

1                   **This transcript has been lightly edited for clarity**

2                   AFTERNOON SESSION

3                   (Resumed at 12:45 p.m.)

4

5                   LUNCH PROGRAM: "A CONVERSATION WITH TIM MURIS AND  
6                   BOB PITOFISKY."

7

8                   SPEAKERS:     ROBERT PITOFISKY

9                                   TIMOTHY J. MURIS

10

11                  MODERATOR:   CALVIN J. COLLIER

12

13                  MR. COLLIER:   My name is Cal Collier.  I think I'll  
14                  stand up here just in order to launch the next part of  
15                  the program, and then we'll be seated, and many of you  
16                  unfortunately may have to look at our likenesses on the  
17                  screen, but I know that would be fortunate in my case.

18                  It is a great pleasure personally to be able to  
19                  moderate this panel and absolutely delightful to be  
20                  among so many old friends.  We gather, as several have  
21                  noted, to look both backward and forward at the  
22                  Commission's work.  We do this at a time, I think, when  
23                  the stature of the Agency has never been higher and when  
24                  its achievements, on behalf of consumers, has never been  
25                  greater.

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1            Surprise, surprise, we have with us, for this  
2 program, the two principal architects of these  
3 achievements. My task will be an easy one. I'll ask  
4 just a few questions to stimulate responses, and  
5 they'll be on a broad range of issues, and then I'll  
6 let Tim and Bob share with us their thoughts on their  
7 own and each others' remarkable achievements.

8            I'll start with this question. Bob, one of the  
9 initiatives during your chairmanship was the revival of  
10 the use of the public hearings to eliminate wrongful  
11 business practices, identify consumer and competitive  
12 issues, and explore appropriate regulatory approaches  
13 and responses.

14           Can you share with us your thoughts on this  
15 approach? How productive were these hearings, and when  
16 do you think their use makes the most sense?

17           MR. PITOFSKY: I thought the idea of hearings was  
18 "back to basics." I knew that President Wilson and his  
19 advisor, later to be Justice Brandeis, were not just  
20 interested in creating another enforcement agency. They  
21 had in mind an agency with broad fact finding authority  
22 that would conduct hearings and seminars and discussion  
23 groups, look at trends in the economy and report to the  
24 public and to Congress. I mean, that role is in the  
25 enabling statute.

1           In the 1920s and 1930s, the FTC did some excellent  
2 work in that direction, but then somehow through the  
3 decades, that approach got lost, and I thought we ought  
4 to restore it.

5           I asked people what they thought the first set  
6 of hearings ought to be about, and it was virtually  
7 unanimous: with respect to antitrust, it should  
8 be the globalization of competition with respect to  
9 consumer protection, it was the growing importance  
10 to consumers of the Internet as a new marketplace.

11           Did the hearing lead to real changes? I believe  
12 so. On the antitrust side, it led rather directly  
13 to negotiations with the Department of Justice to incorporate  
14 an efficiency defense in the horizontal merger guidelines.  
15 As Academics, Tim and I had both written on that subject  
16 before we came to the Commission, and I had never understood  
17 why there wasn't a stronger efficiency defense in the  
18 merger guidelines.

19           On the consumer side, it really focused our  
20 attention on the Internet, which I thought at the time  
21 was virtually a free fire zone. People selling products  
22 on the Internet didn't think anybody was watching. As  
23 a result, some of the most outrageous frauds I've ever  
24 seen were occurring in those early years on the Internet.

25           That's how we got started. Tim carried on in

1 that tradition. I think it is something that the Agency  
2 has a comparative advantage in and ought to be continued.

3 MR. COLLIER: Tim, what are your views on this  
4 subject because your Commission also used these tools?

5 MR. MURIS: Incidentally, it's great to be back  
6 here. Time moves in a funny way. It seems like a long  
7 time ago that I was here, and it's only been about five  
8 weeks.

9 You're going to hear a lot of agreement and a  
10 lot of praise, and I don't know how many times I'm going  
11 to say this was one of Bob's best initiatives, but this  
12 was one of Bob's best initiatives. It put on the map  
13 again a major function of the Commission.

14 We had two sets of hearings. One was suggested  
15 by Bob to me, and that was the intellectual property,  
16 and we also did the health care hearings. In both of  
17 those, Susan DeSanti and her people, and David Hyman with  
18 Susan DeSanti and her people in the health care one, just  
19 did a spectacular job.

20 Besides these excellent reports, you have  
21 5-6,000 pages of transcripts on the public record, which  
22 is just a wonderful resource. Just as did the global  
23 hearings, they have an effect around Washington in the  
24 policy community of influencing the debate. It's an  
25 excellent role for the Commission.

1           The Commission is obviously more than an  
2 enforcement agency. It's an enforcement agency, of  
3 course, and most, in terms of resources, of what the  
4 Commission does -- this is probably the first time in  
5 five weeks I have managed to not say we -- most of what  
6 the Commission does in terms of resources is  
7 enforcement, but the other work can be more important,  
8 and it's certainly just as important.

9           MR. COLLIER: One area where public attention  
10 and I think some hearings were held in a the broad sense  
11 is the health care area. Perhaps more importantly in  
12 both of your chairmanships, the health care area had  
13 significant attention, as it should, and the approaches  
14 to addressing some of the issues was not limited to the  
15 traditional litigation techniques.

16           I thought it would be interesting to hear from  
17 both of you on the variety of tools and how they may  
18 have been employed in the health care area and why you  
19 felt that those were appropriate so that it's not just  
20 bringing a case or, at the other end of the spectrum,  
21 employ a very resource consumptive rule-making.

22           MR. PITOFSKY: Well, we -- I still say we you  
23 notice.

24           (Laughter.)

25           MR. PITOFSKY: The Commission, when I was there,

1 did make a priority out of health care, rightly so. Tim  
2 did even more in that direction and deserves enormous  
3 credit for doing that.

4 We brought some cases. First of all, I immediately  
5 think of cigarettes when I think of health care, and I  
6 thought the decision to challenge the Joe Camel tobacco  
7 ads was a health care initiative. We brought other cases  
8 as well.

9 Beyond that, Jodie and her group were very  
10 energetic in consumer and business education, in trying  
11 to facilitate self-regulation and also in initiating  
12 guidelines. We followed up Janet Steiger's initiative  
13 in weight control guidelines. We put out, not  
14 guidelines, but a book of rules about dietary  
15 supplements, which I thought was quite successful.  
16 Christine Varney and Sheila Anthony were people who were  
17 really pushing in that dietary supplement area.

18 So it was a combination of cases, consumer  
19 education, business cooperation and guidelines that we  
20 tried to put together in the health care area.

21 MR. MURIS: I think the health care area really  
22 illustrates the use of the Commission's many tools. One  
23 of the reasons to use those tools is if you're going to  
24 be a competition policy agency -- and when I say that, I  
25 include the consumer issues as well, because to me

1 they're two sides of the same coin -- you need to  
2 understand that the economy obviously is regulated,  
3 and that you can't directly deal with it through  
4 cases. In health care that's true in spades.

5 A specific example of the many tools and the  
6 Commission's many positive impacts is the pharmaceutical  
7 area. If you just look across the board, it's what Bill  
8 Kovacic dubbed as hitting for the regulatory cycle with  
9 all that the Commission has done.

10 First, there are lots of cases. Bob started  
11 the cases involving the agreements between the generics  
12 and the brands not to compete. We finished the Schering  
13 case and got it into the 11th Circuit where it now is,  
14 and we extended the pharmaceutical case area to include  
15 branded firms manipulating the system to keep out generics  
16 in a way we thought wasn't protected under Noerr-Pennington.

17 As Bob was going out the door, he started a major  
18 6B study which had tremendous impacts. The President of  
19 the United States Cited that study in a Rose Garden ceremony.  
20 The FDA adopted the principal recommendation. Congress  
21 passed legislation. We also filed Amicus briefs that had  
22 a very positive impact in the development of the law  
23 involving the branded and the generic area.

24 Further, we did Congressional testimony. We did  
25 hearings. We did the health care report. The

1 pharmaceutical area alone, and the health care area  
2 more generally, show the tremendous use of the Commission's  
3 many tools. I agree, as Bob said, that this represents  
4 an institutional advantage of the modern Commission.

5 MR. COLLIER: I can't resist asking the  
6 perennial question of two people who have contributed so  
7 much to the Agency, which is the question that was  
8 touched on earlier in one of the panels: What's the  
9 value, what's the public value in having the consumer  
10 protection responsibilities in the same agency as the  
11 competition responsibilities?

12 This is to both of you, and there's been some  
13 discussion on it over and over and over again, and I  
14 would love to get your perspectives on it.

15 MR. PITOFSKY: They're not natural partners, and  
16 yet the more you're at the FTC, the more you see the  
17 virtues of putting these two enforcement initiatives  
18 together.

19 On the consumer protection side, if the people  
20 who are bringing cases or initiating rules don't  
21 understand the market and market forces, consumer  
22 protection tends to become protectionist, and it seems  
23 to me that the antitrust lawyers and the economists in  
24 the Bureau of Economics, who understand the market, can  
25 be of great value in leading consumer protection in



1 the direction of a more sensible approach.

2 One of the reasons why the Commission adapted  
3 what I think were rather unwise, fictitious pricing  
4 rules -- rules that said you have to do a survey before  
5 you can say "lowest prices in town," you can't make a claim  
6 of a sale unless you have maintained a higher price for 60  
7 days or 90 days, is a failure to understand how markets  
8 work. Many fictitious pricing rules really amount to a  
9 challenge to discounters, and the discounters can be, in  
10 many circumstances, friends of consumers.

11 On the antitrust side, now here we may find  
12 there is a little space between Tim and me. I don't  
13 think antitrust is just economics. I think antitrust is  
14 more than that. It's not supply curves and demand  
15 curves, and being in an Agency in which people think  
16 about consumer welfare not in solely economic terms, I  
17 think softens the edges of some antitrust initiatives.

18 Putting the two disciplines together and having  
19 a group of economists addressing questions on each side  
20 of the FTC, it seems to me makes each side of the agency  
21 a more sensible place for enforcement.

22 MR. MURIS: As the only person ever to head both  
23 enforcement bureaus, although not at the same time  
24 fortunately, it is a winning and complementary combination.

25 Bob started from the antitrust side. Let me start

1 from the consumer side. The fact that the focus is on  
2 consumers is extremely important. When you view the history  
3 of antitrust -- it's not true anymore -- but too often the  
4 history was of protecting competitors and not protecting  
5 consumers.

6 Another benefit from the consumer side that runs  
7 to the antitrust side has been the focus on institutions.  
8 On the consumer side, the Commission has done excellent  
9 work on the focus of the institutional role of advertising.  
10 I agree completely with Bob on the benefits of the antitrust  
11 side with its focus on markets as a check on some of the  
12 more egregious and aggressive consumer protection  
13 efforts.

14 Tonight will be interesting. I invited Dick Posner  
15 to revisit his 35 year old call to abolish the FTC. Maybe  
16 he'll think that at least half of it should survive. I  
17 don't know. It will be interesting to see.

18 MR. COLLIER: One of the areas that has engaged  
19 the Commission and involves typically, when it arises, a  
20 fair amount of public interest and media attention is in  
21 connection with advertising of violent entertainment  
22 products or alcoholic beverages, and in both of your  
23 administrations, you dealt with those issues under quite  
24 a spotlight.

25 Bob, why don't you comment, if you would, on how

1 those inquiries were stimulated and your evaluation of  
2 the benefits that came out of them.

3 MR. PITOFISKY: The examination of ratings on  
4 movies, video games and music was very, unusual.  
5 The precipitating event was the massacre in Columbine in  
6 which some people thought that the young, misguided people  
7 who ran around shooting everybody in sight were influenced  
8 by violent entertainment materials.

9 I received a phone call, believe me very rare, from  
10 the White House asking, would the Commission be willing to  
11 examine the rating systems in those three industries and  
12 issue a report. I checked with my colleagues. Everybody  
13 was enthusiastic about it, and we started that project.

14 It was tricky because I said from the very  
15 beginning, the Federal Trade Commission should not be  
16 the thought police, and I have no objection to a parent  
17 saying to a 14 year old -- it would be good for you to see  
18 Saving Private Ryan or even Jaws.

19 On the other hand, I didn't think that Hollywood  
20 was acting properly in rating these materials as R and  
21 then conducting focus groups with 12-year-olds to figure  
22 out how best to convince them through advertising to sneak  
23 into the movie theater.

24 I hadn't played a video game in my entire life until  
25 this project started. I played a video game, and I was

1       astonished at the violence I was inflicting on these  
2       pop-up figures in the games. Music also had serious  
3       problems. Not the executives but the performers tend to  
4       be rebels, and there is a lot of violence in contemporary  
5       music.

6                We conducted a study. We issued our report. As  
7       you know, we found all three segments wanting in the way  
8       they were rating games, and then there was a follow-on  
9       report and I think still another follow-on report.

10              My impression is that things are better,  
11       especially in movies. I think they were the most  
12       responsive in working to improve their rating system.  
13       In clarifying their rating system, getting tougher  
14       about ratings, giving parents more information about  
15       what a rating meant, I thought they did a first rate job.  
16       Many in Congress think that the music group has not  
17       responded in the way the other two have. I haven't  
18       examined that issue very closely.

19              On alcohol, first of all, you've got to give  
20       credit to Janet Steiger. She is the one who started  
21       paying attention at the Commission to alcohol  
22       advertising in college newspapers, high school  
23       newspapers, that sort of thing.

24              There, too, it was initiated outside the  
25       Commission by a committee of Congress. We brought some

1 cases. We brought a couple of cases on an unfairness  
2 theory. We issued a report, which I think was useful.

3 I do not believe that, generally speaking,  
4 alcohol advertising is out of control. I think sellers  
5 are cautious about the way they advertise that product,  
6 but there were a few exceptions, and we challenged  
7 companies on those exceptions.

8 MR. MURIS: I have a somewhat different  
9 experience with violent video games. Given my two  
10 teenage boys, when one of my attorney advisors  
11 learned that I was about to attend a meeting with  
12 critics of these games, he said, "If they ask you to  
13 play, don't do well."

14 In part because of my two teenage boys, I became  
15 fascinated and depressed by Columbine, and I thought  
16 what Bob did there was another one of his most  
17 spectacular initiatives. In the '90s, the biggest  
18 thing in my life was my boys. I was a single parent,  
19 and I managed seriously boys' baseball for the whole  
20 decade, and by the time of Columbine it was all teenage  
21 boys, my boys having grown up. An issue with Columbine  
22 is that culture matters. It has to matter, and I thought  
23 what the industries were doing was wrong. The Commission  
24 helped clean it up, but the music industry has not advanced.  
25 I know Orson is probably here somewhere, and he feels

1 very strongly about that. The Commission, by keeping  
2 the pressure on, has been helpful.

3 A problem with Columbine, however, is Columbine  
4 is the high school to which everybody wants to send their  
5 kids. Harris and Klebold do not follow any patterns. The  
6 one kid, I confuse their names, to me it's Rosenkratz  
7 and Gildenstern, but the one kid, he had a job, he had a  
8 girlfriend, he was getting into a good college, he appeared  
9 to be everything you would hope a kid would be.

10 He had a stable home life, but he was a  
11 follower, and the other kid, who I think was just evil,  
12 was a leader, and they had reacted to the culture in a  
13 way where they didn't understand the irony in something  
14 like the movie Basketball Diaries. Although I do think  
15 the initiative was very positive initiative, I don't  
16 know, in the grand scheme of things, what the impact will  
17 be on future Columbines.

18 With alcohol, you can also see the FTC's impact.  
19 When we released the second report, a follow-up report  
20 to what Bob had done, the industry announced moving to a  
21 much tougher standard on placement of advertising. They  
22 moved to a where the adult population had to be 70 percent.

23 These reports are another example of where the  
24 Commission has a very positive impact beyond its law  
25 enforcement responsibilities.

1           MR. COLLIER: Which kind of brings to my mind  
2 anyway something that's been mentioned in several of the  
3 panels here, which is the Commission's work over the  
4 decades on consumer fraud. Tim, when you were Bureau  
5 Director at the Commission, you emphasized the  
6 importance of an effective anti-fraud law enforcement  
7 program.

8           Why don't you share what you're thinking was and  
9 why you felt that was an important initiative for the  
10 Commission, given the tools that the Commission has. And  
11 comment a little bit about some of the approaches that  
12 you took to make it effective.

13           MR. MURIS: When we came here with Jim Miller in  
14 October, 1981 in some ways it was an opportunity to  
15 start over. The effort, of which kid-vid was the  
16 most notorious, to do rules to rewrite the economy had  
17 failed and failed spectacularly.

18           I went back to Bob's first foray into the FTC which  
19 was the ABA report. The ABA report had focused on fraud,  
20 and there's an interesting article in the latest Antitrust  
21 Magazine about the origins of the fraud program in my  
22 office. One of the things I did was to abolish the Office  
23 of Policy Planning so I could take back the Bureau  
24 Director's office because Bob Reich talked Al Kramer out of  
25 it.

1           Space and furniture have a lot to do with  
2           bureaucracy! Anyway, we were back in the corner office and  
3           Dave Fix came in: he knew I wanted to do fraud cases, and he  
4           had a way to do them. I don't know if Dave's here, but it  
5           was an important moment in the Commission's history.

6           Somebody has analogized that, we were sort of like  
7           the Wright Brothers in those days. We were at a very  
8           early stage, and when I came back in 2001, under Bob and  
9           Jodie, they had really perfected going after fraud. It  
10          was like flying the corporate jet.

11          As you all know I'm a big fan of Jodie's: Jodie  
12          had, with her corporate background, established  
13          strategic and operational planning. They had also set  
14          up a this complaint system in Consumer Sentinel, and it  
15          took me awhile to challenge the staff to say, "don't be  
16          too self-satisfied here. The challenge in this decade is  
17          to improve as much as you improved in the '90s."

18          We all got on the same page and began to do several  
19          very useful things. We increased criminal enforcement.  
20          We redesigned Sentinel, which Do Not Call essentially was  
21          about to break. The cross-border fraud area, which had  
22          begun to be an important issue in the Pitofsky era, really  
23          has exploded. We're very close I hope -- I'm going to owe  
24          Anna Davis a lunch, she says it's a dinner -- but the  
25          Commission has got new legislation through the Senate, and



1 I hope it gets through the House. Fraud is theft, and it's  
2 an important role for the Commission.

3 The Commission is the leader in going after  
4 fraud. A lot of people can take great pride in the  
5 success the Commission has had, but there is a lot more  
6 to do.

7 MR. COLLIER: Bob, Tim's commented on your fraud  
8 program. Would you like to say anything about it?

9 MR. PITOFSKY: Well, I agree with every word Tim  
10 said, but let me address this question in a slightly  
11 different way. If there is a single area of  
12 Commission responsibility that one would single out as  
13 having changed the most between 1970 and 2004, it would  
14 be the fraud program.

15 When I first came to the FTC as a Bureau Director  
16 in 1970, all the emphasis was on national advertising fraud  
17 because companies just didn't think that there was  
18 anybody watching what they were doing and saying in ads.

19 One evening in 1970, the Chairman, the General  
20 Counsel and I, over dinner, sat in front of three  
21 television sets, and we only watched the ads. In that  
22 single evening, we came up with four ads worth investigating.  
23 There was an ad in which a company claimed that if a driver  
24 used their gasoline, his car could pull a locomotive up a  
25 hill.

1           There was another ad, in which there were two  
2 side-by-side panels of roaches. The advertiser arranged  
3 to spray one panel of roaches with a competitive product  
4 and then the other panel of roaches with its product. On  
5 the one side, all the roaches thrived. They grew big, fat  
6 and sassy. On the other panel, they all died. Later,  
7 we discovered that the advertiser had used a competitive  
8 product in when they knew that the special brand of roaches  
9 that they had selected, the German roach, was immune to  
10 their competitor's product.

11           That was then. When we came back in 1995, what  
12 we found was that national advertising, as a result of  
13 the most effective self-regulation that I've ever  
14 encountered, was really under control. We brought only  
15 a few national advertising cases in seven years.

16           On the other hand, Internet fraud was where the  
17 action was, and that's where the most outrageous  
18 deceptions and frauds were occurring, and therefore, we  
19 changed our priorities, and I think in less than four  
20 years, Jodie and her colleagues brought 100 Internet  
21 cases, the internet sellers also thought no one was  
22 watching, and therefore they could get away with  
23 saying virtually anything.

24           So the fraud program, as I started out saying,  
25 has changed radically over the 30 or 35 years.

1           MR. COLLIER: Tim, perhaps you would like to  
2 comment on the challenges that the new technologies  
3 posed. Bob just alluded to them, obviously the whole  
4 explosion of the Internet, the ability to manage and  
5 manipulate huge amounts of data, the very low entry  
6 costs for an advertiser, which is quite unlike the entry  
7 cost that businesses faced in the 1950s when they had to  
8 buy a minute of network time.

9           All of those things compounded misconduct and  
10 turned loose a whole bunch of Commission targets and  
11 challenges. I would like your comment on how you saw it  
12 and what occurred during your administration.

13           MR. MURIS: Let me extract away from privacy,  
14 where this was obviously a very big issue, because I  
15 think we're probably going to talk about privacy a  
16 little later. You can see it with just the  
17 proliferation of issues over the Internet that Bob  
18 mentioned, and the Commission had already begun with  
19 those global hearings in '95.

20           The whole issue of spam, it's another area where  
21 the Commission uses its multiple tools. We had in this  
22 room a three-day spam workshop where, to speak of Orson  
23 again, Orson had to break up a fight. The problems of  
24 spam have led the Commission to issue reports. There have  
25 been over 60 cases against spam. The Commission has also

1 done a lot in educating. There is a lot of street  
2 mythology about spam that the Commission has talked about.

3 As the technology proliferates, and as the  
4 fraudsters, and spam is one of their favorite tools, use  
5 the Internet, the Commission has tried to keep pace.  
6 The Commission has actually educated a lot of people, not  
7 just in the United States, but around the world about how  
8 to detect and go after fraud.

9 Again, fraud is theft, and there will always be this  
10 arms race between the fraudsters and the enforcers, and it  
11 will continue. It will always be an important role for  
12 the Commission.

13 MR. COLLIER: Tim, implied that, the growth of  
14 these communications technologies raised a lot of public  
15 concern about privacy and the extent to which these  
16 technologies could invade personal privacy. Lots of  
17 folks turned to the FTC and asked the Commission to  
18 address that problem. That occurred initially during  
19 your administration and continued in Tim's administration.

20 I would like your comment on what you faced and  
21 how you dealt with it.

22 MR. PITOFSKY: The issue in the privacy area is  
23 not whether or not there are things going on that are  
24 inappropriate. I resent, and I think most people  
25 resent, being asked a series of questions in connection

1 with some business transaction, for example, buying a  
2 sweater on the Internet, and then the information is  
3 accumulated and sold to somebody else without your  
4 permission. It's also true that most agree, notice,  
5 consent, access, and security are what you're entitled to  
6 in terms of privacy.

7 The issue is, what's the best way to deal  
8 with that, and I originally felt, and the majority of  
9 the Commission felt, that self-regulation was the better  
10 way. We issued a report and then another report in which  
11 we found very disappointing results in terms of industry  
12 self-regulation.

13 I still would prefer that it be done by  
14 self-regulators. I think self-regulation is often more  
15 flexible, more insightful about business realities and  
16 so forth, but eventually under the influence of  
17 Christine Varney first and then Sheila Anthony, we came  
18 around to the view that, self-regulation wasn't working  
19 because there's no law that that kind of behavior violates,  
20 and therefore the self-regulators can't say: if you don't  
21 stop it, we're going to send our recommendation to the  
22 Federal Trade Commission or to somebody else to enforce  
23 the law.

24 Therefore, in a very close vote, we finally came  
25 around to the view that Congress ought to act in this area.

1 We never took a position on opt-in opt-out because that's  
2 the most controversial issue, but we did think that  
3 mandatory notice to consumers ought to be required by the  
4 law, but Congress has not acted.

5 I'll let Tim describe his approach which was  
6 aggressive law enforcement rather than legislation, and  
7 my impression is that the situation is better, but there  
8 are still problems in that area.

9 MR. MURIS: Well, this is one of the areas where  
10 I owe Bob probably one of my greatest debts. On the  
11 other hand, it's one of the few areas where we went in a  
12 different direction, as Bob was alluding to.

13 I owe him the debt because during my confirmation  
14 hearings, this was what most people wanted to talk about  
15 on the Hill. They wanted to talk about, whether I supported  
16 notice and choice legislation. They would ask, "Do you  
17 support privacy?" but they meant this legislation. I  
18 thought that was a very odd way to talk about privacy,  
19 but I didn't know a lot about it then.

20 So in the summer of 2001, Howard Beales and I,  
21 with the staff and a lot of outsiders, headed an  
22 extensive education process where we took the Commission  
23 in a different direction. I know Orson and Tom hadn't  
24 completely agreed with Bob or each other; they both had  
25 somewhat different positions from each other on the notice

1 and choice legislation.

2 The direction we took it in was to say, "Let's  
3 focus on the harms of the misuse of information." The  
4 harms of misuse of information, the most common and  
5 serious one for most people is identity theft, which the  
6 Commission had started to get involved with. Also a  
7 serious harm, in the aggregate, was the daily interruption  
8 of our lives from the phone calls and from the spam.  
9 That discussion in the summer of 2001 led to the Do Not  
10 Call Rule, so in that sense, I'm very grateful for Bob  
11 for having put privacy on the agenda.

12 It also led to some very important other  
13 Commission initiatives, not as well known, particularly  
14 in the security area. Consumers tell you, "We are  
15 concerned about privacy on the Internet." When we parse  
16 that out, what they overwhelmingly seem to mean, and there  
17 was some good data on this, is, "We're concerned about  
18 putting our credit card information in cyberspace  
19 because of the security concern."

20 So we brought several cases where people made  
21 promises of security and did not keep it. We looked for  
22 a good case to pursue on an unfairness basis, and one  
23 such case now exists, but I think it's still not public,  
24 so I should keep my mouth shut. I think focus on harm is  
25 a more sensible model for both consumers and business

1 than the notice and choice model.

2 I'll close with my favorite example -- what  
3 I call the miracle of instant credit. You can  
4 walk in -- you guys have heard this, therefore you're  
5 probably yawning out there -- you could walk into a car  
6 dealership and borrow \$10,000 from a complete stranger  
7 in an hour if you've got good credit. That couldn't  
8 happen if you could control your information. If you  
9 were a bad credit risk, if you could prevent that  
10 information from being shared, the credit system, as we  
11 know it, would collapse.

12 Notice and choice is good in theory, but most  
13 people aren't willing to exercise the choice because the  
14 costs, even though they're trivial in many instances,  
15 are not worth the benefits. Thus I thought the  
16 Gramm-Leach-Bliley provision that required a security  
17 rule was superb, but it had the provision that required all  
18 those notices that you get I called the largest junk mail  
19 in history. Quoting an Earl Long line, which I first  
20 heard from Mayo Thompson at the FTC: "It was as  
21 worthwhile to most Americans as socks on a rooster."

22 MR. COLLIER: One of the areas that was active  
23 under both of your tenures was the scope of the unfairness  
24 jurisdiction. Bob, how did the Commission use the  
25 unfairness jurisdiction when you were Chairman, and



1 probably more importantly, how important do you think it  
2 is in connection with the Agency's authority?

3 MR. PITOFSKY: I think it's important on the  
4 consumer side. Let me start with antitrust. I think  
5 I'm right that we didn't bring a single antitrust case  
6 during my seven years based on unfairness.

7 The only role of unfairness is filling the gaps  
8 that Congress unintentionally left in statutes like the  
9 Robinson-Patman Act. But if you're not going to  
10 enforce the Robinson-Patman Act, you don't have to fill  
11 in the gaps.

12 On the consumer side, I think that's different.  
13 First of all, I would say you use it very cautiously.  
14 On the other hand, there are matters that exploit  
15 vulnerable consumers that are not fairly characterized  
16 as deceptive or misleading. The leading example by far  
17 in my years was the Joe Camel campaign. There was  
18 nothing deceptive about that.

19 On the other hand, the matter never went to trial,  
20 but I think the evidence was fairly clear that the campaign  
21 was designed to influence young people toward the Reynolds  
22 brands of cigarettes or towards Camels. You couldn't get  
23 at it under deception.

24 There are other examples of unfairness  
25 jurisdiction like cramming -- putting charges on

1 complicated bills that you would never think people  
2 would notice, but not many.

3 On the other hand, you want uniforms to be  
4 available because some fairly raw types of exploitation  
5 of consumers can occur in a way that's carefully designed  
6 to avoid deception.

7 MR. COLLIER: Tim, would you like to comment on  
8 unfairness and maybe a little bit also on the  
9 evolution of the approach the Commission has taken to it.

10 MR. MURIS: Sure. This is an area where I'm  
11 probably somewhat to Bob's left in the sense of being  
12 somewhat more comfortable using unfairness for the  
13 following reasons.

14 Unfairness has evolved. Speaking of Dick Posner,  
15 he wrote the Cigarette Rule unfairness standard, which  
16 when it got picked up in the S&H case was the most  
17 catastrophic victory the Commission ever had in its  
18 history because it convinced people that the Commission  
19 could stop industry practices based on some vague public  
20 policy notion.

21 That idea has been written out of unfairness. It  
22 was clearly written out in the statute. Now it's a rigorous  
23 benefit cost test, and that is a more flexible than on  
24 occasion trying to torture the deception standard, so I  
25 think it has its uses.

1 I agree with Bob. I think both of us are  
2 extremely leery of using the FTC Act in the antitrust  
3 side beyond the Sherman and Clayton Acts, but in  
4 consumer protection it can have a positive role.

5 MR. COLLIER: Let's switch gears for a minute. I  
6 actually should have done so about five or ten minutes ago.  
7 I'd like to talk about the competition side of the house.

8 First directed at Bob, the number of mergers  
9 reported under Hart-Scott increased from I guess 1,500 a  
10 year in 1991 to about three times that number in 1998.  
11 How did this merger wave affect the Bureau in your  
12 tenure, and what did you try to do to address it?

13 MR. PITOFSKY: It was the most significant  
14 influence on our priorities of anything else that  
15 happened during my years there.

16 As you know merger review has its own deadlines,  
17 and while the agency only challenges 3 percent of the  
18 mergers that it sees, you still have to look at the other  
19 vast numbers of mergers to see if they fall within the 3  
20 percent.

21 Also, Bill Baer and his successors rightly believed,  
22 that there was no sense in a merger enforcement policy  
23 in which you took a quarter of a loaf or half a loaf and  
24 let the deal go through and declared victory. If you  
25 really thought the merger had anti-competitive effects,

1 that question should be decided by a court. Courts should  
2 not be dealt out of the game.

3 The result was that we were in court more often  
4 than had been true for a long, long time. I remember I  
5 would say to Bill, who is sitting here, I would say, Look,  
6 Bill, if we bring this case, do we have lawyers and  
7 economists to staff it, and he would say, Don't worry,  
8 I'll take care of it.

9 Somehow or the other, cases that were being  
10 litigated would fold just about in time to switch  
11 the staff over to another case. It was a magic act to  
12 find enough people inside the FTC to litigate those  
13 merger cases, but the consequence was that while we  
14 brought some very important non merger cases, Intel,  
15 Toys "R" Us and others, I always felt that we could have  
16 done more in the non merger area were it not for the  
17 fact that we were buried in some years by 4,500  
18 merger proposals.

19 MR. COLLIER: Tim?

20 MR. MURIS: Well, we had what I regarded as the  
21 good fortune of not being in the middle of the merger  
22 wave. It allowed us to do a lot more in the  
23 administrative area. I was astonished at what good  
24 shape the Bureau of Competition was in when we arrived.  
25 The fact that it was still standing was itself a

1 testament to Bob and Bill and Molly and Rich.

2 This difference does make it actually very  
3 hard to compare our tenures in the sense that the focus was  
4 so different. But look, for example, at the excellent set  
5 of data we released on how the Commission had handled  
6 mergers. It was mostly cases, on Bob's tenure because  
7 of the merger wave and because Bob was here longer.  
8 It showed how sophisticated merger analysis has become.  
9 This data was on horizontal mergers. There have been very  
10 few vertical merger cases, although there have been a few.

11 We have had a tremendous amount of learning  
12 that's occurred in these hundreds of Hart-Scott  
13 investigations, and it's one of the many areas -- and may  
14 be the best example -- of how there really is a  
15 bipartisan shared consensus on how to approach antitrust  
16 law.

17 The government has lost three cases recently,  
18 including the one that the Commission brought, the Arch  
19 Coal case. But most people in the private sector, and  
20 there are a lot of you sitting out there, including the  
21 three of us up here, are not willing to risk litigation.  
22 It will be interesting to see if those cases have much of  
23 an impact.

24 There are three recent cases where the judges,  
25 and the Heinz case is the third case, all rejected

1 virtually out-of-hand customers' complaints or  
2 support of the merger. The government regards that as  
3 highly relevant information and I think it will continue  
4 to, regardless of what the courts say, unless the  
5 Supreme Court happened to say it was irrelevant. I  
6 would be highly surprised if that happened.

7 MR. COLLIER: Talk just a bit about vertical  
8 mergers, Bob. There was some vertical merger activity  
9 during your chairmanship. Vertical mergers have not  
10 typically been the core of the merger enforcement  
11 program. Horizontal mergers have.

12 What should the public be concerned about in  
13 connection with vertical mergers and what was your  
14 experience?

15 MR. PITOFSKY: Of course, they're not as dangerous  
16 as horizontal mergers. They more frequently involve  
17 significant efficiencies, and therefore, there ought to  
18 be far fewer challenges to vertical mergers than  
19 horizontal mergers.

20 On the other hand, my guiding principle in  
21 deciding which challenges to initiate was to ignore the  
22 vertical merger guidelines. They are hopelessly out of  
23 date, and they ought to be revisited.

24 I'm about to publish a paper talking about this.  
25 I think something like five vertical merger cases were

1 brought by Tim and me, and a finally by the Department of  
2 Justice, over a period of about ten years, and I think  
3 all but one of them could not have been brought under  
4 the existing vertical merger guidelines, because those  
5 guidelines eliminate the concept of foreclosure. All  
6 three of its vertical merger cases brought when I  
7 was chair depended on the concept of foreclosure.

8 So it's not the most important area of the  
9 world, but we ought to get it right, and it seems to  
10 me that somebody should take another look at those  
11 guidelines.

12 MR. MURIS: Well, I agree that there are useful  
13 areas to do and that some marginal improvements could be  
14 made in transparency and explaining how the government  
15 does mergers.

16 In the vertical area it's more than marginal.  
17 The concern I have is I'm not sure that there's a consensus  
18 that exists about how to rewrite the vertical  
19 guidelines. Unless you try, you're not going to know for  
20 sure, so I think that is a worthwhile project.

21 The vertical cases that we brought and a lot of  
22 them that Bob and Joel brought did involve a raising  
23 rivals' cost theory where there was potential  
24 foreclosure, particularly involving the defense industry,  
25 the drug industry and areas where the government is an

1 extremely important part of the process. I thought because  
2 of the entry barrier there, that the story made sense, and  
3 it is certainly an evolving area in the law.

4 MR. COLLIER: We're closing in on the appointed  
5 time, but I have to ask the following question of both  
6 these fellows: What one or two or three things during  
7 your chairmanship and administration do you regard as  
8 being the most significant, then and in the future?

9 MR. PITOFSKY: Why don't you start, Tim.

10 MR. MURIS: Someone wrote my obituary while  
11 I was chairman and said that they were going to put on  
12 my gravestone that I had protected the dinner hour, which  
13 is fine. I don't mind that, although I don't think  
14 much about what's going to be on my tombstone. Obviously  
15 in the general world, my tenure will be most known for  
16 Do Not Call. I think that within this room and in the  
17 policy community that follows us, I hope what we're known  
18 for is -- and I do really believe that Bob's tenure and  
19 mine are one of the same pattern -- applying careful  
20 analysis in a way that abstracts from politics and  
21 contention.

22 Our approach is fact based but uses relevant economics,  
23 and it tries to protect the public interest. I think the  
24 Commission has become an amazingly successful institution,  
25 for which a lot of people in this room, a lot more than just



1 the two of us, deserve the credit.

2 MR. PITOFSKY: I agree that it is  
3 remarkable, the convergence that's occurred in 35 years  
4 in the antitrust world, especially when so much else in  
5 domestic regulation has become polarized: tax policy,  
6 environmental policy, health care policy and so forth,  
7 and yet you see in Bush One, in the Clinton's  
8 Administration years, and in Bush Two very similar  
9 antitrust approaches. There are some differences at the  
10 margin.

11 In terms of things that would matter, I've  
12 already talked a good deal about the Bureau of Consumer  
13 Protection and Jodie's creativity in developing an  
14 arsenal of approaches to Internet fraud, trying to  
15 prevent the fraud while encouraging the marketplace of  
16 the Internet. Doing both of those things at the same  
17 time is difficult.

18 On antitrust, I thought the cases, especially  
19 the merger cases like Staples, showed marked improvement  
20 and sophistication. I guess if I were to select a broad  
21 theme, it is the emphasis on access. That's what led us  
22 to a rather regulatory order in AOL/Time Warner, to  
23 protect the access of competitors of Time Warner to  
24 AOL's Internet properties. That's what led us to  
25 challenge Toys "R" Us because I thought of that as a

1 horizontal case, trying to get the toy manufacturers to  
2 preclude developing competition from the price clubs.

3 I thought of "access" as the reason why we were so  
4 aggressive in going after the Chrysler dealers for  
5 trying to persuade Chrysler to knock Internet car sales  
6 out of the marketplace, and I do think that antitrust has  
7 a very special role in keeping markets open and keeping  
8 access open, and I think that the emphasis in that area  
9 was not misplaced.

10 MR. COLLIER: Thank you. Our time is up. I'm  
11 going to recognize any questions or a couple of  
12 questions. No hands are up so I guess this is it.

13 MR. MURIS: This group of people has never been  
14 silent, but that's fine.

15 (Applause.)

16 MS. BAILEY: Just one brief announcement, we'll  
17 resume again at two o'clock, but I wanted anyone who has  
18 yet to buy a ticket to the ABA dinner who really wants  
19 to come, the ABA will be here for 15 more minutes with a  
20 few tickets remaining, so I encourage you to take this  
21 one last opportunity. See you at two

22 (Break in the proceedings.)

23

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