BEST FRENEMIES: EVALUATING THE DUAL JURISDICTION OF THE FEDERAL ANTITRUST AGENCIES

Abstract: What happens when Congress grants two federal regulatory institutions dual jurisdiction over the enforcement of the antitrust law, but then fails to provide instructions on how to divide up the responsibility? The U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have concurrent jurisdiction over the enforcement of federal antitrust law in the United States. Historically, the DOJ and FTC have worked in tandem as a unified front, but tensions have been steadily increasing between the two agencies. These mounting tensions recently reached two very public boiling points. The first was in September of 2008, when the DOJ released a report detailing its enforcement approach under section 2 of the Sherman Antitrust Act of 1890. The FTC not only refused to join the report, but it also criticized the report for being excessively pro-business and non-interventionist. The second clash occurred on May 2, 2019, when the DOJ interfered in the FTC's civil enforcement case against Qualcomm Inc. by filing a Statement of Interest in support of the company and in opposition to the FTC's position. The DOJ's actions further illustrated the growing cracks in the agencies' methods for navigating their shared jurisdiction of enforcing the antitrust laws. This Note examines the current system that the two agencies have devised to determine which agency is in charge in the event of a dispute and argues that legislative change is necessary to protect the sanctity and future of antitrust law and enforcement in the United States.

INTRODUCTION

"[A] flip of the merger agency coin."[1] That was how a former Department of Justice official characterized the two federal antitrust agencies' method for determining which will assert jurisdiction.[2] In the United States, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) share responsibility for pursuing civil cases for violations of the nation's antitrust laws.[3] This structure of dual jurisdiction demands the establishment of

[1] STATEMENT OF DEBORAH A. GARZA: HEARING ON H.R. 2745: THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES (SMARTER) ACT OF 2015," at 2 (2015), https://docs.house.gov/meetings/JU/JU05/20150616/103609/HHRG-114-JU05-Wstate-GarzaD-20150616.pdf [https://perma.cc/94P3-C2QU] [hereinafter GARZA STATEMENT].

[2] *Id.*

[3] *See* U.S. DEP'T OF JUST. ANTITRUST DIV., ANTITRUST DIVISION MANUAL, at VII-3 (5th ed. 2012), https://www.justice.gov/atr/file/761166/download [https://perma.cc/6EHG-R6ZT] (stating that the DOJ and the FTC have shared authority of civil enforcement of antitrust laws); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED.

some form of inter-agency system to determine how the agencies will divide enforcement and hopefully avoid duplication of efforts, delays, and—worst of all—inconsistency in approach.[4] Over time, an ad hoc system of inter-agency liaison agreements established a loose framework for delegating responsibilities.[5] Thus, although "the flip of a coin" does not truly describe the process that the agencies use to delegate their shared responsibilities, it still conveys the tenuousness of their allocation system.[6]

Recently, escalating clashes between the DOJ and FTC over enforcement policy have called into question the effectiveness of the agencies' system for dividing enforcement.[7] Although historically some disagreement between the

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TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/TBL9-Y3JH] (May 2021) (outlining the areas of overlap in the DOJ's and FTC's jurisdiction of antitrust laws).

[4] *See* Lauren Kearney Peay, Note, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1319 (2007) (examining the various informal and formal inter-agency agreements intended to help divide the agencies' shared jurisdiction); Victor R. Hansen, *Functioning of the Antitrust Division—Its Relationship to the Federal Trade Commission and Current Policies of the Division.*, 13 A.B.A. SECTION ANTITRUST L. 20, 21–22 (1958) (noting that the agencies have established various liaison agreements, including an agreement to obtain clearance before pursuing a new matter, to address the issue of concurrent jurisdiction).

[5] *See* Hansen, *supra* note 4, at 21–22 (explaining how the burden of dual jurisdiction forced the agencies to coordinate with each other to prevent wasting resources and delay); U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (acknowledging that their related jurisdiction requires the agencies to coordinate to avoid inefficiency and fairness to consumers); *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/79PB-YCY7] (discussing how the DOJ and FTC confer with each other before commencing a new investigation to avoid wasting time and resources).

[6] *See Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on H.R. 2745 Before the Subcomm. on Regul. Reform, Com. & Antitrust L. of the H. Comm. on the Judiciary*, 114th Cong. 10 (2015) (statement of Rep. Bob Goodlatte, Chairman, S. Comm. on the Judiciary) (describing the current approach the federal agencies use when faced with a new merger); GARZA STATEMENT, *supra* note 1, at 2 (contending that the DOJ and FTC should have a better system for determining which agency will handle an investigation than coin flipping); Peay, *supra* note 4, at 1321 (discussing the collection of inter-agency agreements intended to help allocate the agencies' shared jurisdiction); Hansen, *supra* note 4, at 22 (noting that the various liaison agreements between the agencies assist in determining which agency is best suited to handle a matter).

[7] *See Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts. of the S. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter *Oversight of the Enforcement of the Antitrust Laws Hearing*], https://www.judiciary.senate.gov/meetings/09/17/2019/07/23/2019/oversight-of-the-enforcement-of-the-antitrust-laws [https://perma.cc/J6UX-YJKA] (statement of Joseph Simons, Chairman, Fed. Trade Comm'n) (acknowledging that the agencies' process to determine which agency would handle an investigation was not working well and that the agencies had fought in the previous year); Kelly Everett, *Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 727, 770 (2009) (noting that when the DOJ and FTC have contradictory approaches to antitrust enforcement, the public does not know the line between legal and illegal competitive business conduct); Lauren Feiner, *Here's Why the Top Two Antitrust Enforcers in the US Are Squabbling Over Who Gets to Regulate Big Tech*, CNBC (Sept. 18, 2019), https://www.cnbc.com/2019/09/18/the-ftc-and-doj-are-squabbling-over-the-right-to-regulate-big-tech.html [https://perma.cc/6TR7-H55S] (discussing the conflict between the DOJ and FTC over

two agencies arising from their concurrent jurisdiction has not been uncommon, fights in the last couple decades have taken on a much more derisive and public nature.[8] Specifically, an undercurrent of political turmoil and polarization undercut two recent instances of divergence between the agencies.[9]

First, in 2008, the DOJ released a report presenting its approach to "single-firm conduct"—the business practices and actions that a single economic entity takes to obtain or maintain monopoly power.[10] The FTC refused to join

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the enforcement of antitrust law in the technology sector); Gregory Luib, *Unprecedented Agency Divergence on Antitrust Enforcement*, LAW360 (Aug. 6, 2019), https://www.law360.com/articles/1183986/unprecedented-agency-divergence-on-antitrust-enforcement [https://perma.cc/3U49-U4GQ] (asserting that the unprecedented clash between the DOJ and FTC in the FTC's case against Qualcomm Inc. (Qualcomm), coupled with the deep divergence in the agencies' policy approaches to exploitative patent licensing, raises serious concerns about fairness, efficiency, good governance, and the future of antitrust law).

[8] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Sen. Mike Lee, Chairman, Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.) (criticizing the DOJ and FTC for the increase in clearance disputes, which have become longer, more public, and more frequent); Timothy Syrett, *The FTC's Qualcomm Case Reveals Concerning Divide with DOJ on Patent Hold-up*, IP WATCHDOG (June 28, 2019), https://www.ipwatchdog.com/2019/06/28/ftcs-qualcomm-case-reveals-concerning-divide-doj-patent-hold/id=110764/ [https://perma.cc/J7DW-9NRY] (noting that the actions of the DOJ and FTC before the U.S. District Court for the Northern District of California in 2019, in *Federal Trade Commission v. Qualcomm Inc.*, marked an unprecedented divergence between the two agencies).

[9] *See* Dawn Goulet, *Justice Department's Section 2 Report Sparks a Heated Debate in the Antitrust Community*, 21 LOY. CONSUMER L. REV. 268, 273, 276 (2008) (contending that the George W. Bush Administration issued a DOJ report, commonly referred to as the Section 2 Report, that announced the administration's views on antitrust policy, in part to "lock in future administrations" to an analogous enforcement approach (quoting Spencer Weber Waller, *Hearing but Not Listening: Comparative Competition Law and the DOJ Monopoly Report*, ONLINE MAG. FOR GLOB. COMPETITION POL'Y, Oct. 2008, at 2, https://ssrn.com/abstract=1296763 [https://perma.cc/EM4G-U55U]); Thomas Duesterberg, *The FTC Goes After Qualcomm*, FORBES (Feb. 19, 2019), https://www.forbes.com/sites/thomasduesterberg/2019/02/19/the-ftc-goes-after-qualcomm/?sh=56724f887bf6 [https://perma.cc/BMD6-Y2TF] (noting that the FTC filed the case against Qualcomm on January 17, 2017, in the last few days of President Barack Obama's term prior to President Donald Trump taking office). *See generally* U.S. DEP'T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (Sept. 2008), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf [https://perma.cc/E9JQ-2R53] [hereinafter SECTION 2 REPORT] (outlining the DOJ's report on its enforcement policies regarding section 2 of the Sherman Antitrust Act of 1890 (Sherman Act) that it filed in the last few months of President George W. Bush's administration).

[10] SECTION 2 REPORT, *supra* note 9, at vii; Press Release, Dep't of Just., Justice Department Issues Report on Antitrust Monopoly Law 1 (Sept. 8, 2008), https://www.justice.gov/archive/atr/public/press_releases/2008/236975.pdf [https://perma.cc/CC34-5NTH]. Single-firm conduct, sometimes referred to as unilateral conduct, refers to the business practices and actions of an individual company. *Single Firm Conduct*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct [https://perma.cc/4KBG-A7X5]. Conduct by a single company is illegal under section 2 of the Sherman Act when it leads to the unreasonable attainment or preservation of monopoly power. Sherman Antitrust Act of 1890, 15 U.S.C. § 2. Economists interpret monopoly power as the capability of a single firm or collection of firms to raise prices above competitive levels. Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 247 (1987). The question of whether a firm possesses monopoly power demands a detailed analysis of the types of products that the firm produces

the report and criticized it for its pro-business antitrust policies.[11] Then, in 2019, in *Federal Trade Commission v. Qualcomm Inc.*, a highly-publicized case before the U.S. District Court for the Northern District of California, the antitrust community witnessed an unprecedented level of divergence between the DOJ and FTC when the two agencies took opposing positions regarding the role of antitrust law in policing patent licensing agreements.[12]

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and if there are adequate substitutes available to the consumer should the firm try to increase prices. *Monopolization Defined*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined [https://perma.cc/A2MW-2MDN]. A single firm's possession of monopoly power alone is insufficient for a finding of illegality under section 2 of the Sherman Act. SECTION 2 REPORT, *supra* note 9, at 5; *Monopolization Defined*, *supra*. The firm must have acquired its monopoly power through some anticompetitive means, such as exclusionary conduct or predatory pricing, rather than as the mere aftereffect of creating a more innovative product, superior business expertise, or past happenstance. SECTION 2 REPORT, *supra* note 9, at 5; *see* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (holding that plaintiffs must satisfy two requirements for the court to find an illegal monopolization in breach of section 2 of the Sherman Act: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

[11] *See* Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), https://www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and [https://perma.cc/R6TT-SDE6] (commenting on the DOJ's Section 2 Report and refusing to endorse it); *see also* STATEMENT OF COMMISSIONERS HARBOUR, LEIBOWITZ AND ROSCH ON THE ISSUANCE OF THE SECTION 2 REPORT BY THE DEPARTMENT OF JUSTICE 1, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf [https://perma.cc/L5HJ-BQVL] [hereinafter HARBOUR, LEIBOWITZ AND ROSCH STATEMENT] (criticizing the DOJ's Section 2 Report because it conveyed a pro-business approach and ignored consumer welfare in favor of the interest of firms); STATEMENT OF FEDERAL TRADE COMMISSION CHAIRMAN WILLIAM E. KOVACIC: MODERN U.S. COMPETITION LAW AND THE TREATMENT OF DOMINANT FIRMS: COMMENTS ON THE DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION PROCEEDINGS RELATING TO SECTION 2 OF THE SHERMAN ACT 1–2, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf [https://perma.cc/K6NR-H865] [hereinafter KOVACIC STATEMENT] (expressing concern that the agencies did not release a joint report and impressing the importance of maintaining a historical perspective when creating antitrust enforcement policy).

[12] *See* Syrett, *supra* note 8 (noting that the filings the DOJ submitted in the FTC's case against Qualcomm underscored the divide in the agencies' policies on the anticompetitive harm that patent hold-up causes); *see also* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019) (holding that Qualcomm violated antitrust law through its anticompetitive patent licensing practices), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020); United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal at 2–3, Fed. Trade Comm'n v. Qualcomm Inc., 935 F.3d 752 (9th Cir. 2019) (No. 19-16122) (requesting an impartial stay of injunction on behalf of Qualcomm, and arguing that the district court erred in its decision by misconstruing relevant law and Supreme Court precedent); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur at 4–6, Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (presenting arguments in support of Qualcomm and in opposition to the FTC, specifically that the district court misapplied the relevant antitrust laws, and in doing so, risked injuring the heart of antitrust law and endangered national security by inflicting an overly broad remedy); Statement of Interest of the United States of America at 3, *Qualcomm*, 411 F. Supp. 3d 658 (No.

This Note argues that, in an era of rising polarization, the agencies' current informal, ad hoc system for delegating responsibility is insufficient to address conflicting philosophies on antitrust enforcement.[13] Now, more than ever, the DOJ and FTC should institute measures formalizing their cooperation to prevent injury to the integrity of antitrust law that results when the two agencies take divergent positions in the same matters.[14] Part I of this Note tracks the history of antitrust legislation and examines the duality of federal antitrust enforcement by the DOJ and FTC.[15] Part II considers two major recent instances in which the DOJ and FTC expressed largely divergent approaches on antitrust policy.[16] Part III argues that rather than consolidating all civil enforcement under one agency, Congress should intervene legislatively to provide more guidance on how the DOJ and FTC should allocate their shared responsibilities and establish a standing committee of senior members from both agencies to foster cooperation and coordination efforts.[17]

I. A TALE OF DUAL JURISDICTION AND BUREAUCRATIC RIVALRY

In the United States, market competition is not only desired but also encouraged within the federal agencies that safeguard that economic competition.[18] As reflected in the agencies' overlapping enforcement responsibilities, the DOJ and FTC both seek to fulfill the goals of the federal antitrust laws: protect market competition and economic liberty.[19] But navigating the bureau-

17-CV-00220) (intervening in the FTC's case against Qualcomm for alleged antitrust violations and asking the court to carefully consider the implications and effect of the ordered remedy if it finds Qualcomm liable for the FTC's claims); Plaintiff Federal Trade Commission's Response to Statement of Interest Filed by United States Department of Justice Antitrust Division at 1–2, *Qualcomm*, 411 F. Supp. 3d 658 (No. 17-CV-00220) (responding to the DOJ's "untimely Statement of Interest" to specify that the FTC had no part in the filing and that the FTC "disagree[d] with a number of contentions in the Statement").

[13] *See infra* notes 18–240 and accompanying text.

[14] *See* Press Release, Sen. Mike Lee, Sen. Lee, Colleagues Question DOJ, FTC Antitrust Enforcement (Oct. 5, 2021), https://www.lee.senate.gov/2021/10/sen-lee-colleagues-question-doj-ftc-antitrust-enforcement [https://perma.cc/M9CF-TL6C] (criticizing how the antitrust agencies divergent applications of antitrust law to closely situated defendants raises "serious concerns about the fairness of America's antitrust enforcement regime"); *infra* notes 18–240 and accompanying text.

[15] *See infra* notes 18–104 and accompanying text.

[16] *See infra* notes 105–190 and accompanying text.

[17] *See infra* notes 191–240 and accompanying text.

[18] David L. Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 BUS. LAW. 2075, 2075 (1976).

[19] *See id.* (describing how Congress charged both the DOJ and FTC with the enforcement and regulation of antitrust laws); *The Enforcers*, *supra* note 5 (stating that the DOJ and FTC have dual jurisdiction to implement the federal antitrust laws, which results in the agencies sharing responsibilities in some aspects of antitrust regulation and complementing one another in other aspects); *Mission*, THE U.S. DEP'T OF JUST., https://www.justice.gov/atr/mission [https://perma.cc/N2LZ-AFMX] (July 20, 2015) (explaining that the purpose of antitrust law includes safeguarding economic liberty and competition).

cracy of dual jurisdiction is not without its challenges.[20] This Part considers the development of the DOJ and FTC and how the agencies have addressed how best to divide their shared responsibility over the enforcement of antitrust law.[21] Section A of this Part explores the history and development of antitrust law in the United States.[22] Section B discusses the development of the two main federal agencies responsible for enforcing antitrust laws, the DOJ and FTC.[23] This Section also analyzes the loose system of agreements that these agencies designed to help allocate their concurrent jurisdiction in the absence of any statutory framework or other congressional guidance.[24] Finally, Section C examines recent trends in antitrust enforcement.[25]

A. A Brief History and Development of Antitrust Law in the United States

In the United States, the growth and development of modern-day competition law began with Congress's enactment of the Sherman Antitrust Act of 1890 (Sherman Act), which outlawed anticompetitive business practices, including monopolies, cartels, and trusts.[26] Yet, in the more than one hundred years following its enactment, the U.S. antitrust movement has seen only intermittent periods of enforcement and progress.[27]

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[20] *See* Hansen, *supra* note 4, at 21–22 (emphasizing that the agencies' concurrent jurisdiction requires that they coordinate with each other to prevent wasting time and resources); U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (same); *The Enforcers*, *supra* note 5 (same).

[21] *See infra* notes 26–104 and accompanying text.

[22] *See infra* notes 26–38 and accompanying text.

[23] *See infra* notes 39–68 and accompanying text.

[24] *See infra* notes 69–93 and accompanying text.

[25] *See infra* notes 94–104 and accompanying text.

[26] *See* Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (outlining the various provisions of the legislation); Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2339–40 (2013) (noting that the Sherman Act outlaws monopolies and illegal restraints on trade under §§ 1 and 2 respectively); Peay, *supra* note 4, at 1311 (stating that the Sherman Act prohibits monopolies and anticompetitive behavior). The enactment of the Sherman Act is generally recognized as the beginning of the antitrust movement in the United States. Collins, *supra*, at 2080. Prior to its passage, however, some states had enacted legislation to regulate markets in the economy. *Id.* at 2335 (discussing the development of state antitrust legislation by thirteen states prior to the enactment of the Sherman Act in 1890).

[27] *See* Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 583 (2018) (noting the cyclical resurgence of the antitrust policy objectives of reducing concentration of economic power in an industry, preventing large companies from dominating the political and economic sphere, fixing wealth inequality, regulating high earnings, and defending the interests of small businesses over the decades); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 378 (2003) (describing the historical growth and stagnation of antitrust enforcement policy since the 1960s). The history of American antitrust enforcement policy, as framed by the "pendulum narrative," has undergone three different periods of activity since 1960. Kovacic, *supra*, at 378. Proponents of this narrative portray the first period, in the 1960s and 1970s, as overly zealous and hostile. *Id.* at 383. The second period, the 1980s, is an overcorrection to the previous period, and resulting in very little antitrust enforcement action. *Id.* at 884–85. These antitrust scholars view the last period, the 1990s, as the moderate, middle ground be-

The early 1900s saw triumphs in the fledgling antitrust movement.[28] Under both Presidents Theodore Roosevelt and William Taft, the DOJ used the Sherman Act as an important tool in dismantling the undue concentration of economic power that business trusts held.[29] In 1911, in *Standard Oil Co. of New Jersey v. United States*, the Supreme Court of the United States held that Standard Oil Company of New Jersey violated the Sherman Act by monopolizing the oil industry and engaging in other anticompetitive actions.[30] The Court also established loose boundaries on the extent of the government's power under the Sherman Act: the government can divide up a monopoly, but it cannot restrict all aspects of commerce—just those that unreasonably restrain trade.[31] This Court-mandated breakup of the giant oil trust into separate, competing firms was just one example of several successful actions against monopolizations of market power during this early era.[32]

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tween the two prior phases. *Id.* at 389–90. Scholars praise the approach taken in the 1990s for its balanced, practical approach to antitrust enforcement. *Id.* at 391.

[28] *See* George Bittlingmayer, *The Stock Market and Early Antitrust Enforcement*, 36 J.L. & ECON. 1, 4 (1993) (indicating that President Theodore Roosevelt's "trust-busting" era launched in 1902 with court actions attacking the Northern Securities railroad merger and the Chicago meat packers); Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSPS. 94, 104 (2019) (noting that from 1901 to 1932, the DOJ had several noteworthy victories in antitrust enforcement against giant mergers, such as DuPont, Standard Oil, American Tobacco, and Alcoa). During President Roosevelt's second term in office, the DOJ brought antitrust suits against numerous small and large companies and cartels, including the Terminal Railroad Association, Otis Elevator, Virginia-Carolina Chemical, Standard Oil, American Tobacco, DuPont, and Union Pacific. Bittlingmayer, *supra*, at 6–7.

[29] *See* Lamoreaux, *supra* note 28, at 98 (stating that Presidents Roosevelt and William Taft used the Sherman Act to prosecute potential violations of antitrust law to varying degrees of success in court); Peay, *supra* note 4, at 1311 (noting that in the years after the passage of the Sherman Act, Presidents Roosevelt and Taft used the Act to bring several large court actions to dissolve big business trusts).

[30] *See* 221 U.S. 1, 72–75 (1911) (holding that the manner in which Standard Oil Company of New Jersey owned stock in various corporations amounted to violations of sections 1, 2, and 4 of the Sherman Act).

[31] *See id.* at 60, 62 (holding that not all restraints on trade are per se violations of the Sherman Act—only unreasonable restraints on trade violate the Act). In *Standard Oil Company of New Jersey v. United States*, the Supreme Court established the "Rule of Reason," holding that the government may prosecute anticompetitive conduct in violation of the Sherman Act if the conduct is unreasonable. *Id.*; Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 230–31 (1980). The Rule of Reason thus limits the otherwise broad reach of the Sherman Act. Averitt, *supra*, at 230–31.

[32] *See, e.g.*, *Standard Oil*, 221 U.S. at 79–80 (finding Standard Oil Company of New Jersey liable for violations of the Sherman Act and, accordingly, ordering the dissolution of the company and the dissemination of stock ownership back to the subsidiary corporations' stockholders); United States v. Am. Tobacco Co., 221 U.S. 106, 184 (1911) (ordering the breakup of the American Tobacco Company, which comprised multiple tobacco companies, because the combined entity violated sections 1 and 2 of the Sherman Act); N. Sec. Co. v. United States, 193 U.S. 197, 356, 360 (1904) (holding that the merger of three railway companies into a single company constituted a monopoly and ordering its dissolution for violations of antitrust law).

Following the Sherman Act, Congress enacted two additional antitrust statutes.[33] In 1914, Congress passed the Federal Trade Commission Act (FTC Act), establishing the FTC, a federal administrative agency that Congress empowered to investigate and prosecute unfair restraints on trade, anticompetitive business practices, and consumer fraud.[34] Later that year, Congress strengthened the government's antitrust powers by passing the Clayton Antitrust Act (Clayton Act).[35] Whereas the Sherman Act focused on anticompetitive practices already in existence, the Clayton Act sought to curtail the inception of anticompetitive practices by outlawing business conduct conducive to their formation.[36]

These three statutes—the Sherman Act, the FTC Act, and the Clayton Act—comprise the core of the federal antitrust enforcement legislation in the United States.[37] Although they have undergone various alterations and amendments over the last hundred years, their core goals remain the same.[38]

B. The Two Federal Antitrust Institutions

Today, the two main federal agencies responsible for enforcing antitrust laws are the DOJ and FTC.[39] At first glance, it may seem impractical or even

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[33] *See* Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53) (outlawing specific behaviors as anticompetitive); Federal Trade Commission (FTC) Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58) (prohibiting "unfair methods of competition").

[34] FTC Act, 38 Stat. 717; *see* Peay, *supra* note 4, at 1311 (explaining that the FTC Act established the FTC to impede unfair practices that harmed competition).

[35] Clayton Act, 38 Stat. 730; *see* Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 49 (1969) (indicating that Congress enacted the Clayton Act—under which the government no longer has to wait until a monopoly has already developed before acting and can prosecute practices that companies use to form a monopoly—to resolve the enforcement gap left open by the Sherman Act); Peay, *supra* note 4, at 1311 (noting that Congress intended the Clayton Act to increase the government's existing authority pursuant to the Sherman Act by providing the government with the power to prevent the formation of a monopoly).

[36] *See* 15 U.S.C. §§ 12–27 (prohibiting anticompetitive practices, including price discrimination, exclusive dealings, mergers and acquisitions, and inter-locking directorates where the effect of such conduct would "substantially [] lessen competition or tend to create a monopoly"); Peay, *supra* note 4, at 1311 (describing how the Clayton Act provided the government with the power to stop anticompetitive conduct before it happens).

[37] *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/7J8D-VB34] (providing an overview of the three most important antitrust laws: the Sherman Act, the Clayton Act, and the FTC Act). *See generally* Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (illegalizing practices that restrain trade or create an unlawful monopoly); Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27 (outlawing certain conduct as anticompetitive); Federal Trade Commission (FTC) Act of 1914, 15 U.S.C. §§ 41–58 (establishing the FTC and prohibiting conduct that could harm competition). Although these three laws make up the lion's share of federal antitrust laws, most states have their own antitrust legislation. *The Antitrust Laws*, *supra*.

[38] *The Antitrust Laws*, *supra* note 37.

[39] Hansen, *supra* note 4, at 21; *The Enforcers*, *supra* note 5. State attorneys general may also enforce some provisions of the federal civil antitrust law. 15 U.S.C. § 15c. For example, state attor-

redundant for two independent agencies to regulate the same area of law.[40] Indeed, critics of antitrust regulation have expressed that exact sentiment.[41] But, although the DOJ and FTC have many similarities, they differ in their substantive focus and process.[42] Subsection 1 of this Section discusses the origins of the DOJ's and FTC's federal antitrust authority.[43] Subsection 2 examines the development of the agencies' current system for delegating their shared responsibilities.[44]

1. Dual Jurisdiction: The Powers of the DOJ and FTC

Although the two agencies have overlapping responsibilities, Congress intended for them to complement each other.[45] For decades, the two agencies took parallel approaches to antitrust enforcement and often issued joint guidelines.[46] Nevertheless, regardless of their tradition of cooperation over competition, both agencies individually have the discretion to prosecute an alleged violation of civil antitrust law.[47]

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neys general can seek damages, including treble damages and injunctive relief for violations of section 2 of the Sherman Act. *Id.*; *see* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-10 (noting that state attorneys general may also bring civil antitrust actions for damages in federal court and federal actions for injunction as *parens patriae* under sections 4C and 16 of the Clayton Act respectively). Sections 4 and 16 of the Clayton Act also authorize a private right of action. 15 U.S.C. §§ 15, 26. Private parties may bring a suit in federal court for treble damages, injunctive relief, and reasonable attorney's fees for violations of antitrust law. *Id.*

[40] *See* Roll, *supra* note 18, at 2082 (noting that the problems of delay and inefficiency created by the agencies' clearance process to determine who is best suited to handle the matter are the fault of the system of dual jurisdiction).

[41] *See* Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026, 2031 (2015) (contending that the FTC's shared jurisdiction over antitrust regulation contributes to the challenges that the FTC faces in performing its job effectively); Roll, *supra* note 18, at 2082 (arguing that having only one agency charged with antitrust enforcement could solve the current problems with the system of dual jurisdiction).

[42] *See The Enforcers*, *supra* note 5 (noting that the agencies have different areas of expertise, even though they have overlapping jurisdiction).

[43] *See infra* notes 45–68 and accompanying text.

[44] *See infra* notes 69–93 and accompanying text.

[45] *The Enforcers*, *supra* note 5.

[46] *See* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at II-24 to -25 (outlining the various official guidelines that the DOJ and FTC have jointly issued to provide an overview of their shared enforcement approach for different subject matters); Hansen, *supra* note 4, at 21–22 (noting that the strong coordination between the DOJ and FTC has prevented most inter-agency disputes or duplication of work, and the agencies have provided an effective joint antitrust enforcement program); Caitlin M. Durand, Note, *Who Blesses This Merger? Antitrust's Role in Maintaining Access to Reproductive Health Care in the Wake of Catholic Hospital Mergers*, 61 B.C. L. REV. 2595, 2613 (2020) (explaining that the DOJ and FTC release shared guidelines providing insight on their shared approach to horizontal merger enforcement).

[47] U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (stating that the DOJ and FTC both have the power to enforce the Clayton Act and Sherman Act for civil violations); *The Enforcers*, *supra* note 5 (acknowledging that the DOJ and FTC have shared jurisdiction to prosecute violations of civil antitrust law).

Prior to when Congress established the FTC and the Antitrust Division in the Department of Justice, the U.S. Attorney's Office and the Attorney General enforced federal antitrust law.[48] In 1914, Congress established the FTC with the passage of the FTC Act in an effort to challenge more vigorously exploitative business practices.[49] In 1919, Congress, during Woodrow Wilson's presidency, created a specific Antitrust Division within the Department of Justice.[50] Around a decade later, in 1933, President Franklin D. Roosevelt appointed the first Assistant Attorney General to head the Antitrust Division.[51]

Structurally, the two agencies differ in their organization and leadership structure, thereby impacting how much executive policy affects their activities.[52] The Antitrust Division operates as a part of the Executive Branch with an Assistant Attorney General as its leader.[53] The FTC operates as a bipartisan, independent regulatory agency under the leadership of five Commissioners.[54] Given

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[48] *History of the Antitrust Division*, THE U.S. DEP'T OF JUST., https://www.justice.gov/atr/history-antitrust-division [https://perma.cc/B4Q6-DCKV] (Dec. 13, 2018).

[49] *See* Posner, *supra* note 35, at 48 (noting that the government established the FTC to bolster the already existing antitrust enforcement agency, the DOJ, with an administrative institution in response to ongoing issues with monopolies); Peay, *supra* note 4, at 1311 (explaining that Congress created the FTC through the passage of the FTC Act for the purpose of impeding unfair practices that harmed competition); *see also* Federal Trade Commission (FTC) Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58) (prohibiting "unfair methods of competition").

[50] *History of the Antitrust Division*, *supra* note 48. Prior to the establishment of the Antitrust Division, the DOJ struggled to adequately enforce the antitrust laws. *Organization, Mission and Functions Manual: Antitrust Division*, THE U.S. DEP'T OF JUST., https://www.justice.gov/jmd/organization-mission-and-functions-manual-antitrust-division [https://perma.cc/CHX7-T3HD] (Jan. 6, 2021). As the United States' economy burgeoned and corporations increased in size and prominence, antitrust regulation was becoming far more complex. *Id.* In response to the evolving economic landscape, President Franklin D. Roosevelt recognized the DOJ's need for a group dedicated specifically to antitrust enforcement. *Id.*

[51] *Organization, Mission and Functions Manual: Antitrust Division*, *supra* note 50. Although many credit President Woodrow Wilson with officially creating the Antitrust Division within the Department of Justice in 1919, historians attribute President Franklin Roosevelt with establishing the modern Antitrust Division when he appointed, and Congress confirmed, Harold M. Stephens as the first Assistant Attorney General of the Antitrust Division. *Id.*; *Timeline of Antitrust Enforcement Highlights at the Department of Justice*, THE U.S. DEP'T OF JUST., http://igmlnet.uohyd.ac.in:8000/InfoUSA/trade/business/timeline.pdf [https://perma.cc/X9B9-44VJ].

[52] *See Commissioners*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/commissioners [https://perma.cc/XRB6-YR44] (explaining the structure of the FTC); *Organization, Mission and Functions Manual: Antitrust Division*, *supra* note 50 (explaining the structure of the DOJ).

[53] *Organization, Mission and Functions Manual: Antitrust Division*, *supra* note 50. The President nominates and the Senate confirms the Assistant Attorney General (AAG) of the Antitrust Division. U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at I-3. The AAG oversees the entire Antitrust Division. *Id.* at I-4. This includes heading and supervising every program and policy. *Id.*

[54] *Commissioners*, *supra* note 52; *see What We Do*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do [https://perma.cc/55VE-ECKL] (noting that the FTC largely operates outside the purview of the executive branch). The President nominates the five Commissioners of the FTC, and the Senate must confirm them. *Commissioners*, *supra* note 52. To maintain independence and bipartisanship, the FTC may have at most three Commissioners with a shared political affiliation. *Id.* To further protect the Commissioners' independence, they each serve seven-year terms, and the Presi-

its position in the Executive Branch, the Antitrust Division generally plays a relatively influential role in determining the government's stance on competition policy.[55] In contrast, the FTC is largely insulated from executive interference and reports its activities to Congress.[56] It consists of three bureaus—the Bureau of Consumer Protection, the Bureau of Competition, and the Bureau of Economics—that work collectively to protect consumers and ensure competition.[57]

Even though the DOJ and FTC act as complementary institutions, they retain limited exclusive jurisdiction over certain areas of antitrust regulation.[58] Under the Sherman Act, the DOJ has exclusive jurisdiction to prosecute criminal anticompetitive conduct.[59] In contrast, the FTC has the exclusive authority to bring actions under the FTC Act for unfair methods of competition.[60]

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dent can only dismiss a Commissioner before tenure conclusion for cause. William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2086–87 (2015).

[55] *See* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at I-2 to -3 (noting that the responsibilities of the Antitrust Division include ensuring that the government does not take any actions that would harm competition, and aiding in the creation of antitrust policy). The Antitrust Division counsels the legislature on antitrust law by submitting legislative proposals and providing advice and reports. *Id.*

[56] *See* Kovacic & Winerman, *supra* note 54, at 2095 (noting that although Congress designed the FTC to function, for the most part, as sovereign from the Executive Branch, it intended for the FTC to be subject to congressional oversight).

[57] *About the FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc [https://perma.cc/WP47-CPHU].

[58] *See* Hansen, *supra* note 4, at 21 (noting that the agencies have shared jurisdiction regarding civil antitrust law specifically); Roll, *supra* note 18, at 2076–77, 2079 (noting that the DOJ and FTC have dual jurisdiction over most, but not all, antitrust enforcement matters).

[59] Sherman Antitrust Act of 1890, 15 U.S.C. § 4; *The Enforcers*, *supra* note 5; *see* Pierce, *supra* note 41, at 2028 (noting that the Sherman Act only authorizes the DOJ to prosecute criminal violations of antitrust law). The FTC typically refers any matter that may constitute a potential criminal antitrust violation to the DOJ. U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3. The DOJ brings criminal charges against offenses that constitute severe per se violations of the Sherman Act. U.S. DEP'T OF JUST. ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 1–2 (rev. ed. 2021), https://www.justice.gov/atr/file/810261/download [https://perma.cc/KWX3-35D5]. This includes conduct such as agreements between industry rivals to fix prices, rig bidding processes, and allocate the market geographically. *Id.* Corporations that courts find guilty of criminal violations under the Sherman Act may be subject to criminal penalties of up to $100 million, and individuals may be subject to penalties of up to $1 million. 15 U.S.C. §§ 1–2; *The Antitrust Laws*, *supra* note 37. Pursuant to the Sentencing Reform Act, a court may also impose fines up to double the money the defendant earned from unlawful conduct or double the money the victim(s) lost because of the crime if either of those figures exceed $100 million. *The Antitrust Laws*, *supra* note 37; *see* Sentencing Reform Act, 18 U.S.C. § 3571(d) (granting courts discretion in certain circumstances involving pecuniary gain for the defendant or loss to another person from the offense to fine the defendant a maximum of "twice the gross gain or twice the gross lost"). Violations of the Sherman Act can also lead to substantial prison time of up to ten years. 15 U.S.C. §§ 1–2; *The Antitrust Laws*, *supra*, note 37.

[60] Federal Trade Commission (FTC) Act of 1914, 15 U.S.C. § 45(a); *see* Pierce, *supra* note 41, at 2028 (explaining that the FTC has sole jurisdiction to enforce the FTC Act and shares jurisdiction with the DOJ to enforce the Sherman Act and Clayton Act).

In most civil matters, however, the DOJ and FTC must contend with having dual jurisdiction to enforce antitrust law.[61] For example, both the DOJ and FTC have concurrent statutory authority to enforce the Clayton Act.[62] Likewise, both agencies may prosecute violations of the Sherman Act, albeit through different means.[63] Although Congress expressly authorized the DOJ to enforce the Sherman Act, it did not provide the FTC with the same direct authority.[64] Rather, FTC Commissioners and courts have broadly construed section 5 of the FTC Act to allow the FTC to challenge any conduct that violates, or would violate, the Sherman Act or Clayton Act, or that might otherwise "contravene the spirit of the antitrust laws."[65] Moreover, Congress intended for the DOJ to prosecute anticompetitive activity under the Sherman Act and for the FTC to subject the same activity to administrative proceedings.[66]

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[61] Pierce, *supra* note 41, at 2028; *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 3.

[62] Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27; U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3; *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 3. Under the Clayton Act, both the DOJ and FTC may prosecute conduct that promotes the development of a monopoly. 15 U.S.C. §§ 12–27.

[63] U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (outlining the statutory authority under the Sherman Act and Clayton Act); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 3.

[64] *See* 15 U.S.C. § 4 (empowering the DOJ to enforce the Sherman Act); U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (stating that the DOJ directly enforces the Sherman Act and that the courts have interpreted the language of section 5 of the FTC Act to grant the FTC the power to prosecute violations of the Sherman Act); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 3 (noting that section 5's prohibition on "unfair methods of competition" encompasses activities that the Sherman Act outlaws).

[65] DONALD S. CLARK, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/HQ7W-UBFQ]; *see also* Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 690 (1948) (asserting that the FTC has the authority to decide that conduct that violates the Sherman Act may also violate section 5 of the FTC Act); Averitt, *supra* note 31, at 239–40 (discussing the Supreme Court's broad interpretation of section 5 of the FTC Act as permitting the FTC to prosecute Sherman Act violations).

[66] *See* Averitt, *supra* note 31, at 239 (noting that there is strong support for the proposition that Congress intended the FTC Act to supplement the enforcement powers of the Sherman Act); Hansen, *supra* note 4, at 21 (examining the legislative history of the FTC Act and asserting that Congress intended for the DOJ and FTC to have dual jurisdiction because Congress wanted the FTC Act to enhance the remedies available for conduct that violates the Sherman Act). The Sherman Act, which prohibits unreasonable restraints on trade and improper monopolization, was Congress's earliest effort at addressing anticompetitive practices in the economy. Averitt, *supra* note 31, at 230; *see* 15 U.S.C. §§ 1–7 (outlawing monopolization efforts and conduct that restrains commerce). Prior to the creation of the FTC, the Department of Justice had sole responsibility for enforcing the Sherman Act, and the Act limited enforcement to legislative action in federal court. Averitt, *supra* note 31, at 230; *see also* 15 U.S.C. § 4 (providing U.S. attorneys with the responsibility to prosecute violations of the Sherman Act in court). Although implementation through court action alone streamlined the administration of the Act, it also had the inadvertent effect of subjecting the Act to judicial scrutiny and statutory interpretation. Averitt, *supra* note 31, at 230. Shortly after its inception, the courts construed the Act as a prohibition against unreasonable restraints on trade rather than as a total proscription on all restraints

In practice, the two agencies' jurisdiction overlaps in several important respects: merger reviews, investigations of anticompetitive conduct, and offering guidance on antitrust laws.[67] With such a potential for competition, duplication of work, and inefficiency, both agencies have historically recognized the need for coordination and cooperation and strived to achieve the same.[68]

2. Ad Hoc Liaison Agreements and Clearance Procedures

Since the FTC's inception, it and the DOJ have sought to establish an efficient method for resolving conflicts that stem from their overlapping regulatory power with limited success.[69] This is unsurprising given the lack of any statutory guidance, the wide discretion Congress granted these two agencies to resolve disputes, and the well-established congressional intent for the two

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on trade. *Id.* at 230–31; *see, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (holding that the Sherman Act only outlaws activities that would unreasonably harm commerce). In 1911, in *Standard Oil Company of New Jersey*, the Supreme Court formally embraced the "Rule of Reason" and its role in evaluating an alleged violation of the Sherman Act. 221 U.S. at 60; Averitt, *supra* note 31, at 230. In response to the Court's decision, Senator Newlands of Nevada immediately proposed instituting corrective legislation that would establish an administrative agency "with powers of recommendation, with powers of condemnation, [and] with powers of correction." 47 CONG. REC. 1225 (1911) (statement of Sen. Francis Newlands). In the following years, Congress worked to enact new antitrust legislation and held hearings studying the same. Averitt, *supra* note 31, at 231. In 1913, its efforts culminated in an extensive report that asserted, among other things, that when a court applies the Rule of Reason, it is creating new law rather than merely interpreting and deciding existing law. *Id*. The report also criticized the Supreme Court for failing to establish predictable or consistent standards regarding what types of practices are anticompetitive. *Id.* at 232. The congressional committee overseeing the studies determined that (1) there were weaknesses in the Sherman Act that necessitated remedial action; and (2) the Act should be supplemented with a new commission to more efficiently implement and discharge antitrust laws. *Id.* One year later, in 1914, members of the legislature presented the bill, which would later become the FTC Act, to Congress. *Id.* With a new antitrust administrative agency, actions for antitrust violations had an additional place to be heard. *Id.* at 236. The new commission could opine on and offer its own interpretation of how courts and the various administrative bodies should employ the Rule of Reason. *Id.*

[67] *See* Peay, *supra* note 4, at 1317 (noting that the DOJ and FTC have historically shared the enforcement and regulation of merger reviews); *The Enforcers*, *supra* note 5 (explaining that both the DOJ and FTC conduct antitrust investigations and that both agencies must first inform the other agency of any potential investigations to prevent duplicative efforts); *Mission*, *supra* note 19 (stating that both the DOJ and FTC issue guidance on the scope of admissible conduct under the antitrust laws to firms, companies, and corporations).

[68] *See* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (acknowledging that the agencies' related jurisdiction requires them to coordinate to avoid inefficiency and unfairness to consumers); Hansen, *supra* note 4, at 21–22 (noting that the agencies' continuous efforts to share information and work together to resolve complications resulting from insufficiencies in their liaison procedure reduced duplication of work and friction between the DOJ and FTC); *The Enforcers*, *supra* note 5 (explaining that the two agencies confer with each other before commencing a new investigation to avoid wasting time and resources).

[69] *See* Peay, *supra* note 4, at 1312 (underscoring that even after the agencies first agreement regarding the division of responsibilities in 1948, the issue of how the DOJ and FTC should share responsibility remained unresolved).

agencies collectively to enforce antitrust law.[70] In an attempt to address this basic procedural question that the legislature left open, the DOJ and FTC have adopted a series of ad hoc agreements that form a loose framework within which the agencies determine how to divide their shared responsibilities.[71]

The agencies made the first of these inter-agency agreements in 1948.[72] The agreement mandated that one agency notify the other as a precondition to initiating a new antitrust investigation, legal action, or Trade Practice Conference.[73] The agency receiving the notice could then determine if the prospective matter would conflict with any of its preexisting matters, and in the event of a conflict, contest the proposed action.[74] Thus, before either agency pursued a new investigation, the two agencies would have already worked out which one was in charge.[75] This initial agreement effected an early cross-agency clearance system and formed the basis for the present-day clearance process.[76]

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[70] *See id.* at 1319 (discussing how Congress gave the DOJ and FTC insufficient statutory instructions to determine who should handle a particular matter, which results in the agencies exercising wide discretion); Hansen, *supra* note 4, at 21 (noting that Congress purposely provided both agencies with jurisdiction over the enforcement of antitrust law, requiring the agencies to work out a system to prevent them from duplicating work).

[71] *See* Peay, *supra* note 4, at 1321 (examining the various informal and formal inter-agency agreements intended to help divide the agencies' shared jurisdiction); Hansen, *supra* note 4, at 21–22 (noting the various liaison agreements between the DOJ and FTC, including an agreement to obtain clearance before pursuing a new matter).

[72] Peay, *supra* note 4, at 1312; Hansen, *supra* note 4, at 21; *see also* Press Release, Fed. Trade Comm'n, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), https://www.ftc.gov/news-events/press-releases/2002/03/ftc-and-doj-announce-new-clearance-procedures-antitrust-matters [https://perma.cc/Z5SX-U4M5] (noting that the 1948 agreement, which founded the earliest cross-agency clearance procedures, was the first of several agreements between the DOJ and FTC designed to reduce clearance conflicts).

[73] Hansen, *supra* note 4, at 21 (discussing the details of the 1948 inter-agency agreement between the DOJ and FTC, which facilitated open communication regarding on-going and new potential matters and introduced a clearance process for opening new investigations). A Trade Practice Conference is an offer by the FTC to work with a particular industry to resolve an industry-wide unfair trade practice. C.W. HUNT, ADDRESS OF C.W. HUNT BEFORE AMERICAN GROCERY SPECIALTIES ASSOCIATION AT CHICAGO, ILLINOIS, OCTOBER 22, 1928: TRADE PRACTICE CONFERENCES 2 (1928), https://www.ftc.gov/system/files/documents/public_statements/683021/19281022_hunt_trade_practice_conferences.pdf [https://perma.cc/NS2U-D8HJ]. Generally, the unfair practice is so pervasive in the industry that a successful change of industry standards requires commitment from a majority of the participants in the trade. *Id.*

[74] *See* Hansen, *supra* note 4, at 21 (examining the clearance process that the DOJ and FTC agreed to follow prior to starting any new investigations); Roll, *supra* note 18, at 2077–78 (detailing how the 1948 agreement established a clearance process that both agencies agreed to follow).

[75] Hansen, *supra* note 4, at 21; Roll, *supra* note 18, at 2077–78.

[76] Hansen, *supra* note 4, at 21; *see* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at III-10 to -11 (describing the FTC Clearance Procedure for opening preliminary investigations, which involves providing the FTC with a memo that outlines information about the relevant goods or services, asserted illicit conduct, applicable statutes, relevant parties, reasonable estimation of amount of commerce affected, relevant territory, whether there might be international implications, and a synopsis of the facts).

Scattered attempts by the DOJ and FTC to resolve the problem of concurrent jurisdiction in the absence of any statutory framework or congressional guidance punctuated the years following the 1948 agreement.[77] In 1976, Congress codified a formal pre-clearance notification system for new mergers with the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).[78] The HSR Act required corporations to advise both the DOJ and FTC of certain prospective acquisitions so that the agencies could investigate whether any such transaction would offend the antitrust laws.[79] Yet, absent from the text of this Act was any language outlining how the two agencies should allocate their dual jurisdiction to determine which agency would investigate or take legal action in a particular case.[80] The omission was not unintentional—Congress elected to leave the responsibility of delegating duties to the DOJ and FTC themselves.[81] Thus, even after Congress attempted to refine the antitrust laws, the agencies still relied on the same 1948 agreement to settle which agency was best positioned to handle a particular matter.[82]

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[77] *See* Peay, *supra* note 4, at 1315–17 (describing the various agreements and actions taken by the DOJ and FTC to establish a process for determining responsibility).

[78] Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390–94 (codified as amended at 15 U.S.C. § 18a); *see* Peay, *supra* note 4, at 1312–13 (discussing the terms of the HSR Act that established a formal clearance system for merger review).

[79] *See* 15 U.S.C. § 18a (stipulating that persons, which includes corporations and associations, pursuing a merger or acquisition of interests in, or assets of, another party must first notify both the DOJ and FTC and receive their approval that the acquisition will not offend antitrust laws before proceeding with the transaction); Peay, *supra* note 4, at 1313–14 (explaining that the HSR Act instituted a pre-acquisition notification requirement for companies interested in a merger and a thirty-day waiting period to allow the DOJ and FTC adequate time to evaluate any prospective anticompetitive consequences).

[80] *See* Peay, *supra* note 4, at 1314 (noting that the HSR Act outlined in detail the process and procedures for the merger notification system, but did not address what the DOJ and FTC should do in the event of a conflict); *see also* 15 U.S.C. § 18a (providing no instructions on how the DOJ and FTC should determine which agency should take charge in a potential merger investigation). With respect to merger enforcement, court action typically includes an agency requesting a preliminary or permanent injunction against a potentially anticompetitive merger from the court. *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 151–52 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [https://perma.cc/Q7FR-6Y8Q] (explaining that the HSR Act allows the agencies to oppose a merger prior to its finalization and pursue injunctive action, partial divestiture, or other appropriate remedies).

[81] *See* 15 U.S.C. § 18a(d)(2)(A), (C) (authorizing the DOJ and FTC to "define the terms used in this section . . . [and] prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section"); Peay, *supra* note 4, at 1314 (noting that Congress provided the agencies with broad discretion regarding the allocation of responsibilities); *supra* notes 63–66 and accompanying text (discussing why Congress chose to leave this responsibility to the DOJ and FTC, including that Congress wanted there to be two different forums for regulators to attack anticompetitive conduct).

[82] *See* Peay, *supra* note 4, at 1314–15 (noting that although the HSR Act established a statutory framework for how to conduct the notification process, it failed to address what the agencies should do when they both seek to pursue the same investigation). Because the HSR Act failed to provide the

Roughly two decades later, the DOJ and FTC made two further noteworthy attempts to improve their approach to dividing responsibilities.[83] In 1993, the agencies jointly issued guidelines establishing that, in the event of a clearance dispute, the agencies would give precedence to whoever had greater historical experience in the particular area in question.[84] Two years later, the DOJ and FTC supplemented their 1993 agreement by publishing the Hart-Scott-Rodino Premerger Program Improvements agreement under which the two agencies promised to settle all clearance disputes timely.[85]

In addition, pursuant to these various liaison agreements, the DOJ and FTC have loosely designated specific sectors of the market as the focus of their enforcement oversight.[86] The FTC concentrates on industries with elevated consumer spending, including technology and essential goods and services.[87] Conversely, the DOJ prosecutes all criminal antitrust violations and focuses on the transportation, communications, and finance markets.[88] The DOJ has also conceded all matters related to price discrimination in violation of the Robinson-Patman Act to the FTC for enforcement.[89] Even with this loose division of the economy, however, both the DOJ and FTC must obtain clearance from the other agency before pursuing a potential violation.[90]

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agencies with further guidance, the DOJ and FTC continued to rely on their 1948 agreement and their own processes to determine the delegation of the agencies' concurrent jurisdiction. *Id.*

[83] *See* Peay, *supra* note 4, at 1315–16 (outlining the terms of the 1993 and 1995 agreements between the DOJ and FTC); Press Release, Fed. Trade Comm'n, *supra* note 72 (noting that the agencies made modifications to their antitrust clearance process in 1963, 1993, and 1995).

[84] *See* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-7 (noting that the main factors in deciding which agency will handle the matter after a clearance dispute are past experience and expertise); William J. Baer, Deborah L. Feinstein & Randal M. Shaheen, *Taking Stock: Recent Trends in U.S. Merger Enforcement*, ANTITRUST, Spring 2004, at 20 (describing that under the DOJ and FTC's 1993 "Clearance Procedures for Investigations," the foremost factor in the resolution of clearance conflicts is which agency has the greatest proficiency); Peay, *supra* note 4, at 1315–16 (noting that the 1993 agreement established an "expertise" hierarchy element to the question of which agency would be best suited to investigate a matter).

[85] *See* Baer et al., *supra* note 84, at 20 (explaining that the 1995 agreement between the DOJ and FTC included a joint commitment to settle any clearance conflicts within nine business days); Peay, *supra* note 4, at 1315–16 (same).

[86] *See* Roll, *supra* note 18, at 2079 (describing the apparent patterns in the matters that the two agencies handle and suggesting that there is an informal assignment of enforcement matters among the two agencies); *The Enforcers*, *supra* note 5 (outlining the respective areas of the market on which the DOJ and FTC focus their enforcement efforts).

[87] *The Enforcers*, *supra* note 5. Several markets on which the FTC focuses much of its attention are "health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and internet services." *Id.*

[88] U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3; *The Enforcers*, *supra* note 5.

[89] U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3; *see* Robinson-Patman Act, 15 U.S.C. § 13 (outlawing discriminatory pricing of similar goods or services where the outcome of such discrimination is likely to "substantially [] lessen competition" or "create a monopoly").

[90] U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3; *The Enforcers*, *supra* note 5.

The broad discretion that Congress grants to the DOJ and FTC to create procedures and a formal structure regarding the delegation of responsibility has necessitated strong inter-agency cooperation, coordination, and goodwill.[91] Indeed, although overall federal antitrust enforcement policy may change with the election of a new President or when there is a shift in popular opinion on the role of antitrust regulatory institutions, traditionally the DOJ and FTC have both jointly altered their antitrust enforcement programs to reflect any such change.[92] Although internal disagreement and competition between the two agencies for the headline cases may arise from time to time, the present arrangement has historically prevented the agencies from taking duplicative action that would subject targets to competing demands from the two agencies and potentially lead to conflicting outcomes.[93]

C. Contemporary Trends in Antitrust Enforcement

Recently, antitrust regulators, politicians, and the public have expressed a renewed focus on antitrust policy, particularly on enforcement of section 2 of the Sherman Act.[94] That section outlaws monopolization—the unlawful con-

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[91] *See* Hansen, *supra* note 4, at 21–22 (emphasizing how the imposition of dual jurisdiction forced the agencies to coordinate with each other to prevent wasting resources). Supplementing the agencies' collection of formal and informal handshake agreements are various official guidelines that the DOJ and FTC jointly issued. U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at II-24 to -25. The agencies intended for these guidelines to generally outline their enforcement policy with respect to specific areas, such as horizontal mergers, intellectual property, international operations, and healthcare. *Id.*

[92] *See* Kovacic, *supra* note 27, at 386–90 (explaining that the "pendulum narrative" of antitrust enforcement history suggests that drastic changes in DOJ and FTC antitrust enforcement coincide with shifts in federal competition policy under different presidential administrations). Under the pendulum narrative, changes in federal antitrust policy often follow presidential elections as the new administration often appoints officials to the DOJ and FTC who share its views on the role of antitrust law. *Id.* at 384–85. For example, under the Republican administrations, particularly under President Ronald Reagan and somewhat under President George H.W. Bush, federal antitrust enforcement underwent a significant conservative shift as both the DOJ and FTC adopted an extremely noninterventionist approach to antitrust enforcement. *Id.* at 384–85, 384 n.25, 388. Some critics even contend that during the Reagan era, the two agencies effected a near complete cessation of antitrust enforcement. *Id.* at 385. Conversely, the election of Democratic President Bill Clinton in 1992 saw a shift in antitrust enforcement policy away from the minimalist approach associated with his Republican predecessors, but not so far left as to revert to the overly aggressive interventionism of the 1960s and 1970s. *Id.* at 390–91. Scholars often contend that under President Clinton, federal enforcement policy arrived at a proper middle ground: the administration revitalized the DOJ's and FTC's static antitrust enforcement programs, and the agencies re-commenced taking more robust enforcement action in cases with serious economic and doctrinal concerns. *Id.*

[93] *See* Roll, *supra* note 18, at 2075, 2080–81 (noting instances of inter-agency competition for headline antitrust cases, such as investigating the $1.9 billion merger of General Electric Co. and Utah International Inc.).

[94] *See* Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html [https://perma.cc/Q5UF-B47D] (outlining Senator Elizabeth Warren's proposals

duct by a single firm seeking to gain monopolistic power—in an effort to protect market competition.[95] Monopolies have always concerned regulators given their great potential for harm: diminished supply and increased prices, stagnation instead of innovation, and fewer suitable alternatives for consumers.[96] Nevertheless, since Congress enacted the Sherman Act over one hundred years ago, the federal antitrust institutions have inconsistently enforced section 2 of the Sherman Act.[97]

In the last several years, the general discourse over antitrust policy has moved away from physical markets towards less tangible markets—the new digital economy and "big tech."[98] Both Congress and antitrust regulators are

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for dismantling some of the nation's largest technology companies that she delivered during her 2020 presidential campaign that received strong support from those who likened the big tech corporations of today to the former big tobacco monopolies and received criticism from those who opposed "politicizing and weaponizing antitrust law" (quoting Carl Szabo)); Tim Wu, Opinion, *Be Afraid of Economic 'Bigness.' Be Very Afraid.*, N.Y. TIMES (Nov. 10, 2018), https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html [https://perma.cc/HR9Y-BNHC] (warning that American corporations' increasing monopolization and consolidation of market power in the economy may pose a danger to democracy); NOAH JOSHUA PHILLIPS, WE NEED TO TALK: TOWARD A SERIOUS CONVERSATION ABOUT BREAKUPS: PREPARED REMARKS OF COMMISSIONER NOAH JOSHUA PHILLIPS 1–3 (Apr. 30, 2019), https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf [https://perma.cc/H3GH-R7Z5] (noting that contemporary populist movements in American politics are reigniting conversations about current antitrust policy with their calls for de-concentration of corporate power and disbandment of monopolies).

[95] Sherman Antitrust Act of 1890, 15 U.S.C. § 2; Press Release, Dep't of Just., *supra* note 10, at 5. Modern antitrust policy recognizes monopolization to mean using a company's dominant market position to exclude rival firms. JAY B. SYKES, CONG. RSCH. SERV., R45910, ANTITRUST AND "BIG TECH" 4 (2019).

[96] SYKES, *supra* note 95, at 3.

[97] *See* Douglas Arant, *Section 2 of the Sherman Act*, 37 ANTITRUST L.J. 643, 645 (1968) (noting that since the Sherman Act's inception, the focus has been on section 1 enforcement, with section 2 viewed as subsidiary to section 1); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1112 (1989) (describing three periods of notable market deconcentration efforts: (1) 1904–1920, (2) 1937–1957, and (3) 1969–1982, which were surrounded by periods of antitrust policy that either encouraged reconcentration of the markets or refused to intervene against powerful firms); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 523 (acknowledging that antitrust regulators irregularly implemented the Sherman Act during its first four decades in existence).

[98] *See* Scott Scher, Michelle Yost Hale & Robin Crauthers, *United States: Digital Platforms*, *in* AMERICAS ANTITRUST REVIEW 2020, at 68, 68 (2019) (noting that in the past several years, debate over anticompetitive monopolistic behavior in the technology sector has dominated dialogue on antitrust policy). In 2018, the FTC hosted a public hearing on anticompetitive activities in particular technology markets, including in the areas of emergent technology and digital platforms. *FTC Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century [https://perma.cc/3PYS-DA3G]. A year later, the FTC created a task force specifically designed to oversee and regulate the technology industry. Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology [https://perma.cc/X6A6-HFS2].

scrutinizing powerful companies in the technology sector, such as Google, Amazon, Apple, Facebook, and Qualcomm (a multinational telecommunications and technology corporation), for unlawful monopolistic conduct.[99] These "big tech" firms are under investigation for a range of alleged abuses of their dominant market position, including exclusionary behaviors such as discriminatory patent licensing practices, harming rivals through self-preferencing, and exclusive dealings agreements.[100]

It is not yet evident how the agencies will administer the antitrust laws in these high-technology markets.[101] These new digital markets present unique challenges to regulators, and the established antitrust doctrine does not adequately apply to them.[102] Moreover, although there seems to be bipartisan

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[99] *See* SYKES, *supra* note 95, at 1–2 (discussing the DOJ's and FTC's on-going investigations into giant technology companies, such as Facebook, Amazon, and Apple, for unlawful applications of their dominant market power in violation of antitrust monopolization laws); Scher et al., *supra* note 98, at 68 (noting that antitrust regulators, Congress, and the public have recently directed their attentions to investigating big technology companies and mergers concerning digital platforms for antitrust violations); Ashley Durkin-Rixey, FTC v. Qualcomm—*The Big Tech Antitrust Case Nobody's Talking About*, ACT: THE APP ASS'N (Feb. 7, 2020), https://actonline.org/2020/02/07/ftc-v-qualcomm-the-big-tech-antitrust-case-nobodys-talking-about/ [https://perma.cc/2VPG-XUVK] (discussing the importance of the FTC's lawsuit against Qualcomm—a big tech firm—for unlawful monopolistic conduct involving its patent licensing practice to the future of various technology markets, consumer welfare, national security, and antitrust remedies for harm to competition); *see also* Nyshka Chandran, *Big Tech Monopolies Are 'Going to Be a Problem More and More,' Media Expert Warns*, CNBC, https://www.cnbc.com/2018/09/11/facebook-google-are-monopolizing-the-internet-warns-jonathan-taplin.html [https://perma.cc/E374-874H] (Sept. 11, 2018) (reporting on the growing concern over big tech companies' monopolization of digital markets and warning that these companies may be harming competition); Lauren Feiner, *Congress Just Finished Its Big Tech Antitrust Report—Now It's Time to Rewrite the Laws*, CNBC, https://www.cnbc.com/2020/10/07/after-congress-big-tech-antitrust-report-its-time-to-rewrite-the-laws.html [https://perma.cc/ACA2-JCK5] (Oct. 7, 2020) (examining Congress's extensive antitrust review of big tech firms—specifically Google, Amazon, Facebook, and Apple—in which it determined that these firms held, and sometimes unlawfully misused, their monopoly power).

[100] *See* SYKES, *supra* note 95, at 20–21 (exploring the DOJ's potential antitrust lawsuit against Google for "search bias"—giving its own content priority on Google Search); Margaret Segall D'Amico, *United States: Government Investigations*, *in* AMERICAS ANTITRUST REVIEW, *supra* note 98, at 87, 91 (noting that one of the FTC's claims in its 2019 lawsuit against Qualcomm was for entering into an exclusive dealing agreement with Apple in violation of antitrust laws); Ann O'Brien & Josh Jowdy, Commentary, *9th Circuit Qualcomm Opinion: Good News for Companies Facing Antitrust 'Techlash'?*, LAW.COM (Oct. 19, 2020), https://www.law.com/legaltechnews/2020/10/19/9th-circuit-qualcomm-opinion-good-news-for-companies-facing-antitrust-techlash/ [https://perma.cc/5UU2-YBF2] (discussing the FTC's recent loss in the Ninth Circuit in its case against Qualcomm, in which the FTC alleged that Qualcomm was abusing its monopoly for cellular chips to extort arduous and expensive patent licensing agreements from its competitors).

[101] *See* John O. McGinnis & Linda Sun, *Unifying Antitrust Enforcement for the Digital Age*, 78 WASH. & LEE L. REV. 305, 316 (2021) (noting that antitrust regulators must adapt the established tests that courts and regulators use in antitrust law to address novel high-technology markets).

[102] *See id.* (noting the difficulties of administering antitrust law in the technology sector); John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1502 (2019) (contending that digital markets present unique challenges to the application of antitrust law in these industries). In today's digital markets, single entities commonly hold enormous market power. Newman, *supra*, at 1503.

agreement that large technology firms possess monopoly power, there is partisan disagreement over the best antitrust approach to policing these companies.[103] Antitrust doctrine and policy under section 2 is so expansive and capricious that it has allowed the DOJ and FTC space to disagree over the future of how to regulate, particularly in the context of emerging technologies.[104]

II. When Internal Disagreement Becomes Public Fighting: The Current System's Inherent Weaknesses

Although occasional clashes between the DOJ and FTC over antitrust enforcement policy have occurred in the past, current conflicts between the agencies are much more frequent and derisive.[105] Previously, the agencies confined their jurisdictional disagreements to private cross-agency negotiations.[106] More

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Companies operating in this sphere acquire their dominant market positions in part by using mergers and acquisitions. *Id.* at 1511. The acquired companies typically exist in markets in which the acquiring firm does not operate. *Id.* In other words, the newly acquired company and the dominant firm are not direct competitors. *Id.* This type of conduct does not offend modern antitrust law; thus, these digitally-oriented dominant firms face no antitrust scrutiny. *Id.* Nevertheless, their actions harm competition. *Id.*

[103] Steve Kovach, *Democrats and Republicans Disagree on How to Curb Big Tech's Power—Here's Where They Differ*, CNBC, https://www.cnbc.com/2020/10/07/democrats-and-republicans-disagree-on-how-to-regulate-big-tech.html [https://perma.cc/9ZUY-8P64] (Oct. 7, 2020) (noting that after a sixteen-month bipartisan investigation into Google, Apple, Amazon, and Facebook, Congress found that these four companies have monopoly power but was split down party lines on how best to remedy the issues).

[104] McGinnis & Sun, *supra* note 101, at 307–08 (noting that the dramatic proliferation of digital technology and the rise of dominant technology firms has exacerbated flaws in the federal antitrust agencies' system for navigating their concurrent jurisdiction and sparked deliberations over how the government should reform antitrust law to police these corporations); Jonathan M. Jacobson, *Towards a Consistent Antitrust Policy for Unilateral Conduct*, Antitrust Source, Feb. 2009, at 1 (noting that the DOJ and FTC have adopted very contrary approaches to antitrust policy for monopolization); William F. Adkinson, Jr., Karen L. Grimm & Christopher N. Bryan, *Enforcement of Section 2 of the Sherman Act: Theory and Practice* 26 (Fed. Trade Comm'n, Working Paper, 2008), https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf [https://perma.cc/8VEC-QTUW] (discussing how the capacious language and directives of section 2 of the Sherman Act make its enforcement challenging).

[105] Raymond Z. Ling, Note, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After* Whole Foods, 75 Brook. L. Rev. 935, 944 (2010) (providing that historically, the DOJ and FTC have had few disputes over merger investigations due in large part to their jointly-created notification and clearance procedures); Bryan Koenig, *In Qualcomm Dispute, A Broader Row Between FTC, DOJ*, Law360 (May 10, 2019), https://www.law360.com/articles/1158652/in-qualcomm-dispute-a-broader-row-between-ftc-doj [https://perma.cc/99HK-YFDF] (noting that disagreements between the DOJ and FTC in the past were relatively minor).

[106] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Sen. Mike Lee, Chairman, Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.) (acknowledging that until recently, the two federal antitrust agencies have largely evaded discord because they have customarily "played well together"); Antitrust Modernization Comm'n, *supra* note 80, at 129 (observing that the DOJ and FTC have a history of collaborating to avoid duplication of work and to devise parallel approaches to material antitrust policy); Roll, *supra* note 18, at 2075 (noting that the DOJ and FTC traditionally resolve their disputes over which agency will handle an investigation be-

recently, however, conflicts between the two agencies have devolved into public feuds reflecting different enforcement approaches.[107] These increasingly serious disagreements suggest that the agencies' current cooperation agreements and reliance on inter-agency goodwill to guide the allocation of their shared responsibility for antitrust enforcement are starting to prove inadequate.[108]

Two instances in particular underscore the problems inherent in a system that lacks a definitive, comprehensive process for allocating the agencies' joint authority.[109] Section A of this Part discusses the first of these instances—the 2008 DOJ monopolization report and the effect of the agencies' divergent positions on the enforcement of unilateral conduct under section 2 of the Sherman Act.[110] Section B examines the second of these instances—the contrary positions that the agencies took in 2019, in *Federal Trade Commission v. Qualcomm Inc.*, before the U.S. District Court for the Northern District of California, which highlighted their opposing policies on the role of antitrust enforcement in patent licensing, specifically a patent holder's violation of its fair, reasonable, and non-discriminatory (FRAND) commitments.[111]

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hind closed doors); Koenig, *supra* note 105 (noting that there have been past disputes between the DOJ and FTC, but never to the extent as in the FTC's case against Qualcomm).

[107] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Joseph Simons, Chairman, Fed. Trade Comm'n) (recognizing that the agencies' system to determine which agency will take on an investigation is not working well and that there have been an increasing number of conflicts between the agencies in recent years); Everett, *supra* note 7, at 770 (noting that when the DOJ and FTC have inconsistent policies for antitrust enforcement, the public does not know the legality of their competitive business conduct); Feiner, *supra* note 7 (noting that the DOJ and FTC are fighting over the enforcement of antitrust law in the technology sector); Luib, *supra* note 7 (asserting that the recent unprecedented fight between the DOJ and FTC in *Federal Trade Commission v. Qualcomm Inc.*, combined with a deep divergence in the agencies' policy approaches to antitrust law and patent licensing, raises serious concerns about the future of antitrust law).

[108] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Sen. Mike Lee, Chairman, Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.) (questioning the efficiency of having two separate federal agencies tasked with civil antitrust enforcement given the growing number of increasingly public clearance disputes); Everett, *supra* note 7, at 770 (noting that when the DOJ and FTC have inconsistent policies for antitrust enforcement under section 2 of the Sherman Act, the businesses cannot know for certain the legality of their competitive business conduct); Syrett, *supra* note 8 (emphasizing that the actions of the DOJ and FTC in the FTC's case against Qualcomm indicate an unparalleled divergence between the two agencies).

[109] *See* Charles Duan, *Of Monopolies and Monocultures: The Intersection of Patents and National Security*, 36 SANTA CLARA HIGH TECH. L.J. 369, 372 (2020) (discussing the DOJ's anomalous intervention in the FTC's action against Qualcomm, in particular, how the DOJ contested the FTC's legal theory regarding Qualcomm's injurious patent licensing practices in open court); Everett, *supra* note 7, at 729–30 (noting that cooperation among the DOJ and FTC, which was commonplace during both President George H.W. Bush's and President Bill Clinton's administrations, collapsed under President George W. Bush as illustrated by the events surrounding the DOJ's monopolization report); *infra* notes 112–190 and accompanying text (outlining the two instances of great divergence between the DOJ and FTC).

[110] *See infra* notes 112–130 and accompanying text.

[111] *See infra* notes 131–190 and accompanying text.

A. 2008 DOJ Section 2 Report

During President George W. Bush's tenure, the DOJ adopted a markedly conservative approach towards antitrust enforcement and in particular, to the implementation of section 2 of the Sherman Act.[112] In fact, the DOJ's most significant contribution to the enforcement of section 2 was a highly-criticized report that it published in September 2008 during the last few months of Bush's presidency.[113] The DOJ initially meant for the report, titled "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" (Section 2 Report), to set forth a cross-agency approach to section 2 enforcement of single-firm conduct.[114] Instead, it exposed a schism in the agencies' antitrust enforcement philosophies, rendering the agencies' tenuous efforts to resolve the challenges inherent in dual jurisdiction insufficient.[115]

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[112] *See* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1612 (2010) (noting that President George W. Bush's administration was reluctant to prosecute individual firms for anticompetitive practices under section 2 of the Sherman Act); Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirational, or Imaginary?*, 79 ANTITRUST L.J. 557, 564 (2014) (discussing how several critics deemed antitrust enforcement by President George W. Bush's administration as unduly cautious); *see also supra* notes 95–96 and accompanying test (explaining that section 2 of the Sherman Act prohibits monopolization to promote healthy economic competition). During President George W. Bush's eight-year tenure, the DOJ pursued three fairly small cases for violations of section 2 of the Sherman Act. *See* United States v. Microsemi Corp., No. 08cv1311, 2009 WL 577491, at *1 (E.D. Va. Mar. 4, 2009) (denying the defendant's motion to dismiss the DOJ's action brought for alleging, *inter alia*, violations of section 2 of the Sherman Act by forming a monopoly and securing monopoly power by acquiring a competitor); United States v. Amsted Indus., Inc., No. 07-cv-00710, 2008 WL 3198887, at *1 (D.D.C. July 15, 2008) (ordering a final judgment—without trial or adjudication of law or fact—with respect to the complaint that the DOJ filed against the defendant for violations under section 7 of the Clayton Act and section 2 of the Sherman Act); United States v. Daily Gazette Co., 567 F. Supp. 2d 859, 863–64, 872 (S.D. W. Va. 2008) (denying the defendant's motion to dismiss against a complaint that the DOJ filed alleging anticompetitive and monopolistic conduct in violation of section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act); Hovenkamp, *supra*, at 1612 (highlighting the DOJ's disinclination to prosecute monopolistic single-firm conduct potentially violative of section 2 during the Bush Administration).

[113] SECTION 2 REPORT, *supra* note 9, at vii; Press Release, Dep't of Just., *supra* note 10, at 1; *see* Goulet, *supra* note 9, at 268 (discussing the FTC's denunciation of the Section 2 Report that the DOJ published on September 8, 2008); Hovenkamp, *supra* note 112, at 1612 (noting that the DOJ released the Section 2 Report in September 2008 and that the report received public condemnation from the FTC Commissioners); Voorhees, *supra* note 112, at 570 (detailing the events preceding the publication of the DOJ's Section 2 Report in September 2008 and the criticism this report received from the FTC).

[114] Goulet, *supra* note 9, at 269; Voorhees, *supra* note 112, at 570. Conduct by a single firm is unlawful under section 2 of the Sherman Act when it results in the improper attainment or maintenance of monopoly power. Sherman Antitrust Act of 1890, 15 U.S.C. § 2; *see supra* note 10 and accompanying text (explaining that "single-firm" conduct refers to the activities of a single economic entity and discussing how single-firm conduct is unlawful under section 2 of the Sherman Act when it results in the improper attainment or maintenance of monopoly power).

[115] Eric Lichtblau, *Antitrust Document Exposes Rift*, N.Y. TIMES (Sept. 8, 2008), https://www.nytimes.com/2008/09/09/business/09antitrust.html [https://perma.cc/Z2YT-YRJK]; *see* Press Release, Dep't of Just., *supra* note 10, at 1–3 (providing details and information on the DOJ's newly issued

The DOJ issued the Section 2 Report after a year-long series of public hearings that the DOJ and FTC jointly hosted.[116] This combined undertaking examined the concerns associated with single-firm conduct in an effort to establish joint guidelines asserting the agencies' shared enforcement policies with respect to section 2 monopolization offenses by single firms.[117] After the investigation, it became evident that the agencies' clashing views on the proper legal framework for assessing single-firm conduct under section 2 would prevent them from reaching a consensus.[118] In September of 2008, the agencies reached an impasse when the DOJ elected to proceed alone and unilaterally issued a report delineating its policy guidelines on section 2 enforcement.[119]

The FTC immediately responded to the DOJ's Section 2 Report with public statements of sharp rebuke and repudiation.[120] The FTC refused to join or support the report.[121] FTC Commissioners Pamela Jones Harbour, Jon

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Section 2 Report); Press Release, Fed. Trade Comm'n, *supra* note 11 (refusing to join or support the DOJ's Section 2 Report because of its pro-business, non-interventionist section 2 policies); HARBOUR, LEIBOWITZ AND ROSCH STATEMENT, *supra* note 11, at 1, 11 (admonishing the DOJ's Section 2 Report for attempting to drastically weaken antitrust enforcement against monopolistic conduct and prioritizing powerful businesses over individuals); KOVACIC STATEMENT, *supra* note 11, at 1–2 (expressing concern that the DOJ published a report without first reaching a consensus with the FTC on the appropriate approach to section 2 enforcement).

[116] *See* SECTION 2 REPORT, *supra* note 9, at vii (noting that Congress intended the hearings to investigate single-firm conduct under section 2); *Public Hearings: Single-Firm Conduct and Antitrust Law*, THE U.S. DEP'T OF JUST., https://www.justice.gov/atr/events/public-hearings-single-firm-conduct-and-antitrust-law [https://perma.cc/AL43-STVZ] (July 23, 2015) (providing transcripts, findings, and other relevant information pertaining to the joint public hearings). The hearings took place from June 2006 to May 2007. *Public Hearings: Single-Firm Conduct and Antitrust Law*, *supra*. The hearings spanned a total of nineteen days and included 119 panelists made up of bar members, academic scholars, economists, and business people spread out over twenty-nine different panels. Press Release, Dep't of Just., *supra* note 10, at 3. The hearings addressed a broad range of issues, including "[b]undled loyalty discounts and market share discounts[, p]roduct tying and bundling[, e]xclusive dealing[, p]redatory pricing[, r]efusals to deal[, p]roduct design[, and m]isleading or deceptive statements or conduct." *Public Hearings: Single-Firm Conduct and Antitrust Law*, *supra*.

[117] *See* SECTION 2 REPORT, *supra* note 9, at vii (emphasizing that the purpose of the hearings was to clarify the best standards for analyzing single-firm conduct under section 2); *Public Hearings: Single-Firm Conduct and Antitrust Law*, *supra* note 116 (stating that the goal of the hearings was to determine the most effective way of discerning whether single-firm conduct was anticompetitive).

[118] Goulet, *supra* note 9, at 269; Voorhees, *supra* note 112, at 570.

[119] Goulet, *supra* note 9, at 269; Voorhees, *supra* note 112, at 570. In the Section 2 Report, the DOJ advocated for courts to adopt stricter standards for finding a defendant guilty of a Sherman Act section 2 violation. *See* SECTION 2 REPORT, *supra* note 9, at viii–ix (contending that the previous standards and tests that antitrust regulators used are insufficient, and advocating for the use of "conduct-specific tests and safe harbor[]" provisions). For example, rather than applying the effects-balancing test—does a business's anticompetitive conduct outweigh its procompetitive benefits—the DOJ contended that courts should assess whether a business's anticompetitive harm is "substantially disproportionate" to its procompetitive benefits. *Id.* at 37, 45–46.

[120] Press Release, Fed. Trade Comm'n, *supra* note 11; HARBOUR, LEIBOWITZ AND ROSCH STATEMENT, *supra* note 11, at 1, 11; KOVACIC STATEMENT, *supra* note 11, at 1–2.

[121] Press Release, Fed. Trade Comm'n, *supra* note 11; HARBOUR, LEIBOWITZ AND ROSCH STATEMENT, *supra* note 11, at 1, 11; KOVACIC STATEMENT, *supra* note 11, at 1–2.

Leibowitz, and J. Thomas Rosch criticized the report for strongly favoring companies over consumers and drastically weakening section 2 enforcement against single-firm anticompetitive conduct.[122] In a separate statement, FTC Commissioner William E. Kovacic conveyed his disappointment that the DOJ had moved forward with its own report rather than working together with the FTC to issue joint enforcement guidelines.[123] The FTC also announced that it was prepared to intervene should the DOJ's lenient, pro-business enforcement policies that the report articulated allow for any gaps in Sherman Act enforcement.[124]

In the end, these one-sided guidelines were short-lived.[125] On May 11, 2009, a mere eight months after the DOJ issued it, new Assistant Attorney General (AAG) of the Antitrust Division Christine A. Varney, whom President Barack H. Obama appointed, officially withdrew the Section 2 Report.[126] AAG Varney concluded that the report created excessive barriers to prosecuting section 2 offenses and did not align with the DOJ's new policy of robust antitrust enforcement.[127] Nevertheless, even though the report may have been relatively inconsequential in the grand scheme of American antitrust jurisprudence, it was significant in underscoring the problems that arise from relying on infor-

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[122] *See* HARBOUR, LEIBOWITZ AND ROSCH STATEMENT, *supra* note 11, at 1 (criticizing the Section 2 Report for disregarding consumer welfare in favor of firms' interests and adopting a pro-business approach that shelters firms with monopoly or close to monopoly power); *see also* KOVACIC STATEMENT, *supra* note 11, at 1–2 (stressing the importance of historical perspective and intellectual influences in providing antitrust enforcement policy); Press Release, Fed. Trade Comm'n, *supra* note 11 (summarizing the statements that FTC Commissioners made in opposition to the DOJ's Section 2 Report).

[123] KOVACIC STATEMENT, *supra* note 11, at 2.

[124] HARBOUR, LEIBOWITZ AND ROSCH STATEMENT, *supra* note 11, at 11 (asserting that the FTC is "ready to fill any Sherman Act enforcement void that might be created if the [DOJ] actually implements the policy decisions expressed in its Report"); Press Release, Fed. Trade Comm'n, *supra* note 11.

[125] *See* Press Release, Dep't of Just. Off. of Pub. Affs., Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law [https://perma.cc/U7MY-MY7K] (notifying the public that the DOJ was withdrawing the 2008 Section 2 Report).

[126] *See id.* (announcing that the DOJ would withdraw the Section 2 Report and that the report would henceforth cease to be DOJ policy).

[127] CHRISTINE A. VARNEY, VIGOROUS ANTITRUST ENFORCEMENT IN THIS CHALLENGING ERA: REMARKS AS PREPARED FOR THE UNITED STATES CHAMBER OF COMMERCE 8 (2009), https://www.justice.gov/atr/file/519881/download [https://perma.cc/F8EF-RLCV] (stating the withdrawal of the Section 2 Report, in part because of the its very conservative approach towards the implementation of section 2 and its safe harbor provisions that protected firms from actionable offenses under section 2); Sean Gates & Tej Srimushnam, *New Directions in Antitrust Enforcement: Obama Appoints Christine Varney to Head DOJ Antitrust Division*, JD SUPRA (Jan. 26, 2009), https://www.jdsupra.com/legalnews/new-directions-in-antitrust-enforcement-57815/ [https://perma.cc/Q4T3-CTE8] (reporting that in January 2009, President Obama appointed Christine Varney to head the Antitrust Division of the DOJ as an initial step in accomplishing his campaign promise to scrutinize more closely potential mergers and merged firms' conduct for anticompetitive harm).

mal agreements and inexact standards to address instances of inter-agency conflict.[128] Central to the viability of these agreements is the agencies' prevailing commitment to upholding inter-agency cooperation, maintaining goodwill, and avoiding needless conflict.[129] Here, the agencies' informal agreements failed to stop the DOJ and FTC from breaking with that convention and presenting diametrically opposing legal theories to the public.[130]

B. FTC v. Qualcomm . . . *and the DOJ?*

The second instance of severe discord between the DOJ and FTC occurred during the FTC's suit against Qualcomm.[131] This conflict is perhaps the foremost demonstration of the divergence in approaches between the federal antitrust enforcement agencies.[132] When the agencies faced irreconcilable differences in ideology on the role of antitrust law in policing violations of FRAND commitments, their ad hoc system of liaison agreements and reliance on longstanding commitments to inter-agency cooperation was simply inadequate.[133] Even though this system, coupled with a mutual assiduity to preserve goodwill, may have been sufficient to placate differences of opinion in the past, it collapsed when placed under significant pressure.[134]

Subsection 1 of this Section provides background information on patent law and FRAND commitments, which are the substance of the recent fight

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[128] Goulet, *supra* note 9, at 274–76.

[129] *Id.* at 274–75.

[130] *Id.* Guidelines that the antitrust agencies issue are treated as controlling law, and businesses may rely on them. Hovenkamp, *supra* note 112, at 1613.

[131] *See* Federal Trade Commission's Complaint for Equitable Relief at 2–4, Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 17-CV-00220) (suing Qualcomm for allegedly misusing its monopoly power and implementing exclusionary practices in violation of the FTC Act); Statement of Interest of the United States of America, *supra* note 12, at 2 (intervening in the FTC's case against Qualcomm for alleged antitrust violations). *See generally Qualcomm*, 411 F. Supp. 3d 658 (holding that Qualcomm's patenting licensing practices, including its refusal to license patents to rival modem chip suppliers and its refusal to sell modem chips to original equipment manufacturers until the manufacturer agreed to Qualcomm's patent license terms, were anticompetitive, and thus, granting injunctive relief), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[132] *See* Luib, *supra* note 7 (asserting that the recent clash between the DOJ and FTC in the FTC's case against Qualcomm is unprecedented); Syrett, *supra* note 8 (expressing shock at the DOJ's aggressive actions in *Qualcomm*, and noting that the case demonstrates the greatest divergence between the agencies to date).

[133] *See* Koenig, *supra* note 105 (noting that this was an unparalleled move by the DOJ); Luib, *supra* note 7 (same); Syrett, *supra* note 8 (same); *see also infra* notes 139–157 (explaining that FRAND commitments are a patent holder's agreement to license some of its patents on fair, reasonable, and non-discriminatory (FRAND) terms).

[134] *See* John D. McKinnon & James V. Grimaldi, *Justice Department, FTC Skirmish Over Antitrust Turf*, WALL ST. J., https://www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402 [https://perma.cc/MJ7W-ABCH] (Aug. 5, 2019) (noting that although the DOJ and FTC have had small conflicts previously, recently their battles over jurisdiction have intensified).

between the DOJ and FTC.[135] Subsection 2 explores the DOJ's and FTC's antitrust enforcement approaches to violations of FRAND commitments and the threat these violations pose to competition.[136] Subsection 3 discusses the opposing positions that the DOJ and FTC took in the FTC's case against Qualcomm and the effect that this conflict had on the antitrust community.[137]

1. Brief Overview of Intellectual Property, Patent Law, and FRAND Commitments

Patent law and patent licensing practices play an essential role in the contentious fight between the DOJ and FTC.[138] In the United States, patents are one of the categories of intellectual property that the government affords legal protection.[139] A patent provides a product's creator with a temporarily exclusive property right to the invention; specifically, a patent's owner has a twenty-year government-issued monopoly on the invention.[140] This promise of exclusive and enforceable property rights fosters innovation and encourages the distribution and commercialization of the patented property.[141] The prospect of

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[135] *See infra* notes 138–157 and accompanying text.

[136] *See infra* notes 158–169 and accompanying text.

[137] *See infra* notes 170–190 and accompanying text.

[138] *See* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 687–807 (N.D. Cal. 2019) (discussing the FTC's allegations that Qualcomm violated antitrust law via its exclusionary patent licensing practices), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[139] *General Information Concerning Patents*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/basics/general-information-patents [https://perma.cc/98S8-PC4P] (July 1, 2021). "A patent for an invention is the grant of a property right to the inventor, issued by the United States Patent and Trademark Office." *Id.* The other main categories of intellectual property are copyrights, trademarks, and trade secrets. *Id.*

[140] *Id.*; *see* 35 U.S.C. § 261 ("[P]atents shall have the attributes of personal property."); Nautilus, Inc. v. Biosig Instruments, Inc., 572 U.S. 898, 901–02 (2014) (noting that patents, which operate as limited monopolies, grant the inventor with property rights to the invention, and as such, those seeking a patent must define its scope); United States v. Dubilier Condenser Corp., 289 U.S. 178, 187 (1933) (holding that "[a] patent is property"), *amended by* 289 U.S. 706 (1933); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Taking Clause*, 87 B.U. L. REV. 689, 693 (2007) (stating that patents constitute property). Specifically, the right the patent grants to the inventor is "the right to exclude others from making, using, offering for sale, or selling' the invention throughout the United States or importing the invention into the United States." 35 U.S.C. § 154. Because the government will not patent all products, patent law has designated specific criteria for the types of products that people can patent and the conditions that the government requires to grant a patent. *See General Information Concerning Patents*, *supra* note 139 (specifying that a "process, machine, manufacture, or composition of matter" must be novel, nonobvious, and useful to be eligible for patent protection (quoting 35 U.S.C. § 101)). A patent holder typically holds this exclusive right for around twenty years from the patent's application date. *Id.*; U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 1 (2017), https://www.justice.gov/atr/IPguidelines/download [https://perma.cc/Q7VL-QJZC].

[141] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 140, at 2.

protected financial gain helps mitigate the potentially high costs of researching and developing, or creating, a new product or process.[142]

Like most other property rights, a patent holder may license the patent, and therefore, patent licensing plays a central role in promoting the commercialization of innovation.[143] A patent license is a contract between the patent owner and a third party in which the owner assigns rights in the patent to that party.[144] As a result, the licensee may use the patented product, system, or device.[145] These contracts may contain royalty requirements as well as various restrictions regarding use.[146]

Patent licensing is particularly critical in the technology sector.[147] Technology companies rely on the compatibility of their product with other companies' products to be successful in the market.[148] For example, a company that creates cell phones must use certain phone chips to connect to Wi-Fi, 4G, or even to phones that other companies make.[149]

Given the need for different companies' technological products or processes to work together, a system of collaboration among competitors that re-

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[142] *See* Andrew Beckerman-Rodau, *Patents Are Property: A Fundamental but Important Concept*, 4 J. BUS. & TECH. L. 87, 91–92 (2009) (discussing the high cost of research and development for innovation and how patents can help offset those costs).

[143] *See* Jonathan M. Barnett, *Why Is Everyone Afraid of IP Licensing?*, 30 HARV. J.L. & TECH. (SPECIAL SYMP.) 123, 124 (2017) (describing the importance of intellectual property licensing in facilitating the commercialization process that provides markets with new inventions and products); Donald W. Rupert, *The Relationship of Patent Law to Antitrust Law*, 49 ANTITRUST L.J. 755, 758 (1980) (describing patent rights as sharing similar attributes of transferability to tangible property, for example, "purchase, gift, exclusive or non-exclusive license, [and] assignment"); SUE A. PURVIS, THE FUNDAMENTALS OF INTELLECTUAL PROPERTY FOR THE ENTREPRENEUR 13, https://www.uspto.gov/sites/default/files/about/offices/ous/121115.pdf [https://perma.cc/R2WD-GC6B] (noting that patents, as a form of private property, may also be "[s]old to others; [m]ortgaged; [a]ssigned; [g]iven away; [b]equeathed in a will and inherited; or [l]icensed and taxed").

[144] *See Patent Licensing: A Closer Look*, INQUARTIK (Jan. 21, 2021), https://www.inquartik.com/blog/basic-what-is-patent-licensing/ [https://perma.cc/4P2P-E356] (discussing: (1) the basics of a patent and patent license; (2) the different approaches to patent licensing, such as the carrot approach and the stick approach; (3) the various types of patent licenses and their advantages and disadvantages; and (4) methods on how to profit off a patent).

[145] *Id.*

[146] Rupert, *supra* note 143, at 761. These restrictions can include geographical limitations on where the licensee can use the patent, how much the licensee can sell the product that they are using the patent for, as well as various other use-type restrictions. *Id.*

[147] A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2112 (2018) (noting how patents are essential for creating standards and thus are necessary tools for the technology sector).

[148] *See id.* (emphasizing that there is great value in establishing compatibility standards in the communications technology sector).

[149] Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 CORNELL L. REV. 607, 609 (2019) (explaining that for a technological communication device to connect to Wi-Fi or the internet, it must use specific standards that many other companies also use to ensure that products that different firms make will work together).

lies on interoperability standards has arisen.[150] Within this system, standard setting organizations (SSOs) establish industry standards through a process in which industry participants vote to accept the features and attributes that a product will require in order to satisfy the standard.[151] These standards are comprised of hundreds, sometimes thousands, of patents referred to as standard-essential patents (SEPs).[152] Once SSOs set an industry standard, SEP owners can hold considerable power.[153] It can be rather expensive for an industry participant who has adopted the standard to circumvent utilizing the patented technology.[154] Thus, there is always the risk that a SEP holder will abuse its superior bargaining position and either refuse to license its SEPs, license them on very unfavorable terms, or engage in other exploitative conduct.[155] To reduce this risk, SSOs customarily require SEP holders to make a contractual commitment to license their SEPs on FRAND terms before including that patent in the standard.[156] By virtue of a FRAND commitment, SEP holders must provide a

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[150] *See* Claire Guo, *Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes*, 18 J. MARSHALL REV. INTELL. PROP. L. 259, 261 (2019) (noting the importance of interoperability of products globally); Erik Hovenkamp, *Tying, Exclusivity, and Standard-Essential Patents*, 19 COLUM. SCI. & TECH. L. REV. 79, 80–81 (2017) (noting that in circumstances where a particular technology relies on the interoperability of its many parts, the various companies will operate using a standard setting organization (SSO)); Lemley & Simcoe, *supra* note 149, at 609–10 (describing the importance of standards to the interoperability of technology); Melamed & Shapiro, *supra* note 147, at 2112 (stressing the importance of interoperability).

[151] Hovenkamp, *supra* note 150, at 81; Melamed & Shapiro, *supra* note 147, at 2112. A vote to enact a new industry standard is usually open to all industry participants. Melamed & Shapiro, *supra* note 147, at 2112.

[152] Melamed & Shapiro, *supra* note 147, at 2113. These standard-essential patents (SEPs) cover fundamental aspects of the standard. Hovenkamp, *supra* note 150, at 79. Standards consisting of numerous SEPs are particularly common in the technology, information, and communications industries. Melamed & Shapiro, *supra* note 147, at 2112–13. After the SSOs set a standard, implementers of that standard must obtain patent licenses for all the included SEPs. Hovenkamp, *supra* note 150, at 79.

[153] *See* Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683, 1690 (2020) (observing that after the SSOs establish a standard and participants in the standard have begun using the essential patented technology, the holder of an SEP is in a powerful position); Melamed & Shapiro, *supra* note 147, at 2111 (same). Antitrust scholars consider a SEP holder to have monopoly power. Melamed & Shapiro, *supra* note 147, at 2115. Traditionally, an implementer of a standard has already started using the patented technology before it has officially obtained a license by the SEP holder to do so. *Id.* at 2113. Thus, when patent negotiations finally take place between the implementer and SEP holder, the implementer has already committed to using the patented technology and is "locked into the standard." *Id.* Once a patent holder is included in a standard, it no longer has to compete to have standard implementers choose its patented technology. *Id.* Thus, an SEP holder's technology becomes essential—implementers have no feasible substitute. *Id.*

[154] Melamed & Shapiro, *supra* note 147, at 2113.

[155] *Id.* at 2111. For a detailed discussion on how implementers of a standard are coerced into paying higher royalties to SEP holders, see generally *id.* at 2114–15.

[156] Hovenkamp, *supra* note 153, at 1688; Hovenkamp, *supra* note 150, at 80–81; Melamed & Shapiro, *supra* note 147, at 2113.

license for any and all relevant industry participants, and any royalty rate that the SEP holder imposes must be reasonable.[157]

2. Historical Approach to Patent Hold-Ups

Prior to *Qualcomm*, the DOJ and FTC adopted similar positions acknowledging the dangers of a patent "hold-up," which occurs when an SEP holder violates its commitment to license its SEPs on FRAND terms.[158] In 2006, the DOJ discussed the potential harm in patent hold-ups, considering that a standard that an SSO sets can be difficult and expensive to change.[159] Thus, rather than encouraging competition and innovation of technologies, the standard may result in acquiescence to more unfavorable licensing terms.[160]

A year later, in 2007, the DOJ and FTC collaboratively published a report in which they again cautioned that SEP owners hold great bargaining power to extort higher royalty fees after an industry establishes a standard and that the SEP owners could harm consumers if they misuse it.[161] In 2013, the DOJ and U.S. Patent & Trademark Office (USPTO) issued a policy statement, again warning of the dangers of patent hold-ups given the tremendous power an SEP holder has over licensees.[162] In addition to making public statements forewarn-

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[157] Hovenkamp, *supra* note 153, at 1689; *see* Hovenkamp, *supra* note 150, at 81 (noting that FRAND obligations limit the rate that SEP holders can charge standard implementers for royalties). In the event of a dispute over the royalty rate, a third party may step in to aid the negotiations. Hovenkamp, *supra* note 153 at 1689.

[158] *See* Erik Hovenkamp & Timothy Simcoe, *Tying and Exclusion in FRAND Licensing: Evaluating* Qualcomm, 19 ANTITRUST SOURCE, Feb. 2020, at 1, 4 ("FRAND commitments are a promise to license patents incorporated into industry standards broadly and at reasonable rates."); Lemley & Simcoe, *supra* note 149, at 609–10 (describing the terms of a FRAND commitment and what it means to violate one); Syrett, *supra* note 8 (noting that prior to Assistant Attorney General (AAG) Makan Delrahim's confirmation in September of 2017, the DOJ and FTC both acknowledged that patent hold-ups may pose a danger to consumers and should be subject to antitrust scrutiny); *see also* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019) (deciding the case that the FTC brought against Qualcomm, during which the DOJ intervened on behalf of Qualcomm and against the FTC), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[159] *See* Letter from Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div. of the Dep't of Just., to Robert A. Skitol, Att'y, Drinker, Biddle & Reath, LLP (Oct. 30, 2006), https://www.justice.gov/sites/default/files/atr/legacy/2006/10/31/219380.pdf [https://perma.cc/6YNA-UKF6] (warning of the dangers of patent hold-ups in a business review letter to counsel for VMEbus International Trade Association, an SSO).

[160] *Id.*

[161] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 37–40 (2007), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf [https://perma.cc/6J8Z-HSLN] (describing the opportunity for a patent hold-up after a standard uses a patent: once a the industry sets a standard, the SEP has great power and could misuse that power to gain higher royalties).

[162] *See* DEP'T OF JUST. & U.S. PAT. & TRADEMARK OFF., POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 4 (2013),

ing about the harms of patent hold-ups, the DOJ also brought related enforcement actions for antitrust violations involving patent hold-ups.[163]

Then, in 2017, the DOJ's and FTC's well-established parallel policies on patent hold-ups changed drastically after President Donald J. Trump took office.[164] After President Trump appointed and the Senate confirmed Makan Delrahim as the AAG of the Antitrust Division, the DOJ moved away from its established view that patent hold-ups pose a danger to competition and consumer welfare.[165] Beginning in late 2017, AAG Delrahim made several speeches articulating the DOJ's new position that the antitrust laws do not apply to violations of FRAND obligations and that the remedy for such issues is more appropriately found in contract law.[166] He further stated that he did not believe that patent hold-ups and FRAND commitment disputes warranted antitrust scrutiny.[167] AAG Delrahim also proclaimed that the DOJ was withdraw-

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https://www.justice.gov/atr/page/file/1118381/download [https://perma.cc/JC2M-5YVC] (warning of the threat an SEP hold-up poses to consumer welfare and that, given the essential nature of an SEP, an implementer of a standard has no choice but to agree to an SEP owner's licensing terms that are in breach of its FRAND commitment).

[163] *See, e.g.* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. a . . . (Feb. 13, 2012), https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations [https://perma.cc/SNC4-7GZA] (detailing the DOJ's 2011 antitrust investigations into Google's acquisition of Motorola Holdings Inc. and a consortium's acquisition of Nortel Network Corp.'s SEPs for potential violations of FRAND agreements). For additional information on these two investigations, see generally *id.*

[164] Sonia Kuester Pfaffenroth, Peter J. Levitas & Dylan S. Young, *DOJ Changing Its Antitrust Approach to FRAND and SEPs*, 31 INTELL. PROP. & TECH. L.J., Apr. 2019, at 1, 1 (explaining that under the Trump Administration, the DOJ moved away from the position it previously shared with the FTC on the role of antitrust in patent licensing and FRAND commitments). Before Trump took office and appointed AAG Makan Delrahim to head the Antitrust Division, the DOJ and FTC had both acknowledged that certain patent practices, such as the use of injunctions by SEP holders that had agreed to license their patents under FRAND terms, could harm competition *Id.*

[165] Brian Fung, *The Senate Has Confirmed Trump's Antitrust Chief*, WASH. POST (Sept. 27, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/09/27/the-senate-has-confirmed-trumps-antitrust-chief/ [https://perma.cc/5PDH-VGWP] (reporting that in September 2017, the Senate confirmed Makan Delrahim, President Donald Trump's appointee, to head the Antitrust Division of the DOJ); MAKAN DELRAHIM, THE "NEW MADISON" APPROACH TO ANTITRUST AND INTELLECTUAL PROPERTY LAW: REMARKS AS PREPARED FOR DELIVERY AT UNIVERSITY OF PENNSYLVANIA LAW SCHOOL 9–10 (2018), https://www.justice.gov/opa/speech/file/1044316/download [https://perma.cc/D2U7-QBHC] (discussing his belief that a patent hold-up does not pose any concerns to antitrust policy, and therefore, antitrust law has no place in disputes regarding breaches of FRAND commitments).

[166] DELRAHIM, *supra* note 165, at 9–10; Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute: "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law (Dec. 7, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford [https://perma.cc/XWF2-BWBX].

[167] DELRAHIM, *supra* note 165, at 5 (asserting that "hold-up is fundamentally not an *antitrust* problem").

ing its endorsement of the 2013 joint policy statement made with the USPTO discussing how patent hold-ups may endanger competition.[168] Given the DOJ's and FTC's well-documented, mutual acknowledgement of the potential dangers of patent hold-ups, the DOJ's strong repudiation of this position shocked the public and antitrust community.[169]

3. The Battle Over *Qualcomm* and FRAND Commitments

Perhaps one of the most public examples of the DOJ's divergence from its prior policy regarding patent hold-ups came when the DOJ intervened in the FTC's case against Qualcomm.[170] In January of 2017, the FTC brought a civil action against Qualcomm for violating federal antitrust law.[171] Qualcomm is the owner of several SEPs for innovations used in modern cellular technologies, and it also manufactures and sells cellular modem chips.[172] The FTC al-

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[168] *See* Delrahim, *supra* note 166 (declaring the DOJ's official withdrawal of support from the 2013 "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments" that the DOJ and U.S. Patent and Trademark Office (USPTO) issued jointly). The jointly issued policy statement had warned of the risks associated with patent hold-ups. U.S. DEP'T OF JUST. & U.S. PAT. & TRADEMARK OFF., *supra* note 162, at 4. Once an industry has established a standard and incorporated certain patented technology into that industry standard, implementers of the standard may find it nearly impossible to transition from the SEP to either an alternative technology or completely different standard altogether without extreme difficulty and high costs. *Id.* Thus, an SEP holder may acquire market power, which the SEP holder could abuse by engaging in patent hold-ups. *Id.* According to the DOJ and USPTO in the joint policy statement, patent hold-ups ensue when an SEP holder (1) requests an overpriced royalty that would not have been viable in a competitive market (where suitable alternative technology exists); or (2) refuses to license its SEPs to a market rival. *Id.* For an analysis of how patent hold-ups harm implementers of a standard, consumers, and overall competition, see generally *id.* at 4–6.

[169] *See* Syrett, *supra* note 8 (discussing how the unprecedented steps the DOJ took in filing briefs in opposition to the FTC's position in its action against Qualcomm "was a remarkable spectacle" and represented a change in the DOJ's prior emphasis on the harm of patent hold-ups).

[170] *See* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019) (finding for the FTC and holding that Qualcomm's patent licensing practices resulted in anticompetitive harm), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020); Statement of Interest of the United States of America, *supra* note 12, at 2 (supporting Qualcomm in the FTC's lawsuit against the corporation).

[171] Federal Trade Commission's Complaint for Equitable Relief, *supra* note 131, at 2–3. Qualcomm is a multinational telecommunications and technology company. Thomas Alsop, *Semiconductor Revenue Market Share of Qualcomm Worldwide 2008-2020*, STATISTA (Apr. 12, 2021), https://www.statista.com/statistics/295482/semiconductor-revenue-of-qualcomm-worldwide-market-share/#:~:text=In%202020%2C%20Qualcomm's%20market%20share,to%20449.84%20billion%20U.S.%20dollars [https://perma.cc/FFB2-59XQ]. One of the products that Qualcomm manufacturers is semiconductors. *Id.* Qualcomm attained a nearly 4% share of the global semiconductor market's over $466 billion revenues in 2020. *Id.*

[172] Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 672, 674 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020). These cellular technologies include third-generation (3G) CDMA and fourth-generation (4G) LTE cellular standards that most of today's smartphones utilize. *The World-changing Technology That Almost Wasn't*, QUALCOMM, https://www.qualcomm.com/research/stories/world-changing-technology [https://perma.cc/XKM6-EN2Q]. Qualcomm dominates the realm of fifth-generation (5G) technology with around 140,000 patents and patent applications for

leged that Qualcomm was employing anticompetitive patent licensing agreements to maintain its monopoly over cellular modem chips.[173] The FTC contended that Qualcomm's patent licensing practices not only violated the terms of its FRAND commitment but also violated the FTC Act.[174]

In May of 2019, the DOJ filed its controversial Statement of Interest in the FTC's case against Qualcomm, opposing the FTC's position and supporting Qualcomm's.[175] In its statement, the DOJ said that, at that stage, it had no opinion on the substance of the FTC's assertions regarding Qualcomm's liability.[176] Nevertheless, it did ask the court, if it held Qualcomm liable, to consider the harmful consequences of an unduly harsh remedy on competition and innovation in telecommunications and 5G.[177]

The FTC was not pleased, and in response to what it termed the DOJ's "untimely" statement, the FTC asserted that that the court had already addressed the remedy issue and that the DOJ had misunderstood the law and facts.[178] The FTC

5G technologies. Jenny Beth Martin, Letter to the Editor, *Qualcomm, 5G, Security and Patent Wars*, WALL ST. J. (Dec. 11, 2019), https://www.wsj.com/articles/qualcomm-5g-security-and-patent-wars-11576096074 [https://perma.cc/RN4X-4MAN] (discussing how domestic patent disputes are threatening Qualcomm's position as the dominate leader in the 5G technology market). In addition to holding thousands of patents for 5G technology, Qualcomm also holds SEPs for 3G and 4G technology. *Qualcomm Technology Licensing: Overview*, QUALCOMM, https://www.qualcomm.com/company/licensing [https://perma.cc/FFW8-VX6W]. Qualcomm also owns cell-phone-related intellectual property for "position location, processing platform, video compression, imaging, computer vision, voice and audio technologies, Wi-Fi, and AI." *Id.* The company licenses its products to hundreds of licensees, such as Apple, AirWire Technologies, CommScope Technologies LLC, Galaxy Microsystems Limited, and Huawei, to name a few. *Id.*

[173] Federal Trade Commission's Complaint for Equitable Relief, *supra* note 131, at 2–3.

[174] *Id.* at 1–2; *see* Federal Trade Commission (FTC) Act of 1914, 15 U.S.C. § 45(a) (outlawing, among other things, "unfair methods of competition"). Here, Qualcomm refused to license its SEPs to any rival companies, except for original equipment manufacturers (OEMs) (companies that manufacture and sell equipment or components of equipment, which is bought by another company who in turn sells the products under its own brand), to avoid "patent exhaustion." *Qualcomm*, 411 F. Supp. 3d at 698. Qualcomm does not want to license its patents to other companies as this would allow OEMs to buy chips without purchasing the patent licenses from Qualcomm itself. *Id.* at 744. These rivals, however, still require Qualcomm's SEPs to make their own chips, and Qualcomm must provide its rivals with access to its SEPs. *Id.* To remedy this dilemma, Qualcomm grants its rival chip-suppliers a royalty-free license so they can make their chips, on the condition that these companies inform Qualcomm of their supply agreements with OEMs. *Id.* at 745. Qualcomm then levies a certain high royalty fee on the OEMs for the use of chips that Qualcomm's rivals make using Qualcomm's SEPs. *Id.* at 751. Thus, OEMs cannot avoid paying Qualcomm royalty fees. *Id.*

[175] Statement of Interest of the United States of America, *supra* note 12, at 2 (intervening in the FTC's case against Qualcomm for alleged antitrust violations, and asking the court to carefully consider the implications and effect of the ordered remedy if it were to find Qualcomm liable on the FTC's claims).

[176] *Id.*

[177] *Id.* at 2, 5.

[178] *See* Plaintiff Federal Trade Commission's Response to Statement of Interest Filed by United States Department of Justice Antitrust Division, *supra* note 12, at 1–2 (noting that the district court had already considered the issue of liability and remedies, and that the parties had already presented the court with comprehensive filings on remedies).

made clear that it contested several of the claims that the DOJ raised and that the FTC was not affiliated with the DOJ's filing.[179]

In May 2019, the district court ruled in favor of the FTC and issued injunctive relief against Qualcomm.[180] Upon Qualcomm's appeal, the DOJ filed two additional statements in support of Qualcomm.[181] Both statements strongly admonished the FTC's position and underlying theory.[182] Ultimately, in August 2020, the U.S. Court of Appeals for the Ninth Circuit overturned the district court's ruling, holding that antitrust law did not apply in the case at all.[183]

The *Qualcomm* case, in addition to having significant implications regarding the application of antitrust laws to FRAND commitment violations, is noteworthy for underscoring the unresolved rift between the DOJ and FTC on the role of antitrust enforcement in patent licensing, particularly FRAND agreements.[184] When addressing this divide in September 2018, FTC Chairman Joseph Simons emphasized the importance of consistency in antitrust policy between the two federal agencies but also noted the inconsistency growing in their joint regulation of intellectual property.[185]

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[179] *Id.*

[180] Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 812, 820–24 (N.D. Cal. 2019) (finding Qualcomm liable for anticompetitive conduct by, *inter alia*, (1) refusing to provide patent exhaustion; (2) refusing to sell modem chips to an OEM until the OEM signed a license; and (3) engaging in chip supply threats and cutoffs), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020). The district court ultimately granted injunctive relief. *Id.* at 820–24.

[181] *See* United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *supra* note 12, at 1 (contending that the district court ruled incorrectly and that "Qualcomm ha[d] a likelihood of success on the merits"); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *supra* note 12, at 1–2 (arguing that the district court erred in ruling that Qualcomm was liable for anticompetitive practices and requesting vacatur).

[182] *See* United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *supra* note 12, at 3 (arguing that the district court's opinion, which found in favor of the FTC, blatantly "ignore[d] established antitrust principles"); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *supra* note 12, at 4–6 (contending that the district court's analysis was flawed and that it "committed fundamental errors of antitrust law").

[183] Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 982 (9th Cir. 2020) (overturning the district court's decision and vacating the order for injunctive relief on the basis that Qualcomm's conduct did not amount to anticompetitive harm against its competitors).

[184] *See* United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *supra* note 12, at 3 (arguing that Qualcomm had a likelihood of success on the merits, thus contending, in other words, that the FTC's theory of the case was incorrect); NOAH JOSHUA PHILLIPS, PREPARED REMARKS OF COMMISSIONER NOAH JOSHUA PHILLIPS: IP AND ANTITRUST LAWS: PROMOTING INNOVATION IN A HIGH-TECH ECONOMY 14–15 (2019), https://www.ftc.gov/system/files/documents/public_statements/1508165/app_association_keynote_final.pdf [https://perma.cc/P2QM-Z3NY] (discussing the repercussions of the United States getting antitrust policy wrong domestically and internationally given its position as a world leader in the international enforcement of antitrust); Luib, *supra* note 7 (explaining that this clash over Qualcomm and patent licensing is the most serious disunion between the DOJ and FTC in recent antitrust history).

[185] JOSEPH SIMONS, PREPARED REMARKS OF CHAIRMAN JOSEPH SIMONS: GEORGETOWN LAW GLOBAL ANTITRUST ENFORCEMENT SYMPOSIUM 5–6 (Sept. 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf [https://

The DOJ's repudiation of the position that it long shared with the FTC causes concern.[186] It marked the first time in history that the DOJ directly intervened in a legal case in opposition to the FTC.[187] In addition to undermining the FTC's authority, the DOJ disregarded all the past agreements and coordination efforts that the two agencies previously designed to avoid this very situation.[188] A new president and a change in administration may render the conflicting antitrust policy with respect to SEP licensing and FRAND commit-

perma.cc/V2Y2-68CV]. President Trump nominated FTC Chairman Joseph Simons in 2017, and he took office on May 1, 2018. Cecilia Kang, *Trump Picks Joseph Simons, Corporate Antitrust Lawyer, to Lead F.T.C.*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/business/trump-ftc-simons.html [https://perma.cc/L3MG-3PZF]; *Joseph J. Simons*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/biographies/joseph-j-simons [https://perma.cc/7NSX-LC5Y]. President George W. Bush previously appointed Simons to serve as the Director of the FTC's Bureau of Competition from 2001 to 2003. Kang, *supra*; *Joseph J. Simons*, *supra*.

[186] *See* Jay Jurata & Emily Luken, *Whistling in the Wind? DOJ's Unusual Statement of Interest in* FTC v. Qualcomm *Case Highlights Disparity Between U.S. Antitrust Agencies on FRAND, SEPs, & Competition Law*, ORRICK: ANTITRUST WATCH (May 14, 2019), https://blogs.orrick.com/antitrust/2019/05/14/whistling-in-the-wind-dojs-unusual-statement-of-interest-in-ftc-v-qualcomm-case-highlights-disparity-between-u-s-antitrust-agencies-on-frand-seps-competition-law/ [https://perma.cc/X8KW-46KP] (showing that the DOJ's public disavowal of the FTC's approach to antitrust enforcement in intellectual property is both very unusual and a cause for confusion for both private plaintiffs and corporations); Jacqueline Yin, *Delrahim Out of Step with FTC, Industry, Academics on FRAND/SEP*, PAT. PROGRESS (Apr. 11, 2019), https://www.patentprogress.org/2019/04/11/delrahim-out-of-step-with-ftc-industry-academics-on-frand-sep/ [https://perma.cc/7GW2-B999] (noting that this type of discrepancy between federal regulators harms and destabilizes the United States' position as a role model on antitrust enforcement worldwide); *DOJ & FTC Will Argue Opposite Sides of a Qualcomm Suit Thursday*, COMPETITION POL'Y INT'L (Feb. 9, 2020), https://www.competitionpolicyinternational.com/doj-ftc-will-argue-opposite-sides-of-a-qualcomm-suit-thursday/ [https://perma.cc/WD6X-UDBW] (noting that although disagreements occur between the two agencies over enforcement, they have never before occurred so publicly and contentiously).

[187] *See* Koenig, *supra* note 105 (noting that before *Qualcomm*, the DOJ had never taken such direct action against the FTC); Luib, *supra* note 7 (same); McKinnon & Grimaldi, *supra* note 134 (same).

[188] *See* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (discussing the elements of the agencies' pre-investigation clearance process that both must follow to reduce the risk of duplicative actions); Hansen, *supra* note 4, at 21–22 (discussing the various agreements between the DOJ and FTC to coordinate and ensure that there is no duplication or conflict); Roll, *supra* note 18, at 2077–79 (outlining the liaison agreements in place to internally resolve disputes); Syrett, *supra* note 8 (noting that the DOJ's actions in the FTC's suit against Qualcomm publicly emphasized the increasing divide in the agencies' policies regarding antitrust and patent licensing); *see also* United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *supra* note 12, at 1 (arguing that the lower court erred in finding Qualcomm liable for violations of antitrust law and seeking a partial stay of injunction for Qualcomm); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *supra* note 12, at 1–2 (contending that Qualcomm could likely win on the merits and that the district court erred in applying the antitrust laws); Statement of Interest of the United States of America, *supra* note 12, at 2 (requesting that if the court was to rule that Qualcomm was liable for antitrust violations, it thoroughly assess the ramifications of the potential remedy prior to ordering it); Plaintiff Federal Trade Commission's Response to Statement of Interest Filed by United States Department of Justice Antitrust Division, *supra* note 12, at 1–2 (replying to the DOJ's intervening Statement of Interest to clarify that the FTC had no part in the DOJ's filing and disagreed with its assertions).

ments that occurred during President Trump's tenure a historical anomaly.[189] Nevertheless, the underlying problem of having two separate federal antitrust regulatory agencies with dual jurisdiction over almost all civil enforcement—but with no legal procedural structure on how to resolve any disputes—remains.[190]

III. In an Increasingly Polarized United States, Federal Regulators Need More Formal Structures to Determine Issues of Jurisdiction

Over the past few decades, political polarization has been a defining feature of the U.S. legal system, and federal antitrust enforcement is no excep-

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[189] *See* Herbert Hovenkamp, Opinion, *Justice Department's New Position on Patents, Standard Setting, and Injunctions*, REGUL. REV. (Jan. 6, 2020), https://www.theregreview.org/2020/01/06/hovenkamp-justice-department-new-position-patents-standard-setting-injunctions/ [https://perma.cc/53F6-FLCY] (discussing the DOJ's recently adopted policy statements declaring that FRAND disputes are generally out of reach of antitrust enforcement and how rifts in the antitrust agencies' enforcement approach on this issue creates conflict and inconsistency under the law); Jon Swartz, *Here's Where Biden and Trump Stand on Antitrust, Social Media and Other Tech Issues*, MARKETWATCH (Oct. 1, 2020), https://www.marketwatch.com/story/heres-where-biden-and-trump-stand-on-antitrust-social-media-and-other-tech-issues-2020-10-01 [https://perma.cc/3V9Q-S74F] (noting that Democrats and Republicans have generally approached antitrust regulation of intellectual property and technology differently: Republicans have leaned towards addressing an "anticonservative bias on social media platforms," and Democrats have focused on "anticompetitive business practices and consumer-privacy rights"). President Joe Biden could rescind the DOJ's approach to patent hold-ups and reinstate the DOJ's pre-President Trump policies, acknowledging that in certain situations, patent hold-ups can be anticompetitive. *See* Muireann Bolger, *Antitrust: A Changing of the Guard*, WORLD INTELL. PROP. REV. (Mar. 9, 2021), https://www.worldipreview.com/article/antitrust-a-changing-of-the-guard [https://perma.cc/45Y8-GG4U] (suggesting that under President Biden, the nation could witness a crack-down on antitrust enforcement, particularly with respect to intellectual property); Swartz, *supra* (discussing President Biden's view on antitrust and technology, his disapproval of the monopoly power of big tech, his criticism of social media platforms, and his support for national data privacy). President Biden has signaled that he plans to more robustly administer antitrust laws and reverse the previous administration's lenient, pro-patent holder antitrust policies. *See* H. Holden Brooks et al., *President Biden's Executive Order on Competition Could Mean Broad Changes Across a Range of Industries*, FOLEY & LARDNER LLP (July 14, 2021), https://www.foley.com/en/insights/publications/2021/07/biden-executive-order-competition-broad-changes [https://perma.cc/KU3H-V5KP] (commenting on how President Biden's Executive Order 14036 suggests that his administration plans to promote a renewed focus on antitrust regulation); Matthew Bultman, *Biden Signals Shift Toward Tech on Standard Essential Patents*, BLOOMBERG L. (July 26, 2021), https://news.bloomberglaw.com/ip-law/biden-signals-shift-toward-tech-on-standard-essential-patents [https://perma.cc/6RNV-G326] (noting that President Biden has taken steps to reverse the DOJ's previously held antitrust policies on SEPs).

[190] *See Peay, supra* note 4, at 1319 (noting that the DOJ and FTC have yet to resolve the issue of shared responsibilities and dual jurisdiction over the enforcement of antitrust law); Kathryn Jordan Mims, Jaclyn Phillips & Trina Shek Rizzo, *DOJ Antitrust Division Quietly Walks Back Prior Administration-Era Support of Standard Essential Patent Holders*, WHITE & CASE (May 26, 2021), https://www.whitecase.com/publications/alert/doj-antitrust-division-quietly-walks-back-prior-administration-era-support [https://perma.cc/CV9H-NKNS] (noting that President Biden's signaling that the DOJ will revert back to a pre-Trump Administration antitrust stance on SEPs has created much confusion for patent holders on the current state of the law and increases the likelihood of inconsistent judicial rulings).

tion.[191] Discourse over the goals of antitrust law enforcement has taken on an increasingly partisan tone, especially in emergent markets and products related to technological advancements.[192] This has been reflected in the growing rift between the two federal antitrust agencies that Congress tasked with enforcing the nation's antitrust laws.[193] In a period of growing polarization, the agencies' current informal, ad hoc arrangement for dividing up responsibility is inadequate to meet diverging ideologies on antitrust enforcement.[194] Accordingly,

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[191] *See* Stephen E. Gottlieb, *Law and the Polarization of American Politics*, 25 GA. ST. U. L. REV. 339, 339–40 (2008) (observing that in the last several years, U.S. political polarization has risen and consequently obstructed valuable government projects); Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, 34 CURRENT OP. BEHAV. SCIS. 179, 179 (2020) (noting that Americans are concerned by the growth of polarization in the United States over the last three decades); Robert P. Jones & Maxine Najle, *American Democracy in Crisis: The Fate of Pluralism in a Divided Nation*, PRRI (Feb. 19, 2019), https://www.prri.org/research/290merican-democracy-in-crisis-the-fate-of-pluralism-in-a-divided-nation/ [https://perma.cc/F7LJ-TTZK] (finding that 91% of Americans believe that the nation is politically fractured); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1743–44 (2015) (examining how polarization can harm a government administrative agency's legislative direction and how the subsequent congressional interference disturbs the agency's capacity to operate and address new regulatory challenges); *The Politics of Antitrust: Candidates & Newsmakers Bringing Antitrust into the Spotlight*, A.B.A. (Sept. 13, 2019), https://www.americanbar.org/groups/business_law/resources/materials/2019/annual_materials/politics_of_antitrust/ [https://perma.cc/Z4AE-WNGG] (noting that in recent times, discourse regarding the objectives of antitrust is taking on a more partisan tone as Democrats call for a reevaluation of the consumer welfare standard); *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions/ [https://perma.cc/ZYL7-8JPH] (finding that political party affiliation is the defining factor for Americans' views on political issues, including guns, race, immigration, role of government, business, economy, and labor). Republicans and Democrats are extremely divided with respect to the role that the government should play in regulating businesses. *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, *supra*. 78% of Democrats who the Pew Research Center surveyed believed that government should take on a larger role in regulating business. *Id.* Conversely, 71% of Republicans held the opposite view and believed that government should take a step back from regulating businesses. *Id.*

[192] *See* McGinnis & Sun, *supra* note 101, at 308 (explaining that legislators, academics, and regulators are uncertain of how to approach antitrust regulation in emergent markets created by technological advances); Kovach, *supra* note 103 (noting that congressional Republicans disagreed with congressional Democrats' call for legislation that would dissolve big technology companies, such as Google and Facebook, by requiring the companies to divide up their various lines of business).

[193] *See* William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 689 (2014) (noting that politics unquestionably impact the DOJ and FTC and influence the decisions that the officials in charge make); *The Politics of Antitrust: Candidates & Newsmakers Bringing Antitrust into the Spotlight*, *supra* note 191 (acknowledging that although the public has traditionally thought of the DOJ and FTC as apolitical institutions, there have been recent calls on both sides of the political spectrum regarding the goals and scope of antitrust enforcement). The DOJ's and FTC's leaders are political appointees, which inevitably can result in some degree of partisanship to infiltrate each agency's policies, goals, and priorities. Kovacic, *supra,* at 689. Partisanship can injure an agency when leaders of the agency prioritize party goals to the detriment of the agency's goals and reputation. *Id.* Moreover, partisanship can harm inter-agency relationships and cooperation, which can greatly diminish the effectiveness of antitrust enforcement. *Id.* at 689–92.

[194] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Sen. Mike Lee, Chairman, Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.) (expressing

the DOJ and FTC should take affirmative steps toward formalizing their cooperation to reduce the damage to the integrity of antitrust law that arises when the two agencies take conflicting positions in the same matter.[195]

Section A of this Part explains why abandoning the agencies' existing liaison arrangement and instituting a formal structure for addressing interagency conflicts over their shared jurisdiction is necessary.[196] Section B argues that Congress should intervene legislatively to provide more guidance on how the DOJ and FTC should divide antitrust enforcement and establish a standing committee for conflict resolution to encourage cooperation.[197]

A. Why Is This Important? Is This Making a Mountain Out of a Molehill?

It is indisputable that politics play a consequential role in antitrust law and enforcement.[198] So, although there are a myriad of other important factors that also influence the agencies' antitrust enforcement policies, such as economics and institutional norms, the DOJ and FTC are not immune to this shift towards partisanship and polarization.[199] Two of the greatest public fights over antitrust enforcement policy—the 2008 Section 2 Report that the DOJ issued under President George W. Bush and the FTC's 2017 suit against Qualcomm that it filed under President Obama—occurred during moments of great political change.[200] Both cases arose when the presidency exchanged party hands.[201]

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deep concern that clashes between the DOJ and FTC have recently increased and that the agencies existing clearance processes for determining which agency will handle a matter are not working); *see also* Statement of Interest of the United States of America, *supra* note 12, at 2 (intervening in the FTC's case against Qualcomm for alleged antitrust violations and asking the court to carefully consider the implications and effect of the ordered remedy if it was to conclude that Qualcomm was liable on the FTC's claims); Press Release, Fed. Trade Comm'n, *supra* note 11 (refusing to join the DOJ's Section 2 Report).

[195] *See* Kovacic, *supra* note 193, at 704 (warning that partisanship in antitrust enforcement can have long-lasting effects, such as the devaluation of the agencies' reputation, the diminishment of their authority on the world stage, and the deterrence of future efforts to improve agency performance); Roll, *supra* note 18, at 2077–79 (outlining the agencies' liaison agreements and efforts to coordinate their joint responsibilities over the years).

[196] *See infra* notes 198–214 and accompanying text.

[197] *See infra* notes 215–240 and accompanying text.

[198] *See* Kovacic, *supra* note 193, at 689 (acknowledging that because it is indisputable that politics affect antitrust enforcement, the real question is the extent of its influence).

[199] *See id.* at 688 (discussing how the enforcement approach of the DOJ and FTC are affected by politics); Kovacic, *supra* note 27, at 399–400 (noting that many internal and external forces affect the direction of antitrust policy, including the interaction of the DOJ and FTC with scholars, bar associations, firms, and consumer organizations, changes in institutional design, the role of economists, and historical enforcement norms); Voorhees, *supra* note 112, at 558 (arguing that there are four main forces that control the direction of antitrust law: (1) common-law framework; (2) the importance of judges; (3) heavy reliance on economic analysis; and (4) the concurrent jurisdiction of the DOJ and FTC).

[200] *See* Duesterberg, *supra* note 9 (reporting that the FTC filed the complaint against Qualcomm just three days before President Trump took office, replacing President Obama's administration);

The fact that the DOJ issued the Section 2 Report during the last few months of Republican George W. Bush's presidency was arguably no coincidence.[202] Critics viewed the report as a last-ditch attempt by the Bush Administration to imbue a formal pro-business approach to antitrust issues before the next—possibly Democratic—President entered office.[203] Although policy positions, such as the Section 2 Report, are not settled law or binding on the next administration, businesses, judges, and the legal community are allowed to refer to them for guidance.[204] Thus, prior to the withdrawal of the report by President Obama's Democratic administration, the state of the law regarding section 2 of the Sherman Act was extremely uncertain.[205]

Similarly, the FTC brought its 2017 case against Qualcomm in the last days of Obama's presidency.[206] Thereafter, the DOJ, under newly-elected President Trump, took a drastically different position on the role of antitrust in issues of FRAND commitments and intervened in the FTC's case by filing several briefs and statements in opposition to the broad remedial relief that the FTC sought.[207] This divide between the nation's antitrust regulators will only con-

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Lichtblau, *supra* note 115 (noting that the Obama campaign criticized the Section 2 Report that the DOJ issued in the last few months of the Bush Administration for its leniency towards businesses); *see also supra* notes 112–190 and accompanying text (discussing the two instances of major agency fighting: the 2008 Section 2 Report and the FTC's 2017 case against Qualcomm).

[201] *See* Duesterberg, *supra* note 9 (reporting that the FTC filed the complaint against Qualcomm in the final days of President Obama's tenure in office); Lichtblau, *supra* note 115 (noting that the DOJ released the Section 2 Report in the final months of the George W. Bush Administration).

[202] *See* Goulet, *supra* note 9, at 276 (noting that critics of the Section 2 Report believe that it was the Bush Administration's attempt to influence the next administration's antitrust policies); Waller, *supra* note 9, at 2 (same).

[203] *See* Waller, *supra* note 9, at 2 (describing the Section 2 Report as the DOJ's flimsy explanation for their inaction over the previous eight years as well as their attempt to bind the next administration to a similar non-interventionist approach to enforcement).

[204] *See* Goulet, *supra* note 9, at 277 (recognizing that even though the Section 2 Report does not equate to law, the legal community relies on agency guidelines to determine the legality of certain actions under antitrust law); Hovenkamp, *supra* note 112, at 1613 (noting that businesses may depend on the agency guidelines to conduct their business practices).

[205] *See* Everett, *supra* note 7, at 770 (noting that when the DOJ and FTC have contradictory approaches to antitrust enforcement, the public does not know the line between legal and illegal competitive business conduct); Goulet, *supra* note 9, at 274–75 (expressing confusion regarding the state of antitrust law in the wake of policy fights between the antitrust enforcement agencies).

[206] Duesterberg, *supra* note 9; *see also* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019) (opining on the FTC's suit against Qualcomm for violations of antitrust law), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[207] *See* Delrahim, *supra* note 166 (declaring that the DOJ was withdrawing its support from the DOJ's and USPTO's jointly issued 2013 "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments"); *supra* notes 170–190 and accompanying text (discussing the DOJ's intervention in the FTC's case against Qualcomm). *See generally* United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *supra* note 12 (arguing against the FTC's position in the FTC's case against Qualcomm and in support of defendant Qualcomm); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *supra* note 12 (same).

fuse SEP holders and standard implementers about the risk of government intervention, as it may vary depending on which agency is reviewing a company's actions.[208]

Some scholars might argue that this concern is overblown.[209] To be fair, these inter-agency battles and resulting episodes of ambiguity over the status of the law have historically been short-lived and arguably remedied soon after a new president takes office.[210] Nevertheless, when such a conflict between the DOJ and FTC arises, and for whatever period of time the agencies leave the conflict unresolved, the public, businesses, and courts lack clear and unified guidance on the government's position regarding antitrust law enforcement.[211] Moreover, squabbles between the DOJ and FTC over antitrust enforcement policies make it more difficult for the United States to exert influence on competition law in foreign jurisdictions such as the European Union.[212] As the nation becomes further polarized, irresoluble differences in antitrust policy and inter-agency

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[208] *See* Syrett, *supra* note 8 (noting that the actions of the DOJ and FTC in this case created significant uncertainty of the state of antitrust law and the standards on which businesses can rely to assess the legality of their conduct).

[209] *See* Everett, *supra* note 7, at 765–66 (noting that some scholars believe that the Section 2 Report will have a short life and little resonating impact on antitrust policy); Goulet, *supra* note 9, at 276–77 (contending that the Section 2 Report may, over time, become largely insignificant in U.S. antitrust legal history); Brooks et al., *supra* 189 (noting that President Joe Biden appears to be revitalizing antitrust enforcement after President Trump's more hands-off approach to regulation).

[210] *See* Everett, *supra* note 7, at 765–66 (noting that President Obama would likely correct the DOJ's non-interventionist approach to antitrust enforcement and act as a stabilizing influence between the DOJ and FTC); Goulet, *supra* note 9, at 276–77 (noting that given President Obama's campaign promises for stronger antitrust enforcement, the Section 2 Report would have little lasting effect on the future of antitrust enforcement under the Obama Administration); Alex Wilts, *Baer Expects "More Responsible" Approach to SEP Holders During Biden Administration*, GCR (Jan. 25, 2021), https://globalcompetitionreview.com/gcr-usa/frand/baer-expects-more-responsible-approach-sep-holders-during-biden-administration [https://perma.cc/22F8-32YK] (noting that under President Biden, SEP holders and the business community can expect a "more responsible, balanced" approach to anticompetitive actions by SEPs holders (quoting Bill Baer, former Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div.)).

[211] *See* Goulet, *supra* note 9, at 274–75 (emphasizing that the conflict between the DOJ and FTC regarding the Section 2 Report deeply undercut antitrust enforcement policy); Jacobson, *supra* note 104, at 1 (emphasizing that agreement between the DOJ and FTC is vital to providing the public and legal community with a clear and consistent understanding of antitrust law). In the context of merger review, disagreements between the DOJ and FTC can cause great harm to regulated parties. McGinnis & Sun, *supra* note 101, at 345. When pursuing action against a merger, the DOJ must bring an action in an Article III court. *Id.* In contrast, the FTC may proceed through its administrative courts as well as sue in an Article III court. *Id.* The FTC also has a lower burden of proof for obtaining a preliminary injunction than the DOJ. Ling, *supra* note 105, at 967.

[212] *See* Goulet, *supra* note 9, at 275 (postulating that foreign nations are adopting the European Commission's model for antitrust law rather than the United States' model, and that the Section 2 Report further removes the United States from a leading global antitrust position); Kovacic, *supra* note 193, at 704 (contending that polarization in antitrust policy can harm the United States' position abroad); Waller, *supra* note 9, at 3, 5 (noting that Europe exerts more influence on the world regarding the governance of anticompetitive behavior than the United States does, and that with the Section 2 Report, the United States moved further away from the dominant world position on these issues).

fighting between the DOJ and FTC may occur with greater frequency, thus jeopardizing the stability and sanctity of antitrust law in the United States.[213] Now, more than ever, the country needs collaboration between the federal agencies charged with enforcing the nation's antitrust laws.[214]

B. Proposal for a Legislative Solution

The federal antitrust agencies' structure of dual jurisdiction has rightly faced renewed criticism.[215] As it currently stands, the agencies have acted in accordance with Congress's broad grant of discretion and determined their own ad hoc process for conflict resolution.[216] This system of informal agreements and reliance on good-faith cooperation, however, is inadequate and inefficient.[217] This Note proposes that congressional intervention is the appropriate remedy to the problems that this concurrent jurisdiction creates.[218] Rather than arguing for a drastic (and most likely politically unattainable) legislative solution, such as consolidating the agencies, Congress should amend the antitrust

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[213] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Joseph Simons, Chairman, Fed. Trade Comm'n) (acknowledging that the agencies' process to determine which agency will handle an investigation is not working well and that conflicts have arisen in recent years); Gottlieb, *supra* note 191, at 339 (observing that, in politics, partisanship has increased in the last three decades). During a Senate subcommittee hearing, Republican Senator Mike Lee raised the issue of increased clashes between the agencies. *Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Sen. Mike Lee, Chairman, Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.). During the hearing, he reprimanded the agencies for their recent track record of lengthy disagreements over clearance disputes. *Id.* Senator Lee further emphasized that, when the DOJ and FTC are divided and publicly take different policy approaches to enforcement, there is much confusion both domestically and internationally on the state of antitrust law. *Id.* The division that occurred in 2019, in *Federal Trade Commission v. Qualcomm Inc.*, where the two agencies directly opposed each other in federal court, exemplified this confusion. *Id.*; *see* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019) (holding Qualcomm liable for violating antitrust laws), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020). During that same hearing, AAG Makan Delrahim admitted that several of the DOJ's and FTC's disputes have wasted time. *Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7.

[214] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (Statement of Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div.) (recognizing that the loose system that the DOJ and FTC use to help delegate their overlapping responsibilities has broken down, resulting in conflict, wasted time, and inefficiency); Gottlieb, *supra* note 191, at 339 (noting that the escalating polarization in U.S. politics is concerning and can have destructive consequences).

[215] *See Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Sen. Mike Lee, Chairman, Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.) (raising concerns over the current dual enforcement structure of the federal antitrust agencies and their current dispute clearance process).

[216] *See* Roll, *supra* note 18, at 2077 (explaining that the DOJ and FTC have adopted several agreements to aid in the allocation of enforcement given that Congress provided no guidance for how to coordinate); Peay, *supra* note 4, at 1322–23 (discussing how in the absence of congressional input or guidance, the DOJ and FTC use a collection of liaison agreements to construct informal procedures providing broad guidance on how to divide up enforcement in various industries).

[217] Peay, *supra* note 4, at 1338.

[218] *See infra* notes 219–240 and accompanying text.

laws to provide the agencies with clearer guidance and tools to allocate their overlapping regulatory responsibilities.[219] In particular, Congress should enact antitrust legislation that (1) provides more guidance on how the DOJ and FTC should delegate their shared responsibilities and (2) creates a standing committee of senior government officials from both agencies to coordinate their actions.[220]

There is some sentiment that Congress should consolidate all antitrust civil enforcement within a single agency.[221] This proposed solution could eliminate several problems, including inconsistency in antitrust policy, unfairness, inefficiency, wasting of resources on clearance investigations, and unpredictability.[222] Nonetheless, this proposed solution suffers from several faults: it disregards Congress's original purpose behind providing these agencies with dual

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[219] *See* Roll, *supra* note 18, at 2082 (arguing that the best method, although politically impossible, to resolving the flaws in the agencies' current system of agreements for delegating responsibilities is to eliminate dual jurisdiction entirely and consolidate power into one agency); Peay, *supra* note 4, at 1331 (noting that agencies have yet to devise a suitable system for resolving disagreements that stem from their concurrent jurisdiction, resulting in openings for delay and duplication of work); Press Release, Amy Klobuchar, Sen., Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement [https://perma.cc/4D8Z-B6T9] (advocating for new antitrust legislation that will provide the DOJ and FTC with needed resources along with other antitrust reforms intended to strengthen antitrust enforcement); Diane Bartz & Nandita Bose, *Exclusive: Biden Administration Considers Creating White House Antitrust Czar—Sources*, REUTERS (Jan. 19, 2021), https://www.reuters.com/article/us-usa-biden-antitrust-exclusive/exclusive-biden-administration-considers-creating-white-house-antitrust-czar-sources-idUSKBN29O2PT [https://perma.cc/5GPS-UCBA] (noting that President Biden is contemplating establishing a coordinator position aimed at helping the antitrust agencies communicate, share information, and coordinate).

[220] *See* Peay, *supra* note 4, at 1331 (explaining the inadequacies and insufficiencies in the DOJ's and FTC's current system for dividing their shared responsibilities of civil antitrust enforcement); A.B.A., REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 66 (1969) (recommending that Congress establish a standing committee dedicated to promoting inter-agency coordination and contending that the DOJ and FTC should focus their regulatory powers on issues best-suited for their specific processes); *infra* notes 229–240 and accompanying text (outlining this Note's proposed legislative solutions).

[221] *See* Roll, *supra* note 18, at 2082 (arguing that the best solution, albeit one that disregards reality, to the problems of dual jurisdiction is to consolidate all antitrust enforcement into one agency); Mike Lee, Opinion, *Just One Agency Should Enforce Antitrust Law*, WASH. EXAM'R (June 17, 2019), https://www.washingtonexaminer.com/opinion/op-eds/just-one-agency-should-enforce-antitrust-law [https://perma.cc/S4KH-JL87] (expressing concern over the issues of having two federal agencies concurrently responsible for antitrust enforcement, such as inconsistency in application of the law, inefficiency, and duplication of investigations, and calling for Congress to centralize all civil antitrust enforcement under one agency).

[222] *See* Posner, *supra* note 35, at 87–88 (outlining the deficiencies of the FTC and recommending its dissolution as the best remedy, but acknowledging that this is most likely impossible to achieve); Roll, *supra* note 18, at 2082 (contending that entrusting enforcement of civil antitrust law to one agency would alleviate the unavoidable shortcomings of delay and inefficiency associated with the agencies' current delegation).

jurisdiction and ignores the importance of having sister agencies providing checks on each other's discretion.[223]

Congress intentionally assumed a hands-off approach towards the issue of delegation in both the text of the antitrust statutes and their corresponding legislative history.[224] The purpose of the FTC Act was to augment the DOJ's power under the Sherman Act with the FTC's power of the administrative process.[225] Congress wanted both remedies to be available against anticompetitive practices.[226]

The existence of two competing federal agencies provides the public with some assurance that if one agency were to adopt an enforcement approach that was overly interventionist to the point of stifling innovation or overly conservative to the point of harming consumers, the other agency could step in to mitigate the negative consequences.[227] Moreover, competition over investigations and other matters encourages each agency to strengthen its expertise and to achieve more favorable outcomes.[228]

New legislation could provide more elements, factors, and circumstances for the agencies to consider when dividing up responsibility, thus further preventing the agencies from clashing in enforcement approaches.[229] Although a

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[223] *See* Everett, *supra* note 7, at 748 (noting that dual jurisdiction allows the agencies to check each other's actions); Roll, *supra* note 18, at 2081 (describing the DOJ and FTC as rival agencies competing for the most desirable, high-profile cases); Peay, *supra* note 4, at 1319–20 (discussing Congress's intent to provide the antitrust agencies with broad discretion to resolve the issue of overlapping jurisdiction). This solution is most likely politically unfeasible. Roll, *supra* note 18, at 2082. Congress views the FTC as its check on the Executive Branch's power, and likely would not be open to relinquishing it. *Id.* at 2083.

[224] *See* Peay, *supra* note 4, at 1319–20 (discussing how the legislative text and congressional intent behind the antitrust statutes purposefully exclude mention of a formal system or process for how the agencies should allocate their enforcement responsibilities).

[225] *See* Hansen, *supra* note 4, at 21 (examining the legislative history of and congressional intent behind the FTC Act). The history of the FTC Act signifies that Congress intended for anticompetitive conduct to be prosecuted by both legal action in federal court as well as through an administrative process. *Id.*

[226] *Id.* (explaining that Congress meant for there to be cumulative remedies against anticompetitive conduct).

[227] *See* Everett, *supra* note 7, at 748 (contending that the FTC's powers under section 5 of the FTC Act enables the FTC to check the DOJ's actions, which it usually does by releasing guidelines and educating businesses on what constitutes legal competitive conduct); *see, e.g.*, Press Release, Fed. Trade Comm'n, *supra* note 11 (explaining that rather than allowing antitrust enforcement to move in an excessively non-interventionist route, the FTC refused to join the DOJ's report and committed to filling any gaps that the DOJ's inaction left open).

[228] *See* Peay, *supra* note 4, at 1331 (noting that one of the benefits of the DOJ and FTC sharing jurisdiction is that they are continually competing for investigations, which drives them to improve instead of sinking into passivity).

[229] *See* Roll, *supra* note 18, at 2080 (noting that one of the factors that the agencies currently use to determine which agency should handle a certain matter is which has the greater expertise in the area); *see also Oversight of the Enforcement of the Antitrust Laws Hearing*, *supra* note 7 (statement of Joseph Simons, Chairman, Fed. Trade Comm'n) (acknowledging that the DOJ's and FTC's procedures to decide which agency will handle an investigation is inadequate as the increasing number of

bright-line rule designating specific areas of industry for the agencies to regulate is improbable and counterproductive given Congress's original intentions for having two federal antitrust regulators, Congress could broadly delineate certain factors for the agencies to consider.[230] For example, given the DOJ's proximity to the Executive Branch, the DOJ could focus on antitrust cases with strong implications to national security.[231] On the other hand, the FTC, with its Bureau of Consumer Protection, could have priority over cases that involve data privacy and high consumer industry markets.[232] These broad factors would provide the agencies with more guidance on which agency should handle a specific case in the event of a disagreement.[233]

In addition to providing the agencies with further instructions on how to divide their shared authority, Congress should also institute a standing committee comprised of high-level members from both agencies.[234] The committee would work to devise sophisticated, long-term, joint plans and coordinate the agencies' enforcement activities, antitrust policies, and evolving concerns.[235] This would reduce the delays, inefficiency, and waste arising out of lengthy inter-agency disputes.[236] Moreover, a standing committee with members from the DOJ and FTC could facilitate and maintain inter-agency goodwill and coop-

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conflicts between the agencies in recent years demonstrates); Everett, *supra* note 7, at 770 (warning that when the federal antitrust agencies adopt conflicting approaches to antitrust enforcement, like with the Section 2 Report, the public does not know whether their actions constitute lawful competitive business conduct or illegal violations of antitrust law); Feiner, *supra* note 7 (noting that the DOJ and FTC are clashing over how to regulate and implement antitrust laws in the technology markets); Luib, *supra* note 7 (examining the unparalleled level of disagreement between the DOJ and FTC in the FTC's suit against Qualcomm and arguing that this growing rift between the agencies' enforcement philosophies to antitrust and patent licensing are cause for alarm regarding the future of competition).

[230] *See* Hansen, *supra* note 4, at 21 (noting that the legislature wanted the DOJ and FTC to both attack and punish anticompetitive conduct).

[231] *See* McGinnis & Sun, *supra* note 101, at 309–10 (suggesting that the DOJ—as part of the Executive Branch, which serves to protect the nation—should oversee antitrust enforcement given how relevant antitrust is to national security).

[232] *See About the FTC*, *supra* note 57 (noting the FTC's different bureaus and explaining that the FTC's mission is, in part, to protect consumers from harm and advance consumer interests).

[233] *See* Peay, *supra* note 4, at 1319 (noting that the DOJ's and FTC's current system for delegation allows the agencies to duplicate work and is ineffective).

[234] *See* A.B.A., *supra* note 220, at 66 (recommending that the agencies create a committee of DOJ and FTC senior members to coordinate and plan their activities).

[235] *Id.*

[236] *See* Roll, *supra* note 18, at 2082 (noting that the DOJ's and FTC's current ad hoc procedures to ascertain which agency is best suited to handle a matter still allow for delay and inefficiency); Peay, *supra* note 4, at 1319 (noting that given the concurrent jurisdiction of the DOJ and FTC, the potential for inefficiency and duplication is unavoidable); *see also* U.S. DEP'T OF JUST. ANTITRUST DIV., *supra* note 3, at VII-3 (recognizing that the agencies' related jurisdiction requires the FTC and DOJ to work together to prevent inefficiency and promote fairness to consumers). Although an American Bar Association (ABA) commission recommended such a committee back in 1969, the government never created it. A.B.A., *supra* note 220, at 66; *see* Roll, *supra* note 18, at 2082 n.18 (noting that the ABA's suggested standing committee was never established).

eration.[237] Congress could also statutorily mandate that the committee resolve and timely clear all inter-agency conflicts over investigations, guidelines, and other enforcement actions that cannot be resolved through the existing liaison agreements and processes.[238]

These two suggested amendments would allow the agencies to maintain flexibility and discretion over antitrust enforcement as Congress intended while also providing enough constraints and safeguards to prevent the agencies from reaching another ideological stalemate.[239] Enacting legislation to reflect these two suggestions would provide a relatively non-invasive solution to the agencies' ongoing struggle to institute an effective system for resolving disputes that derive from their concurrent jurisdiction.[240]

CONCLUSION

As polarization and partisanship become the United States' new status quo, the inter-agency relationship between the DOJ and FTC must change. Until recently, the DOJ and FTC have been able, for the most part, to navigate successfully through the tangled web of dual jurisdiction armed with nothing but their collection of liaison agreements. But, that was in large part because of shared institutional goodwill and respect for long-standing norms of cooperation and coordination. In an increasing polarized political climate, the aspects that traditionally held the system together are not enough. As it is now, the agencies' ad hoc system for allocating responsibilities is insufficient to resolve their increasingly divergent policies. Unless the DOJ and FTC, with the help of

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[237] *See* A.B.A., *supra* note 220, at 66 (contending that a standing committee would enable the two agencies to more easily coordinate their enforcement actions).

[238] *See* Hansen, *supra* note 4, at 21–22 (emphasizing the importance of continued cooperation and teamwork to avoiding time waste); Roll, *supra* note 18, at 2082 (noting that delay is a large problem with the agencies' current system of allocating their shared duties under antitrust law); *see also* A.B.A., *supra* note 220, at 66 (noting that a standing committee could reduce delay); Feiner, *supra* note 7 (proclaiming that the more time the DOJ and FTC spend fighting with each other over the regulation of big tech, the less time they are spending actually investigating the large technology firms for anticompetitive conduct).

[239] Peay, *supra* note 4, at 1319–20 (examining how Congress intended to leave the onus of creating a formal system for resolving interagency clearance conflicts to the agencies themselves); Hansen, *supra* note 4, at 21 (acknowledging that Congress planned for anticompetitive conduct to be subject to both legal action in federal court and administrative action).

[240] *See* Heltzel & Laurin, *supra* note 191, at 179 (explaining that polarization in the United States has ballooned in the past few decades); Kovacic, *supra* note 193, at 689 (contending that politics has an undeniable influence over the individuals that Congress and the Executive Branch charge with overseeing the DOJ and FTC and on the agencies themselves); McGinnis & Sun, *supra* note 101, at 308 (explaining that Congress, academics, and antitrust regulators are unsure of the best approach to antitrust regulation in new markets created by recent technological developments); Roll, *supra* note 18, at 2083 (noting that drastic action, such as elimination of the agencies' overlapping responsibility for enforcing antitrust laws, is likely impossible given the delicate balance of powers between Congress and the Executive Branch).

Congress, establish a more formal system for allocating their enforcement responsibilities, the clashes between the two antitrust agencies are only going to increase and thus further destabilize the state of antitrust law. Despite its hands-off approach to these two regulatory agencies in the past, Congress now needs to intervene by (1) providing the agencies with clear guidelines on how to allocate their overlapping regulatory responsibilities; and (2) instituting an overseeing standing committee to help preserve the sanctity of antitrust law and protect businesses and consumers.

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