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A New Approach to Antitrust Law: Transparency

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A NEW APPROACH TO ANTITRUST LAW: TRANSPARENCY

The following is a transcript of a 2018 Federalist Society panel entitled Technology, Social Media, and Professional Ethics. The panel originally occurred on November 15, 2018 during the National Lawyers Convention in Washington, D.C. The panelists were: Hon. Frank Easterbrook, United States Court of Appeals, Seventh Circuit; Deborah Garza, Partner, Covington & Burling LLP; Eric Grannon, Partner, White & Case; and Douglas Melamed, Professor of the Practice of Law, Stanford Law School. The moderator was the Honorable John B. Nalbandian of the United States Court of Appeals for the Sixth Circuit.

[RECORDING BEGINS]

HON. JOHN B. NALBANDIAN: Are we good? Okay, I think we're going to go ahead and get started. One of our panelists is running a bit late, but I think we'll be okay, and we'll slot him in here when he gets here. I want to welcome everybody. My name is John Nalbandian. I'm a judge on the Sixth Circuit. And the title of this panel today is *A New Approach to Antitrust Law: Transparency*. As many of you are aware, antitrust law has seemingly come back into vogue, at least in some circles, in light of the recent FTC hearings and ongoing hearings on competition and consumer protection in the twenty-first century and renewed publicity in generalist publications, like the *New York Times* and *The Economist*, with a particular focus these days on the so-called FANG companies—Facebook, Apple, Amazon, Netflix, and Google.¹

I have to confess, however, that much of this is new to me. My antitrust experience as a private practitioner and as a one-time summer intern in the Antitrust Division was firmly rooted in traditional markets for goods and services and basic, good-old horizontal conspiracies and price fixing. Indeed, a day when lower prices were actually a good thing. I was, what you might say or what I call myself, a widget-antitrust lawyer.

Now, these days, at least, it seems as if many people are calling for a

¹ Cecilia Kang, David Streitfeld & Annie Karni, *Antitrust Troubles Snowball for Tech Giants as Lawmakers Join In*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/technology/facebook-ftc-antitrust.html>; Elena Popina, *Facebook, Google Regulatory Woes Erode \$137 Billion from FANGs*, BLOOMBERG (June 3, 2019), <https://www.bloomberg.com/news/articles/2019-06-03/facebook-google-regulatory-woes-erode-137-billion-from-fangs>; Patrick Seitz, *FANG Stocks, Apple In Regulatory Crosshairs, Creating 'Headline Risks,'* INV. BUS. DAILY (June 4, 2019), <https://www.investors.com/news/technology/fang-stocks-apple-pressured-antitrust-concerns/>.

reinvigoration of traditional antitrust law and also, in fact, for new concepts of antitrust law that will carry even more weight to address perceived problems with things like labor markets and wages, income inequality, privacy, and, naturally—because Godwin’s law apparently has no bound—to prevent the rise of fascism itself.

Although I expect that our panelists may touch on some of these broader themes, our focus today is a little more narrow. Our panelists are specifically going to address the role, or possible role, of greater transparency in the implementation and enforcement of antitrust laws—something that, arguably, Europe and the EU have been doing a better job of than we have. One question here is whether greater transparency combined, perhaps, with current law is a better way to incrementally address calls for the greater reform and use of antitrust laws; perhaps a scalpel on a tray of otherwise blunt instruments.

Federalist Society panels, of course, are well-known for their quality, and this one is no exception. I will introduce our panelists briefly, and then they will each give opening remarks, and then, hopefully we can have some back and forth, and then, obviously, we’ll take questions from the audience.

Our first speaker is Deborah Garza, who is a partner at Covington & Burling, where she co-chairs the firm’s Global Antitrust and Competition Law Practice Group. Ms. Garza has extensive antitrust experience, which includes, in addition to her current work in private practice, past service in the Department of Justice’s Antitrust Division as an Acting Assistant AG, Deputy Assistant AG, and Chief of Staff and Counselor to the Assistant AG. And she will chair, or perhaps is currently chairing, the Antitrust Section of the ABA during the 2018-2019 year.

Next, we have Eric Grannon, a Partner at White & Case, where he has built an impressive practice focused on helping clients with antitrust matters, including both civil and criminal defense. And I believe Eric is going to talk to us a little bit about the criminal aspects of antitrust as well as his work counseling for mergers and acquisitions and settlements of pharmaceutical patent litigation. A former prosecutor, Mr. Grannon also served as Counsel to the Assistant Attorney General in charge of the Antitrust Division during 2003-2004, where he helped formulate U.S. antitrust enforcement policy and managed civil and criminal investigations and court cases brought by the Antitrust Division.

To my left here is Judge Frank Easterbrook, who is, of course, a familiar face to The Federalist Society. Judge Easterbrook serves as a Circuit Judge on the Seventh Circuit, where he served as Chief Judge from 2006-2013. He is also a senior lecturer at the University of Chicago’s Law School. Before joining the court in 1985, he was a professor at the University of Chicago, where he taught, wrote, and published prolifically in a variety of

areas including antitrust, securities, and corporate law. In addition, Judge Easterbrook previously served as Deputy Solicitor General of the United States.

Finally, we have an empty chair. That will be, hopefully, Professor Douglas Melamed from the Stanford Law School, where his principle areas of research and writing are antitrust law and the intersection of antitrust and patent law. Prior to joining the Stanford faculty, Professor Melamed practiced law for forty years, including serving as Senior Vice President and General Counsel of Intel Corporation, chair of the Antitrust and Competition Practice Group as a partner at Wilmer Hale, and service at the Department of Justice as the Acting Assistant Attorney General in charge of the Antitrust Division, and as Principle Deputy Assistant Attorney General.

So please help me welcome our panelists. [Applause] And thank you. And I'll turn it over to Ms. Garza.

DEBORAH GARZA: Okay, great, thanks. If the question is should we have transparency, to me the answer is yes. I want it now, and I want it fast. When I talk about transparency, I'm talking about transparency in antitrust investigations and enforcement. Transparency, of course, is relevant to U.S. enforcement but it has been particularly relevant for jurisdictions outside the U.S., such as in Europe, Asia, and newly emerging jurisdictions that don't have well-established rule of law or that have different systems of administering antitrust that don't involve the courts. It has been a major objective of the U.S. government and the antitrust community to promote transparency for many years. It has been a bipartisan effort, and that effort has continued through this administration.

I thought I would talk in my opening remarks very briefly about what we mean by transparency, why we value it, where it becomes an issue, and then a little bit about some of the efforts to try to ensure and promote transparency, several of which I've been personally involved in.

There are many benefits to transparency in antitrust enforcement. For one thing, it's necessary for the free flow of capital and investment because you need certainty and you need predictability. Transparency in the rules that are applied and how they are being applied, in both the investigation and enforcement contexts, is critical to businesses and planning transactions.

It's important to efficient enforcement and maximum compliance. Companies are better able to comply with the law, whether it's how they structure their transactions or in determining what their conduct will be, transparency allows them to conform their behavior more closely to the law. It allows for efficient enforcement if people know what the standards are. It also enables the agencies to be better informed in the decision-making process.

Transparency is good for accountability. If you're transparent about the rules that you apply, the procedural rules and the substantive rules, then you can be held accountable. And we want our enforcer to be accountable.

It's important to confidence in enforcement; it's important that people—the antitrust community and others—understand what the rules are, how they're applied, that they're applied impartially. It protects against corruption. It protects against special-interest capture. It protects against capriciousness and just plain bad decision-making. It protects against discriminatory enforcement, which is something that's been a big concern for the business community, particularly in jurisdictions like China and other jurisdictions where you can never be sure whether the action that's being taken is based on complaints by competitors or national champions. It can be situational, or it can be systematic.

There are a number of ways to ensure transparency. One is by enforcement agencies being clear about what standards they are applying—for example, through the issuance of guidelines, written case law, policy and enforcement statements articulating decisions and how they were made. Another is to be transparent with the parties that are subject to investigations, letting parties know when an investigation has been opened, what the basis of the investigation is, what the allegations are, in some sense what the evidence against them is—all of which allows parties to better defend themselves and also enables the agencies to get evidence and information that will enable them to make smarter decisions.

Let me talk a little about a number of the by multi-national organizations to promote transparency. One is the OECD, the Organisation of Economic Co-operation and Development. In June of 2018, championed by the U.S., the OECD issued a scoping note.² The OECD committee that looks at competition law issued a *Scoping Note on Transparency and Procedural Fairness as a Long-Term Theme for 2019-2020*.³ The U.S. has been urging the OECD to focus on transparency as a long-term theme. Part of the rationale for this scoping document and for the work that the OECD will be doing is the belief that transparent and fair process helps to ensure the impartial and reasonable treatment of subjects and at the same time, helps to improve the quality, accuracy, and comprehensiveness of analysis, and decisions. So that's one effort at the OECD.

The International Competition Network, or ICN, is an organization of almost all of the national competition authorities around the world. It's an informal organization of these countries to exchange best practices and talk.

² Org. for Econ. Co-operation and Dev. [OECD], *Scoping Note on Transparency and Procedural Fairness as a Long-Term Theme for 2019-2020*, at 2 (Apr. 23, 2018), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2018\)6&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2018)6&docLanguage=En).

³ *Id.* at 1.

And there is a document called *The Competition Agency Transparency Practices* document, which is part of the Agency Effectiveness project.⁴ That document, too, is about urging all competition authorities to adopt not just transparency, but a whole host of processes that are aimed at preserving due process, including transparency.⁵

The ABA Section of Antitrust Law, which I currently chair, has done two things in this area. One is an International Task Force that has adopted best practices for antitrust procedures that include a number of things, including transparency. The second, and probably more important effort, is our International Procedural Transparency Task Force.⁶ This task force was established to study and report on transparency in enforcement around the world. This task force has been talking to stakeholders around the world, talking to the business community and others in the antitrust community, to understand the extent to which competition agencies have actually implemented the International Task Force's recommended best practices. Where agencies have not adopted or complied with best practices, they are kind of "named and shamed."⁷

Another thing that I've been involved in, along with Doug Melamed, is the International Competition Policy Expert Group, which came about when the U.S. Chamber of Commerce invited a bipartisan group of competition and trade law experts to make recommendations to the then-incoming president and Congress about how to align trade and competition law.⁸ One of the things we recommended was to take action to promote transparency.⁹ The real issue for that group was that we have lots of guidelines and suggestions about transparency and other elements of due process, but we really don't have any enforcement mechanism. So we focused on what the administration could do to actually achieve compliance. Some of our recommendations were to try to expand the World Trade Organization's regular assessment of members by the Trade Policy Review Group to expressly include an analysis of how well members are doing in terms of due process, including transparency.¹⁰

Another thing that we recommended was that the OECD be

⁴ Int'l Competition Network [ICN], *Competition Agency Transparency Practices*, at 4, (Apr. 2013), <https://centrodec.files.wordpress.com/2015/07/report-on-competition-agency-transparency-practices2013.pdf>.

⁵ *Id.*

⁶ *Assessment of Global Competition Agency Implementation of ABA Best Practices for Antitrust Procedure*, ABA SEC. ANTITRUST L., 1 (Apr. 29, 2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/sal-procedural-transparency-2019-04-29.pdf.

⁷ *See generally id.*

⁸ *International Competition Policy Expert Group: Report and Recommendations*, U.S. CHAMBER OF COM., 6-7 (Mar. 2017), https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

⁹ *Id.* at 10.

¹⁰ *Id.* at 2.

encouraged to do specific peer reviews of participating countries, specifically focusing on their processes and whether they provide transparency.¹¹

A third recommendation was to encourage the OECD to adopt a code that would enumerate transparent and impartial procedures.¹²

Finally, I want to talk about what the current Administration is doing. Makan Delrahim, as the Assistant Attorney General for Antitrust at the Department of Justice, has formed something called the MFP, which is the Multi-Lateral Framework on Procedures in Competition Law Investigations and Enforcement.¹³ His objective was to try to ensure *meaningful* compliance with standards beyond the suggestions, guidelines, and recommendations.¹⁴ The theory that they were working on is that you can obtain compliance in one of three ways: by threats of retaliation, by promises of reciprocity, and by potential harm to reputation. The MFP is really focused on reputation.

And, *finally*, finally, some of the competition chapters in recent Free Trade Agreements have included, and are increasingly including, references to due process, including transparency. NAFTA 2.0 and the Korean Free Trade Agreement both include chapters that have pretty good provisions on transparency.¹⁵

ERIC GRANNON: Thank you. Okay. Yeah, I'm going to stand and hope that this light won't be directly in my eye. I actually feel like I'm going to confess to an antitrust crime or something up here.

[Laughter]

Hopefully, that won't happen. So good afternoon. I'm Eric Grannon. I'm going to focus on some transparency issues in the DOJ Antitrust Division's Criminal Enforcement Program. And my first suggestion is quick and mostly symbolic, but I think nonetheless important. The Division should put the briefs for both sides of its litigated cases, in criminal matters and civil matters, up on the Division's website. The Division is not just another litigant; it's the government, and with that special role comes a special responsibility of keeping the public fully informed about the Division's cases and putting up only the Division's briefs for the public to see does not live up

¹¹ *Id.*

¹² *Id.*

¹³ Press Release, Assistant Att'y Gen. Makan Delrahim, Assistant Attorney General Makan Delrahim Delivers Remarks on Global Antitrust Enforcement at the Council on Foreign Relations (June 1, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement>.

¹⁴ *Id.*

¹⁵ See generally OFFICE OF THE U.S. TRADE REP., AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>; OFFICE OF THE U. S. TRADE REP., FREE TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA, ch. 21 (Mar. 15, 2012), https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file503_12720.pdf.

to that responsibility.

Second, the Division needs to rethink what I call the batting average mentality for criminal antitrust enforcement that's applied for about the last twenty years. Each year, the Division reports on its criminal enforcement activity, and it seems like the Division is only happy if it can report ever-increasing totals of fines and annual jail time obtained. Now, I think that may have made sense for the first ten or fifteen years of the amnesty program. But we're now in the twenty-fifth anniversary of the amnesty program. We've succeeded, not just in exporting antitrust and competition law all over the world, but almost every major jurisdiction follows our amnesty and leniency paradigm, even if the penalties are only civil or administrative rather than criminal.

So, in reality, the whole world has drunk our Kool-Aid when it comes to competition enforcement. And to boot, all of these enforcers around the world are now cooperating together in enforcement, which is something that Deb alluded to. The enforcement network has never been stronger. As a result, companies operating in European, Asian, and developing parts of the world are internalizing the same cultures of competition compliance that have been strong in the United States for close to a hundred years.¹⁶

Now, if we've done all of that, folks, and we don't start to see a decline in cartel activity, then something is very wrong. Now, the Division is always going to report on fines and jail time, which is appropriate for a public agency. But what I'm suggesting is that the headlines, if you will, of Division reports, the focal points of Division speeches might benefit from some new metrics. So, for example, the Division has fifty or sixty PhD economists. They could start headlining the millions, if not billions of dollars consumers are saved as a result of Division prosecutions. The Division could use its international DAAG as an ambassador to top-tier companies throughout Asia, for example, and report on how many of those companies have adopted what we would consider to be "gold star" antitrust training and compliance programs. Now, these are just a couple of examples and I'm sure there are other meaningful metrics for success beyond fines and jail time.

Third, the Division should reassess Amnesty Plus and in particular, its implications for follow-on class actions in the United States. So I'm going to give a little background for this. Amnesty Plus applies in this scenario: my company has been fingered by an amnesty applicant in, let's say, the widget industry, for example. And I agree that my company will plead guilty, pay a substantial fine, and agree that some number of my executives will be carved out of the company's plea agreement and prosecuted for having price-fixed

¹⁶ See, e.g., EUROPEAN COMM'N, COMPLIANCE MATTERS: WHAT COMPANIES CAN DO BETTER TO RESPECT EU COMPETITION RULES (2012), <https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-c03c-4c36-bbbe-aa08c2514d7a/language-en>.

widgets. I, then, get to say, “Oh, Mr. or Ms. Division Prosecutor, while you’re prosecuting me for widgets, I want to tell you about another cartel I’m involved in in the sprockets industry,” for example. Now, if I convince you, I, then, become the Amnesty Plus applicant on sprockets, which means I get a complete pass from prosecution for my company and our executives on sprockets. But additionally, I get a substantial discount on my corporate fine for the original widget conspiracy.

Now, you can imagine the incentives that creates for companies to come up with conduct that will effectively injure other industry participants. And the Division has reported in recent years that more than half of its prosecutions are coming from Amnesty Plus applications—more than half. Now, my concern on this is not at all hypothetical. I’ve worked defending a company that was a target of an Amnesty Plus investigation. After granting Amnesty Plus, however, the Division never indicted anyone and obtained no guilty pleas. That means the Amnesty Plus had been improvidently granted in the first instance because it’s only supposed to apply to hard-core cartel conduct.

Now, you might ask, “So what? Your client never got prosecuted. It had the hassle of a criminal investigation, but no harm, no foul, right?” Wrong. The rub is that as soon as the grand jury investigation starts for the Amnesty Plus industry, like night follows day, here come the treble-damage class action cases. And because of the *in terrorem* threat of treble-damage jury trials, and not to mention the expensive, drawn-out nature of antitrust litigation and discovery in particular, many companies end up settling non-meritorious claims.¹⁷ And I can say specifically that in that investigation and the follow-on class actions I’m referring to, several companies paid settlements in the tens of millions of dollars as a result of the Division’s grant of Amnesty Plus but where no company or individual was ever prosecuted.

The Division should announce a public workshop on Amnesty Plus—including its civil litigation implications—schedule the workshop for some time in 2019 and use the intervening months to solicit speakers and papers from prominent practitioners, economists, and academics. And most importantly, go into that kind of public workshop with an open mind rather than seeking justification for current practices.

Fourth, it’s time for an honest determination of what antitrust defenses constitute crimes involving moral turpitude. The Division’s prosecutions of individuals are overwhelmingly of non-U.S. nationals, almost all of whom have pleaded guilty rather than been convicted at trial. Now, one reason for all the guilty pleas is that the Division leverages a 1996 MOU with a former INS—now ICE—that considers antitrust defenses “to be crimes

¹⁷ See Beverly Bird, *When Are Treble Damages Awarded*, ZACKS, <https://finance.zacks.com/treble-damages-awarded-8821.html> (last visited Feb. 15, 2020).

involving moral turpitude.”¹⁸ Now, the consequence of that MOU, which has no valid legal authority whatsoever, is that any foreign national convicted under the Sherman Act can thereafter be excluded from the United States for up to 20 years.¹⁹ Now, that’s a career killer for a lot of non-U.S. business people. But the Division generously says, “If you plead guilty, rather than go to trial, we will waive the application of our MOU that we made up, then you can serve your two or three years in one of our comfy, minimum security prisons and travel freely through the United States once you’re done serving your time.”

Now, I’ve researched on this, folks; I’ve published on this issue. My article is in your CLE materials, and there is no precedent whatsoever for antitrust defenses to be considered crimes involving moral turpitude, which is a category of depraved crimes, most of which existed in common law. The Division should publicly commission an independent, legal opinion from the Office of Legal Policy on whether antitrust defenses constitute crimes involving moral turpitude and let the chips fall where they may based on OLP’s opinion.

My final point is that career-Division prosecutors should not be the only candidates for the criminal-DAAG position in the front office. The AAG in charge of the Antitrust Division is a presidential appointee and all of the other DAAGs, historically, have turned over with each new administration. We have ninety-three U.S. Attorneys across the country who dole out much larger sentences than available under the Sherman Act, and those U.S. Attorneys all turn over with each administration and the Republic is still standing. The Division’s criminal DAAG should also be a political appointee. This is not a job application on my part, by the way, but it should be someone who can bring the perspective of both criminal and civil antitrust defense from the private sector and someone who won’t be beholden to the views and practices of the career staff. I think that perspective might help mitigate some of this overreaching and lack of transparency that, at least, I’ve addressed.

So with that, I think I’ll hit pause and look forward to any questions or comments you all have.

HON. FRANK EASTERBROOK: Thank you. The premise of this panel is that antitrust enforcement needs change. If not something substantive, then more transparency. I’m here as the stick in the mud. I agree with Edmund Burke: “Don’t talk to me of reform. Things are bad enough as they are.” [Laughter]

Antitrust law does not need new enforcement or new objectives. It

¹⁸ Eric Grannon & Nicolle Kowancki, *Are Antitrust Violations Crimes Involving Moral Turpitude?*, ANTITRUST WRITING AWARDS (Apr. 2012), <http://awa2013.concurrences.com/business-articles-awards/article/are-antitrust-violations-crimes>.

¹⁹ See Sherman Antitrust Act, 15 U.S.C. §§ 1–38 (2012); Grannon & Kowancki, *supra* note 18.

should not be invoked to improve the environment or promote racial justice or help small businesses. It needs accurate enforcement to better the lot of consumers, which is its goal. Other statutes have different goals. Trying to load multiple goals into one law produces a muddle, and you're bound to get less of the main objective—competition that drives prices toward marginal cost.

More litigation doesn't promote better enforcement. Antitrust helps consumers when used properly, but it's also an attractive nuisance. Litigation provides a means for firms to raise their rival's costs. Even the threat of litigation is costly. It also helps politicians strike at out-of-state or otherwise unpopular producers. Used that way, antitrust can become a tool to stifle competition and harm consumers.

Chicago's prescription, also the prescription of this man—this is my Adam Smith tie—is to bust cartels and prevent mergers to monopoly, open up markets—domestic and international—reduce regulation, let competition do its job. If we had data showing that consumers lose from other things, and if we can be confident that judges could reliably find those other things, then by all means expand the portfolio of antitrust. But there are no such data and there's no reason to believe that judges, whose principal portfolio in life is managing cocaine prosecutions, are very good at economic managers.

We've been asked to talk about transparency, which sounds like a goal of window design rather than a legal regimen. True, it's become a catch phrase. Everyone is for it. But what is it? Transparency is very trendy in Europe, which leads me to worry that it's a code word for a European fair competition model. In other words, be kind to one's rivals. That doesn't help consumers. The goal of competition is to hurt rivals. As Joseph Schumpeter put it, to be a "gale of creative destruction."²⁰ Anything providing comfort to producers will harm consumers by keeping the inefficient in business.

Perhaps transparency is something producers offer each other—complete statements of their prices and sales or how they make their products. We've seen that before. The usual understanding in antitrust circles is that transparency at the industry level is a cartel-promoting device. If everyone can see what everyone else is charging, and to whom everyone else is selling and how much, it becomes easier to coordinate prices and output. Secrecy, by contrast, is the enemy of cartels because it becomes possible to cheat on the cartel price without being caught. So we ought to oppose transparency for producers.

Perhaps, though, transparency means openness at the enforcement level when deciding what cases to bring. I'm skeptical of that understanding

²⁰ Richard Alm & W. Michael Cox, *Creative Destruction*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/CreativeDestruction.html> (last visited Feb. 15, 2020).

too. Prosecutors need a deliberative process privilege and the ability to offer confidentiality to informants and potential witnesses. Ordinary criminal prosecutors don't announce what cases they are considering and how they decide among them. To the contrary, both state and federal systems have powerful rules of grand jury secrecy that not only protect the interests of persons who are considered but ultimately not charged, but also improve the ability of prosecutors to make decisions free from political influence.

The guidelines issued by the FTC and the Department of Justice afford some general notice. But they're explicit that they don't bind either the enforcers or the courts. Otherwise, they would offer opportunities for business planning. In tax law, those opportunities are generally referred to as loopholes. But loopholes go with any detailed system of regulation. They inhere in systems of detailed rules. And I don't think they should spread to antitrust in the name of transparency.

More than that, transparency interferes with James Madison's prescription for good government. This guy, Madison, his essay known today as Federalist No. 10 contends that the power of faction—what we today call interest groups—can be diminished by breaking government into smaller segments with different constituencies, and by making creative use of silence.²¹ In modern language, he argued that civic-minded representatives needed agency space to do their work. If they are always being monitored, all they can do is react to the demands of factions, which all of the Framers agreed were baleful.²² Factions in the antitrust world consist of producers, who are always trying to find ways to compete less and charge more. We need to do more to insulate enforcers from them rather than make enforcers more readily controllable through political pressure. And it's transparency that gives producers the time to bring political pressure to bear on enforcers.

This is a long-standing problem in American law. The Administrative Procedure Act of 1946 requires agencies to publish detailed proposals, then wait for comments.²³ That exposes the whole administrative process to the power of faction. The Administrative Procedure Act was sold in the name of transparency. You could see what your government is doing, but the result has been to magnify the power of interest groups. In 1946, people thought that rules could be adopted under the APA's procedure in a month. Now they take years, sometimes decades, because interest groups tie up the process in knots while bending it to their own ends.

A vital feature of independent agencies, such as the FTC, is not the tenure of its members, but their isolation from the rest of the Executive Branch. A president can resist claims by interest groups in the way Madison

²¹ THE FEDERALIST NO. 10, at 72, 76 (James Madison) (Clinton Rossiter ed., 1961).

²² *Id.* at 76.

²³ See 5 U.S.C. § 553 (b)–(c) (2012).

envisaged, by adding other items to the agenda. But agencies, devoted to single purposes like antitrust, lack threats. They can't promise to veto "Bill X" on response if some committee in Congress or interest group takes "Step Y." The absence of log rolling means that factions in committees in Congress have extra influence. More to the point, that power has been transferred from the president, with a national constituency, to commissioners and committee chairmen who have different constituency and are less responsive to the public as a whole.

Even the Antitrust Division has a limited agenda, which makes it hard to control the thread of factions and their legislative supporters. More transparency makes this problem of control even harder. The Administrative Procedure Act, the Freedom of Information Act, the Government in the Sunshine Act, and extensive provisions for judicial review all ensure that interest groups have many points of access and influence.²⁴ They monitor intensively. Insulation from their influence has become an objection to the behavior of public officials, and that's what we hear in the name of more transparency. Failing to wait for group monitoring and input is seen as a bad thing, rather than, as Madison argued, a good thing. From a public choice perspective, it can be no surprise that those members of Congress with the most seniority vigorously resist presidential efforts to coordinate public policy.

So I urge you to resist the call of transparency, no matter how much extra sunshine seems beneficial. Always remember that sunlight is full of ultraviolet radiation. And our goal is not to have more in the abstract, but to have the right amount and always carry a bottle of sunscreen. Thank you very much.

Now, before I sit down, I should say that I've talked to Professor Melamed. We're sorry he isn't here, but he told me to say that his whole talk would be "what it was that Judge Easterbrook just said, that's exactly right." [Laughter] Thank you very much.

DEBORAH GARZA: Do I get to respond?

HON. JOHN B. NALBANDIAN: Yeah, it looks like we aren't going to have Professor Melamed, so why don't we go ahead with panelists who want to comment.

DEBORAH GARZA: I don't disagree with everything that Judge Easterbrook said, but I want your telephone number so I can call you the first time that I sit across from someone at the Chinese Competition Authority who wants to explain to me why they think it's appropriate to operate behind a veil of secrecy because Judge Easterbrook urged me to resist the call for

²⁴ See, e.g., *id.*; Freedom of Information Act, 5 U.S.C. § 552 (2012); Government in the Sunshine Act, 5 U.S.C. § 552b (2012).

transparency.

As a practical matter, it may not resonate as much with us in the U.S. because we understand that our antitrust enforcers, ultimately, have to go to a court of law to stop a transaction, to punish a cartel, or to punish other anti-competitive activity. But we live in a world where while almost everybody has a competition regime, everybody does not have the kind of systems that we have. Not everybody has process guarantees. In some cases, the prosecutor is also the court. And in other cases, there isn't a well-established rule of law.

We have seen situations in China, for example, where companies do not know what rules are being applied to them, do not know what evidence is being provided to the enforcers, do not know what is deciding the future of their transaction or their ability to keep doing business, or to prevent their intellectual property from being expropriated. And that's a problem. That's a problem if we want to live in a world with free trade. It's an issue for a lot of companies engaged in mergers and acquisitions. I think it's a good thing to have a free flow of capital across borders, but that is stymied by a lack of regulatory transparency.

Companies can't make decisions about transactions and the risks, etc. if they don't know what the rules are, if there's no transparency into how the various competition authorities around the world are going to look at their transaction, how they define relevant markets, what standards apply, what the rules are in terms of divestitures and fixes, what the timelines are, etc.

There's a lot of good to transparency. Markets function most efficiently when people are aware of what the rules of the road are and when they can be assured that the rule of law will be applied to them. And, Eric mentioned the criminal context. Transparency is important there, too. There won't be complete transparency, obviously; there will be confidential sources, for example. But the subject of a criminal investigation needs due process.

Companies that are being criminally prosecuted have the right to know, "For what?" Basically, "For what? What are you looking at? What are the relevant products? What's your key evidence?" Otherwise you can't defend yourself; if we don't have that kind of fundamental basic transparency, you cannot be sure that you're getting impartial treatment. You cannot be sure that there's no corruption. You cannot be sure that there's no political influence. You cannot be sure that you'll be able to defend yourself. And there's no accountability at all for the enforcers.

I've been on the other side, as an enforcer, and I believe in the integrity of our enforcers. But I also know that it is a lot easier to do your job if you never have to explain it; if you never have guidelines and don't have to explain that you're following them; if you never have to prove your case. It's

a lot easier, certainly. But transparency is essential to protecting individual rights. It's essential to allowing for the free flow of capital. It's essential for a rule of law. I think we need to ensure that the rest of the world provides transparency, and we need to keep doing that here in the U.S.

HON. JOHN B. NALBANDIAN: Deb, can I ask you a question? Just a little bit more concrete. Are you suggesting that there needs to be more formal statements in the context of, let's say in civil context, in the context of individual mergers where the government is explaining why or why not they approved it? Or are you talking, also, about—are you looking for more or broader guidelines, policy statements, in more and more, I guess, formalized, broad-based statements? Or are you looking at kind of more granular things?

DEBORAH GARZA: Most of my efforts have actually been focused outside the U.S. Inside the U.S., the issue for people has been guidelines and, frankly, guidelines that are relevant. For example, today we have vertical merger guidelines that were adopted in 1984 that are no longer really instructive.²⁵ But we have significant enforcement matters based on vertical theories like the AT&T-Time Warner transaction.

The AT&T-Time Warner case is probably a very good example of how current vertical merger guidelines would have been a help because I do think that the Antitrust Division had a legitimate basis to challenge that transaction. It was the same basis as a challenge to Comcast-NBCU in the last Administration, the only difference being a difference of view on the efficacy of consent decrees.

But there was a lot of finger-pointing in AT&T-Time Warner. People claiming that the reason the Antitrust Division brought that case had nothing to do with legitimate antitrust trust concerns but were more driven by the views of the President and his supposed animosity towards CNN.²⁶ Had the Division had in place updated vertical merger guidelines, they could have pointed to those and resisted that kind of finger-pointing. It would have been clear that the Justice Department's evidence and theories were consistent with its enforcement guidelines. So, that's an example where the guidance would have been helpful to maintaining confidence in the enforcement.

I will say there are different opinions and there has been a discussion in the U.S. about the degree to which an enforcement agency should explain enforcement matters. In the U.S., if you challenge a transaction, you have to go to court and prove your allegations. A court reviews your theories and your evidence. Or, the government settles the case with the parties, in which case it, again, provides an explanation, under the Tunney Act of, its theories,

²⁵ See generally U.S. DEP'T OF JUST., NON-HORIZONTAL MERGER GUIDELINES (1984), <https://www.justice.gov/atr/page/file/1175141/download>.

²⁶ Harry Litman, *Trump's Impeachable Antitrust Power Grab*, WASH. POST (Mar. 6, 2019), <https://www.washingtonpost.com/opinions/2019/03/06/trumps-impeachable-antitrust-power-grab/>.

some of what the evidence was, and why the remedy is sufficient.²⁷ If the government doesn't challenge a transaction, most of the time there isn't an explanation in the U.S. In some cases, there has been. Both the Antitrust Division and the FTC have done that where there was a potential public expectation that a transaction would be challenged, and it wasn't. There have been short statements explaining the decision not to challenge. An example is the Antitrust Division's decision not to challenge SiriusXM.²⁸ The Antitrust Division issued a statement so people would understand the decision not to challenge.²⁹ Again, the reason we did that was to try to maintain confidence in our system.³⁰

In Europe, although I generally don't agree that Europe is better on transparency than we are in the U.S., the enforcer issues statement with respect to every transition it looks at, including if there is no challenge. So, there is somewhat more transparency there. I do think that there are downsides to issuing statements in every matter, even when you don't challenge a transaction, because it tends to set a precedent and bind you in the future. On balance, I think there are reasons why we wouldn't necessarily want to adopt the European style here.

HON. JOHN B. NALBANDIAN: There has been some suggestion that if a merger is not challenged—and let's say there's a certain threshold the company is a billion dollars in market cap or has 1,000 or more employees, and it's not challenged—that the FTC or DOJ should explain why they didn't, and in fact, solicit public comment on that merger. Is that something that—

DEBORAH GARZA: I don't think that that's a great idea. Others have also suggested that no challenge decisions should be issued whenever the agency has engaged in a "second request" examination, which is usually a six to nine-month investigation. There's some basis for that suggestion, but I don't think you want to open the decision up to public comment. I will say that while the Antitrust Division and the Federal Trade Commission don't ask for public comments on transactions, they do reach out to suppliers, to consumers, to business partners. So, there is some collection of evidence from stakeholders. But not a general request for comment. I don't think that would be very fruitful.

HON. JOHN B. NALBANDIAN: Do you—Professor Melamed, would you like to give you remarks?

DOUGLAS MELAMED: I'll say just a couple of things. First, I

²⁷ See 15 U.S.C. § 16 (2012).

²⁸ Press Release, Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holding Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), https://www.justice.gov/archive/opa/pr/2008/March/08_at_226.html.

²⁹ See generally *id.*

³⁰ See *id.*

apologize for being late. I actually had this on my calendar for tomorrow until I got a text a few minutes ago. I have an excuse, but I won't bore you with all that.

I do want to say that—I hope this isn't completely out of context here—the topic initially, at least, was framed in terms of the role of transparency as an antidote to some of the unrest about competition law, the populist movement and all of that. And my reaction was basically that I think that misdiagnoses is the problem. The problem from the critics' perspective is not that they don't understand antitrust law—although I think they often don't—but that they perceive outcomes that are worrisome to them—increased industrial concentration or economic power, wealth distribution, whatever. I don't think greater transparency about how antitrust works is going to answer their concerns about those problems. So I think what's needed is a substantive engagement on the question of whether they are real problems and, if so, whether intervention by the government is called for. Antitrust guidelines and closing statements and all that seems to me to be largely beside the point. That was just the basic point I wanted to start with.

HON. JOHN B. NALBANDIAN: Let me ask you this, Professor Melamed, because I know you've written about the—responding to the criticisms of the existing consumer welfare paradigm, and the idea that actually the consumer welfare paradigm might be a little bit more flexible than we give it credit for, right? That it does deal with more than pricing. Why isn't it that greater transparency wouldn't be a part of working within that paradigm to kind of address whatever these perceived issues are? Or are you just completely rejecting that there are any problems right now?

DOUGLAS MELAMED: When I say transparency is not the solution, I'm not saying we should not engage in conversation with the critics and attempt to disabuse them of some of their concerns. I think to those who articulate the concerns in the form of an argument that we should abandon the consumer welfare standard in antitrust and move onto some more populist, new-Brandeis, multifaceted set of criteria—I think as to them, yes, we should respond as I have done in a couple of papers explaining, among other things, that many of the criticisms of the consumer welfare standard that it focuses on price, ignores innovation, and so forth are simply wrong and reflect a misunderstanding of the consumer welfare standard and antitrust law.

But, ultimately, I don't think that's going to end the debate because it will just cause the debate to be focused on what really motivates the critics, which is the larger, political economy question of whether we have issues of concentration of economic power and wealth in this country that ought to be addressed by some form of government policy.

HON. JOHN B. NALBANDIAN: Judge Easterbrook, I don't know whether you had a response to what was said before Professor Melamed came

in. I'm imagining that—well, let me ask you. What's wrong with more guidelines, or policy statements, or fair notice to criminal defendants?

HON. FRANK EASTERBROOK: As I said in my opening remarks, part of the problem is that transparency has become a word that doesn't have that much content. It is being used for all good things. The proposition that the law should be knowable, judicial opinion should be accessible was a proposition that was embraced when this country was created in the 1780s. It was thought to be absolutely essential. This was long before anybody invented the word "transparency." So, if the problem with foreign antitrust enforcement is that nobody knows that producers and consumers don't know what they are supposed to be doing, even approximately, that's a serious problem. But dealing with it is not; the word transparency doesn't describe how you deal with it.

After the Sherman Antitrust Act was passed in 1890, I think it's fair to say that very few people knew what it was or what it did. Judge Taft on the Sixth Circuit writes the first great opinion in *Addyston Pipe & Steel* and begins to give content to it.³¹ That content is expanded through the decades, and we now have a very good idea what antitrust did. That was all achieved without resort to transparency. The concern I was expressing, particularly about Madison's concern, is making the process of antitrust enforcement more open to the influence of interest groups. That, it seemed to me, was one that will do harm to consumers. And that's not something that Deb Garza dealt with in response to my comments.

So, in addition to worrying about the access of interest groups to enforcement policy, I'm also worried just about loading too many things into one word because then it's very hard to have a conversation about whether that word is good or bad.

HON. JOHN B. NALBANDIAN: Eric, did you have a comment?

ERIC GRANNON: Yeah, just briefly. I guess in thinking about this idea about transparency being potentially bad. You know, there's a whole side to this also, which is antitrust lawyers play a very important role in counseling clients on how to conduct their businesses. And if in your role as a counselor, you don't have good visibility into how decisions will be made and what type of analysis will be followed by the enforcers, then your role as a counselor is really handicapped quite poorly. I think, respectfully, a lot of Judge Easterbrook's comments assume the safety valve that we have in the United States, and that makes sense of a hundred years of common law development of antitrust principles as well as the sort of safety value of federal courts for relief.

³¹ See generally *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

So I'll just give an example. My firm just recently won a price-fixing jury trial against the Antitrust Division in the Southern District of New York in the area of alleged foreign-exchange manipulation. The Division gave our team access to some pretty important file materials, including interview notes, the Friday before the trial was to begin on Monday. So I guess I would challenge Judge Easterbrook or anybody who says that that is a good thing. I don't think James Madison would agree with that.

But, nonetheless, we have the backstop of federal courts, and we won that case. Had we been in a different jurisdiction, had we been in Europe or had we been in China, the prosecutor is also, then, acting as the fact finder. And I think those types of failure of transparency can have all kinds of even greater concerns. So I guess that would be my one brief response to that.

HON. JOHN B. NALBANDIAN: Let me ask you, and we'll open it up to audience questions here in a second. But let me ask you, Eric, you had a lot of suggestions for and some points about what maybe we're doing wrong in the area of criminal enforcement. I'm curious whether you have some thoughts on what we're doing right, and if there are things that are maybe a model for the rest of the world or whether we're at least on the right track on some things. Can you talk about that maybe?

ERIC GRANNON: Yeah, I guess I can address that briefly and say that we certainly deserve credit, as I said, for exporting antitrust around the world, for exporting the efficacy of the amnesty model, which is the greatest deterrent to cartel activity is to provide incentives to companies to report themselves. I am also a very firm believer that criminal penalties, meaning jail time for individuals, is the greatest, single deterrent to anti-competitive conduct.

So for example, in Europe they have really, really, really big fines. But that's not the same thing as an individual having to face the prospect of up to ten years in prison. So I'm a believer in our criminal enforcement system. I guess where my comments were going were more along the lines of "having worked there, I saw this." That was fifteen years ago, but I don't think the Division needs to be apologetic at all or have an apologetic attitude about the number of total months in jail they obtain against defendants going down. Or fines going down. I think that is a consequence of our success. So that's what more of my comments were about.

There's plenty of things that I think we do right. There are other things that need to be worked out along the way, like for several years, I mentioned these carve outs. Well, what would happen is the Division would publish the names of the carved-out individuals. So here's a corporate plea agreement, again, for widgets, and ACME Company pleads guilty to widgets. And then here are six or seven executives that are then carved out for prosecution. Those names are out there for everyone to see. Those

individuals' reputations are severely impacted by that. And in many, *many* innumerable investigations, those individuals were never prosecuted. No indictment, no plea agreement. But their names were nonetheless published.

Now, it took about, I don't know, seven or eight years before that finally trickled up to the front office to stop doing that, and now they don't do that any longer. That's a positive step. But many people had their careers, and their families, their personal lives severely impacted by this practice. And those of us in the antitrust defense bar raised that issue, and, again, we got the correct outcome, but it shouldn't have taken as long as it did. And many people suffered under that policy. So that's the kind of thing I think we need to be more responsive to.

And I can tell you, I say this with all due respect, but the comments I made about the Amnesty Plus regime and how that works, that's anathema to so many people at the Antitrust Division. "How dare you question this model that we have that garners more than fifty percent of our prosecutions?" Well, because there's problems with it, and when you give Amnesty Plus in an industry and you never prosecute, you never indict anyone, and you never get a plea agreement, that means you did something wrong. So that's where my comments were going about why, much like the other U.S. Attorneys all over the country, I think we should have a politically appointed criminal DAAG who could be a little more distant and maybe not so captured by some of the views of the career staff that, hey, we've been doing it this way for the past ten years. It's got to be right.

HON. JOHN B. NALBANDIAN: Comments?

HON. FRANK EASTERBROOK: We can go to the floor.

HON. JOHN B. NALBANDIAN: Why don't we open it up to questions? Do we have a microphone? Okay, there we go.

HON. FRANK EASTERBROOK: [Aside] Uh, oh.

QUESTIONER 1: This question is addressed to Judge Easterbrook. You had mentioned earlier about transparency making antitrust conspiracies more amenable. And I just was wondering if you could address the contrast, for instance, of the airline industry where there are very few major players, but the price of that is immediately available, courtesy of the internet, compared to, say, the consumer healthcare market where prices are inscrutable, but there are literally hundreds of thousands of players, and what your thoughts might be as to transparency in those instances, and how that affects competitive conduct among the players.

HON. FRANK EASTERBROOK: I can't talk about particular industries in the abstract. I know that there are data suggesting that the airline industry, precisely because of both the publication of its prices and because

of the way in which a Hub and Spoke System gives economic power at the places where the hubs are, has been thought to be more likely to be able to raise its prices. And you see dramatic changes in price in that industry when a new low-cost competitor comes in. Sometimes it's very difficult to do anything about public prices and about the role as a cartel-inducing device. An airline industry is probably one of those where you couldn't make the prices secret without making it very difficult for people to buy the product. But there are lots of industries where secrecy is both achievable and beneficial. And that's part of the point that I was trying to get across.

QUESTIONER 2: Thank you. Well, the first panel that I went to this morning was very concerned about the role of the administrative state based on the fact that it was not democratically grounded. And also, the fact that there is an inherent bias perceived, both observed and theoretical in the way government officials make decisions, and this was mildly offset by notice-and-comment exposure to the public for rulemaking. Now, it sounds as if Judge Easterbrook is, in fact, expressing confidence in the ability of government officials in the administrative state to make good decisions *if* they are given space and removed from exposure to the public, which comes in the form of interest groups.

And it seems to me that these two ideas are in conflict with each other. I may not have understood what you said, Judge Easterbrook, but I also have to take this in the context of public-choice area, which I think indicates that the government official that is making the decision, whatever agency, they are their own interest group. And they will have a certain predilection to decide, which will, in fact, govern that decision-making authority even more if they are somehow removed from the interest-group politics.

So, as you suggested, not looking at the question of transparency, but I'm intrigued by your comment about trying to remove these officials from factions. I'm not sure that's the way James Madison thought it would play out, that he thought that two factions were responsible for balancing each other in the debate.

HON. FRANK EASTERBROOK: This is probably not the place to have a full explication of Madison's theory of government. But it was important to his theory that public officials be protected, in part, from faction in a variety of ways.³² One was indirect representation instead of having direct democracy.³³ We have an indirect representative system. Madison and his colleagues arranged for different centers of power with different electoral bases and different times in office. And the idea was that power would be set up against power. You don't rely on everybody being an angel. But you rely

³² See generally *Madison's Theory of the Republic*, ONLINE LIBR. OF LIBERTY, <https://oll.libertyfund.org/pages/madison-s-theory-of-the-republic> (last visited Feb. 15, 2020).

³³ *Id.*

on some insulation from factions and some opposing centers of power within the government.

The concern about transparency that I was expressing was that transparency in enforcement is often understood as a program of exposing the decision directly to factions in the way that the Administrative Procedure Act exposes regulation directly to factions as if this whole Madisonian process were to be bypassed. I think the Madisonian process is, by and large, a good one, which should be implemented rather than our trying to find a way to bypass it.

DOUGLAS MELAMED: Let me add a thought or two. It's a bit ironic in a way to hear the notion that we have to worry about the administrative state because it's not democratic enough in the context of an antitrust discussion when some of the leading challengers to the consumer welfare standard and the legacy of Judge Bork argue that that legacy has led to an antitrust law that is not democratic because it's in the hands of technocrats.³⁴ I'm a big believer in technocrats and I guess a republican form of government, rather than a democratic one, because there are useful roles for people with superior expertise.

I want to share one more thought about antitrust in this larger conversation. The antitrust agencies, even the FTC, although there's some roughness about the edge, are not regulators. They're not part of the administrative state. They're part of a law enforcement apparatus, and ultimately, they can't do anything unless the parties expect that they will get or they do get the blessing of an independent, Article III court. That's an enormously valuable check, both on the public-choice problems and on the broader administrative state/non-democratic problem.

HON. FRANK EASTERBROOK: If I could say a bit in opposition to that. The Federal Trade Commission Act gives the Commission the power to define unfair methods of competition.³⁵ That's actually a regulatory power. It's often used in connection with the consumer protection side. But it can be and has been used in connection with the antitrust side. And when the FTC exercises its regulatory power, a court is going to say something like, "Well, they're a political agency. They've made their decision. Unless they've taken leave of their senses, it's going to be enforced."

DOUGLAS MELAMED: I'm sorry. That's all true, in a way, except the last empirical proposition. While the FTC has not passed rules expanding the notion of unfair competition beyond the bounds of the Sherman Act, it has tried to do that by adjudication. And it's lost almost every case

³⁴ Adam J. Di Vincenzo, *Robert Bork, Originalism & Bounded Antitrust*, 79 ANTITRUST L. J. 821, 821 (2014).

³⁵ See 15 U.S.C. § 45 (2012).

because the courts have basically said, “You don’t have a coherent theory for justifying an interpretation of unfair competition that goes beyond antitrust principles.” And the courts have said that, whatever such a broader notion might be, it must include injury to competition within the meaning of the Sherman Act. So that’s what I meant by the roughness around the edges of the FTC. But I think it’s a much less serious problem than Judge Easterbrook’s comments might have suggested.

DAN MCGINNIS: Good afternoon. Dan McGinnis. I have a question going back to the AT&T case. So this year, the Antitrust Division tried and lost the first vertical merger case that’s been litigated in thirty years. There’s now a rumor that the Antitrust Division is thinking about issuing new, vertical merger guidelines. I suspect a lot of people in this room have a healthy skepticism of the federal government, a healthy skepticism of federal regulators interpreting their own rules. Why shouldn’t we have a healthy skepticism, even in this administration, of the Antitrust Division in this context issuing new rules for vertical mergers where we have a court that interpreted the law in the D.C. Circuit who is now hearing that case on appeal?

HON. FRANK EASTERBROOK: I have to bow out. The rules of ethics applicable to judges say I can’t say anything about something that’s in litigation. So everybody else can talk; I can’t.

DEBORAH GARZA: Is it a statement, Dan, or is it a question?

DAN MCGINNIS: It’s a question. Why should we support new vertical merger guidelines at this particular time? Are we better off with speeches, cases, interpretations rather than policy guidelines that, frankly, at least in my view, get over-interpreted by courts as statements of law rather than just simply policy statements?

DEBORAH GARZA: Whether it’s guidelines or some other document that explains how the agency looks at things—a statement, or a speech—it’s all an explanation of what you’re doing. To Judge Easterbrook’s point, we’re talking about transparency as a label, but it covers a lot of different things, including like the ICN and OECD and the policy framework.

But the idea is that you don’t want is a U.S. Justice Department challenging the AT&T-Time Warner merger or any other merger on a whim, capriciously. We don’t want a Justice Department challenging transactions in a situation where we don’t know why, where it can be interpreted as political, rather than a legitimate matter of law enforcement.

And while it’s true that ultimately the Justice Department or the Federal Trade Commission has to go to a court of law to challenge a transaction, most companies do not have the luxury of going to court, or they can’t go to court, because it is hard to sustain a transaction through the time it takes for full investigation under the Hart-Scott-Rodino Act and then a court

trial.³⁶ As a practical matter, most companies are not going to get their day in court on transactions.

Therefore, a company or its counselor would prefer to have guidelines in place in advance, so that they don't necessarily have to wait to get to a court of law a year and a half after the transaction is announced. You can argue to the guidelines and are much better able to deal with getting your transaction cleared, it seems to me, if you know what the procedural rules and substantive rules are.

Imagine that we didn't value transparency. Nobody would know whether the merger was going to get through or, if the merger was challenged, why it was challenged. No one would be able to plan for a transaction. No one would be able to allocate risk. No one would be able to invest freely, understanding what the rules are. In this day and age, in this Administration, people would be claiming that every single thing the Antitrust Division did was politically motivated.

You can't have, in my view, an effective legal regime if nobody has confidence in what people are doing. If nobody has confidence that you've got standards that you're abiding by, whether or not people agree with the standards, if nobody has confidence that you're applying the law impartially, if nobody has confidence that parties know how to target their advocacy, you're not going to have any confidence at all in that legal regime. And that's a problem. It's part of the rule of law and our faith in our institutions.

ERIC GRANNON: I'll just briefly agree with Deb's point that she made earlier, that had guidelines been in place that would've helped the Division deflect the perception that the challenge of the AT&T merger was politically motivated. But I think my agreement stops there because when you put that kind of more maybe prudential concern aside and go to the merits, I share your very healthy and well-founded skepticism that if vertical merger guidelines were written right now they would be written with the overriding goal of giving the Antitrust Division a thumb on the scale in its next challenge and ability to cite those guidelines to a federal judge as to why the Division should be prevailing in the action. So I'm very concerned with the content of those guidelines. The existence of them would, to me, certainly address the concern that you said before.

But the content of those guidelines, I don't have any confidence that it would be written in a way—to be fair to your earlier comment about things that would bind the agency going forward—I want my agency to want to be bound going forward to fair rules of the road. I don't want my agency to think, well, I don't want to write something that's going to tie my hands in the next case if I want to do that. I'd want my prosecutors to put rules out

³⁶ See 15 U.S.C. § 18a (2012).

there that say, "Yeah, these are the rules of the road, and I'm going to follow them, even if it's not something that's going to help me win the next case."

DEBORAH GARZA: Eric, to your point, if it will be difficult now to put out vertical guidelines, because people will be suspicious or cynical about what they're doing, all the more reason for them to have done it before, to replace guidelines issued in 1984 that had become irrelevant. I think that the reason we didn't see guidelines previously is because the agencies didn't want to be bound by them. It's hard for an agency to put out guidelines, to be honest. I've been there before, and we've done a lot of guidelines. And it's always been the political leadership to insist on guidelines; career staff worries guidelines may make it harder to win cases.

Why is that? It is because the political leadership has understood the importance of accountability and the importance of the process that you go through when you look at guidelines because it exposes your precepts. It exposes you to criticism before you send your guidance out. So the guidelines have always been motivated by political leadership; the career staff has never seen guidelines as being particularly helpful to them in bringing cases.

The other thing about vertical guidelines, even if they issued them now, there is a culture internationally of putting guidelines out for comment. So, anything that the Justice Department or the Justice Department and the Federal Trade Commission would put out now would be subject to robust review and criticism, which is also good because that continues the debate and the questioning about the validity of the guidelines themselves.

ERIC GRANNON: My very first antitrust case was the first time that Staples tried to buy Office Depot back in 1997, and back then, merger challenges were not litigated very often.³⁷ And we litigated that challenge, and we lost. What happened during the pendency of the investigation and second request and all that leading up to the DOJ's enforcement challenge in court was they revised the guidelines in 1997 to change the description of the efficiencies defense that we had been pursuing. So they changed the guidelines specifically in response to the dialogue that we were having before the case was brought. And they changed it for their advantage.

DOUGLAS MELAMED: Let me add, if I can, very briefly. I agree with everything Deb Garza said. Her last point about the tension between the political or senior folks who want guidelines and the staff that always says, "Don't tie our hands," is very real and very illuminating. And I think we have to distinguish two very different questions. Do we agree with the guidelines, and do we think that they are the product of an honest, serious, good-faith effort to promulgate standards that can inform and improve government

³⁷ John R. Wilke, *Staples-Office Depot Deal is Blocked by Federal Judge*, WALL ST. J. (July 1, 1997), <https://www.wsj.com/articles/SB867702946293182000>.

policy, attempting as best human beings can to serve the public interest?

In my experience, guidelines, if not uniformly, almost always are the product of such a good-faith effort. Certainly, the horizontal guidelines, with whatever changes Eric had in mind, have been an enormous contribution for all the agency constraining and signal-giving reasons Deb talked about, and also because they have educated a large community about how to think about horizontal mergers. I don't doubt that if the agencies could come up with vertical merger guidelines, which would require some kind of a consensus among the people who are there, across disciplines, the economists, and the lawyers, and across agencies, that they would be a big plus, not only in terms of the institutional considerations Deb was talking about but also in terms of advancing a shared understanding of the sum of the issues that need to be addressed when we think about vertical mergers.

I say that even though I am certain that I would not agree with every part of them. I don't think that's the test of whether guidelines are desirable.

HON. JOHN B. NALBANDIAN: Do we have any more questions? We've got one more in the back.

BOB POPPER: Hi, I'm Bob Popper from Judicial Watch. And it's at least been implied a couple of times in this panel that a belief in transparency is typically held by people who do not share a belief in the classic, consumer welfare model of antitrust. And so I wanted to ask the two practicing lawyers from the big firms whether they would describe themselves as individuals who do not believe, or who have serious criticisms or questions about, the classic, consumer welfare model of antitrust, and whether they believe the EU does?

ERIC GRANNON: [To Deb Garza] Do you want to go first?

DEBORAH GARZA: Well, I testified in the FTC hearings in favor of the consumer welfare standard, although I do agree with Doug Melamed that it's been—that some people sort of caricatured it in order to knock it down. I think it has some flexibility, and I don't agree with the criticism that it's focused solely on price and static competition. But I do believe in the consumer welfare standard, and also that there are limits to antitrust; I don't agree that antitrust is the cure-all for every ill. I agree with Judge Easterbrook on, and his concerns about, the expansion of antitrust. Antitrust law was never meant to cure income disparity or anything else like that. So, yes.

Having just come back from an ICN merger workshop in Tokyo, I know that there is a lot of sentiment for expanding the standard; there's a feeling that the consumer welfare standard is too inhibiting. In parts of Europe there appears to be a desire to use competition law to get at a lot of perceived economic ills, which is a concern to me. And that's also why I think transparency is important, because there are other jurisdictions that

would use the antitrust laws to enforce a paternalistic standard of what privacy should be, or to deal with income inequality, or to deal with a lot of other things that I don't think the antitrust laws are well fit to serve.

And, again, going back to the theme of the panel, the transparency that we've brought about over the last few years has worked because we know that's happening. It's important to have people discussing those things and have them be subject to debate and testing because I'm concerned that if we didn't have that kind of culture, decision-making would be tainted not just by fuzzy thinking but also by bias and by concerns that had nothing to do with antitrust. We will see that creeping in, I think, if we start to allow enforcers to operate in the shadows.

ERIC GRANNON: I agree with all of that. And I just—I don't think we should be apologetic about it at all. I guess I would say that when I hear comments like, "Well, the consumer welfare standard has some flexibility to it," flexibility for what? Because the Sherman Act is not concerned with whether people will lose their jobs. The Sherman Act is not concerned with data privacy or anything like that. The Sherman Act is concerned with whether this certain proposed transaction will make things better or worse for consumers. And that's not just prices. That might be things like choices or the ability to innovate. So it's not singularly focused on price. There's all kinds of elements of consumer welfare—quality, that type—quality of the product.

But if anyone ever suggests to me that it's an appropriate consideration in a merger view to consider whether people are going to lose their jobs or not, I'm going to tell that person that they're absolutely wrong. And luckily in the United States, I think there's enough of a settled, established view in courts that that view would not hold any sway to the question or the extent that argument were made somewhere else, like in Europe. Then I think there is a little more potential for it to have traction because they don't have a hundred years of the traditions that we have. And by the way, I'm completely in favor of transparency.

HON. JOHN B. NALBANDIAN: I think with that we are concluded, and I'd just like to thank our panelists.