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2 FEDERAL TRADE COMMISSION

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4
5 FTC AT 100: INTO OUR SECOND CENTURY
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1 REPORT OF PROCEEDINGS

2 SEPTEMBER 25, 2008

3 INTRODUCTION AND OPENING REMARKS

4 MS. OHLHAUSEN: Good morning, everyone. We'll
5 -- we'll get started. You may notice that one of our
6 panelists, she's on her way, so we are going to get
7 started and she'll join us -- join us in progress.

8 I'm Maureen Ohlhausen. I'm the director of
9 policy planning at the Federal Trade Commission.

10 And first of all, I wanted to thank everyone
11 for coming to this roundtable session of the FTC at 100:
12 Into our Second Century. I certainly want to thank the
13 Searle Center for co-hosting this event, Henry Butler for
14 hosting us here, and Derek Gundersen for keeping us all
15 on track, getting everything set up. I also wanted to
16 mention my thanks to Greg Luib, my assistant director,
17 who has taken on so much of the organizational and
18 thinking work that all this has involved.

19 So the FTC at 100 is a project that our
20 chairman, Bill Kovacic, has asked us to undertake. And
21 for those of you who are real students of the FTC, you'll
22 know we're not actually going to be 100 for another six
23 years. And we had our 90th celebration about four years
24 ago. So it's -- What are we really doing here?

25 Well, this is not meant to be a celebration of

1 the FTC. It's not supposed to be like, oh, aren't we
2 great? It's really supposed be to a careful
3 self-assessment of what we do so that six years from now
4 when we do turn 100, we are the best agency that -- that
5 we can possibly be, fulfilling our mission in the way
6 Congress foresaw us filling it when we were created --
7 well, now, 94 years ago -- but then it will be 100 years
8 ago.

9 So what we're trying to do through this
10 process, which will involve internal consul- -- internal
11 deliberations and numerous external consultations, is
12 really identify approaches for how we can improve as an
13 agency. So -- so we're asking people -- we started out
14 in D.C. with a two-day roundtable there. We talked to a
15 lot of former FTC officials. It was very helpful. But
16 one of the things that Chairman Kovacic really wanted us
17 to do is to reach out beyond the usual D.C. community, to
18 ask people who are in other areas -- he liked to call
19 them other centers of excellence around the world -- what
20 their views are, not simply on what the FTC does, which
21 is very helpful to the extent people can give information
22 and their views on that, that's useful, but also for
23 agencies and organizations with similar missions, how
24 they carry out their work, what they think is important,
25 how they do all the different jobs that an agency like

1 the FTC has to undertake.

2 So we have a mix of people participating in
3 this debate. We have agency officials, state officials,
4 academics, practitioners, consumer groups, just a lot of
5 really interesting, careful observers, and we'll hear
6 from a number of those people today.

7 I wanted to mention a few -- having already
8 done one of these in D.C., a few interesting highlights
9 that came out of that, sort of the pushes and pulls that
10 an agency like the Federal Trade Commission is subject
11 to.

12 For example, on one of our panels at the D.C.
13 workshop, we had Jodie Bernstein, very, very successful,
14 very well-respected, head of Bureau of Competition. We
15 had Tim Muris, former chairman of the FTC and -- I'm
16 sorry, if I called Jodie head of the Bureau of
17 Competition, I meant the Bureau of Consumer Protection.
18 So I'm sure she wouldn't like to hear -- to hear that,
19 that mistake.

20 But anyway, so we had Jodie and we also had Tim
21 Muris and they had some very interesting contrasting
22 views on our basic statute, the FTC Act and how -- you
23 know, Jodie's view was the fact that this is a very broad
24 statute, really gives us a lot of flexibility, an ability
25 to adapt to changing circumstances. And she saw that as

1 real positive.

2 And Tim on the other hand, also cautioned that
3 having such a broad statute, it's hard to have -- you
4 know, that can be too broad, you can take it too far so
5 you really need to provide some rigorous guidance on how
6 you're going to exercise that kind of broad authority.

7 We also had interesting viewpoints on the need
8 to use all the tools that an agency like the FTC has, to
9 use our enforcement, our research, our advocacy, and our
10 outreach. So that was very important.

11 But we also heard from people saying, but you
12 still can't lose sight of enforcement. Lee Peeler,
13 people in the consumer protection world probably know
14 Lee, he's now with the Better Business Bureau, but had a
15 long career at the Federal Trade Commission before that.
16 His point, which I think was a good one, was that we also
17 need to keep our -- our street credibility, is what he
18 called it, through enforcement. So that was a really
19 interesting viewpoint, that all these tools are wonderful
20 but we can't lose sight of what makes them more
21 effective.

22 So anyway, those are just some of the examples
23 of the different insights that we've gotten which I
24 thought were interesting and raised issues that address
25 this sort of -- the push and pull and the careful

1 balancing that an agency like the Federal Trade
2 Commission has to undertake.

3 So today we are going to be hearing from a very
4 distinguished -- three very distinguished panels;
5 consumer protection issues, and competition issues, and
6 economics.

7 And I just wanted to go through the format.
8 It's mainly a roundtable discussion. It's not meant to
9 be a lot of presentations. The panelists will be having
10 discussions among themselves. And I also wanted to say
11 that questions are welcome and I hope that people will,
12 you know, feel free to raise their hands. There is a mic
13 that will -- that will be available.

14 And then finally I also wanted to mention that,
15 you know, time is limited, distances limit the ability to
16 have conversations sometimes. So one of the things that
17 we're augmenting the public consultations with are also
18 an online forum on these issues.

19 So if anyone feels they would like to say more
20 or if they feel that somebody should be a participant in
21 the debate who hasn't been asked so far, please free to
22 contact me and I'd be happy to give you the information
23 about joining the online forum so we get more input from
24 more sources.

25 With that, I will sit down and turn it over to

1 Steve Baker. Thank you.

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1 THE FTC'S CONSUMER PROTECTION MISSION:

2 RESOURCE DEPLOYMENT AND EFFECTIVENESS

3 MR. BAKER: Well, it's good to see everybody
4 today. And I think a hand should go out to Greg and
5 Maureen for putting this together because I know it's
6 been a big challenge for them.

7 We do have a big -- a really good panel today.
8 And Teresa Schwartz will be joining us very briefly so we
9 will certainly roll her into the discussion.

10 I'm Steve Baker. I've been with the FTC about
11 26 years now, spent my first 6 years at the FTC in
12 Washington and I've been fortunate to head up the Chicago
13 office for just over 20 years now. During that time,
14 we've done probably pretty much everything the FTC does
15 from antitrust to all the various nooks and crannies of
16 consumer protection.

17 One of the things that's always interesting
18 about the FTC is it's kind of like two agencies housed
19 under the same roof in some ways. We've got the
20 antitrust and consumer protection side. And they really
21 inform each other really well. And I think what the FTC
22 used to think or we used to hear sometimes is why don't
23 you just take this antitrust jurisdiction and give it all
24 to the Justice Department? You guys can be a consumer
25 protection agency and why do you need to have both of

1 them under the same roof.

2 And I think what we've discovered really is
3 that the two halves of the agency really complement each
4 other really well. You really need some of the antitrust
5 and economic thinking to understand the markets we deal
6 with on the consumer protection side. And I think some
7 of the things that we do on the consumer protection also
8 inform the antitrust side. And as the agency has gone
9 around the world doing more reaching out with other
10 agencies, it has recommended that model of having both
11 under the same roof.

12 But one of the things that makes it different
13 on the consumer protection side is that there is not the
14 same sort of organized interest in scholarly reporting on
15 our consumer protection mission that there is on consumer
16 protection. When you start -- or on competition.

17 With the competition area, there's an Antitrust
18 Law Journal, there's a big spring meeting in Washington,
19 there are -- most law schools have courses in antitrust
20 and almost none of that is true on the consumer
21 protection side. There are people that do national
22 advertising. There are people that do debt collection.
23 There are people that do franchises. There are people
24 that do various marketing promotional things. But
25 there's very few people outside the agency that really

1 kind of get to see us across the board.

2 So this forum is particularly useful because I
3 think we've got a really distinguished group of people
4 here that really have kind of seen what we do across the
5 -- the -- across the board in terms of consumer
6 protection.

7 Just real quickly, we've got with us this
8 morning Bill Brauch, who is head of consumer protection
9 for the Iowa Attorney General's office, has been there
10 many years and has been head of that office, consumer
11 protection, for at least 13.

12 Bill is an old friend and he has done a lot of
13 great consumer protection work. And if I might comment
14 on my own work with the AG, Iowa's Attorney General's
15 office has always been one of the class operations among
16 the state attorney generals and really, really respected.

17 Henry Butler is a policy analyst, law and
18 economics professor here at Northwestern, and he's done
19 some other law and economics things and I'll let Henry
20 talk about his interest and skills in a bit.

21 We've got Paul Luehr. Paul is an old friend
22 from the Federal Trade Commission, spent 11-and-a-half
23 years with the Federal Government doing some of our first
24 work in spam when the internet first hit and we had to
25 figure out how to deal with a huge new medium of mass

1 marketing communications. Paul broke a lot of ground on
2 that. He is now with a private firm working on spyware,
3 data security, and other kind of issues like that.

4 And finally we have or will have with us very
5 shortly Teresa Schwartz. Teresa has been at the FTC at
6 least twice. She was an attorney advisor many years ago
7 for our first female commissioner, Mary Gardiner Jones.
8 And then came back as deputy head of the Bureau of
9 Consumer Protection for Jodie Bernstein. She is a law
10 professor at George Washington University and we're very
11 fortunate to have her because she is very thoughtful and
12 has thought a lot about the FTC.

13 To start off this morning, I've asked that each
14 of our panelists give you five minutes and kind of just
15 who they are, their interests, random thoughts, so they
16 get a chance to kind of make their comments in a kind of
17 a free way before we kind of start moving through a few
18 questions. And one of the things I think is great about
19 this forum and one of the things Maureen reinforced, this
20 is not an FTC congratulation session. There are things
21 that I -- having been there -- know we do pretty good.
22 Some things I don't think we do as good a job that we can
23 and certainly there may be other things we should do. So
24 to the extent that there are criticisms, constructive
25 suggestions, profanity, it's all in order, we welcome it

1 during the course of the morning.

2 Bill, why don't we start with you?

3 MR. BRAUCH: Thank you very much, Steve. And
4 it is an honor for me to be invited to this very
5 distinguished panel and I appreciate it very much. It
6 has been also an honor for us in the Iowa Attorney
7 General's office to work with the Federal Trade
8 Commission. I think in the 21 years I've been there,
9 we've done two used car rule sweeps together, we've done
10 one funeral rule sweep together, we've worked together
11 with folks from Washington on auto credit advertising
12 cases, we've worked together on telemarketing cases, and
13 we continue to work together. Our missions are very much
14 the same.

15 I think sometimes folks don't have a modern
16 conception of what attorney generals do these days in the
17 consumer protection realm. But most of the companies,
18 that residents of our states deal with on day-to-day
19 basis are national or international corporations. The
20 days of the mom and pop stores are pretty much gone. So
21 a lot of what we do is parallel with what the FTC does.

22 I think we want to talk a little bit today
23 about how we can more effectively and efficiently marshal
24 our resources to work together. I think that would be
25 important because so much of our jurisdiction does

1 overlap. In some respects, the state attorney's general
2 jurisdiction may be broader. In Iowa our consumer fraud
3 statute gives us jurisdiction over the advertisement or
4 sale or lease of any merchandise from anybody to anybody.
5 And so charitable contributions are also included in
6 that. We aren't limited. Whereas, the Commission has
7 certain statutory authority that is a little bit more
8 constrained.

9 At the same time the Commission has, I think,
10 very effectively used its resources to focus on things
11 that are the most important to consumers. And, I think,
12 I'm going to encourage in our comments a little bit later
13 that we continue to try to identify those things which
14 make the greater difference in the marketplace.

15 And that's really what we do in consumer
16 protection in any event. And Steve was right-on in
17 talking about competition and consumer protection
18 complementing each other. Ultimately the goal of both is
19 to enable the free enterprise system to work, for it to
20 be efficient and that means informed buyers making
21 choices, not being misled, that means competitors not
22 losing business to others who defraud the public whose
23 offers aren't real. It also means consumers
24 understanding they even own something. I'll talk about
25 that a little bit later, or they're buying stuff they

1 don't even know they own. It's a tremendously important
2 area.

3 We talk about people's homes. Right now a big
4 focus of the state attorneys general -- and has been for
5 several years now -- has been home mortgages. And we've
6 seen unfortunately what happens when an entire industry
7 melts down. It's bringing our economy down with it. We
8 work in a very, very vital area of life in our country.
9 And the need for us will not ever go away. I do not
10 think and there will never be enough of us to do what
11 needs to be done to ensure that the marketplace is
12 efficient.

13 But again, efficiency, working together, we can
14 make a difference and I think we continue to make a
15 difference. I'm very proud of the work we've done in our
16 office, I'm proud of the work the AGs do, and I'm proud
17 of the work the FTC does. It's vitally important work
18 and it's very enjoyable and rewarding work as well.
19 Thank you.

20 MR. BUTLER: All right. Thanks, Bill. It's a
21 pleasure to be here and I welcome all of you to
22 Northwestern University and to the Searle Center.

23 Bill, it's -- I -- I admire the work you guys
24 do and I've seen it, a lot of the state work there. I
25 wanted to kind of issue a caveat. I'm not a consumer

1 protection guy, so to speak. I haven't been in the FTC.
2 I'm more interested in -- over the years in antitrust
3 issues. I'm a general law and economics person. But
4 I've also recently been doing some work on state consumer
5 protection acts which fits right into some of Bill's
6 role.

7 And I think, Bill, you finished at the end with
8 a comment that there'll never be enough people to be
9 enforcing this. I think at some point we could have too
10 many.

11 But what I want to talk a little bit about is
12 the role of the states. Now, Tim Muris has an article out
13 that he must've been working on while he was still
14 chairman of the FTC that describes the institutions of
15 consumer protection. And he -- it's -- it analogizes it
16 to a three-legged stool. And he talks about market
17 mechanisms and how markets and market forces can protect
18 consumers.

19 The notion of competition that Bill was just
20 referring to, reputation effects, all the things that
21 we've learned kind of from transaction costs, economics,
22 and over the years our understanding -- better
23 understanding of advertising and the role it plays.

24 He talked about common law actions as lawsuits
25 as ways to help deter, punish and deter, actions that we

1 find fraudulent. And he talked about regulation, and
2 under regulation he talked about the role of the FTC's
3 consumer protection missions and the important -- some of
4 the important work that he did while -- the Commission
5 did while he was chairman and goes into great detail on
6 that, and a little bit self-congratulatory but it was a
7 nice piece.

8 With all due respect to Bill -- not to Bill, to
9 Tim, who was my law professor and colleague at George
10 Mason, he left out an important leg of his stool. And it
11 is the role that Bill Brauch plays, that the roles that
12 the state consumer protection act play. And this is
13 really a burgeoning area right now possibly because there
14 are a lot of problems that need to be collected --
15 corrected, possibly because of other things.

16 State consumer protection acts were passed in
17 the late '60s, early '70s, at the behest of the FTC.
18 They're oftentimes called little FTC acts so it's
19 important for the FTC to think about perhaps what we've
20 created or does this monster perhaps need to be tamed. I
21 guess there is a question, is it a monster? And we have
22 a project here at the Searle Center that's doing some
23 empirical work on the state consumer protection acts.

24 And just kind of our first pass through the --
25 through the data collecting opinions in Federal District

1 Court, applying the state law -- these are the
2 low-hanging fruit, the easy-to-find cases. Federal
3 District Court opinions from 2000 to 2007 and state
4 appellate court opinions from 2000 to 2007. That, of
5 course, we do not have the state trial court opinions on
6 this yet because that's huge. You'd expect that the
7 appellate opinions are the tip of the iceberg. The
8 federal court cases are usually the larger cases and what
9 we see in this period from 2000 to 2007 is 15,000
10 opinions dealing with state consumer protection acts. We
11 started off with 30,000 and we culled it down to ones
12 that are actually dealing with this. This is a lot of
13 litigation that's going on out there. And it's the
14 private litigation that we're looking at.

15 Bill is from the only state that does not have
16 private causes of action. He would like to have them.
17 But I think probably more for the small cases than the
18 large cases. And what we had -- excuse me -- with the
19 state consumer protection acts is a relaxation of the
20 standards of -- common law standards to establish fraud
21 and liability and a number of other provisions designed
22 to solve the kind of the small injury type of problems,
23 the uneconomic issues related to whether an injured party
24 would like to bring a case. And it's basically relaxed
25 those standards quite a bit with the goal of making sure

1 parties who are harmed will be compensated.

2 So there's generally some minimum type of
3 statutory damages, there's occasional punitive damages
4 are awarded, there's attorneys fees, a number of things
5 to up that problem. But on top of that, they also allow
6 class actions.

7 Class actions solve that problem too. So the
8 problem of having individual small injured plaintiffs'
9 parties having access to the court is solved in two ways.
10 And that's a classic situation where you would expect
11 there to be overdeterrence. So we've got a -- I've got a
12 theoretical piece with Jason Johnson from Penn that
13 addresses that issue and then we've got some empirical
14 work that we're looking on this. Obviously 15,000 cases
15 in and of itself doesn't tell us whether we've got an
16 optimum amount of regulation or litigation at all.

17 But some of these cases, I would submit to you,
18 are things that the FTC took a look at them and they
19 would say this doesn't come anywhere near our standards
20 of unfair and deceptive acts or practices. So we've got
21 this -- this large issue out there. I'm not going to
22 call it a problem because we don't know it's a problem --
23 whether or not it's a problem.

24 But I think it's -- we've got this consumer
25 protection going on that's totally informed -- uninformed

1 by the expertise of the FTC. And the FTC, as the leader
2 of consumer protection in the U.S., I think, has an
3 important role to play in this. And one of the things
4 I'd like to explore today as we bounce through our topics
5 is the possibility of the FTC getting more involved in
6 these types of cases and sharing its expertise. It's
7 kind of the national centralized location for research
8 and development, information about these problems and how
9 private litigation can perhaps be better informed with
10 this.

11 MR. BAKER: We should go there for just a
12 moment here, Henry. What else would -- the FTC, I
13 suppose, could be involved. I mean, other possibilities,
14 I suppose, would be for judges to develop a common law of
15 these state cases and start developing some principles
16 through those by reference to ours. Or the state
17 attorney generals obviously within their states, I think,
18 would be influential probably with state judges.

19 Do you think there is a problem with these
20 private actions and what other things do you think would
21 help it?

22 MR. BUTLER: Well, I do think there is a
23 problem and especially in the class action area. If it's
24 a class action area, it's the big type of problem that we
25 would expect Bill's office to be interested in, for the

1 FTC to be interested in. But the standards that are
2 applied for proof in those cases are very -- for
3 establishing a violation are very low compared to what
4 the FTC would be concerned about compared to what the
5 common law would be concerned about. So -- and they're
6 also just general problems with the kind of class
7 actions. But I think a role for encouraging the courts to
8 try to apply some type of consumer welfare standard or
9 public interest standard, which I think guides your
10 behavior and a lot of your actions, to encourage the
11 courts to think about that in these cases because there's
12 -- and how would the -- how would the courts know what
13 they're doing. Well, the FTC could get involved following
14 amicus briefs or an intervening -- I'm not sure the best
15 way for them to try to get involved in intervening with
16 that.

17 But I think for those large cases, that would
18 -- is where I think there's the huge problem.

19 MR. BAKER: Okay. Thank you. Thank you very
20 much. Paul?

21 MR. LUEHR: My name is Paul Luehr and it's a
22 great pleasure for me to be here as well. In a way, I
23 feel like it's old home week because I see many familiar
24 faces from my tenure at the Federal Trade Commission.

25 By way of background, I think one reason I'm

1 here is I probably represent the nerdiest or geekiest
2 aspect of the agency. I spent eight years at the Federal
3 Trade Commission within the division of marketing
4 practices. Starting out as a basic litigator, trial
5 attorney, worked my way up to be assistant director of
6 the division of marketing practices, really cut my teeth
7 on telemarketing cases, and some of those also crossed
8 over into Canada.

9 So did some international work with some other
10 agencies. And that turned out to be fortuitous training
11 for what was coming next, this little thing we called the
12 Internet.

13 Through the agency I was on the internet before
14 there were pictures. Yes, I remember the first picture I
15 saw and yes, she was clothed. I remember wheeling around
16 the corner and grabbing Eileen Harrington, who was head
17 of our division at the time, and saying Eileen, Eileen,
18 come and look at this. It happened to be to an ad for a
19 900-number company and my division was in charge of
20 enforcing the 900-number rule and that was why I was
21 surfing for this stuff. And I wheeled around the corner
22 and I said, this internet thing, I think it's going
23 someplace.

24 I later went on to chair the internet
25 coordinating committee kind of at the Consumer Protection

1 Bureau level, did a lot of work with my friend and former
2 boss, Teresa Schwartz, in that respect and basically
3 became known as Internet boy at the FTC.

4 I then went on to four years as a federal
5 prosecutor back in my home district of Minnesota and had
6 a chance to look at the agency from the perspective of a
7 fellow brethren within the federal family and how
8 different agencies from the outside interact with the
9 Federal Trade Commission. And in particular looking at
10 that relationship of a criminal enforcement agency and
11 how it interacts with a civil enforcement agency.

12 And for the last four years I've been with a
13 company called Stoz Friedberg and most of us are
14 ex-prosecutors and federal agents and we are a computer
15 forensic, e-discovery, and technical consulting firm.
16 And in that role, I've had the opportunity to coordinate
17 our testimony as an expert both on behalf of the Federal
18 Trade Commission and areas such as cases against bogus
19 antispam software packages. And also sitting across from
20 the Federal Trade Commission, usually in negotiations, we
21 were one of the -- we were the expert brought in to look
22 at the operation of what they call digital rights
23 management software related to the Sony BMG cd's, for
24 example. So I've had a chance to work in the private
25 sector and see how the FTC operates from the perspective

1 of a private person, sometimes acting as the agency's
2 expert and sometimes as an expert for a private firm.

3 I think the three main points that -- when I
4 think about the Federal Trade Commission -- and to begin
5 on a glowing note, I think the things it does very well,
6 having seen it from these many different perspectives --
7 and I also -- I should -- I'll comment a little later
8 about an international perspective since I've had a
9 chance to travel overseas and talk to other enforcement
10 agencies outside the country.

11 But with that background in mind, I think there
12 are three things that stand out to me with regard to the
13 Federal Trade Commission and what it does well.

14 First of all, it's extremely flexible. I think
15 that comes from probably number one, its statute. It has
16 the mission of prohibiting unfair and deceptive acts or
17 practices in or affecting commerce -- didn't think I
18 still remembered that, did you -- under Section 5. I
19 think it does give it broad authority and the ability to
20 change and shift resources as needed.

21 I think by virtue of its size, it's not a huge
22 moribund federal agency that has, you know, rows and rows
23 and rows of steel desks and people all doing the same
24 thing, day after day, partly because it was a
25 congressionally formed agency, it has that aspect of

1 independence, and it's always been fairly small. I think
2 that has contributed to its flexibility.

3 And frankly I think there has been a culture,
4 at least since I was there, starting in the early '90s, a
5 management style that is much different than almost any
6 other agency or even private office that I've been a part
7 of.

8 And a real focus on what you my think of as
9 bottom-up management, taking good ideas from the staff
10 level and letting those percolate to the top, especially
11 with regard to its enforcement mission.

12 The other thing that I think stands out with
13 regards to the FTC is its role as an enforcer. And I
14 think if you look at the FTC historically -- and
15 unfortunately I actually had a chance to do some -- some
16 retrospective historic work way back when I was in law
17 school, looking back at things like the Capper-Volstead
18 Act and different statutes that have been tied to the FTC
19 over the years.

20 I think their role as an enforcer really since
21 the early '90s, has really given the agency added heft.
22 No longer, I think, are they considered just the nanny on
23 Pennsylvania Avenue full of regulations, rules related to
24 the frosted cocktail glass, and things like this. But
25 now they're seen as someone who brings real cases in

1 federal court against real wrong doers and I think that
2 has had a real deterrent effect and many other salutary
3 effects on the market.

4 And the last role I think that really stands
5 out to me and in the hallmark of the FTC as it currently
6 exists, is its role as coordinator. The FTC I think well
7 knows in part because of its size that it can't do
8 everything alone. There are too many con artists out
9 there.

10 Even among legitimate business, there are too
11 many times when the business practices fade over into an
12 area that would be considered by -- deceptive by most
13 consumers. The FTC knows they can't do it alone.

14 And I think it's been very effective at
15 bringing together various stakeholders. And I think it
16 does that in several areas. It does it in forums like
17 this with workshops, I think it does a good job of
18 bringing together stakeholders when regulations are at
19 issue, making sure that there's full comment on
20 regulations such as the telemarketing sales rule, what
21 some people call the dinner hour rule, probably the most
22 popular regulation ever invented in Washington.

23 And also in enforcement actions, it does a good
24 job of bringing together people from various walks of
25 life with various types of enforcement authority and

1 making sure that all those different types of enforcers
2 are really singing from the same score and trying to move
3 in the same direction, particularly when there's a
4 notable problem out there in the marketplace.

5 So I'm looking forward to our discussion this
6 morning. But those would be the three things, I think,
7 that stand out to me as the hallmark of the current FTC;
8 its flexibility, its new role as enforcer, and it's
9 traditional role as a coordinator among various
10 stakeholders.

11 MR. BAKER: And finally we've got Teresa
12 Schwartz as we do our -- give five-minute intros.
13 Teresa, delighted to have you here.

14 MS. SCHWARTZ: I made it. I was going to be
15 very green this morning and take the train. I was told
16 by Chicagoans take the train from the airport. Well,
17 this morning, that was not such a good idea. So I got in
18 a cab with somebody else and we made it. And I don't
19 know where he went from here. But we did get a train at
20 Rosemont -- or anyway.

21 MR. BAKER: I'm sure you were up well before
22 dawn this morning so we appreciate it.

23 MS. SCHWARTZ: So I'm very glad to be here. I
24 guess you're supposed to introduce yourself and then --

25 MR. BAKER: Everybody has got five minutes to

1 do something they kind of want to say and kind of who
2 they are, or special interests or points they want to
3 make sure to make, if you'd like.

4 MS. SCHWARTZ: Okay. Well, I'm the oldest on
5 this panel by far. And so I should tell you my first
6 encounter with the FTC was in 1971. So I can be kind of
7 a historian.

8 I came out of law school right as the FTC was
9 waking up as a result of Ralph Nader's raiders who had
10 pummeled the FTC for being the old do-nothing encrusted
11 agency that it was, which was followed then by an ABA
12 report which said, you know, Nader's raiders are right,
13 this place is in a shambles.

14 And it was President Nixon who appointed Caspar
15 Weinberger, who then was followed by Miles Kirkpatrick as
16 chair, who completely turned the agency around, like a
17 miracle. I think this is the Kellogg School. I think
18 this is an example of turning an entire agency around and
19 making it what -- the beginnings of what it is today,
20 which is, you know, a very well-respected, world-wide
21 respected, federal agency.

22 And I was there as the attorney advisor of
23 Commissioner Mary Gardiner Jones, the first woman
24 commissioner. And she was kind of a rabble rouser
25 herself, making all kinds of waves at a time when

1 actually, you know, that began to be recognized as
2 something that the FTC should do.

3 So then after a year, I left and I went back to
4 GW, where I went to law school, and I became a law
5 professor and then many, many years later in 1995, Jodie
6 Bernstein was named bureau director, the Consumer
7 Protection Bureau director. And she called me -- I had
8 known her for many years -- and asked me if I'd like to
9 come over from the law school and be her deputy. And I
10 did.

11 I loved it so much that I retired from the law
12 school because I could only take two years of leave and
13 became an emeritus professor and stayed for almost six
14 years at the Federal Trade Commission with Jodie.

15 And it was a spectacular job, it was a
16 spectacular time at the FTC. And I hope to share with
17 you some of the innovations during that era. And I would
18 agree with Paul, who was there and one of the innovators,
19 that it was very bottom-up; that is, Jodie was a fabulous
20 manager. And being a fabulous manager she went to the
21 people in the bureau and found the great resource, which
22 is the FTC.

23 Of one the things I'd like to say about the
24 FTC, which is, it has a fabulous staff of people which if
25 listened to and given some leeway, understand the

1 problems and have at least in our experience terrific
2 ideas about how best to go about solving the problem. So
3 it was not top down. Jodie knew how to listen and
4 identify good people and good ideas and then she made it
5 happen.

6 Some of the things that happened in that
7 period, I see still reported on, you know, the complaint
8 center, which was -- had to be created, a help line,
9 gathering all these complaints, then converting that into
10 a huge database of complaints, sharing all that
11 information through the internet with all of our
12 partners. I think there are 1500 people now,
13 organizations, that tap into that database, totally
14 manipulatable.

15 And all of this was not Jodie's idea, coming in
16 saying, let's do this. It was people saying, you know,
17 we need to do this.

18 Sweeps, organizing cases with partners again,
19 we held the -- and I was actually in charge of this, the
20 hearings on the global -- the high tech global market
21 place, which started our period. And out of that came
22 really kind of a strategic plan for how we should proceed
23 with the internet. So it was just a wonderful experience
24 and I think very productive for the agency.

25 What I learned about the agency -- and I just,

1 you know, say much of what Paul has said too -- is that
2 the staff is -- is wonderful, the statute allows a fair
3 amount of flexibility and with that combination, you
4 know, you can do a lot. I read recently that Tim Muris,
5 who was the chair immediately following the chair I
6 worked for, in 2000 -- I don't know. He was there for at
7 least three or four years, I believe. Lois would know.
8 He was interviewed in the ABA Antitrust Magazine. And I
9 quote him exactly, the Bureau of Consumer Protection is
10 one of the wonders of the world. A little hyperbole but
11 he says, extremely efficient organization, many staffers
12 have been there for a long time, their wisdom and their
13 ability to prosecute cases is truly impressive. And I'm
14 not going to --

15 MS. SCHWARTZ: I have to say I'm not going to
16 go quite that far, but I am a great admirer of the
17 agency. I think it has tremendous potential.

18 And what I would like to do today is to spend
19 some time talking about how it can be better because this
20 -- this agency has almost limitless opportunities. The
21 marketplace is in some areas in a total shambles, it
22 seems to me. And I'd like to talk about, you know, how
23 the FTC can play a role in what's happening in the
24 marketplace today and looking ahead to the -- to the
25 future.

1 MR. BAKER: Well, and that's a perfect segue
2 into the set of questions we're going to discuss this
3 morning, the first of which is how should the FTC set
4 priorities?

5 The agency is a very different place than it
6 was when I joined it 25 years ago in a whole lot of
7 different respects. There are things that we are doing
8 now that we didn't do then. For example, I worked on one
9 of the first federal court cases that the agency really
10 had ever done on the consumer protection side. And I
11 remember suggesting as a young staff attorney that, gee,
12 you could have a whole division of the FTC that did
13 federal court fraud cases and I was basically laughed out
14 of the hallway. What kind of knucklehead are you, that's
15 not what we do.

16 Obviously, you know, times have changed, the
17 place is different than it was then. It's going to be
18 different in the future, not only for institutional
19 reasons but because markets change and you've got new
20 innovations, new technologies that affect the way we do
21 things. So the real question then is how ought we set
22 priorities. In other words, I guess, not necessarily for
23 now quite what those priorities ought to be, but in some
24 ways kind of a mechanism for how you decide what you are
25 going to do. We have a very limited number of people at

1 the Federal Trade Commission. The whole FTC is about
2 1100 people. You figure about a third of those are doing
3 consumer protection.

4 I commonly do speeches for people who presume
5 we have several thousand people in the room reviewing all
6 advertising before it goes on TV.

7 So we're a relatively small set of people with
8 a big mission and the question then is how you decide
9 what you're going to focus on and sometimes inevitably
10 what you're not.

11 Teresa, might as well -- you had some thoughts
12 on that? You want to start -- kick that one off?

13 MS. SCHWARTZ: Okay. I've just been talking
14 but I'll keep -- I'll keep going.

15 I do think that what I've learned at the
16 Commission is the value of strategic planning and again
17 kind of bottom-up, get your ideas, identify the key
18 issues in the marketplace. To do that, the staff of
19 course knows from their work experience what's bubbling
20 out there. But I think also you need to go out to the
21 consumer groups, to the AGs, find out what they're doing.

22 I was really struck recently looking at the top
23 six consumer protection agencies. About five years ago
24 they identified predatory lending as one of the top five
25 issues bothering consumers and bothering these consumer

1 organizations of which, by the way, I'm affiliated. I'm
2 on the board of Consumers Union so I'm bringing that kind
3 of hat to the table also.

4 I think making that kind of assessment -- and I
5 look out there, you know, fish where the fish are. You
6 look at where is the money now? It's in retirement
7 accounts and you're seeing stories now about credit cards
8 that you can use to draw your money out, reverse
9 mortgages. People still have equity in their houses,
10 older people, and predatory lending, payday loans and all
11 of that, still very much out there, very, very
12 problematic areas.

13 So you can kind of look at some of these areas
14 and see can you get any kind of a handle on it? Because
15 if you think about what's happened now in the
16 marketplace, there were lots of signals that predatory
17 lending was a really pervasive problem, very, very bad.
18 And I think part of strategic planning is to say, you
19 know, what's the FTC, what is our role here, because
20 there are a lot of banks with roles. So what can we do?
21 How can we tackle this? We have so many tools from
22 learning about it through workshops, being an advocate
23 for legislation, getting more jurisdiction maybe, I
24 think, in that area, bringing the fraud cases against the
25 mortgage brokers and so forth.

1 The FTC did some of that. But when you look at
2 how many cases against mortgage brokers, there was not
3 that many. I think there was a big mailing that went out
4 of 200 letters or something to mortgage brokers that
5 maybe they were violating the law. I think with a
6 strategic plan in place, it might have been -- more could
7 have been done because you would identify that area as
8 very highly problematic and that you had a role in
9 working with the state AGs.

10 So I'm -- I'm very much in favor of that kind
11 of a plan in which everyone is on the same page and you
12 see what the problems are that you most want to focus on
13 and figure out how you want to do it the best you can.
14 The agency doesn't have jurisdiction over all these
15 areas.

16 So that's -- that's how I would go about it and
17 that's what we did when I was there. You know, you
18 always do what you've learned from our own experience. I
19 think it worked for us. We picked the internet as one of
20 our major focuses. It was just coming on. And we had a
21 strategic plan that we built out of those hearings and it
22 actually governed the next five, five-and-a-half years of
23 how we focused our energies at the bureau.

24 MR. BAKER: Bill, what about you? I mean, you
25 obviously head up a consumer protection office that has

1 set priorities and you work with other attorney generals
2 collectively, I know so --

3 MR. BRAUCH: Absolutely.

4 MR. BAKER: -- as some of that goes, do you
5 have any ideas for us or how this can be done generally?

6 MR. BRAUCH: We had a priority setting meeting
7 about 18 months ago in our office. And what came out of
8 that, the thing that really, I think, gave us a charge
9 for the future is how can we be most effective? Where
10 can we make the greatest difference? What's the most
11 important thing to consumers in their lives? Their
12 shelter, their homes, and very much like Teresa was
13 saying about predatory lending and of course what we are
14 seeing today and, you know, the unfortunate circumstance
15 with mortgage loans.

16 But that is something we were working on. But
17 on a going forward basis, that is vital, people's
18 shelter, people's transportation in this country, your
19 cars. For many people maybe the most expensive thing they
20 own if they're renters is their automobile. People's
21 health. Are there products out there that threaten their
22 healthcare? Are there misleading advertising --
23 advertisements about prescription medications that are
24 causing money to flow into companies that are lying about
25 their products, is that hurting the marketplace, is that

1 keeping other products from being developed that are even
2 more effective?

3 And people's financial future, their nest eggs.
4 We're talking about -- she was talking a minute ago about
5 -- Teresa was -- about retirement funds. And we're
6 looking at that very, very closely. We're looking at
7 annuities, for example, which the FTC may or may not have
8 jurisdiction over.

9 But the bottom line is we are trying to focus
10 on those things that have the greatest impact in the
11 lives of Iowans and working together among state
12 attorney's general, those things that have the greatest
13 impact among American consumers. And I would encourage
14 the FTC to look at that as well. Strategic planning is
15 vital. It is absolutely vital. And I think the
16 Commission has done a good job of that. I think do we
17 need to -- to enhance our communications together, the
18 Commission and the state attorney's general and the
19 consumer groups like Consumers Union and Consumer
20 Federation, and so on, because we all have folks who have
21 a great deal of expertise. We also have a lot of new
22 folks who come in with a fresh perspective as well. And
23 I think it's important to keep that in mind. The notion
24 of a bottom-up, I think, is absolutely vital in that
25 respect.

1 Some of the people who come in the AG's offices
2 with very little experience are all of the sudden
3 leaders. Like Patrick Madigan in my office is the leader
4 of the state AG's efforts on predatory lending. He
5 didn't know a thing about it four years ago. And now
6 he's the nation's expert. It can happen quickly if
7 you're able to bring in some pretty sharp people. We've
8 worked together very effectively, I think, with the
9 Commission over the years in planning certain areas and
10 some areas we haven't worked as effectively. Perhaps we
11 need to get together at the early -- very early stages of
12 looking at things and deciding what we are going to focus
13 on together. Obviously, our jurisdictions don't
14 completely overlap and so there may be certain things
15 that certain state AGs focus on. That may be outside the
16 FTC's jurisdiction or maybe more local in nature and the
17 FTC may want to focus more on the things that are
18 national in scope. But I think there's more that we can
19 do together.

20 But that's what I would recommend, more
21 planning, more focusing on things that are of vital
22 concern. I think that the telemarketing sales rule,
23 particularly the telemarketing do not call list has been
24 extremely popular. And it's not something that we would
25 want to have any qualms about having done. I think it's

1 important. But I think on a going forward basis, we want
2 to focus on things that have a greater deterrent impact
3 in the marketplace and less focusing on something that is
4 more of a convenience factor in a sense. That one kind
5 of stands alone. I think the Commission has done a good
6 job on identify theft, for example, which is really both
7 because it threatens people's financial well-being as
8 well. But again, more planning, working together.

9 MR. BAKER: Paul, any quick thoughts?

10 MR. LUEHR: Yeah, I think when you talk about
11 how should the FTC set policy from the get-go? I think
12 bringing together the stakeholders is important. And I
13 think there's probably two different aspects to that.

14 One is a listening session. Letting people hold
15 forth on their positions, bringing people to the table,
16 even those you don't necessarily like but are smart and
17 -- and have something to contribute so that at least you
18 can take that into account during this strategic
19 planning.

20 I think there is another aspect of strategic
21 planning and it's basically inside the agency and what
22 happens there. I think it's the type of session where
23 you're sitting with a white board, brainstorming, putting
24 ideas up on the map. And I think one thing the agency
25 could benefit from is bringing in folks like the -- the

1 AGs into that agency type process.

2 A lot of people who aren't familiar with the
3 politics of federal versus state enforcement actions, I
4 think, should know that -- in a way they're two different
5 animals. The FTC relatively nonpartisan, an independent
6 agency, federally driven, has a federal mandate, whereas
7 each AG's office is run by elected officials. And you
8 have a competition, let's face it, for press is often out
9 there as an aspect of the interworkings of these
10 different groups.

11 And it can lead to tensions. Sometimes the FTC
12 is out in front and the attorneys general feel like
13 they're either not being brought along or if it's not
14 part of their own strategic plan may feel like they're
15 being bullied a little bit into applying some resources,
16 you know, to an area that the FTC has said, this is
17 important. And I think there are two ways to work around
18 those tensions and make the state and federal officials
19 work better. I think part of it might be trying to bring
20 in some of those state partners into the planning process
21 itself, it might be behind closed doors as you're really
22 getting down to the nitty-gritty and what -- what your
23 enforcement strategies are. I think that would be
24 helpful particularly because, as Bill says, sometimes
25 there are different enforcement powers. You know,

1 annuities may be an area where the FTC has almost no
2 authority. But the AGs do. And you could parcel up the
3 plans that way.

4 And the second aspect, I think, is sometimes
5 allowing the state AGs to move out in front and bring
6 some of those first cases and kind of give them some
7 breathing room. And then come in afterwards to make sure
8 that there is kind of a federal bar set across the
9 country because that -- that effect of a federal
10 injunction against a company or group of companies can be
11 very effective. And sometimes the FTC maybe is moving a
12 little too far out in front of the agencies. We don't
13 know where all the -- the FTC doesn't know where all the
14 issues might be. And the AGs want to have a chance to
15 show their stuff, so to speak, and get out in front on an
16 issue.

17 One thing that we haven't mentioned -- and one
18 final point on setting policy, I'm a data guy. I always
19 -- when I give CLEs to lawyers or IT groups I say
20 unfortunately I'm both a nerd and a geek. I went to law
21 school and I like technology, so I'm probably doubly
22 cursed that way. But I do think it's important to look
23 at the data. One think I think the agency has done much
24 better particularly under Teresa's leadership is to let
25 -- actually Chairman Pitofsky when he was chair -- to

1 look at the data and let that drive your agenda.

2 There are different ways that you can do that.
3 One is collecting the data in the first place. There is
4 this large database called consumer sentinel. Not
5 everybody is a part of it yet and they really should be
6 because you can bring all that data up to a central
7 repository and every single state and local agency could
8 tap into it and say what is the problem in my backyard.

9 And I think it's gotten much bigger, much more
10 effective than it used to be. I think there's a long way
11 you can still go with that. And Chairman Pitofsky used
12 to say, I don't want to be an agency that brings a case
13 just because some company was unlucky enough to have a
14 consumer walk through our door. And I think if you look
15 at that data, it's thousands of consumers. This is the
16 case that we should be bringing, if you let that type of
17 data speak to you, I think the mission is much more
18 coherent and I think it has a much more beneficial effect
19 in the marketplace.

20 MR. BAKER: Okay. Just a couple things. We
21 are still doing strategic planning at the FTC. For my
22 money it's the biggest, the best innovation we've had in
23 consumer protection since -- since I've been there. The
24 other thing I think has changed over the last few years
25 is Congress has kind of figured out that we're there and

1 we're now a great place for them to suggest their
2 projects to.

3 So they end up -- I mean, I'm not suggesting --
4 I mean, it's perfectly appropriate for the elected
5 officials to -- to help set priorities for agencies like
6 us. But it seems to me I've seen way more interest in
7 them helping set our agenda than I think I had in the
8 past.

9 Moving on, I mean, I guess the other thing that
10 -- which would be the balance between actions against
11 fraudulent enterprises versus unlawful activities by
12 otherwise legitimate business. We've always done some
13 fraud at the Federal Trade Commission going back to the
14 beginning. But the amount, percentage of resources, we
15 devote to it have shifted largely from time to time. I
16 would guess that one of the biggest differences between
17 those are people in it for the long haul and those who
18 are in it for the quick buck and really don't care about
19 repeat business and good will from consumers.

20 There's a good quote from Sears Roebuck saying,
21 "being honest with consumers is the best policy, I know
22 I've tried both ways." And so I think we've got this
23 balance. What do people think? Is there -- how do we
24 decide which to do?

25 Henry?

1 MR. BUTLER: Well, I mean, you've got plenty to
2 take -- to work on here. So I mean, you obviously need
3 to make some trade-offs there. I've flipped through the
4 transcript from the first FTC at 100 here and I noticed
5 in there Jack Calfee's comments about advertising. And
6 one -- one point he made, which I think was really
7 important is that in the area of advertising that they
8 the F- -- the FTC is to -- to paraphrase him -- has --
9 has been at its best when it decided what not to do. And
10 I think the more we've learned about the economics of
11 advertising over the -- even the time you've been at the
12 FTC and our understanding of that suggests that there's a
13 lot of legitimate businesses that used to get themselves
14 in trouble for things that don't get themselves in
15 trouble for now. And I think that's a good thing, that
16 there's been kind of a back-off in there.

17 But as Paul has certainly pointed out, the
18 opportunity for just outright fraud are just enormous
19 right now and that's areas where it seems to be --
20 deterrence needs to be something to focus on. So I would
21 encourage more focusing on outright fraud where you've
22 got injured parties that you can identify and that would
23 be my balance on that.

24 MR. BAKER: Okay. Any thoughts?

25 MR. LUEHR: Yeah, I'm a firm believer that the

1 FTC should stick with its enforcement mission. And I
2 think continue to push that forward. And by that, I mean
3 bringing real cases in federal court against real
4 hardcore fraud.

5 It's interesting that Lee Peeler, one of my old
6 colleagues, had made this comment in the first round
7 about street cred because I have enforcement written down
8 and then my first bullet point under that is credibility.
9 Because I think one thing that a federal court case does
10 for the agency is it gives it immediate credibility. And
11 I think it gives you credibility in a couple of different
12 ways.

13 It's not just the fear factor, although that
14 has some beneficial effect across the marketplace.
15 People don't want to be pulled into federal court. And
16 so they'll look at -- and I don't think people at the
17 agency realize just how often -- and I've seen this now
18 in the private sector -- just how often other people in
19 the industry look at your final order and say what is the
20 remedy that was called for in this case. And they will
21 look down each of those bulleted provisions in that final
22 order and say, okay, this is what we need to do to make
23 sure we are in compliance.

24 So I think the agency has to keep in mind just
25 how powerful those final orders and settlements can be

1 whether it's on the administrative side or on the federal
2 court side.

3 But beyond the deterrent effect that a court
4 case has, it gives you better data. It's amazing how you
5 get into the middle of a case as a former practitioner in
6 this area and you find out that the facts aren't quite
7 what you thought they were, that -- that the economics
8 are not quite what you thought they were.

9 It could be something like -- for example, in
10 the telemarketing area, I think it was through practical
11 enforcement experience that we found out a lot of these
12 telemarketers were all getting leads from the same groups
13 of slimy list brokers. And it was real enforcement
14 actions that caused the agency to say, huh, maybe we
15 should not just go after the dandelions, we should also
16 go after the roots. And in this case, those roots were
17 these list brokers that were basically passing out what
18 they called sucker lists.

19 These were in many cases senior citizens who
20 had already been taken by one scam and were ripe to be --
21 to be picked and taken by another scam. And I think it
22 was an effective way of moving the enforcement mission.
23 But they only got there because they had brought those
24 other cases in the first place. So in terms of
25 allocation of resources, I don't think that too much can

1 be said about the effect of real federal cases.

2 MS. SCHWARTZ: Well, I think one thing maybe
3 just worth picking up a little bit on is that it's
4 possible -- I don't have substantiation for this but I
5 think probably it's fair to say when the first 13B cases
6 were brought in federal court they were what Tim Muris
7 calls fraud and theft. You know, they were just really
8 outright stealing people's money.

9 And that over the years, the notion of what's
10 fraud has expanded and includes cases of deception where
11 a company lacks substantiation. There are cases in
12 federal court now, some cases that I think initially
13 might've been administrative law cases. So I think when
14 we talk about fraud cases and we're lumping all of the
15 13B cases, all the cases that can be brought in federal
16 court. It's a -- it's broader group of cases than when
17 we first started out. We, I keep saying that. You know,
18 I'm not at the FTC. I haven't been there in 5 years. I
19 still think of it as my agency.

20 So I think that the definition of what should
21 be a 13B action when you go to federal court, are those
22 cases that warrant consumer restitution. I mean, there
23 are serious cases of deception. But it is a -- it is a
24 broader concept. And it really constitutes a very big
25 piece now of the law enforcement. I think that's

1 appropriate.

2 When we get further into the discussion,
3 though, I think my view about the FTC is that it is
4 definitely a strong enforcement agency. It's a huge
5 part. It's an important part. I think it should be more
6 than that, though.

7 So when we talk further, I want to get into
8 that.

9 MR. BRAUCH: And I think you let chips fall
10 where they fall. If it is someone's home that is in
11 danger and it's a legitimate or quasi-legitimate company
12 that's engaged in fraud, that's where you focus your
13 resources. It doesn't matter whether they're on this end
14 of the extreme or this end, whether they're pure scam or
15 purely a legitimate company that's gone awry in one
16 aspect. Most of it is in the middle.

17 Just a couple of examples, predatory lending,
18 Ameriquest. The AGs had very few complaints but we
19 learned through bank examinations and through a few
20 complaints of what became the biggest fraud we've ever
21 uncovered and the greatest recovery we ever had in our
22 state. And probably the biggest settlement in the
23 consumer protection realm, that government has done as
24 far as pure dollars so you never know where it comes
25 from.

1 Another example are what I call the modified
2 negative options free-to-pay conversions where you have a
3 credit card issuer who has a deal with a company, perhaps
4 Vertrue or Trilegiant. They make a phone call or they
5 send a small denomination check and encourage the
6 customer to agree to a free trial offer, which if they do
7 not cancel within 30 days they will be charged for. We
8 have done surveys on these and found that the vast
9 majority of the consumers don't even know they own this
10 membership in a buying club or this identify theft
11 protection plan. They don't know they own it. And
12 they're paying for it every year. It shows up as a
13 charge on their credit card. They don't understand what
14 it is, they don't read it carefully, and they just keep
15 paying it. The vast majority, millions of dollars
16 flowing out of the pockets of American consumers to
17 companies that are in contract with very legitimate
18 banks, primarily national banks, they don't even know
19 they own it.

20 The free enterprise system is not supposed to
21 work that way. So again, it's somewhere on the continuum
22 but let the chips fall where they may.

23 MR. BAKER: One last point I guess I'll make,
24 we don't have criminal authority at the FTC but we work a
25 lot with criminal enforcers these days. And one of the

1 things I've been finding in talking to them is the model
2 we are familiar with at the FTC where consumers are
3 dispersed -- the business may be dispersed across the
4 country or the world, is something we've always dealt
5 with. But law enforcement agencies, they're used to
6 situations where the witness, the victim, and the
7 perpetrator are all in the same place. And the idea,
8 they've got a nationwide or international fraud where
9 different parts of it are maybe located differently.
10 Individual U.S. attorneys offices or state attorney
11 general offices don't necessarily feel any ownership of
12 that and they present special challenges for criminal
13 authorities in particular. They are not used to doing
14 these things. They're not familiar with them. And I
15 think we've seen the FTC break the trail and demonstrate
16 how some of these things can be done in our civil actions
17 that then clarified things for U.S. attorneys offices.

18 We need to move on, Paul. But I'm sure you got
19 a comment on that one. Do you think?

20 MR. LUEHR: I do. I'll keep it short.

21 I think that's a great example of where
22 experience in the courtroom and in the local marketplace
23 serve -- has served the FTC well. One of the reasons, I
24 think, the FTC was so effective on internet related cases
25 under the global strategic plan that Teresa really helped

1 form was because we had done telemarketing cases before
2 that. And some of those same cases applied. Widely
3 dispersed consumers, dealing with -- in some cases -- new
4 technology because phone systems were different,
5 criminals that were using both legal and geographical
6 barriers to hide from law enforcement.

7 We saw all of those in telemarketing. And it
8 was just same chapter, second verse, when we got to
9 internet enforcement. And I think our experience in
10 telemarketing served us well in internet enforcement.
11 And it also helped us teach our brethren on the criminal
12 side how to bring some of these cases such as victim
13 venue cases.

14 MR. BAKER: Okay. The next we're going to turn
15 to, how to allocate resources between spam,
16 telemarketing, business opportunities, financial fraud,
17 deceptive mass media, payment systems, privacy, data
18 protection. In other words, this is a partial catalog of
19 the things we can do. So bringing it down from a little
20 bit of the more general material to the more real
21 specifics.

22 And for each of our panelists, I would be
23 curious from them on areas where they think we should do
24 more or maybe one where we should do less given that
25 you've probably got a finite amount of resources.

1 So who wants to start on this one? Paul,
2 you've always got opinions. Teresa?

3 MS. SCHWARTZ: Well, this is something I want
4 to say. I might as well say it here to whatever question
5 I'm going to fit my answer into -- into your question.

6 I've been thinking about -- I think this is a
7 wonderful idea to have these panels and thing ahead about
8 the FTC and where should it be and, you know, the next
9 100 years. It's a pretty long time.

10 But, you know, I've been pondering this
11 situation that we're in now with the lending crisis and
12 the predatory nature of the credit transactions, sort of
13 more generally. And the extent to which they involve the
14 banking industry, the credit cards, as well as the
15 mortgages. The credit cards just -- you know, the Fed
16 has come out with a regulation to limit the terms of
17 credit cards.

18 And to me that's almost shocking that it's
19 gotten so bad that they are going to tell them you can't
20 have certain kinds of fees that amount to a certain
21 amount when you have a low credit. You know, a card can
22 go \$250 of credit, but in the first bill that you get
23 from the credit card company, there are fees that amount
24 to \$175. So -- and you have to start paying those. You
25 have to pay that -- to enjoy any credit, you have to pay

1 that all off in your first month and then you have the
2 next \$75 -- what is it -- \$75 that you can have.

3 Well, you know that nobody who needs a credit
4 card that has such a limit can pay off those fees in the
5 first month. So they're behind before they even start
6 with those big charges. And the Fed is going to limit
7 that, not enough in my view. But they're going to put
8 limits that you can't do that, you can't have a credit
9 card that has so much fees in the -- in the -- to get a
10 limited amount of credit.

11 So I'm thinking about all of this and what's
12 the role of the FTC? They don't have jurisdiction over
13 banks. And they -- they -- they can bring cases with
14 credit card marketers where the FDIC brings the -- the
15 action against the bank and so forth.

16 But, you know, I think we don't have at the
17 federal level a consumer protection agency that has a say
18 in this -- what's going on in the marketplace. We do
19 over the things that, you know, we have jurisdiction
20 over. But these other agencies have other interests.
21 They have the banks. You know, they're -- I don't want to
22 use the capture terminology but they have other interests
23 as the FCC has interest in the -- in the telephone
24 business. And you -- and you look at mobile credit --
25 credit -- not credit but mobile cell phone contracts full

1 of terms about not being able to cancel without monstrous
2 fees and so forth. And I think the FTC, you know, in the
3 future somehow should become the agency that is
4 representing the consumer interest and has a role, an
5 official role to play, in the kinds of regulation that
6 protects their interest, whether it's for banks or mobile
7 homes or -- mobile phone contracts.

8 It does seem to me because the FTC only cares
9 about the consumer and the marketplace that it functions.
10 The economists may take issue with this. But I do think
11 the FTC could add value to all of these areas. Now, it
12 would need more people and it would need more legislative
13 authority to do something like that. But I would see
14 that as the image for the FTC going forward. I don't
15 think the consumer interest is adequately represented at
16 the federal level. And the FTC is the agency to do it.

17 MR. LUEHR: Can I ask a question about that?

18 MR. BAKER: Sure.

19 MR. LUEHR: Free flowing, right?

20 MR. BAKER: Yeah, absolutely.

21 MR. LUEHR: And this question comes up later
22 when that is the role of B.E. I mean, do you think that's
23 a role where B.E. and the agency overall can provide some
24 of the statistical analysis? Because as we have found,
25 there often isn't a lot of scholarship with regard to the

1 cost of some of these consumer-related matters.

2 And I just throw out there, I think you're onto
3 something. And if we -- if we purely come in with our
4 statute in front of us and our enforcement mission, we'll
5 be seen -- I should say the FTC will be seen as having --
6 I make the mistake -- same mistake you do -- the FTC will
7 be seen as having just another voice at the table,
8 they've got their agenda, they're trying to drive their
9 mission under the FTC Act.

10 But if you come in with statistical data, with
11 consumer surveys, with economic data, you become almost a
12 kind of a third-party broker saying we don't have a dog
13 in this fight, we really don't have enforcement authority
14 here, but this is what we found in the marketplace.

15 MS. SCHWARTZ: Well, I think -- yeah, the role
16 of B.E. is extremely important. And I think going back
17 to that idea of strategic planning. To the extent that
18 you have a plan, okay, these are the things you want to
19 do, it does seem to be terribly important to have B.E.
20 into that -- into that strategic plan, this is what
21 they're going to work on, and help us with the data and
22 the studies and so forth.

23 I would say absolutely B.E. But I think the FTC
24 needs more expertise about consumer behaviors beyond
25 economists. The economists have absolutely a key role to

1 play but I also think that we're learning a lot more
2 about -- through behavioral economics, but just a lot
3 more from people who really understand consumer behavior
4 in a way that I'm not sure the FTC has people on staff
5 that really understand. B.E. did a wonderful study about
6 the mortgages, mortgage documents, that showed that
7 people, educated people, do not understand these fancy
8 instruments with the ARMs and the balloons, and whether
9 insurance is in or out. They're not quite sure.

10 People have been in a marketplace in which
11 they're doing transactions and they really do not
12 understand what they're doing. I don't think this is how
13 the marketplace should be working.

14 MR. BAKER: Well, that would be of the things
15 we were hoping to get out in some of these sessions is
16 things that might be good research projects for the
17 Bureau of Economics. So if there's other ideas, I'm
18 certain they would welcome them.

19 Obviously one of the things that the Bureau of
20 Economics or others at the FTC would say is, look, if
21 you're talking about credit card markets, there's lots of
22 competition for people trying to get you to use their
23 credit cards. They advertise on TV. Consumers pick and
24 choose and to the extent that they disclose the fees and
25 the charges, shouldn't you leave consumers free to make

1 those choices and why would we want to step in?

2 MS. SCHWARTZ: I'm with the Fed on this. I
3 don't think the FTC actually commented on the Fed rules
4 so they may be -- they may not be in favor of limiting
5 these terms.

6 They seem to be so one-sided, so unfair, that
7 someone who is signing up for that cannot be -- cannot --
8 you just -- you just cannot be signing up and paying \$187
9 to get 75 cents worth of -- \$75 worth of credit.

10 MR. BAKER: Henry, I know you wanted to say
11 something.

12 MR. BUTLER: Well, I mean, I think Teresa's
13 point is an important one. And it really comes down to
14 what is the comparative advantage of the FTC as the
15 leader in consumer protection?

16 And -- and I -- I think the idea of spreading
17 it kind of horizontally across the federal -- different
18 agencies in the Federal Government is an important one.

19 My point I wanted to make earlier and didn't
20 get in on this was related to federalism principles and
21 the role of the FTC in exercising its leadership on
22 consumer protection.

23 A lot of this comes down to expertise of -- of
24 the research variety or the Consumer Protection Bureau
25 may -- may be able to bring to the table and provide a

1 lot of information for people like Bill and the other
2 state AGs working on this. It's the same -- same notion.
3 You're really good at this, maybe they ought to do more
4 of it. And you said you may need more budget to do this.
5 I mean, actually, if it's really an important thing,
6 maybe you should bump some other things that you're doing
7 if you're sitting with fixed budget.

8 If it's that important, do what you're best at
9 and what other people can't do. And that's how I would
10 add to that.

11 MR. BRAUCH: And I would just add, again, go
12 after what's most important.

13 In the context of deceptive mass media
14 advertising, how does that equate to financial fraud that
15 threatens somebody's financial future. I think financial
16 fraud clearly, clearly trumps it. And in the context of
17 deceptive mass media advertising, you do have some
18 self-regulation out there. You've got the Better Business
19 Bureau and its advertising review. You do have private
20 actions out there that can supplement the state AGs and
21 the FTC where we focus on the more important, the more
22 vital areas.

23 These other areas still can benefit from
24 enforcement, albeit private by ensuring more fairness in
25 the marketplace. But is it more important to focus on

1 advertisement for jewelry or annuities that empty
2 somebody's bank account into the future?

3 I know where I vote to spend my money.

4 MR. BAKER: Just in the interest of moving
5 along, are there areas where people think the things that
6 the FTC is doing that you say, you know what, it just
7 kind of really doesn't need to be done and why don't they
8 do something else instead?

9 MR. BRAUCH: I think it's hard to say that.
10 There's just so much that needs to be done. The FTC over
11 the past 15 years, of course, has been much more
12 aggressive and has tried to focus on those areas that are
13 most important. I do see the FTC jumping into a lot of
14 areas that are kind of new and burgeoning and there are
15 benefits to that, to sending a message of deterrence
16 right at the outset where you see the potential for fraud
17 whenever there's a new means of communication. There's
18 also new opportunities for defrauding people whether it's
19 the internet or what has flowed off the internet with
20 that -- the kind of buzz marketing for example in more
21 recent years trying to get in on the outset.

22 But I think you also have to be careful that
23 you don't address something just because it's new. You
24 have to address something because it's important. And so
25 I think focusing again on those things that are important

1 is the most important. I don't know that there's an area
2 where I'd say gee, the FTC shouldn't have done that.

3 MR. BAKER: Well, then the next one is kind of
4 -- how do we -- our mission is protecting consumers, not
5 necessarily bringing cases against evildoers, although we
6 certainly do that. And there's a whole lot of ways. One
7 of the fortunate things I think about the structure of
8 the FTC is it doesn't lock us in to one tool in the
9 toolbox. It doesn't say you have to do it this way or
10 that. We've got -- and the FTC has used different things
11 through the years.

12 In the 1970s we did a great number of rule
13 makings. We've been really heavy in litigation
14 particularly in the '90s -- '80s and '90s. More recently
15 we've been doing a fair amount of public workshops which
16 again are time consuming. And of course, we have a
17 variety of consumer education tools and outreach,
18 speeches by the regions, consumer education materials.
19 Identify theft is probably the great example. We've
20 really taken the national lead in developing things that
21 help people.

22 How do we balance those out? I mean, are there
23 tools that we are using more than we should? Are there
24 other ways we should hit that balance? And if we've got
25 some of these -- being from a region, I can't help but

1 asking, how does that effect which tools we should be
2 using in the regions? Thoughts on that?

3 MR. LUEHR: Well, one thing I think that the
4 FTC has done well and should continue to focus on, that
5 is combining the educational mess -- message with the
6 enforcement the actions. I think by bringing coordinated
7 actions, by working with the state AGs, by looking at a
8 particular problem, whether it be identity theft,
9 predatory lending. Back in the day, we were looking at
10 get-rich-quick schemes on the internet. If you can go
11 out with seven federal cases, 25 state AG cases, maybe a
12 couple of criminal prosecutions, and wrap those all up,
13 you've got a real story to tell there.

14 And we used to comment to each other that we
15 knew that sometimes a story above the fold in one of the
16 national publications was at times, you know, worth 10,
17 15 cases that we could bring individually. And you only
18 get that kind of bang for the buck both in terms of
19 business education and consumer education if you involve
20 yourself in coordinated actions and realize that those
21 coordinated actions provide you with a teachable moment.

22 So I think the concept of a sweep is an
23 important one. Probably the FTC could do a better job of
24 coordinating the timing of it. I know sometimes during
25 the sweep, the date you set in the sand kind of drove

1 everything and it would kind of drive a lot of people
2 crazy because you're trying to get your lawsuits filed
3 and consumer complaints all pulled together and you're
4 all shooting for this one date and it wasn't always the
5 most realistic date in the world.

6 But I think that aspect of coordination is
7 pretty important and it combines both the traditional and
8 nontraditional aspects of an enforcement agency which is
9 going to court and sending a message in the form of a
10 press release to the public.

11 MS. SCHWARTZ: Well, you know, it's a hard
12 question to answer, kind of the allocation of all these
13 different tools because if you start, I think, with
14 identifying your problem areas, then you figure out what
15 -- and this is the great advantage the FTC has -- you
16 figure out which tools you need to do which part of your
17 strategy. So if it's a complicated area and you don't
18 have a handle on the work shop, you know, it's really a
19 fabulous tool for educating yourself and getting other
20 people's input. I do think it depends upon what the
21 problem is and -- and you make use of the best tools that
22 you have.

23 Integrating, once you've got kind of your
24 strategic area integrating the Bureau of Economics into
25 the plan, using all of these tools, I think maximizes a

1 small agency's clout because the FTC does have a limited
2 amount of resources and nationwide jurisdiction and very
3 broad jurisdiction.

4 The one thing I would ask about is the -- the
5 advocacy piece. I know the FTC was involved in a fair
6 amount of advocacy on class action relief.

7 MR. BAKER: Can I turn to that one --

8 MS. SCHWARTZ: Yeah.

9 MR. BAKER: -- for just a moment because I was
10 going to ask about that and I'm sure Henry has got some
11 thoughts too.

12 In the early 1980s, the FTC had a pretty active
13 program. I think for the first time particularly in
14 commenting on state laws -- when asked -- state laws,
15 state regulations, that were essentially special interest
16 regulation legislation that was meant to give an
17 advantage to particular competitors. And when asked, had
18 written comments. We got some pushback particularly from
19 elected legislatures or legislators or Congressmen,
20 didn't like us weighing in. We still do some of that,
21 not that much.

22 The other thing that's come in more recently
23 when Tim Muris was chairman was a program of act, the
24 going out and looking for class -- consumer class actions
25 that we thought were really not solving problems and

1 maybe weren't providing consumers with some good
2 remedies.

3 And I know we did some advocacies, consumer
4 amicus briefs, on some of those. There was one here in
5 Chicago at Ameritech our office was involved in where the
6 attorneys were going to get a ton of money and consumers
7 were basically getting locked into longer to a program
8 they really didn't want in the first place.

9 And I talked to the judge in that case at
10 another program and he was delighted we'd weighed in
11 because we reinforced his ability in the face of counsel
12 on both sides to say this is really not pro-consumer.

13 MS. SCHWARTZ: Now, was the end result there
14 more -- more for consumers or is it really to sort of get
15 -- get at these large legal fees that there --

16 MR. BAKER: I think the FTC has -- has
17 commented on -- on both.

18 MS. SCHWARTZ: Yeah.

19 MR. BAKER: Sometimes there are real problems.
20 I think that they're required. But whether the remedies
21 that come out of those are appropriate? And sometimes it
22 could be, of course, that this is a weird technicality of
23 the Fair Credit Reporting Act and we -- and nobody should
24 be worrying about it.

25 But it's not been real extensive and it wasn't

1 really easy for us to track going on class action because
2 there's no newspaper that I think collects these.

3 Henry, this seems to feed into some of the
4 stuff you're talking about.

5 MR. BUTLER: Yeah, I think that is a
6 potentially important role, you know, the courts and the
7 judges are supposed to monitor the class action or awards
8 and try to make sure they're proper. Obviously there's
9 been some problem with that and there may be a role for
10 the FTC on that.

11 I think the bigger concern may be on the
12 substantive side of what's going on in the class actions
13 where the FTC has the expertise on -- on what is -- what
14 -- what they consider -- that the FTC to be unfair and
15 deceptive practices.

16 For example, the -- a lot of the state consumer
17 protection acts have language very similar to the FTC Act
18 but it's interpreted more in the -- in that '70s vein as
19 opposed to what the -- what the FTC has been doing more
20 recently. And I think that that has been part of what's
21 led to a lot of the increased litigation there.

22 By the way, when I was talking about the amount
23 of litigation under the state consumer protection acts
24 earlier, I neglected to mention that the trend on that is
25 that the number per year doubled from 2000 to 2007. This

1 is not like just a steady state here. There's a real
2 explosion of this type of litigation.

3 But the class action area is one where I think
4 the substantive side of the case is important. Another
5 thing related to that is -- is kind of the educational
6 function of the -- of the FTC, maybe outside the
7 litigation function. But to do a better job of working
8 with perhaps the courts, the judges, to understand this
9 area, to work with the state AGs. But a lot of these
10 cases are the private cases where the state AGs are not
11 involved. They generally focus a little better on what
12 the consumer interest would be.

13 MR. LUEHR: Steve, when you talk about
14 allocating resources, one thing we haven't talked a lot
15 about -- because I almost think it's been a historic
16 given now, but I think it's something that over 100 years
17 is relatively recent phenomenon and that is where the FTC
18 takes its rule-making authority from.

19 I think traditionally -- Teresa mentioned the
20 1970s -- I think there was a greater appetite for -- for
21 issuing some regulations kind of based on its own
22 authority. We think there's a problem here. Let's go
23 forward and regulate, maybe have some very specific
24 rules.

25 I think one thing that served the FTC well and

1 you see this kind of across the board, whether it's in
2 the area of telemarketing -- I'm thinking of things like
3 the 900-number rule, things like that, is that the FTC
4 often where there are very specific regulations has
5 waited for Congress to give them specific authority to go
6 forth and issue a set of regulations. And I think when
7 you -- when you're in an area of law where you want to be
8 that specific. I think it's wise to wait for Congress to
9 give you that authority, not just because it gives the
10 agency political cover but also because you end up with
11 clearer direction, you end up with kind of the voice of
12 the public telling you where you think the real problems
13 are. And I think that has served the agency well over
14 the years.

15 And one thing that's come out of that, and I
16 think it's very important, is the concept of one law,
17 many enforcers. Where Congress passes a law and says the
18 FTC shall set forth these regulations but we're not going
19 to kick the state AGs out of the box. The state AGs will
20 have authority under this statute and I think that's been
21 a very effective regulatory regime. And I think those
22 two have really combined out of the history of -- of
23 Congressional action and FTC action.

24 The other thing I think you're talking about,
25 rule making, the concept of putting a rule up for review

1 on a fairly regular basis, every five years or so, I
2 think is very healthy. And it allows you to update the
3 rule, make sure you're taking into account new
4 technology, for example.

5 I remember even simple things like the jewelry
6 guides, you know, how far down do you have to scroll to
7 see how big, you know, that two-carat diamond really is.

8 Yeah, you know with the dawn of the internet,
9 those are some very helpful discussions with the advent
10 of new technology.

11 And it leads into your question, which is
12 balancing resources. If the agency doesn't feel the need
13 to go out and issue all of these regulations on its own
14 but can do so either on a regular basis or when Congress
15 speaks, it kind of frees it up to take care of all the
16 other things and then go forward with rule making when it
17 has a very specific directive to do so.

18 MS. SCHWARTZ: I take a little issue there
19 because I do think the FTC has been too cautious about --
20 about rule making. That is, the FTC in the '70s, it got
21 into all kinds of trouble with a rule called kidvid,
22 which was going to regulate advertising on television to
23 chil- -- to children.

24 But before it got into that kind of trouble, it
25 did -- it issued some very important rules, a credit

1 practices rule, a holder in due course rule. It
2 fundamentally changed. Especially the holder in due
3 course fundamentally changed practices in the marketplace
4 much to the benefit of consumers. And I think it is much
5 safer to stick with fraud. I mean, Congress loves it,
6 Republicans, Democrats. It's very, very safe and it's
7 needed and so forth. I think the FTC should sort of be
8 more willing to consider rule making because it can be an
9 effective way to enforce an area when you specify what
10 the rules are.

11 And we have good processes. We -- we've shown
12 that when we do issue rules and we use our workshops and
13 so forth, we're very good at that. We have a lot of
14 interactive participation in rule making. I think we can
15 do a very good -- we -- the FTC can do a very good job in
16 this area.

17 And let me point out, the holder in due course
18 rule was an extremely aggressive approach to our
19 authority, FTC's authority, under Tim Muris.

20 It was such a good rule however, that Congress
21 finally came in and gave the FTC authority. But it was
22 very, very questionable whether they really have
23 authority to do it. I'd like to see a little more of
24 that spunk, you know, with the Commission.

25 I think they were a very well respected agency.

1 And they had enough political cover that they can -- they
2 can do it -- if it's needed and a good idea, they should
3 do it.

4 MR. BRAUCH: As to class actions, the state AGs
5 are getting notice of the settlements if they affect
6 consumers in our states under the Federal Class Action
7 Fairness Act. That law gives us notice. It gives us no
8 authority to do anything about it if we don't like it.

9 We have intervened in kind of a few of these
10 and gotten settlements improved for consumers. We have
11 not tried to undo any of them in the sense of getting it
12 completely eliminated but we've got them improved for
13 consumers. It's not a role that we relish, though. It
14 is a role that's been basically put before us. I would
15 rather spend our resources doing something else rather
16 than policing class action settlements. I think that is
17 not a role for the FTC or the states. I think it's a
18 role for the judiciary. And if the judiciary is doing
19 it's job and looking at it and says this isn't fair or
20 looking at it and says I want input from the state AGs, I
21 want input from the Federal Trade Commission. I think
22 that's the way to go.

23 But we have to focus our resources and they are
24 limited on the things are important. And regulating
25 class actions is not something that we need to be doing.

1 MR. BAKER: Everybody still seems to be awake,
2 which is a good sign here this morning. These are --
3 even though two hours seems like a long time, there are a
4 lot of these topics that I could personally, happily talk
5 about for -- for much longer. Class actions are certainly
6 one and rule makings.

7 I agree. There are some lessons learned around
8 the Federal Trade Commission for our past efforts. And I
9 think we've hopefully passed the days where too many
10 outside people are terrified that we're going to launch
11 off and boldly go where no one has gone before with no
12 idea where we're going. And so some targeted rules I --
13 I think certainly are something that we might be able to
14 consider, it would seem to me.

15 Here's the next one I want to move on to, is --
16 is -- is kind of our role -- not inside the main
17 building, I suppose, of the Federal Trade Commission, but
18 it struck me some years ago that the Federal Consumer
19 Protection -- well, I'll tell you. Last -- last spring
20 the FTC was good enough to send me to Vietnam for a week
21 so I -- we spent a week educating the Vietnamese on
22 consumer protection sessions. And I don't know quite how
23 helpful we were to them but it really and certainly
24 brought home to me that they have only 40 or 50 people
25 there doing consumer protection.

1 There are no Better Business Bureaus, there are
2 no state attorney generals, there are no trade
3 associations that I'm aware of, there are no legal
4 services things. And anything that's done, they've got
5 to do it. And it just brought it home how much of the
6 overall consumer protection efforts in the United States
7 are a system. We do some. Hopefully we provide some
8 leadership.

9 But it also includes the state attorney
10 generals, the state regulatory -- other state -- the
11 local regulatory folks, a lot of private lawyers and
12 trade associations that are counseling their clients on
13 how to avoid these problems. And -- and -- and we're
14 kind of all -- it's got to work together for us to do it.
15 And I -- the FTC has had different periods during the
16 time I've been there when it engaged the outside world.
17 There have been at least a time or two when I thought we
18 kind of turned in on ourselves and severed some ties,
19 which were important to us. And other times we worked
20 real hard to reestablish those so I thought we might talk
21 about some of those.

22 The -- internationally with the other various
23 things, particularly with the state attorney generals and
24 maybe starting with industry self-regulation. We -- that
25 -- which I think takes several forms, things like the

1 funeral rule offenders program, we've worked out with the
2 National Funeral Directors Association. There's types of
3 counseling, but I think counseling, self-regulation, and
4 rules and guidelines of better business bureaus and
5 various trade associations. The one that, I think,
6 people think of most is the national advertising division
7 of the Better Business Bureau, which reviews national
8 advertising, which has become very effective. And I
9 think the number of national advertising cases the FTC
10 has done over the years has declined. And presumably --
11 well, our best question for our panel is have we kind of
12 given enough to the NARB, does that work? Are there
13 other self-regulatory systems that we might have?

14 Paul?

15 MR. LUEHR: I think -- to comment on the
16 international aspect, I think a lot of people don't
17 realize just how unique the Federal Trade Commission is
18 within the entire international scheme or legal scheme
19 out there. The FTC has very few direct counterparts
20 around the world.

21 You know, the Australian, the ACC -- A triple
22 C, the competition commission in Australia comes somewhat
23 close. The U.K. has a fair trade office that's somewhat
24 close. But off of -- many of those offices, our focus on
25 the antitrust mission or the -- or the competition

1 commission probably first and foremost and to have a real
2 consumer protection mission, I think, is unique for the
3 United States.

4 I had the opportunity to travel to southeast
5 Asia as a speaker for the U.S. State Department on
6 e-commerce and cybercrime issues. Some people might call
7 it a boondoggle. But it was -- it was very informative.
8 I was able to travel to Hong Kong, Singapore, Manila, and
9 Bangkok. And they specifically asked me to go because I
10 had a consumer protection background as well as a
11 criminal cybercrime background.

12 And the one thing that struck me was how much
13 energy there was in many of these foreign countries over
14 what kind of statutes they had. And there seemed to be
15 comparatively little attention given to enforcing those
16 statutes at the end of the day. And in my mind, there
17 was often a little too much heat, not enough fire.

18 Whereas I think in the United States with a
19 statute like the FTC Act on the civil side, or the mail
20 fraud statute on the criminal side. I mean, these are
21 old workhorses within the -- within our legal system
22 where we can bring cases even if it's a new concept. And
23 we don't have to be so focused on having the exact
24 statutory language to be able to get at some deceptive
25 practice. And I don't think people realize quite how

1 unique and fortunate we are to have an agency like the
2 FTC that both has that mission and is willing to bring in
3 enforcement actions.

4 And in terms of harmonization and working with
5 other people, either on a self-regulatory front or on the
6 state front, I come back to the concept of data
7 collection and letting data and the real numbers out
8 there drive our cases.

9 I think in some cases like the funeral
10 directors situation, you know, part of that was driven by
11 what the FTC was seeing when it went in with test
12 shoppers and was finding things that were probably of
13 surprise even to the funeral directors themselves. Just
14 how poor the compliance rate was, for example, or how
15 gummed up some of these price sheets looked when you
16 walked in.

17 And I think the FTC continued -- can continue
18 to play an important role in terms of that data
19 collection.

20 If somebody at the FTC doesn't step in, what
21 I've seen is that people will collect data and you'll end
22 up with too many taxpayer resources writ large almost
23 wasted on all those little data collection efforts. So,
24 you know, the Better Business Bureau collecting its data
25 on a certain type of problem here and the FTC doing it

1 here and the FBI doing it here and customs doing it over
2 here. Well, if you put all those together, you'd have a
3 much more robust source of information from which to work
4 and you'd be saving resources because you would have a
5 central repository to work from.

6 So I think in many different respects, the FTC
7 as a facilitator and as a data collector is very
8 important and will continue to be important.

9 MR. BAKER: Okay. So the -- one of the ideas
10 is central source some of the data and notes and trends
11 particularly in frauds and other things and share those
12 out with particular parties then?

13 MR. LUEHR: Yeah. And I think one that's
14 looming on the horizon right now that could be another
15 laboratory for the FTC is in the area of data security.
16 And, you know, we've talked about identity theft. They're
17 already the repository for identity theft complaints.
18 But the FTC is moving into this area of data privacy and
19 data security and it's an open question where -- what
20 role the agency should play. I think they're a little
21 too general when they come out with a statement in an
22 order that says you have to use commercially reasonable
23 means.

24 All my clients come to me and say, I don't know
25 what that means, what's commercially reasonable for data

1 security? And maybe part of that answer comes from
2 looking at data breach cases, collecting information on
3 data breach cases, looking at what's happening under the
4 34 -- excuse me -- 44 state statutes that now require
5 disclosure.

6 So I think it's an interesting area where the
7 FTC as a laboratory has some room to play.

8 MR. BAKER: Okay. Let me ask specifically
9 about state attorneys general. We've got Bill here.

10 The FTC has had a long history with the Iowa
11 attorney generals office. Some of it, I think, pretty
12 good, some of it really, really bad. And I think you,
13 know, we have that with the -- with the states generally.
14 And the states are not only doing things in their
15 individual capacity as states but multi states, which end
16 up being national actions which could, for example,
17 parallel FTC efforts and things like data protection
18 where they are coming up with an orders of national
19 implication and are probably again reviewed by private
20 industry and looking at them.

21 And so, Bill, I'll let you start. I mean, how
22 is it, how does it work, what should we do different or
23 better and what to avoid?

24 MR. BRAUCH: Yeah, I think privacy is a good
25 example.

1 We've had parallel activities whether it's a
2 data breach or it is something relating to collection of
3 high school student data, national research center,
4 college and university admissions, is a good example.
5 The FTC settlement reached a certain plateau. It
6 actually started after our multistate started, but the
7 FTC being a singular entity, as opposed to the AGs
8 working together, got done more quickly. States looked
9 at it and said we can do a little bit different, we can
10 do a little bit more to protect consumers here. And we --
11 I think we've achieved a little more in that settlement.
12 But did it make sense for the two of us to be working in
13 parallel in that sense?

14 I don't think so to the extent that we can
15 develop a stronger more trusting relationship, that we
16 can work together and reach a resolution that everyone
17 thinks is great. It makes more sense for us to do that
18 together or to say, okay, FTC, you folks do this one,
19 we'll do that one, let's coordinate, let's try to reach
20 the same place if we can, if we have similar actors and
21 similar sets of facts. What that means is getting
22 together earlier in the process to identify our
23 priorities rather than us saying to you, here is the case
24 we have been working up. What do you think? Or are you
25 saying to us, here's the next sweep that we've decided to

1 do. Work together and we both have fault in not
2 communicating soon enough or -- or in bringing all of the
3 stakeholders in enforcement together.

4 MR. BAKER: Does it sometimes feel like the
5 movies where the FBI shows up at the crime scene and
6 says, we're in charge now.

7 MR. BRAUCH: Well, that happens sometimes in
8 the real world, not just in the movies, not as much with
9 the FTC but maybe with the FBI.

10 But in any event, yeah, it does feel like that
11 sometimes. And I think we can -- we can all do a better
12 job of that. I think it would be helpful for us to -- to
13 have the folks who are the heads of the different
14 divisions of the FTC working more frequently with the
15 folks who are the point people for the AGs in certain
16 areas, whether it's automobile or privacy or debt
17 collection or whatever it is. We have our working groups
18 going. You have your different divisions working on
19 things. You know, we just need to coordinate better
20 because, as I mentioned before, so much of what we do is
21 national in scope because what our consumers encounter
22 are national advertisements.

23 MR. BAKER: Teresa? I'm sorry, Henry.

24 MR. BUTLER: I'd like to follow up with Bill
25 just to -- I mean, maybe other people out there are

1 thinking the same about the -- a little skepticism about
2 the AGs and their motivation on this and I wanted to just
3 -- get you to kind of help address this because of work
4 coordinating across states.

5 It seems that the so-called aspiring governors
6 may get a little more aggressive than the people at the
7 FTC would like them to be on some issues at times. Does
8 the FTC have any role in trying to guide that
9 decision-making process or is there kind of a herd
10 mentality across the states that can't be stopped? Or
11 just if you can -- I mean, you've been doing this for a
12 long time so I'd like your insight on that.

13 MR. BRAUCH: Yeah, what we're always trying to
14 do is reach the resolution that makes the decision most
15 sense, and it is the most protective for consumers in the
16 marketplace without having a negative impact on
17 competition. And the extent to which --

18 MR. BUTLER: I know that that's what you're
19 supposed to say, but the political --

20 MR. BRAUCH: No, no.

21 MR. BUTLER: But the political dynamics of it,
22 does it really work that way? I want your view on that.

23 MR. BRAUCH: Yeah, yeah, yeah, if Iowa is part
24 of it, it works that way because our -- you know we're
25 not there for the splash, we're there for the impact in

1 the marketplace. That's what we care about. And, you
2 know, most of the people who are driving this are not --
3 and most of the AGs are elected but not all -- but it's
4 not so much the AGs themselves who are driving. This is
5 staff who know this stuff who work it day in and day out.
6 We are the ones generally who are negotiating the matter
7 and certainly the AGs and chief deputies and others at
8 the higher levels in the offices have a role to play and
9 have an impact there. Add in some areas, like my AG has
10 had a very, very active role in predatory lending.

11 But that's not always the case. We're trying
12 to come up with a result that we think makes sense. We
13 don't always agree with the FTC. I think if we were
14 working together at an earlier point in time, the kind of
15 impact that you think would be good would probably be
16 more prevalent. It may have a sense of a better informed
17 outcome but not always.

18 MS. SCHWARTZ: To pick up on Bill's earlier
19 point about not overlapping, I mean, we don't have enough
20 resources to be all bringing the same cases and so forth.
21 And tying it into the international arena, that does seem
22 to me to be a niche for the FTC. Because as the national
23 consumer protection agency, it can go out to the world
24 and develop relationships which are kind of long-term.
25 The marketplace is going global and we have to be on the

1 global stage and we have to be interconnected and that
2 takes a lot of work, which has paid off -- Steve and I
3 talked about this yesterday, I think. It has paid off.
4 It's kind of down the road. I think the trick for the FTC
5 is -- is figuring out to really be efficient about making
6 these connections in a way that we -- the Commission --
7 Bill's long-term relationship in connection perhaps with
8 cases that are fairly ripe so that when you take the trip
9 you do two things. You do some sharing of information
10 and you actually work on your case, something like that.

11 Because I do think that the boondoggle aspect
12 of a lot of travel around the world, which is perhaps not
13 very productive, is -- has one benefit, which I think if
14 you can give that to the lower level staff it's a real
15 educational opportunity and it gives those hardworking
16 people a chance to, you know, see the world a little bit.
17 There's some merit to that.

18 But I think the travel can really be overdone.
19 And an agency that doesn't have a lot of resources, I
20 think, just really close attention needs to be paid to
21 how those resources are used because the world is very
22 big and the resources are very limited. But I do think
23 it's an important role for the FTC and it's uniquely
24 positioned to play that role.

25 It's interesting you mention the travel and the

1 staff aspect of it because one thing we haven't talked
2 about is the basic concept of training. And I think the
3 FTC is a little different from other agencies, in part
4 probably because of its size where there's not
5 necessarily a formal training center or training program
6 and maybe they could benefit from that. I mean, the
7 justice department, for example, has something called the
8 national advocacy center where I've both been a student
9 and instructor, things like internet investigations.

10 And I think one thing that the FTC could
11 benefit from is a little broader exposure to other law
12 enforcement agencies, maybe sending some of their
13 attorneys to criminal training so that they know when
14 they run into a grand jury 6(e) kind of question where
15 their -- their fellow brethren are sitting at the table
16 holding the evidence close to the vests like this
17 (indicating). I mean, quite literally, they know why
18 that's happening, and they'll know the procedures about
19 how to get that information into a civil suit, if
20 necessary.

21 So I think that -- and because the marketplace
22 is becoming global and technical, I mean, one of the
23 challenges for the agency will be to keep up in both of
24 those areas, keeping up on international law,
25 international developments, and keeping up on technical

1 training and -- and skills.

2 MR. BAKER: I think training is a good point.
3 One of the things I think we bring some to the rest of
4 the world is -- is being able to understand how some of
5 these scams work and why they're scams and how to prove
6 that. We occasionally ran into federal prosecutors who
7 are kind of interested in this who say, well, they do
8 deliver something or they've got verification tapes so
9 therefore they must be legit. They just don't have the
10 experience with them to understand them.

11 Or Internet auction fraud, which is a huge
12 problem. We've got police departments all over the
13 country with local people selling 2, \$3,000 in goods they
14 don't have. They don't know how to prosecute them. They
15 can't afford to bring in witnesses. They don't know what
16 to do.

17 And I think Paul's right that some joint
18 training and probably something we have not done a whole
19 lot that I remember with state attorney generals is -- is
20 -- is talking to each other about just general training
21 on areas and kind of how they work and what to do about
22 them and how to approach them, would be a role that I
23 agree, I think you really could do.

24 MR. BRAUCH: I know our office has benefitted
25 tremendously from some training one of our investigators

1 received on the internet, how it all works, how you get
2 behind the source of a website. I think that's been
3 great. And I think you're right, more opportunities
4 would be wonderful.

5 MR. BAKER: Okay. Any last thoughts on how we
6 would relate to the rest of the consumer protection
7 world?

8 MS. SCHWARTZ: Well, I -- there was -- and I'm
9 going to just reinforce a suggestion that was made at an
10 earlier panel. Ari Schwartz talked about the
11 relationship between the consumer protection and private,
12 the nonprofits.

13 And there are a very small number of people in
14 the private sector who are, you know, consumer protection
15 organizations. And they have very few resources for the
16 most part. And his suggestion was that these -- these
17 folks don't necessarily know how to reach people at the
18 FTC and at the AG's offices as well and they don't have
19 the lawyers who know who to contact and so forth. And he
20 has suggested that there be some one kind of designated
21 consumer organization coordinator or something. Just a
22 person that anybody from consumers union, the CFA, the
23 National Consumer Law Center, if they needed information
24 or they had an idea or something, they actually have
25 somebody to call.

1 And I think some more communication between the
2 consumer protection groups and the FTC and perhaps the
3 AGs as well. I think they go to the AGs more than they
4 go to the FTC actually because I think they find it a
5 little daunting to figure out how to -- how to relate --
6 would be a very positive and fairly easy step to keep the
7 communication going.

8 MR. BAKER: I think so. I, being from a
9 region, I kind of like to think that we can -- we can try
10 to play some of that function --

11 MS. SCHWARTZ: Maybe you do --

12 MR. BAKER: -- but we need it. And the other
13 kind of complement to that is sometimes you've got
14 criminal authorities, either the state or federal level,
15 that are kind of looking, gee, is somebody else looking
16 at this, what other data is there, what do we do with
17 this verification tape stuff, how do we overcome it? Who
18 do you call? And they're facing the same --

19 MS. SCHWARTZ: Yeah.

20 MR. BAKER: -- thing on what's the point of
21 contact for the FTC? And it's not very -- very plain.
22 And we've been discussing a little bit whether there
23 isn't something we can do there?

24 MR. BUTLER: Just to reiterate the point, I'm a
25 one-note person up here, about the product actions under

1 the state consumer protection act. There's a -- there's
2 a tone that seems to be that, you know, more enforcement
3 is better than we -- that we've got out here. But I
4 think particularly in areas like advertising, you can go
5 too far. And that's where I think a lot of the private
6 actions might be.

7 And so there's -- and, you know, the FTC needs
8 to bring a lot of these actions and so forth. But we
9 could get over deterrence of the type that we should be
10 worrying about in all kind of public policy areas. And
11 -- and more is not always better. And I think we've got
12 a specific area that our data is going to show that
13 there's probably some problems there that -- that need --
14 need some intervention. So when we're talking about do
15 you play well with others, this is an area where we
16 perhaps need to look at later on.

17 MR. BAKER: Gosh, Henry, well taken. I mean,
18 the FTC is trying to make sure we are not going to jump
19 into things that we don't know and kind of impose
20 remedies that might end up being worse for consumers.

21 MR. BRAUCH: Let me just add this, when Lydia
22 Parnes was deputy director for consumer protection, it
23 was very clear that she was our noted liaison, the state
24 AGs. I'm not sure we have a liaison now. I know I can
25 call you up and I can get what I want but I'm not sure if

1 we have a designated liaison right now.

2 So I think that would be important both for
3 federal agencies, local law enforcement and AGs, to know
4 that there is somebody identifiable that we can contact.

5 MR. BAKER: Okay. The Bureau of Economics has
6 done important research on consumer protection issues
7 over there and I know they would be interested if there
8 were things that would be really useful for them to take
9 a look at.

10 Teresa referred to earlier the state of
11 mortgages, which I haven't personally seen yet. But
12 they've some really groundbreaking seminal stuff, I
13 think.

14 If I might just mention one, on -- when -- in
15 the early 19- -- up until the early 1980s, food companies
16 were prohibited from making any health claim whatsoever
17 about their advertising.

18 When Kellogg All Bran finally broke that and
19 started, you know, talking about national cancer
20 institute study shows that a diet high in fiber can
21 reduce some incidence of cancer. The FDA permitted it
22 and the Bureau of Economics was able to go back and look
23 at people's knowledge of the importance of fiber in the
24 diet before and after the advertising campaign.

25 And they found out that well-educated upper

1 income people kind of knew because they're getting it
2 from their doctors, but the great mass of single head of
3 household, low income, didn't get that information until
4 they had advertising. So some of the salutary benefits
5 of advertising, I think, it showed and these things
6 they've done on prices in the world.

7 Are there other things that we could capture
8 here that anybody is aware of that would be really good
9 things for them to look at?

10 MS. SCHWARTZ: I think that -- you know, to be
11 honest about when we did strategic planning at the Bureau
12 of Consumer Protection, under Jodie, which was kind of
13 the first effort at that, we did it within the Bureau of
14 Consumer Protection. And we, to my knowledge, we did not
15 include the Bureau of Economics looking back about that.
16 You know, that was a terrible thing. I mean, we didn't
17 bring them in and get them involved in our project so
18 that we would know more about the internet.

19 And so I don't know why that -- why that
20 happened. If it -- I don't know what is going on now in
21 that connection. It seems to me there are key players in
22 the -- in the law enforcement, consumer education, all
23 the things that the bureau had as part of its strategic
24 plan and -- and we didn't do that.

25 I would surely hope that they're doing it now

1 or would be doing it in the future, that it would be --
2 it - the bureau is kind of in our silos too much still.
3 And I think that in this respect the whole -- I think the
4 whole agency should be doing strategic planning of a kind
5 that everyone is involved in. But that particular piece
6 of it seems to me would -- would have really been of
7 great value and we -- and we didn't do it. And I hope
8 going forward that the Commission is or would start to do
9 that.

10 MR. BAKER: Okay. One topic I know the
11 chairman was hoping to evaluate here was to get some
12 ideas on how do you evaluate and measure the
13 effectiveness of the FTC's efforts in the consumer
14 protection area. Do you count cases, do you think it has
15 a deterrent effect, would you count the amount of dollars
16 being returned to consumers or what else? And, Teresa, I
17 think this inevitably comes to you, because I recall that
18 when we first got the Government Performance and Results
19 Act, we first had to think about how to kind of measure
20 what we are doing and it fell on your shoulders.

21 MS. SCHWARTZ: It did fall on my shoulders and
22 they kept saying to us, don't just count the numbers of
23 things you're doing, you know. And I looked at our
24 recent -- the FTC's recent strategic plan and you can't
25 get away from that because that is the proxy.

1 But some of the measures have to do with are
2 you bringing cases that -- that reflect the concerns of
3 consumers through your -- by looking at your database so
4 that at least you know that you're in the ballpark. How
5 many hits on education side and goals to get a
6 million-plus or maybe a billion more than that. I can't
7 remember the numbers. It does -- you know, it does show
8 people are going there and they're reading the material
9 so it is a measure.

10 Do they learn something and does it produce
11 better consumer decisions, more informed decisions,
12 that's what's very hard. They ultimately make a decision
13 -- make an impression that makes the work -- the consumer
14 better and informed and able to navigate.

15 I've been reading recently about the whole
16 financial literacy area with respect to consumer
17 education. Some people just conclude that you cannot
18 educate people sufficiently. You have to -- you have to
19 give them a break. You can't educate them about the
20 complexity of this arena. And no matter how much
21 information you put out, you're really not going to have
22 -- because it's so complicated, you're not going to have
23 that much impact. I don't know where that leaves you
24 exactly, regulation, I guess.

25 But some of these measures are extremely

1 difficult to calculate. I think one measure somebody had
2 mentioned was if you increased the price of spam, because
3 the enforcement has been so great in that arena, that it
4 becomes less and less attractive as an option for raising
5 money and you move to some other scam probably. But that
6 -- that kind of data is hard to collect. I think you end
7 up with a lot of proxies.

8 In cases you've brought, how much money is
9 returned to consumers? That is -- that's important.

10 MR. LUEHR: I think part of this goes to the
11 Bureau of Economics. And I think it would be helpful to
12 have the Bureau of Economics follow up on groups of cases
13 more often precisely to answer this type of question.
14 Obviously number of cases is one measure. I think more
15 importantly one thing I was always concerned about when I
16 was a supervisor putting together cases to try to meet
17 our overall goal was -- was redress, how much money is at
18 stake and sheer numbers of consumers.

19 When you have large volume consumer cases,
20 there are few other places -- few other agencies that can
21 handle that type of work. The AGs can to some extent but
22 sometimes their ability to pull in a witness from another
23 state, for example, might be limited and only through
24 coordinated action by many states could you -- could you
25 get the same bang for the buck.

1 By the same token, federal criminal prosecutors
2 as has been mentioned are not used to doing large volume
3 witness cases. You mention to them, I've got 25,000
4 victims in this case and their eyes just turn into
5 saucers because they go how am I going to put 25,000
6 victims, you know, through the court room? And you end
7 up with pattern and practice types of conversations and
8 how many are the judge and jury going to want to hear?
9 Those are good cases for the FTC to bring. And so I
10 think numbers of consumers affected would be a measure
11 that should be included in the group.

12 When you mentioned B.E., I think they would be
13 helpful as kind of an after action set of eyes to put on
14 a group of cases, particularly when after a year or two
15 you've done a bunch of them and you sit back and say, how
16 have we done, is this working?

17 And the deterrent effect you mention is
18 probably the toughest one to get your arms around because
19 you don't know what you don't know. But one area where
20 B.E. has traditionally played a role and I put out there
21 as -- as just I guess conversation pieces, should they be
22 involved at the front end when you're bringing a case?

23 From a very practical point of view, sometimes
24 it slowed the case down because you were simply waiting
25 for somebody from B.E. to weigh in with their analysis on

1 a fraud case or something like that.

2 And some of the consumer action people would
3 bristle a little bit because there's a different point of
4 view being thrown into the mix. And I think in some
5 cases it was very helpful. And in particular, where it
6 was a new set of cases, I'm thinking about some pyramid
7 scheme cases, where there was really a new -- a new type
8 of economic analysis that was being applied to these
9 pyramid cases saying at some point the house of cards
10 falls down and we know this mathematically and we know
11 this from an economic point of view. I think that's very
12 helpful. But I think they probably could be even more
13 helpful in doing some of the after action analysis.

14 MR. BAKER: And Paul's got a good point. The
15 amount that we include B.E. and talk to them and discuss
16 things with them has also shifted dramatically over the
17 years at the FTC.

18 MR. BRAUCH: I think there's so many variables.
19 It's really hard to measure this.

20 MR. BAKER: Uh-huh.

21 MR. BRAUCH: You know, if you're bringing a
22 whole lot of lawsuits but you're bringing small cases,
23 easy knockdowns, in areas that aren't really important,
24 is that being effective or is it more effective to focus
25 on larger cases that have a greater impact in the

1 marketplace. In a sense, it's almost like judging the
2 quality of a painting or a musical performance. It's in
3 the eyes of the beholder.

4 MR. BUTLER: Well, I think that's part of it.
5 I mean, at the federal level, you can't tease out the
6 effects because you just -- you don't have any control to
7 deal with.

8 What you've got at the state level -- back to
9 the states again, okay -- is -- is variability in the law
10 and enforcement across the states. And perhaps we can
11 get a sense of the overall effectiveness of consumer
12 protection at the state level to help guide -- to learn
13 something at the federal level about what you ought to
14 do.

15 MR. BAKER: Like form partners?

16 MR. BUTLER: Yep.

17 MR. BRAUCH: Reductions in numbers of
18 complaints is important. Some of the big areas you don't
19 get complaints but they're bit frauds. But in certain
20 areas, reductions in numbers can be a good sign.

21 MR. BAKER: We can go on with this one a long
22 time too.

23 Maureen, we're down to like five minutes in
24 this program. I've got another question like where
25 people think this ship is going to be 10 years from now.

1 But if you've got one you think we should pose or if you
2 think we could open it up, we should do that.

3 MS. OHLHAUSEN: I think we should open it up to
4 the audience.

5 MR. BAKER: Okay. Stump the experts. Whose
6 got a question?

7 MS. OHLHAUSEN: I've got a question. This can
8 be for the whole panel, though, Teresa brought it up
9 initially about using our rule-making authority more.

10 Are there particular areas that people think
11 that we should start looking into, you know, developing
12 new rules?

13 MS. SCHWARTZ: I don't know for sure. There
14 are some areas that would seem to lend themselves. I
15 don't know if they're the right areas. But the
16 behavioral tracking. I've forgotten -- the behavioral
17 advertising where you're doing a lot of tracking with
18 people online. And recently there -- are the Commission
19 put out some guidance for kind of a self-regulation
20 approach.

21 Looking backwards -- because after the fact, we
22 all have 20/20 vision we might have -- the Commission
23 might have thought of regulations governing brokers that,
24 you know, there's a lot of problems in that -- in that
25 area.

1 But I was kind of making the more general point
2 that I think the Commission has been kind of gun shy and
3 I think that it's -- it should be more open to thinking
4 about rulemaking as an alternative, as an option because
5 it can be an efficient way and it can send the signal to
6 the marketplace about behavior. And it certainly made a
7 huge difference in telemarketing to have that regulation.
8 Now that was -- that was Congressionally authorized.

9 But the fact the Commission wouldn't, you know,
10 proceed itself until it got to Congress, and it had a
11 great deal of information about how bad telemarketing
12 was. So I don't say willy-nilly need to. But I do think
13 the Commission needs to give that avenue more kind of --
14 recognize that as an avenue to a greater extent than it
15 has, at least than it did when I was there.

16 MR. BAKER: One -- this is purely personal, not
17 for the agency, I suppose, but we have one of the things
18 the telemarketing sales rule addresses is people getting
19 consumers' credit card numbers or checking account stuff
20 and then keep billing them. People don't realize that
21 they're opening up the spigot on their things. But those
22 only apply to telemarketing transactions.

23 And we have people getting consumers, these
24 buying clubs, Bill referred to that we've done cases on
25 too. The trick is somehow trick you out of giving that

1 out in return for a free prize or to look at a product
2 and then they got it and then they're going to keep
3 billing that until you can finally stop them. And I've
4 wondered personally whether some sort of complementary
5 rule for internet transactions, direct mail transactions,
6 not just telemarketing.

7 MS. SCHWARTZ: Advance the credit cards within
8 the rule.

9 MR. BRAUCH: Excellent suggestions.

10 MR. BAKER: Paul?

11 MR. LUEHR: Well, I think there's one area -- I
12 mean, having said that I think it's often more wise for
13 the agency to wait for Congress to act, I do take
14 Teresa's point about the agency's hesitancy at times.
15 And right now we're in a situation with regard to data
16 security and data breach response where we have gone
17 two-and-a-half years of state action, roughly speaking,
18 there are 44 state actions -- state statutes out there
19 that deal specifically with the concept of -- of data
20 breach response on one side.

21 On the preventative side, the entire industry
22 has moved forward, especially in the credit card
23 industry. There is now something out there called the
24 PCIDSS, the payment card industry data security
25 standards. Very precise, very intricate in terms of

1 their level of detail in terms of what you have to do
2 with credit cards.

3 And I think it's -- it's an interesting
4 question whether the FTC should insert itself there.
5 Right now as I said on most of its orders it says for
6 data security you must use something that's commercially
7 reasonable. And a lot of the private practitioners out
8 there are floundering a bit because they don't quite know
9 what that means.

10 And there is, I think, some frustration that
11 the Federal Government has not acted at the Congressional
12 level because the industry is frankly a little tired of
13 dealing with 44 different statutes and trying to figure
14 out what do I do to comply with all of these? And
15 there's a lot of lawyer time spent trying to figure out
16 if I take this one particular action, is it going to
17 comply here as well as here as well as here as well as
18 here? And I think that's an area -- it's kind of an open
19 book right now. Like I said, it may be an interesting
20 laboratory for the FTC because I think there is a bit of
21 a hue and cry for federal action, there is -- there is a
22 need for some greater specificity. And some of the other
23 traditional actors in the marketplace have already an arm
24 moving forward basically past the Federal Government for
25 better or worse.

1 MR. BAKER: Okay. Bill is using the P word,
2 preemption, which I know you have to be wondering about
3 but we're almost out of time.

4 So let me do one thing and clearly this ship of
5 the Federal Trade Commission is moving through time,
6 whether we guide it or it drifts, it's going to be
7 somewhere different. Ten years from now, where is it
8 going to be? I mean, in 1970 Teresa was saying it was
9 kind of dead doing worthless labeling things. By 1980
10 they were about ready to shut the place down altogether.
11 After a lot of single victories, 10 years ago it was
12 different, it's going to be different again.

13 Any idea how you would expect it to be
14 different, bigger, smaller, different mission, what do
15 you think?

16 Last, final thoughts?

17 MR. BRAUCH: Bigger because there will be even
18 fewer mom and pop retailers out there and so there will
19 be even more national retail sales and advertising. The
20 need will always be there and I think it probably will
21 grow.

22 MR. BAKER: Okay. Henry?

23 MR. BUTLER: I -- I -- I'm -- I can't imagine
24 it being smaller because it's in Washington.

25 MR. BAKER: Fair enough. Paul?

1 MR. LUEHR: I think it's going to be more
2 technical in terms of the level of skills that's going to
3 be required of the investigators and attorneys.

4 That's where the marketplace is going and
5 that's going to be a requirement despite all those kids
6 who went to law school to avoid math. I think they're
7 all going to be numerically and technically oriented.
8 And I think -- I would hope that in 10 years, they're
9 often seen as a more credible, independent, and reliable
10 source of information on consumer issues particularly
11 within the federal family. So if the banking industry is
12 having concerns about what consumers are thinking and how
13 they're being affected, I would like to see the FTC as --
14 as kind of a neutral broker in terms of bringing that
15 data forward and saying this is what we think is
16 happening in the marketplace.

17 MS. SCHWARTZ: Well, I'll go a step further and
18 have that -- that role be a very official role; that is,
19 Congress should give the FTC this role of representing
20 the consumer and competitive interests, those two, with
21 respect to these other agencies and their regulation. I
22 think it needs to have a little more clout.

23 I think the marketplace is really changing for
24 the -- for the reason that we have -- I mean,
25 computerization has changed a lot, all those scams with

1 fees, and I'd include all these credit card fees, and the
2 banking fees, and all of this which is ripping off
3 consumers. I mean, the amount of money that is being
4 collected, way exceeds I think what most people would say
5 is warranted by the costs that these sellers are
6 incurring.

7 And I would look to the FTC to be thinking
8 ahead. They've got three basic -- under Section 5 --
9 three basic doctrines of deception which is very clearly
10 articulated. The requirement that you substantiate your
11 claims, also very well articulated. It's been -- had a
12 big impact on how people look at that requirement. And
13 unfairness, which is regulated by statute as -- as well
14 as principles. It's kind of a cost benefit analysis
15 needs to be made. And I think there may be some
16 opportunity for the FTC to develop some other doctrines
17 to deal with the marketplace that -- that I see.

18 I was so struck by the B.E.'s study that people
19 do not understand these contracts. Well, whose
20 responsibility is that? Is it the responsibility of B.E.
21 to find out that consumers don't understand these
22 documents at all? I mean, really, educated people don't
23 understand these documents. Or is the industry's
24 responsibility to test out their documents, to see that
25 the consumers they're working with understand these

1 documents.

2 I'd love to see the FTC think about that and
3 try to figure out whose responsibility, perhaps there is
4 a responsibility to substantiate that your document is
5 understandable to the consumers with whom you are
6 dealing?

7 MS. OHLHAUSEN: Teresa, I just want to mention
8 that study was actually on government required
9 disclosures that were being considered. So -- so that
10 adds another element there that if the -- if, you know,
11 another part of the government is doing this, perhaps
12 they should realize they should be testing or something.

13 MS. SCHWARTZ: Right. Well, the instruments
14 themselves have gotten so complicated that the truth in
15 lending disclosures really are no longer adequate.

16 MR. BAKER: So the question is traditionally
17 our -- our -- our main remedy at the FTC is since the
18 information the consumer is getting is bad information,
19 is to correct it by having disclosures so you get the
20 more good information. But I guess the question --

21 MS. SCHWARTZ: Right.

22 MR. BAKER: -- you're kind of highlighting some
23 too is is there a point where they disclose so much that
24 the disclosures are no longer really useful for people.
25 Does -- can disclosure -- or at least in just giving

1 people more, solve our problems?

2 MS. SCHWARTZ: Believe me, I don't have the
3 solution, but I think the FTC is filled with people who
4 are very, very intelligent. I'd love to see them
5 thinking about these things because I think there's a lot
6 of problems out in the market place and we don't
7 necessarily have the tools we need to deal with them, the
8 intellectual approach, the legal approach.

9 MR. BAKER: Well, we've had folks that have
10 traveled from out of town, sometimes long distances,
11 sometimes starting very early this morning who have been
12 here to do this today, and I have heard a lot of very
13 thoughtful comments. And I'd really like to thank
14 everybody.

15 (A lunch break was had.)

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1 THE FTC'S COMPETITION MISSION:

2 RESOURCE DEPLOYMENT and EFFECTIVENESS

3 MR. ABBOTT: Good afternoon. I'm Alden Abbott,
4 associate director of the FTC's Bureau of Competition. I
5 oversee our policy office and also special projects,
6 other matters. And I am coordinating -- well, I'm
7 bringing a panel today on the FTC's competition mission,
8 which will focus on resource deployment -- deployment of
9 resources to the competition mission and effectiveness of
10 that mission.

11 We've got several very distinguished panelists
12 who have great experience as lawyers and scholars who
13 have written, litigated, done research, spoken publicly
14 on these issues.

15 Starting off to my right, Tom Campbell, partner
16 at Baker & McKenzie, who has an extremely impressive
17 litigation background, having litigated successfully many
18 antitrust cases, having been a leader in the bar on
19 antitrust matters and his practical experience on
20 litigation issues will be of great benefit to us.

21 Next to him we have Randy Picker who holds a
22 chair at the University of Chicago Law School, a
23 distinguished academic who's written on intellectual
24 property rights, antitrust regulation, and he has been a
25 speaker at the FTC and a real polymath in the area of law

1 and economics of property rights, regulation, so forth.

2 Next to him we're honored to have Blake Harrop,
3 senior assistant attorney general in the antitrust bureau
4 of the office of the Illinois Attorney General who not
5 only is a leadership on the state -- a leader on the
6 state enforcement side, but had many years experience as
7 a partner at the Sonnenschein Nath Law Firm and also has
8 been a leader in the antitrust bar as an editor of the
9 ABA's antitrust journal.

10 Next, we'll have Josh Wright who's Visiting
11 Professor at the University of Texas Law School, both
12 trained as a lawyer and an economist, has taught at
13 George Mason Law School, and spent a very successful year
14 as Visiting Scholar at the Federal Trade Commission where
15 he lent his insight to the Bureau of Competition on some
16 of the most difficult matters we studied.

17 And finally, and last but certainly not least,
18 Fred McChesney, who holds a chair at Northwestern
19 University Law School, one of the most prolific writers
20 and scholars on public choice, law and economics,
21 distinguished career at a number of academic
22 institutions. And I've known Fred for many years and I
23 know that his insights will be particularly helpful. He
24 also is an FTC alumnus from the '80s, part of the Tim
25 Muris gang when Muris first brought a number of prominent

1 young scholars to the FTC. And we look forward to what
2 he has to say.

3 So we're going -- we have just a short amount
4 of time. Two hours doesn't seem short but we have a lot
5 to cover. And we would like to start out the panel first
6 by talking about how does one measure the benefits of our
7 competition activities.

8 There is, of course, huge economics literature
9 on competition but that doesn't tell us a great deal
10 about the wisdom of pursuing individual matters or
11 particular types of matters or how we should be
12 allocating resources. And I'd like to turn the floor
13 over first to Tom Campbell to talk about the benefits of
14 the FTC's enforcement actions and remedies and I know
15 he's going to bring his perspective, the perspective of
16 distinguished antitrust litigator to bear, in commenting
17 on the successes and failures of our approach to
18 competition litigation. Tom?

19 MR. CAMPBELL: Thank you, Alden. Alden failed
20 to mention my supreme qualification which is that I am
21 undefeated in litigation against the FTC.

22 So my role here today --

23 MR. ABBOTT: Something we wanted to hide but
24 ...

25 MR. CAMPBELL: So my role here today is to be a

1 bit of a provocateur but I hope it will all be taken in
2 the spirit of constructive criticism.

3 Many years ago when I argued the Ukiah case
4 before the Commission -- and incidentally, arguing a case
5 to the Commission is a wonderful experience because
6 you're carrying on five conversations at once, none of
7 them wanted to hear what the other people are asking
8 about. And it was when Janet Steiger was chair. And
9 Terry Calvani scolded me for having written a brief and
10 made an argument that did not cite any FTC decisions.
11 And I didn't have the presence of mind at the time to
12 rejoin him. But the reason for that is that there aren't
13 very many. The jurisprudence of the FTC is very thin.

14 And for those of you who have a copy of my
15 paper, I came up with the cute little quote from Lincoln
16 that the relevant precedents are as thin as the
17 homeopathic soup that was made by boiling the shell of a
18 pigeon that had starved to death. I stole that from
19 Lincoln's debate. It seemed timely. And the fact of the
20 matter is the FTC does not have a sufficient body of
21 litigated cases one can turn to. Now, I'm perfectly
22 aware of the plethora of consent decrees, but please
23 understand that trial lawyers do not consider consent
24 decrees to be very strong precedent. They are articles
25 of surrender when a CEO is asked to sign a consent decree

1 so he can get his merger through, he doesn't care what's
2 in there. And the FTC stuffs these consent decrees full
3 of their exotic theories to try to validate them and I'm
4 just waiting for a chance to litigate them because I
5 think some of them are a little silly.

6 Anyway, in the context of a merger, I think if
7 the FTC made a CEO dress up in a bunny suit for a week to
8 get his transaction through, they'd all sign up, you
9 know. So the fact of the matter is the FTC does not have
10 a tradition of trying cases. If you're an aspiring trial
11 lawyer, you don't go to work for the FTC. That's not
12 where the action is.

13 And now we have the issue of Part III and I'm
14 going to give you my view on Part III. And I, for one,
15 think the FTC has made a mistake to argue that 13B is a
16 different standard. And as those of you who have been
17 following all of this in Whole Foods, they got a supreme
18 victory when the denial of the preliminary injunctions
19 had been reversed. I understand this is still open and
20 may be en banc yet.

21 But for the moment, the opinion of the D.C.
22 Circuit is that 13B is a different standard and the FTC
23 should have gotten a preliminary injunction. And while
24 the court suggested that this new interpretation of 13B
25 doesn't mean that a district judge has to rubber stamp

1 any request for preliminary injunction from the FTC, it
2 really stacks the deck in favor of the FTC. I, for one,
3 think it's an unfortunate decision. The Antitrust
4 Modernization Commission, of course, recommended that
5 there not be a double standard and frankly I think it may
6 be a ruling that the FTC in the long run is not going to
7 welcome and Congress may in fact seek to correct.

8 So what's wrong with Part III litigation?

9 Well, for one thing, it takes forever. The Ukiah case I
10 was speaking of took five years to get it litigated. And
11 in that case, we were under the limits of
12 Hart-Scott-Rodino. So on the eve of the closing of
13 transaction we got a call from the FTC and they said,
14 please, don't go forward, we want to look move into this.
15 And we said sorry and we closed our transaction. And
16 they started their Part III thing and it went on and on
17 and on and on.

18 Now, as a trial lawyer, one of the first
19 strategic decisions you have to make first is who
20 benefits by the passage of time? And, of course, we
21 care. We had gotten our transaction through.

22 Yet every time we were on the phone with the
23 ALJ, we said we're ready to go to trial. We kept on
24 answering ready, anytime, we're ready, we're ready. And
25 the staff had more and more reasons, they had to look at

1 this, they had to find an expert, they had to take a
2 deposition, five years before it got tried. And that is
3 the history and that's my experience and maybe that's
4 anecdotal but most of the Part III cases I look at are
5 ridiculous for the amount of time they take.

6 And just to contrast that, in the Healthsource
7 case which I had, the passage of time being the most
8 crucial issue, Healthsource was slapped with this
9 monopolization case by U.S. Healthcare, a major
10 competitor. It stopped their financing. They were going
11 to die if they didn't get the case moved forward.

12 And in that case I pushed to get the case to
13 trial early. We agreed to be assigned to a magistrate.
14 The magistrate heard the case. We had the whole
15 antitrust case tried in six months after it was filed.

16 We bifurcated so we didn't have to have damages
17 and got -- said there was an injunction case, won that,
18 and a year later had the thing through the First Circuit
19 with a nice opinion from Mike Boudin.

20 So antitrust cases don't have to take five
21 years. You've got the Hart- -- in merger cases, you've
22 got the Hart-Scott-Rodino, you get tons of information.
23 The idea that you need more information is just
24 ridiculous.

25 Now, let's then get to the issue of the

1 competency of ALJs. Some of you may remember when the
2 FTC was compiling its losing track record in hospital
3 merger cases. You would hear the lament that the reason
4 they were losing them was because of local judges, local
5 judges favoring these local businesses.

6 Of course, that lament conveniently overlooked
7 the fact that Stanley Roszkowski, the district judge in
8 Rockford, gave the government an injunction against the
9 Rockford Hospital merger and a chief administrative law
10 judge, Louis Parker, not a local judge, denied them one.
11 But anyway, the story was that the reason they were
12 losing their cases was local judges. To quote Bob
13 Leibenluft, a cheerleader for the FTC, local judges
14 typically have little experience with merger law or
15 sophisticated antitrust economic analysis. For those of
16 you who have my paper, I have footnotes where I get all
17 these wonderful quotes. But anyway, so there are some
18 FTC partisans claiming that ALJs are more competent than
19 district judges, what we call Article III judges.

20 But there's actually a big body of evidence
21 that the Commission thinks they're less competent than
22 district judges. To start with an ALJ goes and hears a
23 case and makes findings. The Commission does not even
24 have to accept those findings.

25 So this is the opposite of what you would

1 encounter in federal court or state court where a judge,
2 who views the witnesses and makes findings of fact, you
3 have deference to those credibility findings and so
4 forth. And probably the greatest example since we're
5 right here in Chicago, which is the home of Evanston
6 Northwestern Healthcare -- well, I have many comments
7 about that case, there's not time for all of them. What
8 happened in that case was that the chief administrative
9 law judge Stephen McGuire made findings of fact. He
10 probably spent five years on that case too. I've
11 forgotten how long that one ran. He found the market,
12 the geographic market. The Commission totally
13 disregarded the market he found and found a different
14 market. What was the point of having the trial I would
15 ask you. And then he also made a finding that there were
16 four hospitals in the market he defined that could
17 constrain any increase in price by the merging hospitals.
18 And that's a fact that it's very hard to understand how
19 you could disregard in a merger case.

20 Anyway, for those of you who have my bio,
21 you'll see I've got another article on the Evanston
22 Northwestern decision which in my view is unconvincing
23 and I think it's going to be -- going to the dustbin of
24 FTC precedence when you come to the end of the road in
25 Evanston and they come up with a zero relief ruling.

1 Most people will view that decision as being sort of like
2 a consent decree. It's an editorial endorsing certain
3 prosecution theories. It's not a litigated case that
4 would stand as a strong precedent. So my view is the FTC
5 would be better off trying cases before Article III
6 judges and developing and bringing in experienced trial
7 lawyers to head up the trial team.

8 And to take the example of the Department of
9 Justice, bringing in David Boies, I think in the
10 Microsoft litigation -- and there are -- and I don't mean
11 to be slamming the FTC that they have never had any
12 competent people because that's not my view at all.
13 Clearly having somebody like Bill Baer behind the FTC's
14 prosecution at FTC Staples undoubtedly helped bring that
15 case into sharper focus.

16 So here is what I think experienced trial
17 lawyers can bring to the table. First, they can move
18 litigation along and not chase down every rabbit hole
19 that the staff might in Part III; second, they can bring
20 judgment as to what direct evidence is likely to be
21 credible as to market definition, market power, similar
22 issues.

23 Here we are -- and I would just point to FTC
24 Staples as being an example of a litigated case which is
25 both credible and convincing in explaining market power

1 based on the differential pricing. And I think the
2 decision persuasively predicts that consumers would be
3 hurt by permitting the merger to go forward. I don't
4 think you can say the same about FTC and Whole Foods
5 based on what you're seeing in the opinions that have
6 been written so far. And I understand that's still open.

7 So just to sum up where I am on this, I think
8 the Part III litigation, you don't need it. The idea
9 that you need more time to sift the facts, I don't buy
10 that. I think between Hart-Scott-Rodino and ordinary
11 discovery, these cases can be moved along a lot more
12 quickly. And so my recommendation would be that the FTC
13 abandon the Part III process, take their merger
14 prosecutions to the district courts and beef up their
15 trial team so that they can really sift through and put
16 the right evidence in there for most of the economic
17 theories they're interested in.

18 MR. ABBOTT: Well, very provocative comments,
19 Tom, to start off. And that's what we're looking for.
20 We're looking for critiques.

21 Are there any alternatives to what you seem to
22 be suggesting: abolishing the Part III process? For
23 instance, statutory or regulatory reforms, that would
24 make it a better vehicle in your view.

25 MR. CAMPBELL: I guess I have to ask who would

1 want to be an ALJ? I don't know that we're out there
2 hiring Ph.D. economists. And it just -- and if you write
3 an opinion and it can be totally disregarded by the
4 Commission, what's the point?

5 So I just am not sure you can put something
6 into Part III that makes it a better system.

7 MR. PICKER: So that's interesting. So you
8 said -- you've said a lot of things that were actually
9 quite interesting. So we can start with that. But I'd
10 actually start somewhere else.

11 So I mean you started with the discussion of
12 the consent decrees. Do you think those -- I mean, I
13 would have thought we would have judged consent decrees
14 based upon who gets the competition R & D part of the
15 show, which we'll get to. Whether they were effective at
16 shaping competition going forward, right? Having the CEO
17 jump around in a bunny suit? Well, I guess that's not
18 too much effect on competition, interesting, right?
19 Great for you, two, but not for competition. So that
20 should be the test.

21 And then we can also talk obviously about the
22 resource constraints faced by the agency and how you
23 trade off litigating versus settling. Those are general
24 questions.

25 So do you think the consent decrees just do a

1 lousy job of protecting competition going forward?

2 MR. CAMPBELL: No, it's clearly their
3 enforcement statements. So if you have a theory on
4 enforcement as to how competition is hurt, that's where
5 you put it, is in a consent decree and that's a big
6 warning sign to people. I would just say as a litigator,
7 if I had the next guy coming along that was being
8 threatened with that prosecution, I would not be scared
9 off by the consent decree.

10 MR. PICKER: And you're not scared off because
11 you just -- you think it's not meaningful or you think
12 that if you actually forced them to litigate, they can't
13 win, see Tom Campbell?

14 MR. CAMPBELL: The latter. Yeah.

15 MR. PICKER: Exactly, see Tom Campbell. That's
16 interesting.

17 Other people may -- I mean, I'm not assigned to
18 respond so but I'm happy to talk. That's what I do for a
19 living.

20 Can I ask about the ALJs?

21 MR. CAMPBELL: Yes.

22 MR. PICKER: So the institutional design point
23 here is a perfectly general one, which is on the one hand
24 do we use expert ALJs versus off-the-rack Article III
25 judges who see so many different things? I would have

1 said, oh, based on what you said, we should upgrade ALJs,
2 we should call them super ALJs or some other title that
3 you really like. Obviously, I know something about the
4 bankruptcy system. We call them judges. They're not
5 Article III judges; they're Article I judges, right? You
6 pay them more money.

7 The question as to whether or not their
8 findings of fact are reviewable, that's a tool we can
9 play with and all of those are things that we could
10 design around. And the question is do you think that
11 buys us something or, I guess, or not?

12 MR. CAMPBELL: I think there's value to having
13 Article III judges and the breadth of experience they
14 have in trials and finding facts. And I've never -- in
15 my experience with ALJs, I have not been overwhelmed with
16 a greater understanding of antitrust or antitrust theory.

17 And I think that the fact that the Commission
18 follow their opinions on issues of law shows that they're
19 not in the lead on those issues. And maybe there are
20 examples that cut the other way but that's been my view.

21 MR. PICKER: And what do you think is the
22 virtue of litigating cases, great fun for the lawyers,
23 right?

24 MR. CAMPBELL: When you get to the end -- look
25 at Staples. When you get to the end of that and you've

1 got findings of fact and a decision based on a contested
2 controverted matter, you have a decision that -- that
3 stands as a precedent.

4 MR. PICKER: The economist in me wants to know
5 what price. Maybe that's a Rolls Royce and sometimes,
6 you know, you need a Pontiac. I mean, so ...

7 MR. CAMPBELL: And I'm not saying they have to
8 litigate every case. I just think the FTC's tradition is
9 not to litigate enough cases and not to go to court often
10 enough. And that's -- So when Terry Calvani says you
11 didn't cite any FTC cases, I'm going where are they?

12 MR. PICKER: Right, I understand.

13 MR. HARROP: I'm not going to say anything
14 about Article III because the State of Illinois doesn't
15 have an Article III procedure and I don't really use it.
16 And I haven't litigated against the FTC in probably 20
17 years and I guess I should -- consistent with Tom -- say
18 I'm one and 0 in that category but a smaller number than
19 he has.

20 I do, though, have a concern about his
21 statement that you should not be using consent decrees as
22 an enforcement agency because I can tell you right now
23 that all enforcement agencies have very limited
24 resources. In fact I was joking this week the reason I'm
25 here instead of Bob Pratt is at the moment I am the

1 antitrust bureau for Illinois. All the rest of our
2 lawyers are otherwise tied up in other matters and doing
3 things out, attorney leaves, whatever.

4 And if you litigate every case, it means
5 basically you're going to do one enforcement matter a
6 year or two enforcement matters a year, if you're in the
7 Illinois attorney general's office.

8 We depend on bringing cases and convincing the
9 other side that it's more feasible for them to resolve
10 the case quickly to reach the result that we want to
11 reach than it is to set a precedent that Tom can use
12 later on in some litigation.

13 And also to be a little bit more provocative
14 maybe than I should be -- and I was hoping Bob's name
15 would be here instead of mine so I could tell you this --
16 but I'm not that much of a fan of Article III judges in
17 all cases either. They aren't economists by training,
18 they don't necessarily get the things all correct the
19 first time. And the nature of the antitrust cases are
20 such that most of the time, the major decisions are not
21 going to get decided by an Article III judge anyway.
22 Even if you bring the case, even if you go through
23 discovery, the cases usually get resolved by agreement of
24 the parties well before they go to trial. Now, I know
25 Tom and I have both done cases that that wasn't true on

1 and we did end up in trial. But most of those cases are
2 going to resolve themselves some way or another and
3 you're not going to get the precedent you want.

4 Even if they do go to trial, you're probably
5 going to get a decision by a district court judge who has
6 a lot of other things to deal with and he or she is not
7 going to have time to become an expert on antitrust law.
8 And the decisions you get out of the district courts are
9 not necessarily going to be significantly more
10 informative than what you would get out of an ALJ.

11 Where the precedents really get useful and
12 interesting is when you get up to the appellate court
13 levels where you have all the law clerks and the judges
14 have some amount of time to deal with that and you have
15 some judges who actually know some antitrust law and you
16 get decisions that make a lot more reasoned sense. The
17 problem, of course, is it takes a long time to get that
18 process done and it doesn't happen very often, not just
19 because the enforcement agency wants to settle but
20 because the parties involved have too much at stake to go
21 forward.

22 So I guess -- you know, I say, fine, if you
23 want more litigation, but basically what you're going to
24 get is more cases filed and more settlements reached very
25 quickly afterwards instead of the consent decree

1 pre-filing. I don't think it's going to change the
2 precedent a lot.

3 MR. WRIGHT: Two quick sort of responses. I
4 think both are with my economist hat on. I love how
5 Randy framed this issue of the ALJs versus the Article III
6 judges as an institutional design problem of sorts. But
7 we have other instruments to play with which are on the
8 Article III side, right? So if the issue is expertise,
9 right, you know there are folks out there who said this,
10 I don't claim to be the first, but we could be sort of
11 advocating more liberal use of court appointed experts if
12 we think the problem is insufficient understanding of
13 economics, let's say.

14 MR. PICKER: In lieu of private party experts?

15 MR. WRIGHT: In lieu of or in addition to --

16 MR. PICKERS: Yeah, yeah. I was curious how
17 you cut that.

18 MR. WRIGHT: -- you can -- you can play with
19 that in different ways.

20 MR. PICKERS: I understand, right.

21 MR. WRIGHT: But -- but -- but there are -- are
22 -- are instruments to play with to -- to sort of solve
23 the Article III problem, to the extent we think it's a
24 problem. And I don't think those should get lost in the
25 shuffle of are ALJs good or bad?

1 Second, on the consent decrees, I think that
2 the value that consent decrees should be given in
3 litigation, I think, that -- that point is well-taken.
4 But again with my economist hat on, do we really know how
5 effective these things are and -- and -- you know, we
6 should.

7 MR. PICKER: Don't ask what I'm going to say
8 when we get to that part of the panel because --

9 MR. WRIGHT: Okay. Then I'm going to wait, I'm
10 going to wait.

11 MR. PICKER: Yeah, exactly.

12 MR. WRIGHT: We'll both say it.

13 MR. PICKER: And then we'll both be in favor of
14 knowledge. That's a bold statement.

15 MR. WRIGHT: To be provocative, I'll come out
16 against.

17 MR. ABBOTT: Fred, Fred?

18 MR. McCHESNEY: Excuse me. I don't have a
19 whole lot to -- to say because I tend to agree pretty
20 much completely with what Tom had to say.

21 In that I may be unduly influenced by the fact
22 that after finishing law school and a clerkship for one
23 year, my first assignment in private practice was to join
24 the army of lawyers and the phalanx of paralegals working
25 on the In re Exxon proceeding at the Federal Trade

1 Commission. We were defending one of the respondents in
2 that particular case. And those of you who remember that
3 awful episode will recall that it -- it just lasted
4 forever and ultimately went away but not without having
5 cost everyone a great deal of time and money.

6 The one thing that jumped out at me
7 participating in that is a point that goes along with
8 what Tom said but I'm not sure he mentioned it -- if I'm
9 duplicating him, I apologize.

10 But as legal proceedings drag on, I am always
11 reminded of what baseball fans know is axiomatically true
12 and that is when pitchers slow down, the fielders behind
13 them lose their focus and the game deteriorates
14 generally. And I think that's true of litigation also.
15 When things just bog down and drag on, the quality of the
16 fact finding and the quality of the legal analysis, I
17 think, declines as well. That's a particular problem as
18 well at the FTC where there's a certain amount of
19 turnover anyway. And as proceedings get -- get
20 prolonged, we have brand-new groups of people taking over
21 very old cases and an awful lot of things have to be
22 started over again both on the fact-finding side and to
23 the extent that there has been any legal work completed
24 reviewing that again.

25 So slowness is -- is not just an undesirable in

1 and of itself but I think it leads to a deterioration of
2 the quality in the process overall.

3 MR. ABBOTT: Interesting comments. Let me try
4 and push a little bit on the issue of -- of settlements.
5 And a number of people have raised questions about the
6 validity or value they add to the system as a whole.
7 Should settlement statements have more detail of the
8 underlying economic rationale, the legal rationale, are
9 settlement statements inadequate, quite apart from the
10 question about whether there should be as many
11 settlements more or less, or is the FTC doing a good job
12 in -- in explaining its position in the settlements or is
13 improvement needed? Anyone? Yes, Blake.

14 MR. HARROP: No, I haven't settled any cases
15 with the FTC for the last 8 years, you know, the State
16 seldom sues them. Yeah, you know, I will say this about
17 settlements. The key issue on settlements is that in
18 certain situations, yes, the other side will, you know,
19 dress up in a bunny suit if you want them to because they
20 want to get their deal done. But in my experience nine
21 times out of ten they probably are very unwilling to do a
22 lot of things. And I think in the settlements what is
23 agreed to and particularly the kind of relief that is
24 obtained is often a good indication of how the parties
25 are able to at least get a neutrally acceptable idea of

1 what the theory of the case was. What the risks were to
2 the defendant, what the risks were to the enforcement
3 agency, and those can be useful.

4 Obviously they're not the precedent you can
5 cite in a brief but they do -- are very useful -- we'll
6 probably get to this later -- but they are a very useful
7 way for an agency to tell you what they think the
8 priorities are, what industries in particular they think
9 are significant ones that have problems. And I think --
10 you know, discounting them as a value into where the
11 agency is going is a problem.

12 But if you want to, you know, set precedent, as
13 I said, that's a very long and a very expensive process
14 as Randy said.

15 MR. ABBOTT: Do settlements increase in
16 importance or rise in their value with several
17 settlements dealing with the same type of activity? I'm
18 thinking, for example, of -- of invitations to collude.
19 Some Section 5 complaints were settled, not fully
20 litigated, but in the Valassis case I think you had your
21 third -- at least your third settlement in that area.

22 Is there one -- is there real value to
23 precedential -- informal precedential value once you've
24 accumulated a number of -- of settlements in a particular
25 area?

1 MR. PICKER: I think you should ask Tom whether
2 he gives advice to his clients. Isn't that the question?
3 I think that's the proof in the pudding.

4 MR. CAMPBELL: Tom, I've written opinion
5 letters and cited consent decrees and said this is what
6 the enforcement position of the agencies are. And then I
7 evaluate the risk of not going that way.

8 MR. PICKER: Right, right.

9 MR. CAMPBELL: And I don't mean to discount the
10 values of -- of consent decrees for that purpose. But,
11 you know, in responding to Terry Calvani, I'm not going
12 to cite a consent decree.

13 MR. ABBOTT: Fred, Fred McChesney?

14 MR. McCHESNEY: This is really a question, but
15 I can imagine that there's a bit of the problem with the
16 settlement process in something that Tom actually alluded
17 to already and that is that the private party just wants
18 to get out of there. And what is written up in the
19 settlement, what is written up in the consent is probably
20 not of great importance to the private party. At least
21 not as important as it is to the agency itself because
22 they may well go back to that well again and they would
23 like to have it drafted in a certain way. Presumably the
24 party that's consenting out or settling out is not
25 expecting to be back that way again. And I wonder if,

1 therefore, there's a bit of a bias that goes along with
2 that entire process, one whereby the private party just
3 wants to get out and the Commission is happy to have it
4 settled too as long as it gets to write the official
5 record, so to speak, as it gets to record what it is that
6 this case was about. That's me wondering hypothetically,
7 so to speak. I don't know whether that actually occurs
8 or not but, Tom, you may have some insight into that.

9 MR. CAMPBELL: Well, I think that's a valid
10 problem with consent decrees is that the agency will have
11 a theory that they want to promote and it may or may not
12 have any validity to -- and just to give an example of
13 that. If you go back to Aetna Pru, which I guess that
14 was a Justice Department consent decree, but there's a
15 whole section in there about monopsony, which was the
16 first time it had ever been used as enforcement theory
17 and it hasn't been used since. But you know, there it
18 is. And I'm sure the parties couldn't care less about
19 it.

20 MR. PICKER: Well, and you would think, right,
21 again, someone managing a portfolio of litigation, I
22 think of Thurgood Marshall doing that for the NAACP, has
23 obviously got a whole litigation path that one is
24 envisioning and the equivalent for that for the FTC
25 should be a whole path of consent decrees, right?

1 They're not going to litigate, that's what you say? They
2 know they're going to settle today and they're going to
3 settle tomorrow. And the question then is really a
4 question for Alden, right, is how do they -- how do they
5 think they can influence the third settlement based on
6 what they do in the first settlement, right?

7 MR. ABBOTT: Interesting. What about closing
8 statements? When the agency doesn't take action. We had
9 some reaction to that from some panelists in London
10 recently who think they would like to know more about the
11 reasoning of the agency. And that's happened a few times
12 now. I think in the cruise lines merger, the decision
13 not to go forward in that. Should the agency make --
14 obviously it's resource intensive, you have to take time
15 doing it. But should more use be made of closing
16 statements, what is their role in enforcement, the
17 effectiveness of enforcement?

18 MR. PICKER: Well, again, when we get to R & D,
19 I'm going to talk about -- a little bit about
20 one-sidedness of information. And I think it's very
21 important that you generate sort of symmetric information
22 and -- and so the closing statements is a very good
23 example of that, right? So -- so you've obviously spent
24 a lot of time thinking about a particular issue, maybe
25 not as much time as the consent decree, certainly not as

1 much time litigating, but a fair amount of time. And to
2 not sort of close the loop with the -- you know, as -- as
3 -- a reasonably full description of why you chose not to
4 go forward, you're depriving, as it were, the market.
5 And Tom is our representative here for the market of what
6 might be valuable information.

7 And so -- again -- I'm -- I'm in favor of
8 knowledge. But yeah, I think those actually are very
9 important. You know, I certainly read them when they come
10 out if they're interesting.

11 MR. ABBOTT: Josh Wright.

12 MR. WRIGHT: Just a -- a quick point on the
13 closing statements, I mean, one can imagine -- I don't
14 know whether this is -- this is true or not. But I can
15 certainly imagine the argument that if closing statements
16 are going to be issued in a case, it makes -- there's
17 incentive to make the analysis a little bit more careful
18 along the -- along the path there.

19 MR. CAMPBELL: Sure.

20 MR. WRIGHT: And there's certainly nothing
21 wrong with that.

22 MR. CAMPBELL: Actually, it's not just closing
23 statements in -- for example, in Evanston Northwestern, a
24 lot of the decision is based on a pricing study conducted
25 by -- what's the woman's name from CRA who was their

1 expert witness, anybody remember? It what was someone
2 else.

3 Anyway that was under seal so when you get the
4 opinion, it's got, you know, holes in it where there's
5 confidential information that's never been opened. So to
6 be able to look at the basis for that decision and its --
7 and its -- part of it is based on this pricing study, you
8 don't know what you're dealing with.

9 MR. PICKER: I always tell my students the
10 Sherlock Holmes silver blade story where the key fact is
11 why the dog doesn't bark, right? Very important to not
12 get, you know, too focused on what does happen.
13 Sometimes what doesn't happen is just as important. And
14 the closing statements are a way of giving a greater
15 sense of that.

16 MR. ABBOTT: Let me shift gears very briefly
17 and ask about -- assuming the FTC has an important role
18 to play in enforcing the antitrust laws through
19 administrative litigation or litigation in general, does
20 it have adequate remedies? And in particular, of course,
21 the FTC lacks civil fines authority. Does that somehow
22 reduce deterrence, is there -- are there any statutory
23 changes, should the FTC be given civil fines authority?
24 Should it make greater use of Section 13B to obtain
25 disgorgement or should it not have such authority?

1 MR. CAMPBELL: Is Mylan the only disgorgement
2 example or are there others?

3 MR. ABBOTT: Well, there are certainly plenty
4 more, I think, in the consumer protection but there
5 haven't been many in the competition area.

6 MR. CAMPBELL: Well, I think Pitofsky wrote
7 something to support the disgorgement remedy in Mylan and
8 I think everybody went along with that. But again it's a
9 settlement --

10 MR. ABBOTT: Right.

11 MR. CAMPBELL: -- and not a contest at anything
12 so ...

13 MR. ABBOTT: There is a commission, of course,
14 policy statement extant in -- in that area about under
15 what -- what conditions -- you know, conditions of
16 clarity, ability to measure, the Commission would seek
17 disgorgement, of course.

18 MR. CAMPBELL: Well, the question I have is
19 it's a fine remedy but who gets it?

20 MR. PICKER: Well, from a deterrent standpoint,
21 of course, you don't care, right? If that's your theory
22 of what we're doing here --

23 MR. CAMPBELL: Well, I might want to be a
24 commissioner if --

25 MR. PICKER: You can take the money from

1 someone and put it down on the ground and light it on
2 fire, you get the deterrence effect. So who gets the
3 money is a detail. But I realize, you know, you might
4 care. The Commission shouldn't necessarily care.

5 MR. ABBOTT: What about civil penalties?
6 Anyone think it would be a good idea for the FTC to be
7 statutorily authorized to impose civil penalties in
8 enforcement actions?

9 MR. PICKER: As you watch the EU levy fines
10 against Microsoft, like that? I mean, just -- so --
11 maybe that's a sort of fresh example.

12 MR. ABBOTT: Is there anyone here that would
13 defend the idea of civil penalty authority?

14 MR. HARROP: I guess I probably should since I
15 have it.

16 Obviously, though, I don't have any of the
17 other tools that the FTC has and civil penalties are one
18 way of getting to a -- a resolution that doesn't get you
19 involved in a large number of very complicated damage
20 calculations that would be involved if you bring an
21 action strictly on behalf of a disgorgement or a recovery
22 for a consumer kind of case.

23 They are, of course, seldom used. If for no
24 other reason than the fact that a company will go to you
25 and be much happier to pay you x number of dollars as a

1 damage claim because they can write that off on their
2 taxes; with a civil penalty they can't. And so
3 oftentimes the civil penalty may be just there as a
4 potential backstop and we usually end up talking about
5 settling cases based on damage figures rather than civil
6 penalty calculation.

7 MR. ABBOTT: Okay. Before leaving this topic,
8 let me just ask you in general, the relative magnitude of
9 bringing different kinds of actions. Of course, the FTC,
10 like the Justice Department, gets an array of merger
11 filings from one of the functions of the economy, should
12 greater or -- and is it bringing a certain number of
13 cases.

14 Is it bringing the right mix of cases, is the
15 right emphasis on types of cases? Does anyone have any
16 general ideas about given the scarce competition
17 enforcement resources, how should those resources be --
18 well, best allocated?

19 MR. PICKER: Well, to an outsider at least,
20 I'll say Whole Foods is an interesting case. You know,
21 premium, natural, organic, whatever we want to define the
22 market, I would have thought -- I don't want to say it's
23 small potatoes -- but I need some exotic type of
24 potatoes, is what I really need, right, small organic
25 potatoes, right? I wouldn't have thought that would have

1 been that important of a topic that, you know, fun to
2 read, fun to think through. You know I wish the expert
3 testimony was fully out there so we could know what the
4 numbers are. I can't really assess the case without
5 those numbers. Maybe there's a lot of harm going on
6 there each time I walk into Whole Foods. I wouldn't have
7 thought that would have been where we would have started,
8 though, so ...

9 MR. ABBOTT: Josh?

10 MR. WRIGHT: So -- so no, we're not going to be
11 able to estimate with any confidence the magnitude of
12 these different effects. I mean, the whole idea is that
13 the cost and benefits of the enforcement action or the
14 conduct are dispersed through lots of markets in lots of
15 different or interesting ways. And, you know, if you win
16 an enforcement action and you stop some type of conduct,
17 you've got, you know, an alternative form of conduct that
18 arises.

19 And so can we measure those sensibly? Probably
20 not. But I think thinking about these cases in terms of
21 error costs can be useful. I mean, if you take Whole
22 Foods as an example. So some of the numbers from those
23 expert reports are available. And I mean, if you're
24 talking about -- let's say, possibly at the top end of
25 the estimates, you know, one percent changes in the

1 price, and not incredibly precise estimates. You know,
2 you may have a weak belief that prices may go up a little
3 bit. You compare that to Staples and you've got, you
4 know, giant effects, you know, sort of much larger in
5 magnitude. And -- and, you know, we can't compare sort
6 of whether the estimates there are better or not. So I
7 won't touch that.

8 But it strikes me that the best case scenario
9 there is that you're going to do a little bit of a good
10 in a market that, you know, like Randy said, I mean, this
11 isn't -- you know, this isn't premium organic potatoes
12 and that -- that -- that might be small potatoes relative
13 to some of the other ways we can allocate our resources.
14 So that -- that's one way to think about it. What's the
15 best case scenario if you -- if you win and what sort of
16 harm are you doing if you're wrong?

17 MR. CAMPBELL: Well, clearly, you know,
18 supermarkets and healthcare are areas that impact
19 consumers so an emphasis on enforcement in both of those
20 areas is appropriate. I guess the question Randy is
21 asking is, you know, if there's a conspiracy amongst
22 Mercedes dealers, do we really care about protecting
23 those consumers. I --

24 MR. PICKER: I hate to sound like an
25 egalitarian but yeah that was, I guess, sort of the point

1 a little bit, yes.

2 MR. CAMPBELL: And I find consumer injury in
3 the Whole Foods thing a little hard to swallow.

4 MR. ABBOTT: Okay. Well, we'll -- we'll be
5 talking about enforcement aspects as we go on. But let's
6 go on, shift gears, and ask Blake Harrop to talk about
7 the issuance of guidelines. And in particular, you know,
8 is the issuance and revision of enforcement guidelines,
9 has that been beneficial, can you estimate the benefits
10 or in general, what's your comment on the quality and
11 usefulness of the guidelines?

12 MR. HARROP: Let me sort of take a general
13 overview of guidelines, although I'm going to keep my
14 comments a little bit shorter than Tom's because the
15 number of guidelines that have really been a major
16 influence in the antitrust area have been in the merger
17 area. And I don't think that's a coincidence.

18 Merger law, particularly if you read say, 20
19 district court decisions, is at best opaque and maybe
20 completely and totally incomprehensible. And we're
21 dependent to a large extent, and when I was in private
22 practice as well, on trying to advise your client as to
23 what the agency's responses are going to be because if
24 you can avoid the coin flip that you often get in the
25 district court and figure out ahead of time what the

1 likely result of the enforcement agency is, you're way
2 ahead of the game.

3 And in that respect, I think the merger
4 guidelines, you know, do what they purport to do, which
5 is to give you some insight into how the agencies do what
6 they are going to do.

7 The problem with guidelines is that they're
8 large massive undertakings; they take a long time to get
9 done, they get a long time to get revised. And policy
10 issues -- or policy positions, I should say, change
11 quickly within the agency, particularly from
12 administration to administration. And that raises, you
13 know, in my mind having a question -- having not issued
14 any Illinois attorney general guidelines, whether it's,
15 you know, it really is reflective at any one point in
16 time of what the agencies are doing.

17 We've all heard the remarks about if you look
18 at the HHIs indexes and, you know, which ones are likely
19 to be challenged, which ones might be challenged, and
20 which ones are safe and you sort of wrap everything down
21 when we've been in the last -- you know, 8 or 10 years of
22 administration. Where, you know, you really have to be
23 in an absolutely definitely will be challenged category
24 before you even have to worry a whole lot.

25 And those guidelines, if they're going to

1 reflect the first purpose being what the agencies are
2 doing, have to be up-to-date with that particular agency
3 and that's difficult to do.

4 The second thing that they can do is to provide
5 an educational benefit to try to influence how the law
6 develops. And that's been done with a variety of
7 guidelines. The merger guidelines are probably the most
8 successful in that regard because I think now at least
9 every decision you read tries to mimic the merger
10 guidelines in trying to follow through what steps to go
11 through, the market definition, the determination of
12 market shares, the SSNIP tests, the efficiencies
13 defenses, et cetera, and you go through it basically
14 almost in the order the guidelines have them.

15 Attempts to change policy in other areas have
16 been, I think, less successful. I think that's due to
17 the fact that the case law in those areas has developed
18 much more extensively and much more coherently than it
19 has in the merger area. I mean, the vertical guidelines
20 and I could point you to either the federal ones or the
21 state ones. And I think these are difficult for anyone
22 here to be able to recite much of either one of those
23 sets of guidelines because they have not been as
24 influential. Which raises the question of whether trying
25 to, you know, consolidate law, change law, whatever you

1 think the guidelines are, going through the guideline
2 process is particularly useful.

3 The -- the third purpose of guidelines, though,
4 which I think you have to be aware of if you are an
5 enforcement agency is they become sort of a checklist
6 that a defendant can use to say okay, did you do each of
7 these steps in this particular case even if it's not
8 meaningful to do so? And my -- my -- my daughter, who is
9 a big criminal procedures kind of TV show fanatic -- you
10 know, thinks whenever you have a murder investigation,
11 you collect DNA evidence, you do all this other stuff,
12 and, you know, it would be like -- you know, a prosecutor
13 standing up and saying I'm going to prove a murder case,
14 the defense saying, well, you didn't do all the steps we
15 saw on TV, and the prosecutor saying, yeah, but I've got
16 three eyewitnesses that saw the guy shoot the guy.

17 I mean, there are things you take shortcuts on
18 sometimes. And if you have these guidelines in place and
19 it becomes a checklist, sometimes, particularly with
20 judges, they're having to apply them, you may be in a
21 situation where, you know, what doesn't really make sense
22 to be done ends up becoming a requirement in that
23 particular litigation. And I think that's a, you know, a
24 third consideration. They become a checklist for the
25 defendant to use and are they really designed to do that

1 and are there ways of protecting the enforcement agency
2 from doing that?

3 Finally, I think the other thing that you have
4 to deal with is whether -- is the purpose of the
5 particular guidelines. Are they, as they were originally
6 intended to be, the original merger guidelines in the
7 4-firm, 8-firm concentration ratios, supposed to be an
8 insight into how the agency is going to evaluate a
9 particular case or are they supposed to reflect the best
10 learning we have on antitrust law at the time they come
11 out. And those, you know, have been blended to the fact
12 that the agencies try to say they're both.

13 And I'm not sure that's particularly useful
14 because, as I said, oftentimes the agency will be making
15 decisions based on issues beyond just what the law is.
16 We've already touched on them. We have limited resources.
17 You know, we may not bring a case which is, in fact, you
18 know, what we think is a clear violation of the antitrust
19 laws because the people affected happen to be Bill Gates
20 and Warren Buffet and they can take care of themselves.

21 Or it could be that we don't bring the case
22 because of some other factor that just doesn't have
23 anything to do with the substantive antitrust analysis.
24 But if that is something that we want to disclose to the
25 public as an enforcement technique, do we also want it to

1 become substantive law down the road because those are
2 two very different things. And I guess with that I'll
3 throw it open to anyone else.

4 MR. CAMPBELL: I would just like to put on the
5 table one other area of guidelines which is these
6 healthcare enforcement statements which are used
7 extensively. And, you know, in -- in the healthcare
8 arena, you have disproportionate bargaining with the
9 insurance companies having size of networks and so forth
10 and the physicians are sitting there trying to figure out
11 how can they band together, even though, they're all
12 independent and so forth.

13 So there's for hospitals and other healthcare
14 organizations following these guidelines that create
15 safety harbors, that's a very useful enforcement tool. I
16 think in that industry you're going to find people
17 designing their business operations and compliance with
18 those to a great extent. There are gaps where the
19 agencies haven't spoken and if you want to put on your
20 list of things that need clarification, Alden, this issue
21 of clinical integration would be the thing that'll be
22 addressed so put that on your checklist.

23 MR. PICKER: That's so interesting because --
24 so you don't like consent decrees.

25 MR. CAMPBELL: I knew you were going to do that

1 to me.

2 MR. PICKER: Well, of course, what else can I
3 do? You've got guidelines.

4 MR. CAMPBELL: I've got clients. I've got to
5 put something in my opinion letters.

6 MR. PICKER: Okay. Because I would've thought
7 you would have said the consent decrees were a kind of a
8 guideline, right, and so I find that really interesting.

9 MR. CAMPBELL: Do I have to be consistent?

10 MR. PICKER: Sometimes.

11 MR. CAMPBELL: I think the guidelines are an
12 exercise in agency transparency obviously. I think how
13 much of that you need is obviously a function of what
14 other mechanism of transparency there are. I think in a
15 world in which we're not going to litigate many cases --
16 many cases, maybe that's mergers, then we need more
17 transparency and so the guidelines are more valuable.

18 Safe harbors are interesting, obviously,
19 because they really provide concrete guidance to the
20 parties.

21 MR. CAMPBELL: Exactly, exactly.

22 MR. PICKER: And that's obviously very
23 valuable.

24 MR. CAMPBELL: Right.

25 MR. PICKER: Right.

1 MR. CAMPBELL: And we should probably put in
2 the same discussion the ability to ask for one of these
3 letters of advice you go in for and so forth.

4 MR. WRIGHT: The business --

5 MR. ABBOTT: The staff advisory, yeah, business
6 review letters, widely used by the Justice Department,
7 not as widely used by -- used by the FTC, although the
8 FTC has procedures for staff and commission letters.

9 MR. PICKERS: Yeah. And I don't litigate but
10 from a teaching standpoint, the business review process
11 is really interesting, right? I teach a number of those
12 actually, the DVD one. And you know, the back and forth,
13 and -- and you can very much see again, it's sort of like
14 the safe harbors, a chance to have some confidence about
15 how your business affairs are going to be organized going
16 forward. They're obviously not -- they don't technically
17 prevent a challenge but as a practical matter they seem
18 to do so.

19 MR. CAMPBELL: Right.

20 MR. ABBOTT: Would it be recommended that the
21 FTC encourage private parties to ask for more advisory
22 letters?

23 MR. CAMPBELL: Advisory letters are negotiated
24 and at some point you don't ask for one if you're not
25 going to get the answer you want.

1 MR. ABBOTT:

2 MR. CAMPBELL: And so I think the process has
3 to be one where the agency makes it clear that you're
4 welcome to come in and explore, is this something they
5 would give you a green light on?

6 Some -- you know, there have been a couple of
7 instances where the agencies have thrown people a curve
8 ball after they thought they were going to get an
9 approval. So there may be some reluctance to take a
10 transaction and -- and I don't know what's the right
11 balance there.

12 MR. PICKER: I mean, the business review
13 process is -- is typically -- I don't want to say
14 typically but in many of the cases, you're putting into
15 place this elaborate institutional set of arrangements,
16 right? So when you're organizing these patent pools and
17 then the structure is based upon them, that's a DVD case,
18 that's the 3G Wireless case. And you really want to
19 build an industry that's going to leverage off of that.
20 And you want to do that with some confidence. So the
21 underlying structure works, that's valuable.

22 MR. WRIGHT: A related point going back to
23 guidelines for a second. You know, at the end of the
24 Section 2 hearings as part of the antitrust modernization
25 committee hearings, every once in a while after workshops

1 or conferences that the FTC will hold on various topics,
2 I'm thinking of slotting fees, which is something I've
3 written about, you'll get calls for guidelines about
4 these things. You'll get, we want some slotting fee
5 guidelines, we want some monopolization guidelines, maybe
6 some vertical restraint guidelines too.

7 And no doubt these things could produce some
8 welcomed transparency about what the agency would like to
9 do in -- in enforcement activity on these topics. But,
10 you know, there are transparen- -- there are trade-offs
11 between transparency and getting it right.

12 And, you know, I would say, sort of first
13 principle of articulating guidelines should be, that
14 there ought to be some consensus about the competitive
15 effects or what we know -- what we know about these
16 practices. And I think, you know, despite the fact that
17 we're probably missing some transparency on the agency's
18 approach to monopolization or vertical restraints, we're
19 probably better off for it. Because I think there's very
20 little consensus on how to -- how to figure these things
21 out. And I think we ought to approach guidelines
22 cautiously in areas that are -- that sort of fit that
23 description where we just don't know a heck of a lot.

24 MR. PICKER: Well, and I think the safe harbor
25 notion means you think you need to be able to define a

1 well-defined class of cases so that you can say we're in
2 this box and we think that we understand it.

3 MR. WRIGHT: That's right.

4 MR. HARROP: That usually comes after a lot of
5 experience that the agency has.

6 MR. PICKER: That's true.

7 MR. HARROP: And, you know, areas like slotting
8 or something that sort of pops us, everyone would like to
9 know the answer right away, we just don't know the answer
10 yet.

11 MR. WRIGHT: Right.

12 MR. HARROP: And until the agency has a lot of
13 experience -- it both lacks information to make the
14 decision, it also lacks the authority that comes with
15 having litigated a lot of these cases, or at least
16 investigated a lot of these cases, and know the answer.

17 MR. WRIGHT: Or I can just send them my paper.

18 MR. PICKER: Yeah, right. I mean, hard to do,
19 right? You think of the Hatch-Waxman stuff we're seeing
20 right now. There's a lot of churn there. I don't think
21 we know where we are on that. If you think of the -- you
22 know, LePage's type bundling, a lot -- you know, a lot of
23 analysis. I don't think we know where we are on that
24 yet. And those are both areas where you can imagine
25 people wanting guidelines/safe harbors and maybe we're

1 not there yet.

2 MR. ABBOTT: Before leaving guidelines and we
3 have a lot still to cover, one question that's been
4 raised by commentators more recently is direct effects in
5 merger cases. And, of course, some critiques have been,
6 look, the guidelines talk very explicitly about market
7 definition and that may have influenced the courts. It
8 might make it more difficult for the agency, say, to
9 bring a direct effects case without a detailed market
10 definition. Is that something that should be examined,
11 corrected, or not changed in guidelines?

12 MR. HARROP: It should be corrected right away.
13 I think the market definition issue can get -- a lot of
14 these cases, like I was talking about before. Often in a
15 lot of these cases, market definition is essential
16 obviously. But it -- it becomes a distraction in some of
17 these cases where -- particularly, I think, in a lot of
18 these healthcare cases, you'll see the court go through a
19 long line of analysis of what the role of their market
20 is. And then at the end say I don't really care, this
21 isn't any situation where the merger needs to go through
22 to improve healthcare in the local area.

23 Well, if that's going be to the key issue, then
24 let's not spend resources defining the market. Let's
25 spend resources determining what the effect on healthcare

1 is going to be in that market. And -- but unfortunately,
2 you know, with the guidelines that you have in place and
3 the state agencies basically end up having to live with
4 the same guidelines, the court is going to -- the
5 defendant is going to demand and the court is going to
6 expect the court to have what to have a bunch of
7 economists come in and talk about what the market is.
8 Which is interesting because, you know, having also done
9 a lot of economic work, markets are something economists
10 really don't know what they are. And, you know, if you
11 don't believe me, pick up an econ 101 text and look for
12 relevant market in there and you'll never find the term.

13 But it's something that we do want to do in a
14 lot of cases because it's essential to figure out whether
15 or not there's a potential competitive concern. But a lot
16 of the other cases, you know, we understand that the key
17 issue is going to be something else direct and direct
18 cases obviously one of those. So, yeah, I would like to
19 see more flexibility in the guidelines for both the
20 courts and the enforcement agencies to do an analysis
21 that doesn't have to go step, by step, by step in every
22 single case.

23 MR. CAMPBELL: I'm a cynic about direct
24 effects. I think that the agencies have glommed on to
25 direct effects because of their inability to define

1 persuasive markets. And I think the statutory
2 underpinnings of Section 7 -- geographic market, product
3 market -- require some attention to the structure. And I
4 think that a case that doesn't have persuasive markets
5 and points to -- for example, profits. You know, that
6 seems to be something that some economists are looking at
7 is profits or price differentials.

8 In Evanston Northwestern, the rate of a price
9 increase -- you know, if you've -- what were the
10 pre-prices, if they were below a competitive price level,
11 the rate at which you increase a price does not show
12 market power to me. So I just find some of this stuff
13 that people are trying to point to show direct effects to
14 be very unpersuasive.

15 MR. PICKER: And you think the market -- I
16 heard what you said about the statute and, you know, the
17 rules are the rules. But you think it's -- it's
18 important in terms of organizing the analysis.

19 MR. CAMPBELL: And I think if you go back to
20 most of the precedents, certainly in the Supreme Court on
21 mergers, there's a lot of attention paid to the market
22 and who is there and who is being hurt. And so I think
23 that has some -- you know it's stood the test of time.

24 When we get to Evanston Northwestern, the
25 agency spends a lot of time saying that Elzinga-Hogarty

1 is meaningless and they trot out Elzinga to say his own
2 test doesn't work, which is -- I'll never understand
3 that.

4 But I think it's a mistake to throw out that
5 mode of analysis. I think the jury is out as to whether
6 critical loss is an analysis that we ought to be paying
7 more attention to. But I think the agencies are groping
8 to looking at these price differentials, to look at
9 profits, things like that, and I'm not convinced they
10 show us direct anticompetitive effects.

11 MR. ABBOTT: I think I come out somewhere on
12 the middle of this. I think if you think of a case like
13 Staples, either Bill Bear or John Baker or George Cary,
14 one of them has described this as a one-fact case where
15 they sort of repeatedly show the market differentials.
16 They do it in market definition, they do it in
17 competitive effects, they do it in entry, and they say,
18 see, price differentials, no entry, right? And so it's a
19 one-fact case. And I think this is sort of the
20 paradigmatic case where you can say, can we please just
21 do competitive effects and be done?

22 MR. CAMPBELL: I agree.

23 MR. WRIGHT: And save a lot of resources. So I
24 think there exists a set of cases out there where the
25 direct effects approach, I think, is promising in a

1 number of ways. On the other hand, I'm certainly
2 sympathetic to the view, and I think some folks have
3 written about this, that the market definition algorithm
4 provides some discipline so that we don't let these sort
5 of unilateral effects cases run wild. And frankly this
6 is one of the areas where I think still has to be played
7 out. We don't know enough about the way these unilateral
8 effects theories work in practice, what the actual
9 effects of these mergers are, et cetera, and we can talk
10 about that in the R & D portion of the talk.

11 But you know, I think it is -- it's tempting to
12 play gotcha with the guidelines to the agency and say,
13 but you said you had to define a market. It is tempting
14 to do that, but I'm not sure if it's better than a gotcha
15 point. But whether -- whether the discipline imposed by
16 the definition exercise outweighs -- I mean, if it's a
17 really small set of the cases that look like Staples --
18 you know, I think originally Whole Foods was supposed to
19 look like that.

20 MR. PICKER: Yes.

21 MR. WRIGHT: If it's a really small set of
22 cases, then what's the loss of imposing the discipline of
23 the market definition test. But I -- I just don't know
24 what the answer is to what those -- what those trade-offs
25 look like.

1 MR. ABBOTT: Okay. Well, at this point, having
2 made reference to -- to nonlitigation matters, we can
3 keep on going, but unfortunately time is short. So let
4 me turn now to Fred McChesney to discuss competition
5 advocacy whereby the FTC attempts through letters,
6 speeches, and so forth to provide support for taking
7 competition and competition principles into account in
8 regulation, in law. Fred?

9 MR. McCHESNEY: Thanks, Alden, and thanks for
10 inviting me here today.

11 When I was at the Commission a long, long time
12 ago, I was part of the group that went down with Jim
13 Miller and Tim Muris, as Alden mentioned. There had been
14 a sort of fitful history of competition advocacy
15 beforehand but not the -- the sort of regular systematic
16 program that we tried to introduce then. And as Alden
17 has mentioned, it's a -- it's an unofficial, if you will,
18 system of speeches, advocacy, attempts to influence other
19 agencies and what have you, to the extent that those
20 other agencies have before them issues involving
21 competition or consumer protection. But we're talking
22 competition here today.

23 When I was there then, I was the one who was
24 responsible for organizing what it was that the
25 Commission did during the time I was there in the area of

1 competition advocacy. That was sometime ago.

2 Whether things have changed a great deal since
3 then, I don't know. But certainly based on what was done
4 back then and I realize that our fundamental question
5 here today is to talk about the extent to which we can
6 say that FTC enforcement efforts have on the whole been
7 cost-justified, have been beneficial in excess of cost.
8 I thought that the competition advocacy was one of the
9 great successes of the Federal Trade Commission. I
10 thought that the benefits clearly exceeded the costs for
11 -- for some very simple reasons.

12 First of all, the quality of the economists at
13 the Federal Trade Commission and the level of economic
14 understanding of the lawyers at the Federal Trade
15 Commission is extremely high. There's a real comparative
16 advantage among the personnel, be they economists or be
17 they lawyers at the Federal Trade Commission in
18 understanding the competition implications of what it is
19 other agencies might be doing.

20 Proof of the quality, I think, is seen for
21 example in the fact that there are very few government
22 positions as economists where overall one could increase
23 one's stature as an economist by going to work for the
24 government. If you're a -- if you're an economist at
25 some other department, commerce, agriculture, what have

1 you, you were a whole lot less likely to attract the
2 attention of -- ultimately of academic institutions or
3 whatever it might be.

4 Whereas economists who were at the Federal
5 Trade commission are thought of probably among the best,
6 if not the best, in government.

7 And they have -- they have already in effect
8 learned what -- most of what needs to be learned about
9 competition. They did that as part of their degrees. The
10 fixed costs have been incurred. The marginal costs then
11 of applying what they've learned to particular situations
12 that present themselves in Washington or elsewhere
13 perhaps, is relatively low.

14 So the costs are -- are somewhat slight as
15 compared to what's at stake in some of these proceedings
16 when -- when I was at the FTC and was organizing many of
17 these efforts. A big area of concern at the time was --
18 was going on or the issues were at the Federal
19 Communications Commission, grant of new spectrum space,
20 new licenses, and what have you. And the FCC was
21 spending a great deal of time trying to figure out who
22 ought to get spectrum, who ought to get new licenses and
23 what have you. And the Federal Trade Commission
24 routinely got involved in these proceedings just to make
25 the simple point that it didn't really matter who got

1 them.

2 What mattered was to define the property
3 rights, get the property rights well-established, and
4 then step back and let the market buy and sell the rights
5 and perhaps there would be constraints imposed by the
6 agency for various public policy reasons. But fine, the
7 agency could -- could -- could impose whatever additional
8 restraints it wants to.

9 But that was no reason to sit around and worry
10 about who was going to end up with these things to the
11 point of delaying year after year after year the grant of
12 these licenses. Go ahead, grant them -- we used to go
13 before the Commission and repeat all the time, go ahead
14 and grant the licenses and then stand back and let the
15 licenses trade in the market subject to whatever
16 constraints you want to impose for noneconomic reasons.
17 And you'll get the best economic solution that way.

18 Now, that seems rather elementary, rather
19 commonsensical. But I guarantee it was not at the
20 Federal Trade Commission -- excuse me -- the Federal
21 Communications Commission at that particular point in
22 time. They acted as if whoever got these licenses was
23 going to have them forever and it therefore did matter to
24 whom they gave them. When, of course, it doesn't as long
25 as these things can trade.

1 So that's just an example of the kind of thing
2 that we used to get involved with. And I put that
3 example out there to illustrate once again what a
4 relatively simple economic concept this is, no one had to
5 go back to school to appreciate this or learn this.

6 But at the same time, the benefits associated
7 with getting this one right, with getting competition
8 into that business were extraordinarily large. And we
9 did win a few. We did -- we did get to savor some
10 triumphs where the benefits were incurred at relatively
11 low cost.

12 This is not to ignore the fact that there are
13 problems sometimes within the agency itself, within the
14 Federal Trade Commission in the competition advocacy
15 process. Some of the lawyers didn't care to work on
16 these things. They're not litigation-based, they're not
17 traditional lawyer work. And so sometimes it was hard to
18 find people who really had the fire burning within who
19 wanted to go down and undertake those kinds of things.

20 And by the same token, the economists,
21 sometimes it was difficult to find those who wanted to
22 get involved in these kinds of things. These are not
23 complicated problems oftentimes, as I just mentioned.
24 There's no math, there are no second differentials,
25 oftentimes there are no econometrics. You're making

1 basic -- if not economics 101 type arguments, nothing
2 oftentimes more highfalutin than an intermediate price
3 theory argument. And for those who have put in their
4 time getting their Ph.D.s and what have you, sometimes
5 this just isn't very interesting.

6 So even though externally the benefits were
7 there, in my experience, at least, it was sometimes
8 difficult to enlist the full vigor of the Federal Trade
9 Commission in pursuing those benefits. But where we
10 could do that, it was very clear to me that the benefits
11 exceeded the cost.

12 I think that the role of competition advocacy
13 ought to be a bigger part of what the Commission does,
14 quite honestly. Again resource wise, the demand on the
15 agency resources is fairly minimal. The prospects for
16 making a world a better place are great. I'm glad to see
17 that it has remained an important part of the
18 Commission's mission in the 20-plus years since I left
19 them.

20 The problems are different but I think the
21 process is still the same. And I think the Commission's
22 prestige and the recognition of the quality of its
23 personnel and what have you, mean that it can really at
24 the margin make a difference in these -- in these kinds
25 of proceedings.

1 So again, to close, Alden, in terms of what
2 does and does not make sense from a cost benefit
3 standpoint, I think competition advocacy is pretty
4 clearly a winner.

5 MR. ABBOTT: Well, that's a very positive
6 report on competition advocacy. Of course, they were all
7 -- you mentioned various constraints, internal, sometimes
8 there are external constraints, public choice, I guess,
9 that there may be outside groups including outside
10 agencies who may or may not necessarily be very
11 interested in responding to the substantive arguments.

12 Are there any additional thoughts on the value
13 of advocacy and how -- not to throw, okay, resources
14 devoted to advocacy, but what format the advocacy should
15 take? Anyone have additional thoughts?

16 MR. CAMPBELL: I don't know. One thing we
17 ought to throw on the table here is tension between the
18 Federal Trade Commission's view of competition and what a
19 state regulatory body may think and we've got that
20 Pennsylvania Power case that's currently out there where
21 the FTC wanted to not approve an acquisition and then the
22 state was going to do it and then they turned around and
23 sued them. I can't remember the name of the case. But
24 that creates some tension that we ought to put on the
25 table.

1 MR. ABBOTT: Blake, as a state official, do you
2 have any thoughts on advocacy? In recent years lots of
3 advocacy letters, for example, have been directed toward
4 proposed state legislation.

5 MR. HARROP: I think they're quite useful. The
6 State legislatures have a lot of things on their plate
7 and oftentimes what they get, particularly on particular
8 bill in particular industries, their only initial source
9 of information on those is going to be that particular
10 industry and the advocates for that industry may not have
11 the best intentions towards everyone else involved
12 particularly the consumers.

13 We've been involved -- one of the things I do
14 is also serve as chair of the National Association of
15 Attorney Generals Real Estate Task Force.

16 We've had several situations where we've asked
17 the federal agencies to come in and provide a sort of
18 quick explanation in the way of advocacy letters to
19 legislatures that have been considering various real
20 estate bills that would have, I think, in the antitrust
21 sense, have had significant anticompetitive effects if
22 they went into force.

23 And the results have not been 100 percent as
24 successful as I would like to have seen, but they have
25 had impacts in at least several cases where the

1 legislation either was completely killed or changed in a
2 major way.

3 And I think that's, you know, a very valuable
4 resource. I think it's -- you know, I'm very happy that
5 the FTC is willing to devote the resources to doing that
6 type of work. The -- you know, the other thing is,
7 though, that, you know, part of what the FTC has is it's
8 credibility, is the ability to challenge a lot of these
9 types of actions, obviously not legislation, but actions
10 by regulatory boards within the state. One way you get
11 their attention is by bringing cases that challenge their
12 activities when they do step over the lines. And that's
13 in the litigation area but the litigation plays off of
14 the advocacy letters. If the -- I'd love to be able to
15 say that everyone is persuaded by brilliant economic
16 analysis. But there's a little bit of the -- if we don't
17 do it, we may get sued consideration, that also is useful
18 in those cases.

19 MR. ABBOTT: Okay. That's very helpful. And
20 Josh Wright?

21 MR. WRIGHT: You know, I think it's worth -- I
22 was a little critical earlier in some of the merger
23 discussion, monopolization, talking about allocation of
24 resources, any of those areas, on the grounds that we
25 don't know much. I think jumping on the bandwagon Fred's

1 point, I mean, these are really areas where you've got
2 low-hanging fruit in terms of what we know -- excuse me
3 -- what we know are likely to be, for example, harmful
4 state regulations. I have in mind, you've got the FTC's
5 work in the policy shops, that they've done advocacy in
6 the alcoholic beverage industry, not only for state laws
7 that would prohibit various forms of vertical restraints,
8 ban exclusive dealing, ban the use of exclusive
9 territories.

10 So the FTC has a set of letters that have gone
11 to states contemplating passing these laws that explain
12 to them the economics of vertical restraints. They are
13 very good letters -- what the empirical literature says
14 and how this legislation is likely to harm consumers, or
15 you think about state level post and hold legislation,
16 which I mean, on its face, these are intermediate price
17 theory arguments. They would allow -- excuse me. They
18 would force liquor wholesalers to get into the same room
19 and post prices to each other in advance of setting them,
20 right? And -- and I don't think it takes a Ph.D. in
21 economics to think that prices will -- will go up as a
22 result of these regs.

23 And so you've got to have somebody get out and
24 do advocacy with the states for these things. I think
25 it's incredibly useful and I think is one of the sort of

1 no-brainer allocation of resource issues you have in
2 terms of competition advocacy and given sort of the
3 fraction of what we know, what we don't know in this
4 area, I mean, that's really saying something, I think.

5 MR. PICKER: So we think those are typically,
6 though, industry capture regs, right? The states aren't
7 confused about, certainly the people pushing for these
8 restraints aren't confused, so do you think this is about
9 information or about raising the cost as it were which
10 the states know they shouldn't be doing in the first
11 place.

12 MR. WRIGHT: I think it's actually a split
13 story, right? So the post and hold regs, I can't believe
14 anyone in these states thinks this is anything other than
15 a wholesaler capture reg.

16 MR. PICKER: Okay.

17 MR. WRIGHT: But when you get into things like
18 franchise termination laws and exclusive territories, and
19 bans on exclusive dealing, you know, I think the stories
20 are slightly more complicated for the vertical
21 restraints. For the post and holds, you know --

22 MR. PICKER: Right.

23 MR. WRIGHT: -- I think it's pretty straight
24 forward.

25 MR. McCHESNEY: I think, too, if I can jump in,

1 in many of these situations, even if almost everybody
2 understands why this is a bad idea, there isn't anybody
3 who's willing to come forward within the agency --

4 MR. PICKER: I understand that.

5 MR. McCHESNEY: -- to make the argument because
6 the agency, at least on that particular issue, has been
7 captured. But to have someone come in from the outside
8 who doesn't have a -- who doesn't have a dog in the fight
9 really, doesn't have a stake, and is willing to make that
10 argument. First of all the argument gets made and
11 perhaps those on the inside who were a little reluctant
12 to make their own views known, now have a little extra
13 reason to come forward.

14 So like everything else in the economics, it's
15 -- the influence is at the margin.

16 MR. PICKER: Right.

17 MR. McCHESNEY: And if you can just move that a
18 little bit, again given the relatively low cost of doing
19 it, probably you've got something that makes sense to do.

20 MR. PICKER: I thought Fred's initial story was
21 interesting because I -- what I heard basically was it's
22 about the quality of the professional economists that
23 they've been able to attract at the FTC.

24 MR. McCHESNEY: I think that has a lot to do
25 with it.

1 MR. PICKER: And -- and I -- I teach a course
2 in network industry so I pay some attention to the FCC,
3 some attention to the FERC, you know, at least over the
4 time period I've paid attention to the FCC, I think they
5 actually -- the FCC chief economist position is a
6 relatively prominent position. I think they tend to
7 attract pretty good people there. I couldn't name -- and
8 maybe I should just be embarrassed -- a single economist
9 at FERC. So maybe that comparison is interesting.

10 MR. McCHESNEY: Sure, sure.

11 MR. ABBOTT: Before I move on, any last
12 comments?

13 MR. WRIGHT: I -- I can't help --

14 MR. ABBOTT: One more, Josh.

15 MR. WRIGHT: I can't help but say that a letter
16 to Congress about the pending minimum RPM legislation is
17 ripe for some competition advocacy.

18 MR. ABBOTT: Very interesting.

19 And one more area of nonlitigation activity,
20 competition R & D, which is something very dear to
21 Chairman Kovacic's heart, competition advocacy, of
22 course, is complemented by improved learning in the area
23 of competition. It's conferences and workshops, reports,
24 research, how beneficial is all of this?

25 Randy Picker, could you give us yours views?

1 MR. PICKER: Sure, I was asked to talk for two
2 or three minutes so I'll try to do that. I guess I want
3 to start by saying, you know, I don't have a good sense
4 of the full scope of the FTC activities in this arena so
5 I -- I -- I think the lore on Microsoft Office was that
6 something like 27 percent of the new feature requests
7 were already in the product. So -- so it's hard to know
8 what's going on sometimes -- and maybe you're doing all
9 this already so you can tell me if you are.

10 You know, I've often thought that I should
11 teach a seminar called aftermath and what the point of
12 that seminar would be to say, well, what happens after
13 the case is done? So the nature of teaching antitrust is
14 you teach a lot of obviously the great Supreme Court
15 cases, some of the newer great cases like Staples and
16 obviously Microsoft. And the natural question is, what
17 happens afterwards? So you teach NCAA versus Oklahoma,
18 right? In that case -- you all know that case obviously,
19 but there was -- the NCAA at least nominally was very
20 concerned about in-person attendance at football games,
21 right?

22 If we put Notre Dame on every weekend, would
23 anyone still actually go to football games in South Bend.
24 If we put Notre Dame on every weekend, would I stop going
25 to see the Mighty Chicago Maroons play and just watch

1 someone else on television? Well, you know, we do the
2 case, we see what happens afterwards. And, you know, I
3 can, you know, watch the attendance figures.

4 And so I think a very, very important thing --
5 and it seems to be the FTC is exactly the right agency to
6 do this, is to systematically pull together information
7 on what happens afterwards. That should be just as
8 important -- it seems to me from a data collection
9 standpoint and a standpoint of evaluating the impact of
10 the decisions you're making as making the decisions in
11 the first place. And I think that -- that both in terms
12 of the consent decrees and your ability as it were to
13 condition those consent decrees and the ability to get
14 information going forward and the other resources. That
15 should be a very important part of what you do. And I --
16 and I don't have a good sense of how much of that you've
17 done but if I were giving Chairman Kovacic advice,
18 academic advice, I'd say you need to do a lot more of
19 that.

20 You know, the extreme version of that -- and --
21 and, boy, it's so tempting to me as an academic -- would
22 be to say, you know, you ought to invest in data. And
23 the way you do that is you look for cases that you take
24 seriously as cases where you pair them and you apply
25 different treatment effects. And you accept the fact

1 that maybe you're going to have a situation where you're
2 going to have additional competitive harm but you do that
3 because of the data you're going to acquire from it. If
4 -- if you're seriously -- if you're seriously studying
5 whether a drug does or does not help people, you need to
6 have a control group and you need to have different
7 groups that some get treated and some don't, you know,
8 placebos, and the whole bit. And so re- -- designing
9 your approach to -- to -- to -- to enforcement in a way
10 that elicits, creates meaningful information is something
11 which I suspect you haven't done much of. And which, you
12 know, you all, as we head into the second century and
13 that's obviously the set up of this, you know, you should
14 -- you've got 100 years, maybe and you should be willing
15 to have a long-term time horizon with regard to getting
16 the value of getting the information, getting it right,
17 and then -- and then working with that information going
18 forward.

19 So, you know, as I -- as we were sort of
20 talking about before, I have the nice position of being
21 able to come out in favor of knowledge and against
22 ignorance, which is, you know, sort of my professional
23 posture generally. And -- and, you know, I think the FTC
24 could devote -- you know, from an outsider's perspective
25 -- I mean, ask this question. I mean, what percentage of

1 the FTC's resources do you currently devote to those
2 kinds of activities. My guess is that's a relatively
3 small number and it should be in multiples of that.

4 MR. CAMPBELL: Randy, there was a program here
5 that Fred McChesney will remember when -- was it four,
6 five years ago when Tim Muris came here to Northwestern.
7 And at the time they were lamenting this track record
8 they were getting in hospital mergers. And Tim announced
9 that the FTC was going to do a retrospective study of
10 these --

11 MR. PICKER: That was right.

12 MR. CAMPBELL: -- these mergers to figure out
13 where their analysis was right and where their analysis
14 was wrong. And that was I think applauded by a lot of
15 people involved in those kind of cases. But it never
16 came out as to what they looked at and so forth. Instead
17 we did get another report which simply talked about
18 changing the tools by which they were going to analyze
19 mergers. But I think that would be -- to go back to
20 cases that they won, cases that they lost, and see
21 whether the -- the projected price of injury --

22 MR. PICKER: Exactly.

23 MR. CAMPBELL: -- and so forth would be very
24 valid and might very well cause you to change the tools
25 by which you analyze these transactions.

1 MR. WRIGHT: I'm guessing that they're going to
2 talk about this on the -- the panel with the economists,
3 right?

4 MR. PICKER: Yes.

5 MR. WRIGHT: But there's these, you know, these
6 merger retrospectives, you know Dennis Carlton has a
7 paper out saying we should be really careful about doing
8 them because if you had optimal -- even if you had
9 optimal antitrust policy that balances type 1 and type 2
10 errors, you get -- you get errors on the margin, right?
11 So you have it exactly right, you have your policy
12 exactly right, you don't have systematic bias one way or
13 the other. You're going to make some mistakes in so
14 doing any individual merger retrospective, let's say,
15 doesn't tell you much about systematic bias. What he
16 proposes in there as part of the data collection efforts
17 is that you get the predictions, right? So you get the
18 predicted price increases and -- and you get -- and then
19 you go and collect what really happens. You sort of
20 institutionalize this in the agency so that that's what
21 we're collecting. We're forcing everybody to write down
22 their predictions and we're going to record them.

23 I don't know if that -- I don't know enough to
24 know whether we can actually get that.

25 MR. CAMPBELL: Well, the question you're posing

1 is a good one because the merger takes place and goes
2 forward and you go back and look at prices before and
3 after and how do you control for all the other different
4 things that are going on. But you have the same issue
5 when you have a retrospective merger. If you go to the
6 Evanston Northwestern case, for example, where they're
7 talking about price increases, it's very difficult to
8 figure out what's going on there from the -- you know,
9 I've already mentioned that I think that opinion has its
10 shortcomings.

11 MR. WRIGHT: Right. And I don't want to sound
12 too, too negative on the merger retrospectives. It might
13 be correct that we can't learn from them some sort of
14 grand theory of whether mergers are under enforced or
15 over enforced. But it strikes me that there's some
16 information there about how the agency is analyzing
17 mergers and maybe what kinds of errors it's making or
18 what types of cases it's getting right. And the notion
19 that we can't get a home run with it is no reason not to
20 take the single, you know. But, yeah, I'll leave it
21 there.

22 MR. McCHESNEY: Speaking up on a couple of
23 points, one by Randy and one by Tom. And thinking back
24 to when Tim Muris was here and talked about this study of
25 hospital mergers and what have you, I don't know whether

1 this explains why we never saw anything coming out of
2 that or not. But as one who was involved in the Evanston
3 Highland Park thing myself on the doctor IPA side, not
4 the hospital merger side, one of the things that made
5 that so difficult and would make difficult the kind of
6 retrospective that Randy was talking about is that's an
7 industry where the prices are renegotiated quite
8 fitfully.

9 You don't even know for what period as you look
10 at the data retrospectively when they negotiated a price
11 increase in 1997, how long was it going to last, and they
12 lasted for periods of time. You can't find anything that
13 really tells you what exactly is being priced for how
14 long and it becomes for some industries very difficult to
15 do that kind of thing. It doesn't mean we shouldn't try,
16 obviously. But I've often wondered whether Tim didn't
17 get in there and take a look at what he had and realize
18 it just couldn't be done for that particular industry.

19 MR. HARROP: I probably should have done this
20 when I first started the presentation so I'll do it now
21 and probably do it again later on because I'm about to
22 take the position I advocate ignorance rather than
23 knowledge. So before I do that, I should say everything
24 that I've said here today and I'll say further on, are my
25 own personal opinions and not of those of the attorney

1 general of Illinois or her office or anyone else involved
2 in that office.

3 My reaction to that is the FTC is ultimately a
4 law enforcement agency, just like our offices and it has
5 limited resources. These things are fascinating academic
6 subjects. And I haven't quite figured out why with all
7 the people needing to write Ph.D. dissertations, all of
8 the people needing to get articles published, we haven't
9 seen some of the people in academics take on this topic
10 because I think academics is a better source for this.
11 It's a situation where people can put out topics and have
12 a wide variety of people critique it, debate it, analyze
13 it. Well, if the FTC does, they're going to come up with
14 one methodology, they're going to do it that way, and
15 everyone is going to have something wrong with it and
16 it's going to be a back-and-forth mess that really is never
17 going to be useful for the agencies.

18 Academics are in a great position to do, you
19 know -- maybe they can't do the entire industry, but they
20 can do two or three retrospectives. I mean, maybe Randy
21 can take a case and say, okay, what happened in NCAA that
22 gives you a nice set of papers that you can publish for
23 the next five or six years. And he will be able to
24 debate it and we may actually come up with ways of
25 getting answers to those questions without having to use

1 government resources to do that with.

2 Now, obviously if the agency -- and I think
3 what Muris was talking about was -- you know, we did have
4 the FTC and DOJ as well, had a poor track record with
5 their merger cases in the healthcare area, particularly
6 hospitals. If a retrospective gives them abilities to
7 better enforce those laws by finding different tools that
8 will work better or something like that, I think that's
9 useful. But as a purely, you know, informational
10 exercise, I think there are other entities in our economy
11 that are better suited for doing that and I would prefer
12 to see the resources used there instead of --

13 MR. PICKER: But you want to enforce with your
14 eyes closed. I don't know why you like that.

15 MR. HARROP: Well, because I --

16 MR. PICKER: I would think it would be your
17 obligation to figure out how to open your eyes.

18 MR. HARROP: I don't think anyone wants the
19 attorney generals office to be the sole source of
20 antitrust law.

21 MR. PICKER: Not sole, no, no, not sole source.
22 But what --

23 MR. HARROP: Why can't I look to the academic
24 world and say okay, you guys have done a lot of work in
25 the economic area on this topic. I'm going to integrate

1 it into what I'm doing instead of trying to invent the
2 wheel from scratch.

3 MR. PICKER: Yeah, a couple of points on that.
4 So what you guys have -- and I would like subpoena power
5 and if you want to give that to me, that's great. But, I
6 mean, you guys obviously have a mechanism for getting
7 access to information and can do this as part of a
8 consent decree that I don't begin to have. When I knock
9 on someone's door, they close the door so often, right?

10 So there -- getting -- as an academic to get
11 data, and especially these days, is very difficult. And
12 indeed the conditions under which private parties hand
13 academics data is an enormously controversial subject
14 these days. You guys are insulated from all of that.

15 We can talk about academic incentives too.
16 Obviously academics write what the market wants and the
17 absence of these suggests either huge data problems or
18 that this isn't what the academics think the market will
19 ward.

20 MR. WRIGHT: Nobody gets tenure for writing
21 that they got it right.

22 MR. PICKER: Okay. Well, there you go.

23 MR. HARROP: This hasn't been rehearsed but I
24 think I know what Tom's answer is going to be to this.

25 Tom, if I served a subpoena to one of your

1 clients and said, you know, I'm really curious about this
2 particular topic and I'm doing an academic paper, would
3 you please turn over all your business records, now what
4 answer would I get?

5 MR. PICKER: Now, I want to do this as part --

6 MR. CAMPBELL: See me in court.

7 MR. PICKER: -- of the consent decrees. Now,
8 you've got to look for the mechanisms where you have
9 leverage in the consent decrees. Don't do it that way.
10 Consent decrees, that's the place to do it.

11 MR. HARROP: Consent decrees. That's right,
12 Tom.

13 MR. CAMPBELL: Well, Hart-Scott, don't forget
14 about all the information you can get from Hart-Scott.

15 MR. PICKER: I don't have Hart-Scott. And
16 that's not retrospective. Maybe we need a retrospective
17 version of Hart-Scott-Rodino.

18 MR. CAMPBELL: Put me to work.

19 MR. PICKER: Yeah, that's certainly true.

20 MR. ABBOTT: We still, believe it or not, have
21 a lot to cover so unfortunately now we must -- tempus
22 fugit so we must move forward.

23 Let's and we'll pass over the issue of reports,
24 conferences, workshops. I mean the FTC has done more of
25 that in recent years since Chairman Pitofsky

1 reinvigorated the area.

2 But unless someone has something special they
3 want to add --

4 MR. PICKER: We're in favor of them.

5 MR. ABBOTT: Okay. I'll move on.

6 Let me ask one quick question about allocating
7 resources, certainly on the enforcement side.

8 Comments were already made about Whole Foods.
9 But sometimes there are cases like Three Tenors, which
10 was called by -- by an English academic La Triviata.
11 Some cases brought -- some cases brought to try and --
12 and bring forth a particular theory, a particular
13 enforcement theory, and have it tested by the court.
14 Former Chairman Muris was very interested in state action
15 and Noerr theory.

16 So sometimes cases that may not have
17 individually direct, great economic effects, may have
18 very important precedential effects. On the other hand,
19 there remain some practices that may affect the
20 economically important sectors that -- that may involve
21 more routine questions.

22 Is it more important to focus just on big
23 bread-and-butter areas of the economy, see what's
24 happening there, you know, such as healthcare, groceries,
25 petroleum prices, or instead should the agency be looking

1 to spend a lot of resources on advancing theories to
2 improve the application of the rule of reason, for
3 example?

4 MR. PICKER: You should maximize social
5 welfare. Do you want more guidance than that?

6 No, I guess, I mean that seriously in the sense
7 that -- I mean, you know, I said what I said about Whole
8 Foods and the Three Tenors case, yeah, it seems like
9 there's a very narrow slice. Most of my colleagues but
10 not me.

11 So, I mean, I think bang for the buck is
12 important. Now, the practical implementation of that I
13 think is what matters. And so whether you think there
14 are particular cases that you think frame an issue really
15 nicely that in turn then will have important spillovers
16 to the sectors of the economy where there's -- where
17 there's -- where there's more going on. I -- I can't
18 assess that. I mean, that's sort of what you guys do.
19 But I do think that's what should motivate you.

20 Tom, it looks like you wanted to say something.

21 MR. CAMPBELL: No, no, no, I'm going to stay
22 quiet on this one.

23 MR. WRIGHT: Randy, I would have thought that
24 you would have said there that you should randomly
25 enforce so we could learn something about -- I mean, that

1 strikes me as a -- there's been too much agreement on the
2 panel so I think we should argue about it. And it
3 strikes me as a really bad idea that runs maybe into some
4 Rule 11 problems, right, taken -- taken to its extreme,
5 which I know is not how you meant it.

6 MR. PICKER: Right.

7 MR. WRIGHT: But, you know, this trade-off I
8 think we should start with the idea that we should be --
9 we should be thinking about the rate of return for
10 consumers. And obviously, I'm on board with you not
11 really disagreeing with the social welfare point.

12 But that gets us full circle to the R & D
13 point, which is what do we know and what do we not know?
14 And we know something, for example, about price fixing
15 cases, we know the next most about mergers, and we know
16 practically nothing about monopolization. So I think
17 that we're not going to be able to fully specify the
18 trade-offs here. But there are lots of useful guidelines
19 on how we ought to be allocating resources.

20 MR. PICKER: Well, try -- let's do
21 retrospective. What did we get out of Three Tenors?
22 When you guys look back and say ah, this is great and
23 here's why? What do you guys say? I don't know what you
24 say.

25 MR. ABBOTT: Well, I don't want to dominate

1 things but one thing that came out of that was sort of
2 endorsement of the Mass Board type of structure, rule of
3 reason analysis by the D.C. Circuit. And the D.C.
4 Circuit, being a very important court, it becomes a very
5 important precedent in -- in Section 1 theory.

6 MR. McCHESNEY: I would have thought, Alden,
7 that you would have said what really mattered to the
8 Commission -- the reason that Three Tenors was
9 particularly welcome at 6th and Pennsylvania was that the
10 specter of California Dental was largely exorcised
11 because in the wake of the California Dental decision,
12 from my visit you'll recall --

13 MR. ABBOTT: Yes.

14 MR. McCHESNEY: You were there. I visited with
15 you. There was fear and loathing in the halls of the
16 Federal Trade Commission that now any time we're going to
17 bring a case that's more or less based on Section 1 type
18 conduct, we're going to have to go out and develop our
19 own data and do all of the things specific to the
20 industry. And the place that the Supreme Court put us in
21 California dental meant that our decision couldn't stand.
22 And consequently -- and I think this was very much on the
23 mind of Doug Ginsburg when he was hearing the appeal of
24 Three Tenors, I would have -- I would have thought that
25 the best thing for the FTC from Three Tenors was that

1 California Dental Association now could be dealt with and
2 -- and did not have to be the 600-pound gorilla in
3 enforcement any longer.

4 MR. ABBOTT: Good point. If nobody else has
5 anything to add, let me quickly move forward.

6 Blake Harrop, do you have some comments on
7 coordination between the FTC and state AGs and
8 enforcement coordination in general.

9 MR. HARROP: Yeah, let me say that that's a
10 topic I could probably spend the rest of the day on and
11 I'll try to limit myself.

12 The -- there are a variety of areas of which
13 you can talk about the interrelationship between the
14 states and the federal enforcement agencies and the
15 Federal Trade Commission. One of the -- but let me break
16 them in two categories to limit what I talk about. One
17 of those is the situations where the two entities are
18 investigating the same kind of conduct, a merger where
19 both the state AGs and the Federal Trade Commission are
20 involved in the investigation.

21 And then the second topic I'll talk about is
22 where we're basically doing different cases in different
23 ways.

24 The first topic where there's -- you know, a
25 joint investigation. It's important to recognize that

1 there are going to be different issues in play at both --
2 at -- let me try this again.

3 There's going to be within each agency, whether
4 within the Federal Trade Commission, within the state
5 AG's office or more likely is the situation, multiple
6 state AG's offices which are involved, there are going to
7 be different viewpoints going through each of those
8 entities. And so when you talk about the
9 interrelationship between the two entities, you're
10 talking about the interrelationship of multiple actors
11 who are going to have different views. And how those
12 interact are often a situation that depends on the
13 personalities involved and the people that are dealing
14 with each other.

15 You know, from my own personal experience, I
16 will say, it's always easier to do the second case with
17 particular FTC staff than to do the first one because we
18 don't know each other. We don't know how each other
19 works as well, particularly -- I think I'll put it on the
20 FTC's burden. I mean, the states have worked with the
21 FTC a lot, a lot of FTC shops have not worked with the
22 states on a particular merger, and it will be difficult
23 for them to do that the first time through because they
24 don't understand how we work and it becomes more
25 difficult.

1 For those parts seen on the outside, there are
2 a lot of efforts made by the Federal Trade Commission and
3 the states to coordinate their activities. There's a
4 protocol in place that any entity that's involved in a
5 merger can take advantage of, that will aid that
6 cooperation but given the statutes involved, it's
7 required -- necessary for the entity being investigated
8 to agree to that protocol procedure that allows us
9 basically to use FTC documents, the HSR documents, rather
10 than having to issue our own subpoenas and going through
11 that same process.

12 And how much cooperation exists often occurs --
13 depends on how much the entity being investigated wants
14 it to exist. If the entity believes that it's in better
15 shape doing this as efficiently as possible and engaging
16 in the protocol procedures, basically they're dealing
17 with just one set of requests for documents. We do have
18 a pretty good record with a lot of the FTC shops of being
19 able to coordinate our requests with the FTC's if there's
20 a need for a second request and that process moves pretty
21 smoothly. But at the end if they decide that they don't
22 want to enter into the protocol and they want to force
23 the states to go their own subpoena routes, things can
24 get very complicated and messy because different states
25 have different subpoena requirements, different FOIA

1 laws, different all sorts of other laws. And it can
2 really get to be a mess for one entity to have to deal
3 with. But unfortunately those are the laws we have to
4 operate under.

5 I also should add that the FTC in particular
6 does a very good job of creating a position for an
7 individual who's responsible for helping to coordinate
8 with the states so if there are issues, there's a point
9 person that we can go to at the Federal Trade Commission
10 who can, you know, sort of say, wait a second, okay, this
11 person hasn't worked with you guys before, let me talk to
12 them and we can try to figure out where there's issues
13 and go from there.

14 So I think the cooperation at the Federal Trade
15 Commission-state level has been pretty good particularly
16 in matters where we're working together. Doesn't mean
17 we're always going to exactly reach the same conclusions.
18 Just like two economists don't necessarily agree on
19 absolutely everything, two lawyers looking at the same
20 case may disagree over what the results should be.

21 But I think generally in terms of the
22 procedures of the investigation, we coordinate pretty
23 well. And I think it would be hard for us to come up
24 with a lot of situations where there have been
25 differences in substantive opinion. The other area where

1 the state and the Federal Trade Commission can overlap is
2 when they're dealing with similar kinds of situations but
3 maybe approaching them in different regards. It's always
4 possible, for example, a situation where the Federal
5 Trade Commission may be looking to end a particular
6 action that an industry is undertaking, while the states
7 may be more interested in getting a recovery from the
8 consumers that were adversely affected.

9 We touched on this briefly before, but you
10 know, the Federal Trade Commission's ability to recover
11 on behalf of consumers has got a track record of one.
12 And the states have done it in more cases than I can
13 count up easily. That is one of the primary focuses of
14 our AG offices, make sure consumer recoveries are
15 obtained where appropriate.

16 And in those situations, there can be somewhat
17 of a diversion because obviously the Federal Trade
18 Commission is interested in seeing the action enjoined
19 and stopped as quickly as possible, an interest the
20 states share as well, but not at the cost of leaving
21 consumers with no recovery for what's already happened.
22 So you can have situations there where an entity
23 negotiating an attempt to end -- get peace in their time
24 and end disputes with both the states and the Federal
25 Trade Commission.

1 I feel like they're in a situation where they
2 thought they had a deal with the Federal Trade
3 Commission, the states, would fall in place, and I think
4 one of the messages I hope people take away is the states
5 may very well have an interest in seeing damage recovery
6 as part of the overall solution to the problem. And if
7 not, the investigation and/or litigation will continue
8 until the states get that kind of resolution.

9 Related to that, I suppose there are also areas
10 where the states may just decide on policy reasons to
11 take more aggressive approaches on particular topics than
12 the Federal Trade Commission would take.

13 Joshua mentioned recently the minimum resale
14 price issue. I know some of my fellow states, California
15 and New York in particular, have taken a position that
16 basically they consider under their own state laws such
17 activity to be per se illegal and they are looking for
18 cases to demonstrate that in a public context.

19 I think the Federal Trade Commission was
20 interested in that kind of a topic and therefore probably
21 there will be situations where we're different on those
22 kinds of substantive areas.

23 But I think in the cases where we deal -- work
24 with each other, it's just a matter of -- of whatever
25 remedy issues are available to each of the two entities

1 and those remedy issues tend to focus where the interests
2 of those two entities lie.

3 MR. CAMPBELL: Like when the State of Illinois
4 sues in an antitrust, you know, price fixing case or
5 something like that, is it typically as *parens patriae*
6 and injuries to state agencies or purchasing
7 organizations and how is it you line up with the
8 consumer? Is there ever a class action brought by the
9 State of Illinois on behalf of the consumers?

10 MR. HARROP: We have under the federal statutes
11 express *parens patriae* authority to enforce it in the
12 federal antitrust laws and we usually will proceed as a
13 *parens patriae* representative of our consumers if there's
14 a federal case involved.

15 In the situation where there are indirect
16 purchasers, Illinois is one of the states that does have
17 an Illinois Brick repealer statute. In those situations,
18 we have proceeded *parens* successfully in several cases.
19 We have had a couple of courts who have told us we don't
20 have *parens* authority and in those cases we have
21 proceeded as a class representative.

22 In any event, we do try to represent our
23 consumers in those situations.

24 MR. CAMPBELL: And what you just -- to fill out
25 the picture mentioned, whether you work with the

1 plaintiff's indirect purchaser, class action attorneys,
2 or you're in conflict with them, how do you work that
3 out?

4 MR. HARROP: Well, in Illinois, we don't really
5 run into that problem because we are the sole -- our
6 statute sets us up so that only the attorney general may
7 bring a class action under the indirect purchaser portion
8 of our statute.

9 MR. CAMPBELL: Right, right.

10 MR. HARROP: So we don't run into that issue in
11 Illinois. Outside of Illinois, obviously, it becomes an
12 issue for a lot of states where there is concurrent
13 enforcement of the indirect purchaser statutes. And to
14 say that the pattern and whether we work with it or in
15 conflict with it is very difficult to answer. It varies
16 from case to case. There have been cases where we have
17 worked -- where other states work cooperatively with the
18 private bar. There are at least two litigated decisions
19 in which there was a conflict between the parens claims
20 and the class claims in private litigation. And this
21 state has won both of those parens claims.

22 MR. CAMPBELL: And how does the Class Action
23 Fairness Act affect how this goes forward?

24 MR. HARROP: That I don't know the answer to.
25 I do know at the moment three district court decisions

1 that say our parens cases are not subject to CAFA. A
2 2-to-1 Fifth Circuit decision came down from the first
3 appellate court case about a month ago that said, yes,
4 they are. I think that's going to play out over time.

5 MR. ABBOTT: Good. Any additional comments on
6 state/FTC relations?

7 Well, let me move very quickly to closing cases
8 at early stages. You know, obviously -- and this bears
9 on resource allocations, on what policies are pursued.

10 Josh Wright, should the FTC adopt particular
11 protocols or policies regarding how many resources to
12 spend on preliminary investigations, when to pull the
13 trigger and get compulsory process, get a Part III
14 complaint, do you have any general observations?

15 MR. WRIGHT: As far as -- I mean this is going
16 to vary so much case by case over the life of the
17 investigation and whether you are still sort of still
18 learning something new that's helping you with the
19 analysis to figure out whether or not a violation has
20 occurred.

21 So I don't know of a sort of general,
22 one-size-fits-all protocol or guideline would make sense.
23 But I certainly think there are some principles that help
24 out in the resource allocation decisions here. If you
25 think of, for example, a pricing case, all right? So one

1 of the differences between antitrust and whether I'm a --
2 have an investigation about a bank robbery, is that it
3 might be the case if I'm figuring out whether or not
4 pricing conduct violates antitrust law.

5 If I'm wrong, it means consumers are helped by
6 the discounts, lower prices, consumer welfare goes up.
7 The -- you know, the counterfactual is not neutral,
8 right? The counterfactual is consumers are being -- the
9 thing is procompetitive not anticompetitive. Of course,
10 it might be competitively neutral. But as we
11 investigate, if we figure out it's competitively neutral
12 or procompetitive or we don't have evidence that the
13 conduct is anticompetitive and it doesn't look like we're
14 going to get new evidence that's going to change that, it
15 strikes me as -- that there's no reasonable explanation
16 for not -- not closing. I mean, the counterargument, of
17 course, is if we keep it open, maybe -- maybe things
18 change down the road. Maybe the decision-makers change
19 their mind and are more willing to bring the case than
20 they are now based on the same set of information.

21 But the idea that keeping these investigations
22 open, doesn't have some sort of chilling effect on what
23 could be procompetitive conduct strikes me as not
24 plausible and it's at least a factor that should weigh in
25 to these determinations. With that particularly in mind,

1 I have -- I have single firm conduct investigations in
2 mind rather than mergers or -- or -- or price fixing
3 because the danger of false positives there and chilling
4 procompetitive conduct is much higher in part because
5 again we have a very difficult time distinguishing one
6 form of competition from what might be an anticompetitive
7 effect.

8 So I would caution against holding
9 investigations open, you know, that have had a reasonable
10 opportunity to gather facts and have some theory
11 development and test the theory, but there's not yet
12 evidence of a violation.

13 MR. ABBOTT: Anyone want to add to that?

14 MR. CAMPBELL: Well, I think just to give you
15 the private bar's perception on this, I think when you
16 have an FTC investigation or any agency investigation,
17 the private client's going to want to get in there, the
18 sooner the better. Find out who is leading the
19 investigation, see if you can, identify the issues that
20 are really going to make things turn around. And for
21 example, even before you respond to a second request, you
22 may want to find a way to bring people in to be
23 interviewed or something to give them -- if they've got
24 the wrong view of the industry or they think something is
25 going on or customers. The sooner you can find that out,

1 get them the information you need, my experience is that
2 if you've -- if you -- if you've got the right picture
3 and you give them access to this stuff, you can help move
4 these things along and get early termination or whatever
5 it may be.

6 MR. ABBOTT: So as a matter of process, you
7 seem to be suggesting that there shouldn't be
8 hide-the-ball tactics, that -- if it's a good story.

9 MR. CAMPBELL: My experience has been that the
10 agencies don't have to wait for the response to the
11 second request or everything to come in that they're
12 asking for if you can get in there and start the dialog.
13 And you know, if they say, gee, we really don't know how
14 this works and you can bring somebody in, that that can
15 move it along.

16 MR. ABBOTT: Okay. Anyone else? Okay. Before
17 -- we're almost running up on the end. But I think I'd
18 like to close with one general question and it's been
19 raised implicitly and perhaps Tom Campbell might like to
20 address it but everyone jump in, transparency. Is there
21 sufficient transparency to the public FTC decisions in
22 transparency to private parties of agency theories in
23 evidence, in cases how could we improve?

24 MR. CAMPBELL: One area I would say is
25 ridiculous within the FTC and this goes back to Part III

1 litigation, is when Part III litigation is going on, you
2 cannot go in and talk to the commissioners about an
3 on-going case because they're ultimately the
4 adjudicators. So you have this ridiculous nonsense that
5 the case has to be withdrawn from Part III if you want to
6 go and address a settlement issue or something.

7 And one of the reasons -- you know, we talked
8 about Part III going on forever. This -- these things,
9 it's a missile that gets launched and there's nobody in
10 control of it after it gets launched because the
11 commissioners can no longer go back and re-ex -- it's
12 just a ridiculous situation. So I don't know if that
13 falls directly into transparency but I've had the
14 situation where you just can't talk to the people who run
15 the agency because they've launched the missile and it's
16 out there.

17 MR. ABBOTT: Any additional thoughts on
18 transparency and openness?

19 MR. WRIGHT: More closing statements.

20 MR. ABBOTT: Okay.

21 MR. PICKER: More data.

22 MR. CAMPBELL: We're full circle, back all the
23 way.

24 MR. PICKER: Yeah, all right. But you know
25 what to say.

1 MR. ABBOTT: Subject to resource restraints.
2 Okay. We're almost out of time. But questions from the
3 audience? Yes, please identify yourselves for our
4 purposes.

5 AUDIENCE MEMBER: Steve Baker, Midwest region,
6 just two things. One, on the merger retrospect, is I
7 know the FTC has done them, has done them on and off for
8 years. I don't know what we've done recently about
9 publicizing results, but there's certainly things you can
10 find. We've seen one where people promise specific
11 tangible efficiencies of things they're going to do after
12 the merger is complete such as -- open facilities or
13 close facilities. And you go back and look and they did
14 not do that. I mean, it's like -- it's not rocket
15 science. It doesn't require real data to go back and
16 say, okay, we got fooled. We'll be better off, so maybe
17 we should talk about that. But it certainly happens with
18 the FTC and I believe still is.

19 Alden can probably talk -- of course Fred
20 talked about the advocacy efforts and Maureen pointed out
21 to me a little earlier maybe she should be the one to
22 make this point that we still do. I mean, there was one
23 here in Illinois not too terribly long ago. Actually
24 appeared in the Tribune. Some of you have seen this,
25 local medical clinics now in some of the drugstores and

1 there was some proposed Illinois legislation that was
2 designed obviously to close those things down to make
3 them harder to operate. I know the FTC commented on that
4 and this is the sort of stuff that I do think probably
5 benefits consumers.

6 MR. ABBOTT: Any additional questions? Yes,
7 James Cooper from the FTC.

8 AUDIENCE MEMBER: Yes, hi. I'm James Cooper
9 from the FTC.

10 I work in the policy planning office with
11 Maureen and, like Steve said, do the advocacy. I just
12 have a question, it's really more to Fred just to get
13 some background on how things worked when you were there.
14 I think what you and Joshua said is right with a lot of
15 this advocacy stuff, it's kind of basic econ 101. But on
16 the other side of it is often -- because these are
17 professional regulations, we're -- you know, we're
18 dealing with the markets, though, is your argument on the
19 other side? These are always -- all these restrictions
20 are typically touted as -- as necessary, yeah, you know
21 markets work, but not here. So that's where data comes
22 in. And we really need data.

23 Now, we have a laundry list of studies we'd
24 love to do to help us out but we run up into two
25 constraints. One, we have the OMB Paperwork Reduction

1 Act, which we're going to have some more -- I don't know
2 the exact -- you know, we're going to ask ten questions
3 of five people or ten people and we've got to go through
4 this 6- to 9-month process with Federal Register notices,
5 et cetera, et cetera.

6 We also have a lot of external constraints. We
7 have resource constraints that are largely, I think,
8 driven -- a lot driven when we want to borrow someone
9 from B.E. to say do some -- to help out, do some good
10 work. You know, Congress asks us to do a lot of stuff
11 that, you know, we probably don't want to -- you know, I
12 speak only for myself and not for the Federal Trade
13 Commission. But, you know, stuff that -- we -- you know,
14 takes up a lot of resources to do a lot of these studies,
15 so both economists and -- and attorneys. So we run into
16 those two constraints.

17 And I just wanted to know, Fred, I look back in
18 the tenure when you all were there and there was work
19 that we cite, you know, great stuff on advertising,
20 commercial practice restrictions. We -- generating that
21 kind of work would be something we'd like to do but we
22 run into a lot of constraints. And I wondered if you had
23 constraints like that and if you did, how you dealt with
24 them.

25 MR. McCHESNEY: Yes, we did, but I doubt they

1 were nearly as serious as the ones that you face today.
2 I think -- I think your point is a good one because it
3 also -- the availability of data and the fact that you
4 have some of that to work with oftentimes makes it more
5 attractive for the Commission and its personnel to get
6 involved in something. Now, they've got something a
7 little more tangible, they've got something more original
8 to say. It goes beyond econ 101 or intermediate price
9 theory. Now we've got some actual data, we've got some
10 actual empirics.

11 So it -- it is very useful to have and we
12 generated a fair amount of it or there was a lot being
13 generated already. The famous study of lawyer advertising
14 done by the Cleveland regional office is a great example
15 with a tremendous amount of data generated there, which
16 we then used for various advocacy purposes as the same
17 sorts of issues as addressed in that study would come up
18 in regulatory settings. But I just had the impression --
19 and I can't be more specific than that, that the
20 difficulties of getting clear and instant approval for
21 those kinds of things is much greater than it used to be.

22 MR. ABBOTT: Okay. Well, we are running up
23 against our time deadline. I think the next panel is
24 supposed to start at 3:00 but if there's one last
25 question, I might entertain it.

1 Okay. Well, we've solved all our problems.

2 Thanks to this expert panel. Thank you very much.

3 (A short break was had.)

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1 MEASURING THE WELFARE EFFECTS OF THE FTC'S
2 COMPETITION AND CONSUMER PROTECTION EFFORTS

3 MR. BAYE: I guess we should probably go ahead
4 and get started to keep this on track.

5 My name is Mike Baye. I'm the director of the
6 Bureau of Economics at the FTC and it's really a delight
7 to be here.

8 Before we get started in the event that we run
9 out of time, I just wanted to -- again on behalf of the
10 Federal Trade Commission I thank Henry and Derek for all
11 the great work they did in helping organize this and the
12 Searle Center as well and also on behalf of the rest of
13 us at the FTC to thank Maureen and the gang who did a lot
14 of work behind the scenes to set this up so it's really
15 been a great event.

16 And just to make sure everyone is on the same
17 page, Chairman Kovacic is very interested in not praising
18 the Federal Trade Commission but taking a critical look
19 at the things that we've done so that we might learn from
20 some past mistakes so that over the next 100 years we can
21 make better decisions. If he were here personally, he
22 would certainly encourage you not to pull any punches and
23 I therefore make that same -- give you that same
24 recommendation.

25 This session is designed to come up with

1 mechanisms whereby we might more effectively measure the
2 welfare effects of various policies and antitrust
3 enforcement actions that we engage in at the Federal
4 Trade Commission. Obviously we are involved in both
5 competition or antitrust matters and also consumer
6 protection. To the extent that we might think a little
7 bit about the consumer protection angle, that would be
8 very helpful although I know the esteemed panel is very
9 interested in the antitrust side of matters.

10 Let me just very briefly introduce who the
11 panel will be. This is will be a nice panel to have a
12 useful dialog that I believe will help us as we move
13 forward.

14 Dennis Carlton who is sitting on my direct
15 right is a professor in the graduate school of business
16 at the University of Chicago. I had the pleasure of
17 working alongside of -- of Dennis. He was the Deputy
18 Assistant Attorney General for antitrust at the U.S.
19 Justice Department when I am came on board as chief
20 economist of the FTC. Since then he's gone back to his
21 professorial duties. He's living back in Chicago now.
22 He really doesn't need any introduction. You all know
23 that he's an esteemed expert in antitrust. He has
24 written a leading textbook that's been very influential
25 and I look forward to his suggestions and comments today.

1 Then to Dennis's immediate right is Aviv Nevo.
2 He's a professor right here at Northwestern University.
3 He's also an expert in a number of areas, most notably
4 the work I'm most familiar with is his work on estimating
5 demand -- demand and analyzing the impacts of -- of
6 competition, mergers and so forth. And he's a very
7 unique individual because his research not only lies in
8 the area of pure economics but he also has made important
9 contributions on the marketing side which is very, very
10 important as one's contemplating not only antitrust
11 issues but issues related to consumer protection as well.

12 Carl Shapiro is over on the far right over
13 there. Carl is a professor at the Haas School of
14 Business at UC Berkeley. Carl also had the pleasure of
15 serving as a Deputy Assistant Attorney General for
16 Economics at the Justice Department in the 1990s. So the
17 Justice Department is very well represented here.
18 Hopefully we can learn some of their best practices and
19 maybe learn from some of their past sins. That would be
20 a useful thing for us to do. Carl is also a senior
21 consultant with Charles Rivers Associates and has done
22 consulting as has Dennis for the Justice Department as
23 well as the FTC.

24 Who is next down there? Abe. Abe is down at
25 the very end, Abe Wickelgren. Abe is a very unique

1 individual because -- all of these folks are professors
2 -- but Abe is one of those individuals that both has a
3 law degree and a Ph.D. in economics. So he is kind of
4 one up on almost everyone in the room. He also served as
5 a staff economist at the Federal Trade Commission for
6 about four years, was on the faculty at the University of
7 Texas, is now on faculty at Northwestern University, but
8 is on leave at Duke University.

9 So I don't know if Abe can't keep a job or if
10 he just likes to rack up frequent flyer miles. But it's
11 great to have Abe here. And we're very much looking
12 forward to learning something from -- from these people
13 that have a tremendous amount of knowledge about the
14 function and organizational structure and some of the
15 challenges that are faced by antitrust enforcement
16 agencies.

17 So again the purpose of this panel is really to
18 discuss the whole issue of measurement. Chairman Kovacic
19 is -- is very interested in making sure that -- that
20 we're not off on an island doing things that we think
21 ought to be done but we're retrospectively looking at
22 ourselves to see if we're doing the right things, if
23 there are ways we might be able to improve the efficiency
24 of our organization so that moving forward we can make
25 even better decisions than the Federal Trade Commission

1 has made in the past and potentially eliminate some of
2 the stumbles that perhaps these folks might think the
3 Commission has made over -- over the years.

4 So what I'm going to do is it's going to be a
5 fairly freestyle panel as we've had throughout the day.
6 I encourage strong dialog. I'm little more than a
7 referee up here to make sure that everyone stays on task
8 and doesn't talk over each other. And I'd like to begin
9 by directing a question to Carl to start and then we'll
10 open it up for the rest of the panel to -- to -- to
11 comment or disagree or pile on or whatever they may
12 choose to do. I'm going to start fairly general and talk
13 generally about the way we might measure the enforcement
14 efforts and the actions that we take and the welfare
15 effects of those various actions and then we'll move to
16 more specific applications as we move on.

17 So, Carl, let me just begin by asking you what
18 we, as an agency, should be measuring to determine the
19 welfare effects of the policies and enforcement actions
20 as well as the nonenforcement actions that we engage in.

21 MR. SHAPIRO: I was afraid you'd ask that.

22 MR. BAYE: I've got about five more versions of
23 that same question so just to warn everybody.

24 MR. SHAPIRO: Well, thank you. I'm joking of
25 course. But the emphasis on measurement is what makes

1 these questions very hard because -- in fact the group of
2 us talking in advance, we're kind of wringing our hands
3 about how hard it is to get accurate measurements in a
4 broader sense of the antitrust mission, at least that was
5 our focus.

6 And let me first indicate some of the
7 difficulties and then maybe some glimmers of hope, I
8 guess. I think at a very high level the problem -- the
9 difficulty of measurement is that so many of the effects
10 come through deterrence. I mean, basically through
11 having -- if you have clear rules about -- if you really
12 knew where the line is -- let's take unilateral conduct,
13 Section 2 type of issues or Section 5 issues, you might
14 have very few cases and yet substantial benefits from
15 having these rules in place because companies would be
16 adhering to them, okay?

17 So in any broad sense of measuring the impact,
18 I don't think you're going to get an accurate measurement
19 by looking at individual cases, the cases the agency
20 happened to bring, for example.

21 So that, I don't see a good way to -- to do
22 these broad measurements given the importance of
23 deterrence and precedence. Now, that's not to say things
24 are hopeless. In individual cases then, you want to make
25 sure -- you want to somehow get it right, okay? So that

1 if you're drawing these lines that are having so much
2 impact on business conduct, you want to get the line in
3 the right place and that for the very same reason has lot
4 of impact.

5 So how would you tell that in an individual
6 case, okay? Well, in some cases, you can measure effects
7 pretty well. I mean, I happen to work as the expert for
8 the Commission on the Unocal case which was the case
9 where Unocal was accused of deceptive conduct that
10 allowed them to charge excessive royalties for their
11 patents on reformulated gasoline in California. And so
12 this was fashioned as monopolizing the technology market
13 with these excessive royalties.

14 Well, that was -- I mentioned the case probably
15 because I know about it, probably because it's unusually
16 good for being able to measure because we could see what
17 the charges were, and we could estimate this might have
18 been raising the price of gasoline three cents a gallon.
19 And through them there are a lot of gallons of gas that
20 get sold and used in California so you can -- you get a
21 measure of the direct harm there, okay, because it was an
22 overcharge case.

23 Now, of course, that's more commonly measured
24 than in price fixing cases for example, the
25 monopolization cases. So you can do that and get a sense

1 of the magnitude of the importance of any one case but,
2 of course, going back to my first argument, you know, the
3 bigger question is what's the benefit of establishing the
4 rule, the principle, that applied there, which in that
5 case was if you engage in deceptive conduct to get your
6 patent included in a product standard and therefore
7 charge excessive royalties, that's a bad thing to do,
8 that's adverse to the competitive process.

9 And so there may be -- if that rule were
10 established, it doesn't look very likely after the Rambus
11 case, but if that rule were established, then that could
12 have, you know, very widespread benefits that we wouldn't
13 be able to measure. And I just don't see a good way of
14 measuring the broader thing but at least you can see in
15 an individual instance how much that mattered and maybe
16 that's -- you could look for other examples of that type
17 of conduct where it was deterred or where it might have
18 occurred to get a sense of scale. So that's kind of a
19 high level view on it.

20 The other thing I guess you have to think -- if
21 you really focus in on the FTC's mission, again, this is
22 going to apply broadly and we'll drill down to particular
23 areas, mergers, and unilateral conduct and the like, but
24 you really have to think about how it fits in with the
25 other parts of antitrust enforcement. So -- and I think

1 particularly about all the private actions. I mean, you
2 can talk about DOJ, you can talk about state, you can
3 talk internationally, right, but just to focus on the
4 private actions, there's a lot of leverage for the FTC,
5 okay, because when you do bring a case -- let's take --
6 well, again, there's going to be usually some follow on
7 private -- private actions. I mean, again an example, I
8 know better -- it's not an FTC case, it happens to be a
9 DOJ case. But in the Microsoft case, I think Micro- --
10 in the end, I don't think Microsoft, the remedy did much
11 to control Microsoft. But they paid billions of dollars
12 of damages to private plaintiffs. Now, the problem with
13 that system is -- at least in that case, I don't have any
14 confidence that those private damages bore any particular
15 good relation to the actual harm that the conduct caused.

16 So -- so you get this kind of wildcard, if you
17 will, that you have leverage but it's not necessarily
18 well-tuned to the impact of the case at hand. It could
19 go either way. In other words, the leverage might be
20 excessive through class action, trebled damage type --
21 type of case suits, or it might not amount to much if it
22 were causation or other measurement problems that private
23 plaintiffs would face.

24 Particularly, I guess -- and now this is a
25 little more for the lawyers, if it's a Section 5 case,

1 where it would be harder for private plaintiffs to follow
2 the same pattern and use the same evidence because of the
3 unique character of Section 5.

4 So I would again return to the precedent
5 setting role, not so much about measurement but in terms
6 of evaluating what you are doing. And I'll close these
7 initial comments by a more personal note.

8 I happened to just come back yesterday from
9 China, where I was in Beijing talking to government
10 officials about how to implement their new antimonopoly
11 law, which went into effect August 1st and just being
12 there in that very exciting country and city and at this
13 time when -- it's like 1914 for them or 1890 perhaps,
14 right? You get -- I've, of course, been thinking, well,
15 how is it going to affect their economic growth, you
16 know, if they get those rules right rather than wrong,
17 okay? So it's very, very hard things to measure. But it
18 was, you know, very clear that the signals being sent
19 there, for example, about, you know, where are we going
20 to back off from regulation and government control and
21 let the market go and where are we going to put the
22 limits on what that means are going to be very, very
23 important for a lot of companies and how they -- how they
24 run their operations. So that's -- that's where the big
25 effects are.

1 MR. BAYE: Abe?

2 MR. WICKELGREN: Yeah, I think just to return,
3 I think, echo the deterrence point, that that I think is
4 probably the -- you know, where the big welfare effects
5 are. And I think, you know, one implication that that
6 has for measurement is if you measure specific cases, I
7 mean, you are likely to, I think -- you know, the cases
8 that are going to end up getting litigated or at least
9 getting serious consideration are going to be the close
10 cases. And if we think that the parties have better
11 information about what those likely effects are, right,
12 in the close cases, you know, if the parties think really
13 this is not as bad as it looks, right, and, you know, to
14 the extent that the FTC needs to commit to have this
15 threat of enforcement, you know, precisely to deter
16 cases, the FTC is going to end up going after cases
17 probably, you know, when they have a good chance of being
18 wrong, precisely because it's necessary to make this
19 commitment to, you know, not infer too much from the fact
20 that the parties are nonetheless bringing the case.

21 And so I think, you know, the value of the
22 deterrent, you know, could potentially be jeopardized by
23 looking too much at, you know, retrospective saying, you
24 know, were we right in this particular case when it may
25 be sort of the necessity to commit to having a reasonable

1 likelihood of being wrong is important to achieving those
2 deterrence objectives.

3 MR. SHAPIRO: So you think if they never lost,
4 then they would be bringing too few cases, or do they
5 have to lose a fair bit to be doing their job?

6 MR. WICKELGREN: I think that if -- yeah, I
7 mean, you have to lose, you have to be wrong, you know,
8 because part of what is going on with the dynamic with
9 the firms having, you know, better information about what
10 the likely effect is, if you try too hard to get it right
11 in this particular case, all right, you're going to be
12 using the information that well, the firm still brought
13 the case and they probably -- you know, they have better
14 evidence than we do, but if you use that information too
15 much, then, you know, you end up undermining the
16 deterrent threat of getting firms in situations when they
17 are more likely to think the action is anticompetitive,
18 you know, to not bring the case.

19 MR. BAYE: Before we move on to the other
20 panelists, do you guys have follow-ups on how you might
21 quantify the deterrent effect?

22 I have no such clever ideas. That's why we
23 prefaced this whole thing with the caveat that this is a
24 very difficult session because our task is to try to
25 better quantify measures and it's easy to see that these

1 things exist but it's difficult to kind of draw those
2 lines and determine whether you're overly aggressive or
3 not.

4 MR. SHAPIRO: Well, the best I can do is if you
5 -- if you could measure effects of individual cases that
6 you bring, which will -- in some sense is going to be the
7 marginal cases, we think, that people are going to step a
8 little bit over the line, or you're arguing about where
9 the line is. That's not going to tell you about all --
10 you know, the inframarginal cases, if you will, that are
11 being deterred. But if you had some sense of -- I don't
12 know how many of those cases -- what that even means
13 because it's conduct that doesn't happen but it would
14 probably be even worse because it's not at the margin.
15 But that's not a -- that's not a measurement plan, it's a
16 plea.

17 MR. BAYE: General response to the earlier
18 question or response to this, either way?

19 MR. CARLTON: Yeah, I was going to say I agree
20 with the importance of precedent and deterrence but it's
21 -- it's very hard as I think actually all the questions
22 we're going to be asked, unfortunately I'm afraid many
23 times we're going to say, really hard to measure. But I
24 think we have to try somehow otherwise, we have no
25 guidance. I mean, that doesn't leave you in a very good

1 position.

2 So I guess I have three comments. First, I
3 just wanted to respond to something Carl said about him
4 having been in China. When new countries -- when
5 countries adopt new antitrust laws and they're using the
6 antitrust laws in part to replace government regulations
7 of one sort or another, it's a very tricky question to
8 figure out or even to characterize that as relying on the
9 markets. You're really relying on judges who sometimes
10 may not have a very good grasp of antitrust principles.
11 And one of the fears I've had is that these antitrust
12 laws in foreign countries can be used to impose lots of
13 restrictions that the regulators maybe hadn't figured out
14 to do.

15 So, for example, if you want to create laws
16 against international trade, but that violates some
17 international trade treaty, you can have your antitrust
18 laws essentially do the same thing by defining predatory
19 behavior in all sorts of unpalatable ways seem to mainly
20 apply to foreign entry.

21 So to go back, though, to the direct question
22 about deterrence, I agree with Carl that many times
23 penalties that we see in antitrust cases don't seem
24 really related to the harm. We know what the optimal
25 penalty is; it's the net harm to others. Now, when we

1 consider the net harm to others and you include
2 precedence of a case, that gets really hard but at least
3 we know we could do a slightly better job with damages
4 and how we calculate damages. I tried to do that at the
5 antitrust modernization commission. We actually know
6 something about how you would want to vary multiples
7 depending upon the observeability of the action. I would
8 say that went over like a lead balloon, that suggestion.
9 And I think that that would be one way to improve things
10 when you have private rights of action. I do think also
11 that there are some before and after studies that you can
12 do.

13 For example, in the consumer protection area,
14 let's suppose the FTC has certain labeling laws and
15 certain restrictions. You can see what happens not only
16 to price but you can see what happens to products,
17 products withdrawn. What's the consequence of having
18 products withdrawn? A lot of regulatory actions do
19 nothing more than just increase costs. And if you just
20 increase costs but don't see either consumers getting a
21 benefit from it or what you see is products disappearing,
22 you can try and measure that in some way.

23 I think the only attempt to quantify
24 precedential is something that -- I don't know if it was
25 published -- that they were doing in England at the OFT.

1 They were trying to do surveys of how important emergent
2 decisions versus other types of decisions were in firms
3 altering their behavior. And that's the first time I've
4 seen anyone trying to do anything quantitative to try and
5 measure the consequences, precedential consequences, of
6 actions. I think that's a really tough question, though.

7 MR. NEVO: I would just like to kind of
8 reiterate, I guess, you know, what Carl started and
9 Dennis continued with it. You know, this is really an
10 impossible question to really answer.

11 Just to give you sort of an idea, I mentioned
12 to a colleague of mine that I was on this panel and the
13 idea was to quantify the welfare gain from the FTC. He
14 said, oh, that's easy. I said, what do you mean it's
15 easy? He said, well, just estimate the demand curve for
16 FTC and integrate underneath it. That's all you have to
17 do. Thinking back, you know, about ten years ago, Jerry
18 Hausman had a famous paper or infamous paper -- depending
19 on where you stand on this -- on the welfare gains from
20 Apple Cinnamon Cheerios. Think about that, you know,
21 Apple Cinnamon Cheerios, how much back and forth there's
22 been on that. I don't think we've even resolved that
23 issue. So, you know, we couldn't figure it out there,
24 are we going to be able to figure it out for the FTC. So
25 I guess it's very clear this is an impossible question to

1 answer and I think it sort of poses such as to kind of
2 let's see how far can we go?

3 So can -- I think the mirror side is yes, we
4 can't really answer the original question but there's a
5 lot of things that we can do getting towards that. And I
6 would sort of advise -- and I think, you know, we're
7 going to be talking about this for the rest of the panel
8 -- kind of three steps really as to how do we sort of
9 start measuring these effects? And I would say the very
10 first thing is just measure, you know, what happens. You
11 know, if you look at the effects of mergers, you could
12 ask, you know, a merger happened -- or didn't happen --
13 you know, what was the effect? Without even sort of
14 trying to sort of generalize anything beyond that, not
15 even necessarily even putting a causal aspect on it. I
16 think, you know, we know very little about it. We know a
17 little bit about what happened to average prices a little
18 bit. We -- or at least -- I don't know really what
19 happens in other dimensions. I mean, what sort of
20 happens to sort of variation in prices?

21 If you look at, you know, consumer packaged
22 goods, you know, products that I've studied a lot, if two
23 cereal manufacturers produce, we sort of predict that the
24 average price is going to go up. When you look at typical
25 supermarket pricing, there's a lot of sales. There's a

1 lot of promotions. Are there more or less promotions
2 with the change in concentration? I don't think we know
3 that. Just in a pure descriptive level, not sort of
4 saying anything beyond that, just at that level, we don't
5 know. Again, two cereal manufacturers merge, are they
6 more or less likely to introduce new products? Is there
7 going to be more or less innovation? You know,
8 innovation even in the simple sense of, you know, more
9 new product -- and I'm not talking about the big, you
10 know, innovation of are you going to introduce the next
11 browser or something of that sort?

12 So I think that's the very first step, just the
13 descriptive of sort of what do we do. I think the next
14 step is sort of what Carl was kind of talking about which
15 is to try to, you know, measure, you know, what's the
16 impact of a particular kind of marginal case and try to
17 see -- kind of get the causal effect, if you want, of the
18 activity. And then, you know, where I think we need kind
19 of leap of faith or maybe a macroeconomist to come to our
20 help is to kind of try to generalize from those handful
21 of cases that we see to really understand what's
22 happening in the inframarginal. And there, you know, at
23 the end of the day, you know, we're going to have --
24 we're going to see data in this range and we're going to
25 extrapolate and do you extrapolate using sort of a linear

1 curve or exponential curve or whatever curve you want?
2 That's what's going to determine sort of the numbers you
3 get. So that's it, I think, as far as a general sort of
4 ...

5 MR. BAYE: Okay. So having established that
6 we've set up a bunch of economists to answer an
7 impossible question, we'll now work on some specifics of
8 that. I think as we start getting down into a more
9 granular -- granular -- granular level, we'll see that
10 there are in fact are some ways that we might be able to
11 at least shed some light on some of the aspects of our
12 work.

13 I wanted to address this to Dennis because I
14 had the pleasure of listening to Dennis and Orley
15 Ashenfelter go back and forth on the value of merger
16 retrospects at the unilateral effects workshop and I'd
17 like to get his views kind of on the record here and then
18 invite the other panelists to perhaps comment or chime
19 in. And the issue I'd like us to turn to is the
20 measurement of welfare effects in -- in merger cases.

21 And in some of the previous panels this morning
22 and this afternoon we heard about the potential value of
23 doing merger retrospectives. I believe the hospital
24 mergers that Tim Muris initiated in the early 2000s were
25 one example. Incidentally, I think one reason that those

1 have not been released yet -- they will soon be released
2 -- was because they were all in Part 3 and you can't get
3 clearance to release something on a merger that the
4 Commission is actually working on at the time. So
5 probably part of the administrative process backed that
6 up.

7 Back to this issue, Dennis, I would just hope
8 you might be able to shed some light to us on whether
9 merger retrospectives shed light on the value of the
10 welfare that we might be creating for consumers in
11 certain markets.

12 MR. CARLTON: I think they shed light. The
13 question is do they shed enough light and can we do
14 better. And my comments here are really based on a paper
15 I wrote. It's in the DOJ discussion paper series. And a
16 shorter version was just published in the Antitrust, the
17 ABA magazine. My own sense is that we've not done a very
18 good job of quantitative assessments of symptomatic bias
19 in merger policy. We've really not distinguished very
20 well between a systematic bias versus making a mistake in
21 a particular case. And those are two very different
22 things. You don't want to do either. You don't want to
23 be biased and you don't want to make mistakes. But you
24 want to separate the two.

25 I think there haven't been enough retrospective

1 studies. There should be more and they should do exactly
2 what -- what Aviv said. We want to know what happened
3 before we can start analyzing is it good or bad. And I
4 don't think we've done that enough.

5 But these retrospective studies, did price go
6 up, did products -- more -- you know, get out more
7 products, but these types of retrospective studies that
8 ask what happened really aren't as good as -- at least I
9 once thought. And I think we can do a lot better. And
10 let me explain why.

11 A retrospective study -- let's just focus on
12 prices. Ask do prices go up after the merger? Well, if
13 you think about it, if you've done -- even if you look at
14 a lot of mergers, you have to ask yourself the question
15 how come I'm observing this merger? And the answer is
16 you're observing this merger because someone at the FTC
17 or DOJ thought it was a good merger and prices wouldn't
18 go up. So therefore you're looking at a sample, you're
19 drawing from a sample, of which on average you would
20 expect prices to not go up, quality adjusted prices. So
21 you have self-selected sample, we know the problems with
22 self-selected samples, so in some sense, these merger
23 studies, retrospective studies, are primed to give you
24 the answer prices didn't go up. So I'm telling you -- so
25 it's obvious that you can't infer from that observation

1 without doing some correction that your merger policy is
2 fine. So how can you solve this problem? Well, we know
3 you can -- you know, Heckman and others have, you know,
4 shown us how to do these self-selection corrections that
5 might be hard in this case. But there's something else
6 you can do if you have the data and really you do have
7 the data. The data you want and this is what is needed
8 to evaluate government policy is you want to know what
9 are your economists telling you about what they're
10 predicting from this particular merger at the time
11 they're making their decision. Will prices go up -- are
12 you saying prices are going to go up by 5 percent? Now,
13 anyone who -- who's worked in the Department of Justice
14 or in -- ever done a study knows when you do a study,
15 it's not one approach you take. You might do a reduced
16 form to predict price, you may do a simulation model with
17 Logit, you may do a simulation model with nested Logit,
18 with BLP, you know, or more complicated methodology. And
19 you might have different games people play, I mean,
20 Bertrand, Cournot, Stackelberg, as Aviv has in one of his
21 papers.

22 And what you'd like to know is retrospectively
23 if I let a merger go through, who was right, which one of
24 these methods worked better? Now, in fact, if you
25 combine that with the data you get when you did a

1 retrospective, which is typically did price go up
2 compared to the past -- and I show how you can do this in
3 the paper -- you can get an exact estimate of the
4 systematic bias and you can avoid the self-selection
5 problem, if you do it in a particular way. So I think we
6 actually have the tools to evaluate how our government,
7 the FTC and DOJ, are doing in antitrust policy. And what
8 you need is our economists there in those agencies, the
9 FTC and DOJ, to be collecting data on what are their
10 predictions. And it's not just predictions about price.
11 It's predictions about entry because that often matters a
12 lot, product repositioning, product introductions, and
13 all of those are necessary when you look backwards at a
14 merger to say, am I good at predicting entry or am I bad,
15 am I good at predicting product repositioning or am I
16 terrible? If you think about a lot of these econometric
17 models, usually we take the quality dimension as fixed
18 and we play in a merger simulation a Bertrand game and we
19 hold the quality constant. What would happen if you
20 didn't do that, does that give you good predictions of
21 the new qualities?

22 So I think if we are serious about assessing
23 which of our tools that our economists in both the DOJ
24 and FTC are using, we need to start gathering -- having
25 them gather data on what their predictions are, what --

1 how those predictions compare to behavior
2 retrospectively. And then we can whittle out those
3 techniques that work versus those techniques that don't.
4 So I actually think this is in the area where there is a
5 clear research agenda that we could go forward on.

6 MR. BAYE: Aviv?

7 MR. NEVO: So I expected going into this
8 session that I would completely disagree with Dennis
9 simply because the note that we got sort of said that
10 Dennis thought that retrospective studies were inherently
11 flawed and I think there is some mention to it in the
12 previous panel, but going from kind of that extreme, I
13 mean, I basically agree with almost everything that was
14 said.

15 I mean, you know, it's clear that there's
16 limitations on their sample selection. There's issues
17 that we have to deal with. But you know we shouldn't
18 stop. We should really sort of try to sort of get the
19 data both at the descriptive level; but you know, taking
20 it one step further, as sort of Dennis suggested, to
21 really understand sort of our method as to, you know,
22 what are we doing right, what are we doing wrong? I
23 mean, you know, is Nash, Bertrand a good assumption or is
24 it a bad assumption when we do merger simulation? Do we
25 have any hope of simulating the effects of mergers? Are

1 we just focusing on completely the wrong dimension
2 because we're focusing on price and that's not the
3 important dimension. I mean, we don't -- we have no clue
4 on any of these.

5 Indeed I would actually like to sort of -- I
6 think it was about seven or eight years ago -- you might
7 remember, Carl -- there was a proposal we put through IBR
8 when I was still at Berkeley to the Smith Richardson
9 Foundation. We put a proposal to actually do some sort
10 of retrospective study. And I think the comments we got
11 from the reviewers were very nice but impossible to which
12 we sort of agreed but we were hoping we were going to get
13 funded anyway.

14 Part of the time I remember talking to people
15 at the DOJ. I was sort of -- you know, trying to put
16 them -- you know, let's sort of do this but we need kind
17 of a benchmark. It's like, okay, prices go up but
18 relative, you know -- relative to what?

19 So one of the things I was trying to sort of
20 see is if there was any way to get was actually not their
21 own analysis but, you know, can you bring in the analysis
22 of the experts? Let's sort of go and look and see. We
23 have Jerry Hausman sitting on one side, Kevin Murphy
24 sitting on the other side -- just, you know, randomly two
25 names. Let's see how well they did in actually

1 predicting what happened. And, you know, there are
2 probably enough cases are involved that we've seen sort
3 of that things actually went through that you could have
4 a Jerry -- Jerry Hausman fixed effect, right, sort of
5 see, you know, is Jerry systematically biased or not and
6 at some point you know Jerry might have to explain that
7 or, you know, anyone else sort of sitting in this panel.

8 So I think there's sort of a lot of value to
9 that and I think that sort of is a direction that should
10 definitely be attempted.

11 MR. BAYE: Carl?

12 MR. SHAPIRO: I have a number of reactions
13 actually. Let me start with a question to Dennis. The
14 first part of that I didn't -- I totally agree to the
15 extent we can do those retrospectives, look at what
16 happened, and then see which predictions work better or
17 not. That's a very good program, okay? It's difficult
18 in various ways that you know about with confidential
19 information and so on and so forth.

20 But before you got there, you said, well,
21 without -- the simpler thing about just seeing what
22 happened -- you know, if we saw that prices went down, we
23 got the self-selection. So let me push you on that
24 because I don't quite -- I don't think I fully get --
25 follow you.

1 We see a set of mergers that occurred, okay?
2 We imagine there were some others that were deterred and
3 never even proposed and maybe there's some that were
4 proposed and blocked or fixed or something. But we looked
5 at these that went through, say, with no challenge. And
6 I would agree since very few mergers of all mergers even
7 have antitrust issues really to speak of, you know,
8 they're neutral competitively, maybe they're
9 procompetitive. We would expect a lot of prices to go
10 down or good things to happen or we hope anyhow.

11 So if we looked at that whole group, I would
12 agree that wouldn't tell us much about merger policy from
13 seeing that prices on average went down for that whole
14 group. But if I said, I want to look at the ones that
15 were closer to the edge, okay, I want to look at the ones
16 that got second requests, for example, and then were --
17 that were cleared or some or other index -- that's a good
18 set right there. But you think of some other way of
19 finding more marginal mergers or maybe the ones that were
20 supposedly fixed and to see whether the fix was good
21 enough. So some set of mergers that clearly raised
22 issues but did go through.

23 Now, if I looked at those, it seems to me I
24 suppose you could now measure whether prices went up or
25 down, hard thing, wouldn't that be pretty informative.

1 MR. CARLTON: So that's a good question, okay?

2 MR. SHAPIRO: Thank you, professor.

3 MR. CARLTON: And I have it in my -- I discuss
4 this in my paper. It's actually -- I'll answer it in two
5 parts. The first is I do view the -- and what I
6 recommend in the paper is that we limit the analysis to
7 second requests, okay? So I think that's exactly right.

8 The second is what I'm trying to determine is
9 whether there's a systematic bias from government policy.
10 And just to simplify things, do they always make a
11 mistake and underestimate the price effect or
12 overestimate price effect. That's what I'm trying to
13 figure out.

14 Now, if you could tell me which mergers are
15 right on the line, that would be a way of estimating it.
16 I would agree. And you can write down econometrically
17 how to estimate that. All I'm saying is that, that's
18 actually pretty hard to estimate and I can get a much
19 more efficient estimator if I combine my information
20 about prices retrospectively with what the agency is
21 predicting.

22 In other words, I'm trying to see if the agency
23 has a systematic bias. And the easiest -- and what that
24 means is when the government predicts what's going to
25 happen to price, their best predictor, are they right or

1 wrong? And the easiest way to answer that question is to
2 compare the actual price to the government's price
3 prediction.

4 Now, there's another way of doing it. If I
5 don't have the government's prediction, I can look at --
6 let's see if I can draw a dia- -- I'm not going to trip,
7 am I? No. But there's no chalk. Oh, there is chalk.
8 Okay.

9 So if you -- let's see if I can remember. If
10 this is the distribution of prices (indicating), price
11 effect, a neutral policy is ΔP equals zero in that I
12 forbid these types of mergers, okay? And that means on
13 average -- I'm not biased. If it's a systematic effect,
14 if the government is doing something that is, let's say,
15 overly stringent, then that would mean it forbids too
16 many mergers, okay? And let's call that S and that's
17 what I would like to estimate. So the optimal estimator
18 is -- you know, I'm going to get observations in this
19 tail, because that's what I'm going to observe, those are
20 the mergers you're going to see. And then the question
21 is how you observe it -- how you estimate S . So S is the
22 minimum or the maximum support of this distribution,
23 okay?

24 All I'm saying is econometrically, S is also
25 the bias in every single prediction. And it's -- if I

1 can observe the predictions for all mergers and compare
2 them to the actual prices, then I can observe S --
3 actually calculate S -- over a larger body.

4 So the point you are making is exactly right.
5 I can estimate S, as you say, and it's just a much more
6 powerful way for me to estimate things if I can in a
7 sense say, all right I have a thousand mergers. Instead
8 of just concentrating on the ones that were close, for a
9 thousand mergers, I want to compare how bias you are in
10 price. That's all. It's an econometric point.

11 MR. SHAPIRO: So if we can figure out this
12 group was marginal, we'd look at that with a much smaller
13 set -- and that's what you don't like --

14 MR. CARLTON: Yeah, yeah.

15 MR. SHAPIRO: -- but it would give us a pretty
16 good estimate.

17 MR. CARLTON: Yes.

18 MR. SHAPIRO: Except for the small sample size.

19 MR. CARLTON: Small sample size is the other
20 problem.

21 MR. SHAPIRO: But --

22 MR. CARLTON: It's not as efficient as my --
23 also, I think, you know, obviously we're simplifying it
24 to say, you know, you're making predictions about price.
25 But there a lot of other dimensions. And even if we just

1 stay with price, which simulation model, which reduced
2 form, which -- which assumption about gain?

3 MR. SHAPIRO: Okay.

4 MR. CARLTON: And I think it's important for us
5 to get some sense about all of that. My sense is that
6 when we make predictions, we -- you know, I'm not at the
7 Department of Justice anymore but -- that's the loyal we
8 I guess.

9 But when economists make predictions about
10 entry and exit, I've never been convinced that we are
11 very good at it because I've not seen many experiments
12 testing whether predictions of entry and exit, how robust
13 they are, how good they are.

14 MR. SHAPIRO: So I would want to distinguish
15 then, it seems to me, if we think about encouraging
16 academic research, they're not going to have the
17 information about the FTC or the DOJ economists' methods,
18 protocols, predictions, they're just not, okay? They --
19 this could be a method that the academics could use?

20 MR. CARLTON: Absolutely, yes.

21 MR. SHAPIRO: Okay. So now let's go -- but
22 your other method, which you prefer then, which is more
23 powerful --

24 MR. CARLTON: Yes.

25 MR. SHAPIRO: -- and also, you know, put in

1 principle could give a lot more operational guidance in
2 terms of, you know, this particular merger simulation
3 thing isn't working well. We have to use something else.

4 So that seems to be then a call for economists
5 at both agencies to be doing that because nothing else
6 can do that.

7 MR. CARLTON: Correct, I agree with that.

8 MR. SHAPIRO: So then I just want to make sure
9 I understand, if we're trying to be specific, they would
10 have to retain information so maybe there would be a
11 closing memo about here's what we predicted with this
12 method, with that method. I mean, in fact you need
13 quantitative prediction --

14 MR. CARLTON: You're exactly right. I --

15 MR. SHAPIRO: -- right, the price will go down
16 by 7 percent, up by 9, and you keep these and then some
17 resources we put into play a year or two later, the
18 merger went through.

19 MR. CARLTON: And I wrote such a memo to Tom
20 Barnett, the assistant attorney general, about that
21 that's that we should be doing.

22 MR. SHAPIRO: And is that the method he used to
23 evaluate the retrospective on Whirlpool Maytag?

24 MR. CARLTON: Well, you know, there should be a
25 retrospective on Whirlpool Maytag. From what I know, it

1 remains a pretty competitive industry.

2 MR. SHAPIRO: Remained?

3 MR. CARLTON: But -- if --

4 MR. SHAPIRO: Let's not.

5 MR. CARLTON: The competitiveness of it has not
6 dramatically changed.

7 MR. SHAPIRO: I brought it up, but is that
8 something that -- forget about Whirlpool -- in general
9 something you put into place, is that going on at DOJ
10 now?

11 MR. CARLTON: I do think there is right now
12 implemented a policy to gather data either at DOJ or FTC
13 on the part of the economist and I think there should be.
14 And I think it would be very helpful. And it would not
15 only enlighten the agency as to what works and what
16 doesn't to be very valuable for industrial organization.
17 I should point out -- I mean, the industrial organization
18 research.

19 I should point out one -- one -- one paper that
20 I think is really excellent. Craig Peters, who's now at
21 the DOJ and was a student at Northwestern, did his P.h.D.
22 here. I don't know if he was your student or whose
23 student he was. I think he was Rob's -- yeah. He did
24 what I'm suggesting for some airline mergers where he had
25 a number of different models, simulation models. And I

1 think he always used Bertrand competition but he did use
2 different demand estimation models. And asked which one
3 did better and had a reduced form. And I think that's
4 really what we have to do.

5 And when we say merger simulation, although
6 everybody does merger simulation, we should remember that
7 there are several limitations to it. One is it's a
8 static game and two, as I said earlier, it's a game in
9 which mainly price is the variable. And, you know,
10 neither of those two assumptions need -- it's a static
11 Bertrand game. And, you know, static, Bertrand, just
12 price, those are assumptions. How good are they? And I
13 think those really need to be tested.

14 MR. BAYE: Abe?

15 MR. WICKELGREN: I agree. I think this is a
16 good project. I think we need to worry a little about
17 how it's going to end up being used because if there is
18 something that's going to end up being used in, you know,
19 in court, right, to evaluate the method, then we
20 introduce the possibility of all this strategic behavior
21 in how the estimates are generated in the first place,
22 right? So we're going to find out that, you know, well,
23 when we estimate with BLP, there's this particular -- you
24 know, this particular bias and then, you know, when you
25 go to court, that gets introduced. Then there's an

1 incentive to say, well, since we're talking about cases
2 we're going to close anyway, right, maybe we don't worry
3 too much about, you know, putting in the right estimate.
4 Let's put in the estimate that gives us more leverage and
5 makes people believe us later on when we have a case that
6 we really want to challenge.

7 So it seems like, you know, it's a great
8 project if it's something that the agencies are going to
9 use internally but if it's something that is going to be
10 able to be used by the courts, then I'd worry that
11 there's too much incentive to manipulate it.

12 MR. BAYE: That's an excellent point. Let me
13 just kind of follow up while we're on the merger
14 retrospectives theme, I mean, you know, if you talk to a
15 staff economist at the Federal Trade Commission or the
16 antitrust division and ask them what a merger
17 retrospective is, it's some kind of difference in
18 difference estimation on what happened to prices or
19 something like that.

20 One can imagine more broadly as you're talking
21 about these kind of implicit predictions that one makes
22 about whether entry is likely or if prices went up, entry
23 would be likely to discipline those things. When you look
24 at the vast majority of cases that come through the
25 agencies, they're not cases where the sophisticated

1 econometrics is done either because it would be an
2 inefficient use of resources given the information you
3 have about potential overlap or data is completely
4 unavailable. So the number of dots is -- is small.
5 You've got to use the approach that Dennis proposed --
6 let's assume that's true. Let's not argue with that --
7 let's assume that's true and that we're looking at
8 alternative methodologies that economists don't think of
9 right off the bat as a -- as a logical methodology. And
10 several of us are in business schools and we deal with
11 case studies quite a bit or have colleagues that use the
12 case study approach. One might imagine -- I'll put this
13 on the table and get your comments on whether you think
14 there would be value in this.

15 So, case study type retrospectives in instances
16 where data is not available but when you're examining,
17 maybe the staff memos that are making predictions about
18 entry or predictions about the various other facets that
19 might be in a case and doing what you might think is a
20 descriptive rather than a quantitative retrospective, is
21 there value in something like that?

22 MR. CARLTON: I think there is. I think
23 there's great value. In fact, although you can imagine
24 cases in which there's quanti- -- you know, a lot of data
25 and you can do these complicated demand estimations and

1 merger simulations, as you say, in many cases that's not
2 possible. That does not mean that the approach that I
3 articulated is the -- it can't be implemented. If you're
4 a Bayesian or a decision theorist, you know that what
5 matters to determine if someone's prediction is right or
6 wrong, you first have to ask them, well, what's their
7 prediction. And if someone says, well, I don't have a
8 prediction. Then you say you mean you're making a
9 recommendation about whether to challenge or not
10 challenge this merger and you don't have a prediction
11 about price? What's your best prediction about price?
12 Or give me your probability distribution. I mean, you
13 can teach people, as you do in business schools, to think
14 about probabilities in their predictions.

15 So the point is not that this data doesn't
16 exist. It implicitly exists every time the DOJ or the
17 FTC's economic staff write a memo telling their views.
18 And what I'd like them to do is if they have quantitative
19 techniques that tell me your price predictions are, fine.
20 But if you don't, I would like a data sheet that says
21 here's my best estimate of what I think price is, I'll
22 tell you how sure I am about it. And there are
23 decision-theoretic methods to teach people how to give
24 probability distributions.

25 And here is what I think is likely about entry.

1 And I think it's -- you know, again, you can have them
2 put probabilities on things, you can have them put
3 probabilities on, I think, it's highly likely product
4 will be repositioned. I think all of that, whether we
5 call it a case study or descriptive, to me that is
6 defining what the agency as a whole is doing. And just
7 like you should be defining consultants, which I agree,
8 that would be a useful thing to do, you might want to be
9 keeping track of, gee, when I stick Carlton on the case
10 at the DOJ, you know, it never goes through, he's against
11 everything, you know, maybe a Carlton effect or there
12 could be methodology effect. And I think that's very
13 important to sort out.

14 MR. BAYE: Carl?

15 MR. SHAPIRO: I guess I disagree about the --
16 the assumption that there's always a price prediction to
17 the background here. I mean, I guess, let me start from
18 where Mike's question -- what Michael's question was,
19 which is a lot of the time, we don't have all of the data
20 to do all the stuff that, you know, some sophisticated
21 merger simulation, it's rare to be able to do it, okay,
22 so that's not the norm, okay?

23 I think your -- your response, though, seemed
24 to assume, of course, the way we would do merger
25 enforcement, was we would stop the mergers and we were

1 convinced there would be a significant price increase.
2 And maybe if we have to say whether it's 5 percent or 8
3 percent or some notion of the scale -- and, you know,
4 this is actually going to relate to the paper that I'm
5 presenting tomorrow morning with Joe Farrell at
6 tomorrow's conference on merger enforcement. I think
7 that may be asking too much in order to have such a
8 quantitative measure of price effects as a prerequisite
9 for bringing the case. And I -- I guess, I may be more
10 enforcement-oriented in saying, well, if I have reason to
11 believe the price will go up, I don't know how much,
12 okay? You know the traditional structural approach would
13 have been, look at, concentration in a relevant market, I
14 don't really know what's going to happen. That's enough
15 for me, okay? I'm not going to tell you what the price
16 is and I don't know, okay? So -- so that, you know, I'm
17 wondering whether you are raising an extra requirement in
18 a way to bring a case. So that's just a -- or assuming
19 that those numbers do exist, when maybe they don't have
20 to.

21 The other point, Michael, you mentioned
22 difference in differences in this -- I mean, this
23 Ashenfelter paper is an exemplar of that, I guess. That
24 seems to me a very nice reduced form, some nonstructural
25 way of trying to see what the prices effects were, more

1 along the lines of what happened? I may not know why or
2 something but what happened? And that seems to me --
3 again, you can only do that in special cases. I mean,
4 that's also a consumer products where you need a sense of
5 comparable products. But I think that -- so I would go
6 back to look at the mergers that were marginal, which is
7 what they did, tried to find some notion of -- of
8 concentrating or marginal mergers that got through and
9 just look at the price effects. I continue to think
10 that's pretty valuable and there may be more data points
11 there then in Dennis's sample for the in-house sample
12 with the merger simulation methodology. And they did so
13 -- so that seems to be an instructive paper that suggests
14 that in the late '90s, at least, enforcement was a bit
15 too lax based on those results and I'd like to see more
16 of that.

17 MR. CARLTON: Uh-huh. I don't want to leave
18 the impression that to do the method that I'm suggesting
19 you need the DOJ or FTC to have done quantitative
20 estimates. You can still ask whether they're biased by
21 getting an estimate of what their prediction is. Now --

22 MR. SHAPIRO: And along presumably with the
23 method that was used to get it so you could evaluate the
24 method --

25 MR. CARLTON: If you could.

1 MR. SHAPIRO: If you could.

2 MR. CARLTON: If you could, yeah, yeah.

3 Now, it is true people can be sometimes
4 uncomfortable about saying, you know, I just think prices
5 are going to go up, this looks like a bad merger. On the
6 other hand, that just means they are very flat prior as
7 to where their beliefs are. And, you know, in a decision
8 theory course, people are taught how to -- how to -- you
9 know, how to articulate better their underlying beliefs.
10 And I think economists could become comfortable with that
11 method.

12 But, you know, I'd even be willing to say, you
13 know, put it in categories, a lot, a little, you know, I
14 think that they could start doing something. But it's
15 clear when they make decisions they have some
16 understanding that there's some threshold price increase
17 that they think is going to occur when they want to stop
18 a merger.

19 MR. BAYE: Go ahead.

20 MR. NEVO: So just going back to kind of the
21 original comment about, you know, case-based studies. I
22 mean, I think there's two points to be made.

23 One is just from a diagram we have here. I get
24 the impression that you need a lot of mergers to kind of
25 put them on, you know, sort of that diagram. I don't

1 think that's necessarily true.

2 I mean, you know, the Craig Peters sort of
3 case. Well, it's literally a case study of -- and if you
4 look at, you know, recent academic work -- recent
5 basically being the last 25 years, sort of the new
6 empirical IO -- it's really all about, you know,
7 glorified case studies with a lot of econometrics, but
8 that's really what they are.

9 So to the extent, you know, I think it's
10 important to realize we don't need necessarily kind of a
11 cross-section of different mergers to kind of do this
12 sort of thing. What we do need, though, is, you know,
13 you were talking about kind of running a nonquantitative
14 study. I mean, I think at the end of the day, you do
15 need somehow to measure what was the effect. It was a
16 merger, what happened ex post. Now, it doesn't have to
17 be price. You know, maybe you could measure, you know,
18 the merger happened and what happened to the level of,
19 you know, chatter, okay, where chatter is measured by,
20 you know, certain e-mails containing certain phrases sort
21 of exchanged between executives or I don't know, whatever
22 it is you want, maybe something, you know, that we can't
23 really run a regression on but you need to measure
24 something in the effect of the merger. In that sense, it
25 does, I think, need to be quantitative. But, yeah, it

1 doesn't necessarily have to be on price.

2 MR. BAYE: Abe, did you want to chime in at
3 all?

4 MR. WICKELGREN: Yeah, I'm just wondering when
5 we're thinking about case studies, I mean, how well can
6 we generalize the results of a particular case study? So
7 do we need that, you know, the effect of, you know, well,
8 here, you know, there was a prediction that there would
9 be entry and it didn't happen, does that mean there's a
10 general bias for, you know, the agency or this
11 particular, you know, staff member about -- about
12 predicting entry or is it a bias of this staff member in
13 this particular type of industry or is it just -- I guess
14 as Dennis was talking about, you know, in the beginning,
15 is this just noise, right? Sometimes you make a mistake,
16 sometimes not. Do we have -- are we going to get enough
17 information in, you know, enough similar categories to be
18 able to make, you know, any distinctions in situations,
19 you know, where we're talking about -- about case
20 studies.

21 MR. SHAPIRO: Well, you can see, for example,
22 if you saw a bunch of mergers where the department said
23 we're -- or the FTC said we're not concerned about this
24 particularly with the issue of closing statements, which
25 are quite useful, okay, which might be more closing

1 statements might help here, okay? Both agencies, say,
2 well, we're not concerned about these mergers because
3 entry is easy. Well, then you could see whether -- if
4 prices did go up, did entry -- at least that gives you
5 something specific to look for. Or entry and expansion
6 so you can see if smaller firms grew, you know, that sort
7 of thing. That seems to me useful and so I would
8 encourage -- the Commission has done some closing --
9 well, both agencies have, but it's pretty unusual.

10 The Europeans, I guess, have to do it, they
11 routinely do it. I don't know whether they have to, the
12 Commission, the European commission. So that would help
13 a lot and this, of course, doesn't reveal any
14 confidential information. But it does say something
15 about the reasoning that was relevant.

16 MR. CARLTON: Of course, we really haven't
17 discussed that one of the real problems with doing
18 retrospective mergers which is even if you can get the
19 DOJ and FTC economists to give you data, it's not obvious
20 you can get it from the industry after the merger has
21 closed. And that's a serious problem. And I don't have
22 a simple solution. I think the FTC has more authority to
23 get the data than the DOJ. That's my general
24 understanding. I'm sure the lawyers can -- know more
25 about that than I do. But I think that's been one of the

1 difficulties with doing retrospective studies.

2 MR. SHAPIRO: I agree but the one thing that's
3 -- there are industries where a merger may come along a
4 few years later after one so they're looking at the
5 industry again, okay, and then that's an opportunity not
6 just to get data through the HSR process but, you know,
7 maybe just spend the time and effort, there may be data
8 that can be available if you purchased it. You know,
9 there are other data sources. So that's a really natural
10 time to look and see, how were our predictions the last
11 time.

12 MR. CARLTON: Yeah, I agree.

13 MR. WICKELGREN: Well, it seems like, you know,
14 at the time when you're deciding the issue of closing
15 statement, the FTC actually might have leverage to say,
16 well, instead of closing this investigation, how about we
17 agree to close it on the condition that you turn over
18 data so that we can study the effects in the future?

19 MR. CARLTON: I've always thought that was a
20 good idea. But every time I've mentioned it, I think the
21 agencies don't like it. But -- especially at the DOJ. I
22 think the question is does it impinge on you getting
23 something that is above and beyond what your charge is
24 that you're entitled to. But I think it's important to
25 get such data.

1 MR. SHAPIRO: That's interesting.

2 MR. BAYE: Why don't we move on and basically
3 ask the same question we're going to ask over and over
4 again as it applies now to single firm contact --
5 conduct.

6 And, Carl, I'll let you take this on.

7 MR. SHAPIRO: Well, I'll be briefer on this.

8 I think we have a lot more we can do on mergers
9 actually than we're going to be able to do here. And so
10 it's probably suitable we talk a quite while about
11 mergers. But I also think -- still preparatory comment
12 -- that the mergers is, I think, a huge ongoing -- we --
13 we don't understand very well some of the effects and you
14 know, how we're doing these things. There's -- there's
15 quite a bit of differences about methodology. So I think
16 there's a lot of return there to continuing to see how
17 we're doing.

18 In the single firm area, I made my general
19 statements about deterrence hold. I -- I think to a much
20 greater degree we've been fine tuning single firm conduct
21 boundaries for the past -- since maybe mid '70s, okay, in
22 the U.S., okay? And so, you know, it's possible we're
23 way off and we got it wrong and it's going to continue to
24 get more favorable to dominant firms in terms of what
25 they're allowed to do. But I do think the sort of

1 measuring the effects of moving the line a little bit
2 here or there, I mean, you know, if we're pretty close to
3 the optimum of the line a little bit, it's not going to
4 matter very much. Whereas, mergers, in fact as we have a
5 steady stream of them -- you know, a trillion dollars a
6 year, mergers are reviewed by the agency so -- and, you
7 know, you -- situations change. So that's -- that just
8 seems to me there's more return there.

9 Having said that, I just don't see how to go
10 beyond trying to get measurements in individual cases.
11 Well, two things. That -- what I said before, the Unocal
12 Case, I mentioned. But other cases -- you know, we could
13 do a case, a case like Schering-Plough, you know, your
14 Schering-Plough case where you've got drug settlements.
15 You can also do measurements there in terms of how much
16 gener- -- how long generics were delayed from entering
17 the market and the impact of -- they've done a lot of
18 studies at the FTC about the impact of generics on
19 prices. So you can -- you can measure some of the things
20 in some of those areas, okay, but you're not going to be
21 able to measure the deterrence, which I continue to think
22 is the bigger thing so that's the way it goes.

23 The other thing sadly is that if you look at
24 the FTC's record over the last five years maybe, I'm
25 concerned that these are negative precedential effects

1 because you keep losing -- or not just the -- I mean,
2 both the Rambus case and the Schering-Plough case, the
3 consequences of what the FTC has done has been -- the
4 court of appeals decisions, that I would -- I think --
5 and I'm not alone -- are allowing lots of anticompetitive
6 conduct. And companies are more comfortable engaging in
7 that conduct now that the FTC challenged it and lost. So
8 maybe more effort should be -- less effort on regular
9 cases and more effort on educating the judiciary.

10 MR. BAYE: Abe?

11 MR. WICKELGREN: Well, I guess, I wonder to
12 what extent, you know, the fact that you bring these
13 cases and lose is again you know, just noise and ex-ante.
14 It's still a good idea to bring the case and to what this
15 suggests that, you know, maybe you need to hold off for
16 -- for clearer cases so that there's -- so that you avoid
17 this -- this potential mistake.

18 But it seems like it's not obvious from the
19 fact that, you know, you lose cases to the extent that
20 there's noise in the judicial process that that
21 necessarily means from an ex-ante standpoint what the
22 agency was doing was necessarily a mistake.

23 MR. SHAPIRO: Well, I'm not suggesting that it
24 was a mistake to bring those cases. It's just if you
25 think about the program and pursuing and you think about

1 the risks that are faced in litigation and what seem to
2 be very strong cases to get loss, that's got to be part
3 of the calculations as to what you're doing. And so far
4 it hasn't been going very well lately. I mean, what's
5 the big success story the FTC would point to in the last
6 five years in terms of single firm conduct? I couldn't
7 think of one as I was flying from Beijing trying to have
8 an the offsetting example to Schering-Plough and Rambus.

9 I mean, Unocal maybe but it was settled so
10 it's, you know -- I mean, it was a good case but -- but
11 that's -- you can't put it up there as, you know, it was
12 won. It was settled because of the merger that came
13 through.

14 MR. CARLTON: Well, I think when you bring a
15 case and it appears to be a good case and then you
16 subsequently lose, as you point out, it can have a
17 harmful -- harmful effect. What it does, of course, is
18 put pressure on the other parts of the system then to
19 remedy it either for the Supreme Court to take the case
20 or for there to be a legislative solution.

21 I think that part of the difficulty in the IP
22 area is -- as many people have pointed out, including
23 Carl -- is that IP laws are causing havocs in some
24 places. And, therefore, that creates -- when you get
25 cases that, say, many people think come out wrong, I

1 think that does put more pressure on the legislative body
2 to remedy the problem if the courts can't. So the court
3 is saying, listen, you guys pass the laws, we are just
4 interpreting the laws. The suggestion, therefore, is
5 that if you don't like how we're deciding cases, you
6 should alter the laws a little bit. So there can be
7 pressure in that regard.

8 I think the difficulty with single conduct
9 behavior is to find out -- and again I think the issue is
10 not whether you are making a particular mistake in a
11 particular case but whether there's any systematic bias
12 one way or the other, and you don't have to either have
13 systematic bias or make mistakes. But I think you do
14 want to distinguish between the two. And a policy is
15 determining the systematic bias or eliminating the
16 systematic bias. And that's hard to measure in part
17 because there aren't a lot of single conduct cases and in
18 part because they're quite different over time. And if
19 you do a time trend of single conducts cases, we know the
20 antitrust laws have changed enormously over the time
21 period. So it is not obvious that the fact that single
22 conduct cases 30 years ago turned out terrible tells you
23 much about what would happen today.

24 The other area that I think is a very hard one
25 and I think a lot more work needs to be done, is what is

1 the evidence in single conduct cases when you have an
2 industry that's quite dynamic and rapidly changing. Is
3 intervention in those injuries harmful or helpful? And
4 that's a very hard question, I think, and that's an area
5 where we really need a lot more empirical research.

6 I could go either way. The hunch is we like
7 competition. But I'm just pointing out that there are
8 offsetting forces the other way. So I think that is
9 really an area where there should be more study. Dynamic
10 industries, what's the effect of either antitrust
11 decisions or regulation on -- on the innovative process?

12 MR. BAYE: Any thoughts -- for the whole panel
13 -- any thoughts on how you might measure the impact of
14 single firm conduct cases on dynamic innovation?

15 MR. SHAPIRO: Well, I mean in some cases you
16 can measure the pace of product improvement and that's
17 something you could track over time. But I think
18 inherently, those industries are harder to -- to study
19 what's going on than something that's more stable. You
20 know, did the price of this chemical feed stock go up or
21 down? I mean that we understand. But did DVD players
22 get a lot more capable or computers or something? I
23 mean, that's -- again, we could do price indices and we
24 can do economic this and that but that's inherently much
25 harder. And innovation incentives, you know, other than

1 our theoretical points, it's just track the impact of
2 those. It's very hard. Maybe Dennis has a concrete idea
3 on how to do it.

4 MR. CARLTON: No, I think it's very hard. I
5 think people have tried to look at -- and maybe that's
6 where case studies might help a lot just to sort out some
7 of the details. But obviously, you know, what happened
8 wake of IBM, what happened in wake of the AT&T decisions,
9 and obviously the Microsoft decisions? I think you're
10 looking at rapidly changing industries. And that's where
11 you can have either a big positive or a big negative
12 effect. I think there has been evidence that some of the
13 regulations in, say, telecommunications have had enormous
14 effects on the speed with which products get introduced
15 or don't get introduced.

16 I think the Trinko case, if you look, for
17 example, at the penetration rates of DSL, that they do
18 change dramatically and the investment behavior of the
19 telecommunications companies do change as a result of
20 regulatory changes that alter in a sense the property
21 rights people have to -- to gain.

22 So I think you can do that and you can also do
23 in some of these industries cross-national studies. So,
24 for example, if you compare telecommunications in New
25 Zealand to telecommunications regulations in the U.S. --

1 I think Jerry actually -- Hausman -- has published a
2 paper on this. You can see does the different access
3 rules that you allow rivals to have to your network, does
4 that affect your incentive to innovate and invest?

5 So there I think sometimes cross-national
6 studies can help. But I agree with Carl that can be --
7 it's a particularly difficult area. But I think some
8 progress can be made.

9 MR. SHAPIRO: Well, I just have to tell a
10 little story. Coming back from China, I learned over
11 there that private individuals or companies can't own
12 land. So they -- they -- so it used to be the government
13 owned all these buildings and apartment houses and they
14 sold a lot off them off, the building but not the land.
15 So you could have a maximum lease, they were telling me,
16 70 years. You know, most of them are 50, apparently. So
17 I said, well, doesn't -- well, I'm thinking, well, you
18 build this whole building and then you get to renegotiate
19 with the government, you know. Now, a lot of these have
20 been going like 20 years, 30. Doesn't that affect
21 investment? It's a very fundamental thing. We'd be
22 like, what a crazy system, you know, the property rights
23 are so ambiguous, why not well define? Of course, I was
24 like, can I prove to them that's a bad system? You know,
25 we'll see.

1 So we take a lot of things for granted about
2 incentives and property rights and appropriation
3 ultimately, hard to prove.

4 MR. BAYE: Abe?

5 MR. WICKELGREN: You know, one thing that makes
6 it more difficult in, you know, the competition policy
7 context than in the regulation context is -- I mean, not
8 only are sort of the outputs here for innovation hard to
9 measure but it's going to be much harder to identify
10 causal effects on whatever outputs you choose when we're
11 thinking about, you know, well, what's the precedential
12 effect of, you know, the Commission going after this
13 particular conduct versus, you know, the direct
14 implementation of regulations or comparing regulations
15 across -- you know, across countries.

16 So I mean, you know, I think there are two
17 things that are making this hard. Not only is it just
18 much harder to measure, you know, innovative activity
19 than it is price, but it's also much harder to identify,
20 you know, exactly what the causal mechanism is.

21 MR. BAYE: Aviv, do you want to comment on that
22 or we can move along to the next theory?

23 MR. NEVO: The only thought that came to my
24 mind sort of thinking about this was I have a six-year
25 old daughter who just learned about infinity. So the

1 other day she is sort of sitting there and saying, you
2 know, Abba -- Abba, she calls me. Abba, I understand
3 infinity, but what's two times infinity? So it seems
4 like we started with a very hard problem that we've all
5 decided was impossible and went to a two-times harder
6 problem.

7 So that's basically kind of -- I think we can
8 go into all the details but it basically seems to be an
9 even harder problem to --

10 MR. BAYE: Well, on that happy note, let's move
11 on to vertical restraints and see if you have
12 suggestions.

13 Let's start with Abe. Any suggestions on how
14 we might identify the benefits and costs of alternative
15 policies aimed at vertical restraints.

16 MR. WICKELGREN: Yeah, well, I mean as far as
17 measuring these, I guess, to take Aviv's story, you know,
18 I try and teach my daughter the difference between
19 countable and uncountable infinity. So maybe this is --
20 this is a move in that direction.

21 But, you know, yeah, I think to identify the
22 effects is -- is hard. I think we can learn a lot from,
23 you know, the theoretical literature here on sort of
24 identifying, you know, what are the features of a
25 particular market that make vertical restraint more

1 likely to be problematic.

2 I mean, is there some externalities that
3 suggest that buyers and sellers are not likely to agree
4 on -- you know, they agree on a contract that maximizes
5 their own welfare but not social welfare. You know,
6 think about externalities among buyers due to scale
7 economies or network externalities, you know,
8 externalities due to just being an intermediate market
9 where they can pass on a lot of these costs to final
10 consumers.

11 But in terms of, you know -- I mean, I think
12 that gives guidelines -- or guidance in terms of, you
13 know, when you to -- you know, what industries or what
14 particular conduct is something that you want to look at
15 carefully. But in terms of actually measuring, you know,
16 what the net effect of that vertical -- you know, of
17 actions prohibiting vertical restraints when we're
18 deciding not to prohibit vertical restraints. You know,
19 I think that's at least as difficult if not more
20 difficult than the measurement problems that we've talked
21 about until now.

22 MR. BAYE: Carl?

23 MR. SHAPIRO: I get a headache when I think
24 about vertical restraints so since I'm still jet lagged,
25 I can't deal with it.

1 MR. BAYE: Aviv?

2 MR. NEVO: If Carl gets a headache, then ...

3 MR. CARLTON: Well, I'll be the dissenting
4 voice here. I think compared to measuring precedential
5 value of a decision, vertical restraints are a piece of
6 cake.

7 MR. SHAPIRO: But don't we need to measure
8 precedential value of vertical restraints?

9 MR. WICKELGREN: That's where most of the
10 effect is.

11 MR. CARLTON: I think that you can identify
12 more cases of vertical restraints and get data on them
13 than, you know, some of -- some of -- some of the other
14 topics we've discussed. So there are plenty of instances
15 in which a company has vertical restraints or adopted
16 vertical restraints and then you can see what happened.

17 There are countries that allow vertical
18 restraints and countries that don't allow vertical
19 restraints. You can see -- you can test some of our
20 theories of vertical restraints.

21 Now, the FTC has already done a lot of this.
22 In the '80s I thought they had very good volume on RPM
23 and resale price maintenance and they went through, not
24 only case studies, but also some econometric studies, if
25 I remember right. And, you know, you can always, you

1 know, criticize any study but I thought it was a very
2 well-done study and very informative of trying to bring
3 to bear all the evidence that we had, for example, on
4 RPM.

5 I think it's possible to do similar studies on
6 -- on where vertical restraints are used as well as to
7 try and get an idea of are they harmful. For example,
8 one of the important points that came up in -- in the RPM
9 study in the FTC volume, was how frequently it was used
10 and emphasized as an important competitive tool by firms
11 with tiny market shares and that no one disputed that. I
12 think just having a piece of information like that can be
13 quite informative when you're trying to figure out the
14 costs of either allowing or not allowing RPM.

15 So I actually think the vertical area is --
16 although can be complicated -- we have some ability to --
17 to measure it. Now, the difficulty with vertical
18 restraint, as I see it, is that if you put on vertical
19 restraint -- let's just take the simplest vertical
20 restraint where you're trying to induce someone to
21 advertise more to get around an agency problem. So we'll
22 advertise more because they advertise more, provide more
23 service or whatever, the price is going to go up. So the
24 price goes up, you get more service. Does output go up
25 or down? Well, you know, some people who need the

1 service, they're happier, they're willing to pay for that
2 increased price. But other people who didn't need the
3 service, they're probably worse off.

4 So you've got to be a little careful on how you
5 evaluate the outcome of a vertical restraint because you
6 want to distinguish an anticompetitive vertical restraint
7 that harms competition, harms your rival, raises their
8 costs, for example, versus a vertical restraint that even
9 in the absence of competition will have this effect I
10 just described, provide more service, so it's a higher
11 quality product, but price will go up so that will reduce
12 consumption by some people.

13 That is actually a complicated, you know,
14 somewhat subtle point. It just means when you are
15 evaluating the consequences of a vertical constraint, you
16 have to be aware of this -- this subtly.

17 MR. BAYE: Carl?

18 MR. SHAPIRO: I won't miss getting a headache,
19 I guess.

20 MR. CARLTON: I gave him a headache.

21 MR. SHAPIRO: So I guess then -- I -- I agree
22 with you. There are a lot of vertical cases that are
23 brought in private cases. They're all over the place.
24 There's distribution deals gone bad and so forth. So if
25 I wanted to say, oh, we can look at a lot of those cases

1 and other industries, you know, have marketing people
2 look at these -- there's a lot of stuff to look at, okay?

3 I guess one reason I sort of passed the last
4 time through here is that -- that seems to me not to have
5 much of anything to do with the FTC's enforcement
6 program as I have perceived it in recent years -- in
7 quite a few years, okay?

8 So maybe I'm not following closely enough and
9 maybe we need to distinguish, are we talking about RPM,
10 are we talking about tying, are we talking about
11 territorial restrictions, what do we mean?

12 I mean, if I said exclusive deal, I would have
13 put that more -- to me that's more monopolization type of
14 things that I worry about. You know, so -- so are these
15 more garden variety restraints like RPM, are you guys
16 bringing -- has the FTC brought any of those cases in the
17 last five years --

18 MR. BAYE: I think -- I think one way -- well,
19 the Nine West matter was an issue that the Commission
20 recently dealt with that involved RPM as an example.

21 But I think more generally, if you you've read
22 the web logs and looked at the Justice Department Section
23 2 report and the statement of our commissioners, I mean,
24 it's fairly clear that -- that some -- some work to help
25 identify the benefits and costs would be useful. I think

1 everyone recognizes, as a matter of theory, potential
2 costs and benefits exist. But to try and provide some
3 evidence that would shed light on which of these
4 situations -- I think that's the context in which I think
5 this would be very helpful.

6 MR. SHAPIRO: So I think -- I'm more -- I kind
7 of agree with what Dennis has said. Particularly --
8 again looking at private cases and just practices out
9 there. Not so much cases you've brought, because there
10 haven't been that many or DOJ either. And I think you
11 really need to start to distinguish. I mean, I think we
12 have a lot of economists that say quite a bit about RPM.
13 And that's a good example.

14 Tying, much more complicated. That's -- maybe
15 it's tying that gives me the headache in particular,
16 okay, even defining it in one product and two products,
17 integration. I don't --- I think that's much harder,
18 ambiguous effects all over the place theoretically, hard
19 to track empirically. So I'm less optimistic about that.

20 Maybe, Dennis, you have some ideas on tying.
21 You've convinced me on RPM.

22 MR. CARLTON: Well, you know what I tried to do
23 when I was at the DOJ, I didn't really succeed. I was
24 trying to interest Europe in contrasting some of their
25 vertical laws to ours and seeing if we can do any

1 empirical studies. There really are very stark
2 differences in some other countries, European countries,
3 and what's allowed, what's not allowed. I was surprised,
4 for example, to learn just -- didn't know about it, that
5 I think this is correct, that in Japan, for example, if
6 you cut price, you're not allowed to have a temporary
7 discount. There are limitations on temporary discounts
8 because it will induce people supposedly to improperly
9 think your price is really staying low but in fact it's
10 only a temporary discount and they think that that will
11 trick consumers. So they actually have rules against
12 such -- such -- such pricing.

13 And it seems to me somebody could study what
14 the consequences of those rules are. Must have fewer
15 sales, I assume than we do, what's the consequence of not
16 having sales? Things like that I think could be quite
17 interesting and I know around the country -- not only
18 within the United States but actually across countries
19 there are rules on size of retail stores. And I think
20 that maybe it's perhaps aimed at Wal-Mart but it would be
21 good to -- to see what's the consequence of that.

22 So I thought there was some grounds for
23 productive studies across -- across countries. The
24 difficulty, of course, all else equal, we have to keep
25 all else equal, which can be hard. But the fact that

1 they have such startling different rules in some areas
2 struck me as -- as something that could be leveraged into
3 an interesting study.

4 MR. BAYE: Let's move on. I've got another
5 question for -- for Abe. And maybe since I think I know
6 what most of the quantitative parts of your answers are
7 going to be, maybe we can open this up to be more broad
8 discussions of these things other than you saying it's
9 impossible and talking about orders of infinity and
10 things like that. Let's just take that as a given.

11 But -- but you guys talked about deterrent
12 effects and I -- I believe it was Carl that did mention
13 the Unocal case. And one of the things -- one of the
14 tensions that enforcement agencies always face is kind of
15 the trade-off between the welfare effects being large in
16 a big case and focusing resources on those things, Unocal
17 maybe being an example or focusing resources on cases
18 where the immediate welfare effects might be relatively
19 small but that might have large precedential value or
20 deterrent effects in the future, like Three Tenors.

21 I wonder if you could give us some suggestions
22 on how we might balance off or evaluate the relative
23 merits of those sorts of cases.

24 MR. WICKELGREN: I can talk about it, I guess,
25 again it's mostly going to be -- you know, do I have any

1 way to measure whether what I'm saying, you know, has --
2 has any validity or not, you know, doubtfully.

3 But, yeah, I think -- given that, you know, I
4 agree with Carl that deterrence is probably where the
5 main benefit here is. And I think, you know, there's
6 sort of a fine line between, you know, deterrence -- we
7 think of deterrence of harmful activity versus, you know,
8 potential chilling of activity that might be beneficial.
9 And so I think, you know, to the extent deterrence is,
10 you know, extremely important, that suggests an argument
11 for going after clear cases even if they're small cases,
12 right?

13 So, you know, it may be that we're talking
14 about, you know, deterring, you know, something which has
15 a very small market. But if there's, you know, a lot of
16 different, you know, industries with small markets who
17 might also try similar things, you might imagine that
18 there's, you know, real value in demonstrating a
19 commitment to going after something that is clearly
20 harmful that, you know, might, you know, end up not
21 having that big of an effect in this particular instance
22 but having, you know, deterrent value and deterrent in a
23 way which we're not really worried that, you know, we got
24 it wrong and we're going to be chilling something that's
25 -- that could end up being desirable.

1 You know, obviously if it's a big case that has
2 the same characteristics, you know, then it's an easy
3 call. But if we're comparing it to a big case where, you
4 know, it's also a closer case, then I think, you know,
5 the potential deterrent value here is a lot smaller
6 because we could end up being -- you know, chilling
7 desirable activity. Even if the Commission has it right,
8 the signals that that sends to other people, you know,
9 may be somewhat ambiguous and not that these cases should
10 never be brought but I think the value -- it's a clearer
11 case to -- to bring cases albeit small so we don't ever
12 worry or we think the worry is very small that we're
13 likely to end up chilling desirable activity.

14 MR. BAYE: Carl?

15 MR. SHAPIRO: Yeah, I think I agree with what
16 you said. And I want to point out an interaction
17 between, let's say, size of case and precedent -- value
18 of establishing precedent, which is, you may lose a case
19 because it's small, merits held equal, because the judge
20 will say, look, why are you bothering with this, why are
21 you going after with this, you know, and -- and let's not
22 get with excited about it. And you have burdens to
23 carry. So I'm thinking of, you know, in the cases I can
24 think of where enforcement was not taken in part because
25 it wasn't that big a market and it was an interesting

1 point. It was some precedential value from establishing
2 certain ideas but it was a riskier case because it was
3 small, okay? So I would say small and clear is okay,
4 okay, because then you can establish a principle even if
5 it's a small case. But small and murky but interesting,
6 not so much, okay, because you can kind of stack it
7 against yourself.

8 The other thing is, you know, public
9 perceptions of the Commission and what it's doing or not
10 doing. I mean, you know, without you saying political
11 issue factors. But I think it is important for the FTC
12 and DOJ, for that matter, I mean, to -- as part of
13 deterrence to be out there showing how they're thinking
14 about cases that are visible and important cases. That
15 doesn't necessarily mean bringing the cases. But if
16 you're not bringing the visible case, maybe you should
17 explain why not.

18 And there is additional value to bringing a
19 visible case. Maybe that means it's big or just
20 something sexy or something that's a hot topic or somehow
21 Congress is interested in if you think it has merit.

22 So -- so the signal is not just through
23 judicial precedent, I guess, but through reputation of
24 the agency.

25 MR. BAYE: Aviv, did you want to add?

1 MR. NEVO: I guess, you know, one sort of
2 dimension to add that may be orthogonal to everything
3 that was said is I -- I -- I think it might be hard to
4 come in all kind of on a -- you know, a general sort of
5 rule, but you might sort of think that, you know, the
6 trade-offs are little bit different depending on the
7 industries and sort of the cases so let me give you sort
8 of two extremes.

9 I mean, you might think of -- suppose there's a
10 small, you know, merger between two small sort of grocery
11 chains, kind of local grocery chains. Probably in the
12 grand scheme of things you might think, you know, there's
13 a lot of sort of potential deterrence but you might want
14 to establish that on kind of the larger chains as opposed
15 to, let's say, an industry that I've worked on recently,
16 you know, real estate brokerage firms, right?

17 So there you can sort of know in some sense
18 that almost all -- you know, real estate, everything is
19 local, right, so it really might be that, yeah, you're
20 just taking in one particular city. I don't know, some
21 small city in Iowa and you might think in the grand
22 scheme of things that's sort of a small market. But, you
23 know, it's kind of repeated, you know, hundreds, if not
24 thousands of times sort of across the country. So I
25 think, you know, the value of sort of the trade-offs

1 there I think would be very different than suppose you
2 take the exact same market and now, you know, just some
3 two local supermarket chains, you know, sort of the --
4 the value of kind of going after them. So I think that's
5 sort of a -- and maybe one way to start thinking about,
6 you know, what's the value of kind of deterrence to the
7 extent that it's more industry specific as opposed to
8 kind of a wider effect.

9 MR. BAYE: Dennis, did you have anything you
10 wanted to add?

11 MR. CARLTON: I just had two comments. One, I
12 wanted to follow up on something Carl said about sort of
13 suggesting political motivation and I think that's
14 actually more important than people realize in the
15 following sense. The DOJ -- and whether to call it
16 political, I don't know is correct. But the DOJ and FTC
17 have not succeeded in part because of Congress in
18 creating sharp dividing lines into which industries DOJ
19 has and which industries FTC has. And it creates a
20 peculiar problem that if you're an employee, a lifetime
21 employee of one agency, obviously you want to get those
22 new emerging areas. So you fight with the FTC if you're
23 in the DOJ to get that area, it's really on my side of
24 the line. And they fight, no, it's really on my side of
25 the line. And that creates a problem, I think, sometimes

1 for private parties and that clearly should be -- should
2 be remedied to get rid of some of the political
3 negotiations as to who gets which case.

4 The other thing I wanted to say is I'm not sure
5 I entirely agree that a small case where you might lose
6 means you shouldn't go forward. I'll tell you why. It
7 sort of relates to something I said earlier, if you
8 really think you're right and some industry, even small,
9 is doing something wrong, but it's unclear what the legal
10 precedent is, and even if you lose, that will then, as I
11 said earlier, create incentives for someone thereby to
12 react, either the court of appeals or Supreme Court.

13 Now, you may lose and you may come out wrong
14 but the institutions will then have to adjust.

15 So let's take a standard setting case. I was
16 also involved adverse to Rambus in -- in -- in the
17 matter. And whatever you think about standard setting
18 and someone, you know, maybe fooling someone or -- if --
19 if you believe that characterization in a standard
20 setting body, once you are told that it's not an
21 antitrust violation, you can be sure that people are now
22 going to be much more careful and they're going to try to
23 use contract law to try and remedy the problem.

24 And, you know, whether that's good or bad or
25 better than using antitrust law, the point is that you'll

1 try and use whatever mechanisms you can use with the
2 existing legislation to remedy a problem that exists if
3 you're told the antitrust laws can't remedy it. Or it
4 will create pressure for people to lobby their
5 Congressmen to fix the problem. And so -- so that's why
6 I think it's important to bring cases when you think the
7 outcome if you win would improve matters or at least
8 resolve an area of uncertainty.

9 MR. BAYE: Thanks.

10 Move on to -- it's kind of an allocation
11 question. I'll just throw this out for anyone that's
12 brave enough to try to answer it.

13 I mean, if you think of a production
14 possibilities curve that doesn't have guns and butter on
15 it but has all the different outputs that the Federal
16 Trade Commission can produce, it can provide consumer
17 protection, it can produce competition, advocacy, it can
18 produce antitrust enforcement. And then within each of
19 those sub areas of antitrust, for example, it can go
20 after anticompetitive practices in the pharmaceutical
21 industry, in the energy sector, and so on.

22 If you're an agency and you're a chairman like
23 Chairman Kovacic who cares about being on the production
24 possibilities frontier and being at the right point on
25 that production possibilities frontier, any thoughts how

1 we could evaluate whether we're inside or on the
2 production possibilities frontier first, then secondly,
3 how we should allocate those scarce resources among the
4 many things that we can do.

5 MR. SHAPIRO: Well, why don't you go first
6 since you're the director of the Bureau of Economics?

7 MR. BAYE: I just get to ask the questions and
8 be the announcer, you see.

9 MR. NEVO: If you give us answers to the first
10 four questions, this is actually an easy one.

11 I mean, look at Dennis's graph there. Well,
12 draw that same graph now to different sectors, okay?
13 Suppose we're looking at mergers in different sectors.
14 Well, you want the marginal S, right, in different
15 sectors to be the same so --

16 MR. BAYE: It's all about operationalizing this
17 stuff, right?

18 MR. NEVO: Yeah, but, you know, I guess in
19 principle that's sort of.

20 MR. BAYE: So do you look at GDP? I mean,
21 should you be more concerned about sectors that take up a
22 larger share in GDP, should you be concerned about
23 sectors where -- what do you -- I'm not looking for --
24 for a detailed econometric analyses of how one gets the
25 shadow values or tangencies to some hyperplane but just

1 some practical advice on how one would -- would divert
2 resources because obviously that's a big, big problem --
3 not only for the Bureau of Economics, as we're allocating
4 resources, a lot of that is exogenous to us, but to the
5 extent that there's discretion at the level of the
6 Commission.

7 MR. WICKELGREN: Well, I guess one thought, to
8 the extent that we really think that what's important
9 here is deterrence, it would suggest, you know, not
10 focusing too closely on any one particular sector to the
11 extent that, you know, people in other sectors, maybe
12 they have a free pass, right. So making sure that
13 everyone has a reasonable probability of, you know,
14 confronting an enforcement action, you know, may be, you
15 know, important for generating deterrence.

16 MR. CARLTON: I think it is a hard question to
17 figure out where your value added is going to be the
18 most.

19 And, you know, as you and I both know, we
20 worked on an energy report and I think, for example, the
21 value -- the incremental value of the next energy report
22 to investigate whether there's price-gouging is probably
23 low relative to other areas where you could be investing
24 money.

25 I think, as, you know, you asked, the

1 pharmaceutical industry is a pretty big industry and some
2 of the practices on settling lawsuits can have profoundly
3 large consequences. So I -- I thought that was right to
4 focus on that.

5 One area which I tried to focus more on at DOJ
6 -- and the FTC already does a lot of this work but I
7 think it's a place where it's a very high value added --
8 is in competition advocacy. In both the Department of
9 Justice and the FTC, you have a group, a really
10 concentrated group of high-powered economists, and
11 probably a better collection doesn't exist anywhere in
12 the government that appreciate the value of competition.
13 I think you could have a tremendous value added by trying
14 to comment on and influence other branches of government
15 that don't appreciate economics or economists as much as
16 the FTC and DOJ.

17 And I think commenting on legislative proposals
18 in a variety of areas and ways to solve, you know,
19 various problems that other agencies are coming up with
20 that strike us as anticompetitive, are very -- have --
21 have very high value added.

22 I think it's -- one of the things I thought was
23 odd when I came to Washington is which agencies work
24 together and how well they work together, seems like
25 almost a matter sometimes of personalities. I mean, I

1 assume the DOJ and FTC have always probably worked well.

2 When I came, Mike Salinger was there. I knew
3 Mike for years, then you came, you know, it was -- it was
4 very easy for us to work together. Other branches of
5 government -- I had friends in other branches of
6 government and it turns out I worked closely with those
7 other branches of government.

8 And then I said to myself, isn't it kind of odd
9 my friendship is determining who I'm in close contact
10 with? I wonder what happens if I wasn't friends with Mr.
11 X, would I have any ability to interact with them?

12 So, for example, there are agencies in the
13 federal government responsible for reviewing all
14 regulations. That seems to be something the DOJ and FTC
15 really know a lot about and building constant lines of
16 communication to those other agencies that are really
17 involved with economic decision-making but don't have the
18 economic staff. Strikes me as valuable functions of the
19 DOJ and FTC should be helping with and I think there's a
20 very high value added.

21 The other area of very high value added -- and
22 the FTC has done a very good job of this and DOJ had
23 tried to institute a program on this -- is to interact
24 with foreign enforcement agencies. That's where you can
25 also have a very high value added.

1 MR. BAYE: Anyone else?

2 MR. SHAPIRO: I just want to step in. I agree
3 with everything Dennis said. And I really agree about
4 competition advocacy. I guess it's not clearly exactly
5 how that might usefully be divided between the two
6 agencies, as one being part of the executive branch and
7 the other being an independent expert commission.

8 I mean, I threw out the idea of educating the
9 judiciary vehicle. Maybe that's more appropriate for the
10 independent commission rather than the executive. I
11 don't know.

12 But you might -- we talked a lot about
13 competition advocacy when I was at the DOJ as well. And
14 there are sort of executive branch goings-on so maybe the
15 FTC somehow can't be involved in the same way. I don't
16 -- I don't know. But I do think there's a lot of value
17 added there. And it's really -- but it's only just a
18 slight nuance really on what you said, Dennis, when you
19 said other parts may not appreciate economics or have the
20 economic capability.

21 I would put the focus a little bit differently,
22 just the appreciation for and understanding of
23 competition and not stifling it. I mean, this is very
24 much where the government is having rules that are
25 screwing it up as much as anything right now. And there

1 are a lot of those rules. I mean, the federal government
2 in particular so you could imagine the states as well.

3 So that's very clean good stuff that, you know,
4 obviously there's some reasons for various regulations.
5 But there's a lot that I think are hard to justify,
6 special interests groups, and so forth. So there's a big
7 payoff there. And for -- I think particularly if the FTC
8 and DOJ can figure out a way to coordinate those efforts
9 to play to their respective strengths.

10 MR. BAYE: Go ahead, Abe.

11 MR. WICKELGREN: Yeah, I guess I also want to
12 second Dennis's point about interacting with foreign
13 competition policy, you know, regulators.

14 You know, I certainly have had some experience
15 at -- when I was on staff at the FTC with that and, you
16 know, I think there was certainly a lot of value added
17 there in -- you know, to some extent in educating, you
18 know, them because I think, you know, to a large degree
19 they weren't thinking about things exactly the same way
20 that we did.

21 I think also there's sort of interesting
22 implications for however sort of -- on the other side,
23 but for case selection. You know, particularly Europe
24 always tends to take a -- or almost always tends to take
25 a much stricter view of things, which suggests that, you

1 know, education aside, if we think Europe is going to
2 look at it, there might not be any real value added to,
3 you know, the FTC examining something, right, because
4 it's going to be almost never the case that the FTC is
5 going to decide to, you know, block some particular
6 activity and -- and Europe is going to be okay with it.

7 You know, there may be value in getting
8 involved for the purposes of maybe trying to influence
9 the European outcome but, you know, sort of the
10 independent force of, you know -- if it's a -- this same
11 merger that needs approval of both, the FTC and the EU,
12 there might not be any real value in, you know, the FTC
13 looking too closely at it because it's almost never going
14 to make a difference.

15 MR. SHAPIRO: If it's a strict worldwide
16 market.

17 MR. WICKELGREN: Right.

18 MR. SHAPIRO: Because otherwise, it's very
19 different.

20 MR. WICKELGREN: Right, that's what I said. So
21 if it's the case, that it's something that, you know,
22 basically the decision is going to -- you have to get
23 approval from both in order to do anything.

24 MR. SHAPIRO: Well, that's different. It's
25 different. You could have very different markets in the

1 U.S. and Europe, need approval from both, but the remedy
2 in one might be totally inadequate in the other.

3 I just think -- I think your argument only
4 works, I think, if it's really -- the effects are kind of
5 uniform worldwide. And even so, maybe the FTC has a role
6 like to tell the Europeans not to be crazy, you might
7 think about that. But ...

8 MR. WICKELGREN: Right, well, that's what I
9 said. I mean, I think there's an, you know, there's an
10 education role but that -- that may be separate from the
11 enforcement the role.

12 MR. SHAPIRO: Yeah, okay. But the enforcement
13 role, I think, assuming it's a worldwide market with some
14 uniform ...

15 MR. WICKELGREN: Right, with uniform -- but
16 that's not, you know ...

17 MR. SHAPIRO: That's not unheard of.

18 MR. WICKELGREN: Not unheard of.

19 MR. BAYE: Just one more round of questions.
20 I'll address this to Aviv to start and you guys can
21 finish up. And then hopefully we'll have time for a few
22 questions if there are any from the folks in the
23 audience.

24 It's pretty clear that it's pretty hard to
25 measure the welfare effects of FTC policy. And kind of a

1 question folks back home wanted me to ask you is whether
2 you thought there might be any value to putting together
3 a research program that would allow one to more
4 accurately measure these things, because after all, we're
5 required to report how well we're doing by adding up
6 numbers of some sort by law anyway. And the question is
7 there value to having those numbers may be a bit more
8 informative of the marginal value that we're doing. And
9 if so, how would one go about putting that research
10 program together. Is it the kind of thing that can be
11 effectively done with in-house folks or is it the type of
12 thing that academic community or outside folks would have
13 to help us with?

14 MR. NEVO: The short answer to your first
15 question is yes, I think, you know, there is a very
16 clearcut research agenda that you could try. I think
17 it's very clear, you know, from the answer to kind of
18 basically all the questions that we all think these are
19 very hard questions. But I think, you know -- and I
20 could have disagreement later -- but that everyone agrees
21 that there's a lot that, you know, can be done to sort of
22 -- even if not ultimately answering the questions that
23 were posed but at least sort of starting towards it.

24 So before I kind of give you kind of my
25 thoughts, let me just sort of stress one thing. I mean,

1 I have basically very little knowledge of what's actually
2 being done right now. So a lot of what I'm, you know,
3 might be sort of bringing up is stuff that, you know,
4 you're already doing. And I know at least at one point,
5 just from the comments earlier, it seemed like that's
6 sort of the case.

7 So, you know, I'm not going to offer sort of,
8 you know, here is exactly, you know, what you should
9 start doing but just so if you want kind of pillars or
10 sort of some ideas. So, you know, I think the very first
11 thing is, you know, whatever research effort starts,
12 should be sort of a very systematic effort. The bit of
13 impression that I get -- you know, we're talking about
14 retrospective studies of mergers and there's been some --
15 you know, including, you know, co-authored by people at
16 the FTC.

17 It seemed to me it's more kind of individual
18 effort. I mean, you know, they might get support and
19 encouragement from the FTC, but it almost seems to me,
20 you know, people kind of doing it because they just like
21 to do research or they just want to know the answer. And
22 it seems to me that, you know, something more systematic
23 needs to be done.

24 If that means sort of, you know, setting up a
25 research group, I know other government agencies have

1 that. I mean, I do a lot of work with the U.S.
2 Department of Agriculture and they have the whole ERS,
3 Economic Research Service. So obviously that's a
4 completely different order of magnitude without talking
5 or going to something like that. But, you know, there is
6 sort of some precedent for that.

7 In terms of what the agenda should be, I mean,
8 I think there's basically kind of three pillars that I
9 think really have to be included.

10 One is, you know -- and that's kind of to
11 answer your second question. I mean, I think you kind of
12 have to get academics involved for a variety of reasons.
13 Both because of -- at the end of the day, it's unlikely
14 that you will have, you know, all the labor force kind of
15 to do it sort of internally. I think the credibility of
16 what you get -- going back to kind of all the strategic
17 issues, you know, that Abe kind of mentioned a while ago.
18 I mean, I think if it's sort of done by external
19 independent academics, that's going to glean a lot of --
20 a lot of credibility.

21 I think you want to get them involved at
22 different levels. I mean, anything from starting from,
23 you know, having third-year graduate students who are
24 kind of looking for a topic to work on, come and spend a
25 summer, maybe kind of look around. I mean, I know --

1 just to give sort of an example. A lot of consulting
2 firms will have, you, know, a graduate student come and
3 hang out for a summer. We're not going to get much from
4 you but maybe you'll learn a little bit of what -- what
5 we do, you know, you'll learn something you might be
6 interested in sort of later down the road in sort of
7 getting involved.

8 I think I mentioned this example, the USDA have
9 a, you know, current student that's actually spending the
10 summer in Washington working on data. They have -- they
11 are hoping to find sort of a topic for dissertation.

12 So starting, you know, from that level and then
13 obviously sort of later on, you know, pre- and posttenure
14 sort of getting faculty involved.

15 Now, the question is how? And I think, you
16 know, there are sort of two perceptions that I actually
17 disagree with but there are sort of two perceptions out
18 there.

19 I believe actually on this sort of this
20 equivalent panel that was in D.C., I think, Greg Werden
21 kind of make a -- made some joke about, you know, you're
22 not going to get academics involved unless you pay them,
23 which, you know, that's one way to get academics
24 involved. I think there is other ways to get them
25 involved as well. So that's kind of one sort of

1 perception that I disagree with.

2 The other is the fact that, you know, we were
3 talking about retrospective studies of mergers, I think
4 there's maybe a belief, well, this stuff isn't
5 publishable and if it's not publishable, people aren't
6 going to do that. And I strongly disagree that it's not
7 publishable. I think it is publishable. I think a good
8 study -- you know, a retrospective mergers sort of study
9 will get published -- you know, there are no upper
10 boundaries to where it can published as far as journals.

11 The other thing we have to remember, you know,
12 even if the AER is not going to publish 20 papers like
13 this, it might publish, one, two, maybe a few more,
14 there's a lot of other journals. And there's a lot of
15 academics at different levels, right? So it's not just
16 people at Chicago or Berkeley or Northwestern that should
17 be doing a lot of these studies. You know, there are
18 people kind of sort of in schools that are kind of a
19 little bit lower than that.

20 You know, they're not getting tenured based on
21 AERs. You know, if they manage to get, you know, five
22 papers into the Journal of Industrial Economics, from any
23 of them, that will make sort of the tenure case. So the
24 usual claim is you're not going to get this published,
25 academics are not going to do it, I just don't think

1 that's correct.

2 So, you know, that's kind of -- you know,
3 trying to put those sort of two things aside, ways to get
4 academics involved. So -- you know, there is sort of an
5 issue of money but, you know, not getting hired, so if
6 it's consultants, paying consultants, there's a lot of
7 government agencies that basically offer grants. These
8 are fairly sort of small and relatively cheap, you know,
9 in the grand scheme of things.

10 Again, you know, the USDA, the Bureau of
11 Economic Analysis, the BLS, you know, if you're able to
12 sort of get someone and pay them basically two summer
13 months, that's not a lot of money. And you might get
14 sort of people working on sort of -- you know on the
15 margin, kind of tilting them to work on things that
16 you're interested in.

17 Granted, obviously you're not going to take
18 someone who is completely not interested in IO, in
19 antitrust policy, to kind of work on these issues. But
20 on the margin, that's going to have, sort of, a lot of
21 impact.

22 Another way to sort of get academics involved
23 is work with research centers. I want to kind of get
24 back to that. There's a lot of sort of research centers.
25 You know, we have a couple here at Northwestern that I'll

1 mention. You know, they are kind of looking for these
2 sort of connections. And I think that would be sort of a
3 very cheap and cost-effective way to get academics
4 involved.

5 And then the final thing -- and I think, you
6 know, for anyone who has done serious empirical work, you
7 know, at the end of the day the limiting factor is data,
8 okay? So, you know, if you get data, you'll get
9 academics. You know, that's it. You know, we'll --
10 we'll follow the trail, you know, like mice following --
11 going after the cheese. I mean, that's where it is.

12 So I think the big question is how can you get
13 data? You'll get data, you know, you'll have people kind
14 of lining up outside your door to work on it.

15 So, you know, what do you do about data? And I
16 think that's kind of the biggest -- the biggest issue.
17 Dennis sort of mentioned it earlier when he was talking
18 about -- you know, about mergers, that at the end of the
19 day, that's going to be sort of the key, you know, can
20 you really get the data to do this sort of the ex-post
21 analysis? We talked a little bit about getting through
22 agreement or something of that sort.

23 The other thing is, you know, there are a lot
24 of -- I call it -- quasi-public data sets out there that
25 allow you to study some of these effects. I mean, if you

1 look at the, you know, number of sort of industries that
2 have been studied by academics and these are, you know,
3 poor academics that had, you know -- most of them do not
4 have a huge research budget to go spend hundreds of
5 thousands of dollars on data. I don't want to say every
6 industry but, you know, almost every industry has sort of
7 been studied. So it's just a matter of, you know,
8 finding sort of those industries and having data, you
9 know, for, let's say, ex-post merger or ex-post -- you
10 know, whatever antitrust event you want. Some of them
11 are either, you know, public or can be purchased for very
12 low amounts, especially if it's historical data.

13 In other cases, you know, if you go, for
14 example, you know scanner data. There's a lot of scanner
15 data out there. You can actually buy them for not that
16 -- large amounts of money and again create some sort of
17 data set.

18 I think the key issue in sort of all of the
19 data is to really be opportunistic, to really find sort
20 of the right situation, where the data is there, where
21 you're going to find sort of mergers, where you're going
22 to find some sort of nice effects kind of in the -- you
23 know, either change in regulation or sort of change that
24 will actually give you maybe some -- you know, some sort
25 of a variation in the data that would actually be

1 interesting to look at and get at some of the issues and
2 some of the difficulties we were talking about.

3 And then finally, let me just sort of throw
4 something out there and this might be completely kind of
5 a wacky academic idea, but you know, it might not. And
6 that is, you know, up to now, we've sort of taken, you
7 know, the data is sort of -- is there, you know, the
8 mergers are kind of, you know, sort of set the lines.

9 Well, how about if you start running
10 experiments? What happens if you take a merger that you
11 clearly think it's on the other side of the line, okay?
12 Now, obviously, you know, if it's a really big merger
13 that gets a lot of sort of publicity, you're not going to
14 be able to do that. But you take actually one of these
15 small cases that maybe you shouldn't have taken to start
16 off with and, you know, you let it go through, right?
17 That would be -- and sometimes if you want -- you know,
18 from a -- I mean, I did warn you it was a wacky academic
19 idea. But, you know, that would be sort of the way to
20 kind of really -- if you wanted -- not from a social
21 point of view. You know, as economists, we're kind of
22 used to the fact that we're getting nonexperimental data.

23 But suppose you said, you know what? Let's
24 give up on economists. Let's put a chemist here or
25 physicist here, right, I mean, that's what they will tell

1 you. If you really want to learn, do you want to learn
2 what the effect of a particular drug is, how do you do
3 that? You give the people drugs that you know shouldn't
4 be working -- you know, obviously within -- on the
5 margin, you're not going to sort of take it --

6 MR. BAYE: See if you can kill the firm or not?

7 MR. NEVO: Yeah, I mean, maybe not to sort of
8 that extent but, you know, try it, maybe under sort of a
9 more localized sort of event. I mean, there is something
10 there. Obviously, there's the close sort of cousin of
11 these experiments, quasi-experiments, where you have the
12 data actually generated for you.

13 Maybe, you know, again, this is not at the
14 federal level, but maybe a localized market that with
15 some sort of regulation that actually changed things that
16 you get to see the case of what happens when the
17 enforcement was changed, you know, maybe exogenously or
18 not. And I think that's kind of one example of trying to
19 be opportunistic and trying to sort of get that.

20 And then the final kind of point that I want to
21 raise is sort of the issue of corporation. And it was
22 raised sort of a little bit before but I think, you know,
23 corporation both with academics, which I think is
24 essential. It seems to me again as a complete outsider
25 that, you know, you need to have cooperation within the

1 agency. They just -- it seems it's just too hard of a
2 problem for any one agency to do alone. And again,
3 something that was talked about a lot, you know, sort of
4 today is cooperation in other countries, both in the
5 sense of enlarging, you know, sort of the data
6 availability, the -- what we learn, but also, you know,
7 maybe things, you know, some of these sort of things that
8 we can't do in the U.S. I mean, I can imagine if in
9 China, they really wanted to experiment, they would
10 experiment, again, not knowing anything about Chinese
11 politics but just so -- that's my impression.

12 You know, maybe that would be sort of the way
13 you could learn a lot from this and not just from
14 cross-country -- you know, cross-country studies, which,
15 you know, they're -- they're very difficult to do in sort
16 of an unofficial way. But, you know, that might be sort
17 of a way to learn.

18 And then, you know, finally -- let me just sort
19 of throw out kind of one point on the issue of
20 cooperation. You know, here at Northwestern, we have,
21 you know, two centers, you know, the Searle Center, we
22 also have, you know, the center for the study of IO,
23 that's sponsoring the conference that Bill is organizing
24 tomorrow.

25 I mean, that, I think, would be kind of a

1 natural place -- you know, not us in particular, sort of
2 others. You know, I know Berkeley has a competition
3 policy center, there's sort of other places like that. I
4 mean, that would be kind of the -- you know, the -- the
5 optimal place to start to get academics involved and try
6 to see is there a common ground that, you know, and
7 common interests of finding ways to look at these very
8 hard problems together.

9 MR. BAYE: Thanks a lot, very thoughtful
10 response.

11 Abe, did you want to chime in?

12 MR. WICKELGREN: Yeah, I mean, I completely
13 agree sort of on the overall level, but just one
14 qualification. You know, there may be less issue of
15 strategic behavior with academics but there's certainly,
16 you know, potential for publication but some results are
17 more publishable than others. So you still -- you
18 wouldn't be completely removing the possibility that, you
19 know, what studies you end up finding, you know, might
20 not be fully representative of -- of what the actual
21 results are.

22 MR. SHAPIRO: I would say another kind of
23 wildcard in this, there are all these firms, private
24 firms, consulting firms. I work with one, in fact, that
25 have a lot of experience on mergers and these antitrust

1 matters and private matters, not just FTC matters.

2 And, you know, they like to have good relations
3 with the Commission. And the DOJ and maybe you could tap
4 into obviously particularly being maybe sensitive if not
5 weary to biases or, you know, the commercial interests.
6 But there's a lot of expertise there. So there's ideas
7 on research tasks or studies they've done seems to be
8 worth at least asking and tapping into that they would
9 generally, I think, be pretty eager to provide input.

10 Now, we'll have maybe a bias, you know, in
11 mergers, most all the work except for the merging company
12 so then that's not neutral but you try to factor that in.
13 So I think there's -- there's a lot of experience and
14 skill there that is worth tapping into that complements
15 what you get in academia.

16 MR. BAYE: Dennis, the last word on the topic?

17 MR. CARLTON: I think all of these suggestions
18 are good ones. I think that I agree especially with what
19 Aviv said. If you want to get academics, you've got to
20 give them data.

21 I think it's hard to convince academics,
22 certainly young academics, to get involved in a policy
23 area because it's harder to get published in that area.
24 Telling the FTC how to improve their policies is not
25 something that may be a publishable paper. It could be

1 but it's not your typical research.

2 So I think if you're looking for the more
3 practical type of advice, I think the suggestion Carl
4 made is -- is correct that a lot of the people in the
5 consulting firms either have been at the agencies as
6 former employees or they've made a lot of presentations.
7 And I think tapping them for what are the strengths and
8 weaknesses is helpful.

9 I think if you're talking about fundamental
10 research, though, I -- I agree with what Aviv said that
11 having academic centers that have relationships with the
12 FTC and the FTC data is a -- probably a better way of
13 making young graduate students and young assistant
14 professors knowledgeable about how to get in touch with
15 you guys and that it can serve as a repository perhaps or
16 a conduit to -- it could be a repository of data, but it
17 could also be a conduit through which people, academics,
18 naturally go.

19 They'd be more like to go to a center and go to
20 Aviv and say, you know, I'm assistant professor here at
21 Northwestern, how do I do this? Rather than calling
22 someone up at the FTC. I think there will be an
23 inhibition to do that. And I think having academic
24 centers in a liaison with the FTC is a -- is a way to
25 promote academic research.

1 MR. BAYE: Thanks. We have no more minutes,
2 but I'll use my discretion and take a couple of questions
3 from the audiences. State your name formally.

4 AUDIENCE MEMBER: Joe Farrell. Going back to
5 the beginning of the discussion with Dennis's comment on
6 how you have a sample selection issue with mergers that
7 have gone through. That's obviously right but I think
8 you were too quick to move onto so what should we do
9 instead.

10 Even with that sample selection, I think it
11 would be useful to know what's the price impact of the
12 average permitted merger.

13 So, for example, if you discovered that the
14 average permitted merger leads to a 2-percent reduction
15 in prices, that would be a very different world in terms
16 of the possible costs of tightening merger policy, let's
17 say, from if the average permitted merger leads to a
18 10-percent reduction in price. And there's always some
19 chance to say the unthinkable. You might discover that
20 the average permitted merger leads to a 2-percent
21 increase in price and that would really tell you
22 something, working against the sample selection. So it
23 seems to me that would be a very straight forward project
24 relatively speaking and it wouldn't be as ideal as the
25 ones that you've proposed but it would be in some sense

1 very robust, very straightforward and seems worth doing.

2 MR. CARLTON: Yeah, I don't disagree at all. I
3 think retrospective mergers are very valuable to do. I
4 think they are less valuable than I once thought because
5 of the sample selection problem that doesn't -- but I
6 know how to solve the sample selection problem. It's
7 just I can think of an even better thing to do -- a
8 better way to do it.

9 But there is one thing that I think is useful
10 to say. If you find that on average the merger is
11 increasing price, given the sample selection problem, you
12 know your estimate is too low of how much it really is,
13 increase in price. So my paper and my views -- is not
14 that retrospective merger studies aren't valuable.
15 They're very valuable. I just can think of a better way
16 to do things and I think in doing it in those better ways
17 we would learn a lot, not only about industrial
18 organization techniques but how to improve the practices
19 of the agencies.

20 MR. BAYE: One more question, I think we're
21 going to have to stick -- one more question, go ahead.

22 AUDIENCE MEMBER: Louis Kaplow. Two sets of
23 comments.

24 One is on the empirical question most of the
25 first series was what is the effect of a law regulation

1 and that question arises for all laws and all regulation
2 and raises similar kinds of questions and problems for
3 all.

4 So if one asks generally how do we try to do
5 that, I think there's some things to be learned. So one
6 that came up at many points later was cross sectionally
7 with different jurisdictions. Different of state
8 stringency within the U.S. on certain kinds of local
9 activity might be one way. Maybe if one looks at older
10 data in the EU before there was this common enforcement,
11 that would be another way, certain industries have common
12 structures across countries so you might get more
13 commonality. Now, it's obviously going to be very noisy
14 and very difficult.

15 The second main way one does it is over time
16 when the law changes. So, for example, stringency has
17 changed a lot over time both in law in the books and
18 enforcement. So like with price fixing, EU penalties
19 used to be a lot lower, now they're a lot higher. What
20 did that do to price fixing? Or it was mentioned at one
21 point by the different contents.

22 Stringency of U.S. merger enforcement even
23 within given industries has changed a lot over a 25-year
24 period. So if we look at those cases that were near the
25 line now versus 10 years ago versus 20 years ago, since

1 we know the line moved a fair amount, we ought to be
2 learning a fair amount there. That's sort of one
3 empirical.

4 The other is a couple things specifically about
5 the FTC. And they're two points I think are worth
6 thinking about more.

7 One is there was an awful lot of talk about
8 deterrence, which is my favorite thing to talk about and
9 I think it was the right thing to focus on. But in areas
10 the FTC operates, mergers is different from some others.
11 The FTC doesn't dish out penalties, it doesn't put people
12 in jail, it doesn't fine them a billion dollars or
13 whatever. So you have to sort of ask, well, how does
14 deterrence work in that setting? We set an example, you
15 know. If you tiptoe over the line, we might with a
16 probability ten years later make you tiptoe back. It's
17 not so clear there's a lot of deterrence from that. This
18 has a big implication for allocation of resources between
19 FTC versus private DOJ. This has a big implication for
20 the big industry, small industry. Since if you can't
21 deter very much in some of your areas of operation, then
22 you really need to go for the big impact, setting an
23 example, when the example doesn't really deter because
24 there isn't real penalty.

25 Now, I'm overstating a little bit, but I'm just

1 suggesting there's a substantial element where one needs
2 to think about that. There's a second respect in which
3 the FTC is distinctive, that at least in antitrust
4 outside of a few Robinson-Patman related things, it
5 hasn't really gone after. If the FTC by being an
6 independent agency is able to pass certain kinds of
7 regulations -- and it's interesting because when the FTC
8 has done funky, creative, things like in Ethyl DuPont 20
9 years ago, it got struck down by the courts but it didn't
10 actually write a regulation. We've got all these Supreme
11 Court cases that say if an agency writes a regulation
12 that's possibly within the scope of what it's done, the
13 courts have to defer to that regulation and then it can
14 apply it. So if you want clearer lines, as Carl was
15 talking about, maybe there's areas where, say, with
16 facilitating practices where certain bright-line
17 regulations that there could be some discretion in
18 enforcing and applying. Should actually be rule and
19 comments of past enacted, they then would probably be
20 deferred to by the court, they would be the law, it would
21 be easier and quicker, you wouldn't be arguing about the
22 rule and the application of the rule in each and every
23 case so there might be more leverage.

24 MR. BAYE: Thank you. I think we appreciate
25 that. I think on that basis, I would just like to thank

1 the panel for their cooperation and their excellent
2 comments and to you as well. So thank you.

3 (Proceedings ended.)

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