use of illegitimate means, since doing something illegal is inherently illegitimate under existing standards.

--The question is: does the savings clause preclude such a claim? The DOJ says yes, because the savings clause prohibits ‘expanding the scope of antitrust law,’ and applying existing standards to new behavior does so. Our evidence says no, because even if the savings clause prohibits ‘expanding the scope of antitrust law,’ applying existing standards to a new situation does not do this.

--But didn’t Trinko lose? Yes, BUT—Trinko lost because SCOTUS thought the savings clause prohibited more than just scope expansion, NOT because SCOTUS thought Trinko’s interpretation WAS scope expansion. The majority never invokes the idea of “scope” in reference to the antitrust laws.

Carpenter et al. 3, Counsel for AT&T, Cavalier Telephone, and Competitive Telecommunications Association, “Brief of AT&T Corp., Cavalier Telephone, and Competitive Telecommunications Association as Amici Curiae in Support of Respondent,” 2003 WL 21767975 (U.S.), WestLaw

II. THE 1996 ACT’S ANTITRUST SAVINGS CLAUSE DEFEATS DOJ’S AND VERIZON’S CLAIMS.

Against this background, Verizon’s and DOJ’s claims based on the savings clause are spurious. DOJ acknowledges that violations of duties “extrinsic” to the antitrust laws are relevant to determining if a monopoly has been acquired or maintained through illegitimate means, but it contends that the savings clause means that the antitrust laws cannot “outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws.” DOJ Br. 11, 14 n.5, 18, 24-25 & n.10.

DOJ has matters backwards, for three reasons.

First, the language and history of the savings clause foreclose these claims. Even if consideration of the duties imposed by the 1996 Act would expand the “standards” and “scope of the antitrust laws” (DOJ Br. 11, 24) - which it \*23 would not - the savings clause does not say that the Act is to have no effect on the scope of antitrust laws. Rather, it says that “nothing in this Act … shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.” 47 U.S.C. § 152 note. As the legislative history makes explicit, this clause is designed to prevent claims that antitrust law is inapplicable to conduct regulated by the 1996 Act,16 and Congress adopted this clause because it understood - based on the experience of introducing competition into long distance and equipment markets - that antitrust enforcement is an essential supplement to efforts to open telecommunications markets to competition through access regulations.

Second, DOJ’s and Verizon’s claim would be wrong even if the savings clause stated that the Act shall not be construed to affect the “scope” or “standards” of the antitrust laws. As explained above, supra at 17-18, antitrust standards require that monopolization determinations be made on the basis of the regulatory duties and other “facts of market life” in an industry, and when courts do so, they are not “importing” standards from other statutes into the antitrust laws or expanding the scope of the antitrust laws. They are applying the established preexisting antitrust standards in accord with their terms and purposes. In this regard, it would be a \*24 practical impossibility and violation of antitrust standards for a court to attempt to decide a monopolization claim as if the 1996 Act did not exist. As was stated by then-Judge Kennedy, “ ‘the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.’ ” Phonetele, 664 F.2d at 742-43 (quoting 1 P. Areeda & D. Turner, Antitrust Law ¶ 223d (1978)); see id. (“[t]he impact of regulation on pricing and other competitive factors is too obvious to be ignored”). Here, as explained above, supra at 20-21, these effects of regulation mean that denials of access to local areas unequivocally prevent competition on the merits and that the imposition of antitrust liability could not chill procompetitive conduct, lead to collusion, or present administrative problems.

#### The underlying standard is what matters---the AFF doesn’t change that, since the standard already excludes any rates for which immunity has been waived

Verrilli, Jr. et al. 3, fomer Solicitor General of the United States, “Verizon Communications, Inc. v. Law Offices of Curtis V. Trinco, LLP,” Oyez, 10/14/03, https://www.oyez.org/cases/2003/02-682

Donald B. Verrilli, Jr.

And I'd like to... if I could, go to... to the core antitrust issue here.

I think it is common ground with my friends on the other side that a monopolist's right to refuse to deal with competitors is not an unqualified right.

They acknowledge one qualification.

That's where the monopolist discriminates.

They argue that's the only time a section 2 duty ought to be imposed because that... in that situation you can be confident that it's anti-competitive conduct, and you won't have problems with dampening incentives and you won't have administrability problems because you can refer back to the prior course of dealing.

But where they're wrong is in suggesting that that's the only time that you can find liability under section 2 for monopolist refusal to cooperate with its rivals.

It is equally true in this case, in this situation where, as Justice Kennedy, your question earlier indicated, there is a regulatory regime in place that requires competitive access on the part of the monopolist in order to bring competition into the market.

And what you have... and... and I think these allegations are consistent that... what I am about to say is consistent with the allegations in the complaint, and what you have is a course of conduct on the part of the monopolist that is intended to subvert the competitive entry that those regulations require.

William H. Rehnquist

Well, you... you say then that the 1996 act gives you affirmative momentum that you wouldn't have with... that you wouldn't have if it were just the antitrust laws?

Donald B. Verrilli, Jr.

I wouldn't put it quite that way, Your Honor, but I... and I will answer Your... Your Honor's question directly.

The... the test, under the Sherman Act, for exclusionary conduct applies in the same way that... it's [it is] the exact same test whether the '96 act is there or not.

The test is whether the conduct impairs rivals' opportunities to compete in the market and whether the... the conduct does or does not further... by the monopolist further competition on the merits.

That test would apply to a different factual scenario after the 1996 act was passed than before.

And it's clear that that must be the case.

For example, Your Honor, one thing that the 1996 act did... this is section 253 of the act, which I think is at page 90 of the appendix to the petition... it eliminated, preempted State monopoly franchises.

Now, prior to passage of the 1996 act, if... if Trinko went to sue... bring a section 2 claim against a local telephone provider in a State where... where there was a monopoly franchise law, Trinko would be out of court on the State action doctrine.

There would be an ironclad defense.

Well, section 253 of the act preempted the defense.

So obviously in that situation, there is an antitrust claim that wasn't there before, and so it can't be the case that what... that... that the passage of the 1996 act has no relevance whatsoever to the application of section 2 of the Sherman Act.

And indeed, we think it would impermissibly... it would violate the savings clause and impermissibly modify the applicability of the antitrust laws to conclude that the 1996 act is the sole remedy here for a person in Trinko's position.

David H. Souter

Well, you're modifying it either way, aren't you?

I mean, you're modifying it if you say sole remedy.

You're modifying it if... if it gives, in the Chief Justice's words, momentum.

Donald B. Verrilli, Jr.

I don't think so.

David H. Souter

It's modification either way.

Donald B. Verrilli, Jr.

I don't think so, Justice Souter, because the... the statute says that nothing shall modify the... modify, impair, or supersede the applicability of the antitrust laws.

David H. Souter

And the momentum theory, in effect, says the applicability is being modified because there's a declaration of certain anti-competitive conduct.

Donald B. Verrilli, Jr.

Well, I don't... I don't think so.

I think it... the exact same test applies before the act was enacted and after, so it doesn't... it doesn't modify the substantive antitrust rule one iota.

What it changes is the facts to which the rule applies.

Now, in this case it would not be true...

David H. Souter

But I thought you were invoking the act for the characterization of those facts as anti-competitive.

Donald B. Verrilli, Jr.

Well, yes, in the following sense, Justice Souter.

But I don't [do not] think it constitutes a modification of the applicability of the antitrust laws.

It might change the result under the antitrust laws, but not modify the applicability because the general rule under the antitrust laws is that one takes the regulatory context into account, and the fact that conduct violates extrinsic norms, and in particular, when it violates, as it did in MCI v. AT&T and in the Litton Systems case and the court... cases in the court of appeals, when it violates extrinsic norms that are designed to promote competition, that counts against the...

Anthony M. Kennedy

Are... are you saying that the Telecommunications Act imposes new duties and the violation of those duties now becomes an antitrust violation?

Donald B. Verrilli, Jr.

No.

That's...

Anthony M. Kennedy

You want to talk about the... about... about the facts of... of the... of the market.

I understand that.

Donald B. Verrilli, Jr.

They... I...

Anthony M. Kennedy

But it seemed to me the thrust of Justice Souter's question as well was that the Telecommunications Act imposes new duties, and violation of those new duties is... is really the gravamen of your complaint.

Donald B. Verrilli, Jr.

I don't think that... I don't think that's quite right, Justice Kennedy, and let me try to explain why.

The test is whether the monopolist's conduct prevents competition, obstructs competition, whether it does so on a basis other than competition on the merits, and whether it is... there's otherwise a legitimate business justification.

That's the general rule, as the United States acknowledges at page 14 of its complaint.

That's the rule that was applied in Aspen, the rule that was applied in Kodak.

That's the rule.

That rule applies here.

When one answers the first part of that test that... which is does the monopolist's conduct obstruct competition, the... the... it's not the case that any violation of the 1996 act would obstruct competition.

What has to be shown there is that the monopolist's conduct is sufficiently grave, sufficiently serious, sufficiently sustained that it... that it amounts to an overall pattern that obstructs competition.

So it's not the case that there is a... that... that there's a... an automatic transference of a... of a duty under the 1996 act into an antitrust duty.

But where the... where the 1996 act becomes relevant is when you get to the next stage of the inquiry.

And I think... and it's just what Your Honor said earlier.

At that stage in the inquiry, it is... the monopolist does not have open to it the argument that this is pro-competitive behavior and that I have a legitimate business justification for it because in that circumstance, it is unlawful to do it.

And so it can't be a legitimate business justification to say I don't want to do something that the law compels me to do because I'll be better off as a competitive matter if I don't do it.

So it does enter the analysis.

It's not irrelevant by any means.

But it doesn't transform or change in any way the antitrust standard.

#### It's a voter – makes leveraging any offense impossible

#### Even if not all those words are in the plan, perms can be extra-topical but not untopical

#### Best for functional limits – allowing the AFF to merely incentivize behavioral change – via taxes, subsidies, recommendations, or contracting – rather than mandates – takes an already large caselist of every objectionable business practice, multiplied by every sector of the economy, and removes the only remaining predictable element – the mechanism for behavioral change – voiding every topic disad and critique link and making prep impossible

### AT: Deficit – Immunities / Treble Damages

#### FERC already has the authority – and merely signing the contract is sufficient to resolve any question about whether treble damages are a credible threat

Nordhaus 2 (Robert R. Nordhaus, member of the law firm of Van Ness Feldman, P.C., “Electric Power Regulation: Making Partially-Deregulated Markets Work,” Administrative Law Review, 54(1), Winter 2002, pp.365-387, JSTOR)

D. Antitrust Policy

As noted above, there are two reasons why antitrust enforcement may not be effective to rein in market power in deregulated electric markets: (1) much of the conduct in question is not unlawful under the antitrust laws because it appears to be a result of unilateral decisions to raise prices or reduce output; and (2) even in the case of conduct that does violate the antitrust laws, it is not clear that treble damages are available as a remedy.

The first issue (unilateral action to raise prices) has to be dealt with through structural remedies and market power mitigation policies, as outlined above. The second issue, however, needs to be addressed directly either through legislation, by the courts, or by administrative action at FERC. Administrative action by FERC could include (1) FERC's reversing its position on the applicability of the filed rate doctrine to market-based rates,70 (2) FERC's requiring any holders of market-based rate authority to waive the Keogh defense, or (3) FERC's providing in the market-based rate order that the order does not authorize any conduct that violates antitrust laws. There should be no question in the electric marketplace that civil damages are available to redress per se violations of the antitrust laws, such as price fixing.

#### Courts confirmed

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

But IOUs pressed their claims in federal court. In approving the PJM ISO tariff, FERC rejected an IOU-filed proposal that would have allowed IOUs to unilaterally file certain transmission tariff amendments, concluding that only the ISO would have authority under FPA section 205 to file changes to transmission rate design and terms of service.134 The D.C. Circuit rejected FERC’s reading of section 205, holding that, as transmission owners, IOUs have filing rights under section 205 that FERC cannot revoke, although the court noted that IOUs may choose to voluntarily give up rights by contract.135 FERC subsequently approved a settlement between PJM IOUs and PJM that allocated section 205 filing rights and provided IOUs with the “exclusive and unilateral right” to make filings about transmission rate design, recovery of transmission revenue requirements, and incentive and performance-based rates.136 FERC approved similar arrangements for other ISOs and their IOU members,137 although it warned IOUs that it would monitor how they wield those rights to ensure that they do not do so in a way that compromises ISO independence.138

### AT: Deficit – Say No

#### Utilities say yes – FERC – NOT the states – has exclusive authority over transmission expenditures by utilities – counterplan takes those hostage

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

FERC should reclaim its transmission agenda. Rather than intervene directly in IOU-controlled planning processes, I propose that FERC should induce IOUs to accept third-party controlled planning. FERC has exclusive authority to determine whether transmission spending is prudent, and in making that determination, it should consider how transmission investment is planned. FERC should issue a new policy on prudence that subjects IOU-controlled spending to scrutiny while maintaining the current presumption that independently planned transmission is prudent. My hope is that under this new approach to transmission rates, IOUs will voluntarily cede control of planning. If IOUs fail to do so, FERC retains broad authority under section 206 to police anti-competitive IOU behavior and should act decisively to separate transmission planning from IOU control.

#### They’re the only source of all profits – utilities have to agree

Feinstein 20 (Laura Feinstein, journalist at Sightline Institute, focuses on energy policy and decarbonization, former engineer for Puget Sound Energy, modernizing the regional energy grid, MS mathematics, University of Washington, BS electrical engineering, Purdue University; and Eric de Place, Senior Fellow and former director of the Thin Green Line program, spearheaded Sightline’s work on energy policy for two decades, considered an authority on a range of issues connected to fossil fuel transport, including carbon emissions, local pollution, transportation system impacts, rail policy, and economics; “PLAYING MONOPOLY; OR, HOW UTILITIES MAKE MONEY,” Sightline Institute, 5-18-2020, https://www.sightline.org/2020/05/18/playing-monopoly-or-how-utilities-make-money/)

To achieve our climate goals in the Northwest (or any other region in North America), we’ll need to clean up the power grid while also shifting whole sectors of the economy from dirty fuels to electricity. That two-pronged approach is central to every serious study of decarbonization, even in places like Cascadia where we already boast relatively low-carbon power systems. A starting place is utilities. To decarbonize, policymakers will need to fundamentally change how utilities make money. Today, utilities are primarily incentivized to build new infrastructure—more pipes and wires—rather than boost efficiency, make repairs, or invest in operations. And, utilities may see third-party-owned climate-friendly energy systems like solar panels and batteries as a threat to their business model. Understanding how we can realign utility profit incentives is key to decarbonizing the Northwest.

The utility business is not like most other businesses. Utilities inhabit a world of special accounting rules and pre-established investment returns, where ordinary business incentives often do not matter, and where changing course is exceedingly hard.

Utilities’ profit doesn’t come from the natural gas or water or electricity they provide to customers. That’s right, utilities do not earn profits on the products they sell—gas, water, and power are provided “at cost” to consumers—but rather from the investment in the assets (the pipes, substations, transmission lines, etc.) that are used to provide the service. In short, the more infrastructure that a utility builds, the higher the profits it can generate.

#### AND, transmission infrastructure – even in local retail markets rather than wholesale transmission markets – is the foundation of their entire business model – utilities would rather cede some current profits to DERs and smart grids than risk losing all future profits – we’re the only ones reading comparative ev

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

As I describe below, FERC’s transmission planning reforms follow numerous efforts to encourage IOUs, pursuant to section 202, to coordinate their planning. Ultimately, FERC shifted to a mandatory approach under section 206, linking its reforms to its duty to ensure just and reasonable and not unduly discriminatory rates. FERC justified its planning rules by pointing to its well-established conclusion that IOUs will act in their own self-interest to the detriment of consumers and competitors if left unchecked. I see another reason for robust FERC oversight of planning.

For more than a century, IOUs have enjoyed transmission monopolies within their state-granted service territories. A fundamental pillar of the IOU business model is to build more transmission in their exclusive retail footprints.206 As their local networks age, IOUs may find that the simplest paths forward for maintaining reliability, as well as the easiest for supporting their financial returns, are in replacing aging infrastructure or supplementing it with new or reconductored local lines.207 Rebuilding twentieth century infrastructure may be a viable solution for keeping the lights on, but it neglects the innovative potential of twenty-first century technologies and is unlikely to be the most cost-effective solution for decarbonizing the nation’s power networks.

IOUs are generally incentivized to disfavor new technologies, including demand-side solutions and high-tech operational practices, that might obviate the need for additional transmission infrastructure,208 in part because they are not as predictably profitable under the cost-of-service business model. 209 Consideration of twenty-first century technologies, ranging from distributed storage to software optimization tools, should be a fundamental component of transmission planning. Advancing this non-traditional infrastructure may require new planning approaches that seem to me unlikely to come from local monopolists. In addition, as the resource mix evolves, new types of transmission projects — regional and perhaps even continental in scale, and utilizing direct current technology — may be the optimal means for cost-effectively integrating wind and solar generation.210 IOUs’ incentives to prioritize development in their state-protected service territories bias them against large-scale projects, particularly high-efficiency direct current lines that don’t neatly integrate with existing alternating current infrastructure. Although a hypothetical “Supergrid,” or “Smartgrid” is not my focus, it is evident that the current IOU-centric development paradigm is incompatible with construction of continental-scale transmission and deployment of technologies that might obviate the need for IOUs’ local transmission spending.

### AT: Deficit – Capture

#### Capture and gaming is impossible – counterplan takes planning authority away from utilities and gives it to independent oversight entities that are required to hire third-party auditors to verify all the info and studies provided by utilities – and other independent third-party review boards also control project selection – that ZEROs any risk of deficit

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

This dramatic shift — from emphasizing voluntary IOU coordination under section 202 of the Federal Power Act (FPA) to policing IOU conduct under section 206 — was predicated on FERC’s decision to reclassify long-standing IOU practices as “unduly discriminatory” under the FPA. FERC concluded that anti-competitive IOU behavior was systemic and fashioned remedies, for the first time, on an industry-wide basis. FERC’s reforms to transmission operations and planning have been guided by two key principles: comparability and transparency. FERC’s orders require IOUs to provide their customers and their own power marketing operations with comparable transmission service, and, when planning system expansion, to consider the needs of customers on a comparable basis with their own goals. FERC has also attempted to liberate transmission information from utility control by compelling IOUs to share operational and planning data and models. Structural reforms that separate IOUs from transmission operations and planning by placing an “independent” entity between IOUs and decisionmaking aim to improve the effectiveness of FERC’s comparability and transparency requirements and further neutralize IOUs’ incentives to restrain competition.

#### FTC are NOT the only honest people on the planet – independent third-party oversight firms’ entire business model relies on their reputation for NOT getting captured – they’re even more effective than the FTC!

Van Loo 19 (Rory Van Loo, Associate Professor of Law, Boston University; Affiliated Fellow, Yale Law School Information Society Project, “The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance,” Vanderbilt Law Review, 72(5), 2019, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1678&context=faculty\_scholarship)

Perhaps a truly independent private third party could provide that benefit.228 Regulators other than the FTC have deployed more powerful private auditors with “unrestricted access” to the regulated entity’s documents.229 In theory, these private monitors could provide many of the benefits of public monitors, and indeed scholars have often proposed private rather than public monitoring of platforms.230 Private monitors have the advantage of using fewer public resources and avoiding governmental acquisition of private information.

Another common reason for preferring a disclosure-oriented or private third-party regime is that either regime would use monitors with more sophistication and resources than bureaucrats.231 After all, government agencies pay considerably less than Silicon Valley firms.232 Moreover, bureaucrats often have protected employment status, which has led critics to argue that regulators cannot easily update their workforce with training or more technologically savvy employees.233 Many believe that a third-party regulatory regime would make it less likely that “the government will remain several steps behind.”234 In light of these advantages and the political obstacles to government regulation, wholly private monitoring could offer a sensible policy option.

## DER Adv

### 2NC – DC Circuit Solves the aff

#### **NOT just wholesale markets, but retail too!**

FERC 20 (Federal Energy Regulatory Commission, September 17, 2020, “FERC Opens Wholesale Markets to Distributed Resources: Landmark Action Breaks Down Barriers to Emerging Technologies, Boosts Competition” <https://www.ferc.gov/news-events/news/ferc-opens-wholesale-markets-distributed-resources-landmark-action-breaks-down>) MULCH

The Federal Energy Regulatory Commission (FERC) today approved a historic final rule, Order 2222, enabling distributed energy resource (DER) aggregators to compete in all regional organized wholesale electric markets. This bold action empowers new technologies to come online and participate on a level playing field, further enhancing competition, encouraging innovation and driving down costs for consumers.

DERs are located on the distribution system, a distribution subsystem or behind a customer meter. They range from electric storage and intermittent generation to distributed generation, demand response, energy efficiency, thermal storage and electric vehicles and their charging equipment.

The final rule enables these resources to participate in the regional organized wholesale capacity, energy and ancillary services markets alongside traditional resources. Multiple DERs can aggregate to satisfy minimum size and performance requirements that they might not meet individually.

“Today FERC broke new ground towards creating the grid of the future by knocking down barriers to entry for emerging technologies,” FERC Chairman Neil Chatterjee said, lauding the order. “With this final rule on DERs, we build on the significant progress already made through Order 841 and expand our ability to harness the full potential of these flexible resources. By relying on simple market principles and unleashing the power of innovation, this order will allow us to build a smarter, more dynamic grid that can help America keep pace with our ever-evolving energy demands. I am honored to be at the helm of the agency as we bring this critical rule across the finish line and continue to navigate our nation’s energy transition.”

“I thank Chairman Chatterjee for working with me and my team to help get this much-anticipated final rule over the finish line,” FERC Commissioner Rich Glick said, praising the order. “The rule will enhance grid reliability, expand market competition and reduce consumer electric costs.”

Under the new rule, regional grid operators must revise their tariffs to establish DER aggregators as a type of market participant, which would allow them to register their resources under one or more participation models that accommodate the physical and operational characteristics of those resources.

The new rule builds off the DC Circuit Court’s recent ruling on Order 841, in which the court affirmed FERC’s exclusive jurisdiction over wholesale markets and the criteria for participation in them. Order 2222 prohibits retail regulatory authorities from broadly excluding DERs from participating in regional markets. However, the new rule prohibits regional grid operators from accepting bids from the aggregation of customers of a small utility unless the relevant retail regulatory authority for that utility allows such participation. The final rule also respects retail regulators’ current ability to prohibit retail customers’ demand response from being bid into regional markets by aggregators.

#### They’ll say anticompetitive practices will delay implementation BUT that was exactly the problem the order is solving – guarantees it’ll be fast

Campbell 20 (Bruce Campbell, Director of Regulatory Affairs at CPower, expert in regulatory proceedings and market design with 40 years of experience in the electric industry including generating station management and strategic development, an active participant in the stakeholder process of regional grid operators for over 15 years representing generation owners and transmission owners, BS Mechanical Engineering, Bucknell University, “A Primer for Understanding FERC Order 2222,” The Current, 12-18-2020, https://cpowerenergymanagement.com/a-primer-for-understanding-ferc-order-2222/)

Since being issued in September 2020, the Federal Energy Regulatory Commission’s (FERC) Order 2222 has been heralded as a landmark achievement in the history of the energy industry, one that years from now may be seen as a watershed moment when the grid took a giant leap forward in its evolution.

Before we get overwhelmed by hype and possibility, let’s take a minute to examine and clearly explain this order so your organization understands it and can use that knowledge to make an informed, educated decision on your energy use and spend.

When language matters, study the source

Language is important when it comes to interpreting and understanding energy regulations. Let us then examine FERC’s exact words concerning Order 2222 so you understand for yourself what they mean and you don’t get caught up or misled by someone else’s well-meaning and enthusiastic but perhaps not-entirely-accurate explanation of the order.

The following is verbatim from FERC,

“Order No. 2222 will help usher in the electric grid of the future and promote competition in electric markets by removing the barriers preventing distributed energy resources (DERs) from competing on a level playing field in the organized capacity, energy, and ancillary services markets run by regional grid operators.”

Order 2222 exemplifies FERC’s mission: regulate wholesale power markets

One of the Federal Energy Regulatory Commission’s primary responsibilities is to regulate the sale of electricity in the wholesale power markets, which are composed of the organized capacity, energy, and ancillary services markets that are run by the regional grid operators in the US.

To be clear, Order 2222 involves wholesale power markets, which refer to the buying and selling of power between generators and resellers. In contrast, the transaction that occurs when your organization purchases and consumes electricity takes place in the retail power market.

Order 2222 affects the wholesale power markets, NOT the retail markets.

It’s FERC’s responsibility to ensure that the competition in US wholesale power markets is just and reasonable. The markets exist to foster competition and FERC acts as essentially a referee, making sure one entity doesn’t have an unfair advantage over another.

In this respect, Order 2222 is right in the wheelhouse of FERC’s jurisdiction and mission.

Nonetheless, it is important to understand that the interconnection of DERs with the grid remains subject to local utility interconnection rules that are state jurisdictional and that these rules can encourage or discourage DER activity.

DERs are the grid’s future. Order 2222 paves a fair path forward

Until the last few years, most of the electricity entering the wholesale markets in the US originated from large traditional generation sources–coal, oil, or natural gas, for example–and was offered into the market by entities who controlled those sources, which we’ll call traditional electric resources for simplicity’s sake in this examination.

Today, however, distributed energy resources–or DERs as they’re commonly called–have become increasingly popular and have long-sought to enter the wholesale marketplace and compete alongside traditional sources.

Order 2222, as FERC clearly states, seeks to allow DERs to compete on a fair and level playing field in the wholesale power markets.

Order 2222 defines Distributed Energy Resources (for everyone)

Let’s take a moment and consider how FERC defines distributed energy resources, because this is a term that (like many in the energy industry) isn’t necessarily uniform in its definition and can mean different things to different people.

Again this language is verbatim from FERC:

“DERs are small-scale power generation or storage technologies (typically from 1 kW to 10,000 kW) that can provide an alternative to or an enhancement of the traditional electric power system. These can be located on an electric utility’s distribution system, a subsystem of the utility’s distribution system, or behind a customer meter. They may include electric storage, intermittent generation, distributed generation, demand response, energy efficiency, thermal storage or electric vehicles and their charging equipment.”

This text is worth understanding because it formally defines what has previously been nebulous and open to varying interpretations. FERC desires to create a “level playing field.”

The “level playing field” that Order 2222 seeks to create means FERC wants to make sure that assets entering the market as distributed energy resources have equal opportunity to compete against those entering the market as traditional electric resources.

If we look at FERC’s recent history of orders–including 2011’s Order 745 involving demand response resources participating in wholesale markets and 2018’s Order 841, concerning the same of storage resources–we find the Commission has been striving to establish this level playing field between traditional market participants and inevitable new players in the marketplace for some time.

What does Order 2222 do (specifically) for DERs?

At this point in our examination of Order 2222, we know FERC’s objective is to create a playing field that fosters fair competition among market participants.

Let us now take a look at the operative phrase of the order, which instructs regional grid operators to remove barriers preventing distributed energy resources (DERs) from competing on this level playing field.

A good question for us to ask now is what are these “barriers” standing in the way of DERs getting a fair shake in the wholesale markets?

The answer is complicated because the six deregulated energy markets in the US have very different rules for participation. It’s precisely those rules–or more to the point, tariffs–that Order 2222 instructs grid operators to revise, so that–again, in FERC’s words–distributed energy resources are established “as a category of market participant.”

When will we see results from Order 2222?

Back to the horse’s mouth and FERC’s wording: “Order No. 2222 takes effect 60 days after publication in the Federal Register. Grid operators must make compliance filings to FERC within 270 days of publication in the Federal Register.”

Here, we see that at the absolute earliest, the intentions of Order 2222 won’t be fully realized in the marketplace for nearly a year.

If the saga of FERC Order 841 is any indication, it will be some time before grid operators fully comply with Order 2222 and make the necessary adjustments to the tariffs that affect their markets and allow DERs the same access traditional assets have enjoyed.

It’s not unreasonable then to expect grid operators to submit appeals, file extensions (MISO, PJM, SPP, and ISO-NE have already asked for and received extensions), and otherwise take longer than 330+ days to adhere in full to FERC’s order.

On to the Future…

Order 2222 is important because it not only acknowledges the long-held conviction that DERs will play an integral role in the grid of the future, it also guarantees that in the very near future distributed energy resources such as rooftop and community solar, backup generators, fuel cells, demand response, energy storage, microgrids, and energy efficiency will take their place at the adult table in the country’s wholesale power markets.

For now, there are many ways to monetize DERs in US energy markets, especially with demand response, which pays organizations to use less energy when the grid is stressed due to lack of reliability or high electricity prices. Expect those opportunities to increase as Order 2222 is implemented.

### 2NC – Other countries already doing DERS

#### DERs are rapidly exploding globally now – so are smart and microgrids

Miyazu 1-3-22 (Hina Miyazu, Shibuya Data Count, provides market research reports to various business professionals across different industry verticals, “Distributed Energy Generation Market Size, Demand, Outlook, Trends, Revenue, Future Growth Opportunities,” MarketWatch, 1-3-2022, <https://www.marketwatch.com/press-release/distributed-energy-generation-market-size-demand-outlook-trends-revenue-future-growth-opportunities-2022-01-03#:~:text=%22Global%20Distributed%20Energy%20Generation%20Market,the%20forecast%20period%202020%2D2027>.)

"Global Distributed Energy Generation Market is valued at approximately USD 243 billion in 2019 and is anticipated to grow with a healthy growth rate of more than 11.5% over the forecast period 2020-2027. The distributed energy generation (DEG) is a kind of decentralized system used to produce electricity energy and is served to homes, businesses, and industrial areas. These systems are frequently performed their functions through using technologies, such as solar power and fuel cells. More often, distributed energy generation systems are utilized to offer as substitute or addition to the conventional electric power system, and they deliver small-scale electricity generation (usually in the range of 1 kW to 10,000 kW). Distributed energy can be derived from both renewable and non-renewable sources. Furthermore, the deployment of distributed energy generation system also becomes more significant in many countries, with the legislative package on the new electricity market. For instance, the European Commission's has developed a new legislative policy within the Clean Energy Package. As such, the revised Electricity Regulation, which will enter into force on 1st January 2020, opens up opportunities for electricity wholesale markets to renewables, and energy storage. This, in turn, is expected to accelerate the installation of distributed energy generation system in the region. Moreover, the rise in investments in renewable energy projects and smart grid infrastructure, along with growing government focus on reduction of carbon footprint level and usage of cleaner energy resources are the few factors responsible for the high CAGR of the market during the forecast period. For instance, in 2020, the Korean government planned to invest 11 trillion won (USD 9 billion) in renewable energy projects for the upcoming three years. Whereas, Southeast Asian countries will invest USD 9.8 billion in smart grid infrastructure from 2018 to 2027. This, in turn, is likely to strengthen the demand for distributed energy generation, thereby contributing to the market growth around the world. However, the regulatory issues associated with distinct distributed energy resources is one of the prime the few factors restraining the market growth over the forecast period of 2020-2027.

The regional analysis of the global Distributed Energy Generation market is considered for the key regions such as Asia Pacific, North America, Europe, Latin America, and Rest of the World. Asia-Pacific is the leading/significant region across the world in terms of market share owing to the rising renewable energy generation capacity, along with the growing investment & deployment of smart grid and microgrid in the region. Whereas Asia-Pacific is also anticipated to exhibit the highest growth rate / CAGR over the forecast period 2020-2027. Factors such as the stringent government norms concerning environment safety and emission, coupled with the presence of significant number of market players across the developing nations, such as China and India, are the few factors creating a lucrative opportunity for the growth of the Distributed Energy Generation market in the Asia-Pacific region.

## Prices Adv

### 2NC – Alt causes

#### Laundry list of alt causes to economic decline.

Faiola 1-12 (Anthona Faiola, BA in Communications from Florida International University, Writer for the Washington Post; “As pandemic rages on, the global economy is its latest victim;” 01-12-22, The Washington Post, <https://www.msn.com/en-us/news/world/as-pandemic-rages-on-the-global-economy-is-its-latest-victim/ar-AASGvI8?ocid=BingNewsSearch>, TM) [language modified, denoted by brackets]

Fair warning: This isn’t what you wanted to hear at the start of the new year. But the engines of the global economic recovery — which revved into high gear in 2021 after the world ground to a halt in 2020 — are slowing down.

And 2023 could be even worse.

Taken together, this year and next are set to mark the sharpest slowdown after an initial rebound from a global recession since at least the 1970s. That grim assessment comes from the World Bank’s biannual Global Economic Prospects report, released Tuesday. After rebounding to an estimated 5.5 percent global growth in 2021 on the heels of the 2020 pandemic recession, the report said growth is poised to decelerate to a worse-than-expected 4.1 percent this year, and then soften to 3.2 percent in 2023.

Blame the slippage on the omicron variant, coupled with persistent disruptions to supply chains,

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nagging vaccine inequality, soaring energy and food prices,— a bill that has now drained the ability of many to keep protecting and [stifling] ~~crippling~~ levels of national debt as countries pick up the ever-expanding tab for the pandemic workers and businesses damaged by the seemingly endless covid crisis.

Shrinking global growth is not an equal opportunity offender. Mounting evidence suggests the eruption of what the World Bank has called a “pandemic of inequality,” with the wealth gap worsening both among and within nations in a manner not seen in a generation.

“The core issue that’s going on in the world is inequality, poor people being hit the hardest by covid, but also by interest rate hikes, by inflation, by macro policies and vaccine inequality,” World Bank President David Malpass said Monday in an interview with The Washington Post.

He added, “it’s especially harsh on people in poorer countries. And we’re seeing reversals in development that will leave scars for decades. That includes education, health, food insecurity and so on. Inflation is [also] a big problem. It’s hard to stop.” On the heels of deadly demonstrations in Kazakhstan, experts are also warning that deepening inequalities created by the pandemic — coupled with worse-than-expected growth and more extreme weather from climate change — could lead to more civil unrest. “The resulting global divergence will create tensions — within and across borders — that risk worsening the pandemic’s cascading impacts,” warned a new report, also published Tuesday, by the World Economic Forum. Let’s put this into perspective. Rich nations are now on track to get their economic groove back by 2023, completing a rebound back to pre-pandemic trajectories. Not so for developing countries. Some of the worst hit are nations in conflict and tourism-based economies. In fact, in one-third of emerging markets, output this year is expected to be even worse than in 2019, hampering efforts to combat global poverty and fund education, health-care and social programs. Even China — a major anchor of the global economy — is set to see growth abate to a relatively weak 5.1 percent this year as its real estate woes spill into the broader economy, according to the World Bank’s report.

[[VIDEO OMITTED]]

So who will see the sharpest drops?

Overall, the World Bank’s 4.1 percent growth figure for 2022 is revised down from an earlier prediction last June of 4.3 percent. But that seemingly small 0.2 percentage point revision includes some major national nose-dives. Crippled by Turkish President Recep Tayyip Erdogan’s unorthodox interest rate policy that spurred a plunge in the lira and spiking inflation, Turkey’s economy is set to fall from 9.5 growth percent in 2021 to 2 percent this year. Growth in Brazil is set to fall from 4.9 percent last year to 1.4 percent.

Even those outlooks could be rosy.

In some countries, the risk of so-called “hard landings” — even steeper economic plunges that follow growth spurts, like the one the world saw in 2021 — is increasing.

As Fortune reported, omicron may be less severe than the delta variant, but it could hit the global economy harder. Fresh lockdowns, travel cancellations, more woes for supply chains and overburdened hospitals due to the new variant are poisoning a well already teeming with surging inflation and fears of rising interest rates.

One problem with all this: The unpredictable pandemic has made forecasting far harder, as The Post reported Tuesday. Ian Shepherdson, chief economist and founder of economic research firm Pantheon Macroeconomics, for instance, anticipated the creation of 850,000 U.S. jobs in December. What the United States actually got was 199,000 new workers.

“Everybody wants to be pursuing precision,” he told my colleague David J. Lynch “But even before covid, it was like hitting a moving target from a moving vehicle. Now, we’ve got a blindfold on as well.”

But where revisions are being made, they’re tending to be more pessimistic, dampening the broad economic optimism witnessed a few months ago. The International Monetary Fund has delayed its global growth forecasts, initially set for Jan. 19, to late January after its managing director warned of further downgrades in predictions due to the surging pandemic. Goldman Sachs recently cut its 2022 growth forecast for the United States from 4.2 percent to 3.8 percent.

“After the new year, a steady trickle of growth-downgrades became a torrent,” Bernhard Warner wrote in Fortune. The outlet quoted Berenberg Bank chief economist Holger Schmieding as telling investors last week that omicron would shave as much as 1 percent off gross domestic product in the euro zone and Britain.

Some developing countries could be harder hit. The toxic cocktail of slowing economies and high debt is escalating the threat that some countries won’t be able to pay their bills this year.

# 1NR

## CASE

### Adv 1

**Tech prevents a grid collapse-and solves even if one occurs**

**EESI, 14** The Environmental and Energy Study Institute Innovative Technologies to Strengthen the Grid June 18, 2014, <https://www.eesi.org/briefings/view/061814nema> {DK}

The Environmental and Energy Study Institute (EESI), in partnership with the National Electrical Manufacturers Association (NEMA), held a briefing on innovation in electric grid technologies and the opportunity being provided by the Department of Energy’s Quadrennial Energy Review (QER). The QER was launched this January to advance a 21st century energy policy that, among other things, may promote electric grid resilience. The electric grid faces unprecedented threats in the United States, including extreme weather, cyberattack, and physical vulnerabilities which urgently need to be addressed. Speakers from the Department of Energy (DOE), G&W Electric, Siemens, and Commonwealth Edison discussed the concept and purpose of the QER and the need to reform our energy policy to strengthen the nation’s electric transmission and distribution grid, as well as the technologies available today that are making it happen. Extreme weather events are the number one cause of power outages. Tornadoes, hurricanes, and flooding can be particularly disruptive to above-ground transmission networks, and such events are occurring more frequently. The number of federal disaster declarations hit 99 in 2011, shattering the 2010 figure of 81, which itself was substantially above the yearly average of 35 since 1953. And nature isn’t the only threat. According to a 2013 study by the Federal Energy Regulatory Commission, attacking just nine of the country's 55,000 substations could be enough to cause a coast-to-coast blackout on a hot summer day. Coordinated, precisely targeted attacks could cause the entire grid to collapse, taking months to restore. The good news is technologies available today can mitigate such threats and help utilities, grid operators, and electricity customers respond when disaster strikes. The challenge is deploying these new technologies given the complex regulatory structure and financial incentives governing electric infrastructure investment. See also E&E's article about the briefing, "Smart grid is expensive but necessary to integrate renewables and adapt to climate change." Briefing Highlights The Honorable Jerry McNerney (D-CA) spoke about his career-long interest in energy issues. While working in the energy industry he helped develop smart meter technology and brings his engineering and energy experience to Congress. The biggest challenges facing the electricity grid today are meeting demand, ensuring security, and providing clean and renewable energy (which helps reduce pollution and greenhouse gases). Currently, our grid is vulnerable to cyber-attacks, physical attacks and natural disasters, which can be addressed through the installation of smart grids. The federal government’s role should be to give guidance to states as they develop smart grids as well as create standards for energy suppliers to follow. There needs to be bipartisan support for such standards to be created. Dr. Karen Wayland, Deputy Director for State and Local Cooperation, Office of Energy Policy and Systems Analysis at the Department of Energy (DOE), discussed the Quadrennial Energy Report (QER) that the Department of Energy and other agencies are working on, at the request of the President, to provide a comprehensive look at the nation’s energy industry. The first section of the QER, which is due out in January 2015, will look at energy transmission, storage and distribution, which represent huge sections of the nation’s energy infrastructure, require large amounts of investment, and are difficult to change. The DOE has been holding stakeholder meetings across the country to allow for public comment from those who are directly involved with the local energy infrastructure and are facing regional challenges. The comments will be taken into account as the QER is drafted. The report aims to create technology and policy recommendations that can be used by the federal government to improve the efficiency and safety of energy transmission across the country. Kenneth Geisler, Vice-President for Strategy, Smart Grid Division at Siemens, explained how new technologies can and are being used to strengthen and modernize the nation’s grid to create a bidirectional distribution of energy. Developing a “smart grid” involves myriad technologies which are available but should be deployed much more quickly and broadly. While there are many challenges facing the grid, they fall into four key categories: resilience, sustainability, efficiency, and reliability. Siemens is currently working on solutions to ensure that these four overarching goals are met, and examples of their work can be seen around the country and around the world, from Virginia to Savona, Italy. Policy action by Congress can accelerate these improvements. This could include creating incentives to protect essential infrastructure and prevent damage to the grid from natural disasters and cyber attacks. One such action would be accelerating depreciation schedules—some of which are 30 years, when 5-10 years for some technologies would be much more effective at encouraging investments. Efficiency and reliability issues can usually by addressed by utilities under their existing business models, but resilience and sustainability require much larger investments which private businesses are not always capable of taking on unaided. Anil Dhawan, Senior Electrical Engineer, Commonwealth Edison (ComEd) provided details on how a smart grid “uses information and communication technology to gather and act on information to improve reliability, economics and sustainability of the production and distribution of electricity.” Smart metering allows for information about energy usage and outages to be automatically sent from consumers to utility companies, minimizing outage durations. Since the installation of smart metering in the Chicago area by ComEd, there has been a 15 percent decrease in outage frequency, the creation of 2,800 full-time equivalent jobs, and $1.5 billion in supply chain spending pumped into the Illinois economy. Smart grid upgrades have also allowed for better security to be built into the grid, in particular through the use of encrypted data communications. ComEd is planning to replace all 4 million meters in its network with smart meters by 2021. Erich Keller, Automation Engineer, G&W Electric, explained how Reclosers have been integrated into the grid to improve the efficiency and resilience of electricity transmission. This is an example of one technology—among many—that is helping improve the performance and resilience of the grid. Reclosers have sensors that can detect faults on the line. If a fault is detected, the Recloser will reset itself several times, in case the fault resolves itself on its own. If not, the Recloser breaks the circuit to prevent damage to the grid. Independent modules allow for the isolation of problems, and can be used to restore lost power in a matter of seconds, using alternate power sources, rather than the hours it can take when utility crews must be sent out to track the exact cause and location of a power outage.

### Adv 2

**Off-ramps to war solve**

**Schultz 18** (Kenneth, Professor of Political Science at Stanford University, “Perils of Polarization for U.S. Foreign Policy.” Washington Quarterly, Winter 2018)

From the perspective of the country’s foreign policy, one danger is that **presidents** can respond to this political risk by **shaping** military **operations** in ways that make them less effective. A president who expects to meet opposition may decide not to use force in a case where doing so might further U.S. interests—e.g., plausibly, Syria in 2013—or to **delay getting involved** while a crisis deepens—e.g., Bosnia from 1992–95.22 Presidents may also tailor the military strategy to ensure that an operation incurs **low costs** in terms of American casualties, thereby preventing a political **backlash**.23 For example, the (unauthorized) operations over **Kosovo** and **Libya** were designed to rely on air power only. Although several considerations contributed to those decisions—including the need to reassure worried allies and a skeptical Russia— they also dramatically lowered the risk to American service members. As a result, the **domestic** political **salience** and **risk** of these operations were minimized. The Obama administration even cited the limited nature of the Libya mission to argue that U.S. involvement did not rise to the level of “hostilities” for which Congressional authorization was needed.

## Deadlock DA

### 1NR – Extinction Add – ons

#### Bees are dying off---extinction

Gomez 18 – Jacy Gomez, Associate at Keybridge Communications, Contributor at U.S. News & World Report, Contributor to the Washington Examiner's Beltway Confidential Blog, Communications Specialist and Former Congressional Staffer for U.S. Sen. Chuck Grassley, “Bees are Critical to our Survival”, The Gazette, 2-1-2018, http://www.thegazette.com/subject/opinion/guest-columnist/bees-are-critical-to-our-survival-20180201

An attack on these important insects is exceedingly problematic. Wild bees are critical to safeguarding U.S. food supplies and growing our economy. Such utter disregard for bees — whether domestic or wild — puts the species one step closer to extinction.

Wild bee populations have dramatically declined in recent years. At least 37 percent of bee species are declining, according a 2015 United Nations report. Worse still, roughly 9 percent of bee species are facing extinction.

Within the past two decades, some bee populations declined by more than 90 percent.

There are several reasons. Take pesticides. More than 1 billion pounds of pesticides are used in the United States each year. Worldwide, that number is 5.6 billion pounds.

Pesticides can be poisonous to bees. In Oregon, for example, at least 50,000 bumblebees died suddenly after their tree habitat was sprayed with a neonic dinoteguran to control aphids.

Loss of habitat also is a major threat. Here in the United States, we lose about 6,000 acres of habitat per day thanks to land development projects, ethanol production and farm crops. The lack of available habitat makes it nearly impossible for bees and other pollinators to survive.

Climate change is another reason. As Defenders of Wildlife explains, “Shifting temperature and precipitation patterns (alter) the distribution of plants and their flowering times.” This makes it difficult for bees to receive proper nourishment.

Regardless of the cause of their demise, diminishing bee populations are a major threat to human survival.

For starters, bees are critical to safeguarding the global food supply. By transporting pollen between flowers and crops, bees are responsible for producing many important crops that humans enjoy daily. In the United States, bees pollinate more than 90 commercial crops. These crops include nuts, fruits and vegetables.

The same is true worldwide. In fact, the United Nations’ Food and Agriculture Organization reports that roughly 90 percent of the global food supply originates from 100 crop species. Of those species, more than 71 percent rely on bees for pollination.

You can thank bees for one of every three bites of food you eat in your lifetime. According to a June 2014 White House report, bees contribute more than $15 billion to our economy through their role as pollinators.

California’s almond industry, almost exclusively pollinated by honeybees, was valued at roughly $533 billion in 2015.

It may seem counterintuitive to care about bugs, but bees are a critical part of human survival.

#### Topsoil is depleting---extinction

Shah 18 – Vaidehi Shah, Media Advisor at Climate Media Centre at the University of Warwick, Associate Editor at Eco-Business, Master’s in Gender and International Development from the University of Warwick, BSci in Geography from the University of Singapore, Former Policy Executive at the National Climate Change Secretariat, “Our Dying Soils: The Invisible Crisis Under Our Feet”, Eco-Business Special Report, 3-19-2018, http://www.eco-business.com/news/our-dying-soils-the-invisible-crisis-under-our-feet/

The world relies on healthy soils for food, water, and a liveable climate. But soils are rapidly losing the ability to support life thanks to unsustainable development and industrial agriculture. Is enough being done to address this crisis?

Ana Maria dos Santos Suares, a farmer in Timor Leste’s Ermera municipality, has much more free time on her hands now than she did a few years ago. Where she once spent day after day weeding in her maize fields, she now only needs to do so once in a planting season.

“We use the remaining time to plant other crops such as potato and taro, cook, feed the pigs, look after the children, and rest,” says Suares in a documentary by the Food and Agricultural Organization of the United Nations (FAO).

This change is thanks to a project FAO has been conducting in districts across Timor Leste since 2013 to promote an alternative farming method to burning the land, ploughing it, and weeding it regularly.

Instead of this traditional practice, FAO encourages three strategies: First, minimising soil disturbance by inserting seeds directly into the soil; second, covering the soil with a layer of crop residue, or mulch—this is what prevents weed growth—and third, planting a variety of crops on the soil.

Suares, who is one of several farmers involved in the FAO project, says that switching to these practices has improved the quality of maize on her farm. And because the mulch retains water for several weeks, she still gets a good yield even if there is a long drought, or seeds are planted late in the season.

She offers an analogy for the difference between traditional practices and the ones FAO advocates: “Just like humans will burn in the sun without clothes, the ground needs to be covered with mulch.”

Suares adds: “If we do not keep the soil fertile, then over time our children will have problems. They will not have enough food, and will suffer.”

An invisible crisis

This is a reality that FAO knows all too well, and is at the heart of its work to preserve and restore the health of the world’s soils.

The UN agency estimates that a quarter of the Earth’s surface—land that could feed 1.5 billion people—has already become degraded, and a further 24 billion tonnes of fertile topsoil are lost to erosion, deforestation, and unsustainable farming practices every year.

This boils down to one disturbing prediction: The world could have as little as 60 years of harvests left, a scenario that would have knock-on effects on global food security—as well as geopolitics and security—and affect the crucial role soil plays in regulating the global climate and maintaining biodiversity.

So what is a healthy soil? It is a complex measurement that involves assessing physical, biological, and chemical properties. According to FAO, the most relevant qualities are “nutrient availability, workability—that is, the readiness of the soil to be tilled and cultivated, contingent on factors such as water content and structural sability—oxygen availability to roots, nutrient retention capacity, toxicity, salinity and rooting conditions”.

Problems with soil health also take various forms ranging from nutrient loss, erosion, acidification, and contamination by pollutants and toxic chemicals, to name a few. Often, these go hand in hand; for example, when soil erosion takes place, the most fertile layer—topsoil—is the first to be lost, thereby reducing the nutrient content of the soil.

As David Montgomery, professor of earth and space sciences at the University of Washington, intones: “Soil health is like human health; it is hard to define, but you sure know when you don’t have it.”

Definitions may be elusive, but experts agree on two things: first, that intense, large-scale industrial agriculture has been a key driver of soil degradation in recent decades; and second, the world isn’t paying nearly enough attention to this looming crisis.

Yuji Niino, technical officer, FAO, explains: “We recognise that soil degradation is due to the loss of organic carbon.” Essentially, this is the sum of biologically diverse organisms found in the soil including microbes, fungi, invertebrates such as worms, slugs and insects, root matter, and decomposing vegetation.

Soil carbon is widely considered to be the most important component of soil because it is the main source of micro-organisms that live in the soil, determines the availability of nutrients for plant growth, and even affects how resistant soil is to erosion.

In the past, traditional farming methods would return organic carbon to the soil after each harvest by applying manure or crop residue, says FAO’s Niino.

“But modern, mechanised, industrialised farming has eliminated this,” he notes. Today, a major portion of crop residues is usually used for other purposes such as making biofuels and animal feed.

“Three to four decades of not returning this organic matter to the soil has almost completely depleted the soil organic carbon in some regions in Africa and South Asia as well as tropical semi-arid regions with intensive farming practices,” says Niino.

The consequences of soil degradation are severe, and range from exacerbating global hunger to causing biodiversity loss, and contributing to climate change when soil carbon is released into the atmosphere.

A 2015 report by Economics of Land Degradation, a global initiative, estimates that land degradation costs the global economy between US$6.3 trillion and 10.6 trillion annually.

Given the severity of soil degradation and its impacts, and the rapidly depleting lifespan of the world’s soils, Niino observes that the issue “has been ignored for a long time”. There was virtually no international focus on the issue until 2002, when the United Nations declared December 5 as World Soil Day.

More than a decade later, 2015 was designated as the International Year of Soils.

Niino explains that a lack of global attention to the issue of soil degradation is likely because it is a slow-onset and relatively invisible crisis. There have been decades of heated debate about water scarcity because of falling water levels, drying lakes and riverbeds, and dying vegetation are instant and noticeable symptoms of the problem, notes Niino.

“In contrast, farmers and everyone else cannot see the immediate impact of land degradation and soil productivity losses,” he says. “They may notice declining yields if they compare to the past decade or two, but it’s not an immediate impact they can see.”

Soil health is like human health; it is hard to define, but you sure know when you don’t have it.

David Montgomery, professor of earth and space sciences, University of Washington

Asia’s soil future

Niino notes that soil degradation is especially severe in South Asia and Southeast Asia. Years of mono-cropping staples such as rice and the rise of industrial agriculture—for example, a shift from traditional crops such as rain-fed paddy to cash crops such as palm oil, sugarcane, and cassava— in Southeast Asia have exacerbated soil degradation in the region.

Demographic and economic pressures such as urbanisation, population growth, and economic development have also led to land use change and put further pressure on Asia’s soil resources, says Niino. To promote sustainable soil management practies, FAO published a set of voluntary guidelines in 2017, which recommend best practices from both a technical and policy perspective.

A global map of the constraints placed on soil health. Image: FAO

In a 2015 report on the State of the World’s Soul Resources, FAO notes that Asia has the highest percentage of human-caused land degradation of any region globally. Deforestation has been a key cause of this, followed by agriculture and overgrazing.

Currently, FAO says that for most criteria such as erosion, contamination, acidification and nutrient imbalance, the quality of soil is broadly poor and deteriorating. For soil carbon content, the status is classified as poor but variable.

A better way

To address the soil degradation crisis in Asia and globally, FAO has been working with governments and communities to manage soil more sustainably.

A key solution FAO has promoted is conservation agriculture, which entails the three principles the UN agency is promoting in Timor Leste and other project areas: no tillage—that is, disturbing or ploughing the soil—keeping the soil covered with crop residue or plants at all times, and growing a variety of crops on a rotational basis rather than constant cultivation of a single crop.

### 1NR – Turns Case

#### Turns and solves climate

Gustin 19 (Georgina Gustin, covers agriculture for Inside Climate News, won numerous awards, including the John B. Oakes Award for Distinguished Environmental Journalism and the Glenn Cunningham Agricultural Journalist of the Year, formerly reported for the St. Louis Post-Dispatch and CQ Roll Call, graduate of the Columbia University Graduate School of Journalism, “Industrial Agriculture, an Extraction Industry Like Fossil Fuels, a Growing Driver of Climate Change,” Inside Climate News, 1-25-2019, https://insideclimatenews.org/news/25012019/climate-change-agriculture-farming-consolidation-corn-soybeans-meat-crop-subsidies/)

On his farm in southwestern Iowa, Seth Watkins plants several different crops and raises cattle.

He controls erosion and water pollution by leaving some land permanently covered in native grass. He grazes his cattle on pasture, and he sows cover crops to hold the fertile soil in place during the harsh Midwestern winters.

Watkins’ farm is a patchwork of diversity—and his fields mark it as an outlier.

His practices don’t sound radical, but Watkins is a bit of a renegade. He’s among a small contingent of farmers in the region who are holding out against a decades-long trend of consolidation and expansion in American agriculture.

Watkins does this in part because he farms with climate change in mind.

“I can see the impact of the changing climate,” he said. “I know, in the immediate, I’ve got to manage the issue. In the long term, it means doing something to slow down the problem.”

But for several decades, ever-bigger and less-varied farms have overtaken diversified operations like his, replacing them with industrialized row crops or gigantic impoundments of cattle, hogs and chickens.

This trend is a central reason why American agriculture has failed to deal with climate change, a crisis that has been made worse by large-scale farming practices even as it afflicts farmers themselves.

Consolidation has swallowed smaller farms, bolstering a financial and regulatory status quo that has thwarted the kind of climate-friendly approach Watkins and his fellow outliers employ.

“I don’t think any of us wants to get bigger,” Watkins mused. “It’s just the curse of a commodity business. We made all the focus on production, and all the economics, the subsidies, are tied to production. We have a production-focused agriculture policy.”

This article is part of a series by InsideClimate News exploring agriculture’s role in the global warming crisis and the forces preventing it from playing a greater part in combating climate change.

The consolidation of American farming, reinforced by an emphasis on just one or two main crops—corn and soybeans—has led to a system in which there’s little incentive to grow much else, especially in the agricultural heartland of the Midwest.

This has profound climate and environmental implications. Mega-sized farming encourages practices that degrade the soil, waste fertilizer and mishandle manure, all of which directly increase emissions of greenhouse gases. At the same time, it discourages practices like “no-till” farming and crop rotation that grab carbon dioxide from the air, store it in the soil and improve soil health.

“The industrial food system presents a barrier to realizing the potential climate benefits in agriculture,” said Laura Lengnick, a soil scientist who has written extensively on climate and agriculture. “We continue to invest in this massive corn and soybean and beef-making machine in the Midwest despite all that we know about the changes we could make that would maintain yields, improve farm profitability and deliver climate change solutions.”

This is happening as landmark government reports and ample academic research show that agricultural soils are critical for stabilizing the climate.

One recent government report called the trend toward ever-bigger farms “persistent, widespread and pronounced.”

The report, a comprehensive assessment of consolidation published last year by the U.S. Department of Agriculture’s Economic Research Service, confirmed what was already apparent to small farmers: “Agricultural production has shifted to much larger farming operations over the last three decades.”

While the report concluded that consolidation is responsible for improvements in productivity, it noted: “At the same time, large-scale farming operations are said to force small farms out of business, damage the viability of rural communities, reduce the diversity of agricultural production, and create environmental risks through their production practices.”

More than a third of cropland is on farms bigger than 2,000 acres. That’s twice the share of land held on big farms 30 years ago.

Bigger operations are richer, too. Half of the value of farm production came from those with annual sales of at least $1 million.

The drivers behind this ongoing expansion are intertwined and complex—a confluence of politics, economics and technology. Agricultural policy has long emphasized over-production, propped up by government subsidies that favor certain crops. Lawmakers have been unwilling to change the system, largely because of a powerful farm lobby and the might of agribusinesses that profit from technological advancements.

“Farmers are dictated in how to farm,” said Adam Mason, a policy director with Iowa Citizens for Community Improvement. “They’re locked into a system.”

This system has transformed agriculture into a business that resembles the fossil fuel industry as it extracts value out of the ground with relentless efficiency and leaves greenhouse gas pollution in its aftermath.

“From a climate, soil health, and carbon sequestering perspective, we need greater diversity,” said Ferd Hoefner of the National Sustainable Agriculture Coalition. “We’re never going to make huge progress on soil health and carbon sequestration until we get that diversity.”

### 1NR – Links!

#### 2-FTC’s PC – is finite and key – intensifying centrists’ concerns about overreach is fatal

Salvino 11-1-21 (Mary Ashley Salvino, Cybersecurity Lawyer and Privacy & Data Security Professional at Bloomberg Law, CIPP/US, CIPM, member of the DC Bar, JD City University of New York School of Law at Queens College, “ANALYSIS: How Will the FTC Get Its Privacy Mojo Back in 2022?” Bloomberg Law, 11-1-2021, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-will-the-ftc-get-its-privacy-mojo-back-in-2022)

Leveraging Democratic Political Capital

The odds are likely that the FTC will seek to optimize and strengthen its authority via its new left-leaning leadership. Lawyers should keep an eye on how the FTC leverages and aligns political capital in a way that maximizes innovation and cooperation with Democrats in Congress. Be ready for a robust rulemaking effort by the FTC, accompanied by a strong push for uniform privacy legislation.

The confirmation of Alvaro Bedoya as an FTC commissioner will likely give the FTC new leadership and momentum to focus on alternative rulemaking in consumer privacy protection. Additionally, Lina Khan, the new FTC chairwoman, has expressed interest in forging new antitrust rules, which could extend to creating additional privacy rulemaking.

In terms of political calculus, a strengthened regulator faces the same bipartisan gridlock characterized by a divided Congress. Yet legal practitioners should be aware of a growing momentum on both sides of the aisle, seeking more stringent regulations on unbridled Big Tech firms, as well as emerging nonpartisan sentiments toward seeking protection for children online.

Exploring Unprecedented Funding Initiatives

On Sept. 14, the House Committee on Energy and Commerce voted to appropriate an unprecedented $1 billion over 10 years to the FTC to establish and operate a new privacy bureau. Such an infusion, if passed by Congress, would instantly transform the FTC’s ability to effectively regulate unfair or deceptive acts or practices relating to privacy, data security, and data abuses. To put this infusion into perspective, it is critical to compare to FTC’s privacy budget for 2021 ($13 million) to its overall budget of $351 million.

Looking forward to 2022, it is likely that continued political alignment will be necessary to reinforce (and perhaps even expand) the FTC’s data privacy enforcement power. However, proponents of the FTC funding boost will need to reckon with rigorous bipartisan scrutiny in the Senate, as well as fierce opposition skepticism by Republicans and centrist Democrats alike. At the very least, proposals will face serious funding trimming, and even full-throated opposition, by legislators concerned about agency overreach.

#### 3 – epistemology – prefer consilience of Kovacic’s expertise as former FTC Chair, principal-agent theory, AND empirical studies

Miller 5 (Gary J. Miller, Emeritus Professor of Political Science, Washington University in St. Louis, PhD University of Texas at Austin, “The Political Evolution of Principal-Agent Models,” Annual Review of Political Science, vol.8, 2005, pp.203-225, DOI: 10.1146/annurev.polisci.8.082103.104840)

For principal-agency theorists, bureaucratic independence and congressional “dominance” are observationally equivalent as far as monitoring and sanctions are concerned. We should see little of either if bureaucrats are independent; but we should also see little if bureaucratic behavior is shaped by congressionally imposed incentives. Therefore, it is necessary to look beyond monitoring and sanctions to bureaucratic outputs, to determine if they can be shown to vary with congressional preferences. In the case of the Securities and Exchange Commission, Weingast argues that its imposition of deregulation was in response to congressional representation of the interests of large institutional investors. With respect to the Federal Trade Commission (FTC), Weingast & Moran (1983) show more convincingly that the ideological preferences of the Senate and the subcommittee chairman (as measured by Americans for Democratic Action scores) were significantly associated with the FTC’s emphasis over time on consumer-oriented credit (p. 789). In other words, a more conservative Senate led to a less consumer-oriented FTC.

Although neither of these empirical forays could be regarded as the final word on the subject, Weingast’s articles constitute an enormous contribution to the study of congressional oversight and public bureaucracy by exemplifying quantitative research directed at precise questions (e.g., what are the political and other determinants of bureaucratic outputs?) derived from rigorous theory. Almost singlehandedly, these articles raised the bar for academic research in the area of bureaucracy. Weingast (1984) offers the “congressional dominance” hypothesis: “The mechanisms evolved by Congress over the past one hundred years comprise an ingenious system for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress” (p. 148).

#### Interpreting the plan to “be the courts” is the link – only possible way that happens starts with FTC overreach bringing a novel liability theory before the courts – the fact that courts abide because of fiat only makes Congressional retaliation against FTC more likely – implicates our Biden PC link too – because he’ll obviously also be a target of pressure campaigns – it’s NOT a question of who’s blamed for the Court ruling, BUT rather who has the power to prevent agencies from bringing similar cases to the courts

Jones and Kovacic 20 (Alison Jones, Professor of Law, King’s College London; and William E. Kovacic, King’s College London, George Washington University, United Kingdom Competition and Markets Authority; “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, 65(2), 3-20-2020, DOI: 10.1177/0003603X20912884)

The discussion below, and history, seems to indicate, however, that more courage and more people will not necessarily overcome the implementation obstacles that stand in the way of a program that requires the rapid prosecution of a large number of complex cases against well-resourced and powerful companies. Indeed, the criticisms levied at the current system, the proposals for more effective enforcement and reform, and the scale of the action being demanded bear some resemblance to those that led to a more re-invigorated and aggressive antitrust enforcement policy in the 1960s and early 1970s. For example, at that time complaints that the FTC was in decay, was obsessed with trivial cases and failing to address matters of economic importance, anticompetitive conduct, and rising concentration,77 led the FTC to embark on a new, bold, and astoundingly broad enforcement program.78 In an effort to meet criticisms of it as a shambolic and failing institution, the FTC sought to upgrade its processes for policy planning, made concerted efforts to improve its human capital in management and case handling, and sought to improve substantive processes and the quality of its competition and consumer protection analysis.

In the end, FTC’s efforts to improve capability proved insufficient to support the expanded enforcement agenda, partly because the Commission failed to formulate an adequate plan to overcome the full range of implementation obstacles. The FTC seriously overreached because it did not grasp, or devise strategies to deal with, the scale and intricacies of its expanded program of cases and trade regulation rules, the ferocious opposition that big cases with huge remedial stakes would provoke from large defendants seeking to avoid divestitures, compulsory licensing, or other measures striking at the heart of their business, and the resources required to deliver good results. The Commission lacked the capacity to run novel shared monopoly cases that sought the break-up of the country’s eight leading petroleum refiners and four leading breakfast cereal manufacturers79 and simultaneously pursue an abundance of other high stake, difficult matters involving monopolization, distribution practices, and horizontal collaboration. The FTC also overlooked swelling political opposition, stoked by the vigorous lobbying of Congress, that its aggressive litigation program provoked.80

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration by arresting anticompetitive behavior of dominant enterprises (through interim and permanent relief) and by blocking mergers that pose incipient threats to competition. It seems clear, however, that such dramatic legislative proposals are likely to be fiercely contested through the legislative process and so will take time, and be difficult, to enact. Further, even if armed with a more powerful mandate, the DOJ and the FTC will still have to bring what are likely to be challenging cases applying the new laws (see Section F). The adoption, setting up, and bedding in of new legislation or regulatory structures and bodies is therefore unlikely to happen very quickly and is, consequently, unlikely to meet the demands of those seeking urgent and immediate action now.

These difficulties suggest that for the near future, at least, the agencies will have to achieve successful extensions of policy mainly through launching themselves into a number of lengthy, complex investigations and litigation based on the current regime. This means establishing violations under existing judicial interpretations of the antitrust laws and making a convincing case for the imposition of effective remedies, including structural relief.

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

A. Judicial Resistance to Extensions of Existing Antitrust Doctrine

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

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

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

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

B. Infirmities of Section 5 of the Federal Trade Commission Act

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

C. Designing Effective Remedies

Important issues arising for the new enforcement strategy proposed will be what remedies should be sought; how can an order, or decree, be fashioned to ensure that the violation is terminated, that competition on the market is restored, the opportunity for competition is re-established, and that future violations are not committed and deterred; and will a court be likely to impose any such remedy.102

The Sherman Act treats infringements of its key commands as crimes attracting severe sanctions, including fines (corporate and individual) and imprisonment. Although since 1980, the DOJ has used criminal prosecutions only to challenge hard-core horizontal cartels,103 some antitrust reform proponents are calling for the introduction of fines to sanction illegal monopolization, and some commentators have proposed that the DOJ reconsider its policy of not seeking criminal penalties beyond the Section 1 conspiracy context.104 For the time being, however, it would appear that existing civil sanctions will remain the tool of choice for DOJ in dealing with antitrust infringements and will be the only set of remedies available to the FTC, which has no mandate to bring criminal cases.

The civil remedial options, which can broadly be grouped into three categories, for the federal agencies, are nonetheless powerful in principle. The first and, perhaps, the most common form of remedy consists of controls on conduct. Conduct-related relief ordinarily takes the form of cease and desist orders that forbid certain behavior or, in a smaller number of cases, compel firms to engage in affirmative acts, such as providing a competitor access to an asset needed to compete.

The second major form of remedy is structural relief in the form of divestitures or the compulsory licensing of intellectual property that enables a firm to enter a previously monopolized market. The boundary between purely conduct-based and structural remedies is not always clear. A compulsory licensing decree has strong structural features (it directly facilitates new entry) and conduct elements (it may require the owner of the patent to provide the licensee know-how and updates of the patented technology).

The third remedy consists of civil monetary relief in the form of disgorgement of ill-gotten gains or the restitution of monopoly overcharges to victims. A number of Supreme Court decisions in monopolization cases in the late 1940s and early 1950s appeared to hold that these forms of recovery are encompassed in the mandate of courts to order equitable remedies to cure antitrust violations. The federal agencies have not used this power expansively, though it would appear to be available to recoup overcharges in Section 2 or other cases.105

The cures envisaged by many of the advocates of change call for the bold application of the full portfolio of civil remedies, including unwinding past mergers, divestment of assets, restructuring concentrated markets, limiting or reversing vertical integration or through the imposition of licensing obligations. Such advocates thus wish the DOJ and FTC to use the antitrust laws as an effective and simple mechanism for deconcentrating both monopolistic and oligopolistic markets, rapidly introducing new competition into a market; and reversing what they consider to be severe structural problems that have been allowed to develop on the market.106

Structural remedies, in particular, have always been a real and important part of the antitrust remedial arsenal,107 not only in merger cases where a violation of the antitrust rules may consist of an unlawful acquisition of shares or stock108 but also in Sherman Act cases.109 In the 1960s the FTC also sought, using its powers under Section 5 FTC Act to deconcentrate the petrol and breakfast cereal markets110 and in 1969 the Neal Report,111 commissioned by President Lyndon Johnson, proposed the adoption of laws which would allow oligopolistic industries to be deconcentrated and the condemnation of mergers on markets that were already concentrated.112

Modern antitrust has, however, had less appetite for the use of antitrust to break up companies. Although the District Court in United States v Microsoft Corp 113 ordered, at the request of the DOJ, that Microsoft be broken into two parts, the Court of Appeals, despite affirming the violation of section 2, reversed and remanded the finding that Microsoft should be split into two. Setting out a high bar for structural relief, the Court stressed that the lower court had not (1) held a remedies-specific hearing114 or (2) provided adequate reasons for the decreed remedies.115

A number of factors seem responsible for the trend away from structural remedies. First, the change in antitrust thinking that has evolved since the early 1970s, from a belief that antitrust intervention and structural remedies can improve performance116 to the current more laissez-faire one.117 Second, concerns about the effectiveness of previous attempts to deconcentrate industries,118 especially given the length of time that antitrust proceedings take.119 Third, the difficulty involved in constructing and overseeing a structural remedy effectively. Although in cases involving a merger or acquisition it may be relatively easy to structure such a remedy through disentangling assets that were once owned separately,120 outside of this situation, the question of how and what to divest might be much more speculative, seem much more risky and may in fact be complex and difficult to administer (involving significant restructuring, separation of physical facilities, and allocation of staff from integrated teams).121 These types of concern make it a challenge to persuade a court that a structural remedy is warranted and will be successful in achieving its objective.122

In the discussion above, we have been addressing the types of remedies that are imposed at the conclusion of a lawsuit. A problem in highly dynamic markets, however, is that the lag between the initiation of a case and a final order on relief may be so great that market circumstances have changed dramatically or the victim of allegedly improper exclusion may have left the market or otherwise lost its opportunity to expand and contest the position of the incumbent dominant firm. In this context, the antitrust cure arrives far too late to protect competition. The relatively slow pace of antitrust investigations and litigation (with appeals that follow an initial decision) has led some observers to doubt the efficacy of antitrust cases as effective policy-making tools in dynamic commercial sectors.

There are at least five possible responses to concerns about the speed of antitrust litigation, particularly matters involving dominant firms. First, agencies could experiment with ways to accelerate investigations, and courts could adopt innovative techniques to shorten the length of trials. In the United States, we perceive that greater integration of effort among the public agencies would permit the more rapid completion of investigations (e.g., by pooling knowledge and focusing more resources on the collection and evaluation of evidence). Courts could use methods tested with success in the DOJ prosecution of Microsoft in the late 1990s to truncate the presentation of evidence. These types of measures have some promise to bring matters to a close more quickly.

Second, the initiation of a lawsuit could be recognized as being, in some important ways, its own remedy; the prosecution of a case by itself causes the firm to change its behavior in ways that give rivals more breathing room to grow. Moreover, the visible presence of the enforcement authority, manifest by its investigations and lawsuits, causes other firms to reconsider tactics that arguably violate the law. Seen in this light, the entry of a final order that specifies remedies may not be necessary for all instances to have the desired chastening effect.

A third response is to experiment more broadly with interim relief that seeks to suspend certain types of exclusionary conduct pending the completion of the full trial.123 Effective interim measures would require the enforcement agency to develop a base of knowledge about the sector that enables it to accurately identify the practices to be enjoined on an interim basis and to give judges a confident basis for intervening in this manner.

A fourth approach would be that the remedies achieved in protracted antitrust litigation may not be so imperfect or untimely as they might appear to be. There have been a number of instances in which the remedy achieved in a monopolization case was rebuked as desperately insufficient when ordered but turned out to have positive competitive consequences.124 This is a humbling and difficult aspect of policy making. It may not be easy for an agency to persuade its political overseers—or other external audiences—that the chief benefits of its intervention will emerge in, say, two or three decades. Yet the positive results may take a long time to become apparent.

A fifth technique would be to rely more heavily on ex-ante regulation in the form of trade regulation rules that forbid certain practices. A competition authority—most likely the FTC—would use its rulemaking powers to proscribe specific types of conduct (e.g., self-preferencing by dominant information services platforms).

In this article, we do not purport to solve the problems of the remedial design set out above. There is, however, a fairly clear conclusion about how enforcement agencies should go about thinking of remedies. As we note below, there is considerable room for public agencies to design remedies more effectively by systematically examining past experience and collaborating with external researchers to identify superior techniques. In this regard, the FTC’s collection of policy tools would appear to make it the ideal focal point for the development of more effective approaches to remedial design.

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

### 1NR – NO Thumpers

#### Perception’s that Khan’s all bark BUT no bite YET – only plan changes perceptions

Gold 12-20-21 (Ashley Gold, tech and policy reporter at Axios, “Six months with Lina Khan's FTC,” Axios, 12-20-2021, https://www.axios.com/lina-khan-ftc-six-months-4a5c4ba6-cef1-4a1f-b1dc-a528b2b41471.html)

Why it matters: As Biden's first year ends, many are watching Khan's FTC to see whether it really can fundamentally change how the U.S. regulates big companies and how tech should treat consumers.

Entering the role, the 32-year-old, known for her scholarship in antitrust and competition policy, targeted what she sees as monopolistic behavior in Big Tech and beyond. Under her, the agency re-filed its case accusing Facebook of buying up competitors to maintain dominance.

It sued to block a $40 billion semiconductor chip merger between Nvidia and Arm, arguing it would stifle competing next-generation technologies.

It launched an investigative study into supply change disruptions, targeting retailers like Walmart and Amazon.

It reached a settlement agreement with an ad platform that allegedly violated the Children's Online Privacy Act.

The big picture: Khan's tenure so far has seen more table-setting for future actions than major high-profile antitrust cases.

Those who want to see Big Tech taken to task hope to see Khan bring major cases that would spin off prior acquisitions and block proposed mergers. And the clock is ticking.

"We are really feeling a sense of urgency and are hopeful [Khan] will be doing as much as possible as quickly as possible because of the potential threat of a hostile Republican Congress," Alex Harman, competition policy advocate at Public Citizen, told Axios.

#### Khan’s aware of the political risks that our ev identifies and is tactically moderating to preserve PC – that’s Salvino – AND…

Brody 10-5 (Ben Brody, senior reporter at Protocol, focusing on tech policy and lobbying, antitrust and privacy, former reporter at Bloomberg News, CNNMoney and AdAge, “The FTC's next privacy move is a dangerous game years in the making,” Protocol, 10-5-2021, https://www.protocol.com/policy/ftc-privacy-rules)

Litigation could tie up any new rules up for years, but from the commission's perspective it may be the lesser evil as compared to drawing ire from Congress. Critics of FTC inaction trace the agency's timidity to the 1980s. At the time, many saw the FTC's attempts to regulate children's advertising as the height of nanny-state overreach, in part thanks to a campaign by advertisers. In response to "kidvid," Congress reined in the agency's regulatory powers — and in the process taught generations of FTC staff to tiptoe around lawmakers.

It's a cycle that's recurred throughout FTC's existence, and Khan, who loves the agency's history, has made clear she's well aware of it.

#### NOW, deadlock forces restraint – which necessarily prices in ANY and ALL prospective controversies from the existing agenda, because NONE OF IT has actually been enforced yet, which is the whole point

Hoffman 1-11-22 (D. Bruce Hoffman, partner at Cleary Gottlieb, practice focuses on antitrust enforcement, former Director of FTC’s Bureau of Competition, JD University of Florida Levin College of Law; and Henry Mostyn, partner at Cleary Gottlieb, practice focuses on EU and UK competition law, BPP Law School – London; “U.S. & EU Antitrust: Developments and Outlook in 2022,” 1-11-2022, https://www.clearygottlieb.com//news-and-insights/publication-listing/us-eu-antitrust-developments-and-outlook-in-2022)

The FTC in 2021 was characterized by staff and leadership turmoil, controversy and at least the appearance of a significant shift in agency priorities and practices. Initially, under Acting Chair Slaughter, the FTC largely continued its longstanding consensus-driven approach to antitrust, albeit with some aggressive statements on various issues from the Acting Chair and fellow Democratic Commissioner Rohit Chopra. That approach changed substantially with Lina Khan’s ascension to the position of FTC Chair.

Khan, a headliner antitrust progressive most famous for her criticism of Amazon and of the view that antitrust should focus on protecting consumers from higher prices or reduced output, was originally nominated by the President to be a Commissioner; no mention was made of her being Chair. Yet, to the surprise of observers and (as we understand it) much of the Senate, immediately after she was confirmed as a Commissioner the President designated her as Chair – an important distinction, because the FTC Chair controls the day-to-day administration of the FTC. Khan, with a three-Commissioner majority, moved swiftly to alter FTC practices in several areas:

Streamlining the process of adopting trade regulation rules and initiating discussion of several possible rules, notably including unprecedented rules on competition (such as on exclusive contracts, discounts and other widespread contractual practices)

Streamlining procedures for issuing compulsory process and eliminating the normal requirement of Commission votes for process in a wide range of cases

Rescinding longstanding bipartisan FTC guidance on antitrust enforcement to reflect a more regulatory, aggressive philosophy

Withdrawing from the recently adopted Vertical Merger Guidelines, leaving the FTC differently situated from the DOJ and with no clear guidance on vertical mergers.

Interestingly, though, these and other aggressive steps were not accompanied by an uptick in case filings (either initially under Acting Chair Slaughter or subsequently under Chair Khan); in fact, FTC case filings declined from the levels set under the Trump administration.

In any event, following this initial spate of activity, the progressive agenda has been slowed by the departure of Commissioner Chopra to serve as Director of the Consumer Financial Protection Bureau. While Commissioner Chopra cast a number of so-called “zombie votes” enabling the Commission to move forward on a limited number of issues after his departure, the Commission now has only four Commissioners, and so any controversial steps will have to wait until another Democratic Commissioner is confirmed, since the two Republicans can block new Commission actions they don’t support.

As a result, Commission action in the near future will either involve consensus – such as the study of supply-chain disruptions launched in December 2021, or the recently-filed challenge to the merger of NVIDIA and Arm – or areas in which the Chair and Bureau Directors can act without a vote, such as in issuing Second Requests triggering in-depth reviews of mergers (but actual challenges to mergers or consent decrees will require Commission votes, and thus at least some Republican support).

The President has nominated Alvaro Bedoya, a Georgetown law professor and privacy expert, to the Commission; however, his nomination (though supported by all four current FTC commissioners) drew significant opposition in the Senate and failed to advance in 2021. The President has just renominated Bedoya, re-starting the confirmation process. While we think it is still more likely than not that he will be confirmed, it may take several months for the process to play out.

So what will we see from the FTC in 2022? Initially, enforcement action in the form of consent decrees and litigated cases will likely be limited to consensus cases, given the 2-2 Commission split. Chair Khan has used the tools at her disposal to delay the review of some mergers, to launch full Second Request investigations of mergers that on their face don’t appear to raise competition issues and to issue threatening-sounding though legally insubstantial letters to merging firms reminding them that HSR clearance doesn’t mean that the merged firm is immune from antitrust scrutiny. We expect those trends to continue, even if they don’t result in enforcement action in the near term. While FTC staff has been subjected to a gag order and barred from public speaking since Chair Khan’s arrival, limiting insight into the FTC’s position and practices, we expect the limited public statements from the FTC to continue pushing for a progressive agenda. This will likely include criticizing large firms, touting the virtues of deconcentrating markets and expressing a general skepticism of mergers.

#### Khan’s aware of the political risks and is tactically moderating to preserve PC – that’s Salvino – if it’s controversial enough with Senate centrists to trigger our links, then it won’t happen – if it IS going to happen, then it won’t be controversial OR will be sufficiently watered down through the process of making it past deadlock to ensure it does NOT link – only plan changes that dynamic by fiating through Republican Commissioners’ objections

Conley et al 1-19-22 (Stephen Conley, Associate at Wiley Rein LLP, former Law Clerk at the FCC, JD George Washington University Law School; Duane Pozza, Partner at Wiley Rein LLP, former FTC Assistant Director of the Bureau of Consumer Protection, JD Stanford Law School; Kathleen Scott, Partner at Wiley Rein LLP, JD American University Washington College of Law; “’An Avalanche of Rulemakings’ – The FTC Gears Up for an Active 2022,” Privacy In Focus, JD Supra, 1-19-2022, https://www.jdsupra.com/legalnews/an-avalanche-of-rulemakings-the-ftc-1324181/)

FTC Commissioner Christine Wilson dissented from the Annual Regulatory Plan, arguing that it “extends far beyond” the agency’s routine review of existing rules and that many of the existing rules “should be abolished in any event.”[6] She further characterized the Annual Regulatory Plan as ushering in “an avalanche of rulemakings” and rejected Chair Khan’s depiction of the economy as being “hyper-concentrated.”[7] Indeed, in a subsequent statement made at the agency’s December 16 Open Meeting, Commissioner Wilson referred to the FTC’s 2022 agenda as a “Rule-a-Palooza.”[8] Commissioner Wilson’s dissent signals likely uniform Republican Commissioner opposition to most of the agency’s planned rulemakings, leaving the body in a 2-2 Democrat-Republican split on many of the proposals. That said, proposals like the Safeguards Rule SNPRM have drawn some bipartisan support and may point to some additional rulemaking even without a fifth Commissioner.

Much of the FTC’s Expansive Rulemaking Agenda Likely Hinges on Confirmation of a Fifth Commissioner

President Biden originally nominated Alvaro Bedoya on September 13, 2021 to fill the FTC Commissioner seat vacated by former Commissioner Rohit Chopra upon his confirmation as Director of the Consumer Financial Protection Bureau on September 30. Bedoya is the founding director of the Center on Privacy & Technology at Georgetown Law and previously served as the first Chief Counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. He faced opposition from Republican senators on the U.S. Senate Committee on Commerce, Science, & Transportation (Committee) during his November 17, 2021 confirmation hearing, but President Biden renominated him to the FTC Commissioner spot on January 4, 2022. He appears likely to be the swing vote on many of these proposed rulemaking initiatives – not just whether they will go forward, but also their scope and ambition if they do so.

#### They’ll probably sit on oil and gas – BUT that’s NOT being enforced either – and everyone knows it

Cyran 11-19-21 (Robert Cyran, reporter at Breakingviews, Reuter, and columnist for Wall Street Journal, “Biden shoots antitrust blank at oil giants,” Reuters, 11-19-2021, https://www.reuters.com/breakingviews/biden-shoots-antitrust-blank-oil-giants-2021-11-18/)

Politicians everywhere know rising gasoline prices spell trouble. Just look at France’s "yellow vest" protests that started in 2018 against a planned rise in gas taxes. U.S. President Joe Biden has responded to recent high fuel costs by asking the Federal Trade Commission to look for evidence of anticompetitive behavior read more . He's shooting a blank, but it's a political necessity even if it conflicts with his bigger goals.

Similar tactics were even used by Biden’s oil-friendly predecessor George W. Bush, who ordered the Department of Justice to examine price gouging by energy firms back in 2006. Yet while Exxon Mobil (XOM.N) and Chevron (CVX.N) might double their net income this year compared to 2019, as Biden’s letter to FTC Chair Lina Khan points out, it’s almost certainly not because of collusion. Oil is a global commodity, and even America's biggest players are usually price takers.

Moreover, U.S. antitrust regulators are aware the market is competitive. Khan may see more risks than her predecessors have, but the FTC hasn’t stood in the way of a major oil merger in two decades.

#### NOR is it analogous to the plan – does NOT shield the link – it’s obviously about upstream energy commodity markets – COMPLETELY DIFFERENT from downstream electricity utilities – because oil and gas companies are NOT immune – the whole point of their AFF is utilities ARE – which is why their opposition IS unique and unprecedented!

Wheeler et al 1-11-22 (Sean T. Wheeler, Kristin Mendoza, Roald Nashi and Robert S. Fleishman, all Partners at Kirkland & Ellis LLP, specializing in M&A, energy regulatory compliance, or private equity, “The Energy Mergers & Acquisitions Review: USA,” 1-11-2022, https://thelawreviews.co.uk/title/the-energy-mergers-and-acquisitions-review/usa)

Historically, the FTC has explained that pure upstream deals are unlikely to be anticompetitive because individual companies hold small shares of global crude oil reserves and production. However, upstream deals are not immune from antitrust scrutiny, as evidenced by the 2000 merger of BP Amoco and ARCO, then the two leading producers on the North Slope of Alaska. Along with various downstream theories of harm, the FTC alleged that the deal would reduce competition in the purchase of exploration leases from the State of Alaska and in the sale of North Slope oil to certain refiners that could not readily shift to other sources of supply. This matter, which attained antitrust clearance through a divestiture of assets, underscores the fact that the agencies assess each deal on its own merits. More recently, with new, more progressive leadership at the helm of the FTC, at least two upstream deals received Second Requests from the FTC, including HollyFrontier Corp's proposed acquisition of Sinclair Oil and EnCap Investment's proposed acquisition of EP Energy.

In the midstream sector, the FTC defines product markets by focusing on a specific petroleum product transported, refined or stored in a particular way. The FTC has required remedies when customers for a particular product in a particular region would be left with few competitive options. For example, the FTC objected to the proposed 2016 merger of Energy Transfer Equity (ETE) and the Williams Companies (which was later terminated for non-antitrust reasons) because the merged firm would have owned or controlled two of the three interstate pipelines providing firm transportation of natural gas to a certain part of the state of Florida. The parties agreed to resolve the FTC's concerns through an asset divestiture, and (regarding a vertical supply-related issue) post-closing conduct requirements. Similarly, in connection with the 2015 combination of Par Petroleum with Mid Pac Petroleum, which were two of the four firms supplying Hawaii with bulk quantities of Hawaii-grade gasoline blendstock, the FTC required Par to terminate Mid Pac's storage and throughput rights at an import terminal, which it could have used to impair another importer's ability to compete effectively. Finally, the agencies may take issue with non-controlling acquisitions, as demonstrated by the FTC's objection in 2007 to a proposed minority investment in Kinder Morgan by investors that also held a 50 per cent interest in Magellan Midstream, which competed with various Kinder Morgan terminaling operations.25 The investors obtained FTC approval for the proposed investment without a divestiture of assets by agreeing to erect information firewalls between the companies (ensuring no competitively sensitive information would be exchanged) and not to appoint board members to Magellan Midstream (ensuring they could not direct it to compete less vigorously). In July 2021, Berkshire Hathaway Energy Company's Kern River Gas Transmission Pipeline terminated its proposed acquisition of Dominion Energy, Inc's Questar Pipeline after an investigation by the FTC and Utah Attorney General's Office. The transaction would have combined the only two pipelines that bring natural gas from the Rocky Mountain production basins to serve central Utah. While the FTC lauded the outcome, it also expressed disappointment that 'the FTC had to expend significant resources to review this transaction when [it] previously filed suit in 1995 to block the same combination'.

Further downstream, the FTC regularly requires divestitures of select gas stations in mergers of gasoline retailers that would leave few independent competitors in narrow local areas. Recent examples include 7-Eleven, Inc/Marathon Petroleum Corporation (2021), Casey's General Stores/Buck's Intermediate Holdings, LLC (2021), Tri Star Energy/Hollingsworth Oil (2020) (in which the parties divested only two gas stations, demonstrating the FTC's readiness to act against deals with even a small anticompetitive impact), Express Mart/Speedway (2019) and Alimentation Couche-Tard/Holiday Companies (2018). The FTC also fined Couche-Tard US$3.5 million in 2020 for violating the settlement by failing to timely divest the gas stations, maintain their viability pre-sale, and provide accurate information about its efforts to comply with the settlement.

In the coal sector, in 2020 the FTC sued to block a proposed joint venture combining certain thermal coal operations of Arch Coal and Peabody Energy, alleging that it would lessen competition in the sale of coal mined in one particular region (the Southern Powder River Basin), which is characterised by certain unique properties. The court found that such coal was a relevant market, rejecting the parties' argument that the pricing power of the JV would be constrained by the availability of other types of coal to power producers as well as other types of power generation. After the court granted the FTC a preliminary injunction blocking the JV, pending a full trial on the merits, the parties abandoned the proposed transaction.

The DOJ has been active in the oilfield services segment in recent years, investigating such transactions as Ensco/Rowan (now Valaris) (offshore drilling) and Schlumberger's proposed OneStim JV with Weatherford (onshore hydraulic fracturing). The DOJ also rejected a proposed settlement in Halliburton/Baker Hughes (2016), leading to the abandonment of that transaction, and required a divestiture in the subsequent purchase of Baker Hughes by GE (2017). In the proposed Halliburton deal, the DOJ alleged that the transaction would lessen competition in 23 separate narrowly defined product and service markets, mostly relating to offshore drilling and production, such as fixed cutter drill bits, offshore directional drilling, offshore surface data logging services, cased whole wireline services for rigs in deepwater, and many more. The DOJ rejected the proposed divestiture package, claiming it would not fully and successfully replicate competition because it did not include full business units, withheld many critical assets and personnel, and involved numerous ongoing entanglements between the parties and the divestiture buyer. In the subsequent sale of Baker Hughes to GE, the DOJ alleged that the merger would combine two of the leading providers of refinery process chemicals and services and required the divestiture of the relevant GE division.

In the power sector, the DOJ's most recent merger enforcement action concerned Exelon/Constellation Energy (2011). Although the parties' combined market share in the sale of wholesale electricity would have been less than 30 per cent in the relevant region, the DOJ alleged that because of the unique competitive dynamics of the wholesale electricity market, Exelon would find it profitable to withhold output and raise prices. The DOJ cleared the deal pursuant to a settlement requiring the divestiture of three power plants. Additionally, in 2017 the DOJ sued Duke Energy in a rare standalone action for gun-jumping in connection with Duke's acquisition of a power plant. The DOJ alleged that before the parties made their HSR filings (let alone before the HSR waiting period expired), the parties entered into a tolling agreement under which Duke made competitive decisions for the plant, such that it ceased to compete independently in violation of the rules on gun-jumping. This effect of the tolling agreement allowed the parties to argue to FERC that Duke already controlled the plant, and thereby bypass an additional level of scrutiny that FERC applies to acquisitions increasing market concentration beyond a certain threshold; this apparently calculated violation of the gun-jumping rules likely contributed to the DOJ's decision to take action. Duke agreed to resolve the DOJ's lawsuit by paying a $600,000 civil penalty.

#### AND, utility lobbies are even more powerful than oil and gas – electric car fight proves

Bade 19 (Gavin Bade, reporter on the Pro Trade team covering Congress’ approach to industrial policy, formerly on the Pro Energy team covering the Federal Energy Regulatory Commission, electricity markets and state policy, former senior reporter and editor at Utility Dive, an energy trade publication, graduate of Georgetown University, “The oil industry vs. the electric car,” Politico, 9-16-2019, https://www.politico.com/story/2019/09/16/oil-industry-electric-car-1729429)

The oil industry is trying to crush the booming electric car movement.

Groups backed by industry giants like Exxon Mobil and the Koch empire are waging a state-by-state, multimillion-dollar battle to squelch utilities’ plans to build charging stations across the country. Environmentalists call the fight a reprise of the “Who Killed the Electric Car?” battles that doomed an earlier generation of battery-driven vehicles in the 1990s.

Oil-backed groups have challenged electric companies’ plans in 10 states, according to utility commission filings reviewed by POLITICO, waging regulatory and lobbying campaigns against the proposals. The showdown is taking place as utilities, eager to increase the demand for power, push for approval to build charging networks in locations such as shopping centers and rest stops in more than half the nation.

“Fossil fuel interests control 90 percent of the transportation fuel market in the U.S. and are really feeling threatened,” said Gina Coplon-Newfield, director of the electric vehicle initiative at the Sierra Club.

The counterattack involves an array of trade associations and industry-funded political groups representing every segment of the petroleum sector.

In the Midwest, the American Fuel and Petrochemical Manufacturers, a trade group for gasoline makers, has filed comments against charging plans in Kansas and Missouri, and has opposed Colorado’s new zero-emission vehicle mandate as part of a “Freedom to Drive” coalition of auto dealers and oil groups. The typical consumer, they say, should not have to pay for incentives or charging stations that mainly benefit people wealthy enough to afford cars like Teslas.

“We feel like we're on the side of the angels here in terms of wanting this to be a free market and not wanting people who don't use the service to have to pay for service,” said Derrick Morgan, senior vice president at the fuel and petrochemicals group.

In Illinois and Iowa, the American Petroleum Institute joined with Americans for Prosperity — a political group funded by the Koch oil empire — to oppose utilities’ electric vehicle investments. The owner of a large refinery joined other industrial interests to oppose utility charging and shared mobility plans in Minnesota.

In Massachusetts, API teamed with gasoline marketers and convenience stores to oppose an electric vehicle charging buildout from the utility National Grid. The Western States Petroleum Association has opposed utility charging plans in Arizona alongside AFP, as well as electric vehicle legislation in California. And in Maryland, API aligned with convenience stores, gasoline stations and truck-stop owners to oppose utilities’ electric vehicle plans.

Oil groups are far from alone in critiquing the utility charging proposals. Consumer advocates and some independent charging firms argue that utilities, which operate as monopolies, are using electric vehicle infrastructure to pad their balance sheets because their captive customers will have to pay for the investments.

Utilities say the upfront cost of charging stations is minimal for ratepayers, and that customers' bills may actually drop as electric vehicle adoption grows because the cost of power grid infrastructure will be spread over a larger base of power demand. In Maryland, four utilities proposed building 24,000 chargers last year at an estimated cost of 25 to 42 cents per ratepayer per month. The proposal from three Exelon utilities and one owned by FirstEnergy would have been the largest utility plan outside California, with power companies installing chargers in homes and apartment buildings and at workplaces and public locations like grocery stores or rest stops.

So far, the oil sector hasn’t seen much success combating utility plans. Though the American Fuel and Petrochemical Manufacturers celebrated a Kansas utility’s decision to withdraw a charging plan last year, analysts say that in most cases where regulators scale back utility plans, they aren’t doing it in response to the oil industry's pleas.

“So far, the main consequence [of oil lobbying] I've seen has been some delays, but I think the fight is ongoing,” said Samantha Houston, a clean vehicles analyst at the Union of Concerned Scientists. “I wouldn't attribute modifications to electric vehicle programs to API, but they are certainly making a good attempt to muddy the waters in their interventions.”

In Maryland, regulators scaled back the utility proposal, allowing them to build only 5,000 chargers at public sites over the next few years. But the state’s head regulator said the decision largely hinged on competition and price concerns, and that the oil industry’s arguments were underdeveloped.

“I personally did not find those arguments to be compelling,” said Maryland Public Service Commission Chairman Jason Stanek. “There is obviously a push toward the electrification of transportation and [these are] parochial concerns pushed by the petroleum industry to preserve its market share.”

Even so, Stanek, Houston and others expect oil companies to keep up the fight as the threat of electric vehicles grows.

“I think the struggle here will probably continue for a while,” Houston said. “Internal combustion engines still have a pretty significant market share and the oil and gas industry doesn't want to see that go anywhere.”

Whether gasoline-powered vehicles can hold on to their market is increasingly in doubt. By 2040, electric vehicles could make up as much as 40 percent of the U.S. passenger vehicle fleet and 60 percent of sales, up from 2 percent of sales today, according to Bloomberg New Energy Finance. That would erase demand for more than 3 million barrels of oil a day — or more than 20 percent of current transportation consumption.

Oil groups are also fighting in Congress to oppose tax credits for electric vehicles, pushing lawmakers to increase electric vehicle fees — 26 states have them today — and supporting the Trump administration’s proposed rollback of Obama-era fuel efficiency standards. Auto dealers represent one of the prime business sectors allied with President Donald Trump on the rollback.

The motivation for the lobbying push stems from an existential threat facing the global oil sector in the rise of the electric vehicle.

Electric vehicle mandates in China and many European Union nations have set a target of phasing out gasoline vehicles by 2040 or sooner. That will continue driving battery prices down in the coming years, said David Doherty, an oil specialist at Bloomberg New Energy Finance. And that, he said, should create a tipping point in the middle of the next decade as passenger electric vehicles become widely competitive with gas-powered ones — meaning the oil industry has only a few years to stem the tide.

"Then we'll see electric vehicles really ramp up as a percentage of sales,” Doherty said.

With electric vehicles increasing in competitiveness, the biggest hurdle to greater adoption is deploying enough chargers to fuel their growth. That, Stanek said, helps explain the oil sector’s intensified lobbying campaign.

“People need to actually see electric vehicle charging stations and know that they exist prior to actually purchasing an [electric] vehicle,” said the Maryland regulator, who works in a state where Republican Gov. Larry Hogan wants to see 300,000 electric vehicles in 2025 — up from less than 20,000 today. “As more drivers see public charging pop up at gas stations, libraries and on the side of the road, it'll prompt consumers to think twice when making their next vehicle purchase.”

Publicly, both sides are coy about the confrontation. Oil supporters downplay the threat presented by electric vehicles, arguing they still aren’t as functional as internal combustion engine cars and pointing out that many analysts expect that global fossil fuel demand will continue to be strong mid-century.

“I actually think the internal combustion engine is going to be around a long time, barring some kind of a major breakthrough of electric vehicle technology that hasn’t happened yet and doesn't look like it's likely in the near future,” Morgan said. “I think internal combustion engines remain very, very competitive for decades to come.”

Meanwhile, the Edison Electric Institute, a major utility trade group, says it’s too early to know whether electric and gasoline-powered vehicles are headed for a collision.

“I don’t think it’s us and them,” said EEI senior director Becky Knox. “At this point in the market, [electric vehicles] are still relatively new. I don't know if that is a collision course.”

Even so, veterans of the power sector say it’s obvious that utilities have stepped up their electric vehicle lobbying in recent years. Whereas utility electric vehicle charging was rare outside of California at mid-decade, more than 50 utilities in 25 states and the District of Columbia have now proposed charging programs. EEI and its members have also quietly lobbied Congress to extend and expand electric vehicle incentives, and they’ve fought directly with oil groups to defeat model legislation against utilities’ electric vehicle plans at meetings of business leaders and conservative lawmakers.

“The electric utilities are not doing this out of altruism,” Stanek said. “There is a benefit in terms of a return in allowing them to [charge ratepayers] for certain vehicle infrastructure.”

Some observers say utilities’ initial apprehension about pushing electric vehicles has led the power companies to overdo their requests to bill ratepayers for the charging buildout.

“They finally have worked through the blindingly obvious benefits, and having been recalcitrant, are now reaping incentives and concessions that should not have been necessary in the first place,” said Karl Rábago, a former Texas utility regulator and senior policy adviser at the Pace Energy and Climate Center. “Feels a bit like rope a dope.”

The utilities’ shift toward electric vehicles has put environmental groups in an awkward position: After fighting utilities for years to adopt renewable energy, most have come to view them as powerful allies to cut transportation pollution.

“Sierra Club has a long and rich history of suing utilities and opposing utilities when [they] are propping up fossil fuels,” Coplon-Newfield said. “But when it comes to the acceleration of electric vehicles, we've actually found some common ground.”

Environmentalists say many of the oil sector’s arguments against electric vehicles recall the 1990s, when fossil fuel groups and automakers waged a successful campaign to scale back California’s ambitious zero-emission vehicle mandate — as recounted in the popular documentary "Who Killed the Electric Car?"

Back then, California was set to mandate that an increasing percentage of cars sold in the state be non-gasoline vehicles, culminating in 10 percent in 2003. But state air regulators backed down after a dedicated lobbying campaign from car companies and oil interests, who opposed electric vehicle charging plans and argued there was no demand for the vehicles.

One key change since then is the position of the automotive sector. While U.S. automakers fought hard against the California regulations in the past, they are increasingly receptive to state electric vehicle targets, particularly when they are paired with incentives for the vehicles' purchase.

Ten other states today follow zero-emission vehicle targets set by California, which now mandate that electric vehicles make up about 8 percent of new vehicle sales by 2025. In August, the Alliance of Automobile Manufacturers, the sector’s leading trade group, signed on to support a zero-emission target in Colorado because it included incentives for purchasing electric vehicles.

But like the oil sector, electric vehicles are also splitting the auto industry. Car dealerships make much of their revenue from servicing gasoline-powered engines and publicly oppose electric vehicle mandates and utility charging programs in Colorado and elsewhere.

With the automakers singing a new tune and the price of electric vehicles continuing to fall, Stanek says state regulators should be ready for the front lines of the battle between utilities and the oil industry to spread to their states soon.

“The petroleum lobby and the electric utility lobby — I’m talking about API vs. EEI — we are going to see a competition between them for market share like we haven’t seen before,” he said.

#### So do the numbers – 2.7 billion versus 2.5 – no point in spreading large numbers but here’s the proof – that’s…

Frankenfield 21 (Jake Frankenfield, business writer, covering industry trends in big tech, big data, blockchain, cryptocurrency, advertising, and media, BA sociology and politics, Oberlin College; fact-checked by Suzanne Kvilhaug, professional editor and fact-checker, BS finance, Bridgewater State University; “Which Industry Spends the Most on Lobbying?” 11-1-2021, https://www.investopedia.com/investing/which-industry-spends-most-lobbying-antm-so/)

Here, using data from opensecrets.org, we break down lobbying efforts, industry by industry, combining all political contributions and lobbying spending from Jan. 1, 1998, to Sept. 30, 2021. Figures are calculations by the Center for Responsive Politics based on data from the Senate Office of Public Records.

Let's take a closer look at how much each industry spends on lobbying, the top corporate spenders in each category, and what spurs their lobbying efforts.

KEY TAKEAWAYS

Companies and industries in the United States will lobby government officials to influence them to act in ways that benefit the lobby's interests.

Lobbyists for corporations or industries might seek to sway officials regarding legislation, regulations, and the enforcement of government decisions.

The pharmaceutical and health products industry has spent the most money of all industries in lobbying spending.

Other industries that spend heavily on lobbying efforts include insurance, electric utilities, electronics manufacturing, and business associations.

Pharmaceuticals/Health Products: $4,951,696,278

Spending $4.95 billion over the past 23 years, the pharmaceutical and health products industry has far outpaced all other industries in lobbying spending. It's important to note that this industry includes not only drug manufacturers but also the sellers of medical products and nutritional and dietary supplements. In 2021, spending has been topped by the Pharmaceutical Research and Manufacturers of America at $22.9 million.1

1,600 (59.19%)

The number of pharmaceutical/health product lobbyists in the United States and the percentage that are former government employees as of Sept. 30, 2021.1

Overall, the industry is primarily concerned with "leading in the COVID-19 vaccination effort, opposing H.R. 3 (a bill which would give the government the ability to negotiate and cap drug prices based on an international index), and resisting government-run healthcare.”2 As is to be expected, lobbying efforts reached a fever pitch in 2009, around the drafting of the Affordable Care Act (ACA).

Insurance: $3,212,091,113

Including health, property, and car insurance companies, along with agents and brokers, the insurance industry has historically been the second most generous/aggressive industry in lobbying for their interests. In 2021, spending was $111 million. Following the passage of the ACA and subsequent developments under the Trump administration, health insurance companies have been very involved in the legislative process, looking to influence new regulations. In 2021, the leading insurance industry lobbyist corporation was Blue Cross/Blue Shield with $13.4 million in contributions.3

Electronics Manufacturing and Equipment: $2,788,778,841

These are your classic software and hardware computer tech companies, some of the founders of the tech movement that exists today. As this industry has become increasingly profitable, its political contributions have increased. The industry is relatively non-partisan, usually given to each party evenly, with slight favoring to the party in the White House.4

Given the ubiquity of hardware and software, and tech more generally, it makes sense that lobbying from the electronics sector is varied, with lobbying efforts on homeland security, taxes, copyright, immigration, human rights, cybersecurity, and law enforcement data storage. As of Sept. 30, 2021, the top lobbying spender was Oracle with $8.7 million in contributions.54

Electric Utilities: $2,739,876,658

The electric utility industry monitors legislative and regulatory action taken on a number of fronts, including clean air regulation, waste storage, cybersecurity, and infrastructure. The top lobbyist in electric utilities as of Sept. 30, 2021, is Edison Electric Institute with $6.9 million in contributions.67

Business Associations: $2,622,933,997

This grouping includes small business, pro-business, and international trade associations, as well as chambers of commerce. Business associations lobby on issues like labor regulations, intellectual property, product safety, and taxes, but mostly, lobbying efforts have focused on civil justice system reform.8

Business associations want to make sure that damages awarded to plaintiffs involving torts or wrongful acts that led to legal liabilities are limited (asbestos, medical malpractice, etc.). Other important legal issues include business tax reform, including corporate tax policy and taxation of U.S. subsidiaries of foreign companies. The top business association lobbyist in 2021 has been the U.S Chamber of Commerce with $46.4 million in contributions.98

Oil and Gas: $2,493,422,698

As you might imagine, the oil and gas lobbying sector is one of the most active lobbying groups. Lobbying efforts have historically focused on promoting legislators with pro-energy views in the areas of fossil fuel production. As of Sept. 30, 2021, the top lobbying spenders in the industry were Koch Industries, Royal Dutch, Chevron, and Exxon Mobil.1011

### 1NR - Defense is wrong

#### Prefer multiple independent analyses

FDI 12 – Future Directions International (“International Conflict Triggers and Potential Conflict Points Resulting from Food and Water Insecurity Global Food and Water Crises Research Programme”, May 25, <http://www.futuredirections.org.au/files/Workshop_Report_-_Intl_Conflict_Triggers_-_May_25.pdf>)

There is a growing appreciation that the conflicts in the next century will most likely be fought over a lack of resources. Yet, in a sense, this is not new. Researchers point to the French and Russian revolutions as conflicts induced by a lack of food. More recently, Germany’s World War Two efforts are said to have been inspired, at least in part, by its perceived need to gain access to more food. Yet the general sense among those that attended FDI’s recent workshops, was that the scale of the problem in the future could be significantly greater as a result of population pressures, changing weather, urbanisation, migration, loss of arable land and other farm inputs, and increased affluence in the developing world.¶ In his book, Small Farmers Secure Food, Lindsay Falvey, a participant in FDI’s March 2012 workshop on the issue of food and conflict, clearly expresses the problem and why countries across the globe are starting to take note. .¶ He writes (p.36), “…if people are hungry, especially in cities, the state is not stable – riots, violence, breakdown of law and order and migration result.” “Hunger feeds anarchy.” This view is also shared by Julian Cribb, who in his book, The Coming Famine, writes that if “large regions of the world run short of food, land or water in the decades that lie ahead, then wholesale, bloody wars are liable to follow.” He continues: “An increasingly credible scenario for World War 3 is not so much a confrontation of super powers and their allies, as a festering, self-perpetuating chain of resource conflicts.” He also says: “The wars of the 21st Century are less likely to be global conflicts with sharply defined sides and huge armies, than a scrappy mass of failed states, rebellions, civil strife, insurgencies, terrorism and genocides, sparked by bloody competition over dwindling resources.” As another workshop participant put it, people do not go to war to kill; they go to war over resources, either to protect or to gain the resources for themselves. Another observed that hunger results in passivity not conflict. Conflict is over resources, not because people are going hungry. A study by the International Peace Research Institute indicates that where food security is an issue, it is more likely to result in some form of conflict. Darfur, Rwanda, Eritrea and the Balkans experienced such wars. Governments, especially in developed countries, are increasingly aware of this phenomenon.¶ The UK Ministry of Defence, the CIA, the US Center for Strategic and International Studies and the Oslo Peace Research Institute, all identify famine as a potential trigger for conflicts and possibly even nuclear war.