

# The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms

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## I. Introduction

We are grateful for the opportunity to provide comments on the investigation by the House Judiciary Committee (“the Committee”) into the state of competition in the digital marketplace. We thank the Subcommittee on Antitrust, Commercial, and Administrative Law, Chairman David N. Cicilline, and Ranking Member F. James Sensenbrenner, Jr. for the invitation to offer our views.

As the Committee is aware, a large and expanding modern commentary recounts a growing market power problem in the United States (especially in the information technology sector) and dysfunction in its federal antitrust institutions.<sup>1</sup> By failing to protect competition, the federal antitrust enforcement agencies and the federal courts are said to have damaged the economy severely. Commentators give several reasons for the policy default: disregard of the egalitarian aims that motivated adoption of the U.S. antitrust laws in favor of an efficiency-based goals framework;<sup>2</sup> judicial fidelity to outdated views of industrial organization economics;<sup>3</sup> and enforcement timidity rooted in the capture by potential prosecutorial targets of the federal enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC).<sup>4</sup>

The critique sketched above has inspired active debate and intensified demands for a fundamental redirection of antitrust policy and the application of other policy instruments to increase competition. High on the proposed reform agenda is an

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<sup>1</sup> See, e.g., Binyamin Applebaum, *THE ECONOMISTS’ HOUR – HOW THE FALSE PROPHETS OF FREE MARKETS FRACTURED OUR SOCIETY* (2019); Ariel Ezrachi & Maurice Stucke, *COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS* (2020); Rana Foroohar, *DON’T BE EVIL – THE CASE AGAINST BIG TECH* (2019); Thomas Philippon, *THE GREAT REVERSAL – HOW AMERICA GAVE UP ON FREE MARKETS* (2019); Jonathan Tepper & Denise Hearn, *THE MYTH OF CAPITALISM – MONOPOLIES AND THE DEATH OF COMPETITION* (2019); Matt Stoller, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019); Tim Wu, *THE CURSE OF BIGNESS – ANTITRUST IN THE GILDED AGE* (2018).

<sup>2</sup> See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710 (2017).

<sup>3</sup> See, e.g., JONATHAN B. BAKER, *THE ANTITRUST PARADIGM – RESTORING A COMPETITIVE ECONOMY* (2019); *Collection: Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916 (2018).

<sup>4</sup> See, e.g., PHILIPPON, *supra* note 1, at 153-75; TEPPER & HEARN, *supra* note 1, at 162-65.

extension of policy to provide greater control of the practices of leading technology companies (notably, Amazon, Apple, Facebook, and Google) and dominant firms in other sectors such as agribusiness and pharmaceuticals.<sup>5</sup>

Although there are dramatically different views as to whether, and how exactly, change should take place, many observers stress the urgent need for more vigorous and aggressive enforcement of the antitrust laws, especially by the federal agencies. For example, there are calls for the agencies: to police future mergers more strictly, perhaps with bans or presumptions against certain mergers and to arrest exclusionary conduct by dominant companies.<sup>6</sup> Other suggested means of control include the creation of a new regulatory authority – vested in the antitrust agencies or in a new government body – with power to promulgate rules that, among other provisions, would bar dominant firms from selling their own products on the platforms they own.<sup>7</sup> Another body of commentators proposes a “root and branch reconstruction” that would apply the antitrust statutes to increase citizen welfare by, among other means, accounting for the interests of workers, small and medium enterprises, and local communities.<sup>8</sup>

In these comments, we do not debate the condition of competition in the U.S. economy, nor do we assess the substantive merits of various measures proposed to correct the market and policy deficiencies identified in modern debates. For the most part, we do not address whether the substantive mandates embodied in the antitrust statutes -- the Sherman Act,<sup>9</sup> the Clayton Act (as amended by the Robinson-Patman Act),<sup>10</sup> and the Federal Trade Commission Act<sup>11</sup> -- provide sufficient means for public enforcement agencies and private plaintiffs to correct these deficiencies. Instead, we focus on the third topic identified by the House Judiciary Committee in its request for comments on its digital marketplace proceedings:

Whether the institutional structure of antitrust enforcement – including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current

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<sup>5</sup> We summarize some of the principal reform proposals in Alison Jones & William E. Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. (Forthcoming 2020), available at [journals.sagepub.com](http://journals.sagepub.com).

<sup>6</sup> A representative statement of recommendations for expanded enforcement appears in American Antitrust Institute, *The State of Antitrust Enforcement and Competition Policy in the U.S.* (Apr. 14, 2020), available at [antitrustinstitute.org](http://antitrustinstitute.org).

<sup>7</sup> See, e.g., Stigler Center Committee on Digital Platforms, *Digital Platforms, Final Report* (2019) (proposal to establish a new digital regulatory agency); United Kingdom Digital Competition Expert Panel, *Unlocking Digital Competition* (Mar. 2019) (recommendation to create a new “digital unit”).

<sup>8</sup> See, e.g., Sandeep Vaheesan, How Robert Bork Fathered the Gilded Age, Promarket Blog (Sept. 5, 2019) (“Antitrust needs root and branch reconstruction.”), <https://promarketblog.org/how-robert-bork-fathered-the-new-gilded-age/>.

<sup>9</sup> 15 U.S.C. §§ 1-7.

<sup>10</sup> 15 U.S.C. §§ 12-27.

<sup>11</sup> See especially 15 U.S.C. § 45 (declaring unfair methods of competition to be unlawful).

statutes and case law – is adequate to promote robust enforcement of the antitrust laws.

Our principal concerns in these comments are the policy implementation challenges that stand between ambitious reform aspirations and their effective realization in practice. We take the various reform recommendations – presented in scholarly papers, blue ribbon studies, popular essays, and presentations to this Committee – at face value, and ask what needs to be done to land them successfully: how can an effective program actually be delivered (for example, by winning antitrust cases) and how can it be delivered well?

We applaud the Committee’s focus on issues of institutional design and policy implementation. In our view, the modern debate about U.S. competition policy too often overlooks these “implementation” issues and too quickly side-lines them as technical details to be (easily) addressed once the high-level concepts of a bold antitrust program have been settled. Implementation does not, however, simply sort itself out once an expanded substantive policy agenda is set in place. One of us (Kovacic) spent several years in private law practice working for an aerospace industry client which had a major role in the U.S. space program in the 1960s. In one conversation, an engineer with the company remarked that while the essential physics of going to the moon was relatively straightforward, the engineering was very difficult.

In competition law, the quality of the institutional framework is a key determinant of policy success.<sup>12</sup> Brilliant “physics” (a grand substantive vision) joined up with weak engineering (deficient implementation) is a formula for failure. From the creation of the U.S. federal antitrust system 130 years ago to the present, inattention to implementation tasks has sometimes invited acute disappointment by creating a chasm between elevated policy commitments and the ability of competition agencies, regulators, and courts to produce expected outcomes. In particular, the gap between policy commitments and system capabilities has been evident in efforts to resolve the most vexing problem in the history of the U.S. system: how to deal with dominant firms and oligopolies?<sup>13</sup>

Among other points, we propose measures that Congress can take to strengthen antitrust’s implementing institutions. In our view, modern antitrust history suggests there is a significant risk that, without such steps, a major reform program will engage considerable resources, public and private, in initiatives that fall well short of their goals. We urge the Committee to reflect upon earlier instances in which

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<sup>12</sup> The preeminent treatment of the link in the U.S. antitrust system between institutional design and enforcement performance is Daniel A. Crane, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011).

<sup>13</sup> See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 *IOWA L. REV.* 1105 (1989).

demands for a dramatic expansion of public enforcement led the federal antitrust agencies to undertake projects that exceeded the agencies' ability to complete the projects successfully. For example, in the 1960s and 1970s, various congressional committees concluded that lax antitrust enforcement had contributed to dangerous levels of industrial concentration. Congress pressed the DOJ and the FTC to implement a bold program of cases to challenge dominant firms and oligopolies. Such exhortations underestimated the difficulties that the agencies would encounter in seeking to carry out a broad-based deconcentration litigation program.

The miscalculation of Congress (and the agencies) about the magnitude of implementation tasks in this earlier period came at a high price. Implementation weaknesses undermined many investigations and cases that the federal agencies launched in response to congressional guidance.<sup>14</sup> The litigation failures raised questions about the competence of the federal agencies, particularly their ability to manage large cases dealing with misconduct by dominant firms and oligopolists. The wariness of the federal agencies since the late 1970s to bring cases in this area – a wariness that many observers today criticize as unwarranted – is in major part the residue of bitter litigation experiences from this earlier period.<sup>15</sup>

The U.S. experience from the late 1960s to the early 1980s of prosecuting of lawsuits to deconcentrate American industry deserves the close attention of the House Judiciary Committee and other congressional bodies in contemplating a new program to challenge dominant firms and oligopolies. Instead of restoring confidence in the ability of government agencies to enforce antitrust laws effectively, a major new effort that fails to come to grip with longstanding, readily identifiable implementation issues might reinforce doubts, and cynicism, about the quality of public administration.

Our comments begin by identifying important impediments to effective delivery of proposals to expand competition policy significantly. Against this backdrop, we then discuss what it is likely to take to implement a program of more expansive antitrust enforcement successfully, and suggest measures to ensure that reform commitments properly account for the ability of the public agencies to execute the commitments. The discussion includes consideration of how antitrust agencies

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<sup>14</sup> This history is recounted in William E. Kovacic, *Competition Policy in the "Broadest Sense": Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981*, 60 WILLIAM & MARY L. REV. 1269 (2019) (hereinafter *Broadest Sense*); William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize*, 91 WASHINGTON L. REV. 295, 304-13 (2016) (hereinafter *Consume or Invest*); William E. Kovacic, *Congress and the Federal Trade Commission*, 75 ANTITRUST L.J. 869 (1989) (hereinafter *Congress and the FTC*).

<sup>15</sup> We offer no rigorous proof for this proposition. In the late 1970s and early 1980s, one of us (Kovacic) worked on several of the FTC's cases brought to challenge dominant firms and oligopolies and, as a senior official in the FTC in the 2000s, saw how those experiences affected the agency's culture and decision making.

might undertake a more ambitious program with or without receiving new powers or resources from Congress.

Three perspectives inform our analysis of the U.S. policy implementation framework. First, we use experience in other jurisdictions to benchmark the U.S. regime. The comparative point of view identifies important areas in which U.S. system reforms could improve performance. Second, we draw upon historical examples to identify important phenomena that affect the operation of the U.S. regime. A historical view does not always provide ready answers to questions raised by contemporary policy debates, but it offers a valuable basis for understanding why the U.S. system has evolved as it has, and for anticipating challenges that an expansion of existing enforcement programs likely will face. We draw parallels between current debates and past ones, including those that influenced enhanced antitrust enforcement (especially by the FTC) in the 1960s and early 1970s, and we use historical examples to show what might happen if these hurdles are underestimated or ignored in the formulation of bold new initiatives. Third, we apply our own experience in the enforcement of competition laws in the United States and abroad.

## **II. OBSTACLES TO EFFECTIVE IMPLEMENTATION**

Many contemporary proposals for an expansion of U.S. antitrust enforcement seem to be predicated on the assumption that a new, more aspiring program can be driven home straightforwardly by agencies (a) led by courageous leaders and (b) supported by a larger staff that shares the vision for fundamental change. Simply stated, the chief requisites for successful implementation are said to be more guts and more money.

To us, modern U.S. antitrust experience seems to indicate that more courage and more people will not necessarily overcome the implementation obstacles that stand in the way of prosecuting a large number of complex cases against well-resourced and powerful companies. The criticisms leveled at the current system and the proposals for more ambitious enforcement and reform, and the scale of the action being demanded, bear some resemblance to those that led to more aggressive federal antitrust enforcement in the late 1960s and early 1970s. In that period, Congress endorsed the assessment of various commentators that the FTC was in decay, obsessed with trivial cases, and indifferent to serious competitive problems arising from economic concentration.<sup>16</sup> Congress demanded that the FTC undertake

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<sup>16</sup> See Edward F Cox et al, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969) and the American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission* (1969).

sweeping reforms or face extinction.<sup>17</sup> To defeat criticisms that it was a shambolic and failed institution, the FTC embarked on a bold and astoundingly ambitious enforcement program.<sup>18</sup>

The Congress and the FTC were not oblivious to the need to carry out institutional improvements to carry out the new agenda. Congress raised the agency's budget and strengthened its remedial tools.<sup>19</sup> 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.<sup>20</sup> In the end, the congressional increases in budget and authority and the FTC's own efforts to improve its organization, management, and staff proved insufficient to support the expanded enforcement agenda.

Perhaps more than any other source of failure, the FTC did not grasp, or devise strategies to deal with, the scale and intricacies of its expanded program of cases and consumer protection 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. In the end, it became clear that the FTC was unable to manage novel shared monopoly cases that sought the break-up of the country's eight leading petroleum refiners and four leading breakfast cereal manufacturers<sup>21</sup> at the same time as pursuing numerous other high stakes, difficult matters involving monopolization, distribution practices, and horizontal collaboration. It also overlooked swelling political opposition, generated by the vigorous business lobbying of Congress, that its aggressive program of antitrust litigation and consumer protection rulemaking provoked.<sup>22</sup>

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration; Congress could alter legal standards in ways that facilitate enforcement agency cases that attack anticompetitive behavior of dominant enterprises (through interim and

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<sup>17</sup> The external critiques of the FTC and congressional agreement with their principal findings are examined in David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015) (hereinafter *FTC's Critics*).

<sup>18</sup> Hyman & Kovacic, *FTC's Critics*, *supra* note 17, at 1965-67; Kovacic, *Broadest Sense*, *supra* note 14, at 1282-91.

<sup>19</sup> See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 589, 632-43, 654-59 (1982) (hereinafter *Congressional Oversight*)

<sup>20</sup> Kovacic, *Broadest Sense*, *supra* note 14, at 1291-92.

<sup>21</sup> *In re Kellogg Co.*, 99 F.T.C. 8, 8-16 (1982) (describing the FTC's administrative complaint filed in 1972); *In re Exxon Corp.*, 98 F.T.C. 453, 454-59 (1981) (describing FTC's administrative complaint filed in 1973).

<sup>22</sup> See Kovacic, *Broadest Sense*, *supra* note 14, at 1316-17; William E. Kovacic and Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010) (hereinafter *Section 5*).

permanent relief) and seek to block mergers that pose incipient threats to competition. The path to major legislative reforms in antitrust or in any other field is, however, uncertain.<sup>23</sup> One expects that major amendments to the existing antitrust statutes will be contested fiercely through the legislative process. New laws 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. The adoption, setting up, and bedding in of new legislation or regulatory structures and bodies are unlikely to happen quickly. These difficulties suggest that for the near future, at least, the agencies will have to achieve successful extensions of policy mainly through the prosecution of cases within the existing statutory framework.

The discussion in this section identifies some core factors that are likely to impede implementation of ambitious reforms, either through litigation (under the present-day regime) or legislation, unless Congress and the enforcement agencies develop a strategy to overcome them. 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, 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***

In the U.S. antitrust system, judges have played an extraordinarily influential role in their interpretations of the antitrust statutes.<sup>24</sup> Since the late 1970s, judicial decisions have reshaped antitrust law by creating more permissive substantive standards governing dominant firm conduct, mergers, and vertical restraints and raising the pleading and evidentiary standards that plaintiffs must satisfy to sustain cases and obtain relief.<sup>25</sup>

An expansion of public antitrust enforcement will depend, in the short term at least, upon the skill of government agencies in navigating existing jurisprudence to establish an antitrust infringement and, in some instances, in persuading courts to soften, modify, or even reverse elements of current case law. Although such an

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<sup>23</sup> See, e.g., William E. Kovacic, *HSR at 35: The Early US Premerger Notification Experience and Its Meaning for New Systems of Competition Law*, in *NEW COMPETITION JURISDICTIONS* 9 (Richard Whish & Christopher Townley eds., 2012) (describing process that led to enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976). From 1975-76, one of us (Kovacic) served as a research assistant on the majority staff of the Senate Judiciary Subcommittee on Antitrust and Monopoly during deliberations on the Hart-Scott-Rodino Act.

<sup>24</sup> The breadth of this role as exercised by federal judges is analyzed in Daniel A. Crane, *Antitrust Antitextualism* (Mar. 2020), available at [papers.ssrn.com/so13/papers.cfm?abstract\\_id=3561870##](https://papers.ssrn.com/so13/papers.cfm?abstract_id=3561870##).

<sup>25</sup> See Andrew I. Gavil et al., *ANTITRUST LAW IN PERSPECTIVE – CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 437-45, 679-80, 880-90, 902-51 (3d ed. 2017).

evolution could in theory take place, as it has done over the last forty years, in a new stream of antitrust cases, judicial appointments since 2017 arguably have made such a change in direction unlikely. Rather, it seems more probable that successful prosecution of major antitrust (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. A new president could gradually change the philosophy of the federal courts by appointing judges sympathetic to the aims of the proposed transformation. The reorientation of the courts through judicial appointments is, however, likely to take a long time.

Until then, judges in the district courts and the courts of appeals will be constrained by the existing jurisprudence and will only be at liberty to develop a more flexible approach by working in the “gaps” or spaces left by Supreme Court opinions and through creative interpretations of the law. Such cases are likely to be hard fought. For example, Judge Lucy Koh’s finding in *Federal Trade Commission v. Qualcomm, Inc.*<sup>26</sup> 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 from the DOJ, the U.S. Departments of Defense and Energy, and even one of the FTC’s own members.<sup>27</sup> This is the most important government Section 2 case in the courts today, and the FTC faces a daunting challenge to gain appellate approval, including a possible review by the Supreme Court, for its victory at trial.

### ***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, which prohibits “unfair methods of competition.”<sup>28</sup> It is well-established that Section 5 authorizes the FTC to tackle not only anticompetitive practices prohibited by the other antitrust statutes, but also conduct constituting incipient violations of those statutes or behaviour that exceeds their reach, for example, where the conduct does not infringe

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<sup>26</sup> No. 17-cv-00220 (N.D. Cal. Jan. 17, 2017), <https://www.ftc.gov/enforcement/casesproceedings/141-0199/qualcomm-inc>.

<sup>27</sup> Christine Wilson, *A Court’s Dangerous Antitrust Overreach* WALL ST. J. (May 28, 2019), <https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055>.

<sup>28</sup> 15 U.S.C. § 45(a).



the letter of the antitrust laws but contradicts their basic spirit or norms developed in other areas of public policy.<sup>29</sup>

Congress designed Section 5 to be an expansion joint in the U.S. antitrust system. Realizing this potential in practice has proven elusive. The FTC's efforts to use Section 5 for what Professor Daniel Crane has called "norms creation"<sup>30</sup> have encountered immense 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.<sup>31</sup> The last FTC success in federal court in any competition case predicated solely on Section 5 occurred in the late 1960s.<sup>32</sup>

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."<sup>33</sup> The agency's Section 5 agenda yielded some successes,<sup>34</sup> but also a large number of litigation failures in cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.<sup>35</sup> The agency's program elicited powerful legislative backlash from a Congress that once supported the FTC's trailblazing initiatives but turned against it as the Commission's efforts to obtain dramatic structural remedies unfolded.<sup>36</sup>

### *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

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<sup>29</sup> See *FTC v Brown Shoe Co* 384 U.S. 316, 322 (1966) (the Commission has power under section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of section 3 of the Clayton Act or other provisions of the antitrust laws), *FTC. v Motion Picture Adv. Co.*, 344 U.S. 392, 394-395, *FTC v Sperry & Hutchinson Co* 405 U.S. 233, 239 (1972) (section 5 empowers the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws) and Neil W Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act* 21 B.C. L. REV. 227 (1980).

<sup>30</sup> Crane, *supra* note 12.

<sup>31</sup> See Kovacic & Winerman, *supra* note 23.

<sup>32</sup> *Id.*

<sup>33</sup> See Kovacic, *Broadest Sense*, *supra* note 14, at 1286-87.

<sup>34</sup> *In re Xerox*, 86 F.T.C. 364 (1975) (consent order).

<sup>35</sup> The most notable litigation setbacks were the FTC's shared monopoly cases against the leading U.S. breakfast cereal manufacturers and the eight largest petroleum refiners, *Kellogg Co* 99 F.T.C. 8 (1982) and *Exxon Corp.*, 98 F.T.C. 453 (1981)

<sup>36</sup> See William E. Kovacic, *Creating a Respected Brand: How. Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 241 (2015); Kovacic, *Congressional Oversight*, *supra* note 20, at 665.

committed and deterred; and will a court be likely to impose any such remedy. Reform advocates have called for the bold application of the full range of possible civil antitrust remedies, including unwinding past mergers, divestment of assets, restructuring concentrated markets, limiting vertical integration, imposing access and nondiscrimination obligations, requiring the licensing of intellectual property, and disgorging revenues gained from improper conduct.

In this vision of enforcement, structural remedies play a crucial role in deconcentrating both monopolistic and oligopolistic markets, rapidly introducing new competition into a market, and reversing what they consider to be the severe structural problems that had developed.<sup>37</sup> A number of factors have discouraged extensive recourse to structural relief in nonmerger cases. First, some scholars have raised concerns about the effectiveness of previous attempts to deconcentrate industries,<sup>38</sup> especially given the length of time that antitrust proceedings take.<sup>39</sup> Second, courts sometimes have been daunted the difficulty involved in constructing and overseeing a structural remedy effectively. The question of how and what to divest (e.g., how to separate physical facilities and allocate staff from integrated teams) can be intimidating.<sup>40</sup> These types of concerns may lead a court to demand a strong showing that a structural remedy is warranted and will be successful in achieving its objective.

A special problem in highly dynamic markets 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 and 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

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<sup>37</sup> See William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 U. CONN. L. REV. 1285 (1999) (hereinafter *Designing Antitrust Remedies*).

<sup>38</sup> See e.g., Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109 (2001); Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust* 27 IND. L.J. 1 (1951).

<sup>39</sup> The evolution in the market situation since the time the proceedings were launched can make the remedy originally sought inappropriate. See Richard A. Posner, *ANTITRUST LAW* 106 (2d ed. 2001).

<sup>40</sup> See *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295, 348 (D. Mass. 1953) (Judge Wyzanski: "United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.")

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 for illegal monopolization in the late 1990s to truncate the presentation of evidence.<sup>41</sup> These types of measures have some promise to bring matters to a close more quickly.

Second, the initiation of a lawsuit could be recognised 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 gives 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 in 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.<sup>42</sup> 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.<sup>43</sup> 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

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<sup>41</sup> See Andrew I. Gavil & Harry First, *THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY* (2014).

<sup>42</sup> And so to halt potentially anti-competitive conduct pending investigation. On October 16, 2019, the European Commission used such powers for the first time in eighteen years in proceedings against Broadcom. See [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_19\\_6115](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_6115).

<sup>43</sup> Two cases we would include in this category are the breakup of the Standard Oil trust mandated in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911) and the patent licensing remedies accepted by settlement in *United States v. Western Elec. Co.*, 1956 Trade Reg. Cas. (CCH) ¶ 68,246 (D.N.J.1956) (consent decree).

likely the FTC – would use its rulemaking powers to proscribe specific types of conduct (e.g., self-preferencing by dominant information services platforms).

In these comments, we do not purport to solve the problems of 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.

### ***E. Political Backlash***

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.<sup>44</sup>

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but legislators believe independence means insulation from the executive branch, not from the Congress.<sup>45</sup> 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 the Commission’s cases adversely affect the interests of members’ constituents.

Controversial and contested cases may 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.<sup>46</sup>

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<sup>44</sup> On the influence on White House involvement in decision making in antitrust cases at DOJ, see James F. Rill & Stacey L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?* 79 ANTITRUST L.J. 577 (2014).

<sup>45</sup> See William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness* 100 IOWA L. REV. 2085 (2015) (hereinafter *Independent Agency*).

<sup>46</sup> See Kovacic, *Congress and the Federal Trade Commission*, *supra* note 14.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the most carefully examined technology giants: Amazon, Apple, Facebook, and Google. These firms have received unfavorable scrutiny from legislators of both political parties in recent 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 or consumer bodies to oppose the defendants.

### ***F. Opposition to Legislative Reform***

Although statutory reform might at first sight appear to be a direct, effective solution to some of the impediments (such as entrenched judicial resistance to intervention), there are good reasons to expect that powerful business interests will also stoutly oppose any proposals for legislation to expand the reach of the antitrust laws, or to create a new digital regulator.

One can envisage the formidable financial and political resources that the affected firms will amass to stymie far-reaching legislative reforms. Legislative steps that threaten the structure, operations, and profitability of the Tech Giants and other leading firms are fraught with political risk.<sup>47</sup> These risks are surmountable, but only by means of a clever strategy that anticipates and blunts political pressure. One element of such a strategy is to mobilize countervailing support from consumer and business interests to sustain an enabling political environment to enact ambitious new laws.

Even if successful, legislation to override existing jurisprudential limitations might take years to accomplish; cases taken under new legislation – even with the establishment of presumptions that improve the litigation position of government plaintiffs – may still be relatively complex and difficult to prosecute. Rulemaking is an alternative to litigation, but it is no easy way out of the problem. On the contrary, promulgation and defense (in litigation) of a major trade regulation rule may take as long as the prosecution of a Section 2 case. It can also be anticipated that a judiciary populated with many regulation skeptics will subject new rules or related measures to demanding scrutiny.

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<sup>47</sup> To be clear, the political attacks can come, and have come, from both political parties.

### III. INSTITUTIONAL REFORMS TO ENABLE IMPLEMENTATION

#### A. Finding a Path

Two major factors that shape an agency's performance are its capacity and its capability.<sup>48</sup> "Capacity" refers to the agency's human talent and the resources (such as its informational technology infrastructure) that supports its personnel in carrying out their duties. "Capability" refers to whether the agency has the statutory powers (e.g., tools to remedy infringements), organizational structure, and processes (e.g., quality control mechanisms) needed to make sound decisions and implement programs successfully.

In competition law, the Congress and the federal enforcement agencies share responsibility for determining the capacity and the capability of the DOJ and the FTC. Congress affects the agencies' capacity mainly in making appropriations and, as emphasized below in Section B, in setting compensation levels for agency personnel. The agencies also affect capacity by deciding how much to invest in training personnel and in increasing the base of knowledge the agency can draw upon in developing cases and non-litigation projects. The investment in "policy research and development"<sup>49</sup> – for example, in conducting ex post assessments of the impact of past decisions -- can strengthen an agency's skill in selecting good projects and running them well. The sustained investment in policy R&D is essential if the agency is to be truly proficient in addressing issues that arise in dynamic high technology markets.<sup>50</sup>

Capability also is the product of choices made by Congress and the enforcement agencies. Congress approves the statutory framework and the body of administrative rules that govern how the agencies operate. To a significant degree, Congress also controls how the agencies are organized. At the same time, the agencies have considerable discretion to devise methods for setting priorities and choosing projects to carry out the priorities. Agencies that share policy duties with other public bodies

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<sup>48</sup> The framework used here is derived from David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Government Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1474-76 (2014).

<sup>49</sup> During his chairmanship of the FTC, Timothy Muris used this expression to underscore how the FTC's success depended substantially on its ability to accumulate knowledge (e.g., through a study), retain lessons used from past experience, and apply its knowledge to new projects. The ability to produce useful "products" in the form of cases and rules required continuing, substantial outlays for research. Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of Competition Policy*, 2003 COLUM. BUS. L. REV. 359 (2003).

<sup>50</sup> The need to make significant investments in developing knowledge is greatest in sectors, such as information technology, that feature high levels of dynamism. Without the investment, an antitrust agency loses its ability to understand the markets it oversees, to make an accurate diagnosis of commercial developments, and to intervene effectively to correct observed problems. See Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902, 1905-07 (2015).

(which is the case in antitrust law for the DOJ, the FTC, and the state attorneys general) must decide how to cooperate in the common policy domain.

In the discussion below, we offer suggestions about how Congress and the agencies can improve the capacity and capability of federal antitrust enforcement. Successful accomplishment and delivery of reforms, more moderate and more ambitious, alike, will require the awareness and realistic assessment of likely implementation obstacles and a conscious effort to develop a strategy to surmount them. As mentioned above, history provides sobering examples of failures where similar, significant implementation barriers have not been considered or have been discounted.<sup>51</sup> Such barriers are not a formula for timidity or a reason to forego change. Rather, understanding them helps guide the design of a successful program. To return to our U.S. space program analogy,<sup>52</sup> an indispensable foundation for the ultimate success of the Apollo program was the commitment of NASA and its contractors to understand the full magnitude of the task before them and to anticipate all hazards that confront human spaceflight to and from the Moon's surface.<sup>53</sup> The probing analysis of risks inspired successful efforts to find solutions. Operating in an unforgiving environment where even small errors could be catastrophic, humans landed on the Moon and returned safely to Earth.

The discussion below considers approaches for navigating the reform implementation challenges set out in Section II. Our most important caution is that the reforms – more dramatic and less sweeping – will require substantial upgrades in the capacity and capabilities the institutions responsible for implementation. The more ambitious the reform, the more urgent is the need for enhancements.

Further, the prospects of success for the public agencies (federal and state) are likely to improve if the government institutions can formulate a common strategy to overcome identified obstacles. Doing so will demand planned, joined-up, and collaborative enforcement by the public enforcement agencies and a forthright self-assessment of existing operations and capabilities – to repair institutional flaws, to temper interagency disagreements, and to assemble the human capital needed to run a new, large collection of difficult antitrust suits.

### ***B. Strengthening Capacity: Augmenting DOJ and FTC Human Capital***

Measures to expand federal antitrust intervention dramatically – through the prosecution of lawsuits or the promulgation of trade regulation rules – will face arduous opposition from the affected businesses. Assuming that litigation will

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<sup>51</sup> See *supra* Introduction to Section II.

<sup>52</sup> See *supra* Section I.

<sup>53</sup> This experience is recounted in Charles Fishman, *ONE GIANT LEAP – THE IMPOSSIBLE MISSION THAT FLEW US TO THE MOON* (2019).

provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (we assume that legislation to change the doctrinal status quo may not be immediately forthcoming).

Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies can create a serious gap between the teams assembled for the prosecution and defense, respectively. Although the public agencies can match the private sector punch for punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases seeking to impose powerful remedies upon global giants.

An enhanced litigation program therefore will go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital – attorneys, economists, technologists, and administrative managers – to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to raise civil service salaries. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel, and (b) attempting to shut the revolving door through which professionals now move between the public and private sectors. We discuss all three of these steps below.

*(i) Resources and Compensation.* To accomplish the desired expansion of enforcement, we see a need for more resources, but not simply to build a larger staff by hiring more people. It is also to attract and retain a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We would use an increase in resources mainly to boost compensation, which means taking the antitrust agencies out of the existing civil service pay scale. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that adequate compensation for civil servants is not a focus of attention in contemporary proposals for an expansion of antitrust enforcement, including new cases to take on the leading firms in the high technology industry and in other sectors.

Consider two possibilities for compensation reform. The first is to align antitrust salaries to the highest scale paid to the various U.S. financial service regulators. Here the model would be the compensation paid to employees of the banking regulatory



agencies; the salary scale for these bodies exceeds the General Schedule (GS) federal civil service wage scale by roughly twenty percent.<sup>54</sup> In adopting the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010,<sup>55</sup> Congress concluded that the importance of the mission of the new Consumer Financial Protection Bureau (CFPB) warranted higher salaries for the agency's personnel. If the higher salary scale made sense for the CFPB, we see no good reason why a more generous compensation schedule is not appropriate for the antitrust enforcement agencies.<sup>56</sup> Are the duties entrusted to the federal antitrust agencies any less significant? Are the economic problems that the DOJ and the FTC (which is also the principal federal consumer protection agency and privacy regulator) are being called on to address – in the proceedings of this Committee and in many other fora -- any less significant? If the answers to these questions is “no,” Congress should allow the antitrust agencies to pay at least the same wages as the CFPB does.

Our second alternative requires a more dramatic change, which we would implement in the first instance at the FTC.<sup>57</sup> We would triple the FTC's existing budget of about \$330 million per year and use the increase mainly to raise salaries and partly to add more employees. This experiment might be carried out for a decade to test whether a major hike in pay would increase the agency's ability to recruit the best talent, retain the talent for a significant time, and apply that talent with greater success in a program that involves prosecuting numerous ambitious cases and devising other significant policy initiatives.

We see a major increase in compensation, either by adopting the CFPB model or trying our more dramatic alternative, to be a crucial test of the commitment and sincerity of elected officials who say a major expansion of antitrust enforcement is necessary to correct grave market power problems involving digital platforms. If fundamental competition policy reforms are vital to the nation's well-being, then the country should spend what it takes to get the best possible personnel to run the difficult cases (and carry out other measures, such as the promulgation of trade

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<sup>54</sup> See Paul H. Kupiec, *The Money in Banking: Comparing Salaries of Bank and Bank Regulatory Employees* (American Enterprise Institute, April 2014), [https://www.aei.org/wp-content/uploads/2014/04/-the-money-in-banking-comparing-salaries-of-bank-and-banking-regulatory-employees\\_17170372690.pdf](https://www.aei.org/wp-content/uploads/2014/04/-the-money-in-banking-comparing-salaries-of-bank-and-banking-regulatory-employees_17170372690.pdf).

<sup>55</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>56</sup> As a member of the FTC, one of us (Kovacic) observed firsthand how the disparity in salaries between the CFPB and the FTC resulted in a significant migration after 2010 of the Commission's elite consumer protection attorneys and economists to the CFPB. Many of these individuals were major contributors to the FTC's consumer protection programs because they combined outstanding intellectual skills with decades of experience (much of it in middle-level and senior management positions) at the Commission. It was impossible to replace them with individuals of comparable skill and experience, and the FTC's performance suffered as a consequence.

<sup>57</sup> We suggest trying the reform suggested here first at FTC, which is a smaller, standalone agency. The DOJ Antitrust Division is a relatively small part of a large bureaucracy. Singling out the Antitrust Division for the compensation increases we propose here could create great friction with the Justice Department's other operating units. Using the FTC as a prototype would not generate such intra-agency tensions.

regulation rules) that will be the pillars of a new, expanded enforcement program. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in federal service in the expectation of receiving much higher compensation in the private sector at a later time.

In considering these proposals, legislators should take no comfort in the idea that the sense of satisfaction that can come from serving noble goals in public service creates a sufficient inducement for the best personnel to come to the DOJ, the FTC, or other federal agencies and stay there, notwithstanding the huge disparity in salaries between civil servants and their private sector counterparts. From personal experience working inside public institutions<sup>58</sup> and studying their operations as academics, we are convinced that civil servants in the United States and in many other countries derive genuine “psychic income” from their work, and this reward offsets, to some degree, the wage disparities with the private sector. In the United States, the psychic income for civil servants at the DOJ and the FTC is evaporating quickly. In articles, books, blog posts, press releases, and tweets, a large body of commentators (including elected officials) today depict the federal antitrust agencies as “useless” and portray their activities as “toothless,” or worse.<sup>59</sup> Who would aspire to join, or remain at, such institutions?<sup>60</sup>

A dramatic expansion of enforcement could create a temporary buzz of excitement that draws first-rate talent into the agency, but only for a time. As experience at the DOJ and the FTC in the 1970s shows, the excitement wears off after a few years as attorneys and economists, facing relentless opposition from better-resourced teams acting for defendants, leave the agencies for other jobs. Over time, there is no getting around the need to compensate civil servants properly in the

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<sup>58</sup> One of us (Kovacic) has spent a total of almost twelve years in various capacities with the FTC and has been a Non-Executive Director with the United Kingdom’s Competition & Markets Authority since 2014.

<sup>59</sup> The critiques are often vituperative and personal. Consider one example. In a scalding assessment of modern federal antitrust enforcement, a highly lauded volume states that “[t]he process of merger reviews is a scene where lawyers and economists argue with future colleagues in a revolving door of money and influence peddling.” Tepper & Hearn, *supra* note 1, at 164. The authors add that “the Department of Justice now essentially works to serve the interests of companies.” *Id.* at 162. They also observe:

Dozens of industries are so egregiously concentrated that it begs the question as to what the authorities are doing with their time. We don’t know. We know for a fact that workers at the Securities and Exchange Commission spent their time watching porn while the economy crashed during the Financial Crisis. We would hate to speculate about the Department of Justice and Federal Trade Commission.

*Id.* at 116. There is no glory or psychic income for DOJ or FTC employees in an environment in which such commentary is commonplace.

<sup>60</sup> Readers who review blog posts and tweets will discover that the opprobrium lands on senior managers and case handlers, alike. In the modern style of criticism, commentators sometimes name and denounce the stokers who fuel the boilers in the engine room in addition to attacking the judgment and motives of the officers on the bridge of the ship.

paycheck, and not with appeals to patriotic spirit, if they are to persevere in conducting arduous cases, rules, or studies.

(ii) *Respecting and Learning from Past Achievements.* In the United States, there is an unfortunate habit of making the case for major reforms by depicting the existing policy making institutions as utterly incompetent, slothful, or corrupt.<sup>61</sup> Reform advocates sometimes appear to believe that any recognition that existing institutions sometimes have done good work undermines the case for fundamental reform. There is a perceived imperative to portray the responsible bodies and their leaders as hopelessly inadequate. Electoral campaigns can sharpen this tendency by leading the opposition party to claim that the incumbent administration's program was an unrelieved failure.

In a striking number of instances, this pattern has emerged in discussions of antitrust policy.<sup>62</sup> In current discussions about the future of the U.S. antitrust regime, advocates of fundamental reform sometimes portray the federal antitrust enforcement agencies as decrepit -- perhaps to underscore the need for basic change.<sup>63</sup> The implication is that, because the antitrust system has failed so miserably, there are few, if any, positive lessons to be derived from experience since the retrenchment of U.S. policy began in the late 1970s, and certainly none since 2000.

This style of argument has several potential costs. One danger is that it overlooks genuine accomplishments and, in doing so, ignores experience that suggests how to build successful programs in the future. We offer three examples that deserve close study in building future cases that seek to expand the reach of the antitrust system. The first is the development of the FTC's pharmaceutical and non-pharmaceutical health care program from the mid-1970s forward. The Commission identified health care as a major priority and devised a strategy that used the full range of the agency's policy tools -- cases, rules, reports, and advocacy -- to change doctrine and alter business behavior.<sup>64</sup> The affected business enterprises were (and are) economically powerful and politically influential, and they mounted powerful campaigns in the courts and in the Congress to blunt the Commission's initiatives.

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<sup>61</sup> See William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Policy*, 79 ANTITRUST L. J. 687, 692-704 (2014).

<sup>62</sup> See, e.g., William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L. J. 687, 692-704 (2014).

<sup>63</sup> See, e.g., Jonathan Tepper, *Why Regulators Went Soft on Monopolies* (The American Conservative, Jan. 9, 2019), <https://perma.cc/LHR2-NH39> ("Antitrust law is not so much dormant as it is actively sabotaged by the very people who should enforce it. The DOJ and the FTC's policies today are best described as aggressive do-nothingism.").

<sup>64</sup> These efforts are described in Kovacic & Hyman, *Consume or Invest*, *supra* note 14, at 316-17; William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The FTC and Intellectual Property*, 30 SEATTLE U. L. REV. 319 (2007) and William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861 (2005).

The difficulty of the FTC’s program is perhaps most apparent in the case of health care services. The agency had to win cases before courts that displayed skepticism about whether competition had a useful role to play in the delivery of health care, or in any of what are known as the learned professions.<sup>65</sup> The FTC also had to outmaneuver an industry that was bent on gaining legislative relief from antitrust scrutiny. Allied with other professional groups, the leading U.S. medical societies came within an inch in the late 1970s and early 1980s of persuading Congress to withdraw the FTC’s jurisdiction to apply the antitrust law to the professions.<sup>66</sup>

A second example is the FTC’s effort over the past two decades to restore the effectiveness of the “quick look” as an analytical tool in the wake of the Supreme Court’s decision in *Federal Trade Commission v. California Dental Association (CDA)*.<sup>67</sup> By 2001, it had become apparent to the FTC’s senior leadership team that *CDA* had raised doubts about the application of the quick look method of analysis to truncate the assessment of behavior that, while not previously condemned as illegal per se, strongly resembled conduct that antitrust jurisprudence had forbidden categorically.<sup>68</sup> The agency responded with a strategy focused on the development of cases that would enable the Commission to use its administrative adjudication authority to persuade courts to reject the broader negative implications of *CDA* and restore the vitality of the quick look. This initiative ultimately generated court of appeals decisions that upheld the Commission’s effort to treat certain behavior as “inherently suspect” without proving that the defendant possessed market power and to require the defendant to offer cognizable, plausible justifications.<sup>69</sup>

A third example is the FTC’s successful litigation of three cases before the Supreme Court over the past decade.<sup>70</sup> Not since the 1960s has the Commission litigated and won three consecutive antitrust cases before the Supreme Court. Each matter involved difficult issues and featured strong opposition from the defendants

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<sup>65</sup> See, e.g., *Am. Med. Ass’n*, 94 F.T.C. 701 (1979), *modified and enforced*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982).

<sup>66</sup> This campaign is recounted in Kovacic, *Congressional Oversight*, *supra* note 19, at 664-67.

<sup>67</sup> 526 U.S. 756 (1999).

<sup>68</sup> One of us (Kovacic) was the FTC’s general counsel at the time the agency was deciding how to respond to the setback in *CDA*. On the significance of the quick look as an analytical device in U.S. antitrust law, see Gavil et al., *supra* note 25, at 246-58; Alison Jones & William E. Kovacic, *Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Analytical Framework*, 62(2) ANTITRUST BULL. 254, 273-76 (2017).

<sup>69</sup> See *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5<sup>th</sup> Cir. 2008); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

<sup>70</sup> *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013); *FTC v. Phoebe Putney Hospital System, Inc.*, 568 U.S. 216 (2013); *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1117 (2015).

and amici. Had the FTC been a “timid” institution, one cannot imagine that it would have mounted or sustained these litigation challenges.

The programs that accounted for these results were not accidental. Each program began with a careful examination of the existing framework of doctrine and policy to identify desired areas of extension. This stock-taking guided the identification of potential candidates for cases and the application of other policy making tools.<sup>71</sup> Each program built incrementally upon the bipartisan contributions of agency leadership and the sustained commitment of staff across several presidential administrations headed by Democrats and Republicans.

If one assumes (as a number of reform proponents assert) that the FTC was a useless body in the modern era, there would be little purpose in studying these examples, or anything else it did, as there would be nothing useful to learn. The paint-it-black interpretation of modern antitrust history makes the costly error of tossing aside experience that might inform the successful implementation of new reforms.

A second notable harm from the catastrophe narrative, most relevant to the discussion of human capital, is its demoralizing effect on the agency’s existing managers and staff. To see one’s previous work portrayed as substandard, or worse, tends not to inspire superior effort. It breeds cynicism and distrust where managers and staff understand that the critique badly distorts what they have done. Proponents of basic change must realize that the success of their program to expand antitrust intervention will require major contributions from existing staff and managers.

(iii) *Capture and the Revolving Door*. The modern critique of the U.S. system often describes the federal agencies as captured by the business community or beholden to ideas that disfavor robust intervention.<sup>72</sup> Advocates of change suggest that the execution of their reform program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard, or at least embrace vision for expanded enforcement under the consumer welfare, and embrace the multidimensional conception of the proper goals of competition law. Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded (goals) framework or they will find their duties reduced and their roles marginalized. New appointees to top leadership positions will not be tainted by substantial previous

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<sup>71</sup> See e.g., Kovacic & Hyman, *Consume or Invest?*, *supra* note 14, at 316-17 (discussing development of FTC litigation programs involving health care and pharmaceuticals).

<sup>72</sup> See e.g., *Trustbusting in the 21st Century*, *ECONOMIST*, Nov. 18, 2018 (stating that “competition regulators have been captured” and criticizing U.S. revolving door that creates conflicts of interest and warped perspectives on competition policy).

experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law and accepted norms that tilted toward underenforcement. The concern about compromised motives is also likely to disqualify many academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard, or have engaged in consulting on behalf of large corporate interests.

One possible reaction to the anxiety about capture is to slam the revolving door shut, or at least to slow the rate at which it spins. We offer two cautions about this approach. First, the modern experience of the FTC raises reasons to question the strength of the theory. For example, if business perspectives dominate the FTC, why did the agency persist in its efforts to challenge reverse payment agreements involving leading pharmaceutical producers?<sup>73</sup> Was it because the pharmaceutical firms weren't as good at lobbying as, say, the information services giants? And what explains the FTC's decision to sue Qualcomm for monopolization early in 2017?<sup>74</sup> Is this simply attributable to the inadequacy of Qualcomm's Washington, D.C. lobbyists, or is the capture explanation for the behavior of the federal antitrust agencies not entirely airtight?

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of antitrust enforcement. Recruiting attorneys, economists, and other specialists from the private sector can give the agencies a vital infusion of talent which, when combined with agency careerists, permits the creation of project teams that can equal the capability of the best teams that the defense can mount in major litigation matters. We also are wary of the idea that an attorney or economist coming from the private sector will discourage effective intervention during the period of public service as a way to pave the road to a better private sector position upon leaving the agency. Rather, there is evidence to suggest that creating a reputation for aggressiveness and toughness as an enforcer increases one's post-agency employment options. More than a few individuals have developed prosperous careers based upon piloting businesses through navigational hazards that they helped create while they were senior officials in public agencies.

### ***C. Improving Capability: Agency Cooperation and Project Selection***

The U.S. antitrust system is famous for its decentralization of the power to prosecute, giving many entities – public agencies (at both the federal and state

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<sup>73</sup> See *Activas*, 570 U.S. 756 (2013).

<sup>74</sup> See *supra* notes 26-27 and accompanying text.

levels), consumers, and businesses – competence to enforce the federal antitrust laws. The federal enforcement regime also coexists with state antitrust laws and with sectoral regulation, at the national and state levels, that include competition policy mandates.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is disabled (*e.g.*, due to capture, resource austerity, or corruption).<sup>75</sup> Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. In the discussion below, we suggest approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

For models of successful interagency cooperation, one might study the successful policy integration that has taken place through the work of the United Kingdom Competition Network and the European Competition Network. In both examples one can see the mix of organizational structures and personal leadership that enabled agencies collectively to accomplish policy results that would have been unattainable through the work of single agencies operating in isolation. The United States has no equivalent to these institutions, which have served valuable policy formation and coordination functions abroad. The development by America’s public competition bodies of such networks could provide a useful way to replicate the success achieved in other jurisdictions. Other useful measures would include the creation of a regular program of secondments in which the leading competition offices in the United States – federal and state bodies, alike – would swap personnel to build familiarity with the partner institutions and help create the trust and understanding that improve cooperation.

We doubt the ambitious litigation agenda demanded in the modern reform proposals is attainable if the public agencies adhere to traditional practices that overlook the expansion of output and increase in quality that superior interagency cooperation could generate. A suggested program of fuller integration would have the following elements.

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<sup>75</sup> See David A. Hyman and William E. Kovacic, *State Enforcement in a Polycentric World*, B.Y.U. L REV. (Forthcoming 2020); William E. Kovacic and David A Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUROPEAN COMP. J. 527 (2012).

(i) *Development of a Common Strategy.* The path toward a major expansion of the existing litigation program will require careful planning that begins with the formulation of a joined-up strategy implemented harmoniously by the DOJ and the FTC. The starting point for the common strategy is to map out the existing contours of doctrine, identify the high ground for intervention that modern jurisprudence has established, select projects to reshape doctrine and other elements of antitrust policy, allocate them to the best-placed agency to act and avoid duplication of resources on identical or overlapping investigations.

A second focal point in the analysis of the doctrinal status quo would be to consider how existing precedents can be employed to build successful cases and how doctrinal frontiers can be extended.<sup>76</sup> An important element of this mapping exercise is to understand why the courts have embraced more permissive standards over the past four decades. This assessment would facilitate the preparation of effective arguments to persuade judges to rethink elements of the doctrinal status quo. Among other effects, we anticipate that this inquiry will reveal how perspectives beyond the modern Chicago School have influenced judicial thinking.<sup>77</sup> In particular, it will demonstrate how a number of jurists have abandoned a multi-dimensional goals framework in favor of an efficiency orientation out of concern for “administrability” considerations posed by the modern Harvard School of Phillip Areeda and Donald Turner. To gain the support of jurists such as Stephen Breyer (whose antitrust views bear the mark of Areeda’s influence), it will be necessary to show that the restoration of a new antitrust framework, or an egalitarian goals framework, would not lead to unpredictable and inconsistent litigation outcomes as each judge sought to weigh efficiency concerns alongside other values, such as preserving opportunities for small enterprises to compete.<sup>78</sup>

A third element of common strategy would be lessons derived from the examination of the agencies’ base of experience to determine what combination of policy tools – cases, studies, rules, advocacy – offer the best means to effectuate change in the market, and to use this experience base to design specific remedies. Since its creation in 1890, the U.S. competition law system has generated a mass of information about the techniques for government intervention. As explained further

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<sup>76</sup> The contributors to the “Unlocking Antitrust Enforcement Symposium” published in the *Yale Law Review* in 2018 suggest a number of ways in which agencies might develop effective cases within the seemingly foreboding doctrinal framework set by the Supreme Court. See *Unlocking Antitrust Enforcement*, *supra* note 3.

<sup>77</sup> See William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 *CHI. L. REV.* 459, 478-82 (2020).

<sup>78</sup> In conversations we have had with some who support the restoration of the egalitarian goals framework, it appears that efforts to reset the goals of the antitrust system will be to devise strong structural presumptions whose application to dominant firm conduct would facilitate attainment of the pluralistic goals agenda. See, e.g., Sen. Elizabeth Warren, “Anti-Monopoly and Competition Restoration Act” (Dec. 9, 2019). The goals would thus be achieved by applying the presumptions rather than making each goal a factor to be considered in a rule of reason inquiry.



below, the government’s “big antitrust data” can be mined to shed light on what is likely to work. For example, experience in implementing major structural remedies pursuant to decrees in Section 2 monopolization cases and by legislation such as the Public Utility Holding Company Act of 1935 offer important lessons about how to design and carry out the restructuring of major business enterprises.<sup>79</sup>

The study of past experience also will reveal that it is a mistake, as part of a reform program, to focus all of an agency’s resources on the prosecution of big cases against big companies to the exclusion of smaller matters. The history of U.S. Section 2 enforcement shows that small cases can make big law by establishing doctrinal principles that support subsequent successful prosecutions of large enterprises.<sup>80</sup>

(ii) *Project Selection Methodology*. Project selection is the process by which an antitrust agency chooses the specific litigation and non-litigation initiatives it will use to accomplish its policy aims. There is growing recognition among antitrust authorities that improvements in the methodology of project selection can strengthen the prospects of success for any single initiative. Adapted for the purpose of executing a major reform program, a good project selection methodology would pose a series of questions about every proposed initiative.<sup>81</sup>

First, what does the agency expect to achieve if the project succeeds? Will it improve economic conditions, realign doctrine, or both? By defining anticipated gains, the agency can better understand how many resources to commit to a specific measure and make a better-informed decision about how much risk to accept. This inquiry also helps focus the agency’s attention, from the earliest days of the project’s preparation, on the design of remedies to cure apparent problems. The consideration of benefits to be attained and the means for realizing them can lead to agency to reflect carefully about whether the proposed project is the best way to solve the problem at hand. In some instances, a different sequence of initiatives may provide the best path to a solution – for example, to begin with a market study, and then bring cases based on the learning from the study.

Second, what risks does the project pose? How will a project failure – such as a litigation defeat – affect the market and the agency? Will the agency be able to sustain political support for its projects, or will the targets of intervention mobilize

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<sup>79</sup> These possibilities are examined in Kovacic, *Designing Antitrust Remedies*, *supra* note 37, at 1306-10.

<sup>80</sup> For example, the DOJ’s successful prosecution of monopolization claims against Otter Tail Power Co v. U.S., 410 U.S. 366 (1973) and Lorain Journal Co. v. U.S., 342 U.S. 243 (1951) provided key foundations for its monopolization challenges in U.S. v. AT&T Co., 552 F.Supp 131 (D.D.C. 1982) and U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*), respectively.

<sup>81</sup> This framework resembles the project selection methodology developed and applied by the Competition Markets Authority. For a more elaborate exposition of its ingredients, see William E. Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness*, 13 COMP. L. REV. 9 (2018).

a political coalition to constrain the agency by, for example, curbing its authority or budget? To succeed, agencies must be mindful of the shifting sands in politics and be prepared with countermeasures to deal with situations where relevant politicians' interests change and become more sympathetic to commercial interests. Important issues therefore will be whether current political supporters of reform have the staying power to back agencies for the five to ten years it might take to carry out cases successfully, what steps agencies can take to ensure sustained political support and to deal with swings in the political environment, and whether financial support from the affected firms may be used to sway, or can be prevented from swaying, the political process and buckle political resolve.

We raise this issue because, in a painful number of instances, Congress has given unreliable policy guidance to the federal enforcement agencies. Bold cases that endanger economic power often lead adversely affected firms to expend large sums, through lobbying and campaign contributions, to induce legislators to restrain the antitrust agencies. In particular, there is an unvirtuous cycle in the United States through which Congress has demanded bold action from the FTC and then punished the agency, or threatened to reduce its budget or powers, when the Commission followed its guidance. The Commission has grim memories of episodes – for example, in the late 1940s and early 1950s and in the late 1970s and early 1980s –in which Congress berated the FTC for bringing the types of cases that powerful legislators or committees at an earlier time had urged the agency to pursue.<sup>82</sup> No well-informed leader in the U.S. agencies is unaware of this unfortunate history.

Third, which agency will carry out the project? Does that agency have talent available, or can it acquire needed talent in a timely manner, to perform the project successfully and overcome the opposition it will face where the agency seeks strong remedies for individual firms or entire sectors of the economy? A clear-headed answer to these questions helps avoid the creation of large gaps between the agency's commitments and its ability to fulfill them in practice. Because it may be better attuned to the agency's capabilities, a more gradual approach to rolling out a reform program may have better prospects for success than the launch of a number of large, complex cases all at the same time. An agency must wary of commencing a large number of ambitious projects at a pace that will place impossible demands on its ability to land them successfully.

Fourth, what will the project cost be in terms of personnel and out-of-pocket expenditures for items such as expert witnesses to support cases? This inquiry helps the agency make a realistic prediction of the resources needed to carry out individual projects, and prepare disciplined estimates for future budget requests.

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<sup>82</sup> See *supra* sources cited in notes 14, 17, 19, and 22.

Fifth, how long will it take the agency to complete the project? This inquiry helps the agency determine whether its anticipated intervention and remedy will occur fast enough to solve an observed problem. If years may pass before the agency obtains a desired remedy at the conclusion of a lawsuit, it may be necessary to consider interim measures to correct behavior that poses immediate competitive dangers if allowed to continue. By establishing an expected timetable at the outset, the agency equips its leadership with a valuable management tool to track a project's progress.

Sixth, how does the proposed project fit into the portfolio of the agency's existing projects? If the agency examines each project in isolation, it can lose sight of the overall condition of its program portfolio. A portfolio-wide perspective enables the agency to assess the full range of risks it has assumed and, again, to see that it is achieving a good fit between its commitments and its capabilities.

Seventh, how will the agency know that the project, if undertaken, is having its desired effects? It is a helpful exercise to identify how an agency's intervention will bring about change in the market. What are the anticipated effects on prices, product quality, new business entry, or other economic conditions? When are these effects likely to become apparent? This exercise helps the agency develop realistic expectations about the magnitude and timing of anticipated benefits. From its past experience, the agency may be aware that some benefits may take years – perhaps decades – to become apparent.

The specification of performance benchmarks also plays a crucial role of facilitating the ex post evaluation of outcomes. A very basic form of assessment is to compare the agency's assumptions about a project when it begins with the knowledge it gains in the course of implementation. If anticipated performance falls below expectations (perhaps because a significant factor was overlooked), how can the project selection process be improved to account for the factor in the future? Taking careful stock of past measures that worked – and learning lessons from the failures – is a vital way to design new initiatives more effectively.

#### ***D. Enabling the FTC to Perform Its Intended Function***

A number of contemporary reform proposals give the FTC a central role in formulating competition policy. Several features of its original design make the Commission an attractive vehicle for carrying out a program of basic reforms. The Commission has an elastic mandate (Section 5's prohibition on unfair methods of competition) to prohibit behavior not reached by existing interpretations of the Sherman and Clayton Acts. The agency also has expansive authority to collect information from firms through compulsory processes and to publish reports.<sup>83</sup> The

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<sup>83</sup> 15 U.S.C. § 46.

FTC Act also gave the Commission power to serve as a special resource to the DOJ and to the courts in formulating remedies in antitrust cases.<sup>84</sup>

Under the program of greater interagency cooperation we have proposed above, the FTC would run Section 5 cases through its administrative process in cases that to seek to extend the boundaries of existing doctrine in more intervention-minded directions and would use its distinctive information gathering and reporting powers to build the empirical basis for proposed extensions. The starting point for this effort would be to examine the agency's past (and rare) Section 5 litigation successes for lessons about how to gain judicial acceptance for an extension of antitrust doctrine.<sup>85</sup>

In our vision, the Commission also would serve, in effect, as the main public agency resource on remedies. The agency would use its analytical resources and experience in evaluating the effectiveness of antitrust remedies to guide the formulation of remedies in Sherman Act and Clayton Act cases, in addition to Section 5 cases. The agency would employ the large body of experience that that the U.S. system and other systems have collected in the use of structural and behavioral remedies to suggest solutions in specific cases.

We suggest four legislative changes to enable the Commission to fulfill the role we have described above. The first is to relax restrictions that the Government in the Sunshine Act<sup>86</sup> imposes on the ability of commissioners to deliberate together privately to discuss matters of strategy and tactics. Among other consequences, the Sunshine Act severely limits the ability of a quorum of commissioners to deliberate over matters of agency policy except in meetings open to the public.<sup>87</sup> The policy planning functions that we see as essential to an expanded role cannot be performed at a high level without this reform. A central reason to have a collegial decision making process, rather than governance by a single agency executive, is to gain the benefits of deliberation – to set priorities, to formulate a litigation strategy, and to discuss enforcement projects on an ongoing basis. As now written and interpreted, the Sunshine Act severely reduces the FTC's ability to realize the theoretical advantages of collective governance. We know of no other jurisdiction that relies on an administrative commission to implement competition law and encumbers the

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<sup>84</sup> 15 U.S.C. § 47 (authorizing the FTC, upon the request of a federal district court, to act as a master in chancery and advise the court about the design and execution of remedies in monopolization cases).

<sup>85</sup> One worthy subject of examination is the program that led to the Supreme Court's decision in *FTC v. Cement Institute*, 333 U.S. 683 (1948). The Commission used an extended program of research and litigation in mounting a successful challenge to a basing-point pricing arrangement. The development of the case and the adverse congressional reaction that it received are summarized in Kovacic, *Congressional Oversight*, *supra* note 19, at 625-27.

<sup>86</sup> P.L. 94-409, 90 Stat. 1241 (1976).

<sup>87</sup> The Sunshine Act and its requirements are analyzed in Reeve T. Bull, *The Government in the Sunshine Act in the 21<sup>st</sup> Century* (Mar. 10, 2014) (report prepared for the Administrative Conference of the United States), <https://acus.gov/report/final-sunshine-act-report>.

enforcement with so many restrictions on collegial decision making.<sup>88</sup> In numerous conversations, competition officials from other jurisdictions with multi-member commissions express disbelief that the United States created an administrative mechanism with enormous potential and then chose to undermine its governance mechanism so severely.

To serve the accountability and transparency aims that motivated the adoption of the Sunshine Act, we recommend that Congress press the FTC to use other disclosure techniques. Here, as well, experience in foreign jurisdiction suggests a superior alternative path. A number of jurisdictions achieve desired transparency through measures that require their competition authorities to publish an annual statement of priorities, to issue their prioritization criteria, to provide explanations of the decision to prosecute and not to prosecute in individual cases, and to issue annual reports that discuss the agency's progress in realizing its goals.<sup>89</sup> In many instances, documents that set out priorities, case selection criteria, and results achieved are issued first in draft form for public comment. In addition to these measures, agency officials make regular appearances before legislative committees and in public fora to discuss the work of their institutions. These techniques can be supplemented with a program of ex post evaluation that tests, through actual experience, the assumptions that guided agency decisions in specific cases and supplies an additional basis for public debate about the agency's policymaking. Experience with the disclosure mechanisms described here suggests that other jurisdictions have achieved informative levels of public disclosure, and rigorous agency accountability to the public, without the confining strictures of the Sunshine Act.

A second essential step is for Congress to eliminate statutory exemptions that deny the FTC jurisdiction over common carriers, not-for-profit institutions, the business of insurance, and banks.<sup>90</sup> Most of the jurisdictional limitations date back to the agency's creation. Some exemptions may have made sense when established, for the economy and the affected fields of activity were much different. Today, the exemptions are embarrassing anachronisms that diminish the FTC's capability to perform the larger competition role Congress set out in 1914, not to mention the consumer protection and privacy responsibilities that now are key elements of the

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<sup>88</sup> The experience that one of us (Kovacic) has had as a non-executive director of the CMA has highlighted how the FTC is largely foreclosed from using policy planning and prioritization techniques that are commonly employed to great advantage in other jurisdictions.

<sup>89</sup> It strikes us as sensible for the U.S. agencies to emulate the practice of many foreign authorities and more frequently issue closing statements when the agencies decide not to take action in a case. The triggering event in the United States might be matters in which the agency has used compulsory process to conduct an inquiry.

<sup>90</sup> See David A Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORD. INTELL. PROP. MEDIA & ENT. L.J. 1119, 1133 (2019).

agency's policymaking portfolio. On many occasions over the past two decades, the FTC has pled with the Congress to revisit and eliminate – or at least curtail – the jurisdictional exemptions. This is a vivid instance in which Congress has the power to improve the FTC's capability and has failed to exercise it.

A third reform would confer powers on the FTC to conduct market studies (and obtain information necessary to allow it to carry out its functions) and investigations in the same way as the UK's Competition and Markets Authority (CMA).<sup>91</sup> For example, Part 4 of the Enterprise Act 2002<sup>92</sup> enables the CMA to investigate markets where it appears that the structure of the market or the conduct of suppliers or customers in the market is harming competition and, where problems are identified, to propose steps to mitigate, remedy, prevent or overcome them. This would enable the FTC to study sectoral or economy-wide phenomena and to impose remedies regardless of whether the conditions or practices in question violate the antitrust laws.

A fourth measure is to enable the FTC to recruit and hire competition policy specialists to serve as administrative law judges.<sup>93</sup> It is important to recall that the administrative adjudication of cases was a crucial basis for the establishment of the Commission in 1914. Several pillars of the institution were designed solely, or principally, to support administrative adjudication: the multi-member governance configuration (with the board performing the functions of deciding to prosecute and of hearing appeals from administrative cases), the broad, scalable mandate of Section 5, and special information gathering powers to inform the development of legal standards to meet evolving commercial conditions. All of these characteristics put administrative adjudication at the center of the agency's work. There was little point in Congress designing the agency as it did except to create a platform for administrative adjudication and norms creation.

The proceedings before the administrative law judge (ALJ) are the vital first step of the FTC's administrative process. The administrative hearing collects and analyzes evidence and applies the law. It is the foundation for subsequent deliberation by the Commission sitting as a plenum in appeals. At present, the Commission has no ability to insist that ALJ appointees have significant prior experience in competition law or consumer protection law. The ALJ selection process is controlled by government-wide processes that accord no weight to the

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<sup>91</sup> This possible adjustment to the FTC's authority is discussed in William E. Kovacic, *Commercial Innovation and Innovative Regulatory Agencies: An Enhanced Markets Regime for the United States* (Jan. 2020) (manuscript on file with authors).

<sup>92</sup> Enterprise Act 2002, c.40, Section 4 ("Market Investigations").

<sup>93</sup> See William E. Kovacic, Chairman, U.S. Federal Trade Commission, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY* 42-45 (2009)

FTC’s institutional considerations. Congress can and should correct this deficiency by amending the government’s ALJ selection process to use competition and consumer protection expertise as a key criterion in the choice of FTC ALJs.

### ***E. Agency Capacity and Capability: Focal Points for Congressional Oversight***

Earlier in this section, we described how two major determinants of an antitrust agency’s performance are its capacity and capability. In the discussion below, we suggest focal points for congressional oversight that would serve, we believe, to strengthen the capacity and capability of the federal antitrust agencies to execute an expanded antitrust agenda skillfully.

Perhaps the most important process that shapes agency capacity, as we have used the term, is congressional appropriations: how much money should an agency receive, and for what purposes? We have argued above that a paramount subject of future congressional deliberations concerning an expansion of antitrust enforcement should be to increase compensation paid to antitrust agency personnel. In light of the importance that this Committee and other legislators have attached to antitrust enforcement, there is every reason to at least put Antitrust Division and FTC personnel on a par with the CFPB.

Another high priority of congressional oversight is to ensure that the agencies make adequate investments in competition policy R&D in the form of research, studies, and ex post evaluations that strengthen the base of knowledge that the agencies use to formulate cases and rules involving the digital marketplace. There should be a significant increment in each year’s budget for policy R&D.

The oversight process also can press the agencies to cooperate in ways that pools knowledge and enables federal and state officials to get the greatest value from their antitrust expenditures. Congress might encourage the expansion and formalization of interagency contacts through secondments, the formation of working groups, and the creation of U.S. equivalents of the European Competition Network and the United Kingdom Competition Network. Another step would be to encourage the DOJ and the FTC to resume efforts, which various legislators bitterly opposed in 2002, to formalize and clarify the “clearance” agreement by which the two federal agencies allocate antitrust matters between themselves.

Promoting agency efforts to expand their existing impact evaluation programs could be one part of a broader effort by Congress to support efforts to evaluate the effects of past antitrust cases – especially those with significance for the digital marketplace. Committee hearings could provide a regular forum in which agency officials, practitioners, and academics examine the effects of completed matters.

Committees could cooperate with universities and think tanks to hold programs that study past experience.

Earlier in the paper, we also proposed measures that would improve the capability of the antitrust system by upgrading statutory mandates and strengthening agency operations. Many of our suggestions focused on the FTC, including reforms to the Sunshine Act and expanded recourse to other accountability and transparency mechanisms; changes in the process for selecting administrative law judges that would require FTC candidates to have significant expertise in antitrust or consumer protection; and the elimination or curtailment of longstanding exemptions to the FTC's jurisdiction. Beyond these steps, it seems appropriate for Congress to conduct, roughly every five years, a hearing or hearings to benchmark the U.S. system with the rest of the world's competition systems. There is an enormous amount of innovation and experimentation taking place in a world of over 130 competition systems. A periodic review of this experience – and perhaps more frequent consultation to track foreign initiatives such as the formation of a new digital regulatory unit in the United Kingdom – could show the path to improvements in the structure and practice of the U.S. system.

Our last comment about oversight deals with risk-taking. Congress should engage the agencies in a regular conversation about how risky a program of litigation and rulemaking it wants the agencies to undertake – and what expectations Congress brings to the assessment of a litigation program. Does Congress have in mind a specific rate of success? By what measure will an agency's litigation effectiveness be evaluated? How does Congress believe agencies should account for the risk of political backlash – from either end of Pennsylvania Avenue – once the agencies have launched matters that attack powerful economic interests? How can Congress today credibly commit itself not to attack agencies tomorrow for bringing cases that incumbent legislators wish the agencies to pursue?

#### **IV. CONCLUSIONS**

In the United States and many other jurisdictions, pressure is on the competition agencies to undertake a new program of sustained and effective antitrust action, targeting especially the business models of digital platforms. Pending any longer-term, more fundamental reforms, many commentators are calling for immediate, rapid and heightened competition scrutiny of a wide range of practices (including mergers (future and past), business practices of digital firms, restricted distribution and price setting practices, and the use of intrusive remedies to fix antitrust problems going forward.

These demands are imposing formidable expectations on the shoulders of competition agencies. Meeting them successfully will not happen by chance or



through a reactive and ad hoc approach. Indeed, without careful planning an ambitious enforcement program involving a large number of complex litigations being pursued concurrently would risk agency managers and case handlers becoming overrun, and the failure of the program. Consequently, we propose a more gradual and joined-up reform strategy that anticipates and addresses implementation obstacles through the study of past antitrust experience. A common, cooperative approach to planning should lead the public agencies to select a sensible number of ambitious, complementary litigation prototypes for each agency to pursue before the program is expanded in steps.

Both federal agencies have investigative powers, but we propose that the FTC should make full use of its fact-finding powers to collect information on industries or sectors selected for investigation. Further, that before prosecutions are launched a methodology is followed for selecting appropriate cases for prosecution, taking account of past achievements and failures, the goal(s) to be achieved in bringing the case, the chance of success (especially given current doctrinal limitations) and opportunities for reshaping law and policy, the prospect for achieving those goals through antitrust action and remedies (rather than, for example, advocacy or other mechanisms), which agency is best placed to act, and whether that agency has the tools and staff available to take on the case now (taking account of other agency commitments). Essential to all of the proposals is a need for the agencies to anticipate and account for political backlash, and for the human capital of the agencies to be augmented, through recognizing the skills of existing staff and through finding realistic and achievable mechanisms to retain and recruit talented staff with the skill set diversity to take on sophisticated and powerful firms, backed by formidable teams of lawyers and economic experts.