Cozen Currents: Use the Force

The Cozen Lens

- As bipartisanship wanes, forced compromise remains an essential component of governance in Washington, DC.
- Dealmaking activity is up, but antitrust enforcement is also expected to increase as growing political cover from President Biden will give the antitrust regulators more room to take risks, even if the lawsuits end in defeat.
- The growth of populism within both parties is creating an unlikely bipartisan coalition of lawmakers interested in breaking up the dominance of major credit card payment networks.

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Forced Compromise Picks Up Where Bipartisanship Ends

Bipartisanship vs. Forced Compromise. Even amid high partisanship, the federal political system demands a degree of cooperation.

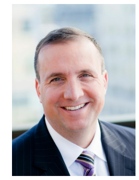
- Political polarization has made compromise a dirty word for many in Washington, DC. While President Biden achieved some bipartisan successes early in his term, the 118th Congress has been one of the least productive under divided government.
- Even as grand bipartisan deals prove elusive, forced compromise remains a necessary part of the system. As long as divided government exists and the filibuster ensures a 60-vote threshold for the passage of legislation in the Senate, working across the aisle is essential to get must-pass legislation over the finish line. Unified control of the federal government by one party will always be fleeting with elections every two years, making forced compromise necessary again.
- The House's razor-thin majority has made compromise virtually essential for passage of major legislation even just in the lower chamber. House Speaker Mike Johnson (R-LA) has been forced to bypass the House Freedom Caucus' control of the Rules Committee by bringing bills to the floor for passage via suspension of the rules, which requires a two-thirds majority.

Appropriations. Forced compromise is necessary for funding the government.

- Appropriations is the quintessential example of the need for compromise. Some measures that until recently would have been considered "must pass," such as foreign aid to Ukraine, have lost that status. Not so with spending bills.
- Lawmakers this week are racing to finish work on the last half-dozen FY24 spending bills, including defense, before current funding expires on Friday. Despite pressure from the right flank of his conference, Johnson struck a spending deal with Democrats that resembles the Fiscal Responsibility Act negotiated between Biden and Johnson's predecessor, Kevin McCarthy (R-CA), last year. Even amid the high partisanship of the 118th Congress, Johnson saw a deal as essential to prevent a shutdown (a bad look for vulnerable GOP incumbents in an election year).

Divided Government. Forced compromise will always be necessary under divided government, which is more common than not.

- Unified control of Congress and the White House (a trifecta) is the exception, not the norm. In the over 30 years since President Clinton's first term began, one party has held a trifecta for only 12 years. Most commonly, a president will enter office with unified control of Congress



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- Regardless of who wins majorities in Congress, barring removal of the Senate filibuster, one party cannot totally impose its legislative agenda. The budget reconciliation process offers the chance to bypass the filibuster but only for a limited range of issues. Most legislation is subject to the 60-vote threshold in the Senate. A 60-vote majority is unrealistic for either party to win in the current polarized era.

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The Politics of Dealmaking in 2024

Biden's Besties. President Biden's embrace of a progressive approach to antitrust has created a symbiotic relationship between the White House and his antitrust enforcers.

- Biden surprised many by choosing Lina Khan to lead the Federal Trade Commission, and since the early days of his administration, progressive policies have dominated his approach to competition policy, including antitrust enforcement.
- For the antitrust regulators, this political cover from the White House allows them to take more risks in the deals they decide to challenge. Khan and Assistant Attorney General for Antitrust Jonathan Kanter are more comfortable with defeat in court than their predecessors. Still, a big reason this is possible is Biden's unwavering support.
- Winning in court is not the only way for Biden to have a political victory. Simply challenging a transaction can be a win as it gives Biden something to point to as evidence of his administration's efforts to stand up to corporate interests and prove his populist stripes.

Consumer-Focused Competition Policy. As the election cycle has ramped up, the White House's focus has been on fighting for consumers and has bolstered the political cover for Biden's regulators.

- Inflation has been an issue for much of Biden's presidency, but the White House's focus on the topic creates additional political scrutiny on deals in sectors it blames for driving high prices. These sectors include grocers, the energy industry, and the healthcare industry. Another area the White House has frequently targeted is junk fees, making transactions in industries such as the airline and financial services sectors political targets too.
- While politics alone are not the reason Khan and Kanter will challenge a given deal – the size of some deals would have made scrutiny from their "anti-Big" mindset unavoidable – knowing they have political cover may lead them to take more risks. Resource constraints will limit how many challenges the antitrust regulators can bring. Still, based on past patterns, they may choose to go after the largest transactions, in turn generating the most political value for Biden.

The Elephant in the Room. In addition to increasing political cover for Biden's antitrust regulators, the election can also impact the timing or determine the fate of some transactions depending on the politics of the deal.

- The election has supercharged Nippon Steel's proposed acquisition of US Steel. In addition to the fact that it is a historic American company, US Steel's concentration in key swing states and unionized workforce have created additional political dimensions. Approval for the deal is doubtful before the election as there is little political upside for Biden to clear the transaction prior, if at all.
- Some businesses may also be eyeing the election as a potential pivot from aggressive antitrust enforcement if former President Trump wins. However, with the growing populist trend among Republicans, this is not a sure thing. Senator J.D. Vance (R-OH) recently referred to Khan as the "best person" in the Biden administration. At a minimum, Trump will likely continue the scrutiny on Big Tech, but the rest of his antitrust agenda will depend on his regulatory nominees.

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Credit and Debit Card Battle Lines in DC

Retail Takes on Credit. A planned April 9th Senate Judiciary Committee hearing on the swipe fees credit card payment networks charge merchants is reigniting a battle in Washington between retailers seeking lower fees and the credit card issuers and payment networks who charge them.

- Major retail merchants and their trade associations are strongly supportive of a bill from Senate Judiciary Committee Chair Richard Durbin (D-IL), known as the Credit Card Competition Act (CCCA), that would require large credit card issuers to allow at least two credit card networks on their credit cards, one of which could not be Visa or Mastercard. Merchants' argument that the cost savings from lower fees would be passed on to consumers has caught the attention of lawmakers.
- Retailers' characterization of the issue has angered banks and credit card networks which are quick to note merchants historically pocketed the savings from lower interchange fees instead of reducing costs for consumers. Banks are also warning the bill would force them to eliminate popular credit card reward programs.
- Banks and credit card networks gained a powerful ally in the airline industry late last year. Major airlines are increasingly reliant on co-branded credit cards as a source of revenue. The airlines similarly worry the bill would force them to eliminate popular rewards programs, reducing travelers' interest in their cards.

Populism Comes for Finance. Democrats supportive of the effort to break up Visa and Mastercard's dominance of the credit card payment network space are supported by a group of former President Trump-aligned populist Republicans who dislike corporate consolidation.

- While Durbin's support for lower interchange fees is unsurprising given the successful passage of his 2011 amendment to lower debit card swipe fees, his partnership with three Trump-supportive senators is. Senators Roger Marshall (R-KS), Josh Hawley (R-MO), and J.D. Vance (R-OH) all co-sponsored the legislation.
- Roger, Hawley, and Vance are part of a new wave of Republicans increasingly skeptical of consolidating actions from corporations. They view Visa and Mastercard's dominance of the credit card network market as an antitrust issue that is harming businesses and consumers.
- While bipartisan support for the CCCA is a concern for banks and card networks, a majority of lawmakers from both parties have yet to take a position on the bill. The White House and Senate leadership are similarly silent, leaving the legislation's path to law uncertain in an election year.

Credit Rating: Junk. The election year is also placing credit card issuers in the crosshairs of a Biden administration eager to highlight its regulatory efforts to lower costs for voters at a time of high prices.

- Banks are fighting a war on two-fronts as preparation for the hearing on the CCCA overlaps with a legal fight against the Consumer Financial Protection Bureau (CFPB). The CFPB has targeted credit card late fees as part of President Biden's war on "junk fees," finalizing a rule this month that would slash the average credit card late fee an issuer can charge from $30, or $41 in the case of second time violations, down to $8.
- Trade associations representing credit card issuers sued to block implementation of the rule days after its finalization. If the legal fight drags on until next year, the rule's ultimate fate could depend on the outcome of the presidential election. Bloomberg projects the bill could eliminate as much as $9 billion in late fee revenue for issuers if implemented.
- One other issue worth watching is a Federal Reserve Bank proposed rulemaking to further lower debit card interchange fees from the levels set by the Durbin amendment. The rule pits retailers against card networks and issuers, similar to the CCCA. The Fed extended the comment period to May 18th at the request of the banking industry.