# Case (Circumvention)

### 1NC---Circumvention

#### Court circumvention---they ignore intent and plain meaning, reject literature bias towards optimism.

Crane ‘21 [Daniel A Crane. Frederick Paul Furth, Sr. Professor of Law, University of Michigan. I am very grateful for many helpful comments from Tom Arthur, Jonathan Baker, Steve Calkins, Dale Collins, Eleanor Fox, Rebecca Haw, Hiba Hafiz, Jack Kirkwood, Bob Lande, Christopher Leslie, Alan Meese, Steve Ross, Danny Sokol, and other participants at the University of Florida Summer Antitrust Workshop. "ANTITRUST ANTITEXTUALISM." https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr]

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

#### Clarifying the scope and meaning of vague language doesn’t solve---courts ignore, Congress backs down, it’s already very clear.

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This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation?

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

Even where reform statutes are textually honored in their immediate aftermath, history shows a creeping judicial tendency to begin integrating the reform statutes into the mainstream of antitrust jurisprudence within a few decades. This has been the fate of the four major antitrust reform statutes— the FTC, Clayton, Robinson-Patman, and Celler-Kefauver Acts—each of which was meant to rein in capital in ways that the Sherman Act did not. In all four instances, however, the courts incrementally began mainstreaming the statutes into Sherman Act precedent, creating a homogenous antitrust jurisprudence that read the textual distinctiveness out of the reform statutes. Thus, today, cases under the FTC Act, section 3 of the Clayton Act, and the Robinson-Patman Act are largely indistinct from Sherman Act cases,256 and merger cases have been rolled into the same modes of price-theoretic analysis that would be employed in a Sherman Act case.257 Given that neither statutory text nor legislative history seems to have deterred the courts from this process within a few decades after the passage of the statutes, there is little reason to believe that a “this time we mean it” statutory reform would not meet the same fate. If the courts continue to understand aspects of the antitrust statutes as aspirationally motivated and operationally impracticable, the previously observed pattern is likely to continue.

### 2NC---Circumvention

#### Courts ignore the law---clarity, congressional intent, and precedent are all irrelevant

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Judges and scholars frequently describe antitrust as a common-law system predicated on open-textured statutes, but that description fails to capture a historically persistent phenomenon: judicial disregard of the plain meaning of the statutory texts and manifest purposes of Congress. This pattern of judicial nullification is not evenly distributed: when the courts have deviated from the plain meaning or congressional purpose, they have uniformly done so to limit the reach of antitrust liability or curtail the labor exemption to the benefit of industrial interests. This phenomenon cannot be explained solely or even primarily as a tug-of-war between a progressive Congress and conservative courts. The judges responsible for these decisions were far from uniformly conservative, Congress has not mobilized to overturn the judicial precedents, nor, despite opportunities to do so, have the courts constitutionalized their holdings to prevent congressional overriding. Antitrust antitextualism is best understood as an implicit political arrangement in which Congress writes broad statutes expressing anti-bigness republican idealism, and then the courts read down the statutes pragmatically to accommodate competing demands for efficiency and industrial progress.

#### Congress won’t check---decades prove they avoid conflict with the courts over interpretive issues

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Congress writes expansive statutes reining in business power, the courts (either immediately or over time) disregard the plain text of the statutes and trim them down in favor of capital, and Congress acquiesces through inaction. Why? The best-fitting explanation is this: the antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche—the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large-scale organization may be necessary to achieve material advantages. The romanticism and idealism of the anti-bigness impulse pushes it to the fore in the popular political arena. Congress legislates on the popular aspiration for an egalitarian economy organized around small proprietors and independent local businesses and freedom from economic dominance. When the statutes come to the courts or antitrust agencies, judges and antitrust enforcers play the pragmatic role of balancing those popular aspirations against the contending impulse for efficiency and material benefit. This balancing act induces them to give less effect to the statutes than the broad statutory texts suggest. So long as the judicial decisions achieve results that strike a politically acceptable outcome between the aspirational and pragmatic impulses, Congress is content to leave the judicial and enforcement decisions alone.

#### Empirics---Historically, not a single law has been interpreted faithfully

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In sum, from the courts’ earliest forays into interpreting the Sherman Act up through contemporary antitrust jurisprudence, the courts have manifested a systematic tendency to interpret the substantive antitrust statutes contrary to their texts, legislative histories, and often their spirit.236 Sometimes, as with the rule of reason and labor exemption, the judicial disregard of text and purpose has occurred fairly immediately. In other cases, as with the Robinson-Patman and Celler-Kefauver Acts, an initial period of statutory fidelity has slipped gradually into a period of statutory infidelity. In some cases, as with respect to section 5 of the FTC Act and section 3 of the Clayton Act, the courts continue to proclaim their fidelity after they functionally move to infidelity. In many cases, the courts stop pretending after a while and admit quite candidly that they are taking liberties with the statute.

If this antitrust antitextualism is merely the product of common-law methodology, one would expect to see movement away from the statute’s text in both permissive and restrictive directions, or, to put it more crassly, both in favor of big capital and against it. But the movement has all been in one direction: loosening a congressional check on big capital. Thus, the rule of reason allowed courts to bless large combinations of capital that the courts deemed reasonable; narrowing the labor exemption frustrated labor’s ability to countervail capital’s power; restricting the private right of action for treble damages significantly curtailed the private-litigation check on business; judicial narrowing of the Clayton Act’s exclusive dealing and tying restrictions allowed (mostly big) firms to exploit market power; reading “unfair” out of the FTC Act eliminated section 5 as a check on business morality; eviscerating the Robinson-Patman Act protections for small and independent businesses favored large and powerful businesses; and requiring proof of likely price increases and technical relevant market definition in merger cases immunized many large-scale mergers from legal challenge. Throughout the history of American antitrust law, the courts have shown a systematic tendency to read down the antitrust statutes in favor of big capital.

But the story of antitrust antitextualism is not simply one of conservative/progressive ideological struggle between Congress and the courts. Much of the action away from statutory text and purpose was accomplished by, or with the support of, judges of the political left. Unlike in other fields, Congress has not responded with statutory overrides. And far from buttressing its atextual statutory readings of the antitrust laws through veiled constitutional warnings about congressional overreaching, the Court has repeatedly pulled in the opposite direction, asserting quasi-constitutional reverence for antitrust law.237 Despite ample opportunity to do so, the Court has not removed antitrust law from the reach of congressional reconsideration by constitutionalizing its atextual readings. Antitrust antitextualism does not follow a conventional left/right ideological pattern. Its actual pattern is more subtle.

# Advantage CP

## 1NC---CP

### 1NC---CP

#### The United States federal government should:

#### Advantage 2---FTC Assurance Planks

#### assure the FTC it will remain an independent authority;

#### increase mechanisms to ensure public confidence in the FTC;

#### Advantage 2---Food I/L

#### regulate cryptocurrencies;

#### Advantage 2---Terror I/L

#### prosecute bank employees involved in money laundering ;

#### Advantage 2---Terror Impact

#### reduce governmental bureaucracy, by establishing a universal definition of “counterterrorism” and allocating resources accordingly;

#### create an intergovernmental framework for evaluating U.S. counterterrorism programs and missions;

#### promote cooperation and development of counter-terrorism efforts among allies;

#### Advantage 1---Remedial Regulation [Kicked]

#### should adopt a remedial regulation requiring private sector actors engaging in false advertising to govern their licensing arrangements under a penalty default contract until and unless contracts are negotiated which are proven to create reasonable competition;

#### Advantage 1---R&D Planks

#### increase its funding for startup companies in the United States;

#### increase its spending on research and development;

#### should fully fund, resource, and deploy ASSURE.

## 2NC---CP

### 2NC---Solvency---R&D

#### Solves pharma innovation.

Mandt et al 20, 8-20-2020, Rebecca Mandt, Department of Immunology and Infectious Diseases, Harvard T.H. Chan School of Public Health; Kushal Seethara, Department of Electrical Engineering and Computer Science, Massachusetts Institute of Technology; Chung Hon Michael Cheng, Institute for Data, Systems, and Society, Massachusetts Institute of Technology. "Federal R&D funding: the bedrock of national innovation," MIT Science Policy Review, https://sciencepolicyreview.org/2020/08/federal-rd-funding-the-bedrock-of-national-innovation/

Addressing Market Failures

Unlike the private sector, the federal government is uniquely suited to guide national innovation toward public priorities, such as healthcare, clean energy, and infrastructure, that market incentives ignore [24]. The government has a role in two different types of market failure. The first is a true market failure where fundamental research underlying new technologies is not funded by the private sector due to the risk-reward profile and timeline to commercial relevance. The second is that regardless of how efficient the market is, an incrementally progressing economy does not always align with pressing societal needs or generate optimal societal outcomes.

Private firms’ and industries’ goal to maximize profit from an R&D investment often results in the financing of short-term, low-risk technologies. This is especially true in areas where the foundational research is mostly complete and the bulk of the remaining work is in short-term development. It follows that U.S. industries tend to spend about 80% of their R&D investments on technological development and only 20% on foundational research, which are longer-term, riskier (although arguably cheaper) investments [8]. This trend towards “short-termism” has become increasingly predominant in industry with more and more investment going into development rather than research [25]. As less and less research is being done in the private sector, companies are increasingly relying on work done at academic institutions funded by the federal government. For example, almost 90% of high-impact research papers authored by corporations were written in collaboration with scientists at academic and government labs [26]. The amount of corporate patents that rely on work done elsewhere has also increased dramatically; almost a third of all patents filed in recent years cite federally-supported research. The patents that cite federally-supported research were also found to be of greater substance and novelty on average [27].

While the reliance of the private sector on research produced elsewhere is not problematic a priori, this model only works when federal funding is available to provide these long-term, risky investments into basic and applied research. For example, the U.S. shale gas boom relied heavily on federal funding through the scientific research performed at the Gas Research Institute and the geologic mapping technology developed at Sandia National Labs [24]. This is an example of the federal funding addressing a true market failure by derisking private sector R&D.

The market by itself, however, is often blind to environmental concerns and the long-run societal and economic impact of pressing issues like climate change. Such societal issues are the purview of the federal government, which can use federal funding and other policies to catalyze national innovation towards clean energy technologies and climate resilience. Other examples of public priorities where the government has a pivotal role include developing new antibiotics and understanding the effects of opioids [28]–[30]. Federal research funding is therefore critical both by supporting fundamental research that the private sector is not incentivized to invest in, as well as by providing leadership in targeting societally critical issues. Below, we give two case studies demonstrating these roles.

Case study 1: A canonical example of the government’s role in laying the foundation for innovative technology is the Internet. While the concept of a wireless telecommunications system was around as far back as the early 1900s when Nikola Tesla coined the term “World Wireless System,” the first working prototype of such a network was created by the Department of Defense under the Advanced Research Projects Agency (ARPA) [31]. The goal of “ARPANET,” as it was named, was to create a secure telecommunications system that could distribute information wirelessly in the case of an attack [32]. ARPANET incorporated many key innovations including the concept of “packet switching”—breaking an electronic message into smaller packages that can be transmitted to a new location and re-assembled. The initial network had host computers connected via phone lines to “interface message processors”—the predecessor to the modern-day router [32]. Over the next 20 years, ARPA-funded researchers continued to develop advanced communication protocols and to expand ARPANET into a broader “network of networks” [31, 33]. In addition to the role of ARPA, another federal agency, the National Science Foundation (NSF), was also essential in providing networking services and high-end computing power to universities across the county. These NSF-supported supercomputing centers developed many advances in web applications, including the first freely accessible web browser, which was the basis of modern browsers including Microsoft Internet Explorer and Netscape Navigator [34]. While the Internet as it is known today cannot be credited to any single organization, the role of government research in laying the foundation is undeniable. It is difficult to imagine that such an expansive project involving years of research and coordination across multiple institutes could have been undertaken without its involvement [35].

Case study 2: A good example of the mismatch of public and private objectives can be seen in the development of new antibiotics to keep ahead of rising bacterial resistance to pre-existing drugs. Antimicrobial resistance is widely recognized as one of the greatest threats of the 21st century [36]. Widespread use of antibiotics has led to the evolution of drug-resistant bacteria that no longer respond to currently used treatment methods. Thus, there is a critical need to produce new antibiotics. In spite of this, there has actually been a decrease in the number of new antibiotics being developed and approved since the 1980s, and many large pharmaceutical companies have downsized or eliminated their antibiotic discovery programs [37, 38]. This is because there are several barriers that limit the profitability of new antibiotics, often leading to a poor return on investment. Unlike drugs for chronic conditions, antibiotics are typically taken for a short period of time. New antibiotics entering the market face competition from cheaper generics, and are often reserved as drugs of last resort [39]. Even if an antibiotic is successful, there is always a danger that resistance to the new drug will emerge, so it may only be effective for a limited window of time.

Given the high risk associated with bringing any new drug to market and limited ability to recoup investments, it is understandable that this is a priority that the private sector will not address on its own. Thus, several government agencies have stepped in to fill the gap. For example, the Biomedical Advanced Research and Development Authority (BARDA) has contributed $1.1 billion since 2010, advancing nine new antibiotics to clinical development, three of which have already been approved [29]. BARDA and several other Department of Health and Human Services (HHS) agencies have also awarded grants and facilitated public-private partnerships to incentivize the development of new drug candidates [39, 40]. It is clear that without continued federal involvement, there would exist few solutions against a post-antibiotic world where millions die each year from bacterial infections that were once easily treatable [36].

#### Solves tech leadership.

Mandt et al 20, 8-20-2020, Rebecca Mandt, Department of Immunology and Infectious Diseases, Harvard T.H. Chan School of Public Health; Kushal Seethara, Department of Electrical Engineering and Computer Science, Massachusetts Institute of Technology; Chung Hon Michael Cheng, Institute for Data, Systems, and Society, Massachusetts Institute of Technology. "Federal R&D funding: the bedrock of national innovation," MIT Science Policy Review, https://sciencepolicyreview.org/2020/08/federal-rd-funding-the-bedrock-of-national-innovation/

America’s prosperity and success have been underwritten in no small part by its technological leadership [2]. And as America loses ground in the global race in technological innovation, this position, along with the prosperity and security America has enjoyed, are at stake [3, 4]. In an increasingly competitive global environment, federal support of scientific research—research that pays dividends decades into the future—is all-the-more fundamental to the U.S.’s current and future economic success [5].

American progress in an array of key research areas—e.g. photonics, robotics, artificial intelligence, nanotechnology—areas that would generate the yet-unimagined technologies and industries of the future decades from now, threatens to lag behind that of other countries [5]. Put another way, compared to other countries, we are not investing enough in our own country’s future, threatening economic prosperity and job creation decades down the line. The federal government’s failure to aggressively invest in scientific research is already exacting a cost: research projects in universities across the country are being shut down because of funding cuts [6]. The ramifications of these present cuts will be felt for decades to come [3].

This paper diagnoses the current problem with insufficient federal research funding and lays out the unique role of the federal government in the national scientific research enterprise. In particular, we first highlight the importance of federal funding in facilitating innovation and then outline the reasons for and results of insufficient federal research funding. The federal government sets national priorities for scientific and technological progress, addresses market failures concerning high-risk, public-good research endeavors, and “crowds in” human and capital resources to R&D, both public and private, creating a virtuous, self-reinforcing cycle of greater investment in research and innovation. We conclude that U.S. federal R&D expenditures should be greatly expanded in order to sustain the economic prosperity and social well-being of America and its people. Furthermore, we recognize the necessity of galvanizing political will through policy advocacy and public engagement to safeguard future support for federal R&D.

### 2NC---Solvency---Disease

#### Assure plank solves disease---provides best models for containment

Lee ’17 (Eva; 2/19/2017; Ph.D. at Rice University in the Department of Computational and Applied Mathematics, professor in the H. Milton Stewart School of Industrial and Systems Engineering at Georgia Institute of Technology, Director of the Center for Operations Research in Medicine and HealthCare, Senior Research Professor at the Atlanta VA Medical Center, undergraduate degree in Mathematics from Hong Kong Baptist University, NSF/NATO postdoctoral fellowship on Scientific Computing, postdoctoral fellowship from Konrad-Zuse-Zentrum Informationstechnik Berlin in 1995 for Parallel Computation, received the NSF Presidential Young Investigator Award for research on integer programming and parallel algorithms and their applications to medical diagnosis and cancer treatment; “Adaptable model recommends response strategies for Zika, other pandemics,” <https://www.sciencedaily.com/releases/2017/02/170219165113.htm>; Date Accessed: 7/3/2017; DS)

Lee's presentation gave the results for Zika using her model, described by public health experts as "a digital disease surveillance and response" tool. The tool, ASSURE, can use many types of data, including biosurveillance, environmental, climate, viral, host, human behavior and social factors. If genetic information for the disease carriers are available, they also can be incorporated. Lee explained how the modeling system provides the ability to predict disease spread, assess risk and determine effective containment methods. In addition, it can help public health leaders optimize deployment of limited resources to help prevent and reduce the extent of future outbreaks. "The containment of pandemics is fundamental to preventing a global epidemic**,"** said Lee. "ASSURE is a computational modeling tool designed for real-time support. By accepting real-time data, the model produces predictions that are customized to reflect a specific environment, policy and human behavior on the ground." Referring to data related to the Zika outbreak in Brazil, Lee discussed which containment approaches are most effective there. Her model shows that the easiest and most productive way to contain the outbreak in Brazil is to the reduce the biting rate of mosquitoes by using insect repellents/mosquito-wristbands, wearing long-sleeved shirts and long pants, and employing air conditioning and window/door screens to keep mosquitoes out. The result is practical. For example, the model demonstrates that only 20 percent compliance can reduce the total infection by half. This strategy is more successful than just widely applying insecticide and lasers to kill mosquitos. The model offers policymakers a decision-support framework to estimate the cost-effectiveness of each prevention measure. The modeling system also underscores the importance of early intervention by revealing the timing of different interventions and associated outcomes. "Knowing when to respond and how it affects the outcome is essential," Lee said. Lee has shared some of these findings with federal officials, who recommended implementation of her resulting policies and strategies for Puerto Rico. She is also working with public health leaders in Houston, Texas, to identify high-risk areas and to optimize local surveillance and intervention. Lee's system can be applied to help contain a wide variety of epidemics, including not only Zika but also dengue, Ebola, and many other types. "The modeling framework accommodates various transmission mechanisms. This allows public health officials to adapt rapidly to changing disease environments and different emerging epidemics," said Lee. As part of a continuing research effort, Lee is working with vaccinologists on vaccine immunity prediction to permit faster design and evaluation of new and emerging vaccines and to identify individuals either most likely or least likely to be protected by a vaccine. An applied mathematician and modeling innovator, Lee has traveled to hot spots around the world as an advisor in response to public health catastrophes. She has long partnered with the CDC on medical preparedness and emergency response. Since 2015, she served on the National Preparedness and Response Science Board (NPRSB), the federal committee that provides advice and guidance to the U.S. Department of Health and Human Services (HHS).

### 2NC---Solvency---Terror

#### Counterrror solves ---each plank is an alt-cause

Tankel 18 – Stephen; assistant professor at American University, adjunct senior fellow at the Center for a New America Security, a senior editor at War on the Rocks, and author of “With US and Against US: How America’s Partners Help and Hinder the War on Terror.” Former senior advisor at the Department of Defense. (“Doing More With Less: How To Optimize U.S. Counterterrorism” War on the Rocks. May 22, 2018. <https://warontherocks.com/2018/05/doing-more-with-less-how-to-optimize-u-s-counterterrorism/>)//SR

The United States has made considerable strides in its ability to gather and synthesize intelligence, track and target terrorists, and use direct action to eliminate threats. It has also put in place a robust homeland security architecture that, in concert with international protocols, has helped prevent another centrally directed terrorist attack from overseas. These and other unilateral measures could undoubtedly be improved. But to really combat terrorism effectively while prioritizing other security challenges, the United States must also conduct counterterrorism more efficiently. The U.S. government will need to do at least two things: reform the counterterrorism bureaucracy and policymaking process, and get more out of its allies and partners. Intergovernmental Reforms Almost 17 years after 9/11, the different U.S. government agencies involved in the fight against terrorism still cannot even agree on a common conception of counterterrorism or the objectives that should define it. There may be agreement at the top of the pyramid in the National Security Council, but get into the trenches at different agencies and it quickly becomes apparent that conceptions and priorities vary. It is also unclear whether anyone but a few senior officials has an accurate picture of what the counterterrorism bureaucracy actually looks like or how the different pieces fit together. It is not uncommon for lines of effort to conflict with one another, either across multiple agencies or sometimes within the same one. The cumulative lack of clarity – on a definition of counterterrorism, objectives and priorities, and areas of responsibility – makes strategic planning difficult. This incoherence also makes it nearly impossible to allocate resources effectively. Is the United States getting sufficient bang for its buck? Some people may see the $2.8 trillion price tag and declare it is not. Others could point to the small number of Americans killed in terrorist attacks since 9/11 to suggest the expenditure has been worth it. The truth is, no one knows because there has never been a comprehensive, government-wide evaluation of counterterrorism efforts. Moreover, the assessments conducted by individual offices or agencies vary in rigor and are often isolated from one another. They also tend to focus on investments or to measure performance as opposed to effectiveness. Of course, counterterrorism is not the only policy area where the U.S. government struggles to assess whether programs are working as intended. Congress literally [had to mandate](https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf) that the Department of Defense implement an assessment, monitoring, and evaluation framework for security cooperation. Nevertheless, the fact remains that no intergovernmental framework exists for evaluating U.S. counterterrorism programs. These failings are partly a function of the fact that the United States was thrust into the fight after 9/11. Policymakers and practitioners immediately began adding on to the existing counterterrorism infrastructure without first drawing up the blueprints for how to do it. It’s beyond time, however, to find ways to make U.S. counterterrorism both more effective and efficient. Above all, the government needs to outline common criteria for what constitutes counterterrorism. This would enable policymakers to map the existing U.S. counterterrorism infrastructure and identify gaps and redundancies. Additionally, a common picture would improve oversight of how money for counterterrorism is spent, allowing for more transparency and providing a baseline for assessment, monitoring, and evaluation. Congress could help drive reforms by mandating evaluations for all counterterrorism-related programs similar to [the way it did](https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf) for security cooperation and assistance. The House Armed Services Committee, recognizing the need for effective evaluation, has taken the initial step of directing the military’s Special Operations Command [to support a counterterrorism effectiveness research](https://rules.house.gov/sites/republicans.rules.house.gov/files/CRPT-115HRPT-676.pdf) agenda like the one at [The National Consortium for the Study of Terrorism and Responses to Terrorism at the University of Maryland](http://www.start.umd.edu/). This is a good start and Special Operations Command is a key player in the counterterrorism effort, but truly effective evaluations would be intergovernmental and civilian-led. Ideally, Congress would [devote more money to research](http://thehill.com/opinion/national-security/370748-new-defense-strategy-requires-paradigm-shift-in-us-counterterrorism), promote the development of a menu of common metrics to enable better interagency coordination, and devote 3 to 5 percent ([the internationally accepted best practice](https://www.cnas.org/publications/reports/remodeling-partner-capacity)) of any program budget to assessment, monitoring, and evaluation. Getting More from U.S. Partners President Barack Obama sought to make counterterrorism more sustainable by emphasizing the need to work by, with, and through partner nations. This emphasis on sharing the costs and risks of counterterrorism in order to reduce the strain on the United States is one of the few areas in foreign policy where Trump has not broken with his predecessor. As I describe in a new book about counterterrorism cooperation – [With Us and Against Us: How America’s Partners Help and Hinder the War on Terror](https://www.amazon.com/Us-Against-Americas-Terrorism-Irregular/dp/0231168101/ref=sr_1_1?ie=UTF8&qid=1513890604&sr=8-1&keywords=with+us+and+against+us+tankel) – there are three major problems with the current U.S. approach. The first two are longstanding, whereas the third is unique to Trump. First, U.S. policies often fail to account for how partners prioritize the shared terrorism threat relative to other challenges. For years, the United States has emphasized shared threats as a reason why partner nations should cooperate with it. Trump’s counterterrorism strategy is [missing in action](https://www.theatlantic.com/international/archive/2018/03/trump-terrorism-iraq-syria-al-qaeda-isis/554333/), almost a year after [news reports that a draft was close to complete](https://www.reuters.com/article/us-usa-extremism/exclusive-trump-counterterrorism-strategy-urges-allies-to-do-more-idUSKBN1812AN); however, early drafts suggest it maintains this emphasis. All things being equal, countries are most willing to take action when a terrorist group threatens them directly. Of course, other things are not always equal. Local partners often face other, greater threats from a variety of sources, including regional competitors, domestic opposition movements, or separatist movements. For example, Saudi Arabia faces the same jihadist threat from al-Qaeda and ISIL as the United States does, but views Iran as a greater threat. This contributed to the Saudi intervention in Yemen, where the kingdom has [targeted the Iranian-backed Houthis at the expense of al-Qaeda in the Arabian Peninsula](https://www.thecipherbrief.com/the-end-of-aqaps-last-refuge-in-yemen-2) and thereby [created space for group to expand its zones of support](https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf). Second, American officials have been overly optimistic about their ability to change a partner’s calculus, or at least secure cooperation, as a result of America’s reputation or the provision of security assistance. Incentives are most useful for obtaining transactional cooperation, such as military access, which can be critical for disrupting terrorist attacks but typically are insufficient to defeat a terrorist group. They are considerably less useful for getting a country to conduct robust counterterrorism operations, address the risk factors for terrorism, or contribute to diplomatic initiatives. For evidence of this, look no further than Pakistan. In return for security assistance, it provided the Unites States access to resupply forces in Afghanistan and conduct drone strikes. But no reasonable amount of aid could change Pakistan’s strategic calculus when it came to supporting the Taliban-led insurgency in Afghanistan or thwarting efforts to negotiate a political solution to the conflict there that was not in its interests. Third, although Trump has embraced burden-sharing, he is pursuing a highly transactional and overwhelmingly militarized approach to it that seeks only to outsource military operations to other countries or secure agreement for the United States to conduct its own operations on their territory. Obama’s reliance on partners was not only intended to share the costs and risks of counterterrorism, it was also supposed to make gains more sustainable by giving partners ownership of the fight, building patterns of cooperation with them, and marrying military efforts with diplomacy and development. Trump’s departure from this strategy is evident in his engagements with America’s democratic allies — especially in NATO — who he has attempted to [bully into greater burden sharing](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-nato-unveiling-article-5-berlin-wall-memorials-brussels-belgium/) by threatening to limit U.S. protection if they don’t do (and pay) their fair share. It is also apparent in Trump’s decisions to [freeze hundreds of millions of dollars in stabilization aid for areas in Syria](https://www.cnn.com/2018/05/19/politics/donald-trump-syria-aid/index.html) liberated from the Islamic State and to [instruct the military to begin planning for a full withdrawal](https://www.washingtonpost.com/world/national-security/trump-instructs-military-to-begin-planning-for-withdrawal-from-syria/2018/04/04/1039f420-3811-11e8-8fd2-49fe3c675a89_story.html?utm_term=.63e39eea9847).

#### Solves cartels---eliminates funding and support

Morris ’13 (Evelyn Krache, Research Fellow, International Security Program, Belfer Center for Science and International Affairs @ JFK School of Govt, Harvard; Think Again: Mexican Drug Cartels; Dec 3;www.foreignpolicy.com/articles/2013/12/03/think\_again\_mexican\_drug\_cartels)

"We Need to Hit Them Where It Hurts: the Wallet." Exactly. Despite the ongoing arguments about drug legalization and border security, the most effective way to combat the scourge of the DTOs would be to interdict not drugs or people but money. As in any business, money is the fuel that keeps the cartels running. Even if Sinaloa, to give only one example, were to disappear tomorrow, other organizations would quickly rise to take its slice of the lucrative pie. One of the most basic tenets of business is that highly profitable markets attract lots of new entrants. This is true for legal and illegal enterprises alike. The staggering profits of illegal trade would be much less attractive if the DTOs could not launder, deposit, and ultimately spend their money. But shutting down the cartels' financial operations will be a formidable task, given the help they have had from multinational financial institutions, which have profited from the cartels' large-dollar deposits. In 2010, Wachovia bank (which was acquired by Wells Fargo in 2008) admitted that it had processed $378 billion of currency exchanges in Mexico -- an amount equal to about one-third of the country's GDP -- to which it had failed to apply anti-laundering restrictions. In 2012, British bank HSBC settled with the U.S. government for $1.9 billion to escape prosecution for, among other things, laundering hundreds of millions of dollars for the Sinaloa cartel. U.S. law enforcement has also implicated Bank of America and Western Union in DTO money laundering. Although illegal money transfers can happen without banks' knowledge, the volume and widespread occurrence of these transactions indicate just how easy it is for the cartels to clean their dirty money. Paying a fine to avoid prosecution is almost no punishment at all. The fines Wachovia paid amounted to less than 2 percent of its 2009 profit. Even the record fine assessed on HSBC amounted to only 12 percent of the bank's profits. Furthermore, banks can simply accrue funds to offset any possible fines, either by increasing what they charge cartels or by setting aside some of the earnings from laundering, even as they continue to do business with the DTOs. Prosecuting bank employees involved in money laundering, up through the highest levels of an institution, would be a better tack. Pictures of a chief compliance officer as he entered a courtroom for sentencing would have a far greater deterrent effect than any financial penalty. To that end, investigative techniques and legal precedents for going after global criminal networks are increasingly robust, and the political payoffs could be substantial. One of the more successful campaigns in the war on terrorism has been the financial one; experience gained in tracking the funds of al Qaeda could make it easier to similarly unravel Los Zetas' financing. Malfeasance in the financial industry is nothing new, but public sensitivity to banks' wrongdoing is arguably higher than it has been in decades. An enterprising prosecutor could make quite a reputation for herself by tracking DTO money through the financial system. The cartels, along with the violence and corruption they perpetrate, are threats to both Mexico and the United States. The problem is a complicated one and taps areas of profound policy disagreement. The way to make progress in combating the DTOs is to ignore issues like gun control and illegal immigration and follow the money. Stanching the cartels' profits will do more to end the bloodshed than any new fence or law.

# FTC DA

### Link Turns Case---Backlash

#### Link turns case. Expanded antitrust enforcement of anticompetitive practices causes backlash.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

#### Congressional backlash scares them off from overexerting themselves.

Chris Jay Hoofnagle et al 19. Adjunct Professor of Information and Law - University of California, Berkeley, and Woodrow Hartzog, Professor of Law and Computer Science - Northeastern University, and Daniel J. Solove, John Marshall Harlan Research Professor of Law - George Washington University Law School. “The FTC can rise to the privacy challenge, but not without help from Congress.” Brookings. 8/8/2019. <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>

**Resources are the FTC’s greatest constraint**. It is a small agency charged with a broad mission in competition and consumer protection. It carries out this mission with a budget of just over $300 million and a total staff of about 1,100, of whom no more than 50 are tasked with privacy. In comparison, the U.K.’s Information Commissioner’s Office (ICO) has over 700 employees and a £38 million budget for a mission focused entirely on privacy and data protection. In addition, for much of modern history, Congress has kept the FTC on a short leash. In 1980, Congress punished the agency for being too aggressive, causing it to shut down twice. Congress has held authorization over the agency’s head and used oversight power to scrutinize what members of Congress perceive as the expansive use of FTC legal authority, including its interpretation of privacy harm.

Given these constraints, **FTC attorneys make pragmatic choices in their case selection**. **At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources.** **The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy**.

### AT: Deterrence---Resources

#### Plan collapses the FTC.

Alan Devlin 21. Partner, Latham & Walkins Law Firm. “Part II - The Case for Change.” *Reforming Antitrust*. Cambridge University Press. 2021. DOI: 10.1017/9781009000260. 109-226.

Meanwhile, flipping the burden of proof upends the American tradition in which free contract is the default and the government must prove its case in order to enjoin private conduct. As described below, easing the agencies’ need to establish harm to competition would usher forth diminished rigor of analysis and, in time, an abundance of unmeritorious cases. Separately, eliminating divestitures as a means for resolving horizontal merger issues – a neo-Brandeisian favoriteFootnote121 – is unworkable. Resource constraints pose a threshold problem. Suing to block every transaction that features, in some line, a problematic horizontal overlap would require a massive increase in staff and budget for the agencies. More fundamentally, however, the policy would be unsustainable. Sophisticated parties to a transaction could agree to sell an overlap unit as a precedent condition to their merger. The government would then face a fait accompli, and be left with trying to challenge a transaction that involves no competitive overlap – a case that, even on the proposals above – would likely be dead on arrival.

### AT: Empowerment/Effort

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### 1. FTC is cash-strapped---the plan destroys other enforcement priorities.

Nicolás Rivero 21. Technology reporter at Quartz. “Biden’s antitrust crusaders can’t crusade without Congress.” 3/11/21. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which is already struggling to pay for its current docket. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

#### 2. Limited resources force tradeoffs in enforcement decisions.

Bernard (Barry) A. Nigro Jr. et al., 21 – Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ, with Nathaniel L. Asker and Aleksandr B. Livshits, 1/5/21. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert. https://www.friedfrank.com/siteFiles/Publications/FFAntitrustAggressiveAntitrustEnforcement01052021.pdf

Further, despite a record number of litigated cases, the budget at the antitrust agencies is insufficient to match the rhetoric of more enforcement. The DOJ had 25% fewer full-time employees in 2019 than it had 10 years earlier9 and the FTC recently imposed a hiring freeze. With limited resources, the agencies are forced to make important tradeoffs in deciding what matters to challenge, settle, or walk away from. Indeed, Commissioner Wilson reportedly voted against bringing a lawsuit to block CoStar’s acquisition of RentPath, in part, because of limited FTC resources.10 Although the agencies will receive a modest budget increase for the current fiscal year,11 it is far short of what some think is needed.12 As antitrust enforcement has become a bipartisan issue, a significant increase in the antitrust agencies’ budgets in the future is likely.

#### 3. It directly undermines privacy enforcement.

David Hyman 19 – Professor at Georgetown University Law Center, with William E. Kovacic, “Implementing Privacy Policy: Who Should Do What?” 29 Fordham Intell. Prop. Media & Ent. L.J. 1117 (2019). https://ir.lawnet.fordham.edu/iplj/vol29/iss4/3

The case for making an enhanced FTC the national privacy regulator is straightforward. Of all U.S. privacy implementation institutions, the FTC has unequaled capacity in the form of expert case handling and policy teams and physical resources (including the development, over the past decade, of an internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort). The agency’s capacity also is the product of extensive experience in applying its UDAP authority and enforcing statutes such as the FCRA and COPPA. The FTC has a broad portfolio of policy instruments (litigation, rulemaking, consumer and business education, data collection, the preparation of reports, the convening of conferences), and it has demonstrated its ability to use all of them to good effect in the privacy domain. The FTC’s stature as an independent agency gives it additional credibility in the eyes of foreign officials, who generally distrust the vesting of privacy powers in an executive department.

Within an enhanced FTC, privacy policy implementation also would be informed by the Commission’s larger experience with consumer protection. The FTC’s privacy unit is one part of its Bureau of Consumer Protection, rather than being a self-contained bureau. This reflected the institution’s reasonable view that the effort to safeguard consumer interests in “privacy” was one dimension of “consumer protection,” rather than a wholly distinct policy realm. Our impression is that many matters that involve privacy issues also raise problems that fit within other areas of the FTC’s consumer protection program. The analysis of the “privacy” issue often benefits from perspectives developed in the course of applying the agency’s deception and unfairness authority in other cases. The intertwining of privacy issues with other consumer protection concerns in many scenarios has important implications for how the mandate of a privacy agency should be defined. In whatever setting one ultimately might place a “privacy” mandate, we would expect that the host agency would have a mandate that incorporates powers that traditionally have been associated with the FTC’s broader consumer protection program.83

The FTC’s expertise in antitrust should also help it develop and enforce privacy policy. Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections. The FTC’s work in both consumer protection and antitrust draws upon a Bureau of Economics with over 80 PhDs in economics.84 The Bureau of Economics has developed considerable skill in sub-disciplines (including behavioral economics) with special application to privacy issues.

Of course, inputs are not the same thing as outputs. The FTC has not always achieved the full integration of perspectives that the combination of these institutional capacities would permit. And, although there are policy complementarities across the domains of antitrust, consumer protection, and privacy, this combination of functions is not an unmixed blessing. An agency with all three functions might seek to use its position as a gatekeeper with respect to one policy domain to leverage concessions from firms over which it exercises oversight in another domain.85 Such temptations have been present when the FTC has applied its antitrust powers to review mergers involving companies in the information services sector.86

Finally, there is the possibility that any one of these functions might be diminished if all three are contained in the same agency. An agency focused solely on privacy will make privacy policy its single concern. An agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.

#### 4. Companies will drag out cases and drain FTC resources.

Michael Kades 21 – the director for markets and competition policy at the Washington Center for Equitable Growth, 7/28/21. “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law.” https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### 5. Treading on new turf magnifies the link---the agency will take time AND money to develop new proficiencies

Seth B. Sacher & John M. Yun 19, Sacher is an Economist, Washington, DC; Yun is from the Antonin Scalia Law School, George Mason University, “TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT,” 26 Geo. Mason L. Rev. 1491, 1493, Summer 2019, Lexis

VII. Fallacy Seven: Not Recognizing That Their Proposals Will Strain Competition Agency Resources, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, will require significantly more active market supervision than is currently the case. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

### Antitrust Tradeoff Privacy

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

### AT: New Antitrust Now

#### Deadlock prevents antitrust enforcement

Doesn’t interfere with privacy enforcement because there’s consensus. The plan changes this by FIAT

Eleanor Tyler 10/7/21. Legal Analyst on the Litigation team, with a focus on antitrust, at Bloomberg Law. “ANALYSIS: FTC May Be Headed Into Deadlock, Delaying Big Deals.” https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ftc-may-be-headed-into-deadlock-delaying-big-deals

The Federal Trade Commission may be about to pause, unable to act on antitrust enforcement and policy until President Biden’s nominee can be confirmed and seated.

On Oct. 8, Federal Trade Commissioner Rohit Chopra is stepping down to take up his new position as head of the Consumer Financial Protection Bureau. Because it takes a majority among the Commissioners present to conduct business, and because the remaining commissioners will be split 2-2 between Democrat and Republican appointees, the Commission may find itself sitting on its hands until an equally divided Senate can approve privacy expert Alvaro Bedoya, whom Biden nominated Sept. 20 for Chopra’s seat.

In the past, the Commission has typically managed to continue making decisions and bringing cases while short a member (or several). These aren’t normal times, however. Many actions could be easily conducted on a bipartisan basis, but decisions about antitrust policy—and, potentially, antitrust enforcement—have proven contentious. That poses a potential obstacle for deals currently under investigation at the FTC, which tend to be large deals and those with market overlap between the parties.

#### 4. They’re giving everything else a pass.

Zephyr Teachout 10/29/21. Associate professor of law at Fordham Law School. “Why Judges Let Monopolists Off the Hook.” https://www.theatlantic.com/ideas/archive/2021/10/antitrust-facebook-congress-sherman-act/620539/

Americans have gotten far too used to the idea that corporate behemoths are free to acquire any company they want, engage in predatory behavior, and bully, squeeze out, or demand kickbacks from smaller rivals. Indeed, the U.S. government’s decision to let Facebook buy an obvious rival, Instagram, looks so wrong in hindsight—especially now that leaked documents have revealed Facebook’s seeming indifference to the many problems that its products cause or exacerbate—that Americans should utterly disavow the complex legal framework that allowed the Federal Trade Commission to rationalize that decision. Over the past several decades, establishing that a company has violated antitrust law has become an extraordinarily difficult process. And when violations of the law are hard to punish, authorities will usually give them a pass—as the FTC did with Facebook’s acquisition of Instagram. (Yesterday, Facebook rebranded itself as Meta.)

#### No major new cases

Brent Kendall 10/9/21. Legal affairs reporter in the Washington bureau of The Wall Street Journal. “Justice Department Makes Quiet Push on Antitrust Enforcement.” https://www.wsj.com/articles/justice-department-makes-quiet-push-on-antitrust-enforcement-11633800598

The five-member FTC voted 3-2 along partisan lines last month to formally withdraw those guidelines. The commission’s new chairwoman, Lina Khan, is a leading progressive advocate for overhauling antitrust enforcement. She has been laying the groundwork for changes at the commission as she settles into the job, but hasn’t yet spearheaded any major new cases.

### UQ---COVID---Slow Down

#### COVID goes neg – proves ftc taking it slow – green

Andrew M. Levine 20, litigation partner who focuses his practice on white collar and regulatory defense, internal investigations, “White Collar Crime and COVID-19: Enforcement in a Rapidly Changing Landscape”, https://www.debevoise.com/insights/publications/2020/05/white-collar-crime-and-covid-19-enforcement-in-a

In the short term, while enforcement agencies prioritize safety and work remotely, at least certain aspects of white collar and regulatory investigations globally will slow. There is much anecdotal evidence that enforcement agencies have reduced the scale and pace of some investigations given current obstacles. For example, there will be inevitable delays as response times to subpoenas and investigative requests are extended due to difficulties in sourcing documents and information remotely. Further practical limitations – such as lack of remote access to investigation files and physical evidence due to information security protocols, court closures, difficulties with videoconference technology, and restrictions on in-person meetings and interviews – also have delayed investigations.

### UQ---Brink

#### This is our brink argument---the FTC’s managing its caseload, but only barely---the aff is a bolt from the blue, unplanned expansion of antitrust enforcement that forces tradeoff with privacy.

LEAH NYLEN 9/29/21. POLITICO's antitrust reporter. “Lina Khan’s big tech crackdown is drawing blowback. It may succeed anyway.” https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581

Despite all the friction, Khan’s admirers say the agency is finally back on the right track.

“The FTC is pushing as hard as they can right now, which is what we have needed for so long,” said Charlotte Slaiman, competition policy director for the advocacy group Public Knowledge, during POLITICO’s Tech Summit this month. She added: “I expect great things from the FTC.”

#### Current enforcement is streamlined to enable focus on algorithmic bias.

Jeffrey J. Amato and Jay R. Wexler 9/28/21. “United States: FTC Ramps Up Tech Investigations, Reduces Investigators' Hurdles.” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1115450/ftc-ramps-up-tech-investigations-reduces-investigators39-hurdles

At its September 14, 2021 open meeting, the Federal Trade Commission (FTC) announced the passage of eight "omnibus" resolutions by a 3-2 party-line vote to authorize quicker investigations into prioritized issues. The resolutions allow staff attorneys to use compulsory process demands, which are usually issued as civil investigative demands or subpoenas, with approval from only one commissioner. Previously, agency staff were expected to receive approval from the full commission prior to issuing demands for information from companies. The resolutions aim to facilitate investigations into: unlawful conduct directed at veterans and service members; unlawful conduct directed at children; bias in algorithms and biometrics enabling discriminatory practices; dark patterns and deceptive online conduct that lure users into making unwanted purchases; repair restrictions that allegedly harm competitors and consumers; abuse of intellectual property; common directors and officers and common ownership; and monopolization offenses.

#### Other enforcement is all talk

JED GRAHAM 9/16/21. Writes about economic policy for Investor's Business Daily.

Khan is clearly using her bully pulpit to the utmost, trying to dissuade merger talks from reaching fruition.

But right now it's all talk. She has turned a few heads, but the S&P 500 and Big Tech leaders have kept cruising. Facebook stock is up 11% since Khan took the FTC's helm on June 15, while Apple has climbed 15% and Google stock 18%. That's despite reports that the Justice Department is preparing to file a second Google antitrust suit over its ad dominance.

The new antitrust enforcement regime may not change all that much "until they show that they can sue and win," Kovacic said.

### AT: XO Thumps

#### Plan is different.

Masuda et. al. 21. Funai, Eifert & Mitchell, Ltd. Masuda, Funai, Eifert & Mitchell, Ltd. is a U.S. law firm headquartered in Chicago, Illinois, “The Implications of President Biden's "Executive Order on Promoting Competition in the American Economy" 8.18.21. https://www.masudafunai.com/articles/the-implications-of-president-bidens-executive-order-on-promoting-competition-in-the-american-economy?utm\_source=Mondaq&utm\_medium=syndication&utm\_campaign=LinkedIn-integration

On July 9, 2021, President Joe Biden signed a sweeping executive order titled the “Executive Order on Promoting Competition in the American Economy” (the “Order”), affirming the policy of the Biden administration to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” To achieve this, the Order, among other things, directs regulatory agencies to assert oversight over certain business practices and encourages regulatory agencies to develop and/or strengthen rules. The Order includes 72 initiatives by more than a dozen federal agencies.

The Order specifically cites the areas of “labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.” The scope of this order is broad. On the other hand, the Order itself does not create new regulations or laws, leaving the specific implications of it vague.

### Ai = Extinction

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

#### **1. Algorithmic bias risks nuke war.**

Elsa B. Kania 17. Adjunct fellow with the Technology and National Security Program at the Center for a New American Security, 11/15/17. “The critical human element in the machine age of warfare.” https://thebulletin.org/2017/11/the-critical-human-element-in-the-machine-age-of-warfare/

Today, however, the human in question might be considerably less willing to question the machine. The known human tendency towards greater reliance on computer-generated or automated recommendations from intelligent decision-support systems can result in compromised decision-making. This dynamic—known as automation bias or the overreliance on automation that results in complacency—may become more pervasive, as humans accustom themselves to relying more and more upon algorithmic judgment in day-to-day life.

In some cases, the introduction of algorithms could reveal and mitigate human cognitive biases. However, the risks of algorithmic bias have become increasingly apparent. In a societal context, “biased” algorithms have resulted in discrimination; in military applications, the effects could be lethal. In this regard, the use of autonomous weapons necessarily conveys operational risk. Even greater degrees of automation—such as with the introduction of machine learning in systems not directly involved in decisions of lethal force (e.g., early warning and intelligence)—could contribute to a range of risks.

Friendly fire—and worse. As multiple militaries have begun to use AI to enhance their capabilities on the battlefield, several deadly mistakes have shown the risks of automation and semi-autonomous systems, even when human operators are notionally in the loop. In 1988, the USS Vincennes shot down an Iranian passenger jet in the Persian Gulf after the ship’s Aegis radar-and-fire-control system incorrectly identified the civilian airplane as a military fighter jet. In this case, the crew responsible for decision-making failed to recognize this inaccuracy in the system—in part because of the complexities of the user interface—and trusted the Aegis targeting system too much to challenge its determination. Similarly, in 2003, the US Army’s Patriot air defense system, which is highly automated with high levels of complexity, was involved in two incidents of fratricide. In these stances, “naïve” trust in the system and the lack of adequate preparation for its operators resulted in fatal, unintended engagements.

As the US, Chinese, and other militaries seek to leverage AI to support applications that include early warning, automatic target recognition, intelligence analysis, and command decision-making, it is critical that they learn from such prior errors, close calls, and tragedies. In Petrov’s successful intervention, his intuition and willingness to question the system averted a nuclear war. In the case of the USS Vincennes and the Patriot system, human operators placed too much trust in and relied too heavily on complex, automated systems. It is clear that the mitigation of errors associated with highly automated and autonomous systems requires a greater focus on this human dimension.

#### 2. Algorithmic bias in AI is an existential threat.

Mara Hvistendahl 19 – correspondent with Science magazine, 3/28/19. “Can we stop AI outsmarting humanity?” <https://www.theguardian.com/technology/2019/mar/28/can-we-stop-robots-outsmarting-humanity-artificial-intelligence-singularity>

Existential risks – or X-risks, as Tallinn calls them – are threats to humanity’s survival. In addition to AI, the 20-odd researchers at CSER study climate change, nuclear war and bioweapons. But, to Tallinn, those other disciplines “are really just gateway drugs”. Concern about more widely accepted threats, such as climate change, might draw people in. The horror of superintelligent machines taking over the world, he hopes, will convince them to stay. He was visiting Cambridge for a conference because he wants the academic community to take AI safety more seriously.

At Jesus College, our dining companions were a random assortment of conference-goers, including a woman from Hong Kong who was studying robotics and a British man who graduated from Cambridge in the 1960s. The older man asked everybody at the table where they attended university. (Tallinn’s answer, Estonia’s University of Tartu, did not impress him.) He then tried to steer the conversation toward the news. Tallinn looked at him blankly. “I am not interested in near-term risks,” he said.

Tallinn changed the topic to the threat of superintelligence. When not talking to other programmers, he defaults to metaphors, and he ran through his suite of them: advanced AI can dispose of us as swiftly as humans chop down trees. Superintelligence is to us what we are to gorillas.

An AI would need a body to take over, the older man said. Without some kind of physical casing, how could it possibly gain physical control?

Tallinn had another metaphor ready: “Put me in a basement with an internet connection, and I could do a lot of damage,” he said. Then he took a bite of risotto.

Every AI, whether it’s a Roomba or one of its potential world-dominating descendants, is driven by outcomes. Programmers assign these goals, along with a series of rules on how to pursue them. Advanced AI wouldn’t necessarily need to be given the goal of world domination in order to achieve it – it could just be accidental. And the history of computer programming is rife with small errors that sparked catastrophes. In 2010, for example, when a trader with the mutual-fund company Waddell & Reed sold thousands of futures contracts, the firm’s software left out a key variable from the algorithm that helped execute the trade. The result was the trillion-dollar US “flash crash”.

The researchers Tallinn funds believe that if the reward structure of a superhuman AI is not properly programmed, even benign objectives could have insidious ends. One well-known example, laid out by the Oxford University philosopher Nick Bostrom in his book Superintelligence, is a fictional agent directed to make as many paperclips as possible. The AI might decide that the atoms in human bodies would be better put to use as raw material.

Tallinn’s views have their share of detractors, even among the community of people concerned with AI safety. Some object that it is too early to worry about restricting superintelligent AI when we don’t yet understand it. Others say that focusing on rogue technological actors diverts attention from the most urgent problems facing the field, like the fact that the majority of algorithms are designed by white men, or based on data biased toward them. “We’re in danger of building a world that we don’t want to live in if we don’t address those challenges in the near term,” said Terah Lyons, executive director of the Partnership on AI, a technology industry consortium focused on AI safety and other issues. (Several of the institutes Tallinn backs are members.) But, she added, some of the near-term challenges facing researchers, such as weeding out algorithmic bias, are precursors to ones that humanity might see with super-intelligent AI.

Tallinn isn’t so convinced. He counters that superintelligent AI brings unique threats. Ultimately, he hopes that the AI community might follow the lead of the anti-nuclear movement in the 1940s. In the wake of the bombings of Hiroshima and Nagasaki, scientists banded together to try to limit further nuclear testing. “The Manhattan Project scientists could have said: ‘Look, we are doing innovation here, and innovation is always good, so let’s just plunge ahead,’” he told me. “But they were more responsible than that.”