

## Antitrust Enforcers Must Have More Funding

By **Barry Barnett** (July 7, 2023, 6:10 PM EDT)

Robert Bork said that serving on the U.S. Supreme Court "would be an intellectual feast."<sup>[1]</sup>

Abstract, arcane and avid for tricky math, the technocratic approach Bork proposed to antitrust law in "The Antitrust Paradox: A Policy at War with Itself," published in 1978, has all but eaten its populist heart.

As a result, "Paradox" has for 45 years made antitrust enforcement actions increasingly costly to bring, far harder to win, and challenging for even experts to understand.

In an economy that has grown 1,000% since 1978, suffered far greater concentration of markets, and produced ever larger gigantic firms, antitrust agencies need more resources — in terms of today's dollars — than they did then. Yet they have less. That must change.<sup>[2]</sup>



Barry Barnett

### **A Cold Wind Blew**

At the center of the worst winter storm in Connecticut's modern history, deep within the Sterling Law Building, Yale's gothic shrine to American law, crisp new copies of "The Antitrust Paradox: A Policy at War with Itself" lay atop the desk of its enigmatic author.<sup>[3]</sup>

They awaited inscription to colleagues he wanted to help him transform antitrust law with "a pair of related propositions": (1) that the "only legitimate goal of American antitrust law is the maximization of consumer welfare," and (2) that any action to enforce antitrust law has no legitimacy unless it increases consumer welfare.<sup>[4]</sup>

Bork's thesis left no room for any of the "noneconomic values" that underlay antitrust statutes; it made economics essential.<sup>[5]</sup>

### **And I Do Mean Essential**

The year of "Paradox's" debut, 1978, arrived "during a peak era of antitrust enforcement."<sup>[6]</sup>

But by 2004, professor Bork's panegyric to maximizing "consumer welfare" had led the Supreme Court to pronounce "charging monopoly prices" not only not a crime but an "important element of the free-market system."<sup>[7]</sup> Indeed, Bork's valorization of a narrowly economic measure of consumer welfare as

the sole goal of antitrust laws now rules most antitrust doctrine[8] almost as resoundingly as the Yale football team dominated the gridiron before World War I.[9]

### ***Dismal Science***

The central role in which "Paradox" cast economics goes far in explaining why antitrust cases have become hugely, and increasingly, more expensive to litigate — and progressively harder to win.

On the cost side, the now-indispensable economics experts might charge, in a private case, millions and even tens of millions of dollars to define the relevant market; compute the "but for" price of the goods or services in question; prove the losses resulting from anti-competitive conduct; establish that common elements of proof will predominate over individual proof; and disprove the inevitable theoretical pro-competitive justifications for facially anti-competitive behavior.

In consequential challenges to practices of digital platform and other Big Tech firms, gaining internal expertise in cutting-edge — and high-paying — fields like data science, algorithms, artificial intelligence and more has become essential.

### ***Gloomy Outlook***

On the difficulty-of-winning side, several factors — the Bork movement's disdain for populist underpinnings of antitrust law, its Pollyannaish idea that conspiracies and monopoly power bring about their own destruction, its worry about false positives and dread that enforcement might cause collateral harm, its near insistence on compelling proof of price effects, and its faith in market self-correction — soon enough combined with conservative vetting of prospects for the federal trial and appellate bench and pressure on federal courts to decide cases at the dismissal or summary judgment stage to forge a judicial attitude that made progressing to trial, and then, God willing, prevailing on appeal, even more costly and risky.

Today, with even a pro-enforcement administration focusing less on "antitrust views" of judicial appointees, the "technocratic" impulses of the judiciary could remain a hindrance to enforcement victories.[10]

### ***And such small portions.***

The same reluctance that infected federal courts appears to have affected antitrust appropriations by Congress too.

Over the same four-plus decades, funding for enforcement of antitrust laws fell in real terms. By one measure, while the U.S. economy grew almost 10 times over from 1979 to 2022,[11] the Federal Trade Commission's and U.S. Department of Justice Antitrust Division's budgets increased fewer than seven times — a loss equal to 34% of the enforcers' total resources.[12]

Just to return the agencies to their appropriation levels of 45 years ago, Congress would need to add almost \$340 million to the 2023 fiscal year appropriation of \$655 million — a whopping 50-plus percent rise over an unusually large \$85.7 million bump in 2022, and \$50 million more than the \$290 million the FTC and Antitrust Division have collectively requested for 2024.

And a \$340 million boost would not account for the much more daunting qualitative difficulty — in

investigating, litigating and trying antitrust cases — that arises from the greater complexity inherent in a modern digital economy.[13]

### **Ready for Revival**

Paradoxically, the confluence of greater cost, higher risk, stronger foes and dwindling resources comes at a time of extraordinary ambition by, and outside demands from, both progressives and conservatives.

Neither side fancies the immense power of tech titans like Amazon.com Inc., Apple Inc., Facebook/Meta Platforms Inc., and Google LLC/Alphabet, although each tends to dislike their dominance for different reasons.

While they also diverge on important details of enforcement policy and none of the major bills for reining in digital platform behemoths like Amazon, Apple, Google and Meta passed or appears likely to pass in the current Congress,[14] bipartisan support for reinvigorating antitrust enforcement remains at or near a 45-year peak.

### ***We have leaders willing and able to bring cases.***

The major battlefield for antitrust will remain the courthouse.

Success in that forum will depend in the first instance on the willingness and ability of leadership at the FTC and Antitrust Division to staff and sustain the merger challenges, nonmerger civil actions, and — in the case of the Antitrust Division — criminal prosecutions that will optimize moving antitrust law forward while cost-effectively preventing competition-diminishing mergers,[15] remedying civil antitrust law violations, and punishing and deterring criminal violations.

FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter have the necessary drive.

And the Biden administration's "Whole-of-Government Competition Policy" has made fostering competition a priority in all agencies, providing important presidential support for an aggressive enforcement stance by the Bureau of Competition and Antitrust Division.[16]

### ***Efforts to reform antitrust doctrine fell short.***

As the 117th Congress neared its end Jan. 3, hopes for a slew of ambitious antitrust reform bills dwindled to just two: the American Innovation and Choice Online Act, S.B. 2992, and the Merger Filing Fee Modernization Act, H.R. 3842.

Had it passed, AICOA would have allowed enforcers to police discrimination against rivals by owners of dominant online platforms — such as Google's search and ad platforms and Apple's app store.

The Merger Filing Fee Modernization Act did become law, boosting enforcement funding by a fraction of the \$1 billion total necessary to restore it to a pre-"Paradox" level. A change to venue law frees state attorneys general from involuntary transfers of antitrust actions from their home states to distant forums handling multidistrict litigation involving the same subject matter.

But substantive antitrust law did not change. The burdens of post-"Paradox" jurisprudence remain firmly in place.

***We need at least a billion dollars.***

Restoring the principal enforcement agencies to the funding levels they had when "Paradox" came out would require Congress to appropriate a total of almost \$1 billion — \$629,850,000 to the FTC and \$324,821,000 to the Antitrust Division.[17]

But they actually need more.

Even a 50% funding boost would not equip federal enforcers to restore competitive vigor to the economy. The near half-century reign of "The Antitrust Paradox" has left the American economy, in industry after industry, with firms that wield power to raise prices and slow innovation as well as "seemingly endless" and "nearly unlimited" resources for fighting enforcement.[18]

As the Antitrust Division put it, "increased enforcement activity has stretched its staff and technology infrastructure to their limits." [19]

And litigation itself has become vastly more expensive since 1979. While views vary on the causes, the usual suspects include the much greater volume and cost of discovery involving electronically stored information, the time-consuming motion practice it often spawns, high-stakes challenges to experts and the opinion evidence they sponsor, and case-dispositive motions for summary judgment.

**The Necessity of More Funding**

The 45 years since Bork inscribed those crisp new copies of his magnum opus in 1978 have brought economics to the fore in antitrust law, vastly increased the cost of litigating antitrust cases, produced a jurisprudence — and judiciary — tolerant of large aggregations of economic power and skeptical of vigorous enforcement, reduced the resources available for enforcement, and produced adversaries with the means to threaten enforcers' mission.

Last year, I argued in a Law360 guest article that thinking like private contingent-fee lawyers could help trial teams at the FTC Bureau of Competition and the DOJ Antitrust Division get the most bang for scarce antitrust-enforcement bucks.[20]

But the resource mismatch between enforcement agencies and their stunningly wealthy corporate opponents has grown too large for simply doing more with less.[21]

The FTC and the Antitrust Division together received a welcome \$85.7 million funding boost in fiscal year 2023,[22] but both need — and can productively use — substantially more money.

"We are not keeping pace with the demands of our expansive mission," FTC Chair Khan told a House subcommittee in April.[23]

With "rapidly changing technology" and "ever more complex merger transactions," she said, the FTC must pursue "more complex and expensive litigation" while "confronting legal challenges to our authority" and facing defendants that have "seemingly limitless resources." [24]

In the previous month, the Antitrust Division likewise pointed to the "nearly unlimited defense budgets" corporate opponents routinely bring to bear.[25] It, too, cited the "imperative" that the division "have

the resources needed to be successful and litigate these cases effectively." [26]

The FTC and Antitrust Division, respectively, have asked Congress for increases of \$160 million and nearly \$100 million over their appropriations for fiscal year 2024. [27]

But even if they get the full \$260 million boost they requested for 2024, [28] total funding for federal antitrust enforcement would remain almost \$340 million — in today's dollars — below its equivalent level for the much smaller U.S. economy in 1979 [29] — a year that marked an important turning point in antitrust enforcement.

A less progressive, more technocratic approach to antitrust doctrine started taking hold, and an economically more cautious federal judiciary began doubting the benefits of assertive enforcement.

Today, moreover, the enforcers' biggest potential adversaries have market capitalizations 20 or more times as large as their counterparts did — in constant dollars — 45 years ago. [30] Meanwhile, litigating a case costs much more now than then.

And a digital world that did not exist in 1979 and an economy with much higher rates of concentration have brought new challenges requiring new competencies. [31]

Thinking like a plaintiffs lawyer will surely enable the FTC and Antitrust Division to do more with the funding they have.

But Congress must recognize that almost five decades of consolidation have damaged the competitive vitality of the U.S. economy while rewarding the few at the expense of the many.

With each of four U.S. companies now worth more than 1,000 times the \$1 billion in annual funding the FTC and Antitrust Division must have to do their jobs properly, appropriating anything less would be a dereliction of duty.

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[1] THE BORK HEARINGS; An Intellectual Appetite, The New York Times, Sept. 20, 1987. The remark helped sink Bork's nomination to the Court.

[2] See, e.g., Yale School of Management, Modern Antitrust Enforcement: Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects (available at <https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement>).

[3] Three blocks away, I—a freshman recruit in a helmet-wearing sport—had just begun wrestling with the economic concepts—supply and demand, marginal cost, and above all efficiency—that the wide influence of Paradox would make essential knowledge for the plaintiff-side antitrust lawyer I would become seven years later.

[4] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978).

[5] *Id.* at 48.

[6] Michael Kades, *The State of U.S. Antitrust Enforcement*, Sept. 17, 2019. [https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true#antitrust\\_resources](https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true#antitrust_resources).

[7] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

[8] Professor Bork achieved a sort of antitrust apotheosis in one of the Supreme Court's latest antitrust decisions, *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021). Writing for a 9-0 Court, Justice Gorsuch said "consumer" 42 times while lavishing praise on the superiority of "markets" over "the heavy hand of judicial power when it comes to enhancing consumer welfare." *Id.* at 2166.

[9] The Elis won 348 games out of 397 during those four decades. That Yale's first coach, Walter Camp, wrote almost all the rules of the game, including the one creating the line of scrimmage, of course played no role in that dominance!

[10] Tim Wu, "The President's Role in Antitrust Policy" (May 15, 2023), <https://ssrn.com/abstract=4448227>, forthcoming in *Journal of Antitrust Enforcement*. A left-leaning journal recently lamented that, in contrast to Republicans, "Democrats have shown no interest in finding antitrust experts to be judicial nominees." David Dayen, "The Case for Judge Tim Wu", *The American Prospect* (May 9, 2023). <https://prospect.org/justice/2023-05-09-case-for-judge-tim-wu/>.

[11] See *infra* n.27.

[12] See FTC Appropriation History (reflecting appropriations of \$65 million in 1979, \$376.5 million in 2022, and \$430 million in 2023); AD Appropriation Figures (showing appropriations of \$37,508,000 in 1979, \$192.8 million in 2022, and \$225 million in 2023).

[13] See, e.g., Giovanna Massarotto, "Can Computational Tools Revitalize Antitrust Enforcement?", *ProMarket*, June 13, 2023 ("In this new technological environment, antitrust agencies need to be equipped with the same computational tools that companies are increasingly using to pursue profits and market expansion."). <https://www.promarket.org/2023/06/13/can-computational-tools-revitalize-antitrust-enforcement/>.

[14] Areas of dispute include whether and how much to narrow the liability shield for online content in section 230 of the Communications Decency Act, whether the consumer-welfare standard gives enough weight to suppression of non-price aspects of competition (such as quality and innovation) by dominant firms, and whether Congress should lower the standards enforcers must meet to block or undo mergers.

[15] On June 27, 2023, the FTC and Antitrust Division proposed major increases in the amount and type of information that merging firms must provide under the pre-merger notification requirements of the Hart-Scott-Rodino Act of 1978. See Bryan Koenig, "FTC Proposes Dramatic Overhaul of Merger Filings", *Law360*, June 27, 2023. Although the notice of the proposal states the changes "would improve the efficiency and effectiveness of [the] initial review" that all mergers above \$111 million in value must undergo, it does not discuss whether the revisions would increase the agencies' workload.

[16] Professor Wu led the conception and drafting of the "Whole-of-Government Competition Policy" that President Biden embodied in July 2022 in his Executive Order on Promoting Competition in the American Economy. Executive Order 14036, Promoting Competition in the American Economy § 2, July 9, 2021. <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

[17] See *infra* nn.12 & 27. Multiplying the 1979 fiscal year appropriations for the FTC (\$65 million) and Antitrust Division (\$37,508,000) by 9.69 yields the figures in the text.

[18] A recent study found that the agencies could almost triple the number of mergers they challenge without significant risk of blocking procompetitive ones. See Vivek Bhattacharya, Gason Illanes & David Stillerman, "Is US Antitrust Policy Too Lenient", ProMarket, July 3, 2023. The rise in challenges would, of course, "entail a significant increase in their workload." *Id.*

[19] AD Submission at 18.

[20] Barry Barnett, "How Antitrust Enforcers Might Think Like Plaintiffs' Lawyers", Law360 Competition, Apr. 7, 2022. <https://www.law360.com/articles/1481142/how-antitrust-enforcers-might-think-like-plaintiffs-lawyers>.

[21] See Logan Billman & Steven C. Salop, "Merger Enforcement Statistics: 2001-2020", 85 Antitrust L.J. 1, 7 (2023) ("A budget-constrained agency cannot afford to litigate too many cases in any year.") [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=4274304](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=4274304).

[22] See FTC, FTC Appropriation and Full-Time Equivalent (FTE) History ("FTC Appropriation History"); <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>; Antitrust Division, Appropriation Figures for the Antitrust Division, Fiscal Years 1903-2023 ("AD Appropriation Figures") (footnote omitted); [https://www.justice.gov/d9/2023-03/atr\\_fy\\_2024\\_pb\\_narrative\\_omb\\_cleared\\_03.13.23.pdf](https://www.justice.gov/d9/2023-03/atr_fy_2024_pb_narrative_omb_cleared_03.13.23.pdf).

[23] Testimony of Federal Trade Commission Chair Lina Khan Before the House Committee on Appropriations, Subcommittee on Financial Services and General Government ("Khan Testimony") at 2, Apr. 23, 2023. <https://docs.house.gov/meetings/AP/AP23/20230427/115772/HHRG-118-AP23-TTF-KhanL-20230427.pdf>.

[24] *Id.*

[25] Antitrust Division, FY 2024 Performance Budget Congressional Justification (CJ) Submission ("AD Submission") at 3. [https://www.justice.gov/d9/2023-03/atr\\_fy\\_2024\\_pb\\_narrative\\_omb\\_cleared\\_03.13.23.pdf](https://www.justice.gov/d9/2023-03/atr_fy_2024_pb_narrative_omb_cleared_03.13.23.pdf).

[26] *Id.*

[27] Khan Testimony at 3 (stating that "the FTC has requested \$590 million in FY 2024"); Antitrust Division Submission at 3 (requesting "an increase of \$99,821,000 over the FY 2023 Enacted Budget").

[28] AD Submission at 3.

[29] Between 1979 and 2022, the latest full year available, U.S. gross domestic product rose 969 percent

(or 9.69 times) in nominal terms, from \$2,627.3 billion to \$25,462.7 billion. See U.S. Bureau of Economic Analysis, Table 1.1.5. Gross Domestic Product. <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey>. The \$340 million shortfall estimate likely understates the agencies' effective funding disadvantage. Reasons include greater concentration of the economy, the need to develop new competencies for digital and other rapidly changing markets, rising litigation costs, and the larger disparity between government and corporate resources.

[30] In 1979, the biggest U.S. company, IBM Corp., had a market capitalization of \$29.3 billion; today, Apple's totals \$2,286 billion. RankingCharts, Top 10 Largest Companies by Market Cap (1979-2021). <https://www.youtube.com/watch?v=Z93yWXb9Tb0>. Even using 2021 dollars for IBM puts it at \$115.9 billion, a little more than five percent of Apple's \$2,286 billion. See U.S. Bureau of Labor Statistics, CPI Inflation Calculator. [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). The economy today has much more concentration and displays far greater inequality in corporate as well as individual assets and income than in 1979.

[31] See, e.g., "Antitrust Needs Better Models for Estimating Social Welfare in the Digital Age", ProMarket, Apr. 5, 2023. <https://www.promarket.org/2023/04/05/antitrust-needs-better-models-for-estimating-social-welfare-in-the-digital-age/>. In 1979, no global Internet existed. Mark Zuckerberg still had his baby teeth. <https://en.wikipedia.org/wiki/Internet>; [https://en.wikipedia.org/wiki/Mark\\_Zuckerberg](https://en.wikipedia.org/wiki/Mark_Zuckerberg). Tron came out three years later. <https://en.wikipedia.org/wiki/Tron>. Few people could imagine that they would have computers in their homes and smart phones in their purses and pockets. The first IBM microcomputer shipped in 1981, the first Mac in 1984. [https://en.wikipedia.org/wiki/IBM\\_Personal\\_Computer](https://en.wikipedia.org/wiki/IBM_Personal_Computer); [https://en.wikipedia.org/wiki/Mac\\_\(computer\)](https://en.wikipedia.org/wiki/Mac_(computer)); The iPod did not debut until 2001, the iPhone until 2007. <https://en.wikipedia.org/wiki/iPod>; <https://en.wikipedia.org/wiki/iPhone>.