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The Petitions for the Recusal of Chair Lina Khan: A Matter of Due Process or Delaying the Process?*

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ABSTRACT: On the 30th of June 2021, Amazon filed a request to the Federal Trade Commission (FTC) to seek newly appointed Chair Lina Khan's recusal from "any antitrust investigation, adjudication, litigation, or other proceedings in which Amazon is a subject"[1], arguing due process would not be respected because of her potential partiality. Two weeks later, on the 14th of July, a petition following the same objective was filed, this time, by Facebook[2], with notable similarities. Following their path, in November 2021, Google targeted the other agency in charge of public enforcement, the Department of Justice (DoJ). The tech giant pressed the authority, in a letter, to recuse the new Assistant Attorney General, Jonathan Kanter, for his past work in private practice representing competitors such as Microsoft or Yelp[3]. At a turning point in the enforcement of antitrust law towards Big Tech players, especially regarding the offense of monopolization and merger enforcement, one can wonder if these petitions for recusal really are a simple matter of due process or if bigger stakes are at play, such as the future of public enforcement of American antitrust law.

KEYWORDS: Due process, impartiality, Federal Trade Commission, public enforcement, digital platforms

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[1] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc.*, 30 June 2021, 1.

[2] Federal Trade Commission, *In re motion for recusal of Chair Lina M. Khan from involvement in the pending antitrust case against Facebook, Inc.*, 14 July 2021.

[3] Giuseppe Macri, "Google Asks DOJ to Probe Kanter Role", *Bloomberg Law,* 22 November 2021, https://news.bloomberglaw.com/tech-and-telecom-law/hill-tech-cyber-briefing-google-asks-doj-to-probe-kanter-role.

Introduction

1. Due process of law is undeniably "a historic and generative principle"[4]. Its origins trace back to Magna Carta's Chapter 39 sentence "according to the law of the land"[5], which was later reformulated in a 1354 statute: "None shall be condemned without due Process of Law"[6]. It has since then been elevated to the role of a constitutional guarantee in American law, being first written in the 5th Amendment in 1791 regarding the federal State. It was then made enforceable in every state government by the 14th Amendment, Section 1, in 1868, which contained the same words, called the due process clause: "[no person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law". Construed initially as a safeguard against the government's arbitrariness, its meaning significantly broadened throughout the years with Society's evolution[7]. Indeed, as the risk of being "deprived of life, liberty, or property" was quite literal in a 14th century feudal system, in which barons and the Monarch could imprison their vassals and subjects or collect their goods arbitrarily[8], it does not reflect the reality of a democratic system anymore. Accordingly, as no precise definition had been given of "due process of law", the clause has been the subject of abundant legal precedents and doctrines trying to define its substance, deviating from its original meaning, and thus giving rise to important controversies.
2. At first, there was a strict interpretation of the due process which did not actually include the proceedings within a trial. In fact, the process referred to "writs or precepts issuing from a court rather than courtroom procedure"[9]. The clause also only targeted criminal matters, due process thus meaning originally that criminal defendants

[4] *Rochin v. California*, 342 U. S. (1952), at 173.

[5] Leonard G. Ratner, "The Function of the Due Process Clause", *University of Pennsylvania Law Review*, vol. 116, No. 6, (April 1968): 1049.

[6] *Liberty of Subject*, Statute of the 28th Year of King Edward III, Chapter 3, 1354.

[7] The evolution being different for the 5th Amendment, as it concerns only federal government and its representatives, and the 14th, as it concerns states governments and their representatives; *See e.g.*, Max Crema and Lawrence B. Solum, "The original meaning of 'due process of law' in the Fifth Amendment", *Virginia Law Review* (April 2022): 447-534.

[8] See e.g. Charles E. Shattuck, "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property'", *Harvard Law Review*, vol. 4, no. 8 (March 1891): 371-376.

[9] Crema and Solum, "The original meaning of 'due process of law' in the Fifth Amendment", 486.

could not be "deprived of life or liberty" without the issuance of an official document from the courts first. In brief, the due process clause first "ensure[d] notice and jurisdiction"[10]. However, courts progressively softened this interpretation by enlarging the concept. It first was expanded to civil cases, as expropriation, for example, could be a risk of deprivation of property. The South Carolina court, for instance, invalidated a legislative act forcing the transfer of land in 1792, as "it was against common right [...] to take away the freehold of one man and vest it in another [...] without any compensation, or even a trial by the jury of the country, to determine the right in question"[11]. The benefit of the due process clause was shortly after offered to corporations, and not only to individuals, by *Trustees of the University of North Carolina v. Foy*[12]. The word "process" progressively shifted to include proceedings as "the words 'due process of law' [...] cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property"[13]. By the mid-nineteenth century, a consensus was reached over the understanding that due process ensured procedural fairness. Still, as there is no constitutional definition of "liberty" or "property", cases were brought, advocating for an even broader intent of these words to, *in fine*, protect rights in themselves. The case law that followed fueled a prolonged controversy between this last vision of a substantive due process and the procedural due process position that had been adopted.

3. The 20th century was hence predominated by a critique of the substantive due process[14], as it is far removed from the traditional conception of the due process clause. What originated as protection against arbitrary detention or deprivation was now considered as "substantive protection for private rights, 'against all mere acts of

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[10] *Ibid*.: 453.

[11] *Bowman v. Middleton*, I S.C.L. (I Bay) 252, 254 (1792); Edward J. Eberle, "Procedural Due Process: The Original Understanding", *Constitutional Commentary*, (1987): 347.

[12] *Trustees of the University of North Carolina v. Foy*, 5 N.C. (1 Mur.) 58 (1805); Eberle, "Procedural Due Process: The Original Understanding": 348.

[13] Hill (N.Y.) 140 (1843); Eberle, "Procedural Due Process: The Original Understanding": 353-354.

[14] See e.g. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 15: "There is general agreement that the earlier clause [the 5th Amendment] had been understood at the time of its inclusion to refer only to lawful *procedures*" (emphasis intended by the author).

power, whether flowing from the legislative or executive branches of the government'"[15], applying even to rulemaking. For instance, in the *Dorsey*[16] case, a state statute forcing lawyers to take an oath not to duel to be authorized to exercise their activity was deemed unconstitutional as it violated the due process clause. The court considered that the right to be an attorney and to practice the law was a "property", and that it should not be taken away without at least a trial by jury. Another significant example is the *Lochner v. New-York*[17] case, in which a labour law restricting the number of weekly hours of work for bakers was invalidated based on the 14th Amendment. The Supreme Court stated that the "liberty" protected by this Amendment included freedom of contract, which was restricted unnecessarily by the law in force. Hence, "due process of law" has increasingly been used to place substantive restraints on legislations, covering a wide array of areas, such as discrimination in employment[18], public school segregation[19], the right to marital privacy[20], and punitive damages[21].

4. Nevertheless, despite these cases, nowadays some still vehemently refuse to acknowledge the reality of a substantive due process[22]. Indeed, it does not follow the letter of the Constitution, protecting unenumerated rights[23] – present in the Bill of Rights, for example, but not in the Constitution, or inferred from the other Amendments, such as the 7th, preserving the right of trial by jury – and going beyond adjudication, affecting rulemaking itself. However, these critics are now outnumbered, as many recognize the dichotomy between substantive and procedural due process, such as Justice Roberts, for whom "a distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedures in court"[24].

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[15] Eberle, "Procedural Due Process: The Original Understanding": 365.

[16] *In re Dorsey*, 7 Port. 293 (Ala. 1838).

[17] *Lochner v. New York*, 198 U.S. 45 (1905).

[18] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1985).

[19] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[20] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[21] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); stating that excessive punitive damages violate the due process clause as it deprives property with no sufficient justification.

[22] Erwin Chemeinsky, "Substantive Due Process", *Touro Law Review*, vol. 15, no. 4 (1999): 1501, "Still, there are now and have always been Justices of the Supreme Court who believe there is no such thing as substantive due process".

[23] On this topic, see e.g., Chemeinsky, "Substantive Due Process", 1510 ff.

[24] *Snyder v. Massachusetts*, 291 U.S. 97 (1934), at 137.

The former thus embodies a more general vision related to fundamental rights and interrogates "whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose"[25], whereas the latter means that rules of fairness should be followed during the trial and the conduct of judicial inquiries leading to a deprivation of life, liberty, or property, as reminded by Justice Black in *In re Murchison* as he asserted that "a fair trial in a fair tribunal is a basic requirement of due process"[26].

5. Furthermore, adding complexity to this controversial separation, an extra layer must be considered, as those rules diverge between civil and criminal proceedings, and must be applied to administrative actions. For instance, to ensure such fairness, notice-and-hearings rights are required in every step of a civil case and administrative proceedings, but not in the pretrial phase of a criminal case[27]. Due process of law is hence an extremely complex, evolutionary principle, with different standards for each of these situations. Howbeit, as this article will focus on the petitions for recusal filed by Amazon and Facebook in 2021 against the Federal Trade Commission, an administrative agency, only the rules applicable to administrative proceedings which resemble civil due process[28] will be further reviewed. More precisely, as it is the impartiality of the Chair Lina Khan that is being questioned, and consequently the fairness of proceedings, these rules will be further narrowed down to civil procedural due process.
6. Four essential obligations must be observed in administrative proceedings. The affected party must be duly noticed of the proceedings, during which it has the right to be present and to be heard at every stage. When a decision is reached, it must be made by an unbiased adjudicator[29]. This last requirement is established by different legal means regarding administrative agencies. First, by well-known jurisprudence, such as *Gibson v. Berryhill*, framing a test of whether "in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or

[25] Chemeinsky, "Substantive Due Process", 1501.

[26] *In re Murchison*, 349 U.S. 133 (1955), at 136.

[27] Niki Kuckes, "Civil Due Process, Criminal Due Process", *Yale Law & Policy Review*, vol. 25, no. 1 (2006): 1.

[28] *Ibid*., 15, "This is the civil due process approach, laid out above, which applies in court cases as well as administrative proceedings".

[29] *Ibid*., 10.

against any issue presented to him"[30]. Thusly, according to this test, an impartial decision-maker "is not simply a person without a financial interest in the outcome of the case, but more broadly a person who is not affiliated with, or biased in favour of or against, one side or the other"[31]. Second, by section 7 (a) of the Administrative Procedure Act (APA), adopted in 1946 in reaction to the growing power of administrative agencies[32]. Indeed, section 7 states that: "The functions of all presiding officers and of officers participating in decisions […] shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified […]"[33].

7. As the FTC is a federal agency, authorized by Section 5 of the FTC Act to open investigations and initiate enforcement actions regarding antitrust and consumer protection matters – administrative or judicial – and by Section 7 of the Clayton Act to review mergers, it is "part prosecutor and part judge"[34]. Hence, any adjudication procedure is regulated by the rules set out by the APA, at the risk of the decision being invalidated after judicial review made possible by its Section 10[35]. Consequently, Commissioners taking part in FTC's administrative proceedings must be unbiased or must recuse themselves. Otherwise, adverse decisions can be reviewed either under the scope of a violation of procedural due process or a violation of Section 7 of the APA. Correspondingly, some precautionary measures exist within the FTC, such as the adversary nature of the proceedings, the possibility to ask for the disqualification of the Hearing Examiner at any point in the proceedings on grounds of bias or the fact that, "in practice different individuals are responsible for the investigation (members of FTC Bureau of Competition) and for the decision-making (FTC

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[30] *Gibson v. Berryhill*, 411 U.S. 564 (1973), at 571.

[31] Kuckes, "Civil Due Process, Criminal Due Process", 11.

[32] Roni A. Elias, "The legislative history of the Administrative Procedure Act", *Fordham Environmental Law Review*, vol. 27, no. 2 (2016): 207 ff.

[33] Administrative Procedure Act, *An Act to improve the administration of justice by prescribing fair administrative procedure*, Section 7 (a), 1946.

[34] John T. Rosch, *Thoughts on the FTC's Relationship (Constitutional and Otherwise) to the Legislative, Executive, and Judicial Branches*, Remarks before the Berlin Forum for EU-US Legal-Economic Affairs, 19 September 2009.

[35] Administrative Procedure Act, Section 10 (a), 1946: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof".

Commissioners and the Administrative Law Judge)"[36]. Nonetheless, these are sometimes not enough to prevent a violation of procedural due process, as it has been the case in *American Cyanamid*[37] or *Cinderella*[38], in which Chairman Dixon was disqualified for being partial, both precedents having been used by Amazon and Facebook.

8. In fact, the two companies filed petitions for recusal of then-newly appointed Chair of the FTC, Lina Khan[39], regarding any antitrust investigations in which they will be the subject. Amazon's marketplace was already under scrutiny[40], and Facebook has been sued by the FTC for illegal monopolization[41]. Recently, its merger with Within has been challenged by the FTC[42]. According to both companies, Lina Khan has reached legal conclusions on their liabilities and, thus, has prejudged the issues. Her participation in pending and future investigation would hence be a denial of procedural due process given that she would be biased, as she is antagonistic to these firms. Both companies carry out their argument based on the Chair's previous work, at the Open Markets Institute, a political advocacy group, as an academic writer – one of her most famous articles being titled *Amazon's Antitrust Paradox*[43] – and finally as a "leader" of the House Majority's Investigation and Report on Competition in Digital Markets[44] (the

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[36] Maciej Bernatt, "McWane and Judicial Review of Federal Trade Commission decisions - Any Inspirations for EU Competition Law?", *European Competition Law Review*, 38(6), 288 (2017): 293; On this topic, see also William E. Kovacic and Marc Winerman, "The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness", *Iowa Law Review*, vol. 100 (2013): 2086-2113.

[37] *American Cyanamid Co. v. FTC*, 363, F.2d 757 (6th Cir. 1966); *See Infra* § 19.

[38] *Cinderella Career & Finishing Schs. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *See Infra* § 19.

[39] Federal Trade Commission, Press Release: *Lina Khan Sworn in as Chair of the FTC*, 15 June 2021.

[40] Spencer Soper, "Amazon's Market Power to Be Investigated by New York AG", *Bloomberg*, 3 August 2021; "Attorneys general from New York and California are partnering with the Federal Trade Commission to investigate Amazon.com Inc.'s online marketplace".

[41] *FTC v. Facebook, Inc.*, Complaint, Case No. 1:20-cv-3590 (D.D.C., filed Dec, 9, 2020); although the complaint has been dismissed, the FTC having failed to demonstrate Facebook has "monopoly power in the market for Personal Social Networking (PSN) services"; however the case itself isn't dismissed and the FTC has now amended the complaint; *FTC v. Facebook, Inc.*, Case 1:20-cv-03590-JEB, Doc. 73, 28 June 2021 : Doc. 82, 8 September 2021; Doc. 85, 17 November 2021.

[42] Federal Trade Commission, Press Release: *FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within*, 27 July 2022.

[43] Lina M. Khan, "Amazon's Antitrust Paradox", *Yale Law Journal*, 126 (2017).

[44] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets*, October 2020.

Report). In fact, this Report has sections dedicated to both Amazon[45] and Facebook[46], drawing conclusions on relevant market, market power and anticompetitive conduct – all elements of the offense of monopolization[47]. It also makes comments on past mergers such as Instagram's acquisition by Facebook. The firms also support their claim with former tweets from the Commissioner expressing views on the same matter, as well as "repeated" statements made during public appearances[48] expressing beliefs on the companies' alleged anticompetitive practices.

9. Although these facts are compelling, it is called for to remind that there is not necessarily "a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law"[49]. Indeed, if Commissioner's opinions expressed in reports or other documents would stop them from working in unfair trade proceedings or antitrust concerns, "it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another […]"[50]. Senators Elizabeth Warren, Richard Blumenthal, and Cory A. Booker, as well as Congresswoman Pramila Jayapal, in a letter addressed to Amazon's and Facebook's CEOs[51], urging them to cease these petitions for recusal, seem to be an echo of this paradox. They pertinently point out that the "real basis of [the] concerns appear to be that [they] fear Chair Khan's expertise and interpretation of federal antitrust law"[52]. Accordingly, there needs to be a careful balance between due process and the requirement "that both unfairness and the appearance of unfairness should be avoided"[53] and the obligations of members of the FTC. Certainly, "Commissioners, like

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[45] *Ibid*., 247-316, 406-414.

[46] *Ibid*., 132-170, 423-431.

[47] 15 U.S.C. § 2, *Sherman Antitrust Act*, 1890.

[48] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc*: 12-13; *Facebook, Inc*: 13-15.

[49] *FTC v. Cement Institute*, 333 U.S. 683 (1948), at 702-703.

[50] *Ibidem*.

[51] *Letter to Amazon and Facebook*, 4 August 2021, https://www.warren.senate.gov/imo/media/doc/Letter%20to%20Amazon%20and%20Facebook%20re%20Petitions%20for%20Khan%20Recusal%20(8.4.21).pdf.

[52] *Ibidem*.

[53] *Trans World Airlines, Inc., Petitioner, v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958), at 91.

other adjudicators, [are] entitled to hold and express views on the laws they are charged with enforcing and applying"[54], and their expertise should not be considered as a bias[55]. However, where is the limit drawn between these two necessities? Does a tweet, for example, mean a Commissioner is taking a stance, thus taking the risk to be deemed partial in future proceedings, or is it simply a mere reflection of his work? Is there finally a general duty of self-restraint for members of federal agencies that can be deduced from Section 7 of the APA?

10. Regarding these considerations, it is interesting to reflect upon Lina Khan's questioned partiality and whether the best solution is to recuse herself to avoid a decision being remanded, or if such a risk does not actually exist. Professor Darren Bush, for example, after analysing legal precedents, has reached the conclusion that the petitions would unlikely result in a recusal[56] given the circumstances of the case. Likewise, in the letter mentioned previously[57], the definition of conflict of interest is recalled and does not seem to be met in this case, as "federal ethics laws clearly define the conflicts of interest that would require recusal: 'any arrangement concerning prospective employment [or] a financial interest'"[58]. Yet, this point must be cautiously regarded, as the test set by *Gibson v. Berryhill* goes beyond simple financial interests[59]. Lastly, the FTC's Office of the Secretary itself dismissed the petition in the amended complaint against Facebook[60], a position that has later been endorsed by judge Boasberg, stating that "Khan was acting in a prosecutorial capacity, as opposed to in a judicial role, in connection with the vote"[61]. There thus appears to be a consensus that will be analysed. It is especially relevant as you can draw a parallel with Google's later demand for the recusal of DoJ

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[54] *Texaco Inc. v. FTC*, 336 F. 2d 754 (1964), at 764 (C.A.D.C.), dissenting opinion, Justice Washington.

[55] Darren Bush, "What's Behind Amazon's Demand that FTC Chair Lina Khan Recuse Herself?", *Promarket*, 24 August 2021, https://promarket.org/2021/08/24/amazon-demand-ftc-lina-khan-recusal/; "4. Chair Khan's 'bias' isn't bias: it is expertise".

[56] *Ibidem*.

[57] *Letter to Amazon and Facebook*, 4 August 2021.

[58] 18 U.S.C. § 208.

[59] See Supra § 6.

[60] Federal Trade Commission, Press Release, *FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate*, 19 August 2021.

[61] Lauren Feiner, "Judge grants FTC second chance to challenge Facebook on antitrust grounds", *CNBC*, 11 January 2022.

Assistant Attorney General, Jonathan Kanter[62] in November 2021, its basis being a violation of ethical rules. The search engine invoked Kanter's past representation of "companies that were subpoenaed to provide documents in litigation against Google", in a demand that has notably been qualified as "baseless"[63] by some. This must be nuanced though, as past representations of parties or witnesses, or in this case of a rival, can be an indication of partiality, or at least of a risk of influence of the adjudicator.

11. However, certain forms of hypocrisy can be brought to attention here, as attorneys, for example, may have previously worked at the FTC or the DoJ and are not asked to recuse themselves[64] when involved in a case against the agencies. Conversely, "nor do we recuse lawyers from serving as Commissioners who have uniformly evinced a pro-defense position. A lawyer could serve as a counsel to a variety of antitrust violators, […] and not be accused of having 'made up their mind'"[65]. As an example, Makan Delrahim, a registered patent lawyer – who vigorously advocated for the primacy of patents to avoid the reduction of incentives for innovation – was still appointed Assistant Attorney General of the DoJ afterwards. He was then in charge of that specific aspect of enforcement and delivered a speech – regarding standard setting organizations – in which he maintained that antitrust law "if mis-applied, [...] can cause great harm to innovation, the competitive process, and the consumer"[66]. Thus, a free market would have been the best solution to resolve the tension between innovators and implementers. Neither him, nor other conservative heads of agencies favourable to the invisible hand were challenged as being partial.
12. Moreover, even when expressing progressive views and calling for more antitrust enforcement, judges, for example, have rarely asked to recuse themselves for being biased – even if the norm is different than

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[62] Macri, "Google Asks DOJ to Probe Kanter Role".

[63] Laurence H. Tribe, "Google's Calls for DOJ Antitrust Head Jonathan Kanter's Recusal Are Baseless", *Promarket*, 1 February 2022, https://promarket.org/2022/02/01/google-antitrust-kanter-doj-recusal-baseless-tribe/.

[64] *Letter to Amazon and Facebook*, 4 August 2021: "How many of your current attorneys, if any, whether in-house or outside counsel, have formerly worked at the Federal Trade Commission, the Department of Justice, or the office of the Attorney General of a state?".

[65] Bush, "What's Behind Amazon's Demand that FTC Chair Lina Khan Recuse Herself?".

[66] DoJ, *Assistant Attorney General Makan Delrahim Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference*, 10 November 2017.

for an administrative adjudicator[67]. Nevertheless, judges are subject to procedural due process, as *Caperton v. A.T. Massey Coal* recalls, by stating that "there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable'"[68]. Yet, one can think of Justices Oliver Wendell Holmes and Louis Brandeis's work on the First Amendment and the theorization of the marketplace of ideas. Their dissents in *International News Service v. Associated Press*[69], *Abrams*[70] and *American Column & Lumber Co.*[71] "planted the seed of an idea about the roles that antitrust, competition, and free speech could play in nurturing marketplace democracy"[72]. According to Justice Holmes, "the ultimate good desired is better reached by free trade in ideas"[73], and thus a free marketplace of ideas would guarantee a functioning marketplace of goods and services. Justice Brandeis further elaborated the procompetitive aspect of free trade of ideas, correlating it to the notion of power, stating that "the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises"[74]. As a result, the newspaper industry was the subject of investigations from the DoJ "on the theory that restraints on newspaper competition by dominant newspapers resulted not only in higher prices but also fundamentally challenged the functioning of a free press and the

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[67] See e.g., Andrey Spektor and Michael Zuckerman, "Judicial Recusal and Expanding Notions of Due Process", *Journal of Constitutional Law*, vol. 13:4, (2011): 984 ff.

[68] *Caperton v. A.T. Massey Coal*, 556 U.S. 868 (2009), at 2257; in this case, one of the parties donated almost three million dollars to the judge's campaign which led to his election leading the court to decide that "there is a serious risk of actual bias (…) when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge", at 2263-2264.

[69] *International News Service v. Associated Press*, 248 U.S. 215 (1918), at 246-267, dissenting opinions of Oliver W. Holmes and Louis Brandeis.

[70] *Abrams v. United States*, 250 U.S. 616 (1919), at 624-631, dissenting opinion of Oliver W. Holmes; Louis Brandeis concurred with this opinion.

[71] *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), at 412-419, dissenting opinions Oliver W. Holmes and Louis Brandeis.

[72] Daniel Crane, "Collaboration and Competition in Information and News During Antitrust's Formative Era", *Knight Columbia*, 29 June 2020, https://knightcolumbia.org/content/collaboration-and-competition-in-information-and-news-during-antitrusts-formative-era.

[73] *Abrams v. United States*, 250 U.S. (1919), at 630, dissenting opinion Oliver W. Holmes.

[74] *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), at 414, dissenting opinion Louis Brandeis.

marketplace of ideas"[75]. Justices Brandeis and Holmes were involved in later proceedings such as *Whitney v. California*[76] or *Gitlow v. New-York*[77] but were not asked to recuse themselves for having previously expressed firm views on the matter.

13. These few examples can show how evaluating bias is thusly an extremely complex task for judicial reviewers, as subjectiveness will always play a role and peculiarly when political issues are at stake, which is the case in antitrust. Truthfully, it is undeniable that politics plays a role in antitrust[78]. Nominees for FTC Chair positions, such as Lina Khan, are chosen by the President and confirmed by the Senate – even if, out of five chairs, a maximum of three can be chosen from the same political party for independency reasons[79] –, as well as the Justices of the Supreme Court, the highest court of the United States. The Department of Justice is led by an Assistant Attorney General, also nominated by the President. Companies can directly – and heavily – invest in lobbying Congress to push for their agendas. For instance, in 2020, the five Big Tech Companies have spent altogether a combined total of 61,09 million US dollars[80]. It does not come as a surprise when one thinks of the direct influence strict or soft antitrust laws can have on economy and, consequently, on popular satisfaction (or dissatisfaction). Hence, political influence is "especially strong in the antitrust arena, where decisions and policy measures often significantly affect the profitability of market players"[81]. However, what may diverge is the weight of this political influence over the years, and whether it leads to a more vigorous enforcement. Antitrust has thus been navigating through periods of aggressive enforcement, such as "from 1935 until

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[75] Crane, "Collaboration and Competition in Information and News During Antitrust's Formative Era".

[76] *Whitney v. California*, 274 U.S. 357 (1927), at 372-38, Louis Brandeis, concurring.

[77] *Gitlow v. New York*, 268 U.S. 652 (1925), at 672-673, Oliver W. Holmes, dissenting.

[78] See e.g. Daniel Crane, "Antitrust's Unconventional Politics", *Virginia Law Review*, 104 (2018): 118-155; Jonathan B. Baker, "Economics and Politics: Perspectives on the Goals and Future of Antitrust", *Fordham Law Review*, vol. 81, no. 5 (2013): 2175-2196.

[79] Bernatt, "McWane and Judicial Review of Federal Trade Commission decisions - Any Inspirations for EU Competition Law?", 293.

[80] Lauren Feiner, "Facebook spent more on lobbying than any other Big Tech company in 2020", *CNBC*, Jan. 22, 2021.

[81] Michal Gal, "Reality Bites (or Bits): The Political Economy of Antitrust Enforcement", *Fordham Corporate Law Institute, Law & Economics Research Paper, Series Working Paper* No. 06-22 (May 2006): 12.

the beginning of World War II"[82], with the New Deal administration, and periods of "simultaneous deregulation and relaxation"[83], such as the one between the 1970s, the Reagan Administration[84], and nowadays. Notwithstanding, the tendency now seems to fall back into a pattern of robust enforcement, which makes an interesting timing for the filing of the petitions.

14. Indeed, American antitrust law is currently experiencing "the biggest […] shakeup in generations"[85]. Various litigations are currently undergoing against Big Tech players[86] [87] directly aimed at the Digital Sector, as the "Ending Platform Monopolies Act" can testify. Its goal is, in fact, to "prevent dominant online platforms from leveraging their monopoly power to distort or destroy competition in markets that rely on that platform"[88]. A "broad Executive Order presaging sweeping change"[89] has been signed. Furthermore, Lina Khan is considered one of the prominent figures of these changes and "one of the primary figureheads of the Neo-Brandeisian movement"[90]. Given this situation, one can wonder if the petitions for recusal are strictly limited to a matter of due process or if it is actually a matter of delaying the process and switching roles – from alleged illegal monopolists to victims of denial of due process – especially as Amazon is not yet currently

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[82] Crane, "Antitrust's Unconventional Politics", 126.

[83] *Ibid*.: 134.

[84] Period during which AT&T was paradoxically dismantled; Crane, "Antitrust's Unconventional Politics", 132: "How did the largest antimonopoly corporate break-up in history occur at the hands of the Reagan Administration and its decidedly Chicago School Justice Department?".

[85] Daniel Francis, "Making Sense of Monopolization: Antitrust and the Digital Economy", Draft, July 2021: 6.

[86] *See Supra* § 8; *See e.g.*, *U.S. v. Google*, Case No 1:20-cv-3010 (D.D.C. filed 20 October 2020); *Colorado v. Google*, Case No. 1:20-cv-3715 (D.D.C. filed 17 December 2020); *District of Columbia v. Amazon.Com, Inc*., Complaint (D.D.C. filed 25 May 2021); although this last suit was dismissed on 18 March 2022: John D. McKinnon, "Amazon Wins Dismissal of D.C. Antitrust Lawsuit Over Pricing", *The Wall Street Journal*, 18 March 2022, https://www.wsj.com/articles/amazon-wins-dismissal-of-d-c-antitrust-lawsuit-over-pricing-11647645389.

[87] House Committee on the Judiciary, Press Release, *Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation*, 24 June 2021.

[88] *Ibidem*.

[89] Francis, "Making Sense of Monopolization: Antitrust and the Digital Economy", 6; Exec. Order No. __, *Promoting Competition in the American Economy*, 9 July 2021; See e.g. Herbert Hovenkamp, "President Biden's Executive Order on Promoting Competition: an Antitrust Analysis", Draft, July 2021.

[90] Luke Mason, Dr. Herbener Economics Colloquium, *The Big Tech Debate, Neo-Brandeisians, and Competition*, 4 December 2020.

facing any official complaint by the FTC[91]. Moreover, as settlements are now a core practice of antitrust law – the FTC having settled 93 percent of its competition cases between 1997 and 2012, for example[92] – these petitions for recusal might just be a first step for the companies in prospective negotiations to gain a position of strength.

15. Even if the doubts regarding the limits of bias and the Chair's impartiality (**I**) do not appear significant anymore after judge Boasberg's endorsement[93], the filing of these two petitions for her recusal, two weeks apart, by two different companies, yet with similar claims, did raise interrogations on their true motivations. Especially now that "antitrust issues [have] such political salience"[94] and a more rigorous public enforcement of antitrust laws is demanded by many from various backgrounds[95]. By shifting the focus from monopolization to procedural due process, the debate can take an increased political turn **(II)**, with consequences unknown yet.

I. The limits of bias: crossing the line from partiality to impartiality

16. In view of the Federal Trade Commissioners' judicial powers, invested by Section 5 of the FTC Act, procedural due process historically applies to the federal agency members **(1)**, generating jurisprudential principles that can be examined to reflect upon the Chairwoman's questioned partiality **(2)**.

1. The historical application of procedural due process to Commissioners

17. As the Congress sought a way to reinforce the fight against trusts and concentration in the early 20th century, the *Federal Trade Commission Act* was adopted in 1914 – along with the *Clayton Antitrust*

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[91] The acquisition of MGM was being reviewed but it is not currently being challenged; Leah Nylen, "U.S. antitrust enforcers won't challenge Amazon's MGM deal, dashing hopes of monopoly critics", *Politico*, 17 March 2022, https://www.politico.com/news/2022/03/17/u-s-antitrust-enforcers-amazons-mgm-deal-00018252.

[92] Douglas H. Ginsburg and Joshua D. Wright, "Antitrust Settlements: The Culture of Consent", *William E. Kovacic: An Antitrust Tribute – Liber Amicorum,* Vol. I (February 2013): 1.

[93] *See Supra* § 10.

[94] Carl Shapiro, "Antitrust in a Time of Populism", *61 International Journal of Industrial Organization*, (2018): 715.

[95] See e.g. Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018); Sophia Lam, "It's Time to Break Up Big Tech", *The Gate*, 20 October 2019, http://uchicagogate.com/articles/2019/10/20/its-time-break-big-tech; Former Candidate Elizabeth Warren, "Break Up Big Tech", https://2020.elizabethwarren.com/toolkit/break-up-big-tech.

Act – creating a new administrative agency complementing the Department of Justice. The FTC was given notable powers, including the "authority to use administrative adjudications to develop norms of business conducts" and the capacity to "initiate an administrative litigation or […] court proceeding"[96], to prevent unfair methods of competition in commerce. Commissioners thusly endorse a dual role as prosecutors – issuing an official complaint – and judges – estimating the legality of challenged conducts, either in a case brought to the federal court or in adjudicative proceedings. Both situations induce the obligation to satisfy the due process clause. Indeed, *Palmer v. McMahon* extended its application to administrative proceedings, affirming that "due process of law does not necessarily mean a judicial proceeding"[97], a position endorsed by *Ballard v. Hunter* as the word "process" needs to be "adapted to the nature of the case"[98]. In addition to this constitutional requirement, Commissioners are required to be impartial by Section 7 (a) of the APA, as mentioned previously[99]. Hence, a jurisprudential framework regarding procedural due process in adjudicatory processes[100] has been drafted over the years, sometimes marked by Benjamin Cardozo's observation that judicial officers "do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do"[101].

18. As a matter of fact, in *United States v. Morgan*, the Supreme Court concluded that the mere expression of "strong views" did not disqualify a judicial officer, given that he "may have an underlying philosophy in approaching a specific case" but is still capable of being "a [man] of conscience and intellectual discipline"[102]. Such an approach can be transposed to FTC's agents, Justice Washington expressing, in

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[96] Kovacic and Winerman, "The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness": 2088.

[97] *Palmer v. McMahon*, 133 U.S. 660, 668 (1890), at 668.

[98] *Ballard v. Hunter*, 204 U.S. 241, 255 (1907), at 255.

[99] See Supra § 6.

[100] This article being focused on the jurisprudential framework regarding adjudicatory process and not the rulemaking process, which has different standards; See e.g. *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979); Ernest Gellhorn and Glen O. Robinson, "Rulemaking "Due Process": An Inconclusive Dialogue", *University of Chicago Law Review*, vol. 48, no. 2 (1981): 206-210.

[101] Benjamin Cardozo, *The Nature of the Judicial Process*, (Literary Licensing, LLC, 1921), 168.

[102] *United States v. Morgan*, 313 U.S. 409 (1941), at 421; *See Supra* § 9 for a similar solution in *FTC v. Cement Institute*.

a dissenting opinion in *Texaco Inc*., that "we do not expect a Trade Commissioner to be neutral on anti-monopoly policy"[103]. Indeed, impartiality must not be understood as "utter indifference" and, consequently, a "strong conviction" or a "crystallized point of view"[104] on matters of antitrust, and consumer protection should not be a ground for disqualification. Nonetheless, these considerations should not deprive companies or individuals from a "fair consideration of its defense by a Commission that is neutral and impartial in both fact and appearance"[105]. As a result, "wherever there may be reasonable suspicion of unfairness, it is best to disqualify"[106], given that "even the probability of unfairness" must be prevented[107]. This fairness prerequisite is however extraordinarily complex to quantify, *Tumey v. Ohio*, for example, giving it a broad meaning stating it is a denial of procedural due process for "every procedure which would offer a possible temptation to the average man as a judge […] not to hold the balance nice, clear, and true"[108]. But what is the limit drawn for such temptation? The courts do not necessarily provide a clear answer to that question. Therefore, as much as the rule of having an unbiased adjudicator clearly applies to the FTC members, the question of its execution might sometimes be blurry. Yet, some cases are more evident, as certain actions go beyond having a "strong conviction".

19. It has been the case in both *American Cyanamid* and *Cinderella* regarding Chairman Dixon[109], resulting in his disqualification. In the first case, Chair Dixon oversaw all the investigatory activities regarding drug industry of the Subcommittee's staff. Doing so, "he then had formed the opinion that Tetracycline prices […] were artificially high and collusive […]. Any opinions so formed were conclusions as to facts, and not merely an 'underlying philosophy' or a 'crystallized point of view on questions of law or policy'"[110]. Thus, the participation

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[103] *Texaco Inc. v. FTC*, 336 F. 2d 754 (1964), at 764, dissenting opinion of Justice Washington.

[104] Federal Trade Commission, *Statutes and Courts Decisions*, vol. VIII (1972), 258.

[105] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc.*: 17.

[106] *American Cyanamid Co. v. FTC*, 363, F.2d 757 (6th Cir. 1966).

[107] *In Re Murchison*, 349 U.S. 133 (1955), at 136.

[108] *Tumey v. Ohio*, 273 U.S. 510 (1927), at 532.

[109] *American Cyanamid Co. v. FTC*, 363, F.2d 757 (6th Cir. 1966); *Cinderella Career & Finishing Schs. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

[110] *American Cyanamid Co. v. FTC*, 363, F.2d 757 (6th Cir. 1966), at 765.

of the Chairman in the hearing "amounted [..] to a denial of due process which invalidated the order under review",[111] and the case was remanded for a *de novo* consideration of the record without his participation. In *Cinderella*, after a school had been charged for deceptive advertising – making false claims about the career possibilities it offered – Chairman Dixon gave a public speech condemning newspaper advertisements that, among others, "offer college educations in five weeks"[112]. As a result, the court vacated the order and remanded it for review without the participation of the Chairman, after applying a test for disqualification, which is whether "a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it"[113], this test being one of the pivotal points of the petitions.

2. The questioned partiality of Chairwoman Lina Khan

20. Both companies allege that Chairwoman Lina Khan has already adjudged the facts and is thus biased. According to Amazon, she already "made up her mind"[114] about its liability, an assertion also made by Facebook, for whom the Chair made "consistent" and "repeated"[115] statements about the company's presumed anticompetitive conduct. To make their case, they start by demonstrating that her work at the Open Markets Institute, as a Policy Analyst for three years and Legal Director from 2017 to 2018, already shows signs of prejudgment. Notably, the organization started a campaign, "Freedom for Facebook", during which it addressed a letter to the FTC – personally signed by the now Commissioner – to ask for actions regarding Facebook's "dominance in social networking and online advertising"[116]. Such a letter was also sent to the Antitrust Division, about Amazon, petitioning to investigate supposed antitrust violations, such as predatory pricing

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[111] *Ibid*., at 767.

[112] *Cinderella Career & Finishing Schs. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), at 589.

[113] *Ibid*., at 591; quoting *Gilligan, Will Co. v. SEC*, 267 F.2d 461 (2d Cir., 1959), at 469.

[114] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc*.: 2; 11; 12.

[115] Federal Trade Commission, *In re motion for recusal of Chair Lina M. Khan from involvement in the pending antitrust case against Facebook, Inc*.: 2; 5; 6; 16; 17.

[116] *Ibid*., 7-9; It is noteworthy here to say that the European Commission is currently investigating Facebook on some of these matters: European Commission, Press Release, *Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook*, 4 June 2021.

and "bullying book publishers", words used in an opinion piece written by Lina Khan, *A Remedy for Amazon-Hachette Fight?*[117].

21. Secondly, a biased point of view could be demonstrated, according to the companies, by her academic writings, especially two articles: *The Separation of Platforms and Commerce*[118] and *Amazon's Antitrust Paradox*. The first claims, on the one hand, that Facebook is a dominant actor that "[blocks] apps that it deemed competitive threats" and "has established a systemic informational advantage […] that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors"[119]. On the other hand, Amazon is presumed to engage in questionable practices concerning its ranking algorithms, for instance, and its dual role as a marketplace and as a retailer[120], "[responding] to popular items introduced by third-party merchants by sourcing those same products directly […] and demoting the third-party merchants in search results"[121]. The latter article focuses on Amazon's presumed "numerous antitrust violations"[122], such as its pricing practices, its tying practices, and the acquisition of Quidsi and its subsidiary, Diapers.com. It also advocates for strong structural remedies, such as "breaking up parts of Amazon" and splitting up "its retail and Marketplace operation"[123], amongst others. It is true that the combination of these arguments, following *Cinderella*'s test, could show for "a disinterested observe" that the Chairwoman has already "adjudged the facts" regarding Amazon and Facebook's possible anticompetitive practices, and that the appearance of unfairness is not met. Nevertheless, as there is no complaint against Amazon, and no decision, and thus no deprivation

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[117] Lina M. Khan, "A Remedy for Amazon-Hachette Fight?", *CNN.com*, 30 May 2014.

[118] Lina M. Khan, "The Separation of Platforms and Commerce", *Columbia Law Review*, vol. 119, no. 4 (2019).

[119] Federal Trade Commission, *In re motion for recusal of Chair Lina M. Khan from involvement in the pending antitrust case against Facebook, Inc.*: 9.

[120] A conduct for which the company is currently under investigation in Europe; See European Commission, Press Release, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, 10 November 2020.

[121] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc.*: 14.

[122] *Ibid*., 8.

[123] *Ibid*., 12.

of property or liberty yet against Facebook, there can be no prejudgment of a case for the time being.

22. Finally, both petitions rely on the fact that the FTC's latest member "led the congressional investigation into digital markets and the publication of [the] final report"[124], a Report that draws conclusions regarding the elements of the offense of monopolization[125]. In fact, the document reckons that Facebook has monopoly power in the social networking market, Amazon in the U.S. online retail market, and that both acquired and maintained it through anticompetitive means, causing consumer harm. The Report also questions Instagram and WhatsApp's acquisitions by Facebook – saying the famous social network searched to "expand its dominance" by these means – as well as the acquisitions of Amazon's two "direct competitors", Zappos and Quidsi[126]. This draws parallel to the *American Cyanamid* precedent, as Chairman Dixon was previously Chief Counsel and Staff Director of the Senate Subcommittee in charge of the investigation regarding drug industry. However, what is divergent is that the decision in this case relied heavily on the conclusions drawn in the investigation, which is why the Commissioner was disqualified. If ever a decision is issued in the *FTC v. Facebook* case, in which Lina Khan takes part, and that uses conclusions from the Report, then the facts will be the same, and it should lead to her disqualification after a judicial review. Yet, on the opposite side, if the Report is not a central part of a ruling, then her previous work should not be an obstacle to her adjudicatory status.
23. In conclusion, while some points are accurate regarding an eventual test for disqualification, others are more questionable. For starters, concerning "public statements", both companies use tweets from Lina Khan, some of them only available using archives. Does a message on a microblogging social network really qualify as a public statement? The District Court of Columbia once answered positively to that question

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[124] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc.*: 14; *Facebook, Inc*: 10.

[125] These elements can be found in *U.S. v. Grinell Corp.*, 348 U.S. 563 (1966), at 570-571: "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.".

[126] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc.*: 15.

as regards President Trump's tweets in the *James Madison Project*[127], but can this solution be widened to federal agency members? A clear answer to that question would be desirable. Amazon, in turn, uses articles from newspapers to argue that Lina Khan is their "public […] adversary-in-chief", such as *How to Fight Amazon (Before You Turn 29)*, from The Atlantic, and *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, from the New York Times[128], even though she has no control over the daily press sector. Besides, "Commissioners should be presumed to operate with honesty and integrity"[129], since the Supreme Court itself remarkably stated in *Withrow v. Larkin* that "the contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity"[130]. Quoting the *FTC v. Cement* case[131], the Court reminded that the simple carrying out of previous investigations "did not necessarily mean that the minds if its members were irrevocably closed"[132] and thus is not enough to suggest bias.

24. Albeit, the FTC Chair's heavy participation in the Report, given the *American Cyanamid* precedent, does seem to raise concerns about a possible disqualification in case of a decision being rendered, and if the case relies on the Report. In presence of such a risk – and despite judge Boasberg's approval of the FTC's Office of Secretary dismissal – it might be preferable for her to recuse herself in future proceedings. Indeed, it would avoid decisions being remanded based on a denial of due process, and, consequently, longer (and thus costlier) proceedings. However, it can sound a bit absurd, as it was her expertise in Digital Economy and Antitrust that first qualified her for her position. Unfortunately, that "very expertise" is the reason Commissioners "[are] particularly susceptible to personal bias because of [their]

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[127] *James Madison Project & al. v. DoJ*, 1:17-cv-00144-APM, doc. 29, (Filed 13 November 2017, D.D.C.); "In answer to the Court's question, the government is treating the President's statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States".

[128] Federal Trade Commission, *In re motion to recuse Chair Lina M. Khan from involvement in certain antitrust matters involving Amazon.Com, Inc.*: 8.

[129] Bush "What's Behind Amazon's Demand that FTC Chair Lina Khan Recuse Herself?".

[130] *Withrow v. Larkin*, 421 U.S. 35 (1975), at 47.

[131] *FTC v. Cement Institute*, 333 U.S. 683 (1948).

[132] *Withrow v. Larkin*, 421 U.S. 35 (1975), at 48.

knowledge in [their] particular field"[133]. Does it mean that academics should restrain themselves in their work? While the answer seems to be an unambiguous "No", simply because of academic freedom, sometimes it does have repercussions. One can think of Robert Bork's nomination to the Supreme Court in 1987 rejected because of his "extreme views", the Senate fearing, amongst other[134], an under-enforcement in antitrust law[135]. Indeed, they invoked his previous writings, such as *The Antitrust Paradox* in which he qualified the Supreme Court decision-making practice of "mindless law"[136]. Nevertheless, opposite examples can be found such as Professor William Francis Baxter, named Assistant Attorney General for the DoJ, from 1981 to 1983, despite numerous publications such as *The Political Economy of Antitrust* in 1980.

25. Nonetheless, regardless of their ideology, academics can set aside precedents during their reflections, which is the essence of the richness and variety of positions expressed in literature. The choice to follow or to ignore this literature belongs *in fine* to the judges for whom legal precedents are binding and who conduct judicial reviews of the FTC administrative or judicial proceedings. Thus, even though the FTC does hold adjudicative proceedings and is subjected to the respect of due process, one can argue that the recusal of Chair Lina M. Khan would be a dangerous precedent to set. Indeed, the choice of being accommodating is a risky path that should not be taken by academics, the variousness of beliefs and ideas ensuring a constant evolution and progression of antitrust laws, or of Society. However, the strong

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[133] Mark A. Williams, "Standards of Disqualification for Federal Trade Commissioners in 'Hybrid' Proceedings: Association of National Advertisers v. FTC", *Washington and Lee Law Review*, vol. 37 (1980): 1359.

[134] There are more reasons beyond antitrust law, Senator Ted Kennedy comparing Robert Bork's America to "a land in which women would be forced into back-alley abortions, Blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids […]."; Ilya Shapiro, "The Original Sin of Robert Bork", *Newsweek*, 9 September 2020.

[135] U.S. Senate, 1987, 6261: "We will see the institutionalization of non-enforcement on the Federal level […]. The real victims of a Bork antitrust era on the Supreme Court will be consumers, small business entrepreneurs, and mid-sized corporations"; See e.g. Thierry Kirat and Frédéric Marty, "How Law and Economics was marketed in a hostile world: L'institutionnalisation du champ aux États-Unis de l'immédiat après-guerre aux années Reagan", *Hermann, Cahiers d'économie politique*, no. 78 (2020): 192.

[136] Thierry Kirat and Frédéric Marty, "How Law and Economics was marketed in a hostile world", 193.

reiteration of a position might raise interrogations on the fairness of procedures, such as this case illustrates it, questioning procedural due process issues and shifting away the focus from the initial matter.

II. Shifting the focus: from solely antitrust concerns to increased politicization

26. U.S. antitrust law is currently "undergoing disruption" **(1)** with "the rise of [a] fifth cycle – namely a progressive, anti-monopoly, New Brandeis School"[137], led by, *inter alia*, Lina Khan. By being painted as an "adversary-in-chief" of the Big Tech Companies, a stronger politicization of the debate **(2)** is now occurring with heavy discussions on what should antitrust' future should be.

1. The current "disruption" of U.S. antitrust law

27. Antitrust public enforcement has known a decline since the late 1970s[138] with the rising influence of the Chicago School of Economics[139] and its "laissez-faire ideology" based on the assumptions of self-correcting markets and "rational, self-interested"[140] participants. Indeed, Chicagoans believe that "cartels are naturally unstable; there are few entry barriers; monopoly attracts disruptive entry; mergers almost never produce anything except reduced costs; vertical integration and contracting are unmitigated goods"[141]. Since competition should then be effective, no government intervention, and thus antitrust enforcement, should be needed to maintain a competitive market. Moreover, the maximizing of social welfare advocated by the Chicago School took over antitrust's previous goals – political, social, and moral – with the implementation of a single economic goal, the "consumer

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[137] Maurice E. Stucke and Ariel Ezrachi, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement", *Harvard Business Review*, 15 December 2017, https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

[138] Except for cartel cases; Stucke and Ezrachi, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement".

[139] *See e.g.* Herbert Hovenkamp and Fiona Scott Morton, "Framing the Chicago School of Antitrust Analysis", Research Paper No. 19-44, University of Pennsylvania Law School, ILE (November 2019); George L. Priest, "Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law", *Journal of Law and Economics*, vol. 57, no. S3, The Contributions of Robert Bork to Antitrust Economics, (August 2014).

[140] Stucke and Ezrachi, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement".

[141] Hovenkamp and Scott Morton, "Framing the Chicago School of Antitrust Analysis", 1848.

welfare" standard that became omnipresent over the years although there is still no consensus on its actual meaning[142].

28. As a result, this led to what some call an "under-enforcement" of antitrust with few monopolization cases[143] and with rare challenges of mergers among competitors and even more scarcely vertical mergers[144]. Moreover, even when cases were brought by the DoJ or by the FTC, they often ended in settlements, sometimes considered as very convenient for the defendant, such as in the *Microsoft III* case[145]. In this instance, the company was sued by the DoJ and nineteen states for attempting to illegally maintain its operating system monopoly and to obtain a monopoly in Web browsers[146]. Finally, conducts considered as problematic, such as Google using its dominant position in general search to self-preference its vertical properties[147] were subject to investigations closed afterwards[148] even though the FTC stated "that some of Google's algorithm and design changes resulted in the demotion of websites that could, collectively, be considered threats to Google's search business"[149]. However, these search biases were ultimately con-

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[142] Maurice E. Stucke, "Reconsidering Antitrust Goals", *Boston College Law Review*, vol. 53 (1 March 2012): 559 ff.; 571 ff.

[143] See e.g. Department of Justice, *Workload Statistics*, 2010-2019.

[144] Stucke and Ezrachi, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement".

[145] *See e.g.* Norman Hawker and Robert H. Lande, "As Antitrust Case Ends, Microsoft Is Victorious in Defeat", *Baltimore Sun*, 16 May 2011; Einer Elhauge, "Soft on Microsoft, The Potemkin Antitrust Settlement", *The Weekly Standard*, 25 March 2002; Meanwhile European Commission fined Microsoft €500M for an abuse of dominant position; European Commission, *Microsoft*, COMP/C-3-37.792, 24 May 2004. A €561M additional fine was also imposed in 2013 for non-compliance with the commitments; European Commission, Press Release, *Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments*, 6 March 2013.

[146] *U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30. (D.D.C. 2000); At first, the district court followed DoJ's proposal that Microsoft should be divided in two firms, but the order was reversed and remanded: *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[147] Federal Trade Commission, *Memorandum on Google Inc.*, File No. 111-0163, at 18-30, 8 August 2012.

[148] Federal Trade Commission, *Statement of the Federal Trade Commission Regarding Google's Search Practices in the Matter of Google Inc.*, FTC File Number 111-0163, 3 January 2013. Meanwhile, as for Microsoft, Google has been fined afterwards by the European Commission for different practices considered as abuse of dominant position: European Commission, *Google Shopping*, AT39740, C(2017) 444 final, 27 June 2017; European Commission, *Google Android*, AT 40099, C(2018) 4761 final, 18 July 2018; European Commission, *Google AdSense*, AT 40411, C(2019) 2173 final, 20 March 2019.

[149] Federal Trade Commission, *Statement of the FTC Regarding Google's Search Practices in the Matter of Google Inc.*, 2.

sidered beneficial for users, providing quicker answer and "directly relevant information" to them, which is why the investigation was closed unanimously[150], scoring what was called "a major victory"[151] for Google.

29. Anyhow, the situation seems to be changing[152]. DoJ is now suing Google[153] "to stop Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets"[154]. Facebook is also undergoing investigations and Amazon is presently under close observation[155]. The FTC created a Technology Task Force to monitor technology markets and anticompetitive conducts in those markets[156]. The "consumer welfare" standard is now being called out[157] while some advocate for it to be replaced, for example, by an "effective competition standard"[158]. The 2020 Vertical Merger Guidelines were withdrawn by the FTC, on the 15th of September 2021[159], only a short year after they were adopted in June 2020, being considered as too lenient as the elimination of double marginalization was given too much prominence and digital platforms characteristics were not introduced. Overall, as it is the case in the Report, a revival "of robust oversight over the antitrust laws" is solicited[160] and appears to be going underway along with the rise of

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[150] *Ibidem*.

[151] Frank A. Pasquale, "Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias", *Harvard Journal of Law and Technology*, Paper Series, (July 2013): 2.

[152] *See Supra* § 14.

[153] *U.S. v. Google LLC*., Case 1:20-cv-03010, 20 October 2020.

[154] Department of Justice, Press Release, *Justice Department Sues Monopolist Google For Violating Antitrust Laws*, 20 October 2020.

[155] *See Supra* § 8.

[156] Federal Trade Commission, Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, 26 February 2019.

[157] Khan, "Amazon's Antitrust Paradox", 716: "[…] 'consumer welfare', typically measured through short-term effects on price and output – fails to capture the architecture of market power in the twenty-first century marketplace"; Frédéric Marty, "Is Consumer Welfare Obsolete? A European Union Competition Perspective", *Prolegómenos*, 24(47), https://doi.org/10.18359/prole.4722.

[158] Marshall Steinbaum and Maurice E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust", *University of Chicago Law Review*, vol. 87, no. 2 (March 2020).

[159] Federal Trade Commission, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, Commission File No. P810034, 15 September 2021.

[160] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff Report*, 2020, 7.

the New Brandeis School and the growing interest in Lina Khan. Big Tech Companies previous mergers are now being reconsidered, more challenges are underway such as Meta's acquisition of Within, a company specialized in virtual reality, and a more rigorous enforcement of monopolization can be expected in the next few years. Nonetheless, it is far from being a unanimous choice of evolution. For instance, out of five Commissioners, two voted against legal action in the Meta-Within acquisition, as William Kovacic described it as "an experimental case" with "a theory of harm that the agencies have not tried out in the past"[161]. Furthermore, some perceive the filing of this legal action as an additional indicator of Lina Khan's supposed personal "battle" against Big Tech and as a sign of bias. Controversy surrounding this contemporary scrutiny of few corporations with significant economic power is hence far from being over, causing a stronger public and political debate in connection to antitrust.

2. The stronger politicization of the debate

30. The purpose of antitrust laws is "to promote free and fair competition in the U.S. economy"[162] and they were thus already intertwined with politics. Nonetheless, with today's growing concern over the economic power of certain corporations, as Carl Shapiro pins it, "Antitrust is sexy again"[163] – a phenomenon that can be attested by the quick publicization of Lina Khan. This might be explained by the confrontation between the increase of economic inequalities[164] and the concentration of economic power which brings political power[165], notably thanks to lobbying. Those two divergent – yet inextricably related – paths are forced to collide and provoke a reaction that can go either way. Either

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[161] Dave Lee and Stefania Palma, "'Here we go': FTC's Meta case puts Lina Khan's antitrust vision to the test", *Financial Times*, 29 July 2022.

[162] B. Dan Wood and James E. Anderson, "The Politics of U.S. Antitrust Regulation", *American Journal of Political Science*, Vol. 37, No. 1, (February 1993): 1.

[163] Shapiro, "Antitrust in a Time of Populism", 714.

[164] The Organisation for Economic Co-operation and Development, "United States, Tackling high inequalities, Creating opportunities for all", June 2014, https://www.oecd.org/unitedstates/Tackling-high-inequalities.pdf: "Income inequality in the US is higher and increased more than in most OECD countries"; "the average income of the richest 10% is 16 times as large as for the poorest 10%".

[165] Jonathan B. Baker and Steven C. Salop, "Antitrust, Competition Policy, and Inequality", *Georgetown Law Faculty Publications and Other Works*, 1462 (2015): 1-28.

it can "spark proposals to modify antitrust and competition policy"[166] and "tilt the balance towards specific markets or firms or [it can] shift the investigation away from them"[167]. Both are not without risks. The first can fall into a danger of adopting a "populist" vision and fighting "a growing and intolerable evil"[168] represented by big companies to attract voters. It is the epitome of the "Big is bad" vision, and what is criticized regarding the FTC's vigorous approach lately. Whereas the latter can pave the way to under-enforcement of antitrust and false negatives – in which conducts are not deemed as anticompetitive practices when they did injure competition – which is precisely what is being criticized by, notably, the Neo-Brandeisians. Howbeit, this can swiftly divert the attention from the judicial matters, something that the firms can take advantage of.

31. First, they can invest in lobbying Congress, as it has been the case in 2020, the five Big Tech Companies having spent altogether a combined total of 61,09M$, with Facebook being the biggest lobbyist at 19.68M$[169] and Google directly addressing the problem of online advertising regulation[170], a sector in which it has a dominant position[171]. More interestingly, these companies have only recently been interested in this aspect of politics, as Appendix 1[172] can show, with a notable increase of spendings since 2010. Is it a mere coincidence that investments in lobbying have known a significant expansion as public interest in Big Tech has concomitantly grown? One can doubt it. Second, by introducing new topics, as the impartiality of the agency's members, they can slow down future proceedings which can be problematic as the DoJ's antitrust division and the FTC "are severely

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[166] Baker and Salop, "Antitrust, Competition Policy, and Inequality", 4.

[167] Gal, "Reality Bites (or Bits): The Political Economy of Antitrust Enforcement", 4.

[168] Crane, "Antitrust's Unconventional Politics", 134; quoting William Howard Taft.

[169] Feiner, "Facebook spent more on lobbying than any other Big Tech company in 2020".

[170] A sector for which the enterprise is undergoing investigation by the European Commission; European Commission, Press Release, *Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*, 22 June 2021.

[171] Luigi Zingales, Guy Rolnik and Filippo Maria Lancieri, "Stigler Committee on Digital Platforms" (Final Report), 16 September 2019: 156. digital-platforms---committee-report---stigler-center.pdf (chicagobooth.edu).

[172] Nolan McCarty and Sepehr Shahshahani, "Economic Concentration and Political Advocacy", Draft, 12 September 2021, Figure 13: Lobbying trends for six tech giants, 1999-2017.

resource-constrained"[173], as their combined annual budget is "below what Facebook makes in three days"[174].

32. Third, this shift of focus can benefit them as "major investigations are won as much as in courts of public opinion as in they are in actual courts"[175]. And public opinion is formed by the circulation of information, hence through the "marketplace of ideas"[176], which now seems to be falling under the private regulation of these actors. Presumably, "digital media platforms such as Facebook, Twitter, and Google operate as news aggregators and portals"[177]. Social media allowed consumers to share information on a worldwide scale and instantly, giving the appearance of an "ideal manifestation of the 'Marketplace of Ideas'"[178]. However, the censorship of hate speech, moderation of content has been slowly falling into their hands, as the 1st Amendment prohibits government intervention in this "marketplace of ideas". As a result, they now have the power to shape public opinion and the "capacity to influence the public discourse to their advantage"[179]. The Utah Statement, the so-called Neo-Brandeisian pamphlet, alerts on this risk as "economic power is recognized as inextricably political"[180]. By controlling the narrative, Amazon and Facebook could attract the sympathy of the public and play a substantial part in legal changes. Yet, the opposite point of few could be that the constant denunciation of the Big Tech's economic power and their practices could be perceived as relentlessness from Neo-Brandeisians and Lina Khan, impacting the FTC's independency.

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[173] Michael Kades, an ex-FTC trial lawyer; Alex Kantrowitz, "Big Technology, 'It's Ridiculous': Underfunded U.S. Regulators Can't Keep Fighting the Tech Giants Like This", *OneZero*, 17 September 2020, https://onezero.medium.com/its-ridiculous-underfunded-u-s-regulators-can-t-keep-fighting-the-tech-giants-like-this-3b57487b4d63.

[174] *Ibidem*.

[175] Filippo Maria Lancieri, Personal communication, 2 September 2021.

[176] See *Supra* § 12.

[177] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff Report*, 2020, 287.

[178] Peter Maggiore, "Viewer Discretion is Advised: Disconnects between the Marketplace of Ideas and Social Media Used to Communicate Information during Emergencies and Public Health Crises", *Michigan Telecommunications and Technology Law Review*, vol. 18, no. 2 (2012): 629.

[179] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff Report*, 2020, 278.

[180] Tim Wu, "The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech", *OneZero*, 18 November 2019, https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7.

33. These petitions for recusal fall into this polarized context and can be interpreted in two ways. It could end up entrenching the position that "Big is bad"[181] as in the letter addressed to Facebook and Amazon's CEOS warn the companies that "your efforts only add to the perception that you are attempting to bully your regulators, disarm the FTC, and avoid accountability rather than to strengthen ethic standards"[182]. Furthermore, the Report heavily points out the political power of the digital platforms, expressing worries that "this concentration of political influence alone would be a troubling development for American democracy"[183]. On the opposite side, it could be perceived as raising valid concerns about the impartiality, the independency and the fairness of the FTC proceedings and Commissioners at a crossroad towards stronger public enforcement.

Conclusion

34. Eventually, the filing of these petitions for recusal appears to be a win-win situation for Big Tech companies, even if they have not been the object of a decision so far, violation of due process requiring a deprivation of "life, liberty or property" first. If, regarding future proceedings, the newly appointed Chair recuses herself – if she esteems herself as disqualified for partiality concerns – this could be a step back in the current disruption of antitrust and might set a precedent that Google and Apple could also use given that they are both present in the Report[184] and the article *The Separation of Platforms and Commerce*[185].
35. If she does not, there remains a very slight risk that future decisions would be remanded for denial of procedural due process. This situation would force the FTC to review the case without her participation, losing time and money, both resources that the federal agency does not necessarily have. And even if such a conclusion is not reached, if she's considered as unbiased – her academic writings only

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[181] Affirmation which needs to be nuanced as monopolization is not prohibited *per se*, but only when achieved by unreasonable means; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[182] *Letter to Amazon and Facebook*, 4 August 2021.

[183] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff Report*, 2020, 279-280.

[184] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff* Report, 2020, 174-230, 330-373.

[185] Khan, "The Separation of Platforms and Commerce", 996-997, 1004-1005.

being an expression of "strong opinions" for example – the judicial review will stir the pot in an already heavily polarized antitrust context. Nevertheless, as regards to the repercussions on academic freedom, these petitions can have and, on the undergoing stricter public enforcement of antitrust laws, it will be interesting to witness the end of this controversy surrounding the Chair's impartiality, especially as legal changes are as much won by public opinion, then by the vote itself of the Bills and judicial or adjudicatory decisions.

Appendix 1: Nolan McCarty and Sepehr Shahshahani, "Economic Concentration and Political Advocacy", Draft, 12 September 2021, Figure 13: Lobbying trends for six tech giants, 1999-2017:

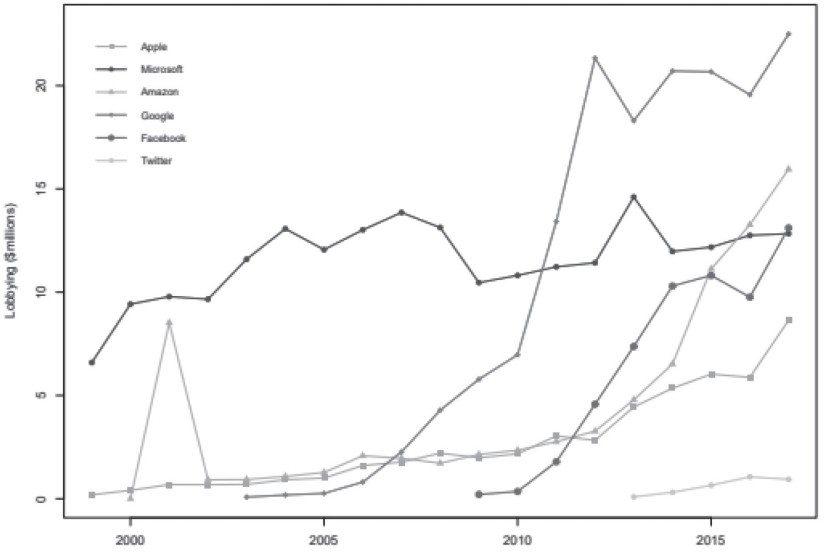

Figure 13: Lobbying trends for six tech giants, 1999-2017

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