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FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION: INTO OUR 2ND CENTURY

Wednesday, July 30, 2008

9:00 a.m.

Federal Trade Commission
FTC Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

FEDERAL TRADE COMMISSION

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3 MS. OHLHAUSEN: Good morning, everyone. I
4 think we will get started. I will just do the required
5 security announcement, but today remember to introduce
6 myself. You probably all know me. I am Maureen
7 Ohlhausen, Director of Policy Planning. And welcome to
8 the second day of the Federal Trade Commission: Into Our
9 Second Century: FTC at 100. We will start off our
10 roundtables this morning and go through until the end of
11 the day.

12 But before we start, I just wanted to give the
13 security announcement, which is that if there is an
14 incident, if something happens and we have to evacuate
15 the building, we gather at the corner on this side of
16 building. When you go out, you will turn right, across
17 from Georgetown Law School, but on this side of the
18 school.

19 I would also remind people if you are going to
20 use cell phones, please do not use them right outside
21 these doors because the sound carries. Use them through
22 the double doors.

23 And if people leave for lunch, just remember if
24 you are not an FTC employee, you need to leave time to go
25 back through security.

1 So, with that, I think we will begin our first
2 panel.
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1 **SESSION 1: CHARACTERISTICS OF A SUCCESSFUL**
2 **GOVERNMENT AGENCY**

3 MS. OHLHAUSEN: Now, I am taking on my
4 moderator hat here. So, the first panel today is
5 Characteristics of a Successful Government Agency.
6 Yesterday, we spent basically the whole day talking very
7 specifically about the FTC, particular things that have
8 worked well at the FTC, challenges we have faced over the
9 years, ideas for changing or adapting so that we could do
10 things better in the future.

11 But what this panel this morning is trying to
12 do is take a little step back from the direct FTC focus
13 to see if there are lessons from management of government
14 agencies in general that we can learn from. Do all
15 agencies face similar challenges? Have other agencies
16 overcome them in ways that we should consider emulating?

17 And to help us with that, we have Jerry Ellig.
18 He is the former Acting Director and Deputy Director of
19 the Office of Policy Planning. Jerry and I used to work
20 together. And he is also a Senior Research Fellow at
21 Mercatus Center. And Jonathan Breul, who is a partner at
22 IBM Global Business Services and also, as you will see
23 from the bios, has a long history in government service.
24 Also, my co-moderator, Greg Luib.

25 So, I think what we might do to start is just,

1 Jerry and then Jonathan, ask you to just give a brief
2 background of the kind of work you do, the kind of issues
3 that you look at when you are considering how government
4 agencies should look to do a better job. So, Jerry?

5 MR. ELLIG: Oh, okay, sure. First of all, I
6 want to congratulate the FTC on undertaking this because
7 I know the Government Performance and Results Act says
8 you should do a new strategic plan every five or six
9 years, and looking at a 100-year plan --

10 **(Laughter.)**

11 MR. ELLIG: Looking at the next 100 years is
12 extremely ambitious. I do not say that sarcastically at
13 all. I think it is good to have a time horizon a little
14 longer than five or six years, difficult as that may be
15 sometimes in Washington.

16 I think we have learned a few things at the
17 Mercatus Center through several projects. One is our
18 annual performance report score card where we evaluate
19 the quality of the performance reports produced by the 24
20 largest federal agencies covered by the Chief Financial
21 Officers Act, and the other is through other types of
22 work and study of federal agencies. And this is one of
23 these things where the ideas are pretty simple and it is
24 the implementation that is hard.

25 But it seems like successful agencies, like

1 successful organizations in general, seem to be able to
2 do about half a dozen things well. They have a very
3 clearly defined mission that is based on outcomes and
4 they manage to take that mission down to the level of the
5 individual employee so that individual employees know how
6 what I do affects the mission. Not just so they feel
7 good, but also so that they are more effective and the
8 mission can actually guide individual action. So, they
9 have mission and they have measures that come off of the
10 vision that can guide action.

11 They have an organization structure that -- I
12 do not know that there is any best organizational
13 structure for an agency. But the key thing in agencies
14 and organizations that seem to work well is that people's
15 roles and responsibilities are clearly defined and people
16 have the authority and control over resources they need
17 to accomplish the things that they are actually held
18 responsible for.

19 You have an organizational culture where the
20 focus is on performance and results rather than following
21 rules and also, where the focus is -- you might describe
22 it by the slogan "reality is not optional." That is the
23 folks in the organization feel that they have a
24 responsibility to understand what they do well, what they
25 do not do well, what their shortcomings are and make

1 plans to remedy shortcomings.

2 One of the best examples of that I have seen is
3 the Department of Veterans Affairs. They always rank
4 very highly in our performance report score card for
5 doing an informative performance report. And then we get
6 letters from ticked off veterans saying "Your project
7 must be a whitewash because you ranked the Department of
8 Veterans Affairs so highly on performance." Well, we are
9 not ranking them on performance, we are ranking them on
10 the report.

11 In fact, if you look at their report last year,
12 they will admit that they missed half of their goals and
13 that they have a lot of major challenges identified by
14 the Government Accountability Office and by their
15 Inspector General, but they are very forthright about
16 what they are trying to do to fix these things and when
17 they expect to fix it. So, that is the good concrete
18 example of an agency that does not treat reality as
19 optional and takes a realistic look at where are they not
20 doing well and how do they need to improve.

21 And, finally, the organization also has the
22 people with the capabilities and, depending on its job,
23 the other assets that it needs to actually accomplish the
24 mission.

25 MS. OHLHAUSEN: Great. Thank you. Jonathan?

1 MR. BREUL: Well, let me just as a starter
2 explain where I'm coming from because it will perhaps be
3 helpful here. I spent many years in government, the last
4 22 of which were at the Office of Management and Budget
5 dealing with management reform and particularly
6 government-wide management reform the various
7 administrations wanted to put in place. So, I have quite
8 a bit of perspective on various agencies and what works
9 and doesn't work across the government.

10 And I left government a number of years ago,
11 five I guess it is now, and joined IBM in what is a
12 little think-tank where two or three of us actually
13 sponsor research with university experts, whether it's
14 Michael Barzelay at the London School of Economics or
15 Steve Kelman at Harvard and people out in Arizona who are
16 doing on networks and partnerships, which we might talk
17 about in a little bit, but trying to get the best ideas
18 from the cutting edge thinkers on what works, what
19 doesn't work and where things are heading.

20 And with that, we put out three dozen reports a
21 year on matters dealing with management issues, run a
22 radio show every week featuring government officials and
23 letting them tell their story about, again, what works,
24 what doesn't, how they have wrestled with public service
25 careers. And we put out a magazine. We do a number of

1 things that basically support the question of management.

2 And, so, with that in background, let me give
3 you five sort of conclusions or characteristics about
4 what I'll call high-performing organizations, and even
5 high-performing organizations don't all succeed, but they
6 at least are working well and are at the top of their
7 game.

8 The first characteristic and thing I think to
9 keep in mind is that you're never done. Being a high-
10 performance organization is not sort of one of those
11 things that all of a sudden you get the gold star and
12 you're there. Becoming one and remaining one is a
13 constant struggle and a constant effort. You really
14 can't ever think that you're there. And part of that is
15 because the reform and restructuring or whatever the
16 changes are that are necessary never fully solve the
17 first problem and usually lead you on to another set of
18 problems. In other words, lingering issues usually
19 create the next set of problems you have to deal with.

20 And, so, the real question of these public
21 management kind of issues of reform and change is that
22 it's not so much about problem solving as it is
23 continuing a constant balance of what the competing
24 issues and demands are and being able to adjust those
25 going forward. You're never ever going to get it quite

1 right and it's never ever going to be stable. And, in
2 fact, you're going to constantly be dealing with issues
3 at the margin. Do a little bit more of this, a little
4 bit more of that. That constant adjustment is part of
5 the lesson that you really have to keep in mind. You're
6 never really done with this.

7 The second issue on high-performing
8 organizations is that they are fundamentally different
9 than other non-high performing, particularly government
10 organizations. They've got a number of characteristics
11 that Jerry began to suggest and I'll repeat a few, as
12 well. The first is they don't operate primarily based on
13 bureaucratic authority. In fact, they've replaced
14 bureaucratic authority with very different tactics.

15 They use incentives, which you folks know all
16 about. They have very much a customer focus. And they
17 typically rely on what, in the management role, we call
18 different sourcing arrangements. But they don't do
19 everything themselves. Some things they may contract
20 out. Some they may use partners. But they use various
21 techniques and devices to get the work done. They don't
22 view it all as an in-house bureaucratic exercise.

23 So, the real high-performing organizations defy
24 a neat clean definition, but they operate very
25 differently from the traditional bureaucratic command and

1 control structure that's familiar with the government
2 particularly in the past.

3 The third issue about a high-performing
4 organization is that political reality drives their high
5 performance, and that's the reality point that Jerry
6 mentioned again. And different problems have different
7 political realities. And high-performing organizations
8 rise to the occasion of fiscal issues or budget issues of
9 those are driving the agenda. They move towards public
10 service issues if those are on the political agenda. But
11 they shift and move. They've got an agility that lets
12 political reality make them in tune with what the larger
13 set of demands are.

14 And they sustain attention and effort on things
15 where it has political value. That's the point of
16 remaining relevant. And, so, when you really scrub hard
17 on management reform and the larger changes that have
18 succeeded in organizations that are high-performing,
19 politics do lie at the heart of a lot of what they do.
20 The management agendas are not simply textbook, do good
21 kind of things. Some of them are, but the fact is
22 there's a driver behind it that has a political reality
23 that the leadership recognizes.

24 Point four is that being or becoming a high-
25 performance organization has much less to do with

1 structure. The question of reorganizing and seeing
2 structure is the answer. It just really isn't the key
3 matter. So, it has much more to do with re-engineering
4 the processes and activities within the organization. It
5 has much more to do with the relationships and
6 partnerships and networks outside the organization. But
7 defining the box and the organization chart and all that
8 stuff, which public administration has fixated on in the
9 past and which often the Congress thinks is important, is
10 really not the key to a high-performing organization.
11 That's not the essential focus, and high-performing
12 organizations work around that in substantial form.

13 And a lot of that has to do with the fact that
14 hierarchy, authority, command and control kind of
15 activity has really reached its limit in terms of
16 effectiveness. And that's both the way organizations
17 operate these days and it also has a lot to do with the
18 new generation of employees coming in. There are a whole
19 bunch of factors involved here. But, again, structure,
20 hierarchy and authority are not the remedy here that's
21 going to be most important. So, you've really got to
22 think about supplementing or replacing a focus on
23 structure and organization with an examination much more
24 of process, of what you do internally, and then how you
25 relate and partner on the outside world.

1 Point five is that, unfortunately -- and I say
2 this with no disrespect to academe or any of us even who
3 are sort of on the think-tank side of government -- there
4 is a significant mismatch between what happens in
5 practice and what is in theory and instruction. There is
6 not, unfortunately, a nice course at a university or a
7 whole program that's going to teach this. There's not a
8 playbook or a game plan for how you go about sort of
9 restructuring, transforming, becoming a high-performance
10 organization. There's really only a modest theoretical
11 foundation for it right now.

12 What you're striving for, I think, in terms of
13 performance is more about building capacity and capacity
14 to do the old things in very new, different, agile and
15 better ways. So, I think you have to think about it in
16 those terms. And in some cases, it's going to be about
17 doing new things that need to be done, as well, things
18 you may not have done in the past.

19 But, again, traditional restructuring is not
20 going to eliminate those problems. It's not going to
21 prevent them from reoccurring. The restructuring kind of
22 remedy, again, simply relocates problems from one
23 division or one bureau or one segment to another. It
24 really is not the solution.

25 So, let me conclude with a couple lessons for

1 you. I think they tie in with Jerry's pretty nicely.
2 The first is: You need some clarity of purpose. And I'm
3 not suggesting you don't have it. In fact, I've looked
4 again at your strategic plan and it's remarkably good and
5 I think pretty helpful. But high-performing
6 organizations have a clarity of their purpose and
7 everybody understands that. And, so, without that
8 clarity and understanding of the problem to be solved,
9 you really can't move on. So, having some clarity of
10 purpose is point one.

11 Point two is the need to experiment with
12 various methods and carefully gauge the results of those
13 methods in terms of what combination best solves the
14 problem. In other words, you don't want to move out with
15 some big wholesale firm change because you could really
16 upset things pretty seriously. So, having an ability and
17 willingness to start making adjustments, calculate the
18 effect and benefit of that and continuing to move on and
19 learn from that is a pretty smart move.

20 And, finally, any such changes to become a
21 high-performance organization requires time, it requires
22 patience, energy and a lot of commitment to careful,
23 unbiased and unvarnished sort of evaluation and
24 assessment of what you're doing. You don't want to do it
25 just because it sounds good or someone else told you it's

1 good or because it's some sort of -- I don't want to
2 pitch too many stones, but part of the national
3 performance review with Vice President Gore was there was
4 almost a religious fervor to some of it. Well, in some
5 cases what they were pursuing made a lot of sense for
6 some organizations and was very helpful, but in others
7 maybe not.

8 So, again, as you move ahead with any changes,
9 you've got to be very attuned to making sure and
10 assessing, in some sort of evaluative fashion, whether
11 what you're doing is actually improving things or not.
12 Again, you can't afford to make big mistakes here. I
13 will maybe leave it at that. We'll see where we go.

14 MS. OHLHAUSEN: Thank you.

15 MR. LUIB: Question for Jerry. I was wondering
16 if you might briefly describe the Mercatus Center
17 Government Accountability Project and tell us what you
18 think as far as the criteria on which you judge the
19 agencies and if the process that you use could be
20 translated to what we're doing with our self-assessment
21 here.

22 MR. ELLIG: Okay, sure. We try to not get too
23 hung up in our silos at Mercatus, but we have a set of
24 activity that go under the umbrella of the government
25 accountability project. Essentially what we're trying to

1 do in that project is improve transparency and
2 accountability in government agencies or, rather, help
3 federal agencies improve their own transparency and
4 accountability.

5 Kind of the flagship project of that has been
6 our annual evaluation of performance and accountability
7 reports where we essentially ask: To what extent do
8 these reports present relevant information about agency
9 performance in a transparent way that a reasonably
10 intelligent and interested person who is not an insider
11 could understand? So, it's very much an evaluation of
12 the quality of reporting and communication rather than
13 the quality of the agency's actual performance.

14 But there are some of the questions we ask and
15 some of the things we look at in the reports where if you
16 assume that the agencies are actually doing the things
17 they say they're doing in the reports do shed light on
18 some actual management practices, strategies and things
19 that are maybe more relevant directly to what you are
20 doing in this project here at the FTC.

21 And one cluster of things relates to
22 essentially having goals that are stated as outcomes and
23 that are measured. So that your goals are laid out as
24 the actual good things we are trying to achieve for the
25 public that legislators, members of the public and others

1 would kind of look at, nod their heads and say, yes,
2 those are good things that we want to see happen, and the
3 focus is on the goal rather than the means of the goal.
4 You can dispose of a way of doing things or a means if it
5 doesn't work, but the focus on the goal remains.

6 For example, one of the better reports this
7 year was produced by the Department of Health and Human
8 Services. I mention that because traditionally they had
9 not done very well. But they had a very outcome-oriented
10 statement of their mission in their latest strategic plan
11 where they said what they're trying to do is -- one of
12 the things they're trying to do is improve the safety,
13 quality, affordability and accessibility of healthcare;
14 prevent and control disease, injury, illness and
15 disability; protect the public from infectious,
16 occupational, environmental and terrorist threats.
17 That's probably a bigger mouthful than the FTC's
18 strategic plan requires.

19 But if you listen to that carefully you could
20 think, gosh, measures darn near fall right out of that.
21 Sure enough if you look at the things HHS tries to
22 measure, they look at things like percentage of the
23 population with prescription drug coverage. That's
24 something that's verifiable, tells you whether they're
25 achieving some of their mission or not. The number of

1 people and percent of people in the country with ongoing
2 access to healthcare. The percentage of the population
3 with immunization coverage. These are all things that
4 are either health outcomes or closely related to health
5 outcomes that fall right out of their mission.

6 Another cluster of things involves
7 understanding how the actions of the agency contribute to
8 the outcomes and knowing what it costs. So, it's not
9 enough to measure an outcome and say, gee, that went
10 better, we did a fantastic job. I hope that's not the
11 approach you want to take or else \$4 a gallon gasoline is
12 going to make the FTC look real bad. Of course, I know
13 from reading Bill Kovacic's multitude of testimonies that
14 85 percent of the price of gasoline is determined by the
15 price of crude oil. So, I am not going to blame the FTC
16 for the fact gasoline prices are high.

17 But what you want to be able to do, whether
18 it's gasoline, groceries or the broader consumer
19 protection issues, you want to be able to -- ideally, you
20 will have had some good program evaluations that give you
21 an idea of how has the Federal Trade Commission's
22 activity contributed to the observed change in the
23 outcome? Kind of a controlled experiment rather than
24 just looking at a trend.

25 And then some of the best agencies, in terms of

1 knowing what they're doing, are also able to break down
2 their costs according to not just their strategic goals
3 but their performance measures and their outcome measures
4 so that can actually give you an idea of how much did it
5 cost to produce this much outcome or what does it cost to
6 produce a successful outcome? And that's helpful both on
7 the agency level because you may say, gee, we ought to
8 spend more resources on this kind of initiative over here
9 because the pay-off for consumers is a lot bigger than
10 over here and it's also potentially of use to
11 Congressional appropriators who may be thinking about the
12 same kinds of decisions.

13 The final cluster of things we've noticed, I
14 kind of hinted at before under the slogan, reality isn't
15 optional, that agencies that seem to be doing a good job
16 based upon their performance reports and seem to be
17 better managed actually use performance information to
18 manage the agency.

19 So, they are not just cranking out this stuff
20 in order to do an annual report that they then set out
21 there and Congress may or may not pay attention to and
22 the President may or may not pay attention to, but rather
23 they can access performance information, the same things
24 they measure in their performance reports and more
25 detailed stuff. They can access performance information

1 on a more frequent than yearly basis in order to look and
2 say, gee, how are we doing, what are we doing?

3 One of the other departments -- darn it and I
4 forget off the top of my head if it's Transportation or
5 Labor -- in management meetings actually looks at a lot
6 of their performance indicators where they can monitor
7 them over the course of the year and do kind of mid-
8 course adjustments that say, gee, we're not on target to
9 hit our goal, what do we need to be able to do to change.
10 So, being able to use performance information to actually
11 make decisions in the course of the year is a pretty
12 important thing, too.

13 MS. OHLHAUSEN: I have kind of a general
14 question about measuring the outputs of an agency. I
15 think some agency outputs might be easier to measure. We
16 vaccinated millions of children or we processed a million
17 appeals for disability or something like that. But in an
18 area like in which the FTC operates where doing more
19 cases may not necessarily be the best outcome, maybe we
20 should be doing fewer cases that have more of an effect
21 on the market or fewer cases, but they are more important
22 in establishing the correct case law, or maybe we should
23 be doing more of a policy function.

24 How do the performance measures take into
25 account something where the outcomes are not easily as

1 measurable just by sheer output numbers? Both or whoever
2 wants to answer.

3 MR. BREUL: Well, let me take a crack at it.
4 The whole business of measuring performance and results
5 is inherently difficult in the public sector. If it was
6 easy, someone else would have been doing it. That's why
7 it's a public sector responsibility. It's usually
8 something that's fundamentally beyond the reach of the
9 private sector or academe or somewhere else. So, I think
10 you have to take that as a given.

11 The second thing I would urge you to do is not
12 be entirely sort of frustrated or negative with it. And
13 don't think you're unique with it, because, honestly,
14 there are other parts of the government that I think have
15 a much more difficult and strange set of results to be
16 after. I mean, some of the basic R&D functions that some
17 of the agencies like NIH are pursuing, curing cancer and
18 things like that, are very difficult. Obviously,
19 measuring the homeland security, you're looking for the
20 absence of certain events.

21 And the one that always, I thought, was going
22 to be one of the most difficult was the State Department
23 in terms of diplomacy and foreign policy. I think Jerry
24 will probably tell that from his reports, but I can also
25 tell you from their strategic plan and the way they

1 manage, or they have for a while, particularly under
2 Colin Powell, the State Department was spectacular, and
3 probably had some of the clearest goals and they fell
4 apart this year in your report. But they've done, in the
5 past, a spectacular job of coming to an understanding and
6 clarity of what they're about, what's important and what
7 to measure.

8 Without getting carried away with the geekiness
9 of it all, Maureen used a couple terms in what you
10 described. And I think, at some point, a little
11 precision there is helpful. Yes, indeed, a focus on
12 outputs, and if it's cases and so forth are easy enough
13 to measure. People feel comfortable with those. The
14 budget weanies will love to be able to attach those to a
15 budget number. And the budget often does sort of
16 associate outputs to dollars. Frankly, that's okay
17 because there is a relationship there and that works.

18 The more important thing, in fact, if you look
19 at the title of the Government Performance and Results
20 Act, there are actually two terms at the ends there,
21 there's performance and there's results. And that was
22 deliberate because performance was aimed at those output
23 kind of things, those kinds of matters that are in front
24 of you that you can control, that you can count more
25 readily. But, frankly, at some point, those don't tell

1 the whole story.

2 The idea of results at the end of the term in
3 the Government Performance Results Act was aimed at at
4 least one other, if not two other, kinds of measures.
5 The first and primary and most important one in GPRA is
6 outcomes. What's the larger outcome that you're trying
7 to achieve? And putting some focus and clarity on that
8 is terribly important, and I would argue is the most
9 important. Because what you want to do is line up your
10 outputs to contribute to those outcomes.

11 And having a logic and a theory about that is
12 terribly important to understanding what you're doing.
13 And you may, again, on a daily basis, focus more on the
14 outputs because that's what's in front of you. But you
15 want to make sure they are leading to the outcomes that
16 are important, that are most meaningful.

17 And, finally, in the measurement business, the
18 whole business of impact is most important, what would
19 have happened in the absence of your intervention and in
20 the absence of your activity? And that's an even more
21 difficult matter to measure. And, again, when I stressed
22 earlier the need to have a high-performing organization
23 be clear and then evaluate what the changes are, you've
24 got to start thinking in those terms. What is the impact
25 of what you're doing? What would have happened in the

1 absence of your effort and intervention? And what are
2 the outcomes you're trying to achieve?

3 And to my way of thinking, you've got to start
4 there and work backwards, then, towards questions of
5 outputs in cases and all the rest because, again, you've
6 got to set up the inputs that you're putting there of FTE
7 in dollars and the particular activities undertaken in a
8 way that is strategically oriented towards those
9 outcomes. Because if you miss the mark there, you're
10 spinning your wheels and, again, you are not going to
11 have the real result that's most meaningful politically
12 and to the consumer and the public.

13 MR. ELLIG: If you really twist my arm, I'll
14 say, yeah, measuring outcomes can be really useful for
15 internal measurement, it can tell you something about
16 efficiency. But really what you want to be able to
17 measure is outcomes, outcomes, outcomes. And in some
18 cases you may be able to proxy for that with an output
19 measure if you have good, reliable, independent program
20 evaluation that tells you that if you will see a change
21 in this output, it will translate into a change in the
22 outcome. Not because we believe that happens or not
23 because it's logical, but because program evaluation has
24 demonstrated it.

25 I can't remember what year they did this, but I

1 remember the Department of Transportation one year laid
2 out some measures where they measured the quality of
3 pavement in the highways, conditions of the highways.
4 And they said, we realize this is not an outcome, it's an
5 output, basically. And the reason we do this is because
6 if you look at these studies over here, it has been
7 pretty well statistically demonstrated that if the roads
8 are in this condition, that translates into these kind of
9 effects on accidents, fatalities, injuries, which are the
10 safety outcomes that we're really interested in.

11 So, in that case, they were able to find an
12 output measure where pretty rigorous analysis
13 demonstrated that -- did I say outcome? I'm sorry. They
14 found an output measure that pretty rigorous analysis
15 demonstrated that if you change this output, you upgrade
16 the quality of the highways, then you will get an
17 improvement in safety.

18 Another good example of a contrast came from
19 this year's DOT report where they were looking at
20 enforcement of various kinds of safety regulations on
21 motor carriers, truckers. It's easy for enforcement to
22 measure caseload and inspections and all that kind of
23 stuff. In fact, looking at other agencies, I spent some
24 time looking at the Securities and Exchange Commission's
25 performance and accountability reports and whatnot. I

1 know their enforcement division seems to want to measure
2 the enforcement function separate from everything else,
3 so that way they are only measuring stuff they control.
4 I think that's common in other agencies where there's a
5 separate enforcement division, as well.

6 But, in any case, DOT could measure that kind
7 of stuff. But they went further and said, okay, we do
8 inspections on these motor carriers. They went out and
9 did a program evaluation where they looked, before and
10 after, to figure out when you do a safety inspection of a
11 motor carrier, does its safety record actually improve or
12 not? And they found that, in fact, when they looked at
13 all the ones that they had done the inspections on, they
14 found that there was indeed an improvement in the safety
15 records of motor carriers as a result of the inspections
16 they did.

17 So, basically, they were able to go beyond just
18 measuring their output, the amount of inspection
19 activity, to the actual outcome, which is, well, gee, how
20 much did we improve safety as a result of the year's
21 activity? How much better did something in the world get
22 because of what we did, is the critical thing.

23 And the only other thing I'll mention in ten
24 seconds is I think the evaluation that the Office of
25 Policy Planning did on competition advocacy is a good

1 example of that where you didn't just say, well, here's
2 how many comments we submitted, but rather you went back
3 to the decision makers the comments went to to try to
4 figure out what changed as a result of what we did.
5 That's looking at outcomes.

6 MR. BREUL: Let me go back to DOT one more
7 time. DOT is a fine example and actually one that
8 everybody can sort of understand. As Jerry suggested,
9 safety is one of their three or four major strategic
10 goals. And that means fewer fatalities or injuries
11 whether you're boating, in the air, on the rails or on
12 the highways. And if you look at the highway program and
13 what it does, it issues grants. The output there is more
14 grants and public service announcements and this and
15 that.

16 They do not control driver's licenses, they
17 don't control your alcohol consumption, and they do not
18 control the speed on the highway. Three probably pretty
19 important factors in injuries and fatalities. They
20 control none of that. But their goal is to reduce
21 fatalities and injuries. The SES are held to some goals
22 in those programs and the programs are all oriented to do
23 that, even though they have no control or direct
24 connection to the critical factors involved.

25 And, so, figuring out what the outputs ought to

1 be that could have an influence on those outcomes and
2 contribute positively to a reduction in injuries and
3 fatalities is what they struggle with. And, in a sense,
4 it's the same kind of problem you've got here.

5 These kind of sort of measurement outcome
6 questions are common throughout the government. And
7 they're not easy. There's not a quick fix. There's no
8 magical solution here. But don't ignore those kind of
9 questions because, again, without that focus on outcomes,
10 you're likely to be spending your time on a lot of
11 activity that may or may not be critical to achieving the
12 real purpose and the real objective of the Commission.

13 MR. LUIB: Turning to the issue of clarity of
14 mission, as most of us here know, the FTC's organic
15 statute is very broad or flexible depending on how you'd
16 like to characterize it, prohibiting unfair deceptive
17 acts or practices, unfair methods of competition. At
18 yesterday's discussion, we had former Bureau of Consumer
19 Protection Director Jodie Bernstein embracing that
20 flexibility that the statute provides while former
21 Chairman Tim Muris was cautioning that that broad statute
22 can sometimes lead the agency to stray from being a
23 referee, a process-oriented agency at its core.

24 Are there other agencies with similarly broad
25 statutes? Are there lessons to be learned from other

1 agencies in that regard?

2 MR. BREUL: Let me offer you a suggestion there
3 because I think there are a number. And what I would
4 suggest, believe it or not, is the Department of Defense.
5 The Department of Defense has a pretty broad and sweeping
6 responsibility. The notion of national security is not
7 exactly something you put in a tight little box.
8 National security threats and the question of whether
9 it's one war, two wars, in the Pacific, the Mideast, in
10 outer space, wherever, the nature of those threats is
11 pretty broad.

12 In this world, with terrorism, with tsunamis,
13 you can even argue that financial problems, that
14 financial collapse is a national security problem at some
15 point. So, there is a very broad, very broad set of
16 responsibilities there. And some of what are regarded as
17 the high-performing organizations in DoD, one of them is
18 Special Forces. And the whole idea of Special Forces was
19 not to be so expert in doing this, that or another thing,
20 not to have a very narrow doctrine, a narrow set of
21 outcomes, but rather to have a set of capabilities. And,
22 in fact, they think about their outcomes and their
23 mission in terms of capabilities that can then be
24 deployed by the President in the face of a national
25 security problem.

1 And those capabilities, in their case, have to
2 do with jointness in terms of mission, mobility and
3 certain other kind of weapons and force measures that let
4 them be ready for a lot of different circumstances and
5 can let them move based on what emerges as a national
6 security threat. And it seems to me there may be some
7 lessons in that for you because, indeed, part of your
8 role is to respond to market conditions, market failures
9 and maybe some of you are way ahead of the game and saw
10 subprime mortgages five years ago. But what the problem
11 is each day sometimes catches at least some of the
12 government by surprise.

13 And being able to shift, being able to move and
14 being able to adjust to market changes and what's next, I
15 think, is an enormous capability you've got to deal with.
16 And I think one of the big threats going forward to all
17 departments and agencies is what we've called the need to
18 expect surprises. Stuff happens. Earthquake in L.A.
19 yesterday, you could have another Katrina, you could have
20 a market challenge of some sort.

21 The notion that we're dealing with a stable and
22 predictable set of conditions is probably not realistic.
23 And, so, you've got to have that ability to have
24 capabilities and the agility to move around that may be a
25 little uncomfortable, but gives you the ability to

1 respond as the market and other conditions change.

2 MR. ELLIG: I'm an economist, so I'm going to
3 give you an on the one hand, on the other hand. On the
4 one hand, I think the FTC's organic statute is more
5 focused than the mandates that some federal agencies
6 have, where at least there's clearly a focus on the
7 consumer which in some cases is specific enough to guide
8 action.

9 I remember when I was working here in the
10 Policy Planning Office and we had written an advocacy
11 letter responding to a state official's request for
12 advice. And there was a small business association in
13 that state that was very upset with us and they came in
14 talking about how what we recommended was damaging small
15 businesses and a lot of these businesses are owned by
16 women and minorities. And the director very patiently
17 about five times said, you don't understand. Our statute
18 says we are supposed to protect consumers, not small
19 business. And after about five times, one of the
20 visitors said, wait a minute, I think I get what you're
21 saying. You're saying you're supposed to look out for
22 consumers and not small business.

23 **(Laughter.)**

24 MR. ELLIG: So, there is a certain amount of
25 specificity there that, in some cases, can be quite

1 helpful.

2 Now, can it be interpreted overbroadly? I
3 think in the '70s we have some evidence that, yeah, it
4 was interpreted overbroadly then.

5 The only other thing I would suggest is what
6 can we suggest from the -- there's the consumer
7 protection mission and the competition mission. Let's
8 face it. The antitrust laws are written pretty darn
9 broadly, too. It's not just the consumer protection
10 mandate that's written broad. And, yet, there is a
11 certain discipline. And I think it maybe relates back to
12 the countless features I have heard from FTC Chairman and
13 Commissioners that say, well, in antitrust there's this
14 consensus that the focus is consumer welfare and the
15 method for figuring out what advances consumer welfare is
16 economic analysis.

17 If folks here feel that the consumer protection
18 side isn't as focused as that, maybe it's because there
19 isn't quite the intellectual edifice and body of research
20 in consumer protection comparable to antitrust. I'm not
21 saying that that's the case because I don't know the
22 consumer protection side as well. But it seems to me
23 antitrust gets a lot of its focus from the intellectual
24 edifice known as antitrust economics and antitrust law
25 and that a similar set of things could maybe help better

1 define the consumer protection mission if some folks feel
2 that that could be defined too broadly.

3 In practice from what I saw, I'm not sure that
4 the FTC today is defining the consumer protection mission
5 too broadly.

6 MS. OHLHAUSEN: Jonathan, I wanted to go back
7 to one of the points that you raised about how political
8 reality drives performance. You said high-performing
9 agencies sustain attention where it has political value.
10 Two threads in that that I wanted you to expand on a
11 little bit. First, when you say political reality, do
12 you mean simply relations with Congress or do you mean
13 sort of the public in general and sort of the overall
14 perception of the agency? And then, secondly, how do
15 they sustain attention on those kinds of topics?

16 MR. BREUL: I mean it broadly. It's the
17 Congress, it's the White House, it's the public. Because
18 there is a sentiment there that's often a pretty good
19 indicator of where some problems are. And organizations
20 that are deaf to those are going to find themselves sort
21 of left out of the action or, even worse, in trouble when
22 Congress or the White House decides that they're part of
23 the problem and not really part of the solution.

24 The way you do that, obviously, is -- to me,
25 the most important piece of it is often leadership. It's

1 tough for the career staff to do all that on their own.
2 Again, my sense and experience is that the high-
3 performing organizations that really have been in tune
4 and able to take advantage of what's going on politically
5 have had very strong leaders. There are perhaps probably
6 no more than a half a dozen very good examples across the
7 government.

8 I'll give you a few examples. One is the
9 Veterans Health Administration at the Department of
10 Veterans Affairs. It's generally regarded as having made
11 substantial improvements over the last decade,
12 particularly toward the end of the '90s with a director
13 named Ken Kaiser who really led VA Health in some very
14 important new directions, where the Veterans Health
15 Administration was not seen any longer as running 286
16 hospitals, but rather in the business of delivering
17 healthcare to veterans. And that could be done by
18 clinics, that could be done by outpatient, that could be
19 done by any number of ways.

20 And it also led to a use of technology where a
21 veteran can go into a hospital if they're in Buffalo, New
22 York, or they can go into a hospital if they're in
23 Biloxi, Mississippi, and the system recognizes them as
24 the same veteran and has a complete patient file there
25 and is able to deliver care regardless of whether it's in

1 a clinic or a hospital or in Buffalo or Biloxi. A very
2 different way of seeing the mission and delivering it.
3 But that leadership was the way that that connected
4 politically to the veteran, the veterans affairs groups
5 and the rest.

6 Another strong leadership illustration was FEMA
7 with James Lee Witt. You know, the joke used to be, and
8 perhaps even now these days, is that first there's the
9 natural disaster and then there's the bureaucratic
10 disaster. First comes the hurricane and then comes FEMA.
11 But James Lee Witt changed that for some period of time
12 and FEMA was actually regarded as a responsive and highly
13 effective and well-performing organization.

14 And, again, he had connections to the White
15 House, he had connections to state and local leaders.
16 There was a reality and a connection there politically
17 that made FEMA very much a high-performing organization.

18 Another one is the Internal Revenue Service.
19 They really crashed and burned at some point with some
20 horrible hearings on the Hill and a beating up of the
21 career staff there which was brutal. But it was followed
22 by Charles Rossotti coming in and doing a major overall
23 in the way they do their business. And, again, the IRS
24 was really on the road to becoming -- and is much more of
25 a high-performing organization now than it had been

1 before.

2 And the example I gave quickly before was
3 Special Forces with a fellow named General Downing. A
4 lot isn't known and a lot can't be told about what goes
5 on in Special Forces, but from all I can gather and tell,
6 that they really had a very different view of things.
7 And that was connected, again, to the National Security
8 Council, the President, the Secretary of Defense and a
9 larger set of political players that gave them a
10 direction and a sense of purpose.

11 And, again, when I use politics there, it's not
12 politics in necessarily the Republican-Democratic sense,
13 but it's what's really in play and what's important. And
14 that has to, at some point, for public programs be part
15 of the picture.

16 MS. OHLHAUSEN: Jerry, I don't know if you had
17 anything to add on that.

18 MR. ELLIG: Just politicians will often want
19 all kinds of things from an agency that may be kind of a
20 distraction from the principal mission. And it's
21 important to demonstrate and to explain to them how
22 performance of the core mission is probably 99 times out
23 of 100 anyway, good politics. I think James Lee Witt
24 demonstrated that with FEMA, that when the Federal
25 Government can very effectively coordinate disaster

1 assistance, that's fantastic politics. And I think in
2 the current administration, FEMA's demonstrated the
3 reverse, as well.

4 Similarly at the FTC, I think the National Do
5 Not Call list is a good example of something that
6 delivered a significant positive outcome for many
7 citizens and was also very good politics, even though
8 there were things around the edges that maybe some folks
9 in Congress complained about or wanted to do differently.
10 And there were maybe 100 other things they were trying to
11 get the FTC to do at a time that were unrelated to that.
12 Nevertheless, I think showing folks, being able to focus
13 on really important outcomes and demonstrate them does
14 end up being good politically.

15 MR. LUIB: A quick question for Jerry.
16 Chairman Kovacic has reiterated the point that we're not
17 just here to self-congratulate and that we really are
18 interested in critical assessments here from outside
19 folks. Looking at the next five, six years as we
20 approach our Centennial, what are the greatest
21 vulnerabilities of the agency? What things should we
22 really work to shore up so that we are in the best
23 position come 2014?

24 MR. ELLIG: This is dangerous to talk about
25 because I was only here two years and that information is

1 five years outdated. So, I'm going to take the cowardly
2 way out and point out the obvious challenge, which is
3 whenever you have a change of administrations and new
4 folks coming in at the top, whether it's a change in
5 party and control of the White House or not, it's the
6 whole challenge of how do you keep the good things going
7 and also be responsive to the priorities of the new
8 leadership and not just have a year of interregnum where
9 not much happens.

10 MR. BREUL: Let me just jump in there because
11 there's some common problems around the government that I
12 would suspect you share in some degree, and maybe those
13 just ought to help you out a little because I think they
14 bear attention anyway. And if you've got these under
15 control, great. But if you don't, watch out.

16 The first would be the competence factor. And
17 some describe it around the government simply as the
18 workforce, the FTE factor. We don't have enough people
19 or we've got the baby boomer retirements and all that. I
20 think it's a broader question of the competence. You've
21 really got to have the people and the capabilities, with
22 the right skills and the right experience in the right
23 place here to get on with those outcomes. And that's a
24 huge challenge that is affected by, in many cases,
25 limited FTE or limited dollars. It is affected by the

1 retiring baby boomers. It's affected by the new Gen-Xers
2 coming in. There are a whole bunch of factors that are
3 involved here.

4 But the people factor and the competence of the
5 workforce seems to me is a huge issue and a huge
6 capability that you've got to have at the top of your
7 list and you've got to be on top of your game with that
8 one because if you fail on that one, I think you're going
9 to fail overall.

10 We've talked a lot about results and the focus
11 on outcomes. I think you've just got to keep that out
12 front. If you don't, you begin to stray.

13 Third issue that I think is a bit of a sleeper
14 to some folks, maybe, again, you've got this one licked,
15 but the issue of information overload is a huge problem
16 in many departments and agencies. With digital
17 technology and everything going on the web, we are
18 overloaded with information. You've got census
19 information down to census track detail with
20 disaggregated data that we've never had before. You've
21 got so much stuff that many departments and agencies are
22 drowning in information. They can't figure out what's
23 important, what's not, how to go through it, how to use
24 some strategic analytic tools to sort through it, how to
25 use all that information not only to find out what

1 happened and happened last year, the year before and in
2 the prior fiscal quarter or whatever, but to make some
3 sense about what's going to happen next, to do some what-
4 ifs and forecasting and anticipation.

5 There are tools and techniques to begin doing
6 that now. But most departments and agencies are not yet
7 set up to make constructive and intelligent use of all
8 the data that is available and to use it in a very
9 strategic sense going forward. And I think that's going
10 to become a big issue for all departments.

11 The fourth issue is this question of networks
12 and partnerships. They are becoming far more important
13 for the way government agencies get their work done.
14 Relying on other groups to share and be involved in
15 activities, to not see things simply in a bureaucratic
16 form but to -- the whole business of network theory is
17 fascinating.

18 If you look at the way Julie Gerberding took on
19 SARS and some of those health problems for the Centers
20 for Disease Control, the response mechanism there was not
21 the Centers for Disease Control and its staff or its
22 traditional relationship with state health agencies, it
23 was United Airlines, it was folks in China, it was
24 hospitals in Toronto. The network of people involved in
25 that problem didn't even know they were part of the

1 network. Part of her job was to alert them they were
2 part of the way SARS was traveling and had to be part of
3 the way SARS was tracked and arrested.

4 But that kind of new thinking in terms of
5 problems and problem solving is much more, I think, going
6 to be a factor going forward. And if you're not mindful
7 and taking advantage of that, you may find yourself
8 missing out.

9 And, again, as I said earlier, I think the
10 whole business of expecting surprises. I don't think we
11 can take a very firm and comfortable look towards what's
12 going to happen next. Different surprises are going to
13 come along. Certainly, the next administration is going
14 to have a set of challenges to face and a set of
15 challenges they're going to expect everybody to respond
16 to. And I suspect we're going to be surprised by some of
17 them. I just think we can't rest comfortably on the
18 notion that we've got the game plan laid out with any
19 clarity. I think you've got to be flexible in that
20 respect.

21 MR. ELLIG: One other little thing, and, Greg,
22 I know you said this isn't supposed to be
23 self-congratulation, but I am going to mention something
24 that I tell other agencies they should learn from the FTC
25 anyway and that could be a challenge in the future. I

1 don't know. But don't lose the policy R&D function. I'm
2 not saying that just because Maureen invited us and --

3 **(Laughter.)**

4 MS. OHLHAUSEN: You know where your coffee
5 comes from.

6 MR. ELLIG: It is not just a Policy Planning
7 thing. It's in the Bureau of Economics, Competition.
8 It's a focus on trying to stay ahead of the game and
9 learn and understand what's going on before the FTC acts
10 and also before Congress acts. And I've seen many other
11 agencies who find themselves in a straight-jacket often
12 when they have to issue regulations. But they find
13 themselves in a straight-jacket because Congress has
14 written a piece of legislation that very specifically
15 tells them, you must do this. And it didn't always
16 benefit from several years of in-depth study when that
17 was passed.

18 **(Laughter.)**

19 MR. ELLIG: And the agency itself did not
20 necessarily have a lot of input into it. And one of the
21 things that I've actually spent time telling other
22 agencies is: You've got to look at how the FTC does this
23 because they will do conferences and workshops and things
24 on emerging issues before Congress has acted so that then
25 what gets learned here can inform Congressional

1 discussion. And, so, there's some actual homework and
2 research done before decisions get made. That's a
3 crucial input into the good decision-making that you all
4 should make sure that you keep as you move forward into
5 the next century.

6 MS. OHLHAUSEN: In our remaining couple
7 minutes, I just wanted to see if anybody from the
8 audience had any questions for our panelists.

9 **(No response.)**

10 MS. OHLHAUSEN: No? All right. Well, then I
11 will ask a final question here. So, the FTC, we're doing
12 this self-assessment. And I'm sure some other agencies
13 from time to time undertake something similar. What I
14 wanted to know was: What is the biggest mistake or the
15 most common error that happens, do you think, in your
16 experience when agencies try to sort of see how they're
17 doing and evaluate themselves? What should we avoid in
18 this process?

19 MR. BREUL: I avoid the Enron problem of
20 thinking you're the smartest guys in the room. It goes
21 back to Jerry's point, I think, as well. I think you
22 need to poke your head outdoors and ask other people
23 what's going on and what might happen and what might we
24 expect it to do? If you don't poke your head outdoors,
25 bring folks in. But whether it's a conference, a think-

1 tank, try to open the aperture at this point and see what
2 else is going on and look around and see what others
3 might think.

4 I mean, you've obviously got to be the filter
5 and judgment on that, but I think the biggest risk is
6 thinking that you do have the answers or that what you've
7 done in the past is necessarily going to work going
8 forward. It may well. But, again, I think you've got to
9 challenge that and be ready for some change and some new
10 challenges and new thinking. And, again, opening the
11 aperture is the way to think about that and see what you
12 come up with.

13 MR. ELLIG: It's funny because my knee-jerk
14 response was it's very easy for an exercise like this --
15 and I've seen this outside government as well as in
16 government, so I'm not saying it's a government thing.
17 But it's very easy for an exercise like this to become an
18 exercise in justifying the current activities we're
19 engaged in rather than actually figuring out what ought
20 we be accomplishing and how ought we be accomplishing
21 that.

22 MS. OHLHAUSEN: Well, I hope you all will join
23 me in thanking our panelists for their very good
24 observations.

25 **(Applause.)**

1 MS. OHLHAUSEN: We are just slightly off
2 schedule. So, what I would suggest is that we take a
3 10-minute break and reconvene at 10:20 for the
4 Effectiveness of the FTC's Competition Mission Panel.
5 Thanks.

6 **(Session 1 concluded.)**

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1 **SESSION 2: EFFECTIVENESS OF THE FTC'S**
2 **COMPETITION MISSION**

3 MR. HEIMERT: Good morning, and welcome to
4 today's second panel, which is titled the Effectiveness
5 of the FTC's Competition Mission. My name is Andrew
6 Heimert. I'm an attorney in the Office of Policy and
7 Coordination within the Bureau of Competition. For those
8 of you less familiar with the FTC, yes, there are a lot
9 of policy offices, I'm in one of them.

10 Yesterday and earlier this morning, panels took
11 a look at the Commission's efforts from a variety of
12 broad perspectives and how we could go about evaluating
13 the Commission's work. With this panel, and the two to
14 follow this afternoon, we are going to dig a little bit
15 deeper into specific aspects of the Commission's mission.
16 This one, in particular, will focus on the competition
17 mission.

18 There are three principal topics we're hoping
19 to cover on this panel this morning. The first is how
20 can we measure the benefits of the various competition
21 activities the Commission undertakes? For example, what
22 are the benefits of enforcement action? Does the
23 issuance of guidelines offer benefits to the public? Are
24 workshops, like this one and many others we have held
25 this year and the past, of benefit to consumers, even if

1 the learning takes some amount of time to sort of filter
2 into the Commission's work and the courts perhaps.

3 The second question is whether the Commission
4 is engaged in an appropriate mix of these activities.
5 That is easy to determine if we can measure the benefits
6 of each activity in the first place, which we're hoping
7 to do this morning, or at least come up with a way to
8 measure them. But if we can't make an accurate measure
9 of those benefits, is there a principled way to determine
10 whether the FTC should be engaging in more or less
11 enforcement, guidelines issuance, competition advocacy,
12 competition research and development, which is a term our
13 Chairman favors?

14 Finally, with the remaining time, we'll turn to
15 several specific topics regarding how the Commission
16 conducts its competition mission. Depending upon the
17 amount of time, we plan to discuss such topics as the
18 FTC's administrative adjudication process, the civil
19 remedies available to the Commission and the agency's
20 efforts towards greater transparency.

21 Setting out the questions is the easy part.
22 The hard part is answering them. So, fortunately, we've
23 assembled a really nice panel that I'm quite confident is
24 up to that task. None of these participants really needs
25 an introduction, especially to this group, but I will

1 still take a couple of minutes to lavish some praise on
2 them for their accomplishments, all of them having many,
3 and more are fully laid out in the bios list in your
4 packets that were distributed.

5 I'll start first with Jan McDavid. Jan is a
6 partner at Hogan and Hartson where her practice focuses
7 on antitrust, competition and trade regulation, with a
8 particular emphasis on government investigations
9 litigation and antitrust policy issues. She is a former
10 chair of the American Bar Association Antitrust Section
11 and she has handled numerous high profile mergers before
12 the FTC and DOJ, but we'll talk about her FTC experience,
13 including Exxon's acquisition of Mobil and the Carnival
14 Cruise Line merger. As you all know, Jan is regarded as
15 one of the leading antitrust practitioners not only in
16 Washington but in the world.

17 Second, Tom Krattenmaker who is Of Counsel to
18 the Washington office of Wilson, Sonsini, Goodrich and
19 Rosati. Tom, befitting his years of experience in
20 government, focuses on antitrust, telecommunications and
21 trade regulation issues. Before joining Wilson, Sonsini,
22 Tom was an attorney in the FTC's Office of Policy and
23 Coordination, a colleague of mine, served as Senior
24 Counsel in the Department of Justice's Antitrust Division
25 and held positions at the Federal Communications

1 Commission, including Chief of Telecommunications Merger
2 Review. Tom also spent many years in academia teaching
3 at such law schools as Georgetown, William and Mary and
4 the University of Natal in South Africa.

5 Third, and immediately to my left, is Ken
6 Heyer. Ken is the Economics Director at the Antitrust
7 Division of the United States Department of Justice where
8 he supervises the staff of the Division's Economic
9 Analysis Group. He is currently, and has been before,
10 actually quite frequently as we were just discussing, the
11 Acting Deputy Assistant Attorney General for Economic
12 Analysis, a position he has held since Dennis Carlton
13 left this past spring, or whenever it was.

14 Ken has authored a number of antitrust related
15 articles. Most recently, he coauthored with Dennis
16 Carlton an EAG discussion paper entitled "Appropriate
17 Antitrust Policy Towards Single Firm Conduct." This will
18 appear in a forthcoming issue of the Antitrust Magazine.

19 Finally, Steve Calkins. Steve Calkins, also no
20 stranger to folks at the FTC. He's a Professor of Law at
21 Wayne State University where he is also an Associate Vice
22 President for Academic Personnel. Among the courses he
23 has recently taught are those on antitrust and trade
24 regulation, consumer law and torts. He also serves as Of
25 Counsel to Covington and Burling. Steve was General

1 Counsel at the Federal Trade Commission from 1995 to 1997
2 and has taught at other universities, including those of
3 Michigan, Pennsylvania and Utrecht in the Netherlands.
4 Steve is also serving his third three-year term on the
5 Council of the American Bar Association Section of
6 Antitrust Law.

7 So, with that, I'd like to begin the
8 discussion. The FTC engages in several different types
9 of competition-related activities which perhaps can be
10 grouped into four categories. First, enforcement;
11 second, issuance of guidelines; third, competition
12 advocacy such as presentations to Congress, foreign
13 officials, state governments and other regulators as well
14 as consumers at large in an effort to reduce obstacles to
15 the benefits of a free market; fourth, competition
16 research and development, competition R&D, which can
17 consist of such things as internal studies to understand
18 competitive dynamics, workshops and conferences like this
19 one and others where the Commission learns from the
20 members of the public.

21 So, I'd like to ask the panel the same
22 questions regarding each of these types of activities.
23 First, how can we measure the benefits of each of those
24 activities? Second, if one were to try, how might one
25 measure the magnitude of the benefits of the activity?

1 I'll go activity by activity and have each of you take
2 the lead on one of them and then everyone can follow-up.

3 So, I'll call on Jan to discuss the primary
4 benefits of enforcement actions. Is there a way to
5 measure the magnitude of these benefits? What are the
6 direct consumer benefits from bringing cases and blocking
7 anticompetitive mergers or stopping anticompetitive
8 conduct? Is it deterrence of other activities? Is it of
9 other similar activities by other companies and
10 competitors? Is it the development and clarification of
11 legal doctrine? Each of those, I think, are possible
12 benefits. Is one larger than another? Is there a way to
13 say?

14 MS. McDAVID: Well, thanks. I think it's hard
15 to quantify these in numerical terms. But speaking as a
16 counselor who tries to tell clients where the lines are
17 and what conduct is and is not appropriate, I think that
18 quite apart from, and let's park the notion of the impact
19 on a particular case, which can be very significant in
20 some cases. From my perspective, the notion of
21 demonstrating to the bar and the business community that
22 the cop is really on the beat is a really important part
23 of the agency's enforcement mission.

24 And the other is the clarification of doctrine,
25 of which we've had just an illustration within the last

1 24 hours.

2 Let me go back to the first one to begin with.
3 Most antitrust enforcement in this country, and I think
4 around the world, actually doesn't happen in a building
5 like this. It happens in my clients' boardrooms, in the
6 conference rooms in our law firms, where we tell the
7 clients the risks that attach to the conduct that they
8 are proposing, whether they are or are not close to line,
9 and whether they're likely to be able to sustain this
10 course of conduct if they choose to proceed with it.

11 And our ability to get the attention of the
12 business people and have them take us seriously when we
13 tell them, you are close to the line or you are over the
14 line, is directly correlated to the things that do happen
15 in this building and in your enforcement mission.

16 I think the most obvious example of that was in
17 the 1980s when there was a perception among the business
18 community of extremely lax enforcement, particularly at
19 the Antitrust Division and particularly in the merger
20 area, where clients would say to us when we said you are
21 close to the line, you must be kidding, no one is
22 enforcing the antitrust laws. And that makes it very
23 difficult for counselors who believe in a competition
24 role in the economy to get the attention of business
25 people and to hold it. So, I think that is very

1 important.

2 The other is the elucidation of doctrine and
3 where the lines are. One of the issues that many of us
4 in the antitrust bar have been wrestling with, for
5 example, is what exactly are the standards and unilateral
6 effects in cases in the merger area and how are the
7 courts going to draw the line in the face of some notable
8 failures in the enforcement effort? And, yesterday, the
9 D.C. Circuit has provided us some guidance in the area,
10 and that's useful.

11 In the absence of court authority, and there
12 isn't enough of it, we must rely on guidelines, speeches
13 and policy statements. The FTC's special mission in the
14 policy area, I think, has been extraordinarily valuable.
15 And I really look back to the hearings that Bob Pitofsky
16 convened on anticipating the 21st Century, which produced
17 a wonderful two-volume book and was really the first in-
18 depth examination of what does it mean to have
19 competition laws in an increasingly global high
20 technology environment.

21 And the series of things that have happened
22 over the last ten years, including workshops like this
23 one, I think are extremely valuable to the bar and to the
24 business community in helping us be able to explain to
25 our clients where the lines are and where their conduct

1 may stray.

2 MR. HEIMERT: Steve, would you care to respond
3 or offer some thoughts on that?

4 MR. CALKINS: I'm trying to remember what the
5 question is.

6 MR. HEIMERT: Well, we're talking specifically
7 about enforcement actions or the benefits that they
8 bring. Are the benefits stopping the actual conduct, or
9 as Jan posits, the deterrence and the ability it provides
10 her and her colleagues to tell her clients, you know
11 what, this isn't such a good idea.

12 MR. CALKINS: Do you want me to bring out my
13 slide?

14 MR. HEIMERT: At your pleasure.

15 MR. CALKINS: This is also so incredibly hard.
16 As Andrew mentioned, I am now really an Associate
17 Provost, and we were in a meeting yesterday and the
18 Provost said, well, we've got data here on the typical
19 class size in the university, because I now have to worry
20 about the whole university. And the problem is that you
21 sit there and you look at that and then you really are
22 struggling because sort of what's the right answer. Is
23 the right answer that the typical class is very big, that
24 we're running an efficient operation and using our
25 resources well? Or is the correct answer that the

1 typical class is very small, there's lots of intimate
2 contact between students and faculty and how do you know?
3 And all these things are so incredibly hard.

4 So, I wanted to find the answer. And I went to
5 the Federal Trade Commission Performance and
6 Accountability Report Fiscal Year 2007 because you guys
7 quantify all that sort of stuff. And we got numbers here
8 on exactly how much consumers have benefitted. I can
9 tell you that back in Fiscal 2007, merger enforcement
10 saved \$805 million which was \$305 million more than the
11 goal. And that if you go to another measure, you find
12 that in terms of a key measure of a success rate, you'll
13 find that the success rate here, achieving positive
14 outcomes was -- the goal is 90 percent and the answer is
15 there was 100 percent achieving positive outcomes for
16 that particular measure. A positive outcome was either
17 getting a consent order or voting out a complaint or
18 closing the matter.

19 **(Laughter.)**

20 MR. HEIMERT: And that kind of would lead to
21 100 percent. What would reduce it to 90?

22 **(Laughter.)**

23 MR. CALKINS: I don't know. Actually, it's
24 closing it without finding evidence that you really
25 screwed up.

1 MR. HEIMERT: Within that fiscal year.

2 MR. CALKINS: It's so hard. I mean, I applaud
3 and I think counting is terribly important. And I guess
4 I just want to emphasize the one little part of this
5 that's not in here. When you went through the numbers of
6 cases that were the dollars -- it was focused in on the
7 cases that were brought and how much was saved in this
8 particular case and how much consumers benefitted and all
9 that.

10 And in that connection, I wanted to -- I don't
11 know, I guess I'm being webcast so I have to talk in
12 front of a microphone. I wanted some objective way of
13 knowing what is it that the antitrust agencies do that is
14 recognized by an objective impartial source as important
15 and, in particular, an objective impartial source that I
16 had with me on the airplane this morning. And, happily,
17 I had a very objective and impartial source that the
18 Chairman can't object to, namely, his and my coauthored
19 antitrust nutshell.

20 MR. HEYER: Copies on sale in the lobby.

21 MR. CALKINS: New edition overdue a little bit.

22 MS. McDAVID: Do you carry it with you
23 everywhere you go?

24 MR. CALKINS: When in doubt, it's always good
25 for all antitrust people to carry it.

1 **(Laughter.)**

2 MR. CALKINS: So, I did extensive research. I
3 went to the index of this book and checked it out and I
4 looked up what this book actually cites. And to do that,
5 let's see what we found. Here we go. We close that out
6 and, bingo, then you open it up and then you try to go
7 and F5. Bingo, you go to the nutshell index of what's
8 really important. And there's very little in the way, I
9 regret to say, Maureen, of studies and reports that get a
10 whole lot of attention in something as simplistic as
11 this. Instead what you see are cases.

12 And, indeed, then if you do a simple mindless
13 count of the number of pages in the index on which cases
14 appear, which is a rough and ready guess as to sort of a
15 little bit of what do you see a lot when you're reading
16 what we all know as antitrust law, what do you find? And
17 that was my count. You find that the big winner was the
18 Microsoft case. This is, of course, biased in favor of
19 stuff that was current and that Bill and I liked at the
20 time we were working on this thing.

21 **(Laughter.)**

22 MR. CALKINS: And you also see I can't type
23 very well on an airplane and so I have typos and things.
24 But that's sort of antitrust law as we know it. And in
25 terms of what is antitrust law, this is what antitrust

1 law is. And there you have one of the things that's sad
2 for the beloved Federal Trade Commission is the Federal
3 Trade Commission doesn't make the list until you get over
4 into number seven where you have Cal Dental and Indiana
5 Dentists. But it does remind you that a funny little
6 case like Indiana Dentists can be quite important and
7 cited for a variety of things.

8 But on the other hand, what's it prove that a
9 case is on there and that people pay attention and learn
10 it? Does that mean it was a good thing to bring it?
11 Baker Hughes, for instance, we talked about on six
12 different pages. I think the world is worse because
13 Baker Hughes was brought. And, so, just because
14 something may have made a difference to the development
15 of doctrine, it didn't mean that it made the development
16 of doctrine better.

17 If you keep on going down with your count, Vons
18 Grocery is on there. And there are not a lot of people
19 today who would say that Vons Grocery made the world
20 better. On the other hand, Staples, I think most people
21 think that Staples did make the world better. And I want
22 to point to Staples and I want to point to Dell. I
23 remember back, I have said this before, when I was at the
24 agency, we were working on the Time Warner consent order.
25 We were at a retreat and it was very hot. I remember

1 chatting with Bill Baer, and we said, what really
2 matters, the legacy, the difference that the Pitofsky era
3 FTC would make is going to be Time Warner, this is the
4 big deal important case. And that's just not the legacy
5 of the Pitofsky era FTC. Staples made a big difference.
6 And I'd like to point to Dell and say that Dell made a
7 big difference.

8 I guess my point is that anything that looks
9 only at the particular matter as brought is not doing
10 nearly what you need to do. This kind of mindless
11 looking can only begin the thinking about it. But at
12 least it helps sort of raise questions about what's
13 important. And, with that, I've taken more than my share
14 of time so I'm going to shut up.

15 MR. HEIMERT: Just in fairness on the
16 Performance and Accountability Report, I think Tom
17 Barnett gave a speech in June assessing the DOJ's merger
18 record and used a similar metric where they had a success
19 in 119 of 121 cases, which is they obtained relief in 119
20 of 121 cases where they believed there would be an
21 anti-competitive effect. So, again, if you don't believe
22 there's an anticompetitive effect, you did nothing wrong.
23 So, the type two error cases are not identified easily.

24 I'll ask the other two panelists, Tom and Ken,
25 the same question about enforcement actions and any

1 follow-up. But let me throw this into the mix as well.
2 Jan talked principally about deterrence, so this may
3 answer the question from her mind set but, Ken and Tom,
4 maybe you have a different view.

5 When the FTC selects cases, is it important to
6 pursue large cases that cover a big section of the
7 economy? Take a Microsoft. That is a DOJ case, but that
8 is obviously a large area. Exxon-Mobil was a large share
9 of the gasoline and oil refining market. And then we
10 bring cases also against fairly small companies. We had
11 a merger that was at the screening level whether to issue
12 a second request recently where I think we determined, at
13 least preliminarily, that the maximum consumer cost would
14 have been in the order of \$1 or \$2 million. But should
15 we pursue that as a matter of principle, setting
16 precedent, setting the legal standard? Even though it's
17 a small case, economically speaking, can it have large
18 value?

19 But, Tom and Ken, on the enforcement question.
20 What kind of benefits are we getting? Are they
21 significant? What is the primary benefit?

22 MR. KRATTENMAKER: Well, let me try to, as I
23 suppose the official old curmudgeon, I am a federal
24 pensioner, I wrote down on the top of my notes the
25 following chemical formula, opinions plus anecdotes do

1 not equal facts. And I guess I think that with respect
2 to -- the questions you're posing here on the
3 enforcement, in my experience it's kind of a red herring.
4 Neither in my time at the Department of Justice nor in my
5 time at the Federal Trade Commission did I ever see a
6 bureau director or a division chief say, I think we have
7 a violation of the antitrust laws here, but I'm not going
8 to bring the case.

9 Whether that's right or wrong, I do not believe
10 that people who have the antitrust laws have the option
11 to say, here's a case that's too small, it's beneath me.
12 So, today, that just doesn't seem to me to be a realistic
13 issue. It would, as Ken would say right away, shift us
14 over into the question of how many resources do you put
15 in there, because how many cases you see is partly a
16 function of how many resources you have there.

17 I also don't know what to make of Stephen's
18 chart. I noticed that some of the big ones were Standard
19 Stations, which is, at best, a very lousy opinion that no
20 one follows anymore. Cal Dental, which I hope didn't
21 survive Three Tenors. And I hope nobody is giving
22 information on the basis of that except that, yes, if
23 it's doctors, they won't indict them even though they
24 should treat doctor price-fixing just like they treat
25 cement truck price-fixing.

1 So, I must say I think these are absolutely
2 crucial questions. But unless Ken's got an answer coming
3 from the empirical economic side to it, on this
4 particular topic, some of the others I could see open on
5 the enforcement issue, I just don't see how the agency
6 has the choice to say, yes, we have all these merger
7 guidelines, yes, we've issued this second request, yes,
8 this is way over the line, but we're not going to bring
9 the case.

10 MR. HEIMERT: Ken?

11 MR. KRATTENMAKER: Oh, footnote, one reason you
12 don't say that is because you can get cases like Three
13 Tenors that can, in fact, have a large, as Jan suggested,
14 a large impact in shaping the doctrine out there that is
15 then being used widely outside the Commission.

16 MR. HEIMERT: Ken?

17 MR. HEYER: Well, let me first make a couple of
18 more general points rather than trying to pick at each of
19 the questions you're going to ask and each of the issues
20 one by one. Oh, first, I should say I'm not speaking for
21 the Department of Justice. I am speaking for the Federal
22 Trade Commission.

23 **(Laughter.)**

24 MR. HEYER: I'm actually never speaking for the
25 Department of Justice, which gives me a little more

1 freedom. The questions that are being asked here, sort
2 of the big picture cosmic questions, they don't have easy
3 answers. In fact, one reason we rely on markets in the
4 regular economy is because that's how we answer questions
5 about allocating resources. When you're talking about a
6 government agency and you're talking about the type of
7 work we do, you don't have those kinds of pressures and
8 incentives that competition creates.

9 A footnote: I am in a distinct minority of
10 people who actually think it's a good thing that we have
11 two competition agencies in the country, two federal
12 ones. I bemoan the fact that we have these clearance
13 fights from time to time that are a true waste of
14 resources. But I will tell you, as somebody at the
15 Antitrust Division, I think we are spurred to do a better
16 job when we see what's going on at the Federal Trade
17 Commission. And I would like to think that there's a
18 similar dynamic going in the other direction. So, that's
19 my footnote.

20 I think that the most important thing, whether
21 it's enforcement or some of the other areas for the
22 agencies to engage in, is greater transparency and more
23 public advocacy, which includes bringing cases because I
24 think that it's the dynamic process of advocacy, which,
25 in fact, attorneys are very familiar with from their

1 training in law schools, that we hope to get us good
2 outcomes. So, the back and forth between people with
3 different views; the idea of hashing things out in a
4 courtroom occasionally, rather than just talking
5 internally about what we think the right answer should
6 be; engaging in competition advocacy and other forms of
7 public debate, I think is an important way of having
8 maybe two sides, or more than two sides in some cases,
9 wrestle with some of these difficult issues, whether
10 they're policy issues or whether they're case-specific
11 issues. And through that process, repeated over time,
12 hopefully, moving towards more efficient outcomes.

13 That doesn't literally answer questions like
14 how many resources should be given to the Federal Trade
15 Commission? But it's a start as far as I think how to
16 improve outcomes. And I would add to that the
17 transparency that comes from things like some of the very
18 informative closing statements that the Federal Trade
19 Commission pioneered a while back, the cruise lines one I
20 thought was very good because it not only informed
21 people, and maybe it gave further guidance to people like
22 Jan and her clients, but it also allowed people to debate
23 things publicly, and that is something that helps lead
24 you towards a better answer.

25 And I think, for example, the Europeans with

1 their statements of objection I think is another way to
2 do it. And I would like the agencies to do more in all
3 of these sub-areas in terms of both being more actively
4 involved publicly and more transparent.

5 MR. HEIMERT: Let me skip forward a bit since
6 we've sort of taken up the competition advocacy. Tom, I
7 was going to ask you to speak first about this. Maybe
8 now you can react a little bit to Ken. But do you see
9 benefits? Are there significant benefits in competition
10 advocacy of any type? I think of things like letters to
11 regulators, letters to legislators that the Office of
12 Policy Planning does a lot of, speeches given by either
13 Commissioners or the Director of the Bureau of
14 Competition, Deputy Directors and others, the agency's
15 participation in the ICN or OECD and other international
16 organizations, advocacy overseas. Is that an area where
17 the FTC is providing benefits? They are obviously even
18 more difficult to quantify than with enforcement, but is
19 that an area where we should give more attention, the
20 same amount of attention? How do you see things?

21 MR. KRATTENMAKER: How much I don't know that I
22 can say. Because after all I'm the one who already said
23 opinions plus anecdotes don't equal facts or data. But I
24 am a big fan of competition advocacy, so I thought I
25 would deliver two cheers for competition advocacy.

1 To me, there are two reasons for it. One, it's
2 like applying antitrust concepts to antitrust law.
3 You're filling in the gap. You're looking at the market
4 failure. Where isn't the market working? It's not
5 working in areas where we've supplanted competition for
6 reasons that don't give us some sort of strong
7 countervailing justification.

8 And I also think there are potentially large
9 pay-offs out there. Because of my background in the
10 telecommunications area, I immediately think of things.
11 Suppose the agencies had told the Federal Communications
12 Commission just what it was doing through its spectrum
13 allocation policies and limited the world to three and
14 only three networks for three decades? Or when they
15 first announced that wireless telephony was a natural
16 duopoly? Or when local cities were handing out monopoly
17 cable franchises? The data are in on all three of those
18 areas, and millions and millions of dollars in monopoly
19 profits were flowing to the beneficiaries of that
20 government action right out of consumers' pockets.

21 What if this Commission had talked about the
22 impact of the steel import quotas back in the '70s? What
23 if it went out and talked to local authorities about just
24 what our silly system of picking up trash is doing both
25 economically and environmentally? So, I think there are

1 potentially huge pay-offs out there. And I think of one
2 specific example, sort of broader, while I was here, and
3 I had very, very little to do with it, the agency put out
4 what I think is a smashingly good report on the patent
5 system in antitrust.

6 So, I'm inclined to think that there's an awful
7 lot to be done here. That's why I say two cheers for it.
8 I think we have to recognize that here there is no iron
9 fist in the velvet glove. You can go testify before the
10 regulators and they say, well, why are you bothering me.
11 In fact, it can be worse. They will then call up the
12 Congressmen and Senators and say, what are you doing
13 walking outside your jurisdictional boundaries. So, I
14 think there's a real political risk that the agency takes
15 when it engages in competition advocacy. I know in the
16 past on more than one occasion it's been slapped down for
17 that sort of stuff.

18 I think you cannot measure the benefits. So,
19 it's very hard to say. Unlike enforcement where I don't
20 think you can sit there and say, I think this is a
21 violation of Section 1 of the Sherman Act, but I'm not
22 going to pursue it, you can sit there and say, I think
23 the present system of trash removal at the residential
24 level in this country is intolerable, but I'm not going
25 to do anything about it, it's somebody else's business.

1 Lest I be accused of just saying, well, it's a
2 great idea, but how are we going to measure the benefit,
3 I will throw in one way of -- what the Commission already
4 does, which is very good, could be improved, is if there
5 were more extensive and more overt collaboration between
6 lawyers and economists. I would like to see in the
7 competition advocacy work more extensive and rigorous
8 economic work being done right alongside the legal.

9 MR. HEIMERT: Jan?

10 Ms. McDAVID: I agree with what Tom had to say
11 because the effect of competency advocacy can be across
12 an entire sector, whereas even a case like Staples which
13 helped develop the law in unilateral effects -- I mean,
14 the impact of Staples isn't that we pay less for paper
15 clips, but the doctrine of unilateral effects analysis
16 was advanced. Here you can have an impact across an
17 entire sector. And the work that was done in recent
18 years in the real estate industry by both agencies, I
19 think, is an example of that. And, most recently, the
20 Antitrust Division's consent with the National
21 Association of Realtors is going to have real impact on
22 consumers in the prices they pay in closing and
23 purchasing homes. That's assuming that the real estate
24 market doesn't collapse entirely.

25 **(Laughter.)**

1 MS. McDAVID: So, I think that there is real
2 bang for the buck in this area. It's hard to see it.

3 Advocacy in the Congress is important. Because
4 the Congress is subject to all kinds of polls. For
5 example, there's some really silly legislation that's
6 pending. Now, it's even been passed out of the House
7 Judiciary Committee to create an antitrust exemption for
8 collective negotiations by merchants with credit card
9 companies and to require the credit card companies to
10 negotiate collectively with the merchant cartel and to
11 require the Antitrust Division to babysit the whole
12 thing. For what purpose, given that the conduct is now
13 exempt, is hard to imagine. But the agencies have both
14 weighed in with the Congress and said, this is not a good
15 idea. Competition works best when there is competition.

16 MR. KRATTENMAKER: What a silly idea.

17 MS. McDAVID: I know, I know. But it's
18 important for the agencies to lay down that kind of
19 marker to members who are hearing from their gas station
20 constituents that we are paying too much to Visa and
21 Mastercard today when you buy a gallon of gasoline. The
22 answer to that is not to allow all of the gasoline
23 stations to form a cartel for their negotiations with
24 Visa and Mastercard.

25 MR. HEIMERT: Steve, I'd like to ask you to

1 respond also, but let me throw into the mix a follow-up
2 question. It came up yesterday. One of the things that
3 the Consumer Protection Bureau does a lot of is what we
4 call consumer education. If you're a consumer, I think
5 the example is how not to get ripped off by a contractor,
6 take these ten steps. The Bureau of Competition, I don't
7 think, does that to nearly the same degree. A lot of the
8 time, we're talking to people like each other who know
9 the benefits of competition, we understand it. But I'm
10 not sure the average consumer necessarily does.

11 We see that obviously gas prices, there's a
12 solid group of people who believe gas prices are high not
13 because the price of crude oil is high as a result of
14 greater demand, but because oil companies collude at
15 every part of the distribution system and that raises
16 prices. And Congress seemingly feeds on that and asks
17 the FTC to determine why there's not enough competition
18 in gasoline. That's just the most prominent example.

19 The Whole Foods merger was laughed at by some.
20 A grocery store is a grocery store. Other people said,
21 well, it's organic. I understand the debate. But,
22 certainly, the consumer on the street, if you will,
23 perhaps didn't understand what the problem was with that
24 merger.

25 Can the FTC, should the FTC engage in sort of

1 consumer education efforts about the benefits of
2 competition? What might they look like? Would that be a
3 useful form of competition advocacy that's to the
4 consumer level as opposed to the regulator/government
5 official level where it's at perhaps a higher plane of
6 sophistication?

7 MR. CALKINS: Well, the good news, of course,
8 is that all of this is measured and is tested. And if
9 you go to the FTC's report, you'll discover that there's
10 actually a metric on whether or not the agency is being
11 effective in terms of advocacy and there is a key
12 measure. And the FTC's proof of success is to make at
13 least six advocacy filings a year, and it made 11. And,
14 so, it's well above its target in terms of success.

15 The problem with that, of course, is that it
16 doesn't, in any way, tell us what we'd really want to
17 know, which was this a better use of resources than
18 whatever was the alternative? Whether that was putting
19 more people into some investigation or putting more
20 people into writing guidelines or putting more people
21 into what. And it's a really hard question.

22 I was struck listening to Tom's list about how
23 it would have been great if the FTC had boldly come in in
24 the steel case and prevented import restrictions, and it
25 would have been great if it had come in and prevented the

1 local cable monopolies from being created and things.
2 And, yet, he didn't say that the FTC had succeeded in
3 preventing that. He didn't even go on and say the FTC
4 was out there leading the charge against steel import
5 limits and leading the charge against local monopolies.

6 And, so, you sort of sit down and you say,
7 well, okay, given that we all like competition, given
8 that we all know that there's lots of ways that
9 governments can harm consumers and harm competition, you
10 then need to do, if you really wanted to do this in terms
11 of the difficult metrics stuff that Bill is talking
12 about, you then need to figure out, okay, to what extent
13 is the FTC actually making a difference that benefits
14 consumer and then compare the use of those resources to
15 alternative uses. And, obviously, it's so hard to
16 quantify this. That's why it's easy to point to the
17 simplicity of just counting up to six advocacy filings.
18 If you're short one, go throw in another. You're opposed
19 to lawyers agreeing on fees and you've made your quota
20 and things.

21 And, yet, it's such a hard question. How do
22 you tell whether the agency's actually made a difference?
23 If it testifies on the side of the angels in favor of
24 letting people import wine from out of state, which is a
25 cause I dearly believe in, how do you end up proving that

1 it made a difference?

2 When we see all sorts of anticompetition,
3 government regulation and the FTC is sitting on the
4 sidelines, is that because it is prudently holding its
5 fire? Is that because its prudently going to things that
6 are more likely to be places where it could make a
7 difference or is that because it is shying away from the
8 big, challenging, controversial issues? Very, very hard
9 questions.

10 And I wish I had the answer, but I guess I
11 think that it's important to be asking those questions
12 and to try to, really, in a searching way, figure out
13 whether or not competition advocacy, which seems like a
14 good idea, does it make a difference, when does it make a
15 difference and what kind of cases does it make a
16 difference?

17 Jan talked about real estate but immediately
18 cited a lawsuit which we know makes a difference. My
19 guess is that that actually is an example of the whole
20 process working well because the agencies are litigating
21 and doing advocacy and doing R&D and using a whole
22 panoply of their resources, which I tend to think is when
23 things work best. But I can't say I've studied
24 carefully. My guess is that that linking together is
25 what really works.

1 In terms of your suggestion about should the
2 FTC be out there telling consumers that competition's a
3 good thing? I must say if it's hard to measure success
4 when we're talking about influencing government behavior,
5 the chance that we could really measure success on
6 whether communicating with consumers about competition
7 being a good thing, I have my doubts about it. And given
8 all the other needs, I wonder whether there aren't better
9 resources.

10 But I'm willing to sit back and look at what
11 the FTC would do and judge it on the merits. And I've
12 never done that. So, I don't think I'm in a position to
13 really have an informed opinion on that one.

14 MR. HEIMERT: Ken, did you want to follow up?

15 MR. HEYER: Sure, yeah, my turn. On
16 competition advocacy, I'll say a couple of things. One
17 is about how and why I think it can be good and is good.
18 I'm a big fan of it. And I think the FTC has done a
19 fantastic job on it over the years. And we, at the
20 Antitrust Division, are trying to improve ourselves
21 partly following the competitive behavior of the FTC in
22 that area.

23 One thing about it is that the value, to me,
24 that's important is -- and this ties in a little bit to
25 the point about educating the public -- is that one of

1 the reasons why regulations and laws that are harmful or
2 anticompetitive in some way manage to flourish, there are
3 many reasons, but one is because the costs associated
4 with them are not obvious to people who don't spend their
5 lives studying them.

6 A lot of times it's a very complicated thing
7 and it gets through in some bill or some regulatory
8 thing. Most consumers don't read the Federal Register
9 every day. And one value to folks in the competition
10 agencies or anywhere for publishing things and doing
11 studies that don't have to be very high tech is to
12 illustrate the costs associated with certain types of
13 policies. And, at that point, you have to leave things
14 up to democracy to decide. But at least you're
15 clarifying and highlighting what the costs of certain
16 things are. And then if people say, we want to keep out
17 steel because there's \$200,000 of costs for every job
18 that's saved in Ohio, then that's up to them. But at
19 least it's made clear.

20 Another value -- and this is something I think
21 is very important and underappreciated -- but at the
22 agencies, we have a lot of very good people and they like
23 doing this kind of work, some of them. It's very helpful
24 in terms of recruiting and retaining human capital, which
25 is, as someone had mentioned, the most important thing

1 that the agencies have going for them, to give them
2 opportunities to do things like this.

3 It's a little bit like being in academia
4 without the publish or perish pressure. You get to pick
5 topics that are interesting and important. You can say
6 what you want. If necessary, you put in a disclaimer
7 that you're not speaking for the agency. But you get
8 your stuff out there and it's coming from a respected
9 source, so it can have an impact.

10 The thing I'd mention on allocating resources
11 across the wide range of competition advocacy
12 opportunities that are out there, I think part of what
13 Stephen was getting at when he was talking about the
14 effectiveness is, it's true that broad regulatory
15 policies in an industry, whether it's steel or telecom,
16 in principle, are extremely important and much more
17 important than keeping the price of organic something or
18 other lower than it otherwise would be.

19 But the impact that the agency is going to have
20 in that debate is probably much smaller. Bringing a
21 lawsuit, you have a tremendous amount of influence over
22 what happens. If you convince the judge, you have
23 complete influence. In terms of other fights, other
24 battles, there are undoubtedly umpteen other people
25 involved in the debate. And, so, you need to pick your

1 spots for when and where you think you'll be most
2 effective, try to allocate your resources there.

3 And, perhaps, one way is to stay a little bit
4 closer to the competition area. Even though I like the
5 idea of sometimes straying outside and writing or talking
6 about things that are not antitrust specific, I think the
7 more we focus on what's our natural comparative
8 advantage, the more authority we speak with and,
9 therefore, the bigger bang for the buck.

10 MS. McDAVID: Let me just put in a brief pitch
11 for the international mission on competition advocacy.
12 It's on the list as one of the things you mentioned. If
13 you go back sometime, the agency's devoted some
14 resources, some of it funded by other government
15 agencies, to helping other governments develop a
16 competition mission from whole cloth, especially, for
17 example, in Eastern Europe.

18 Now, some resources are being devoted to the
19 International Competition Network, which started eight
20 years ago, and I think has succeeded beyond anyone's
21 expectation at the first Ditchley House conference at
22 which people talked about having a virtual organization
23 of competition authorities who would exchange best
24 practices and discuss policy questions to try to arrive
25 at substantive convergence and advance the law.

1 This has been an extremely worthwhile effort
2 that has had effects around the globe. We now have 100
3 countries around the world with antitrust statutes and
4 antitrust enforcement agencies. And they're out
5 protecting competition in each of their countries. And
6 the efforts in the ICN, modest though they may have been
7 in terms of dollars spent by the agencies, I think have
8 been extraordinary.

9 And the U.S. agencies have had the extremely
10 good judgment to let other governments lead the ICN in
11 its principal roles because they understand that it's
12 important that other governments be perceived to have an
13 important voice in this mission. So, that was money well
14 spent. It wasn't a lot of money, but it was well spent
15 and it was over probably a 20-year time period.

16 MR. HEIMERT: Let me turn to guidelines and the
17 issuance of guidelines. And, Ken, I'll direct the
18 question to you, but, again, everyone can weigh in. Is
19 there a benefit to issuing guidelines? Should we do it
20 more? Should we do it less? Should we update them,
21 revise them? How can we measure what benefits they
22 bring, again, to the public, to competition generally?

23 MR. HEYER: Well, I think they are most
24 valuable when there is a strong consensus behind
25 something. I think there's a stronger consensus behind

1 horizontal merger policy, for example, and I think the
2 guidelines there have been of value, although I'll
3 qualify that in a second.

4 To my mind, issuing guidelines on things like
5 vertical mergers and issuing guidelines on things like
6 Section 2, which none of us fully understand anyway, have
7 only limited value. I think an understanding of those
8 things needs to sort itself out better through academic
9 work and through research that folks do internally and
10 through proceedings in courts before we even think of
11 issuing guidelines there.

12 The one negative -- it's not a negative so
13 much, it's a qualification. The guidelines that are out
14 there, the horizontal merger guidelines, the
15 international licensing guidelines, a number of things,
16 often receive tremendous praise, and they are the product
17 of a good deal of fine work by talented people.

18 I'm not someone who advises clients. And, so,
19 I'll defer to Jan a bit on how valuable they are. But a
20 lot of times the fights that I see taking place in the
21 merger area, for example, the guidelines have these
22 numbers, which most people don't pay a lot of attention
23 to now anyway, but let's say we did arrive at certain
24 numbers that people thought were reasonable. Let's say
25 we had 2,000 or 3,000 or whatever as a realistic number

1 for typical mergers that we might be very concerned
2 about.

3 I think the biggest fight that takes place in
4 the merger area has to do with what the market is, not
5 what concentration is. Because we'll say, well, the
6 Herfindahl was over 2,000 or over 3,000 or over 4,000
7 and, therefore, there should be a presumption of harm.
8 The big fight that takes place isn't usually over whether
9 that's reasonable, although the other side would never
10 stipulate anyway. The big fight is over whether the
11 Herfindahl is really 600 or 800 as opposed to 3,000 or
12 4,000 because they're arguing all this other stuff is in
13 the market. And that is when you have to get into all
14 nitty-gritty difficult case-specific analysis that you
15 can't put in the guidelines.

16 So, I think it can be overstated how much
17 guidance these things really give. Although in certain
18 clear cases, they obviously help.

19 MS. McDAVID: The framework that was
20 established by the merger guidelines is applied almost
21 universally today. And the framework, whatever the
22 failings in particular provisions, such as the fact that
23 everyone knows the HHIs don't reflect enforcement policy
24 and that different kinds of efficiencies get credited and
25 there's no discussion of potential competition and that

1 vertical mergers are basically not treated, those sorts
2 of failings don't really undercut the value of the
3 fundamental structure for thinking about how one analyzes
4 a merger. That's been the value, I think, in the merger
5 guidelines.

6 And when they were issued -- there certainly is
7 broad consensus today, but Bill Baxter's first guidelines
8 were regarded as a little revolutionary when first
9 brought out. Consensus evolved pretty quickly as people
10 understood how they worked. But at the time they were
11 done, they were on the edge.

12 MR. HEIMERT: Steve, care to comment? And let
13 me throw in a couple of additional questions to the mix.

14 MR. CALKINS: I did such a good job with your
15 extra question the last time?

16 MR. HEIMERT: Just trying to get things out on
17 the table. The commentaries we had for the merger
18 guidelines, the horizontal merger guidelines commentaries
19 and the data that were released, does that add value to
20 the guidelines? And then a different, but I think
21 related, area is advisory opinions. Is that something
22 that the Commission provides value in issuing? Should it
23 do more of it? Again, you have to have someone come in
24 and ask for an advisory opinion. But feel free also just
25 to talk about guidelines more specifically. But I'll add

1 those to the mix and then we'll go around.

2 MR. CALKINS: All right, very quickly. I agree
3 with everything that Ken said. One of the things that
4 made the mergers guidelines work and a good thing was
5 that they were real, they were used. They were not an
6 academic exercise. They were not a sales pitch that was
7 just thrown out there for the purpose of selling. They
8 stand in sharp contrast, for instance, to one of the
9 vertical restraint guidelines that the Department of
10 Justice issued at a time when it was all a piece of a
11 sales pitch to the courts because the Department of
12 Justice wasn't bringing any vertical cases at all.

13 And, so, setting out a document saying this is
14 how we identify the cases to bring was a little bit of a
15 fraud. And it made it into less of an important process
16 developing the document, it made it much less credible,
17 it made it much less real.

18 The merger guidelines were something that Bill
19 could at least say was how things were being done and
20 people believed that and everybody knew that they would
21 matter and they did matter and you needed to know them
22 and think about them and the agency needed to care about
23 them because they would be used against the agency in
24 courts and cases the agency would bring. And, so, there
25 was a lot of integrity to the process and they became

1 very important and very valuable. And, so, clearly that
2 makes a huge contribution.

3 But that, in no way, says that more guidelines
4 are better and it, in no way, says there ought to be, as
5 Ken suggested, Section 2 guidelines or something out
6 there.

7 The one place that I'm sort of a little
8 wishy-washy as I think about it is as I think about the
9 competitor collaboration guidelines, which was really
10 quite a rich process of writing and developing and
11 thinking about those. It let the agency respond to the
12 Cal Dental case. It helped people sort of try to think
13 through what matters and how do we do this. And that
14 process had some serious value and I think helped
15 contribute to the ongoing discussion about how we
16 evaluate. This was an area where the agency was going to
17 be bringing cases and, so, it did matter. And it's not
18 sort of a classic merger guideline case, but it's quite
19 different than a vertical restraint guideline case. And
20 I think there was some benefit to that.

21 In terms of the things that you tossed out
22 afterwards, let me talk quickly about two, the one being
23 the merger sort of reports, if you will, and the other
24 being advisory opinions.

25 On advisory opinions, I've said this before, I

1 think advisory opinions for the Federal Trade Commission
2 are a wonderful thing because a real advisory opinion is
3 a statement by the Commission, which means the
4 Commissioners have to author it, which means they have to
5 fight it out and they need to resolve their views and
6 then they need to issue a formal document with a dissent,
7 if necessary. And, indeed, one of the things I regret is
8 that the term "advisory opinion" or "advisory opinion
9 letter" and variations of this term is rather casually
10 used to all sorts of staff issued documents, which can
11 also be valuable, and I'm not objecting to them in
12 particularly sort of the narrow areas they can be quite
13 useful in trying to understand hopeless laws, like the
14 Fair Credit Reporting Act, and things like that.

15 But it really is a very special thing when the
16 Commission, as a body, gets together and issues a formal
17 advisory opinion. And I wish they would do far more of
18 it. And I wish they would do far more telling the staff
19 that before you send out another advisory opinion letter,
20 A, stop calling it advisory opinion because that confuses
21 the terminology and, B, think about referring it up to us
22 and we'll set up a system where we can address it quickly
23 and then there could be more formal giving of collective,
24 official Commission advice. And I think that would be a
25 good thing to be done.

1 Last, and I'll be very quick. In terms of
2 mergers, I think the thing that really made a massive
3 difference were the reports showing the mergers that were
4 actually challenged. And that became part of an
5 essential piece of understanding about government
6 enforcement of mergers. You could no longer, as a
7 responsible person, look only at the merger guidelines.
8 You had to pull out your nifty little report that told
9 you what cases actually get challenged. And that greatly
10 enriched our understanding of what the agencies are
11 actually doing and then greatly enriched the discussion
12 about what the agencies ought to do. And, so, that
13 stands as one of the great, great accomplishments of the
14 agencies.

15 MS. McDAVID: And those merger data are
16 incredibly useful in walking a business person through
17 the likelihood that their particular merger will or will
18 not be challenged. Because you say to them, okay, if
19 your customers are unhappy about this, your chance of
20 getting challenged goes up dramatically, look at these
21 data. It's a way of focusing their attention in a way
22 that almost nothing else we had has.

23 Let me throw out one other thing that I think
24 this agency has done extremely well and I would encourage
25 it to do more of, and that's retrospective. How well

1 have the decisions the agency has made actually worked
2 out? The remedies study, I think, has been a really
3 valuable resource for the agency in terms of revising its
4 remedies processes. Too often staff treats it as though
5 it came down with Moses and is written entirely in stone.
6 But there were valuable learnings about what works and
7 what doesn't work from the remedies study that have
8 informed the Commission's remedies.

9 And the Antitrust Division, I don't think has
10 done anything quite like that, but I think it might be a
11 very good idea. We've recently had a circumstance in
12 which a trustee had to be appointed to implement an
13 Antitrust Division remedy because the parties didn't
14 divest the assets. That's a pretty extraordinary thing.
15 So, some sort of retrospective might be useful down the
16 street as well.

17 MR. HEIMERT: Let me proceed to the -- and
18 Jan's point there is a good lead-in to the competition
19 research and development. The FTC obviously has a lot of
20 workshops, conferences like this, issues reports and
21 studies and occasionally does retrospectives. And there
22 are probably some more internal ones that don't
23 necessarily get released for a variety of confidentiality
24 reasons and maybe just the nature of the study isn't
25 suitable for public release.

1 I assume there are benefits to all of these
2 activities, but perhaps each of you could offer up some
3 rough impressionistic sense of the size or magnitude of
4 those benefits. Ken?

5 MR. HEYER: Let me start. Because I've been
6 thinking a lot about retrospectives for a little while
7 now. I used to be in the camp that thought they were
8 fantastic and wonderful and it would be great to do more
9 of them. In fact, I used to joke that every time a new
10 deputy came into the Antitrust Division, one of the first
11 things he would say is, you know, I've been thinking,
12 maybe we should try to do more retrospectives. Every
13 single one of them would say it as if it was like a brand
14 new idea.

15 Well, first of all, let's put aside the fact
16 they're hard to do, and they are hard to do, both in
17 terms of getting the data and controlling for intervening
18 events. I've become more worried over time with what one
19 can actually draw from doing some of them.

20 Let's say you do a few of them extremely well.
21 Exactly how much is that going to inform future policy?
22 Is it going to tell you whether in general a four-to-
23 three merger is a good thing or a bad thing if you found
24 that in three out of five cases with very fact-specific
25 circumstances, the agency got it sort of right or sort of

1 wrong with some standard error based on inability to do
2 the study perfectly anyway? I'm not quite so sure. It
3 might help people point fingers about whether you got
4 that one right or wrong, but I'm not certain how well it
5 informs policy, broad policy going forward. Not that I
6 have a simple answer for how to inform broad policy going
7 forward, but I think individual studies can be
8 overstated.

9 I will say that I do like the idea of studying
10 certainly more than the Antitrust Division has. And
11 perhaps for the other agencies, the FTC and the
12 Europeans, they have done some work trying to look at the
13 effectiveness of remedies. I think that's extremely
14 important because it bears greatly on when and whether
15 one should litigate versus taking effects of some sort.

16 I think that all else equal, it's best not to
17 be in court because it sort of has the same kind of
18 flavor as wars, which are inefficient. You might as well
19 just cut a deal ahead of time. Why engage in all these
20 costs? But I think it presupposes that when you do cut a
21 deal, things are going to work well.

22 Remediating something is a little bit different
23 from analyzing the competitive effects of a merger.
24 There's a lot of idiosyncratic stuff going on that you
25 might not -- well, certainly you won't be able to study

1 if you don't have past data on that remedy in that
2 industry, which it's unlikely you will. You will
3 probably have better data when you're trying to predict
4 the effects of a merger. And I think that very often,
5 very often -- all the time, I might say, the parties who
6 are asked to remedy something or are ordered to remedy
7 something, they know a great deal more about their
8 business and they know a great deal more about what
9 remedy is going to be good enough and what remedy isn't
10 going to be good enough.

11 And it's a very difficult situation for a
12 government agency to be in where the other party knows a
13 lot better than you do exactly how things are going to
14 work out in the business world. And, so, I think not
15 only studying the effects of remedies, the types of
16 remedies that work, when they do, when they don't, but
17 perhaps even being a little bit more willing to go in
18 court to challenge things when the alternative is
19 something that appears to be a non-surgical remedy,
20 particularly when there are conduct provisions.

21 MR. HEIMERT: Tom or Steve?

22 MR. KRATTENMAKER: On the R&D? Yeah, I guess I
23 would pick up a little bit. I don't know if my thoughts,
24 as you can tell, are focused enough on it, but it seems
25 to me people have made a lot of sense here. And

1 particularly a retrospective on a particular case is
2 unlikely, I think, to teach you anything. I guess Ken
3 already said it. But that doesn't mean that there
4 couldn't be R&D into how competition works and how
5 enforcement works. On enforcement, I think they've
6 already talked about the remedy thing.

7 I'll give you another example. As far as I can
8 tell, the coordinated effects part of the merger
9 guidelines, notwithstanding everybody else's praise for
10 the guidelines, are intellectually bankrupt. They rest
11 on a series of studies by a professor named Joe Bain back
12 in the '50s that nobody agrees with anymore.

13 So, I know about the theory underlying
14 unilateral effects, but I haven't the faintest idea, and
15 I don't know why the economists aren't out there studying
16 how it is that industries with fewer or more firms with
17 greater or lesser degrees of homogeneity of products are
18 behaving wholly apart from the merger area. These are
19 the kind of R&D things that it seems to me these agencies
20 are in a wonderful position to do. When they do it, I
21 think it's a smashing success and I would hope they would
22 do more of it.

23 How much more, everybody on the panel will say.
24 And I'm sort back to my little mantra about opinions and
25 anecdotes don't equal data. I don't know. I would

1 simply add that if you sit around saying, I don't know
2 how much to put in the pot, therefore, I won't put
3 anything in the pot, you've made a decision not to put
4 anything in the pot. That doesn't mean that deciding to
5 do it is the right course of action. But unless you
6 think there isn't any benefit there, it seems to me
7 you've got to give some of it a try. Try to do it right.

8 But as far as the overall mix, I think we're
9 all probably sending you signals that we don't know how
10 to do that.

11 MR. HEIMERT: Steve?

12 MR. CALKINS: You need some disagreement and,
13 having agreed so lavishly with Ken last time, I'll
14 disagree a little. First on his basic point or one of
15 his points, which is that it's a good thing not to be in
16 court, I guess I just disagree with that. It seems to me
17 that if you're in court, there are all sorts of potential
18 positive externalities because you can develop -- if
19 you're doing it right, you can develop good case law.
20 And if you're planning to go in there and do it wrong,
21 well, then you ought not to be in government. You ought
22 to be doing something else.

23 So, assuming you're going to go try to do it
24 right, you've got the potential to do a lot of good
25 things in addition to this one case. And, so, I would

1 not at all say try to avoid court but, in fact, Ken, in
2 the end, ended up right where I am by saying that for
3 God's sakes don't accept a stupid conduct remedy and stay
4 out of court that way. And, so, I think we probably
5 would agree when it comes down to most of the cases.

6 On the conduct remedy, the things I really find
7 absurd are when you see a conduct remedy subject to a
8 five-year or ten-year expiration provision as the ticket
9 for approving a lifetime merger. I mean, this just does
10 not make sense, folks. Unless you've got a really
11 strange situation where you can say that we only got to
12 worry about the next five or ten years, after that we
13 know that because the following things, it's going to --
14 I have just a strong, strong bias against conduct
15 remedies.

16 In terms of the going back into retrospectives,
17 I mean, obviously he makes a sensible point. He always
18 does. Let me play devil's advocate the other way. If
19 you were going through a phase as a merger agency where
20 you found yourself saying terrible increase in
21 concentration but entry is easy and, so, there won't be
22 any problem and you find yourself saying that in a bunch
23 of cases, I would sure think you'd want to go back after
24 a while and say, you know, we have been blessing these
25 amazing increases in concentration because fancy

1 economists paid a fortune and fancy outside lawyers have
2 come in and persuaded us that entry was easy and would
3 take care of any problems. Shouldn't we go back and just
4 check to see whether we were being sold a bill of goods?
5 And I would think that an agency ought to want to go
6 back.

7 And although each of those cases is going to be
8 fact-specific, if you found that, by golly, entry wasn't
9 so easy as you'd thought, at least it would make you say,
10 golly, maybe we need to think about this a little bit
11 more and maybe sort of the way that we were proceeding
12 didn't make sense. And, so, I think it is important to
13 go back from time to time and just do the best you can to
14 try to get lessons from the decisions you've made.

15 MR. KRATTENMAKER: Steve, how does that help
16 you in the next case?

17 MR. CALKINS: Well, if you discover that --

18 MR. KRATTENMAKER: If you had a case and you
19 think entry is easy and you're going to say, I got fooled
20 last time, you know, fool me once, shame on you, fool me
21 twice, shame on me.

22 MR. CALKINS: Well, then you try to figure
23 out --

24 MR. KRATTENMAKER: What if it is a different
25 lawyer? It's not Jan this time, it's me that came in and

1 told you --

2 MR. HEYER: Then we have a challenge.

3 MR. CALKINS: I agree.

4 MR. KRATTENMAKER: I think you don't want to do
5 a retrospective on cases. A study of conditions of
6 entry, that would be fantastic. But why would that be a
7 retrospective on cases in which we rolled over because we
8 thought entry was easy? Because the next time we think
9 entry is easy, we are going to roll over again because we
10 believe it.

11 MR. CALKINS: Well, maybe you could go back and
12 -- I mean, obviously, if you can go off and do a really
13 marvelous wonderful study of entry, that would be great.
14 But there are limited resources. You need to start
15 somewhere. And one place to begin are with some cases
16 where you know what your thinking was, which will then
17 let you know how things played out.

18 MR. KRATTENMAKER: But wouldn't it be a mistake
19 to only do those?

20 MR. CALKINS: Oh, I wouldn't say only do those.
21 Obviously, one hopes there are all sorts of studies going
22 on. I couldn't agree more.

23 MR. KRATTENMAKER: Okay, I'm sorry to
24 interrupt.

25 MR. CALKINS: No, no, not at all, that sort of

1 finishes it.

2 MR. HEIMERT: I think we've already answered
3 this question, which is we've tried to establish the
4 benefits. Is there a way to allocate, in a principled
5 fashion, among these? I don't think that is going to be
6 a very productive discussion. But maybe,
7 impressionistically, we could each take 10 seconds to
8 answer does the FTC have the right mix of these
9 activities now? Should it have more of something or less
10 of something in your opinion and nothing more?

11 MR. KRATTENMAKER: No, they could do a lot more
12 because you --

13 MR. HEIMERT: Finite resources, Tom. Assuming
14 the resources we currently have.

15 MR. KRATTENMAKER: You've got a whole Bureau of
16 Economics out there that could be doing the studies that
17 Ken and I have outlined here, and they're not doing them.
18 It's not their fault. Turn them loose. Ken's got a
19 bunch of people, too.

20 MR. HEIMERT: I don't think they're going home
21 at noon, though.

22 MR. KRATTENMAKER: I know that.

23 MR. HEIMERT: They must be working on
24 something. Jan?

25 MS. McDAVID: Under the Goldilocks standard

1 it's probably just about right.

2 MR. HEIMERT: Steve?

3 MR. CALKINS: I don't know enough.

4 MR. HEYER: I don't know enough, but I'll say
5 something anyway.

6 **(Laughter.)**

7 MR. HEYER: I haven't looked carefully at the
8 FTC's allocation of things, but I will say that I've been
9 impressed with the fact that they've been playing in a
10 variety of areas. And I think they've been reasonably
11 aggressive in mergers, for example. I mean, Whole Foods
12 was a bit of a stretch, which they've just gotten a good
13 opinion on, and some others were close calls. I think
14 that you don't want to be in a position where every case
15 you bring you win. That suggests maybe you're not
16 bringing enough. And I like the idea of pushing a bit
17 and being in court more often.

18 I mean, Steve qualified his criticism a little
19 toward the end of something I had said. I began by
20 saying I think the agency should try to be in court more.
21 It does have benefits, transparency, fashioning the
22 doctrine. War is inefficient, but sometimes you do go to
23 war.

24 I think that, in addition to that, the FTC's
25 been great in the competition advocacy realm. They

1 probably could do more, as Tom was suggesting. And
2 maybe, my view, allocating slightly away from
3 retrospectives and slightly more towards other things
4 that I think might be a little more helpful. But the
5 fact they've been -- they filed comments frequently on
6 matters. Whether one agrees or disagrees, they've been
7 very bold in certain areas, in intellectual property,
8 Rambus stuff, the Schering Plough stuff.

9 And, internationally, I mean that's probably a
10 whole other conference, whether we're spending enough,
11 too much or whatever we're saying internationally. But
12 they've been obviously very aggressive there as well.
13 So, I think that whatever their resources happen to be,
14 they're allocating them reasonably nicely.

15 MR. HEIMERT: All right. Let's shift the focus
16 a little bit to even more granular questions about some
17 of the FTC process questions. One thing we have, it's
18 not unique but it certainly differs from the Department
19 of Justice, is our administrative adjudication mechanism.
20 Two recent developments, the first I think was yesterday,
21 was the Whole Foods case which at least suggests perhaps
22 that it should have a more prominent role or can have a
23 more prominent role when the FTC seeks a preliminary
24 injunction. At least in my quick review of the opinion -
25 - obviously, I don't speak for anyone at the FTC -- is

1 that arguably it makes the standard a little bit easier
2 for the FTC to get a preliminary injunction and bring a
3 matter into the administrative mechanism.

4 We obviously have had, over the last several
5 years, fairly aggressive use of administrative
6 litigation, bringing a variety of cases, Three Tenors was
7 mentioned earlier, Schering, Rambus, which ultimately we
8 know where those turned out, and several others as well,
9 in both conduct cases and merger cases.

10 Questions constantly arise. Is it sort of
11 bizarre? Is it a kangaroo court? Is this a proper way
12 for antitrust law to be made? It was certainly what it
13 was conceived to be to have that role in the early 1900s
14 when the FTC was created, but is it the right role today?

15 Tom, I'll start with you, but then, again, the
16 whole panel, the question is, is Part III litigation an
17 anachronism -- oh, I'm sorry, the second case was Inova
18 and Tom Rosch, a Commissioner, sitting as the ALJ, I
19 meant to mention in that.

20 Tom, is Part III an anachronism? Is it an
21 appropriate method for enforcing the antitrust laws?
22 Should the FTC continue to be aggressive in its use of
23 Part III? How should the process be fixed if it's
24 problematic but fixable?

25 MR. KRATTENMAKER: My views on this one are a

1 little bit complicated. And I know we have a limited
2 amount of time, so I'll try to truncate my responses
3 rather than talking even twice as fast as I usually do.

4 Number one, I am not a litigator. Number two,
5 that doesn't stop me from saying I don't know why we do
6 any adjudication in this area anyway. If it's not a
7 criminal case and your antitrust complaint whether you
8 win or lose depends upon the credibility of a witness, I
9 don't think you have an antitrust case. So, I don't know
10 why we do adjudication on these.

11 Partly, this is very personal. I've done
12 mergers here and at the DOJ and at the Federal
13 Communications Commission. At the FCC, they're done on a
14 paper record. And I don't see a difference in the
15 quality. I see a lot of difference in the ability to
16 bring hard thinking to it and a quicker and more sensible
17 resolution to complicated matters that don't turn on the
18 credibility of whether the red car hit the blue car or
19 the blue car hit the red car.

20 So, one of the reasons why my thoughts here are
21 complicated is I don't see the value of it as opposed to
22 trying to do something that would be an equally
23 responsible way of trying to get at the right answer for
24 this particular case.

25 If you are going to have adjudication, I do

1 think the present system is an anachronism. I mean no
2 personal offense here, but there is no requirement that
3 the people whom the cases are being tried before have any
4 antitrust knowledge or any experience in a courtroom. We
5 have a Commission which is, to the outside world, acting
6 as judge and jury. I mean, you talk about trying to
7 explain things to clients. Try to explain to them how,
8 yes, you have a chance now to go litigate this case
9 inside this agency that just voted that complaint out
10 against you. That's a very hard thing to understand.

11 On the other hand, finally, there's a wonderful
12 advantage here to having this administrative agency. I
13 mean, the possibility that you have a truly expert group
14 of Commissioners who could be thinking and focusing on
15 antitrust law and consumer protection law and how markets
16 work as another parallel track to just going to
17 generalist lawyers, which is what federal trial judges
18 are, to resolve these kinds of antitrust questions.

19 So, I guess I wonder whether it would be
20 possible. Could you make it less anachronistic by
21 changing a little bit? Why doesn't the Commission, when
22 it votes out a complaint, specify what it thinks the
23 issues are? And why doesn't it treat the ALJs as law
24 clerks, as magistrates, as hearing examiners? Which is I
25 think what they used to be called. And tell them don't

1 wear robes. You don't need to issue formal findings.
2 We're the ones who are going to do this.

3 I thought it was a wonderful idea to have
4 Commissioner Rosch try the case for the reasons I'm
5 suggesting, assuming you could deal with the ex parte
6 issues that are inevitably going to arise.

7 And why doesn't the Commission say, here's the
8 complaint. Here's why we think it's bad. Here's what we
9 think are the contested issues of fact. People are going
10 to submit papers on this in three weeks. I don't care
11 about three weeks. Three months. Janet will be in here
12 with a motion that we need to double that. And our
13 hearing examiner, our magistrate is to put together a
14 paper record that we can review. We want it back here in
15 six weeks.

16 Why don't we try to do some of that? And then
17 maybe it wouldn't seem quite so anachronistic. Maybe it
18 would try to keep some of the advantage of a collegial
19 expert body looking at these issues as opposed to one
20 individual federal trial judge doing it. And maybe it
21 would get us away from the idea that the way to resolve a
22 merger case is to put a couple of -- I'm sorry, there's a
23 bunch of really good litigators out here, and you all
24 know I'm not among you -- people in the courtroom who say
25 I object every 30 seconds to testimony that's going to be

1 admitted anyway for, well, it may have some possible
2 relevance and the person listening to it is an expert.
3 He used to do Social Security cases. But he will decide
4 whether --

5 **(Laughter.)**

6 MR. KRATTENMAKER: -- not the credibility, but
7 just how much weight to give it. And it will be decided
8 back in the -- I'm sorry. I've run off long enough. I
9 don't know why that kind of material can't be submitted
10 in a paper that can be responded to by the other side's
11 paper and done in a way that is much more transparent and
12 accessible to people and then puts the responsibility for
13 the decision where you would want it to be, which is with
14 the Commissioners. If you don't want the Commissioners
15 making these decisions on the basis of the record, let's
16 just get rid of it.

17 MR. HEIMERT: Jan?

18 MS. McDAVID: One of the problems facing the
19 Part III adjudication process at the Commission now, and
20 it is the time involved. These cases simply are barely
21 resolved in years. And it makes it ill-suited for things
22 that require a fast result.

23 One wonders how the Whole Foods case is going
24 to play out now. The assumption appears to be that it is
25 going to be first remanded to the District Court which is

1 then going decide whether or not to do something,
2 although exactly what, given that the merger closed
3 almost a year ago, is hard to know. And then there will
4 be a Part III adjudication which will take God knows how
5 long, followed by an appeal to the Commission, followed
6 by the appeal to a federal court. Sometime five years
7 from now we may have the final resolution of Whole Foods
8 on a transaction that closed a year ago.

9 So, how do you do administrative adjudication
10 in something that has to move quickly? Maybe it's for
11 closed mergers like Chicago Bridge and Iron. I regard
12 the Inova thing as an experiment to try to prove to the
13 courts that the agency can, in fact, move it along
14 quickly.

15 It raises issues. It compounds the issues that
16 Tom talked about with the kangaroo court. You have a
17 Commissioner presumably who was briefed on the matter
18 while it was under investigation, who didn't participate
19 in the decision to bring the complaint, but is now going
20 to be the judge. And then some other Commissioner is
21 going to also do the appeal. These are issues that have
22 to be sorted through. But I think that one of the
23 principal ones is: How are you going to make these cases
24 be resolved more quickly than the Rambus case?

25 MR. HEIMERT: Steve, do you want to share some

1 thoughts? And I'll add to the mix, is there a
2 distinction between mergers and nonmergers? The time
3 issue is obviously the most important in a merger case if
4 the merger's been stopped and the parties are still
5 pursuing it. But, certainly, Rambus was an issue. By
6 the time we got to a remedy, the patents are close to
7 expiration. And given the remedy that you can't enforce,
8 you can only collect a certain amount of royalties, you
9 can certainly imagine that if it had taken a couple more
10 years, then really that's it. But Part III, reform it?
11 How so? Different for mergers and conduct?

12 MR. CALKINS: Well, I'd like to begin by
13 noticing that it's quarter to 12:00 and we've utterly
14 failed at our assignment of coming up with any metrics
15 for anything.

16 **(Laughter.)**

17 MR. HEIMERT: Fifteen minutes, Steve.

18 MR. CALKINS: But I'll go ahead nonetheless.

19 MR. HEIMERT: Plus a little bit of lunch,
20 maybe.

21 MR. CALKINS: All right. Oh, those who know me
22 know that I have long thought that it's important for the
23 Commission to make Part III work. And that one of the
24 alleged comparative advantages of the Commission is that
25 it can be an adjudicative body. And I do think that it

1 is -- it's important for this agency to get it right, to
2 make it work, because it's one of reasons we have a
3 Federal Trade Commission. And if you're not going to
4 have them in the business of adjudicating, then you're
5 really back to wondering in a very serious way whether we
6 ought to continue on having a group like this.

7 That said, I want to first say that I don't
8 think it's fair to continuously bash the Commission for
9 taking forever. I mean, you look at the doctor case that
10 was just -- the Commission just won down in the Fifth
11 Circuit on appeal. I mean, the Fifth Circuit Court of
12 Appeals had that pending before it for just an
13 unbelievably long time. And, so, you can find all sorts
14 of federal courts that have taken forever to decide
15 things. And, so, it's just not fair to say, oh, the
16 Federal Trade Commission is slow. The federal courts can
17 be very slow as well. That's point one.

18 Point two, any time you have an operation like
19 the Federal Trade Commission that does investigating and
20 then deciding, you're either going to either decide that
21 you can live with that approach or you're not. And if
22 you're going to live with it, then there will be a period
23 of time when the Commissioners are thinking about whether
24 a case should be brought. And then at the end of the
25 day, they're supposed to sit back and decide whether or

1 not the valid cause of action was set out. And then the
2 defendant has the immense advantage, thank the Eleventh
3 Circuit, of almost choosing any circuit to which to
4 appeal and complain that it was not treated properly
5 under the various standards. And, so, there's a mix of
6 benefits depending upon what you do.

7 In terms of the Tom Rosch thing, I have been
8 struck with the vigor of the cries of dismay and
9 disbelief and horror and just sort of the friends of mine
10 in the private bar saying, my God, what are we talking
11 about here. And I view it really as the Commission
12 saying, by golly, we need to make this thing work, and a
13 sense that what's going on now isn't working and wanting
14 to try something different. And maybe it is saying, by
15 golly, we should be a better court and we should be a
16 better way to decide these things and we need to figure
17 out some way to make it happen. And I think that that's
18 right.

19 And whether that is to address the problems
20 through the legislation and the re-authorization bill on
21 the qualifications of ALJs, whether it's through
22 procedural changes, whether it's through letting a
23 Commissioner be a trial judge, I'm not sure exactly
24 what's the right mix, but I applaud the Commission trying
25 to address the problem and trying to move towards being a

1 better way to resolve some of these issues. I think
2 that's a very good thing.

3 And I suppose one last thing I'd mention is
4 that although the problems with a Tom Rosch doing this
5 have been talked about a lot, I'd add one other benefit
6 on the benefits side, which is that one of the
7 interesting problems at the Federal Trade Commission is
8 what do you do if you're not the chair and you're a
9 commissioner? How do you feel good about yourself at the
10 end of the day that you spent your time well and you've
11 made a contribution to society? And how do we persuade a
12 president not to appoint some idiot who's an old family
13 friend or somebody who's been sitting in the White House
14 needing someplace to go for their next job or something?

15 And, so, the more that we have important things
16 for non-chair commissioners to do, the more there's a
17 benefit, both in attracting good people and persuading
18 the process to appoint good people and then letting them
19 do good things that they can feel good about and stay
20 energized and continue doing a good job. And, so, if
21 having somebody serve as a trial judge is a way of doing
22 that, I'd just put that down on the benefit side of the
23 ledger on what is really a very interesting, challenging
24 and important problem.

25 MR. HEIMERT: Ken, do you want to opine on Part

1 III?

2 MR. HEYER: Since I don't even know what it is,
3 I won't opine. But can I take my time to talk about a
4 different issue while we --

5 MR. HEIMERT: Sure, could I move us on to the
6 next issue then?

7 MR. HEYER: Put some other things into the mix.

8 MR. HEIMERT: One thing -- and we had a couple
9 of other specific topics. Ken, I know you wanted to talk
10 about transparency. If you want to take a cut at
11 transparency first, then I will flip back to somebody
12 else.

13 MR. HEYER: I did try to talk about it in kind
14 of my opening remarks where I talked about the value of
15 having things out there so that the battle, if you will,
16 in the court of public opinion, in the court of actual
17 court opinion can help burnish people's arguments and
18 lead to better policy.

19 One other thing about transparency before
20 smuggling in my other point is that I found that when
21 something is going to be made transparent, it forces the
22 competition agency to be more careful and to have
23 stronger support for whatever it is they're doing. If
24 you're committed to having to explain yourself publicly
25 in any kind of detail, you're going to do a better job

1 ahead of time. And, so, that's one reason I value
2 committing to transparency.

3 The one very quick thing I was going to say as
4 my substitute for commenting on Part III is in deciding
5 where to allocate resources -- I'm kind of harkening back
6 to one of the things we're supposed to be focusing on.
7 One thing that we haven't mentioned yet, but is
8 important, I think, is this type one, type two error cost
9 issue. Type one and type two accidentally getting things
10 wrong by doing something and then one of the other ones
11 is doing something you shouldn't have done. Anyway,
12 making mistakes. That's what type one and type two are
13 about, making mistakes.

14 And I think in deciding where to put your
15 resources, whether it's bringing a case, whether it's
16 competition advocacy, I think you want to start with,
17 number one, realizing you may not be right even though
18 you think you're probably right. And thinking harder
19 about the costs if you're wrong. If you're wrong in
20 bringing something or if you're wrong in not bringing
21 something. I mean, you can do it with math and expected
22 value and such, but one example might be, should you
23 challenge a merger that you think, in a worst case
24 scenario, might raise prices a couple of cents?

25 If you had reason to believe that with some

1 reasonable probability, maybe only 30 percent, permitting
2 the merger could lead to wonderful things for the
3 economy, in a circumstance like that, you might want to
4 think twice before bringing the case.

5 MR. HEIMERT: Tom, Jan, Steve, reaction to the
6 transparency or the error question?

7 MR. McDAVID: I think on transparency, we've
8 all applauded it. There is a two-edged sword to the
9 agency because the things that it says may come back and
10 bite it in the next case and probably do. But
11 recognizing that risk, I applaud the agency for doing
12 what it's been doing and for doing more of it.

13 And Ken's point on forcing me to think it
14 through I think is interesting. In the Launch Vehicles
15 joint venture that the Commission approved, the agency
16 required the Defense Department to come in and explain
17 why they wanted the deal approved, because that was going
18 to help the agency explain why they were letting it go.
19 The only customer was putting on the record in a way that
20 was going to be available to the public why you should
21 approve this merger to monopoly.

22 MR. HEIMERT: Let me ask a follow-up to the
23 Part III litigation, which is not quite Part III, but
24 getting it to Part III and the length of investigations
25 at the FTC. Mergers, there is always the concern, four

1 months, five months, eight months, it's always too long,
2 the financing, holding the deal together, keeping the
3 companies viable.

4 But there are also nonmerger investigations and
5 they drag even longer for a variety of reasons. One is
6 the parties don't have an incentive to move the
7 investigation forward quickly, but sometimes they get
8 mired down internally. One, how big a problem do you see
9 that from the outside? And, two, what can be done about
10 it? Are there ways to terminate investigations or make
11 sure that they continue on only if there's a good reason
12 to do it at stages before a complaint is even issued?
13 Whether it's getting to process, getting subpoenas out,
14 or getting to the complaint stage that the Commission has
15 to vote out a complaint saying within a certain time
16 period after an investigation is opened, whatever that
17 time period might be, six months, a year, two years?

18 Any thoughts in that regard for improvements
19 that the FTC might undertake?

20 MR. McDAVID: A lot of these things do languish
21 very long. I've got a nonmerger investigation that's
22 been pending here now for nearly five years. The
23 recommendation to sue from staff went forward to the
24 Bureau almost a year ago. My client has not been
25 prejudiced because they haven't been sued. They're

1 certainly not spending any money with me at the moment.
2 But one wonders why that should be necessary. It's
3 certainly not good government. And there should be a way
4 of deciding what's in the pipeline that isn't likely to
5 go anywhere.

6 Assume the facts to be the way you expect them
7 to develop, is this a violation of law? Is it a
8 violation of law that we should be pursuing? Those
9 questions should be asked early in the process.

10 MR. HEIMERT: Steve?

11 MR. CALKINS: I don't have a perfect fix, but,
12 once again, going back to my Bible here, I read that the
13 numbers get changed in terms of what the FTC counts from
14 time to time. There was a change this last year. It
15 used to be that the FTC counted the number of cases that
16 it opened. And now, under a new emphasis, it is no
17 longer counting the number of cases it opened. Now, it
18 only cares about the number of cases it has closed.

19 Well, when you count something, it forces some
20 numbers to be put there. And if you were to start
21 regularly reporting on the length of cases of
22 investigations out there and had that on this report each
23 year, my guess is that that would create some pressure to
24 get things resolved and move on. It sounds silly, but
25 the problem is that there's so damn many mergers and

1 they're so time sensitive and the Hart-Scott process
2 drives it and everything drives it and then you have
3 other things with external deadlines, whether it's
4 Congress yelling at the agency or you have to testify or
5 you agreed to go give this speech, you have all these
6 things with deadlines which force you to turn your
7 attention to them, what's going to give?

8 The answer is the thing that's going to give is
9 the thing that doesn't have a deadline. Namely this
10 investigation of Jan's that's been going on for five
11 years. It's inevitable. So, you have to create some
12 pressure to push back the other way.

13 MR. HEIMERT: Well, why don't we, with our last
14 four or five minutes, give everybody four or five minutes
15 to -- or one or two, to offer some concluding thoughts
16 and cover -- if you want to make a point you didn't have
17 an opportunity to, to go ahead and do that.

18 Tom, why don't we start down at the end and
19 we'll come towards me?

20 MR. KRATTENMAKER: For what it's worth, I think
21 the agency is doing a terrific job. I think the people
22 that work here and run the place should be very proud of
23 it. I know when I worked here, I was very proud to work
24 here. So, I think that the things you choose to do are
25 generally very well selected. I think the way you

1 allocate your resources is well done.

2 We all make these kinds of judgments based on
3 our background. And I'm not only a federal pensioner.
4 I'm also a recovering academic. I spent 30 years as a
5 professor. And, so, therefore you're not surprised to
6 hear me say that I don't think that a litigation process
7 is going to get you very far, nor should you be surprised
8 to hear me say that I think people will listen to good,
9 soundly researched opinion advocacy. And that's probably
10 partly why I believe in the competition advocacy. And I
11 do believe that it's possible to research how markets
12 work. And that's why I believe you can do even more in
13 the R&D area.

14 But to say that you can do more is not to say
15 that you are doing badly. I think you're doing a very
16 good job.

17 MS. McDAVID: I also think the agency is doing
18 a remarkable job. And I particularly applaud the
19 introspection in hearings like this, in the unilateral
20 effects hearings, in the merger hearings a few years ago
21 going back to the Pitofsky hearings on anticipating the
22 21st Century. The agency is part of the think-tank for
23 antitrust and competition policy, and what it has to say
24 really matters and advances the ball.

25 MR. HEIMERT: Steve?

1 MR. CALKINS: I got a whole lot of things that
2 we didn't get to cover. I will go through them real
3 quickly. One of the things that we might have talked
4 about that's on one of the lists was remedies and civil
5 penalties and things like that. On that I've talked
6 before about the fact that penalties can change the
7 substantive standards, but maybe that's good, maybe
8 that's bad. You just have to think it through.

9 One of the things that I've been intrigued in
10 the reference to Part III is the question of whether or
11 not if you could have some kind of a financial penalty at
12 the end of the day in a Part III case, whether that would
13 have the effect of having the FTC, especially in consumer
14 protection, less rarely always rushing into federal court
15 and might it be a good thing or might it be a bad thing?
16 I just thought about that as I was sitting here. So, I
17 toss that out as part of the mix you'd have to think
18 about if you were to tweak the remedies of the agency.

19 Next, competition R&D and things like that. We
20 didn't spend a lot of time on workshops. Of course, all
21 of us up here think workshops, bringing people like us
22 in, are a good thing. I am struck with how frequently
23 people in Europe, I think England, for instance, do
24 sectoral studies. It's a different emphasis. We do more
25 workshops. We do some, but it's much more of an emphasis

1 there. And we're not doing it nearly as much.

2 And the next time we get together, we should
3 probably talk about whether that would be a good thing,
4 because it would help to look at a particular area of the
5 economy, maybe looking at both competition and consumer
6 protection, maybe doing some good, or maybe it would be a
7 bad thing because there would be an internal pressure to
8 announce some fix and define some problem. And, so,
9 maybe it would be a bad thing. But when we're
10 functioning differently than they are, we ought to look
11 at it and think about whether that's good or that's bad.

12 In terms of metrics, and I do think metrics
13 matter, I said before we should be trying to figure out
14 whether the competition advocacy makes a difference going
15 out to government bodies. I think we also ought to be
16 going back to all of the reports. I went to the website
17 and printed out the number of reports the Commission has,
18 and it just goes on page after page after page after
19 page. And as part of Bill's retrospective looking back
20 at the agency, somebody ought to be figuring out whether
21 these have really made a difference and which ones have
22 and which ones haven't.

23 Some of them are easy. The IP report clearly
24 made a difference because it's been cited in the Supreme
25 Court. It's been cited in lots of articles. It's been

1 part of an important national dialogue or discussion and
2 has really made a contribution. Other ones probably less
3 so. And, so, the agency ought to be trying to think
4 about that. And I'm not saying you just do a Lexis
5 search, but you at least do a search on the various
6 databases and find out how much people have paid
7 attention to them. Because if nobody is paying attention
8 to them, they surely are not making a difference. And,
9 so, you need to be doing that, looking at data.

10 One of the things we didn't specifically talk
11 about was amicus briefs and amicus appearances. When you
12 went back to my numbers that I had up there, I only had
13 government cases. You could have mentioned private cases
14 where there was an amicus brief, I think Broadcast Music,
15 which appears 21 times in my little index, one of the top
16 five most cited cases on that one. And that case I
17 actually wrote about as part of a foundation press book
18 going back with the history of famous cases. And I did
19 Broadcast Music.

20 And it's really an exciting story where the
21 whole nature of the court's approach to the case appears
22 -- it's always hard when you're going back and
23 recreating, but appears to have changed when the
24 solicitor general's advocate Frank Easterbrook stood up
25 and addressed the court raising very different kind of

1 issues, the kind of issues that became the Broadcast
2 Music opinion. So, if you were sort of counting score on
3 how did the Justice Department make a difference, you
4 would count that one and say they made a difference. And
5 then you'd have to sit back and say for better or worse?
6 I think probably for better. But you'd have to count
7 that, whereas there are a bunch of other amicus briefs
8 that have been tossed in that really haven't made any
9 difference at all, important things. You need to figure
10 out some way to do this.

11 And I guess I do think that on all of this, I
12 guess the lesson I would have is that you need to look at
13 numbers because it sort of grounds you in something. It
14 lets you start thinking about things. You want to keep
15 score, in part because it influences behavior since they
16 started counting sacks in the National Football League,
17 the way that defensive ends operate has changed quite
18 significantly. Well, you want to be counting things
19 partly to influence behavior but also partly to start
20 your analysis. But you can't stop there because, as my
21 little chart showed, you can say that you've done all
22 sorts of different things and it only begins the
23 discussion about whether those are things that have made
24 the world better or worse.

25 MR. HEIMERT: Thank you. Ken, some final

1 thoughts about your chief competitor?

2 MR. HEYER: Final thoughts. I applaud the
3 introspection, although, as we have discussed and as
4 I am pretty sure is going to happen in most other places,
5 it may be difficult to come up with good metrics for some
6 of these things, in measuring them and providing
7 incentives.

8 If you can't come up with good ones, I would
9 urge the Federal Trade Commission to resist the
10 temptation to come up with bad ones just to say that they
11 have some. Because as Steve just pointed out, these
12 things have incentive effects. And if you create
13 something just so you can have something to work towards,
14 that doesn't make any sense if it's not a good thing to
15 be working towards.

16 Because I applaud introspection, I will defer
17 comment on whether or not it's an efficient use of tax
18 dollars to have so many of these hearings in so many
19 locations around the world.

20 A quick point on international. I think that
21 it's important to try to have the focus as much, probably
22 much more, on process issues than on analytical
23 substance. Now, personally, I enjoy the analytical
24 substance. And the times I've gone around the world,
25 probably too many for the taxpayers' own good, I've liked

1 talking about economics and about what I think good
2 policies are and what the effects of various things are.
3 My own sense is that it's not quite so easy to persuade
4 people as I thought it might be. They've got their
5 priors, they've got their political sensitivities.
6 Frankly, most of them don't even understand what you're
7 saying.

8 I think that for the standpoint of business and
9 antitrust generally, the most important thing is to try
10 to harmonize the processes. You file one piece of paper
11 with everybody. You've got similar deadlines.
12 Information can be shared. I think that is a much better
13 way of promoting efficiency worldwide than having
14 lectures about bundled discounts, personally.

15 And then, finally, I would just applaud the
16 FTC. I think it's undeniable they are one of the best
17 federal competition agencies.

18 **(Laughter.)**

19 MR. CALKINS: Can I toss in a grumble real
20 quick?

21 MR. HEIMERT: Steve, go ahead.

22 MR. CALKINS: A quick grumble. You look at the
23 amicus briefs that the agencies have filed. You can come
24 away deciding that none of them were bad or that most of
25 them were good or that all of them were good.

1 On the other hand, you look at what the Supreme
2 Court has done over the last decade and you come away
3 saying they've never written an opinion that was in favor
4 of an antitrust plaintiff. And that's not a good thing
5 for the antitrust system as a whole. And, so, it's too
6 bad that our agencies haven't figured out some way,
7 whether it is identifying a good private case and
8 nurturing it along and bringing it along or bringing on
9 their case -- a little bit I would encourage thinking the
10 big picture thoughts as well as the individual for every
11 matter as it comes along.

12 It's really an important responsibility that
13 these agencies have to care about the whole system. This
14 is part of it. And I applaud their doing it. But I
15 would encourage them to think about what's not working or
16 what's not going well and then to address it.

17 MR. HEIMERT: All right. Well, the limited
18 resource of time is up. I want to thank the panel for
19 very thoughtful thoughts over the last couple of hours.
20 And please join me.

21 **(Applause.)**

22 MR. HEIMERT: We'll adjourn for lunch until --
23 is it 1:00, Maureen? So, it's a quick lunch. For those
24 of you who weren't here, your packet does have a list of
25 local lunch places. Remember to leave a little extra

1 time to get back through security if you're not an FTC
2 employee.

3 **(Session 2 concluded.)**

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1 **SESSION 3: EFFECTIVENESS OF THE FTC'S**

2 **CONSUMER PROTECTION MISSION**

3 MR. PAUTLER: Good afternoon, everyone. Thank
4 you very much for coming to this panel of the FTC at
5 100. We're here to examine the effectiveness of the
6 consumer protection mission at the FTC, to see whether
7 we're doing the appropriate set of functions, and to get
8 some ideas on how we might be able to measure what we're
9 doing in the consumer protection area perhaps better
10 than we do now.

11 We're going to be looking at the law
12 enforcement efforts of the FTC first, and then we'll be
13 looking at the other areas of activity in consumer
14 protection: advocacies, research, workshops, and consumer
15 education, and perhaps guidelines and all of the many
16 approaches that we take to doing consumer protection
17 work.

18 We'd like to be able to measure the impacts of
19 each of those areas. It's pretty clear, if -- I don't
20 know if any of you were at the competition segment
21 before this, but I don't think there were a lot of
22 perfect ideas on how to measure what we do on the
23 competition side. I don't know whether we'll come up
24 with any of those today in this group, but we're going
25 to try.

1 The FTC has a very broad set of
2 responsibilities in consumer protection, from antifraud
3 to various types of rules, from funerals to
4 telemarketing, in the consumer credit area, consumer
5 privacy. There's just a wide range of things we could
6 do, and so it makes -- it would help the agency a lot to
7 figure out what are the relative merits of the different
8 areas and can we, in fact, do our job better by
9 allocating our resources a little differently than we do
10 now? And then another question is, are we absolutely
11 missing something that we ought to be doing? And we'll
12 talk about that a little bit.

13 So, we have four panelists here today, each of
14 whom have some substantial experience at the FTC, some
15 in the recent past and some in the more distant past.
16 We'll try to gain from their experience and insights
17 into the FTC policy choices.

18 Directly to my left is Jack Calfee. He's a
19 resident scholar at the American Enterprise Institute,
20 and he's worked on a range of issues, including
21 regulatory policies. Most recently, he's done a lot of
22 work on the manufacture and sale of pharmaceuticals. He
23 taught at the University of Maryland as a marketing
24 professor, and his connection to the FTC is that he
25 worked in the Bureau of Economics in the late 1980s

1 doing advertising and marketing work, tort liability,
2 and work on tobacco issues.

3 To his left is Bill MacLeod, who's a former
4 bureau director at the Federal Trade Commission. He's
5 currently in private practice working on the competition
6 law and trade regulation. And Bill is one of the few
7 people in Washington that seems to be equally
8 comfortable on the competition and consumer protection
9 sides of the work that the FTC does.

10 To his left is Lee Peeler, who is the president
11 and CEO of the National Advertising Review Council.
12 He's responsible for leading the advertising industry's
13 self-regulatory efforts. And everybody knows him here,
14 because he was at the FTC for 33 years and left a couple
15 years ago to take on the BBB's work.

16 Paul Rubin, to his left, is Professor of
17 Economics and Law at Emory University in Atlanta, and
18 he's the chief editor of Managerial and Decision
19 Economics. He has an extensive publication record, and
20 Paul's connection to consumer protection is that he was
21 the head of what we now call our Division of Consumer
22 Protection in the Bureau of Economics for some time, and
23 then he was also the chief economist at the Consumer
24 Products Safety Commission.

25 For this panel, we're going to jump right into

1 some questions, although one thing I did want to do was
2 to mention a little bit about -- since the segment is
3 about how we might measure things, I wanted to talk a
4 little bit about what the FTC has done so far to try to
5 measure things in our Performance and Accountability
6 Report, and that report does a lot of counting of what
7 the Federal Trade Commission has done and what BCP has
8 done and the other organizations that give input into
9 the consumer protection function.

10 It counts items that we've done over time,
11 within the last year, to try to get a notion of how well
12 we're doing at protecting consumers. You can see a
13 number of the categories up there. There's actually
14 another page -- another third of the page to the
15 strategic goal of protecting consumers.

16 And one thing we're going to talk about today
17 is, in part, whether those are very good measures and
18 how we might be able to do our evaluation somewhat
19 better. Obviously, this is the best we've been able to
20 do so far. Part of what we want to know is by 2014,
21 when the FTC gets to be 100 years old, what should this
22 set of things look like? Should we be measuring
23 different things? Should we be measuring them
24 differently? And should we be able to determine how to
25 do our job better than we know today? And this panel's

1 going to try to help us figure that out.

2 So, we wanted to get started by asking the
3 panelists different questions. Occasionally, we will
4 have a designated starter, but everybody gets to answer
5 all of the questions if they choose to do so. And we'd
6 like to get started with a general question about how we
7 can measure the benefits from enforcement. We're going
8 to start out talking about the BCP enforcement efforts,
9 in general. How can we measure the benefits? Is the
10 way to do it by the number of cases or the amount of
11 recovery we can get in our consumer protection efforts?
12 Is thinking about our deterrence effect really a more
13 important thing to consider, perhaps? And then from the
14 attorneys on the panel, they may want to tell us whether
15 the movement of legal doctrine is really, perhaps, the
16 more important effect of what we do on the consumer
17 protection side.

18 But to start us off, we would like to have Jack
19 Calfee.

20 MR. CALFEE: Thank you, Paul.

21 You know, I work at a think tank with a free
22 market orientation, and so we're constantly looking at
23 regulatory agencies, and the buzz at lunch is all
24 about -- usually about all the disastrous decisions that
25 are being made by various regulatory agencies. And

1 right now, everyone's kind of doing handsprings when
2 they think about the Federal Reserve and the Department
3 of Treasury and the mortgage industry, et cetera, et
4 cetera, et cetera.

5 And then we talk about the FDA. We move on to
6 the EPA, et cetera. And no one ever mentions the FTC,
7 at least not in my presence. It's -- in fact, when I do
8 mention it, people say, "Hmm," and they think a little
9 bit. "Oh, yeah, advertising." And they say, "Well,
10 yeah, they do do antitrust and so on." But on the stuff
11 we're talking about, people are almost unaware.

12 I mean, that isn't true with the rest of this
13 panel, because they're deeply involved in the things
14 that the FTC deals with, but the people I talk to, who
15 are -- tend to be regulatory economists, it's amazing
16 how little attention they pay. And I don't think that's
17 because the agency is doing a lousy job. I think it's
18 because, on the whole, it may be one of the most
19 successful regulatory agencies we have.

20 I'm not sure I thought that when I worked here,
21 but having spent 15 or 20 years looking at other
22 regulatory agencies, my views of the FTC are really
23 quite elevated beyond what they once were.

24 And I think that the secret to the FTC's
25 success is also the reason why it's virtually impossible

1 to measure the costs and benefits of what they do,
2 because I think the secret to a success is that the FTC,
3 on consumer protection, that what they relate to is very
4 narrow. It's marketing, advertising, something to do
5 with transactions and so on, but it's not the product,
6 it's not the firm.

7 General Motors can make any kind of automobiles
8 they want to as far as the FTC is concerned, as long as
9 they advertise them accurately, don't deceive consumers,
10 et cetera. And what that means is that the agency is
11 not in a situation where they can push firms around,
12 like the FDA does -- and I assure that you it does -- or
13 the Federal Reserve sometimes does. You can't push
14 firms around. It has to fight them in court if there's
15 resistance. But also, no one holds FTC to account when
16 something goes wrong in these markets.

17 And so, right now, everyone wants to know why
18 -- what the Fed was doing when the -- and the other
19 agencies were doing when the mortgage banks got
20 themselves into so much trouble. People wanted to know
21 what the FDA was doing when this, that, so forth
22 happened. Even when people talk about the supposedly
23 dry pipeline of new drugs, again, the discussion turns
24 very quickly to the FDA.

25 No one says, "What's wrong with the FTC?"

1 because we're not getting more fuel-efficient
2 automobiles, which means that they can do their job in
3 relative peace without being pushed back and forth by
4 politics the way the other agencies do. But it also
5 means that because what they do is -- even though it's
6 extremely important, it's sort of at the edge of what
7 people think about when they think about these various
8 markets and products, it means it's very difficult to
9 figure out what the actual impact is of what the agency
10 does, especially when some of the most important things
11 are the things that the agency does not do.

12 Now, when I look at the advertising area, I've
13 looked at it quite a bit, I see an industry, the ad
14 industry, that actually seems to work pretty well. We
15 have a lot of advertising. It has a lot of information.
16 It has substantial effects on the kinds of products that
17 people buy, et cetera, et cetera. It undergirds product
18 development, manufacturing, so we can come up with
19 better products, know that they can advertise the
20 benefits of their products, and so on. But the reason
21 they can do that is because there's a lot of stupid
22 things that the FTC does not do.

23 There are things that it lets happen, and it's
24 almost impossible to know what the benefits of those
25 actions are. It's very difficult just to know what the

1 costs and benefits of advertising are, generally. For
2 example, the automobile industry, which is gigantic, I
3 am unaware of any studies -- at least not recently,
4 maybe Paul knows of some -- that have actually tried to
5 assess the impact of advertising on consumer welfare.
6 And then, you'd have the more difficult task of trying
7 to figure out what the impact is of the FTC's actions on
8 whatever costs and benefits are associated with the
9 advertising.

10 And so, again, what I see is an advertising
11 market that seems to work quite well. I think the FTC
12 deserves a lot of credit for that. I think there are a
13 lot of benefits to what the FTC does, but a lot of those
14 benefits arise from the things that the FTC forbears
15 doing, the things it avoids doing. And then when they
16 do do something, it's a fairly narrow action, and then,
17 like Paul mentioned, most of the effects have to do with
18 deterrents or look at Web commerce.

19 And this will be the end of my brief remarks.
20 I'm sure that the FTC, in the early nineties, late
21 nineties, on into 2000, there was a huge amount of
22 discussion over whether or not we needed new rules, new
23 regulations, a new approach to marketing in order to
24 prevent consumer deception, unfairness, et cetera, in
25 connection with Web commerce. My sense is that on the

1 whole, the agencies said, "No, we think the old rules
2 actually work in this new environment."

3 Now, sure, there are a lot of people who
4 thought that we needed a new approach to regulation for
5 this kind of commerce. I think the FTC did the right
6 thing in saying, "No, Section 5 will work, unfairness,
7 deception, et cetera, et cetera," and the benefits of
8 the system right now really are quite large. I think
9 the consumer welfare increases from Web commerce are
10 gigantic, and I think the FTC's regulation is -- you
11 know, accounts for a substantial portion of those
12 benefits. But I'm unaware of any way to measure those
13 benefits.

14 MR. PAUTLER: Lee, would you like --

15 MR. PEELER: So, first off, I just want to say
16 how great it is to be back here at the FTC. I think
17 this is my first official appearance at the FTC since I
18 left. It's just terrific to be back, and I know Bill
19 Kovacic said, you know, that you're not allowed to, you
20 know, celebrate the agency at this forum, but I am in a
21 nonprofit now, so he doesn't have jurisdiction over me,
22 and I just want to say, you know, I continue to think
23 this is, you know, the best place with the best people
24 and the best government agency in town, and I think, you
25 know, Jack's views are consistent with that, at least.

1 What I wanted to do is, if we're talking about
2 how you measure the agency's success -- and I agree and
3 we all agreed in our earlier conversations that it's
4 very difficult how you measure the agency's success, but
5 I think you have to look at sort of what it is -- what
6 is the agency's mission? And I actually have gotten to
7 the point where I think it's a pretty simple issue,
8 that, you know, the first thing is the FTC brings a
9 unique approach to consumer protection. You heard that
10 talked about yesterday on Tom Leary's panel and all the
11 panels. But, you know, it melds the competition
12 expertise and the economic expertise and consumer
13 protection expertise, and so it's an agency that when
14 it's doing consumer protection, it really sweats the
15 details about the effect on competition and the economic
16 effect of what it's doing. So, it's a different
17 approach to consumer protection than any other consumer
18 protection agency in the country takes and one of the
19 few in the world, probably, that takes that approach.

20 And to me, what the FTC's mission needs to be
21 is
22 basically to be the leader in consumer protection in the
23 United States. And if you think about it, it doesn't
24 make any sense to have a little agency in Washington
25 doing enforcement work, but that's not the goal of the

1 agency, and that has really dramatic benefits for the
2 economy of the type that Jack just talked about, because
3 if you apply a market-based approach to consumer
4 protection, it's much more likely to stimulate markets
5 and encourage competition than -- and it's also more
6 likely to work than the alternative approaches. So, you
7 know, I think if you define the agency's mission that
8 way, then that helps you in assessing the measurements.

9 And having said that, you know -- and, again, I
10 have to -- the measurements that have been set out are
11 all proxies. They're not direct measurements, but
12 they're good proxies. They help measure the agency's
13 level of activity in relevant areas. I have three
14 measures that I would add to the list if I were at the
15 agency and not responsible for having to meet them, but
16 I -- and I think that this new measure on number of
17 times the agency is mentioned in print media articles is
18 new since I left, and it's a great measure, because it
19 really does go to what I see as the overall mission of
20 the agency, which is to be a leader in consumer
21 protection. Now, I notice it doesn't --

22 UNIDENTIFIED SPEAKER: Should it be high or
23 low?

24 MR. PEELER: -- distinguish between good
25 mentions and bad mentions, but that's for another day.

1 So, do you want me to say what the three that I
2 would add are? Are we ready to go there?

3 MR. PAUTLER: Sounds good to me.

4 MR. PEELER: Or, Bill, do you want to --

5 MR. MacLEOD: I want to hear them, Lee.

6 MR. PEELER: So, there has been a convention in
7 the Bureau and I think from the Bureau of Economics and
8 probably from the law itself that says we don't talk
9 about the number of cases that we bring, because the
10 number of cases we bring, you know, can mean anything.
11 But, you know, if you look at the report that we submit
12 to -- oh, my other disclaimer is during the course of
13 this conversation, I will inevitably start talking about
14 "we." I don't work at the FTC anymore. I'm working at
15 the Better Business Bureau, but it's a hard habit to
16 break.

17 The first line of the report to the ABA talks
18 about how many cases we brought, and I just think, you
19 know, my experience is year-in and year-out, at the end
20 of the year, people want to know how many cases you
21 brought. The other measures we have are great proxies,
22 how much you're recovering, and if there was a way to
23 measure development of the law, that would be great,
24 also, but how many cases seems that it's important.

25 The second thing is, building on the question

1 of
2 how many times you're mentioned in the media, if the
3 goal of the agency is to be a leader in consumer
4 protection, both domestically and just by default, if
5 you are going to be the leader domestically, you have to
6 be the leader internationally. There needs to be some
7 better measures of the external relations of the agency,
8 and, you know, I thought that the panel yesterday at
9 the -- that Nancy Judy moderated was a great example of
10 how that external component of the agency's work should
11 be.

12 And then the last point -- and everyone that
13 knows me in the audience will laugh about this -- is
14 that when I go around and talk to people, I hear
15 essentially the same thing that Ari Schwartz said
16 yesterday at the panel, which is a big -- the big issue
17 with the FTC's consumer protection issue is speed, how
18 quickly we do things, you know, and goodness knows it
19 must
20 have gone better since I left, but, you know, it seems
21 to me that a measure on how quickly cases move to
22 filing, cases and investigations move to filing would be
23 an important measure.

24 In my new job, we track that like the stock
25 market. You know, we offer in the NAD a system of

1 basically dispute resolution between parties that tries
2 to apply FTC principles; tries to do that in 60 business
3 days. And how close we come to meeting that goal is
4 really the measure of success of the program and sort of
5 the key market piece. And, you know, one of the reasons
6 why it's so important is because, you know, 60 days is
7 tough for the Government to compete with, and it's -- 60
8 business days is tough for the Government to compete
9 with anyway, but the point is that the companies that
10 are participating in the process need the quick
11 resolution. You heard that again from the consumer
12 groups yesterday, that they want quicker, faster
13 resolution. So, that's my two cents.

14 MR. PAUTLER: Thank you, Lee.

15 Paul?

16 MR. RUBIN: I guess I'll follow Lee and say
17 it's good to be back, although I seem to get back here
18 every few years for something or another. I don't know
19 how popular I was when I was here, but I left here and
20 went to the Consumer Products Safety Commission, and
21 they've never invited me back. So, I guess I did better
22 here than I did there.

23 I think Jack and I have disagreed maybe twice
24 in our careers, so I don't disagree with anything he
25 said, but I think if we do want to measure the effects of

1 what the agency actually does as opposed to what it
2 doesn't do, I think deterrence is the only measure that
3 makes any sense. Getting money back to consumers, you
4 know, to an economist, that's a sunk cost and has no
5 welfare effects. In fact, if consumers think they're
6 going to get their money back, they may be less careful
7 in making decisions. So, recovery I don't think is a
8 good measure.

9 Economists would never say number of cases is a
10 good measure of anything, in particular, but I think
11 what we want to use is deterrence. If you're doing a
12 narrowly focused effort, it may be possible to do a
13 little measure, but the important thing is to do a
14 beforehand measure, to measure whatever it is you're
15 concerned with before the policy goes into effect, and
16 then try to determine, afterwards, what effects it might
17 have. There's a lot of empirical techniques.

18 It's difficult for the FTC to do that, because
19 they're a national agency. Economists like to do stuff
20 at the state level, because there's variation across
21 states, and when you do a policy -- I've been gone long
22 enough to say "you" -- when you do a policy, it affects
23 the whole country, but you can still do some time series
24 analysis on occasion, and sometimes you can use states.

25 There's a paper -- it hasn't been published

1 yet -- that some people at Carnegie did looking at the
2 effects of state disclosure laws, the notice to
3 consumers when their identities are compromised, and it
4 was a nice paper, because it used the 50 states or the
5 30-some states that have actually adopted those laws,
6 adopted them at different times, and the paper was able
7 to look and see if that had any effect, found it had no
8 effect. So, that would be something to consider when
9 you're thinking do we want these sort of notice laws.

10 But a before-and-after study, whenever
11 possible, and Jack's right, it wouldn't be possible for a
12 broad effort, but for narrow efforts, for targeted
13 efforts, it may sometimes be possible to do that, and the
14 important thing is, then, to get data from before so that
15 you have something to use after, and, of course, it's the
16 economists who would get the data from before.

17 MR. PAUTLER: Well, I just wanted to follow up
18 on that a little bit. Is there any good way to tell
19 when we should go about gathering that information? I
20 mean, there's a lot of -- there's a continuous change in
21 policy at the FTC. Things get tweaked quite often.
22 It's very seldom that we come in with -- I mean, we do,
23 on occasion, have a brand new rule that gets put in
24 place, and it really supplants what was there before,
25 but normally, the process is a lot smoother than that.

1 Is this going to be sort of just idiosyncratic,
2 that every once in a while we'll be able to figure out
3 how to measure one of our impacts, but we're not going
4 to be able to do it very often?

5 MR. RUBIN: It may be. On the other hand,
6 presumably if you're changing a policy, there should be
7 some reason you have in mind for changing it. So, you
8 should know something about what's going on. You know,
9 one would like to think that, that you have some idea of
10 what's going on in the marketplace that you want to
11 correct by changing the policy. So, you may be able
12 to -- you should have some ongoing information about
13 policies as you go on.

14 MR. PEELER: You know, I think the other point,
15 though, is a lot of the enforcement work the FTC does
16 doesn't result in direct monetary recoveries for
17 consumers. So, that's hard to gauge, and that there are
18 a lot of intangible benefits that come from FTC
19 enforcement. And I just tried to think of what the top
20 ones would be, but one intangible benefit of an active
21 FTC enforcement program is that basically it gives the
22 FTC what Eileen Harrington would call street
23 credibility, so that when we do go to another government
24 agency or a state or a consumer group and advocate an
25 approach to consumer protection, it provides

1 credibility. And I think that's true internationally,
2 too. You know, how do you measure that?

3 If you want to be -- you know, Jan McDavid this
4 morning said 99 percent of compliance occurs in
5 counseling and made the second point, which is if
6 there's no FTC enforcement, you know, people just -- you
7 know, you're talking to a wall. Nobody's going to
8 listen to you. If there is FTC enforcement, people
9 listen to the counseling they're getting. So, you know,
10 that's a question -- there's a question of how you
11 measure that.

12 And the other thing is if you want to know
13 where the line is between right and wrong, kind of, you
14 know, FTC cases and decisions help you draw those lines.
15 So, you know, it's a very important method of guidance,
16 also. So, it -- you know, it becomes difficult to
17 measure all those in sort of the quantitative ways that
18 I know Paul and Jack would like us to think about
19 everything we do.

20 MR. PAUTLER: Bill?

21 MR. MacLEOD: I think most of it's been said
22 now, Paul, but I think one thing bears repeating, and
23 that is, the mission of the FTC is not to bring cases.
24 The mission is very well stated in the PAR that you
25 already posted, and that is, it's to stop deception,

1 stop unfairness. A police chief would not get any
2 credit at all for putting ten bank robbers into jail if
3 100 banks had been robbed in the town in the period that
4 they made ten arrests. There has to be a focus on
5 compliance, a focus on the markets that the FTC is
6 charged to protect. And I think the Commission has done
7 that many times over the years.

8 I remember, going back into the 1980s, when the
9 Commission first launched a survey of Truth in Lending
10 compliance by automobile dealers and then brought cases
11 against them, but only after they recognized that simply
12 by surveying and warning, they were able to raise a
13 level of compliance substantially. The Commission has
14 done that over and over again, and the cases are then
15 brought to give the street credibility that Lee is
16 talking about.

17 I think it's important, to the extent
18 possible -- and I think it's much more possible than a
19 sophisticated economic analysis that would appear in a
20 peer-reviewed journal -- for the Commission to go out
21 and get a sense of how the marketplace is working in
22 different areas. That's what the workshops do. The
23 workshops get an understanding of what is going right,
24 what is going wrong, and you can get a much better idea
25 of where your resources ought to be.

1 That first item that's on the screen right now,
2 looking at the complaint database, that's a very
3 important thing. If something's not appearing as an
4 important source of complaints, that suggests that maybe
5 the FTC doesn't have to do as much in that area as it
6 does in the area where the complaints are high.

7 The last thing that I think I would mention in
8 response to a point that Lee made is that I don't think
9 I have ever, since I left the FTC, had a client complain
10 that the FTC was moving too quickly when it was making
11 an investigation. We do hear from the interest groups,
12 and I think it's an important thing to recall, that the
13 interest groups are not necessarily representing
14 consumers generally. They're representing a particular
15 interest. They might want to see something happen or
16 something happen very quickly.

17 That something may not be consistent with the
18 mission of the FTC in the first place, and constantly
19 calibrating what that mission is and recognizing whether
20 what is being requested of the Commission is consistent
21 with stopping fraud, stopping deception, or stopping
22 unfairness, that is a never-ending task, and especially
23 as new markets and new practices develop, that is
24 something that the Commission is constantly going to
25 have to adjust.

1 MR. PAUTLER: Well, one thing I think we'll get
2 to later is the question of how well we've done using
3 workshops to get to -- as guidance as part of the FTC's
4 efforts.

5 For now, I want to try to keep us focused on
6 enforcement, and I'm going to ask each of the panel
7 members to think about what were some of the more
8 influential cases that were important in the consumer
9 protection area. And the reason for thinking about that
10 is to try to get some notion of what are the
11 implications of the influential cases? Do they -- and
12 for the cases that were influential, how do we repeat
13 that? How do we make the cases we choose to bring --
14 and this may not apply as much to our efforts to just
15 stamp out frauds, but certainly in most of the other
16 areas -- the cases we choose to bring, how do we target
17 those that are going to be influential in the future so
18 we spend our money on cases that really ought to matter?

19 And I'll throw that open to the panel. I
20 assume our attorneys on the panel will have a few things
21 to say about that.

22 MR. PEELER: Well, you know, again, going back
23 to I think what the FTC's real mission is, which is to
24 develop this market-oriented consumer protection, you
25 know, I think if you look at the Pfizer case, you know,

1 it's a landmark case. It created a new legal doctrine,
2 and the important thing about it is it created a new
3 legal doctrine out of what was then an established
4 industry self-regulatory approach. Internally, ad
5 agencies used to review ad claims to see what support
6 there was for the claims, but it wasn't a legal
7 doctrine, and, you know, the development of that into a
8 legal doctrine has basically changed the way advertising
9 and consumer protection has been delivered --
10 advertising regulation and consumer protection
11 regulation has been delivered, you know, in modern
12 times.

13 And, again, because of what is -- because it
14 was a legal doctrine that harnessed the forces of the
15 marketplace, it's really much more like a natural sand
16 dune than a sea wall. You know, it's something that's
17 going to be long-standing effect. So, that's my top
18 candidate.

19 On the enforcement side, the first sets of 13-B
20 cases -- I think it was Virginia Holmes was the first
21 one, right, Alan? -- and the International Diamond case,
22 I mean, that really changed the way the FTC thought
23 about enforcement. So, that would be my next one.

24 But almost any FTC litigation addressing new
25 issues helps provide guidance. So, there was a case

1 that Joel and I were involved in with an endorser called
2 Steve Garvey that we pursued up to the Court of Appeals,
3 and we didn't get quite the decision that we wanted.
4 That case is relied on by legal counsel in major
5 corporations all over the country to try to give them
6 some guidance about how to apply the FTC's endorsement
7 guides. So, cases and decisions that provide guidance
8 are all important.

9 MR. PAUTLER: Yeah. Go ahead, Jack.

10 MR. CALFEE: Can I add just one little thing to
11 that? Which is there was a time when the FTC used to
12 bring a lot of cases against advertisers when they would
13 claim that they were selling a product on sale, 20
14 percent off, 50 percent off, something like that, and
15 they brought a lot of those cases in the forties,
16 fifties -- all the way back to the twenties, thirties,
17 forties, fifties, sixties.

18 And then at some point -- I've forgotten
19 exactly how it happened -- the Commission saw the light
20 and concluded that they had been so unnoticed that they
21 were mainly suing the sellers that had the lower prices,
22 and the beneficiaries were the sellers who had the higher
23 prices, and so they made a conscious decision to stop
24 bringing those cases. And you could argue that there
25 was a very substantial benefit, but the benefit came

1 from making it clear that they were not going to bring
2 those cases anymore. So, it was literally the end of
3 bringing certain kinds of cases that had a big impact on
4 the market.

5 MR. PEELER: And that's a great example. That
6 decision was made actually in the Pertschuk
7 Administration, and it was made as a result of a law
8 review article that Robert Pitofsky published called
9 "Beyond Nader: Advertising Regulation and Consumer
10 Protection," which it was very unusual for the agency --
11 I think Pitofsky had left the agency, but it was very
12 unusual for someone who left the agency to sit down and
13 sort of objectively comment on the pros and cons of
14 different enforcement strategies.

15 So, you know, this law review article advocated
16 very strongly that resale price maintenance cases had
17 been used to attack discounters and that it was a bad
18 use of taxpayer resources, and everybody in the
19 Commission basically stood up and saluted.

20 What the Commission hasn't done is the second
21 piece that you're talking about. The Commission hasn't
22 been as transparent about that as they could have been.
23 The guides are still in place -- and they're good
24 guides -- but they're still in place and they're still
25 followed by state and local consumer protection

1 agencies, and from time to time, the self-regulatory
2 group has cases involving those issues.

3 MR. RUBIN: And also, if you -- I once searched
4 those on the Web, and several trade associations very
5 prominently feature those guides as, you know, attempts
6 to keep their members by I assume cutting prices. So,
7 they do still have that --

8 MR. CALFEE: And they will until BCP mounts an
9 intervention against those particular organizations.

10 MR. PAUTLER: Well, I suppose that might be one
11 candidate for our rolling review of guides and rules
12 which we've been doing for a number of years, but maybe
13 that's a candidate to bring up for the next -- the next
14 set of reviews.

15 MR. MacLEOD: Well, Paul, let me weigh in with
16 one that may be the grand daddy of them all, and that's,
17 of course, the S&H case, where the Commission was told
18 by the Supreme Court that unfairness meant what the
19 Commission decided what unfairness would mean according
20 to the various norms and laws of society. That almost
21 got the Commission shut down in the 1970s when they
22 started bringing their rulemaking.

23 But more importantly, it set out unfairness as
24 a
25 very vibrant part of the FTC, and that was part of the

1 Pfizer decision that Lee is -- that Lee just described.
2 And if there is an example of a more recent application
3 of that and a more important case in our lifetimes, I
4 would probably say something like the Eli Lilly case,
5 where the Commission went from a deception-based
6 standard of policing privacy cases, and it moved to or
7 at least it added an unfairness measure to those privacy
8 cases.

9 I remember early on in the FTC privacy cases, I
10 was telling clients, "Why in the world would you publish
11 your privacy policy? All you're doing is setting up
12 yourselves for an FTC prosecution when you screw it up."
13 Well, after Eli Lilly, it didn't matter quite as much,
14 because the law, as it has been since then, is that if
15 you take unreasonable efforts to secure data or the
16 information that you have about consumers, you may well
17 be meeting the tenets of the Unfairness Doctrine, and
18 the Commission can come after you for that.

19 So, I think if you go through the unfairness
20 applications of the Commission's cases, you can find
21 some really important cases. Probably back in the
22 eighties, the most important one being the Orkin case.
23 You still see applications of these in modern
24 pronouncements of the FTC, and if I'm not mistaken, I
25 think we even saw S&H cited in the N-Data decision that

1 came out of the Commission, a combination competition
2 and consumer protection case, at least judging by the
3 pleadings.

4 MR. PAUTLER: Does anyone else have any other
5 candidates for great cases?

6 MR. RUBIN: I would have said Pfizer, also,
7 so...

8 MR. PAUTLER: Okay. But one question, the
9 follow-up question to that was, is there a way to
10 tell -- a way to recreate the important cases? I mean,
11 if we're trying to measure what we do well and we're
12 trying to do what we do better, if there are
13 particularly important cases, we'd like to be able to
14 figure out, ex ante, what those might be and pursue
15 those.

16 Is it true -- is there any way to do that, or
17 do all of these sort of fall out of a time trend that
18 just makes them all sort of individually important but
19 not replicable?

20 MR. RUBIN: I think you can follow it with a
21 specific litigation strategy of looking for something
22 you'd like to change, finding a defendant who doesn't
23 have much interest in that issue, and, you know, and
24 bring the case. I mean, that's what people do. And the
25 agency, of course, is in a good position to do that,

1 because you see all the possible cases in the world.
2 You're not like a litigator or the Court who has to wait
3 for something to come before it. So, I'm not sure I
4 would recommend that. I mean, it would have to be --
5 because I'm not sure I would agree with what might come
6 out of it, but it is quite possible for something like
7 the FTC to establish an explicit litigation strategy.
8 "This is the result we want to see. We're going to find
9 people and bring those cases." I imagine that was done
10 with Pfizer.

11 MR. PAUTLER: I guess my question presupposed
12 that the influential cases were considered to be good
13 cases, but -- but that's definitely true.

14 MR. PEELER: And that goes to the difficulty of
15 measuring the benefits of the enforcement program I
16 think pretty dramatically, but in the data and security
17 area, for example, where the FTC knew that data security
18 was an issue, there was a very conscious decision to
19 look and see how the FTC Act would apply to data
20 security, and there were a series of decisions that
21 followed each other that developed legal principles.

22 And, you know, going back to where I started,
23 which is what's the role of the agency, that the
24 importance of that development was it established the
25 FTC as the leader in developing data security cases in

1 nonregulated industries, and -- you know, and the
2 alternative to that is that somebody else is going to
3 step in and do it, and they are not going to do as good
4 a job.

5 But it's hard to measure the benefits -- the
6 direct benefits that you get from that, but it's clearly
7 a very important benefit of the way the FTC does
8 business.

9 MR. MacLEOD: Lee, that's exactly an area where
10 the Commission can and has measured a lot of benefits.
11 I think, Paul, to me the answer to your question is not
12 looking at what kind of case the Commission needs to
13 bring, but looking at what area the Commission needs to
14 police. I wasn't inside the Commission at the time, but
15 I probably am not being terribly prescient in saying you
16 could tell the Commission was going to go further than
17 it had gone before in the privacy cases, and the reason
18 why is there were too many privacy cases that were not
19 going to be based on failure to follow through on a
20 privacy promise that a company had made to consumers.

21 It turned out the Lilly case wasn't a litigated
22 case, but of the litigated cases in the eighties, they
23 were the 13-B cases, and we used to worry tremendously
24 about screwing up one of those cases when we went in to
25 court, because we recognized that the authority of the

1 Federal Trade Commission would largely stand or fall on
2 the success the Commission had in those cases.

3 And then I remember when the Bureau of
4 Competition started wanting to bring 13-B cases, and the
5 Bureau of Consumer Protection was very concerned that
6 they would screw it up. It's when you start applying
7 the tools that you have into an area where you know you
8 need to bring them, but they have not been there before,
9 that you recognize you've got a very important case on
10 your hands.

11 And I think that -- I don't -- I can't speak
12 for the Pfizer case, but I know that there is very
13 typically a good sense within the staff and there's a
14 good sense within the respondents when a case is a
15 path-breaking or pioneering case, and you very often can
16 tell that, depending on how this case goes, will go the
17 regulation of an entire sector or an entire principle.

18 MR. RUBIN: I want to talk about privacy, but
19 maybe I'll wait until another question.

20 MR. PAUTLER: Okay. Well, maybe you can do it
21 in response to this one. I guess one general question
22 that we've got, one that was discussed earlier on the
23 competition side, was trying to figure out how to
24 allocate our resources across the different functions.
25 On the competition side, it's sort of just, "Okay,

1 there's mergers and there's vertical restraints," and
2 then there's a few other things. On the consumer
3 protection side, the set of areas for enforcement is
4 pretty broad: spam, telemarketing, business
5 opportunities, lots of financial fraud, a number of
6 credit areas have become important now, privacy and data
7 security obviously has become very important. There's a
8 wide range of enforcement targets.

9 And one thing the FTC would like to know I
10 think in general is how should we allocate our resources
11 across those various types of targets? Is there any way
12 to really get at that that's systematic or what's the
13 best way to think about the problem if there's no real
14 systematic, database approach to getting at the
15 question?

16 Paul?

17 MR. RUBIN: Well, I think my own belief is that
18 the agency should focus those resources on fraud cases,
19 on real fraud cases, rather than on deception or other
20 kinds of cases. Fraud cases, there's no fear of
21 overdeterrence. If somebody's engaged in fraud and
22 you've stopped them, you've done a good thing.

23 With advertising, for example, with deception,
24 usually a message that's deceptive to some is beneficial
25 to others. There's, you know, the cases we used to

1 bring, let's say the false uniqueness cases. There's
2 lots of those cases where there's some harm to bringing
3 the case. The legitimate firm is doing maybe something
4 on the margin, but there's much more chance of harming
5 commerce by attacking a legitimate firm, where if you're
6 attacking a fraudster, there is no chance, because there
7 is no possibility of overdeterrence.

8 And I want to come back to the privacy issue,
9 where I think, you know, people have been congratulating
10 the FTC, and I think they've got it all wrong, actually,
11 to take an extreme statement. I think the whole focus
12 on data security turns out not to be a very useful
13 focus. Right now, according to Symantec -- not you,
14 because you don't know where -- but crooks can buy
15 online for 40 cents anybody's credit card number,
16 information to use a credit card. Forty cents. That's
17 essentially the transaction's cost of the transaction.
18 I mean, essentially, it says that credit card numbers,
19 at least, are free.

20 What determines how much fraud there is? Well,
21 it's not a scarcity of credit card numbers; it's a
22 scarcity of people who can do it or it's policies by --
23 post-theft policies by the credit card companies and by
24 others to stop the use of illegitimate credit cards.
25 Maybe it's policies the FTC has undertaken to help

1 reduce the use of the cards afterwards, although we
2 know -- at least we have a good indication it's not
3 notice that does it. It's not consumer notice, based on
4 the study I mentioned before, but that would be -- it
5 seems to me that the people that you want to go after
6 are the people that are engaged in the fraud, the actual
7 criminals. Harder to get at, but more effective.

8 And I know the FTC has no law enforcement
9 authority, but if you read what people say, they say,
10 "Well, there's jurisdictional issues. It's hard to get
11 these people because they operate across state lines."
12 Some of them are international, but it turns out that a
13 plurality, if not a majority of the fraudsters are
14 actually U.S. -- in the U.S., not in other countries.

15 So, the FTC, it would seem to me, with its
16 legal talent, would be in a position to try to get at
17 those jurisdictional issues. What kinds of legal issues
18 are making it difficult to find these people? How can we
19 get the states to cooperate? Are there any particular
20 state laws that would make it easier to get at these
21 people?

22 And, of course, what an economist would say is
23 if it's hard to catch them, you really zap them when you
24 get them. You don't give them a year or two. You give
25 them five years, ten years, make it really costly to

1 engage in that fraud, maybe lobby the states to increase
2 the criminal penalties for explicit fraud, and I think
3 that would be a much more effective policy than -- and,
4 again, there's real costs to targeting firms. I mean,
5 the firms have costs of data security.

6 I tried to buy something online the other day
7 -- I do it a lot -- but this particular time, there was
8 some question of my PIN number, and it took me a half
9 hour to answer questions about who lived with me in 1950
10 or something of this sort to get through. All of these
11 things are expensive. They make doing business more
12 expensive.

13 And part of it is because of fears of security.
14 Some of them are real, and some of them are the approach
15 to stopping fraud once the credit card is out there, but
16 I think we've gone probably too far. And I think the
17 agency, by emphasizing -- warning people all the time
18 about the dangers of fraud, may be making people more
19 scared than they need to be.

20 Even if your card is -- even if the information
21 is released, the best estimate is it's only 2 percent
22 chance that you'll be the victim of anything, and the
23 expected cost is not tremendously high. So, I'm not
24 sure that we've done -- that you've done -- I'll say
25 "you" now -- done consumers a service by putting out all

1 this information about, you know, the dangers of fraud
2 and by forcing firms to perhaps be more careful than is
3 optimal for these things. As I say, credit card numbers
4 seem to be free. It's the use of them that's expensive.

5 So, it sounds like we have another measure,
6 Paul, if credit card numbers go up to 60-80 cents
7 apiece...

8 MR. PEELER: Although if you're really
9 successful, they might go down, because you would reduce
10 demand for them by putting the people who want them in
11 jail, so that's hard to know.

12 MR. PAUTLER: Now, how did you get those
13 numbers?

14 MR. RUBIN: It's a study of Symantec. Symantec
15 actually, apparently, has studied some of the Web sites
16 where the criminals -- criminals sell the -- only last a
17 few days. I don't know how the criminals find them, but
18 apparently there are semi-organized criminal exchanges
19 where there are transactions in these things, and they
20 have a report that's available on the Web where they
21 quote those numbers.

22 MR. PEELER: Well, there's a lot there.

23 MR. PAUTLER: Yes. Does anyone else have
24 thoughts on how we should allocate our resources or --

25 MR. PEELER: Sure.

1 MR. PAUTLER: Yes.

2 MR. PEELER: You know, first off, I think
3 Paul's right. I think fraud's important, and I think,
4 you know, one of the great success stories of the FTC, as
5 you heard yesterday, is developing a fraud program, a
6 strong fraud program, and it's particularly impressive
7 to me, because when I started at the FTC, the -- it was
8 black letter, you know, operating procedure, "The FTC
9 doesn't do fraud." So, you know, the fact that the
10 agency was able to get beyond that stereotype and move
11 in and put together a very successful program is -- was
12 terrific.

13 In terms of how you balance all these competing
14 priorities, I think that's an incredibly difficult job.
15 It's one of the reasons why I'm glad I never had Bill or
16 Lydia's job, because I never had to be finally
17 responsible for doing that, but again, I think the
18 agency ought to be looking at the goal that I started
19 out with, which is if you want to be a leader in
20 consumer protection, if you want to apply market-based
21 consumer protection principles, you have got to be
22 active in the areas that are, you know, important and
23 topical.

24 You can't have a telemarketing Do-Not-Call Rule
25 that is the most popular thing in the U.S. since the

1 Elvis staff, according to Dave Barry, without enforcing
2 it. You know, you've got to put enforcement behind it.
3 And even in the fraud area, I mean, you know, you have
4 got to have enough fraud enforcement so people know
5 there's some likelihood that they're going to get sued.
6 There's, you know, story after story about FTC staff
7 people going after people and hearing from the victims
8 that, "Oh, I called and complained, and they said, 'Oh,
9 I don't have to worry about the FTC. They'll never come
10 after me.'" So, you know, that's really important.

11 And I just disagree with Paul on privacy. I
12 think it's very important for the FTC to be involved in
13 privacy and in setting standards on privacy, because I
14 think, you know, first off, they'll do it better than
15 the alternatives, and secondly -- and this goes to a
16 real measurement issue -- you know, there is at least a
17 theory that if people are concerned that their privacy
18 is not being protected based on, you know, data tapes
19 falling off the backs of trucks and things like that,
20 that they will make less use of electronic commerce than
21 they should, and so an enforcement presence that tries
22 to change that, you know, can have benefits. You know,
23 the question is how you'd measure them.

24 MR. RUBIN: But also -- by the way, I should
25 say -- I forgot, I promised my co-author, I have been

1 doing some work on privacy with Tom Leonard from the
2 Technology Policy Institute, and I promised him I'd give
3 his new organization a plug.

4 But when the tape falls off the truck and
5 there's a story in the paper, you know, "This tape's
6 fallen off the truck, 8 million names are exposed," and
7 someone from the FTC says, "Yeah, that's a dangerous
8 thing, we should worry about that," someone from the FTC
9 could say, "Yeah, but most of the time, when tapes fall
10 off of trucks, no one gets them, and the data really
11 doesn't get used, and it's only a very unlikely event
12 that people will be harmed." That would, I think, go --
13 you know, it would be a way of saying to people, "It's a
14 bad thing, but it's not the end of the world just
15 because your name is" -- I just got an email from Emery,
16 some insurance thing, you know, and they're all worried
17 and they're going to start monitoring my credit or
18 something, some insurance company released some names.
19 I'm not particularly worried about it, but, you know,
20 when people say, "Yeah, it's a terrible thing," and
21 there are stories in the paper, the FTC is always
22 quoted. The FTC could come in on the other side and
23 say, "This is a bad thing, but it's not as bad as you
24 might think. It doesn't happen all the time. It's only
25 occasionally that the data is misused. Don't panic."

1 That could be something they could do, and you don't see
2 them doing it. You see them more -- you know, the
3 institutional approach seems to be on the other side.

4 MR. PEELER: Actually, I think the ID theft
5 reports that the FTC puts out do do that. You know,
6 whether the press picks it up and writes it that way is
7 a different issue, but I -- you know, and I hope we get
8 to that. I mean, I think that the surveys the FTC does
9 on ID theft and things like that are really extremely
10 valuable.

11 MR. MacLEOD: Paul, I don't think you are going
12 to get from this panel a general prescription, unless
13 it's maybe disagreeing with Paul's observations, but --
14 and one of the reasons why you're not going to get a
15 general prescription is, how do we know? I think it has
16 to come back to what's going on in the marketplace, what
17 is the mission, and in the end, it has to be an internal
18 deliberation.

19 My guess is that it's not much different today
20 from what it was back when I was here, but a way to
21 think about it is, what would you do with a marginal ten
22 work years if they were made available to the Bureau of
23 Consumer Protection? You could put every single work
24 year into fraud and do nothing about anything else
25 that's the entire profile or the entire portfolio of the

1 Bureau, but that's not what's going to happen.

2 What's going to happen is, where can you put
3 those work years in a place where they are likely to
4 have the most effect? That's where the associate
5 directors will say, "Well, if you give them to me, I'll
6 be able to do this. If you give them to me, I'll be
7 able to do that." And that's what you have to be able
8 to ascertain.

9 But it comes from a combination of where the
10 divisions can go with the resources and what's really
11 hot. Identity theft remains the number one complaint.
12 That doesn't mean everything goes to identity theft, but
13 where does the Bureau believe, where does the -- where
14 do the enforcers, where do the prosecutors think the
15 marketplace needs extra cops on the beat? That's how
16 you have to answer the question.

17 And it may not be because some area is high
18 profile right now. It may well be that the case brought
19 last year or the report just issued has really settled
20 this area down, and we can now move the cops to a more
21 dangerous neighborhood. That's how it has to be
22 decided. I don't think we can do that here.

23 MR. PAUTLER: Is there a good way to determine
24 where the dangerous neighborhood is?

25 MR. MacLEOD: I think you have to rely on a

1 number of sources, and that's some of the things that
2 we've been talking about here.

3 MR. PEELER: But I think another, you know, big
4 success, and it's reflected in the GPRA measures is the
5 FTC's gotten much more sophisticated about the data
6 collection, you know, the consumer complaint data that
7 they get, the ID theft data, and backed up by the market
8 surveys is a much better, much more systematic way of
9 doing it than when I started.

10 When I -- my first day at the FTC, I asked the
11 associate director I was working for where he got his
12 cases, and he said, "Well, I saw one on a television
13 show the other night," you know, and that's just not a
14 good way to open cases.

15 MR. PAUTLER: But I bet it still works for us
16 every once in a while.

17 MR. CALFEE: In principle, if you have one
18 market segment in which there is actually frequent,
19 wholesale deception, usually there's some way in which
20 the purveyors in that segment compete to some extent
21 with other segments nearby that don't have that kind of
22 deception, in which case I would think the Commission
23 would hear from the competitors who are losing out to
24 the highly deceptive characters.

25 I'm sure you hear from competitors who are

1 losing out to the fraudulent people, and I would think
2 that they would go to the Commission and say, "Can you
3 stop these guys? You know, they are claiming that
4 people can lose weight with this thing, and they can't,"
5 and so forth and so on. But I would think if there's
6 any market where there's actually a lot of deception for
7 some reason -- I'm not sure why it would happen, but I
8 can imagine it could happen -- there must be someone
9 who's being adversely affected by that, in addition to
10 the consumers, who in some cases may not know they're
11 being deceived.

12 MR. PEELER: And now for a page announcement, I
13 mean, one of the things the FTC has done has encouraged
14 the development in the advertising area of a
15 self-regulatory system where competitors can go and get
16 those cases resolved very quickly, and that system
17 wouldn't exist except for the encouragement of the FTC
18 when it was being developed and the support of the FTC
19 as it was being implemented, and, you know, it should be
20 a case selection criteria.

21 The other thing I just wanted to add, and
22 it's -- and Bill's point, I think, is exactly right,
23 that you do have to look and see where you want to put
24 your relative emphasis, and to do that, you need a plan.
25 And I think, again, a new innovation has been building a

1 plan each year, and there are lots of sources of data
2 that go into that plan, but a big piece of the input in
3 the Bureau of Consumer Protection is from the staff, who
4 is working in the area and has access to all these
5 different sources of information, and, you know, from
6 that, you develop a plan that allows you to establish
7 priorities for the year. And, you know, that might be
8 changed the next year, but you need a plan each year,
9 where you're going to spend your resources.

10 MR. RUBIN: Just a caveat on what Jack said,
11 there is a risk, of course, that the competitors are
12 complaining or the --

13 MR. CALFEE: They'll complain about competition
14 as well.

15 MR. RUBIN: -- on competition rather than
16 deception, so...

17 MR. PAUTLER: I'd like to move a little bit
18 from the enforcement area into the other areas of
19 consumer protection activity, and we touched on some of
20 this already. There's several different avenues that we
21 can use to try to have some impact on consumer
22 protection. Research and workshops, self-regulatory
23 efforts and rulemakings, consumer education, guidelines,
24 and consumer protection advocacy work are all different
25 avenues that the Commission uses. And I guess we'll go

1 over a few of these.

2 Lee had mentioned workshops before, so I
3 suppose that we could begin with thinking about how
4 workshops and what you might call -- well, I guess you
5 could think about those, in part, as policy R&D efforts,
6 but they've been a -- an innovation -- I guess they have
7 been an innovation since 1995, probably, about that
8 period, and I was wondering whether the panel had any
9 thoughts on how workshops have aided us in our consumer
10 protection efforts and whether we can do those better
11 than we have been in the recent past.

12 MR. PEELER: In terms of whether they've aided
13 in consumer protection, you know, the answer is just
14 clearly yes, because they're a mechanism -- they're one
15 mechanism of getting the information you need to
16 establish priorities and also getting the information
17 you need to figure out, you know, what will work. So --
18 and they have immense value, both within the FTC in
19 terms of establishing enforcement priorities, and also,
20 making the FTC an informed commentator on legislative
21 proposals.

22 I mean, and the best example of that is the
23 Spam Legislation, where the FTC was really a leader in
24 developing information about spam and spam fraud and was
25 a major participant in fashioning a workable spam law.

1 So, you know, they're great.

2 MR. PAUTLER: Anyone else have any thoughts on
3 workshops as a policy approach?

4 MR. MacLEOD: Well, Paul, I agree completely
5 with Lee, and, as a matter of fact, you probably can
6 identify some of the workshops that the Bureau has done
7 over the last ten years as among the most influential
8 things that have come out of the agency, including the
9 biggest cases. A perfect example would be the workshop
10 or the workshops now that the Commission has undertaken
11 with respect to food advertising and childhood obesity.
12 That is probably done more to influence advertising and
13 the -- both the nature of advertising and the conscience
14 of the advertisers, not only in the United States but
15 around the world. No single case ever could have done
16 with the Commission accomplished there.

17 And you can go from area to area to area where
18 the Commission has held workshops, maybe not ever
19 resulting in a case, but sometimes prestaging
20 enforcement that comes later, and that has clearly made
21 the Commission much more intelligent, but I think
22 equally important, it has given a warning to the
23 industry that this is an area in which the Commission is
24 now extremely interested and one where compliance is
25 likely to be at a premium.

1 MR. PAUTLER: And I know the other day I went
2 through the workshops and counted up how many of them
3 were Internet-related, and I think it was over 25 over
4 the course of the last 13 years, and that's one of the
5 areas in which I think BCP has done a pretty good job of
6 trying to keep ahead of the curve. I actually have to
7 ask them how they managed to come up with the ideas for
8 the workshops, but --

9 MR. PEELER: And I think the point that Bill
10 just made about the food marketing workshops is really
11 establishing not just national but international
12 leadership for the Commission in those ideas is a great
13 example. The other one is a green marketing, and, you
14 know, right now, that's the biggest issue among
15 companies who are engaged in advertising of consumer
16 products, and they really -- you know, the fact that the
17 FTC was out in front and doing the workshops has really
18 put the FTC in a leadership role, and people are really
19 looking to the FTC rather than other entities to
20 establish policy there.

21 MR. PAUTLER: I'd like to move from workshops
22 to the research efforts on the consumer protection
23 mission and ask the panelists whether they have
24 particular -- whether there are -- there's research work
25 that we could do or should do or whether there's been

1 research work in the past in consumer protection that's
2 been particularly influential that we should try to mimic
3 in the future to get an idea of where we ought to go in
4 the next few years.

5 Does anyone have sort of candidates for useful
6 research or a research agenda?

7 Paul?

8 MR. RUBIN: In the past, of course, from my
9 era, Pauline and Alan's -- Pauline Ippolito and Alan
10 Mathios' research on food advertising and fiber was
11 very important. Jack's research -- Jack Calfee's
12 research on cigarettes was of great interest. Not to
13 toot my own horn, I had a little paper with Allison
14 Mason, Allison Keith on direct-to-consumer advertising
15 that was cited.

16 MR. CALFEE: Of prescription drugs.

17 MR. RUBIN: Prescription drugs,
18 direct-to-consumer prescription drugs. I'm sorry. So,
19 those have been influential. I like to think mine has
20 been, too.

21 One thing they had in common was they all dealt
22 with the effects of other agencies, two or three, maybe
23 all, one with the FTC, two the FDA. The FDA was not
24 allowing DTC advertising of drugs. They were not
25 allowing advertising of the health benefits of fiber.

1 And so in that sense the advertising -- the research was
2 important, and it was important not for markets
3 directly, but for behavior of other agencies. So, I
4 think that's something that you may want to think about.
5 What other policies are out there that other people are
6 doing that may be harmful that you can get a research
7 handle on?

8 At the state level, people mentioned the
9 Pricing Guide to Advertising, you know, you could do
10 research on the effects of that. I have a paper coming
11 out looking at state requiring -- some states require
12 item pricing laws on -- in stores, that turns out to be
13 very expensive. You know, the research came from me and
14 some colleagues, but I think it's the kind of thing the
15 -- the FTC has done some work in that area, but I think
16 it would have had -- even though I write my own research,
17 I think it might have had more impact had it come out of
18 something like the FTC or had the imprint of the FTC.

19 But looking at ways in which other governmental
20 entities interfere with the market process one of the
21 more important things that the research endeavor could
22 do.

23 MR. MacLEOD: You know, that seems to raise an
24 interesting, more general principle, because most of the
25 research people talk about that's really influential,

1 like the stuff you mentioned, especially in health
2 claims for foods, but also, the early advertising on --
3 advertising for eyeglasses, research done at the
4 University of Chicago and then done by FTC later on,
5 then later in Lawyer Advertising, and so on. Most of
6 that advertising pertained to -- not directly to FTC
7 policies. It pertained to restrictions in advertising
8 that were imposed by entities other than the FTC.

9 My sense is -- and you all can tell me whether
10 there's any sense to this at all, especially Lee with
11 his long-time responsibilities -- my sense is that the
12 net effect of that research was to document the benefits
13 of advertising and, therefore, the cost of unnecessary
14 restrictions, and what that did was to reinforce what
15 may have been a previously somewhat weak feeling or
16 tendency on the FTC's part, which was to take account of
17 the benefits of advertising whenever they were thinking
18 about any kind of litigation or anything else that might
19 affect advertising, or to put it another way, my sense
20 is if you go back to the 1960s and earlier, the FTC
21 would be looking at a case, a possible deception case,
22 and their main concern was, "Can we make a deception
23 case out of this? And if so, we can do something, we
24 can go to court," et cetera.

25 In the wake of this research and other research

1 and the revolution and thinking that took place in the
2 late 1970s and was continuing in the early 1980s, the
3 attitude seemed to be quite different. It wasn't so
4 much can we make a deception case here, but rather, is
5 this advertising doing good? And if it is doing good,
6 is there a way that we can get at whatever we think
7 is -- may be deceptive about it without interfering with
8 or dismantling the benefits of the advertising?

9 Does that make any sense to how you all were
10 doing your work?

11 MR. PEELER: Yes. The time frames are off a
12 little bit, but yeah. I mean --

13 MR. MacLEOD: Okay.

14 MR. PEELER: -- when -- in the early 1970s,
15 when the Bureau of Consumer Protection was created and
16 they brought Pitofsky in, one of his theses is that
17 advertising is an important form of competition, but
18 there was very little empirical work to support that.

19 MR. MacLEOD: Okay.

20 MR. PEELER: And so the agency, I think, has
21 always tried to implement the advertising program with
22 that perspective, that it's an important means of
23 competition, but in terms of convincing other people
24 that that's the appropriate approach to take, these
25 studies that have actual, hard data saying, you know,

1 here are the prices of attorneys' services in states
2 that prohibit advertising of pricing, and here are the
3 prices of attorneys' services in states that allow the
4 advertising of attorneys' services, allow the FTC to be
5 effective in advocating its sort of market-based
6 approach to advertising regulation and to -- you know,
7 and to consumer protection in general. So, you know, I
8 think that there are -- those types of studies are
9 essential.

10 MR. PAUTLER: Well, for the research function
11 in general, is there a particular way in which we ought
12 to go about choosing our research topics? One
13 alternative is that the staff thinks of interesting ideas
14 and they tend to bubble up from the bottom, and another
15 alternative is that they come top-down. Obviously, some
16 of those may be Congressionally required, and those sort
17 of fall in a very different category, I suppose, than
18 other types of research.

19 One issue we're generally interested in is
20 trying to figure out what the right approach to setting a
21 research agenda, where the ideas should come from and
22 whether it should be centrally planned or whether it
23 should be more -- the ideas should be more individually
24 derived. I'd sort of like to get thoughts on that issue.

25 Paul?

1 MR. RUBIN: It's always the hardest question,
2 where to get your research ideas. I think, frankly, a
3 mix is the way to go. I mean, some questions, like
4 Keith's work on privacy, the Commission's concerned
5 about some topics, and so it's important that someone do
6 that research on those topics.

7 In other cases, a staff person may see a case,
8 see an interesting issue that arises in a case, and that
9 may lead them to think about it and come up with a
10 research proposal there. I think if people are
11 interested in doing research and if they're thinking
12 about consumer protection issues, then some of the
13 things are going to come about just from their own work.

14 When I was here, I did some -- both kinds of
15 research, really. The direct-to-consumer paper, I think
16 Howard Beales suggested that Allison and I look at that
17 issue, and so that was a top-down piece. Richard
18 Higgins and I did a piece on counterfeit goods that came
19 out from a case that we had been working on. So, I
20 think it happens both ways.

21 I think there's some things that have to be
22 done, and whether it's congressionally mandated or --
23 and as I said before, if you are going to be looking at
24 the impact of things, then you -- what you have to do is
25 say, "We want someone to study the baseline. We want

1 someone to get the data for the baseline study." But I
2 think if you have smart people thinking about consumer
3 protection, they are going to come up with some topics
4 of their own, and I think you absolutely have to allow
5 them to explore those topics.

6 MR. PAUTLER: Anyone else have thoughts on a
7 research agenda?

8 MR. MacLEOD: I think self-interest and virtue
9 can coincide here. So, I think you can do a combination
10 of both, but what is interesting to research? What is
11 interesting to research is where there are disruptions
12 or controversies in the marketplace that you want to
13 understand. I will be politically naive and say one
14 place to look for research is places on the border of
15 the FTC's jurisdiction, where maybe it's been dealt some
16 sort of exemption and where you might find all kinds of
17 wild behavior going on.

18 But how did the Commission, in the first place,
19 get involved in these areas that Lee was talking about?
20 It was when Bob Pitofsky decided that he wanted to set a
21 basis for solid consumer protection enforcement in the
22 1970s. That not only guided the FTC. You could say
23 that that gave us the Commercial Speech Doctrine,
24 because the Supreme Court use that had in deciding the
25 Virginia Pharmacy case.

1 Today, what has the Commission done the last
2 few years that has been, I think, equally important?
3 Some of the research the Commission has done in the
4 lending areas, the mortgage studies, and so on, you can
5 almost always identify. And once again, going back to
6 the mission, where is the Commission likely to be needed?
7 And if they are likely to be needed there, there is very
8 likely to be an opportunity for some economic and
9 theoretical and legal research to determine what it is
10 the Commission ought to be thinking about. What is the
11 best way to approach an area?

12 And that is the kind of research that I think
13 is especially valuable. It's the sort of thing that I
14 think draws economists to the Bureau of Economics in the
15 first place, and it's the kind of thing that the
16 leadership of the Commission ought to be encouraging the
17 staff to undertake.

18 MR. PEELER: And it's not completely apropos
19 here, because it was asked for congressionally, but the
20 study the FTC released yesterday on expenditures for
21 children's food advertising and marketing has new
22 information that, you know, people didn't know and will
23 be useful for setting an agenda in that area for years
24 to come. So -- and the fact that it came from the FTC
25 gives it a level of credibility and acceptance that you

1 wouldn't get if it came from the grocery manufacturers,
2 for example.

3 MR. PAUTLER: Bill, you mentioned that there's
4 a lot of interesting research ideas where the FTC is
5 likely to be needed next, and I -- that -- I was
6 wondering, how would I know that? As I said at the
7 beginning, there's -- the FTC covers a lot of territory.
8 Jack argued we regulate narrowly, because we just
9 regulate claims about things. We don't regulate
10 products. But we sort of cover all of the United States
11 and all of those products and look at how -- consumer
12 effects across a large number of things, and I'm trying
13 to figure out, is figuring out where the FTC is likely
14 to be needed next, is it divining things from
15 politicians, you know, congressional interests, or is
16 it -- and we heard about that in the first panel today,
17 or is it -- is there some other way to usefully figure
18 out where we are likely to be needed?

19 MR. MacLEOD: Well, let's say in defense of our
20 politicians, of course they are one barometer of what
21 the body politic is interested in, and so, sure, they're
22 a source of what might be worthwhile on the Commission's
23 agenda. By the same token, you know that there will be
24 representatives of various interest groups, including
25 industry groups, that you'll need to filter before you

1 figure out how reliable their information is.

2 But what are some of the areas that are
3 incredibly important right now in the economy? Well,
4 healthcare is one. Everybody is -- or perhaps not
5 everybody, but it seems like most of the commentators
6 are saying there is something not working right in the
7 market for healthcare. There are proposals to transform
8 this market dramatically. Those proposals will have
9 competition implications, but they will also have
10 consumer protection implications. There's a perfect
11 example.

12 My recollection -- and Lee probably knows this
13 better than I do -- is that it was, in fact, a study of
14 the insurance industry that the Commission was
15 undertaking back in the early seventies that got the
16 Commission dealt an exclusion from studying the business
17 of insurance. The --

18 MR. PEELER: From thinking about insurance.

19 MR. MacLEOD: And so there is an area, as an
20 example, where for a long, long time the Commission has
21 not been able to devote either enforcement or research
22 and development resources, and I think you can identify
23 that as a market that gets more commentary for not
24 working as well as the markets where the Commission is
25 exercising its jurisdiction.

1 But again and again and again, I think you can
2 find where are the controversies today? Where are the
3 headlines coming of the latest disruptions, the latest
4 allegations of fraud, the latest allegations of abusive
5 or unfair behavior? Well, obviously, in the last couple
6 of years, it's been in credit markets, and fortunately
7 for the Commission, it's been studying well in advance
8 of a lot of the real controversy some of the impacts of
9 the various disclosure instruments in the credit
10 markets.

11 This is exactly the kind of thing I think the
12 Commission needs to do, so when it goes in and starts
13 thinking of remedies in some of these areas, it comes up
14 with a remedy that improves the problem.

15 One of the points that is always useful to
16 remember -- we're going to talk a little bit later,
17 Paul, about the intersection between competition and
18 consumer protection -- is that again and again and
19 again, on the competition side and on the consumer
20 protection side, you discover that if you don't offer or
21 impose the right remedy, you can make the problem worse
22 than the market was when you started out.

23 And you've seen that happen on the competition
24 side when they have ignored consumer protection
25 principles, and you can see it happen on the consumer

1 protection side when you ignore competition principles.
2 That's one of the things we do in the competition
3 advocacy and the consumer protection advocacy that we
4 talked about earlier.

5 MR. PAUTLER: Switching gears one more time to
6 try to get at issues of the effectiveness of our
7 research agenda -- and we may have covered some of this
8 already implicitly -- but we know what some of the
9 greatest hits of the consumer protection area research
10 has been from some of the discussion before. If we were
11 trying to figure out where the next new areas are, one
12 whole set of research that's been burgeoning in economics
13 that has consumer protection implications is behavioral
14 economics. Obviously, that now manages to -- if you look
15 at the American Economic Review, there will be 30 papers
16 in there each issue, and now three or four of them in
17 each issue will be about behavioral economics of one type
18 or another.

19 And I was wondering whether anyone has views on
20 the applicability of that, whether it's really new for
21 the FTC, and whether it's one of those areas that we
22 ought to be thinking about even more heavily than we are
23 now.

24 MR. PEELER: Let me start on that. I think the
25 FTC was sort of the leader in behavioral economics. The

1 way the FTC has always approached advertising has been,
2 you know, sort of basic behavioral economics. When we're
3 trying to figure out what an ad communicates to
4 consumers, we go out and test -- see what consumers get,
5 trying to figure out whether the particular disclosure
6 works. You go out and test to see whether -- you know,
7 whether it communicates to consumers. So, if you think
8 about behavioral economics in the sense of, you know,
9 consumers bring different things to the mix, and you
10 need to know how different remedies or different
11 campaigns affect those consumers, you know, we've been
12 doing that since -- you know, again, the 19 -- late
13 1970s and the early 1980s.

14 And I think this is an area where you go back
15 to the basic questions that you're asking, which is how
16 you allocate your resources, but it's an area where, you
17 know, the Bureau of Economics probably could have taken
18 more of a leadership role if it had more resources, to be
19 more engaged in the debate, because, you know, the
20 debate's gotten out a little bit in front of the agency,
21 particularly at the international level.

22 So, at the international level especially, it's
23 an example of how -- of why the consumer protection
24 mission needs to have a strong profile and be engaged
25 internationally. And just for people in the audience,

1 behavioral economics basically internationally is being
2 used to argue that consumers make a lot of irrational
3 choices or dumb choices, and so in certain instances,
4 the Government should be making the choices for
5 consumers rather than having consumers make them
6 themselves. And that's a much different approach to
7 thinking about consumer protection than we have
8 traditionally followed. That doesn't mean there's not
9 some truth to the fact that consumers make irrational
10 choices. It's a question of how you address that in
11 consumer protection policy, and that's an important
12 question.

13 MR. CALFEE: You know, I would recommend very
14 highly the article that Howard Beales, the former BCP
15 director, recently published in Competition -- I think
16 the journal is Competition Policy International, which
17 is an international journal. It's one of the new free
18 ones. I think it came out in March. And Howard
19 basically went through the leading tenets of behavioral
20 economics, and he basically asked the question as, how
21 can we translate what they're finding into consumer
22 protection policy? And his answer was, "Only with very,
23 very great difficulty." A lot of the results in
24 behavioral economics come from experimental situations.
25 It's hard to translate those results into actual

1 markets. When you do get into actual markets, it's
2 still hard to translate what you find in general to one
3 of the most important questions, which is what is the
4 impact of a particular rule? What would be the impact
5 of a particular rule?

6 And even on very basic things, like opt-in
7 versus opt-out for things like savings plans, anchoring
8 phenomenon, so forth and so on, what he pointed out with
9 some nice examples is that often, when you try to use
10 those findings to implement a policy, and when you look
11 at what happens with the policy, often you end up with
12 something that isn't nearly as good as you would have
13 thought it would be, such as a cooling off rule, which
14 you can think of as being an implementation of
15 behavioral economics back before anyone talked about
16 behavioral economics, and what he pointed out is that if
17 consumers know they have a cooling-off period, they're
18 going to make different decisions than they otherwise
19 would, and they actually might not be as well off,
20 because the sellers can actually exploit a cooling-off
21 period to induce people to buy things they might
22 otherwise not buy, et cetera.

23 I'm not sure there's any good data on how it
24 comes out, but I do think that it is not clear that a
25 cooling-off rule unambiguously improves consumer

1 decisions. I mean, at least not as a general rule. And
2 so I think that there's a case to be -- that where we
3 stand right now is we have some very interesting results
4 in behavioral economics. It's not at all clear that
5 they have a lot of implications for FTC policy. I think
6 the FTC is to be applauded for the care with which it
7 has looked at these results and the diffidence with
8 which it has tried to implement them.

9 And I do think that they have one very
10 interesting natural experiment, and that is the advent
11 of Internet or Web commerce. I would think that the way
12 the purchasing environment -- the marketing environment
13 works through the Internet is so different from the
14 traditional ways that this would have been a good
15 situation in which we could have seen some of the
16 adverse effects of the various consumer mental shortcuts
17 and deficiencies that have been revealed by behavioral
18 economics. We should have been able to see how those
19 things worked through to the detriment of consumers in
20 this very new situation, because it is so different from
21 what happened before.

22 There are so many situations in which people
23 can make very quick and impulsive decisions, et cetera,
24 et cetera, that they could not easily do before. And as
25 far as I can tell, we're not seeing those adverse

1 effects, and so again, I would applaud the FTC for
2 looking at this, but being very careful about
3 implementing these results, and they might pay a lot of
4 attention to these ongoing natural experiments to see
5 whether what has been feared in behavioral economics
6 actually tends to occur.

7 MR. PAUTLER: Paul?

8 MR. RUBIN: Yeah, I think there's a real
9 danger -- I know when I was at the FTC, it was a few
10 years after Akerlof's lemons markets papers, and
11 whenever an attorney in BCP wanted to bring a case, lo
12 and behold, there was a lemons market, so it was
13 justified by the economics. Behavioral economics gives
14 you a thousand lemons markets, you know, a thousand
15 different ways people can make mistakes. So, someone
16 looking for justification for a case can greatly misuse
17 it, I think.

18 Economists, I think, have fallen down a little
19 bit. We used to assume everybody was really rational.
20 I mean, some theorist would sit around in his office for
21 two years solving a game theory problem and then say,
22 "This is how firms behave," right, and maybe they
23 weren't able to solve that problem. Now we have gone
24 too far the other way, and we see an experimental
25 result, and we say, "A-ha, people are making these

1 mistakes." There is some disagreement even in the
2 experimental literature. Some psychologists say that
3 you can get different results -- for example -- here's
4 an example. If you ask people about probabilities and
5 to make a decision based on probabilities, they usually
6 get it wrong. If you ask them the same question based
7 on relative frequencies, they do much, much better.
8 Human -- natural humans think in terms of relative
9 frequencies; they don't think in terms of numbers
10 measuring probability. And so if you think -- if you
11 look at the way people actually behave, it may turn out
12 that the experimental results don't always go through.

13 What I think the FTC can do -- and I am not an
14 experimental economist -- but I think that they can get
15 involved perhaps in funding some outside research. I
16 remember there was one paper that Charlie Plott and
17 several others did. I don't remember the subject of it,
18 but I know that it was -- I've cited it, but it's been a
19 few years since I looked at it.

20 But the FTC has from time to time funded some
21 research, and I think it might be a useful thing to do,
22 either -- you know, it's probably hard for people to do
23 here -- maybe it's not -- but to do some experimental
24 research looking more at actual market behavior
25 rather -- because what you have -- what you have in

1 behavioral economics, people have a rule that they use
2 to make decisions. The rule usually works pretty well.
3 What the experimenters do is they look for a way that
4 that rule will break down. Here's the marginal case
5 where it breaks down, and then they say, "A-ha, this
6 leads to a bad decision." So, I think the FTC might
7 consider -- seriously consider -- there was a conference
8 Joe Mulholland put on a year or so ago on this issue,
9 and that was a good thing. But I think dealing with the
10 people doing the research and given the institutional
11 knowledge here of how markets actually work, there might
12 be some useful research that could come out. But I
13 think the real danger is if people get a hold of it and
14 say, "We want to bring cases, does economics justify
15 them?" This just gives you a whole grab bag of things
16 that you can use to justify cases.

17 MR. PAUTLER: Okay. Our next to last question,
18 industry self-regulation and the harmonization of
19 consumer protection and competition missions. What
20 we're interested in or one of the many things we're
21 interested in is how the FTC's efforts to foster
22 self-regulation, and we've done that in a number of
23 different areas, and Lee is obviously pretty interested
24 in one particular area of self-regulation, but we
25 undertake that in numerous areas, and in some ways, that

1 manages to have implications both for consumer
2 protection and for our competition missions.

3 I wanted to get some idea from the panelists
4 about whether they think we're doing enough in the area
5 of self-regulation or too little. Are we fostering
6 enough of it? Or if one thinks it's a competition
7 problem, then maybe we're fostering too much of it. I
8 was wondering if anybody had ideas about that.

9 MR. MacLEOD: Self-regulation is a measure of
10 compliance, and I think that the first question you have
11 to ask is whether it makes sense for the Commission to
12 encourage self-regulation, and it's like asking the cop
13 on the street if it makes sense to encourage people to
14 abide by the law. Of course, it does. And there are
15 sophisticated programs, like Lee's, in place that do
16 this.

17 But I think that the beauty of encouraging
18 self-regulation is that it also can reflect credit on
19 the FTC. I don't think there is any better example of
20 that than the report that Lee mentioned just yesterday.
21 Yesterday was a big news day for the FTC on both sides
22 of the -- on both sides of the Commission, and I think
23 it is fascinating, and what I -- I predict people will
24 call the most important decision of this administration
25 on the competition side of the FTC came down yesterday

1 in the D.C. circuit, and that is the reversal of the
2 District Court opinion in the Whole Foods case. It sets
3 a very clear standard for what the competition attorneys
4 must prove to get a preliminary injunction in a merger,
5 and at the same time, Lydia and Mary Engle announced the
6 FTC's report that dealt with, in large part, what
7 companies are doing voluntarily and what systems are
8 doing voluntarily to advertise food to children. Look
9 at the report. On the business page of The Washington
10 Post, the very lead story is, "Children Targets at 1.6
11 Billion in Food Ads." The most important case the
12 Bureau of Competition had this year gets two paragraphs
13 in the digest, "Whole Foods Ruling Reversed."

14 Self-regulation is big business, and getting
15 compliance with what the FTC does is big business,
16 whether it's a case or not, and it can be much bigger
17 business sometimes when it is not a case. But I think
18 that this is a very good example of the Commission
19 encouraging self-regulation and the self-regulation
20 working.

21 Is there a competition concern there? Of
22 course, there is. The last thing that we want to see is
23 self-regulation leading to the elimination of
24 advertising. We've talked a lot about that today.
25 That's what the Commission, since the Bob Pitofsky

1 Bureau days, has tried to protect, and that's what this
2 Commission has tried to protect as well, notwithstanding
3 many activist groups who purport to speak to consumers
4 who are saying, "Advertising is a bad thing that kids
5 should not see." The Commission went down that path 30
6 years ago. They're not likely to do it again, but it is
7 still a debate that is never going to go away.

8 At the same time, there are going to be cases
9 right on the margin. The Bureau of Competition brings
10 them. The Bureau of Competition brought one a few years
11 ago that didn't come out so well, and that was the
12 California Dentists case, and I think one of the reasons
13 why it didn't come out so well is the Bureau of
14 Competition didn't handle the consumer protection issues
15 as well as it could.

16 The defense, in most restraint-of-trade cases
17 involving advertising, is almost inevitably consumer
18 protection, from the classic Supreme Court case,
19 National Society of Professional Engineers, who had
20 rules against competitive bidding. Why did they have
21 those rules? They did not want cheap bridges to be
22 built that would then fall down. The Supreme Court said
23 that that is not an adequate explanation for suppressing
24 competition in bidding. We are not going to buy that.
25 The California Dentists had rules that the FTC alleged

1 were inhibiting competition among dentists. The
2 California Dental Association said that those rules were
3 protecting consumers. The Commission lost. California
4 Dentists won, and the reason why was because there was
5 not an adequate explanation -- or let's put it this way:
6 From the Commission's standpoint, the Commission failed
7 to persuade the Court that the consumer protection
8 rationale of the California Dental Association was a
9 bogus rationale.

10 So, there is always going to be the threat that
11 self-regulation turns into a restraint on competition,
12 and the assessment of that threat is going to turn on
13 legitimacy of the consumer protection rationale and the
14 restraint on competition that the rationale imposes.

15 Lee, I mentioned your operation. Again, you
16 might want to pick up from there.

17 MR. PEELER: And again, you know, the
18 advertising self-regulatory programs are administered by
19 the Council of Better Business Bureaus, which is -- you
20 know, has a two-year head start on the FTC. Actually,
21 it will turn 100 in 2012, not 2014. And, you know,
22 that's 100 years of working with businesses to promote
23 better business practices on a self-regulatory basis.
24 And, you know, there are lots of programs in addition to
25 the advertising program.

1 And, you know, the Commission, I think, has
2 done a really good job -- I mean, you know, for a long
3 time, but particularly after Jodie Bernstein was here, in
4 trying to take self-regulatory programs and use those in
5 ways that move consumer protection forward but don't tie
6 up a lot of FTC resources, and particularly in areas
7 where the Government -- where government probably
8 wouldn't do a very good job of consumer protection
9 because of the mechanisms that the Government has to
10 use.

11 So, I think that's a huge advantage.
12 I think the other advantage, though, and I'm -- and when
13 we look at this chart, you know, we've skipped over a
14 third of the chart, which is about the Commission's
15 consumer education program. These organizations can also
16 be important multipliers for the FTC's consumer education
17 program, and, you know, when you look at the numbers that
18 the FTC is cranking out in consumer education right now,
19 I mean, you know, they were unimaginable when I was --
20 started at the FTC, you know, that we would get -- that
21 we would have 47 million messages out to consumers is
22 just astounding.

23 You multiply that, and the FTC is good about
24 multiplying that by going to other organizations, both
25 self-regulatory organizations and consumer groups, to

1 get those messages out. You know, as Paul said at the
2 beginning, you know, one of the measures of enforcement
3 is how effective you are -- you know, in many instances,
4 a consumer education approach can be equally or more
5 effective than enforcement, and phishing, for example,
6 is a great example where the FTC said, you know, "We
7 could bring cases against these phishers in their
8 basement for the rest of our lives, but what we really
9 need to do is change consumer behavior. We need to get
10 people not to respond to these emails." And, you know,
11 that seemed like an impossible task when it started. I
12 think, you know, that's a message that's actually gotten
13 out to -- you know, not all consumers, but many
14 consumers.

15 MR. PAUTLER: Just as -- we've got a couple of
16 minutes left. I wanted to give each panelist, if you're
17 interested in doing it, a chance to wrap up a little bit
18 by answering a question about what you would like to see
19 us celebrate in 2014, six years from now. What should
20 we change, and what should we be celebrating? This is a
21 question that Bill Kovacic asked yesterday, and it's I
22 think a good question to end with, to say, well,
23 what's -- if you can just pick one thing, what's the one
24 new thing we ought to be celebrating in 2014?

25 UNIDENTIFIED SPEAKER: New thing?

1 MR. PAUTLER: Well, it could be an old thing.
2 It could be something we've continued to do well, if
3 anyone has any thoughts.

4 MR. CALFEE: I like Lee's little capsule
5 summary of going back to the Pitofsky BCP days, et
6 cetera, when the FTC transformed its advertising
7 regulation into something that was really kind of a --
8 kind of bizarre almost into what Lee describes as a
9 market-based regulation, and it's been remarkably
10 successful.

11 MR. PEELER: What I'd like to see
12 in six years -- why I think the FTC should be able to
13 celebrate in six years, and I think this symposium
14 approach is a great start on that, it's going to be
15 basically a transition in the leadership of the agency
16 from, you know, the types of folks that you see sitting
17 up here at this panel, the baby boomers, to a whole new
18 group of managers, and hopefully, they'll be learning
19 from everything we did and doing a better job than we
20 ever did. It seems like if we're there in six years, it
21 will be terrific.

22 MR. MacLEOD: That's setting a pretty easy
23 standard, Lee.

24 MR. RUBIN: I suppose what I would measure as
25 the thing most important to celebrate in six years is

1 that the FTC was able to persuade its various
2 constituencies that basic law enforcement by the FTC was
3 a better way of making these markets work than some new
4 form of regulation that would either come down from
5 Congress or Congress would force the FTC or some other
6 agency to write. Again and again and again, we have --
7 we will always have challenges where interest groups
8 will want to twist and turn markets to work to their
9 advantage, and I think the great success of the FTC over
10 the years, but the continuing challenge is going to be
11 to persuade people to believe that consumers, in a
12 competitive and well-informed market, can look out for
13 themselves better than some other entity can.

14 MR. RUBIN: I guess I would like Lee not to be
15 able to say in six years that the FTC is the only agency
16 that uses this approach. So, it would be nice if we
17 could spread it to some others who would think more
18 about these kinds of issues.

19 MR. PAUTLER: Okay. Well, thank you. I'd like
20 to thank everybody on the panel.

21 (Applause.)

22 MR. PAUTLER: We'll take a break now for about
23 15 minutes and resume a little bit after 3:00.

24 **(Session 3 concluded.)**

25

1 **SESSION 4: HOW TO MEASURE THE WELFARE EFFECTS OF THE**
2 **FTC'S COMPETITION AND CONSUMER PROTECTION EFFORTS**

3 MR. PAUTLER: Thank you for coming this
4 afternoon to the session of FTC at 100. We're preparing
5 for our next 100 years, so what we're going to be
6 discussing today is how to measure the welfare effects
7 of competition. The title of this session was how to
8 measure the welfare effects of competition and consumer
9 protection actions, but we actually aren't going to be
10 doing consumer protection actions, so I guess this is a
11 misleading title, and maybe I could get into trouble
12 with our consumer protection group for that, but we'll
13 be focusing on competition issues today.

14 And we're going to try to discuss how one might
15 measure welfare impacts, and we will focus on our merger
16 work, on single-firm conduct, perhaps discuss a little
17 bit about some of the other approaches we take to doing
18 competition policy, our consumer advocacy activity, for
19 instance.

20 The other panels that have gone on yesterday
21 and today were attempts to either define some of the
22 FTC's goals or to try to talk about measuring -- do a
23 little bit of measuring on the competition enforcement
24 work and consumer protection enforcement work. I think
25 so far we probably haven't come up with brand new

1 measures for anything. I think that's fair to say from
2 where we are today. But we'll now have a panel of
3 economists who will try to give us some insights on how
4 we might measure what we've done, with the notion that,
5 looking forward, in six more years, we'd like to have
6 some notion of where should we be looking so that we can
7 measure our impact in the competition area in 2014?

8 All of our panelists have backgrounds in
9 competition policy and in measuring the effects of
10 economic regulation. I'll just give a brief overview of
11 the panel. I am sure a number of you in the audience
12 know many, if not all of these people.

13 Bob Crandall is a senior fellow in economic
14 studies at the Brookings Institution. He's done work in
15 industrial organization and also in telecommunications
16 policy recently.

17 Luke Froeb is with us from Vanderbilt
18 University, where he holds the Chair of Entrepreneurship
19 and Free Enterprise, an interesting title. And his
20 research focuses on competition policy, and everybody
21 knows him because he was the director of the Bureau of
22 Economics not very long ago.

23 Vivek Ghosal is an associate professor at
24 Georgia Tech, and he was an economist at the Antitrust
25 Division before going to Georgia Tech. He's worked on

1 mergers and joint ventures and horizontal and vertical
2 market power, the same kinds of issues that a lot of our
3 economists study. And he's working some on
4 international competition policy now.

5 Tom Hazlett is the professor of law and
6 economics and serves as the director of information --
7 the information economy project at George Mason
8 University. He was previously the chief economist at
9 the FCC, and he's done a lot of work on a large number
10 of regulatory issues.

11 And Greg Werden is the senior economic counsel
12 at the Antitrust Division of the Department of Justice,
13 and he's -- he works on a wide variety of policy --
14 antitrust policy issues for the Antitrust Division and
15 is one of their main inputs into their amicus work at
16 the Supreme Court.

17 So, the panel today, we will start out by
18 having brief statements from each of the panelists that
19 will just cover the general area of the welfare effects
20 of competition, and then we'll get into some questions.

21 Let's see, we might as well go in alphabetical
22 order, I suppose. Bob, I don't know if you have a brief
23 statement.

24 MR. CRANDALL: I do. I do, but the way you had
25 organized this was each one of us would take on a

1 different area. Do you want us to continue in that
2 fashion or how do you want us to proceed, because I was
3 thinking we'd start with mergers.

4 MR. PAUTLER: Oh, okay. Okay. Okay. Well,
5 let's just jump into the questions then, if that's the
6 way we want to do it.

7 MR. CRANDALL: You want to jump into the
8 questions? Okay. Go ahead.

9 MR. PAUTLER: Would anyone -- it's obvious
10 we've had a little bit of a miscommunication here, so if
11 anyone would like to start out with an overview
12 statement, that would be fine.

13 MR. CRANDALL: I'll start anyway, but without
14 getting into how you measure welfare, consumer and
15 producer welfare.

16 MR. HAZLETT: It seems to me you ought to work
17 on your collusive enterprise here just a little bit.
18 This is a Trade Commission.

19 MR. CRANDALL: There is a difference between
20 cooperation and collusion, Tom.

21 First of all, thanks for inviting me here, and
22 as a result of some work we did a number of years ago,
23 Cliff Winston and I have been eager to see DOJ and FTC
24 to push for more retrospective analysis of how the
25 policy has worked. And, of course, it's unusual for a

1 lot of government agencies to do this kind of work.

2 The premise here, I judge from the way this has
3 proceeded, is that a lot of this research will either be
4 undertaken, funded, coordinated, led by the agency
5 itself. My own feeling is that what we need to do is to
6 try to get academe interested in this and that it ought
7 to be a joint effort between DOJ and FTC, since
8 obviously you overlap enormously on merger policy and
9 even to some extent on single-firm cases. One of you
10 couldn't bring the Microsoft case; the other did.

11 But it seems to me that it is less important
12 for us to sit around here and schmooze about how you
13 would measure the welfare effects of a policy than to
14 consider just more fundamentally, you know, what are the
15 limitations to doing good research in this area? And it
16 seems to me that the one that Cliff Winston and I
17 identified some time ago are the deterrence effects.
18 Whatever the effects of individual cases are and whether
19 you can measure the difference between how industries
20 have proceeded after a successful attack in a merger
21 versus other industries in which you did not attack a
22 merger, you or DOJ, may be even less important than the
23 effect particularly of certain behavioral aspects. And
24 I suppose this would turn, importantly, on Section 1,
25 Sherman, which you are not responsible for, the

1 deterrence effects of antitrust. And it seems to me
2 that is even more difficult to attempt to measure.

3 So, this is not an easy task. What is
4 surprising, and what was surprising to Cliff and me, was
5 how long we have been -- after all, we're now, what, 118
6 years and counting since the first antitrust statute,
7 and there was common law antitrust before that. I mean,
8 there are other agencies that have funded retrospective
9 analyses. The one I came across that did a pretty
10 darned good job years ago was the National Highway
11 Traffic Safety Administration, surprisingly, and they
12 contracted it out to John Delorean & Associates. You
13 may remember him. If you saw Back to the Future, that
14 gull-wing car that he couldn't sell on the market, he
15 sold to Hollywood. That was his greatest success.

16 But they actually did a pretty good job, and
17 it's an interesting model. I never went back to see
18 what it was that motivated NHTSA to do this or how they
19 handled the process, but it wasn't a bad model. I'll
20 just stop there.

21 MR. PAUTLER: Thank you. Vivek, would you like
22 to make an opening statement?

23 MR. GHOSAL: I think I make sort of an opening
24 statement versus some details. I think that there is no
25 one strategy or metric that will yield answers in terms

1 of retrospectives. Each has its own limitations. So,
2 we need to implement alternative methodologies to gain
3 insights.

4 One of the things that I find useful to look at
5 is understand firms' alternative business strategies.
6 So, if you think of a vector which has mergers and the
7 different types of mergers, you have single-firm
8 conduct, different types of single-firm conduct, and
9 then you have collusion. If antitrust blocks, for
10 example, a certain merger, and assuming for the moment
11 that these alternative business strategies, just for
12 simplicity, let's say they are only rent-seeking, then
13 new firms might rate to the alternative strategies to
14 pursue their end-seeking objectives.

15 And then, if firms do migrate to alternative
16 strategies, then that has implications for the conduct
17 of antitrust. So, effectively what you're saying is
18 these alternative rent-seeking business strategies and
19 antitrust essentially become endogenous in the system.

20 What this does is to really make life much more
21 complicated in terms of understanding -- I mean, or
22 thinking through retrospectives, because if a
23 retrospective looks like you've blocked a merger and
24 then you evaluate what it did, but the firm that got the
25 merger blocked migrated to this alternative strategy,

1 then, in effect, it is a -- did may or may not be a very
2 meaningful thing to do.

3 So, what we need to do is to sort of develop a
4 core set of variables that we track, potentially.
5 There's a lot of interest in prices for obvious reasons,
6 and I'll talk later in terms of how price information
7 can or cannot be used, but I find that in terms of
8 retrospectives, one core set of variables that should be
9 institutionalized in terms of tracking are issues
10 related to product innovation, all elements about
11 variety, quality, new products, process innovation, the
12 standard variables, as well as looking at cost
13 efficiency gains.

14 So, the reason why the second part is important
15 is because since late seventies, eighties, evaluation of
16 efficiencies has become very important, and whether or
17 not the loan, specific things from these retrospectives,
18 this this is an important part of what both DOJ and FTC
19 will do in its competition mission.

20 The other advantage of looking at these
21 alternative set of core variables is that a lot of these
22 variables are actually available in the public domain.
23 I will give examples later. Unlike price, which is very
24 difficult to get a handle on, many prices are
25 transactions prices which you don't get to observe,

1 so -- and if you look at Dennis Carlton's 2007 paper,
2 one of the things he says is, "Well, we need this price
3 data so the agency should seek authority to get the
4 price information," I don't think that's happening. I
5 think it's going to be nearly impossible to get the
6 power to force companies to provide price information
7 post decision.

8 So, I think there's a lot to be learned by
9 developing a core set of variables, and I think looking
10 forward and looking to gain metric, I think to develop
11 this core set of variables and very important,
12 institutionalize the process, that is, we will talk
13 later about how to figure out which cases to follow in
14 the future, and institutionalize this process so if a
15 case falls in that framework, you automatically have a
16 framework for tracking it.

17 And essentially if you look at these effects,
18 whether it's prices or whether it's innovation and cost
19 efficiency related effects, these -- some of them take
20 quite a bit of time to materialize. So, actually
21 following something for a year may or may not tell us a
22 whole lot. So, in effect, if you look at something,
23 like a three-year window, it provides a more substantive
24 basis for understanding, in particular, about the
25 innovation investment and other issues materializing

1 that the firms have followed. So, I will just stop with
2 that for the time being.

3 So, I think what we need to do is to develop
4 sort of a core set of variables, track that
5 systematically once we have a case that falls in the
6 framework that we should track, and then so we can talk
7 later about that more.

8 MR. PAUTLER: Thank you, Vivek.

9 MR. PAUTLER: Tom?

10 MR. HAZLETT: It is interesting at 100 years
11 old plus, that antitrust is still, in terms of really the
12 core of antitrust, we've failed to reach a consensus.
13 Now, it's not like this is a public controversy. There
14 aren't people -- you know, a ground swell asking for
15 reform of the Sherman Act, and if we watch a
16 Presidential debate this fall and somebody actually asks
17 one of the candidates about the use of the Herfindahl
18 index in merger cases, it would wake up all the
19 journalists, and, of course, make all of us in this room
20 swell with pride, but that is not going to happen.

21 So, you know, you look -- when I talk about
22 controversy, of course, I'm talking about looking at
23 the experts who deal with these things, and you can
24 juxtapose, for instance, the excellent scholarship by
25 Crandall and Winston, looking at some of the major

1 antitrust cases in history, and finding little evidence
2 for the effectiveness of antitrust in improving consumer
3 welfare. Of course, Jonathan Baker conducts a parallel
4 analysis and comes to the opposite conclusion. So, that
5 is somewhat standard, that there is no consensus amongst
6 the experts.

7 So, Dennis Carlton comes into this world with a
8 nice, well-packaged set of -- small set of suggestions,
9 and he cites the dearth of quantitative measures and
10 studies, and also saying that we are simultaneously
11 hearing the frequent call for retrospective studies, and
12 this is very general and hard to argue with, that the
13 antitrust agencies should have better -- sorry about
14 that -- battle assessment reports.

15 So, -- now, Carlton, of course, issues a
16 warning to the wise that going out and doing empirical
17 analysis of particular, say, merger decisions by the
18 regulatory agencies has to be undertaken with care. For
19 one thing, the optimal level of antitrust enforcement
20 does not imply that no output-reducing merger is ever
21 permitted or that every output-enhancing merger is
22 accommodated. Rather, it does imply that in the
23 aggregate, the benefits exceed the costs.

24 And so he has a proposal to systematize some of
25 the particular predictions, and as has already been

1 mentioned, the data available to researchers now and in
2 the future, and these procedural improvements can
3 improve analytical transparency, and then, therefore,
4 trace the agency analyses against actual developments.
5 And I do believe, if that were constituted and
6 implemented, that it would be an improvement. I'm
7 hoping that Greg or others who have their feet on the
8 ground in that world day to day will comment on that.

9 But even if the -- they were instituted, the
10 interesting irony here is that the great effect of
11 antitrust, of course, is distributed across markets, and
12 as has been noted, I mean, that's the whole purpose of
13 law, is to encourage certain forms of behavior and
14 discourage other forms. So, in looking at the computer
15 software market, say in the wake of the Microsoft
16 antitrust case, we can say certain things about how the
17 case performed, but the real question, in big aggregate
18 benefits, net benefits to society, is how other markets
19 performed or markets that almost inherently, given the
20 nature of the enterprise, will not be subject to
21 analysis or the data will be too elusive to reveal.

22 So, three quick points, then. The first is I
23 think that these battle reports, to the extent that
24 academics can engage in them, are a very good thing.
25 That may seem self-interested. In fact, the problem

1 with such ex post analysis and the reason we don't see
2 much of it at the antitrust agencies is that the product
3 is a public good. The beneficiaries are not those who
4 are influential in the process of forming antitrust
5 policy. To the extent that there are private benefits,
6 they're probably associated with the rents to experts in
7 law and economics that would conduct those analyses, and
8 I encourage folks in that sector to take leadership and
9 push to do more of this in the spirit of Dennis
10 Carlton's paper.

11 Secondly, I do and have suggested that we
12 include more nonprice data in evaluating the price
13 effects of mergers, in particular, other antitrust
14 actions in general. Specifically, examples would
15 include looking at financial market data, including
16 event studies, to see what the expectation of various
17 market structure changes or antitrust interventions
18 might be.

19 In addition, looking at profitability and
20 capital values as exhibited by financial market trading
21 prices can give us some idea of market estimates of
22 profits, which should be -- and I think have not been to
23 the degree possible and useful -- been incorporated in
24 antitrust analysis, and I cite the recent XM-Sirius
25 merger, which took 47 years to complete. You may have

1 just read about the final -- the final -- you feel when
2 it gets to the end, you have to explain to young people
3 what satellite radio is.

4 But at any rate, the merger analysis I think
5 benefited quite handsomely from the fact that a merger
6 of two firms in the satellite radio industry to one firm
7 in the satellite radio industry did not generate as much
8 as zero excess return, even with a healthy merger
9 premium involved. So, that kind of market data should
10 be incorporated into the price effects -- I'm talking
11 now about the retail price effects.

12 And finally, I would say that Professor Carlton
13 strikes an interesting note at the end of his 20 --
14 December 2007 paper. He says, "Strong opinions are not
15 substitutes for quantitative analysis," and this point
16 is clearly incorrect, okay? I don't think there's
17 anything more commonly observed in Washington, in
18 particular, than strong opinions substituting for
19 quantitative analysis. And, in fact, I will make a
20 stronger statement, and that is that even in a more
21 perfect world, it would still be the case, that strong
22 opinions would be substitutes for other kinds of
23 analysis.

24 And, in fact, I would suggest that the role of
25 quantitative and other analysis, scientific analysis in

1 general, in informing people's opinions is what we're
2 after here. We will always be stuck with strong
3 opinions. What the objective is here is to elevate the
4 quality of those opinions through a much more rigorous
5 and common level of ex post or retrospective economic
6 analysis of antitrust.

7 MR. PAUTLER: Thank you, Tom. Greg?

8 MR. WERDEN: I think it's a good idea to step
9 back and ponder what we know already and what we can
10 figure out that would shed some light on whether the
11 FTC's doing a good job, but I think we should be
12 realistic from the start about what can and can't be
13 done. The title of this session is how to measure the
14 welfare effects of the FTC's competition and consumer
15 protection actions. We've just stricken consumer
16 protection from that, which makes the task a little
17 easier, but it's still impossible.

18 You can't measure -- not if you use the word
19 literally -- any meaningful effect of any competition
20 action, much less the welfare effects. Some important
21 effects of some competition actions can be estimated,
22 some can be inferred, but that's it. And all the
23 limitations really add up.

24 The greatest limitation is that the competition
25 actions themselves are designed to block proposed

1 conduct and/or deter future conduct, and so the
2 competition actions themselves prevent nature from
3 performing the experiment that would generate the data
4 that you could use to evaluate the impact of the
5 competition actions. This limitation is obviously very
6 acute with merger enforcement. Very, very few
7 challenged mergers ever happen. One that did was in the
8 paper yesterday, and it will be interesting to hear what
9 the FTC does with evaluating the ex post effects of that
10 merger.

11 Another significant limitation is that the law
12 is largely self-enforcing. The relatively few cases
13 that are filed by the agency sends signals about what
14 conduct is allowed. Private antitrust lawyers make a
15 living processing this information and advising the
16 clients. A whole lot of conduct that clients
17 contemplate never gets off the drawing board because the
18 antitrust lawyers tell them you better not do that. So,
19 this is all below the surface. We don't see any of
20 this, but these are the important effects of competition
21 enforcement. It's pretty hard to get a handle on what
22 those effects are.

23 Another major limitation is the enormous gulf
24 between what you could do in principle and what you
25 really can do in practice and do well enough that you

1 would actually want to rely on it. Suitable data can be
2 really tough to come by, and even with the best data,
3 constructing a benchmark for what would have happened
4 but for the merger or the competition action or whatever
5 is more challenging than people generally acknowledge.

6 So, my best advice to the FTC is to embark on a
7 small number of case studies, selected mainly on two
8 bases: One, they think they might actually be able to
9 do them, and two, that the findings could be expected to
10 have some practical significance for informing the FTC
11 as it carries out its competition mission. A
12 broader-based study I don't think is going to happen,
13 and we'll get into a lot of reasons why it's unfeasible
14 when we talk about more particular conduct. .

15 MR. FROEB: So, I want to thank Paul and the
16 FTC for setting this up, and I do think, you know, self,
17 you know, retrospectives are important and self-analysis
18 is -- the unexamined life is not worth living, and it
19 probably applies to agencies.

20 I just want to say kind of the three criteria
21 that I would use in determining, you know, what to do is
22 just to start, what do we want to use the info for? I
23 mean, what are we going to really do with the
24 information if we get it? And from my point of view, it
25 would test our thinking about, you know, are we thinking

1 about mergers in the right way? Are we thinking about
2 vertical restraints in the right way? Are we thinking
3 about, you know, consumer protection, monopoly,
4 exclusion in the right way? And is it going to really
5 affect -- you know, let's look ahead and say, "Okay,
6 suppose this experiment comes out this way, suppose it
7 comes out the other way. What's it going to do to our
8 thinking?" And if the answer is nothing, I would say
9 that, you know, maybe -- maybe you ought to think about,
10 you know, asking -- looking for information that would
11 actually affect how you think about things.

12 And what I mean by that is that if we did a
13 merger retrospective and it found no effect or it
14 found -- you know, we let a merger go through and it had
15 a positive effect, I mean, we had a pretty -- or
16 relatively, I won't say absolutely, but a relatively
17 well -- you know, kind of a relatively good
18 understanding of, you know, the competitive effects of
19 horizontal practices. And we have theory, we have
20 natural experiments, we have -- we have retrospective
21 studies on individual cases that inform our learning.
22 And I honestly don't think that, you know, a few case
23 studies in the horizontal area is really going to
24 move -- you know, move thinking very much.

25 The second question I would ask is, what don't

1 we know? Where is -- where are the biggest gaps in our
2 knowledge? And here, I would shy away from horizontal
3 effects and go towards the big -- the big unknowns,
4 which are effects that occur over time.

5 I would say innovation, practices that might
6 appear good in the short run, but in the long run, may
7 have deleterious effects. And just a classic example of
8 that is the -- this is going to sound like I'm pandering
9 to the former agency -- but the authorized generics
10 study that Congress authorized the FTC to do or asked
11 the FTC to do a study of authorized generics, which are
12 generic drugs introduced by the branded manufacturer.

13 In the short run, they have a positive effect,
14 but in the long run, they may deter future entry by
15 generics, and getting that trade-off, I don't think
16 anybody has an idea how to do that, and looking at these
17 long-run effects, that might be -- you know, that's
18 really -- oh, and declining industries is another. I'll
19 talk about that later, but -- so, practices that are
20 good in the short run, but may be deleterious in the
21 long run, have this short run/long run trepidation.
22 There's a lot of antitrust exclusion. Bundling might be
23 good in the short run, but in the long run, might -- if
24 we could -- I mean, that's where we really don't know
25 very much.

1 And the third criteria is what can we learn,
2 and
3 again, I would look ahead and kind of look at a proposed
4 study and say, "Okay, suppose it comes out this way.
5 Suppose it comes out this way. You know, how is that
6 going to affect our learning?" And then really try to
7 look ahead, reason back, before we embark upon one of
8 these studies.

9 The last thing I want to say -- and I'll shut
10 up -- is I want to -- I want to tell you a little story.
11 When I first got here, I was really anxious to do a lot
12 of retrospectives to see if I was right, and one of the
13 cases that I worked on before I got to the FTC was the
14 Chex/General Mills merger, and Chex -- Ralston basically
15 sold the Chex brand to General Mills. General Mills had
16 a lot of existing cereal brands. And the counterfactual
17 that amounted to -- what they had claimed was that they
18 had -- I mean, the reason -- the stated reason for the
19 merger was that Chex was not -- was a generic
20 manufacturer, they weren't very good at marketing
21 branded products. General Mills was really good at
22 marketing branded products, and they would come out and
23 be able to extend the value of the Chex brand.

24 And they just sold the four letters, you know,
25 they sold the four letters for \$50. They didn't want

1 the recipe. They didn't want the production plans.
2 They just wanted the four letters. They took some other
3 assets, but that was basically it, and they were going
4 to extend the brand of those four letters. And sure
5 enough, they came out with Honey Nut Chex and all these
6 little prepackaged Chex and Chex Mix, and they extended
7 the brand just as they said they would.

8 And then I kind of asked somebody in BE, "Hey,
9 let's do a follow-up study and just see what happened,
10 and let's just document that they did what they said
11 they were going to do." And it turns out somebody's
12 uncle worked at Chex or at Ralston, and the uncle, you
13 know, kind of came back and said, "You know, we had
14 plans on the books to do all that stuff."

15 And so really, the marginal value of the
16 General Mills acquisition was zero, because we would have
17 done all that if they -- if the merger had not gone
18 through. And that just underscores the difficulty of
19 isolating the counterfactuals. What would have happened
20 but for the acquisition? I think this is really, really,
21 really tough to do.

22 And finding industries where you know what the
23 counterfactuals are is almost -- almost unheard of. To
24 be able to get the counterfactuals right is absolutely
25 critical to figuring out what the -- what the effect of

1 the enforcement policy is.

2 So, the final thing was, try to pick -- try to
3 pick instances where we know what the counterfactuals
4 are.

5 MR. PAUTLER: I take it you don't think that
6 last statement's easy to do either.

7 MR. FROEB: No. No, I think it's really hard.

8 MR. PAUTLER: Okay. I think from the opening
9 statements it's pretty clear that measuring what we're
10 doing anywhere is going to be difficult, but we're going
11 to go through an exercise here to try to ask a few more
12 questions and dig a little deeper into what we might be
13 able to measure or estimate to get at the effects of
14 mergers and single-firm conduct and vertical restraints.

15 So, I think, Vivek, you wanted to get us going
16 on mergers so we can -- you might want to give us a
17 little more detail of the process you were describing
18 for how you would think about looking at individual
19 mergers.

20 MR. GHOSAL: So, we start for the right
21 reasons, a lot of focus is on prices, what did it look
22 like before, what did it look like after, and I think
23 there's going to be broad consensus that that is a very
24 difficult exercise for a variety of reasons. Data isn't
25 there. There's intervention in the market that changes

1 the behavior of participants. Issues that Carlton
2 brings up. There's a variety of reasons -- I mean,
3 looking at the before and after using price data is
4 going to be very, very difficult. So -- and I think
5 this is what I was trying to focus on when I said
6 earlier that we need to develop a broader set of core
7 variables that we will follow over time.

8 There is -- so, I think more than trying to --
9 so, part of what Luke said as well -- if we get an
10 answer, what do we do with it and what do we learn? I
11 think there is some learning to be had in terms of
12 understanding why firms do what they do, right? So, I
13 think there is some gaps in understanding business
14 strategies, and unless we have a proper sense of that,
15 how the interventions work becomes more complicated.

16 So, I am going to give an example, which is not
17 quite in the same ballpark, but I was doing a study for
18 the Sloan Foundation on the global pulp and paper
19 industry, and I visited a company in Finland, they let
20 us in, and I think they were the world's third largest
21 capitalized firm, and they had two important issues that
22 confronted them. One was environmental standards, and
23 the other was the European Commission had told them that
24 basically no more mergers. You guys have acquired far
25 too many, and this is it for a while. You don't get to

1 eat more lunch right now.

2 And so what they went about describing is a
3 bunch of things that they did once they knew that
4 answer.

5 Now, I was not at that point -- so, this was
6 several years back. I was not at that point able to
7 parse out the effects of the environmental regulations
8 that was enforced on them versus what came out of this
9 decision by the European Commission, but following this
10 no merger said of guidance, effectively, they embarked
11 on extensive investments in modernization, recontracting
12 all kinds of input supplies, recontracting output
13 supplies, so basically, in the management jargon, they
14 revamped the entire supply chain, all the contracts, as
15 well as the back-end, which is the output side.

16 There is some learning in here in the sense
17 that if you -- so, this wasn't a blocked merger, but it
18 was a signal that you can't do this anymore, what do
19 firms do when you take action, right? So, if you block a
20 merger, I think there is useful evidence -- I mean, if
21 you can track certain variables, you try to go back and
22 see what did they do after that.

23 So, price is very complicated for a variety of
24 reasons, but this information about investments,
25 information about many different things, like product

1 innovations, these are relatively easily available.
2 They're not easy, but they're relatively more easily
3 available compared to price information, and that's why
4 I think if you develop a broader set of core variables
5 to track -- and we don't necessarily have to study
6 mergers where there was an action taken. You can look
7 at close calls where the agency had concerns about price
8 effects, the agency had to weigh that against efficiency
9 effects, and at the margin, suppose nothing was done,
10 you let the merger go. Internally, you understand what
11 your concerns were, what the parameters were. If you
12 were to track this market after the no decision, you try
13 to see what do the parties do after that? In
14 particular, I think getting a better handle on the
15 scores of the variables to innovation, which is both
16 product process, as well as things like economies of
17 scale and scope, cost efficiencies from there.

18 You can actually get lots of information from
19 firms' investment activity, which is publicly available.
20 So, there is learning to be had from that sense, which
21 can be valuable for sector-specific inquiries.

22 I think it is a huge stretch to say if you have
23 inquiry in a particular area, you know, what are the
24 crossover effects? I think that is much more difficult,
25 but at some point, if you think of sector-specific

1 inquiries, doing some kind of evaluation of this type
2 might be very valuable in the future.

3 I'll have more to say later on, but one quick
4 other comment was that when I became involved in the
5 database management systems market, this was 2000-2001,
6 this is not a close call by any means, because both
7 had -- IBM and Informix, combined, I think had 20
8 percent of the database management systems market. Or
9 Dell was the main player in that market. So, when the
10 merger was announced, I mean, all the stuff that came
11 out was about complementarities between the two firms, the
12 efficiencies that could come out if the merger -- et
13 cetera, et cetera.

14 And as part of what I do, I kind of tracked
15 this merger later on for about three years after they
16 merged, and basically, probably 80 percent of what they
17 said when they came in, what they would do, materializes
18 in the market, and those are actual observations.

19 So, both in terms of new products introduced, a
20 bunch of other things, and they also talked about how
21 they would complement Informix product, but IBM had
22 better service, it was a complementary process market,
23 and so that you can actually -- and all this information
24 is available in the public domain.

25 So, I think there is value to tracking these

1 types of mergers. This wasn't a close call, but the
2 close calls should give us much more information. So, I
3 think that could form a basis for analysis of mergers in
4 terms of retrospectives.

5 MR. CRANDALL: I want to agree with, I guess,
6 what Greg and Luke suggested, which is it's very
7 difficult to do this kind of analysis that doesn't mean
8 to say, after 118 years, we don't get started trying.
9 It wasn't the end of the world when maybe Houthakker and
10 Taylor didn't estimate consumer demand perfectly 40 years
11 ago. I mean, there have been improvements in econometric
12 techniques since then.

13 We can -- there are lots of ways, including
14 cross-country comparisons, to try to estimate the
15 effects of industry-specific events, mergers or
16 whatever, but one of the -- and then to argue exactly
17 the opposite. One of the things that makes analyzing
18 antitrust today even more difficult is that the
19 interesting markets and where antitrust has most effect,
20 I suspect, though I haven't looked at this
21 systematically, would be markets in which there is rapid
22 technological change. We're not talking about the
23 International Trade Commission's fundamental mission is
24 to suppress competition in industrial commodities, which
25 don't change very much, like steel and chemicals, and so

1 forth.

2 We're talking about an activity which impinges
3 upon the overall general economy, where industrial
4 commodities and simple goods, simply a declining share
5 of total output and rapidly changing services and
6 high-tech products like medical equipment,
7 telecommunications equipment, computer software, and so
8 forth, are the areas of interest.

9 And there, you've got to worry about what the
10 effect is on innovation. It isn't whether -- just
11 whether the prediction of the two software merger
12 partners were accurate or not. You want to know what
13 happened in terms of innovation before and afterwards.
14 For instance, how would you estimate the effect of the
15 Microsoft antitrust action? I mean, the one -- the one
16 certain thing is that it's become a way of raising tax
17 moneys for Europe, but other than that, can you conclude
18 what the effect has been on innovation? Would Microsoft
19 have not failed a large number of things that they're
20 doing now had they not been distracted by -- I don't
21 know how many years, eight years of antitrust or
22 whatever? It's very difficult to determine those
23 things.

24 So, it's very difficult to measure innovation
25 in the first place, much less the --

1 MR. FROEB: Will the gentleman from Brookings
2 yield for a second?

3 MR. CRANDALL: Yeah, go ahead. Go ahead.

4 MR. FROEB: No, I -- I -- one of my suggestions
5 is go specific, go narrow, go tight. Don't -- don't --
6 I wouldn't try a broad-based study. And one of the
7 things that early -- like the first week that I was at
8 the FTC, they -- they blocked the -- or they let the
9 Genzyme/Novazyme merger go through, and it was a split
10 decision. It was really interesting. The only issue
11 was whether or not they would speed the development of
12 this orphan drug for Pompe disease or -- I don't know
13 how to pronounce it -- say it again -- Pompe disease,
14 and one had a delivery mechanism, one had the compound
15 that cured the disease, and the Commission was split
16 over whether or not the merger would speed innovation or
17 slow innovation, and, you know, again, it's hard to
18 figure out what the counterfactual is, but I think it
19 would be really interesting to go back and try to figure
20 out, well, how fast did they deliver -- you know, did
21 they develop the drug? Was it -- you know, is there any
22 way we could tell? Just -- you know, the
23 counterfactuals are really, really tough, but let's just
24 figure out what happened. And so kind of going narrowly
25 on narrowly focused events that -- you know, it might

1 tell us if the drug was developed or whether it was
2 slowed down.

3 MR. WERDEN: According to the Web site, it was
4 developed. I followed up.

5 MR. FROEB: Oh, you did?

6 MR. WERDEN: Let me take this opportunity to
7 disagree with Tom Hazlett on event studies, which I
8 thought --

9 MR. HAZLETT: Do you mean event studies or
10 "event studies"?

11 MR. WERDEN: Stock market event studies, which
12 pretty much died out in the United States in the
13 eighties, but they live in Europe, and, in fact, the two
14 chief economists of DG Comp are principal authors of
15 three of them. I've never thought these studies made
16 any sense, because they presume that the instant
17 analysis of uninformed investors is more accurate than
18 the pain-staking work of enforcement agencies, with
19 access to lots of confidential documents and data. This
20 proposition cannot be accepted without some supporting
21 evidence, and none has ever been produced.

22 It wouldn't be that hard to see whether stock
23 market studies ever got one right, and so far as I know,
24 no one has shown that one did. There is one published
25 study showing that a stock market study got one wrong.

1 That's as much evidence as we have on this.

2 In addition, to the original motivation of such
3 studies doesn't apply with unilateral effects, which has
4 been the predominant basis for merger challenges for the
5 last two decades. The 1980s studies, pretty much early
6 eighties, were based on coordinated effects notions,
7 which motivated the idea that if the merger was A-okay.
8 There would be positive abnormal returns to the merging
9 firms and to their close rivals, but this presumption
10 isn't so right with unilateral effects, and with a
11 homogenous product and Cournot competition, the merging
12 parties may make less profits after the merger.

13 With differentiated products and Bertrand
14 competition, effects on rivals tend to be insignificant
15 and won't show up in the data. With oral auctions,
16 mergers have no effects on the rivals of the merging
17 bidders. With competition in multiple dimensions, the
18 little work that we have, which Luke and I did with two
19 co-authors, indicates that the rivals can easily be
20 worse off after the merger than they were before. So,
21 I'm a big fan of not doing event studies.

22 As for retrospectives, I guess I'm all for
23 doing them, but I'm pretty pessimistic about how much we
24 can learn from them. I think we can learn some things,
25 but like Luke, I want to -- I want a narrow focus. I

1 want to do case studies. I want it to be intensive
2 analysis, not broad-based analysis. Dennis Carlton's
3 suggestion, which Tom related, seems to go in exactly the
4 opposite direction. And in particular, he said, "Well,
5 what you need to do is compare the ex ante predictions to
6 the ex post results," which presumes that there are ex
7 ante predictions and that you can figure out what the ex
8 post results are. I've got problems with both of those
9 assumptions.

10 I don't know, but I'm willing to wager the FTC
11 can't pull the file drawer open and find all these
12 quantitative ex ante predictions for the mergers. I'm
13 pretty sure we don't have them over at Justice. And I
14 think we're kidding ourselves if we think we can
15 generate a huge raft of reliable estimates of the actual
16 effects of interesting mergers. These studies are not
17 easy to do. Suitable data is typically unavailable.
18 Isolating the impact of the merger from the impact of
19 all the other forces going on is quite difficult. And
20 even if you do a respectable study, you have to realize,
21 it does not reveal truth. It generates a point estimate
22 with a confidence interval, and that confidence interval
23 can be big, and it can be sensitive to all kinds of
24 assumptions that you made in the estimation.

25 So, as a matter of statistical inference, we're

1 going to need a whole lot of data if we're going to do
2 what Dennis has in mind. I don't think we're going to
3 have it. And I think that unilateral effects are really
4 easy compared to coordinated effects, where the theory
5 seems to be that the merger, in fact, has a random
6 effect, because the way the effect is always stated is
7 it increases the likelihood of coordinated conduct or
8 successful coordinated effort, which presupposes that
9 sometimes it happens and sometimes it doesn't. So,
10 whether it happens or not, you don't know did the merger
11 have any effect. It just might have.

12 Well, with enough data, you could probably
13 figure that out, but enough data might be thousands and
14 thousands of data points, which we're not going to have.
15 So, again, I favor a small number of intense case
16 studies, focusing on unilateral effects. To the extent
17 possible, try to compare ex ante predictions to actual
18 results. And to the extent there is a difference, try
19 to figure out why. What happened? Was the economic
20 analysis wrong? How was it wrong? Or did unforeseen
21 circumstances arise, in which case you can't really
22 learn very much from that case?

23 What cases should we study? Well, at the top
24 of my list, I would put consummated mergers that the FTC
25 objected to. It's a short list, but it continues to

1 grow. Next, mergers the FTC took flak for not opposing.
2 I think we know what they are. And I'd round out the
3 list with any mergers that were allowed to proceed
4 largely on the basis of efficiencies or entry, although
5 I'm a little worried that that doesn't add anything.
6 So, that's my suggestion.

7 MR. CRANDALL: Tom, you need to defend
8 yourself. Come on.

9 MR. HAZLETT: You didn't take that seriously,
10 did you?

11 I would like to say a couple of things. The
12 first one is that the short run/long run problem
13 obviously is a very, very large problem for antitrust,
14 and it goes to a lot of what's been said here about the
15 analytical framework and what -- you know, what's
16 trackable and what's not. And I recall about 15 years
17 ago, I had the pleasure of actually being a listed
18 witness, I think, at the same moment on both sides of a
19 merger in front of the Federal Trade Commission. I was
20 told the attorney for the merging parties had put me
21 forward and the Federal Trade Commission talked to me,
22 so I was being put forward. So, I ended up not being a
23 witness for either side, which is the standard outcome.

24 But the -- this was a merger in cable
25 television, and at the time, head-to-head competition in

1 cable television was nascent, approximately, by an
2 optimistic estimate, 2 percent of U.S. household had the
3 ability to choose between competitive, head-to-head
4 cable TV providers. And there had been some very rough
5 business down in Florida where the most aggressive
6 so-called overbuilder -- that was the industry
7 pejorative for a competitor -- overbuilder, why do you
8 need to overbuild? We already have one.

9 So, the most competitive overbuilder in the
10 country was down in Florida, owned by Florida Power &
11 Light Group Capital, and they finally had been beaten up
12 enough so that they were selling out, and one of their
13 systems in Orange County, Florida was of significant
14 size and was being acquired by a direct rival.

15 So, the question was, do you allow the merger
16 when, in fact, it would be my opinion, as a cable
17 television market expert, that, indeed, prices will go
18 up and output or growth will decline from trend as a
19 result of this?

20 And the question is, we have cable competition
21 in 2 percent of America. That leaves 98 percent in the
22 monopoly model. Maybe you'd like to encourage people to
23 enter markets if you take away the exit, which -- you
24 know, and take away the premium they might get. So,
25 anyway, this discussion obviously was not subtle to the

1 Federal Trade Commission lawyers, who, you know, I was
2 talking to, and they were very frank about it. They
3 said, "Look, you know, that's a great argument. We wish
4 you well. You can write a paper on that. We can't do
5 that. We can't look at that. That's out of the market.
6 That's beyond the window."

7 And, you know, you folks who are antitrust
8 professionals here know that you do have to draw these
9 lines in fairly dramatic ways just to make the problems
10 trackable and to be standard within the analysis and to
11 comply with, you know, agency and legal precedent.

12 Well, you know, that certainly is a problem,
13 and I -- you know, I think that, you know, at 100 years
14 of age, there really should be more sophistication in
15 trying to look at these things, knowing that
16 trackability is an issue, but certainly the
17 professionals should try to push the analysis and look
18 at those dynamic factors.

19 We have, you know, markets all over the place
20 here that really do have important dynamics to them,
21 and, you know, as William Baumol says in -- this is a
22 splendid 2002 tome -- "The free market innovation
23 machine, you know, it really is not price competition,
24 but innovation competition that is determinative in
25 these markets, and focusing only on price is going to

1 yield some very, very bad results."

2 With respect to the event study question,
3 Greg's told us nothing other than the fact that bad
4 analysis is very bad analysis, and yes, you can do event
5 studies that come out with poor interpretation, but the
6 fact is that there is information there. He puts it
7 forward. You know, why should markets know about stuff
8 that the government officials don't? I don't know if
9 that's a serious question. Are you trying to make a joke
10 with that?

11 There have been studies done on prediction
12 markets which are a lot lighter in terms of liquidity,
13 and the prediction markets tend to outpredict the
14 experts with lots of inside information, supposedly, the
15 policies, with lots of data, and investment and
16 gathering data, and these studies will go on.

17 But here's the fact, there are people playing
18 with real money on some of the events that are, in fact,
19 antitrust events, and if you throw away those data,
20 you're confining your analysis to, in many cases, quite
21 inferior data. So, if you look at the Microsoft case
22 and you see that the sector, as a whole, is not reacting
23 positively to the antitrust case, and there are
24 particular parts of that sector that you can decompose,
25 and you see regularity in those data that, in fact, when

1 Microsoft is constrained and the stock price movements
2 react to the antitrust case, that instead of being
3 helped, Microsoft's complementary suppliers are not
4 helped. That's information.

5 Now, you can criticize the -- you know, the
6 industrial organization economics that goes into that,
7 and you should criticize it to the extent that you have
8 an improvement, but to say that that data is not
9 legitimate data or to look at, again, the XM-Sirius
10 merger where not -- in XM-Sirius, you did not have event
11 study data that rendered an opinion one way or another
12 on the merger, and I went through that fairly carefully.
13 So, if you do it right, you should be willing to come to
14 that conclusion.

15 At the same time, there were other sources of
16 parallel data in terms of the lobbying efforts of the
17 competitors, the terrestrial radio competitors against
18 merger, both commercial and noncommercial, public and
19 nonpublic radio stations, lobbying against merger, which
20 indicated, quite clearly, that there was a
21 pro-competitive purpose to the merger in the eyes of
22 well-informed, far better informed than the regulators
23 who were analyzing the data, with access to all the data
24 that the regulators had and more, and to take that
25 information and throw it out and say, "Well, that's not

1 a critical loss analysis. It doesn't fit in the box.
2 We're not going to look at that," I think that's wrong.

3 MR. WERDEN: Let me make one comment on
4 XM-Sirius. There's probably an unusual reason why I
5 wouldn't have put any stock in an event study at the time
6 of the merger announcement in that case, and that is
7 that the facts changed drastically between the merger
8 announcement and the time that the agency made its
9 decision. I'm fairly confident that if the facts on the
10 date of the announcement and on the date of our decision
11 had been the same, we would have challenged the merger.

12 MR. HAZLETT: Really? Hmm.

13 MR. WERDEN: They weren't.

14 MR. HAZLETT: What does that have to do with an
15 event study?

16 MR. WERDEN: When are you going to do that
17 event study?

18 MR. HAZLETT: You are going to do it all
19 through the period to see where you get abnormal returns,
20 particularly in the merging parties, the target firms.

21 MR. WERDEN: And how do you know when this
22 information is leaking out or if it's leaking out?

23 MR. HAZLETT: Well, I --

24 MR. WERDEN: Are you going to have a two-year
25 window?

1 MR. HAZLETT: You analyze it -- that's a very
2 good question and answered very nicely in this case.
3 There was an event study done that had the wrong event
4 date. The announcement event date was not the event
5 date. The information leaked out the date prior to the
6 announcement, and the target, which was XM, share
7 returns jumped up markedly, and there were some press
8 commentary as to that effect, attributing to that, and
9 that -- if you actually look at the data, look at what
10 was reported in terms of the tech Web sites, there is
11 absolutely no question that that was the release date,
12 but that doesn't tell you what the efficiency effects of
13 the merger are.

14 The efficiency effects show up in complementary
15 and competitive supplier returns. In the competitive
16 market, the rivals are essentially the terrestrial radio
17 stations. The merger has a very small impact, as a
18 percentage of those -- the revenues of those firms.
19 It's just not large enough amongst the publicly listed
20 firms to get that.

21 If you're serious about doing these studies,
22 you will take this into account. I'm sure there are ways
23 to improve that. I'm sure you should take a good look at
24 the I/O models and see where the reaction should be and
25 you should test and probe, but, you know, the simple

1 fact is there's a lot of information there. You can get
2 a lot out of that. In fact, you can get a lot more out
3 of that than you can get out of a critical loss study,
4 because there was nothing on the counterfactual in the
5 record to really tell you what that critical loss study
6 was going to look like if you threw out all the other
7 stuff around it, including the financial market data,
8 not all of which is event study, but how do you know
9 that the facts changed in the market between the time
10 that the merger was announced and the time that it was
11 approved?

12 MR. WERDEN: Because we had access to mountains
13 of confidential information.

14 MR. HAZLETT: And it's financial. That's what
15 changed. The markets were going south on satellite
16 radio all through the last several years, including this
17 last 17 months or so for the merger period, and those
18 data are not the ones that the DOJ will cite in its
19 opinion. I think that's wrong. I think it ought to be
20 explicit. I think those data ought to be evaluated, and
21 I think this sort of sub rosa use of financial data,
22 which is -- and use of lobbying interest -- interested
23 party lobbying, which has to influence and should
24 influence the analysis, I think that should be stated
25 explicitly.

1 MR. PAUTLER: Well, I think it's pretty clear
2 we are not going to have any agreement here on the issue
3 of using stock event analysis.

4 MR. CRANDALL: I want to put this in some
5 perspective. As I look around the room, there's a great
6 distribution in age here, and for those of you that want
7 to make a career in antitrust, I would worry that one of
8 the senior proponents and practitioners of antitrust at
9 the Department of Justice takes such a nihilistic
10 approach about being able to measure what he's doing.
11 Remember that the antitrust authorities aren't working
12 for the Dalai Lama or for the Catholic church and the
13 Vatican. They're working in a institutional setting
14 where everything you do is reviewable in court.

15 And as I look back over the last 30-40 years,
16 the courts have taken a very different view of
17 antitrust. I can remember Potter Stewart opining that
18 the only sense he could make of Section 7 was that the
19 Government always wins. I would think that the
20 Solicitor General today, giving a speech, would say that
21 the only sense he could make of it is that the
22 Government always loses. And that the courts look very
23 seriously for empirical evidence. And if the principal
24 antitrust authority, the Department of Justice, is
25 saying that there's no way they can measure the effects

1 of what they're doing, I would think that would make the
2 courts very skeptical of accepting their view that this
3 merger or that merger may tend to lessen competition or
4 create a monopoly in any line of commerce.

5 MR. WERDEN: That's not what I said at all, and
6 I have --

7 MR. CRANDALL: I know you didn't say that, but
8 this is an implication, right?

9 MR. WERDEN: -- I've favored for some years
10 compiling what evidence can be compiled and doing
11 original research to figure out what the effects of
12 mergers really is, and then, if the evidence is found to
13 be useful, and I would think it would be, then you would
14 take it into court.

15 MR. CRANDALL: Oh, what I'm suggesting, though,
16 is that where we're talking about where it may tend to
17 substantially lessen competition and create a monopoly,
18 et cetera, et cetera, the courts looking at this, if the
19 antitrust authority itself says, "We can't really tell
20 whether our past activities had any effect or not," that
21 this might cause them to be much more skeptical of
22 approving a decision to attack a merger or pursue
23 Section 2 case or whatever.

24 MR. FROEB: Let me ask Bob a question. You
25 know the empirical evidence on the minimum wage, you

1 know, the natural experiment in --

2 MR. CRANDALL: It depends which empirical
3 evidence you --

4 MR. FROEB: Now, has that changed your thinking
5 about the effects of the minimum wage?

6 MR. CRANDALL: Well, I mean, the --

7 MR. FROEB: Does everybody know what I'm
8 talking about? They did a natural experiment. They
9 looked at the imposition of minimum wage in Delaware and
10 Pennsylvania, and they found no difference between the
11 two things. Now -- but we have very strong, kind of
12 theoretical priors that if you put in price controls in
13 markets, you're going to have an effect, and has that
14 upset your -- your -- has that changed your feeling?

15 MR. CRANDALL: Well, it was difficult for me to
16 believe --

17 MR. FROEB: Come on, answer the question.

18 MR. CRANDALL: No --

19 MR. FROEB: Okay, no, there you go. I rest my
20 case.

21 MR. CRANDALL: -- but I don't --

22 MR. WERDEN: In 1971 when I took a labor
23 economics course, a professor brought in a stack of
24 studies this high, in 1971, put them on the table and
25 said, "This is what we know about the effects of minimum

1 wage. Half of these studies say there was effect, half
2 of them say there wasn't effect. We don't know
3 anything."

4 MR. PAUTLER: It's clearly going to be
5 difficult to figure out what we do and don't know. I
6 think we're having an argument here that -- it's a matter
7 of how you weigh different methods of getting at the
8 questions, and clearly we don't have agreement about
9 exactly what sets of weights we'd use. I think part of
10 what we're trying to get at today is figuring out, going
11 forward, what's the best set of information we can look
12 at to try to figure out what our effect is. I don't
13 think we want to be in a position, for instance, in 2014
14 to tell the world that, yeah, we don't have any idea what
15 we're doing. I don't think that's where we want to be.

16 I think everybody sitting up here actually
17 wants to be somewhere else in 2014, at a position where
18 we can say something. We've clearly got a difference of
19 opinion about what sets of information are going to allow
20 us to make inferences about the effects of mergers, and I
21 think we're going to have to leave the difference of
22 opinion probably sitting here for the moment.

23 Vivek, you wanted to add to --

24 MR. GHOSAL: If I could jump on the stock
25 price, I think in terms of retrospectives, I brought up

1 earlier that the benefits may, in fact, be relatively
2 sector-specific, and there might be a lot to learn from
3 it, and one study that I wanted to sort of highlight in
4 this context is by Dennis Breen -- I don't know if he's
5 still here at the FTC or not -- okay, so this is about
6 Union Pacific/Southern Pacific Railroad merger, and I
7 think this study, in part, in some ways highlights what
8 I was talking about earlier, that price information is
9 often very difficult to get, but there's a lot of
10 information in the study.

11 For example, looking at what happened in this
12 market after the merger was consummated, and there's a
13 lot of information in the study, which is about specific
14 efficiencies they will reap, various sets of cost
15 efficiencies.

16 And there's one thing here which is about labor
17 savings, and that's a problematic area, because
18 typically, when a merging party comes in, he says, well,
19 if we marginally lay off 30,000 people, so that's a cost
20 efficiency, well, typically that's not what we try to
21 look for. But there are a lot of other things about
22 this study which highlight what I was talking about
23 earlier.

24 So, I think this could be used as something of
25 a template, in some ways, and refine understanding other

1 ways and look at specific sectors that you're interested
2 in, and I think that can yield meaningful results.

3 And I think that the discussion about stock
4 price, there is no one methodology that's going to yield
5 answers, and that is absolutely clearly, but is looking
6 at price data or stock price data or innovation data, it
7 is not -- there is no one variable that's going to be
8 the determining factor. So, I think in terms of the
9 short run/long run stuff, I mean, the innovation stuff
10 is going to play out in the longer run, and I think that
11 is central to the objectives of what we're trying to do.
12 Price is also central. Price is much more difficult to
13 get a handle on. So, I think this can be used as a good
14 template for the other side of it, which are the
15 nonprice elements.

16 MR. HAZLETT: I think that's absolutely right.
17 I mean, I really don't understand a categorical
18 rejection of financial market data as being an
19 improvement in antitrust analysis, and I think we want,
20 you know, at the margin to pull in stuff that's valuable
21 and relatively valuable to what else we have in a lot of
22 cases. For example, let's go to the XM/Sirius again.
23 You know, market power of XM and Sirius, how are you
24 going to evaluate that claim? Totally on pricing data?
25 Very hard to do. In fact, close to impossible given

1 your comments, I think, and, you know, I obviously agree
2 with a lot of what you said.

3 The place you want to look, in addition to
4 everything else, is financial market valuation data on
5 capital values of the firms, cost of capital of the
6 firms, and that's probative, and it tells you something
7 about what kind of market power is there, because yes,
8 super-competitive profits should be in evidence if they
9 have duopoly market power and are going to monopoly
10 market power. So, that's an empirical inquiry that is
11 implied by the subject matter, and a categorical
12 assumption that financial markets really don't have the
13 full story or don't have anything to contribute is
14 inexplicable to me.

15 MR. WERDEN: Well, I didn't categorically
16 reject use of financial data, but rather, only stock
17 market event studies, but I do categorically reject the
18 suggestion you just made, because I don't think it's
19 right that we're looking for evidence of monopoly power
20 in satellite radio.

21 Let us suppose -- and it seems plausible to
22 me -- that this was a really dumb idea, but two guys had
23 it. They threw a lot of money at it. They're hoping
24 some day -- you know, there's 20 times as many
25 customers, and at that point, it pays. They may be

1 right; they may be wrong. The market makes a judgment
2 about whether they're right or wrong. The market may be
3 right; the market may be wrong. Let's suppose the
4 market's smart, and they were wrong. This is a bad
5 business to be in. So, the stock market will be telling
6 you it's a bad business to be in. That doesn't mean the
7 merger isn't A-okay. It still may be.

8 MR. HAZLETT: Well, if -- okay. Okay. So, you
9 are going to make the assumption that these guys are
10 just nutty, and the actual data on what their costs
11 happen to be has nothing to do with efficiency. Well,
12 that means --

13 MR. WERDEN: Not --

14 MR. HAZLETT: Hang on a second, Greg. That's
15 an interesting assumption for you to make when you're
16 going to documentary evidence in a case and looking at
17 firm costs to see what their costs are, because you're
18 going to have to throw out all that data. You might as
19 well forget about all of the internal documents, because
20 everything they do now is random, because all of it
21 could just be wacky.

22 MR. WERDEN: I didn't say anything like that,
23 and I was relying on the financial data. I was saying,
24 what if the financial market says this was a bad idea?

25 MR. HAZLETT: Well, if you don't make the

1 assumption that the firms were profit-maximizing and
2 that they're trying to achieve efficiencies in their
3 operations, then that's going to throw off the rest of
4 your analysis --

5 MR. WERDEN: I do make that assumption.

6 MR. HAZLETT: Of course, you do, and you've
7 changed your standard just to say that this sort of
8 evidence is wrong. That is inconsistent and obviously
9 not where we want to go with antitrust policy.

10 MR. WERDEN: I don't understand.

11 MR. PAUTLER: Well, I think maybe we'll leave
12 that one there and move on to a few questions about
13 other areas that we might be able to measure the effects
14 of.

15 I was interested in moving on to single-firm
16 conduct cases and thinking about whether we can measure
17 FTC monopolization cases or DOJ monopolization cases,
18 for instance, deter dynamic innovation, and how we might
19 be able to get at that question, if we can.

20 And I know Greg had some thoughts about the
21 single-firm conduct cases, so I figured he could start
22 us off there.

23 MR. WERDEN: Well, I'm prepared to be even more
24 vilified for my nihilistic attitudes, because I think
25 this one is harder than mergers by a long shot.

1 MR. CRANDALL: Do you think there will ever be
2 another one? What do you think?

3 MR. WERDEN: Another monopolization case? Yes,
4 I do.

5 MR. CRANDALL: After Microsoft? Okay.

6 MR. WERDEN: That's an easy question. Keep
7 them coming.

8 But effects of potentially exclusionary conduct
9 tend to be fairly subtle. They're frequently
10 experienced long after the conduct. The interesting
11 questions in these cases may be not what the effect of
12 the conduct was but what the effect of the remedy was.
13 That's pretty tricky, too. That's going to be felt long
14 afterwards.

15 As has been suggested by several people, I
16 think, already, from a policy perspective, the most
17 important thing may be the external effects of the case.
18 What signals did it send for investment in that industry
19 and other industries? Very difficult to get a handle on
20 those things.

21 The easiest thing to do probably is one of the
22 least useful, and that is to look at the immediate
23 effects on the things that we can actually measure, like
24 prices. But most of these cases aren't really intended
25 to have those kinds of effects. And so whether the

1 effects of the cases are good or whether they're bad,
2 we're not going to see them in those data.

3 We're going to have to follow these industries
4 longer run. We're going to have to look at more subtle
5 cues for what effects these cases have had on
6 investment, not an easy thing to do and probably not an
7 econometric thing at all.

8 I'm prepared to rely on all kinds of
9 information for this task. I think that Bob suggested
10 cross-country comparisons might be an interesting thing.
11 Here, I think that might be the best bet. Certainly we
12 have different policies in different countries in this
13 regard. I expect that they've had different effects.
14 I'm not real optimistic of being able to measure them,
15 but it might be worth a try.

16 And I -- again, as I've said before, I favor
17 the case study approach. We have some published case
18 studies of the effects of past monopolization cases. I
19 think generating new case studies is a very good idea.
20 I think an extensive, in-depth, long-term study of the
21 effects on a case of an industry over a period of time
22 is typically the best way to go with these things.

23 I think we might be able to learn a lot. Maybe
24 we can't fine-tune policy all that much, but there will
25 be feedback effects on how we implement antitrust law

1 from these case studies, and I think that they're worth
2 doing.

3 They used to be the kind of things that
4 academics would gravitate to. This was a dissertation
5 in 1970. The profession has come back to case studies a
6 little bit, but not the same kind of case studies. I
7 think the same kind of case studies really might be
8 useful today.

9 MR. FROEB: But this is one of these areas
10 where -- were you done?

11 MR. WERDEN: Yeah. Go ahead.

12 MR. FROEB: This is one of these areas -- sorry
13 about that. This is one of these areas where there is
14 no consensus on the theory. You know, I mean, even the
15 theories that show anti-competitive harm in the long
16 run, you know, in the short run there might be, you
17 know, offsetting efficiencies, but in the long run, the
18 welfare effects or the price effects of a lot of these
19 theories are ambiguous. You know, they don't
20 unambiguously show that, hey, all the time this is when
21 you get price going up, and because there's no consensus
22 in theory or much less consensus than there is in
23 horizontal cases, I think you have a much more difficult
24 problem.

25 You can't -- it's much harder -- it's harder to

1 test -- you know, there's -- it's harder to test
2 overidentifying restrictions, hey, write down a theory,
3 and does the theory at least match what we -- explain
4 what we can observe? And then there's the problem of
5 time. You know, you're estimating stuff over time. A
6 lot more stuff happens.

7 I want to just tell an anecdote. I started out
8 my professional life as a macroeconometrician, and I
9 remember very -- you know, I started out estimating
10 these quadratic smoothing models. You know, people, if
11 your costs are convex, then it pays to smooth your
12 production so you're not bouncing between high-cost
13 areas. You hold the inventories to smooth production.
14 And they estimated these quadratic inventory models with
15 aggregate data and tried to figure out whether the costs
16 were convex, and the point was that if they were, then
17 there was an inventory smoothing, and Keynesian
18 macroeconomics works. I mean, that was this whole
19 literature.

20 Then I think it was Ken West, an econometrician
21 at Wisconsin, did a Monte Carlo study, wrote down one of
22 these models, and tried to back out the parameter of
23 interest, which was the curvature of the cost function,
24 to see if it was concave or convex, and he showed that
25 you could identify it with only 10,000 years of data, of

1 monthly data. And it stopped this whole line of
2 inquiry.

3 And that's what I mean by kind of look ahead,
4 reason back, and let's not go down a road where we're
5 not going to be able to get an answer.

6 MR. PAUTLER: Well, I think in an earlier
7 panel, there was some discussion of what you might learn
8 from retrospectives before we started this discussion,
9 and people were saying, "Well, if you have five of them,
10 you are not going to really know any -- there is no way
11 you can know anything generalizable about them."

12 With regard to single-firm conduct studies,
13 while I think they would be very interesting to read
14 after the fact, how many of them would we -- how many
15 would you have to have to really know much of anything?
16 I don't know what --

17 MR. HAZLETT: Microsoft.

18 MR. PAUTLER: -- the right number is.

19 MR. HAZLETT: Microsoft. But I would like to
20 ask Greg, okay, so we have been ten years now since U.S.
21 v. Microsoft --

22 MR. WERDEN: It was a smashing success. Next
23 question.

24 MR. HAZLETT: Smashing, yes.

25 MR. CRANDALL: Do you use Microsoft Office

1 these days, or not?

2 MR. WERDEN: As little as possible.

3 MR. HAZLETT: I made the switch. So, the DOJ
4 had a theory of that case. I mean, they didn't fill out
5 the forms that Dennis Carlton said you should fill out,
6 but they did have a theory of the case, and the theory
7 was that if Microsoft was, you know, constrained from
8 predating, then JAVA would emerge as a competitive
9 quasi-operating system and that that would bring
10 competition to the -- commoditize the operating system
11 software market.

12 Now, obviously, that hasn't happened. I think
13 you can see that obviously that hasn't happened. That's
14 the sort of specific prediction I take Carlton to want
15 to focus on. You have a theory of the case. Let's see
16 how your theory does.

17 MR. WERDEN: Well, I think that would be a very
18 poor test in Microsoft. By the time of the trial, that
19 window had been closed forever. No going back.

20 MR. HAZLETT: But that was the theory of the
21 case.

22 MR. CRANDALL: So, there's no relief available.

23 MR. WERDEN: We got relief. Didn't you see
24 that relief?

25 MR. CRANDALL: Did you or the Europeans get

1 relief?

2 MR. WERDEN: That was forward-looking relief
3 designed to prevent similar conduct in the future.

4 MR. CRANDALL: Well, I think the answer to your
5 question is that I'm not sure that these retrospective
6 studies of single-firm cases, whether it's Microsoft
7 or -- I don't know, Alcoa or whatever they are are a
8 useful guide -- I mean, they may be somewhat valuable --
9 but a very useful guide to the next one, because, I
10 mean, the behavior alleged, the marketing question, the
11 rate of technical progress, everything is very
12 different.

13 But I think you really do need to focus, as I
14 guess Luke said, on the relief, not just on the bringing
15 of the case. That is, is it -- do we have evidence that
16 once we find behavior which contributes to market power
17 and otherwise reduction of consumer welfare, that we
18 know what to do about it, that we can fashion relief?

19 Now, I don't know if you -- if any of you have
20 seen this piece yet, but it appeared on my computer just
21 today by Einer Elhauge, who's not exactly one of the
22 leading critics of antitrust, you'd agree, right,
23 entitled, "Disgorgement as an Antitrust Remedy, "and he
24 says, "Disgorgement of illicitly gained profits is a
25 legally available remedy but is rarely sought by

1 antitrust agencies," outside of Europe, I guess. He
2 says, "This piece argues that the main conventional
3 explanation for its rare usage, availability of private
4 damage remedies, is often unconvincing given obstacles
5 to such suits," et cetera. He says, "Further, because
6 the behavioral and structural remedies otherwise sought
7 by the Government are often ineffective in
8 monopolization cases, disgorgement might often be a
9 preferable government remedy."

10 What I worry about is that the direction we're
11 heading is for antitrust authorities to become tax
12 authorities, and I think that's a very dangerous
13 direction for us to be heading. So, we really need more
14 information about how these remedies work.

15 MR. GHOSAL: The area of single-firm conduct
16 since private litigation is very important. If you want
17 to understand the effect of interventions, we will have
18 to look at both public as well as private actions, and I
19 think in this particular area, I mean, mergers and
20 cartels have very different issues, but in single-firm
21 conduct, any evaluation of interventions in the market
22 must bring into consideration private enforcement, and
23 there is no other way out of it.

24 So, on a previous comment, I think we disagree
25 somewhat with cross-country studies providing useful

1 information. In some cases, they might, but I've
2 recently done a lot of work for the OECD looking at
3 rules and regulations across countries, different
4 markets, whether they are local, whether they are
5 national, regional, et cetera, and I think one of the
6 things that bothers me is that across countries, there
7 are far too much heterogeneity of underlying rules and
8 regulations that govern the behavior of participants.

9 So, looking at just industries in the U.S.,
10 looking at industry in France and Australia, unless you
11 appropriately control for the underlying rules and
12 regulations, I don't think you can say a whole lot, and
13 this OECD work just came out. I mean, it's just, like,
14 staggering disparity across countries in terms of those
15 underlying rules and regulations. So, I'm not sure
16 about the cross-country evidence. In some cases, they
17 might, but in a bunch of other cases, they say basically
18 they learned nothing.

19 MR. FROEB: There is cross-country -- I mean,
20 there is cross-state variation in laws within the United
21 States, say, in liquor laws, and it's tremendous across
22 states, you know, on single-firm conduct. For example,
23 you know, Tennessee doesn't -- gives property rights to
24 distributors.

25 MR. GHOSAL: And my comment is the same, then,

1 that if there is underlying rules that change the
2 behavior of participants, I mean, you can't really
3 compare them, and that's -- I mean --

4 MR. FROEB: But, if they change the behavior --
5 that's what we're trying to measure, right?

6 MR. GHOSAL: No, but change in behaviors is
7 conditioned on the underlying rules and regulations,
8 too, right? I mean, the rules and regulations that are
9 there in a certain market define what the participants
10 can do. So, if you look at different countries and you
11 look at actions, there is a complex interaction of the
12 actions and the underlying rules and regulations in the
13 market.

14 MR. FROEB: It sounds like you're just saying
15 that you can't interpret the evidence without a model.
16 Is that what you mean?

17 MR. GHOSAL: Yeah, or you have controls for
18 underlying rules and regulations.

19 MR. FROEB: Okay. Well, I'll sign on to
20 that.

21 MR. PAUTLER: And then we just have to build
22 models we all believe, I guess. That will be another
23 interesting task.

24 I'd like to move on from single-firm conduct to
25 something that's -- well, sort of related to it, is the

1 area of vertical restraints and whether there might be
2 some ability -- if we can't -- if we can't agree whether
3 we can measure anything much about mergers, we aren't
4 sure whether we can measure anything about single-firm
5 conduct, now I've got the question, well, gee, what can
6 we know about vertical restraints? And we've got somebody
7 who wants to take that on.

8 MR. FROEB: Actually, one of the things I did
9 when I was at the Bureau was I did a review of the
10 empirical literature on vertical restraints, and both
11 voluntary vertical restraints, you know, and, you know,
12 legal, exogenously imposed vertical restraints, and
13 basically it all says the same thing, that when you --
14 when you restrict people's ability to contract or
15 firms' ability to contract upstream and downstream --
16 there's a couple of studies, but it's almost all on one
17 side of the literature -- that good things happen, that
18 output goes up, price goes down, and they interpret it as
19 alignment of incentives, of retailers and manufacturers,
20 or elimination of double marginalization, but again, it's
21 all looking at the short-run behavior.

22 So, you know, the joke of the drunk looking
23 under the lamp post, you know, you're going to look where
24 the light is but you're not going to see where the real
25 pay-off is, which is in the long-run behavior. So, it's

1 a little bit misleading.

2 It gives you one side of the equation,
3 but using that as a basis for antitrust policy, you
4 know, could be potentially misleading. You could see the
5 short-run benefit, but the long-run potential harm, you
6 won't find out. I mean, I just haven't seen much.

7 There is one study that I saw that got at the
8 long-run harm question, and that was a very interesting
9 study by Mike Vita, who works at the FTC, of systems --
10 not overbuilt cable systems, but systems like
11 Baltimore-Washington, where you have to carry both local
12 channels, and when the Supreme Court ruled that you --

13 UNIDENTIFIED SPEAKER: The must carry.

14 MR. FROEB: The must-carry laws. When they got
15 rid of the must-carry laws, which stations did the cable
16 companies drop? Did they drop the competitors in their
17 market for consumers and advertising, or did they drop
18 the exact same content that wasn't a competitor for
19 consumers and advertising but was in a different market?
20 And sure enough, they dropped the ones in the different
21 market.

22 And it's kind of a rejection of the
23 anti-competitive theory of the case, but studies like
24 that are really rare, but I think they're indicative of
25 the kind of studies that are exactly the kind of stuff we

1 ought to do. Look for these rare, natural events or
2 experiments that we can actually back out the results to
3 get at the questions of interest.

4 MR. HAZLETT: Not to fuel our cynicism, but in
5 1997, when the -- those must-carry rules came to the
6 Supreme Court, the Supreme Court totally ignored that
7 great piece of work by the expert agency and it had no
8 impact whatever. I don't even think the paper was cited
9 by the Supreme Court, which was a terrible, terrible
10 loss.

11 MR. CRANDALL: And I think the decision --
12 wasn't the opinion written by Steve Breyer, who's a
13 student of -- wasn't it?

14 UNIDENTIFIED SPEAKER: Kennedy.

15 MR. CRANDALL: Was it? But he wrote a
16 concurring opinion. I remember talking about it.

17 MR. HAZLETT: Yes, it was concurring.

18 MR. WERDEN: I'll add a few comments. First,
19 vertical restraints are tricky because the
20 pro-competitive effects and the anti-competitive effects
21 look almost identical. In fact, they're probably the
22 same thing exactly, just depending on your perspective.
23 So, that's tricky.

24 Secondly, there is, in fact, a vertical
25 restraint on which we have a mountain of empirical

1 evidence, resale price maintenance. We have
2 cross-section, lots of it. We have some time series.
3 But do we really know anything? I'm not so sure.
4 Mostly, these are really old, low-quality studies, so
5 that's part of the problem.

6 But there are some more interesting issues
7 here, one of which is there was an interesting suggestion
8 made by Howard Marvel that the cross-sectional
9 comparisons are useless, because all the efficiencies
10 from RPM go out the window when you have a patchwork of
11 different rules in different states and you can't really
12 achieve the efficiencies. Maybe that's right. I don't
13 know.

14 My favorite little vignette on this subject
15 comes from the hearings on the Consumer Goods Pricing
16 Act of 1975, and one of the very few witnesses that
17 testified that RPM was a pretty good thing and we
18 shouldn't get rid of it had a very interesting response
19 to Senator Brooks' little empirical study that he did.

20 Senator Brooks sent somebody out to the
21 drugstores in Virginia, the drugstores in the District
22 of Columbia, and compared a whole bunch of prices. One
23 of them was a fair trade state; one of them wasn't. He
24 said, "Okay, now we have an estimate for what the effect
25 of fair trade was."

1 The witness says, "Just one problem with that
2 study. Not a single one of those products that you
3 looked at was a fair trade product. They weren't
4 actually under fair trade contracts in Virginia."

5 How did any academic researcher actually know
6 which products were subject to RPM contracts? Now, I'm
7 wondering, how did they know? They probably didn't.
8 They guessed. They guessed wrong some of the time. So,
9 these things are tricky.

10 Even when we have a lot of empirical evidence,
11 I'm not sure we know very much, and I think if we had it
12 to do over again, we could probably do it a lot better,
13 because now we know all these things that you could do
14 wrong.

15 MR. FROEB: I just want to just make a little
16 bit of a pitch that when you write down these theories
17 and you have specific pro-competitive or
18 anti-competitive theories, a lot of times you can test,
19 a restriction of the theory and that may get you part of
20 the way there, reduce some of the uncertainty that you
21 face.

22 So, it's not -- you know, and we've been
23 talking as if there's just one way of drawing inference
24 about all of these -- all of these events, is do an --
25 you know, just do a post mortem and follow up, but

1 there's other ways that economists have of drawing
2 inference, and that's -- you know, we use models and look
3 for overidentifying restrictions, and I think that is a
4 -- there's a lot of evidence out there about -- you know,
5 that allows us to accept or reject certain models, and I
6 don't want to -- I don't want to, you know, neglect that
7 very, very useful way of -- you know, kind of if you
8 write down a model of what you think is going on, make
9 sure that it can explain that which you can observe
10 before you use it to predict that which you can't.

11 MR. PAUTLER: Okay. I want to move on to a
12 question about whether there is a method for choosing
13 our nonmerger enforcement targets that we could use. It
14 seems like from the start of this discussion, it's
15 been -- well, maybe we don't know very much about much
16 of anything. A suggestion has been made to me that
17 perhaps decision theory, where we take a look at the
18 costs of making errors, might help us determine what
19 kinds of enforcement we ought to undertake.

20 And I was wondering whether anybody on the
21 panel has any thoughts on whether the cost of false
22 positives would help us pick the kinds of enforcement
23 actions that would be better for an agency to take than
24 some other set of actions.

25 MR. CRANDALL: Well, we've moved from empirical

1 estimation to the effects of antitrust to decision
2 theory guiding antitrust. That's a slightly different
3 topic. I don't claim any expertise at all in that.

4 MR. GHOSAL: Would sectorial studies help us?
5 I mean, if some -- I don't have an answer. I'm just
6 asking a question. I mean, if you -- based on
7 retrospectives and other things that you may have done
8 in the past, I think retrospectives may play a much
9 larger role in sector-specific -- understanding
10 sector-specific behavior and business strategy.

11 So, presumably -- so, it's not theory that I'm
12 talking about. I'm still talking about a data world.
13 Maybe that can provide some guidance into choosing
14 targets. That is, if you identified industries where
15 certain types of violations are cropping up repeatedly
16 and certain types of behaviors are cropping up, then,
17 effectively, that industry becomes more of a focal
18 point.

19 MR. PAUTLER: Well, that would be basically
20 using some research methodology to target industries, I
21 guess, and we would have to do that across, I suppose, a
22 very large number of industries to have any hope picking
23 the best set of candidates.

24 MR. GHOSAL: I don't think I'm talking about
25 cross-industry studies. I mean, this is -- there has to

1 be input that goes into this before this. So, if you
2 think of retrospectives and if you think of
3 institutionalizing retrospectives of some form or
4 another with alternative methodologies, and if it turns
5 out that a bunch of these studies point to certain
6 industries as being usual suspects in terms of
7 violations, certain types of violations, then that base
8 information could be used to select industries and
9 specific targets within an industry.

10 So, I'm not talking about examining 200
11 industries in a cross-section. That's not what I'm
12 suggesting.

13 MR. HAZLETT: But you have to understand the
14 reason why they keep coming up. I mean, it may be that
15 there's an efficiency driving it and the regulator has
16 that wrong. I mean, the idea that if you prosecute a
17 monopolization case that is supposed to deter behavior in
18 that sector or industry, that other firms will see that
19 that are adjacent to the firm you're prosecuting. If you
20 get - if you get persistence, I mean, maybe dedicated
21 monopolists or these may be dedicated folks who are, you
22 know, for efficiency pushed in the same direction.

23 You may also get rent-seeking that pushes you
24 in the same direction, because you've got exactly the
25 same thing going on period after period, where, you know,

1 in the communications world, the hot vertical topic, of
2 course, is net neutrality, and, you know, there's a lot
3 of rent-seeking to go around on all sides of that. To
4 say -- you know, to say that you're getting some -- some
5 positives on anti-competitive conduct because you've
6 gotten a regulator to take a look at it, I mean, this is
7 not the antitrust regulator, although, you know, yes,
8 the Federal Trade Commission had a proceeding on net
9 neutrality, but I'm talking specifically now about the
10 FCC.

11 The FCC is moving. On this, they -- you know,
12 they moved before on certain firms. They will move
13 again in the future. My take is that they don't
14 understand the efficiencies that are embedded throughout
15 the Internet, and if they really want to push
16 nondiscrimination rules, economic nondiscrimination,
17 they're going to be prosecuting a lot of cases.

18 So, I don't think that's a -- I think that's
19 sort of an extension of what you're saying, because, I
20 mean, yes, you want to look at these incidences, but you
21 have to certainly evaluate them for what they are and
22 make sure that your theory is correct about why you're
23 getting repeat instances.

24 MR. GHOSAL: Absolutely. I did not mean that
25 retrospectives necessarily go in one direction.

1 Retrospectives could go in either direction. If you
2 learn from the past, there is a lot of stuff coming out
3 later where there is innovation in some instances and not
4 in others, then you are obviously not going in a single
5 direction. So, retrospectives don't point to one
6 direction, as I said. This is what I was talking about.

7 MR. WERDEN: Coming back to decision theory, I
8 just want to say that I have found fairly unhelpful most
9 of the suggestions that we balance error cost because
10 they usually come complete with subjective beliefs about
11 what the error costs are rather than data. While I am
12 perfectly willing to go with my beliefs about the error
13 costs, I'm not sure I can get a consensus on that.

14 My advice if the FTC really is asking where
15 they should find targets for nonmerger enforcement or
16 decide whether there are targets out there to be found is
17 to take practices on which we don't have well-developed
18 subjective beliefs because we don't have a big body of
19 theory, we don't have a big body of data, but people are
20 talking about the practices, they're starting to write
21 articles, people are filing cases, and make that a
22 research agenda.

23 The topic that I would most quickly recommend
24 is bundled pricing. We have cases on that. We have
25 academic literature on that, but I don't think we really

1 know very much about that. I can write down a model in
2 which you can engage in bundled pricing and exclude
3 competitors without lowering price to any consumers. But
4 has anybody ever really accomplished that? I would like
5 to know.

6 Firms have instituted bundled pricing schemes.
7 Did consumers pay more or did they pay less? That
8 presumably we could figure out. I want to know.

9 MR. GHOSAL: Here, also, I think private
10 litigation in the private markets would be very important
11 to track. Because if you are trying to build a database
12 effectively on where to focus your energies on, it is not
13 just public investigation and public enforcement because
14 in the area of single firm conduct, I mean, private
15 litigation is very important. So, to build up the
16 database, that would be essential.

17 MR. PAUTLER: Well, I wanted to just ask one
18 final -- give everybody a shot at one final question if
19 they are interested. Greg just mentioned a research
20 agenda for bundled pricing as the next item we should
21 look at. I was wondering if anybody had any thoughts on
22 a research agenda for the FTC going forward.

23 We have obviously talked about this a lot
24 implicitly in everything that has been discussed today.
25 Is there something that moving forward we might be able

1 to do that would have a pay-off by our second century, by
2 2014, that would let us know something more specific
3 about the effects of mergers or single firm conduct or
4 particular conduct by firms or vertical restraints?

5 MR. FROEB: I would say be opportunistic. A
6 systematic research agenda is great if it satisfies those
7 three criteria. What do we want the info for? What do
8 we want to know? What can we learn? If you can answer
9 those questions and look ahead, reason back, before you
10 engage in a systematic research agenda, but I suspect a
11 lot of the biggest returns will come from being
12 opportunistic.

13 Look around. Look for cases that can test
14 anticompetitive theories of concern. I mentioned Mike
15 Vita's study of the must carry rules and the Supreme
16 Court reversing those and provided a nice natural
17 experiment that he exploited to give us one of the few
18 tests of these anticompetitive exclusion theories. I
19 would look for more stuff like that.

20 MR. HAZLETT: Yes, the Supreme Court did not
21 reverse those. That is the problem. They ignored his
22 study. They upheld them. They upheld the must carry
23 rules.

24 Yeah, I certainly agree with the opportunistic
25 idea. In fact, the Vita study that is a model here, I

1 believe that came out of an FTC contribution to a
2 regulatory proceeding at the Federal Communications, if
3 I'm not mistaken. But there used to be a lot more. I
4 think this comes out of the 1970s deregulatory era.
5 There used to be a lot more involvement, it seems to me,
6 by the antitrust agencies, DOJ, FTC, in participating in
7 regulatory proceedings. And that's part of the
8 opportunism I would like to see them restore.

9 This has fallen off in recent years, and I
10 think it is a shame because I think that as expert
11 agencies with real economic analysis, they can add a lot
12 to a lot of regulatory proceedings. I would like to see
13 that. Now, that's not specifically on merger policy.

14 But I will just say this in defending merger
15 policy -- excuse me, defending antitrust policy in
16 general and that is this, I mentioned net neutrality
17 being the ticket item in vertical restraints in the
18 communications field. Well, I think it is the easiest
19 argument to make and it has been made quite eloquently by
20 an attorney, John Neckterline (phonetic) and also in
21 another paper by the inimitable Alfred Kahn, the
22 economist, that the best way to handle the net neutrality
23 issue is through antitrust. Very persuasive argument.

24 When you look at the alternative to antitrust,
25 which is agency regulation in many cases, certainly

1 antitrust looks comparatively better. Indeed for over
2 100 years there have been models, frameworks and
3 precedents developed that do give you some ability to
4 talk rationally about efficiency. Some of those things
5 are off and missing in other places. So, I think that
6 that needs to be said.

7 MR. CRANDALL: To put it another way, we do
8 have empirical evidence of the failure of the FCC if we
9 don't have empirical evidence on the effects of antitrust
10 policy. I think I would just conclude by saying that the
11 way you formulated the question suggested that this is
12 sort of an internal research agenda. I think it's very
13 important if we could somehow stimulate young empirical
14 academics to get involved in this. I don't know it's
15 possible in the current world to do so. I am so far
16 removed from that. But it would be useful to try to get
17 more research going elsewhere not just within two rather
18 well-funded and competent regulatory agencies.

19 MR. FROEB: I don't think that's possible. I
20 mean, just the way academia is set up to reward
21 innovation, they don't reward people who actually do
22 applied work and do useful things.

23 MR. CRANDALL: Yeah, I know, I know. Yeah,
24 yeah.

25 MR. WERDEN: You would have to get tenured

1 people doing the work. But I think it would be
2 interesting to try to get academics involved, but I
3 wouldn't get involved by paying them, which probably is
4 the only way to get them involved, by the way.

5 **(Laughter.)**

6 MR. WERDEN: People are suspect if the work
7 coming out of the FTC --

8 MR. CRANDALL: Do you work for nothing?

9 **(Laughter.)**

10 MR. WERDEN: Even more suspect of work for
11 hire. Nobody believes the stuff hired guns say on behalf
12 of a company.

13 The other thing I would suggest is that if you
14 are going to go outside, have at least two researchers
15 tackle every problem and see if they get the same answer.
16 One draw out of the urn doesn't do much for me, but if
17 two guys agree then maybe they're right.

18 MR. CRANDALL: As long as you get both Kruger
19 and Card (phonetic) doing it, it's okay.

20 **(Laughter.)**

21 MR. WERDEN: Yeah. And I would hope that the
22 reward is publication. If that is not enough, then maybe
23 there's something wrong with the journals.

24 MR. GHOSAL: The brief point I would make is
25 that I think in terms of internal assessments, a point I

1 raised earlier is I think there needs to be consensus on
2 a core set of variables to track. I really think that is
3 very important. It is not just prices, it is a wider set
4 of variables. I talked about Dennis Green's paper
5 earlier. I think that, with some modifications, could be
6 a useful template for figuring out what sorts of
7 variables to track.

8 Second is that you need to look at a timeline
9 for follow-ups because these are not short timelines that
10 you reveal investments, innovations, product or process,
11 et cetera.

12 Third is there needs to be focus in selecting a
13 criteria for choosing the cases. It should not be
14 random. I like opportunism, but the point is that there
15 needs to be some criteria for choosing which kind of
16 cases to follow up on and that should be adhered to
17 rather than just being all over the map. All over the
18 map is fine, being opportunistic is fine, but I think
19 what I sense here is that there needs to be a more
20 systematic agenda versus stuff that you can add on to it.

21 And the last -- two other quick comments. One
22 is that I really like this paper by John Simpson and
23 David Schmidt, also at the FTC. They looked at different
24 approaches in pricing, et cetera, and they have a lot of
25 interesting things to say. As I read this, there is a

1 lot of econometric stuff that can be added onto this to
2 parse out some of the effects. This is a very difficult
3 venture no matter how you look at it. But I think this
4 article provides useful insights to form a basis to do
5 sort of price analysis.

6 And my last comment is that there are a lot of
7 mergers that just don't work out. I mean, if you look at
8 the management literature, a whole bunch of mergers just
9 don't work out. So, if you are spending a ton of
10 resources on blocking mergers which would have failed
11 anyway three years down the line, I think it would be
12 useful to work at sectors where mergers are more
13 successful versus less. What might be the reasons why
14 they're successful or not naturally. That could form
15 important learning in terms of whether you should be
16 really tearing your hair out if a merger is in a certain
17 sector versus others.

18 MR. FROEB: I'm more sanguine about paid
19 research. I think there is a lot of problems that just
20 no one will work on unless they get paid and the only
21 people who are willing to pay them are the companies.
22 They give them access to data and information that they
23 wouldn't ordinarily have. As long as the work can be
24 vetted, I think it is fine. I mean, it's part of our
25 adversarial system.

1 MR. PAUTLER: I would like to thank everybody
2 on the panel. We will have to go back and figure out
3 what we can know and see if we can come up with an agenda
4 that will help us move toward. Thank you very much.

5 **(Applause.)**

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