

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

2           PANEL ENTITLED:   "THE FIRST 90 YEARS:  PROMISE AND  
3           PERFORMANCE"

4

5           SPEAKERS:           WILLIAM E. KOVACIC

6                               MARC WINERMAN

7                               EDWARD F. COX

8

9           MODERATOR:        ERNEST GELLHORN

10

11                   MR. GELLHORN:  Good morning, I'm Ernie Gellhorn,  
12           I teach at George Mason Law School, and I'm delighted to  
13           be the moderator of the first program.  We begin with a  
14           program that seeks to take a critical, honest and we  
15           hope helpful evaluation of a 90-year, I would say,  
16           roller coaster ride, some highs, some lows.  And it  
17           certainly is appropriate to celebrate the 90th  
18           Anniversary of the FTC founding in the midst of a  
19           presidential campaign.

20                   You recall, of course -- well maybe we don't  
21           quite recall, but we know that the Federal Trade  
22           Commission really grew out of the Supreme Court's  
23           decision in 1911 and the furor it created of committing  
24           to a conservative federal judiciary, a decision on  
25           antitrust in connection with how the rule of reason

1           should be evaluated and applied.

2           The candidates at the time: Roosevelt, the  
3           progressive; Wilson, the Democrat; Taft, the  
4           conservative Republican incumbent, all put the creation  
5           or discussion of antitrust policy at the center of their  
6           campaigns. Roosevelt, who had once made control of the  
7           trust a major focus of his administration, now promised  
8           a new nationalism that would, per Marc Winerman's  
9           comments, rationalize the economy, tame but not dissolve  
10          the trust and accommodate rather than challenge  
11          concentration and inter-firm cooperation.

12          Taft, on the other hand, was committed to a  
13          judiciary or judicially applied rule of reason, and yet  
14          he promised, and alone, strict de-concentration under  
15          that rule.

16          Wilson's New Freedom, on the other hand,  
17          straddled it by attempting to satisfy his parties'  
18          agrarian base yet appeal to business interests. He  
19          urged the Congress to set forth precise standards backed  
20          by criminal sanctions and also urged the creation of an  
21          interstate trade commission to promote fair competition  
22          by investigating and publicizing, but not otherwise  
23          prosecuting trade abuses.

24          Wilson assailed Roosevelt's proposal of a  
25          federal commission with power to investigate any

1 business activity and Roosevelt's other unmentioned  
2 proposal to set maximum prices for goods produced by  
3 monopolists.

4 To quote Wilson, "If the government is to tell  
5 big businessmen how to run their business, then don't  
6 you see that big businessmen have to get closer to the  
7 government, even than they are now. Don't you see that  
8 they must capture the government in order not to be  
9 restrained too much by it?" Interesting words.

10 The happy end of the story, of course, is that  
11 Wilson won the campaign, and then implemented  
12 Roosevelt's proposals with Taft's idea.

13 The Federal Trade Commission is perhaps the most  
14 studied, reported upon and evaluated independent Agency.  
15 I know of no other that has been reviewed and studied so  
16 frequently. They begin with the reports of Henderson  
17 and Rublee in 1924 and '26, to the Nader and ABA  
18 Commission reports in 1969, to the most recent, I  
19 believe, 1989 study, again, by the American Bar  
20 Association.

21 Interestingly enough, I believe there are no  
22 studies in the last 15 years, at least major studies.  
23 What does that tell us?

24 Now, the Commission has been subject to  
25 withering criticism, indeed public scorn, in the past,

1 the 1969 studies, of course, are one, but the Washington  
2 Post, not a necessarily restrained animal at all points,  
3 called it a national nanny, as we all recall from 1979.  
4 And yet if you look at the reports, virtually every one  
5 of them ends up on an optimistic note, says we got to  
6 keep the Commission and it can, in fact, improve and  
7 perform better.

8           Indeed it was the 1969 ABA committee report that  
9 said, however, if they don't take our guidance and don't  
10 improve their performance, they ought to be terminated.  
11 Today we get three perspectives on this 90-year history.  
12 First, Marc Winerman, and I'm not going to give  
13 biographies, it's in your book, you know these people  
14 too well for me to go through the litany.

15           Marc Winerman, the unofficial historian of the  
16 FTC has, of course, the seminal article last year in the  
17 Antitrust Law Journal, it's only 97 pages, and it gets  
18 you to Wilson's first appointees. So, he still has more  
19 to do.

20           (Laughter.)

21           MR. GELLHORN: But it's nothing if not thorough.  
22 He will provide a distinctive evaluation, at least if he  
23 says what he told me he was going to say, of the  
24 development and the record of the Federal Trade  
25 Commission and its legislative origins to its early

1 struggles to its modern era in identifying differences  
2 in public opinion of public attention given to the  
3 Federal Trade Commission.

4 Edward Cox, widely recognized and highly  
5 respected New York corporate lawyer, will go back to his  
6 roots, 36 years ago when he was one of the original of  
7 Nader's Raiders, and also talk about the politics of  
8 regulatory reform from his unique perspective, both as a  
9 confidant and worker for Ralph Nader, and one who also  
10 knew Richard Nixon close at hand.

11 Bill Kovacic, our third and final panelist, is  
12 really a true antitrust superstar in the tradition, in  
13 my view, of Phil Areeda. A brilliant teacher, an erudite  
14 scholar and a bent for practical wisdom. His antitrust  
15 norms article last year beats Marc by four pages. But  
16 it is a tour de force of antitrust policy and progress.  
17 He will identify today -- he will tour -- take us  
18 through a tour, a quick tour, of the reports over the  
19 90-year history, and from this assessment, identify what  
20 the FTC must do to fulfill its expectations for the  
21 future.

22 Finally, the paper for the conference will  
23 include a commentary from Jesse Markham, who  
24 unfortunately is unable to be here today, but he did  
25 submit a paper, it's an interesting one. He was a

1 participant, he notes, in two other FTC symposiums,  
2 starting first 50 years ago. He was, of course, the  
3 chief economist for the Federal Trade Commission in 1953  
4 through 1954, and he's going to look at the leading role  
5 that economic analysis has played in the Commission,  
6 really from his appointment and forward, and he  
7 describes it interestingly enough, as first a shotgun  
8 marriage that has matured and evolved into the golden  
9 years.

10 With that, we will start with Marc Winerman.

11 MR. WINERMAN: Hello. The standard disclaimers  
12 having been made, I'll start. Ninety years ago,  
13 President Woodrow Wilson signed the FTC and Clayton Acts  
14 -- his New Freedom antitrust Program. The Commission  
15 absorbed the Bureau of Corporations. The FTC Act  
16 transformed the Bureau into an independent agency,  
17 replaced its single commissioner with five, and gave it  
18 new powers. Most importantly, Section 5 authorized the  
19 Commission to challenge unfair methods of competition.  
20 The Commission soon used this authority to challenge not  
21 only antitrust violations, but deception as well. The  
22 Clayton Act, the second part of Wilson's antitrust  
23 program, authorized the Commission to enforce a series  
24 of more specific prohibitions.

25 As we've heard, these laws culminated a

1 national debate about competition policy. They  
2 were A culmination, obviously, not the start, nor the end,  
3 of the debate.

4 The FTC was a response to industrial  
5 consolidation. During a merger wave that began in 1898,  
6 there were often mergers, where five or more firms united  
7 at once. On one occasion, 43 firms got together at once.

8 The Sherman Act wasn't used to stop the merger  
9 wave until 1902. Though the government won that  
10 challenge against the Northern Securities Company, the  
11 court's decision exposed, not for the first time, deep  
12 disagreements about antitrust. Four of the justices said  
13 that the Sherman Act had no application to merger. Four  
14 of them basically said mergers that eliminated any  
15 horizontal competition were, per se, illegal.

16 When the next major divestiture cases reached  
17 the Supreme Court seven years later, the government  
18 won again. But the remedies in Standard Oil and American  
19 Tobacco were flawed, and the newly-announced rule of reason,  
20 for many, overshadowed the government's purported victory.  
21 Three-time presidential nominee for the Democrats,  
22 Williams Jennings Bryan, proclaimed, "The Trusts Have  
23 Won."

24 The fall-out dominated the 1912 election. For  
25 Theodore Roosevelt, size, however great, meant

1 efficiency. Antitrust undermined America's global  
2 competitiveness and the court's couldn't be trusted  
3 to develop competition policy. Progress required  
4 concentration and control, and they required a  
5 Commission. Roosevelt secured a litigating antitrust  
6 division in 1903, but simultaneously created the Bureau of  
7 Corporations. He then worked to expand its powers. In  
8 1908 he sought authority for it to pre-clear combinations  
9 and contracts. In 1911, he argued that it should  
10 protect consumers, competitors, shareholders and labor.  
11 He had a pretty broad mandate for the Commission.

12 He contrasted America's flawed antitrust with  
13 German law that regulated a cartel's output, maximum  
14 pricing and labor conditions. He said, "Where under  
15 modern conditions competition has been eliminated and  
16 cannot be restored," the government should provide  
17 control. It should stop unfair competition, but  
18 efficient firms would still grow too large for the  
19 market to tame. A commission should tell business in  
20 advance when proposed conduct was fair. If necessary,  
21 it should resort to price regulation and receiverships.

22 In contrast, Taft, as we've heard, favored  
23 judicial exposition of antitrust. He gave ambiguous  
24 support to a commission, but the courts, he said, typified  
25 "what we shall meet in heaven under a just God."



1 Further, the Sherman Act announced the right industrial  
2 policy, and the rule of reason, which he equated to his  
3 own 1898 analysis in the Addyston Pipe & Steel case,  
4 held the key to its meaning. But Taft confused  
5 everyone. Most polemicists thought the rule of reason  
6 would kill antitrust, but Taft endorsed the rule of  
7 reason and stepped up antitrust enforcement. As we've  
8 heard, he was the only candidate who endorsed corporate  
9 dissolutions in 1912.

10 Many antitrust advocates, in contrast, looked to  
11 Congress to take the lead in defining specific  
12 conduct -- proscribing specific conduct by legislation.  
13 They wanted business on a smaller scale, not necessarily  
14 because they opposed efficiency, but because they  
15 weren't persuaded that large firms were efficient.  
16 Some would proscribe not only conduct, but even size.  
17 The 1908 Democratic platform would have banned firms  
18 with a 50 percent national market share from  
19 interstate commerce. In 1914, 16 Senators, during the  
20 Clayton Act debates, voted to ban all firms capitalized  
21 at more than \$100 million from interstate commerce. Many  
22 of these Senators weren't enthusiasts for a commission,  
23 but some, like Harry Lane, supported it reluctantly. "May  
24 God have mercy on our souls," he added.

25 Louis Brandeis, advisor to Democratic nominee

1 Woodrow Wilson, agreed with these agrarians in part. He  
2 acknowledged that industrialization required increased  
3 scale, but thought business had grown larger than economic  
4 and what he called "social" efficiency warranted. He argued  
5 that size blunted innovation. To protect smaller enterprise,  
6 he would construe, bias, and supplement antitrust law.  
7 For example, he wouldn't make size per se unlawful, but he  
8 would establish a presumption that a restraint of trade  
9 affecting over 40 percent of a market was unlawful.

10 He also anticipated a coming trend. Brandeis  
11 advocated collective activity through associations,  
12 albeit with an eye, which many of these so-called  
13 associationalists lacked, to antitrust.

14 Woodrow Wilson also wanted Congress to establish  
15 clear antitrust standards. Like the agrarians, he  
16 distrusted a commission. Though he grappled to define  
17 a limited role for a commission, he was far more articulate  
18 when he said he didn't want to be governed by a smug lot of  
19 experts playing providence to him.

20 Substantively, Wilson said that trust produced  
21 vast wealth if you cared  
22 about vast wealth no matter how distributed. He even spoke  
23 of giants gripping the throats of working men, blood  
24 dripping through their fingers -- but Wilson also said  
25 that large enterprise did not necessarily endanger

1 economic liberties. As a candidate, he opposed  
2 corporate dissolution, but not because, like Roosevelt,  
3 he welcomed growth. Rather Wilson trusted competition  
4 -- potential competition. Once the giants were stopped  
5 from competing unfairly, then in his words, the pygmies  
6 would triumph.

7           After the election, Wilson quickly changed course  
8 on the question of dissolutions. Perhaps he was persuaded  
9 by a letter sent on behalf of his friend, John Bates  
10 Clark, an economist who had recently lost faith in  
11 potential competition. But his grounds for opposing a  
12 commission went deeper and he held to them longer. When  
13 he introduced his antitrust program in 1914, the  
14 centerpiece was a definitions bill, the future Clayton  
15 Act. Reaching out to Roosevelt Progressives and  
16 businessmen (two groups that overlapped) Wilson promised  
17 in soaring rhetoric to create a commission as "an  
18 indispensable instrument for doing justice" when  
19 judicial progress was inadequate. Also, he said it  
20 would be an aid to business through advice and definite  
21 guidance. But all he actually proposed was to remove the  
22 Bureau of Corporations from the Commerce Department and  
23 replace its single Commissioner with multiple Commissioners.

24           What happened then was that the House, which  
25 first debated the antitrust package, couldn't produce

1 the clear legislative standards Wilson anticipated. Not  
2 surprisingly, it couldn't develop a clear formula to  
3 distinguish illegal from pro-competitive price-cutting.  
4 When the House debates were winding down, George Rublee,  
5 who straddled the field -- he had been a Roosevelt  
6 speech writer and a Brandeis ally -- persuaded Brandeis  
7 and then Wilson to back Section 5. It appears that they  
8 originally intended to substitute Section 5 for all the  
9 substantive provisions of the Clayton Act, although  
10 ultimately the Clayton Act had substantive prohibitions,  
11 enforceable through civil and administrative  
12 proceedings, but not through criminal proceedings.

13 The expanded commission bill drew bipartisan  
14 support in the Senate, although its advocates, including  
15 its principal spokesman, differed significantly among  
16 themselves. Francis Newlands, the Democratic spokesman,  
17 was curious. He actually tracked Roosevelt's ideas more  
18 closely. He argued that a commission could prevent  
19 monopoly at its incipiency, but also suggested that  
20 Roosevelt's style of regulation might later be  
21 warranted. He wanted to take all antitrust enforcement  
22 away from the Justice Department and give it to the  
23 commission if he could have had his way.

24 On the Republican side, Albert Cummins  
25 had an agrarian distrust for size. In 1913, he argued

1       that a special tax on firms with a more than 25 of a  
2       percent national market would target "so much dishonest  
3       wealth." For Cummins, the commission should be part of  
4       an broader antitrust package. For example, he opposed  
5       specific limits on corporate size, but championed a flexible  
6       ban against firms that grew so large that they prevented  
7       substantial competitive conditions.

8               The commission drew support, albeit sometimes  
9       reluctant support, from agrarian antimonopolists,  
10      from Roosevelt-style progressives and from businessmen who  
11      sought clear advice which many hoped would broadly  
12      permit collective activity. In his study of the New Deal,  
13      Ellis Hawley identifies three competing traditions with roots  
14      in the Progressive Era: National planning, industrial  
15      self-government, and antitrust. There were variations  
16      in each. Brandeis, for example, was an associationalist  
17      who supported antitrust. But each was present, in some  
18      form, among commission's advocates.

19             Wilson's initial Commissioners internalized some  
20      of the ambiguities in the agency's creation, and they  
21      fought over more parochial matters as well. Brandeis  
22      refused a seat, so none of the original Commissioners  
23      had true national stature. In order of their term's  
24      length, they were Democrat Joseph E. Davies,  
25      Wilson's Commissioner of Corporations; Edward N. Hurley,

1 a self-made businessman;and William Harris, formerly (with  
2 few qualifications for the position) the head of the Census  
3 Bureau.

4 The others, Will Parry and George Rublee, were  
5 Progressives.

6 There were no Republicans, despite the  
7 bipartisan support for a Commission. Wilson was  
8 apparently courting Roosevelt supporters for 1916. And  
9 there were, quite consciously on Wilson's part, only two  
10 lawyers and no economists. This commission was troubled,  
11 though. The Commissioner worked together poorly, and all  
12 these Commissioners were gone by 1918.

13 Their first Chairman was Davies, whose interests  
14 and disputes illustrate the potential and the problems of  
15 the early Commission. During Davies' years, the agency saw  
16 itself as a progressive-style problem-solver, prone to  
17 direct intervention. Rublee and Parry were  
18 Progressives, and Davies had similar instincts. When he  
19 became Commissioner of Corporations in 1913, he  
20 suggested to Wilson that they study the level of  
21 efficiencies appropriate to economy -- basically to find  
22 out if Roosevelt was right. On the Commission, when the  
23 agency was directed to investigate rising newsprint prices,  
24 he successfully urged the Commissioners to arbitrate a fair  
25 price. The plan fell apart when the Justice Department

1       insisted on litigating, but when DOJ settled, the  
2       settlement order provided that the FTC would be the  
3       pricesetter for newsprint.

4               During Davies' tenure, the Progressive and  
5       associational strands got another boost. When the U.S.  
6       entered World War I in April of 1917, wartime  
7       imperatives drove further government intervention in the  
8       economy. And though the Commission played mostly a  
9       supporting role once the transition was made -- the Agency  
10      primarily served as a cost-finding agency to help others  
11      set prices for government purchases -- it was at the center  
12      of the initial decision to adopt these policies. In April  
13      of 1917, Wilson conferred with the Commissioners four  
14      times.

15             Another important development during the  
16      Commission's first months was the decision to challenge  
17      deceptive representations. During the Congressional debates,  
18      Cummins, Newlands and the other Commission advocates hadn't  
19      encouraged regulation of deception. In fact, it was the  
20      opponents of the FTC who said Section 5 is so broad,  
21      you can get to deception -- and, therefore, we shouldn't  
22      pass it.

23             But the bill passed, of course. And on November  
24      23rd, 1915, the Commission heard the Associated  
25      Advertising Clubs of the World. They were a

1 self-regulatory body with "vigilance committees" that  
2 were precursors to the Better Business Bureaus. The  
3 AACW had drafted an anti-deception law and secured its  
4 passage by two-thirds of the states, so it could turn to  
5 state regulators when self-regulation failed.

6 But the president of the clubs told the  
7 Commission that they had faced such new challenges like  
8 direct mail appeal, "the greatest offender against honest  
9 advertising." The post office could get some fraud  
10 orders but that wasn't enough. The Commission accepted  
11 the argument and its first three complaints challenged  
12 deceptive claims.

13 Internally, though, the Commission was in  
14 disarray, for reasons that went to core issues of  
15 antitrust policy, the FTC's role in implementing that  
16 policy, and personalities. The first disputants were  
17 Rublee and Davies. Rublee served only a recess  
18 appointment, the Republicans weren't happy about not  
19 getting a commissioner, and he left in September 1916.  
20 He suspected that Davies actively opposed his  
21 confirmation. Meanwhile, Davies had engineered a vote  
22 at the first Commission meeting naming himself Chairman  
23 for seven years, and Rublee then turned around and  
24 organized a coup to depose him.

25 After that, the commissionership rotated



1       annually and the Chairman had no special powers. This  
2       created some problems then as the years went on. Each  
3       commissioner took administrative responsibility for  
4       certain units within the Agency. In 1947, they even  
5       decided to trade units every year. Commissioners voted  
6       on promotions and performance ratings at meetings. And  
7       the situation stayed that way until 1950 when we've  
8       heard it changed.

9                 Rublee and Davies also clashed on substance.  
10       Speaking in 1926, Rublee outlined three bones of  
11       contention. He didn't want deception cases. He didn't  
12       think Section 5 reached horizontal restraints, a  
13       voluntary combination or contract putting an end to  
14       competition. That would have eliminated a lot from our  
15       jurisdiction. Further, he didn't want to give advance  
16       advice to business, which Hurley and Davies did want to  
17       do. And Wilson had pushed very hard on this notion of  
18       helping business, at one point inviting businessmen to  
19       turn to the men of the Federal Trade Commission who would  
20       tell them to go on rather than the lawyers at the Justice  
21       Department who would tell them to stop.

22                 Hurley assumed the chairmanship when Davies lost  
23       it. But Hurley told a business conference when he was  
24       offered a spot on the Commission, "I told the President  
25       that all I knew was business, that I knew nothing about

1 the new laws nor the old ones and that I would apply all  
2 the force that I had in the name of business." He added  
3 that German industry became safe when the government  
4 sanctioned cartels.

5 Hurley pressed for uniform cost accounting, so  
6 that businessmen could better understand the workings of  
7 their own operations. The Commissioners approved this  
8 basic program, but they were shocked when they learned  
9 in December 1916 that he approved specific cost  
10 accounting plans that facilitated industry coordination.  
11 Davies also learned that Hurley held discussions to make  
12 the Secretary of Commerce permanent FTC Chairman. In  
13 any event, Hurley soon resigned.

14 Wilson's later appointees worked better together  
15 than his initial selections. Indeed, they worked  
16 together through most of the next administration. They  
17 included Victor Murdock, who had headed the Progressive  
18 contingent in Congress for two years after ten years as  
19 a Republican representative. They included two  
20 Democrats, Huston Thompson, a Justice Department  
21 litigator, and John Nugent, who had been elected to a  
22 short Senate seat in 1918 and defeated in 1920, and when  
23 Wilson nominated him in 1921, he was confirmed, even  
24 though Wilson and he were both lame ducks, through  
25 Senatorial courtesy. Nugent later ran for his old Senate

1 seat. Without resigning from the Commission, he conducted a  
2 Senate campaign. He lost.

3 Wilson appointees dominated the Commission until  
4 1925 and that was part of his problem in the 1920s.  
5 They were out of sync with the rest of the government.  
6 But the balance shifted dramatically in 1925 when  
7 William Humphrey arrived. Humphrey was confrontational.  
8 He had an unusual approach to Congressional relations.  
9 For example, he wrote a Congressman a letter in which  
10 identified his the Congressman's favored weapon as  
11 the jawbone made famous by Samson. He was also  
12 gratuitously offensive at Commission meetings. In 1926,  
13 the Commission and Justice Department both sued  
14 Continental Baking over a series of acquisitions. The  
15 Department settled, but a condition was that the  
16 Commission dismiss its case. Humphrey demanded an  
17 immediate vote, denying Nugent a day to study the  
18 papers. Humphrey also tried to stop investigations  
19 directed by the Senate, arguing that the Commission  
20 should not respond to resolutions by a single house of  
21 Congress.

22 Humphrey did have an affirmative agenda. He  
23 aggressively backed challenge to fraud, for example,  
24 and pressed the Cm mission to name magazine publishers  
25 as respondents. He also expanded the trade practice

1 conference procedure, which was a precursor to modern  
2 rule-making. He had many successes, but two years into  
3 his term a curious thing happened. Another Coolidge  
4 appointee, Abram Myers, came on, and for two years, Myers  
5 proved far more effective than Humphrey, repeatedly  
6 clashing with Humphrey and winning. Humphrey tried to  
7 stop Commission investigations that lacked a specific law  
8 enforcement purpose, for example; Myers pushed through  
9 several such investigations.

10 In 1933, Humphrey had his most famous clash.  
11 Hoover, as President, gave Humphrey a second term in  
12 1931. Franklin D. Roosevelt removed him without cause.

13 As an epilogue to my remarks, I would like to  
14 introduce a chart. I've done a study of first page  
15 stories covering the FTC over the years. Now, this  
16 first one is just to demonstrate some idiosyncrasy among  
17 publications, that there's peaks and valleys in the New  
18 York Times coverage that don't quite appear in the  
19 Washington Post coverage. But then I like to turn to  
20 this chart, which actually traces the whole history of  
21 the FTC through 328 newspaper articles. There were some  
22 subjective judgments in selecting these 328. For  
23 example, I didn't include stories that focused on a  
24 merger and merely mentioned that the FTC would review it.

25 This is a rough tool. It focuses more on the

1 big cases which, a lot of good and harm can be done through  
2 smaller cases.

3 Still, it focuses on some issues that did matter  
4 at the time. For example, a dozen stories in the summer  
5 of 1917 discussed the Commission's role in shifting to a  
6 wartime economy, showing the Commission was playing an  
7 important, non-case role at the time. In a two-year  
8 period in late 1917, eight front-page stories covered  
9 the FTC investigation of meat packers. In the early  
10 1920s, the FTC remained prominent through a series of  
11 investigations and cases, including challenges to base  
12 point pricing and the Alcoa Corporation. Coverage remained  
13 high in the mid-1920s, though, by then, it often focused  
14 on Congressional criticism of the Commission.

15 In 1929, though, press coverage dropped  
16 dramatically. The one exception involved the utilities  
17 investigation -- which Congress directed the FTC to do  
18 because some Senators wanted to divert an investigation  
19 that other Senators themselves wanted to do. Hugo  
20 Black, who was then a Senator. Insisted the investigation  
21 be made publicly. It made constant headlines. The utilities  
22 hearing, with a Commissioner presiding, produced five front  
23 page stories in May 1929.

24 Unfortunately, I've got to skip through a bit  
25 now, but there's one thing that I would like to focus

1 on, in particular. First of all, the Commission's press  
2 coverage dropped substantially for nearly two decades.  
3 I'm sorry about bypassing the '30s. In contrast to  
4 substantial coverage during World War I, only two first-page  
5 stories covered the Commission in World War II: During  
6 a cigarette shortage, the Commission acted to ensure an  
7 adequate supply for soldiers.

8 Coverage picked up after the war, though. The 1952  
9 oil cartel report drew some attention. But the real key to  
10 the 1950s was television. For the first time, with television  
11 advertising, consumer protection became important.

12 Finally, to lead into Ed's discussion, things  
13 pick up in the '60s, there are a lot of strong  
14 initiatives that develop despite the criticisms that  
15 were made at the time. But after the next  
16 administration, during the Nixon and Ford  
17 administrations, it stepped up even more dramatically in  
18 part because of the work Ed and others did.

19 Thank you.

20 (Applause.)

21 MR. COX: You saw that peak up there?

22 (Laughter.)

23 MR. COX: That was us. I think it was Adlai  
24 Stephenson who said that every speaker gives three  
25 speeches. The first speech is the one that he prepares,

1 the second speech is the one that he gives, and the  
2 third speech is the one that he wished he had given  
3 afterwards.

4 And as I was thinking about what I would do  
5 here, because we were going -- I was going back 36  
6 years, I didn't want to rely just on memory, so I've  
7 done a prepared speech here, and I generally don't like  
8 to do that.

9 There's a story of a President of the United  
10 States who had an event coming up. He wanted a  
11 15-minute speech for it and he called his speechwriter  
12 and said, I would like to have a 15-minute speech for  
13 this event and here's what I need, and came the day of  
14 the event and the President of the United States walked  
15 out of the Oval Office, got in his car, as he went in  
16 and the speech writer handed him the speech, went to the  
17 event and he started speaking. At the end of 15  
18 minutes, he still had more to go; at then end of 20  
19 minutes, he was still going; half an hour, people  
20 started leaving, started walking out of the room on the  
21 President of the United States.

22 And 45 minutes later, the speech was over to a  
23 small smattering of applause and the room was half  
24 empty. Well, he didn't take that too well and went back  
25 to the White House and called in the speechwriter and

1       said, look, I wanted a 15-minute speech, you gave me a  
2       45-minute speech. The speechwriter responded,  
3       Mr. President, I gave you a 15-minute speech and two  
4       copies. Well, although this is prepared and I do have  
5       some copies, I hope it won't go that way.

6                   (Laughter.)

7               MR. COX: But it was 36 years ago, the year was  
8       1968, and there was a whiff of revolution in the air.  
9       This was the year of the TET offensives by the Vietcong,  
10      in a war fought by a draftee Army, a war that had gone  
11      on too long, a year President Johnson declined to run  
12      for another term, the year of the tragic assassinations  
13      of Bobby Kennedy and Martin Luther King, the year race  
14      riots in our major cities and riots within and without  
15      the Democratic Convention in Chicago, as new political  
16      forces jousted with the old.

17              And more relevant to this 90th Anniversary  
18      Symposium, 1968 was the year that Ralph Nader assembled  
19      a group of seven students to do a summer study of the  
20      Federal Trade Commission, a study which resulted in a  
21      self-styled student task force report which received  
22      extensive press coverage when the report was issued in  
23      January 1969. All the student volunteers had just  
24      graduated from or were attending either Yale or Harvard  
25      Law School with the exception of myself, who had just



1 graduated from Princeton. Judy said that this was  
2 college students, I was the only one I guess who could  
3 qualify since I had just graduated from college. All  
4 the others were really very high-powered graduates of  
5 law schools or who were about to graduate from law  
6 school.

7 I enrolled in Nader's seminar the prior year at  
8 Princeton, had been impressed by his insights and the  
9 workings of our political processes and had used him as  
10 the informal advisor for my senior thesis. While the  
11 most junior member of this team that he assembled, I had  
12 by far the most working experience with Nader and in the  
13 end was one of three of the students who saw the project  
14 through to the end and one of two who continued to work  
15 with Nader as he organized the hundreds of students who  
16 came to Washington the next summer to replicate what we  
17 had done with the FTC in task force reports on other  
18 federal agencies.

19 In the fall of 1969, I entered law school and  
20 went on to other things. I did not give any significant  
21 thought to or interact in any significant way with  
22 either the FTC or Nader until I was invited to  
23 participate in this symposium. I can only liken my  
24 preparation for this as the opening of a time capsule, a  
25 time capsule full of things that I knew intimately at

1 the time and now have the opportunity to measure in  
2 light of 35 years of subsequent FTC history and my own  
3 personal experiences.

4 For the subsequent FTC history, I am very  
5 indebted to Marc for his patient tutoring over the phone  
6 and source references, and to the thoughtful writings of  
7 Richard Harris and Sid Milkis, among others, on the  
8 subject.

9 So, in this context, what is the significance of  
10 the Nader report? I will let others speak, others with  
11 a more measured and experienced perspective than mine.  
12 Harris and Milkis in their book, the Politics of  
13 Regulatory Change, make this observation, and I quote,  
14 "The Nader Report's criticism of the FTC was not  
15 especially radical or novel. The direct impact,  
16 however, was surprising. It sparked a series of  
17 political actions that eventually revitalized the  
18 Agency."

19 Justin Martin, in his more sort of colloquial  
20 book on Nader, published in 2002 wrote, "Nader's FTC  
21 raid really did accomplish something, his seven children  
22 really did manage to lead the adults."

23 In 1969, Richard Nixon, newly elected as  
24 President, asked the American Bar Association to conduct  
25 an independent investigation of the FTC. The ABA report

1 findings were remarkably similar to the conclusions of  
2 Nader's Raiders, though couched in more temperate  
3 language. In January of 1970, Nixon appointed Caspar  
4 Weinberger as Chairman of the FTC. Weinberger was an  
5 activist Chairman. By the early 1970s, the FTC would be  
6 a revitalized Agency.

7 In a 2003 oral history interview conducted by  
8 Chris White and Marc, Mary Gardiner Jones, who was a  
9 Commissioner at the time of the report, had perhaps the  
10 most thoughtful comments. This goes on a bit, but it's  
11 interesting, as it comes from a Commissioner at the time  
12 who was indeed thoughtful. "My conclusion about the  
13 Nader report was that in balance, after I began to think  
14 about it, and got past my original reaction to it, it  
15 did a lot of good. I began to realize that our  
16 incremental way of trying to change the FTC from the  
17 inside would not probably succeed in making the major  
18 changes that were needed.

19 "I think that the Nader Report came at a time  
20 when no matter how we had done, no matter how much we  
21 had changed small things, the basic problems of staff,  
22 senior staff, were not going to change. So, no matter  
23 how many bright people you had on the staff, it wasn't  
24 really going to change the whole passion and direction  
25 of the Commission. The Nader people have a different

1 style and a lot of polemics, a lot of adjectives. I'm  
2 not an adjective person," says Mary Gardiner Jones. "So,  
3 it's hard for me to take the report without more balance  
4 in its appraisals. But I have to admit, it did the  
5 necessary job. Without it, the FTC probably wouldn't be  
6 anything where it is today."

7 So, what were those adjectives, that purple  
8 prose? I will read you some examples from Nader's  
9 preface. Not just to entertain you, but those of you  
10 who are knowledgeable of the contemporaneous and  
11 subsequent history of the FTC, I'm sure will recognize  
12 that each item, in fact, has a lot of substance behind  
13 it, whereas making a correct indication of what the  
14 future would bring or rather what Nader intended the  
15 future would bring for the Federal Trade Commission.  
16 This comes from the preface to the book which was based  
17 on the report.

18 Preface by Ralph Nader. "The Commission could  
19 have been an exciting and creative formatter of consumer  
20 democracy. In reality, the little old lady on  
21 Pennsylvania Avenue was a self-parody of bureaucracy,  
22 fat with cronyism, torpid through an inbreeding unusual  
23 even for Washington, manipulated by the agents of  
24 commercial predators, impervious to governmental and  
25 citizen monitoring. As the tide of consumer

1       dissatisfaction rose in the 1960s, the FTC droned on,  
2       seemingly oblivious to the billions of dollars siphoned  
3       from the poor and middle class. Consumer-like by  
4       deceptive practices hiding shoddy and harmful products  
5       and fraudulent services."

6               Then he commented on the enforcement powers of  
7       the Commission. "Moreover, the Commission's enforcement  
8       policies were ridiculous. It did not have, and did not  
9       actively seek, from Congress, powers of temporary  
10      injunction or criminal penalty, and almost ignored the  
11      enforcement tools that it did have." Well, we know that  
12      the commission soon did seek those enforcement tools and  
13      did get them in the period of '73 through '76.

14             He commented also on the lack of a constituency  
15      for the Federal Trade Commission. "In the rare  
16      instances when the Commission does try to act forcefully  
17      against strong economic political interests, such as its  
18      cigarettes advertising proposals in 1964-'65, it finds  
19      itself without a consumer constituency, and is promptly  
20      overwhelmed by the industry concerned, thus a federal  
21      agency that should have a strong grass roots  
22      constituency is deprived of this democratic support, in  
23      large part as a result of its past ineptness and  
24      lassitude."

25             Well, that constituency was building up, and it

1 still has that constituency of the consumer movement.

2           Lastly, and this is predicting the future, and  
3 this doesn't necessarily concern the FTC, but it's  
4 interesting. "During the summer of 1969," he concludes,  
5 "more law students would be on their way to Washington"  
6 -- he's looking forward -- "to study more agencies.  
7 This time with the participation of medical and  
8 engineering students." This was Nader's dream. "In  
9 short time, this scrutiny should extend, should extend  
10 to state and local governments, and other significant  
11 institutions."

12           And, of course, we know he established his  
13 consumer task force here that eventually went from being  
14 one hundred, two hundred students to a thousand students  
15 in a peak year and then he started his public interest  
16 research groups, his PIRGs, which are now all over the  
17 country, and as a trustee now of the State University of  
18 New York, I get together with them from time to time,  
19 and actually they do some very good things. They push  
20 good things forward with a lot of energy and vitality.

21           So, when Nader predicted back then, what he  
22 wanted to do in fact for the most part, for the FTC, and  
23 for the consumer generally, and for people, students who  
24 want to be part of working for the public interest, has  
25 worked itself out. This was not just a critic who made

1 criticism. This is a person who was looking into the  
2 future and built something and we, the students who  
3 worked with him on the Federal Trade Commission report,  
4 were part of that. Were his instruments, I could say,  
5 in doing that.

6 So, what did we actually do? Well, we read  
7 cases and the various reports dating back to the 1920s,  
8 as well as the news clips from the morgues of  
9 newspapers, from which we gleaned support for our themes  
10 of a lack of priorities and need for motivated and  
11 capable personnel. We spoke to committee staffs on the  
12 Hill, who gave us encouragement, inside information and  
13 views. We interviewed the staff, we reviewed the files  
14 of the Commission, which at the start were made readily  
15 available to us.

16 As the summer progressed, however, Chairman Paul  
17 Rand Dixon, FTC's Chairman at the time, realized that we  
18 were not just a bunch of nice college kids in suits, but  
19 we were very aggressive and asking searching and  
20 antagonistic questions. The door then was both  
21 literally and figuratively shut in our face. In one  
22 instance, Chairman Dixon bodily threw out our leader,  
23 John Schultz, who had a very annoying way of  
24 persistently asking questions. Threw him out of his  
25 office bodily and ordered the staff to shut us down.

1                   One early turning point, before that incident,  
2                   which no doubt initiated and irritated Chairman Dixon  
3                   very much, was an article in the Wall Street Journal  
4                   which I generated by finding in a search of the  
5                   personnel files, and that -- what we discovered, there  
6                   was a purely patronage office in Oak Ridge, Tennessee,  
7                   which was manned by a friend of Chairman Dixon's, a  
8                   certain Judge Castro C. Gear.

9                   Nader told me to take the information to Jerry  
10                  Landauer. I don't know if many of you remember Jerry  
11                  Landauer, he was one of the great muckraking reporters  
12                  on the Wall Street Journal at the time. I will never  
13                  forget the scene, Landauer, cigarette in his mouth, on  
14                  the telephone, calling various sources to confirm and  
15                  supplement the information which I had given him and  
16                  pounding out the story on his typewriter, and all the  
17                  time while he was doing this saying, oh, that poor  
18                  fellow, talking about Judge Gear.

19                  Let me just read to you the way that interview  
20                  between Landauer and Judge Gear on the telephone went.  
21                  He started off, let me just say, by calling Judge Gear's  
22                  boss, who could not say precisely what kind of work  
23                  occupied Judge Gear, but adding parenthetically, but I  
24                  understand there's a good deal of work down there in Oak  
25                  Ridge, Tennessee.



1                   The telephone interview with the Judge himself  
2                   proceeded as follows. Landauer: What date was the Oak  
3                   Ridge office open? Judge Gear: You will have to get  
4                   that information from the central office. Landauer:  
5                   What type of work primarily occupies you? Judge Gear:  
6                   You will have to get that information from the central  
7                   office. Landauer: You mean to say that they know more  
8                   about your work in Washington than you do in Oak Ridge?  
9                   Judge Gear: Well, they have the first hand information  
10                  there.

11                  Long pause.

12                  Landauer: Is it an FTC policy to release all  
13                  information only through the central office? Judge  
14                  Gear: Pause. I don't know if it is or not. Landauer:  
15                  On what grounds, then, do you refuse to give even the  
16                  most innocuous information? Judge Gear: You'll have to  
17                  get that information from the central office.

18                  (Laughter.)

19                  MR. COX: So, that gives you a flavor of what we  
20                  did. What resulted was what I guess they would call  
21                  these days in campaigns a lot of earned media, which was  
22                  priceless to our cause. And Dixon didn't help himself  
23                  by noisily trying to shut us down. It didn't work  
24                  either. Phil Elman opened all his files to us,  
25                  regardless of what the Chairman said. And right down

1 through the staff, there were lots of good people then,  
2 who were willing to talk to us, who wanted to help us,  
3 they wanted the Commission to become what it could be,  
4 what its basic powers and the way it was meant to be,  
5 would come to fruition.

6 We finished our interviews and our work, being  
7 students we had to go back to school. September came.  
8 And although we had -- there was a spate of articles  
9 talking about it and then it was Nader's Neophytes, they  
10 hadn't quite gotten to Nader's Raiders, but we had a  
11 Christmas vacation and we came back then to produce the  
12 report, and I'll never forget, it was a very intensive  
13 time. I slept four hours a night in the basement of my  
14 brother's -- he was here working at systems analysis at  
15 the Pentagon, and we just worked around the clock and  
16 produced a nearly two-hundred page report that Nader  
17 whipped up the interest of the press in it and they  
18 eagerly awaited it.

19 I remember driving around at 3:00 in the  
20 morning, driving a Volkswagen, I didn't know how to use  
21 the stick shift really, going through red lights, with  
22 Ralph Nader seated next to me without a seat belt on.

23 (Laughter.)

24 MR. COX: The thought that went through my mind,  
25 it could all be over in a minute. And then after we

1 released our report, later on there were, of course,  
2 extensive news articles and then hearings before a  
3 Senate committee, which really was very congratulatory,  
4 Ribicoff and others saying what wonderful kids we are to  
5 volunteer this time and do all this great work.

6 And Willie Taft, with a wonderful sense of  
7 humor, raised his hand and said, Senator, I would like  
8 to make a comment. Pause, silence in the hearing room.  
9 I would like to thank my parents who supported me during  
10 this time.

11 In the next month, in April 1969, pursuant to  
12 the request, this is -- the hearing was in March of '69,  
13 in April '69, pursuant to a request of the recently  
14 elected President Nixon, the American Bar Association  
15 appointed a Blue Ribbon Commission to study the FTC and  
16 produce a report. The findings of the ABA report, which  
17 was delivered by the ABA to President Nixon on time in  
18 December of 1969, largely confirmed our findings,  
19 although as I quoted before, from a historian in more  
20 temperate language.

21 Now, President Nixon's foreign policy  
22 initiatives are well known, but Richard Nixon is also  
23 the President who much to the consternation of his  
24 political base, not only went to China, but also  
25 established the EPA, signed OSHA and Title IX with

1        respect to equality for women in athletics on campuses,  
2        signed those two acts into law, established the Consumer  
3        Product Safety Commission, and reduced the percentage of  
4        segregated schools in the south from 90 percent to 10  
5        percent, quietly, but got it done, the only way to do  
6        it, thereby recognizing respectively the environmental  
7        movement, with the EPA, the workers safety movement,  
8        with OSHA, the women's rights movement, Title IX, the  
9        product safety movement, with respect to the Consumer  
10       Product Safety Commission, and the civil rights  
11       movement. It was only logical that President Nixon's  
12       administration would pick up on the imperativeness of  
13       the consumer group, when the noise made by Nader report  
14       on the FTC, put the FTC on the front burner.

15                According to Harris and Milkis, after seeing the  
16       ABA report in September of 1969, President Nixon, in his  
17       October 30, 1969 special message to Congress on consumer  
18       protection, in a remarkable demonstration of bipartisan  
19       support for consumers, the President called for the  
20       adoption of a buyer's bill of rights, called for the --  
21       and unlike the Kennedy and Johnson presidencies, Nixon  
22       took direct action, according to Harris and Milkis, to  
23       strengthen the commitment to consumer protection at the  
24       FTC.

25                Endorsing the recommendations of the ABA report,

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1 Nixon announced the time had now come for the  
2 reactivation and revitalization of the FTC.  
3 Accordingly, he promised that his appointees of the  
4 Commission would take measures to initiate a new era of  
5 vigorous action to protect the consumer. The President  
6 appointed Caspar Weinberger as Chairman and Weinberger  
7 assumed the office in January 1970. Three of the four  
8 other Commissioners, interestingly enough, I learned  
9 this from Will Taft last night, realizing that radical  
10 reform was needed and taking the statements -- the  
11 statements approach as they -- that they should support  
12 the new President appointee as chair, pledged their  
13 support to Weinberger.

14 With the support of the White House and his  
15 fellow Commissioners, Cap Weinberger, who would earn the  
16 nickname "The Knife" as Governor Reagan's Budget  
17 Director in California, put in a top-to-bottom  
18 overhauling of the organization and personnel of the  
19 FTC, consolidating operations into two principal  
20 operating bureaus, which is the way it is now,  
21 competition and consumer protection, upgrading the  
22 Bureau of Economics to apply sound economic analysis to  
23 those operations, establishing a planning office to help  
24 set priorities, revamping and upgrading the regional  
25 offices to enable local enforcement initiatives, and

1 most importantly, attracting very capable young  
2 attorneys with a strong commitment to consumer  
3 protection.

4 In the summer of 1970, Weinberger moved out to  
5 be Deputy Director of the budget and Miles Kirkpatrick,  
6 who had chaired the ABA Commission on the Federal Trade  
7 Commission, succeeded Weinberger as Chairman and  
8 continued the reforms. The rerigging, remanning and  
9 redirection of the FTC ship by these Republican  
10 appointed Chairmen was accomplished against the backdrop  
11 of what Harris and Milkis describe as a loosely  
12 organized, but influential coalition of consumer  
13 advocates among House and Senate members, a talented and  
14 programmatically ambitious Congressional staff, an  
15 aggressive core of investigative and advocacy  
16 journalists, an elaborate network of consumer public  
17 interest groups.

18 It was this coalition that in the '73 to '76  
19 period passed the Alaska Pipeline Act and the Magnusson  
20 Moss Act, both of which gave the FTC new enforcement  
21 powers, as well as such consumer advocacy programs as  
22 the Intervener Funding Program.

23 While Nader gave great kudos to we students who  
24 produced the Nader Report, Nader received the credit  
25 generally, and properly, for the report. It was a

1 political force and specific assistance of this  
2 coalition that made our report and its ultimate impacts  
3 possible. It was also this coalition that put an  
4 increasingly strong consumer movement wind behind the  
5 FTC's sails, culminating in Mike Pertschuk's  
6 administration under President Carter.

7 For the better part of two years, in which I did  
8 my thesis for Nader, did the FTC report and then worked  
9 as a journalist at the New Republic and organized the  
10 1969 summer of Nader's student task force, I was right  
11 in the middle, although not always a part of this  
12 coalition of consumer advocates. The very success of  
13 this coalition during President Carter's administration  
14 resulted in squabbles in overreaching from unseemingly  
15 impregnable positions of power. The coalition lost most  
16 of its momentum and the FTC was ready for new  
17 leadership.

18 With the election of Reagan in 1980, the  
19 consumer movement and the FTC were subject to a whole  
20 new set of forces, which go beyond my experience and  
21 competency to comment on.

22 In conclusion, I see three basic views of the  
23 Federal Trade Commission. One holds that the free  
24 market can sort out the problems which the FTC was  
25 designed to solve, and therefore, it should be

1       abolished. David Stockman apparently held this view  
2       when he was Director of the Office of Management and  
3       Budget, and seriously propounded it in his budget  
4       proposals.

5               On the other extreme is the coalition's view  
6       that corporations control the government and manipulate  
7       the general public in ways that are destructive to  
8       everything from our basic health to our democratic  
9       society, and therefore, a grass roots revolution, led by  
10      the enlightened and an enlightened consumers czar, whether  
11      in the chairmanship at the FTC, or better yet in the  
12      Department of Consumer Affairs, which Ralph Nader pushed  
13      for very hard as you all know, that kind of strong  
14      leadership from the top is needed to set the whole world  
15      right.

16             For all its rhetoric, some of which tended to  
17      the latter view, our report on the Federal Trade  
18      Commission and immediate results which were produced are  
19      based on a third view, the premise that neither the  
20      government nor the marketplace are perfect, and there  
21      are many areas where well-structured government  
22      intervention is much needed and should be implemented by  
23      creative, capable and well-directed professionals. If  
24      an immediate and present example is needed of where that  
25      happened, I believe I can point to Chairman Muris's Do



1 Not Call success.

2 The FTC came into being in 1914, under President  
3 Wilson's New Freedom administration, as Marc pointed  
4 out, but its legislative design, giving it broad  
5 regulatory authority over the entire economy smacks more  
6 of Teddy Roosevelt's New Nationalism. The result is  
7 that those of you who are privileged to staff it have  
8 front row seats to view and be potential actors in the  
9 great drama and success story of our ever-evolving  
10 American economy.

11 And I have to say that it was a privilege for me  
12 to have played a small role in the re-invigoration of  
13 the Federal Trade Commission and in this great and  
14 fascinating drama 36 years ago. Thank you.

15 (Applause.)

16 MR. KOVACIC: I want to start today by  
17 recognizing three intellectual debts. The first is that  
18 when I was an undergraduate at Princeton a couple of  
19 years after Ed and was interested in the Wilson School  
20 and looking at an extensive study of reform in a  
21 government agency, one of my instructors said, there's a  
22 young guy who graduated here recently who did one of the  
23 best. And what he held up is this book that's been on  
24 my bookshelf for now over 30 years that Ed wrote before.  
25 Ed, in many ways, was my first introduction to the

1 Federal Trade Commission and a very informative one.

2 Second, my debt to Ernie Gellhorn, whose work on  
3 this subject really set me in the motion of looking both  
4 at quantitative measures of performance and really as  
5 the inspiration for much of the work that I have done in  
6 the area and the person who in many ways taught me to be  
7 a teacher.

8 And third, Marc Winerman. Marc recently has  
9 been named Counsel for Special and Historical Studies at  
10 the FTC. Marc is both special and an expert in  
11 historical studies and after this symposium will be  
12 beginning his year as a Victor Kramer Fellow, which is  
13 one of the most distinguished honors that a career staff  
14 person of the FTC or the Department of Justice can hold.  
15 And the daily seminar in the hallways that Marc has  
16 provided me over time is, in many ways, a source of  
17 insight for my presentation today.

18 What I would like to look at is the basic  
19 question of how we evaluate performance over time. And  
20 I would like to look, as Ernie mentioned before, at the  
21 vast literature on the Commission. It's fair to say  
22 that the academic literature that looks at the Federal  
23 Trade Commission easily exceeds the literature on any  
24 other federal government regulatory body. It's  
25 unmistakably voluminous and has been, literally over

1 decades from the very time of the Agency's creation, an  
2 extraordinarily powerful source of attraction for  
3 commentators.

4 But an issue that all of this literature begs  
5 is, how do we measure the performance of public  
6 institutions? The commonly used test that shows up in  
7 many instances, both more serious and scholarly and  
8 popular, is that it is the big case that really matters.  
9 Discreet enforcement events. But this neglects -- and  
10 this is really the theme of my talk today -- crucial  
11 nonlitigation inputs and outputs, especially investments  
12 in institutional capability.

13 In many ways, and Ed didn't have time to cover  
14 that in his treatment, that was a key focus of the Nader  
15 Report, especially with respect to human capital, and  
16 it's that dimension that I really want to focus on.  
17 That is, how does one develop a good institutional  
18 platform for success over time?

19 I want to underscore how institutional design  
20 and capabilities shape policy results. There's a  
21 natural tendency for all of us, I think, when we talk  
22 about competition or consumer protection policy, to  
23 focus on developments of doctrine. Those are the most  
24 interesting things we do. Those of us who are teachers,  
25 that's what we teach. You move away from that and our

1 students become completely somnolent. Audiences at  
2 conferences start flipping through the program to see if  
3 there are concurrent sessions they can attend, start  
4 making lunch plans, but in so many ways, this is the  
5 vital infrastructure that determines the success of an  
6 institution over time.

7 I want to suggest the importance, distilling  
8 this literature, of developing a norm, a standard that  
9 applauds officials for making capital investments in  
10 institutional capability that is truly to plant the  
11 trees rather than to simply grab the low-hanging fruit.  
12 That's an idiot bit of advice to policymakers. If you  
13 don't plant trees, you starve after a generation or so.

14 And last, to improve the role of historical  
15 understanding, which is a crucial -- has a crucial role  
16 to play in formulating policy over time and, indeed, is  
17 a key theme of this entire symposium.

18 By way of overview, I want to give you a quick  
19 summary of the key commentaries spanning nine decades to  
20 identify key institutional lessons and to offer my own  
21 report card that comes out of this body of commentary  
22 about how to evaluate the performance of this  
23 institution or others, and indeed, I'm speaking in my  
24 own capacity and not for anyone else at the Commission.

25 To divide the massive commentary basically into

1 three baskets, the first are large blue ribbon panels of  
2 the kind assembled at President Nixon's request in 1969  
3 by the ABA; the 1949 report of the Hoover Commission,  
4 being perhaps second in importance in this category.

5 A second being non-government organizations,  
6 Ralph Nader's group in '69, the 1989 report of the ABA  
7 called Kirkpatrick II, sometimes reports that are not  
8 published, which set in motion the Kirkpatrick Report in  
9 1989, was a separate report that the antitrust section  
10 had commissioned in 1987 and '88. What resulted, and  
11 this is for a group of us who are basically alumni from  
12 the late 1970s and the early 1980s, working on a variety  
13 of matters and then independently putting together  
14 different pieces, it was a scathing assessment of what  
15 the Commission had done. So scathing that the ABA  
16 decided not to publish it on its own, but instead set in  
17 motion the 1989 Kirkpatrick II report.

18 Last have been individual contributions.  
19 Henderson's 1924 volume being terribly important, Landis  
20 in 1960, his report to President-Elect John Kennedy.  
21 Robert Bork's book in 1978, in addition to talking about  
22 doctrine, spends a lot of time focusing on institutional  
23 capability and incentives. Not all of these works cover  
24 both competition and consumer protection.

25 Among the more flamboyant phrases in Ralph

1 Nader's introduction in the Nader Report is a single  
2 sentence that says, we're not talking about competition  
3 policy here. It was focused on consumer protection,  
4 although its institutional concerns spread well beyond  
5 the boundaries of the consumer protection mission.

6 What are the main recurring themes in these  
7 reports? Let me simply summarize some of the principal  
8 observations they've made over time. The first is that  
9 the Commission was afflicted with inadequate planning.  
10 And I think the basic core of the criticism here is one  
11 that policymakers have to continue to take into account.  
12 Indeed, it comes from even the earliest works, and  
13 Henderson's work gets this very well.

14 When I worked with transition economies, I  
15 encourage them to read Henderson's book. It's written  
16 in 1924, it's a decade after the adoption of the statute  
17 and it's a marvelous account of what a new institution,  
18 even with favorable initial conditions, good judicial  
19 system, respect for the rule of law, administrative  
20 propriety standards that ensure that individual  
21 government officials, for the most part, are going to  
22 act in an honest way, despite those initial conditions,  
23 Henderson documents what a new institution of this type  
24 is likely to face.

25 And one of the key points that came out of his

1 volume and is emphasized in subsequent work is that if  
2 you don't have a metric, a process, a strategy, for  
3 deciding what you're going to do, you will be buried  
4 over time by what simply comes into the door. You will  
5 be completely reactive, you will have no capacity to  
6 sort out the trivial from the important, you will be  
7 utterly ineffective.

8 And sadly, it's only in the comparatively modern  
9 era that the Commission gets ahead of this flow of work  
10 and starts to put in place a conscious process for  
11 deciding what it will do and how it will do it.

12 A second basic theme deals with the  
13 cumbersomeness of the procedures for administrative  
14 adjudication and for the routine execution of work. And  
15 I have to admit, this remains still a sore spot. Why?  
16 A key assumption in the formation of the Commission is  
17 that it would have a comparative advantage, not simply  
18 with respect to substantive analysis, but with respect  
19 to speed in the treatment of competition and consumer  
20 protection matters, and a continuing battle and a  
21 continuing area for improvement which is identified  
22 throughout the commentary and I think quite rightly, is  
23 that conceptual general ambition in many respects still  
24 hasn't been realized and practiced, although there's  
25 been dramatic, dramatic progress in that respect.

1           Steve Calkins, who will wrap up this session,  
2 played an enormous role in setting in motion internal  
3 administrative reforms and adjustment in procedures.  
4 Although I don't think we're at the point where Congress  
5 expected us to be in 1914 in this respect, what is  
6 promising is that the modern trend has featured  
7 significant progress in that direction.

8           The third basic objection was poor transparency,  
9 and here, again, there's a powerful lesson for any new  
10 competition authority. The Commission's early  
11 decisions, and if you flip through the early FTC  
12 reports, you see this, are extraordinarily cryptic in  
13 their treatment of the issues before them.

14           And the basic message that came out of the  
15 commentary is that if you want to obtain deference from  
16 reviewing tribunals, you have to provide a compelling  
17 basis to obtain the deference. Notwithstanding the  
18 formal standard that gives you deference with respect to  
19 substantial evidence. The basic message of the  
20 commentaries, quite properly, I think, is you get the  
21 deference you deserve, notwithstanding the legal  
22 standard. That has to be earned all the time, if it  
23 were a mathematics exam, you've got to show your work in  
24 a way that convinces the instructor that you've done  
25 good work.



1           The fourth observation deals with ineffective  
2 management. Partly as a matter of the overall  
3 government design, but partly as the manner in which  
4 individual managers at the most senior levels of the  
5 Agency allocated their time and did their work.

6           Marc has pointed already to what may be the  
7 single most important administrative adjustment,  
8 government-wide, and for the Commission in its history.  
9 It's the Reorganization Act of 1950. Think for a moment  
10 of what Marc described about the leadership and  
11 management of the Commission until 1950. The  
12 chairmanship shifts every single year. And the  
13 individual Commissioners, much like feudal lords, have  
14 control over individual bureaus and individual programs,  
15 so that you do not have a program developed over time  
16 under the supervision of an individual Commission  
17 Chairman who is going to be doing this for several  
18 years. With the accountability that comes through it,  
19 every year it's up for grabs.

20           And if you want to ask why did the Commission  
21 stumble about so badly in doing the first thing on this  
22 line, the Commission designed before 1950 ensured that  
23 the planning was in 12-month cycles, at best. It didn't  
24 go beyond that.

25           A key lesson about how institutional design

1 directly affects substantive outcomes, the '50  
2 Reorganization Act, which allowed the President to  
3 designate the chair, so that you would have a chair that  
4 would serve more than 12-month terms, instead of having  
5 the continuing disruptions over time, was a vital  
6 adjustment.

7 Poor integration of economics and law. Again, a  
8 basis for creating the Commission in 1914 is that it  
9 would have a comparative advantage over public  
10 institutions because it would have a large body of  
11 researchers and the research would inform the  
12 development of competition and consumer protection  
13 programs over time. Realizing the integration of those  
14 two sets of capabilities has remained a challenge over  
15 time, but the awareness, I think, in the modern era,  
16 beginning in the 1960s, about the importance, the  
17 possibilities for doing that, has promoted adjustments.

18 And last the continuing criticism of the  
19 personnel of the Commission, this I think is the most  
20 important single contribution of the Nader Report. The  
21 Nader Report motivated a fundamental change in the model  
22 by which the Agency recruited and retained personnel.

23 There are painful instances in the '69 report in  
24 which Rand Dixon, and he not only told it to the Nader  
25 folks, he told it to others, said that is my philosophy

1       for hiring: I can hire really good people out of  
2       school, but they'll go away. I want to hire people who  
3       will not go away. Unlike the Air Force, which aims  
4       high, I'm going to be like the Navy and dive deep. I'm  
5       going to penetrate those lower strata of the class,  
6       people who are inert and will stay forever.

7                The Nader Report motivated a basic change in the  
8       model, and we have come to live with, to accept, to deal  
9       with the fact of continuing turnover and rotation, but  
10      that shock to the system, the exogenous shock that  
11      established a different internal norm was absolutely  
12      indispensable to the transformation of the Agency's  
13      human capital over time.

14               These are the benefits, these are the recurring  
15      themes, I'm now going to talk about things I don't like  
16      about the earlier studies and flaws that, perhaps,  
17      obscure other things we have to do. A couple of  
18      different types.

19               First, bad history. What do you see in lots of  
20      the studies? You see the rote recitation of earlier  
21      studies. And I understand what's going on, they didn't  
22      have the time to go back and really dig through original  
23      sources that Marc did, they take the earlier study and  
24      take the punch line and say it's still true, still true,  
25      still true.

1                   But what don't you have in the earlier studies?  
2                   You don't have common agreement about what the Agency  
3                   ought to be doing, except some generalized view that it  
4                   ought to do stuff that's important. Do important stuff.

5                   Henderson's punch line, for example, that the  
6                   Agency spends too much time on trivial matters  
7                   highlights this. Henderson thought consumer protection  
8                   was pointless. Don't worry about deception, why are you  
9                   wasting time on these advertising cases? The  
10                  unmistakable inference of Henderson's work is that  
11                  everything ought to be channeled in the direction of  
12                  competition policy, period. Yet, every subsequent  
13                  author recites Henderson's words, quote that says, "the  
14                  same criticism is true today," yet none of these  
15                  authors, I think, really parsed his work to see that he  
16                  was really talking about having an antitrust agency  
17                  only, nothing to do with consumer protection.

18                  Weak data in many of the stories. David Hyman,  
19                  my colleague in the General Counsel's Office, now at the  
20                  University of Illinois, is fond of telling me, in God we  
21                  trust, all others provide data. Too many of the  
22                  formative studies rely on impressionistic assessments of  
23                  authors without giving you the specific cases that would  
24                  inform your judgment about what they're thinking about.  
25                  In so many instances, no context is provided. Criticism

1 did not take account -- and I've got a CF site to Tom  
2 McCraw at the bottom. Tom McCraw, just about 25 years  
3 ago, held a wonderful seminar at the FTC on industry.  
4 Tom McCraw said, regulatory experiments must be judged  
5 to a standard true to their own time. And so often the  
6 evaluations of the Commission's work ignore what other  
7 people were telling it to do at the time. That is a  
8 dynamic policy environment in which standards are  
9 changing, expectations are changing, but modern  
10 assessments about what should be done are superimposed  
11 as a way of denigrating the quality of the  
12 contributions. That in academic terms is a wonderful ex  
13 post approach to evaluation as opposed to an ex ante  
14 standard that would focus on the reasonableness of  
15 choices made.

16 Further problem, there's such a fondness for  
17 caricatures, the literature -- and you can tell so  
18 often, a certifying mark of the weakness of the  
19 literature is they talk about the horses. So many  
20 authors have thought and they smack themselves on the  
21 forehead as though they've discovered this for the first  
22 time, ah, the symbolic importance of the horses. If you  
23 see any reference to the horses in a study, one full  
24 grade off, every study. Sorry, Ed. There is a great  
25 architectural exegesis at the beginning of the book.

1                   MR. COX: I was an architect student at the  
2 time.

3                   (Laughter.)

4                   MR. KOVACIC: But so often, and this is a larger  
5 problem, is that in the effort to underscore specific  
6 phenomena or trends, too often the authors of the text,  
7 I think, are not confident in their basic findings and  
8 analysis, and in baseball terms, they feel they have to  
9 scuff the ball. They have to paint it black by pounding  
10 inconsistent data into the ground so you can't observe  
11 it. And the consequence is that good work that's done  
12 over time is just dismissed quickly.

13                   I ask you, how many things has the Commission  
14 done that surpassed the cigarette report in the early  
15 '60s? No. Do Not Call is not bad, that's an  
16 extraordinary accomplishment. Can an absolute  
17 degenerate turkey farm do that kind of work, I pose to  
18 you? Probably something a little bit better was going  
19 on. There's a tendency simply to cast aside positive  
20 contributions.

21                   And the consequences is that you suffer from the  
22 exaggerations over time. The ABA '69 report and the  
23 Congressional reaction basically said that everything  
24 that's gone before is a failure, and there has to be a  
25 tremendous dramatic continuing revival. History just

1        isn't like that. There's a lot more continuity, many  
2        more links over time.

3                Second, bad political science. I mean, this  
4        literature for the most part ignores the political  
5        constraints and forces that operate upon the Commission.  
6        The Cement Institute case was the product of a textbook  
7        effort to do good research and channel it into a case,  
8        regardless of whether you think it was a good case or  
9        not. By contemporary standards, it was a great job.  
10       The Commission was almost turned into the city's largest  
11       three-sided swimming pool by Congress, because it  
12       brought the Cement Institute case. Commentators don't  
13       talk about that dynamic. The force of Congressional  
14       oversight, the fact of judicial oversight.

15               The best book on this score is Thomas Blaisdell  
16       book in '32, points this out and says, ah, this broad  
17       collection of powers comes with it some fairly powerful  
18       limitations and dangers. Trying to use it is going to  
19       require not just technical proficiency, but  
20       extraordinary political adroitness. And they had a  
21       sense of public management in many instances.

22               This literature suggests there are no upward  
23       limits on capacity, but if you do one good thing, you  
24       can immediately do another. It's like thinking on the  
25       basis of Do Not Call that Do Not Spam is right around

1 the corner. You went to the moon yesterday, you're  
2 going to go to Mars next month, aren't you, and Saturn  
3 after that. No sense that doing one thing well  
4 immediately means you can do a natural extension to  
5 something else immediately. And it ignores the  
6 cumulative nature of policy.

7 A couple of conclusions about lessons. What  
8 would my report card look like? Coming out of this,  
9 first, one basic institutional criterion, do you have a  
10 good strategic plan? Are your goals well-identified?  
11 Not just for internal discussion, but external debate  
12 and analysis.

13 Second, are you tracking the nature and type of  
14 cases you're bringing and are you following their  
15 outcomes? Following their outcomes is very important.  
16 There is a tendency in this city, and I have  
17 participated in this, to grade policymakers by the  
18 number of things they start. That's like measuring the  
19 effectiveness of an airline by the number of flight take  
20 offs. Landings, not our problem.

21 In economic terms, there is a tremendous  
22 capacity there. If you're not internalizing the  
23 results, in effect, to impose huge external costs on  
24 your Agency. You don't fill out the score card, at  
25 best, when any individual chair leaves, the grade is an



1 incomplete, because you don't know until years later  
2 what the actual grade is.

3 Are you evaluating advocacy initiatives and  
4 outcomes in the same way? Are you investigating  
5 capability and knowledge base that gives you the  
6 credibility to persuade courts to know what you're  
7 doing, to persuade judges that you know what you're  
8 doing over time? Are you displaying information about  
9 what you're doing? Are you putting information into the  
10 public domain so you can engage in a public debate?

11 There's a natural reticence to do this, to do  
12 after-the-fact assessments in a candid way. But if  
13 you're afraid that your ideas are too fragile to  
14 withstand scrutiny, then maybe, maybe in that instance  
15 it's time to get some better ideas. So, to put  
16 information into the public domain is an important good  
17 practice that comes out of this. And, finally, a  
18 commitment to do after-the-fact assessments.

19 How did the story end? What were the  
20 consequences both with respect to process and outputs?  
21 Implication for good leadership. What should good  
22 leaders do based upon this literature? You maximize  
23 positive externalities for the Agency and new leaders in  
24 the future. You make their lives better, as well as  
25 those of the employees.

1                   You engage in a continuing process of  
2 self-assessment and you promote critical public debate.  
3 In short, we're not really in the business of looking  
4 for best practices. So, to say best practices suggests  
5 that there's a final fixed destination, it's a  
6 continuing search for better practices, and that's what  
7 I think the literature says we ought to do.

8                   Thank you.

9                   (Applause.)

10                  MR. GELLHORN: Thank you very much to each of  
11 the panelists. A couple of comments just on Bill's last  
12 point. Back in 1962, I think it was, the Commission  
13 held a formal vote to overrule the Chairman's decision  
14 that Phil Elman's dissent could not be published. It  
15 was secret. So, there's some interesting and rich  
16 history. Not all of it great.

17                  The other ones that I was reminded of, as Bill  
18 was talking about, the fact that initially the  
19 Commission had only annual chairmanships. That is, of  
20 course, a practice of one agency still today in  
21 Washington, the Federal Election Commission, and that  
22 may, of course, explain some of its problems. A lot of  
23 us think so.

24                  Well, let's spend the next ten minutes just  
25 following up with some questions, some suggested by the

1 audience, others by my sitting and listening here. One  
2 of the things that's sort of unique in this area, both  
3 in antitrust and consumer protection, is we have more  
4 than one federal agency addressing the question. We've  
5 got two antitrust agencies, we have at least four in  
6 consumer protection when you think of the Consumer  
7 Product Safety Commission, the Food & Drug  
8 Administration, the Securities and Exchange Commission,  
9 which grew out of the Federal Trade Commission. I would  
10 like to, you know, pose to the panelists, why that  
11 event, is it just a historical accident, and second,  
12 does it make any sense?

13 MR. KOVACIC: Let me take a swing at the pitch.  
14 I think if you were uncertain at any one time, for  
15 example, about how you wanted to enforce a relatively  
16 novel set of legal commands, and you're not certain what  
17 the optimal institutional design is, I think it would be  
18 a legitimate choice to decide, I'm going to diversify my  
19 portfolio, I'm going to choose a couple of different  
20 approaches. Judicial enforcement on the one hand,  
21 administrative enforcement on the other. Having set the  
22 experiment in motion, I think you'd necessarily want to  
23 ask how is it turning out, and perhaps do some  
24 evaluation over time.

25 So, I think we can explain the initial decision

1 partly as a bit of experimentation diversification,  
2 partly, certainly, as a matter of legislative interest  
3 in having its own institution. That is an unmistakable  
4 part of the original legislative design. I would say  
5 that, you know, I have to come clean on this, it's  
6 awkward to be an academic and take these jobs.

7 In 1997, I wrote a paper that talked about dual  
8 enforcement and the discussion said, hey, you know, on  
9 the other hand, you've got to pick. I said, well, okay,  
10 I'll add a conclusion, I'll say if there had to be one  
11 agency in antitrust, that it should be the Department of  
12 Justice. Now, I wrote the thing at a time before, he  
13 back peddles, damn electronic databases.

14 (Laughter.)

15 MR. KOVACIC: But at the time that I did hedge  
16 in the paper and say there's some very interesting  
17 things happening that are serving in many respects that  
18 couldn't realize the basic game of the institutional  
19 design. And if I had to back off or reassess my earlier  
20 suggestion, I think the rationale for the  
21 diversification has been realized more in practice than  
22 modern nature.

23 MR. COX: Just for a short answer, I'd like to  
24 take two, the Consumer Product Safety Commission, yes,  
25 it's almost the same kinds of things that are being done

1 as consumer protection. Securities and Exchange  
2 Commission, I'm a securities lawyer, that's a completely  
3 different analysis, way of doing things, different  
4 marketplace, one that wouldn't -- even though it came  
5 out of the Federal Trade Commission, it was initially  
6 organized at the Federal Trade Commission, it would not  
7 be one that should be consolidated as part of that  
8 consolidated consumer protection administration.

9 MR. GELLHORN: Well, that sort of leads to  
10 another follow-up question, and that is, the SEC and the  
11 FTC, in many respects, are aligned in terms of their  
12 authority, their structure, and to some degree their  
13 history, and yet I think if one did an assessment of the  
14 SEC's record over its history, one would find fewer  
15 peaks and valleys, and generally greater strength in  
16 terms of its ability to sustain different political  
17 forces.

18 So, one argument could be, well, the securities  
19 industry, the group that's being regulated by the  
20 agency, depends upon the integrity of the regulatory  
21 agency, and one cannot necessarily say that about the  
22 FTC's base, but is there more to the story?

23 MR. COX: Actually, I would go back to something  
24 that Bill said about continuity, and I agree with that,  
25 continuity is very important. I think every agency of

1 government has a DNA, a basic DNA of how it was  
2 conceived and put together, and the FTC came out of the  
3 Bureau of Corporations, and you go through Marc's  
4 history of it, and then it ran into World War I and then  
5 it ran into the conservative '20s and then it ran into  
6 the judicial problems -- the problems that President  
7 Roosevelt had with the Supreme Court and the New Deal  
8 and that's the way it was born, if you will, and that  
9 makes it a confusing history.

10 The SEC came out of the crash of 1929, huge  
11 problems in the security industry, something had to be  
12 done, and a basic disclosure, if you will, with respect  
13 to the '33 Act, an agency to assure proper disclosure  
14 was established. And that was, it was born cleanly, if  
15 you will. And that's what gives it the continuity. Its  
16 mission was clear, it was a good mission and it didn't  
17 overreach. If you talk to Louie Loss about 10(B)(5), he  
18 drafted it in a couple of hours. Very simple. And lots  
19 of judicial interpretations of it. But the mission has  
20 been consistent from the start. The Federal Trade  
21 Commission, much different DNA.

22 MR. GELLHORN: Marc?

23 MR. WINERMAN: Well, two thoughts, first of all,  
24 it's much easier to measure the success of the SEC  
25 because you're dealing with a more limited universe.

1 The Commission's universe, and particularly on the  
2 consumer protection side, because that's where the  
3 comparison is a broader universe and --

4 UNIDENTIFIED SPEAKER: Use the mic.

5 MR. WINERMAN: I'm sorry. Is a broader  
6 universe, and in addition, much of the work that the FTC  
7 does, for example, creating databases for state and  
8 federal agencies to work together, is more or less  
9 invisible and the state and federal regulators realize  
10 it but the general populous wouldn't.

11 And I guess I would also point out that the SEC,  
12 I believe it's Joel Salzman, who is the historian of the  
13 SEC, points out that the first four Chairmen were Joe  
14 Kennedy, James Landis, William Douglas and Jerome Frank,  
15 and in the '40s, the Agency completely tanked when it  
16 was relocated in Philadelphia, so they are not without  
17 their own peaks and valleys.

18 MR. GELLHORN: Well, that leads to sort of do we  
19 have explanations of the Commission's peaks and valleys?  
20 What is it that seems to invigorate it periodically and  
21 what is it that tends to contribute in the other  
22 direction? Or alternatively, I think it's generally  
23 acknowledged that the last 15, 20 years have really been  
24 very strong ones for the Agency.

25 MR. COX: Let me jump in, I think Marc pointed

1 out some of the things that he did, the broad mandate of  
2 the Federal Trade Commission to begin with, it's huge.  
3 It's not as well defined as, for instance, the SEC. So,  
4 you can put -- any era in time can be put into this  
5 vessel called the Federal Trade Commission what it wants  
6 to. I think since the '60s, I think the mandates have  
7 become clearer. Now, the way of implementing those  
8 mandates has changed, obviously, but yet it's been a  
9 consistent kind of energized mandate.

10 MR. KOVACIC: I think there's a more positive  
11 trend, especially in the modern era, for a reason that  
12 both Ed mentioned and Marc alluded to, the authority,  
13 the basic statutory platform to work with for a  
14 strikingly long period of time was terribly weak. And  
15 since being enhanced, the enforcement of orders, the  
16 structure of penalties and remedies, it's not until the  
17 '60s that the Commission gets the unambiguous signal  
18 from the Supreme Court that the heavy baggage from Gratz  
19 and Kodak from the '20s has been tossed over the side.

20 I think, in part, the rehabilitation of  
21 authority that takes place, beginning in the 1960s in  
22 the Supreme Court and into the '70s, makes a big  
23 difference.

24 MR. GELLHORN: Well, we have to leave time for  
25 the next panel, so one final question for the panel, and



1       that is, let's assume you're attending the 100th one ten  
2       years from now, and I hope we all are here, what would  
3       you expect different to be said at the 100th than at the  
4       90th? I tried to stump the panel.

5               MR. COX: I would hope, following what Bill  
6       said, I don't think there's any best practices, period.  
7       I think what Jefferson said about we need a little  
8       revolution every 30 years is right. That's basically  
9       what I think you were saying, Bill. And if you don't  
10      have a little revolution every 30 years, you're going to  
11      have a big revolution. I would hope that things would  
12      have changed by then. In the next ten years, I don't  
13      know what it would be, but because of that change, the  
14      Commission will be as energized as it is now.

15             MR. WINERMAN: I guess I would say that the  
16      terms of the various competition debates won't change,  
17      but although the terms won't change, I would hope that  
18      the Commission continues to participate vigorously in  
19      the debates and react to the debates and initiate parts  
20      of the debate, and on the consumer protection side,  
21      particularly the Commission stays highly adaptable to  
22      technology, both in their use of the furtherance of the  
23      Commission and in preventing the abuses of those  
24      technologies, and again, the changes in front of us, but  
25      hopefully the Commission will continue to look after

1 those changes.

2 MR. KOVACIC: Let me mention the three norms  
3 that I hope will be well-established by that time and  
4 they have roots going back a number of years already.  
5 The first is that the routine habit of after-the-fact  
6 assessments will become -- without picking a number that  
7 that will be something that one expects and sees  
8 happening every single year with respect to the work we  
9 do.

10 Second, I hope that the work that's being done  
11 and is developing on the conceptual and practical  
12 integration of the consumer protection and competition  
13 policy functions of the Agency will proceed, the subject  
14 of another panel later today. So that rather than as a  
15 matter of historical accident, that we'll see that there  
16 are genuine synergies, a lot of thoughts being done on  
17 that, but I would like to see some more fruit on that  
18 score.

19 And the third would be that the public  
20 expectation at that time, that we can say that the  
21 public regards the full use of the Agency's tools across  
22 the board, that they each get the appropriate weight.

23 Right now, if there was a box score, and you  
24 asked about the contribution of good advocacy, for  
25 example, stopping a bad idea, unraveling an existing bad

1       idea that's embedded in another public policy, that  
2       doesn't show up in the box score. It's not elsewhere  
3       classified. It's not there. Good work on that front  
4       has to count as much as bringing the case.

5               So, I'm hoping that the box score by which we  
6       score activity, you know, imagine the National  
7       Basketball Association if it doesn't measure and track  
8       assists, that is you have to have a metric that's  
9       publicly accepted and developed that properly observes  
10      and evaluates that which makes the Agency effective.  
11      Those would be three hopes.

12              COMMISSIONER GARDINER-JONES: Could I make a  
13      statement?

14              MR. GELLHORN: Just for a moment, please. Great  
15      to see you, Commissioner.

16              COMMISSIONER GARDINER-JONES: On the question of  
17      FTC versus antitrust. There's no question you need  
18      FTC, if you're going to develop economic policy, you  
19      can't do it case by case in many cases. You have a  
20      study of conglomerates as we had it. You have a study  
21      of the mergers between computers and publishing  
22      companies to try to figure out what's going on. You  
23      issue rules. You do a variety of things instead of just  
24      a case by case, which is a terribly inefficient way of  
25      going. You can have a rule that attacks the whole

1 industry.

2 So, on that, I think it's just very important  
3 that you have the variety and I think that's what  
4 Congress had in mind. Every European country has this  
5 kind of a jurisdiction, not the kind of litigation  
6 things that we do.

7 On planning, one of the experiences that I had  
8 trying to plan was that the lawyers are not planners.  
9 They're not comfortable with doing that, they want to  
10 adjudicate facts, and if you're going to get real  
11 planning into this Commission, you've got to find a way  
12 of loosening up the Commissioners.

13 Now, Chris White took our planning thing and  
14 turned it into the absolute first hand, which was an  
15 information system. We didn't even have that at that  
16 time. So, we did make some progress. But I just think  
17 it's terribly important and I'm sorry to intervene, but  
18 I needed to say something.

19 (Applause.)

20 MR. GELLHORN: I'm sure I speak for every one  
21 when I say thank you very much. And to the panel, I  
22 don't think we have to wait ten years to make a  
23 judgment. Thank you very much.

24 MS. BAILEY: Thank you. We'll take a break  
25 until 11:15 and then we'll hear from our next panel.

1

(Applause.)

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Waldorf, Maryland  
(301) 870-8025