



UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Remarks of Commissioner Noah Joshua Phillips¹

Championing Competition: The Role of National Security in Antitrust Enforcement

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Introduction

Thank you, Harold for that introduction. And thanks to the Hudson Institute for hosting me today. It's an honor to be here at the Hudson Institute, to discuss national security. Going back nearly to the beginning of the Cold War, Hudson has hosted some of the most influential and thought-provoking actors and thinkers about global strategy and national security. That raises an important question: what am I doing here?

My job as a Federal Trade Commissioner is enforcing antitrust and consumer protection law, and today I'm here to speak about the former. Antitrust and national security have a stronger connection than you might think. For over a century, from defense to telecommunications, in mergers and conduct cases and investigations, folks have raised national security concerns both in opposition to and in support of antitrust enforcement.

¹ The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

Today, I want to talk a little bit about that history, how it relates to the broader national debate about the role of antitrust, and what it instructs for enforcement today. Historically, national security authorities have often argued against antitrust enforcement of one kind or another, to protect American companies viewed as critical to U.S. strategic interests. Today, new voices argue the opposite: that large U.S. firms are deserving of special attention from antitrust enforcers, in their view, in the service of those same interests.

My view is that antitrust works best as a tool for protecting competition, and an imperfect one for vindicating national security goals. There are separate tools for that, and they are important. But one area where antitrust needs to reckon with the strategic interests of other nations is when we scrutinize mergers or conduct involving state-owned entities. The assumptions underlying modern antitrust rest on free market principles, and contemplate markets in which firms compete to maximize profit. But state-owned entities may pursue other goals. That is particularly important to recognize as the U.S. government focuses increasingly on the impact of foreign investment in domestic technology. Where other countries are, in effect, distorting markets, antitrust enforcement needs to take that into account.

Historical Interplay

The historical interplay between antitrust and national security goes back more than a century. During World War I, for example, the United States charged German agents with violating Section 1 of the Sherman Act for plotting labor

disruptions and planning to bomb factories and transportation facilities, under the theory that their actions “restrained” foreign trade.²

The Department of Justice’s breakup of AT&T in the early 1980s provides a more recent example. During the years of hearings before the parties agreed and the court ordered the breakup, Pentagon officials argued that national security could be compromised in an emergency because they would not be able to use a single communications system in the event of a natural catastrophe or attack on the homeland.³ Testifying before the Senate Armed Services Committee, President Reagan’s Secretary of Defense (and former FTC Commissioner), Caspar Weinberger, asserted that the AT&T network was “the most important communication net we have to service our strategic systems in this country.”⁴ He publicly opposed the antitrust case and the break up remedy and advocated to the Attorney General to dismiss the lawsuit. Unphased by the Defense Secretary’s objections, the Antitrust Division pursued the case.

The landmark 1982 settlement, approved by Judge Harold H. Greene of the Federal District Court for the District of Columbia, did address the national security concerns. It required AT&T to divest its local operating companies, which

² *United States v. Rintelten*, 233 F. 793 (S.D.N.Y. 1916), *aff’d sub nom. Lamar v. United States*, 260 F. 561 (2d Cir. 1919).

³ James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577, 590 (2014); *see also* Christopher S. Yoo, *The Enduring Lessons of the Breakup of AT&T; A Twenty-Five Year Retrospective*, FED. COMMUNICATIONS L. J. Vol. 61, Iss. 1, Article 2 (2008).

⁴ Hearing on S. 694 Before the S. Comm. on Armed Services, 97th Cong. 21 (1981) (statement of Caspar Weinberger, Sec’y of Def. of the United States).

became regional “Baby Bells”.⁵ But it included a condition that the Baby Bells must have a single point of contact—an organization called Bellcore—that would function as a control center in the event of a national emergency.⁶ A National Security Emergency Preparedness group within Bellcore would make sure that the regional Bells could respond to everything from hurricanes to nuclear war.⁷

National security concerns also entered into a recent case, against Qualcomm. The FTC sued the company, a dominant wireless modem chip designer and producer, alleging it withheld chips to extract standard-essential patent royalty rates in a manner that harmed competition in cellular modem chips.⁸ The district court granted the FTC a permanent injunction, prohibiting Qualcomm from conditioning the supply of modem chips on whether a customer has purchased a license, and requiring it to make its patents available to rival chipmakers.⁹

On appeal, in an extraordinary move, the Antitrust Division of the Justice Department filed a brief, in favor of Qualcomm and against its sister agency.¹⁰ The Justice Department argued that the injunction against Qualcomm “would

⁵ *United States v. AT&T Co.* (Modification of Final Judgment), 552 F. Supp. 131 (D.D.C. 1982), aff’d mem. sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

⁶ *Id.*

⁷ *Id.*; see also John Horgan, *Safeguarding the national security: Can the military and other Government functions be confident that the newly fragmented telecommunications system will respond to crises?*, IEEE SPECTRUM, Vol. 22, Iss. 11 (Nov. 1985).

⁸ Complaint, *FTC v. Qualcomm, Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

⁹ Findings of Fact and Conclusions of Law, *FTC v. Qualcomm, Inc.*, No. 17-CV-00220-LHK (N.D. Cal. May 21, 2019).

¹⁰ Brief of the United States of America as *Amicus Curiae* in Support of Appellant, *FTC v. Qualcomm Inc.*, D.C. No. 19-16122 (9th Cir. Aug. 30, 2019).

significantly impact U.S. national security” by diminishing Qualcomm’s R&D expenditures and reducing America’s ability to compete in global 5G markets.¹¹ In an attached statement, the Defense Department agreed, emphasizing how harming Qualcomm could undermine American efforts to reduce China’s dominance in 5G.¹² The FTC answered that these national security arguments were incognizable under modern economics-focused antitrust law, while also disputing the assertion that the injunction would harm innovation and therefore national security.¹³

The Ninth Circuit considered the national security arguments in granting a preliminary stay pending appeal, citing the concerns along with legal questions.¹⁴ The merits panel, which ruled unanimously against the Commission, did not, however, credit the national security concerns.¹⁵ The case and the district court’s decision raised serious antitrust questions, and antitrust alone was the basis for its decision.¹⁶ I voted against seeking *en banc* review, which the court declined to grant.¹⁷ My objection, like that of the merits panel, was based on antitrust, not national security. But it is worthy of note that national security interests will not always be served by novel interpretations of the antitrust laws.

¹¹ *Id.*

¹² *Id.*

¹³ Brief of the Fed. Trade Comm’n, *FTC v. Qualcomm, Inc.*, No. 19-16122 (9th Cir. Nov. 22, 2019).

¹⁴ *FTC v. Qualcomm, Inc.*, 935 F.3d 752 (9th Cir. 2019).

¹⁵ *FTC v. Qualcomm Inc.*, D.C. No. 19-16122 (9th Cir. Aug. 11, 2020).

¹⁶ *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d. 658 (N.D. Cal. 2019).

¹⁷ Order denying Pet. for Reh’g *en banc*, *FTC v. Qualcomm, Inc.*, No. 19-16122 (9th Cir. Oct. 28, 2020).

So, as you can see, national security concerns are not foreign to antitrust enforcers. Unlike many of the non-competition goals some are trying to force into the antitrust regime, whether it be data privacy or racial equity, antitrust enforcers have had to contend with advocacy for national security goals for a long time.

Non-Competition Goals

So what about those other goals? An antitrust debate is raging today, in the halls of Congress, on op-ed pages, in academia, abroad in places from Brussels to Beijing and, as it happens today, in tweet after podcast after Substack post. Some tout antitrust enforcement as the solution to a host of problems that traditionally have little to do with U.S. competition law: income inequality, labor relations, data privacy, race relations, etc.

Antitrust law protects competition. It ensures the integrity of the competitive process, which benefits consumers by ensuring lower prices and new and innovative products and services. Correlatively, it does not purport—and never has purported—to solve every problem that markets will not solve on their own. (Indeed, that is the classic justification for regulation: to solve problems the market cannot.) Lately, some voices are calling to use antitrust to take non-competition goals into account, to solve those other problems.¹⁸ It is perhaps not unfair then to

¹⁸ See e.g., Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Sep. 26, 2020), available at <https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html>; Open Markets, *Income Inequality & Monopoly*, <https://www.openmarketsinstitute.org/learn/income-inequality-monopoly> (last visited Dec. 6, 2020); Felicia Wong, *Why monopolies are threatening American democracy*, WASH. POST (Dec.

ask why antitrust enforcers *should not* consider national security when evaluating antitrust cases. After all, if we are asked to tackle labor and race relations through antitrust enforcement and case selection, why not improve national security? Many of the most vocal proponents of injecting non-competition goals into antitrust are largely (and ironically) silent on whether antitrust enforcers should grapple with national security.

It is no secret that much of the recent talk about antitrust stems in large part from public (and press) mistrust of and concern about technology companies.¹⁹ Within that context, both opponents and defenders of large technology companies are wielding national security arguments. Opponents argue that a less concentrated—and therefore, in their view, more competitive and innovative—tech sector will be crucial to prevailing in the ongoing power conflict with China, and to defense procurement more broadly.²⁰ That may be, though it is hardly intuitive. The argument cuts against the historical grain of national security as an argument *not* to pursue American firms, in particular those facing their toughest competition

8, 2017), available at <https://www.washingtonpost.com/news/democracy-post/wp/2017/12/08/why-monopolies-are-threatening-american-democracy/>.

¹⁹ See e.g., Cecilia Kang & David McCabe, *House Lawmakers Condemn Big Tech's 'Monopoly Power' and Urge Their Breakups*, N.Y. TIMES (Oct. 6, 2020), available at <https://www.nytimes.com/2020/10/06/technology/congress-big-tech-monopoly-power.html>; Shira Ovide, *Big Tech's Backlash Is Just Starting*, N.Y. TIMES (Oct. 6, 2020), available at <https://www.nytimes.com/2020/07/30/technology/big-tech-backlash.html>.

²⁰ See e.g., Ganesh Sitaraman, *The National Security Case for Breaking Up Big Tech*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Jan. 30, 2020), available at <https://knightcolumbia.org/content/the-national-security-case-for-breaking-up-big-tech>; Dakota Foster & Zachary Arnold, *Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon's Access to AI*, CENTER FOR SECURITY AND EMERGING TECHNOLOGY (May 2020), available at cset.georgetown.edu/research/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/.

from national champions abroad. The most important strategic threat the U.S. faces today is from China, where the state has sponsored technology companies.

Meanwhile, Europe, which has always had “tougher” competition laws, continues to try to find a path toward tech competitiveness.

Defenders argue that technology companies’ size is instead a source of national strength due to their ability to counterbalance similarly sized foreign competitors, and that they are—at the end of the day—American companies subject to U.S. law.²¹ To the extent that claim means that national security—or nationalism—should mean declining to enforce the antitrust laws, I disagree. Whether Congress or antitrust authorities should be rewriting laws with the weakening of those companies in mind is another question altogether.

I suspect the fact that, as in the AT&T and Qualcomm examples, national security authorities have often opposed the use of antitrust enforcement is why some would-be antitrust reformers omit national security from their list of non-competition values the law should pursue. Perhaps these reformers hope that pouring other values into the vessel of antitrust will permit more liability and enforcement. I’m not certain that is always correct: depending on the facts, each of

²¹ See e.g., Jon Bateman, *The Antitrust Threat to National Security*, WALL ST. J. (Oct. 22., 2019), available at <https://www.wsj.com/articles/the-antitrust-threat-to-national-security-11571784197>; Loren Thompson, *Inventing Bogus Antitrust Arguments To Bring Down Big Tech Is Bad For National Security*, FORBES (July 16, 2020), available at <https://www.forbes.com/sites/lorenthompson/2020/07/16/inventing-bogus-antitrust-arguments-to-bring-down-big-tech-is-bad-for-national-security/?sh=2d03bd06784b>; Bruce A. Khula, *Antitrust at the Water's Edge: National Security and Antitrust Enforcement*, 78 NOTRE DAME L. REV. 629 (2003).

these other values can themselves argue against liability in one case or another.²²

But leaving that aside, the broader point is that arguing for the inclusion of non-competition values requires justification on its own, and relative to other goals. If you think the law should countenance, say, privacy or the interest of labor, why not national security?

National security best left for national security laws, not antitrust ones

So should we use antitrust to pursue national security goals, or forbear in enforcing it because of them? As the U.S. Constitution itself makes clear, there is no responsibility more essential for a government than the protection of its citizens. My humble premise is that, like other non-competition considerations, antitrust is an imperfect tool. And, when it comes to national security, the U.S. government has other tools. We have, for example, separate and distinct systems requiring mergers to be notified to one set of enforcers who monitor antitrust concerns and to another set of government officials responsible for national security review. This is not a bug, but a feature, of our government and economic policies more generally.

The Committee on Foreign Investment in the United States (CFIUS) is authorized to review national security implications of certain cross-border transactions.²³ Note that CFIUS is not an antitrust tool, but a national security one.

²² Noah Joshua Phillips, *FTC commissioner: Is antitrust the next stakeholder capitalism battleground?*, FORTUNE (Sep. 26, 2020), available at <https://fortune.com/2020/09/26/ftc-antitrust-laws-corporations-stakeholders/>.

²³ U.S. Dep't. of the Treasury, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Dec. 1, 2020).

And a very effective one at that. Look no further than Broadcom's recent (unsuccessful) bid for Qualcomm.

Broadcom, the eighth-largest chipmaker in the world, formerly named Avago, is the product of numerous acquisitions, most notably its \$37 billion acquisition of California-based Broadcom in 2016.²⁴ Avago was incorporated in Singapore, but the majority of its personnel and facilities were in the United States.²⁵ On November 2, 2017, Broadcom CEO Hock Tan stood in the Oval Office alongside President Trump and announced Broadcom's plan to redomicile in the United States from Singapore.²⁶ Within days, Broadcom disclosed a hostile bid for Qualcomm.²⁷ Qualcomm requested that CFIUS review the bid, which CFIUS did.²⁸ And, on March 5th, 2018, CFIUS expressed several concerns with the transaction that it believed warranted a full investigation: primarily, that (i) Broadcom would drastically cut Qualcomm's investment in 5G wireless technology research and development, opening the door to Chinese dominance; and (ii) a potential disruption

²⁴ Paige Tanner, *Broadcom: A Product of Several Mergers and Acquisitions*, MARKET REALIST (Aug. 24, 2016), available at <https://marketrealist.com/2016/08/broadcom-product-severalmergers-acquisitions>.

²⁵ Amy Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, MARQUETTE LAW REVIEW, VOL. 102, No. 3 (Nov. 20, 2019).

²⁶ Associated Press, *Broadcom Will Move Back to the U.S.-and Bring Tax Money With It, Trump Announces*, L.A. TIMES (Nov. 2, 2017), available at <http://www.latimes.com/business/technology/la-fi-tt-broadcom-trump-tax-20171102-story.html>.

²⁷ Press Release, Broadcom, *Avago Technologies to Acquire Broadcom for \$37 Billion* (May 28, 2015), available at <https://www.globenewswire.com/news-release/2015/05/28/739835/10136316/en/Avago-Technologies-to-Acquire-Broadcom-for-37-Billion.html>.

²⁸ Amy Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, MARQUETTE LAW REVIEW, VOL. 102, No. 3 (Nov. 20, 2019).

in supply to critical Department of Defense and other government contracts.²⁹ One week later, after CFIUS had met with Broadcom, the President issued an order blocking the transaction, one of only five such orders ever and the first one in which a transaction was blocked before an agreement was even entered into.³⁰

Even the threat of a CFIUS action can scuttle a deal that is problematic for national security, as it did in 2005, when China National Offshore Oil Company (CNOOC) proposed to acquire Unocal³¹; or in 2006, when Dubai Ports World considered purchasing the right to operate six major U.S. ports, including terminals in the New York/New Jersey area, Philadelphia, and New Orleans.³²

CFIUS is effective and efficient, and Congress—led by my former boss, U.S. Senator John Cornyn—added to the quiver in August 2018 with the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA broadened CFIUS’s jurisdiction to include investment in a U.S. business that “maintains or collects personal data of United States citizens that may be exploited in a manner that threatens national security.”³³ In the spring of last year, CFIUS informed the Chinese company Kunlun that its ownership of the popular gay dating app, Grindr,

²⁹ *Id.*

³⁰ *Id.*

³¹ Matt Pottinger, *Cnooc Drops Offer for Unocal, Exposing U.S.-Chinese Tensions*, WALL ST. J. (Aug. 3, 2005), available at <https://www.wsj.com/articles/SB112295744495102393>.

³² U.S. Dep’t. of State, Archive, <https://2001-2009.state.gov/e/eeb/rls/fs/2006/61915.htm> (last visited Dec. 4, 2020).

³³ Amy Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, MARQUETTE LAW REVIEW, VOL. 102, No. 3 (Nov. 20, 2019).

constituted a national security risk, prompting Kunlun to divest the app.³⁴ CFIUS was apparently motivated by concerns that the Chinese government could blackmail individuals with security clearances or use its location data to help unmask intelligence agents.³⁵

The U.S. government has other tools beyond CFIUS to address national security risks in the private sector. On August 6, 2020, President Trump signed an executive order banning China's TikTok and WeChat services from mobile app stores in the U.S.³⁶ The order relied upon the International Emergency Economic Powers Act and the National Emergencies Act.³⁷ And earlier this year, we all saw the Defense Production Act being put into use on multiple occasions in response to the COVID-19 pandemic.³⁸ The DPA can be used under certain circumstances to allow other-wise illegal coordination by companies, in the service of national defense.³⁹ Critically, the DPA also provides for oversight of agreements among

³⁴ Kori Hale, *Grindr's Chinese Owner Sells Gay Dating App Over U.S. Privacy Concerns For \$600 Million*, FORBES (Mar. 26, 2020), available at <https://www.forbes.com/sites/korihale/2020/03/26/grindr-chinese-owner-sells-gay-dating-app-over-us-privacy-concerns-for-600-million/?sh=46cc764b551c>.

³⁵ *Id.*

³⁶ U.S. Dep't. of Commerce, Press Release, *Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States* (Sep. 18, 2020), available at <https://www.commerce.gov/news/press-releases/2020/09/commerce-department-prohibits-wechat-and-tiktok-transactions-protect>.

³⁷ *Id.*

³⁸ Alex Leary, *Trump Issues Order Under Defense Production Act to Secure More Ventilators*, WALL ST. J. (Apr. 2, 2020), available at <https://www.wsj.com/articles/trump-issues-order-under-defense-production-act-to-secure-more-ventilators-11585857321>.

³⁹ Fed. Trade Comm'n, <https://www.ftc.gov/enforcement/statutes/defense-production-act-1950> (last visited Dec. 5, 2020).

companies by the antitrust agencies, an important input to ensure that national security needs account for competition.

The U.S. government is equipped with tools to monitor and, if need be, take action with respect to national security goals as they arise in the private sector. I am glad it has these tools, to provide for the national defense. I am also glad that the national security experts are in charge of these processes, and that they are politically-accountable for their decisions. Charging antitrust authorities with vindicating national security goals would undermine both.

Protecting Competition in the Defense Sector

While national security authorities have the means to deal with the national security implications of mergers, antitrust authorities must grapple with the competitive implications of transactions in markets of interest to national security. Consistent with the existing antitrust framework, mergers of companies that supply, say, the Defense Department, take into account the government—and the taxpayer—in its capacity as a consumer.⁴⁰

In 1994, prompted by a wave of defense mergers, the Defense Department's Defense Science Board released a report that examined the Department's role in

⁴⁰ Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the U.S. Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Fed. Trade Comm'n), *available at* <https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry>.

defense merger reviews.⁴¹ The report noted the argument by some commentators that the Department's role as a monopsonist with an interest in keeping prices low rendered antitrust oversight redundant—the Defense Department had buyer power, and so even a monopolized seller would be equally matched.⁴² Though regulators and courts have consistently (and sensibly) rejected such arguments, which would nullify antitrust review of defense mergers, enforcers do take account of the Defense Department's expressed views on proposed mergers.⁴³

This is not unusual. The courts and enforcers take stock of testimony from customers who stand to incur the costs of potentially lost competition as the result of a merger. Although the Defense Science Board agreed with enforcers that an exemption for defense mergers was unwarranted, some worried that antitrust enforcement could undermine national security by blocking mergers essential to the national defense.⁴⁴ These commentators synonymized the well-being of companies

⁴¹ Office of the Under Sec'y of Defense for Acquisition and Technology, *Report of the Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation* (Apr. 1994), available at <https://apps.dtic.mil/dtic/tr/fulltext/u2/a278619.pdf>; see also Cullen O'Keefe, *How Will National Security Considerations Affect Antitrust Decisions in AI? An Examination of Historical Precedents*, Centre for the Governance of AI, UNIV. OF OXFORD (last visited Dec. 5, 2020), available at <https://www.fhi.ox.ac.uk/wp-content/uploads/How-Will-National-Security-Considerations-Affect-Antitrust-Decisions-in-AI-Cullen-OKeefe.pdf>.

⁴² *Id.*; see also Marina Lao, *Mergers in A Declining Defense Industry: Should the Merger Guidelines Be Reassessed?*, 28 CONN. L. REV. 347, 347–48 (1996); Joseph Kattan, *The Declining Defense Sector and Federal Antitrust Enforcement*, 23 PUB. CONT. L.J. 21, 21 (1993); William E. Kovacic, *Merger Policy in a Declining Defense Industry*, 36 ANTITRUST BULL. 543, 546–53 (1991).

⁴³ See Statement of Bureau of Competition, *In the Matter of Northrop Grumman Corp.*, Orbital ATK, File No. 181-0005 (June 5, 2018), available at https://www.ftc.gov/system/files/documents/cases/1810005_northrop_bureau_statement_6-5-18.pdf; *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); *United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002).

⁴⁴ Office of the Under Sec'y of Defense for Acquisition and Technology, *supra* note 41.

in the defense industry with that of the nation, a particularized form of the national champion arguments historically more common outside the United States. The Defense Science Board saw the poverty in the argument and declined to get behind the idea of national champions in the defense industry.

The Defense Science Board also recognized that “[m]ost claims that a merger or joint venture is important to national security are recognized... as “efficiencies”...—*i.e.*, the combined firms can produce a better product at a lower price, maintain long-term R&D capacity, or put together complementary resources or staff that will produce a superior product.”⁴⁵ As former FTC Chairman Robert Pitofsky told Congress just a few years later: “[t]he Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner.”⁴⁶ But he was also not shy about stating plainly that the FTC strongly believes that “competition produces the best goods at the lowest prices and is also most conducive to innovation.”⁴⁷ Competition authorities recognized the needs of the Defense Department, as a market participant, not the sole decisionmaker on transactions implicating national security. Recognizing its view should not be

⁴⁵ *Id.*; see also Office of the Sec’y of Defense, *Defense Science Board Task Force on Vertical Integration and Supplier Decisions* (May 1997), available at <https://apps.dtic.mil/sti/pdfs/ADA324688.pdf>.

⁴⁶ Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the U.S. Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Federal Trade Comm’n), available at <https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry>.

⁴⁷ *Id.*

conclusive, the Defense Department resolved to strengthen communication on the impact of defense mergers with the antitrust authorities.⁴⁸

In late 2015, Defense Department officials, once again concerned about defense industry consolidation, proposed a legislative fix that would give the Department independent authority to review defense industry mergers.⁴⁹ After the antitrust authorities explained the ability of existing merger guidelines to handle defense industry mergers,⁵⁰ it withdrew the proposal. Since then, the Defense Department has continued to work closely with antitrust enforcers on mergers that potentially implicate national security concerns.⁵¹ The antitrust agencies proudly consider such cooperation the “hallmark of the agencies’ defense industry reviews.”⁵²

State owned enterprises and the challenge for antitrust

Over time, then, the U.S. has pursued national security goals using national security tools; and antitrust has protected the government as a market actor.

⁴⁸ Office of the Under Sec’y of Defense for Acquisition and Technology, *supra* note 41; *see also* Office of the Sec’y of Defense, *supra* note 45.

⁴⁹ Colin Clark, *Whoa, Lockheed & Co.! Kendall Urges Congress To Protect Innovation*, BREAKING DEFENSE (Oct. 2, 2015), *available at* <https://breakingdefense.com/2015/10/whoa-lockheed-co-kendall-urges-congress-to-protect-innovation/>.

⁵⁰ *See* Joint Statement of U.S. Dep’t of Justice & Fed. Trade Comm’n on Preserving Competition in the Defense Industry (April 12, 2016), *available at* https://www.ftc.gov/system/files/documents/public_statements/944493/160412doj-ftc-defensestatement.pdf.

⁵¹ *See* Stmt. of Bureau of Competition, *In the Matter of Northrop Grumman Corp.*, Orbital ATK, File No. 181-0005 (June 5, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1810005_northrop_bureau_statement_6-5-18.pdf.

⁵² *Id.*

Antitrust agencies have deferred to national security authorities where appropriate, and worked with them to ensure their needs as buyers are met. Those trends should continue.

But I see another area where coordination should increase, and that has to do with evaluating the mergers and conduct of state owned enterprises (SOEs). SOEs are companies that are controlled, to varying degrees, by the state.⁵³ SOEs play an important role in many jurisdictions, often in key strategic sectors, such as utilities, transportation, telecom, and finance.⁵⁴

Like privately owned firms, SOEs can have the incentives and abilities to engage in anticompetitive conduct. But they can also be deployed by the nations that own them to achieve ends not dictated by the normal incentives that companies face. That is, they may not be profit maximizing. Indeed, a defining characteristic of SOEs is that many have a broader set of objectives other than profit maximization, such as public policy goals. Many SOEs in emerging economies were originally established to provide public services and goods in the presence of a natural monopoly or of market failures.⁵⁵ SOEs often are a government tool for implementing industrial policies or to protect national security.⁵⁶ We may find

⁵³ Directorate for Fin. and Enterprise Affairs Competition Committee, *Competition Law and State Owned Entities*, OECD PUBLISHING (Nov. 2, 2018), available at [https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

certain of their ends sympathetic; others may repel us. But the point is: SOEs may not compete like other firms.

And that is a problem for antitrust. The profit maximization assumption that U.S. antitrust enforcers attribute to firms is a function of free market principles. That assumption and those principles may not hold against SOEs. For example, consider the existing test for predatory pricing. Recoupment of foregone profits is an element of the test and behind that is again, the assumption that firms being profit-maximizing, will not lose money on purpose without a reasonable expectation of making up for it.⁵⁷ But one can see how this assumption could fall apart pretty quickly with a SOE. SOEs have the ability to sustain losses for an extended period of time and even forego recoupment if it helps accomplish another goal—protecting a national champion, national security, etc.⁵⁸

This is where the national security authorities should come in. As antitrust enforcers, it's up to us to determine what the incentives of firms are, and to make guesses about how they will act. Faced with a transaction or conduct involving a SOE, we should consult with our colleagues in the national security space, to determine whether the assumptions we are applying are correct in light of what we know about the company. Antitrust enforcers, for example, delve into ownership structures of merging parties to determine competitive overlaps and assess

⁵⁷ *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993); see also David E. M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, ANTITRUST L.J., Vol. 71, No. 2, pp. 479-523 (Dec. 10, 2002).

⁵⁸ Joel R. Samuels, *Tain't What You Do: Effect of China's Proposed Anti-Monopoly Law on State Owned Enterprises*, 26 PENN ST. INT'L L. REV. 169 (2007).

complicated common ownership issues—a task that could become significantly more complicated if a SOE was involved. Information about other control or support by a foreign government may also be relevant. Just last week, the U.S.-China Economic and Security Review Commission, a bipartisan panel of experts chartered by Congress, recommended that Congress require companies to disclose to the antitrust agencies, as part of premerger notification, information about any financial support or subsidies provided by any foreign government.⁵⁹ The idea behind the recommendation is simple: antitrust agencies should follow the money to discover potentially hidden motivations of foreign-subsidized firms playing in the U.S. economy and incorporate that assessment into their enforcement decisions. And I agree. As SOEs expand in their prominence, and state control over and support for the activities of foreign firms in the U.S. becomes more relevant, getting this right will become more important.

Conclusion

In America, SOEs play less of a role. Industrial planning has played less of a role. (More on that in a moment.) And, in the main, the American capitalist economic model is a success. The United States, with less than five percent of the world's population, controls the world's largest economy.⁶⁰ Not only is that good for

⁵⁹ Yuka Hayashi, *China Panel Calls for More Federal Trade Commission Authority in Approving Mergers Involving Foreign Money*, WALL ST. J. (Dec. 1, 2020), available at <https://www.wsj.com/articles/china-panel-calls-for-more-federal-trade-commission-authority-in-approving-mergers-involving-foreign-money-11606866786>.

⁶⁰ Office of the U.S. Trade Representative, <https://ustr.gov/issue-areas/economy-trade> (last visited December 5, 2020).

consumers, workers, and investors, the American economy remains a primary source of our nation's geopolitical strength—it undergirds our national security. Competition is central to that economic model. That makes protecting the competitive processes that have fostered the American economy, industries, ingenuity, and innovation—that makes antitrust—good for national security. We need to enforce the antitrust laws, even against companies with friends in high places, as we have seen over time in the context of national security.

By the same token, however, we should recognize that adapting the law to bar competition, entry, and growth by companies that are not in the good graces of the powerful for reasons unrelated to the law is not good, either for competition or national security. We should keep antitrust focused on competition—not on national security, but also not on the myriad other goals that would-be reformers would have us pursue under the guise of antitrust. The systematic weakening of American corporations sought by some—a misguided, Harrison Bergeron view of competition—takes the language of competition to justify a dramatic expansion of state control of private enterprise.

There is a renewed and robust debate today, on the political Right and Left,⁶¹ about the role of industrial planning. I am generally a skeptic of the capability of government to get such things right, and a believer in market forces. But, as with national security, if we are to head increasingly in this direction, it is important to

⁶¹ Prepared Remarks of Sen. Marco Rubio, *American Industrial Policy and the Rise of China*, Nat'l Defense Univ. (Dec. 10, 2019), available at https://www.rubio.senate.gov/public/_cache/files/5922cc54-2966-48a1-8e88-f7b51bbeca06/D0E7312935012E45F20C67A3450DDAFD.ndu-china-industrial-policy.pdf.

be honest and transparent and to have political accountability. As with the Defense Production Act, it may very well be warranted to have antitrust authorities involved to protect competition. But our primary job should be to do that, not to use antitrust law to do the planning itself.

As antitrust enforcers, we should not work to protect national champions from competition, foreign or domestic. Other nations do just that. But in ours, an open and free market is the centerpiece of our national economy. Nor should we pretend that competition law gives us license to champion every popular cause, no matter how important. Our work should be to champion competition.

Thank you again for the opportunity to speak and participate in the program today. I look forward to our discussion and any questions.