FEDERAL TRADE COMMISSION

WORKSHOP ON
SECTION 5 OF THE FTC ACT
AS A COMPETITION STATUTE

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FEDERAL TRADE COMMISSION

I N D E X

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P R O C E E D I N G S

MR. AVERITT: Good morning, everyone, and welcome to the FTC's one-day workshop on Section 5. This workshop is our effort to revisit territory that's lain fallow for some decades now. Like other distant territory, the territory of Section 5 offers a landscape with several different attributes. There's some attractive features and then there's some imperfectly understood hazards. Our job today is to begin the task of sorting those out.

To open the workshop and to lay out a more detailed road map for our efforts of the day, it's my pleasure to introduce the agency's Chairman, Bill Kovacic. In fact, it's Chairman Kovacic's past life as an academic that's really one of the mainsprings for today's activities. The Chairman has long been an advocate for using workshops as a way of exploring new issues and as a way of building intellectual capital for the future actions of the agency.

So, without more ado, Chairman Kovacic.

(Applause.)

OPENING REMARKS BY CHAIRMAN KOVACIC

CHAIRMAN KOVACIC: I'm very grateful to Neil and his colleagues for putting together these programs. As Neil recalls, it was a mere 29 years ago that we first met at the FTC to begin working on a number of these very same issues, issues that are, if anything, more important now than they were at that time.

I'm also delighted and want to thank foremost our participants. I think when you look at the agenda you'll see that Neil and his colleagues have organized a truly superior collection of participants and I think it's fair to say that anyone who's made thoughtful contributions to the work in this area is represented on the panel. There are really few omissions.

Most and foremost of all is Neil himself. Neil will be too modest later to exalt his own contributions, but in Neil's own work we have really the person who's thought more about this topic and thought more thoughtfully about this topic than any other. So, it's delightful to have this session.

Why reflect on an element of the agency's jurisprudence that, to some extent, has had a difficult history in implementation? I suppose the short answer is it was a critical assumption upon which the agency itself was founded. If you ask the basic question, why have two competition agencies in the United States, a critical consideration was to have an institutional design that was predicated upon maintaining different forms of adjudication, a different mix of policy-making tools and, quite importantly, a different mandate.

If you pull Section 5 out of the mix of what the Commission does, I think you begin to ask profound questions about whether the institution ought to exist at all. So that if Section 5 is meaningless and simply an anachronism in some sense, I think that ought to dictate a basic rethink of what we're doing.

I want to simply offer five questions that I think are implicit in the agenda, but are quite important to think about -- next steps for a mechanism that, again, was put in place now nearly 100 years ago.

First is, how much room is there for Section 5 to contribute usefully to the development of competition policy principles? And to step back again 30 years ago to the time when Neil and I, Bob Lande and others in the planning office that Jack Kirkwood had at the FTC, spent a great deal of time thinking about these things, there was a prevailing hypothesis about Section 5 of the FTC Act.

In many respects, it was a hypothesis developed by Phil Areeda, who, just about this time in 1979, did a workshop internally at the FTC. My notes of that event recall Areeda going through the following view about Section 5. The initial assumption in 1914 was that the Sherman and Clayton Acts, owing to prevailing judicial interpretations at the time, might be inflexible and frozen in time. That they would not be adaptable and, as a consequence, would tend not to cover or address a wide variety of commercial phenomena that competition policy litigation ought to address. Thus Section 5 was deliberately created to have an extraordinary possibility for elastic adaptation and adjustment.

So, if you had frozen in time narrow conceptions of competition law embodied in the Sherman Act, the Clayton Act and their interpretations -- well, the Sherman Act at that time, the Clayton Act having more elasticity to it -- then there's a role for Section 5. If it's going to add something to the existing mix, it's going to add something because the other elements of competition policy were seen to be narrow.

But Areeda's view was that, certainly since Alcoa in 1945, the history of modern antitrust jurisprudence had been extremely elastic. That is, the Sherman Act had grown, expanded, and Areeda's basic point was rather than being comparatively non-adaptable and relatively rigid, the courts had been willing to apply the Sherman Act in a way that picked up just about anything you would want a competition policy system to pick up.

And you recall Areeda's writings in the 1970s, partly with Don Turner, but certainly expansively on his own. This is the time in which Phil was saying that a no-fault conception of monopolization was available under Section 2 of the Sherman Act, and thus to the extent that Section 5 was being offered as an instrument to back away from conduct-based prohibitions and simply to focus on persistent durable monopoly power not explainable by efficiencies, the Sherman Act got that, too.

Areeda's conclusion at this time, which I think enjoyed a great deal of support, partly through Areeda's students and through the body of scholarship in the field, was that Section 5, though intended to be the expansion joint in the antitrust system, simply wasn't necessary. And by reason of this post-Alcoa elaboration and expansion of Section 2, Section 5 really had become somewhat of an anachronism.

A reason to rethink all this, I believe, is what's been happening in the Supreme Court in the past 30 years and, in particular, what I would emphasize to be a great suspicion of private rights of action as developed in the United States. I'm not going to suggest to you or argue that the Court's interpretation of private rights is necessarily correct as an empirical matter, but I don't think I'll have a hard time convincing you that when you look at one modern Supreme Court decision after another that's been serving to shrink the zone of enforcement -- to impose more demanding evidentiary and liability standards -- in many respects that's been happening because the Court fears that private rights of action are excessive and, in some respects, dangerous.

So, you see a recurring refrain in modern Supreme Court cases that basically says, private rights, dangerous, we're going to raise the liability bar, we're going to use screening techniques, antitrust injury. And what is also quite interesting, I think, is that the same Phil Areeda and Don Turner who were writing about the perhaps anachronistic quality of Section 5 in the 1970s, were laying down doctrines that would promote the suspicion of private rights of action.

It's 30 years ago this year that the first volumes of the Antitrust Law treatise came out. The first volume, I believe, lays out Areeda and Turner's views, for example, that private rights of action and treble damages have to be treated with the same care that one would apply the imposition of criminal sanctions under a Sherman Act Section 2 case. So that when you put criminal sanctions and treble damages on the same plane, you're basically arguing about an extremely cautious approach to the application of private rights.

If the antitrust universe, as Areeda was saying, was expanding greatly in the big bang that happens in Alcoa and afterwards, and if you accept the view that it's been contracting dramatically over the past 30 years, perhaps also as a result, in many ways, of Areeda's own scholarship, is there a point in which it contracts so much that the elastic quality that Section 5 has becomes important, especially if Section 5 actions can truly be insulated from having collateral effects in private cases, be they state- or Federal-based cases?

So, the question of whether Section 5 is unimportant, anachronistic, I think, comes back into full view now if you accept my hypothesis that the system is shrinking dramatically. It's the fear of private rights, it's the fear of collateral consequences, that's been propelling that process. Is it propelled to a point -- has the shrinking and collapse of the system gone so far -- that it's necessary now to rethink having a mechanism that's detached from private right implications through which an administrative body can elaborate and articulate principles without the overhang of the private suits? We have several people in this room today that will be on the panel who will talk about exactly that point.

The second thing I think we have to think about, in thinking about where do we go ahead, is to say, well, how well have we done in the past? And here is an exercise for you to perform. There's a famous episode where God turns to Abraham, God is thinking about a fairly serious step to be taken and says, I won't do this fairly dramatic thing I'm thinking of doing if you can bring me ten good people, I won't do it. But I need ten. And as we know the end of the story, it was impossible to come up with ten and the fairly terrible thing happened, the destruction of two fabled cities.

What would our ten best accomplishments over 94 years be here? What would our ten distinctive accomplishments, good or bad, be in this instance? I suggest to you that's a tough list to come up with. Litigated disputes. Or pick settlements, I think there are some there. The Xerox settlement in the mid '70s is arguably one. Some of the patent and IP-related matters over the past decade or so arguably belong on the list. But if you look at litigated disputes, not settlements -- I sort of regard settlements as kind of like being the pre-season games in some way, where the real strength of schedule and test come when you're in the court because those are the ones that last.

In litigated disputes, name your best ten, and then ask which of those have durable shelf-life power? What are the enduring good contributions that have come from the litigation of this process? For myself, who, again, thinks that this is a necessary and useful component of competition policy, that's a sobering exercise -- to come up with the ten good ones or the ten distinctive ones.

And my basic argument would be, if you can't do better than one a decade, it forces you to ask, why has that been the case? And further to ask, why are future outcomes going to be better? I think there's some good answers to this, but if the track record -- and I look back to the years in the late '70s when a prodigious amount of great talent came to the Federal Trade Commission, where you had extraordinarily good talent come, 1979 being a very good year, as I've told my colleagues in particular. But a period in which you had very thoughtful people doing this, working on extremely ambitious and difficult cases, many of which in the courts fell right on their face, I think one has to ask, why is the story going to be better now?

And I don't think I have to twist your hearts too much to say that the judicial perspective regarding the acceptability of this point of view might be more suspicious than it was in the late '70s and early 1980s. Why is it going to get better?

In looking at the litigation process, a related point is, is the elasticity really a mirage, over which the Federal Trade Commission, going through the desert, over the dunes, sees the glimpse of blue and the palm trees in the distance, says, ah, Section 5, but it simply evanesces in the hot sun and there's just another sand dune to be crawled over. In theory, that wasn't supposed to be so. You had the expert administrative body whose job it was -- because the Commissioners were all experts and, of course, they are. They're giants. Particularly in the modern era, particularly right now, no question about that.

But over time you would have an expert body with a tremendous amount of resources to draw on that would formulate principles, that the FTC truly, with the combination of administrative litigation, plus Section 5, plus the Bureau of Economics, plus Section 6, would become the nation's trade regulation court. That's where the formulation of concepts and principles would take place. The norms developed in those cases would be widely influential and it would be the rare Court of Appeals -- because things were done so well, so expertly -- that would second guess that, except in extraordinary circumstances. That's Section 5 in theory.

What's Section 5 in practice been? I look back again to the period beginning in roughly 1972, '73, going forward about a decade to '82, '83, '84. To look at the outcome of the matters where the FTC went to Courts of Appeals and said, no fuzz on the picture, no ambiguity about what we're doing. We're going in here and saying we're going to premise the finding of liability on Section 5 itself, we're not relying on Section 2 or Section 1 concepts. Here it is for you, teed up in a clear and pristine way, yes or no based on our judgment. Every one of those cases in that era failed.

Official Airlines Guides. Who was the author of that opinion? That was Bob Pitofsky. We had the top of the order, the future hall of fame member of the Federal Trade Commission, writing a very thoughtful opinion. And the Second Circuit, not a panel predisposed to dislike the FTC, not a judge who wrote the opinion predisposed to oppose the FTC, buried it.

Likewise in Ethyl, again a thoughtful intelligent case, where you could imagine if Section 5 in theory was going to work, the court would say, I'm going to call that a strike. That's what I'm supposed to do.

Now, yes, Ethyl and OAG both say, oh, we're not saying it's an empty set. Here are the conditions, here are the criteria. You fulfill these criteria and conditions and, of course, we'll find liability. I think the deeper and more profound question to ask is, is that just a mirage? Is that an unattainable possibility? Where just like Tantalus, the FTC will reach up to get those grapes, it will drop down to try and drink the water, but in neither instance will it be able to capture what is said to be a real possibility.

I can't accept a likelihood that it is a mirage, and I can't escape my own history in working on these things. But I think back and look at the old folders from the '70s and the early '80s when, oh, yes, I worked on some of these things, where we thought we had the good line-up in place and, ultimately, how much deference did we get on these issues? Not a whole lot. And, again, the question is, why will this be better today? Are we going to say, oh, the judicial setting is much more favorable? The courts are more inclined today to support intervention. They'll be much more willing to accept the notion of administrative decision-making and discretion in this area. You know as well as I do that's a doubtful proposition.

What are the political constraints? What happens when we've tried to do this? I'm not suggesting there's an inevitability to this, but when you look back at our history, when we've tried to stretch the frontiers outward, there have been some striking instances of political retaliation of the harshest type.

In Cement Institute, which was the result of decades of effort to work with the phenomenon of signaling tacit collusion, base point pricing, the FTC found liability, got to the Supreme Court, and received from the Supreme Court deference for exactly the kind of reasons that Section 5 in theory would say ought to be the case. Where the Court said, the Commission did its homework here. It spent decades through studies, through research, through litigation, administrative litigation -- good job! We respect that and uphold it.

The Congress of the United States passed a statute, vetoed by Harry Truman, that would have repudiated the principle that the FTC established.

And in hearings, at the same time, Congress brought up those five Commissioners and said, we want your assurances you're never going to do this again. You're not going to outrun Section 1 of the Sherman Act in applying these concepts. And the FTC sat there and said, you understand us correctly, that's right. A bit of testimony that was flung back in the Commission's face in Ninth Circuit decision in Boise Cascade in the late 1970s.

And the first assignment I had at the FTC when I came in 1979 was to prepare for hearings where Congress was seeking to take away the FTC's authority to order the relief that was considered in Kellogg and Exxon. They didn't do that, but it was a fairly pointed shot at the Federal Trade Commission. And, indeed, on the morning of the elections in the 1980s, Walter Mondale goes to Battle Creek, Michigan, the day before, and he says, citizens of Battle Creek and your little cereal company here, citizens of Battle Creek, if you reelect the President and myself, the Federal Trade Commission will never be permitted to proceed with that lawsuit involving your company. Reported on the front page of the Washington Post. I just about spit out my cornflakes that morning in getting ready.

(Laughter.)

Notice all of this happens before Ronald Reagan comes to Washington, doesn't it? The mob that was surrounding our building and right down to the White House were saying, stop it. Powerful Democratic majorities in both chambers and Democrats in the White House. And one might think, oh, they love us now. We're much better off. I can't capture for you the deep love that they had for us in the mid 1970s. Love in the form of more money, love in the form of greater statutory authority.

A gloomy view of this is that, in some ways, Congress has said, go on, push the frontiers. The frontiers are pushed, the political backlash occurs, and they say, whoever told you to push the frontiers out there? Why did you do this? It becomes a natural circulation device that becomes quite attractive in a city in which lobbying is part of the very life blood of what goes on here. Why will this be different in the future?

And last, what's the appropriate content of Section 5? Are they basically extensions of Sherman Act and Clayton Act concepts? Do you take notions like invitations to collude and you think maybe that's an agreement within the meaning of Section 1 of the Sherman Act? No. Maybe it's attempted monopolization, maybe it's actual monopolization, maybe it's a conspiracy to monopolize, not quite.

But we're confident that the underlying principle at work there is worth further elaboration and development. Is there anything to be gained by the behavior, that is hey, would you like to collude? Probably not. Real potential harms? Yes. You extend the principle embodied in the laws to capture that.

Second is the other possibility, that

extensions have to be based on demonstrable effects. Is this the message of Ethyl in particular? You show us actual or highly likely adverse effects, we'll support the application. But by the way, because we are skeptical of this mechanism, we want the broomstick of the Wicked Witch of the West. We want really powerful proof before we do this. Is that the gloomier message of a case like Ethyl?

Or last, is it a matter of incorporating extrinsic norms? That is, cases like S&H, are they really meaning to say if you find a principle, a concept, a norm embedded in a collateral body of law, contract, tort, unfair competition, another body of economic regulation, we permit and endorse your effort to basically incorporate that and say that's a basis for a Section 5 case?

One of my predecessors named Mike Pertschuk, in the fall of 1977, gave a speech in which he laid out what that might mean. And the bare terms of S&H arguably incorporate that, in which he said, what happens if other Federal regulatory bodies aren't doing a good job of enforcing their laws? Suppose the company is gaining a great advantage in its commercial operations because it is not abiding by Clean Air and Clean Water Act commands? It gets a big cost advantage and, as a consequence, is able to compete for customers on a basis other than the merits. Might the FTC, in this and other areas, sweep behind the EPA to say that's an unfair method of competition because you're not playing by rules?

And the uproar after the speech was, well, Chairman Mike, where does this end? Is the FTC going to be the enforcement backstop for every economic command in the country that affects the cost and operations of individual firms? To the extent that S&H is saying go and look for collateral norms, import them into the Act, what are the appropriate boundaries? Which are the extrinsic norms that would be incorporated?

So, if we ask, is Section 5 a useful thing, I think in part it has to be. If it's not, if the answer is no, then you have to ask basic questions about why this institution exists. So, this is not an idle exercise by any means.

To foreshadow my own interests and my own answer here, I think the answer is yes, there's a valuable role. There's powerful conceptual attractions and I think some useful applications. But the discussion about this cannot take place, I think, without a careful and deliberate effort to ask why things haven't gone better in the past. Those are the problems of implementation, the distance between theory and practice.

When I look back to my time 30 years ago and I think of the great enthusiasm and capabilities that were brought to bear on this issue, I hesitate to think that things will necessarily be better because the folks are so much smarter there now than they were before. That was a pretty good team that was playing on the field before. Is the strengths of schedule inherently too great, is this an area in which the Commission can work well? I think we have the program assembled today to answer these questions in a very useful way and point us in the direction of getting some better thinking on this.

I'd like to turn things back to Neil who will bring together our historians to look at the most distant past. Neil?

(Applause.)

PANEL 1: THE HISTORY OF SECTION 5

MR. AVERITT: Thank you very much, Bill.

The gauntlet has clearly been laid down here, and the task before this workshop and before the agency in the years ahead is clear enough. It's to find a way to balance appropriate types of action on the one hand and, at the same time, prudent avoidance of the risks that have manifested themselves in the past. And the question will be, how do we walk that line?

As a start on that question, let me welcome you now to the history panel. In this workshop we're going to follow the often reliable principle of beginning at the beginning. So, this panel is going to summarize a hundred years worth of legislative history and Section 5 case law beginning around the year 1910.

Our format is going to be somewhat different from that followed by later panels in the day. Many of those are going to be following a conversational format with a give and take among the speakers that's intended to come to grips with some of the difficult issues. Before we do that, though, we thought it would be useful to lay out certain facts -- to put them en masse on the table so that we'll all have sort of a common culture, a common basis of knowledge to bring to the discussions later in the day. We're therefore going to use longer presentations and we'll have a discussion period at the end, but that will be somewhat shorter than others.

To make all of that happen we have two excellent speakers here. The first is Marc Winerman, FTC lawyer and scholar extraordinaire. Marc has written extensively on the legislative history of the FTC Act and on the political climate surrounding its passage. He will recount events from the beginning up through the Supreme Court's decision in S&H, which marked, in a sense, the judicial high water mark of FTC Act enforcement.

Then at that point, the baton will pass to Steve Calkins, who will carry the narrative from S&H up to the present day. Steve, you will know, is a Professor of Law at Wayne State, a former FTC General Counsel, and a memorable teller of stories, many of them actually true.

Before Marc begins, let me gave a disclaimer on his behalf and mine and on the behalf of any other member of the FTC staff who is up at the podium later today. Nothing that any of us says will reflect the views necessarily of the Federal Trade Commission or of any individual Commissioner. We are all speaking on our own behalf and expressing our own views.

With that, Marc, take us away.

MR. WINERMAN: Thank you. First, the standard disclaimer remains very much the case. Notwithstanding, I would like to thank Bill for the opportunity to pursue my historical studies and for the discussions we've had over the years. In 20 minutes, I'm first going to try to give you some of the legal, economic and political context of the Federal Trade Commission Act and then look to the Senate debate over the Act, the most important part of the legislative history, from the perspective of five participating senators.

Lots more details about these points can be found in my article on the FTC's origins, available in the Antitrust Law Journal and at the FTC's history web page.

Then I'm going to zap through 58 years of developments of unfair method of competition law, raising more questions than providing answers.

Legal and economic background. The Sherman Act was passed in 1890. But I didn't stop a huge merger wave at the turn of the century, where as many as 42 firms would merge simultaneously into one. This was the merger wave to monopoly, unlike a later merger wave to oligopoly in the 1920s. And the fact that there were mergers to monopoly at this period probably informs some of the thoughts of the participants in the FTC Act debate.

In 1904, Theodore Roosevelt's prosecution of Northern Securities led to a decision that may have helped to stop the merger wave. But the Court's decision, though it held the merger before it unlawful, showed a battle of extremes that left antitrust law unsettled. After all, four justices thought the Act didn't reach mergers at all and four seemed to indicate that horizontal mergers among competitors were per se illegal.

Seven years after that, in 1911, the Court ruled that Standard Oil had violated the Sherman Act and ordered the oil giant dissolved. But the specifics of the dissolution remedy and the Court's announcement of the rule of reason led a three-time Democratic presidential nominee, William Jennings Bryan, to declare. "The trusts have won." The stage was set. Antitrust became the central issue in the 1912 campaign.

The candidates in the campaign included one former President, one sitting President, and a future President. Theodore Roosevelt was the former President. He became President in 1901. In 1908, in deference to what was then a two-term tradition, he stepped aside. He handpicked William Howard Taft to run in his stead. But by 1912, in part angered by Taft's decision to prosecute U.S. Steel on antitrust grounds, Roosevelt challenged Taft in the Republican primaries, and when he failed, launched a third party campaign.

Despite his reputation, Theodore Roosevelt was an antitrust skeptic. As Jim May notes in Antitrust in the Formative Era, goals such as efficiency and the preservation of small businesses were initially seen as fully compatible. For many, this confidence remained fully intact in 1914. But for Roosevelt, antitrust was anti-big business and, in many industries, anti-efficiency. Roosevelt didn't want to break up big firms, he wanted to keep them honest. To that end, he sought a Bureau of Corporations in 1903 and the Bureau, after Congress created it, soon wrote that antitrust laws should essentially be displaced by laws using an interesting term: "unfair competition."

In 1911, Theodore Roosevelt was one of the two candidates who thought Standard Oil's dissolution was a mistake. He wouldn't break up large firms; he would place them under temporary receivership and made them honest.

This would be done through an agency like the Federal Trade Commission with the power to review mergers and even agreements in advance. Note that the sort of ideas he had in mind anticipated the Hart-Scott-Rodino Act by decades. This was a centerpiece of his plan.

William Howard Taft, was Roosevelt's successor. He was a lawyer at heart. He was a former federal Circuit Court Judge, a future Chief Justice. He thought the solution to the trust problem was already in place --

the Sherman Act enforced by the courts. Taft confused people. He defended Standard Oil; he had actually appointed most of the Justices who decided it. But he also brought an aggressive antitrust enforcement program, particularly in the 22 months remaining in his term following the Standard Oil decision.

So, those are two of the candidates. Roosevelt, by the way, would come in second with 27 percent of the vote in 1912; Taft would come in third with 23 percent. With them splitting the Republican vote, the door would be open to Woodrow Wilson.

Wilson had been a leading political scientist, a student of British politics who admired the parliamentary model, with its ties of the executive to the legislature. The implications for antitrust? Theodore Roosevelt saw a Commission as the key institution for developing antitrust. Taft saw the courts in that role. Wilson wanted the legislature, working with the executive, to pass precise laws and to provide strict penalties -- penalties directed to leaders of corporations, not simply the firms.

Consistent with his general model of how the government should operate, Wilson was the first President who put forth a legislative program and worked with Congress to implement it. For the antitrust part of his program, he thought his task would be easy. Congress could easily define antitrust violations and then impose civil and criminal liability on corporate leaders. Like Roosevelt, Wilson thought it was unnecessary to dissolve firms like Standard Oil. He thought the Standard Oil decree was a mistake. But unlike TR, he thought that once firms like Standard Oil were stopped from acting dishonestly, their smaller competitors would easily triumph and cut back on the market share of the Standard Oils.

All three candidates focused on process, on who would develop antitrust standards. To varying degrees, each expressed an economic vision, but there was relatively little on specific standards.

The post election context. 1912 was a big year for the Democrats, a party generally on the ropes since the Civil War. Democrats took the House in 1910. They added the Senate and White House in 1912. Wilson immediately began focusing on future elections, including the 1914 midterms. He wanted to show that Democrats could govern and he sought broad, unprecedented legislative initiatives. He obtained tariff reform, he added banking reform, and then, in January 1914, he turned to antitrust.

At first, consistent with his ideas, his focus was on the Clayton Bill, which had strict definitions and harsh penalties. As for a commission, he proposed only modest changes to the Bureau of Corporations. The commission would remain an investigatory agency after the Bureau had merged into it, or morphed into it. Basically the only difference was that it would become an independent agency with five Commissioners rather than an executive agency with one.

What happened? The Clayton Bill bogs down. Even smaller companies get nervous about laws that are going to make price cutting potentially criminal behavior. In May, a desperate Wilson embraces Section 5 as the House is finishing up its debates on antitrust and the ball is about to be passed to the Senate.

Wilson's intent, apparently, is to eliminate all substantive provisions from the Clayton Act. The switch takes place in a meeting with Wilson's advisor, Louis Brandeis, and Brandeis's friend, George Rublee. Rublee would soon be writing floor speeches from offstage -- essentially writing key floor speeches of all of the Democrats who support the legislation.

Now, please understand, not all Democrats are excited about the FTC bill. In fact, many of them from agrarian states hate the idea and see it as a cop-out. Harry Lane of Oregon, for example, attacked the bill's "indirection and lack of virility" and he, asked as he contemplated voting for it, "God have mercy on our souls."

The majority of the Democrats did back the bill, though, and I'll focus on three of them; Francis Newlands, Chairman of the Commerce Committee, Joseph Robinson, later of Robinson-Patman fame, and Henry Hollis, a one-term senator from New Hampshire. Newlands was a big fan of a commission, probably even of a Roosevelt-style commission, even though he was constrained from focusing on that in 1914. He made it clear that he personally preferred to take all antitrust enforcement away from the Justice Department and give it to the FTC.

His confidence reposed in the agency itself and its ability to interpret a standard that Newlands had trouble articulating. His remarks are full of general references to good morals and unfair advantage. After others developed the points, he did add legal and economic significance to his litany. He offered a laundry list of practices tied into previous Section 2 complaints, like cutting prices with a view of injuring and destroying the business of a competitor, as well as, tying practices, commercial espionage, and bribery of employees. And he made clear that the thrust of the FTC was to go beyond existing interpretation of the Sherman

Act and, in his words, “destroy monopoly in the embryo.”

Joe Robinson I’ll just mention briefly. He declared that efficiency is generally regarded as the fundamental principle of fair competition. Oppression or some advantage obtained by deception or some questionable means is a distinguishing characteristic of unfair competition.

Henry Hollis also spoke of efficiency. In fact, he spoke of “productive efficiency.” He declared, as well, that the aim of the new law was to nip practices in the bud. The Sherman Act doesn’t become effective until a monopoly is fully grown. The FTC could stop unfair competition earlier. Indeed, he offered an unusually explicit rejection of a market power screen. Under the Sherman Act, there may be some doubt as to whether the mere use of an unfair method without more by a corporation of no conspicuous size would be held to fall within the scope of the Sherman Act.

The FTC Act wouldn’t raise such concerns, although his standard raises questions about how the commission might handle practices that might advance competition when engaged in by a small firm but were problematic when engaged in by a firm with sufficient market power. Finally, Hollis observed that unfair competition would develop by looking at existing law in a process of common law development.

Albert Cummins. Now, Albert Cummins is perhaps the most interesting of the senators I'll discuss. Wilson wanted a Democratic program without help from Republicans, but Cummins of Iowa, former Chairman of the Commerce committee, wouldn't be stopped. The FTC Act became a bipartisan bill despite Wilson's best efforts.

In 1914 and earlier, Cummins sought legislation that would, among other things, ban stock ownership by corporations. He proposed laws to challenge size, albeit with a relatively sophisticated approach that didn't proscribe specific market shares, but rather proscribed firms so large that they impeded substantially competitive conditions. He advocated a tax on firms with more than a 25 percent national market share, declaring that this would stop "the accumulation of so much dishonest wealth."

In 1914, he begins by making clear that his views aren't the same as Newlands'. He rejects morality as a guide, noting that most countries allow the very practices the Sherman Act proscribed, so how could they be immoral? He focuses on economic concepts. He calls unfair competition "that competition which is resorted to for the purpose of destroying competition or of limiting a competitor of introducing a monopoly. There's no unfair competition that's consistent with the endurance of any competition."

The FTC Act would go beyond the Sherman Act and strengthen the antitrust law, gathering up the lesser incidences which the antitrust law cannot. It would reach and prevent the beginning of the attempt to monopolize, the beginning of the insidious effort toward restraint of trade and commerce.

Also, it would cover consumer protection, though the specifics here are a little bit confusing. Section 5 is prohibition or unfair method of competition would apply if a soap manufacturer used a name similar to its competitors, confusing consumers. That would harm the public as well as the competitor, Cummins explained, since the consumer -- even if he got a better good at a cheaper price -- didn't get what he wanted. But then Cummins explained that was no public injury and no Section 5 violation if a railroad misrepresented a competitor's facilities.

Further, his view of Section 5 was, in one sense, narrow. He didn't think it reached practices like interlocking directorates or corporate stock ownership. That's not "unfair competition," he said, but the suppression of competition. He wanted the commission to deal with it, but not under Section 5. He introduced other legislation to do that.

One last point for Cummins. According to Cummins, size means power. It could confer the power to suppress real substantial competition. He proposed, in 1914, the law I mentioned before, to limit size. And he also introduced the notion of size when he talked about the FTC and Section 5.

According to Cummins, unfair competition depends on one's economic and sociological view of society. He had earlier, in a 1911 discussion, described the "sociological view," the desirability of having "as many men as possible as their own masters building up and maintaining the manhood and character necessary to sustain a nation like ours." In 1914, he noted that "we can purchase cheapness at too high a price if it involves the surrender of the individual, the subjugation of a great mass of people to a single mastermind." On the other hand, he said in 1914 that unfair competition doesn't require consideration of such broad sociological industrial conditions as are necessary to determining restraints of trade.

So, although he has more sophisticated notions than Newlands, Cummins certainly opens the door to more than efficiency in his comments.

The early years of the FTC Act. The Act passes in September 1914. The Commission opens its doors the following March. I would like to segue back now to Hollis' idea that a common law process of development would be involved in the FTC Act. The process begins here.

Let's look at some early Commission cases, all brought as unfair methods of competition cases. Our first docket is a misrepresentation case. Our first sweep, commercial bribery. Other early cases, challenging the sale of adulterated meat to the Army, that one wasn't successful. Challenging sales of bread, buy one get one free; not successful either. Challenging the use of lotteries; that's a series of cases the Commission brings into the 1960s, that basing a price on an element of chance was an unfair practice.

All of these are challenged as unfair methods of competition. A potentially significant limitation emerged in Raladam in 1930, a Supreme Court case that said you needed to show harm to a competitor or competition generally as part of an unfair method of competition case. Keppel, though, in 1934, seemed to contradict or at least take back much of Raladam. That was a case involving gambling and the sale of candy for children. The practice was a problem, the Court said, because it forced competitors to match lower standards in order to compete.

Well, with any questions remaining about whether unfair methods of competition went beyond antitrust, the Congress in 1938 adds unfair or deceptive acts or practice jurisdiction to our Section 5 arsenal; this is done in the Wheeler-Lea Act. And, subsequently, most Commission cases, with some exceptions, are pled as both unfair methods of competition and unfair and deceptive acts or practices. Often, findings are based on one or the other, but the pleadings routinely include all of them and they often include "ands" rather than "ors."

The Cigarette Rulemaking in 1964 is the next point I would like to focus on, as a prelude to S&H. This is a statement justifying the FTC's Cigarette Rule. (The rule never went into effect, but prompted legislation.) The statement of basis and purpose was drafted by a young Richard Posner in 1964. After describing Keppel and Wheeler-Lea, the statement observed in a footnote that a practice would be both an unfair method of competition as well as an unfair practice if it both exploits competitors (not competition) unfairly, and injures consumers. It then set up a three-part test for unfair acts or practices, which was its main focus: offends public policy, immorality, and harm to consumers.

Now, I'm going to jump ahead eight years to S&H. S&H sold Green Stamps, which merchants distributed to consumers with their purchases. S&H acted to stop stamp exchanges, which allowed trading of one stamp for another or selling your stamps, and which undermined the uniqueness of green stamps. The appeal's court found that there was no violation of either "the letter or the spirit of the antitrust laws." And the Supreme Court and the Commission seemed to take that as a challenge. The Commission's brief and the Court's decision take as a given that that finding was correct but conclude that, even assuming that, S&H may have violated Section 5.

But there's some ambiguity in how the conduct violated Section 5. The Court goes through the history of Raladam, Keppel, the Wheeler-Lea Act, the cigarette statement, quoting the statement's three factors. It quotes the unfair act or practice standard to show them that an act or practice could be unfair (and they just use the word "unfair," without unfair methods of competition or unfair acts) if it was neither an antitrust violation nor deceptive.

Since S&H quoted the cigarette statement, there's some suggestion, at least, that the Court was specifically focusing on unfair acts or practices, but then it pivots back. In remanding the case to the

Commission, it asks whether the challenged practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless either unfair methods of competition or unfair or deceptive acts or practices.

It also observed that there was no indication in the Commission's decision that S&H's conduct was unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws, again the focus being on competitors. So, the statement seems to embrace earlier antitrust law and open the possibility to all of the interpretations that the Chairman suggested in his remarks.

So, what do we make of the assertions in this 34-year-old case, and particularly of the assertion that unfair methods of competition need not fall within either the letter or the spirit of the antitrust law? Might a court still view lotteries or some modern equivalent to be unfair methods of competition, without reference to antitrust principles? Also, what's the relevance of the fact that we're looking at a common law process of the sort that Hollis observed? What's the relevance of subsequent antitrust jurisprudence, such as the Supreme Court's embrace of antitrust injury five years after S&H in Brunswick Corporation v. Pueblo Bowl-O-Mat? What's the significance of the courts giving teeth to the notion that antitrust competition protects competition and not competitors? Does unfair methods of competition still protect competitors independently of protecting competition?

Also, when S&H focused on Keppel, it noted that Keppel had, in turn, focused on public policy as a basis for finding unfair methods of competition. On that score, what's the relevance of subsequent development of the unfairness test? What's the relevance specifically of the 1994 codification of consumer unfairness that expressly elevated consumer injury to the fore and relegated public policy to the background.

So, with that, I leave you with a brief summary of the history of the FTC Act and far more questions than answers. Thank you.

MR. CALKINS: Okay, Neil, depending upon which of the clocks you use, we have about ten minutes left. What do you want me to do? How long do you want me to take?

MR. AVERITT: Why don't you take your 20 minutes.

MR. CALKINS: All right, now we're talking.

MR. AVERITT: But no more.

MR. CALKINS: No more, okay.

MR. AVERITT: We'll keep the discussion somewhat shorter than otherwise.

MR. CALKINS: All right, 20 minutes it is then. There you go.

I get the great pleasure of picking up where Marc left off, covering 1972 to the present. That has the advantage that I lived through a lot of it, so I just have to search my fertile memory about what I did or saw or read or something. It has the disadvantage that an awful lot of people in this room actually know what happened, worked on these matters and will surely correct me when I get things wrong. And I just want to remind you that I only have 20 minutes to cover this time period, so be gentle with me. You know, I'll make a couple of mistakes. We'll do the best we can.

It's an exciting time period. We're going to go quickly. I have the disadvantage that I was told emphatically that PowerPoint was not going to be provided. I now see that some folks like our Chairman are powerful, and others are just academics who come wandering in.

(Laughter.)

MR. CALKINS: All right, let's get started covering this period. I'm going to divide it up into five different eras. These are all sort of arbitrary. Mine are ‘72 to ‘80, ‘80 to ’89, ‘89 to 2000, 2001 to ‘05, and 2006 to the present.

So, let me get started. I’m supposed to start with 1972. I don’t think that’s really weird. That first era begins -- I think it begins back in 1969, just to take you back in time as Chairman Kovacic is so apt to do. This was when we had the Neal Report coming down and we had serious national concern about concentration and the problem of oligopoly and President Nixon was coming in to have a new, bright day for antitrust and doing something about these big problems.

Then we had the Kirkpatrick Report coming along, by the ABA and a major leader of the bar, which slammed the FTC, because why? In recent years, FTC enforcement, with few exceptions, had been limited to enforcement of the Robinson-Patman Act. Some investigations and proceedings concerning antitrust problems in connection with vertical distribution arrangements, and studies reports and guidelines, and some formal challenges of mergers. But one ought to get off of this Robinson-Patman kick and do something that makes a difference. And that’s what the FTC set out to do.

Under a series of Republican Chairmen, Kirkpatrick and then Engman and then Collier and, yes, one Democrat, Mike Pertschuk, the Federal Trade Commission set out to make a difference and address what had been identified as the important national issues of the day. Go through that period and just let me rattle off the complaints. This would work well with PowerPoint, but you just visualize it.

1972, Kellogg, the shared monopoly complaint. 1973, the Xerox complaint and the big Exxon Oil Company complaint. 1974, Boise Cascade delivered prices innovative case, and the Brunswick joint venture complaint. 1976, GM Crash Parts trying to fix the problems Tom Leary was causing in Detroit. 1976 was also Reuben Donnelly, the Airline Guide case, Perpetual Federal Savings -- going beyond Section 8, using a Section 5 complaint -- and the General Foods predatory pricing complaint.

1978, we had General Motors promotional allowances, and the Lockheed consent order wherewith the FTC was going after foreign corrupt payments under Section 5 of the FTC Act. 1979 was the Ethyl Du Pont famous complaint. 1980 was Russell Stover as the FTC decided to solve the problem of Colgate. An incredible line-up of ambitious attempts to do something important.

This was not, however, really about Section 5. This was about trying to do something that mattered. In the words of one of the many Directors of the Bureau of Competition, Jim Halverson, quote, “Whatever happened to the little old lady of Pennsylvania Avenue?” And the answer is that it was now doing something that made a difference.

On the other hand, there were storm clouds during this same time period. 1977 was the GE/Sylvania case which has been identified correctly as such a landmark in antitrust development. 1979, the FTC lost in the Supreme Court a Robinson-Patman case, a vote of six to one with one concurrence.

Then 1977, as Chairman Kovacic identified, was when Chairman Pertschuk delivered that famous New England speech which has been quoted so many times, where he said that, quote, “Although efficiency considerations are important, they alone should not dictate competition policy. Competition policy must sometimes choose between greater efficiency and other social objectives such as dispersal of power which may result in marginally higher prices. In 1977, no responsive competition policy can neglect the social and environmental harms produced as unwelcome byproducts of the marketplace. Resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands.”

That's a famous quote that many people cite. And I was assuming it must have been taken out of context. So, I worked very hard to find the original speech and the answer is, it was not taken out of context. Shortly before that, Chairman Pertschuk said, quote, "Competition policy cannot make every person a company president, but it can help assure that there will be enough presidencies to aspire to so that the system will not be stifled by a pervasive feeling that there is no room at the top. And below the top, competition policy can help assure that the worker has a choice of employers to deal with in a workplace of human scale." This was a vision that held the Federal Trade Commission up to a certain amount of criticism.

And then, of course, in March of 1978 we had the very infamous Washington Post "National Nanny" editorial and the handwriting was on the wall, leading up to 1980.

1980, Ronald Reagan was elected President and there was a transition report written in significant part by Jim Miller and Tim Muris that slammed the Commission for the shared monopoly cases and these other efforts that had been going on. 1980 was when the Boise Cascade Court of Appeals defeat came down and the Airline Guide's defeat came down, a bad year for the FTC. We'll come back to those cases.

1980 kicked off a period, 1980 to 1989, of extraordinary retrenchment at the Commission. 1980, the Unfairness statement. 1981, the Exxon case dismissed. 1982, Kellogg dismissed; the General Motors Crash Parts case was dismissed. 1983, the Deception statement. '84, General Foods dismissed. General Motors was dismissed. We don't take the spirit of 2(d) and apply it expansively. And then the Commission just failed to file the kinds of cases it had been filing before.

Let's go talk about those losses on appeal, four of them. First, Boise Cascade, Ninth Circuit, May 1980. The Commission opinion had gone after delivered pricing in plywood and was concerned about delivered pricing using artificial freight from the northwest, even if you were from the south and things like that. But, importantly, the Commission opinion by Chairman Dixon does not suggest that things were done that were very wrong.

Quote, "The conduct challenged here evolved in a justifiable way," close quote.

And quote, "Force of habit may explain conduct and soften the attitude of society toward the actor, but force of habit cannot provide a defense for conduct which loses commercial justification and produces anticompetitive results," close quote.

You get up to the Court of Appeals and what does the Court of Appeals say? The Court of appeals says that what we have here is a total failure of proof. There's little evidence, no expert testimony was introduced. There were no unhappy buyers testifying. And said the Court of Appeals, quote, "In this setting at least, where the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry, and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a Section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior." And the court was not going to blur that distinction.

Airline Guide's case. Bob Pitofsky's opinion, you can go back and you read that, and I -- well, let's just tell you what it said. It condemned Donnelly for how it listed flights in the airline guide, but the opinion specifically said that these acts, quote, "Were not intended to benefit Donnelly in that market," close quote.

What we had here was the commission finding a duty on a monopolist not to be arbitrary. And, although the case was brought under Section 5, Pitofsky wrote, quote, "We see no persuasive reason why a similar duty would not arise under the Sherman Act," close quote. This was a rather sweeping finding of a duty on a monopolist not to be arbitrary, the test sometimes phrased with a few caveats in there, but it invited what you can expect to see when you use language like this, I think, back to the "quick look" problem in Cal Dental.

The Commission found the duty not to be arbitrary. And what does the Court of Appeals do? The Court of Appeals concludes that this was a case where the FTC had been arbitrary itself and it was not going to be allowed to go forward and to do that. We don't have time to go into it in detail, but it was basically saying that this was a kind of grabbing of power, and a thrust that the Court was not going to allow.

Russell Stover -- Colgate lives! We'll go on to Du Pont Ethyl. This was the serious attempt to use Section 5. This was the case that really said Section 5 is different. There's no private litigation. We can address things under Section 5 that we couldn't under Section 1. Addressed a series of facilitating practices, including advanced notice of price changes, press releases, uniform delivered prices, most favored nations clauses, and so on and so forth, but there was a powerful dissent by Jim Miller. When it gets up to the Second Circuit, it does not succeed.

What was missing? Answer, once again, the Court of Appeals said there was a complete failure of proof. Quote, “In short, we do not find substantial evidence in this record as a whole that the challenged practices significantly lessened competition in the anti-knock industry or that the elimination of those practices would improve competition.”

Yes, the Court then hands down a standard about what’s going to be illegal. The Court saying that, quote, “In the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory or exclusionary conduct, business practices are not unfair in violation of Section 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.”

This is not a tough test as phrased. “Or” means “or.” So, what do you have to show? Answer, proof of a violation or collusive or coercive or predatory or exclusionary conduct or anticompetitive purpose or lack of independent business justification.

What’s really going on here? Let me just sort of string together a couple of quotes to give you a sense of what this Court of Appeals opinion is about in my judgment.

Quote, “Congress did not authorize the Commission, under Section 5, to bar any business practice found to have adverse effect on competition. Instead, the Commission could prescribe only unfair practices or methods of competition. As the Commission seeks to break new ground by enjoining otherwise legitimate practices, a line must be drawn between conduct that is anticompetitive, and legitimate conduct that has an impact on competition. Standards must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.”

What’s really going on here? We’re right back to Boise Cascade with the court saying we have to have a way to distinguish between the guilty and innocent commercial behavior. That’s what those cases are about.

During that time period -- and we’re going to have to really pick up the pace. Not to worry, we’re almost done. We’ll go fast. Not all was bad for the Commission.

Indiana Federation of Dentists, the Supreme

Court upheld an important Commission decision, in pure dictum reiterated the standard language about Section 5 as more expansive. Also, during that time period, Judge Posner, one of the best friends the agency has ever had, wrote an opinion in United Airlines against CAB, which took an expansive view of a Section-5-like standard that was being applied by the CAB and distinguished the Ethyl Du Pont case. So, there was good things going on, but, in general, that era was not good for expansionists under Section 5 at all.

That brings us up to 1989 to 2000. What do we have? We have Kirkpatrick, II, coming in there and saying, go get them, do some real things. The FTC is a less dangerous forum to explore these ideas, and listing a series of cases to be considered and that were the appropriate kinds of things for the Commission to be doing that included Du Pont Ethyl and other interesting cases.

Janet Steiger became chair in 1989.

1990, a very important year because that's when Howard Metzenbaum had a hearing and condemned the infant formula industry for outrageous pricing behavior and outrageous misuse of power and doing bad things to women and children and governments and all sorts of stuff. And the FTC was hauled up there and in a couple of different hearings and in a letter to the agency, the FTC was told emphatically, do something about infant formula, and by golly, the Commission, prodded by Congress, did.

1992, we had consent orders that pursued what we now know as the beginning of the new wave of aggressive use of Section 5, going after practices, including things such as sending out a letter to a state ahead of time saying -- well, let me quote from Bureau Director Steptoe, quote, "Where there's an advance price announcement which is made not for benefit of purchasers but rather intended simply to communicate information to competitors, there's no business justification for pre-disclosure of bidding strategies and the Ethyl standard is met." This announcing ahead of time in a letter what you're going to bid can be condemned under Section 5. So, also, there was an exchange of marketing strategies which was condemned under Section 5.

These were consent orders but were the beginning of the new wave.

Now, I have almost no time left at all, and so, I'll merely point out to you that in that new wave, we began a series of challenges to cases that you now know about, which are -- I have four minutes. We'll go casually here -- which are the invitation to collude cases, which are the facilitating practices cases, and which is the abusive standard setting.

So, going through that period what have we got? The beginning was June '92, Abbott Laboratories. 1992, Quality Trailer. '93, Clevite. YKK came down in '93, although I think it began a long time earlier. The Coca-Cola case, which people forget, was actually using Section 5 in a way, that came down in this era. Dell Computer, the very important beginning of that whole new line of cases.

1995, Precision Molding. '96, Stone Container. '98, McDermott. 2000, BMG Music, the MAP case in 2000. A series of cases. But my sense is that unlike the early days when the FTC was deliberately trying to do something big, many of these simply responded to a sense that something bad was going on. With the infant formula cases, perhaps, being the classic example. Something bad was happening and the FTC tried to do something about it and managed to do it. Unfortunately for the FTC, these were all consent orders. Indeed the one exception was the infant formula theory that did end up getting litigated and succeeded in a district court loss -- not important in the development of the law, but still a loss. So, we have a long string of cases coming along.

That's followed by a quiet period that comes along in 2001-'05, just not a lot of activity on that front.

Followed in 2006 by what? Well, by new people coming to the Commission and focusing in on these concerns in a speech and a concurrence and a couple of interesting cases that you all know about and that, frankly, are the reason why we're having this session today.

So, without more, I'm going to step down vaguely on time and thank you for your attention on this sprint through the past.

(Applause.)

MR. AVERITT: Many thanks to both of you. That history covered an immense amount of territory in a very short period of time and provides plenty of material for answering all of Chairman Kovacic's questions. Unfortunately, there are no assembly instructions included with it.

Listening to this, it sounds an awful lot like reading the history of the Roman Empire. You know, there's an immense mass of detail, and then, only vaguely discernible beneath the detail, there's sort of the ebb and flow of larger trends. And as I was listening to what you were saying I was wondering which of the larger trends should we be looking at as possibly giving us some guidance for the future, telling us something about what we should or shouldn’t try to do with Section 5.

One odd feature of the narrative is that there seem to be two independent lines of cases that are both current, that are both well established, and that look in substantially different directions, almost from two separate planets. One is a set of Supreme Court cases going back to the ‘20s or the ‘30s, extending through S&H, extending through Indiana Federation of Dentists. And those are Supreme Court cases that look back to the legislative history and they say, you know, Section 5 is intended to let the Commission have a fairly broad discretionary power to identify undesirable forms of competition.

And then there’s the second line of cases which is exemplified by the recent Circuit Court decisions that Steve Calkins was citing, that say, well, not so fast, the FTC may have discretion in principle, but there are also a series of philosophical or procedural hurdles that the Commission has to get over and those hurdles are high and difficult to such degree that the Commission will almost never succeed in surmounting them.

So, I guess a question that I would like to put to both of you is, are these two lines of cases fundamentally reconcilable? If so, on what basis? If not, how does one deal with that fact?

MR. WINERMAN: I guess I would suggest there’s a third element in here, in addition to cases. That’s the legislative developments of both 1938 and 1994. Now, 1938, Congress was very clear, when it added “unfair or deceptive acts or practice jurisdiction,” that it had no intention, at the time, of cutting back on our unfair methods of competition jurisdiction. It was attempting to supplement it. But I think by a common law process, as we now look at some 70 years of development of unfair or deceptive acts or practice law (and particularly steps along the lines of the unfairness statement), the deception statement, and then as we look at the subsequent 1994 legislation -- which, in the context of a consumer protection unfairness, de-emphasized the pure public policy prong, clearly subordinating it in consumer protection -- we do have some other features here.

I would also suggest that a useful focal point might be the language from S&H about conduct violating “neither the letter nor the spirit of the antitrust laws” and yet it’s still seeming to be an unfair method of competition. I think the reference to “the letter of the antitrust laws” remains very much intact. The reference to not violating “the spirit of the antitrust laws remains far more questionable,” particularly in light of some of the factors like the antitrust injury cases.

MR. AVERITT: Is that consistent with original legislative history?

MR. WINERMAN: I don't think it's inconsistent with the legislative history. Part of the reason for the cop-out in that answer is that the legislative history took place in a different intellectual context. I'll go back to one of Jim May's observations about Sherman Act history, which is that there are references in the Sherman Act history to both theft and notions of transferring money from consumers to producers, as well as economic efficiency. While looking through that legislative history, Jim raises questions about the fact that the goals which are now seen to be at tension, were seen to be compatible at the time. So, many of the people who were emphasizing one or the other didn't intend to de-emphasize the other.

I think that same problem arises when looking at the legislative history of the 1914 Act, that a lot of remarks were made in a specific context and it's difficult to say exactly how they would apply as contexts change.

MR. AVERITT: Steve, anything to add to that?

MR. CALKINS: Do I get to give two minutes of advice before I walk off the stage?

MR. AVERITT: Two minutes of advice are always welcome.

MR. CALKINS: All righty. The advice would be go read my article on invitations to collude which does a nice little job here and has the following advice. One, you have to adjudicate quickly because otherwise none of this is going to work. So, stick to your knitting.

Second, it's important for the Commission as a Commission to speak. One of the real unfortunate things in the infant formula cases is that there's almost nothing to cite because we didn't really end up with a lot of good Commission statements. They were consent orders without a good analysis since you don't have sort of a nice Commission statement: and, indeed, if you struggle through this area, you're stuck looking at a speech here, a concurrence there, a dissent there. There ought to be Commission statements where the Commission as a Commission steps up and tries to figure out what it means to say and to say it.

Next, it really is a shame that we had so much activity in this front without any precedent that supports any of it in terms of the period in the '90s and to date. So it really is important to find some way to litigate. I know you can't litigate against people who won't, but boy, that would be good.

The agency reputation really matters. When you want to explain why the Commission loses or wins, sometimes it has as much to do about the regard in which the agency is held as anything else. So, you can't sort of separate out the litigation part from the rest. Reputation is terribly important.

Dissents hurt. There's no question that if you're going up on appeal and there's a powerful dissent, that's a bad thing for the agency position. It doesn't mean that somebody shouldn't express their view honestly and candidly, but the reality is that dissents do hurt.

Try not to engage in what can be pilloried as an academic exercise because that's just not going to play well. The courts are going to listen much more receptively when they think that there is a sense that the Commission is trying to right a wrong. When you go back and you look at the cases and what's going on there, it seems to me that time and time again, the message we get is that when the Commission has seen some terribly bad thing going on out there and has attempted to stop it and to undo the damage, then the Commission is given a fair amount of deference.

But it seems to me that in terms of unfairness, one needs to rely upon a sense of what's unfair and one has to be able to say that yes, this action that we're challenging, this activity is activity that falls on the side that can be condemned as guilty and not approved of as innocent. Unless you can say that this activity is wrong, you probably won't succeed in challenging it.

MR. AVERITT: Thank you very much. I guess this brings us to the end of the history panel. It looks like we have been unable to answer all the questions, that there is still a dilemma on the table. How does one reconcile the fairly expansive Supreme Court cases on the one hand, with the fairly narrowing Circuit Court cases? Clearly, a theory of Section 5 is going to be needed -- one capable of bridging that gap -- which will make use of the agency's discretion, but do so with a level of discipline that will satisfy the Circuit Courts. That is going to be a task for the theory panel, which is the panel that will follow this one.

That panel will convene, let us say, in five minutes at 10:30. That will begin moving us back onto schedule. Thank you so much.

(Applause.)

PANEL 2: INTERPRETATIONS OF SECTION 5

MR. AVERITT: Welcome back to the second panel of the day. This is a panel that's going to be discussing legal theories of Section 5, legal and economic theories as possible ways of bridging between the broad Supreme Court law and the more cautious Circuit Court opinions.

To moderate this panel, it's my pleasure to introduce Rick Dagen. Rick is a longtime FTC lawyer. He helped to investigate or manage most of the Commission's post-Ethyl cases. Those included matters involving invitations to collude, facilitating practices and standard-setting. This makes him especially well-qualified to lead the panel that will be looking for workable theories of Section 5. Rick Dagen.

MR. DAGEN: Good morning. As Neil indicated, we are going to be considering varying interpretations of Section 5 and theories of Section 5. So, we'll be considering a range of questions, such as, is or should Section 5 be limited to violations of the Sherman Act? If not, what limiting principles should be applied to the definition of unfair methods of competition? How can unfair methods of competition be defined so as to capture anticompetitive conduct but not pro-competitive conduct while giving sufficient guidance to the business community?

By the end of this session, we expect to have answered all of these questions and solved the current economic crisis.

(Laughter.)

MR. DAGEN: Today, we are honored to have assembled a distinguished panel well versed in the issues we will tackle, some for longer than others. Since most of the panel are so well known and their bios are posted on the Web site, I'll try to be brief with these introductions.

Starting to my left, we have Bob Pitofsky, Sheehy Professor of Trade Regulation Law at Georgetown University Law Center and of counsel at Arnold and Porter. Bob was Chairman of the FTC from 1995 to 2001 and is the author of an antitrust textbook and numerous articles. During his term as Chairman, the Commission reached several consent agreements involving Section 5 unfair methods of competition allegations. Prior to that time, as was previously mentioned, Bob was also involved in the Official Airlines Guides case, among other things, involving Section 5.

I'm going to do all of the introductions right now.

Next is Mike Antalics, a partner at O'Melveny & Myers. Before joining O'Melveny, Mike spent 23 years at the FTC, most recently as Deputy Director in the Bureau of Competition from 2000 to 2001. Mike was an Assistant Director for Mergers and before that, Assistant Director for Non-Merger Litigation from 1991 to '97, the shop primarily responsible for the Section 5 matters at the FTC. As a result, Mike was involved in several

Commission Section 5 cases that were settled.

Next is Dan Crane, Professor at the Benjamin Cardozo School of Law and counsel at Paul, Weiss. He is the author of two recent articles touching on the history and institutional significance of the FTC. The first is Technocracy and Antitrust and the second is Antitrust Anti-Federalism. He has a book on the institutional structure of antitrust enforcement forthcoming.

Next is Michael Salinger, Professor of Economics at Boston University and former Director of the Bureau of Economics at the Commission. Prior to his tenure at Boston University, he was an Associate Professor at Columbia University Business School and a staff economist in the Bureau of Economics and served on the editorial boards of the Review of Industrial Organization and the Journal of Industrial Economics. Michael was present at the Commission when multiple Section 5 matters were considered.

Next is Bob Lande, Venable Professor of Law at the University of Baltimore School of Law. Bob previously worked at Jones, Day and at the FTC. He has authored or co-authored more than 70 publications. He is a co-founder and Director of the American Antitrust Institute, a past chair of the AALS Antitrust Section, and has held many positions in the ABA Antitrust Section.

He recently submitted comments in connection with the N-Data consent.

And, finally, Bill Page, Marshall Criser Eminent Scholar and Senior Associate Dean for Academic Affairs at the University of Florida, Levin College of Law. He has authored over 50 articles and book chapters primarily on antitrust law and economics and is co-author of the Microsoft Case: Antitrust, High Technology and Consumer Welfare. He was a trial attorney with the Antitrust Division.

Just one preliminary matter. If we run late, one or more of the panelists may have to leave as they have prearranged travel plans.

Now, in a moment, the panelists will have the opportunity to present a brief opening statement, and I'm hoping not to do any Tom Brokaw imitation in connection with those. We're trying to limit those to approximately ten minutes or less.

As a starting point for these statements, I would like to put forward the views of Joe Sims, who couldn't be here today. Now, Joe Sims wrote that even if Section 5 is more expansive than the Sherman Act, Section 5 enforcement is unnecessary, Section 5 enforcement is dangerous, Section 5 enforcement is highly likely to be harmful to the American economy. This was written in 2006 before our recent N-Data matter.

Others, like Veronica Kayne, have suggested that our invitation to collude cases may have -- we may have the authority to bring those cases, but perhaps they're not a good use of the agency's resources because, by definition, the invitations are unsuccessful.

Joe Sims suggested that Section 5 enforcement might, quote, "fracture the antitrust consensus in the United States and threaten the FTC's hard won good reputation." And added that there is no good argument for opening this Pandora's box.

Now, today, we will find out if these panelists agree with those sentiments or disagree and why. And, hopefully, some of the opening statements will address some of these issues.

First up, Bob Pitofsky.

MR. PITOFSKY: Well, thank you. Good morning, everyone. I must say this is an issue that's been debated ever since I've known there was a Federal Trade Commission. It's interesting because there's such disagreements. So, we should have an interesting morning today.

I do not agree with Joe Sims that Section 5 has no role to play except where the behavior violates the Sherman or the Clayton Act. Doug Melamed, I think, said a similar thing in a paper that he delivered here in one of these panels.

First of all, it reads unfairness out of the statute. If that's the way you feel about it, go back to Congress and say delete unfairness.

Second, there are three Supreme Court cases that say unfairness means something besides beyond the Sherman and the Clayton Act -- Sperry, Indiana Federation, Brown Shoe -- and I don't think that we ought to just ignore three Supreme Court cases.

On the other hand, I believe one must be very, very cautious about using Section 5. It is not a roving mandate to the Commission to go around doing good from an antitrust point of view. Why? Because the private sector has to have an idea of what the law is and it's just not fair to interpret unfairness in unpredictable ways.

Second, it produces a situation in which behavior that's illegal at the FTC is legal at the DoJ. I think that's untenable. Especially if Congress has rejected the particular unfairness idea that the Commission is advocating, I think that's untenable. And, most important, I think if the Commission gets very aggressive about unfairness it will lose its hard earned reputation of being careful, balanced, active. I think the Commission is in a better state today, in terms of Congress's views of the agency and published views of the agency, than at almost any time -- and I think abusing unfairness is the way to lose that position.

Well, you say, well, if that's how you feel about it, why would you allow it at all? Why wouldn't you stick with the Joe Sims' position? Because there's no criminal exposure under Section 5. There's no treble damages. And I think there are areas where you need some flexibility. I don't think you can declare under unfairness a no fault monopoly. Congress considered it and rejected it. We can't say that Congress gave the Commission the authority to ignore Congress. I don't think conscious parallelism can equal agreement. That's been before the courts too many times.

The Federal Trade Commission really cannot overrule the Supreme Court. I don't care what Section 5 says.

Now, there are other areas I think the Section 5 can do a good deal of good. One which almost everybody agrees to is fill in the gaps, and that is situations where Congress would have covered a transaction or a behavior if it thought of it. You say give me an example. Congress in Section 3 would not have stopped with goods, wares, merchandise, et cetera. They would have added advertising. And Section 5, I think, can be used to cover exclusive dealing or tie in sales for advertising.

There are many examples. The Robinson-Patman Act, the worst drafted statute in the history of antitrust, left all sorts of gaps that the Federal Trade Commission filled in. Of course, now the Robinson-Patman Act is a gap and nobody thinks it’s going to be enforced at the federal level. But there are situations where you can fill in gaps. Now, I don’t think of a gap as saying, well, exclusive dealing contracts under Section 3 begin at 40 or 50 percent of the market. But under Section 5, they begin at 25 percent. That’s not a gap. That’s making new law and I think it’s unwise.

The toughest question here today is one that I think we should address in our last 15 minutes or half hour rather than our first. Well, you keep telling us it’s not this extreme, it’s not that extreme. Where do you want to draw the line? I’ll give it a shot, but, frankly, I reserve the right to retrench and restate at the end of our discussion because I really want to hear what the other folks have to say. I believe it can cover very difficult to reach practices that cause substantial anticompetitive harm. If you apply Section 5, you block little or no good business reasons and there can be a clear and predictable line describing that kind of conduct.

If the FTC, by the way, is going to publish a rule along this line or any line, it should be put out for public comment so that people can react to it.

Let me give examples of what would fall within my line. My leading example would be facilitating practices. I was going to discuss Du Pont and Boise. Both cases the Commission lost and should not have, but I'll save that for later on. I think invitations to collude are very, very anticompetitive. Yet, if the invitee says no, it's really difficult to get at it except under Section 5. So, I think that's worthwhile.

I have recently seen some descriptions of what Section 5 can cover. Oppressive, coercive, bad faith, fraud, and even contrary to good morals. I think that's the kind of roving mandate that will get the Commission in trouble with the Courts and with Congress. And besides, I just don't think that Congress could have intended to give an agency that kind of authority.

So, that's my rough definition. We can discuss what goes in and what doesn't go in. I do think many of these unfairness cases I have looked at over the last three weeks, at Rich's urging, are consent decree cases. My final thought is if the Commission is going to take a position applying Section 5 in a consent context, it really has an obligation to spell out in detail exactly what it was that was illegal and anticompetitive and why it applied Section 5 in that situation.

Thank you.

MR. DAGEN: Mike.

MR. ANTALICS: Let me talk a little bit about an area where I think there is some general acceptance, though not universal, and then talk a little bit more about, in general, some areas or some things that the Commission should keep in mind, in my view, when they're pursuing a Section 5 case. And also some things they should not be doing when they're pursuing a Section 5 case. Then, finally, maybe get a little bit more specific with one particular area of the law that I think probably could stand a little bit more scrutiny.

First, one of the types of cases Bob mentioned, I think the invitations to collude. I mean, we started those in the early '90s, and from day one, we kind of went into this thinking, the guy that made the invitation, he's already done enough to go to jail if the other guy says yes. We're not deterring any efficient conduct here if we prohibit that, and there's good reason, I think, to prohibit it, even if it's not accepted.

I guess Veronica has written that the

anticompetitive effects are somewhat speculative. Well, I'm not sure that they are. If you look at a lot of invitations, and in particular if it's a public invitation, it's pretty hard to tell whether or not the people being invited actually agree. They could unilaterally, at least in their own mind, be thinking they're adopting the same conduct and is that an agreement, or are they just acting as a oligopoly, in which case it ought to be outlawed anyway. And you don't want to give people an extra bite at the apple.

If it's not unlawful, it really reduces the risks of trying to enter into any competitive agreements. You go up to somebody and say, hey, would you like to fix prices? If he says yes, he's not going to go to the authorities. If he says no, if you haven't violated the law, why not try it again? I mean, I think on the margin, it's useful in reducing the incidence of price fixing. So that's one area where I think a lot of people think the Commission is on relatively firm ground in going after that type of case.

More generally, I think one thing that the Commission should not do -- and I think Bob alluded to this, too -- is go after cases where the evidence might not quite reach Sherman Act standards. You know, in an exclusive dealing case for example. I don't think the

Commission should take the position, well, this is not an unreasonable restraint of trade, but still it's somehow unfair. I mean, if it's not unreasonable, that at least suggests it's a reasonable restraint of trade. So, I think the Commission should not take the view that we have a black box here and trust us, we're right, even though it doesn't violate the Sherman Act.

I think what the Commission should do, though, and especially in the early stages of investigations doing the kind of stuff that Rick does every day, is they should be aggressively looking for areas where it looks like there's some consumer harm. Kind of the standard we used to use when I worked with Rick. I remember when we first read about the Dell situation in the newspaper and our reaction was, well, that can't be right. So, that was kind of our standard -- that can't be right, they can't get away with that if they have intentionally misled the standard-setting body and then walked into a monopoly because of that. It just seemed improper. We thought about it a lot, worked around it, looked at some equitable estoppel doctrine law and tried to bring it together. There's a lot of work done by a lot of people.

And, ultimately, I think it's beginning and it's not all the way there yet, obviously, but that's an area that's going to get widespread acceptance under the

Sherman Act, as well under Section 5. Same thing with the patent cases, the Hatch Waxman cases. It's an area where you had some new facts coming up where the Commission went in aggressively and explored it, but fit it into a context where I think you see a Sherman Act remedy as well. It's not just a Section 5 remedy.

So, I don't think the Commission should be looking then for the little carve-out of "these are Section 5 cases that only we can do and nobody else can." I think they should be actively looking for consumer harm and using kind of the breadth of existing antitrust law to see how the new factual situation plays in, so that you're at the cutting edge of new ways of restricting competition.

Then, finally, just one specific example, just to show you I can still be a little out there perhaps. The one area that the Commission has not done, and I always thought we ought to do a little bit more in, was in the area of predatory pricing. Think of a situation where the company's average total cost is $1, and its average variable cost or marginal cost is, say, 20 cents. Well, if he charges 19 cents for a while, he's going to start driving people out of the market and everybody agrees that that's pretty bad. It's presumptively unlawful.

Well, if he's charging 21 cents, one cent above his marginal cost, he's still going to drive people out of the market and, ultimately, in the long run, everybody's got to cover all their costs. I remember, at least in the old days, Posner took the view that you could have an anticompetitive arrangement involving pricing even if it's above marginal cost or above variable costs.

Now, I know there's a lot of reluctance in the courts, and I think a lot of reluctance at the Commission to be aggressively pursuing pricing theories that might chill pro-competitive behavior. That's always been kind of the mantra. However, that might be a place where the Commission, if there is an area where they could carve out a Section 5 type offense that wouldn't be generally available under the Sherman Act -- maybe some combination of below-cost pricing in connection with other anticompetitive conduct or strong evidence of intent. I think that might be an area worth exploring.

Anyway, with that, I'll pass the baton.

MR. DAGEN: Thanks, Mike. Dan.

MR. CRANE: Well, I have to, at the outset, respectfully disagree with Bob Pitofsky about the Robinson-Patman Act being the worst drafted antitrust statute. That would be the FTAIA, as we all know.

(Laughter.)

MR. CRANE: That's not a relevant consideration for today's purposes.

The approach that I'm going to take today is an institutionalist approach. The basic argument I want to advance is that the question of the relationship between the Sherman Act and Section 5 of the FTC Act should not be addressed as a textual matter, but as a comparative institutional advantage matter. So, all of antitrust law, including the Sherman Act and Section 5 of the FTC Act, is a very broad delegation of common law like powers to someone -- to someone to make decisionmaking, to create antitrust norms. The question really is who is the someone? Is it courts or is it agencies?

Unfair methods of competition, just like restraint of trade or monopolization, is not a textually determinant set of words. We're not going to get anywhere by talking about what the words mean on paper. The proper framework is really this comparative institutional advantage question -- courts or agencies, what's the relevant roles and deferences that are owed to each of these institutional actors?

What I want to suggest is that, in many ways, by marrying the meaning of Section 5 to the Sherman Act, the FTC is losing many, many of its institutional advantages, as both a norm creator and an enforcer of antitrust law.

If you think about the Sherman and the FTC Act, it's a story of institutional divergence. Most Sherman Act litigation is private litigation, a ratio of about ten to one, ten private cases for every public case. Private litigation is subject to unique constraints, whether perceived or real. I don't want to buy all of these as necessarily being true in a strong way, but in terms of the perception of the courts -- and I think Bill Kovacic alluded to this first thing this morning. The perception of the courts is that these things are all major constraints on the way in which the Sherman Act is implemented.

Abusive competitor suits -- the Supreme Court said this many times, it's worried about it. Contorted standing issues, the treble damages remedy and the chilling effect of that, and then marginally competent, maybe directionally biased juries, maybe juries are sort of directionally biased against large businesses. Whether or not this is true, in fact, it certainly has very strong explanatory power for the way in which antitrust norms have contracted in recent years in the Supreme Court and the lower courts.

So, the Sherman Act liability rules that we have seen have been highly influenced by this institutional context. An example here is predatory pricing law. During the ‘70s, ‘80s, ‘90s, a view emerges that predatory pricing is extraordinarily dangerous in the hands of competitors as a theory of liability. These competitors are motivated by chilling good and wholesome competition, and in cases like Matsushita and Brooke Group, the Supreme Court develops a very restrictive set of liability rules in favor of defendants, largely motivated by institutional contexts in which these claims are being asserted.

Then along comes the AMR case, the first predatory pricing case by the government in decades, and the government loses on sort of the strength of a liability rule that's been molded and crafted to fit the exigencies of private litigation.

Now, maybe there's nothing we can do about that when it comes to Department of Justice Antitrust Division, which has to enforce the Sherman Act, the same statute that's privately enforceable under Section 4 of the Clayton Act. But does it have to be this way with respect to the FTC? I would argue no, but, in fact, the effect is the same.

Think of the Valley Drug case. The Eleventh Circuit says in Valley Drug, a private patent settlements case, here is the rule. A very, very restrictive liability rule makes it hard for a plaintiff ever to win this case. Lots of institutional considerations. You can't re-litigate the underlying patent claim years and years after the settlement takes place.

Then what happens? The Schering case comes to the Eleventh Circuit from the FTC. And what does the Eleventh Circuit say? We've already decided the question. We've already created the liability norm under the Sherman Act. Oh, it sounds like it's the same thing for the FTC Act because, after all, you're enforcing the antitrust laws. It's all the same kit and caboodle.

Completely different institutional contexts. In Schering, the FTC announces a prospective rule, effectively, a $2 million cap on reverse payment settlements and so forth. It had all the earmarks of a rule and yet by coupling the Sherman Act to the FTC Act, the FTC gets saddled with a rule that was created in a completely different institutional context with different considerations.

The Supreme Court decides the NYNEX case involving a private damages suit. It tells us it doesn't want to transform routine business disputes, business friction into antitrust law. There are lots of reasons it doesn't want to do that.

What happens in the Rambus case? D.C. Circuit purports to apply the NYNEX decision wholesale to the FTC in Rambus even though, again, the institutional context is completely different. And, in fact, if you look at the Rambus opinion, the D.C. Circuit says, well, the Commission told us it was proceeding under sort of standard monopolization law theory. We don't have to even think about the possibility that there's something different about the FTC Act.

I think this is a huge mistake in terms of the institutional context. You're taking baggage you don't have to take and you shouldn't take and it leads to weakened liability norms in the FTC.

So, let's think a little bit about sort of the comparative advantages and disadvantages here. At one level, we have Article III appellate judges versus the FTC. Who should we favor in terms of deference, in terms of norm creation? Generalists versus specialists? Well, the FTC Act is a product of a Progressive Era belief that we like experts, we like technocratic virtues.

The Humphrey's Executor case, 1935, that sort of creates the possibility of independent executive and quasi-legislative agencies, is predicated on the value of expertise and administrative independence. Recall Humphrey's Executor, which is about the FTC, calls the FTC a quasi-legislative body. The FTC is not simply a law enforcer like the Department of Justice, that finds these sort of abstract, platonic norms of antitrust law as sort of the courts create them. The FTC is supposed to be a source of norm creation.

Why shouldn't there be Chevron deference in adjudicatory proceedings to the FTC? Well, one reason is, if you marry the meaning of the FTC Act and Sherman Act, you now have two different agencies, DoJ and FTC, who are enforcing the same body of norms. There is precedent in the courts that says when two different agencies have concurrent jurisdiction to enforce the same statutory scheme, they don't get Chevron deference.

Again, it might be very different if we sort of thought about the FTC as having a norm creation role with respect to Section 5 that's not coupled to the Sherman Act. And why not? Why not proceed under notice and comment rule making? I know this has been discussed, it's been rejected over time.

Again, think about what happened in the Schering decision. The FTC effectively created a legislative rule. It said, you know, this is going to be applied prospectively. Our enforcement intention is to apply it across the board. A $2 million cap. That sounds very rule-like. So, there's space within the ambit of what the FTC does where if deference was really the question, it might be advantageous to proceed by more formal rule making.

That's all just comparing the Article III judges, appellate judges, to the FTC in terms of their respective comparative advantages. But it's not just the Article III appellate judges in a vacuum. It's the Article III appellate judges with all the baggage that comes from private litigation, all the things I talked about a minute ago. That's where the rubber really hits the road.

If you marry the meaning of the FTC Act Section 5 to the Sherman Act, you're going to lose all of the advantages of having an administrative tribunal that's supposed to be expert and independent and not saddled with that baggage.

So, three principles -- and then I'll close. First of all, whatever Section 5 means in terms of unfair competition, it must be justified in antitrust terms. We have a rough intuition of what this means, harm to competitive processes, creating potential for the exercise of monopoly power. No theories that are not about that.

Secondly, fair notice and due process predictability. The idea that business people need to sort of know the content of the law applies really only if you're talking about retrospective application. If we're announcing decisions that have really only prospective application, then due process and predictability matter less. It's like announcing a new speed limit. As of now, everyone has to follow the speed limit.

If you sort of think about rule making by an administrative agency, there's nothing inherently unfair about announcing a new rule as long as we're doing it so prospectively. Again, I think Schering could be thought of in these terms. $2 million cap for reverse payment settlements will apply to all cases prospectively and now everyone knows what the rule is. It doesn't raise particular due process concerns to me as long as we're doing so with respect to the future.

Finally, beware the prima facie weight effect of FTC rulings. This is sort of a statutory problem, but what you can't have is the FTC deciding cases in a way that now will be used collaterally in private litigation as if the FTC has found a violation of the Sherman Act when it's applying Section 5 of the FTC Act. If we want to claim independence for the FTC and the sort of space for the FTC to be an independent agency creating norms, you have to be very worried about the spillover effects and find ways to cabin those going forward.

MR. DAGEN: Thank you very much. Michael Salinger.

MR. SALINGER: Well, I figured my role today would be to try to provide an economic perspective. So, let me begin with five observations.

First, when Congress included Section 5 in the FTC Act, it was not merely reminding the courts and agencies that it had already passed Sherman Sections 1 and 2.

Second, in broad terms, there are three classes of activity that could conceivably offend competition law. There's collusion, which is the province of Sherman Section 1. There are acts that create, preserve or extend market power, which is the province of Sherman Section 2. Then there's the exercise of market power, which is the province of Sherman Section 0, by which I mean the Sherman Act doesn't cover it.

Three, antitrust enforcement should be economically sound and, therefore, guided by advances in economic understanding.

Four, economics is an imprecise discipline.

And, five, rational antitrust standards rest on assessment of error costs. That's something economists believe, but it's also well established in the case law.

Based on these five principles, I see four possibilities for how to understand the relationship between Section 5 of the FTC Act and Sections 1 and 2 of the Sherman Act. None of these approaches contradicts any of the five observations, but they implicitly rest on a difference in the emphasis placed on each one.

The first possibility is that Section 5 can be used to go after the exercise of market power. I haven't heard anyone suggest that, and I don't think anyone is proposing that. So, forget that.

The second possibility is that Section 5 adds nothing at all. Now, this would seem to contradict Observation One about congressional intent, but one might argue that Congress deliberately left the standards vague to allow for enforcement to evolve with advances in economic understanding. One would then need to argue that based on these developments -- that is, developments in our understanding of economics -- we've come to realize that Sherman Sections 1 and 2 are sufficient for economically sound antitrust enforcement. To take that position, you have to believe that indeed that's what economic analysis suggests.

The third possibility is that Section 5 can pick up behavior that falls into the cracks between Sections 1 and 2. An example is invitations to collude. They have the feel of Section 1 behavior, but without agreement from other parties they do not fit Section 1. The agencies can go after an invitation to collude as a Section 2 offense, as the Justice Department did in the famous American Airlines episode, but proving all the elements of a Section 2 case might impose too much of a burden for this kind of behavior.

Specifically, in general, market power means something different in a Section 2 case than it does in other kinds of cases, and you might not want to have to establish Section 2 market power to bring an invitation to collude case. A creative use of Section 5 might be a better way of going after those cases than the Justice Department's creative use of Section 2.

I would classify facilitating practices as this in-between behavior as well. If implemented unilaterally, or even without explicit agreement, they're not proper Section 1 cases. However, since the harm is to help solve the prisoner's dilemma problem rather than to exclude competitors, then at least, as a matter of economics, they more nearly resemble a Section 1 offense.

So, if you look at the facilitating practices cases, I don't think the problem with them has been that the underlying theory of using Section 5 to go after facilitating practices is wrong, it's just that in those cases there wasn't a necessary showing either of actual competitive harm or a high likelihood of competitive harm.

The fourth possibility is that the FTC alters the error cost analysis. This, as I understand it, is the position that Commissioner Leibowitz staked out in his concurring statement in Rambus and it's the rationale, as I understand it, behind the use of Section 5 but not 2 in the N-Data case. According to this view, the risk of follow-on suits with treble damage liability increases the cost of a false finding of liability. The argument is that Section 5 doesn't have that.

I'm troubled by this argument for two reasons. First of all, I think it's a misapplication of the error cost analysis. Take predatory pricing, which has already been mentioned. The problem with the false findings of liability or the false positives in predatory pricing is not the risk of shareholder class actions. The problem is that you might be chilling competitive behavior. And lowering the penalty from the false finding of liability doesn't change that basic trade-off.

My second concern is that it increases the number of cases that will be settled with consents and, therefore, without serious judicial review. Now, of course, for many people that's the point. It allows the FTC to be -- to use a commonly used metaphor -- the cop on the beat, who not only can drag people down to the station from time to time, that is take them to court, but it can also, in effect, twirl its nightstick and say knock it off.

So, the question you want to ask is whether the FTC is going to tell parties to knock off anticompetitive behavior or whether it might tell the parties to knock off pro-competitive behavior. I don't know that we can be completely confident that it's going to do that.

This approach will necessarily provide for a reduced role for formal economic analysis. Within the Commission, it will mean that the Bureau of Economics will play a role on antitrust cases that is more like the role it plays in consumer protection cases.

Those who stress how imperfect our knowledge of economics is might find this attractive. However, no one, as far as I know, says that antitrust enforcement should be economically unsound. They just do not trust modern economic analysis as a guide to what is economically sound. At least implicitly they believe the personal economic intuition of people at the FTC who contribute to the stew of FTC policy is more sound than the analysis of professional economists. Now, perhaps I'm just being professionally provincial, but that worries me.

So, to summarize, my personal view is that Section 5 should not be used as a lesser version of Sherman Sections 1 and 2, but instead it should be used for cases that fall in the cracks between Sections 1 and 2. So, I think I'm agreeing with Bob and disagree with Michael and Daniel.

MR. DAGEN: Thank you. Bob Lande, please.

MR. LANDE: Thank you very much.

I'd like to make two points. First, Section 5 of the FTC Act, properly construed, should be significantly broader and more encompassing than the Sherman Act or Clayton Act. So I may be the outlier on this panel, at least a little bit.

Second, the best and probably the only way to interpret Section 5 in an expansive manner is to do so in a way that is relatively definite, predictable, principled and clearly bounded. This is the Steve Calkins test. You've got to show the court a way to separate good conduct from bad conduct. If you can't meet it, an expansive view of Section 5 of the FTC Act fails. I submit that this can only be done if the Commission uses the "consumer choice" framework. I submit that without the discipline and constraints provided by this framework, the FTC Act risks becoming standardless.

If the Commission does adopt the choice

limitations, however, I believe the reviewing courts would be likely to give the Commission the comprehensive deference that it deserves. At the end of my talk, I'll give some examples of how this could make a difference in practice.

First, I think there can be no doubt that Section 5 was intended to be significantly broader than the other antitrust laws. The legislative history makes it absolutely clear that it's supposed to include incipient violations of the other laws, violations of their spirit and so on.

It's also crystal clear that there are extensive Supreme Court opinions that ratify this legislative history. The problem is these opinions are all at least 20 years old. There is a question, would the Supreme Court come out the same way today? I submit if the Commission tried to have an expansive reading of Section 5 of the FTC Act, but did not do so in a way that was clear and was bounded, then the Supreme Court would today restrict Section 5 of the FTC Act to the other antitrust laws. And this would especially happen if the Commission interpreted Section 5 in a way that was non-economic, such as condemning conduct that was unjust, oppressive or immoral.

Happily, there is a way out. There is a way for the Commission to minimize the risk of reversal on appeal. That is, of course, the consumer choice framework. I believe Section 5 can be expansive if, but only if, it's interpreted under this framework. The choice framework would impose the threshold requirement that every Section 5 antitrust violation must significantly impair the choices that free competition would bring to the marketplace, in the same way that traditional violations, such as price fixing and anticompetitive mergers, do this. It also would impose a requirement that every Section 5 consumer protection violation must significantly impair consumers' ability meaningfully to choose from among the options that the market provides. Construed this way, these two halves of the FTC Act together would protect our free market economy.

The choice approach to antitrust, as opposed to the efficiency or price approach, would change antitrust analysis somewhat because it would give greater emphasis to such short-term issues as quality and variety competition, and to such long-term issues as competition in terms of innovation, ideas and perspectives. It would make a difference in a number of broad categories of cases where price or efficiency approach to antitrust would lead to the wrong result, but it would do so in a predictable, principled manner.

I'd now like to give three examples of how Section 5 should usefully be broader than the other antitrust laws. Actually, two examples because one of my examples is invitations to collude and that's been talked about already. So, I'm going to skip it and just talk about cases similar to N-Data and also incipient exclusive dealing and tying arrangements. For each of these, I'll have more extensive remarks in a written version of my paper.

Let me start with cases similar to N-Data. First, I applaud the Commission's N-Data decision. I commend the Commission for condemning the anticompetitive, post-contractual opportunistic behavior that's at issue. However, I respectfully believe the Commission's approach could have been improved if it had been supplemented by choice limitations that made it clearer and gave more notice as to why the conduct at issue had been condemned. The main drawback to the unfairness standard in the majority's opinion is that it is relatively indefinite and non-economic. The opinion's condemnation of conduct because it was, quote, "unjust," quote, "inequitable," quote, "contrary to good morals," arguably gives the Commission too much discretion. The language also can be attacked for giving insufficient notice to business.

However, the conduct at issue did artificially impair the choices that free competition would have been likely to bring to the market in the long run. For this reason it would have been condemned if the Commission had utilized the choice framework. Since the choice framework carefully builds upon an extensive body of earlier Commission unfairness policy statements and opinions and case law, it would have provided as much notice as possible that the conduct was illegal.

When a case like N-Data finally is appealed, reviewing courts would be more likely to give deference to the Commission's interpretation of Section 5 if unfairness were limited to practices that significantly interfered with consumer choice, rather than of future Commission opinions that use fuzzier, non-economic concepts, such as condemnation of conduct that was unjust, inequitable and contrary to public morals.

The choice limitation also would show that the Commission was not seeking open-ended powers. So reviewing courts would be more likely to give the Commission the considerable deference that it is entitled to when it goes beyond traditional antitrust violations.

Finally, I would like to talk about incipient exclusive dealing and tying arrangements. I do this at my peril, with due respect to Bob Pitofsky who questions whether there should be any difference between Section 5 violations in this area and Section 2 violations in this area.

As we all know, the precise market share and market power requirements for tying and exclusive dealing violations are somewhat amorphous. It's also hard to know when a particular restraint will be characterized as a tying or an exclusive dealing violation. How much of a discount, how much pressure, how much inducement before we will even characterize something as an exclusive dealing or a tying arrangement?

I think these requirements should be relaxed, especially in situations that involve a defendant with a significantly larger market share than that of the victim. In these incipient tying or exclusive dealing situations -- and if you want to call them violations of the spirit of exclusive dealing or tying, it doesn't much matter to me what you call them -- incumbents often will be able to disadvantage a significantly smaller competitor or would be-entrant anticompetitively, because their market power is so much larger than that of the victim, even if it is not large enough for a traditional Sherman Act violation.

Now, for a number of reasons, these situations often would be unlikely to constitute a tying or exclusive dealing violation, or it would be unclear whether they would be winnable under the Sherman Act. Yet, if this exclusionary strategy succeeds, consumer choice in the markets would be diminished in the short term, and incentives to innovate and enter by non-incumbents would be also be lowered in the long term. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement. It doesn't bother me at all that there's two distinct standards, as other people have pointed out. There's no private treble damages. You have institutional expertise, institutional neutrality and so on.

So, in conclusion, Section 5 should be interpreted to be broader than the other antitrust laws, but it should only be done so by the use of the consumer choice framework.

MR. DAGEN: Thank you, Bob. Bill Page.

MR. PAGE: Thanks, Rick. I want to limit my comments to conscious parallelism and to facilitating practices. And I think my basic message will bear a family resemblance to Dan's in that I am going to emphasize institutional considerations in trying to describe a distinction between Section 1 and Section 5. But my conclusion will be that there is no substantive difference between the reach of the two statutes, but there is an important procedural gap.

The dilemma of conscious parallelism is often posed by many authors with the following unrealistic hypothetical. Four service stations on the same corner in a remote town, isolated from any realistic threat of entry, who post their prices conspicuously on signs. One decides, without any cost or demand shock, that it would be nice if I were charging the monopoly price, and announces a price increase. The others recognize that they have a choice. Either we can take the opportunity to increase our sales and garner short-term profits, or we can match this price and perhaps in the long run garner monopoly profits. One by one, they choose the latter course. The market has now achieved a monopoly price. Is this a violation of Section 1?

Now, from the point of view of the literal language of Section 1, many authors have observed that there's no problem with extending the contract combination or conspiracy to this scenario. The initial announcement of a price increase by the first mover is a kind of an offer. The matching of that price is a kind of acceptance.

If you only looked at the Supreme Court's broad definitions of agreement under Section 1, you also have no problem. It looks like a conscious commitment to a common scheme. It looks like a meeting of the minds, whatever those phrases might mean. Both Donald Turner and Richard Posner, in their classic dispute about this, agreed that there's no lexical problem with the application of Section 1 to this arrangement. Turner, of course, famously said we cannot apply Section 1 in this context.

It would be wrong to characterize this as an agreement, or at least as an illegal agreement, for two reasons. First of all, all these firms are doing is acting rationally in the same way the competitors would do because they're simply taking account of their rivals. They're anticipating and taking account of those anticipated actions of rivals.

Or alternatively, even if we could characterize this as being in some way culpable, there's no way the antitrust laws can regulate it without direct price regulation. In other words, these actions are either not culpable or not regulatable. Posner disagreed with that, of course. But both authors agreed that if we complicate the picture and depart from this desert island hypothetical, and we add issues like product differentiation, discounting, power buyers and so forth, this result can only be achieved by facilitating practices. Well in that context perhaps Section 1 should be able to reach it.

As we all know, regardless of whether we have pure conscious parallelism or facilitating practices, the courts have generally said that Section 1 does not apply in these circumstances. They have been resistant to inferring an agreement from the use of facilitating practices, like most favored customer clauses or product pre-announcements or uniform delivered pricing. And in my reading of these, I think essentially they're going back to the same observation and extending the same point that was decisive for Turner -- that in each case where you look at the facilitating practices, if that's all you have, you're going to find examples in which those practices were actually demanded by consumers, they're valued by consumers as providing certain benefits. So, it's impossible to infer anything that can properly be considered an agreement.

In the summary judgment cases and now in the post Twombley cases, what the lower federal courts have been asking for essentially is communications. They're looking for overt communications among rivals as sort of the key culpable act that can be penalized.

The lessons for Section 5, I think, are pretty clear. The problem is not with the language of Section

1. The problem is with the concept of what can be sanctioned. In these circumstances, I see no reason to say Section 5 applies any differently than Section 1 in these circumstances. We have achieved perhaps an anticompetitive effect, but it's through conduct that the courts simply are not willing to characterize as culpable or at least they're not willing to undertake the task of enjoining.

So, in these circumstances -- and I might add, it doesn't matter whether you think of this as an issue of gaps or an issue of incipiency or whether you characterize this as a frontier case or something that's -- there's nothing frontier about it. This is something that's been analyzed for decades. And I might add the unfairness language of Section 5 might even be interpreted to implicitly require some showing of culpability in this sense.

So, even if there is no substantive gap, I still think there is a procedural gap particularly after Twombley. Under Twombley, a plaintiff has to plead more than simple conscious parallelism, enough to make an inference of agreement plausible. So some factual detail from which we can infer an agreement.

And the court rested this conclusion on discovery, its fear of discovery. I'm quoting here. "It's only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a Section 1 claim."

And Justice Stevens, in dissent, agreed, that this will foreclose discovery, but he viewed this as a great injustice because we had a clear allegation of a conspiracy in this case, a per se violation. And what we're doing is essentially saying that the plaintiffs have no access to discovery. They have no access to the means necessary to get information from the defendants.

In the post Twombley cases, there have now been 19 of them, the courts seemed to be demanding that the plaintiff produce allegations in the complaint of culpable communications, fairly specific allegations of communications. And I think you could safely say this lends a little credence to Justice Stevens' fears. If the plaintiffs have no access to discovery, how are they going to get evidence of these communications?

Now, my reading of these cases has revealed that the court was somewhat -- it had an unrealistic view of the way discovery actually happens. In many of these cases, discovery really does go on. The Supreme Court seemed to have the idea that before the answer there's no discovery. That's absolutely not true. In a lot of these cases, discovery has gone on. There are even quotations from depositions in the court's ruling on the motion to dismiss. But in other cases, it does not.

So, to the extent that courts take seriously this fear of discovery, and say that we're not going to let the plaintiff get to discovery unless he can survive the motion to dismiss, there is this danger that there is a risk that there will be culpable behavior that will simply not be turned up. And that's where the FTC comes in.

To the extent that there is a set of cases, in which the plaintiff cannot satisfy Twombley's pleading standards, but an expert agency or an expert staff can identify reasonable grounds to believe that there may have been communications, there may be concerted action going on behind the surface of the parallel conduct. In those circumstances, the FTC has the power under Section 9 of the FTC Act to issue a pre-complaint subpoena which could require depositions or discovery of documents. Potentially, there could be discovery devices or investigative devices short of that. But it's a powerful device that can be used to get at hidden communications.

Now, when I first broached this with my

somewhat more conservative co-author, John Lopatka, who is an alumnus of the FTC, he was quite alarmed. What? You're giving the FTC the power to go on fishing expeditions, it will impose huge costs. On the other hand, Max Huffman, who I also shared this thought with, thought there was good reason to believe that the FTC is in a different position from the private plaintiff run amuck, and he analogized the private plaintiffs to the herders in the tragedy of the commons story, who damage the public interest by their single-minded pursuit of private gain.

The FTC's in a different position. They cautiously take account of the public interest in their choice. And as I read the FTC's manual, which I actually took a look at for some of their criteria for the use of these devices, this is clearly something that's contemplated and there's caution in the use of those devices.

So, bottom line, I suggest that the FTC, at least in principle, can make the choice of whether and to what extent this kind of early discovery should be used and better balance the private social costs and benefits.

MR. DAGEN: Thank you, Bill. I have some questions to pose, but before I get to them I wanted to give the panelists a chance to comment on each other if you desire. If not, I will kick into higher gear.

MR. PITOFSKY: Bob, I have a couple of questions. I just want to understand what you mean by consumer choice. Suppose there are four players and somebody drops the price and improves the product and drives all three out. That certainly diminishes consumer choice. Is that something that -- you're not suggesting Section 5 does that?

MR. LANDE: Of course not. You know, we have a 90-page article which says not everything that diminishes consumer choice should be an antitrust violation, far from it. Your example would be one good example. We're saying what antitrust violations have in common is they all significantly impair consumer choice. But we certainly don't mean the converse.

MR. PITOFSKY: So there are materials that distinguish between consumer choice diminishing that should be challenged under Section 5 and those that should not.

MR. LANDE: Absolutely, absolutely.

MR. PITOFSKY: Okay, that's fine.

MR. LANDE: Certainly.

MR. DAGEN: Let me follow up on that point. Bob, I think you mentioned that consumer choice would be different from efficiency. Did you mention -- I'm not sure I heard you mention a case where you could have a violation of Section 5 based on consumer choice that would not be consistent with efficiency considerations.

MR. LANDE: We have found a number of cases that would violate the Sherman Act under choice theory, but not an efficiency theory. I would have to go through those cases and see if any of those would be more likely to be an FTC Act violation than a Sherman Act violation. I'm afraid I haven't done that.

MR. DAGEN: Bill?

MR. PAGE: A similar question, isn't economics all about choice? I mean, I would say everything you say in economics you always put parentheses, substitution. There's choice being made. In market definition, we're always talking about consumer choice. So, what's the difference between the kind of consumer choice we take into account when we define markets and the kind of choice you're talking about?

MR. LANDE: There's a difference in emphasis. If you look, for example, at the merger guidelines, the merger guidelines talk about price, price, price, price. And then once in a while in the footnotes they say, by the way, you also have to worry about quality and you also have to worry about variety. But as a practical matter also, often we talk about price and we forget about quality and variety even though in theory any economist will say, well, of course you've got to worry about quality and you've got to worry about variety. This would, in effect, take the footnotes up and put it into the text. It would give more emphasis to quality, variety, innovation in the short and long term. It's fully consistent with modern economics. It would just change the emphasis somewhat.

What it wouldn't do is tread in the language of unfair, oppressive, against public morals and that kind of thing. That's where I think you violate Steve Calkins' rule of not giving the court a way to distinguish good conduct from bad conduct. If we talk about consumer choice in terms of quality, variety, innovation, someone like Michael can say, sure, I can apply modern economic tools to that just as I can to an efficiency criterion, just as I can to a price criterion. But we're staying away from the amorphous realm of Section 5 which is what gets us in trouble.

MR. DAGEN: Yes, Michael, you're not just any economist, but you're here so...

(Laughter.)

MR. SALINGER: So, would you view tying as restricting consumer choice?

MR. LANDE: Well, remember, there can be

efficient reasons for tying, of course. Efficient reason for exclusive dealings, so we're putting all that to the side. Maybe they can be justified by efficiencies. With that caveat, tying can reduce consumer choice, of course.

MR. SALINGER: Okay. But we already have an overly expansive Section 2 view of tying. We have Section 1 tying. So, are you suggesting that the agency should use Section 5 to be more aggressive about tying than you can do under Sections 1 and 2?

MR. LANDE: Well, I don't agree that we have an overly aggressive approach to tying or exclusive dealing --

MR. SALINGER: Do you support the per se rule?

MR. LANDE: Not a per se rule, no. But let me go back to what Bob was saying. What are the market share requirements to have a tying or exclusive dealing actions? What do you do with my hypo of a firm with let's call it 30, 40 percent of the market rubbing out a firm with 5 percent, or a would be entrant? What if the market share isn't high enough for a traditional Sherman Act violation, but -- and let's assume no efficiencies, but they're rubbing out the firm with 5 percent or preventing someone from entering. Even if it wouldn't have enough market power to qualify under Section 2 standards, I submit it's anticompetitive.

But I prefer it go under Section 5 of the FTC act because then you don't have private treble damages and suspect motivations and so on.

MR. DAGEN: Okay. Bill's comments suggested a question which was raised earlier by the Chairman. How has the courts' development of the Sherman Act over time altered its relationship to Section 5? Does the Sherman Act encompass all conduct that is truly harmful to competition?

I think that the panelists have generally agreed that invitations to collude certainly would fall out of the Sherman Act in many cases and be harmful. But more generally in terms of the Sherman Act development that Bill Page and Chairman Kovacic were talking about, the narrowing, if you agree that it's narrowed over the last period of time, has that increased the need for an expansive Section 5?

MR. PITOFSKY: I think it's increased the need for new justices on the Supreme Court.

(Laughter.)

MR. PITOFSKY: I'm quite serious. I don't think when you have justices who reach a decision like Twombley -- I'm second to none in thinking that was a really bad decision or (inaudible). But I don't think down here in this building we say, we don't agree with that 5-4 decision and, therefore, we're just going to go ahead and enforce the law as if that were not on the books, or we're going to expand our interpretation of Section 5 as if that's not on the books.

I tell you, that is a prescription for getting this agency at cross purposes with Congress and with the courts. Frankly, I don't think it's worth it. I'm for a modest expansion in areas where you can't get at it. And you're not doing very much harm. I mean, what's the harm of challenging invitations to collude? What's the efficiency loss there? There's none really. And they can facilitate broader conspiracies in that area.

Good. I think the agency when I was here, brought what, three, four, five cases, you reminded me of them.

(Laughter.)

MR. PITOFSKY: But to say that Twombley was a wrong decision and, therefore, the Commission ought to move ahead with pre-complaint discovery on behalf of the plaintiffs. First of all, the plaintiffs' lawyers are not going to be asleep. And they're going to go right after you and explain to the judge what's going on. And if you try to say, well, we're not really doing this for that set of plaintiffs, this is an industry-wide investigation, the lawyers are going to say that's an abuse of process. That's not really what you're doing.

So, I sympathize with how irate you may be about Twombley, but I think the answer is, and it's an issue in the coming election, let's get some different justices up there who are more balanced and less ideological on the proposition that the free market solves all problems.

MR. CRANE: I'm actually quite happy with Twombley. I'm happy with most of the recent Supreme Court decisions because they arise in private cases. I think the institutional context justifies antitrust retrenchment as we've seen it.

But, again, Bob's point that somehow the Supreme Court sort of decides what the law is. If it decides what the Sherman Act is, why is that binding on the meaning of Section 5 of the FTC Act? The FTC does not enforce the Sherman Act. There's nothing in the statute that allows or requires, in any way, the FTC to enforce the Sherman Act. The FTC was created precisely because of defects and flaws in the perception of the Sherman Act.

For the FTC to take a different view under the FTC Act than the Supreme Court has taken on the Sherman Act is not to show contempt for the decisions of the court. It's to say, we are in a different context, we are deciding with different remedial structures in place, we are deciding with a different sort of set of issues before us, and I don't think there's anything inconsistent with sort of rule of law values for that to happen.

MR. PITOFSKY: Well, I'll try to indicate my four reasons why I don't agree. First of all, you've got to give the private sector some indication in advance of which conduct you're going to claim is covered by Section 5 and we're not influenced by what the Supreme Court says.

Second, it produces this intolerable situation where people will be found to have engaged in illegal conduct if they're sued by the FTC, but legal conduct if sued by the Justice Department. That's a prescription to ensure there can only be one agency left. If you have a lot of cases like that, then I believe there will be only one of the two agencies left.

And in a more general way, I don't know that the prestige of this agency has been as high in the last 50 years as it is right now in terms of being aggressive but balanced. I think this approach to the Section 5 threatens the continuity of what I think is a very admirable state of affairs between the FTC and Congress.

MR. PAGE: I guess I don't get the relevance of Twombley for this. Because if the FTC had been concerned that there was an illegal agreement, it would have investigated it, and at the end of the day when it was bringing a case, if it had to bring it formally as a Section 5 case, the question is, would the Section 5 standards be different from Section 1 standards? Not for getting to discovery, when you actually brought the case. There are good reasons not to go after conscious parallelism and there are good reasons to go after actual agreements. And Twombley doesn't change that.

MR. LANDE: I find myself in full agreement with Dan for all the reasons he gave. But I would like to put in the caveat that if the FTC does that with an open-ended mandate, talking about public morals and things that are unfair and unscrupulous and so on, then it's going to get in real trouble, it will get slapped down by the reviewing courts and by Congress. It has to do so in a responsible manner, a bounded predictable manner and, again, I'm coming back to my one note theme of consumer choice.

MR. DAGEN: Yes?

MR. PAGE: Just in response to Bob's comment, Bob Pitofsky's comment, one way of interpreting the comment is that there is no distinction between the set of cases in which private plaintiffs can satisfy the Twombley standard and a complainant to the FTC could persuade the FTC that there's enough to pursue an investigation, and that may be true. In Twombley itself, Max Huffman again alerted me to the fact that there actually had been a government investigation before the plaintiffs filed suit -- by the Department of Justice -- and they concluded that there was no problem. So, at least in Twombley itself, you could say there would have been no difference.

But I still believe that there can be circumstances in which plaintiffs with no access to discovery, presenting their evidence to an expert agency as opposed to a generalist judge, might be able to justify the use of further investigation.

MR. DAGEN: Okay, I would like to move on. We remember we started with Joe Sims. I think the panel has suggested that they don't agree with Mr. Sims, at least at this point. There have been a number of tests or statements about what Section 5 could cover, some of which were discussed here: Technical gaps, spirit of the antitrust laws, incipient violations. Ethyl was mentioned before: there have been tests based on Ethyl. Identifiable culpable conduct and evidence of actual and incipient injury to competition. Moderate threat to competition and few offsetting benefits, capable of being differentiated adequately and limited to an injunction.

Broader practices that are against public policy for various reasons and that might include gaps in other statutes or business torts or other types of practices.

Some people, I think, later will posit that newer theories should be brought under Section 5. And there's an issue of immunities.

So, I just wanted to put those sorts of tests up there and see, as we discuss some additional questions, whether we can put meat on any of these things as to what they mean, whether they're operational, how they would be helpful for the Commission going forward. So, we'll come back to these in a second.

First, something that was talked about, the use of treble damages. So, a question is, does the FTC's use of Section 5, independent of the Sherman Act, make it less likely that treble damages could be assessed in follow-on actions. Some of you have commented on it, but if you haven't I would like to know whether that fact should influence the interpretation of Section 5's scope or its application?

MR. CRANE: I'll be glad to add my two cents. Yeah, absolutely, without a doubt, it should. And, also, the FTC, as had been said before, doesn't have the suspect motive that private plaintiffs sometimes have. That should also be a factor. Institutional expertise, no suspect motive, and the absence or near absence of private treble damages that would follow it.

UNIDENTIFIED MALE: One possible thought on this. I think there probably would be some follow-on actions. I think to the extent the FTC shows interest in a practice, even if it doesn't, in a litigated opinion, determine it violates Section 1, I think that's going to trigger follow-on cases. As a broad analogy you can look at the -- well, it happened in the compact disc case. There was significant private litigation that followed on that.

Beyond that, the Microsoft case, I doubt that the actual holdings in Microsoft supported very many of the private suits that followed, apart from the competitor suits. The consumer class actions really contained allegations that went far beyond any holdings that were affirmed by the Court of Appeals. So, setting aside collateral estoppel and technical benefits of a government judgment in a follow-on action, I think you're going to see follow-on actions regardless.

MR. DAGEN: Now it's time for the quiz portion of our show. I've put together some hypothetical questions to explore some of the issues that touch on where the boundaries of Section 5 and distinctions with the Sherman Act might lie.

So, for example, one hypothetical: In a three-firm market with barriers to entry, a firm with a 30 percent market share engages in exclusionary conduct. For example, sham petitioning that satisfies PREI, or blowing up a factory, the traditional example, to prevent a new entrant. And the firm has 30 percent. It's unlikely that that share is going to change, so there's no dangerous probability of monopolization. Can or should Section 5 reach this conduct?

I would like to ask Bob for his views on that.

MR. PITOFSKY: Well, let's hold blowing up the factory for a minute here. As I understand what you're saying, the firm engages in a lot of conduct designed to exclude a potential competitor, but holding the blowing up the factory, none of it is illegal. Well, firms do that all the time. They lower their prices. They improve their product. They hire excellent marketers.

Those things are not illegal and whether their intent is or is not to exclude a competitor doesn't matter. You wouldn't want to tell a firm, well, I don't want you lowering your price to consumers because your secret ambition here is to keep others out. So that would be the wrong result.

Blowing up the factory, I don't know. I've heard that since law school. My answer is it's a criminal violation, let's put these people in jail. We don't need the antitrust laws.

MR. DAGEN: Any other views on that?

MR. ANTALICS: Yeah, I'm not sure I agree on that. It depends on what you mean by exclusionary conduct. If Bob just mentioned a lot of types of conduct that I think are ordinary course business activity. If the hypothetical is truly sham petitioning where you're raising their costs and keeping them out of the market so that you can return the market to an oligopoly, I think there's some likelihood of harm there.

MR. PITOFSKY: I agree, but that's not our problem. But I agree completely.

MR. ANTALICS: Okay.

MR. DAGEN: That was supposed to be the problem. So, the conduct here does not fall obviously within Sherman 2.

Bob Lande?

MR. LANDE: It all depends, as you say, what they're doing and whether there's an efficiency reason for it. If it's lower prices, better advertising, that's in the interest of consumers. That's efficient, it adds to consumer choice, it's wonderful. But suppose it's an exclusive dealing arrangement which says you may not sell their product if you want to sell my product. A firm with a third of the market says, you can't have my established product with a third of the market if you handle anything by that would-be entrant. Again, assuming there are no efficiencies for it as well, then to me that looks like anticompetitive conduct and it should be forbidden under Section 5 of the FTC Act.

MR. DAGEN: Yes, Bob?

MR. PITOFSKY: There are always efficiencies through exclusive dealing. I mean, Standard Station said that, what, 50 years ago. Forward planning, reducing costs of marketing. I've forgotten what all --

UNIDENTIFIED MALE: Let me --

MR. DAGEN: Hold on one second. I want to remove the efficiency justifications. Let's assume for this hypothetical that it's conduct that has no efficiency justification, but because the firm does not meet the requisite market share, would not be monopolization. And there's no agreement, so presumably would not fit under Section 1. The question is, does Section 5 have a role there to condemn unilateral conduct under that circumstance?

MR. PITOFSKY: No, I don't think so. It's legal. It's legal conduct. Since when do you convert legal conduct to illegal because of Section 5?

You know, let me just say, let me coin a phrase. Those who forget history are bound to relive it. I was here when Section 5 went wild. It was applied to people who were coming across the borders. It was threatened to apply to labor disputes --

UNIDENTIFIED MALE: Illegal immigrants, right.

MR. PITOFSKY: Illegal immigrants. Environmental, right? Good. Any more in the audience?

(Laughter.)

MR. PITOFSKY: I remember being sent, along with Mike Salinger, to Congress, to the Judiciary Committee to defend the existence of the Federal Trade Commission because people were so upset about that. That's not what this crowd is doing. That was really off the page. But when you think about expanding Section 5 to cover conduct that's otherwise legal you can expect a fight. And the Commission may lose more than it gains in that fight.

MR. DAGEN: Bob Lande?

MR. LANDE: Look, I agree completely, Bob. If we start saying conduct that oppresses the public morals is hereby illegal, the FTC is going to get its head chopped off and we shouldn't do that. But if you stick to something reasonable like, forgive my one note, consumer choice, what's the problem? Everything does have some potential efficiencies, even price fixing does has potential efficiency. There's only one price that reduces consumer search costs, right?

So, I concede there's always going to be some potential efficiencies. You got to put in a word like significant. If there are no significant efficiencies from Rick's hypothetical, then I say condemn it. But don't use words like it's bad, it's immoral, it's against the public morals, then the agency is going to get destroyed. You've got to be careful in your articulation of why you condemn it.

MR. DAGEN: Yes. Bill?

MR. PAGE: I'd add one caveat to this. I think this is somewhat in defense of Bob Pitofsky's point. I think there's a value to safe harbors and essentially expanding Section 5 in this way is saying the safe harbor is no longer so safe and we're going to make everything, you know, if not an open-ended rule, of reason, at least something that's questionable under your framework or some other framework and that will be controversial.

MR. DAGEN: Okay. Let's move on to our next hypothetical. I know some people in the audience will appreciate this one. In a standard-setting situation with clear duties to disclose, a firm does not disclose a patent -- for example, because it doesn't believe the patent is enforceable. Technology covered by the patent is adopted. After lock-in, a new lawyer joins the company and determines that the patent is enforceable and proceeds to enforce it creating a dangerous probability of monopolization.

In this case, there is no bad intent at the outset or express commitment prior to acquisition of monopoly power. Why should or shouldn't Section 5 reach this conduct? Is this a case of an accidental monopolist that should be actionable under Section 5, but not under Section 2, as I think Chairman Kovacic talked about -- a no-fault monopoly or a slight fault monopolist.

MR. DAGEN: Mike? Yes.

MR. ANTALICS: When I read it the first time, I thought, boy, that's an easy answer, yeah, you know, they're liable. Then I read it again and said, well, that's an easy answer, no, they shouldn't be because I know what the expectations are going to be on the part of a lot of people that are engaged in standard setting. You have competing interests here. The enforcement-oriented interest would be they've said they don't have an interest in any proprietary technology here. People have relied on it and they're now locked in and why should consumers later pay the price?

On the other side, you have somebody that's not intentionally engaging in anticompetitive conduct and you have the danger, the danger that if the rule is a stringent rule, you could dissuade people from engaging in the standard-setting process in the first place.

So, I think the answer is having come down -- it's easy on both sides, I think the answer is in the standard-setting body's rules. It's really a matter of expectation. The enforcers are thinking everybody expected kind of a complete disclosure and we're never going to have to pay any royalties. That's what the enforcers think.

On the other hand, I can see a lot of people in the standard-setting body saying, well, we said we would disclose, but we weren't going that extreme. If it's not intentional and somebody let it slip through and they were going to adopt it anyway, we ought to get a reasonable royalty. So, I think it's a problem that can be solved and should be solved by the standard-setting body where the rules are clear.

If the rules stated you make your best efforts to disclose what you have, but if it's clear from the rules that if there really is an inadvertent non-disclosure that's not going to be held against them, then the agencies ought to go with that. Now, different standard-setting bodies value different things. I mean, they all don't have the same rules. Some standard-setting bodies are really bent on obtaining the standard that is going to be free for whoever wants to use it no matter what, and I think they ought to be able to set that out and then the participants ought to live with what they're given.

But I think it's something that in the first instance ought to go to the standard-setting body.

MR. DAGEN: Any other thoughts on that? Mike?

MR. SALINGER: You're looking at what is, in essence, Section 2 behavior. And what you have to prove for a Section 2 violation comes down to an error cost analysis. And for that behavior, the error cost analysis comes out one way or the other, but it doesn't come out differently because you're calling it Section 5 instead of Section 2. So, I would say either you can bring this as a Section 2 case or it falls.

MR. DAGEN: The next hypothetical. In Detroit Auto Dealers, the dealers reached an agreement to restrict hours of operation. What if instead one announced a restriction on hours followed by another, followed by another? We kind of touched on this sort of issue before. That is, there's no express agreement. And assume that none would have done this unless the others follow. Thus, we've got prisoner's dilemma issues.

If the Commission could show anticompetitive intent and anticompetitive effects -- so, for example, the anticompetitive intent could be the reason the Commission finds out about this, because an employee of the first mover can't sleep at night and comes in and says, look, we're trying to restrict hours to raise profits. We did this, we restricted hours. Everybody followed. We didn't have any efficiency justification for it. We just wanted to see if this practice would work out. And then, subsequently, we do see higher prices as a result of restricted hours.

Should or shouldn't this be covered by Section 5? Should the Commission be permitted to investigate for efficiency justifications if staff believes it unlikely that an agreement would be found? This is for Bob Lande.

MR. LANDE: Thank you. This, to me, sounds like a situation of conscious parallelism that Bill Page was describing earlier. And believe it or not, Bill, I think I find myself in complete agreement with you in the area of conscious parallelism. Now, you're going to have to rethink your position, right? I know.

(Laughter.)

MR. LANDE: But there's nothing you can do about it. You can't enjoin it. You just can't do anything.

Now, I guess the one area -- I have to find something to disagree with Bill Page about, if there were some facilitating practices, Bill said, well, they always seem to be justified, so you shouldn't go after them either, at least that's what I think he said. So, I guess I would be more optimistic, if that's the right word, that sometimes in these conscious parallel situations, there would be facilitating practices and we'd be getting into an Ethyl-like situation, but where the restraints didn't have a justification.

So, in other words, I would go after the right facilitating practices case. I would not go after pure conscious parallelism, which is what I think this one is.

MR. DAGEN: Bob Pitofsky, I think you wanted to talk about Ethyl. This might be an opportunity to slip that in.

MR. PITOFSKY: I don't think this is pure conscious parallelism. I mean, look, you can't even get to a jury with conscious parallelism in this country. Standard enterprises has not read (inaudible) --

UNIDENTIFIED MALE: That's exactly what it is.

MR. PITOFSKY: But this is interdependent in the way Don Turner describes it. In other words, it really works only if everybody goes along. There's evidence of intent and there's no efficiency. So, you know, as far as I'm concerned those are plus factors that avoid a motion to dismiss if the Commission brings a case, and if a private party brings a case, I think you can get the jury with this (inaudible).

MR. DAGEN: So, you wouldn't see a Section 1 versus Section 5 difference here?

MR. PITOFSKY: That's right, that's right. I wouldn't. And, you know, we did a lot of (inaudible) stuff where it was a Section 1 case but we threw in Section 5. Who knows what might happen later on. I'm not even sure I can prove very much of what we did there. I think the emphasis should be on Section 1 or it can be on Section 1 and I think -- and here Professor Posner, Judge Posner is in the same place. There should be a more elaborate, generous reading of what is a plus factor.

MR. DAGEN: Mike?

MR. ANTALICS: Yeah, I think this hypothetical all turns on what you mean by the anticompetitive intent. If you can characterize this as an invitation to collude because it's obvious what they're doing in trying to signal an agreement, that's one thing. But short of that, I mean, you have people every single day raising prices and hoping that their competitors will follow so that prices go up. This is just pure oligopoly behavior unless you have something very strong in the way of your anticompetitive intent there.

I would take it to mean more than just let's reduce the hours because that cuts our costs and we make more money. It's got to be some overt act. I would hinge this on whether it's akin to an invitation to collude. This gets back to one of the reasons I said earlier why I think it's a good use of the Commission's resources. In a case like this, if it were clearly an invitation, you may not know why the others went along with it. Did they knowingly try to get into an unlawful agreement or are they just acting interdependently as they would in an oligopoly?

So, I would make use of Section 5 invitation to collude for sure if you had that evidence.

MR. DAGEN: Bill?

MR. PAGE: As a matter of law this is not a Section 1 violation. I commend to you the Travel Agents case. There's a delightful excerpt from the deposition testimony of one of the airlines explaining exactly why they were reducing -- why one would make a move to reduce travel agent commissions and, evidently, he was well versed in the law of Section 1 because he clearly said, you know, we never communicated about this and I know it would have never been successful unless all of my rivals went along, but I was just hoping that they would. So, we reduced the travel agents' commissions. And sure enough they all followed suit. And the court dismissed -- the complaint was dismissed. It's nothing but conscious parallelism.

Again, it confirms my reading of these cases and the pleading cases and the summary judgment cases is, the definition of a Section 1 violation now incorporates communication. Communication is that which distinguishes conscious parallelism from collusive action. I could be more specific about the type of communication. I see absolutely no reason why Section 5's substantive coverage should be any different.

MR. DAGEN: Let's move on to another hypothetical. What if the Supreme Court ultimately finds there is no misrepresentation exception to Noerr under the Sherman Act. Why should or why shouldn't the Commission use its authority to stop conduct that would otherwise violate Section 1 or 2, but for Noerr? Are there reasons that the immunity should be more strictly construed under Section 5 than Section 1 or Section 2?

Bill?

MR. PAGE: Thanks, I think, Rick. I got this question -- I got notice of this question last night in my hotel room, and it's one that I can honestly say has never occurred to me. Just off the top of my head, I would say to the extent that Noerr is based on First

Amendment considerations, as a first approximation, there won't be any difference. There's no reason to think that if misrepresentation is insufficient to satisfy the concerns about petitioning under the First Amendment, that that would be different under Section 5 or under Section 1.

Now, to the extent that there are balancing questions in the First Amendment analysis, if could be -- and this is getting perhaps to something, and Dan might want to elaborate on this -- if FTC were to use its rule-making power in a specific context and articulate a strong government interest in particular types of misrepresentations, perhaps ones that don't rise to the level of a sham, maybe that would make a difference in the scope of immunity.

MR. CRANE: Yeah, I think the problem, Bill, is that Noerr is not exactly a First Amendment case, but it's clearly sort of statutory construction in the shadow of the First Amendment. So I think this is an area where, if anything, the law should very closely track the Sherman Act law because of exactly this feature.

MR. DAGEN: Okay, another hypothetical. A firm invites another firm to stop discounting. The other firm appears to have accepted. Can or must this be pled as both a Section 1 and a Section 5 invitation to collude case? Can it just be pled as a Section 5 case to avoid the need to prove agreement, particularly given that the relief is likely to be the same? Or because it looks like the Sherman Act violation, does it have to be pled as Section 1 and not Section 5?

Dan?

MR. CRANE: So, I guess, first of all, going back to my earlier statement, I don't think that the FTC ever has to plead a Sherman Act theory and is not allowed to plead a Sherman Act theory, it has to plead a Section 5 theory. That's what the statute says.

Obviously, if there's evidence that there's agreement by the competitor then we have a straight up Section 1 case, an easy Section 5 case, no difficulties there.

As someone said earlier, there's a Section 2 theory obviously as well. The American Airlines attempt to collude with Braniff theory was pled as a Section 2 theory by the DoJ because there's no attempts to conspire but there is an attempt to monopolize. But I think that even if you couldn't plead as a Section 2 or a Section 1 case, this is a good place for Section 5 to sort of fill the gaps. Just because there's no efficiency justification for an attempt to conspire and it seems to me to be simply an area where there isn't a lot to be said for allowing the conduct to go forward, you want to catch it in its incipiency, you want to prevent it from happening again, and because it's the kind of conduct that, if it was accepted clearly would be criminal, it's easy for me to think it was a Section 5 violation.

MR. DAGEN: Yes, Bob Pitofsky?

MR. PITOFSKY: Well, I found those arguments quite persuasive, but I do want to call attention -- in this hypothetical, it says, can it just plead as a Section 5 case to avoid the need to prove agreement, particularly given that the relief is likely to be the same? I really do not like that idea that Section 5 is there to diminish the burden on the Commission on how it proves its case. Antitrust laws are not there for the convenience of the Commission enforcement staff. They're there for consumer welfare, the competition sector and so forth.

So, if the argument in favor of using Section 5 are the ones you put forward, I'm very comfortable with that. But I think this business of using Section 5 to save the Commission time, effort and maybe funds, that's not what it's there for. I can't believe that Congress in 1914 said, let's make it easier for the Commission to prove its cases, let's put unfairness in there. I just can't believe that's what it was about. I don't think it should be about that.

MR. DAGEN: Mike Antalics?

MR. ANTALICS: No, I think I agree that the statute is not there to make your job easier, but in the context, for example, of a public invitation, it may be quite ambiguous as to what's motivating the responses of others in the industry, and I can certainly envision where the Commission would be very uncomfortable ascribing acceptance of a price-fixing agreement to people based on what could have been in their own unilateral self-interest. In a case like, if it's clear the invitation was made and they just don't really have sufficient evidence to ascribe agreement from the other side, then that would be the criteria I would use. Then you would go straight to Section 5 invitation.

MR. DAGEN: Bill?

MR. PAGE: I won't criticize any of the invitation to collude cases that were brought, or on a Section 2 theory in the airlines case. But I would like to add a note of caution about an over-expansive interpretation of this notion of invitations to collude.

One of the government's charges in the Microsoft case was the so-called market division proposal. It didn't survive the Court of Appeals because the Court of Appeals believed that the government had failed to prove that there was a browser market. So, it didn't have to answer the question of whether there was an attempt to monopolize the browser market.

In our book on the Microsoft case, we sort of delved back into the issue of this so-called market division proposal. And it turns out to be quite complicated. Not all invitations to collude are as stark as in the airlines scenario. With platform manufacturers, they have to deal on a daily basis with firms whose products are going to work on that platform. In the circumstances of this case, there were many plausible suggestions about the reasons for Microsoft's discussions with Netscape about the use of its browser.

So, a note of caution about invitations to collude. Very often firms that are rivals need to deal with each other.

MR. DAGEN: So, we're done with hypotheticals and moving toward closing up. As Bob Pitofsky suggested, we revisit limiting principles at the end. So, a question for the panel is if they have anything to add on this. I know most of you have already spoke on this, but what limiting principles should be applied to the definition of unfair methods of competition? How can unfair methods of competition be defined to avoid capturing benign or pro-competitive conduct while allowing for sufficient guidance and predictability for business?

Most of you addressed that at least in your opening comments. But I guess in closing, I would like to figure out whether any of the statements that we've found in the decisions involving Section 5 provide a test that you think that the Commission should apply here, and whether there are tests the Commission should not apply when invoking Section 5.

MR. PITOFSKY: I've moved really erratically since when we've started. I (inaudible) for an entirely tentative proposal. One thing that has struck me, let me just say, my proposal was for where the practice causes very substantial harm, the remedy does not affect efficiencies or other good business reasons, and a clear line can be developed that allows predictability. I was thinking about that third point when we were discussing predatory pricing. I believe that below average variable cost was a mistake.

Now, three or four Circuits go along with that. That under certain circumstances, prices just above average variable cost can still be a violation. I think that's fine and I think the Commission should help to develop a rule in that area. But to say it's a violation of Section 5 but not of Section 1 and then not come up with rules that are necessary -- and just think how difficult the rules would be as to which pricing above average variable costs but below full costs. I mean, just think about the Turner-Areeda article which went on for about 20, 25 pages or more on that.

So, I want to emphasize the third factor that Section 5 can certainly cover, for good reason, matters that are not comfortably covered by Section 1 and Section 2, being very cautious about the scope of that, and that a clear line of predictability is essential to justify Section 5.

MR. DAGEN: I don't know if the panel -- the last page of your handout has the various formulations, if you want to take a look at that for a second. One of the proposals from the antitrust treatise is found in this, which was: "a moderate threat to competition and few offsetting benefits to customers, and is capable of being differentiated adequately from permissible behavior, where enforcement is limited to the FTC, and relief is limited to an injunction prohibiting or undoing the challenged conduct."

Several people have mentioned that as an appropriate standard. I guess to get a final word, does anybody think that's an inappropriate standard? I think maybe Bob Pitofsky thinks that that might be too lenient.

Is that correct? And does anybody else share that view?

MR. PITOFSKY: The fourth bullet point? The fifth?

(Discussion off microphone.)

MR. DAGEN: Dan?

MR. CRANE: I like that formulation. Again, I want to make sort of one more pitch for the idea that there may be a difference between sort of the deference or the space that courts should give to the FTC and the sort of prudential exercise of the FTC's powers. So, I think I'm fully on board with Bob's cautions that there's sort of just a political context in which the FTC cannot get too far ahead of Court's interpretation of the Sherman Act.

But I do think that in terms of FTC's own advocacy, of what deference should be by the courts, it needs to distinguish his own position from the position of the Sherman Act.

MR. DAGEN: Anybody else?

UNIDENTIFIED MALE: Just again a thought I had thrown out earlier, apart from something like the gap filling invitations to collude, I think the Commission, as in recent years, I think the Commission is on a high because it's bringing, for the most part, good cases and being successful and contributing to consumer welfare, but it's not doing it so much by carving out "these are Section 5 alone" theories. It's doing it by attacking different forms of competitive behavior that, in its view, are anticompetitive whether it be, again, the Hatch-Waxman type context, the standard-setting context. These are all types of cases that get interwoven into Sherman Act jurisprudence, but it's the Commission that has been leading the way.

UNIDENTIFIED MALE: I don't think it's a helpful statement. I would restrict the use of Section 5 when you're not going to use a Section 1 or 2 standard to cases where you have a clearly articulated reason why it falls in the gap. And when you're doing that, you need to have a broad scope for a business justification defense.

MR. LANDE: I don't find it very useful. Identifiable doesn't help me, culpable doesn't help me. Incipient is good. I like that. Injury to competition. Again, I already said I'd prefer putting it in terms of choices on the market rather than competition.

But I do want to agree with Bob Pitofsky's caution that it's got to be a clear predictable standard. If the election, in particular, goes to Obama, I would urge enforcers not to overreach. If they overreach, they're going to make the mistakes that were made in the past. If we go after conduct that was immoral, unscrupulous, against the public goods, public morals and things like that, it's just going to inevitably get reversed by the court. So, we have to keep predictability in mind as Bob said.

MR. PAGE: Once again, limiting myself to the conscious parallelism and facilitating practices area, I don't see this aids us in any way. The word "culpable" jumps out at me. What that has meant in that area is communication. That's the dividing line. Once you have that, you have the Section 1 violation.

So, my suggestion is for the FTC is play with strength, which is its procedural advantage, its ability not only to use compulsory process, but its superior ability to analyze market conditions to identify conduct that perhaps private plaintiffs are unable to.

MR. DAGEN: I would like to thank the panelists for all their excellent views today and thank you for being here today.

(Applause.)

MR. AVERITT: Thank you all very much. This brings us up to our lunch break. Why don't we reconvene at 1:15, which is -- well, a show of hands. How many people would like to take a full hour for lunch and how many would like to reconvene at 1:15? Full hour? The full hour seems to have it. We will reconvene at 1:25.

(Panel 2 was concluded.)

REMARKS BY COMMISSIONER J. THOMAS ROSCH

MR. AVERITT: Ladies and gentlemen, welcome back to the afternoon part of the program. At this point, our focus is going to shift and we're going to move from questions of theory over to questions of practical application. Where in particular might Section 5 be useful and for what concrete purposes, if any?

That discussion is going to be opened by Commissioner Rosch. He has, as you know, a long experience in private practice and this gives him a special background for considering the interface between theory and practice.

For his thoughts on that enterprise, it is my pleasure to introduce Commissioner Rosch.

(Applause.)

COMMISSIONER ROSCH: Thank you very much, Neil.

First, I would like to welcome all of the participants on the panel. Actually, the next two panels. The Commission understands that a lot of time and effort goes into these panels and I want you to know that we're deeply appreciative. I also look forward to hearing some very practical advice on the appropriate use by the Commission of Section 5's unfair methods of competition prong.

I need to stress that I am, unfortunately, going to have to go back to headquarters because Tom Leary has been bugging me about transparency and how important it is, and it just so happens that we have a possible Part 3 matter and I want to be sure that I meet with the parties, so I don't get in dutch with Tom about this.

But that having been said, I am going to ask Jon to be my eyes and ears here, together with Holly and Kyle. I'm going to be watching this like a hawk and I'll be hearing everything that is said here. So, please don't consider my absence as being something that signals at all inattention to what's going to be said here.

I want to acknowledge that I have expressed some opinions in prior remarks and in the N-Data matter about the application of Section 5. I've said I think that as a matter of law Section 5 is broader in scope and deeper in reach than Section 2 of the Sherman Act. The Supreme Court's decision in FTC vs. Sperry Hutchinson endorses an expansive reading of Section 5 unfair methods of competition. In that case, as you'll recall, the Supreme Court held that Section 5 empowered the Commission to, and I quote it, "define and proscribe an unfair competitive practice even though the practice does not infringe either the letter or the spirit of the antitrust laws," end quote. And to, quote, "proscribe practices as unfair or deceptive in their effect on competition," end quote.

This expansive reading of Section 5, I would suggest, is not surprising. About two decades earlier, the Court had declared that the unfair methods of competition which are condemned by Section 5 of the Act, quote, "are not confined to those that were illegal at common law or that were condemned by the Sherman Act."

Now, S&H, in my judgment, is alive and well, notwithstanding the trilogy of appellate cases decided in the early '80s, that rejected the Commission's decisions challenging conduct as unfair methods of competition under Section 5. I'm referring, of course, to Boise

Cascade, Official Airline Guides and the Ethyl case. None of those decisions directly challenges the holding in S&H that conduct not governed by the Sherman Act may be treated as an unfair method of competition.

Indeed, after those decisions issued, the Supreme Court, albeit in dictum, and I've stressed the difference between dictum and holding before, but the Supreme Court did say that the teaching of S&H was that, quote, "the standard of fairness under the FTC Act is, by necessity, an elusive one encompassing not only practices that violate the Sherman Act and other antitrust laws but also practices that the Commission determines are against public policy for other reasons," end quote. I'm quoting the court now, of course, in Indiana Federation of Dentists.

I've also said I think Section 5 should apply to conduct which is not covered by Section 2. I explained my votes in Valassis, which was a consent decree covering an attempt to collude, and in N-Data, which was a consent decree covering an effort to renege on what was akin to a RAND commitment in a standard-setting process on that basis. In neither case did I consider the conduct at issue to be a Section 2 violation. Indeed, I've opined that for both legal and policy reasons Section 5 should not apply when Section 2 does apply. That's arguably the teaching of Boise Cascade. There the Ninth Circuit rejected a stand-alone unfair methods of competition claim when there was, quote, “well forged,” end quote, Sherman Act case law governing the conduct lest that, quote, “blur the distinction between guilty and innocent commercial behavior.”

I’ve also said there must be some other limiting principles on the application of Section 5, whether the challenge is made under the unfair act or practice prong of the statute as it was in N-Data or the unfair method of competition prong as it was in N-Data and Valassis.

First, the Second Circuit cases appear to me to require proof that the conduct at issue is oppressive. In Ethyl, the Court described an unfair method of competition as requiring, quote, “at least some indicia of oppressiveness such as, one, evidence of anticompetitive intent or purpose on the part of the producer charged, and two, the absence of an independent legitimate business reason for its conduct,” end quote.

In OAG, the Court held that a monopolist could refuse to deal with whomever he pleases stating that, quote, “even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly and does not act coercively, retains this right,” end quote.

Second, the Ninth Circuit's decision in Boise Cascade appears to me to teach that in the absence of per se illegal conduct, proof of actual or incipient anticompetitive effect is also required when the theory is that there's an unfair method of competition. Indeed, former Chairman Tim Muris has written that sound antitrust analysis must always be grounded in anticompetitive effects. His focus was on single firm conduct cases under Section 2, but his views would seem to apply, with equal force, to an unfair method of competition claim under Section 5.

It may be that the effect element of the claim can be inferred from clear evidence of anticompetitive intent and lack of legitimate business purpose. The analysis in the aid to public comment in Valassis, for example, stated that an invitation to collude could be treated as an unfair method of competition where there was clear evidence of anticompetitive intent and of a dangerous probability of an anticompetitive effect. But I think there must be some evidence, direct or circumstantial, of actual or incipient anticompetitive effect, otherwise the claim would arguably be to unbounded.

I've also said we should be mindful of the impact that application of Section 5 instead of Section 2 will have on follow-on treble damage actions. Important here is that violations of the FTC Act that are not also antitrust violations will not support subsequent federal private antitrust actions for treble damages. And although damages actions are theoretically available under many "little FTC Acts" of several states, as Commissioner Kovacic pointed out in one of our consent decrees, to my knowledge there haven't been any follow-on state court cases based on a Commission 5 unfair method of competition case. Rather, whatever follow-on litigations there have been to Commission Section 5 unfair method of competition cases has been based on the Sherman Act and I think that's very frail indeed.

So, I think a Commission conclusion that an act or practice is an unfair method of competition under Section 5 is far less likely than a finding that an act or practice is a Sherman Act violation to do collateral damage. That's particularly, so, I think, if one adopts Commissioner Leary's views, which he's going to express a little later, about the kind of relief that ought to be granted in Section 5 cases.

But all of this said about all of my prior remarks, I still think that there exists a myriad of open questions. Most fundamentally, are my premises right? Put differently, should enforcement of Section 5 be confined to conduct that the Commission also finds does not violate the Sherman Act or the Clayton Act? I'm not entirely clear about that, particularly after reading some of the papers that have been submitted and will be submitted for comment this afternoon.

If not, what kind of business conduct besides the conduct challenged in Valassis and N-Data should be covered by Section 5? What kind of conduct should not be, either on legal or policy grounds? Should conduct that cannot be shown to injure the competitive process ever be considered to be an unfair method of competition? And if so, when? How can the Commission avoid creating a rudderless, unbounded standard acceptable to whoever happens to be in the majority of FTC Commissioners at any particular time? What should be the practical workable boundaries, susceptible to coherent application? How can unfair methods of competition under Section 5 be defined to avoid capturing benign or pro-competitive conduct while allowing for sufficient guidance and predictability for business?

Are there some universal limiting principles? If not, what limiting principles should be applicable or may be applicable? Can we conclusively say that bringing the statute back to life outweighs the risks? Should we care whether our Section 5 decrees bar some or all follow-on treble damage actions? And if so, what decrees should be employed to ensure that there's such a bar?

As I say, I've read some of the papers that will be presented on these subjects this afternoon. I found them absolutely engrossing. And I must say that I have begun to rethink some of my premises again. What is it, consistency is the hobgoblin of little minds? And I am short enough to not want to have a little mind as well.

These are just some of the questions I've got. I'm sure that other Commissioners, who don't necessarily share the views I've expressed before, have many more. For that reason, I want to stress that we all want to learn from what's said here today, including me. That's the purpose of these panels, and I can assure you that that will be the effect.

Without further adieu, what I would like to do now is to introduce to you Holly Vedova, who is going to be moderating the first of these panels. Holly is a graduate of the George Mason Law School. She has served as an attorney advisor to Chairman Janet Steiger, first of all, then to Commissioner Tom Leary and, most recently, she's one of my most valued attorney advisors. She's been with the Commission for -- it says 20 years in the celebratory brochure yesterday but, in fact, it's been 21 years. She did take a vacation from the Commission and went over to the legal staff of American Home Products and she is a wife and the mother of two boys.

With no further adieu, we want to bring everybody up, Holly, and get started.

MS. VEDOVA: Thank you, Commissioner Rosch.

(Applause.)

PANEL 3: APPLICATION OF SECTION 5 TO BUSINESS PRACTICES

MS. VEDOVA: Good afternoon, everyone. We've got a very distinguished panel here. Can I just say, we do have one last-minute substitution. Susan Creighton had a last minute dilemma and Tom Krattenmaker has graciously agreed to sit in. As Susan said to me earlier this morning, I was trading up. So, thank you, Tom, very much for being willing to sit in.

MR. KRATTENMAKER: My pleasure. I've crossed her name out, so I think she's officially out of here.

(Laughter.)

MS. VEDOVA: Well, for purposes of the webcast, I think that's a good idea.

So, as Neil and the Commissioner said, we're going to pick up right where the morning panels left off and delve into some specific business practices that may or may not be appropriate for the use of Section 5. We'll probably touch on a lot of the theories as well. I can't promise there won't be any overlap from the second panel this morning. I'm hoping we're going to have a really vigorous debate and also get some really good practical use for the Commission as Commissioner Rosch was also hoping.

So, first, I'm going to introduce each of the panelists, one right after the other, and then they're each going to give a 10 to 12-minute presentation and then we should have about half hour or 40 minutes afterwards to have some discussion.

First, we have David Balto. He's an antitrust attorney and senior fellow at the Center for American Progress focusing on competition policy, intellectual law and healthcare. He has over 20 years experience as an antitrust attorney in the private sector, the Antitrust Division of the Department of Justice and the Federal Trade Commission. He's nationally known for his expertise in competition policy in high-tech industries, healthcare, pharmaceuticals, medical devices, media and financial services.

From 1995 to 2001, he was the Policy Director of the FTC's Bureau of Competition and attorney advisor to Chairman Robert Pitofsky.

Next, we have Bert Foer, who is the President of the American Antitrust Institute. His career has included private law practice in Washington D.C. -- Hogan & Hartson and Jackson & Campbell; the Federal Senior Executive Service -- here at the Federal Trade Commission as Assistant Director and Acting Deputy Director of the Bureau of Competition; CEO of a mid-sized chain of retail jewelry stores for 12 years; trade association and non-profit leadership; and teaching antitrust undergraduate and graduate business school students. He has published numerous articles, book chapters and reviews relating to competition policy. He is a graduate of the University of Chicago Law School with a AB, magna cum laude from Brandeis University and an MA in Political Science from Washington University.

Next, we have Tom Krattenmaker, of counsel in the Washington, D.C. office of Wilson, Sonsini, Goodrich & Rosati, where he focuses on antitrust, telecommunications, and trade regulation issues. Immediately prior to joining Wilson Sonsini, Tom was an attorney in the Federal Trade Commission's Bureau of Competition, Office of Policy and Coordination. In this role he principally served as a legal advisor to the Bureau Directors and to attorneys investigating and litigating antitrust cases and advised on several Bureau and Commission public reports.

Previously, he served as a senior counsel in the Department of Justice's Antitrust Division and held positions at the Federal Communications Commission, including Chief of Telecommunications Merger Review and Director of Research and Co-Director of the Network Inquiry Special Staff.

Earlier in his career, Tom served as Assistant Director for Evaluation of FTC's Bureau of Consumer Protection. He was also senior counsel at the law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo. Tom also spent more than 30 years in legal education. He was a professor at the University of Connecticut, professor and associate dean at Georgetown University, and Dean of the William and Mary School of Law. In 1991, Tom was a Fulbright visiting professor at the University of Natal School of Law in South Africa. In addition, Tom served as a law clerk to Justice John Harlan on the Supreme Court of the United States.

Next, we have Tom Leary, former Commissioner at the FTC. He rejoined Hogan & Hartson in February 2006 after six years here as Commissioner. As an FTC Commissioner, Leary's opinions, articles and speeches made original contributions on a variety of issues such as the application of the antitrust laws to the healthcare industry, the antitrust intellectual property interface, the consistent enforcement of the merger laws, and the common roots of competition and consumer protection law. He also represented the FTC in policy discussions with competition authorities from a number of countries including China and Russia.

Commissioner Leary testified before Congress several times on privacy and security issues.

He has received both the Miles W. Kirkpatrick Award for Lifetime Achievement at the FTC and an award for lifetime contributions to antitrust and regulatory policy from the American Antitrust Institute.

Before he joined the FTC, he was a partner with Hogan & Hartson from 1983 to 1999. Earlier, he was a partner in a major New York law firm and Assistant General Counsel of General Motors with overall responsibility for antitrust, consumer protection, and commercial law matters.

He gave more than 100 speeches while at the FTC and has published extensively about antitrust law, attorney-client privilege, corporate compliance programs and other problems of corporate practice in various trade publications. He also served as an air intelligence officer in the U.S. Navy during the Korean War.

Last, we have Tad Lipsky, a partner in the

Washington, D.C., office of Latham & Watkins. He is an internationally recognized expert on antitrust and competition law and policy and a veteran of numerous antitrust proceedings throughout the world. He has served as Deputy Assistant Attorney General under William Baxter, playing central roles in the preparation of the 1982 Justice Department merger guidelines, the review and ultimate dismissal of United States v. IBM, the amicus program that resulted in profound changes in Supreme Court interpretation of antitrust law, and the decisive realignment of the interface between antitrust enforcement policy and intellectual property law that occurred in the first Reagan administration.

After nine years of private practice in Washington, D.C., he was appointed Chief Global Antitrust Lawyer for the Coca-Cola company in 1992. After joining, Latham & Watkins in 2002, he served as the inaugural International Officer of the ABA section of antitrust law, and since has been closely associated with efforts to streamline antitrust enforcement around the world, advocating the reduction of compliance burdens and the harmonization of fundamental objectives of antitrust law.

So, David, why don’t you get started.

MR. BALTO: Thanks, Holly. My remarks, which are outside, are titled, A Section 5 Enforcement Agenda That Even Bill O'Reilly Could Love.

I appreciate the opportunity to come and speak to you today at this important program. I think we should take a moment to applaud the FTC for its efforts to examine the full range of its statutory powers. Too often in the past, the FTC has seen itself as the little sister of the Antitrust Division, trying to replicate what the division does in going into federal court and bringing federal court actions, and in doing so has failed to perceive and fully utilize its unique range of statutory and adjudicative powers.

To its credit, the current Commission has revitalized the administrative litigation process, and perhaps under its new rules, this process offers the potential of the Commission becoming the Times Square of administrative litigation -- antitrust litigation in the past.

Determining the scope of the FTC's jurisdictional powers is every bit as important. That's why the Commission's self-examination of its powers under Section 5 is vital to antitrust enforcement.

By the way, it's extremely vital, if you just look at the economy generally. I went back and read these texts about Section 5 jurisprudence in the 1908s.

It was amusing to hear them talk about the dangers of oligopolies. Guys, in those days, you were lucky, there were relatively few oligopolies. Thanks to relatively lax merger enforcement, we're lucky in many industries. If we have oligopolies, maybe we'll be lucky and the FTC will challenge a duopoly and make it into an oligopoly.

Today, I'm going to focus on a particular industry. I'm going to be Joe the plumber. These people here, they're a lot smarter than I am. They'll tell you the legal rules. I'm going to tell you where the enforcement effort should be spent. And it should be spent on healthcare intermediaries, health insurers, PBMs and group purchasing organizations.

And as I will explain today, I'm focusing on this area for two reasons. First, as we all know, healthcare is phenomenally important to our economy and to our Federal budget. Enforcement in this area offers the greatest potential benefits for consumers.

Second, there appears to be this striking disconnect between federal and state enforcement in this area. If you are going to look at the report card of these intermediaries, their federal antitrust report card, you would see that they were perfect antitrust citizens. Yet in practically every major state in the United States, there are significant investigations of

PBMs and insurance companies which have resulted in record awards of damages in an attempt by states to go and reform anticompetitive and anti-consumer practices.

Why is there this disconnect? Why is there this profound disconnect? Well, I think in part it can be resolved by the FTC looking at its powers under Section 5 and addressing the harmful conduct by these intermediaries.

This point was made clear to me when Commissioner Rosch and I appeared at a Korean antitrust conference a couple months ago. We were all speaking on a panel. Of course, it being in Southeast Asia, we held our breath as the guy from China got up to talk about where the priorities would be under the new Chinese anti-monopoly law. You know what he said? Commercial bribery in healthcare. He talked about the efforts of people to pay kickbacks in the healthcare environment and how that harmed the legitimacy of the process. But, we said, well, that's just one guy.

And then the fellow from Korea got up and he talked about this huge case they had brought in the pharmaceutical industry, bringing back fines of 20 billion wan -- that's only $20 million -- but 20 billion wan against the ten major pharmaceutical companies for similar conduct. And even Commissioner Rosch talked about the potential use of Section 5 to go against certain types of conduct by specialty hospitals engaging in cost-shifting conduct, that would ultimately harm their rivals.

So, I think this is an area where it is important to look at the potential for Section 5. To attack conduct that isn't necessarily a technical violation of Sections 1 and 2, but are enforcement actions that are important for the protection of consumers and the integrity of the market. Let me underscore that there are two things. Not only the protection of consumers, but the integrity of the market. And to emphasize something Commissioner Rosch said, these should address actions that don't necessarily immediately harm consumers but have the potential for harming consumers. It's always important to remember that Section 5 is an incipiency statute.

What should the FTC look at? Well, I identify in my written remarks a number of things. Each of these markets -- PBMs, group purchasing organization and health insurers -- have similar economic conditions. They're highly concentrated markets with significant entry barriers. They're very complex markets in which the ultimate consumer doesn't make the immediate transactions. There are agency arrangements which cause complexity and it provides a fruitful environment for deception and other types of conduct that can harm consumers.

For example, for pharmacy benefit managers, I identify the fact that the amount that a pharmacy benefit manager offers a planned sponsor -- that's an employer who is buying the pharmacy benefit plan -- might suggest that they're offering the highest rebate. But if you actually are able to go behind the numbers, you find out that they're manipulating the data and that, ultimately, consumers don't benefit. Consumers ultimately pay more. Or pharmacy benefit managers have a conflict of interest where they go and they favor a shipment of drugs through mail order even though those ultimately cost consumers more.

Group purchasing organizations engage in a variety of practices with medical device manufacturers in which they receive kickbacks. Now, you might say, kickbacks, maybe that could be an antitrust violation. Indeed there is a case involving health insurers and hospitals back from the 1990s in which the Ninth Circuit explicitly said, that's a gap. That's the Forsythe vs. Humana case which annoyingly ends up in the D.C. Circuit's opinion in the Rambus case, where it says that even though this conduct appears to be very unkosher, it's not an antitrust violation because you didn't specifically explain how it harmed competition.

Finally, let's turn to health insurers. There are a variety of practices. Anybody who deals with health insurers knows these practices, but there's a variety of things they do that keep the market from working. Health insurers penalize doctors from telling you whether or not you can go to a different insurance plan that may cover your preexisting condition, may cover the condition that you have. That effectively harms consumer choice.

Harken back to Bob Lande's remarks earlier this morning about the importance of consumer choice in creating a paradigm for using Section 5. Let me go and give you another practice. This is really a wonderful practice if you happen to be a health insurer or a stockholder in a health insurance company. Health insurers automatically enroll providers, doctors and networks they don't choose to participate in. This is called silent networks.

Now, there's an antitrust claim here. If you can automatically enroll doctors into these networks, it may make it harder for doctors to go and select and participate in other rival networks. But basically this is just a straightforward unfair practice. These networks oftentimes offer a lower reimbursement rate.

Oftentimes, they can have conditions placed on them that inhibit the ability of the doctor to fully inform patients. So, patients lack consumer choice.

Anyway, I look forward to hearing everybody else's remarks about the intricacies of Section 5, but there could be no more valuable effort of the FTC in using Section 5 to address the harmful unfair methods of competition engaged in by health insurers, GPOs, and pharmacy benefit managers.

MS. VEDOVA: Thank you, David. Bert?

MR. FOER: Thank you, Holly. I'm going to take a different approach today. The context for the ideas that I'm going to raise is international. One of the primary missions of the antitrust enterprise in the coming years is going to have to be to move toward a system of enforcement that has coherence and practical workability on a global playing field.

I intend to focus on some ways in which Section 5 can be used to bridge gaps with the European Union and perhaps other civil law jurisdictions. Because of the time limits, I think I'm going to be a little too cryptic, but I'll elaborate in my written presentation.

The first main point is that Section 5 and Article 82 have similarities that can be emphasized through various mechanisms of guidance that will give common structure to their inherently vague meanings. So, let's begin by recognizing a few important similarities -- and I know there are differences -- between Section 5 and Article 82 of the Treaty of Rome. One deals with unfair methods of competition. The other deals with abuse of a dominant position.

Both unfair and abuse are open-ended words that are normative in nature. They're certainly not restricted to a narrow efficiency-based meaning. They're actually quite similar. What's not unfair is not abusive. What's not abusive is not unfair, or so it could be defined.

Both of these tests of commercially incorrect business behavior are fundamentally vague as they're stated, and they both require structure in order to avoid their arbitrary and unpredictable application. It's in the common interest of the EU and the U.S. to find the areas in which they can express their interpretations of Section 5 and Article 82 with similar guiding language.

Now, both concepts deal with monopoly power, but market power can be exercised unfairly or abusively with anticompetitive effects in certain situations without having monopoly levels of market share. In this, I may be disagreeing with the previous panel, or many of them. Whereas the Sherman Act clearly applies to firms that have the status of economic monopoly, Article 82 clearly applies to lesser levels of market power in which a firm has achieved something called dominance.

I believe that Section 5 can and should be applied with a realistic and practical assessment of a firm's ability and incentives to exercise market power and its effects, and that a firm which is dominant in actuality and which engages in an unfair method of competition should be reachable under Section 5, even if the market share is less than the 70 percent or so that often characterizes Sherman Act decisions.

The concept held in common is, or could be, that when a firm has so much power over its market that it's capable of undermining a competitive market by unilateral actions, then it can be held liable for abusing that power.

The EC is currently on the verge of issuing formal guidance as to its interpretation of Article 82. Hopefully, we'll be able to make some comparisons in a more detailed way when this becomes public. Hopefully, the FTC will be able to work jointly with the EC to provide comparable, compatible if not identical, guidance which can be directed at specific categories of abuse.

Now, let me provide a couple of examples. Unilateral withholding is an example of a Section 5 violation that does not necessarily violate the Sherman

Act, but which can be viewed as an abuse of dominance. We've seen circumstances in the electricity industry, most strikingly in California, where an electric generator has been able to produce a significant increase in price by strategically reducing its output. For example, by closing a plant for maintenance at a time of peak demand when the industry is operating close to full capacity.

A successful withholding strategy appears to require highly inelastic demand on the part of consumers and a temporary situation that can be exploited by a strategically situated, but not necessarily monopolistic firm. The electricity example occurs in the context of a regulated industry. This fact does not deprive the FTC of regulatory authority, under various interpretations of the Federal power act, for example.

But could there be a Section 5 violation in unilateral withholding, an example in an unregulated industry? Well, consider the possibility of a manufacturer of flu vaccine who does not have monopoly power. Let's say that there's several manufacturers of flu vaccine and that it takes a long time to gear up to produce this vaccine. And that now we're in the middle of flu season, everybody is operating their various plants at full capacity and one of the players decides it will be more profitable to close down a plant and create an artificial shortage at this time. I would submit that that would violate Section 5.

I'll go on. The next point I think I'll hit on has to do with buyer power. A second example of a dominant, but not monopolistic firm engaging in an unfair method of competition could be found in this area of buyer power. We've actually got a whole chapter on the subject in this book, which I'm not going to try to sell you today. It's called, "The Next Antitrust Agenda," and it's available through Amazon and other Internet resources, but I'm not going to mention that.

UNIDENTIFIED MALE: It's only $29.95.

MR. FOER: It's more than that actually. We fixed the price higher than that, David, but we're going to keep the demand low intentionally.

(Laughter.)

UNIDENTIFIED MALE: Strategic withholding?

MR. FOER: Yes, it is.

(Laughter.)

MR. FOER: For a variety of reasons, a power buyer can exercise disproportionate anticompetitive bargaining power over its suppliers when it has a market share far below that required for a monopolistic seller. Our report points to the emergence of large buyers as a prominent feature in many sectors of the economy and it defines buyer power as, quote, “the ability of a buyer to depress the price that it pays a supplier or to induce a supplier to provide more favorable non-price terms.”

Now, this encompasses both classic monopsony and what we’re referring to as countervailing power. To quote from the report, “Since classic monopsony power is the mirror image of monopoly power, classic monopsony power is normally associated with a large share of the relevant market, approximately 70 percent or more.” Now, in contrast, both in theory and substantial evidence suggests that a firm can exercise countervailing power in many market settings with a substantial but non-dominant share, perhaps as little as 20 percent, maybe 10 percent.

Countervailing power, therefore, is likely to be exercised more frequently than classic monopsany power and its effects, whether beneficial or harmful -- let me stress, they may be beneficial -- are likely to be more widespread.

Now, there are undoubtedly all kinds of difficult questions relating to what would constitute an unfair method of competition or an abusive dominance by a non-monopsonist power buyer. But if the possibility of anticompetitive effects is realistic, and it will play an increasingly important role in economic life as we think is the case, then the FTC and the EC should be both trying to provide guidance as to the line between proper and improper exercises of buyer power.

Switching to another subject, price discrimination policy. It's well recognized that price discrimination by a company with market power can be anticompetitive under certain circumstances, but it can be pro-competitive under other circumstances. Section 5 could be utilized, again perhaps in consultation with the Europeans, to develop a series of parallel guiding statements as to what practices will be deemed by the FTC and the EC to constitute unfair methods of competition.

We believe that a market power screen is necessary in this regard, but that price discrimination can, under identifiable circumstances, be used anticompetitively by a firm with less market power than a monopolist.

The last point I'm going to make is that developing a structure for RPM rule of reason cases can be an example of bridging the gap between Section 5 and Europe's Article 81, which is the article that is similar to Sherman Act Section 1. The Supreme Court in Leegin, of course, called on the legal system to develop a methodology for dealing with resale price maintenance, but dealing with it under a rule of reason regime.

An appropriate approach already exists in the form of the EU block exemption regulation applicable to vertical restraints and the guidelines that are associated with it. According to the EC's guidelines, there's a rebuttable presumption that an agreement which contains RPM is anticompetitive and it will not have positive effects, or that where efficiencies are likely to result, these will not be passed on to consumers and/or that RPM is not indispensable for creating these efficiencies. But it's always possible for the person in question to come forward with substantial claims that the RPM will bring about efficiencies. When this occurs, the EC then has to show that the likely or the actual negative effects are what they are, in detail.

If the efficiencies outweigh the negative effects and the other conditions such as the indispensability tests are also fulfilled, then the agreement is not prohibited.

Now, that's guidance that's already provided in Europe. It really resembles a truncated rule of reason test that we'd feel comfortable with, I think. The EC is going to be reevaluating this guideline in 2010 and it's already begun the process.

Now, I think that the FTC could apply its jurisdiction under Section 5 and work in conjunction with the EC to agree on a rebuttable presumption and burden shifting approach very similar to, if not identical with, the current EC guidelines in order to arrive at a structured rule of reason approach which is workable and also meets the Supreme Court requirements. So, those are ideas I want to put forward and I thank you for your attention.

MS. VEDOVA: Thanks, Bert. Tom?

MR. KRATTENMAKER: Thank you, Holly. I'll stand up to give you a target, if you wish. I know the first thing you are all saying is it's funny, you don't look like Susan Creighton. I get that a lot.

(Laughter.)

MR. KRATTENMAKER: And when I realized I was going to be doing this, I don't know why but my mind flashed back to the first time I remember pinch hitting, which was the first baseball game I ever played in college, and I drew a walk. I don't know why I remember that. So, I'm going to at least try to put the ball in play today.

Now, those of you that know me know that I lack both Susan's eloquence in defining issues and her passion for trying to get them right. So, God forbid you should think I'm speaking for Susan Creighton. There's a paper out there on the table that we co-authored. I think it's fair to say that she agrees with everything in that paper. Why don't we just assume the remarks I'm about to give are my own and, hopefully, I think Susan would agree with at least 90 percent of them. We did work on this together.

The final disclaimer here is that we both think of this as a work in progress. So, I'm going to sound a lot more self-assured than I really am, and I immediately see Neil Averitt sitting there saying, Tom, you always sound completely self-assured, so what's new? And the answer is this time I really mean it, that I'm not necessarily completely self-assured.

Holly said she wanted a list of specific kinds of cases that could responsibly be brought under Section 5, not including standard-setting cases because you've got a separate session on that. So, I'm going to give you a list of cases and I'm hoping, Geoff, that you're listening, you can go out and file a bunch of them later this afternoon, please.

But because I am a recovering academic, I do start with a kind of a framework and it goes something like this. It seems to me that before the FTC brings a competition case, you want to have a solid case on the Sherman Act economics and policy. I think what was oftentimes referred to as the current bipartisan consensus on antitrust, I don't see any reason to depart from that. Even if you wanted to, I don't think you could. I think those cases from the 1980s tell you that judicial review is going to bring you back to it. It's got to be harm to competition, not to competitors.

You've got to have reason to say what you're doing is protecting consumer welfare, not competitor welfare here, and you've got to take adequate account of any efficiencies or efficiency justifications, and you have to think about what kinds of implications the rule you were pushing has for how business is going to be conducted under that rule of law.

So, we start from the proposition that those are the only kinds of cases you ought to bring, whether you're talking about Sherman Act, Clayton Act or Section 5. That leads to the next principle which is if you can bring it as a Sherman Act case, it seems to me you ought to bring it as a Sherman Act case. If it's a Sherman Act case, it's a Sherman Act case.

Does that leave anything else? Well, yeah, I think it does. I think it leaves three kinds of cases, although the first one maybe could be brought as a Sherman Act case, too. In the paper, we label them frontier cases, gap-filling cases and yes-but cases. Let me talk about each a bit.

By frontier cases, we mean cases that you actually might be able to bring under the Sherman Act, but where it seems sufficiently novel. Either the conduct hasn't been subjected to antitrust review before, or the theory seems novel even though it does fit under conventional Sherman Act analysis, so that there's reason to believe that perhaps a reviewing court, might get its "uh-oh, there's trouble in the water" antenna going. It might make more sense to try this as a Section 5 case to show that you're quite serious about proving all these elements and that you're not imposing a lot of retrospective liability on someone.

Now, I'm going to leave more talk about that to Tom Leary because his paper is largely about that. I was going to refer to him, of course, as Commissioner Leary, but since he's calling me Susan, I figure I can call him Tom. He suggests -- and I think they're very good examples -- Schering Plough and Rambus as cases that maybe, in retrospect, might have been even better as Section 5 cases because they were frontier cases.

One that comes to my mind, the FTC couldn't bring it because of division of jurisdiction, but the Justice Department's AT&T case on predatory cost shifting was a very, very solid Section 2 case. Tad might want to comment, I know he was involved in it. But I think it might fit very well Tom's discussion of the kind of case you might be better off bringing as Section 5, so you don't frighten people into thinking that we're about to impose this massive liability on behavior that heretofore had never been brought into question.

My own candidate for such kind of behavior would be market share discounts or what are sometimes called loyalty discounts. There's a lot of talk about that out there right now. If people are nervous about that, if judges would be nervous because, oh, you bring a case and all of a sudden there's going to be multi-million dollars of liability and every lawyer who can't find an ambulance chasing case is going to be filing a treble damages case on market share discounts, then maybe it ought to be brought as a Section 5 case first to basically establish the rule. We're talking about a case that is still a solid Sherman Act case.

I'm not talking about market share discounts being, per se, unlawful. I'm talking about where you show all the Sherman Act elements. Actual harm to competition, harm to consumer welfare, not harm to competitors, accounting adequately for efficiencies. Seems to me that might, and perhaps Tom might want to comment as to whether he thinks that would fit his -- I think, very well developed -- framework. So, those are frontier cases.

The second type that we talk about are gap-filling cases. Sometimes you can't bring the Sherman Act case because -- and we've all been here, at least those of us who work for the government -- you've got an incomplete case. The facts show you. There's harm out here. It's harm to competition. It's not harm to a competitor. There's a diminution in consumer welfare. There is no story here about efficiency. But you're missing some legal hook that's required under the Sherman Act.

Of course, we're all thinking about Valassis. Invitations to collude. That's become almost the poster child for what we call the gap-filling cases. There might be cases where it walks like a duck, it quacks like a duck, it swims like a duck, but the courts are going to tell you it's not a duck because it hasn't got the right size bill, even though that doesn't matter.

I think that for my suggestion of one that might have the same kind of coloration as invitation to collude cases, what about the practice of patent fishing? Again, I don't mean all of it, but what if you find a case where -- and I think you wouldn't have to look very hard to find one, folks -- where someone acquires a patent in an area in an industry where the inputs are very expensive, sends demand letters around to probable non-infringers, saying give me a lot less than the cost of litigation and I will go away.

That kind of behavior is very, very hard to bring under the Sherman Act. The simple reason is that the fisher is not really deriving any benefit from whatever anticompetitive consequences that fisher has created in the market. Usually, in order to be guilty of monopolization, I think you would find a case to suggest you have to be benefitting from the monopoly profits that are accruing thereby.

Nevertheless, in the kind of case I described under other fact circumstances, you'll have all the Sherman Act economic and policy issues there. You'll have entry barriers. You will have the increase of costs across the board, the infliction of massive inefficiencies in that industry. And depending on how those demand letters are spread out, you may even have the creation of market power among some firms in that industry that didn't have it before this happened.

Why couldn't a case like that be a perfectly good Section 5 case, even though I think it would be very doubtful as a Sherman Section 2 case?

Another thing I have that Susan doesn't have is if I can run my mouth much faster. I think I might have time to sneak another one in. And that would be Ethyl let's go back and take look at Ethyl. My own take on Ethyl is that the Commission lost it because they couldn't convince the court of the facts, of how it fit that industry. I don't see why, in another case, information dissemination that was serving as a facilitating practice might not be challengeable under Section 5 even though you can't bring the Sherman Act because you can't meet that agreement requirement, the Sherman Act test.

I think that could turn out to be a very solid Section 5 case that fits that definition of gap filling. You've got a case that on the facts, the policy, the economics of the Sherman Act, of the modern bipartisan antitrust consensus, ought to be a Sherman Act case, but there's sort of a technical legal reason inside the Act why you can't do it. It seems to me that Section 5 could be a perfectly good vehicle for that. I've given you a couple of examples.

The final one we suggest are the yes-but cases. Here I'm talking about a legal inhibition that's extrinsic to the Sherman Act. Sometimes you have a Sherman Act case, but you can't bring it because there's some other rule out there that stops you from doing it.

The first one you're supposed to think about is the Noerr-Pennington Doctrine. Here is consummate anticompetitive monopolizing behavior, but it was carried out through the process of petitioning the government. Therefore, you can't reach it. It's exempt, it's immune.

Now, I'm not suggesting that Section 5 be used to get rid of Noerr, although I do note that I do not believe there is a federal case applying Noerr to Section 5. But I do suggest that to the extent that Noerr is motivated in part by the chilling effects that may be brought about by exposure to mass litigation, there might be reason to bring some cases under Section 5 that could be stopped under the Noerr Doctrine. I would like to see this Commission bring a repetitive petitioning case. I think this Commission was the right one to do Unocal, because it called into question petitioning before an administrative agency, that is in a non-political context. In both these kinds of cases, what we're talking about is a much-reduced threat to the system of freedom of expression coming from this one single case rather than multiple cases, and a future-looking cease and desist remedy rather than the imposition retrospectively of massive liability.

For another example, another area where you get stopped is in the State Action Doctrine. Again, I'm not here to complain about the State Action Doctrine. If you didn't have the State Action Doctrine, every state regulation would be illegal. Not because it violated the substantive due process nonsense of Lockner against New York, but because it interfered with the interplay of free competitive markets.

In the State Action area, we have some pretty good doctrine -- the requirement that the state make a conscious decision to displace competition and actively supervise that displacement. But why couldn't this Commission say, with respect to us, there's not as much worry that if we bring a case, this means that the whole system of regulation is subject to being overseen by a bunch of private lawyers. I'm thinking about certificate of need statutes.

What if you find a case where a certificate of need statute is administered in a way that for want of a better phrase is a sham. Think Kentucky Movers. That was a sham case. Well, I suspect there are some out there where if you investigated you might find similar things in the data and healthcare area with respect to hospitals. But it doesn't happen only in healthcare. Essentially the state appears to have chosen to substitute a regulatory regime and seems to oversee that regime, but it's really kind of a sham. Frankly, South Carolina Dentists was close to that as well.

For another example, what about Walker Process? The law that we have from Walker Process is that the enforcement of a patent obtained by fraud can violate the antitrust laws if you meet the Sherman Act requirements in there.

For those of you who don't do this kind of stuff, you might not have noticed the first word I said was enforcement. That's in the case law, that's in the case. That's in the Walker Process case. But why do you require that the patent be enforced? That's extrinsic to any antitrust concern. I can drive people out of business, I can raise rivals' costs, I can exclude people by taking a fraudulently obtained patent and threatening litigation. I don't actually have to bring it.

Why couldn't the FTC under Section 5 examine whether that enforcement requirement, if there is indeed an enforcement requirement -- the Federal Circuit in the Hydrolevel case has suggested that maybe the Court didn't exactly mean it that way -- still applies? Why couldn't you act under Section 5 -- again, for the very same reason that you're not talking about bringing the massive force of treble damages, retrospective liability, and opening up a panoply of private cases -- and question the threat of litigation, and indeed even the threat of litigation in cases where the patent is not obtained by fraud?

It doesn't require a fraudulent patent in order to wreak anticompetitive havoc in a market under the right -- maybe I should say under the wrong circumstances. I'm not saying that every threat to enforce a patent violates the antitrust laws of Section 5. By no means. But it's not hard for me to sketch out a series of facts under which, through deception and through misrepresentation, threats are made even with respect to a patent that isn't challenged, that winds up that it has the effect of creating market power.

Finally, here is either a yes-but or a frontier case. Let's go back to everybody's favorite, burning down rival's factories or, if you will, taking display racks and throwing them out in the street. It is sometimes said, I want to discuss this because I have to put in a pitch for cheap exclusion. Susan and I wrote a piece called cheap exclusion, suggested that one of the enforcement priorities here should be going after exclusionary practices that are cheap and that it doesn't cost much to do them, and they're also cheap in the sense that they're no good, they're inefficient.

Why wouldn't Section 5 be the appropriate vehicle? If somebody says, well, what you're trying to do is to federalize torts. You're trying to make a federal private treble damages action out of a simple tort. Bring a Section 5 case. You say, no, that's not what I'm doing at all. I'm just protecting the competitive process and I'm not letting something run amuck here. There are some examples. Thank you.

MS. VEDOVA: Thanks, Tom. Tom?

MR. LEARY: Yeah, like a lot of people, I guess I started to think about this for the first time in many years when the Commission's split decision in the N-Data matter came down, and I found myself, quite frankly, not fully in agreement with any of the opinions. I'm very wary of a Section 5 standard that relies on my ideas or anyone else's ideas as what are good morals, what is abusive and oppressive and what have you. I think you need more content that that. I'm also a little bit wary of the notion that Congress neglected to take care of some kind of a problem so we will sort of rewrite the statute internally for them. And I think that, frankly, although it's been identified as the narrowest possible position for Section 5, I'm not so sure it's so narrow.

My view is that Section 5 has greatest utility, as my colleague here graciously referred to it, in so-called frontier cases, cases where you believe there are the elements of a traditional antitrust case, either under the Sherman or under the Clayton Act, but for which, at the moment, for one reason or another, there is no established precedent.

Now, there are all kinds of reasons why that could be true. You could be dealing with a new industry, you could be dealing with new aspects of competition that are just becoming apparent. Economic knowledge is not static. There are developments in economics and new potential sources of competitive harm, or new defenses against arguments for competitive harm are emerging all the time. I think you also have situations where either Congress or the judiciary has invited you to look at some perhaps familiar practices in a slightly different way.

So, the Federal Trade Commission can do that kind of thing, the Department of Justice can do that kind of thing. Where the Federal Trade Commission has the particular advantage is that the Federal Trade Commission can and historically was intended to speak prospectively to a greater degree than the Department of Justice. Now, there's no way that you can ensure against some private plaintiff cribbing from a complaint, whether you're in the Federal Trade Commission or whether you're in the Department of Justice, regardless of what you do with it. They can crib from the complaint even if you dismiss it.

So, you can't be 100 percent sure that anything you do will not have retroactive consequences, but I think it's clear that the Federal Trade Commission has greater freedom than the Department of Justice to behave prospectively, purely, for a number of reasons. The most notable one is that no prima facie effect to an FTC finding of a violation. So, I think they're the logical people to undertake this job.

Some specific examples, Bert Foer mentioned Leegin. Now, that's an area where, at the moment, there's no precedent whatever to distinguish between a pro-competitive and an anticompetitive resale price maintenance agreement. It's been per se illegal for 90 years. Now all of a sudden the door is wide open, and the Supreme Court has invited the development of some standards for guidance in this area. I think if the Federal Trade Commission doesn't do it, these standards are going to be established in private litigation or state litigation where I do not think it is optimal.

So, I think the Federal Trade Commission, as Bert suggested, could take the lead. We part company on whether or not the European model is any good. But I think that the establishment of some standards in that area, it's wide open. And I think Section 5 would be logical.

Someone mentioned this morning non-price competition. As you probably know, if you read some of my stuff, this is an area which has always intrigued me. There are some industries where price competition is not the most significant competitive variable. If you don’t believe me, look at the entertainment pages of the newspaper this weekend and you will find myriad motion pictures advertised there and precious little price advertising. People make their choices on areas other than price, and yet, at the same time, we seem to be fixated on this SSNIP test for looking at things and fixated on whether or not econometric models can predict a price increase or not predict a price increase. We’re missing something.

I think another area, this is probably a little more controversial, but one has mystified me for many, many years. We’re fixated on horizontal competition in the mergers -- preexisting horizontal competition. Every once in a while, very rarely, on foreclosure effects. I’m not going to talk about foreclosure effects. But I’ve always thought it was very, very odd that we consider injection of greater capital -- greater financial strength -- as a competitive plus, why we demand it when we’re looking at a third party that’s going to come in and buy divested assets, and yet, for some odd reason, we consider highly leveraged buy-outs outside the pale of antitrust concern.

I don’t get it and I don’t quite understand why that’s so. That’s not a modification of the Clayton Act.

The language of the Clayton Act fits that. Instead of creating a dominant competitor, you are weakening an existing competitor by an unwise financial transaction. And I don't see why that could not be a matter of competitive concern.

And there are a number of others that I mention in the paper. I think the antitrust intellectual property frontier is wide open. It may be that the issues in the Rambus case and in the patent settlement cases have been aired so thoroughly, and there are so many cases in the courts, that it's no longer a frontier, there is precedent. But, in any event, maybe five, six years ago it would have been smarter to have brought those cases under Section 5 in the first place.

Now, the key question in all this, and I kind of wrote this down when Chairman Bill Kovacic spoke this morning. I thought the biggest question he asked, he had what, about six questions. One of them that to me was the key, what makes us think that Federal Trade Commission experiments in Section 5 will fare any better today than they fared in the past? Because the history has not been all that encouraging.

And I think there are a number of things that can be said. First of all, I think we need to make sure that these initiatives are carefully contained. To make it clear up front that we are relying on traditional antitrust standards, that we are relying on sound economics. But sound economics, as your mentor and mine in many, many ways, Bill Baxter, said, it should be based on what we know at any given moment about the economics of industrial organization, or words to that effect. And it's not static.

So, I think there is freedom there to depart from it. I've got to make it clear, it's not how I felt after breakfast this morning and what outrages me personally. It has to be based on sound economics, and I don't see why prospective competitive harm is not necessarily also consistent with sound economic principles.

I think the Commission needs to emphasize prospective relief. I think, quite frankly, the Commission has undercut, to some degree, its credibility as a purely prospective enforcer by focusing perhaps more than it should have on restitution and disgorgement and remedies of that kind, which are retroactive. I personally dissented in the Mylan case, as you may know, for that reason. I was afraid we were selling our soul. But the Commission did issue a statement, a policy statement about five years ago indicating it wanted to carefully limit the application of retrospective relief.

I would urge the future leadership of the Commission to adhere to those principles.

I think it's very important that the Commission, use the bully pulpit. One of the best things about being a Federal Trade Commissioner is you have a bully pulpit, and I think through speech making and perhaps through expansive complaints -- if you bring a Section 5 complaint, make sure that everybody understands why you're bringing that Section 5 complaint and why you're bringing it under Section 5 rather than bringing it under the Sherman Act or the Clayton Act.

And I think that one way to do that, in general, is to let people know what you think of this workshop, what your reaction is to this workshop. Not two or three years from now, guys, I mean real soon. That way you'll be out there in the open and that way you'll be able to get some critique and some feedback from the larger elements of the private bar out there, who are not your enemies actually, they're your friends and you need them because they're the ones, most of the time, who are enforcing the law for you.

So, that's about all there is out of me and thanks very much.

MS. VEDOVA: Thank you, Tom. Tad?

MR. LIPSKY: All right. First, I would like to say how delighted I am to be on a platform with such a distinguished group. I'm very grateful to the Commission. I'm glad to be here today with all of you. Although I might, for the sake of argument, lapse into overstatement, I think I'm here to state the case against.

MS. VEDOVA: It's okay if everyone's talked you into it, Tad.

MR. LIPSKY: Oh, well, now, I'm inspired seeing Calkins walk through the door.

(Laughter.)

UNIDENTIFIED MALE: Aren't we all?

MR. LIPSKY: The wording of the basic antitrust statutes is extremely broad and flexible, and even these general statutes have been supplemented from time to time, and Section 5 itself is an example of that. Taken to its maximum and used to the full scope of the Commission's administrative discretion, both with respect to Chevron deference to statutory interpretation, and also with respect to the substantial evidence test used to review the Commission's fact finding and fact-based inferences, the Commission could easily use its authority under Section 5 to wreck the economy legally if it wanted to. In fact, if I'm not mistaken, that's pretty much what it almost did about 30 years ago, although I'm sure the Commission would claim it was unintentional.

At certain intervals, our political process tends to place demands on our legal and administrative institutions that just cannot be fulfilled, either because they either make no sense or they can't be implemented at tolerable cost. We shouldn't forget the sequence of events in the antitrust world that contributed to the last severe U.S. recession, which was the one that started about a year before Ronald Reagan took office in 1981. Included, among other things, was the culmination of the long-term intensification of antitrust doctrine and enforcement policy.

Largely at the urging of the federal antitrust enforcement agencies, although abetted by the private bar, most practices were, per se, illegal or nearly so. Schwinn, all vertical practices, all vertical restraints, Topco and Sealy, horizontal restraints, horizontal mergers. And even being a monopoly, itself, was risky business back when no fault monopoly was important enough to be one of the two fields of study put before a presidential commission, the National Commission for the Review of Antitrust Laws and Procedures.

The Commission, at that time, was chasing a huge variety of perceived competitive ills in the breakfast cereal, integrated petroleum, ground coffee, lemon juice industries, just to name a few. You may also recall the shared monopoly craze that swept the Carter administration, which I regard as probably the economic policy successor to President Ford's WIN buttons.

Had the Commission pursued every commercial practice that could have been characterized as a facilitating practice within an oligopolistic industry, there would have been a fantastic boom in the antitrust law business followed by a crash in GDP. Most leading U.S. industries would have stopped what they were doing to respond to a blizzard of subpoenas demanding justifications for things like delivered pricing, product differentiation activities, slotting allowances and that sort of thing, and preparing very high-priced economic talent to go do research and explain justifications and then go to hearings in front of the dozens of ALJs that the FTC would have been required to hire just to listen to all the cases that could have been brought.

Hundreds of industries were examined -- I think 300 is pretty close to the exact number -- for evidence of oligopoly-facilitating practices. Yet, we had only a tiny handful of cases, all of which failed to show it, and it was a colossal waste of time.

Now, we can argue about the causes of the three prominent failures that were brought to the attention of this group specifically -- Ethyl, Plywood and OAG. But the themes are roughly the same. It's very, very broad Commission discretion, meeting boundaries imposed by sound analysis and fallibility of institutions. Shall we do this all over again? Well, let's consider some of the reasons we've heard today.

How about using Section 5 to converge with Article 82 of the European Union treaty? In my opinion, this is an idea that makes WIN buttons sound great. There is no reason for the U.S. to emulate Article 82 enforcement, least of all in the areas that have been suggested, to assert control over competitive conduct by firms that don't really have monopoly power or anything too close to it that could be reached under an attempt theory.

I'm not even sure the European Commission would claim that Article 82 extends as far as some of the speakers seem to think. After all, the word "dominance" is right in the treaty. Can dominance really mean superior bargaining position or something less than having a position of monopoly power or something terribly close to it? If that's where Neelie Kroes wants to take an Article 82, I would say let's fail to follow.

The Section 2 enforcement record here in the United States itself is richly mixed even as it has been interpreted up to now. It has definitely had successes

-- the break-up of the old Bell system. But it has had dismal failures -- United States vs. United States Shoe Machinery Corporation, United States vs. IBM Corporation. Who knows what industrial accidents would befall us if we had extended it to the near monopolies that are suspected to lurk just beneath the surface of our placid economy.

How about using Section 5 to develop more price discrimination law? Is this a weird dream? The Robinson Patman Act is well and justly recognized as the crazy uncle of the antitrust family. Not because it has gaps, but because its coverage is broad enough to threaten all the other pro-competitive, output enhancing antitrust values. Even Ruth Bader Ginsberg -- not previously regarded as a willing lackey of the Hollman Jenkins School of Antitrust -- felt compelled in the closing section of Reeder Simco to renew the Supreme Court's repeated warning that Robinson Patman interpretation must remain tethered to the fundamental antitrust objective of preserving inter-brand competition.

Come to think of it, even Irv Sher -- another individual who I think was a civilian in the Reagan administration, not a soldier therein -- gives a fantastic speech about why the universally recognized defects of Robinson Patman are as much attributable to the Commission’s Chevron protected constructions of the Act as to the Act itself. And some of the prominent examples he uses include the Commission’s treatment of functional discounting in Mueller or the narrow scope permitted for rebuttal of the Morton Salt inference in secondary line injury cases. The notion of using Section 5 to carry the price discrimination rules out beyond even the heavily exposed Robinson Patman salient, to me, is truly frightening.

What about a post-Leegin attack on RPM? Well, if you think that Cuisinarts, Creepy Crawly Pool Cleaners, or Leegin Creative Leather Products were using RPM to exploit power as distinct from simply trying to aim high on the price/price-quality spectrum of Robinsonian competition, then we’d better start with some basics about when the costs of regulatory intervention make such intervention appropriate.

Now, the papers submitted by Susan Creighton and Tom Krattenmaker and Tom Leary, in my view, really, really represent the gold standard in terms of legal and policy analysis. I certainly could not improve, and won’t even attempt to improve upon them. But the main danger of pursuing Section 5 as a distinct source of antitrust authority is a lack of assurance that these types of high-quality creative ideas would be implemented with the same scrupulous attention to intellectual quality and good practice that these authors have brought.

Now, if I may, I ran across just today this gem on the Web. It's an unattributed post talking about Chevron deference and saying that it has some advantages. It shifts the responsibility for construing statutes for which an agency is responsible from overworked, under-equipped federal judges to overworked, under-equipped federal administrative law judges.

But it also creates certain problems. The entire reason that agency interpretations receive any deference is that specialized agencies are presumed to have greater subject matter expertise than generalist judges. However, agency behavior often goes far to rebut this presumption. And one particularly good example of an agency's rebuttal of the presumption of expertise is the INS. Here is a quote from Judge Posner on the INS from a case called Salamada (phonetic) vs. INS back in 1995.

This is a Federal Circuit Court judge speaking. The proceedings of the INS are notorious for delay and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality. The lodgement of this troubled service in the Department of

Justice, of a nation that was built by immigrants and is enriched by a flow of immigration, is an irony that should not escape notice. We imagine that Congress is more to blame than the department or even the INS itself. The agency is absurdly understaffed. In 1994, when it decided this appeal from the decision of the immigration judge to deport them, the Board of Immigration Appeals had an effective membership of four to handle 14,000 appeals lodged with the Board that year.

Thus the anonymous poster comments, frequently Chevron deference is a matter of letting the inmates run the asylum.

Now, I hasten to say that I don't think the FTC is ever likely to fall anywhere near this abysmal INS standard as outlined in Posner's opinion in Salamada. But we ought to think about what would happen if it did. I suspect that one theme of the post-game review of the crash of '08 will be weaknesses in the safeguards entrusted to administrative agencies.

Let's be realistic about how agencies behave. It is very, very tempting to go through an open door to challenge, for example, invitations to collude when Tom Leary is inviting you to go through that door. But the problem is that once you get through that door, it might close behind you and you may be forced to deal with the other liberals who are in the room.

Now, things have changed a bit since the last time the FTC plunged into this kind of quagmire in the ‘60s and ‘70s. For one, consumer welfare and long-run wealth maximizations are the touchstones of analysis of the judiciary. Interventionist approaches were proven ineffective in the last round. The share of imports in U.S. GDP has at least tripled since then. So, U.S. consumers who used to have access to three or four domestic firms, now have -- let's talk about automobiles for a minute -- now have access to dozens of suppliers from around the world. And they can use an enormous new variety of information-seeking devices to shop much more effectively.

The reasons for using Section 5 as an antitrust extender are far less than they were the last time this was attempted. And we can expect the success of such a venture to be correspondingly less likely now. Unless you make your living as an antitrust lawyer and expect to be able to retire very soon, this idea seems like a non-starter to me.

MS. VEDOVA: Thank you, Tad. Well, we've got about ten minutes for some discussion. I have a number of questions I could ask, but why don't I give each of you the chance to comment on each others first.

MR. BALTO: Twenty years from now, Tad's grandchildren will be in my antitrust class and I will explain to them the failure of the FTC and antitrust enforcement around the turn of the century. I'll explain to them that even in the situation where industries were increasingly oligopolistic, the FTC somehow forgot about its enforcement powers against facilitating practices, that even though the Antitrust Division of the Justice Department is incredibly busy bringing cartel enforcement actions, maybe perhaps there could be problems they're identifying that don't quite rise to the level of a criminal violation.

Obviously, industries are having no problem going and arranging cartels. Maybe we should think that our tax dollars, which go to pay for the Bureau of Competition of the FTC, should be spent in their considering the use of Section 5 to go after facilitating practices in oligopolistic industries.

If you ever shopped, Tad, in a grocery store and you actually had to keep in mind the increasing prices of things you have to buy in oligopolistic industries, you might think it was worth the candle to go and actually look at whether or not there are facilitating practices. No one on the face of this earth is suggesting that the errors of the 1970s are going to be repeated. The fact that critics at this seminar seem to repeatedly repeat those errors shows the lack of real hard criticism of what could happen. This is obviously a prudent group of federal regulators who will hopefully use Section 5 to carefully address things that really do harm consumers.

UNIDENTIFIED MALE: I'm sure somewhere Bill O'Reilly is applauding that statement, David.

(Laughter.)

UNIDENTIFIED MALE: Let me respond very quickly. First to David and then to something that came up repeatedly in the other remarks. First, I have noticed that most of the products where the price increases have been greatest are those subject to Federal marketing orders administered by the U.S. Department of Agriculture. And let me just say that if there's a place where the United States can very profitably converge with the European Union, it is in developing some kind of a structure similar to what the European Union has for applying competition policy to acts of government which are rather aggressively excluded under a variety of doctrines -- State Action, Noerr-Pennington -- under United States law. It is a glaring deficiency of United States competition policy relative to European Union policy.

The other comment I wanted to make was on the Valassis case, because we seem to have consensus that nobody sees any danger of chilling invitations to collude. As a matter of fact, if an invitation to collude works out right and the inviter gets lucky, they all get to go to prison for ten years. And that's the right -- that's definitely the right outcome.

But back in the first Reagan Administration, Bill Baxter found a way to win United States vs. American Airlines, which was an invitation to collude case. Maybe somebody can explain to me why Valassis could not have been based on invitation to collude theory under an attempt to monopolize theory, whether included within a Section 5 complaint or otherwise. But I thought that Valassis was a case where all of the lights on the attempt-to-monopolize meter were triggered. So, although I certainly don't shy away from attacking invitations to collude, I'm a little puzzled as to why we think we need Section 5 to pursue them.

MR. LEARY: Well, I think the difference between Bill Baxter's case and Valassis is the invitations to collude cases were in highly concentrated industries where you could make a plausible claim that it was an attempt to monopolize, and attempts are covered under Section 2. It's a little harder to apply.

I'm not in favor, by the way, of invitation to colludes in fragmented markets, but I think where the market is very highly concentrated, you can argue that it does not do violence to Section 2 of the Sherman Act to bring a case. I guess the advantage of doing it under Section 5 rather than under Section 2 is simply if you're going to apply it in a slightly novel way -- my feeling is that prospective relief is the appropriate kind of relief when you are plowing new ground or entering unchartered territory, even if you're using the same compass that you've always used. If you're in unchartered territory, it's a good idea to make the relief purely prospective, and if you make it a Section 5 case, you have a slightly higher chance that that will happen.

I'm not going to take issue with you, you said such nice things about me for God's sake, I would be crazy. But I think the Leegin case has left the field now wide open. I happen to believe with you that the subset of anticompetitive RPM is very, very small. It is very, very small. We can each think of cases where it might arise. But somehow or other, law is going to be made in that area and the Federal Trade Commission, in my view, is better suited to make law in that area than a myriad of private actions all over the United States or state governments.

And just one other thing on Chevron deference and so on. The Federal Trade Commission gets no Chevron deference today.

(Laughter.)

MR. LEARY: And as a matter of fact it doesn't even get deference for its findings of fact. So, I think that they have a better chance of getting some kind of deference in some of these frontier cases -- and they're going to come down, you can't escape them. There are going to be frontier cases coming down the road. If the FTC uses its own statute, it has a slightly better chance of getting deference in the Court of Appeals, I believe. At least it's worth a shot. And I'm not interested in improving the Federal Trade Commission's batting average. That is not the objective here. It is to enable an institution with greater flexibility than the Department of Justice, with all due respect, to deal with frontier messages.

TOM KRATTENMAKER: I'd like to wrap myself in the mantle of both Balto and Lipsky, if that's possible to do. Tad, since I'm your gold standard, you've co-opted me as well as Tom Leary. But I do think that it's possible to engage in rational analysis of this stuff. Although it's a lot more fun to suggest that one could ruin the economy by banning delivered pricing. I mean, my lord, Bill O'Reilly is probably applauding that one.

What I'm trying to do is to answer what I agree with Tom is the really sort of central question. As you said Chairman Kovacic put it, what makes us think the FTC can succeed now? I'd put it differently than David did. I don't think it's because we have a lot of really bright, smart people and everything, it's that I think those trilogy of cases from the '80s would hold the Commission's feet to the fire and say, you've got to have what's basically a solid Sherman Act case.

The thrust of my remarks is to say there might be room under Section 5 where there is a reason why you can't prevail under the Sherman Act, but under the economics and the policy of the Sherman Act, you should.

Oh, and I guess I have to say I can't imagine either resale price maintenance or leveraged buy-outs being among them. You said you can imagine resale price maintenance schemes that would have anticompetitive consequences. I can't. I tried for 30 years and gave up. On the leveraged buy-out, I mean, I understand how they can destroy a company, but I suppose bad hiring practices and producing inferior products will have the same effect and it's pretty hard to treat those as monopolizing, I think.

MS. VEDOVA: Let me just pose one final

question and I think we're going to have to wrap it up. One of the things that Chairman Kovacic said in his opening remarks is that he feels that one possible reason to rethink the use of Section 5 here is the recent developments in the Supreme Court -- you know, the suspicion of private actions that possibly led to a narrowing of interpretation of the Sherman Act. Steve Calkins explained thereafter how the agency has had various sorts of movements forward and retrenchments.

I guess, Tad, I didn't hear your remarks respond to that new development in the Supreme Court. Perhaps you disagree with the premise, but I would just be curious, and then anybody else as well.

MR. LIPSKY: Well, I do want to address that. Let's put it this way. I think there is at least a kernel of truth in the suggestion that the Supreme Court recognizes the limitations of the litigation process as a truth-producing process in antitrust litigation. There's definitely a recognition there, but where I differ, I think, is as follows. I don't think that the case against the per se rule on vertical restraints or the per se rule on horizontal restraints is founded either in policy or in the pronouncements of the Court on concern with private litigation.

I think you could cite the concern in support of Sylvania and in support of Monsanto and in support of State Oil v. Kahn and in support of Cal Dental. But, primarily, those developments arose because of some very early doctrines that had arisen and become embedded in the law at a time when economics is not really available -- it not only wasn't cool, it just didn't exist.

When the economic learning accumulated and the experience with the application of those rules to our real economy accumulated, they simply rendered those approaches totally unpersuasive. Sylvania is more persuasive than Schwinn, based on the analysis of the relationship between territorial restraints and inter-brand competition. Totally apart from the fact that the possibility of litigation will tend to chill anything that is of doubtful legality under the antitrust laws.

Now, having said that, I think there are these recent cases that very overtly cite the old Easterbrook article -- was it Trinko that cites the Easterbrook article -- saying that judges don't know how to conduct discovery. That's pretty strong stuff. And I think there's a kernel of validity to that. But it ought to have its impact really in these massive private treble damage actions, purported class actions, both direct and indirect purchasers, that now get filed with just a hair trigger.

You know, dawn raid on Tuesday and you've got 80 class actions by Friday. And with Hanover Shoe, Illinois Brick, all those issues of damage allocation and complexity and multi-jurisdictional litigation, now with an international dimension, those are the problems on which the management of private litigation ought to focus. But most of the changes in antitrust doctrine -- in the substantive analysis, in the substantive rules, horizontal, vertical merger -- have changed not because of any concern about private litigation, but because the economics-based, rigorous, empirically-based analysis is much more persuasive than the old rationales in the old cases.

MS. VEDOVA: Anyone else?

UNIDENTIFIED MALE: Is there time to respond to that?

MS. VEDOVA: Yes, but maybe just 30 second responses and then we better --

UNIDENTIFIED MALE: I think you're right about the '60s and you're wrong about the 21st Century, Tad. You describe Sylvania. You didn't describe Trinko or Weyerhaeuser or the -- I keep forgetting the name of the case that says that before you can plead a conspiracy, you have to have a tape recording of it.

MR. LEARY: I don't know whether this is a response or not, but this is a gloomy prognostication. We have had, for roughly the last 30 years, a persistent trend towards deregulation in this country. It's carried through different administrations. It's been more intense in some than in others, but it's lasted fairly consistently for 30 years.

I am concerned that as a result of recent events of the last month and things that have been building for quite some time, we are going to see some pressure to re-regulate the economy in various areas. Some areas where it may be indicated, it's a good idea, but I'm afraid there are going to be a great many other areas where it's going to be a very, very bad idea. And I think that the Federal Trade Commission, as a educator and as a sturdy advocate for competitive values and for competitive discipline, is going to have to play a very, very important role and that goes beyond simply bringing Section 5 cases. It's a very, very important role for competition advocacy via relations to the Hill and amicus briefs and things of that kind.

So, we may not be talking right here and now about where the pressing needs and action are.

MR. FOER: Yeah, I want to associate myself entirely with what Tom Leary just said. It seems to me that we're going to be entering into, almost regardless of the outcome of this election, but in particular if Obama is the victor, I think we're going to enter a new stage of the relationship between government and private enterprise. It will be a more interventionist phase.

We exactly need the FTC at this point to do the things Tom said and to act in as prospective a manner as possible to clarify so many of these areas that are troublesome, and they're going to be so much more troublesome because of the other fact -- internationalization. You know, so many of these companies are going to operate across borders. There's going to be so much more international oligopoly.

It would be beneficial to arrive at whatever areas of convergence we can. What I'm suggesting is that the FTC make it a priority to use its abilities to try to help us move in those directions. That's not to say to take the lead from Neelie Kroes; it's to say let's start working together in the recognition that we need clearer, more predictable standards for antitrust. I think that's a huge challenge, and the FTC is very well situated to play a leadership role in that.

MS. VEDOVA: Well, thank you all. This has been wonderful.

(Applause.)

MR. AVERITT: Let us take a ten-minute break and reconvene at 3:30.

REMARKS BY COMMISSIONER JON LEIBOWTIZ

MR. AVERITT: Welcome now to the final segment of the program on Section 5. This is going to be moving from the realm of business applications in general, to one particular and particularly complex business application. That will be the application of Section 5 to standard-setting organizations.

To introduce this segment of the workshop, we have with us Commissioner Jon Leibowitz. He has written extensively on standard-setting issues in the context of several recent Commission actions. He has also been one of the principal sponsors of this workshop as a whole. And so, as a great pleasure, Commissioner Leibowitz.

(Applause.)

COMMISSIONER LEIBOWITZ: Thank you, Neil, for that warm and entirely undeserved introduction.

Let me start by thanking the Commission staffers who have been involved with producing this workshop -- Neil, Rick, Holly, Suzanne, Kyle, Rob Davis of my staff who couldn't be here because of a death in his family, and let me thank everyone for attending and folks for participating. The panels have been really terrific, including the last one, although I'm still not clear exactly where Tad Lipsky really stands on Section 5. Hopefully, if we have another one he can explain that to us.

(Laughter.)

COMMISSIONER LEIBOWITZ: So, technically, it's part of my job to understand Section 5 of the FTC Act, and, of course, I have my own opinions on the subject. But the truth is we've gathered here the real experts today and it's a pleasure to learn from them about this topic which, in the future, may be very central to the life of our agency.

Let me also assure you -- those of little faith or those with such incredible endurance you're still here -- that we're not planning to resurrect the statutory undead in a way that would be worthy of an episode of Tales from the Crypt. But we are planning to try to learn from our past.

So, imagine a United States where wealth has become concentrated in the hands of a few. Or imagine the United States where the prevailing philosophy in the country is a school of thought that distrusts government intervention and emphasizes a laissez faire approach. Or imagine also a federal judiciary and especially a Supreme Court that is hostile to vigorous enforcement of the antitrust laws.

What year do you think that is? What year? Yes, that's right, it feels like 2008 to me as well. But, in fact -- that was a joke by the way. I know it's been a long day and you're a fairly geeky audience, but really if you're not going to laugh at my jokes, I'm just not going to go on. Maybe that's what you want.

(Laughter.)

COMMISSIONER LEIBOWITZ: But the year is actually 1914. As the FTC approaches its centennial, and we've already been doing workshops on a hundred years of the FTC, even though we don't approach our centennial for another six years actually, the antitrust world does look to some extent like it did in the period that preceded the creation of our agency. Back then the antitrust laws were young and competition policy was kind of, well, sexy. No, it really was. But the cramped reading of the Sherman Act that we see from federal courts today does resemble the interpretation of the antitrust laws by courts early in the last century.

And even when the government won those cases, it often won just barely, as in Northern Securities, which was a 5-4 decision. Justice Holmes was dissenting, and I'll just read you a little excerpt from his dissent. It says, I'm quoting, "The court below argued as if maintaining competition were the object of the act." The act -- that's the Sherman Act. "The act says nothing about competition. I stick to the exact words used."

That is among the worst of, I would say, Justice Holmes' writings, only exceeded by Buck v. Bell. Are you guys familiar with Buck v. Bell? It's the compulsory sterilization cases which begins "three generations of imbeciles is enough."

The Standard Oil case of 1911, in which the Supreme Court adopted a rule of reason analysis for the prohibition on restraints of trade, was an even greater flash point. Many within and outside of Congress viewed the Supreme Court's reasonable test as judicial intervention that threatened to undermine Congress' aim in passing the Sherman Act. These concerns actually made competition policy a hot button issue in the 1912 election and ignited a bipartisan rush to create an agency with a mandate that was more expansive than the antitrust laws.

Roosevelt proposed creating a commission that would have many powers beyond antitrust enforcement. And Wilson adopted a similar position. After the election, he actually addressed a joint session of Congress to propose, and I quote, "additional legislation for the control of trusts and monopolies." He did that in 1913.

I don’t expect the next President McCain or the next President Obama, even though I know they’re both concerned about competition policy, to address Congress on the antitrust laws.

Congress reacted expeditiously, for Congress. Senator Cummins of Iowa, one of the main proponents of the Federal Trade Commission Act, emphasized that the reason for the law that they were enacting, which became the FTC Act, was, and I quote, “to go further and make some things offenses that were not condemned by antitrust laws.” Congress did make some attempts as the legislation moved forward to identify the sort of specific conduct that the FTC should enforce, but ultimately it gave up. As the Senate report put it, and I quote, “There were too many unfair practices to define, so we’ll leave it up to the Commission to determine which practices were unfair or are unfair.”

Now, all of you probably have the FTC Act memorized in its entirety. I’m not going to quiz you on it, but it does help me to recite what ended up as a law back in 1914. Again, let me just quote it. Section 5, “That unfair methods of competition in commerce are hereby declared unlawful.”

Now, Congress could have given the Commission the ability to enforce the Sherman Act, but it didn’t.

Instead, the plain text of the statute makes it clear that Congress intended to create an agency with authority that extended well beyond the limits of the antitrust laws. I worked in Congress for more than a decade and believe strongly in legislative intent. I think the legislative intent here was very, very clear. And one of the things that's very heartening and one place where we seem to have agreement among almost all the panelists, at least those who have spoken, is that clearly the legislative intent of Congress was to go beyond the antitrust laws. And I don't think a year or two ago, if we had this same discussion, we would necessarily have gotten that same consensus.

Throughout the 20th century, from Keppel & Brother -- not a case we necessarily want to emulate -- through Brown Shoe, through Sperry and Hutchinson, through Indiana Federation of Dentists, the Supreme Court has consistently affirmed this expansive view of the agency's authority. So, everyone can agree, I decided or I think we've all decided, that the FTC Act goes well beyond the metes and bounds of the Sherman Act.

The more important question, and really it's the far more important question that we've been addressing today is, how far beyond should we go? To that point, it's instructive to think about the last time we systematically tried to enforce Section 5, the late 1970s, which was an effort that culminated in Commission losses in a trilogy of Circuit Court cases, and they've been discussed before today, Ethyl, Boise Cascade and Official Airline Guides.

One reason I think we should learn from these cases is that many in the corporate antitrust bar, and a few who are left in the audience I think, seem to have flashbacks to the lessons of the 1970s whenever we talk about Section 5. I think we do understand the excesses of that era. I was actually talking to Chairman Kovacic this morning after he gave his speech, and I had not seen the Walter Mondale quote from the morning of the election in Michigan about Kellogg's. I hadn't read the speech from then-Chairman Pertschuk about how he wanted to use Section 5 in an environmental context and other contexts. I think we have to be mindful of the excesses of the 1970s.

But another reason, it seems to me, is that these cases were decided at a time when antitrust was very, very broadly, some might say very creatively applied. Unlike today, or 1914 for that matter, the federal courts in the 1960s and '70s favored a very expansive view of what was prohibited by antitrust. And so, if you take, for example, a case like Von's Grocery, this is a case where Von's wanted to buy another supermarket chain. Together, they would have had 8 percent of the market. I don't think there's anyone in this room who possibly believes that such a deal would be challenged today. The Supreme Court, of course, upheld the challenge to the deal. Today I don't think it would or should reach second request.

Tom, is that correct? Tom says yes. So, I think that that's pretty much the highest level of authority, the gold standard. Where's Tom Krattenmaker? Do you agree? Okay. So, we're all in agreement.

(Laughter.)

COMMISSIONER LEIBOWITZ: So, clearly, to go beyond what was the dominant interpretation of the antitrust laws, and to arrive at the penumbra that is Section 5, the Commission back then had to venture very, very far indeed from the types of conduct that we would now consider to be anticompetitive. And this concern, and people have said this before today, about this kind of over-expansion of the antitrust laws, and really of unfair methods of competition beyond that, animated the decisions I think in the three cases from the late 1970s, early 1980s, Ethyl, Boise and Official Airline Guides.

During the last three decades, though, we have seen a dramatic retrenchment in the scope of the antitrust laws. Now, some of that retrenchment, cases like Matsushita, Sylvania, Brooke Group, make sense at least to me. But if you look at the restrictive Supreme Court opinions of just the last few terms, and I'm thinking about Trinko and Twombley and Leegin, but there are several others, it's also reasonable to say that the Sherman Act is no longer the broad mandate protecting consumers that it once was. As Bill Kovacic said this morning, the zone of enforcement has really shrunk considerably.

The Supreme Court's underlying rationale for these decisions is, I believe, a very justifiable -- and people have talked about this, too -- a very justifiable concern about the toxic combination of treble damages and class actions. But the result, at least in the aggregate, is that some anticompetitive behavior is no longer stopped. And from the perspective of FTC enforcement, there are cases we can't bring or the Justice Department can't bring because we're all saddled with the court-based restrictions that were designed to circumscribe litigation. It clearly is undergirding much of the Supreme Court's thinking. So, to some extent, the same rationale that motivated Congress to create the FTC in the first place now requires us, it seems to me, to revisit our unfair methods of competition authority again today.

What standard should we apply when we use Section 5? Well, that's obviously part of the reason or the entire reason that we're holding this workshop. The standards aren't really clear at all. Indeed, as I read through some of the excellent submissions from my former colleagues Tom Leary and Susan Creighton and Tom Krattenmaker, to my current colleague Tom Rosch, among others, all of us agree -- I think almost everyone here agrees, with maybe one exception today -- that circumstances exist under which the Commission ought to bring so-called pure Section 5 cases. But none of us agree on precisely when the Commission should invoke this statute.

Here the Section 5 cases from the late 1970s and 80s can give us some useful guidance, because they make clear that when we go beyond enforcement of the antitrust laws, Section 5 is only violated by conduct that's not normally acceptable business behavior. That's a phrase straight out of Ethyl. But I think you have to go further than that. There needs to be, at the very least, another element for Section 5 violation as well.

Our powers to restrict unfair methods of competition should extend only to those practices that harm consumers or have a strong potential for doing so.

It shouldn't be enough for the Commission to show that a firm acted just inconsistently with normal business behavior.

Having said that, at the same time, I don't think the Commission should be tied to the technical definitions of consumer harm that sometimes limit applications of the Sherman Act, at least when we're looking at a pure Section 5 unfair methods of competition violation.

Where could we use Section 5? Well, actually, in the previous panel, people made, I think, some very useful suggestions. Let me just say where we shouldn't use Section 5. I would be very reluctant to use it in the merger context. We don't win all the cases that we like, because, of course, we like to win every case we bring. But Section 7 itself works reasonably well.

But I do believe that there are some types of behavior -- we're going to talk about standard setting later, right after I finish. Standard setting especially is a useful thing to think about after the D.C. Circuit seemed to fumble the ball in Rambus. Pharmaceutical evergreening, loyalty or bundled discounts, maybe pricing above, and someone mentioned this today, pricing above average variable cost but pricing below some measures of cost that, nevertheless, harms competition, that don't fit neatly into an antitrust box, but nevertheless might justify the use of Section 5.

And if the Justice Department's vision of monopolization is ever adopted by the courts, and I don't think that's necessarily going to happen, using our unfair methods of competition authority would be a useful way perhaps to fill the gaps.

Finally, lest anyone in the room panic, there are other practical checks on our unfair methods authority. For example, the weak array of remedies that Congress, in its infinite wisdom, afforded to us. And by the way, people don't like to say this, but this is actually the brilliance of Congress. They created an agency, the Justice Department and its Antitrust Division, where they have much stronger remedies than we do, but much narrower jurisdiction, and they gave us fairly weak remedies, but fairly broad jurisdiction, at least with our unfair methods authority.

Anyway, unlike the Byzantine Emperor Zeno -- are you familiar with his antitrust doctrine? You're not?

(Laughter.)

COMMISSIONER LEIBOWITZ: Zeno ruled from 476 to 491 A.D. Anyway, unlike the Emperor Zeno, we do not have the authority to send monopolists into perpetual exile or order the forfeiture of all of their assets -- including their lands, by the way -- and unlike the Department of Justice, which can put violators in prison. The Commission can generally obtain, I think, if you're using Section 5, only prospective injunctive relief for violations.

Far more importantly -- and people have talked about this. I thought this was going to be a fairly controversial assertion, but I think it's been generally accepted. I think it's generally accepted today, by people on different sides of the judicial philosophy about what powers the FTC might have or use, unlike in most government antitrust cases, Section 5 violators do not find themselves subject to private antitrust actions under federal law. Probably not also under state baby FTC acts as well, and certainly not even under state FTC acts for treble damages.

For this reason alone, it seems to me that the business community should be, or at some point should be, embracing our use of Section 5. And in time, I do believe that it will.

So, for those of you who would dread the possibility that the Commission is embarking on a new quest for cases like Boise Cascade or Official Airline Guides or that we're disinterring them from the crypt, let me assure you we are not going to do that. But for those of you who want us to abandon our congressionally mandated statutory responsibilities, let me assure you we are not going to do that either.

Some of the retrenchment from the 1960s and '70s makes sense. And I had as a prop, I left it on the chair, Chairman Pitofsky's new book, which is about the excesses of the Chicago School, available from Amazon in hard cover for only $99 and well worth the read, although there is a less expensive paperback version. But while some of the retrenchment makes sense, some of it does not. And put differently, just because the Sherman Act no longer stops bad conduct doesn't always mean that that same conduct itself is no longer bad.

Precisely which alleged unfair methods of competition the agency has an obligation to try to stop is the subject of our workshop today, and I think we've made enormous progress in thinking through where we should draw the line and certainly where we shouldn't. Certainly, where we should draw the line. But not to stop any, though, seems to me would be to ignore the reason that the Commission was created way back in 1914. Of course, we also shouldn't ignore the next panel. So, let me stop bloviating now, and I'm going to sit at the end over there and I'm happy to take questions after they finish.

Thank you so much for listening. You have been a very patient audience and you guys have been a patient panel. I will turn it over to Kyle.

(Applause.)

PANEL 4: APPLICATION OF SECTION 5 TO STANDARD-SETTING ISSUES

MR. ANDEER: Great, thanks, Commissioner. As everyone can tell, I'm not Rob Davis, I'm Kyle Andeer. Rob called me the other day and asked me to pinch hit at the last minute for him. When he did, he said, this will be real easy. It would be at the end of the day. You have a great group of panelists. All you've got to do is throw open a question and get out of the way. So, that's going to be my general game plan.

As Commissioner Leibowitz said, the focus of our last panel, we've really funneled it down to kind of where it all began, so to speak. A lot of people have talked about the Rambus decision and the Commission's N-Data decision earlier this year, that's really touched off this current round of what is the scope and limits of Section 5. We're going to try to drill down on that issue here with a great group of panelists.

I could probably spend the next hour talking about all their credentials. I'm not going to do that, so I'm going to briefly introduce them. But if you want more information, it's all on our website.

So, let me start with the introductions.

First, to my left is Bob Skitol. He's a senior antitrust partner at Drinker, Biddle & Reath, with over 35 years of antitrust experience. In recent years he has published, lectured, and represented clients on a broad array of antitrust issues relating to standards development. He was, for example, counsel for the VITA standards organization in connection with its 2006 request for a DoJ business review letter on a new VITA patent policy.

To his left is Richard Taffet, partner in Bingham McCutchen and co-chair of its intellectual property practice group. Richard has represented technology standards development organizations and standards development participants for more than 25 years. He's a frequent speaker on standard-setting issues and we thank him for coming today.

To his left is Geoff Oliver, currently a partner in the Washington, D.C. office of Jones Day, and an FTC alum. From 1998 to 2007, Geoff held various positions in the Bureau of Competition, including serving as the Assistant Director of the Anti-Competitive Practices Division. While at the FTC, Geoff was frequently involved with standard-setting issues, and among the cases he handled at the Commission are two we probably will talk a little bit about today, Rambus and N-Data.

To his left, Scott Peterson, senior counsel at Hewlett-Packard Company. He joined HP in 1991 and since then has provided legal advice concerning the development of standards, initially in the context of specific business activities and in recent years in the development of HP policy. Again, thanks to Scott for taking the time to join us today as well.

To his left is Michael Lindsay, partner in the law firm of Dorsey & Whitney, where he's the co-chair of Dorsey's antitrust practice group. Michael's practice focuses on antitrust, including counseling of standards development organizations. For example, he was counsel for IEEE in connection with a request for a DoJ business review letter several years ago.

Sixth, to his left is Jack Slobod -- I hope I pronounced that correctly.

MR. SLOBOD: Yes, Slobod.

MR. ANDEER: Slobod. Sorry about that, Jack.

MR. SLOBOD: That's okay.

MR. ANDEER: He's presently the Senior Director, IP Licensing, and Principal IP Counsel at Phillips Intellectual Property and Standards. Among Jack's many responsibilities at Phillips, he's responsible for IP and antitrust issues in standard-setting participation. In addition to his day job, Jack is a frequent speaker on antitrust and IP issues and we're lucky to have him here today.

Finally, but not least, is Amy Marasco. Amy is the General Manager for Standards Strategy at Microsoft where she addresses strategic policy and engagement issues on a corporate-wide, global basis. She joined Microsoft in 2004 after serving as the Vice President and General Counsel at the American National Standards Institute for ten years. She's a regular speaker on standards-related intellectual property policy.

So, that's who we have with us today. As you can see, it looks like my strategy will work out. I plan to simply get out of the way, but before I do, our format is going to be a little bit different than some of the earlier panels. It's really going to be a Q&A session. The general format will be somewhat like the presidential debates where I throw out a question and then let everybody jump on it. Actually, it might be more appropriate to the early primary debates.

The goal is to give each of our panelists the opportunity to address at least one question for a couple of minutes and then open it up to a short panel discussion, and then ideally move on to another question. We'll see if this is a successful strategy.

So, without further adieu, let's hear from our experts. Geoff Oliver, you pulled the short straw. You're going to lead us off with a nice easy question. What issues are raised by the possible application of Section 5 to conduct related to standard setting?

MR. OLIVER: Thanks very much, Kyle. And, first, let me say it's a great pleasure to be here at such an important discussion. I really appreciate having the opportunity to participate here today.

I guess from my viewpoint, there's probably at least four issues that are directly relevant to the question of Section 5 in the standard-setting context. First of all, what conduct, if any, is appropriate for action under Section 5 that may not be reachable under either Section 1 or 2 of the Sherman Act?

Second, what limits can one impose on use of Section 5 in the standard-setting context?

Third, what is the appropriate standard or the appropriate test for causation when applying Section 5 of the FTC Act?

And, fourth, what would be the implications on the development of Section 1 or 2 of the Sherman Act if the FTC were to take action in Section 5?

Let me elaborate a bit on each of those issues. First of all, the question of what conduct, if any, would be appropriate for action under Section 5 that could not be reached in Section 1 or 2? Obviously, the discussion, as people have heard today, often implies to some extent a comparison of what conduct can be reached under Section 5 versus under the Sherman Act. But, to date, most of that discussion has focused on comparison of Section 5 with comparison to Section 1. Because some of the recent standard-setting cases that have been brought under Section 2, I think the standard-setting context does raise a slightly different question. It involves a comparison of the reach of Section 5 versus the reach of Section 2.

Now, here, we're in an interesting position. The Federal Trade Commission had an opportunity recently to set forth its views of the appropriate reach of Section 2, but it did not do so. So, to some extent today, we're actually comparing two variables. What should be the reach of Section 5 compared to the reach of Section 2 when we're not quite certain what the FTC's view of the reach of Section 2 is? It makes for a little bit more challenging discussion.

Second, what are the appropriate limits for reach of Section 5 in the standard-setting context? This, of course, is an issue that was presented in the N-Data case and has given rise to quite a bit of debate since the N-Data decision came out.

Third, what is the appropriate standard for causation under Section 5? And here I think, in some ways, the elephant in the room is the Rambus decision. I won't go into detail on my views on that. But I guess my own view of that is that if the D.C. Circuit opinion represents an accurate view of the law under Section 2, it means it's virtually impossible to bring a standard-setting case under Section 2 because the causation test that was set forth there.

And the question then is, does Section 5 involve a different test of causation? I think looking at Boise Cascade and Ethyl, the courts there really applied a test of causation that is very similar to what one would see under the Sherman Act. Therefore, I would suggest that before one can seriously consider bringing action under Section 5, one needs to consider whether Ethyl and Boise Cascade, in fact, represent the causation test or whether it is possible to bring a different test of causation under Section 5.

Finally, the question of what would the impact be on the development of Section 1 and Section 2 if the FTC were to bring actions under Section 5? Here, in particular, looking at Section 2, again, my own personal view is the current state of the law makes it very difficult for private plaintiffs to bring actions in court under Section 2 with respect to misconduct in the standard-setting context. If the FTC were to focus its efforts on developing Section 5, what impact would that have, if any, on the ability of parties to litigate in federal court under Section 2 with respect to some of these issues?

So, those, at least, are the issues that I view. I'm sure I missed some, but those are the issues that I hope we have a chance to discuss today.

MR. ANDEER: Great, thanks, Geoff. And just a few ground rules, in terms of opening us up for discussion, if you could somehow signal your interest by either tipping up your name card or some other way. That will hopefully keep us somehow orderly. And then also speak into a microphone since this is being recorded. That would be very helpful.

Richard, I know you've expressed some interest in this topic. Do you want to lead us off in the discussion?

MR. TAFFET: Sure. I, too, would like to thank the Commission and, Kyle, thanks for sitting in for Rob, and this opportunity to address what I think are some of the most complex issues that I have at least had to address over a number of years. And I think going to Geoff's questions that he teed up, and I think Geoff really does raise some of the key issues. I hope we get into some of effects discussion later on, too. I would add that.

But one observation I would make is that when looking at the question of what conduct should be addressed under Section 5, or is addressable under Section 5 as compared to the Sherman Act, I'm not sure that there is a difference, in the sense that in the standards context itself, we're inherently dealing with -- and I'm putting aside the Allied Tube type conduct, which is more collusionary in nature under Section 1 -- but we're dealing with single firm conduct which, in and of itself, is inherently ambiguous in many instances.

We're adding on top of that the extra layer of IP. And the assertion of IP raises all kinds of different issues competitively. So, I think whether it's under Section 2, I should say, or Section 5, the efforts of the Commission probably have to be the same and look at conduct that, when fully assessed, is going to have, whether it's interpreted to be coercive or somehow otherwise oppressive, to then lead to some kind of anticompetitive effect.

So, I'm not sure that there's going to be much of a difference in assessing an extra scope of conduct under Section 5. Indeed, I think it may be more of an interesting question to look at the differences of the effects that should be considered if there is a difference at all.

The other position I would say -- and I know I'm well outnumbered by Commission people here -- that I probably have a different view than Geoff on the Rambus D.C. Circuit decision, because I do think that there is a way to look at that case and look at the issue of causation, and really the way I look at it is, in some respects it was a failure of proof. And I recall a couple of weeks ago at the program that David Balto put on, Commissioner Rosch was speaking and raising the issue of causation as well. And a comment that resonated with me is that the Commission prepared its case looking to the Microsoft case as the guidelines, and at least in Commissioner Rosch's view, because of what he viewed as the 180 of the D.C. Circuit, it sort of has led to a different result.

That being said, I don't see the D.C. Circuit as currently establishing an insurmountable burden of causation if the facts can be proven. Because, again, whether it's proof that there were no alternatives or that the technology and (inaudible) technology would have been adopted anyway, is just a matter of proof, difficult proof but possible. And if you can't prove that, then there may be the conclusion that the effects shouldn't warrant competition law scrutiny. Thank you.

MR. ANDEER: Anyone else on this issue?

Scott, we have talked a little bit already about Section 2 and whether it's appropriate to -- maybe that covers the landscape here. So, let me ask you, is monopolization in Section 2 an adequate framework for understanding the implications of patents that are essential to the standards?

MR. PETERSON: So, my short answer is, no, I don't think it is adequate.

Also, I want to express my appreciation for the opportunity to be here and thank the agency for holding this hearing on this topic.

Monopolization is not an adequate framework. A patent that is essential to the standard is a lever that can be used to exploit a value that was created by the collective action among competitors.

Now, let me explain. I speak from the perspective of having worked in the information technology industry for over 20 years. Think computers, hardware, software, consumer products, enterprise information systems. A substantial value received by consumers of IT products flows from the network economies that are so characteristic of such products. These network effects are enabled by the existence of interoperability standards.

Producers of IP products implement a large number of standards in their products. These interoperability standards are typically developed by collaboration among competitors. And an expected result of such collaboration is that there is very limited, if any, competition on that aspect of products that is described in the standard. Thus, we have collaboration among competitors that leads to a kind of non-competition.

In another context, this might be a serious competition concern. However, as is widely appreciated, this collaboration to agree upon interoperability standards is well justified by its tremendously pro-competitive effects. Markets are enabled for products that might never have gotten off the ground, innovations facilitated. There's tremendous richness of value that consumers of IT products realize as a result of the diverse products that implement these standards being able to interoperate.

A patent that is essential to a standard leverages the value that was created by that collaborative action. That's what sets it aside from other kinds of patents.

In the hearings held in April 2002 on this general topic, not Section 5 but on standards, antitrust, patents, in which I participated, the term “anointed” was used to describe what happens to a patent that becomes essential to a standard. The collective action that includes reliance on a licensing assurance for an essential patent is something that, in effect, becomes a characteristic of the patent. The patent becomes a more dangerous bundle of rights than it was prior to its involvement in that collective standard-setting activity.

So, finally, with this understanding, let me go back to the beginning where I started. Now, we see why monopolization can be an inadequate framework in which to understand the competitive implications of use of an essential patent. To think about this solely in terms of monopolization by that patent owner fails to take into consideration the baggage that this patent has acquired. The essential patent is a lever into a competitive setting that has been significantly altered by collaboration among competitors. Exercise of such patent rights has a higher danger of anticompetitive impact than exercise of patent rights that don’t have that baggage.

An essential patent can leverage the value that has been created as a result of permitting competitors to agree on a single way of doing a particular thing. That is not fully appreciated when thinking of the situation as being a single firm using exclusionary conduct to monopolize a market.

MR. ANDEER: Thoughts? Michael.

MR. LINDSAY: Yes, I do need to respond to that, particularly to the word “non-competition” that Scott used, because I don’t think that that adequately characterizes the nature of the standards process. There is competition at several levels and of different kinds. First of all, if you don’t have all of the players, relevant players in the room, you may well end up with competing standards. Now, to some degree that defeats the purpose of standardization, but those standards could well end up competing in the marketplace and there may well end up being one winner and another standard that is, shall we say, less successful. Take the example of Blu-ray and HD. If you are an early adopter of HD, you’re not very happy today.

Second, there is competition -- once the standard is implemented, the whole purpose is to create a “commons” -- I think Scott’s term -- or community benefit in which all of the implementers can compete. And they’ll compete on price, they’ll compete on features, but they will have interoperable products.

Third, there is a form of competition that goes on within the standards development process itself. That is competition for inclusion within the standard. It is very possible that there are two different ways -- or three or four or five -- of accomplishing the same technical purpose, and you can argue about technical merits, you can argue about the costs. But, at any rate, those proposed alternatives will be competing with one another. It's not certainly the same kind of market-based competition that goes on once you are talking about compliant implementations, and I'm not sure whether it can be characterized as simply being a different market. But there is a degree of competition there, which has important implications for the IPR policies that organizations will adopt, and it was one of the underpinnings, I believe, in both the VITA and IEEE business review letters.

MR. ANDEER: Before I turn to Amy, let me ask you, Michael, going back to the original question, I mean, Section 1 or 2, do they provide enough flexibility -- let me split this into pre-Rambus and post-Rambus D.C. Circuit decision. Is there enough flexibility there to address some of the competitive issues?

MR. PETERSON: Well, ultimately, I think that there is a place for Section 5, and we'll talk later in the program about how frequent and on what terms that place should be. But I do believe that there is room for it and that Sections 1 and 2 do not cover the entire ground.

MR. ANDEER: Amy?

MS. MARASCO: Yes, and thank you very much for having me here today as well. I just wanted to take a minute to talk a little bit about the standard-setting environment. I think, as Richard said, it's a very complicated landscape because of the overlay of intellectual property. Of course, the intellectual property laws provided certain exclusionary characteristics in order to increase incentives to innovate, which does provide a lot of consumer goods and societal good. And then you have a group of competitors coming together to work on technical issues. The technical committees spend a lot of their time making hundreds, if not thousands, of technical decisions every time they sit down to draft a standard. And some of these standards are long. So, those are complicated. Again, multiple decisions being taken.

And then you've got the competition law aspects. You have competitors coming together and agreeing on what the standards should say. And I think that the agencies have recognized that there are a lot of pro-competitive benefits to standardization, but that, as with everything, there needs to be an appropriate balance and balancing of pro-competitive and anticompetitive effects and looking at all of those together.

I would say that standards bodies have created a framework. They're not going to be the adjudicators at the end of the day as to either legal issues, such as, are certain patents essential or not? They're not going to be adjudicators of whether licensing terms are fair and reasonable and non-discriminatory. But they will create a framework, and I think they do a reasonably good job at doing that. That's not to say it can't be improved.

Standards bodies every year review their procedures and policies to see what they can do to improve on them. But that being said, they have balanced IPR policies typically that try to encourage participation by patent holders. So, they'll come, they'll bring their patented technology to the table and contribute it. Otherwise, their technology is not under any constraints, if you will. They do not have to share that technology with their competitors in order to enable implementation of the standards.

So, the policies need to encourage them to come and, at the same time, though, they are asked to make a licensing commitment, that they will license all implementers' on reasonable and non-discriminatory terms and conditions in order to enable these competing implementations. So, it's a balancing act.

And with so many competitors there -- and a notion of, well, what is unfair -- there's somewhat of a joke within the standards community that consensus means everybody left the room equally unhappy. So, I think that from an industry perspective the use or the possible use of Section 5 being applied to standard setting needs to have some very clear lines, because otherwise you run the risk that holders of essential patented technology will decline to participate in those standardization activities if they feel that they do not know where the boundary lines are.

And I personally would advocate for some notion that there be some anticompetitive intent, that there's not just a good-faith dispute or difference of views, because that happens rather rampantly, I think, throughout the standardization environment. There are commercial law opportunities for litigation if people feel that they want to argue over whether licensing terms are reasonable or not. So, I think there needs to be something more that shows some truly bad intention and bad act, and not an otherwise legitimate business objective.

Then I think later we'll probably talk about how do we measure impact on consumers, because I think that's also very difficult to do. Standard-setting environments are ecosystems. So, for example, my company, we're a large patent holder. We're also a big implementer of standards. So, we're going to have incentives, I would think, to act as a rational, reasonable player because we have to be on both sides of the table.

So, you have to look at all the different business models that go on, what are the incentives that companies have? It's a very, very complicated analysis.

MR. ANDEER: I know Richard wants to react, but let me just turn it over to Jack real quick. Let me ask you this, just following up on some of the points that Amy made. Should Section 5 ever be used in connection with a commercial dispute such as a dispute as to whether proffered licensing terms are RAND and other issues arising out of standard-setting activities?

MR. SLOBOD: I think that it probably shouldn't, because it will create uncertainty and it will really tilt the balance of having potential innovators and patent holders participate in the process. I think that the problem is -- I wouldn't say if Section 5 were properly and defined as to exactly how it would be used, exactly what kinds of conduct would be proscribed, I'm not sure that would be a problem. But I think that the uncertainty that it would bring right now would be a very big issue.

MR. ANDEER: The concerns about uncertainty, what exactly -- I mean, what are we talking about?

MR. SLOBOD: Well, what's happening today is that in standard setting we're having -- we're sort of tilting the balance a little bit between implementers and patent holders. We're asking to take the uncertainties about what patents -- what royalties might ultimately be on an end product or that sort of thing and put the uncertainty on the patent holders to say, perhaps ex ante, what royalties they might charge, things of that nature.

And once you do that, you wind up in a situation where there is potential discussion about price terms. There's lots of risk there of crossing the line and doing something anticompetitive. Basically, you have to understand the people who participate in the standard setting are basically technical people. They're not there with lawyers; they're not there with business people. So, there are lots of risks that companies may not want to take in that context.

MR. ANDEER: Richard, I know you were waiting, but maybe we should turn to Bob since he's the last to speak on this panel. So, let me give him an opportunity.

MR. SKITOL: I think both the FTC and the Justice Department have done a lot in the last four years to alleviate the risk that Jack is talking about. The idea that it is somehow risky to have a system where there is ex ante transparency about the cost of this technology versus that technology, so that informed decision making can occur in a standards development group. The idea that that somehow violates or even comes close to violating the antitrust laws is something that both of these agencies have shot down hard a year and a half ago in the joint IP report.

The fact of the matter is that what goes on in most standard-setting organizations today is competitors collectively suppressing anything approaching meaningful ex ante price competition. That, to my mind, is a bigger antitrust risk than the opposite.

You might remember this Professional Engineers decision of the Supreme Court of 25 years ago, that slammed the Association of Engineers for collectively adopting a rule that prohibited competitive bidding until after the award was made. That's the essence of what's going on today in many standard-setting organizations -- is collective suppression of anything coming close to meaningful transparency about license terms.

I’m a strong supporter of using Section 5 to deal with abusive practices in standard setting. Just like the Commission did in N-Data, I think the concern about standards and -- oh, it’s all so uncertain -- is belied by the specificity and objectivity of the standards that were made very explicit and that were at the heart of the Commission’s N-Data action. It’s not anything that we think is unfair in some subjective way.

The Commission, in N-Data, laid out in detail -- you know, it was a case involving a subsequent owner of a patent repudiating a prior owner’s ex ante assurance, on which the whole industry relied and got locked into, a standard and so forth and so on. The Commission found the conduct was oppressive and coercive with serious injury or threatened injury to competition and consumers, with no legitimate business or efficiency justification. Those are the standards.

There’s been a lively debate over whether or not that same conduct could have been challenged under the Sherman Act. I think that’s an interesting debate with good arguments on both sides, but the point is that whether or not that kind of conduct is reachable under the Sherman Act, there’s no reason why it should not be reachable under Section 5. There are a whole variety of other kinds of things going on in standard setting these days of a similar nature, that I think should also be considered for next generation Section 5 cases. And I can give you some examples or I can wait until later.

MR. ANDEER: We might as well hear the examples now.

MR. SKITOL: We all know that ex ante deception about the existence of essential patents, that that's bad and that can injure competition and so forth. We know from N-Data that a subsequent owner's repudiation of a prior assurance is bad. What else is going on these days? Well, I'd just offer two or three examples.

One is where the holder of an essential patent gives the required ex ante RAND assurance and all the participants in the standard setting rely on that assurance in going ahead and adopting the patented technology into the standard. They all become locked in and, thereafter, there's a disagreement between an implementer and the patent owner over what reasonable terms should be.

The patent owner lays down its license demands. The implementer disputes the reasonableness of the demands or maybe even chooses in good faith on reasonable grounds to challenge patent validity. The patent owner then turns around and threatens to seek or actually seeks injunctive relief to shut the implementer down altogether instead of simply litigating over reasonable royalties or negotiating over what the reasonable royalties should be.

The mere threat of injunctive relief is enough to force implementers to accept whatever the demands might be. Seeking injunctive relief or threatening injunctive relief ex post is totally inconsistent with the whole -- the heart and soul of what a RAND assurance is supposed to be. It's an assurance that if my technology is adopted into the standard, reasonable licenses will be available, and then turns out six months later that you sign now or else we're going to shut down your business all together.

Now, as in N-Data, that's conduct that defeats reasonable ex ante expectations in ways that subvert the ex ante competitive process for selecting technology, and in ways that threaten the whole pro-competitive open standards objective and creates barriers to and impediments to a competitive market outcome. It's an example of installed base opportunism. So, that's one example.

And I'll throw out another. A patent owner -- the owner of an essential patent gives a public RAND assurance as required, refuses to publicly reveal anything else about its intended license terms, but then on the side in private engages in selected bilateral private negotiation of license terms with particular selected participants in the proceeding. And the actual terms are private and never known. I think it’s time for the Commission to take a look at what’s actually going on in this process that results in different license terms for different implementers, despite a public RAND assurance. And the ND part of a RAND assurance says non-discriminatory.

The defenders of the status quo argue that we don’t need transparency about license terms that are publicly available to all because ex ante bilateral negotiation goes on and that’s satisfactory to everyone. Well, what is the justification, what is the efficiency justification or any justification for preferring private selective negotiation with X number of companies out there in lieu of a single public disclosure on a timely basis of what the license terms for everyone will be? The giving of a public RAND assurance followed by the private selective negotiation process invites discriminatory outcomes and, therefore, potentially anticompetitive outcomes.

And I’ll just throw out a third, which was kind of suggested by one of the other panels. It’s part of what the Rambus case was all about, but didn’t get highlighted and get the kind of treatment that it deserved. It's what I would call a patent owner's abuse, gaming the system. A patent owner's antitrust liability or Section 5 liability for gaming the system should not depend entirely on whether there is literal compliance with the particular SSO's rules and policies or whether those rules and policies are clear or vague. There are circumstances where a patent owner games the system through misuse of patent application amendments and divisions and continuations that undercut the value of a RAND assurance that is given before that kind of stuff goes on at the Patent Office. I'll stop right there.

MR. ANDEER: All right. I know Richard and Amy both wanted to make a few comments, but I'm hoping we can kind of focus on some of these things that Bob has brought up so well. Specifically starting, one, is there a role for Section 5 in standard setting, and two, if so, are there some examples of areas where the FTC should look to apply Section 5?

Richard, do you want to start? Then we'll turn it over to Amy.

MR. TAFFET: Sure. Really three points come to mind. I think it's based upon the whole dialogue, finishing up with Bob's. Point one is, Kyle, to be quite honest, I think it may be quite important to restate your question. If the FTC is going to take some action, it's going to be under Section 5. Now, it may be coincident with the Sherman Act as well.

I think we have to be able to focus on the difference between Section 5 and Sherman Act, and what for me is the more important question of should the FTC be focused on standards development conduct, whether it's under the broader scope of Section 5 specifically or under the Sherman Act, and we can talk about it later. I don't necessarily think there should be a difference in that regard.

But the answer to that question, I think, is if the facts warrant it -- and I'll get back to it in a second. I think Bob is living in a world that's very, very different than I'm living in. I think his words were "rampant suppression of competition is actually occurring." The efficacy and robustness of standards development would have screeched to a halt already. Technology would have been hurt and we would not have the competition we have, getting back to that.

So, point one is I think the real question is should the FTC be acting, and I think that's an unequivocal yes. We can then say, okay, under what circumstances?

I think in looking at that, and looking at conduct, and looking at the effects that conduct has, I think it really is very important to look at the broad scope of competition that exists in the standard context. And Michael addressed some of them. I think it's even more complex and I think you have to start from the position that IP is recognized to be pro-competitive. A strong IP environment has been recognized over and over again by the FTC, by the Department of Justice in the '95 IP guidelines, in the '07 second IP report, that a strong IP environment and enforcement of the IP laws and the rights of IP owners is complimentary to a strong enforcement of the antitrust laws, and I would put within that Section 5.

Listening to Scott's comments on the scope of, I think it was "dangerous bundle of rights," and the baggage that patents has acquired, the exercise of patents has a higher level of danger in the standards context, these are pretty scary words. I'm not -- well, I can't say that Scott is -- I don't agree with that. I mean, do I think is there an opportunity to abuse any kind of rights? Absolutely. We have to start from the prospect that the inclusion of patented technologies in standards is good. That's a competitive evaluation that has to be made.

I think in all the cases, including N-Data, in Dell, in Unocal, in Rambus, the one thing that I would urge the Commission to do in their analysis would be to start from that premise, recognizing the value and the competitive value of the IP and then go from there and really assess the full panoply of competitive issues.

So, Bob says he's concerned with this rampant suppression of competition because somebody is going to make a RAND commitment and then bilaterally negotiate and have different license terms. Well, I would assert to Bob that he could actually read SDO/IPR policies. For example, TIA's policy which expressly says that non-discriminatory doesn't mean that every licensee gets the same license term.

If that were the case, I may agree with you, Bob, that that homogenization would be anticompetitive if that were required because that would limit the type of licensing freedom which is recognized to enhance not only competition and the ability of dynamic competition to advance because licensors get the benefit, but implementers get to compete, also, and they get to define the license terms that are going to benefit them most. Some licensees might view a choice of law provision to be more valuable than another provision. Cross licensing provisions. How do you value that?

So, I think we have to really drill down and look at all of the competitive considerations. I think even in the IEEE, we see competition amongst different standards, the 80216 versus the 80220. Working groups, there was overlap of essentially local area network type of WiFi standards. That gets sorted out. We have competition between a GSM and a CDMA standard in the United States. My Verizon phone doesn't work with my AT&T phone. So, we have competing standards in the United States. Europe had a regulatory regime there which only allowed GSM, and I would assert to you that the competition of new entrants was much more difficult there.

My last point is that I think it's a very, very, very dangerous argument to make that if one contributes its IP to standardization, for example, allows its patent to be included in a standard, and there are advantages and incentives to have that done, to say that you give up your rights to enforce your patent.

So, for example, as Bob suggested, it is antithetical to a RAND commitment to be able to enforce your patents and you somehow forgo your rights of injunction. And I will disclose, we're litigating these issues currently, that I think that is a very dangerous position to make, that is a position that has been put forward in various standards bodies to change the policies. It has been rejected. And the key reason that

that is is because it would unbalance this careful balance, I think that Amy talked about, amongst the various interests, and they're very, very varied interests. That's competition also within the standards development process.

Very simply, the licensee -- or it's an opportunity for prospective licensees to act opportunistically by simply saying, I am not going to license your patent, go sue me. Then I'll pay you some reasonable royalty for the past infringements down the road. I will assert to you -- I can't give the citations right now, but I'd be happy to email them to you of well established Federal circuit law which says if you diminish the value of the IP through that type of opportunism by licensees which drive down the ability to enjoin a bad actor on the licensee side, which is again, a competitive consideration which I would like the see the FTC take into consideration -- if and when they ever bring another case -- that would unsettle the whole competitive environment. It will diminish the value of IP, and it's unfortunate that it's really boiled down to, as someone said, implementers versus IP owners, because it's not that simple. Everybody sits on the same side of the coin. I'm sure we'll come back to this, too.

MR. ANDEER: Before I turn to it to Amy,

Richard, let me ask you, just a quick follow-up in terms of the application of Section 5 outside of the established antitrust statutes. Are you saying there shouldn't be any application outside the Sherman Act and some of the other acts?

MR. TAFFET: I'm thinking specifically in the context of IP and standards related conduct, and I'm struggling a little bit and here's why. Because I recognize that Section 5 is an incipiency statute. I think David Balto said that earlier today. I think in that regard there may be a difference. I think though that we have to look at cases like Zenith v. Hazeltine, which still allows for a private party to have standing to obtain injunctive relief under Section 16 of the Sherman Act. So, there may be some overlap there.

I'm not sure of that answer. Even if there was the incipiency difference, I think the same very rigorous evaluation of competitive effects would still be warranted. And indeed I was mentioning to Armando earlier today that one of the things about N-Data is that there's a list of many of the anticompetitive effects which the Commission majority found. What is not there is a very rigorous explanation of how those effects were established.

So, I'm not commenting whether they were or they weren't, but there's a difference between an incipiency standard and a speculative standard and a theoretical standard. And if it's still grounded as Commissioner Leary and I think Chairman Pitofsky said earlier today, then if it's grounded in sound economics, then that would be a strong showing.

The other, which was a discussion at the earlier panel, for single firm conduct, is there the necessity of showing monopoly power to be able to bring that? Again, I'm not sure of the answer yet. But I'd ask the question if there is not monopoly power by the party that's asserting, in this instance, the IPR. And now the Supreme Court has told us in Independent Ink that monopoly power is not going to be presumed from the patent, the real question for me is how is that going to affect the analysis of the anticompetitive effects?

And really, even if there is an increase in short-term costs -- and I would assert to you that higher IP costs, if my royalty rate is higher, that is not necessarily going to result in any higher cost down the road -- that may be an insignificant de minimus cost when it's compared to performance, obsolescence cost, implementation cost and the overall cost of the technology. Or there may be rent shifting, because if I license my IP to you and you decide to make more profit, you can push that cost down to the consumer. But if your derived demand is such that you can't pass that cost down, then I make money and you make a little bit less. But that's just competition of a different nature. Thank you.

MR. ANDEER: Amy, let me turn it over to you. I know you've been waiting very patiently. And then I'll turn to Michael to go through some more examples perhaps of where we might be able to use Section 5.

MS. MARASCO: All right, thank you very much. I just wanted to go back to Bob's comment about companies or competitors suppressing transparency about licensing terms at standards bodies. There have been numerous discussions at standards bodies over the past few years over the disclosure of licensing terms as part of the standard-setting process. And I am not aware of any standards body that prohibits the voluntary disclosure of licensing terms. And, in any event, if a patent holder makes a RAND commitment, sends in a disclosure, there's nothing that prevents you also from just calling them up and asking them about their licensing term. So, there is information about licensing terms available.

I think when I have participated in some of these discussions at standards bodies, and I think ETSI is a great example, the European Telecommunications Standardization Institute. They looked at this issue, meeting every month for over a year with 100 people from around the world in the room, all different stakeholders, patent holders, users, implementers, and they had a very, very detailed discussion. And one thing that everybody came away with is a much better understanding of the complexity of the issues. So, it was very good from an educational point of view.

But they were at the end of the day collectively concerned about injecting commercial discussions about licensing terms into the standard-setting process. They were worried about some of the potential antitrust concerns, of buyer cartel behavior, group boycott type behavior. How do you police that in a room full of engineers? So, there were concerns about that.

There were concerns about the efficiency of the standards development process. Already people complain that it takes the ICT industry too long to get standards out, that the technology is evolving so much more quickly than the standards are promulgated. And the thought was if we start to inject iterative discussions about licensing terms when there are hundreds of technical decisions getting made around each of these standards, that the standard will never get done. And you never have complete information in any event. There's always patents out there you're not going to be aware of, you're never going to have perfect disclosure of information. All this is going to do is just sort of grind a lot of the standards development processes to a halt.

They also observed that they didn't see a lot of problems associated with the hold-up situation. With thousands of ICT standards, there are a few glorious examples. But do you solve for the one-off by changing the rules for all the other ones that seem to go very, very well? So, there's a lot of these kinds of discussions that went on. I think there are similar discussions at other standards bodies.

So, I don't think that there was any attempt to try to hide the ball, if you will, in terms of licensing terms. It's just, you can get the information, but let's not inject some of this into the standard-setting environment.

I also want to agree with Richard that "non-discriminatory" in RAND has never meant that everybody gets the same license. In fact, what some people argue is great about RAND is that it's flexible in that a license or a licensee can develop an agreement that works for them. If you're an implementer, you probably want to be able to distribute your whole product, not just the essential patent claims. You may want to negotiate for other things. You may have different things to trade. You may say, hey, maybe we'll do a patent cross license. So, in other words, the RAND commitment gives people an ability to fashion a reasonable license, but to deal with different business models. So, actually there's a lot of benefit to a RAND approach.

So, these are sort of the realities of the standard-setting environment and I think that anything that the FTC does with Section 5 has to send a very -- it has to map to those realities and, again, send a clear message to industry. Because, otherwise, I'm afraid then people will not want to participate. They will not want to contribute their technology.

COMMISSIONER LEIBOWITZ: Can I just ask a question? You have the same problem, it seems to me, if you have deception and you can get away with deception in a standard-setting context. Doesn't that also undermine the value of standard setting? RAND is complicated, but let's take two simple examples that this Commission has dealt with. I'm just sort of curious what your reaction is.

One is if we're all members of a standard-setting body and the standard-setting body requires that you disclose your patents and I don't disclose a patent, and five years later I raise my hand and say, pay me royalties. If that can't be reached by the antitrust laws, is it useful for us to use Section 5 in that context? Where, for example, the private, follow-on treble damage suits are unlikely or less persuasive.

And the other case is, let's say I make a commitment for a particular price or a range of prices, and it's written, and I sell my business to somebody else. To Holly over there. And she's aware of this commitment and she says pay me more in royalties. It's a sort of reneging. Isn't there a use for Section 5? Again, the part of Section 5 that's not part of the antitrust laws, it's an unfair method of competition where you can't have follow- on treble damage liability or it's harder for a private party to get there.

I'm just sort of curious because those may be easier examples than some of the complexities of dealing with the RAND commitment. We've had difficulties, sort of, and no consensus necessarily between us and the courts or even on the Commission in those contexts. So, just wondering if anyone can respond to that and you can disagree with me, too. Feel free to be brutal.

MS. MARASCO: I guess the thing that I keep coming back to is it gets more complicated. Because in your two examples, like the first one, what was the patent policy in place? What were the obligations of disclosure in connection with the Dell case? The FTC has said we're not trying to send a signal that inadvertent failures to disclose should result in having to later maybe waive rights to the patent vis-a-vis implementations.

So, in other words, disclosure is a very difficult concept because sometimes people with large patent portfolios are just not aware that they have it. It's one thing if it's intentional. That's why I mentioned earlier, it's much easier for me to accept a potential antitrust issue if there is a really intentional anticompetitive motive and no legitimate business purpose.

The other fact for your first scenario, I would ask, well, even if they discovered the patent later on, would they still be willing to make a RAND commitment? Because very often companies are willing to do that. Most companies, I think, are good players in standards. That's not to say you don't have bad actors. But most of them -- I know my company would try very hard. If we discovered it later, we would say, look, we really have to make a RAND commitment at this point. And so, I think there's a lot of goodness that just sort of happens. Again, I think because of the ecosystem environment that standards are.

Your second question is, again, a little harder, too, because it sort of depends on what was the nature of the licensing commitment and what were the rules in the standards body and what is the general legal framework and did the subsequent owner have notice? I mean, it's complicated. But I will say that standards bodies now are all discussing this issue and they're thinking, is there something we can do with our policy to help put greater notice or something to help maybe move the licensing equipment with the patent? I think most people in industry would like to see that happen. The issue is, how do get there and who's got the burdens and risks associated with that?

UNIDENTIFIED MALE: So, I would offer an analogy to illustrate my point earlier about why monopolization really isn't enough. Section 5 does offer some advantage in this context. This goes to the bundle of rights can become more dangerous. The analogy is that you may observe a set of patients that are dying of pneumonia and there's a lot of consternation to try to understand their respiratory problem. After much study, it turns out all these patients have been on some sort of therapy for some organ system completely unrelated to the respiratory system that has resulted in a reduction of the effectiveness of their immune system.

So, I view the application of monopolization as the framework for looking at the single firm conduct as looking at that patent owner who's exercising those rights. That's the pneumonia at the end. That's focusing on that. If you don't stand back and have a way of encompassing those earlier factors, the monopolization won't necessarily capture all of the things that play into what resulted in the bad behavior.

MR. ANDEER: Jack, I know you've been waiting patiently.

MR. SLOBOD: I want to agree with Amy. I think the first line of defense really is that the standard-setting organization has an obligation to have explicit rules that handle these situations. If it's clear that there's an obligation to disclose and it's violated and it can be clearly shown, there are defenses that can be asserted. Implied license, equitable estoppel, those kinds of things are there.

In the case where a commitment is made and then reneged upon, it really also has to do with, do the rules of the standard-setting organization explicitly say that commitments are irrevocable? Do they explicitly say that they will be binding or you will make them binding on successors?

COMMISSIONER LEIBOWITZ: So, Jack, if they're clear and they say, yes, then is your response we shouldn't be involved because it's a private contractual manner, which is not an unreasonable intellectual position at all?

MR. SLOBOD: Not necessarily. But I'm saying, is there a need for you to be involved? If there's a really clear defense that people have.

MR. ANDEER: Go ahead, Bob.

MR. SKITOL: Yeah, I agree in the first instance each SDO should develop for itself the policies and rules it thinks are appropriate for its kind of standards development activity; everybody agrees that one size does not fit all. There are different kinds of policies out there that different groups might want to try. Every SDO doesn't need to wear the same shoes, but it should be unacceptable for any to go barefoot.

I don't think it's appropriate to leave this entirely in the hands of SDOs and their members to decide for themselves. I think there's an important oversight role that the Commission can play. SDOs are creatures of concerted action among various groups of direct competitors, including different groups with different business models and clashing interests, and the result is that the rules and policies that end up being adopted, end up being awkward and often ineffectual compromise solutions and that enables any significant faction to block effective safeguards against anticompetitive patent hold-up outcomes.

So, I'm pretty negative about the idea of total deregulation, leave it to SDOs and members to do whatever they want. I don't think that that makes sense. I think to the contrary, we're at a stage where the Commission ought to be reminding the SDO community that 25 years ago the Supreme Court handed down a decision called the Hydrolevel decision that hasn't been mentioned much in a long time. But that's a decision that says that an SDO bears antitrust liability for failure to employ adequate and effective safeguards against anticompetitive misuse of its processes.

That's the law of the land and I think that one desirable use of Section 5 of the FTC Act would be for the FTC to study, in a serious way, what exactly is going on out there among all these different SDOs. How effective or ineffective are their rules? What is the RAND assurance all about? Has it become a tool for anticompetitive misuse? Does it have any meaning to it at all, et cetera, et cetera?

Then the FTC can, let's say, modernize or update the Hydrolevel doctrine to say that an SDO that fails to adopt meaningful safeguards against anticompetitive patent hold-up conduct should confront Section 5 liability. I don't think this means that the Commission ought to start going out there and bringing lawsuits against SDOs. I do think there's a role for the FTC to play in studying what is happening and then issuing a report on its findings and offering a competition policy perspective on best practices.

What kinds of SDO rules are consistent with competition policy and what kinds are inconsistent with sound competition policy? And perhaps even issue industry guidelines.

MR. ANDEER: So, let me turn it to Michael, I know you've been waiting, and then to Geoff. I'll let you share any reactions or thoughts you might have to what we've heard, but I also hope we can touch on some of your original comments where you seem to suggest that there was a role for kind of stand-alone Section 5 enforcement and talk about it and provide examples.

MR. LINDSAY: And I think we're actually getting there. I've collected, I believe it's now six points of response, so let me try to go through those.

First, in response to one of Richard's points, he said that the inclusion of patented technology in a standard is good. I have to agree that there are certainly circumstances where a patented technology is the best approach and the group of engineers who are deciding upon that should make that choice. But that is a different proposition from whether the inclusion of patented technology should, in some way, be privileged and ought to be preferred. I'm not sure if Richard was saying that, but certainly we want to make sure that standards organizations have the ability to make the choice that they either do not want any patented technology in their standard or they want only royalty free patented technology in their standard.

One of the points that the Commissioner made concerned the role that the FTC might play, and it prompted one additional thought in my mind. When a standard has become successful and the participants in the industry are effectively locked in to that standard, and then a patent holder raises its claim, there is a disincentive of one implementer to take the risk of challenging that patent because they're the ones who will bear the loss of being enjoined effectively out of the industry or having to pay the very large amount, whereas all the other implementers can simply sit back and watch.

Now, of course, there are circumstance where the patent holder decides to sue everyone in the industry at the same time, or maybe one implementer has decided they want to take on that risk. But that is a disincentive that I think the Commission does need to bear in mind as a guidance for when it might be appropriate for the Commission to be taking action under Section 5.

I want to agree with something that both Richard and Amy have said, that if you haven't gotten the flavor already, this really is a complicated process. There are costs to participating if the legal risks of participating become too high. As a counselor at the standards organizations, I can assure you that the organizations want participation, they don't want to unduly discourage it. But on the other hand, they also want to make sure that the outcome of the standardization process is worth it. Participants who don't see value in standards because they see too much bad behavior are going to start withdrawing.

Now, are we at a crisis point today? No, of course not, because we see a lot of standardization still going on. So, we are, to some degree, talking about exactly where within a section of the center of the spectrum, you know, where exactly we're going to place the needle.

One of the examples that the Commissioner also asked about was what do you do with a RAND letter and does the clarity of a rule on whether the RAND letter is binding or not make a difference. There I think you also have to bear in mind, what is the RAND letter? If a RAND letter said I can assure you that I will offer reasonable and non-discriminatory terms for as long as I hold this patent and I'm going to sell it in five minutes, that would tell you something about the value of the assurance. It seems to me that the very fact that you are giving an assurance implies that this is something that is going to be binding along the line.

Now, does that mean a standards organization couldn't adopt a different rule? A clearly different rule that says this is not binding unless you explicitly say it? I suppose a standards organization could do that. But I don't think you would want to start with the presumption that a RAND letter is not binding unless the rules say that it clearly is binding.

That said, if there are clear rules for an organization as a general matter, the bargain that is reached in the setting of those rules ought to be honored because there are all sorts of competing considerations that have gone into arriving at those rules. I think a number of the people at this table were participants in the IEEE's process in deciding upon its IPR policy a couple of years ago. There are competing considerations. For example, under what circumstances do you oblige a patent holder to disclose knowledge of its own patents? Under what circumstances do you oblige a participant in the process to disclose knowledge of someone else's patents? In what circumstances do you think there are good reasons why they should not be obliged to do that?

That said, we also have to remember that that is a bargain among the participants. It is not always the case that the end user of compliant implementations is at the table when that bargain is made. That clearly is part of the consideration that the FTC has to think about. Yes, there is a bargain. Yes, bargains should be honored, but are all relevant players at the table and to what degree has their voice not been heard?

Then, finally, as to Bob Skitol's comment about the Hydrolevel case, all I will say is that I can't speak for the standards community in general, but I can say that at least those who are my clients are keenly aware of the Hydrolevel case.

(Laughter.)

MR. ANDEER: Geoff?

MR. OLIVER: Sure. I would actually like to pose somewhat of a follow-up question to the panel generally, but perhaps I'll pick most directly on Bob, and my apologies. But coming back to the theme that I started with, I guess one of the questions that has really struck me is in the standard-setting area in particular is, is Section 5, in fact, broader than Section 2?

As I think I mentioned to start out, it involves a judgment both with respect to the potential breadth of Section 5, as well as a judgment with respect to the breadth of Section 2 which, of course, as people know, has itself been a topic of debate recently. And it also involves focus not just on element of conduct, but also on element of what I'm framed as causation, what Richard has framed as effects. I think we're essentially talking about the same thing.

I think Richard, in fact, gave a couple of examples where he thought that Section 5 might be broader than Section 2. Bob, you gave a number of examples of conduct you thought should be reached. I guess the follow-up question that I would have is why do you think those examples could not be reached under Section 2 and why do you think those examples could be reached under Section 5?

MR. SKITOL: Well, I think the strategic predatory use of injunction threats, for example, and the RAND commitment followed by the private and secret separate negotiations, those kinds of practices might be reachable by the Sherman Act. But I think it's debatable, and it would be difficult to fit those kinds of situations into a Section 2 mold for the reason that Commissioner Rosch has suggested, I think. I don't necessarily agree that they are not exclusionary conduct, but we're in an environment where there's total confusion and huge debate over what is and is not exclusionary conduct for Section 2 purposes.

My point would be that Section 5 is a more robust and effective way of reaching those kinds of practices, which I would call abusive practices, that harm or at least threaten to harm competition in a serious way and to harm consumers in a serious way. They should be reachable by this enforcement agency whether or not they fit within the confines of this court's or that court's notion of what the standard should be for a Section 2 violation.

UNIDENTIFIED MALE: Just to follow up a little bit about that and also to, I think, try to respond to Commissioner Leibowitz's question as well. One thing, and I'll warn you all, I'm going to agree with Bob on this one point.

(Laughter.)

UNIDENTIFIED MALE: In trying to assess

conduct, I think it's clear that although the rules of the SSO are critically important, they're not dispositive. And we know that from Allied Tube, we know that from Northwest Stationers. Critically important, but not dispositive. But what is dispositive? Again, I'm still struggling to get to the point where Section 5 may be more expansive is because even in the scenarios, Commissioner, that you laid out, I think there's still a structure which is consistent with the Sherman Act to assess whether there should be liability from a competition law perspective.

So, from one of your scenarios where somebody -- let's assume there were clear rules, you were required to disclose, which is not the typical situation, but you were required to, and somebody didn't, we're not going to get into why they didn't or why they did. And then later, ex post, they try to enforce. I would assert to you, absent a finding of anticompetitive effect, there is no role for the FTC in that circumstance. And I think that's pretty well established that there has to be an anticompetitive effect for Section 5 to play a role.

COMMISSIONER LEIBOWITZ: Or incipiency or likelihood of anticompetitive.

UNIDENTIFIED MALE: Yes. Then we then go back to the question of what anticompetitive effects are we going to try to put into the hopper so that you, as a Commissioner, and your staff are going to have to assess all of the pros and cons and balancing of interest and everything else. I don't envy necessarily that task because it is balancing a lot of varied interests, dynamic competition, static competition.

COMMISSIONER LEIBOWITZ: Let me just say -- and I think I can speak for the Commission on this -- we're all struggling with precisely where we should draw the line or what might be an unfair method of competition that isn't encompassed in the Sherman Act. Because if you look at the statute itself, unfair methods of competition shall be prohibited, it's clearly broader than the antitrust laws. If you look at the legislative history from 1914, they clearly meant to create something broader. If you look at the cases, if you look at Sperry and Hutchinson, they clearly acknowledge this. In fact, some of the language in Sperry and Hutchinson is even broader than it has to have a relationship to the antitrust laws.

But we also understand we live in the real world. The lessons of the 1970s or the three cases from the late 1970s and early 1980s is, you know, if you use this unwisely or you don't prove your case efficiently, the courts will find a way to reject this claim. And we don't want to go -- I'll finish in a second. We don't want to go, as my colleague Chairman Kovacic said, I think he said a Sisyphysian -- no, he didn't use Sisyphus, but Sisyphus is just as good. He used Tantalus. Sisyphus is just as good. We don't really feel like pushing the rock up the hill only to have it roll down with another bad case or another inappropriate use, or even if we think it's appropriate, the court saying no. So, we're struggling with all of these things.

UNIDENTIFIED MALE: That was going to be the last point I was going to make. In the 1970s, the competition law issues and the interface between IP and competition laws didn't exist as they exist now. And it may be an issue of prosecutorial discretion. And there are larger issues. Because when we deal with standardization and IP, it's not just competition law issues, there's competitiveness issues from an industrial policy standpoint. And I think nobody is asking the FTC to become a regulator, as opposed to an enforcer, to pick winners and losers.

MR. ANDEER: Let me turn it over to Bob for a brief comment, but let me pose one last question these last five minutes. Assuming the FTC decides to go forward and, for lack of a better word, experiment with Section 5, how best should it do that? Should it do it through enforcement, policy, a combination of both? So, I'll throw that last question out there, but let me turn it over to Bob first.

MR. SKITOL: Well, the point I wanted to make, which relates to that question, and I'll give an answer to that question, only part of Section 5 requires an anticompetitive effect, and that's the unfair methods part. The unfair practices part does not. The unfair practices part of the statute requires consumer injury and some other things.

I think one thing that's worth mentioning, is that what the Commission did in N-Data was an important innovation in Section 5 enforcement that was not part of the unfortunate case law of the 1980s. That was combining the unfair practices authority with the unfair methods authority. I think together it's a much stronger tool for addressing standard-setting abuses than either by itself.

As far as how the Commission should proceed under Section 5, I mentioned the idea of doing a study. I think that's very important. There are many of us involved in standard setting who believe that abusive "patent holdup" kinds of conduct are rampant, are going on much too much. There are others who disagree and say, no, no, no, it's a rarity. And for the most part all is fine. The Commission doesn't know and none of us on this panel know how prevalent a patent hold-up outcome is.

Second, we have a disagreement obviously about what RAND means. I agree with Richard that non-discriminatory doesn't mean the same for everyone, but it must mean something. There's all this private bilateral negotiation that goes on that produces secret different kinds of settlements for different players. Nobody knows what's been going on there. That's another area that the Commission could study. How real or non-real is the non-discrimination thing in practice? Is there a lot of anticompetitive discrimination going on or not? Nobody knows. What exactly are SDOs doing these days with their rules and policies? Nobody has really studied that in a serious way.

So, I think that an FTC Section 6 study of the SDO community and participants in the SDO community would be a valuable undertaking and that would entail collecting information from lots of different SDOs and collecting information from lots of different major participants in SDOs to get at the facts and then to issue a report that says, here are our findings. Here is what we think is right and here is what we think is wrong or questionable or potentially threatening of competition.

Here are kinds of rules and policies that we think would be very supportive of competitive market outcomes and here are some other approaches that we think fall short and here are proposed guidelines and best practices recommendations that we promulgate for comment. It's a Section 6 study aimed at potential Section 5 enforcement, but in the first instance aimed at a public report and public guidelines.

MR. ANDEER: So, I know we're running out of time, but let me give each person let's say 30 seconds to a minute to kind of sum up, if you want to address the question I posed or share some last thoughts. Why don't we start with Richard and then we'll just go down the line.

MR. TAFFET: I dissent.

(Laughter.)

MR. TAFFET: Again, I think I understand what Bob is saying. That is exactly the regulatory model that I think should be avoided. I think that would impose an enormous amount of costs, and it really would bring us back when I was a young antitrust lawyer in the '80s and everybody is talking about industrial policy and picking winners and losers. I think there is a group of people in the FTC right now that have looked at this issue for going on more than ten years and even longer. And there's an institutional knowledge now of what exists and there's processes in place that allows this agency to act as an enforcement agency.

If there are issues that can be rigorously looked upon, I think that's the obligation and the role of this Commission, to act as antitrust enforcement agents. And I think with the incipiency exception, I think there's frameworks to weigh competition. I think dialogue with the Commission, with the Commissioners about the nature of competition within standards development is incredibly important and, again, I appreciate this opportunity.

UNIDENTIFIED MALE: Kyle, let me respond to your question, although without answering it perhaps. I'd simply like to point out to the Commission that whatever decisions they take here, please bear in mind that there is quite a bit of private litigation in this area. These issues, in fact, often come up in the context of patent litigation, in the form of perhaps antitrust counterclaims, perhaps in the form of patent misuse defenses.

I think that whatever action the Commission takes here could have an impact. Even if the decision is to proceed under Section 5, there could be unintended consequences. I'd simply urge the Commission to bear that in mind as they're thinking about how they proceed in this area.

UNIDENTIFIED MALE: The Commission's action in the N-Data case stimulated a lot of attention to the issue and SDOs sought to find ways to see if they could improve their policies to be more effective in dealing with that problem. However, one thing that I have observed is that after extensive discussion and struggle with that issue, it turns out that SDOs can only do so much. They can improve their policies, but to the extent that what they need to do is to pass on what is, in effect, a contractual commitment, they really can't close the holes. They can't solve that problem in a comprehensive way.

So, it's been good that SDOs have been stimulated to address the question and try to do more. It is also clear to me that they won't be able to solve the problem of eliminating the risks of abuse that could happen through transfers.

UNIDENTIFIED MALE: I'll try to respond both to the question and the last comment. The one is that we do need to bear in mind that one value to be observed is the value of self-governing standards organizations that are able to choose their own path. And that there is plenty of room for different kinds of standards organizations and different rules. But having said that, I do agree with Scott that the best set of rules from a standards organization cannot address every situation and that there is still room for Section 5, but we should also bear in mind what I think everyone on this panel would actually agree with, that we are trying only to find market failures. We would defer to whatever the wisdom of the market is. That does include the standards process, and what the Commission ought to be looking for is those places where the market or the market substitutes are not achieving a market-type result.

UNIDENTIFIED MALE: I think I agree that the standard-setting process needs flexibility, and rules should not be imposed upon it that would hinder that. To the extent enforcement under Section 5 is undertaken, that we should have clear guidelines and understanding of when such things would be undertaken so we can counsel our clients on how to guide their behavior.

MS. MARASCO: I think the only thing that I would add to what's just been said is that I would encourage the Commission to make sure that when they evaluate conduct that is potentially of concern to somebody, that they make sure to analyze it looking at the dynamic efficiencies as well as the static efficiencies. I think we all appreciate it might be easier to measure static efficiencies and what would happen if we brought the price of the essential IP down and what might be the impacts, although even in a standard setting that's hard because there might be intervening players and you don't know actually what effect it's going to have on the consumers, ultimately, or at least it's a very difficult assessment.

I know dynamic efficiencies are extremely hard to measure. But I think that many people believe they are very important efficiencies to preserve the incentives to innovate and the societal benefits we get from that as well. So, it's easy for me to say, and it's probably a lot harder for you to do. Thank you.

COMMISSIONER LEIBOWITZ: I'll just concur with all the excellent points made by the panel today and by its moderator.

MR. ANDEER: All right. With that, I just want to thank everybody for a great discussion. I really do appreciate it and thank everyone who participated today. I hope it's an ongoing discussion. There's obviously a lot of issues that need to be hashed out and we encourage comments, which I believe can still be submitted.

COMMISSIONER LEIBOWITZ: Let's also thank Neil for putting this together and taking the lead on doing that.

(Applause.)

(The workshop concluded.)

C E R T I F I C A T I O N   O F   T Y P I S T

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I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: JANUARY 5, 2009

ELIZABETH M. FARRELL

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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